MEAT LABELING THROUGH THE LOOKING GLASS

By
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The United States Department of Agriculture (USDA) regulates meat labeling under the statutory authority of the Federal Meat Inspection Act (FMIA). The FMIA's labeling preemption clause prohibits labeling requirements beyond federal requirements, and would thus preclude state causes of action on the basis of deceptive labels that were properly approved under federal law. Through the eyes of Kat, a hypothetical consumer concerned with the origins of the meat she purchases for her family, this Article argues that consumers should be able to pursue state law claims based on fraudulent animal welfare labels on packages of meat. This is true for two reasons: first, the FMIA's labeling preemption only covers the USDA's statutory scope of authority, which does not include on-farm treatment of animals; and second, both FMIA and a state cause of action would require the same thing—a non-fraudulent label. However, even if a court did find that a state cause of action based on a fraudulent label was preempted, consumer plaintiffs would have other avenues through which to pursue their claims.

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I. INTRODUCTION

Lewis Carroll's Humpty Dumpty may well be speaking for the federal bureaucracy when he says "When I use a word, it means just what I choose it to mean—neither more nor less."[1]

Right now, somewhere in America, a hard working mom—we'll call her Kat—is standing at the meat counter in a grocery store, reading the labels on the various packages, trying to decide which pork to purchase for her family. Like the vast majority of Americans, Kat cares about animal welfare;[2] her daughter recently went on a field trip to Farm Sanctuary[3] near Los Angeles and learned that, like dogs, pigs

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[1] *Natl. Broiler Council v. Voss*, 44 F.3d 740, 749 (9th Cir. 1994) (O'Scannlain, J., concurring) (quoting Lewis Carroll, *Through the Looking Glass* (Harper & Bros. Publishers 1902)).

[2] According to a poll commissioned by the American Farm Bureau, 95% of Americans want to see farm animals treated well, and 76% of Americans say that animal welfare is more important to them than lower meat prices. Jayson L. Lusk et al., *Consumer Preferences for Farm Animal Welfare: Results of a Nationwide Telephone Survey* 12–13 (Dept. of Agric. Econ., Okla. St. U., Working Paper, Aug. 17, 2007) (available at http://asp.okstate.edu/baileynorwood/Survey4/files/InitialReporttoAFB.pdf [http://perma.cc/0hUt9qpSpTt] (accessed Nov. 17, 2013)).

[3] *See* Farm Sanctuary, *About Us*, http://www.FarmSanctuary.org/about-us [http://perma.cc/0aEnC3K8F9d] (accessed Nov. 17, 2013) ("Today, Farm Sanctuary is the nation's largest . . . farm animal rescue and protection organization.").

know their names and come when they are called. They also build nests for their babies,[4] and are more behaviorally, emotionally, and cognitively complex than dogs or cats.[5] Yet the Farm Sanctuary tour guides also told her daughter that the vast majority of farm animals, including pigs, are treated in ways that would likely result in felony cruelty charges if dogs or cats were the victims, rather than pigs, cattle, and other farm animals.[6] Most pigs raised for food never know human kindness, and mother pigs are treated like breeding machines.[7] Kat is looking for a less cruel product, both to placate her daughter and to assuage her own conscience, and she is willing to pay more for meat from an animal who was humanely raised. Finally, she settles on Nugent's Brand[8] bacon because of a label on the package that reads, "Swine Welfare Assured." The label also includes a nice picture of a farm with happy pigs frolicking in the grass.

But contrary to the implication of the "Swine Welfare" label, Nugent's pigs are castrated without pain relief, bred and drugged to be so huge they can barely walk, cooped in their own waste, and never allowed to engage in any natural pig behaviors beyond breathing and

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[4] Humane Socy. of the U.S., *An HSUS Report: Welfare Issues with Gestation Crates for Pregnant Sows* 5 (Feb. 2013) (available at http://www.humanesociety.org/assets/pdfs/farm/HSUS-Report-on-Gestation-Crates-for-Pregnant-Sows.pdf [http://perma.cc/0y5Zuw4AW6T] (accessed Nov. 17, 2013)) [hereinafter *HSUS Report*] (explaining that pigs choose to create nests when not confined).

[5] Dr. Donald Broom, an expert in animal behavior and professor at the Department of Veterinary Science at Cambridge University, has remarked that pigs "have the cognitive ability to be quite sophisticated. Even more so than dogs and certainly three-year-olds." *New Slant on Chump Chops*, Cambridge Daily News (Mar. 29, 2002). *See* Natalie Angier, *Pigs Prove to Be Smart, if Not Vain*, N.Y. Times (Nov. 9, 2009) (available at http://www.nytimes.com/2009/11/10/science/10angier.html [http://perma.cc/0LmEJ7ZFCTg] (accessed Nov. 17, 2013)) (discussing research that "is just one in a series of recent discoveries from the nascent study of pig cognition"); PBS, *The Joy of Pigs—Smart, Clean, and Lean*, http://www.pbs.org/wnet/nature/episodes/the-joy-of-pigs/smart-clean-and-lean/2126 [http://perma.cc/0mUUmu1viSV] (Nov. 17, 1996) (accessed Nov. 17, 2013) (discussing the intelligence of pigs).

[6] *See* Mariann Sullivan & David J. Wolfson, *What's Good for the Goose . . . The Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States*, 70 L. & Contemp. Probs. 139, 154–55 (2007) (explaining that many state laws exempt "customary" farming practices from legal restriction, and that even where no such exemption exists, anti-cruelty laws have failed to curtail the development "of the most egregious farming methods available"); *see also What Came Before*, Online Video Documentary (Farm Sanctuary 2012) (available at http://www.whatcamebefore.com (accessed Nov. 17, 2013)) (documenting these types of acts committed in practice by the industry).

[7] *See HSUS Report*, *supra* n. 4, at 1 ("Throughout nearly the entirety of their 112–115 day pregnancies, most breeding sows in the United States are confined in gestation crates (also known as sow stalls)—individual metal enclosures so restrictive that the pigs cannot turn around."); *see generally id.* (discussing the physical, mental, and behavioral concerns of breeding sows in the U.S.).

[8] Brand name is fictional and author's creation.

defecating—just like the rest of the nation's factory farmed pigs.[9] Nugent's confines mother pigs in tiny crates for their entire lives; they cannot even turn around or express any natural behaviors, and they certainly can never build a nest. Their muscles and bones atrophy, and they go insane.[10] Nugent's wanted to capture the compassionate market, but instead of improving conditions for pigs, the company decided to create a label that would mislead people into thinking that its pigs were well-treated. Of course, if Nugent's had placed a label on its meat that said "16 ounces" when the package contained less than that, or if it had claimed "100% pork," but actually used 50% dog meat, a deceived consumer would have a variety of potential causes of action under state law—from consumer fraud to breach of explicit and implied warranty.[11]

But what if, in our scenario, the United States Department of Agriculture (USDA) had approved Nugent's fraudulent meat label—happy looking farm animals basking in the sun and all?[12] Based on the Federal Meat Inspection Act (FMIA) labeling preemption clause, which disallows any state law requirements "in addition to, or different than" those promulgated by the USDA,[13] would the company be able to violate state consumer protection laws with impunity?

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[9] Am. Socy. for the Prevention of Cruelty to Animals, *Pigs on Factory Farms*, http://www.aspca.org/fight-cruelty/farm-animal-cruelty/pigs-factory-farms [http://perma.cc/0hF4RUUqwgF] (accessed Nov. 17, 2013).

[10] *See generally HSUS Report*, *supra* n. 4 (describing the physical and psychological maladies that plague confined sows); *see also* Bruce Friedrich, *National Pork Producers Council: Anti-Science & Anti-Animal*, Common Dreams, http://www.commondreams.org/view/2012/09/08-0 [http://perma.cc/0nnjygryGNz] (Sept. 8, 2012) (accessed Nov. 17, 2013) (discussing the scientific defects of the National Pork Producers Council's defense of the practice of crating pregnant sows).

[11] *E.g. Mario's Butcher Shop & Food Center, Inc. v. Armour & Co.*, 574 F. Supp. 653, 656 (N.D. Ill. 1983) (holding that state consumer fraud and deceptive practices actions could be brought by the plaintiff if he based them on violations of FMIA's labeling requirements).

[12] Unfortunately, such a hypothetical is not at all unlikely, since the USDA primarily functions to promote U.S. agriculture, not to regulate it. USDA, *Mission Statement*, http://usda.gov/wps/portal/usda/usdahome?navid=MISSION_STATEMENT [http://perma.cc/08VASM5Nm8q] (updated Feb. 25, 2013) (accessed Nov. 17, 2013) (providing the USDA's "vision statement": "To expand economic opportunity through innovation, helping rural America to thrive; to promote agriculture production sustainability that better nourishes Americans while also feeding others throughout the world; and to preserve and conserve our Nation's natural resources through restored forests, improved watersheds, and healthy private working lands"); *see* Sullivan & Wolfson, *supra* n. 6, at 158–59 (describing the USDA's goals as increasingly encompassing the promotion of corporate agribusiness).

