No. 19-CV-0397

In the
District of Columbia Court of Appeals

ANIMAL LEGAL DEFENSE FUND,

Appellant,

v.

HORMEL FOODS CORPORATION,

Appellee.

On Appeal from the Superior Court of the District of Columbia, Civil Division No. 2016 ca 004744 B (Hon. Anthony C. Epstein, Judge)

BRIEF FOR APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule of Appellate Procedure 26.1, Plaintiff-Appellant Animal Legal Defense Fund states that it has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

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I. JURISDICTIONAL STATEMENT

Plaintiff Animal Legal Defense Fund ("ALDF") brought claims under the D.C. Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3901 *et seq*., against Defendant Hormel Foods Corporation ("Hormel")'s "Make the Natural Choice" advertising campaign directed at D.C. consumers, among others. Thus, the lower court had jurisdiction for those D.C. law claims. On April 8, 2019, the lower court granted Hormel summary judgment on all claims. On May 6, 2019, ALDF filed its notice of appeal from that order and judgment. Therefore, this Court has jurisdiction under D.C. Code § 11–721 and D.C. Rule App. P. 3 & 4.

II. STATEMENT OF THE ISSUES

1. Whether ALDF—which the lower court found seeks to "provid[e] consumers with accurate information" about industrial meat production, and has done so by highlighting Hormel's false and misleading claims regarding its "Natural Choice products"—has standing to challenge Hormel's Natural Choice advertisements under the CPPA.

2. Whether the lower court, in ignoring facts it stated were undisputed, misapplying an evidentiary doctrine in order to throw out ALDF's declarations, and applying incorrect standards, erred in holding that ALDF lacked standing.

3. Whether, because the federal government reviewed and approved Hormel's Natural Choice product labels, ALDF's CPPA claims, that Hormel's

advertisements falsely represent the products, are preempted by federal meat and poultry labeling law.

III. STATEMENT OF THE CASE

Proceeding under the CPPA, as a non-profit, public interest organization that the statute empowers to protect "the general public," D.C. Code §§ 28-3905(k)(1)(C)-(D), ALDF established that Hormel's Make the Natural Choice advertising campaign defrauds consumers. Hormel uses a variety of terms and images in its commercials, magazine ads, web pages, and internet banners—including "natural," "preservative free," and "no nitrates added"—to communicate that the animals that become Natural Choice products are raised naturally, *e.g.*, without drugs and hormones, and that the products do not contain nitrates. Hormel concedes this is untrue. The meat in the "Natural Choice" line is the same meat Hormel uses to make Spam.

Nonetheless, the lower court allowed Hormel's scheme to persist, concluding that ALDF lacked standing and that ALDF's false *advertising* claims are preempted by federal meat *labeling* laws, a decision that is internally inconsistent and stands in direct contravention of the CPPA and governing precedent. Despite acknowledging, as undisputed facts, that Hormel's misleading statements led ALDF to engage in mission-driven activities to counteract Hormel's misrepresentations, draining ALDF's resources, the lower court held against ALDF

by applying an extreme and erroneous test (a) at odds with this Court's organizational standing precedent and, critically, (b) inconsistent with the D.C. Council's explicit command that non-profit organizations be granted expansive standing to remedy CPPA violations, as numerous other trial courts have recognized. The lower court compounded these errors when it refused to consider substantial evidence demonstrating ALDF's injury and its close and longstanding ties to the consumer interests harmed by Hormel.

Further, despite having determined that it lacked jurisdiction, the lower court went on to hold ALDF's false *advertising* claims are preempted because the federal government approves Hormel's *labels* under the Poultry Products Inspection Act ("PPIA") and Federal Meat Inspection Act ("FMIA"). Though the decision accurately explains the federal government reviews and approves *only* Hormel's labels—in light of the font size, word placement, coloring—it then concludes this approval provides Hormel unfettered rights to use the "terms" that appear on the label in any context. A119-20 (Summary Judgment Order (hereafter, "Order") at 22-23). The court failed to cite a single provision of the PPIA or FMIA supporting its decision, despite the Supreme Court's teaching that "the purpose of Congress is the ultimate touchstone" for preemption. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quotation marks omitted). Indeed, it instead placed the burden on ALDF to disprove preemption, ignoring the presumption against preemption,

which mandates that the party arguing preemption "must show" Congress intended to preempt. *Merck Sharp & Dohme Corp. v. Albrecht,* 139 S. Ct. 1668, 1678 (2019). Either of these precepts, properly applied, establishes that federal review of Hormel's labels does not preempt state advertising laws. *See id*.

