No. 21-

IN THE

Supreme Court of the United States

ROBIN THORNTON AND MICHAEL LUCERO,

Petitioners,

v.

TYSON FOODS, INC., CARGILL MEAT SOLUTIONS, CORP., JBSUSA FOOD COMPANY AND NATIONAL BEEF PACKING COMPANY, LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can the beef packing industry and United States of Agriculture override the clearly stated Congressional purpose of enacting the Federal Meat Inspection Act and the clear grant of concurrent jurisdiction to the states in the preemption section of the Act, in an agency guidance document to permissibly lie to the consumers on a label that the Bangladeshian beef that they are consuming was produced in this Country merely because is reprocessed or repackaged on American soil or the cattle arrived here shortly before they were slaughtered? Of the Tenth Circuit Panel examining that question, one Judge easily and resoundingly arrived at the obviously correct answer that such a premise violates not only this Court's preemption jurisprudence, but also the principles of federalism specifically preserved by Congress in the Act, to say nothing of what such dishonesty by the beef packers does for consumer trust in American beef. *See Thornton v. Tyson Foods, Inc.*, 28 F.4th 1016, 1029–33 (10th Cir. 2022); Appendix pages 23a-31a.

Thus, the question presented is: Did the Tenth Circuit Majority err in affirming the decision of the District Court that the state law enforcement against false labeling of the beef packers was preempted by federal law?

PARTIES TO THE PROCEEDING AND RELATED CASES

The parties to this proceeding are listed on the front cover. Related cases to this proceeding are

- *ROBIN THORNTON and MICHAEL LUCERO v. TYSON FOODS, INC., CARGILL MEAT SOLUTIONS, CORP., JBSUSA FOOD COMPANY, and NATIONAL BEEF PACKING COMPANY, LLC.*, No. 1:20-cv-105-KWR-SMV, U.S. District Court for the District of New Mexico. Memorandum and Opinion Judgment entered August 27, 2020.

- *ROBIN THORNTON and MICHAEL LUCERO v. TYSON FOODS, INC., CARGILL MEAT SOLUTIONS, CORP., JBSUSA FOOD COMPANY, and NATIONAL BEEF PACKING COMPANY, LLC.*,, Case No. 20-2124, U.S. Court of Appeals for the Tenth Circuit. Judgment entered March 11, 2022.

RULE 29.6

Corporate disclosure statement is not required in this matter.

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PETITION FOR WRIT OF CERTIORARI

Can the Majority's holding in the Tenth Circuit ratifying that beef packers (of which the Respondents here comprise over 80% of market share) have a statutory right to make billions of dollars by outright lying to the American consumer about the foreign origin of the beef they are consuming. Moreover, the Majority's holding affirms the district court's blessing of the unscrupulous practices harming the planet used to raise the product in order to use that blatant fraudulent falsehood of a blessed false label to destroy fair competition for America's farmers and ranchers that are sustainably, safely and responsibly raising cattle for wholesome American beef that consumers want to purchase. Thus, the issue now presented to this Court is to bless this pillaging of American consumer confidence and the razing of the small American family producers of beef all while forgetting that this industry described by Upton Sinclair in *The Jungle* gave rise to a clear stated Congressional intent against these very practices. Of course, these beef packers that are now engaged in intentionally deceptive practices at issue here are the modern-day successor equivalents in the industry accurately depicted by Sinclair then as:

> glimpses of the Beef Trust from all varieties of aspects, and he might discover it anywhere the identical; it was the incarnation of blind and insensate Greed. It turned into a monster devouring with one thousand mouths, trampling with a thousand hoofs; it became the Great Butcher—it turned into the spirit of Capitalism made flesh. Upon the sea of trade it sailed as a pirate deliver; it had hoisted the black flag and

> declared struggle upon civilization. Bribery and corruption have been its everyday strategies. In Chicago the city authorities became honestly one in every of its department workplaces; it stole billions of gallons of town water openly, it dictated to the courts the sentences of disorderly strikers, it forbade the mayor to put in force the constructing legal guidelines in opposition to it. In the countrywide capital it had power to prevent inspection of its product, and to falsify authorities reports; it violated the rebate laws, and when an research become threatened it burned its books and despatched its crook retailers in a foreign country. In the industrial global it turned into a Juggernaut vehicle; it worn out thousands of agencies each year, it drove guys to madness and suicide. It had pressured the charge of livestock so low as to spoil the stock-elevating industry, an career upon which whole states existed; it had ruined heaps of butchers who had refused to deal with its merchandise. It divided the U.S.A. Into districts, and stuck the fee of meat in all of them; and it owned all the fridge cars, and levied an huge tribute upon all fowl and eggs and fruit and vegetables. With the thousands and thousands of greenbacks a week that poured in upon it, it turned into achieving out for the control of different interests, railroads and trolley lines, gasoline and electric mild franchises—it already owned the leather and the grain business of the usa.

Sinclair, Upton. *The Jungle*, p. 374, Doubleday, Page & Co. (1906). The Federal Meat Inspection Act (FMIA)

directly at issue here, of course, as recognized by Justice Kagan as being implemented in response to *The Jungle* as "[f]irst enacted in 1906, after Upton Sinclair's muckraking novel *The Jungle* sparked an uproar over conditions in the meatpacking industry, the Act establishes 'an elaborate system of inspecti[ng]' live animals and [] carcasses in order 'to prevent the shipment of impure, unwholesome, and unfit meat and meat-food products.'" *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455–56, 132 S. Ct. 965, 967, 181 L. Ed. 2d 950 (2012); *citing Pittsburgh Melting Co. v. Totten,* 248 U.S. 1, 4–5, 39 S.Ct. 3, 63 L.Ed. 97 (1918).

The audacity of such intentionally and notoriously deceptive practices should have shocked the conscience of the district court and the Majority into making the decision the Dissent easily made correctly applying the statutes to this Court's precedent. This Court, however, will easily recognize why the position of the beef packers is wrong given that foreign produced beef labeled as "Product of the US" so clearly contradicts the clearly stated intention of Congress that:

> Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and **properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products impair the**

> **effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers.** The unwholesome, adulterated, ***mislabeled***, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

21 U.S.C.A. § 602. That stated Congressional intent should have formed the Majority's touchstone into the inquiry as to whether or not allowing packers to intentionally deceive the consumers and compete in the market unfairly properly preempts an attempt to hold them accountable under state laws designed specifically to protect consumers and stop anti-competitive practices. "The purpose of Congress is the ultimate touchstone in every preemption case." *Medtronic, Inc. v. Lohr*, 518 U.S.

470 at 485 (1996) (citations omitted) (internal quotation marks omitted).

Thus, agreeing with the district court to affirm in this case required that the Tenth Circuit favor giving great weight and precedence to a guidance document from USDA that directly contradicts the clear purpose of Congress to prevent unfair competition by allowing products that are deceptively labeled (which there is no argument that would pass the laugh test that beef imported into this country in a box that as a bovine never breathed a single breath of air on in this country is a "Product of the US" is not deceptively labeled) to be sold to unsuspecting consumers. To call a guidance statement that USDA allows the packers to slap that label on beef that in no way originated in this Country simply because it was cut into a smaller piece, disingenuous would be more than a mild understatement, it is downright farcical. The federal judiciary certainly owes a greater obligation to both the American consumer and the American producer than to let the packers from the days of the *The Jungle* back into a position of power to abuse the confidence of the American consumer and to destroy the fair market for the American producer, much less to visit the environmental destruction on other people around the globe in order to gorge on profits in America by blatantly lying about the origin and the standards or practices used in that place of origin. The district court failed horribly in this obligation to uphold a duty not to deceive, despite the clear direction from this Court that claims like the one here "are predicated not on a duty based on smoking and health but rather on a more general obligation [] the duty not to deceive. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 528–29, 112 S. Ct. 2608, 2624, 120 L. Ed. 2d 407 (1992). Likewise, the district court

in ratifying an utter failure by USDA to follow the clear direction of guidance to follow the FMIA in order to stop misbranded, mislabeled deceptively packaged foreign beef from being sold as domestic beef failed to uphold the law from Congress to the betrayal of the consumers and producers that Congress explicitly sought to protect from just this type of problem in passing the FMIA. Thus, it was facile to contend, as the Tenth Circuit did, that clearly mislabeled beef qualifies as correctly labeled as "Products of USA" because it meets the USDA FSIS definition in a guidance document that directly contradicts the very purpose of the statute that guidance was adopted under. Plainly, there nothing special about beef that makes it acceptable to lie to the consumer except that the powerful lobby of the packers deceived, just as they did in the days of *The Jungle*, thus similarly, "[t]he product is called 'fruit juice snacks' and the packaging pictures a number of different fruits, potentially suggesting (falsely) that those fruits or their juices are contained in the product. Further, the statement that Fruit Juice Snacks was made with 'fruit juice and other all-natural ingredients' could easily be interpreted by consumers as a claim that all the ingredients in the product were natural, which appears to be false. And finally, the claim that Snacks is 'just one of a variety of nutritious Gerber Graduates foods and juices that have been specifically designed to help toddlers grow up strong and healthy' adds to the potential deception." *Williams v. Gerber Prod. Co.*, 552 F.3d 934, 939 (9th Cir. 2008)

If lying is wrong, fraudulently labeling beef, directly contrary to the purpose of the FMIA, in order to allow mega corporations to steal from consumers using that misrepresentation resulting in the destruction of fair

competition pricing for the American farmers and ranchers while ignoring the clear limitation that Congress included regarding preemption to allow the states jurisdiction to address mislabeling, should strike this Court as beyond the pale.

OPINIONS BELOW

The published Opinion of the United States Court of Appeals for the Tenth Circuit in *Thornton v. Tyson Foods, Inc.*, 28 F.4th 1016, dated March 11, 2022, affirming the district court's decision finding preemption under federal law is set forth in the appendix hereto pages 1a – 31a.

The Memorandum Opinion and Order Granting the Defendants' Motion to Dismiss in *Thornton v. Tyson Foods, Inc.*, 482 F. Supp. 3d 1147, dated August 27, 2020, is set forth in the appendix hereto pages 32a – 60a.

The Order of the United States Court of Appeals for the Tenth Circuit in *Thornton v. Tyson Foods, Inc.*, Case No. 20-2124, dated March 28, 2022, denying rehearing is set forth in the appendix hereto pages 61a – 62a.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit affirming the District Court decision finding preemption under federal law was entered on March 11, 2022 and the order denying rehearing was entered on March 28, 2022. This petition for writ of certiorari by Robin Thornton and Michael Lucero is filed within ninety (90) days from the date of the Order denying rehearing. 28 U.S.C. § 2101(c). The jurisdiction

of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article VI, Clause 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

21 U.S.C. Section 602

Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome,

adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

28 U.S.C. Section 1343

Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter,

exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. This chapter shall not preclude any State or Territory or the District of Columbia from making requirement[1] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

N.M. Stat. Ann. § 57-1-1 (West)

Every contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within this state, is unlawful.

N.M. Stat. Ann. § 57-12-3 (West)

Unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful.

STATEMENT OF THE CASE

A. Unfair Trade Practices and Anti-Competitive Harms Consumers and Producers by False Labeling of Raw Beef Products as to the Actual Country of Origin

Ms. Robin Thornton filed a consumer protection class action on behalf of herself and other similarly situated that were ultimately frauded by the dishonest labeling of beef

by the packers in this matter that imported beef or live cattle for slaughter that they marked as a product of the USA. Mr. Michael Lucero brought a anti-trust class action on behalf of himself other similarly situated beef cattle producers that were harmed by the collusive practices associated to the marking of imported beef or beef from imported cattle as a product of the USA.

B. District Court Proceedings.

Ms. Thornton filed her Complaint in the Second Judicial District Court for the State of New Mexico on January 7, 2020 and Mr. Lucero filed his Complaint in the Thirteenth Judicial District Court for the State of New Mexico on January 7, 2020. Both cases were removed by Respondent to the Federal District of New Mexico on February 5, 2020 under the Class Action Fairness Act and consolidated by Order of the District Court on February 10, 2020. The Memorandum Opinion and Order finding that preemption applied to the claims of both Plaintiffs to dismiss the cases was entered on the district court docket on August 27, 2020. The notice of appeal was filed on August 27, 2020.

C. Tenth Circuit Decision.

The Tenth Circuit affirmed the District Court decision on March 11, 2022. In affirming the District Court the Tenth Circuit Majority, over a persuasive dissent, determined that an agency guidance document may preempt state law jurisdiction that the operative statute expressly preserves and allowed the Respondents to continue to falsely label imported beef from cattle that we neither born, raised or slaughter in this Country, or

beef from cattle that were largely not born or raised in this country to be marketed to consumers under a false label that they were a product of this country.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's decision to find preemption strays far away from this Court's precedent both in terms of statutory interpretation and federalism. Congress' intent to preempt state law should be manifest and clear. Here, the opposite is true. As discussed more fully below, Congress chose expressly to preserve states' jurisdiction regarding misbranding of beef. *See* 21 U.S.C.A. § 678. It is unprecedented and unwarranted to rely on agency guidance, which does not have the force of an enacted law, to override the clear congressional intent not to preempt exactly the type of claims Petitioners brought here.