[13] "Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State . . . 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 pur-

Generally speaking, the USDA's pseudo-legislative labeling powers will allow it to regulate however it sees fit. Thus, the Ninth Circuit upheld the USDA approval of a label that declared frozen birds to be "fresh."[14] As explained by Justice O'Scannlain, where labeling preemption is concerned, the USDA has Humpty Dumpty's denotative power such that a label within its remit will mean, legally, just what the agency chooses.[15] However, as discussed below, for two independent reasons, our hypothetical shopper—and her many deceived co-plaintiffs—should be able to pursue state causes of action based on inaccurate animal welfare claims on packages of meat. First, labels regarding on-farm treatment of animals are far outside the scope of the FMIA as mandated by Congress; thus, humane labels fall completely outside of the FMIA's labeling preemption reach (by contrast, whether meat is fresh or frozen is precisely what the USDA is supposed to be regulating).[16] Second, because the USDA has not yet created law in the area of humane labels[17]—as it has with regard to frozen poultry[18]—and because the FMIA's labeling requirement prohibits the use of labels that are "false or misleading,"[19] state laws that are based on the illegality of deceiving consumers as to animal welfare are not preempted.[20] Finally, it is worth noting that even if humane labels were preempted, deceived consumers would have a variety of ways to fight back.[21] These include state causes of action for all non-label promotion of a fraudulent humane handling label, even where that promotion simply publicized the USDA-approved words and label.[22]

II. BACKGROUND

A. The Doctrine of Preemption

The federal preemption doctrine stems from the Supremacy Clause of the U.S. Constitution, which states that federal laws "shall be the supreme Law of the Land; and the Judges in every State shall

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poses of any such articles which are adulterated or misbranded . . . ." 21 U.S.C. § 678 (2006).

14 *Natl. Broiler Council*, 44 F.3d 740.

15 *Id.* at 749 (O'Scannlain, J., concurring); *see Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (stating that an agency's interpretation of its own regulations must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation"). This argument is more fully explored *infra* pt. II.

16 Discussed *infra* pt. II.

17 Labels such as "Certified Humane" and "Animal Welfare Approved" are part of programs run by the nongovernmental organizations Humane Farm Animal Care and the Animal Welfare Institute, respectively. Humane Socy. of the U.S., *Meat and Dairy Labels: A Brief Guide to Labels and Animal Welfare*, http://www.humanesociety.org/issues/confinement_farm/facts/meat_dairy_labels.html [http://perma.cc/08RJun5PQc4] (Dec. 18, 2012) (accessed Nov. 17, 2013).

18 9 C.F.R. § 381.129(b) (2013).

19 21 U.S.C. § 607(d).

20 Discussed *infra* pt. III.

21 Discussed *infra* pt. IV.

22 Discussed *infra* pt. IV(A).

be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding."[23] Thus, if a state law or cause of action conflicts with a federal law and is challenged, a deciding court is required to nullify the state law to the extent needed to achieve the federal purpose.[24]

Federal preemption jurisprudence recognizes three forms of preemption: express preemption and two forms of implied preemption (field preemption and conflict preemption).[25] Express preemption exists when a federal law explicitly preempts state law on a particular subject.[26] Field preemption exists where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the [s]tates to supplement it . . . ."[27] Conflict preemption exists "where compliance with both federal and state regulations is a physical impossibility,"[28] or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[29]

Regardless of the type of preemption asserted, the key to the preemption discussion is the intent of Congress, which can be discerned by a "statute's language or implicitly contained in its structure and purpose."[30] Although there has been a spirited debate among the Supreme Court about whether the plain language of a statute should be negated based on court analysis that goes beyond that plain language, recent case law proves that it can be. For example, in *Altria Group, Inc. v. Good*, the majority concluded that even "[i]f a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the *substance and scope of Congress' displacement of state law still remains*."[31] The Supreme Court in *Altria* stressed that state law should be vacated by federal law only if that is the clear purpose of Congress, noting that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption."[32]

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[23] U.S. Const. art. VI, § 2.

[24] *Pac. Gas & Elec. Co. v. St. Energy Resources Conserv. & Dev. Commn.*, 461 U.S. 190, 204 (1983).

[25] *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–80 (1990).

[26] *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983).

[27] *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

[28] *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

[29] *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

[30] *Jones*, 430 U.S. at 525.

[31] *Altria Group, Inc., v. Good*, 555 U.S. 70, 76 (2008) (emphasis added).

[32] *Id.* at 77 (citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)).

B. The Federal Meat Inspection Act

The Federal Meat Inspection Act (FMIA) was enacted in 1906 in response to outcry over the filthy conditions in the meat packing industry depicted by Upton Sinclair in *The Jungle*.[33] 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." And since amended in 1978, the FMIA requires all slaughterhouses to comply with the standards for humane handling and slaughter of animals set out in the Humane Methods of Slaughter Act . . . .[34]

The U.S. Department of Agriculture (USDA) Food Safety and Inspection Service (FSIS) administers the FMIA "to promote its dual goals of safe meat and humane slaughter."[35] The FSIS employs 9,000 personnel who, "[i]n fiscal year 2010 . . . examined about 147 million head of livestock and carried out more than 126,000 humane handling verification procedures."[36]

Congressional intent for the Act is found in section 602, which reads, "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."[37] The intent of Congress is reiterated in section 661(a): "It is the policy of the Congress to protect the consuming public from meat and meat food products that are adulterated or misbranded and to assist in efforts by State and other Government agencies to accomplish this objective."[38]

C. The Argument in Favor of Preemption

The FMIA's preemption clause with regard to labeling 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 . . . 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 . . . .[39]

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[33] Upton Sinclair, *The Jungle* (Doubleday, Page & Co. 1906); *Natl. Meat Assn. v. Harris*, 132 S. Ct. 965, 968 (2012).

[34] *Natl. Meat Assn.,* 132 S. Ct. at 968 (alteration in original, internal citation omitted).

[35] *Id.*

[36] *Id.* (internal quotations omitted).

[37] 21 U.S.C. § 602.

[38] *Id.* at § 661(a).

[39] *Id.* at § 678.

In our hypothetical, Nugent's would argue that the preemption clause of the FMIA is clear: states cannot require anything different from what the USDA allows under the FMIA. Allowing a cause of action based on an approved label would, functionally, require something different. In the one Supreme Court case that dealt with the FMIA labeling preemption clause, a unanimous Court held that the FMIA's "explicit pre-emption provision dictates" that California's labeling requirements—which imposed a different requirement for measuring weights that would be included on packaging—"are pre-empted by federal law."[40]

There is ample Supreme Court case law that stands for the proposition that allowing state causes of action based on a federally approved label would have the effect of requiring something different from the label in question, and that such actions are thus preempted. Most recently, in *Riegel v. Medtronic, Inc.*, a patient sued Medtronic based on a faulty balloon catheter, asserting various state law tort claims.[41] The Court held that those claims were preempted based on the Food & Drug Administration (FDA)'s approval of the device and its label, noting that "[a]bsent other indication, reference to a State's 'requirements' includes its common-law duties."[42] Citing *Bates v. Dow*, *Cipollone v. Ligget*, and *Medtronic, Inc. v. Lohr*, the Court noted that common law duties have consistently fallen to federal preemption.[43] The Court found it especially crucial that "[t]he premarket approval process includes review of the device's proposed labeling. The FDA evaluates safety and effectiveness under the conditions of use set forth on the label and must determine that the proposed labeling is neither false nor misleading."[44]

There is ample similar analysis from lower courts: In both *Holk v. Snapple Beverage Corp.* and *Fellner v. Tri-Union Seafoods, LLC*, the Third Circuit Court of Appeals held that properly enacted federal regulatory action on food labels—in these cases under the FDA—would preempt state causes of action.[45] For example, the *Fellner* court noted: "[T]here is no doubt that federal regulations as well as statutes can establish federal law having preemptive force."[46] The court held that the FDA had not promulgated regulations on the issue that had the force of law.[47] However, in both decisions, the courts reiterated that if the FDA had, the regulations would preempt state causes of action.[48]

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[40] *Jones*, 430 U.S. at 530–32.

[41] *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

[42] *Id.* at 324.

[43] *Id.* at 323–24 (citing *Bates*, 554 U.S. 431 (2005), *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996)).

[44] *Id.* at 318 (internal citations omitted).

[45] *Holk v. Snapple Bev. Corp.*, 575 F.3d 329 (3d Cir. 2009); *Fellner v. Tri-Union Seafoods, LLC*, 539 F.3d 237 (3d Cir. 2008).

[46] *Fellner*, 539 F.3d at 244.

[47] *Id.* at 251.

[48] *Holk*, 575 F.3d at 339; *Fellner*, 539 F.3d at 243.