The CPPA is meant to "be construed and applied liberally to" ensure "an enforceable right to truthful information," "remedy all improper trade practices and deter the[ir] continued use," and "educate consumers to demand high standards." D.C. Code §§ 28-3901(b)-(c). The decision below, in contrast, provides merchants, and particularly food companies, new license to dupe consumers. It cannot stand.

IV. STATEMENT OF FACTS

A. ALDF's Claims and Evidence.

The CPPA authorizes "nonprofit" and "public interest organizations" to vindicate the rights of D.C. consumers against false advertising. *Id.* at §§ 28-3905(k)(1)(C)-(D). ALDF is both, and brought suit against Hormel's Make the Natural Choice campaign for violating §§ 28-3904(a), (d), (e), (f), (f-1), and (h).

The summary judgment record establishes that Hormel falsely represents how the animals who become Natural Choice products are raised and treated, facts that are material to consumers when they purchase meat products. In addition to "natural" appearing in the product name and the "Make the Natural Choice" slogan, more than 100 ads in the campaign use the word "natural" in other ways.

A147 (Hormel's Response to ALDF's Statement of Undisputed Material Fact (RSUMF) ¶ 60). More than 90 include statements to the effect that the products have no preservatives and/or no nitrates or nitrites added. A147, A149 (*id.* ¶¶ 61, 64). Ads also feature language such as claims that the products are "simple" or "clean." A149-51 (*id.* ¶ 65). This color commentary is in service of the campaign's "KEY MESSAGES," which according to Hormel, are "100 percent natural and preservative free." A148 (*id.* ¶ 63).

Those messages were received. Research commissioned by Hormel demonstrates that between 55 and 72 percent of consumers viewing the ads associated the products with being "100% Natural," and consumers also believed the products had "no preservatives" and "[n]o chemicals." A143-46 (*id.* ¶¶ 56-57).

Hormel also knew what consumers understood when it said the products were "natural" and had "no preservatives." For example, a "summary of Hormel custom[er] research" prepared by the Natural Choice Brand Manager stated, "consumers assume that Natural includes other health claims (ABF [Antibiotic-Free], No Preservatives, etc.)" A153-55 (*id.* ¶ 81). A 2017 Hormel document explained that consumers have the "expectation[]" that having a "100% natural" brand means that the "[a]nimals [were] treated humanely." A156-57 (*id.* ¶ 98).

Hormel concedes Natural Choice meats do not comply with these expectations. It admitted Natural Choice animals are given "preventative"

antibiotics—*i.e.*, when no disease is present, but because of the risk of disease in Hormel facilities—growth stimulants such as hormones and the internationally banned drug ractopamine, and are trapped indoors for their entire lives. A163-178 (*id.* ¶¶ 255, 260-64, 281, 287-89, 292). It also acknowledged it has been cited for "egregious" mistreatment of animals, A183 (*id*. ¶ 332), and keeps its sows in "gestation crates" for which, as explained to its Board of Directors, the "[p]ublic perception is bad" and Hormel "[r]isk[s] losing consumers" by continuing to use the crates. A178, A180-82 (*id.* ¶¶ 321, 325-26). Also, Hormel adds celery juice-based ingredients, which contain nitrates and/or nitrites, to the products. These substances can be "excellent meat preserver[s]." A158-62 (*id.* ¶¶ 248-53).

Hormel thus purposefully "represent[ed]" its "good[s]" as having "characteristics" and "benefits" they do not and of being of a "particular standard [or] quality" they are not, and "misrepresent[ed]" about "material fact[s]" that "ha[d] a tendency to mislead" consumers. D.C. Code § 28-3904(a), (e), (f), (f-1), and (h). This is exactly what the CPPA is meant to stop.

