UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 25-1986

TIM TAYLOR and **BRYCE BAKER,** on behalf of themselves and others similarly situated,

Plaintiffs-Appellees,

v.

JBS FOODS USA, TYSON FOODS, INC., CARGILL MEAT SOLUTIONS and **NATIONAL BEEF PACKING COMPANY, LLC**,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

THE HONORABLE ERIC C. SCHULTE
United States District Court Judge
Case No. 3:23-CV-3031-ECS

BRIEF OF *AMICI CURIAE* SOUTH DAKOTA, NEBRASKA, IDAHO, NORTH DAKOTA, COLORADO, NEW MEXICO, TEXAS, MONTANA, KANSAS, OKLAHOMA AND WYOMING SUPPORTING APPELLEES AND AFFIRMANCE

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

The States of South Dakota, Nebraska, Idaho, North Dakota, Colorado, New Mexico, Texas, Montana, Kansas, Oklahoma and Wyoming file this *amicus* brief under Fed.R.App.P. 29(a)(2). The *amici* states raise, process and ship to market a large share of the domestic beef products consumed in this country. Thus, they have an interest in the accurate labeling of beef products sold to consumers, fair competition in the national beef market, and consumer confidence concerning the quality of beef products marketed as being of domestic origin. In furtherance of these interests, the *amici* states have an overarching interest in preserving the system of concurrent federal and state regulation of beef product labeling contemplated by the Federal Meat Inspection Act (FMIA) which this appeal threatens. *Amici* counsel requests the opportunity to present a brief oral argument of no more than 5 minutes.

SUMMARY OF THE ARGUMENT

Defendants sell beef products that were born, raised, slaughtered and sometimes processed in foreign countries under the label "Product of USA." This labeling practice is deceptive and

anticompetitive. A United States Department of Agriculture (USDA) study found that only 16% of consumers associate "Product of USA" labeling with beef that has been nothing more than processed in the United States. Cates *et al.*, RTI INTERNATIONAL, *Analyzing Consumers' Value of Product of USA Labeling Claims* 8 (2022). In other words, 84% of consumers are being misled by defendants' labeling.

Nonetheless, based on "guidance" from a USDA "policy book" and an informal USDA "regulatory comment," the Food Safety Inspection Service (FSIS) approved defendants' use of the "Product of USA" label on foreign beef product that was at most merely processed and packaged in the United States. Neither the "policy book" nor the "regulatory comment" are law. According to the FMIA's duly-enacted statutory and regulatory definitions of "misbranded," the defendants' "Product of the USA" labeling is deceptive because their product purports to be of domestic origin when it is not.

Under the FMIA framework of concurrent federal and state jurisdiction, the states are permitted to police such deceptive meat labeling practices provided that state law is consistent with federal law. But defendants argue that the FSIS's approval of its labeling totally preempts any further policing of its deceptive labeling under

South Dakota law. This argument disregards the fact that the FSIS's "approval" rests entirely on its "policy book"/"regulatory comment" definitions of a "Product of USA," which are not law and are in conflict with the FMIA and its implementing rules. The FSIS's erroneous approval of defendants' use of the "Product of USA" label does not magically make a deceptive label non-deceptive. Because South Dakota seeks simply to enforce its laws in accordance with the correct, controlling definitions codified in the FMIA and its implementing rules, South Dakota law is not preempted by the FMIA and may be invoked to police and prevent defendants' anticompetitive and deceptive practices.

ARGUMENT

America's abundant grasslands yield beef products that consumers worldwide associate with exceptional quality and flavor, commanding a price premium commensurate with the superior reputation of domestic beef products. The FMIA recognized that the marketing of misbranded or mislabeled beef products can "destroy markets for . . . properly labeled and packaged meat . . . and result in sundry losses to livestock producers and processors of meat . . . as well as injury to consumers. The . . . mislabeled or deceptively

packaged articles can be sold at lower prices and compete unfairly with . . . properly labeled and packaged articles, to the detriment of consumers and the public generally." 21 U.S.C.A. § 602. Defendants' practice of commingling substantial amounts of inferior imported beef with domestic beef and marketing the resulting product under the label of "Product of USA" conceals a competitive disadvantage intrinsic in their product and deceives consumers into paying a premium for an inferior product which in turn harms the reputation of genuine domestic beef products.