And in *National Broiler Council v. Voss*, discussed briefly in Part I, the Ninth Circuit used similar reasoning under the Poultry Products Inspection Act (PPIA) to overturn a California law that had requirements different from federal regulations regarding what constitutes "fresh" poultry meat.[49] Similarly, a district court in the Fourth Circuit considering a "raised without antibiotics" claim, held that where a label had been duly approved by the USDA, a Lanham Act cause of action based on that label was preempted.[50]

Nugent's would argue that the situation with a USDA-approved humane label tracks perfectly with *Jones* and *Riegel*: Kat and her class are out of luck, because state causes of action based on a USDA-approved label would, if successful, require something different from federal law. Similar to *Jones*—where the Supreme Court found that the FMIA's explicit labeling preemption required that a state law mandating a different manner of measuring weights for labels must be vacated—so too must an effectively different requirement for humane handling be prohibited.[51] And similar to *Riegel*—where the FDA's approval of the catheter label's accuracy precluded any state causes of action that were based on deficient warnings[52]—the USDA's approval of a humane label's accuracy should have an identical effect here.

III. ON-FARM WELFARE LABELS ARE OUTSIDE THE USDA'S LABELING PREEMPTIVE AUTHORITY AND STATE CLAIMS WOULD ALIGN PERFECTLY WITH THE FMIA

The pork producers and the U.S. Department of Agriculture (USDA) would be incorrect in asserting that state causes of action should be preempted, for two independent reasons. First, of the many cases the pork industry and the USDA could cite in favor of preemptive labeling authority, not one involves an agency's approval of a label that is outside of the "substance and scope" of the agency's statutory mandate—such as an on-farm animal welfare label. *Jones* addressed the measuring and labeling of the weight of meat, a key concern of the Federal Meat Inspection Act (FMIA) since its inception.[53] *Riegel* dealt with the safety of medical devices, a key concern of the Food & Drug Administration (FDA), and the law that preempted the state causes of action.[54] All of the cases the USDA and the pork producers would likely cite in favor of preemption would fall to identical analysis. Sec-

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[49] *Natl. Broiler Council*, 44 F.3d at 742–43.

[50] *Sanderson Farms, Inc. v. Tyson Foods, Inc.,* 549 F. Supp. 2d 708, 719 (D. Md. 2008) ("If Plaintiffs' Amended Complaint had alleged that the Defendant's labels were false and misleading under the Lanham Act, the claim would be precluded as an attempt by Plaintiffs to use the Lanham Act as a vehicle to challenge the USDA's primary jurisdiction under the PPIA to determine whether or not a label is false or misleading." (emphasis omitted)).

[51] *Jones*, 430 U.S. at 543.

[52] *Riegal*, 552 U.S. at 323–30.

[53] *Jones*, 430 U.S. at 528.

[54] *Riegel*, 552 U.S. at 318–30.

ond, a state cause of action would presumably challenge an animal welfare label for being false and misleading, which is precisely what the FMIA proscribes[55]—the requirements are identical and therefore allowed under the statute.[56] Both *Jones* and *Riegel* dealt with labels where the regulating agency was either in the process of or had gone through, the full regulatory process of approving the labels in question,[57] as would all cases that Nugent's might use to support preemption.

A. The Substance and Scope of the FMIA's Labeling Preemption Does Not Reach Pre-Slaughterhouse Animal Welfare

1. Congressional Intent Is Key to Preemption

It is well settled that "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case."[58] This is one of two guiding principles reiterated by the Supreme Court in *Medtronic, Inc. v. Lohr*: First, Congress's intent to preempt a power that is a traditional state responsibility should be construed as narrowly as possible.[59] Second, with regard to the purpose of Congress as the "ultimate touchstone," Congress's intent should be discerned "from the language of the pre-emption statute and the 'statutory framework' surrounding it."[60] Also, courts should consider

> the "structure and purpose of the statute as a whole," as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.[61]

More recently, over a spirited dissent from the conservative Justices, the Supreme Court in *Altria* stressed that even an express pre-emption clause should be weighed against "the question of the substance and scope of Congress'[s] [intended] displacement of state law . . . ."[62] The Supreme Court in *Altria* stressed the importance of

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[55] 21 U.S.C. § 678.

[56] It is possible that the USDA would work through the Agricultural Marketing Service on a humane label, but that would not change the analysis—preemption would be claimed under the FMIA.

[57] *Riegal*, 552 U.S. at 315–21; *Jones*, 430 U.S. at 528 n. 13 ("Rath's procedures for assuring that its bacon packages contain the stated net weight have been submitted to the Department of Agriculture for approval." For the purposes of this case, the Court assumed that Rath's bacon complied with the standards.).

[58] *Lohr*, 518 U.S. at 485 (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

[59] *Id.*

[60] *Id.* at 486 (quoting *Gade v. Natl. Solid Wastes Mgt. Assn.*, 505 U.S. 88, 111 (1992)).

[61] *Id.* (quoting *Gade*, 505 U.S. at 98) (internal citation omitted).

[62] *Altria Group, Inc.*, 555 U.S. at 76; *see id.* at 91–112 (Thomas, J., Roberts, C.J., Scalia, J., & Alito, J., dissenting).

disfavoring preemption in all cases, but especially in an area of traditional state concern.[63]

2. Consumer Protection, Meat Inspection, and Humane Treatment of Animals Are Traditional State Concerns

Meat inspection and labeling are traditional state concerns. Meat inspection only came under federal regulation in 1907,[64] and the preemption sections of the FMIA did not go into effect until December 15, 1967, with the Wholesome Meat Act of 1967.[65] In fact, just one year before preemption, the Second Circuit upheld a New York law that was in direct conflict with federal law.[66] In *Swift v. Wickham*, the court considered New York labeling requirements that went well beyond what the USDA required.[67] Swift sued to overturn—or receive an exemption from—the New York law, but the Second Circuit held that the plaintiffs "failed to establish an irreconcilable conflict between the New York and federal statutes and regulations" because Swift could add the detail required by New York to its labels.[68] And the historical authority of states continues today, as twenty-eight states remain actively engaged in regulating roughly 2,000 slaughterhouses.[69]

Regarding food labeling specifically, the Third Circuit pointed out in *Holk v. Snapple Beverage Corp.* that food and beverage labeling "have traditionally fallen within the province of state regulation."[70] Additionally, the court noted, "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."[71]

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[63] *Altria Group, Inc.*, 555 U.S. at 77.

[64] The Meat Inspection Act of March 4, 1907, 21 U.S.C. § 71, 34 Stat. 1260 (1907) (amended and codified at 21 U.S.C. §§ 601–695).

[65] Pub. L. No. 90-201, § 408, 81 Stat. 584, 600 (1967) (amended and codified at 21 U.S.C. § 678).

[66] *Swift & Co. v. Wickham,* 364 F.2d 241 (2d Cir. 1966).

[67] *Id.* at 241.

[68] *Id.* at 244.

[69] Natl. Assn. of St. Depts. of Agric., *Interstate Meat Inspection Issue Paper: Background & History on Interstate Shipment of State-Inspected Meat and Poultry Products and Meat and Poultry Inspection Programs* 1 (available at http://www.nasda.org/File.aspx?id=1670 [http://perma.cc/0v3rT11ZG8H] (accessed Nov. 17, 2013)).

[70] 575 F.3d at 334.

[71] *Id.* at 334–35 (quoting *Plumley v. Massachusetts*, 155 U.S. 461, 472 (1894)) (internal quotations omitted). The author suggests that everything that does not relate directly to the federal government qualifies as within the states plenary control. In case after case, the author has come across the concept of presumption against preemption in areas of traditional state concern. *See e.g. Altria Group, Inc.*, 555 U.S. at 77 ("That assumption [against preemption] applies with particular force when Congress has legislated in a field traditionally occupied by the States."). The only case to discuss counterexamples was *Fellner*, which listed two areas that do not qualify: "policing fraud against federal agencies" and "national and international maritime commerce." *Fellner*, 539 F.3d at 248 (internal quotations and citations omitted).

3. Congress Did Not Intend the FMIA's Labeling Preemption to Apply to Humane Labels

Applying the presumption against preemption of state laws in areas of traditional state concern, it becomes clear that the FMIA's labeling preemption does not apply to humane labels. Although the "substance and scope" of the FMIA includes humane slaughter, (1) neither the substance nor the scope of the FMIA reaches animals before they are on a slaughterhouse's premises; and (2) the labeling preemption clause of the FMIA was not intended by Congress to impact even humane slaughter, let alone pre-slaughter animal treatment. Additionally, the purpose of the statute as a whole, the statutory framework, the language, and the way in which the regulatory scheme was designed to work all point clearly and definitively against preemption of state causes of action based on a duplicitous humane label, especially where the humane label implicates pre-slaughter treatment of animals.[72] The following two points are discussed below: (1) the FMIA *labeling* preemption does not cover humane slaughter (despite humane slaughter being a part of the FMIA); and (2) even if it did, it would certainly not cover humane pre-slaughter treatment.