B. Prior Decisions in This Case.

Hormel raised and lost arguments on standing and preemption prior to summary judgment. It initially removed the case to federal court, arguing that ALDF's false advertising claims "necessarily raise certain federal issues" because of federal meat labeling laws. *Animal Legal Def. Fund v. Hormel Foods Corp.*, 249

F. Supp. 3d 53, 57 (D.D.C. 2017) (cleaned up). The district court remanded, concluding there was no "real conflict between the false advertising claims in this case and the federal laws Defendant cites." *Id.* It explained:

> [T]his case is not about the labels or packages on particular meat products produced by Defendant. It is about a national *advertising* campaign including, among other things, magazine advertisements, newspaper inserts and webpages. The federal laws and regulations cited by Defendant may grant Defendant the right to use various terms on its meat labels—when accompanied by certain disclaimers—but they do not appear to have given Defendant any sort of approval to produce the *advertisements* challenged in this case.

Id. (emphasis in original).

On remand, Hormel moved to dismiss, again claiming ALDF's CPPA claims were preempted, and also arguing ALDF lacked standing. The lower court found ALDF had adequately alleged standing: "Although it is apparent that ALDF's advocacy work goes beyond challenging the labeling and advertising of meat products," ALDF can establish such efforts are part of "its mission" if, as ALDF alleged, it "advocat[es] for robust and meaningful standards for the natural and organic labels …, stopping false advertising by meat producers, … and educating consumers about the truth behind meaningless and misleading labels and advertising." A72 (Order Denying Def.'s Motion to Dismiss at 7 (cleaned up)). Therefore, ALDF would prove standing if it showed that it diverted resources "in filing administrative petitions and lawsuits, preparing comments in response to federal rulemaking, conducting undercover investigations of factory farms,

publishing email and print newsletters, producing online resources, and conducting social media campaigns" connected with Hormel's unlawful acts, which would limit ALDF's ability to undertake other activities in pursuit of its mission. *Id.* As discussed below, ALDF followed this blueprint.

On preemption, the lower court agreed with the district court, finding that Hormel "characteriz[es] ALDF's suit as an attack on the *labeling* of Hormel's 'Natural Choice' line of products. The complaint, however, focuses not on labels but on Hormel's *advertising*[.]" A67-68 (*id.* at 2-3 (emphasis in original)).

C. The Summary Judgment Decision.

Judge Neal Kravitz held this case from 2017 to 2019. Through routine judicial rotations, in 2019 the matter was sent to Judge Fern Saddler, who received the summary judgment and sanctions motions, and then transferred to Judge Epstein. Within weeks, Judge Epstein overturned the prior rulings, rejecting ALDF's law-of-the-case argument by stating, "the important question is not whether different judges express different views of the law at different stages of the case but which view was right." A123 (Order at 26 (cleaned up)).

The lower court began its standing analysis by acknowledging "the CPPA was amended in 2012" to add provisions providing consumer advocacy organizations the ability to challenge false advertising and protect D.C. consumers, and that the amendments were adopted by the D.C. Council to "express[]

disagreement" with courts' prior, narrow interpretations of standing under the CPPA. A108-9 (*id.* at 11-12). However, the lower court went on, the amendments would not inform the "Article III standing principles" it would apply, and, regardless, ALDF does not qualify for any more lenient standard under the CPPA because it works to protect "the consumed"—i.e., animals—rather than consumers. A109-10 (*id.* at 12-13). The lower court did not consider the D.C. Council's intent behind the 2012 amendments or other decisions interpreting them.

In conducting its standing analysis, the lower court listed fourteen undisputed facts, including that: (a) ALDF works to "educat[e] consumers about the conditions and practices of factory farming" to "reduce consumer demand for factory farmed products"; (b) after ALDF became aware of Hormel's Make the Natural Choice advertising campaign it "advocated" against "the use of the term 'natural' on labels of products that are 'factory farmed,' including Hormel's Natural Choice products" and publicized that work; and (c) ALDF conducted an "undercover investigation of a pig breeding facility" that services Hormel, and publicized Hormel's connection to the breeder. A105-6 (*id.* at 8-9).

Yet the court held that ALDF was not injured by its work against Hormel because it did not show a "direct conflict" between Hormel's advertisements and ALDF's mission. A110-11 (*id.* at 13-14). To reach this conclusion, beyond ignoring its findings, the court discounted two of ALDF's supporting declarations

under the "sham affidavit" doctrine, and minimized a third. A111-12 (*id.* at 14-15).

To justify its treatment of the declarations, the lower court cited half a sentence from ALDF's interrogatory *objections*, claiming it created a conflict in ALDF's testimony. There, ALDF simply explained it could not directly respond to a request about how the "Product Claims" conflict with its mission, because it was not contending the "Product Claims themselves," *i.e.*, the words "natural" and "no preservatives," conflict with its mission, but rather that Hormel's *use* of them, combined with its practices, conflicts with ALDF's mission. A111 (*id.* at 14).