More importantly, the Dissent was also spot on regarding the historical context and the congressional intent underlying the FMIA. Specifically, the Dissent's recitation of Upton Sinclair's *The Jungle* (Doubleday, Page & Co. 1906) was not mere color to that opinion, but rather an explanation of the historical significance and context under which Congress adopted the Federal Meat Inspection Act (FMIA) for the protection of consumers and America's farmers and ranchers producing meat for the Nation. In fact, that historically significant context has been recently recognized by Justice Kagan writing for the unanimous Court in *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455–56, 132 S. Ct. 965, 967, 181 L. Ed. 2d 950 (2012); *citing Pittsburgh Melting Co. v. Totten,* 248 U.S. 1, 4–5, 39 S.Ct. 3, 63 L.Ed. 97 (1918). Yet here, the Majority missed that a significant driving force behind Congress' intent

in passing the FMIA was not just to protect consumers and producers from deceptive or dangerous circumstances and practices that occur in the process of the American public consuming meat, but to protect those people from an industry that demonstrated they were very willing to seize control of the levers government power through corruption to perpetrate those harms for their pecuniary gain. This was part of Sinclair's loud and clear whistle about this industry where he wrote:

> glimpses of the Beef Trust from all varieties of aspects, and he might discover it anywhere the identical; it was the incarnation of blind and insensate Greed. It turned into a monster devouring with one thousand mouths, trampling with a thousand hoofs; it became the Great Butcher—it turned into the spirit of Capitalism made flesh. Upon the sea of trade it sailed as a pirate deliver; it had hoisted the black flag and declared struggle upon civilization. **Bribery and corruption have been its everyday strategies. In Chicago the city authorities became honestly one in every of its department workplaces; it stole billions of gallons of town water openly, it dictated to the courts the sentences of disorderly strikers, it forbade the mayor to put in force the constructing legal guidelines in opposition to it. In the countrywide capital it had power to prevent inspection of its product, and to falsify authorities reports;** it violated the rebate laws, and when an research become threatened it burned its books and despatched its crook retailers in a foreign country.

The Jungle, p. 374, Doubleday, Page & Co. (1906).

And this is where the Majority's error is compounded in the way historical context guides that Congress intended to avoid because it proposes to elevate mere guidance from an executive agency that is openly and notoriously lobbied as well as manipulated by the beef packers over the clear unambiguous stated intent of Congress and over principles of federalism also included in the preemption statute for this express purpose. It simply cannot be correct that the statute should be read to give a guidance document from an agency the power to override expressly what Congress said in the statutes themselves. It cannot be honestly true that USDA's guidance gives an industry, with a congressionally-recognized history of corrupting governments to its own ends, the sanctioned ability to lie to consumers to tell them that the beef that was born, raised and slaughtered in Bangladesh is American beef when the Congressionally stated purpose of the FMIA is that:

> Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or ***misbranded meat or meat food products*** **impair the effective regulation of meat and meat food products in interstate or foreign commerce, are injurious to the public welfare, destroy markets for wholesome,**

> **not adulterated, and properly labeled and packaged meat and meat food products, and result in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, *mislabeled, or deceptively packaged articles* can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally.** It is hereby found that all articles and animals which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

21 U.S.C.A. § 602 (emphasis added)

Of equal note, Congress in order to address these important objectives of stopping misbranded or deceptively labeled meat also intentionally relied upon principles of federalism which should also have guided the Majority to a different conclusion in this case where Congress stated unambiguously that:

> but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles

> required to be inspected under said subchapter I, for the purpose of **preventing the distribution for human food purposes of any such articles which are adulterated or misbranded** and are outside of such an establishment.

21 U.S.C.A. § 678 (emphasis added).

Thus, the Majority for the Panel erred by affirming that a guidance document from USDA, that is wholly inconsistent with the Congressionally stated purpose of the FMIA, preempts a state's action to stop the sale of beef misbranded as a product of the U.S. through the State's consumer protection laws, an area of law traditionally occupied by the several state's police powers.

When weighing out a guidance statement from an agency to override a clear recognition of federalism the Majority erred as noted by the Dissent by failing to apply the Supreme Court's direction that "[t]he purpose of Congress is the ultimate touchstone in **every** preemption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470 at 485 (1996) (citations omitted) (internal quotation marks omitted) (emphasis added). "In areas of traditional state regulation, [the Supreme Court] assume[s] that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest." *Bates v. Dow Agrosciences*, LLC, 544 U.S. 431, 449 (2005). Thus, when facing two plausible statutory interpretations, the court has "a duty to accept the reading that disfavors preemption." *Bates v. Dow Agrosciences*, LLC, 544 U.S. at 449.

Here, to reach the conclusion it did, the Majority had to bless the notion that an administrative agency can

override Congress and declare that a deceptive practice is, as a matter of federal law, not only permitted, but required. Facing such twisted logic, Judge Lucero correctly posited a more plausible analysis, *citing Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), that Congress did not intend that agency guidance, that is completely inapposite to both the stated purpose of the Act from Congress and to supplant the States from a field they traditionally occupied and for which Congress has expressly recognized concurrent jurisdiction, would preempt the states from regulating beef that packers intentionally misbranded to misrepresent that it originated in America. Congress could not have intended to sanction overt deception. Thus, the Dissent had it correct, and the Majority erred when it decided to find preemption in the face of strong indicia of Congressional intent to preserve the right of states to regulate and prevent deceptive branding practices in the meat industry. *See Plumley v. Massachusetts*, 155 U.S. 461, 472 (1894)("If there be any subject over which it would seem the states ought to have plenary control . . . it is the protection of the people against fraud and deception in the sale of food products.").

Even beyond the concepts federalism that should have guided the Majority's holding, the Dissent wass ultimately too kind in allowing that Majority's interpretation is equally plausible. This is because the Majority's holding ignores that it allows an agency guidance statement to cause a portion of the statute itself to be read into a nullity. During oral argument, Respondents were asked how to give effect to an express reservation of state and territorial jurisdiction over misbranding under their view of preemption. Their answer was essentially to go and beg administrators for relief. Agency bureaucrats, however, are not Congress and they do not have the authority to undo a

reservation of jurisdiction in a duly enacted statute. Under the Majority opinion, the statute now contains surplusage.

Even if there is some argument that a regulation or rule formally adopted in keeping with the Administrative Procedures Act plausibly preempted the field here, it is not plausible to posit that Congress was contemplating that an agency could promulgate guidance that is contrary to purpose and text of the Act. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249, 105 S. Ct. 2587, 2594, 86 L. Ed. 2d 168 (1985); *citing Colautti v. Franklin*, 439 U.S. 379, 392, 99 S.Ct. 675, 684, 58 L.Ed.2d 596 (1979).("In light of 'the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative,'").

With regard to the weight that should be applied to the USDA FSIS guidance at the heart of this controversy, the Dissent struck what should have been a fatal blow with citation to the Majority's analysis stating "[s]everal of our sibling circuits have held that mere agency guidance, as opposed to statutes or formal regulations, is not automatically entitled to preemptive effect. Thus, the Dissent's holding makes the most compelling analysis of how to unwind a preemption gordian knot created by guidance about voluntary statements in agency guidance.[1, 2] Yet, here, the Majority adopts an analysis

1. *See Am. Tort Reform Ass'n v. Occupational Safety & Health Admin.,* 738 F.3d 387, 395 (D.C.Cir.2013). ("Admittedly, interpretive rules, guidance policies, and other general agency statements that lack the force of law 'generally do not qualify' as a final agency action.)

2. *See Nat'l Min. Ass'n v. McCarthy,* 758 F.3d 243, 251–52 (D.C. Cir. 2014) ("An agency action that sets forth legally binding requirements for a private party to obtain a permit or license is

and a holding that elevates the guidance of USDA officials authorizing deception above Congress' express balance expressed in the Act. Such a reading is not consistent with the Supreme Court's holding that when interpreting statutes, "[e]mphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.'" *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 544, 60 S. Ct. 1059, 1064, 84 L. Ed. 1345 (1940)(citation omitted). Therefore, such a reading of Section 602 and Section 678 as held by the Majority is in clear error contrary to the clear holdings of this Court.

This Court has been transparently emphatic that express preemption does not encompass the more general duty not to deceive or make fraudulent statements. Looking to the legislative history of the FCLAA, the Court in *Cipollone* noted that traditional police powers, such as the "regulation of deceptive advertising," were not to be displaced by the enactment of the preemption provision: "Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud." *Id.* at 529 and n.26. Here, Congress has offered

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a legislative [] rule. (As to interpretive rules, an agency action that merely interprets a prior statute or regulation and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule.) An agency action that merely explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule—is a general statement of policy.")

zero indication that it wishes to insulate Respondents and their cohorts from longstanding rules governing fraud perpetrated through false advertising, false labeling or misbranding. The district court and the Tenth Circuit essentially resurrected the argument articulated by Justice Scalia in his dissent in *Cipollone,* which was rejected:

> Justice SCALIA contends that, ... as a matter of consistency. we should construe fraudulent misrepresentation claims *not* as based on a general duty not to deceive but rather as "based on smoking and health." ... ,[T]o analyze fraud claims at the lowest level of generality (as Justice SCALIA would have us do) would conflict both with the background presumption against preemption and with legislative history that plainly expresses an intent to preserve the "police regulations" of the States.

Cipollone, 505 U.S. at 529. n. 27. Thus, the Tenth Circuit's holding is a distortion that must ignore the limit of preemption to allow the states to enforce the prohibition on misbranding to instead a version of what Justice Scalia propounded in dissent in *Cipollone*.

The overwhelming weight of the authorities interpreting *Cipollone* and *Lorillard* acknowledge that affirmative fraud claims are not preempted. *See Johnson v. Brown & Williamson Tobacco Corp.,* 122 F.Supp.2d 194, 203 (D.Mass. 2000)(no preemption of claims based on "intentional misrepresentations and false statements" in "advertising and promotional material.") *Penniston v. Brown & Williamson Tobacco Corp.*, No. 99-CV-10628. 2000 WL 1585609 at *5 (D.Mass. June 15, 2000) ("fraudulent misrepresentation claims based on false

statements of material facts" not preempted); *In re Simon II Litigation,* 211 F.R.D. 86, 141-143 (E.D.N.Y. 2002) *(Lorillard* reaffirmed *Cipollone* by emphasizing that "generally applicable obligations and laws were not preempted" and particularly "state laws prohibiting fraud" which are based on "'the duty not to deceive."); *Spain v. Brown & Williamson Tobacco Corp., 363* F.3d 1183, 1101-1202 (11th Cir. 2004)(claim that "manufacturers misrepresented and fraudulently stated ...material facts about smoking and health ...not preempted, even to the, extent it arose in relation to advertising and promotion ...because such claims arc predicated . . . on a duty ... not to deceive.")(internal quotations and citations omitted); *Hill v. R.J. Reynolds Tobacco Co.,* 44 F.Supp.2d 837 (W.D. Ky. 1999) ("'claims based on deception" such as "affirmative fraud ... remain undisturbed by *Cipollone.'"): Appavo v. Philip Morris Inc.,* No. 122469/97, 1998 WL 440036 at •4 (N.Y. Sup. Ct. July 24, l998) ("claims based on affirmative representations of fact, whether the alleged misrepresentations appear in advertisements or elsewhere, will escape preemption so long as they are based on a general duty not *to* deceive.'"). Recent New Mexico state appellate court jurisprudence continues to support this notion applying it to motor carriers stating that:

> Plaintiffs' negligence claim is directed specifically at the manner in which Tavenner's carried out the service of loading and transporting Plaintiffs' property. Although Plaintiffs' negligence claim relates to the transportation of property, the claim does not target or affect the regulation of motor carriers in general. In such instances, courts have declined to find preemption under the FAAAA, concluding that the relation or effect

> on a motor carrier's rates, routes, or services to be too tenuous to be preempted.

Schmidt v. Tavenner's Towing & Recovery, LLC, 2019-NMCA-050, ¶ 16, 448 P.3d 605, 611. Consistent with the discussion in *Schmidt*, here, liability would not have an impact on meat labeling (at least on labelling that adheres to the Congressional purpose of the FMIA,) nor would it alter or conflict with the federal scheme at issue. Instead, entities such as the Respondent beef packers would simply be held liable for lying about the nature and origin of their products.

CONCLUSION

The Majority's decision affirming the ratification of deceptive conduct that harms hundreds of millions of Americans is inapposite to the clear stated purpose of the FMIA by Congress and contradicts the clear jurisprudence from this Court regarding statutory interpretation and as such merits review by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED MARCH 11, 2022

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 20-2124

ROBIN G. THORNTON; MICHAEL LUCERO, ON BEHALF OF THEMSELVES AND OTHER SIMILARLY SITUATED,

Plaintiffs - Appellants,

v.

TYSON FOODS, INC.; CARGILL MEAT SOLUTIONS, CORP.; JBS USA FOOD COMPANY; NATIONAL BEEF PACKING COMPANY, LLC,

Defendants - Appellees.

RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA; PUBLIC JUSTICE,

Amici Curiae.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:20-CV-00105-KWR-SMV)
(D.C. No. 1:20-CV-00106-KWR-SMV)

Appendix A

Before TYMKOVICH, Chief Judge, LUCERO, Senior Circuit Judge, and MORITZ, Circuit Judge.

MORITZ, Circuit Judge.