The structure and purpose of the labeling section of the FMIA were and are focused on consumer health and food safety, and on ensuring that corporeal aspects of meat (e.g., weight, additives, species of animal) are subjected to one uniform standard.[73] The FMIA was passed more than 100 years ago to regulate meat safety,[74] and while it incorporated the Humane Slaughter Act in 1978,[75] this occurred more than ten years after the labeling preemption clause was added, and nothing indicates that Congress intended for the labeling preemption to include labels related to the new humane slaughter mandate.[76] More importantly for this discussion, at no point does the USDA Food Safety and Inspection Service (FSIS)'s remit under the FMIA involve animal treatment pre-slaughter.[77] Indeed, FSIS employs over 8,600 personnel, but not one of them visits a farm to find out how animals

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[72] To be clear, the author is making two arguments: (1) even an approved "Humanely Slaughtered" label would not preempt state causes of action; and (2) even if a court held that a "Humanely Slaughtered" label did have preemptive protection from state claims, certainly a label claiming humane pre-slaughter treatment would not. While the second argument appears stronger than the first, the author believes that both are strong, for the reasons discussed.

[73] 21 U.S.C. § 607.

[74] The Meat Inspection Act of March 4, 1907, 21 U.S.C. § 71, 34 Stat. 1260 (1907) (amended and codified at 21 U.S.C. §§ 601–695).

[75] Pub. L. No. 95-445, 92 Stat. 1069 (1978) (amending the Federal Meat Inspection Act, 21 U.S.C. §§ 601–695, and incorporating the Humane Methods of Slaughter Act, 7 U.S.C. §§ 1901–1906).

[76] *See id.* (making no mention of amending the labeling preemption provision of the FMIA).

[77] *See* 21 U.S.C. §§ 603(b), 610(b), 620(a) (The only provisions of the FMIA pertaining to "humane treatment" refer to "humane methods of slaughter.").

are treated—let alone to ensure humane treatment—as a part of their duties.[78] So even if the FMIA could claim a labeling preemption mandate for humane slaughter labels, it certainly would have no such mandate for labels related to pre-slaughter treatment of animals, which are far outside the substance and scope of the FMIA.

The statutory framework of the law also points against preemption of a humane label, especially one based on pre-slaughter treatment. First, the labeling preemption was passed in 1967, before the FMIA included anything about humane treatment of animals; there was no change to the statutory framework or the labeling preemption to indicate congressional concern with humane slaughter labels.[79] Second, there is still nothing covered by the FMIA regarding humane considerations pre-slaughter.[80] Although the FMIA's discussion of misbranding begins by noting that meat is mislabeled "if its labeling is false or misleading in any particular,"[81] this extensive section offers eleven more specific examples of misbranding, all of which relate to on-plant activities that can be overseen by FSIS's thousands of personnel (e.g., mislabeling for weight, as in *Jones*).[82] Not one example of misbranding was changed after 1978 to include humane slaughter.[83] More importantly vis-à-vis pre-slaughter humane label preemption, all of

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[78] USDA/FSIS, *Permanent Full-Time Employees and Breakdown by Occupation*, http://www.fsis.usda.gov/wps/portal/fsis/topics/careers/opportunities-and-types-of-jobs/fsis-employees-by-series [http://perma.cc/0fYbJNRKHWy] (May 30, 2013) (accessed Nov. 17, 2013); *see* FSIS, *Opportunities and Types of Jobs*, http://www.fsis.usda.gov/wps/portal/fsis/topics/careers/opportunities-and-types-of-jobs [http://perma.cc/0yimPY8kGQA] (July 9, 2013) (accessed Nov. 17, 2013) (providing information on four major job categories). The four major job categories are "Food Inspector/Consumer Safety Inspector"; "Veterinary Opportunities"; "Scientific Positions"; and "Administrative and Professional Positions." *Id.* The first three job categories describe their purposes as protecting public health or food safety. *Id.* The largest category, Food Inspector/Consumer Safety Inspector, has over 7,500 employees nationwide; these employees are stationed at slaughter and processing plants, and at ports or other points of entry into the U.S. USDA/FSIS, *Food Inspector & Consumer Safety Inspector Positions*, http://www.fsis.usda.gov/wps/portal/fsis/topics/careers/opportunities-and-types-of-jobs/food-inspector-and-consumer-safety-inspector [http://perma.cc/08umT5mhgnR] (Aug. 20, 2013) (accessed Nov. 17, 2013). No position is described as being stationed at farms, and even if they were, the primary purpose of their duties would be to ensure public health and food safety, not humane treatment.

[79] Pub. L. No. 90-201, § 408, 81 Stat. 584, 600 (1967) (amended and codified at 21 U.S.C. § 678); *see* Pub. L. No. 95-445, 92 Stat. 1069 (1978) (codified at 21 U.S.C. §§ 601–695) (An Act "[t]o amend the Federal Meat Inspection Act to require that meat inspected and approved under such Act be produced only from livestock slaughtered in accordance with humane methods . . . .").

[80] *See* 21 U.S.C. §§ 603(b), 610(b), 620(a) (The only provisions of the FMIA pertaining to "humane treatment" refer to "humane methods of slaughter.").

[81] 21 U.S.C. § 601(n)(1).

[82] 21 U.S.C. § 601(n); *Jones*, 430 U.S. 519.

[83] *See* Pub. L. No. 95-445, § 3092, 95 Stat. 1069, 1070 (1978) (indicating that only sections 603, 610, and 620 of the FMIA were amended by the Humane Slaughter Act of 1978).

the misbranding examples involve processes related to the rest of the FMIA.[84]

The language of the preemption section also points against preemption of state causes of action based on a humane label that implicates pre-slaughter animal handling. First, the labeling preemption comes in the same section as the general FMIA preemption section, which makes clear that it intends to preempt only requirements that are "within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided . . . ."[85] Although those words were not included in the labeling preemption, they are in the same section as the labeling preemption and are only reasonable, considering that the statute explicitly invites state regulation in areas not covered by the rest of the FMIA.[86] Second, the statute preempts labels "in addition to, or different than": (1) "those made under this chapter" and (2) "with respect to articles prepared at any establishment under inspection in accordance with the requirements . . . of this chapter."[87] Again, there is no indication that preempted labels would deal with more than corporeal aspects of the meat (e.g., weight, type of meat, nutrition information, etcetera).[88] Although section 603 of the Act discusses humane slaughter, nothing in any of the labeling discussions in the Act appears to impact even humane slaughter.[89] One will search the twenty-six pages of the FMIA in vain for any indication of language extending the Act to humane pre-slaughter concerns or any labeling mandate beyond the focus of the Act.

Based on statutory framework and language alone, "[a] reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law"[90] points conclusively against labeling preemption, and certainly against labeling preemption for labels that deal with animal treatment pre-slaughter. On the latter point, no less an authority than the Supreme Court summed up the FMIA just last year, noting at least five times that the FMIA applies to activities on slaughterhouse grounds and by slaughterhouses (i.e., not before animals arrive at slaughterhouses and not by farms).[91]

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[84] *See* 21 U.S.C. § 610(n)(1)–(12) (lacking any reference to humane slaughter).

[85] *Id.* at § 678.

[86] *Id.*; *see id.* at § 661 (describing federal and state cooperation in forming state meat inspection programs).

[87] *Id.* at § 678.

[88] 21 U.S.C. § 601(n).

[89] *Id.* at § 603; *see id.* at § 601(n) (noting examples of "misbranded" meat, making no reference to humane slaughter).

[90] *Lohr*, 518 U.S. at 486.

[91] *Natl. Meat Assn.*, 132 S. Ct. at 968–70, 974–75. The Supreme Court did note that the preemption clause of the Act preempted different animal treatment, but that dealt only with humane handling "throughout the time an animal is on a slaugherhouse's premises, from the moment a delivery truck pulls up to the gate." *Id.* at 974.

4. The FSIS Does Not Interpret Its Legal Mandate to Include Animal Welfare Labeling

As noted, nothing in the FMIA points toward any USDA authority to oversee humane treatment concerns before slaughter.[92] And nothing indicates that the labeling preemption should relate even to humane slaughter, let alone animal welfare pre-slaughter.[93]

FSIS seems to agree with this interpretation, with the proverbial smoking gun being FSIS's own *Strategic Plan*: *FY 2011–2016*, which states: "We are one team, with one purpose. And that is to protect public health."[94] This slogan appears on the inside of the front and back covers of the *Strategic Plan*, and is discussed in a letter from FSIS Administrator Alfred Almanza.[95] Reiterating the agency's "one team with one purpose" theme, Almanza further explains that FSIS's *Strategic Plan* "will serve as a foundation document for both the long-range and day-to-day operations of the [a]gency."[96] At no point are humane considerations included in the discussion of the "one purpose" of the FSIS. The agency's prominently displayed "vision" identifies itself as a "public health regulatory agency committed to preventing foodborne illness."[97]

The "Strategic Plan Roadmap" also ignores humane considerations, as the FSIS relegates them to one of seventeen "outcomes" and one of thirty "supporting measures" from among eight goals (not one of which is focused on humane concerns).[98] Even more troubling is that among the thirty things the FSIS is measuring, the humane slaughter outcome is the least aggressive because: (1) it is not identifying the percentage of slaughter plants actually practicing humane slaughter, but rather is identifying the percentage of slaughter plants "having an effective systematic approach to humane handling . . . " and (2) it sets the lowest compliance objective of the thirty things the FSIS is measuring.[99]

The one humane outcome in the FSIS's *Strategic Plan* involves working with slaughter plants to "implement and maintain a systemic approach" to compliance with the Humane Methods of Slaughter Act (HMSA)[100] through

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92 Discussed *supra* pt. III(A)(3).