The lower court also labeled the declarations "conclusory" without providing a single example. It stated that the declarations could not be relied on because they did not attach supporting exhibits—even though it earlier acknowledged declarations based on personal knowledge frequently establish standing. A101, 112 (*id.* at 4, 15). Yet, the declarations cited to documents in the summary judgment record. On this convoluted basis, the lower court stated it would be "unfair" to Hormel to allow ALDF to proceed. A112 (*id.* at 15).

It held that whatever diversion of resources (organizational injuries) ALDF incurred was not caused by Hormel's marketing. A113-16 (*id.* at 16-19). The court stated that though ALDF purposefully focused its advocacy against Hormel, A115 (*id.* at 18), because it did not establish "it would have remained silent" had Hormel's ads not existed, Hormel's false and misleading ads did not contribute to

ALDF's injuries, A114-5 (*id.* at 17-18). The court also held ALDF failed to demonstrate redressability for similar reasons. It extrapolated that were an injunction granted, Hormel's Natural Choice products would still be *labeled* "100% Natural," and because ALDF might work against that "labeling," the cessation of Hormel's false ads would do ALDF no good. A116-17 (*id.* at 19-20).

Despite emphasizing at the outset that "[s]tanding is a threshold jurisdictional issue which must be" resolved in ALDF's favor before the court could address the merits, A103 (*id.* at 6 (cleaned up)), the lower court went on to hold, on the merits, that ALDF's claims are preempted. It stated, "[t]he legal issue is whether a state can require advertisements to describe a product differently than labels approved by USDA[.]" A118 (*id.* at 21). It further acknowledged the federal meat and poultry labeling statutes, the PPIA and FMIA, "do not regulate advertising, and they do not preempt all state-law claims alleging false or misleading advertising." A119 (*id.* at 22). However, it continued, "If this Court found misleading Hormel's use in advertising of the same terms that USDA approved in labeling, the finding would conflict with USDA's determination[.]" A120 (*id.* at 23). Without citing any statute, it stated, "Federal law regulates labeling so that consumers can use labels as the authoritative source of information about a product's ingredients, and if a producer can accurately use a term in a label, the producer should be able to use the same term in its advertising." *Id.*

After addressing issues of sealing the record, the lower court finally concluded by noting it could not reach ALDF's claim that Hormel spoliated evidence because "lack of standing means that the Court lacks subject matter jurisdiction over a dispute and must dismiss the complaint without a ruling on the merits." A137 (*id.* at 40). Yet, the lower court nevertheless held monetary sanctions would not be warranted for any spoliation that did occur. *Id.*

V. STANDARD OF REVIEW

This Court reviews the trial court's order granting summary judgment *de novo*. *See Pajic v. Foote Prop., LLC*, 72 A.3d 140, 146 (D.C. 2013). This includes examining "the facts in the light most favorable" to the nonmoving party to determine if "there is no genuine issue of material fact requiring resolution at trial." *Id.* (cleaned up). "When jurisdiction…depends on a factual question, the court may independently review the evidence and conduct additional fact-finding to determine whether it has jurisdiction." *Equal Rights Ctr. v. Properties Int'l*, 110 A.3d 599, 606 (D.C. 2015 (citing *Matthews v. Automated Bus. Sys. & Servs., Inc.,* 558 A.2d 1175, 1179 (D.C.1989)).

The decision to exclude evidence under the "sham affidavit" doctrine is also reviewed *de novo*. *Hinch v. Lucy Webb Hayes Nat'l Training Sch. for Deaconesses & Missionaries Conducting Sibley Mem'l Hosp.*, 814 A.2d 926, 931 (D.C. 2003); *Galvin v. Eli Lilly & Co.*, 488 F.3d 1026, 1030 n.* (D.C. Cir. 2007). Courts engage

in a searching review before upholding an application. *See Hinch*, 814 A.2d at 930; *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1237 (11th Cir. 2010) (doctrine "applied sparingly because of the harsh effect it may have on a party's case").