The plaintiffs' complaint alleges that defendants' anticompetitive and deceptive practices violate both the FMIA's truth-in-labeling mandates and South Dakota's antitrust and unjust enrichment laws because the labels mislead consumers about the true origin of the defendants' products. 21 U.S.C. § 607(d); SDCL 37-1-3.1.

The defendants filed a motion to dismiss alleging that the FMIA and FSIS preempt South Dakota's power to regulate their products under state antitrust and consumer protection statutes because the USDA approved defendants' use of the "Product of USA" label on beef it markets and sells in South Dakota and other states.

This simplistic argument does not account for either South Dakota's concurrent authority under federal law to enforce the FMIA's truth-in-labeling requirements under state law or the fact that the USDA's "policy book"/"regulatory comment" definitions of "Product of USA" conflict with the FMIA and its implementing rules.

A. The FMIA And FSIS Provide Concurrent Roles For The USDA And States Regarding Labeling Of Beef Products

The FMIA was enacted for the purpose of "assuring that meat and meat food products distributed to [consumers] are wholesome, not adulterated, and properly marked, labeled and packaged." 21 U.S.C. § 602. While the FMIA preempts states from imposing "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under" the FMIA, the FMIA expressly authorizes states to "exercise concurrent jurisdiction" with the federal government "for the purpose of preventing the distribution . . . [of] misbranded" meat products provided such state requirements are "consistent with the requirements" of the FMIA. 21 U.S.C. § 678.

This concurrent jurisdiction exists because Congress did not intend for the FMIA to usurp the historic police powers of the states

to regulate "against fraud and deception in the sale of food products . . . within their borders." *Fla. Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 144 (1963); *Wyeth v. Levine,* 555 U.S. 555, 574 (2009)(recognizing "decades of coexistence" between state and federal laws regulating drug labeling). Rather, the FMIA was enacted to "assist in efforts by state and other government agencies" to "protect the consuming public from meat and meat food products that are adulterated or misbranded." 21 U.S.C. § 661(a); *United States v. Stanko,* 491 F.3d 408, 418 (8th Cir. 2007)("nothing in the text of the FMIA indicates an intent to preempt state unfair trade practices laws in general").

This shared responsibility in the field of food product regulation is codified in the FMIA's requirement that beef labeling be *both* "approved by the Secretary" of Agriculture *and* "not false or misleading." 21 U.S.C. § 607(d). In other words, USDA approval of a "false or misleading" label does not "preclude any state . . . from making requirements or taking other action, consistent with [the FMIA]" for the purpose of "preventing the distribution" of any "misbranded" meat products provided it does not impose labeling requirements "in addition to, or different than," those imposed by

the FMIA. 21 U.S.C. § 678. Defendants contend that South Dakota law is preempted if it imposes requirements in addition to or different from the USDA's "policy book" and "regulatory comment." But 21 U.S.C. § 678 only preempts state law requirements that are "in addition to, or different than," the FMIA itself.

Thus, the FMIA does not preempt South Dakota law here because the state seeks simply to enforce its laws consistent with the FMIA's definitions of misbranded. *Mario's Butcher Shop and Food Center, Inc. v. Armour and Co.,* 574 F.Supp. 653, 655 (E.D.Ill. 1983)(action under state consumer fraud and deceptive practices act regarding labels of meat packages not preempted when "the standards . . . applied are those set out by [the FMIA]"). Defendants' products fit the FMIA's definition of "misbranded" to a T.

B. Defendants' Beef Products Are Patently Misbranded Under The FMIA And FSIS

The parties do not actually dispute that South Dakota possesses concurrent authority to enforce the FMIA under equivalent state laws, but they disagree over the extent of that authority. Nor do the defendants dispute that their products are derived from cattle that were born, raised, slaughtered and, in some

cases, partially processed in a foreign country. The defendants' position is that the true origin of its product is irrelevant given the USDA's approval of its use of the "Product of USA" label. According to defendants, this approval preempts any form of state-law claim that its product is mislabeled or misbranded. The merit of the defendants' preemption argument, or lack thereof, is best understood by first examining whether its product is mislabeled or misbranded under the FMIA.