93 *Supra* pt. III(A)(3). This would not change in a scenario in which the Agricultural Marketing Service or any other third party were to promulgate humane labels. Any labeling preemption would still have to occur through the FMIA's labeling preemption provision.

94 USDA/FSIS, *Strategic Plan FY 2011–2016* (2012) (available at http://www.fsis.usda.gov/PDF/Strategic_Plan_2011-2016.pdf [http://perma.cc/YM9G-X9NZ] (updated Aug. 2012) (accessed Nov. 17, 2013)).

95 *Id.* at 1.

96 *Id.*

97 *Id.* at 4.

98 *Id.* at 4–5.

99 *Id.* at 4, 30.

100 7 U.S.C. §§ 1901–1907 (2012).

> (1) conducting an initial assessment of locations where livestock are handled in connection with slaughter; (2) designing facilities and on-going standard handling procedures that minimize excitement, discomfort, or accidental injury to livestock; (3) conducting periodic evaluations of the humane handling methods; and (4) identifying and implementing corrective measures when necessary.[101]

So where food safety outcomes are focused on testing for contamination,[102] compliance with the HMSA is focused on having a plan and occasionally checking on the progress of that plan.

In addition to the fact that the goal itself does not require industry implementation of humane slaughter, as ostensibly required by the HMSA,[103] the agency has also set a less-than-ambitious compliance goal for its objective of 50% by 2016.[104] If the FSIS took its humane slaughter mandate seriously, it would have required long ago that 100% of plants conduct an initial assessment, create a plan for and periodically evaluate compliance, and correct problems when found. Any plant that had not achieved this bare minimum would be shut down by an agency taking its legal mandate seriously. That the FSIS is hoping to reach 50% compliance with these record-keeping objectives over five years is a strong indication that it does not see humane slaughter as a significant part of its mandate. If FSIS's *Strategic Plan*, which will guide "both the long-range and day-to-day operations of the [a]gency"[105] set similar goals for any aspect of its sanitation or food safety, everyone involved in promulgating the document would be fired.[106]

Similarly, the agency's website does not appear to refer to humane labeling in any of its labeling guidance documents. FSIS's website has a section on labeling policies, where a visitor can learn about basics of labeling, irradiation, natural or regenerated collagen sausage casing, net weight labeling of meat and poultry products, nutrition labeling, product dating, and standards of identity.[107] Under basics of labeling,

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101 USDA/FSIS, *Strategic Plan*, *supra* n. 94, at 16–17.

102 For example, regarding food safety, the FSIS counts and minimizes prevalence of pathogens and illnesses, rather than counting how many plants have a plan to think about addressing pathogens and illnesses. *Id.* at 15.

103 7 U.S.C. § 1901 ("It is therefore declared to be the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter *shall be carried out only by humane methods*." (emphasis added)).

104 USDA/FSIS, *Strategic Plan*, *supra* n. 94, at 4.

105 *Id.* at 1.

106 Not surprisingly, there is even less evidence that the FSIS thinks its labeling mandate has anything to do with humane animal handling. Its *Strategic Plan* through 2016 discusses labeling, but only as it relates to what the FSIS sees as its "one purpose"—food safety. *See e.g. id.* at 13 (describing FSIS's mission to "[p]rotect consumers by ensuring that meat, poultry, and processed egg products are safe, wholesome, and correctly labeled and packed").

107 FSIS, *Labeling Policies*, http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/Labeling-Policies [http://perma.cc/0N9k9gCx1MF] (updated Sept. 12, 2013) (accessed Nov. 17, 2013).

FSIS includes several documents:[108] (1) *Food Standards and Labeling Policy Book* (202 pages),[109] (2) FSIS's *Policy Memoranda* (124 pages),[110] and (3) *A Guide to Federal Food Labeling Requirements for Meat and Poultry Products* (117 pages).[111] The terms "welfare," "humane," or "animal handling" are not included in these almost 450 pages of labeling guidance from FSIS's labeling personnel. Thus, nowhere in this labeling section is there anything to indicate the agency oversees anything related to humane labels.[112]

5. The FMIA Case Law Opposes Preemption

FMIA labeling case law after preemption was mandated in 1967 is comprised of fewer than two-dozen cases, with most having to do with actual state labeling requirements that were directly in conflict with federal law.[113] For example, the one Supreme Court case relating to meat labeling preemption, *Jones v. Rath Packing Co.*, is a simple case where California law required label weights to adhere to different standards than federal law.[114] Similarly, the only circuit court case involving FMIA labeling preemption overturned a Michigan law that included different ingredient labeling requirements.[115] That said, there are a few lower court cases that are useful to consumers seeking to vindicate their rights through state causes of action, and none that point in favor of preemption in a case like ours.[116]

In two recent FMIA preemption cases (not involving labeling), the Seventh and Fifth Circuits looked beyond express preemption to the purpose of the law and found that bans on horse slaughter were not

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[108] *Id.*

[109] USDA/FSIS, *Food Standards and Labeling Policy Book* (2005) (available at http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf [http://perma.cc/0guqsL1LSjZ] (accessed Nov. 17, 2013)).

[110] USDA/FSIS, *Label Policy Memoranda* (2005) (available at http://www.fsis.usda.gov/OPPDE/larc/Policies/Policy_Memos_082005.pdf [http://perma.cc/0ARiPpRp26A] (accessed Nov. 17, 2013)).

[111] USDA, *A Guide to Federal Food Labeling Requirements for Meat, Poultry, and Egg Products* (R. Post et al. eds., 2007) (available at http://www.fsis.usda.gov/shared/PDF/Labeling_Requirements_Guide.pdf [http://perma.cc/0v5JXZXKV8P] (accessed Nov. 17, 2013)) [hereinafter USDA, *Food Labeling Requirements*].

[112] A diligent search of the agency's website will turn up three half-pages titled *Animal Production Claims Outline of Current Process* (71 words), *Animal Production Claims Review* (187 words), and *Commonly Approved Claims* (178 words). USDA/FSIS, *Claims Guidance*, http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/Claims-Guidance [http://perma.cc/0VJFD4SzJWd] (updated Jun. 25, 2013) (accessed Nov. 17, 2013). These short documents fall far short of anything approaching clear guidance on humane handling labels.

[113] *See* Diane M. Allen, *Federal Pre-Emption of State Food Labeling Legislation or Regulation*, 79 A.L.R. Fed. 181, § 3(a)–(b) (1986) (discussing and analyzing cases involving labeling preemption under the FMIA).

[114] *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

[115] *Armour & Co. v. Ball*, 468 F.2d 76 (6th Cir. 1972).

[116] The two cases on point, *Mario's Butcher Shop v. Armour* and *Swift & Co., Inc. v. Walkley*, are discussed *infra* pt. III(B)(1).

preempted.[117] In both cases, states had banned horse slaughter,[118] which—by limiting the types of animals who could be slaughtered—certainly puts different and additional requirements on slaughterhouses relative to the FMIA. Nevertheless, both circuit courts upheld state law, because they looked—as required—to congressional intent.[119] In *Cavel International*, *Inc. v. Madigan*, the court noted that preemption "need detain us only briefly," because while

> [o]f course in a literal sense a state law that shuts down any "premises, facilities and operations of any establishment at which inspection is provided" is "different" from the federal requirements for such premises, . . . so literal a reading is untenable. . . . The Act is concerned with inspecting premises at which meat is produced for human consumption, rather than with preserving the production of particular types of meat for people to eat.[120]

The court noted, taking the language in the title of the Act very seriously, that "[i]f despite its title the Meat Inspection Act were intended to forbid states to shut down slaughterhouses, it would have to set forth standards and procedures for determining whether a particular slaughterhouse or class of slaughterhouses should be shut down; and it does not."[121] Similarly with humane labels, if the FMIA were intended to deal with aspects of animal treatment—or anything else pre-slaughter—one would find some indication of it somewhere in the text of the Act.[122]

B. State Claims Based on Humane Labels Have the Same Requirements As FMIA's Labeling Preemption Clause

The second and independent reason state claims against fraudulent humane labels on meat are not preempted is that they require exactly the same thing as is required by federal law—veracity. Even if the USDA were to approve a humane label, the agency's approval will only warrant deference if it goes through a full regulatory process, be-

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[117] *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry,* 476 F.3d 326 (5th Cir. 2007); *Cavel Intl.*, *Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007).