Plaintiffs Robin Thornton and Michael Lucero allege that defendants Tyson Foods, Inc., Cargill Meat Solutions, Corp., JBS USA Food Company, and National Beef Packing Company, LLC, use deceptive and misleading labels on their beef products. In particular, plaintiffs contend that the "Product of the U.S.A." label on defendants' beef products is misleading and deceptive in violation of New Mexico law because the beef products do not originate from cattle born and raised in the United States.

But the federal agency tasked with ensuring that meat labels are not misleading or deceptive preapproved the labels at issue here. And critically, the governing federal statutory scheme—the Federal Meat Inspection Act (FMIA), 21 U.S.C. §§ 601-695—includes an express preemption provision that prohibits states from imposing any "labeling . . . requirements in addition to, or different than" the federal requirements. 21 U.S.C. § 678. In seeking to establish that defendants' federally approved labels are nevertheless misleading and deceptive under state law, plaintiffs aim to impose labeling requirements that are different than or in addition to the federal requirements. Accordingly, we conclude that plaintiffs' deceptive-labeling claims are expressly preempted by federal law. We further agree with the district court that plaintiffs fail to state a claim for false advertising. We therefore affirm the district court's order dismissing plaintiffs' complaints.

Appendix A

BACKGROUND[1]

Thornton is a consumer who purchased defendants' beef from various retail stores. She filed a class-action complaint in state court against defendants, alleging that their labels deceived her and other similarly situated consumers into paying higher prices for beef based on the mistaken belief that it originated from cattle born and raised in this country. Lucero is a "producer of beef cattle with a multi[]generational history of ranching in New Mexico." R. vol. 1, 100. He filed a separate class-action complaint, alleging that he and other similarly situated ranchers are paid less for their domestic cattle as a result of defendants' conduct.

According to both complaints, since 2015, defendants have imported live cattle from other countries, slaughtered and processed the cattle here, and labeled the resulting beef products as "Products of the USA." Defendants place the same "Product of the USA" label on already-slaughtered beef that they import into this country. Plaintiffs allege that these labeling practices are misleading, fraudulent, and deceptive under New Mexico law. Accordingly, they bring state-law claims for unjust enrichment and violation of the New Mexico Unfair Practices Act (UPA), §§ 57-12-1 to 57-12-26. Thornton additionally asserts a breach-of-express-warranty claim, and Lucero sought to amend his

1. We take these facts from plaintiffs' complaints. *See Straub v. BNSF Ry. Co.*, 909 F.3d 1280, 1287 (10th Cir. 2018) (stating that when reviewing ruling on motion to dismiss, we "accept[] as true all well-pleaded factual allegations in a complaint and view[] those allegations in the light most favorable to the plaintiff").

complaint to replace his UPA claim with a claim under the New Mexico Antitrust Act, §§ 57-1-1 to 57-1-19.

After removing both cases to federal court, defendants moved to dismiss.[2] The district court granted the motions and denied Lucero's motion to amend as futile, concluding that federal preemption barred all plaintiffs' claims, including the claim that Lucero sought to add. The district court alternatively concluded that, for various reasons, plaintiffs failed to state a claim under any of their theories of liability, including failing to state a false-advertising claim. It also declined to abstain from exercising jurisdiction under the primary-jurisdiction doctrine. *See TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1238 (10th Cir. 2007) ("Even where a court has subject[-]matter jurisdiction over a claim, courts have discretion to refer an issue or issues to an administrative agency.").

Plaintiffs appeal each ruling. Our review is de novo. *See Mowry v. United Parcel Serv.*, 415 F.3d 1149, 1151-52 (10th Cir. 2005) (stating that we review dismissal orders and preemption issues de novo); *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1239 (10th Cir. 2001) (noting de novo review of "district court's refusal to grant leave to amend a complaint based on the court's conclusion that the amendment would be futile").

2. The parties agreed to consolidate the cases for pretrial purposes.

Appendix A

ANALYSIS

I. Labeling Claims

Plaintiffs argue that the district court erred in dismissing their state-law labeling claims as preempted by federal law. The Supremacy Clause of the United States Constitution grants Congress the authority to preempt state law. U.S. Const. art. VI, ¶ 2 (providing that "the [l]aws of the United States . . . shall be the supreme [l]aw of the [l]and; . . . any[t]hing in the [c]onstitution or [l]aws of any state to the [c]ontrary notwithstanding"). There are different types of federal preemption, but this case involves only express preemption, which "occurs when Congress 'define[s] explicitly the extent to which its enactments pre[]empt state law.'" *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007) (quoting *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 792 (10th Cir. 2000)). Specifically, this case turns on § 678, the express preemption provision of the FMIA. As relevant here, § 678 prohibits states from imposing any labeling requirements for meat products that are "in addition to, or different than" the requirements imposed by the FMIA.

But before turning to § 678, we first outline the broader federal statutory and regulatory framework. The FMIA "regulates a broad range of activities" related to meat processing, *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455, 132 S. Ct. 965, 181 L. Ed. 2d 950 (2012), including "assuring that meat and meat food products . . . are . . . properly marked, labeled, and packaged," 21 U.S.C. § 602. Consistent with this stated purpose, the FMIA prohibits

false or misleading labeling, allowing only labeling that is "not false or misleading and [that is] approved by the Secretary" of Agriculture or his or her delegate. *Id.* § 607(d); *see also id.* § 601(a) (defining "Secretary"). And the FMIA charges the Food Safety and Inspection Service (FSIS), an agency of the United States Department of Agriculture (USDA), "with ensuring . . . that certain commercial meat products are not misbranded." *United Source One, Inc. v. U.S. Dep't of Agric., Food Safety & Inspection Serv.*, 865 F.3d 710, 711, 431 U.S. App. D.C. 363 (D.C. Cir. 2017); *see also* § 601(n)(1) (defining "misbranded" meat product in part as one with "labeling [that] is false or misleading in any particular").

To that end, the FSIS requires manufacturers to obtain preapproval of labels before using such labels on their products: "No final label may be used on any product unless the label has been submitted for approval to the FSIS . . . and approved . . . ." 9 C.F.R. § 412.1(a); *see also* § 607(d) (allowing labels that "are not false or misleading *and* [*that*] *are approved by the Secretary*" (emphasis added)). One of the standards governing this review is that labels may not "convey[] any false impression or give[] any false indication of origin." 9 C.F.R. § 317.8(a). And "to help manufacturers . . . prepare product labels that are truthful and not misleading," the FSIS issues a Food Standards and Labeling Policy Book, which "is a composite of policy and day-to-day labeling decision[s], many of which do not appear in" the applicable regulations or inspection manuals. FSIS, Food Standards and Labeling Policy Book 2-3 (2005), https://www.fsis.usda.gov/sites/default/files/import/Labeling-Policy-Book.pdf [hereinafter Policy

Book]. According to the Policy Book, a label "may bear the phrase 'Product of the U.S.A.'" if "[t]he product is processed in the U.S. (i.e., is of domestic origin)." *Id.* at 147. Under this view, as the FSIS explained in regulatory commentary, this label "applie[s] to products that, at a minimum, have been prepared in the United States" and does not "mean that the product is derived only from animals that were born, raised, slaughtered, and prepared in the United States." Product Labeling: Defining United States Cattle and United States Fresh Beef Products, 66 Fed. Reg. 41160, 41160-61 (advance notice of proposed rulemaking Aug. 7, 2001).[3]

Notably, this permissive interpretation of what qualifies as a "Product of the U.S.A." has not always been the governing standard; from 2008 to 2015, Congress took a more restrictive approach to country-of-origin labeling. Specifically, in 2008, Congress implemented a new law that established four categories for country-of-origin labeling: United States origin, multiple countries of origin, imported for immediate slaughter, and foreign country of origin. Food, Conservation, & Energy Act of 2008, Pub. L. No. 110-234, § 11002, 122 Stat. 923, 1351-54 (2008). But this new law generated several years of international-trade issues with Canada and Mexico, including two disputes before the World Trade Organization and more than $1

3. By contrast, FSIS views "terms such as 'U.S. (Species),' 'U.S.A. Beef,' and 'Fresh American Beef' . . . as geographic claims associated with animal raising and production," denoting "that the cattle to which the terms are applied were born, raised, slaughtered, and prepared in the United States or in specific geographic locations in the United States." 66 Fed. Reg. 41160, 41160.

billion in retaliatory tariffs imposed against the United States. *See generally* Joel L. Greene, Cong. Rsch. Serv., RS22955, Country-of-Origin Labeling for Foods and the WTO Trade Dispute on Meat Labeling (2015). As a result, in 2015, Congress repealed the new country-of-origin requirements for beef products, essentially reinstating the pre-2008 status quo. *See id.* at 1; Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 759, 129 Stat. 2242, 2284-85 (2015). And that status quo—the permissive interpretation of what "Product of U.S.A." means—is the law that applies here.[4]

Turning to the facts of this case, it is undisputed that—in line with the currently applicable and permissive regulatory framework and meaning of "Product of the U.S.A."—the FSIS preapproved defendants' labels. As a result, the district court concluded that each of the forms of relief plaintiffs sought (injunctions forcing defendants to change their labels and prohibiting defendants from using their labels, as well as damages resulting from defendants' use of their labels) were "all . . . preempted under [§ 678] because they seek to impose different or additional labeling requirements than those found under the FMIA." R. vol. 2, 558. In support, the district

4. The dissent acknowledges this recent history but focuses on the broader historical context leading to federal regulation of the meat industry at the turn of the 20th century. Yet this more recent history significantly undercuts the dissent's conclusion that plaintiffs' claims should be allowed to proceed. Although not dispositive, it is certainly relevant that plaintiffs seek to impose—by way of New Mexico law—a similar country-of-origin approach to labeling that Congress specifically repealed in 2015.

court relied on a variety of district-court cases reaching the same result in similar contexts. *See, e.g., Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312, 1316-18 (S.D. Fla. 2017) ("By attempting to challenge the FSIS-approved [labels] as false, misleading, or deceptive, each of [p]laintiff's claims improperly seeks to impose additional or different requirements on [d]efendant's labeling than those required by USDA."); *Brower v. Campbell Soup Co.*, 243 F. Supp. 3d 1124, 1128-29 (S.D. Cal. 2017) (finding plaintiff's claims preempted because plaintiffs sought to apply state law to impose labeling requirements different from or in addition to federal requirements).[5]

Challenging this conclusion on appeal, plaintiffs first urge us to apply a presumption against preemption. In support, they point to the Supreme Court's statement that "[i]n *all* pre[]emption cases," especially in cases involving an area of law traditionally belonging to the states (like food labeling), the court "start[s] with the assumption that the historic police powers of the [s]tates were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (emphasis added) (quoting *Rice v. Santa Fe Elevator Corp.*,

5. Some of these cases apply the preemption provision of the Poultry Products Inspection Act (PPIA), 21 U.S.C. §§ 451-473, which is substantively identical to § 678. *Compare* § 678 ("Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any [s]tate . . . ."), *with* 21 U.S.C. § 467e ("Marking, labeling, packaging, or ingredient requirements . . . in addition to, or different than, those made under this chapter may not be imposed by any [s]tate . . . .").

331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)). But in more recent years, the Supreme Court has declined to apply such a presumption in express-preemption cases. *See Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 136 S. Ct. 1938, 1946, 195 L. Ed. 2d 298 (2016) (explaining that for express preemption clause, courts "do not invoke any presumption against pre[]emption but instead 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre[]emptive intent'" (quoting *Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582, 594, 131 S. Ct. 1968, 179 L. Ed. 2d 1031 (2011))); *cf. Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 258 (5th Cir. 2019) (noting that "the Supreme Court has . . . changed its position on the presumption against preemption where there is an express preemption clause"). We have done the same. *See EagleMed LLC v. Cox*, 868 F.3d 893, 903-05 (10th Cir. 2017) (citing *Franklin* and declining to apply presumption against preemption in case involving express preemption provision in Airline Deregulation Act); *Dirty Boyz Sanitation Serv., Inc. v. City of Rawlins*, 889 F.3d 1189, 1198 (10th Cir. 2018) (same but for Federal Aviation Administration and Authorization Act). Accordingly, we do not invoke any presumption against preemption and focus instead on the plain language of the FMIA's preemption provision, "which necessarily contains the best evidence of Congress' pre[]emptive intent."[6] *Emerson*, 503 F.3d at

6. The dissent agrees that the plain language of § 678 governs the express-preemption analysis. Yet in our view, the dissent's approach—under which it would adopt an "equally plausible construction of the statute" that disfavors preemption, Dissent 6—would effectively invoke the inapplicable presumption against

1129 (quoting *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002)).

Section 678 prohibits states from imposing "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter." This preemption provision "sweeps widely" and "prevents a [s]tate from imposing any additional or different—even if nonconflicting—requirements." *Nat'l Meat Ass'n*, 565 U.S. at 459. And it plainly preempts plaintiffs' labeling claims. The FSIS has already approved defendants' labels, concluding that they are not deceptive or misleading under the FMIA. *See Cohen v. ConAgra Brands, Inc.*, 16 F.4th 1283, 1288 (9th Cir. 2021) (noting that when FSIS "reviews and approves a label, the agency is deciding that it is *not* false or misleading"). But plaintiffs seek to impose a different standard, insisting that the labels are nevertheless deceptive and misleading under state law and must be changed. Allowing plaintiffs to do so would impose a requirement different from what the FSIS has already approved as consistent with the FMIA, which is

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preemption. And notably, in beginning its purportedly plain-language approach to this "meaty question of statutory interpretation," the dissent focuses *not* on the text of § 678, but instead on the historical backdrop that prompted federal regulation of the meat industry. *Id.* at 1; *cf. also Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175-76, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (quoting *Engine Mfrs. Ass'n S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252, 124 S. Ct. 1756, 158 L. Ed. 2d 529 (2004))).

precisely what § 678 prohibits.[7] *See id.* ("[A] plaintiff who brings a state[-]law claim that the approved label is false or misleading is seeking to impose a requirement different from the federal requirements. That state[-]law claim is preempted . . . .").