VI. SUMMARY OF ARGUMENT

ALDF has standing to bring this suit under any standard, but particularly in light of the D.C. Council's directive that organizational standing under the CPPA be construed expansively so that organizations can act as private attorneys general to prevent exploitation of D.C. consumers. *See*, *e.g.*, D.C. Code §§ 28-3905(k)(1)(C)-(D). ALDF can so show even under the artificially limited facts recognized as undisputed by the lower court (and ignoring the remainder of the record). Moreover, the "sham affidavit" doctrine, on which the lower court relied to narrow the record, has no place here. It was also unquestionable error for the lower court to entirely ignore yet other relevant evidence. In light of the full record, ALDF has standing, or at the very least, raises a genuine dispute of fact.

The lower court's preemption analysis must likewise be reversed. Indeed, given its standing analysis, the lower court should not have reached the issue at all, but was further incorrect in its outcome. As both a federal and state trial court initially held, the District can regulate meat advertising under the CPPA because the federal government only approves meat labels. The federal food labeling scheme does not speak to what can be false or misleading in advertisements, nor

does it provide any approval for food companies to use claims outside their labels. Therefore, there is no conflict between federal meat and poultry labeling statutes and long-established state consumer protection laws. In holding otherwise, the lower court ignored the two "cornerstones" of preemption—that courts must employ a presumption *against* preemption, and find a law preempted only if it is clear Congress wished to displace state laws. *See Wyeth*, 555 at 565.

VII. ARGUMENT

A. ALDF Has Standing To Pursue Its CPPA Claims.

i. The CPPA Establishes ALDF's Standing.

In 2012 the D.C. Council amended the CPPA explicitly to grant organizations like ALDF standing to pursue actions on behalf of themselves, their members, consumers *or* the general public. In holding that ALDF lacked standing, the lower court erred in two critical ways. First, it ignored the clear legislative command that D.C. Code § 28-3905(k)(1)(D) provides a distinct avenue for "public interest organization" standing, apart from federal Article III standing. And second, it found ALDF is not a "public interest organization," despite contrary uncontested facts the court accepted as true.

a. The 2012 Amendments Explicitly Broadened Organizational Standing to Pursue CPPA Actions.

The D.C. Council's 2012 CPPA amendments enable ALDF to proceed. In 2011, the Court stated, "the CPPA retains our injury-in-fact standing requirement,"

because "the Council of the District of Columbia did not disturb or override our constitutional standing requirement in amending the CPPA in 2000[.]" *Grayson v. AT&T Corp.*, 15 A.3d 219, 224; 232, at *29 (D.C. 2011). This Court emphasized that there was no "mention of this court's constitutional standing requirement" in either the D.C. Council committee reports on the 2000 amendments or the tapes of the related committee hearings, and thus there was nothing to override the Court's traditional reliance on federal Article III standing jurisprudence. *Id.* at 243. Nonetheless, the Court invited the legislature to be "explicit" in any intention to affect the standing inquiry under the CPPA.[1] *Id.* at 238. The following year, the D.C. Council did exactly that.

As the October 11, 2012 testimony before the Committee on Public Services & Consumer Affairs (the "Committee"), reflecting an early version of the proposed amendments, demonstrates, the 2012 amendments were intended to expand standing for non-profit, public interest firms to bring CPPA claims in D.C. courts. The National Consumers League, which frequently seeks to remove false advertising from the D.C. marketplace, testified, "[t]he amendment to Section 28-3905(k)(1)(B) and (C) here expresses the clear intent of the Council to grant

[1] *Grayson* acknowledged that, having been established pursuant to Article I, D.C. courts "are not bound by the requirements of Article III." *Grayson*, 15 A.3d at 233, 235-39. Furthermore, Judge Ruiz, in dissent, made clear that the D.C. Council "may eliminate the basic [Article III] injury-in-fact requirement." *Id.* at 259-60.

nonprofit organizations standing under the CPPA without the need to suffer an injury-in-fact to itself or its members and to legislatively and partially overrule *Grayson*." A229 (Report on Bill 19-0581 of the Committee on Public Services and Consumer Affairs (Nov. 28, 2012) ("Alexander Report"), at 44). The Center for Science in the Public Interest testified that the amendments "would aid in consumer protection by clarifying the Council's intent to eliminate the court-imposed requirement that a plaintiff suffer injury-in-fact to have standing to bring a claim under the DC CPPA." A207 (*id.* at 22).