Per 21 U.S.C.A. § 601(n)(1), a beef product is misbranded "if its labeling is false or misleading in any particular." Product origin is one such particular as reflected in 9 C.F.R. § 317.8(a), which provides that a label is false or misleading if it "conveys any impression or gives any false indication of origin." Origin means the "rise, beginning, or derivation from a source" or a "primary source or cause." Webster's Seventh New Collegiate Dictionary (1967). By these standards, defendants' use of a "Product of USA" label on their product is patently and shamelessly misleading.

Defendants' foreign-sourced cattle obviously does not "rise" or "begin" or have its "primary source" in the United States. The USDA has confirmed that 84% of consumers do not consider cattle born,

raised and slaughtered outside the United States to be a "Product of USA." Cates *et al.,* RTI INTERNATIONAL, *Analyzing Consumers' Value of Product of USA Labeling Claims* 8 (2022).[1] In fact, because the USDA has determined that labeling foreign-sourced beef product as a "Product of USA" *is* misleading, it has changed the definition of "Product of USA" to require, effective January 2026, that product sold with this label be "born, raised, slaughtered and processed in the United States." 89 Fed.Reg. 53 at 19,470 (Final Rule).[2]

It is important to point out that South Dakota does not seek to apply the prospective new definition retroactively; rather, South Dakota seeks to apply the existing, non-misleading statutory and regulatory standards of the FMIA found in 21 U.S.C.A. § 601(n)(1) and 9 C.F.R. § 317.8(a) to the question of whether defendants' products are misbranded. *Mario's Butcher Shop,* 574 F.Supp. at 655. Such "claims are perfectly consistent with the [FMIA] and thus

[1]https://www.fsis.usda.gov/sites/default/files/media_file/documents/Analyzing_Consumers_Value_of_PUSA_Labeling_Claims_final_report.pdf

[2]https://www.fsis.usda.gov/sites/default/files/media_file/documents/FSIS-2022-0015-Final.pdf

covered by its concurrent jurisdiction clause." *Thornton v. Tyson Foods, Inc,* 28 F.4th 1016, 1032 (10th Cir. 2022)(Lucero, J. dissenting). Because the USDA's new definition was prompted by the conflict between the "policy book"/"regulatory comment" definitions and the FMIA's codified standards and rules, and because the "policy book"/"regulatory comment" definitions are not law, South Dakota is not preempted from enforcing its laws in accordance with the FMIA's standards.

C. The USDA's Approval Of Defendants' Use Of The "Product Of USA" Label Is Not Preemptive

The USDA's approval of defendants' use of the "Product of USA" label does not preempt enforcement of the FMIA's labeling standards under South Dakota law for two reasons: (1) the "policy book"/"regulatory comment" definitions on which the USDA's approval rests are not, and are contrary to, controlling federal law and (2) USDA approval of a label that conflicts with the FMIA's standards is invalid and, therefore, not preemptive.

With respect to the first point, defendants contend their products are label compliant because the USDA's "policy book" and a "regulatory comment" published in the Federal Register define

"Product of USA" as beef that is simply processed in the United States, even if it is sourced from cattle of foreign origin. The problem with the defendants' position is that neither the USDA's "policy book" nor "regulatory comment" were promulgated by statute or rule and so are not law. *Spirit Lake Tribe v. North Dakota,* 262 F.3d 732, 741 (8th Cir. 2001)(informal agency opinion letters, manuals, enforcement guidelines and such, unlike rules and adjudications, "lack the force of law"). Not only are the USDA's "policy book"/"regulatory comment" interpretations of the FMIA not law, but they are no longer entitled to deference in the post-*Loper Bright* legal landscape. *Loper Bright Enterprises v. Raimondo,* 603 U.S. 369 (2024).

But even if the USDA's approval of the use of a "Product of USA" label on defendants' products were due some level of deference, no deference is due for agency interpretations that are not "reasonable." *Kisor v. Wilkie,* 139 S.Ct. 2400, 2415 (2019). To receive deference, an "agency's reading must fall 'within the bounds of reasonable interpretation.'" As noted in *Kisor,* there should "be no mistake . . . [that reasonableness] is a requirement an agency can fail." *Kisor,* 139 S.Ct. at 2416.