This case is indistinguishable from *Webb v. Trader Joe's Co.*, 999 F.3d 1196 (9th Cir. 2021).[8] There, after the plaintiff conducted her own research on the amount of water in the defendant's poultry products, she brought state-law claims alleging that the defendant's retained-water labels were misleading. *Id.* at 1198. The Ninth Circuit held that the claims were preempted under the PPIA's preemption provision. *Id.* at 1204. It reasoned that because "the retained[-]water statement on the label was federally approved," the "additional label requirements" that the plaintiff sought to place on the defendant by means of her own retained-water data "would necessarily be 'different than' those required by the PPIA." *Id.* (quoting § 467e); *cf. Cohen*, 16 F.4th at 1289-90 (reversing and remanding district court's preemption ruling based on insufficient evidence of FSIS approval; emphasizing that on remand, "[i]f the evidence shows that [the defendant's] label was approved by FSIS, then [the plaintiffs'] claims are preempted"). Here, similarly, because defendants' origin labels were federally approved, plaintiffs' claims

7. Indeed, as defendants point out, in alleging that the current labels are misleading, plaintiffs essentially seek to impose a labeling standard similar to the more restrictive approach to country-of-origin labeling that Congress implemented in 2008 but abandoned in 2015.

8. The district court relied in part on the Southern District of California's decision that the Ninth Circuit affirmed in *Webb*.

of misleading labels are preempted. A number of district courts have reached similar conclusions. *See Phelps*, 244 F. Supp. 3d at 1316-18; *Brower*, 243 F. Supp. 3d at 1128-29; *Kuenzig v. Kraft Foods, Inc.*, No. 11-cv-838-T-24, 2011 U.S. Dist. LEXIS 102746, 2011 WL 4031141, at *6-7 (M.D. Fla. Sept. 12, 2011) (finding preempted "any state[-]law claim based on the contention that the labels are false or misleading . . . because such a claim would require [p]laintiff to show that the information stated on the labels should have been presented *differently*" and would therefore "impos[e] a *different and/or additional* labeling requirement than those found under the FMIA and the PPIA"), *aff'd sub nom Kuenzig v. Hormel Foods Corp.*, 505 F. App'x 937 (11th Cir. 2013) (unpublished) (per curiam); *Barnes v. Campbell Soup Co.*, No. C 12-05185, 2013 U.S. Dist. LEXIS 118225, 2013 WL 5530017, at *6 (N.D. Cal. July 25, 2013) (finding state-law claim that chicken soup was deceptively labeled as "100% Natural" preempted by FMIA, noting that "[b]ecause the USDA and FSIS previously approved of [d]efendant's . . . label, . . . the . . . label cannot be construed, as a matter of law, as false or misleading"); *Meaunrit v. ConAgra Foods Inc.*, No. C 09-02220, 2010 U.S. Dist. LEXIS 73599, 2010 WL 2867393, at *7 (N.D. Cal. July 20, 2010) (finding plaintiffs' labeling claim preempted and citing earlier district-court and state cases rejecting state-law challenges to federally approved labels).

Against this plain language, plaintiffs argue that because § 678 allows states to exercise concurrent jurisdiction to prevent misbranding and because they have alleged misbranding, their claims are not preempted. The concurrent-jurisdiction portion of § 678 provides that

"any [s]tate . . . may, *consistent with the requirements under this chapter*, exercise concurrent jurisdiction with the Secretary . . . for the purpose of preventing the distribution for human[-]food purposes of any such articles which are . . . misbranded." § 678 (emphasis added). And the statute further does "not preclude any [s]tate . . . from making requirement[s] or taking other action, consistent with this chapter." § 678.

But both of these provisions contain the same condition: The state's labeling requirements or its exercise of concurrent jurisdiction must be "consistent with" the FMIA. *Id.* And although plaintiffs assert that New Mexico law "require[s] exactly the same thing as is required by federal law," this assertion plainly fails in light of the FSIS's preapproval of defendants' labels. Aplt. Br. 24. That is, plaintiffs assert that (1) defendants' labels are deceptive and misleading under state law and (2) the state law is coextensive with federal law. But the FSIS has already determined that defendants' labels are not deceptive or misleading under federal law. So the state law plaintiffs seek to rely on cannot be coextensive with federal law. Stated differently, plaintiffs' concurrent-jurisdiction argument ignores the critical feature of this case: that under federal law, through the FSIS preapproval process, defendants' products are not misbranded.[9] The states' concurrent jurisdiction over misbranding claims does not change that fact. *See Cohen*,

9. This simple fact undermines plaintiffs' reliance on cases in which state-law claims survived preemption because those claims alleged conduct that violated the FMIA. *See, e.g., Mario's Butcher Shop & Food Ctr., Inc. v. Armour & Co.*, 574 F. Supp. 653, 656 (N.D. Ill. 1983).

16 F.4th at 1288 (rejecting argument against preemption based on concurrent-jurisdiction clause in PPIA because such clause only authorizes states "to enforce *federal* requirements" (quoting *Nat'l Broiler Council v. Voss*, 44 F.3d 740, 746 (9th Cir. 1994) (per curiam)); *Kuenzig*, 2011 U.S. Dist. LEXIS 102746, 2011 WL 4031141, at *4 ("The states' concurrent jurisdiction has been interpreted to mean that states can impose sanctions for violations of state requirements that are *equivalent to* the FMIA and the PPIA's requirements." (emphasis added)); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 447, 125 S. Ct. 1788, 161 L. Ed. 2d 687 (2005) (interpreting similar preemption clause and noting that "a state-law labeling requirement is not pre[]empted by [7 U.S.C.] § 136v(b) if it is equivalent to, and fully consistent with, [Federal Insecticide, Fungicide, and Rodenticide Act]'s misbranding provisions"). Thus, the concurrent-jurisdiction language does not remove plaintiffs' claims from the scope of § 678.[10]

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10. The dissent also relies on the states' concurrent jurisdiction, as well as the FMIA's requirement that labels be "not false or misleading *and* . . . approved by the Secretary," to conclude that plaintiffs claims should not be preempted. § 607(d) (emphasis added). According to the dissent, the conjunction "and" in § 607(d) "suggests that mere agency approval does not suffice to satisfy the statute." Dissent 6. And the dissent interprets the states' concurrent jurisdiction as "allowing states to enforce the [FMIA's] prohibition against misleading labels when the agency declines to do so." *Id.* Yet the dissent's view overlooks the critical language of the FMIA's preemption provision, which prohibits states from imposing "requirements in addition to, or different than, those made under this chapter." § 678. And allowing plaintiffs' claims to proceed here would effectively allow New Mexico law to impose labeling requirements additional to or different than the labels that the FSIS has already approved as neither false nor misleading.

Plaintiffs next suggest that because the label "Product of the U.S.A." is optional, rather than mandatory, their claims are not preempted. This position is similarly doomed by the FSIS's preapproval—the FSIS has already concluded that the label, although not required by federal law, is not deceptive or misleading under federal law. And again, the plain language of § 678 prohibits state requirements that are different than or in addition to the federal labeling rules. Yet for plaintiffs to succeed on their claim that the labels are deceptive and misleading under state law and therefore must be removed or changed would be a different requirement than what the FSIS already approved. We therefore reject plaintiffs' argument based on the nonmandatory nature of the label at issue.

Plaintiffs next attempt to analogize § 678 to the preemption provision in the Federal Cigarette Labeling and Advertising Act (FCLAA), which prohibits states from imposing any "requirement or prohibition *based on smoking and health . . . with respect to the advertising or promotion* of . . . cigarettes." 15 U.S.C. § 1334(b) (emphases added). Courts interpreting § 1334(b) have relied on the emphasized text to determine whether a party's state-law claim is preempted, "ask[ing] whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under [s]tate law with respect to . . . advertising or promotion.'" *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 524-30, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) (plurality opinion) (omissions in original) (quoting § 1334(b)). In *Cipollone*, for example, the plaintiff's "claims that [defendants] concealed material facts [were] not

pre[]empted insofar as those claims rel[ied] on a state-law duty to disclose such facts through channels of communication *other than* advertising or promotion." *Id.* at 528 (emphasis added). Likewise, fraudulent-misrepresentation "claims based on allegedly false statements of material fact made in advertisements" were not preempted because they were "predicated not on a duty 'based on smoking and health' but rather on a more general obligation[:] the duty not to deceive." *Id.* at 528-29 (quoting § 1334(b)).

But importantly, the FCLAA's preemption provision is narrower than the FMIA's: The former applies only to "advertising or promotion" that is "based on smoking and health," § 1334(b), while the latter bars any state regulation of meat labeling that is "in addition to, or different than" the federal regulations, § 678. *See Phelps*, 244 F. Supp. 3d at 1317 (finding analogy to FCLAA cases "inapposite because [its] preemption provision[] [is] far narrower than those in PPIA and FMIA"). As a result, the FMIA's preemption provision requires no similar inquiry into the legal duty underlying the state-law claims, and *Cipollone* and its progeny do not affect that conclusion.

Plaintiffs' reliance on district-court decisions in *Parker v. J.M. Smucker Co.*, No. C 13-0690, 2013 U.S. Dist. LEXIS 120374, 2013 WL 4516156 (N.D. Cal. Aug. 23, 2013), and *Kao v. Abbott Labs. Inc.*, No. 17-cv-02790, 2017 U.S. Dist. LEXIS 187379, 2017 WL 5257041 (N.D. Cal. Nov. 13, 2017), fails for a similar reason: These are not FMIA cases, so they offer no guidance on the scope of the FMIA's preemption clause. The defendant in *Parker* argued for

preemption under the Food, Drug, and Cosmetics Act (FDCA), as amended by the Nutrition Labeling and Education Act (NLEA). 2013 U.S. Dist. LEXIS 120374, 2013 WL 4516156, at *4. The NLEA provides in part that states may not "directly or indirectly establish . . . any requirement for the labeling of food . . . that is not identical to" certain listed provisions in the FDCA. 21 U.S.C. § 343-1(a)(3). Yet this preemption provision "does not purport to preclude all state regulation of nutritional labeling"; instead, it "seems to 'prevent [s]tate and local governments from adopting inconsistent requirements with respect to the labeling of nutrients.'" *Barnes*, 2013 U.S. Dist. LEXIS 118225, 2013 WL 5530017, at *6 (quoting *Astiana v. Ben & Jerry's Homemade, Inc.*, Nos. C 10-4387, C 10-4937, 2011 U.S. Dist. LEXIS 57348, 2011 WL 2111796, at *8 (N.D. Cal. May 26, 2011)). Accordingly, claims arising from aspects of labels not directly regulated by the FDA—such as the term "natural," which the FDA has specifically declined to define—are generally not preempted. *See Parker*, 2013 U.S. Dist. LEXIS 120374, 2013 WL 4516156, at *4 (explaining "that at no point has the FDA stated any intention to alter its longstanding position not to adopt any regulations governing the term 'natural,' regardless of consumers being misled"). Indeed, at least one district court found state-law claims based on chicken-soup labels preempted under the preemption provision in the PPIA (which is identical to § 678) but the same claims based on vegetable-soup labels not preempted under FDCA and NLEA. *See Barnes*, 2013 U.S. Dist. LEXIS 118225, 2013 WL 5530017, at *7. Thus, we conclude that *Parker* is distinguishable and does not provide helpful guidance on whether the FMIA preempts

plaintiffs' claims in this case. *See Phelps*, 244 F. Supp. 3d at 1317-18 (explaining that "preemption issues arising under FDCA are distinguishable" from FMIA cases on basis of FSIS preapproval process); *Meaunrit*, 2010 U.S. Dist. LEXIS 73599, 2010 WL 2867393, at *7 (distinguishing FDCA preemption case "because there was no federal pre[]approval of product labeling and thus no inherent issue of imposing different or additional requirements").

Kao is similarly distinguishable. It involved the preemption provision in the National Bioengineered Food Disclosure Standard providing that "no [s]tate . . . may directly or indirectly establish . . . any requirement relating to the labeling or disclosure of whether a food is bioengineered . . . that is not identical" to the federal standard. 7 U.S.C. § 1639b(e). In finding that plaintiffs' unfair-competition, false-advertising, and breach-of-warranty claims arising from a "non-GMO" label on infant formula were not preempted, the *Kao* court relied on two critical facts, neither of which exist in this case. First, it noted the absence of any federal preapproval, specifically declining to follow two FMIA cases on the basis that they "involve[d] labeling that had been pre[]approved by a regulatory agency[] or that explicitly complied with federal law." *Kao*, 2017 U.S. Dist. LEXIS 187379, 2017 WL 5257041, at *6-8 (citing *Brower*, 243 F. Supp. 3d 1124, 2017 WL 1063470, at *3, and *Barnes*, 2013 U.S. Dist. LEXIS 118225, 2013 WL 5530017, at *5). Second, the *Kao* court noted, as a supporting reason for finding the claims not preempted, that the claims "[we]re consistent with the current USDA guidance." 2017 U.S. Dist. LEXIS 187379, [WL] at *8. Here, by contrast, defendants' labels were

preapproved, and plaintiffs' claims are not consistent with the FSIS's guidance. We therefore find *Kao* unpersuasive in this case.