The D.C. Attorney General initially argued against the amendments because they would do away with *all* constitutional standing requirements, stating, "by dispensing with normal standing requirements when certain nonprofit organizations bring CPPA cases on behalf of the general public, Bill 19-581 would compel the Court of Appeals to…(1) follow the law and depart from the so-called 'constitutional standing requirement,' or (2) adhere to the standing requirement and strike down the 'third prong' of [the amendments to standing]." A223 (*id.* at 38).

Following the October 11 hearing, the Committee incorporated suggestions from the testimony—including traditional injury-in-fact analysis as *one* avenue to establish organizational standing, *see* D.C. Code § 28-3905(k)(1)(C)—but provided other additional avenues to satisfy standing in the District's courts. A186-87 (*id.* at 1-2). According to the Committee, the amendments created several paths

to organizational standing not previously recognized by the courts and were intended as a direct response to the "chilling effect" of *Grayson* on litigation by non-profit and public interest organizations. As the Committee stated, "Bill 19-581 clarifies that non-profit organizations and public interest organizations may act as private attorneys general for the public under circumstances that ensure the organization has a sufficient stake of its own to pursue the case with appropriate zeal," which include avenues that "satisfy the prudential standing principles for non-profit and public interest organizations acting as private attorneys general," and *also* "*other approaches* that rely on *different means* of ensuring a sufficient stake in the outcome of the case." A187 (*id.* at 2 (emphasis added)); *see also* A189 (*id.* at 4 ("The bill responds to *Grayson* by being more explicit about what kinds of suits the Council intends to authorize.")). Bill 19-0581 passed as amended, and organizational standing under the CPPA was broadly expanded.

Specifically, D.C. Code § 28-3905(k)(1)(D), which enacts the D.C. Council's grant of "maximum" standing, A191 (*id.* at 6), empowers any "public interest organization"—"a nonprofit organization that is organized and operating, in whole or in part, for the purpose of promoting interests or rights of consumers[,]" § 28-3901(a)(14)—to bring a CPPA action to protect D.C. consumers so long as the organization demonstrates a sufficient stake in the action. Section (k)(1)(D) states, "a public interest organization may, on behalf of the

interests of a consumer or a class of consumers, bring an action seeking relief from the use by any person of a trade practice in violation of a law of the District if the consumer or class could bring an action under subparagraph (A) of this paragraph for relief from such use by such person of such trade practice." Subparagraph A provides, "A consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District." *Id.* § 28-3905(k)(1)(A). Subsection (k)(1)(D)(ii) goes on to state that a public interest organization can proceed unless the court determines the "organization does not have sufficient nexus to the interests involved of the consumer or class to adequately represent those interests." This text tracks the Committee's state purpose for (k)(1)(D):

> New subsection (k)(1)(D) responds most directly to *Grayson* and to the Committee's desire to explicitly state the maximum of the Council's intentions for maximum standing in enacting the 2000 amendments to the CPPA. Subparagraph (D) is intended to reach, for persons who qualify as public interest organizations under section 3901(a)(15), the full extent of standing as may be recognized by the District of Columbia courts. This…*may include bases for standing that the D.C. courts have not yet had occasion to recognize at all…*
> Subparagraph (D) is intended to explicitly and unequivocally authorize the court to find that a public interest organization has standing beyond what would be afforded under subparagraphs (A)-(C), beyond what would be afforded under a narrow reading of prior DC court decisions, and beyond what would be afforded in a federal case under a narrow reading of prior federal court decisions on federal standing.

A191 (Alexander Report at 6 (emphasis added)). As federal courts have acknowledged, (k)(1)(D) is intended to, and does, recognize organizational standing distinct from Article III. *See, e.g.*, *Beyond Pesticides v. Dr. Pepper*

Snapple Grp., Inc., No. CV 17-1431, 2019 WL 2744685, at *2 (D.D.C. July 1, 2019) (drawing distinction between Article III and what "works in the District of Columbia's courts" under CPPA).

Without distinguishing whether it was referring to (k)(1)(C)—which allows an organization to proceed based on traditional standing—or (k)(1)(D), and perhaps impermissibly combining the two, the lower court relied on four cases in support of its contention that the 2012 amendments to the CPPA did not change traditional organizational standing analysis. A108 (Order at 11). Yet each case was brought by an individual, not an organization, and thus this Court had no occasion to opine on organizational standing under (k)(1)(C) or (D).[2] The general practice of D.C. courts following Article III is not at issue here, where the question is how the 2012 amendments contextualized and "expanded" CPPA standing for organizations. *See Stone*, 120 A.3d at 1289 n.10.