For reasons stated above, the USDA's labeling approval here unmistakably fails the reasonableness test; no label that misleads 84% of consumers can be considered reasonable. But the question of deference is a bit beside the point here when any deference to the USDA's approval is explicitly circumscribed by the FMIA itself, which holds that USDA approval alone is not determinative of what is truthful and reasonable with regard to labeling. 21 U.S.C. § 607(d).

Which leads to the second point. Defendants exaggerate the legal import of the USDA's approval of its use of the "Product of USA" label. According to the explicit terms of the FMIA, it is not enough for a label simply to be USDA approved. 21 U.S.C. § 607(d) has two requirements – in addition to USDA approval the FMIA requires that the label not be false or misleading. In other words, per the FMIA no deference is due to the USDA's approval of a false or misleading label. 21 U.S.C. § 607(d).

Thus, as discussed above, the USDA's approval of defendants' "Product of USA" labeling is not reasonable or preemptive per 21 U.S.C. § 607(d) because it is false and misleading as applied to their products. *Kisor,* 139 S.Ct. at 2416. The court below is not the first court to conclude that USDA label approval is not determinative of

the truthfulness of labeling and, therefore, not preemptive of state law claims under the FMIA.

In *Swift & Co., Inc. v. Walkley,* 369 F.Supp. 1198, 1199 (D.N.Y. 1973), a manufacturer of imitation frankfurters whose labeling failed to disclose that their product did not meet federal regulatory standards for a "frankfurter" sued the New York Department of Agriculture to lift its ban on the marketing and sale of its product in New York. As here, the manufacturer relied on the USDA's approval of the use of a label that omitted the word "imitation." 21 U.S.C. 601(n)(3). *Swift & Co.,* 369 F.Supp. at 1199. As here, the USDA's approval was not based on statute or administrative regulation but on guidance from a White House Conference on Food, Nutrition and Health that discouraged labeling foods as "imitation" because "[c]onsumers are reluctant to purchase products labeled 'imitation' even though the products are very good and highly nutritious." *Swift & Co.,* 369 F.Supp. at 1200. The manufacturer argued, as defendants do here, that the USDA's approval of its misleading label preempted New York's "imitation" labeling mandate because it added a requirement that was "in addition to, or different than," those imposed by the FMIA. *Swift & Co.,* 369 F.Supp. at 1200.

New York "resist[ed the manufacturer's] claim on the ground its product [wa]s misbranded under both federal and state statutes, absent a statement indicating it [wa]s an imitation, and accordingly the state, consistent with 21 U.S.C. Section 678, [wa]s exercising [its] 'concurrent jurisdiction'" to enforce the FMIA's truth-in-labeling requirements. *Swift & Co.,* 369 F.Supp. at 1200. Like South Dakota here, New York defended its enforcement action on the ground that the USDA had been "derelict in its duty in permitting the misbranding of" the manufacturer's product. *Swift & Co.,* 369 F.Supp. at 1200; *Thornton,* 28 F.4th at 1032 (Lucero, J., dissenting)("Congress most assuredly could not have intended [for USDA labeling approval] to rubber stamp deception as to the national origin of beef").

The *Swift & Co.* court agreed with the state, finding that "the approval granted by the federal government to the labeling of [the manufacturer's] product without any indication that it is an 'imitation'" was contrary to the FMIA. *Swift & Co.,* 369 F.Supp. at 1200. The *Swift & Co.* court found that the USDA's reliance on the White House conference admonition against "imitation" labeling did "not justify the disregard of the [FMIA] by the Department of

Agriculture" and ruled that the fact that the USDA had "ignored the standard set by [the FMIA] [wa]s not a ground for prohibiting a state from enforcing it, as it is permitted to do under Section 678." *Swift & Co.*, 369 F.Supp. at 1200.