In sum, each of plaintiffs' state-law labeling claims—unjust enrichment, breach of warranty, violation of the UPA, and violation of state antitrust law—attempt to establish a labeling requirement different than that imposed and approved by the USDA and the FSIS under federal law. These claims are therefore preempted under § 678,[11] and we affirm the district court's decision on that ground, without reaching its alternative holdings or plaintiffs' various challenges to those alternative holdings.[12]

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11. Our preemption ruling is further supported by the executive order plaintiffs highlight in a letter of supplemental authority. *See* Fed. R. App. P. 28(j). Plaintiffs point to the portion of the order directing the Secretary of Agriculture to "consider initiating a rulemaking to define the conditions under which the labeling of meat products can bear voluntary statements indicating that the product is of United States origin, such as 'Product of USA.'" Aplt. Rule 28(j) Letter, July 21, 2021 (quoting Exec. Order No. 14,036, Promoting Competition in the Am. Econ., 86 Fed. Reg. 36987, 36993 (July 9, 2021)). And although plaintiffs contend that this order "directly supports" their position that defendants "are engaged in using voluntary deceptive practices to mislead consumers," it does nothing to overcome the preemption issue. *Id.* Instead, as defendants assert, the order's instruction "to consider initiating rulemaking to change [the] labeling requirements" simply "reinforces the conclusion that [plaintiffs'] claims are preempted under [the] current rules." Aplee. Rule 28(j) Letter, July 23, 2021.

12. We do not—as the dissent contends—"assert that beef raised and even slaughtered in other countries can legally be said to be a product of the United States of America merely because it was

II. False-Advertising Claims

The district court dismissed plaintiffs' false-advertising claims for several reasons, including that the complaint alleged "third[ ]parties and not [defendants] themselves produced the false advertisements." App. vol. 2, 559. On appeal, plaintiffs do not dispute the district court's assessment that defendants did not produce the allegedly false advertisements; instead, they argue that the district court erred by failing to join those third parties as indispensable parties.

But this is not an issue of indispensable parties. It is an issue of plaintiffs' inadequate pleading. *See* Fed. R. Civ. P. 8(a)(2) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief"). As defendants point out, the complaints barely reference advertising (each use the word "advertising" only twice, in complaints that are over 20 pages long and include over 65 numbered paragraphs) and include only conclusory assertions regarding defendants' participation in such advertising. The complaints also each include a single paragraph composed of pasted images of labels and advertising, images that appear to show that the advertising was created by third-party retailers, not defendants. And again, plaintiffs do not challenge the district court's conclusion that they failed to allege

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packaged here for retail sale." Dissent 1. On the contrary, we offer no opinion on the FSIS's broad interpretation of the meaning of the "Product of the U.S.A." label. We simply hold that plaintiffs cannot use their state-law claims as a mechanism for bypassing federally approved labeling.

defendants engaged in false advertising; nor do they rebut, in their reply brief, defendants' similar assertion on appeal. Thus, we conclude that plaintiffs' complaints do not state a false-advertising claim against defendants, and we affirm the district court's dismissal of the false-advertising claims on that basis.[13]

CONCLUSION

Because plaintiffs' state-law claims are preempted by federal law and because plaintiffs fail to state a claim against defendants for false advertising, we affirm the district court's orders dismissing their complaints and denying leave to amend as futile. As a final matter, we grant the motion to file an amicus brief.

13. In so doing, we express no opinion on the district court's alternative holding that the false-advertising claims would be preempted.

Appendix A

LUCERO, Senior Circuit Judge, dissenting:

This case poses a meaty question of statutory interpretation: did Congress intend to preclude states from regulating beef labels that blatantly deceive consumers? The text, history, and purpose of the Federal Meat Inspection Act (FMIA) reveal that Congress could not have intended such a result. Rather, the statute expressly creates concurrent state jurisdiction, utilizing our federalist system to protect consumers against false and misleading meat labeling. *See* 21 U.S.C. § 678. In this case, plaintiffs' state law claims that beef labels mislead consumers as to cattle's country of origin are perfectly consistent with this federal goal. My respected colleagues in the majority disagree, they assert that beef raised and even slaughtered in other countries can legally be said to be a product of the United States of America merely because it was packaged here for retail sale. Thus, I respectfully dissent.

I agree with my colleagues that questions of express preemption turn on the plain text of the statute. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125, 136 S. Ct. 1938, 195 L. Ed. 2d 298 (2016); *EagleMed LLC v. Cox*, 868 F.3d 893, 903-05 (10th Cir. 2017). However, when express preemption language is susceptible to equally "plausible alternative reading[s]," we "have a duty to accept the reading that disfavors pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S. Ct. 1788, 161 L. Ed. 2d 687 (2005). This is especially true when "Congress has legislated in a field which the States have traditionally occupied." *Medtronic, Inc. v. Lohr*, 518 U.S.

470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (cleaned up). Because food safety and labeling are quintessential domains of state power, any ambiguity in the FMIA's preemption clause should be resolved against preemption. *See Plumley v. Massachusetts*, 155 U.S. 461, 472, 15 S. Ct. 154, 39 L. Ed. 223 (1894) ("If there be any subject over which it would seem the states ought to have plenary control . . . it is the protection of the people against fraud and deception in the sale of food products."). Although my colleagues in the majority advance a plausible reading of the FMIA, my interpretation of the Act leads me to adopt an equally plausible alternative that cuts against preemption. *See Bates*, 544 U.S. at 449.

I

Before turning to the text, the FMIA's history and purpose are instructive, revealing Congressional intent to create a regulatory regime characterized by cooperation between the federal government and the states. President Theodore Roosevelt signed the FMIA into law in June 1906—just months after Upton Sinclair's famous muckraking novel, *The Jungle*, exposed horrific health and safety conditions in Chicago's slaughterhouses and meat packing facilities. *See Federal Meat Inspection Act of 1906*, Pub. L. 59-382, 34 Stat. 669 (codified as amended at 21 U.S.C. § 601 *et seq.*); Upton Sinclair, *The Jungle* (Doubleday, Page & Co. 1906).[1] In response to Sinclair's

1. Sinclair's work was hardly the public's first exposure to problems in the meat industry. In 1898, the industry came under fire for supplying rotten canned beef to American troops fighting in Cuba amidst the Spanish-American War. James Harvey Young,

revelations, President Roosevelt commissioned the Neill-Reynolds Report, which conducted surprise inspections of meat packing facilities and substantially confirmed Sinclair's allegations, expounding on the dangers to public health, meat packing workers, and the integrity of markets. *See* Arlene Finger Kantor, *Upton Sinclair and the Pure Food and Drugs Act of 1906*, 66 Am. J. Pub. H. 1202, 1204-05 (1976). The FMIA was signed into law less than two months after the Report's publication. *Id.* at 1205.

Against this backdrop, it is hardly surprising that Congress intended to create a sweeping, federalist regulatory scheme. In its statement of findings, Congress noted that "[i]t is essential in the public interest that the health and welfare of consumers be protected by assuring that meat . . . [is] properly marked, labeled, and packaged," citing concerns about public health, small cattle farmers, and unfair competition. 21 U.S.C. § 602. This sweeping declaration reveals a clear intent to protect consumer safety and market integrity. But these efforts were not delegated to the federal government alone. Rather, the Act's provisions were meant to be enforced "by the Secretary [of Agriculture with] *cooperation by the States*

The Pig That Fell Into the Privy: Upton Sinclair's 'The Jungle' and the Meat Inspection Amendments of 1906, 59 Bulletin H. Med. 467, 468-69 (1985). Soon-to-be President Roosevelt, a Colonel fighting as a "Rough Rider" in Cuba at the time, refused to eat the "embalmed beef." *Id.* Moreover, at the dawn of the trust-busting era, scholars and journalists had long noted the "Beef Trust's" monopolistic efforts to raise consumer prices and reduce competition from small, independent cattle farmers. *Id.* at 468; see also generally Francis Walker, *The 'Beef Trust' and the United States Government*, 16 Econ. J. 491 (1906).

and other jurisdictions." Id. (emphasis added). Indeed, the FMIA is littered with references to state and federal cooperation to protect consumers. *See, e.g.*, § 661 ("It is the policy of the Congress to protect the consuming public from meat . . . that [is] adulterated or misbranded and to assist in efforts by State and other Government agencies to accomplish this objective."); § 678 (conferring concurrent enforcement jurisdiction to the states).[2]

II

Keeping the FMIA's history and purpose in mind, I turn to its text. In substance, the Act allows only the sale of beef with labels that "are not false or misleading and which are approved by the Secretary" of Agriculture. 21 U.S.C. § 607(d). To effectuate this ban on misleading labels,

2. The majority discusses more recent history, including a law in place from 2008 to 2015 that more tightly regulated country-of-origin labeling and was Congressionally repealed following WTO proceedings and imposition of tariffs against the United States. (Op. at 7-8.) As the majority's own authorities make clear, however, Plaintiffs are not seeking to reimpose the same labeling regime established by the repealed statute. (*Id.*) For example, the statute affirmatively required disclosure of foreign beef's country of origin. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 11002, 122 Stat. 923, 1351-53 (2008); *see also* Joel L. Greene, *Country-of-Origin Labeling for Foods and the WTO Trade Dispute on Meat Labeling*, Cong. Rsch. Serv., RS22955 at 4 (2015). On appeal, plaintiffs merely contend that New Mexico law prohibits "Product of the U.S.A." labeling for cattle that are born and raised in other countries. If Congress wishes to preempt such a claim, it is free to do so by enacting a new statute. Likewise, the USDA can promulgate a formal rule. *See infra* n.3 (explaining that mere agency guidance does not have the same preemptive effect as formal rules).

the USDA promulgated a regulation prohibiting any label that "conveys any impression or gives any false indication of origin." 9 C.F.R. § 317.8(a). However, the Food Safety and Inspection Service (FSIS), a group within the USDA, issued a policy guidance booklet providing that a meat product "may bear the phrase 'Product of the U.S.A.'" if "[t]he product is processed in the U.S." FSIS, Food Standards and Labeling Policy Book at 147 (2005), https://www.fsis.usda.gov/sites/default/files/import/Labeling-Policy-Book.pdf [hereinafter "FSIS Policy Book"]. In this case, plaintiffs challenge defendants' practice of importing cattle from other countries, slaughtering or processing them in the United States, and labeling the resulting meat a "Product of the U.S.A.," in what, but for the district court's summary dismissal, would appear to be a clear violation of New Mexico law. My colleagues conclude, however, that these state claims are preempted by the FMIA because the FSIS preapproved defendants' labels and therefore they cannot be "false or misleading," pursuant to § 607(d). (Op. at 13-14.)

To arrive at this conclusion, the majority relies on the FMIA's express preemption clause. In relevant part, that clause reads: "Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any state or Territory . . . ." § 678 ("preemption clause"). However, the same provision also provides that states are free to "exercise concurrent jurisdiction" with the federal government "for the purpose of preventing the distribution . . . [of] misbranded" meat products, so long as concurrent state regulation is "consistent with the

requirements" of the FMIA. *Id.* ("concurrent jurisdiction clause").

Everyone agrees that this case turns on the interaction of those two clauses. Read together, they suggest that states are free to regulate meat labels so long as such regulations are consistent with the FMIA and do not add to the requirements imposed by the Act. The inquiry thus becomes whether plaintiffs' state law claims deviate from or add to FMIA labeling requirements. I conclude they neither deviate from nor add to the Act because plaintiffs merely invoke New Mexico law consistent with the Act's express prohibition on misleading labels.

The plain text of the FMIA demonstrates that FSIS approval of a label is not conclusive as to whether the label is unlawfully misleading. The Act allows the sale only of meat products with labels that "are not false or misleading *and* which are [pre]approved by the Secretary." § 607(d) (emphasis added). This conjunctive language suggests that mere agency approval does not suffice to satisfy the statute. Rather, the Act contemplates the existence of—and indeed proscribes—labels that are both misleading and approved by the Secretary. In this context, the most natural reading of § 678's concurrent jurisdiction clause is as an attempt to close the resulting gap by allowing states to enforce the Act's prohibition against misleading labels when the agency declines to do so. This construction has the benefit of according with the federalist history of the FMIA. Because we are dealing with a traditional regulatory domain of the states, it is this equally plausible construction of the statute—the one

disfavoring preemption—that we are required to accept. *See Bates*, 544 U.S. at 449; *Medtronic*, 518 U.S. at 485.[3]

This case presents a paradigmatic example of the federal-state balance Congress intended in enacting the FMIA. At a minimum, it is plausible that the label "Product of the U.S.A." misleads consumers to believe that the beef they purchase derives from cattle born and

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3. Having established that FSIS approval does not necessarily render a label compliant with the FMIA, the question remains whether approval of defendants' labels in this case is sufficient. Defendants point only to the FSIS Policy Book for the proposition that their labels comply with the FMIA's regulatory regime. *Policy Book, supra* at 147. Several of our sibling circuits have held that mere agency guidance, as opposed to statutes or formal regulations, is not automatically entitled to preemptive effect. *See, e.g., Good v. Altria Group, Inc.*, 501 F.3d 29, 51 (1st Cir. 2007); *Wabash Valley Power Ass'n, Inc. v. Rural Electrification Admin.*, 903 F.2d 445, 453-54 (7th Cir. 1990); *Reid v. Johnson & Johnson*, 780 F.3d 952, 962-65 (9th Cir. 2015); *Fellner v. Tri-Union Seafoods, LLC.*, 539 F.3d 237 (3d Cir. 2008). Because the FSIS Policy Book is accompanied by a disclaimer that its contents "do not have the force and effect of law and are not meant to bind the public in any way," it is hard to derive Congressional or agency intent for such guidance to preempt state law. FSIS, *Food Standards and Labeling Policy Book*, https://www.fsis.usda.gov/guidelines/2005-0003.