[118] *Curry*, 476 F.3d 326; *Madigan*, 500 F.3d 551.

[119] *Curry*, 476 F.3d at 333–35; *Madigan*, 500 F.3d at 553.

[120] 500 F.3d at 553–54 (7th Cir. 2007) (internal citation omitted).

[121] *Id.* at 554. These cases should both survive *National Meat Assn. v. Harris*, in which the Supreme Court overturned a California law where its requirements for animal handling on slaughterhouse grounds were different from those of the FMIA regulations. 132 S. Ct. 965. There, the Court found it significant that if a truck full of pigs arrived at a slaughterhouse, state and federal law conflicted about how some of those pigs should be handled. *Id.* at 975. In perfect alignment with the Supreme Court, the Fifth and Seventh Circuits rightly interpreted the FMIA as affecting slaughterhouse operations—that is the scope of the Act—rather than which slaughterhouses could operate. Pre-slaughter humane considerations are even more clearly outside the preemptive scope of the Act and its labeling provision.

[122] *See Curry*, 476 F.3d at 333 (discussing limitations of the FMIA due to the language of the Act).

cause only federal law preempts state law;[123] to date, the USDA has not created law relating to humane labeling, so its approval of a humane label would not preempt a state claim.

1. The FMIA and State Causes of Action Based on Duplicitous Humane Claims Are Allowed to Have the Same Requirements

The FMIA prohibits "any act . . . which is intended to cause or has the effect of causing [meat] to be adulterated or misbranded."[124] The Act provides examples of "misbranded," with the first example defining it as "false or misleading in any particular."[125] Thus, any consumer action that is based on a "false or misleading" label will have perfect resonance with the Act.

Two FMIA cases apply here, and both point against preemption. First, in *Mario's Butcher Shop & Food Center., Inc. v. Armour & Co.*, the court held that state consumer fraud and deceptive practices actions could be brought by the plaintiff if he based them on violations of FMIA's labeling requirements.[126] In this case, a butcher sued three meat companies for consumer fraud and deceptive practices under state law, claiming that they had lied on the labels of their meat containers, stamping the containers "10 pounds" when in fact they contained less.[127] The meat companies claimed federal preemption under the FMIA.[128] The court ruled that as long as the butcher's state law claims were based on a violation of the FMIA's requirements regarding weight declarations, his causes of action could continue, since they would not require anything in addition to or different from federal law.[129] Likewise here, since the FMIA prohibits "false and misleading" labels, state causes of action based on duplicitous humane handling claims would be allowed.[130]

Similarly, in *Swift & Co., Inc. v. Walkley*, the court considered a situation in which the State of New York refused to allow sale of a

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[123] *See Von Koenig*, 713 F. Supp. 2d at 1076 ("[T]he FDA's policy regarding the use of the term 'natural' does not have the force of law. Neither the FDA policy statement set forth in 1993 nor the July 2008 FDA letter regarding the use of the term 'natural' were the result of a formal, deliberative process akin to notice and comment rulemaking or an adjudicative enforcement action.").

[124] 21 U.S.C. § 610(d).

[125] *Id.* at § 601(n)(1).

[126] 574 F. Supp. at 656.

[127] *Id.* at 654.

[128] *Id.*

[129] *Id.* at 656 ("[T]he standards and regulations enacted [in the FMIA] may properly be applied to a lawsuit brought under Illinois law as enacted in the Consumer Fraud and Deceptive Practices Act and the Uniform Deceptive Trade Practices Act."). It is not clear from the court's opinion whether the USDA approved the "10 pounds" labels, though since the USDA requires prior approval of all labels, non-approval would be a curious detail for the court to have omitted.

[130] *See e.g. Riegel*, 552 U.S. at 330 ("State requirements are pre-empted . . . only to the extent that they are 'different from, or in addition to' the requirements imposed by federal law.").

product that looked like, but was not, frankfurters, unless the company marketing the product would add "imitation frankfurters" to the label.[131] The company argued labeling preemption, but New York argued that the USDA had approved the label in violation of the FMIA, which states that meat is "misbranded" in violation of the law "if it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation' and immediately thereafter, the name of the food imitated."[132] The court agreed with New York, ruling that the state could, in exercising its concurrent jurisdiction approved of in the FMIA preemption clause, require a different label.[133]

State action based on USDA-approved "humane" labels for inhumane products presents an even simpler case. The question as to whether "all American fun-links" are in fact imitation frankfurters is entirely subjective, and Swift and the USDA made a perfectly tenable argument that they are not imitation anything—they are precisely as they are described on the label, which included a complete ingredient list. On the other hand, it would be impossible to make a plausible argument that modern farming practices are humane, so a welfare label on factory farmed animal products would fall far afoul of the FMIA's prohibition of "false or misleading" labels.[134]

These two FMIA cases are almost thirty and forty years old, but more recent Supreme Court precedent in the non-FMIA realm supports the analysis. In *Bates v. Dow Agrosciences LLC*, Dow argued that the Federal Insecticide, Fungicide, & Rodenticide Act (FIFRA) preempted state law claims for damages.[135] The Court looked at the preemption clause of the FIFRA, which—just like the FMIA's preemption clause—preempted state law "in addition to or different from" FIFRA requirements.[136] The Court ruled that "a state-law labeling requirement is not pre-empted . . . if it is equivalent to, and fully consistent with, FIFRA. . . ."[137] And to be clear, it is only the requirements that have to be the same—the precise words do not. The *Bates* court explained: "To survive pre-emption, the state-law requirement need not be phrased in the identical language as its corresponding FIFRA requirement; indeed, it would be surprising if a common-law requirement used the same phraseology . . . ."[138]

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131 *Swift & Co., Inc. v. Walkley*, 369 F. Supp. 1198, 1198 (S.D.N.Y. 1973).

132 *Id.* at 1200; 21 U.S.C. § 601(n)(3).

133 *Swift*, 369 F.Supp. at 1200.

134 For the purposes of this Article, the decisions in *Mario's Butcher Shop* and *Walkley* stand only for the proposition that state and federal law can work together where what is proscribed is the same. *Walkley* also stands for the proposition that a state's interpretation of the FMIA's requirements can trump the USDA's properly promulgated regulatory decision, even on a matter that is at the essence of the Act. 369 F.Supp. 1198. However, that determination is almost certainly bad law. See Part II for a discussion of the three forms of preemption.

135 544 U.S. at 431.

136 *Id.*

137 *Id.* at 447.

138 *Id.* at 454 (emphasis omitted).

In explaining why state law would be retained where it aligned with federal law, the Supreme Court stressed that an overreach attempting to vacate state law that is not in conflict with federal law would not offer "any plausible alternative interpretation of 'in addition to or different from' that would give that phrase meaning."[139] The Court, discussed Dow's argument to the contrary, in terms that would apply perfectly to any attempt to challenge state law claims based on false humane labels. It noted that

> they appear to favor reading ["in addition to or different from"] out of the statute, which would leave the following: "Such State shall not impose or continue in effect any requirements for labeling or packaging." This amputated version . . . would no doubt have clearly and succinctly commanded the pre-emption of *all* state requirements concerning labeling. That Congress added [the phrase "in addition to or different from"] is evidence of its intent to draw a distinction between state labeling requirements that are pre-empted and those that are not.[140]

The Court also noted that allowing state causes of action for violation of federal law will in no way hinder federal action; in fact, doing so "would seem to aid, rather than hinder" federal law.[141] That is especially true here, where meat inspection is a duty shared by states and the federal government, and where the FMIA explicitly anticipates and welcomes state action in the area. Specifically, states are encouraged to "exercise concurrent jurisdiction with the Secretary over articles required to be inspected . . . for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded."[142]

2. Even If the USDA Were to Approve a Humane Label, the Agency's Decision Would Not Have the Preemptive Force of Law

Federal regulation generally has the force of law,[143] so if the USDA determines through regulatory action that cruelty is kindness,

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[139] *Id.* at 448.

[140] *Id.* at 448–49 (emphasis in original); *see also Riegel*, 552 U.S. at 330 ("State requirements are pre-empted under the [Medical Device Amendments of 1976] only to the extent that they are 'different from, or in addition to' the requirements imposed by federal law. Thus, [the law] does not prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations; the state duties in such a case 'parallel,' rather than add to, federal requirements."); *Lohr*, 518 U.S. at 495 ("Nothing in [the law] denies Florida the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements.").

[141] *Bates*, 544 U.S. at 450–51.

[142] 21 U.S.C. § 678; *see also id.* at § 661 ("It is the policy of the Congress to protect the consuming public from meat and meat food products that are adulterated or misbranded and to assist in efforts by State and other Government agencies to accomplish this objective.").