Here, the USDA's "policy book"/"regulatory comment" definitions of "Product of USA," like the White House "guidance" in *Swift & Co.*, are not found in either the statute or administrative rule. *Swift & Co.*, 369 F.Supp. at 1200; *Spirit Lake Tribe*, 262 F.3d at 741; *Atlantic Ocean Products, Inc. v. Leth*, 292 F.Supp. 615, 618 (D.Ore 1968)(Fair Packaging and Labeling Act did not preempt Oregon's regulation of products which could be labeled as "halibut" when the FDA had "made no firm or final policy decision" concerning the definition of "halibut" under federal law). Indeed, the USDA's promulgation of a new definition is in response to the conflict between the "policy book"/"regulatory comment" definitions and the FMIA and its implementing rules. As in *Swift & Co.*, the USDA's labeling approval here "ignore[s] the standard" set by the FMIA. *Swift & Co.*, 369 F.Supp. at 1200. Accordingly, the *Swift & Co.* court, like the district court here, found that "concurrent enforcement by a state under Section 678 would apply . . . to meat food products that

satisfy [the FMIA's] definition of misbranding." *Swift & Co.*, 369 F.Supp. at 1201.

Defendants' products certainly satisfy the FMIA's definition of misbranding. As the USDA itself has found, labeling beef products born, raised and slaughtered in a foreign country as a "Product of USA" is "false or misleading" with regard to the "particular" of its origin and conveys "a false indication of [its] origin" to 84% of consumers. Cates, *et al.*; 21 U.S.C.A. § 601(n)(1); 9 C.F.R. § 317.8(a); 89 Fed.Reg. 53 at 19,470. South Dakota and other beef producing states have a legitimate economic and regulatory interest in preventing the distribution of such products within their borders, and the statutory mandate to do so. 21 U.S.C. § 678.

D. Defendants' Practices And Legal Position Are Inimical To State Regulatory Authority

If defendants had their way, South Dakota's only "recourse is to challenge [the FSIS's labeling] determination in federal court." APPELLANTS' BRIEF at 25. Reducing South Dakota to the status of a mere litigant strips the state of its inherent police powers and its statutory role as a concurrent regulator under the FMIA.

But, far from stripping states of their historical role as the immediate regulators of the quality of food products in their states, the FMIA explicitly authorizes states to "prevent" the distribution of meat the FMIA defines as "misbranded" through their own internal regulatory frameworks. 21 U.S.C. § 678. Whether beef is a "Product of USA" when it has been born, raised to maturity, and slaughtered outside of the United States, and only then transported from its country of origin to the United States for mixing with domestic beef or simply packaging, is a legitimate concern of the *amici* states. Defendants' theories in this appeal threaten the states' ability to vindicate these interests through the concurrent regulatory authority conferred by the FMIA.

CONCLUSION

Defendants' marketing and sale of foreign beef products – whose only apparent connection with the "USA" is that some processing or packaging took place in the United States – is deceptive, anti-competitive and detrimental to consumers and the reputation of genuine, domestically-produced beef products. Defendants have secured an unfair competitive advantage over real domestic beef producers and unjustly enriched themselves by selling

an inferior product to consumers for the premium prices commanded by authentic "Product of USA" beef.

Though defendants would have it otherwise, states are not potted plants in the national regulatory framework enacted to prevent the importation and distribution of misbranded beef products. Holding defendants to the FMIA definition of "misbranded" when enforcing equivalent South Dakota law imposes nothing different from or in addition to the FMIA. When, as here, a beef product's labeling conveys a false indication of origin, states are authorized to act when the USDA has not. Accordingly, *amici curiae* states ask that the decision below be affirmed.

Dated this 8th day of August 2025.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The State of South Dakota, by and through its counsel, Paul S. Swedlund, hereby certifies that this document complies with the type/volume limit of Fed.R.App.P. 32(a)(7)(b). It contains 3,388 words and complies with the typeface and type style requirements of Fed.R.App.P. 32(a)(5)/(a)(6). It has been printed in a proportionally-spaced typeface in 14-point Bookman Old Style font and scanned for viruses using Symantic Endpoint Protection.

Paul S. Swedlund
Paul S. Swedlund
Solicitor General

CERTIFICATE OF SERVICE

The State of South Dakota, by and through its counsel, Paul S. Swedlund, hereby certifies that the brief of *amici curiae* was served on appellants' counsel via CM/ECF by electronic filing of the foregoing brief with the clerk of this court this 8th day of August 2025.

Paul S. Swedlund
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Solicitor General