The majority cites several cases for the proposition that FSIS approval is dispositive that defendants' labels are not misleading. (Op. 11-15.) But these cases are all distinguishable because they did not rely on mere agency guidance to support a finding of preemption. *See, e.g., Webb v. Trader Joe's Co.*, 999 F.3d 1196 (9th Cir. 2021). To the extent other courts find that FSIS approval based on guidance does preempt state law, we should decline to adopt that holding as contrary to the text and purpose of the FMIA.

raised in the United States. To the extent consumers are deceived, the labels violate both the FMIA's ban on misleading labels, 21 U.S.C. § 607(d), and the USDA's own regulation barring any beef label "giv[ing] any false indication of origin." 9 C.F.R. § 317.8(a). Taking this plain text alongside the history and purpose of the FMIA, Congress most assuredly could not have intended to rubber stamp deception as to the national origin of beef. Rather, the statute explicitly enlists states in the fight to protect consumers by creating concurrent jurisdiction to regulate misleading labels. Because plaintiffs merely invoke state law to enforce this ban, their claims are perfectly consistent with the Act and thus covered by its concurrent jurisdiction clause.

III

Upton Sinclair famously quipped that the meat industry "use[s] everything about the hog except the squeal." *The Jungle, supra* at 38. The federal government enacted the FMIA to end that industry's sordid practice. Yet rather than monopolizing the field, Congress created a regulatory framework in which federal and state actors work together to protect consumers from unsafe and deceptive meat labeling. The text, history, and purpose of the FMIA all point toward the same conclusion: Congress could not have intended to authorize outright deception in meat labeling. Plaintiffs invoke state law to challenge precisely this sort of label, alleging that defendants mislead consumers about the origin of their beef products. As a result, plaintiffs' New Mexico claims are wholly within the confines of the FMIA's regulatory regime and do not add to the Act's dictates. Because this reading of

the FMIA is just as plausible as the majority's, we are required to err against finding preemption. *See Bates*, 544 U.S. at 449; *Medtronic*, 518 U.S. at 485.

Accordingly, I would reverse dismissal of plaintiffs' complaint on preemption grounds and remand for further proceedings consistent with these views.[4]

4. Because I would reverse on the preemption conclusion, it is also necessary to discuss the district court's alternative holdings. The court's dismissal of plaintiffs' New Mexico Unfair Practices Act, unjust enrichment, and antitrust claims all depend at least in part on FSIS approval of defendants' labels. Because such approval is not conclusive that labels are fair, accurate, or lawful, I would reverse these dismissals and allow these claims to proceed as well. I concur with the majority that the district court properly dismissed plaintiffs' false advertising claim.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, FILED AUGUST 27, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 1:20-cv-105-KWR-SMV

ROBIN G. THORNTON, ON BEHALF OF HERSELF AND OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

TYSON FOODS, INC.; CARGILL MEAT SOLUTIONS CORP.; JBS USA FOOD COMPANY; AND NATIONAL BEEF PACKING COMPANY, LLC,

Defendants.

CONSOLIDATED WITH:

No. 1:20-cv-106-KWR-SMV

MICHAEL LUCERO, ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED,

Plaintiff,

Appendix B

v.

TYSON FOODS, INC.; CARGILL MEAT SOLUTIONS CORP.; JBS USA FOOD COMPANY; AND NATIONAL BEEF PACKING COMPANY, LLC,

Defendants.

August 27, 2020, Filed

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendants' Motion to Dismiss Plaintiff Lucero's Complaint, filed on March 9, 2020 **(Doc. 45, 1:20-cv-106)**, Defendants' Motion to Dismiss Plaintiff Thornton's Complaint, **(Doc. 43, 1:20-cv-105)**, and Plaintiff Lucero's Motion to File Second Amended Complaint, filed on May 12, 2020 **(Doc. 55)**. Having reviewed the pleadings and arguments, the Court finds Defendants' arguments well-taken, therefore the Motions to Dismiss are **GRANTED** and the Motion to Amend is **DENIED** as futile.

BACKGROUND

Plaintiffs Robin Thornton and Michael Lucero filed substantially similar putative class actions and their cases were consolidated for pretrial matters. Defendants produce and sell beef products to retailers. Both Plaintiffs assert that Defendants are misleading retailers and consumers by labeling their beef "Product of the USA", when in fact the cattle are raised in foreign countries,

imported into the United States live, then slaughtered and processed in the United States. Plaintiff Thornton asserts a putative class of consumers who were deceived into paying higher prices for American beef when it was allegedly foreign beef. Plaintiff Lucero asserts a putative class of American Ranchers who receive less for their American cattle because of the influx of imported cattle sold as product of the USA.

A. Procedural History

Plaintiff Michael Lucero is a "long time producer of beef cattle with a multi-general history of ranching in New Mexico." 20-cv-106, Doc. 1-1 ¶ 14. Plaintiff Lucero brings a class and subclass of all ranchers and Farmers in the United States (or New Mexico) who produced beef cattle for the commercial sale that were born, raised, and slaughtered in the United States. 20-cv-106, Doc. 1-1, 58 of 67, ¶49.

Plaintiff Thornton is a consumer who bought Defendants' beef from various retail stores. She brings a putative class action of retail consumers allegedly deceived by Defendants' county or origin label. Aside from the different classes, the two complaints appear to be substantially similar.

Plaintiff Thornton filed a complaint alleging violation of the New Mexico Unfair Practices Act pursuant to NMSA § 57-12-1; (2) breach of express warranty; and (3) unjust enrichment. Plaintiff Lucero's complaint alleges (1) violation of the NM UPA and (2) unjust enrichment.

On March 11, 2020, the cases were consolidated for all pre-trial purposes, and the parties agreed the cases would be tried separately before the undersigned. **Doc. 47**.

After briefing on the motions to dismiss were complete, Plaintiff Lucero filed a motion to amend complaint to replace his New Mexico Unfair Practices Act Claim with a violation of the New Mexico Antitrust Act. Defendants opposed the motion as futile.

B. Federal Meat Inspection Act and beef labeling.

Federal law "regulates a broad range of activities" related to meat processing. *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455-456, 132 S. Ct. 965, 181 L. Ed. 2d 950 (2012). Labels on beef products are regulated under the Federal Meat Inspection Act ("FMIA"), codified at 21 U.S.C. § 601, *et seq.* Meat products may not be sold "under any... labeling which is false or misleading, but... labeling and containers which are not false or misleading and which are approved by the Secretary are permitted." § 607(d). The FMIA allows the USDA to ban labeling for meat products that it finds to be false or misleading. § 607(e).

The USDA regulates beef labels through its Food Safety and Inspection Service ("FSIS"). FSIS administers a label approval program which ensures that no meat products "bear any false or misleading marking, label, or other labeling and [that] no statement, word, picture, design or device which conveys any false impression or gives any false indication of origin or quality or is otherwise false or misleading shall appear in any marking or other labeling." 9 C.F.R. § 317.8(a).

Appendix B

FSIS has provided by regulation that "no final label may be used on any [meat] product unless the label has been submitted for approval to FSIS Labeling and Program Delivery Staff, accompanied by FSIS form 7234-1, Application for Approval of Labels, Marking, and Devices, and approved by such staff." 9 C.F.R. § 412.1(a). Here, it is undisputed that the label at issue has been approved by FSIS and found to not be misleading or false.

Defendants recite the history of "country of origin labels" thoroughly in their briefs. *See* **Doc. 46, 1:20-cv-00106, at 19-23**. In 2016, Congress made country or origin labeling optional for beef products. Pub. L. No. 114-113, 759, 129 Stat. 2242, 2284-85 (2016). The USDA treats country of origin labels as optional. The USDA continues to approve beef labels; if a producer wants to label its beef with a country of origin, it must comply with FSIS's approved standard before doing so. 21 U.S.C. §607(d); *See* Food Safety Inspection Service's Food Standards and Labeling Policy Book, available at https://www.fsis.usda.gov/wps/wcm/connect/ 7c48be3e-e516-4ccf-a2d5-b95a128f04ae/Labeling-PolicyBook.pdf?MOD=AJPERES (last visited March 9, 2020). The FSIS approval process is required by federal law and beef products could not be sold unless the seller complied with that process. *See Kuenzig v. Kraft Foods, Inc.*, 2011 U.S. Dist. LEXIS 102746, 2011 WL 4031141, at *7 n.8 (M.D. Fla. Sept. 12, 2011) ("The regulations relating to the FMIA and the PPIA are clear that Defendants' labels were required to be submitted to the FSIS for approval prior to their use, and given that the labels were, in fact used, the Court will presume that the labels received the FSIS's approval."), *aff'd*, 505 F. App'x 937 (11th Cir. 2013).

C. Beef Labels at issue were approved by USDA.

As noted above, before a label may be used, it must be approved by the USDA. It appears to be undisputed that the labels at issue here were approved. Moreover, the label at issue is consistent with USDA regulations.

According to the FSIS labelling book "labeling may bear the phrase 'product of USA' under one of the following conditions: 1. If the Country to which the product is exported requires this phrase, and the product is processed in the U.S., or 2. The product is processed in the U.S. (i.e. is of domestic origin)." FSIS Labeling Book at 147. "Processed" means as follows:

> **Labeling to Meet Export Requirements**
>
> . . . . "Product of the U.S.A." has been applied to products that, at a minimum, have been prepared in the United States. It has never been construed by FSIS to mean that the product is derived only from animals that were born, raised, slaughtered, and prepared in the United States. *The only requirement for products bearing this labeling statement is that the product has been prepared (i.e., slaughtered, canned, salted, rendered, boned, etc.).* No further distinction is required. In addition, there is nothing to preclude the use of this label statement in the domestic market, which occurs, to some degree. This term has been used on livestock products that were derived

> from cattle that originated in other countries and that were slaughtered and prepared in the United States. Also, the cattle could have been imported, raised in U.S. feed lots, and then slaughtered and prepared in the United States. The beef products from these cattle can be labeled as "Product of the U.S.A." for domestic and export purposes.
>
> **Labeling of Imported Beef Products**
>
> Under Section 20 of the FMIA (21 U.S.C. § 620), imported beef products are to be treated as "domestic" product upon entry into the United States.

66 Fed. Reg. 41160, at 41160-61 (Aug. 7, 2001) (emphasis added). Therefore, the regulations are clear that cattle born and raised in a foreign country but slaughtered in the United States may use the "Product of the USA" label.

LEGAL STANDARD

In reviewing a Fed. R. Civ. P. 12(b)(6) motion to dismiss, "a court must accept as true all well-pleaded facts, as distinguished from conclusory allegations, and those facts must be viewed in the light most favorable to the non-moving party." *Moss v. Kopp*, 559 F.3d 1155, 1159 (10th Cir. 2010). "To withstand a motion to dismiss, a complaint must contain enough allegations of fact 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (quoting

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In ruling on a motion to dismiss, "a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011). Mere "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555.

The Court may consider materials that are part of the public record or materials that are embraced by the pleadings and there is no dispute as to their authenticity. *Peterson v. Saperstein*, 267 F. App'x 751, 754 (10th Cir. 2008); *Hodgson v. Farmington City*, 675 F. App'x 838, 840-41 (10th Cir. 2017) ("The district court correctly noted that facts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment."). Here, at Defendants' request the Court takes judicial notice of the relevant USDA regulations and the undisputed fact that the beef labels have been approved by the USDA. Plaintiffs did not object.

Appendix B

DISCUSSION

I. Federal Preemption.

Defendants argue that Plaintiffs' claims challenging federally approved beef labels are expressly preempted by federal law and should be dismissed. The FMIA is clear that labeling requirements in addition to or different than those under the FMIA or approved by the USDA are preempted. 21 U.S.C. § 678. Plaintiffs seek to effectively alter or change USDA approved labels which are allegedly misleading. Therefore, the Court agrees with the Defendants and holds that Plaintiffs' state law claims are preempted under 21 U.S.C. § 678.

A. Preemption law.

"Congress has the power to pre-empt state law under Article VI of the Constitution, which provides that 'the Laws of the United States shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.'" *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1128-29 (10th Cir. 2007), *quoting in part* U.S. Const. art. VI. Because of the supremacy of federal law, "state law that conflicts with federal law is without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). There are three types of preemption: 1) "express preemption, which occurs when the language of the federal statute reveals an express congressional intent to preempt state law;" 2) "field preemption, which occurs when the federal scheme of regulation is so pervasive

that Congress must have intended to leave no room for a State to supplement it;" and 3) "conflict preemption, which occurs either when compliance with both the federal and state laws is a physical impossibility, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir.1998), *quoted in US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1324 (10th Cir. 2010).