[143] *New York v. Fed. Commun. Commn.*, 486 U.S. 57, 63 (1988) ("The phrase 'Laws of the United States' [of the Supremacy Clause] encompasses both federal statutes themselves and regulations that are properly adopted in accordance with statutory authorization.").

state law claims would be preempted, if the "congressional intent" argument was to fail. However, agency action would not have the force of preemptive law in a case where a humane label was approved based on the perfunctory process that the USDA has implemented thus far.

In *Fellner v. Tri-Union Seafoods, LLC*, the Third Circuit considered FDA action that aligns nicely to our hypothetical.[144] There, complainant Fellner sued Tri-Union Seafood for failure to warn her about the dangers of consuming excessive amounts of tuna.[145] While the lower court had found Fellner's state law claims to be preempted by the Food, Drug & Cosmetics Act (FDCA), the Third Circuit determined that the FDA's actions on mercury in fish were not rigorous enough to have qualified as law-making, writing "we find no federal law with which the alleged state duty to warn conflicts."[146]

In considering whether the FDA action preempted the state claim, the court noted that an "agency's regulations issued pursuant to [congressionally mandated] authority have no less preemptive effect than federal statutes, assuming those regulations are a valid exercise of the agency's delegated authority."[147] However, the court stressed that only federal *law* preempts state law, and that "nothing short of federal law can have that effect."[148] Because the FDA had "taken no regulatory action that preempts Fellner's lawsuit," Fellner's state law claims were not preempted.[149]

The court's analysis applies even more clearly to animal care standards that the USDA might wish to approve through a thorough regulatory process. In *Fellner*, the FDA took far more action with regard to mercury than the USDA has taken to date with regard to animal welfare. While Fellner's initial lawsuit was pending before the Superior Court of California, the Commissioner of the FDA wrote a letter to the then-Attorney General of California, Bill Lockyer. In the letter, the Commissioner expressed his views regarding the *Fellner* case and ar-

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144 539 F.3d at 237.

145 *Id.* at 237, 241 ("Fellner alleges that Tri-Union produces, cans and distributes Chicken-of-the-Sea brand tuna fish and that, from 1999 to 2004, her diet consisted almost exclusively of Tri[-]Union's tuna products.").

146 *Id.* at 256.

147 *Id.* at 243 (internal quotes and citation omitted).

148 *Id.*

149 *Id.* at 241. The FDCA's preemption clause is even more severe than the FMIA's. Titled, "National uniform nutrition labeling," it holds that "no State . . . may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce . . . any requirement for nutrition labeling of food that *is not identical to* the requirement of section 343(g)." 21 U.S.C. § 343-1(a)(4) (emphasis added). For a discussion of the FDCA's mandate and the Act's shortcomings, see *Holk*, 575 F.3d at 331–32. "[U]nder the FDCA, the FDA could 'promulgate food definitions and standards of food quality;' 'set tolerance levels for poisonous substances in food;' and take enforcement action on adulterated and misbranded foods. The FDCA had its shortcomings, however. Neither the FDCA nor FDA regulations required detailed nutritional information on all food labels. In fact, nutrition labeling was required only if the manufacturer made a nutrition claim about the product such as 'low-fat' or 'high in fiber.'" *Id.* (internal citations omitted).

gued that "the defendants would be unable to comply both with that approach and state law and the existence of the lawsuit would 'frustrate the [FDA's] carefully considered federal approach' to the issue of mercury in fish."[150] The FDA had done extensive work on the issue of mercury in tuna and what to do about it—so much so that the FDA Commissioner argued strongly in favor of preemption. Nevertheless, the court found no preemption.[151]

The argument in favor of state relief from false animal-handling claims would be exponentially stronger. First, where the FDA's mandate includes mercury in tuna, the USDA's mandate excludes humane handling. Second, while the FDA has done quite a lot on the issue of mercury in tuna, the USDA has done nothing on pre-slaughter farm animal welfare. And with regard to humane handling labels, the USDA has certainly "taken no regulatory action that preempts" a state cause of action challenging a fraudulent humane handling label.[152] In October 2008, the USDA published a notice in the Federal Register and held a public meeting to solicit input on how it should approve animal raising claims.[153] The notice in the Federal Register explained that "because FSIS does not regulate food animal production, the agency may not always have all the relevant information necessary to the proper evaluation of the animal raising practices described in a producer's animal production protocol."[154] The USDA noted that, as of now, the exact same words on a label can mean totally different things in practice.[155] The agency was looking for input into whether animal-handling claims should require third party verification and whether minimum standards should be required.[156] Four years later, the USDA has not responded to the public comments and has not promulgated regulations that might qualify as law.[157] As discussed above in

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150 *Fellner*, 539 F.3d at 241–42.

151 *Id.* at 241. Note that the court did not agree with the Commissioner. In discussing what weight to give an agency's thoughts on its own preemption, the court wrote, "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if lacking power to control." *Id.* at 250 (internal citations omitted). One assumes that the USDA will assert the preemptive force of any humane label it might approve, but courts should give it exactly the deference that it is due—none.

152 *Id.* This argument is independent of the argument that the USDA has no authority to create preemptive regulations regarding such a label in the first place. Even if a court held that a USDA humane handling label would be within the scope of the USDA's authority, it would still only have preemptive effect if it went through a full regulatory process.

153 73 Fed. Reg. 60228 (Oct. 10, 2008).

154 *Id.* at 60229.

155 *Id.*

156 *Id.*

157 eRulemaking Program Mgt. Off., *Docket Folder Summary*, http://www.regulations.gov/#!docketDetail;D=FSIS-2008-0026 [http://perma.cc/0a561kgCzkj] (accessed Nov. 17, 2013) (displaying no subsequent actions with regard to the request for public comments on October 10, 2008).

Part III(A)(4), the agency does have three half-pages regarding animal production claims posted on its website (totaling 416 words),[158] just as it did when it posted the notice in the Federal Register; but since those very short pages were not created based on any regulatory process, they are not law. To quote the *Fellner* court,

> [F]ederal law capable of preempting state law is [not] created every time someone acting on behalf of an agency makes a statement or takes an action within the agency's jurisdiction. . . . We decline to afford preemptive effect to less formal measures lacking the "fairness and deliberation" which would suggest that Congress intended the agency's action to be a binding and exclusive application of federal law.[159]

Clearly, what the USDA has done regarding humane handling is far short of "the fairness and deliberation" required for "the agency's action to be a binding and exclusive application of federal law."[160] And as was the case in *Fellner*, "state tort law and other similar state remedial actions" are "complimentary to [the] federal regulatory regime[ ]."[161] In fact, they may well save it from the poor oversight of the USDA.

Another Third Circuit case, *Holk v. Snapple Beverage Corp.*, offers similar analysis regarding what does and does not qualify as preemptive law.[162] In *Holk*, the court considered the FDA's approval of the phrase "all natural" on food products, despite their inclusion of high fructose corn syrup (HFCS), an unnatural ingredient.[163] The district court granted Snapple's federal preemption claim under the FDCA, and the Third Circuit reversed.[164] In refusing to preempt state tort claims for fraud, breach of express and implied warranty, among others, the court held that the FDA's actions on HFCS were not sufficiently rigorous to qualify as federal law.[165]

The court noted that in 1991, the FDA announced that it was considering federal rulemaking to define "natural" and requested comments, but then did not create a standard and did not appear to have considered all received comments.[166] The FDA noted that use of the term natural "is of considerable interest to consumers and industry," but declined to define it, based on "resource limitations and other agency priorities."[167] The court stated that the FDA's refusal to define the term "hardly supports preemption."[168] It noted that for preemptive effect, a federal action should involve a "formal administrative proce-

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158 USDA/FSIS, *Claims Guidance*, *supra* n. 112.
159 *Fellner*, 539 F.3d at 245.
160 *Id.*
161 *Id.* at 249.
162 575 F.3d at 340.
163 *Id.* at 335.
164 *Id.* at 331.
165 *Id.* at 342.
166 *Id.* at 340.
167 *Id.* at 340–41.
168 *Holk*, 575 F.3d at 341.

dure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[169] The court's analysis in *Holk* would align fully with any approved animal handling label: We are at precisely the same point, where the USDA has recognized a need for rules and has solicited input, but four years on, it has not acted.[170] Such a lack of any formal deliberative process "hardly supports preemption."[171]

Finally, *National Broiler Council v. Voss* is worth quick consideration.[172] There, the Ninth Circuit allowed the USDA's approval of a "fresh" label on frozen poultry because the USDA was acting based on a policy that had gone through the full regulatory process.[173] The court held that the USDA's interpretation of its regulations warrants deference "unless it is plainly erroneous or inconsistent with the regulation."[174] Thus, even though "fresh" is a subjective term, the court allowed the USDA to call frozen poultry "fresh."[175] A humane label approval would fall into the *Fellner* and *Holk* analysis, since the USDA has not promulgated any regulation that would qualify as law such that it could justify a fraudulent humane label. *National Broiler Council* also stands for the proposition that state action might succeed even if the USDA had gone through the full regulatory process in promulgating a fraudulent label, based on an argument that calling cruelty "humane" would be "plainly erroneous [and] inconsistent with the regulation."[176]

IV. KAT AND HER CO-PLAINTIFFS WOULD HAVE ADDITIONAL FORUMS IN WHICH THEY COULD CHALLENGE FRAUDULENT HUMANE LABELS

A. Even If a Court Did Preempt State Action Based on a Fraudulent Label, State Action Would Be Preserved for Any Marketing of the Label or Its Claims

Even if state causes of action based on a fraudulent label were to fail on preemption grounds, claims based on use of the exact same

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169 *Id.* at 340.