Defendants primarily argue that the claims in this case are expressly preempted under 21 U.S.C. § 678. Express pre-emption occurs when Congress "define[s] explicitly the extent to which its enactments pre-empt state law." *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1128-29 (10th Cir. 2007). Where there is an express preemption clause, the Court must "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Id.* at 1129.

Congress enacted the Federal Meat Inspection Act ("FMIA") in part to ensure that meat products are properly labeled. 21 USC § 602. Meat cannot be sold if the product has labeling that is false or misleading. § 607(d). The FMIA contains an express preemption clause, 21 USC § 678. 21 U.S.C. § 678 provides that "marking, **labeling**, packaging, or ingredient **requirements in addition to, or different than**, those made under this chapter may not be imposed by any State or Territory or the District of Columbia." (emphasis added). The United States Supreme Court noted that "[t]he FMIA's preemption clause sweeps widely...[t]he clause prevents a State

from imposing any additional or different—even if non-conflicting—requirements." *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 459, 132 S. Ct. 965, 970, 181 L. Ed. 2d 950 (2012). "This includes claims raised under state common law or statutory law." *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir.2005) ("Under the Supremacy Clause of the United States Constitution, Congress may preempt state common law as well as state statutory law through federal legislation."); *see also Dist. 22 United Mine Workers of Am. v. Utah*, 229 F.3d 982, 987 (10th Cir.2000) (same).

B. FMIA Expressly preempts this state law action.

Here, the core of Plaintiffs' various causes of action is that Defendants are misleading consumers by representing that their foreign-born beef is a product of the United States. They seek injunctive relief directing Defendants to change or modify the country of origin labels, or damages for the allegedly misleading labels.

Defendants argued, and Plaintiffs do not dispute, as follows:

- The FMIA grant the USDA exclusive authority to regulate the labels and packing of beef products, which the USDA exercises through its Food Safety Inspection service (FSIS). **20cv106, Doc. 46 at 5-6**;

- The FSIS administers a comprehensive label approval program ensuring that meat products do not bear any false or misleading labeling and do not give any false impression as to a product's origin or quality. **9 CFR 317.8(a), 412.1(a); 20 CV 106 Doc. 46 at 6**.

- A beef product label cannot be used until FSIS has approved it, including by determining that the label contains no false or misleading words or pictures. ***Id.***

- FSIS permits a beef product label to bear the phrase "Product of the USA" if the product is processed in the United States. The USDA defines the term processed to mean prepared (slaughtered) in the United States. The USDA does not require that cattle must be born and raised in the United States for the beef processed from them to quality as a Product of the USA. *See* 66 Fed. Reg. 41160, at 41160-61 (Aug. 7, 2001).

- FSIS necessarily approved the product labels. The FSIS approval process is required by federal law and the products could not be sold unless the seller complied with the process. *Kuenzig v. Kraft Foods, Inc.*, 2011 U.S. Dist. LEXIS 102746, 2011 WL 4031141, at & n.8 (M.D. Fla. Sept. 12, 2011) ("The regulations relating to the FMIA... are clear that Defendants' labels

were required to be submitted to the FSIS for approval prior to their use, and given that the labels were, in fact used, the Court will presume that the labels received the FSIS's approval."), *aff'd* 505 F. App'x 937 (11th Cir. 2013). Plaintiffs do not disagree.

- The Court may take judicial notice of FSIS's approval of product labels because they are matters of public record and not subject to any dispute. *See, e.g., Shalikar v. Asahi Beer U.S.A. Inc.*, 2017 U.S. Dist. LEXIS 221388, 2017 WL 9362139, at *2 (C.D. Cal. Oct. 15, 2017) (considering agency approvals of food or beverage labels).

Here, Plaintiffs seek (1) an injunction to change the "misleading labels"; (2) an injunction prohibiting Defendants from using the Product of USA label on their foreign-born beef; and (3) damages for the misleading labels. *See* 20-cv-106, **doc. 1-1, p. 64 of 67**. Clearly, Plaintiffs seek injunctive relief that creates labeling requirements "in addition to, or different than" the USDA's standards. This injunctive relief is preempted under the plain language of 21 U.S.C. § 678.

Moreover, suits that seek damages for USDA approved beef labels on the ground that those labels misleading are also preempted under 21 U.S.C. § 678, as those claims would effectively require labeling different than the USDA approved labels. "FSIS's preapproval of a label must be given preemptive effect over state-law claims that

would effectively require the label to include different or additional markings." *Barnes v. Campbell Soup Co.*, No. C 12-05185 JSW, 2013 U.S. Dist. LEXIS 118225, 2013 WL 5530017, at *5 (N.D. Cal. July 25, 2013) (quotation marks omitted); *Webb v. Trader Joe's Co.*, 418 F. Supp. 3d 524, 2019 WL 5578225, at *3-4 (S.D. Cal. 2019) (noting that plaintiff's state law claims "would effectively impose" an additional labeling requirement and "undermine federal agency authority"); *Craten v. Foster Poultry Farms Inc.*, 305 F. Supp. 3d 1051, 1060-61 (D. Ariz. 2018) (concluding that a failure-to-warn claim challenging a label that had been preapproved by the FSIS was preempted by the PPIA); *La Vigne v. Costco Wholesale Corp.*, 284 F. Supp. 3d 496, 507-11 (S.D.N.Y. 2018) (noting, among other things, that FSIS review "includes a determination of whether a label is false or misleading," so a jury finding for the plaintiffs "would directly conflict with the FSIS's assessment" and "introduce requirements in addition or different from those imposed by" federal law (internal citations omitted)); *Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312, 1316-18 (S.D. Fla. 2017) ("FSIS's preapproval of a label 'must be given preemptive effect' over state-law claims that would effectively require the label to include different or additional markings." (citation omitted)); *Brower v. Campbell Soup Co.*, 243 F. Supp. 3d 1124, 1128-29 (S.D. Cal. 2017) (finding plaintiff's claims preempted where the FSIS previously found no fault with the labels at issue); *Trazo v. Nestle USA, Inc.*, 2013 U.S. Dist. LEXIS 113534, 2013 WL 4083218, at *7-8 (N.D. Cal. Aug. 9, 2013) (concluding that "allowing a jury to weigh in on preapproved USDA labels would surely conflict with the federal regulatory scheme" as a negative "jury

verdict would improperly 'trump' the USDA's authority"), *reconsidered on other grounds*, 113 F. Supp. 3d 1047 (N.D. Cal. 2015); *Meaunrit v. ConAgra Foods Inc.*, 2010 U.S. Dist. LEXIS 73599, 2010 WL 2867393, at *6-7 (N.D. Cal. July 20, 2010) (citing cases rejecting state-law challenges to federally approved labels); *Meaunrit v. Pinnacle Foods Grp.*, 2010 U.S. Dist. LEXIS 43858, 2010 WL 1838715, at *7 (N.D. Cal. May 5, 2010) ("To allow a jury to pass judgment on Defendant's labels, notwithstanding the USDA's approval, would disrupt the federal regulatory scheme.").

Therefore, all of Plaintiffs' claims are preempted under 21 USC § 678 because they seek to impose different or additional labeling requirements than those found under the FMIA. *See, e.g., Kuenzig v. Kraft Foods, Inc.*, No. 8:11-CV-838-T-24 TGW, 2011 U.S. Dist. LEXIS 102746, 2011 WL 4031141, at *6-7 (M.D. Fla. Sept. 12, 2011) ("any state law claim based on the contention that the labels are false or misleading [was] preempted, because such a claim would require Plaintiff to show that the information stated on the labels should have been presented *differently* (thus, imposing a *different and/or additional* labeling requirement than those found under the FMIA and the PPIA).", *aff'd* 505 F. App'x 937 (11th Cir. 2013); *Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312, 1316-17 (S.D. Fla. 2017) ("By attempting to challenge the FSIS-approved [labels] as false, misleading, or deceptive, each of Plaintiff's claims improperly seeks to impose additional or different requirements on Defendant's labeling than those required by USDA.").

C. Plaintiffs' remaining arguments against preemption are unavailing.

Plaintiffs spend much of their argument analyzing *different* preemption clauses under different acts. For example, Plaintiffs refer to case law interpreting the Federal Cigarette Labeling and Advertising Act (the "FCLAA"). The Court finds these cases inapposite. That preemption clause applies to tobacco advertising about "smoking and health" but not to other advertising. Here, as the United States Supreme Court noted, the preemption clause under 21 USC § 678 sweeps widely, prohibiting states from requiring labels "in addition to, or different than" those approved by the USDA. §678. As noted above, the Court must look to the specific language of the preemption clause at issue. Therefore, the Court finds that the case law on the preemption clause under the FCLAA is irrelevant to the specific language of the FMIA's preemption clause under section § 678.

Plaintiffs argue that even if the claims based on the labels are preempted, they may proceed on the basis that Defendants' advertising is misleading customers. Plaintiffs' advertisement argument fails because (1) Plaintiffs pled that third-parties and not the Defendants themselves produced the false advertisements; (2) the advertisements appear to merely be a picture of the USDA approved label reflecting "Product of the USA" or "USDA approved"; (3) the USDA concluded those labels are not misleading or false; and (4) allowing this claim would undermine Congress's intent to create uniform standards for describing meat products under conflict preemption.

Kuenzig v. Hormel Foods Corp., 505 F. App'x 937, 939 (11th Cir. 2013) (labels which complied with federal regulations and passed FSIS approval were presumptively lawful and not false or misleading. Therefore, the labels "could not become unfair or deceptive simply by virtue of being depicted in an advertisement."); *Phelps*, 244 F. Supp. 3d at 1317 n.2 ("PPIA and FMIA do not preempt all FDUTPA claims alleging false or misleading *non-label* advertising. However, the only advertising content to which Plaintiff objects in the Complaint is use of the terms "Natural" and "No Preservatives," which are claims approved by FSIS for use in describing the Products. Therefore, Plaintiff's FDUTPA claims based on advertising and marketing are preempted."). To the extent Plaintiffs request leave to amend their complaint as to their advertisement claims, they do not explain what facts they would assert to establish a plausible claim.

Plaintiffs argue that the preemption clause applies only to mandatory label requirements, not optional label requirements such as the country of origin. This argument is not reflected anywhere in the plain language of 21 U.S.C. § 678, which provides that "labeling...requirements in addition to, or different than those made under this chapter may not be imposed by any State...."

Plaintiffs argue that 21 U.S.C. § 678 grants New Mexico concurrent jurisdiction over beef labeling. Congress provided that states may, consistent with the requirements set forth under the FMIA, exercise concurrent jurisdiction with the USDA to prevent the distribution of meat products that have labeling that

is false or misleading. *See* § 678 (state may not impose labeling requirement in addition to or different than those made under this chapter "but any State... may consistent with the requirements under this chapter exercise concurrent jurisdiction with the Secretary... for the purpose of preventing distribution for human food purposes of any such articles which are...misbranded."); *see also* 21 U.S.C. § 601(n)(1). However, that clause must be read in conjunction with language in § 678 which provides that no state may impose labeling requirements "in addition to, or different than" those issued under the FMIA. "The states' concurrent jurisdiction has been interpreted to mean that states can impose sanctions for violations of state requirements that are equivalent to the FMIA and the PPIA's requirements." *Kuenzig v. Kraft Foods, Inc.*, No. 8:11-CV-838-T-24 TGW, 2011 U.S. Dist. LEXIS 102746, 2011 WL 4031141, at *4 (M.D. Fla. Sept. 12, 2011), citing *National Broiler Counsel v. Voss*, 44 F.3d 740, 746 (9th Cir.1994); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 442, 447, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005) (construing similar language in 7 U.S.C. § 136v(b)); *see also Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312, 1317 (S.D. Fla. 2017) (rejecting concurrent jurisdiction argument as to FMIA). Here, Plaintiffs do not seek to impose equivalent requirements as those imposed by the USDA or to enforce the USDA's labeling requirements. Rather, they seek to impose different labeling requirements by asking this Court to declare USDA approved labels misleading. Plaintiffs' interpretation of 21 USC § 678 would render the express preemption clause a nullity.

Plaintiffs alternatively argue that even if the USDA approved the labels at issue, their decision to approve the labels was wrong and therefore their decision has no effect. Plaintiffs offered no support for this argument, and the Court disagrees. As explained above and in Plaintiffs' motion, the USDA has authority to regulate country-of-origin labeling. 20 cv 106, **Doc. 46 at 5-12**. Moreover, Defendants explained in detail that the USDA exercised its authority to approve labels and determine whether they are misleading. ***Id.***; 21 USC 607(d), (e); *see also Background section, supra*. Even if the USDA made the wrong decision in determining that the labels were not misleading, it is unclear how that changes the preemption analysis.

II. Court declines to exercise discretion under primary jurisdiction doctrine.

Defendants argue that the Court should dismiss the claims under the primary jurisdiction doctrine. "Even where a court has subject matter jurisdiction over a claim, courts have discretion to refer an issue or issues to an administrative agency. The doctrine of primary jurisdiction is specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency." *TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1238 (10th Cir. 2007) (internal quotation marks and citations omitted).

"A district court's decision to invoke the primary jurisdiction doctrine "require[s] it to consider whether the issues of fact in the case: (1) are not within the

conventional experience of judges; (2) require the exercise of administrative discretion; or (3) require uniformity and consistency in the regulation of the business entrusted to the particular agency. Additionally, when the regulatory agency has actions pending before it which may influence the instant litigation, invocation of the doctrine may be appropriate." *Id.* at 1239.

The Court finds Defendants' arguments persuasive. *See* **Doc. 46 at 36 to 38 of 52**. However, the primary jurisdiction doctrine requires the court to stay the matter, refer the matter to the agency or dismiss this matter without prejudice. *TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1239 (10th Cir. 2007). Because the Court is dismissing the matter with prejudice on other grounds, the Court declines to exercise its discretion to stay or refer this matter to the USDA.

III. New Mexico Unfair Practices Act claim fails as a matter of law.

Alternatively, even if Plaintiffs' New Mexico UPA claims were not preempted, they fail as a matter of law as explained below.

A. Plaintiff Lucero lacks standing under the UPA as a competitor.

Plaintiff Lucero admits that he cannot assert a UPA claim as a competitor under NMSA 57-12-7. **Doc. 50 at 34 of 47**. Therefore, the Court dismisses Plaintiff Lucero's UPA claim.

B. Plaintiffs' UPA claims otherwise fail under statutory safe harbor.

The UPA contains a safe harbor clause precluding UPA liability for conduct that is permissible under federal law. Because Defendant's labeling practices are permissible under federal law, specifically under the FMIA and regulations, Defendants' conduct cannot constitute an unfair practice.

> Section 57-12-7 of the New Mexico Unfair Practices Act provides:
>
> Nothing in the Unfair Practices Act shall apply to actions or transactions expressly permitted under laws administered by a regulatory body of New Mexico or the United States, but all actions or transactions forbidden by the regulatory body, and about which the regulatory body remains silent, are subject to the Unfair Practices Act.

N.M. Stat. Ann. § 57-12-7. "For the UPA exemption to apply, more than the mere existence of a regulatory body is required. At a minimum, the regulatory body must actually administer the regulatory laws with respect to the party claiming the exemption, thereby exercising at least the modicum of oversight that the exempting language indicates is required. Thus, the party claiming the exemption must have obtained permission from the regulatory body to engage in the business of the transaction, thereby subjecting that party to the

regulatory body's oversight." *Zamora v. Wells Fargo Home Mortg., a Div. of Wells Fargo Bank, N.A.*, No. CV 12-0048 RB/LFG, 2012 U.S. Dist. LEXIS 198243, 2012 WL 12895364, at *7 (D.N.M. Sept. 18, 2012) (internal quotation marks and citations omitted), *citing State ex rel. Stratton v. Gurley Motor Co.*, 1987- NMCA 063, 105 N.M. 803, 737 P.2d 1180, 1184 (N.M. Ct. App. 1987).

Here, as explained in detail above, the labels were approved by the USDA and FSIS and comply with relevant regulations. Therefore, the labels are expressly permitted under the laws administered by the USDA and fall within the safe harbor clause of NMSA § 57-12-7. *Kuenzig*, 2011 U.S. Dist. LEXIS 102746, 2011 WL 4031141, at *7 (citations omitted) ("labels that have received FSIS preapproval "are presumptively lawful and not false or misleading." "If the FSIS had determined that the labels were false or misleading, Defendant['s] labels would not have been approved, and the FSIS would have prohibited Defendant[ ] from using the labels."); *Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312, 1318-19 (S.D. Fla. 2017) ("Defendant cannot be liable under the FDUTPA because the challenged labels were approved by FSIS and therefore fall within the safe harbor provision.") Therefore, both Plaintiffs' UPA claims are dismissed with prejudice.

IV. Unjust Enrichment Claims fail.

Alternatively, Plaintiffs' unjust enrichment claims fail as a matter of law, even if they are not preempted. An unjust enrichment claim under New Mexico law requires

that "(1) another has been knowingly benefitted at one's expense (2) in a manner such that allowed of the other side to retain the benefit would be unjust." *Ontiveros Insulation Co. v. Sanchez*, 2000-NMCA 051, 129 N.M. 200, 3 P.3d 695, 699 (N.M. Ct. App. 2000).

As explained above, Defendants are complying with USDA regulations and their approved labels are presumptively lawful and not false or misleading. There is nothing unjust about using approved USDA labels. *Kuenzig*, 2011 U.S. Dist. LEXIS 102746, 2011 WL 4031141, at *7 (citations omitted); *Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312, 1318-19 (S.D. Fla. 2017).

Moreover, Plaintiff Thornton bought the offending beef from retailers. Plaintiff Thornton does not explain why she does not have a breach of contract claim with the retailers. Generally, an unjust enrichment claim does not sound when they could pursue her claims in contract. *Ontiveros Insulation Co. v. Sanchez*, 2000-NMCA-051, 129 N.M. 200, 203-04, 3 P.3d 695, 698-99.

Plaintiff Lucero's unjust enrichment claim should also be dismissed because his claims are governed by contracts either with the Defendants or third parties. *See* **20-cv-106, Doc. 46 at 42-43 of 52**. New Mexico law disfavors "an unjust enrichment claim against a third party when the that claim involves the same subject as a contract, unless there is something preventing the plaintiffs from pursuing the contract claims." *Abraham v. WPX Energy Prod., LLC*, 20 F. Supp. 3d 1244, 1276 (D.N.M. 2014).

V. Plaintiff Thornton's Breach of Warranty Claim fails as a matter of law.

Even if Plaintiff Thornton's breach of warranty claim was not preempted, it would fail as a matter of law. *See, e.g., Kuenzig v. Kraft Foods, Inc.*, No. 8:11-CV-838-T-24 TGW, 2011 U.S. Dist. LEXIS 102746, 2011 WL 4031141, at *7 (M.D. Fla. Sept. 12, 2011) (Plaintiff's breach of express warranty claims that contradict the FSIS's nutrition labeling regulations are preempted.").

Plaintiff Thornton did not plead or argue in her response that she filed a pre-suit notice. Plaintiff must give notice within a reasonable time under NMSA § 55-2-607. "A buyer wishing to sue a seller for a breach of warranty must within a reasonable time after he discovers or should have discovered any breach[,] notify the seller of breach or be barred from any remedy[.] Section 55-2-607(3)(a). On its face, Section 55-2-607 facially operates to bar Plaintiff, as the "buyer" of the boots, from "any remedy" if he failed to abide by its provisions. The failure to allege sufficient notice may be a fatal defect in a complaint alleging breach of warranty." *Badilla v. Wal-Mart Stores E., Inc.*, 2017-NMCA-021, ¶ 10, 389 P.3d 1050, 1054 (internal quotation marks omitted). Defendants argue that the complaint may constitute sufficient notice. However, the New Mexico Court of Appeals concluded that failure to give pre-suit notice was unreasonable under the circumstances of that case. *Id.* Here, Defendants did not allege or argue they gave pre-suit notice or argue whether notice was reasonable under the circumstances.

Here, Plaintiff Thornton failed to plead that she gave notice, and Plaintiff does not suggest she could correct this in an amended complaint. Moreover, she did not plead or argue in her response that the notice under the circumstances was reasonable. Rather, the Court concludes that any lack of pre-suit notice was unreasonable because she had capable and experienced counsel. Moreover, failure to provide pre-suit notice deprived Defendants of the opportunity to respond to Plaintiff's concerns and explore settlement. *Badilla v. Wal-Mart Stores E., Inc.*, 2017-NMCA-021, ¶ 21, 389 P.3d 1050, 1057 ("Factors to be considered in determining reasonableness of notice include the obviousness of the defect, the perishable nature of the goods, and possible prejudice to the seller from the delay.").

VI. Defendants' remaining arguments for dismissal.

Defendants assert several other grounds for dismissal. For example, Defendants also argue that Plaintiffs' claims should be dismissed because they violate the dormant commerce clause. Generally, the Court avoid unnecessarily reaching constitutional issues when a case fails on other grounds. Therefore, the Court declines to address this argument.

VII. Plaintiff Lucero's Motion to Amend Complaint.

Plaintiff Lucero seeks to amend his complaint to replace his UPA claim with a claim for violation of the New Mexico Antitrust Act (NMSA § 57-1-3). Plaintiff Lucero appeared to acknowledge that his New Mexico

UPA claim in his first amended complaint fails because, as a competitor of Defendants, he lacks standing. **Doc. 55 at 2**. Defendants argue that amendment here is futile. The Court agrees. The ATA claim fails because it is also preempted, for the same reasons as above.

Plaintiff Lucero argues that his ATA claim is not preempted by federal antitrust law. However, Plaintiff merely repackages his UPA allegations here. Plaintiff Lucero's ATA claim still alleges that Defendants mislabeled their beef. Plaintiff Lucero would require Defendants to modify their labeling practices and would therefore impose requirements that are "in addition to or different than" the USDA's standard. For example, Plaintiff Lucero's proposed Second Amended complaint **(20-cv-105, Doc. 55-1)** alleges as follows:

- Defendants deceptively label and market their beef as product of the USA, when the cattle were in fact born and raised in other countries. ¶¶2, 25, 27.

- Defendants' misrepresentations about the country of origin of their beef prompts consumers to buy their beef products and pay more to Defendants. ¶ 9.

- By deceiving customers about the origin of their products, Defendants are able to sell a greater volume of products. ¶11.

- Contrary to representations made by Defendants, their products are not actually a product of the United States. Defendants made this misleading or deceptive representations knowing that consumers would rely on the representations. ¶¶ 31, 37.

- "Defendants have acted unfairly and deceptively in a scheme to fraudulently label their Beef Products, so that they may compete in a predatory and anti-competitive manner in violation of the ATA, by misrepresenting to consumers that the muscle cuts of beef in the Products originates exclusively from American ranchers and farmers like Plaintiff Lucero and other similarly situated in order to capitalize on the reputation of those domestic producers and cause underpayment for their cattle to Plaintiff and the class members." ¶ 57.

- As a remedy, Plaintiff Lucero requests that the Court issue an injunction requiring Defendants to remove the deceptive or inaccurate labeling and affirmatively label their beef as a foreign product. **Doc. 55-1 at p. 26 and 27**.

The alleged violation of the ATA is the alleged mislabeling or misbranding of foreign cattle as product of the USA, which causes consumers to buy the misbranded beef. Plaintiff's claim is still based on the same theory

as above that the USDA approved labels are misleading. Therefore, Plaintiff Lucero's ATA claim is still preempted under the FMIA for the same reasons as stated above.

B. Alternative grounds for dismissal of ATA claim.

Alternatively, Defendants argue that Plaintiff (1) failed to allege an antitrust injury caused by allegedly anticompetitive behavior. Plaintiff appears to only briefly address these arguments. The Court agrees with Defendants.

New Mexico law follows federal antitrust law to construe its provisions. *Nass-Romero v. Visa U.S.A., Inc.*, 2012- NMCA 058, 279 P.3d 772, 777 (N.M. Ct. App. 2012). An antitrust plaintiff has standing to bring a lawsuit when it alleges facts showing that it has suffered an antitrust injury *Abraham v. Intermountain Health Care, Inc.*, 461 F.3d 1249, 1267-68 (10th Cir. 2006).

"An antitrust injury is an injury of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." *Abraham v. Intermountain Health Care Inc.*, 461 F.3d 1249, 1267 (10th Cir. 2006). Here, Plaintiff's alleged injury — receiving less for their beef as a result of Defendants' USDA approved product labeling—is not an injury resulting from anticompetitive behavior. Rather, the injury resulted from Defendants complying with USDA regulations. A plaintiff does not suffer an antitrust injury when the injury results from governmental regulatory framework authorizing

Defendants' conduct. *In re Canadian Imp. Antitrust Litig.*, 470 F.3d 785, 791 (8th Cir. 2006) (injury was caused by the federal statutory and regulatory scheme adopted by the United States government, not by the conduct of the defendants.").

CONCLUSION

For the reasons stated above, all of Plaintiffs' claims are preempted. Alternatively, they also fail to state a claim as a matter of law. Plaintiff Lucero's motion to amend is denied as futile.

IT IS THEREFORE ORDERED that Defendants' Motions to Dismiss **(20-cv-105, Doc. 43; 20-cv-106, Doc. 45)** are **GRANTED**.

IT IS FURTHER ORDERED that Plaintiff Lucero's Motion to Amend Complaint **(20-cv-105, Doc. 55)** is **DENIED**.

IT IS FINALLY ORDERED that the consolidated cases are **DISMISSED WITH PREJUDICE**.

Separate judgments dismissing both cases will be entered.

/s/ Kea W. Riggs
KEA W. RIGGS
UNITED STATES
DISTRICT JUDGE

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED MARCH 28, 2022

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 20-2124
(D.C. Nos. 1:20-CV-00105-KWR-SMV
& 1:20-CV-00106-KWR-SMV)
(D. N.M.)

ROBIN G. THORNTON, *et al.*,

Plaintiffs - Appellants,

v.

TYSON FOODS, INC., *et al.*,

Defendants - Appellees.

RANCHERS-CATTLEMEN ACTION LEGAL FUND, UNITED STOCKGROWERS OF AMERICA, et al.,

Amici Curiae.

ORDER

Before **TYMKOVICH**, Chief Judge, **LUCERO**, Senior Circuit Judge and **MORITZ**, Circuit Judge.

Appendix C

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/_____
CHRISTOPHER M. WOLPERT,
Clerk