170 *Supra* n. 157 and accompanying text.

171 Lower court decisions in California agree: In *Von Koenig v. Snapple Beverage Corp*., 713 F. Supp. 2d 1066 (E.D. Cal. 2010) and *Lockwood v. Conagra Foods, Inc.*, 597 F. Supp. 2d 1028 (N.D. Cal. 2009), California district courts held that the FDA's approval of the word "natural" was based on policy that fell short of law. For example, the *Von Koenig* court held, "[T]he FDA's policy regarding the use of the term 'natural' does not have the force of law. Neither the FDA policy statement set forth in 1993 nor the July 2008 FDA letter regarding the use of the term 'natural' were the result of a formal, deliberative process akin to notice and comment rulemaking or an adjudicative enforcement action." *Von Koenig*, 713 F. Supp. 2d at 1076.

172 44 F.3d 740.

173 *Id.* at 747.

174 *Id.* (internal citation omitted).

175 *Id.*

176 *Natl. Broiler Council*, 44 F.3d at 747.

wording in any other context will stand. In *National Broiler Council*, the Ninth Circuit held that although California was preempted from requiring a label that violated the U.S. Department of Agriculture (USDA) regulations regarding what constituted "fresh," California could continue to enforce its ban on advertising—so that chickens labeled as "fresh" could not be advertised that way unless they were not frozen.[177] The court noted that "California stores can still be required by state law to tell the truth in advertising and to display frozen chickens for what they are—'frozen'—even though the labels on the chickens themselves are required by federal law to say 'fresh.'"[178]

Similarly, in *Bates*, the court of appeals suggested that oral claims—the same as those on a federally approved label—were preempted because applying state law against oral repletion of an approved claim on a label would work as a preempted incentive to change the label.[179] The Supreme Court disagreed and overturned the decision:

> Because [the Federal Insecticide, Fungicide, & Rodenticide Act (FIFRA)] defines labeling as "all labels and all other written, printed, or graphic matter" that accompany a pesticide, any requirement that applied to a sales agent's oral representations would not be a requirement for "labeling or packaging."[180]

Finally, in *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, the court granted plaintiffs the right to sue for fraud under the Lanham Act based on Tyson's "raised without antibiotics that impact antibiotic resistance in humans" claims.[181] The label had been approved, but the court held that repeating the claims of the label could still be cause for action if the claims were untrue.[182] Distinguishing from cases where Food & Drug Administration (FDA) approval of claims has preempted suits based on those claims as a matter of law, the court noted that the FDA has broad authority to regulate food, drug, and cosmetics advertising—power not shared by the USDA.[183] The court goes in some depth into why claims based on a USDA-approved label can be actionable in other contexts.[184] For the same reason, if Nugent's were to pro-

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[177] *Id.*

[178] *Id.* at 749 (O'Scannlain, J., concurring). To reiterate, the analysis of the USDA's decision to allow frozen poultry to be labeled fresh involves the USDA interpretation of a regulation. Regarding a humane label, there is no USDA regulation that its policy interprets, so the analysis of *Fellner* and *Holk* would control.

[179] *Dow Agrosciences LLC v. Bates*, 332 F.3d 323, 331 (5th Cir. 2003), *vacated*, 544 U.S. 431 (2005).

[180] *Bates*, 544 U.S. at 444–45 n. 17 (internal citation omitted).

[181] 549 F. Supp. 2d 708 (D. Md. 2008).

[182] *Id.* at 717.

[183] *Id.* at 716.

[184] *Id.* at 719–20. Note that none of the three courts held that labeling is advertising or that the relevant agency does not have plenary power to regulate labels. That said, the *Natl. Broiler Council* and *Tyson* courts both discussed the fact that the USDA was acting on the basis of its regulatory authority in allowing the deceitful labels at issue in those cases. The USDA's approval of any humane label, before making a determination

mote their meat through social media, advertising, etcetera, based on a false welfare assurance that was approved by the USDA, Kat and other deceived consumers would be able to use those promotions for non-preempted state claims.

B. Kat and Her Co-Plaintiffs Would Have Other Forums for Recourse As Well

Kat and other aggrieved consumers would have a variety of additional actions against corporate animal welfare fraud, although none of them would work as effectively as state tort lawsuits. For example, they might (1) pursue a Better Business Bureau National Advertising Division complaint;[185] (2) petition the USDA for stricter standards, for meaningful welfare standards, or simply to revoke the fraudulent label—and sue later if the USDA refuses to act reasonably;[186] (3) pursue a Securities and Exchange Commission complaint if Nugent's were to promote the label online;[187] or (4) file a Federal Trade Commission (FTC) complaint.[188] These actions, while useful, are not as valuable as state claims, because they do not bring with them the same punitive power.

V. CONCLUSION

Kat is "Everywoman":[189] Almost all Americans care about animal welfare and are willing to pay more for animal products if they can be assured that the animals are treated well.[190] And yet, as Kat's daughter learned on her Farm Sanctuary tour, when a consumer purchases meat, she enters into a relationship that involves paying others to abuse animals in a myriad of ways that she opposes—and would happily pay more to avoid supporting. Rather than eliminating the most egregious abuses of farm animals, however, the meat industry lies to

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based on the Federal Register notice, would be premature and not subject to preemptive effect.

185 Council of Better Bus. Bureau, *National Advertising Division*, http://www.bbb.org/us/national-advertising-division [http://perma.cc/0QxSUZme9ov] (accessed Nov. 17, 2013).

186 Administrative Procedure Act, 5 U.S.C. §§ 553(e), 701–706 (2012).

187 U.S. Sec. & Exch. Commn., *Enforcement Tips and Complaints*, http://www.sec.gov/complaint/tipscomplaint.shtml [http://perma.cc/0zSgGn8wSfk] (May 12, 2011) (accessed Nov. 17, 2013).

188 In fact, an FTC complaint could proceed based solely on the fraudulent label. According to the USDA, "FTC has additional authority pursuant to section 5 of the FTC Act to prevent 'unfair or deceptive acts or practices in or affecting commerce.' This broad authority enables the FTC to proceed against all unfair business practices, *including false and misleading labeling of food products.*" USDA, *Food Labeling Requirements*, *supra* n. 111, at 11 (emphasis added). An FTC action against a company based on a USDA-approved label would send a strong and powerful message to the meat industry.

189 This concept is adapted from the late fifteenth century English morality play, *Everyman*.

190 Lusk et al., *supra* n. 2, at 12–13.

consumers, claiming that farm animals are treated well and that the most abusive practices are not actually abusive at all.[191]

To Humpty Dumpty in Lewis Carroll's *Through the Looking Glass*, horribly cruel practices might tenably be called "compassionate" such that animal welfare labels stamped on factory farmed meat would make perfect sense—but to Kat, her daughter, and the rest of us, such labels would represent clear fraud. Kat and other deceived consumers would have a range of options for challenging such a fraudulent label, but the choice with the sharpest teeth would be a class-action lawsuit based in appropriate state causes of action.

Fortunately, if the meat industry does try to take advantage of Americans' concern for animals by placing "looking glass" welfare labels on meat, traditional state consumer protection laws will be available to Kat and other deceived consumers. This is because the U.S. Department of Agriculture (USDA)'s authority does not encompass animal handling pre-slaughter, and even if it did, the Federal Meat Inspection Act prohibits "false and misleading labels."[192] Absent USDA regulations on animal handling that authorize the deceit, a state cause of action would be allowed because it would require the exact same thing as federal law: truth.[193]

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191 *See e.g.* Cody Carlson, The Atlantic, *The Ag Gag Laws: Hiding Factory Farm Abuses from Public Scrutiny*, http://www.theatlantic.com/health/archive/2012/03/the-ag-gag-laws-hiding-factory-farm-abuses-from-public-scrutiny/254674 [http://perma.cc/0Beu5fwWZcR] (Mar. 20, 2012) (accessed Nov. 17, 2013) ("[Ag gag laws] protect a system where consumers are regularly deceived into supporting egregious animal suffering . . . .").

192 Discussed *supra* pt. III(A).

193 Discussed *supra* pt. III(B).