The lower court ignored these questions and treated § 28-3905(k)(1)(D) as requiring Article III standing, in direct conflict with the D.C. Council's explicit

[2] *See Stone v. Landis Constr. Co.*, 120 A.3d 1287, 1289 n.10 (D.C. 2015) (recognizing 2012 amendments expanded standing and were "designed to explicitly permit non-profit and public interest organizations…to bring suit under the CPPA"); *Little v. SunTrust Bank*, 204 A.3d 1272, 1275 (D.C. 2019) (holding routine litigation costs were not a basis for an individual's standing); *Vining v. Executive Bd. of Health Benefit Exch. Auth.*, 174 A.3d 272, 278-79 (D.C. 2017) (addressing individual standing in non-CPPA case); *Floyd v. Bank of Am. Corp.*, 70 A.3d 246, 251 (D.C. 2013) (addressing standing only as to individual plaintiffs).

instruction, the legislative history, and the statute's text. A110 (Order at 13). Indeed, the court treated sections (k)(1)(C) and (D) as indistinguishable and overlapping, ignoring this Court's directive to "construe each provision of the" CPPA so as not to "render[] any provision superfluous." *Grayson*, 15 A.3d at 245 (cleaned up); *see Barnhardt v. D.C.*, 8 A.3d 1206, 1212 (D.C. 2010).

b. As a Public-Interest Organization With a Sufficient Nexus to the Consumers Targeted by Hormel's Misleading Natural Choice Ads, ALDF Has Standing Under D.C. Code § 28-3905(k)(1)(D).

Even based only on the facts acknowledged as undisputed by the lower court, ALDF demonstrated that it has standing to pursue its claims under (k)(1)(D). In a section of its opinion nearly devoid of citation to facts or law, the lower court found that, while "[s]ection 28-3901(a)(15) defines 'public interest organization' as 'a nonprofit organization that is organized and operating, in whole *or in part*, for the purpose of promoting interests or rights of consumers[,]'" (emphasis added), ALDF "is organized and operating to promote not the interests and rights of the consumers of Hormel meat products, but rather those of the consumed." A110 (Order at 13). This ignores the Court's *own* accepted undisputed facts that ALDF protects animals by "operating … in part for the purpose of promoting the interests and rights of consumers" and "fulfills its mission" in part "through public outreach, including educating consumers about the conditions and practices of factory farming," A105 (*id.* at 8), bringing ALDF within the plain text of the statute.

The lower court further ignored additional evidence ALDF offered demonstrating innumerable ways, spanning years, in which ALDF has striven to vindicate consumers' right to truthful information about animal products, with the belief that doing so will promote more humane purchasing. A818-25 (Hormel MSJ Ex. E, ALDF response to Interrogatory No. 35); A342-56 (Hormel MSJ Ex. B, ALDF supplemental response to Interrogatory No. 3); A260-63, A265 (Decl. of Carter Dillard ISO ALDF's MSJ, ¶¶ 6-15, 21); A267-68 (Decl. of Elizabeth Putsché ISO ALDF's MSJ, ¶¶ 4, 6-10); A273-75, A279 (Decl. of Mark Walden ISO ALDF's MSJ, ¶¶ 8-10, 13, 26); A1147-68 (ALDF MSJ Ex. 187-190, ALDF letter to FDA, press releases, and media article); A1192-98 (ALDF Reply in Support of MSJ Ex. 243-244, ALDF website posting and Huffington Post blog).[3]

These facts, undisputed by Hormel, and ignored evidence also demonstrate ALDF's "sufficient nexus" to the interests of the consumers targeted by Hormel, so that ALDF clearly complies with § 28-3905(k)(1)(D)(ii). ALDF was aware consumers could construe Hormel's claims as reflecting humane production practices, which was why ALDF worked to expose misleading "natural" meat and poultry claims in its regulatory and public advocacy, and Hormel's ties to cruel and unnatural factory farms, before bringing this suit. A105-6 (Order at 8-9). And sure

[3] The lower court's striking several of ALDF's witnesses' declarations as "sham affidavits" was absolute error meriting reversal. *See § VII.A.ii.d.*, *infra.*

enough, ALDF's fears were proven by Hormel's own analysis of its advertising's effects. *See § IV.A., supra*; *see also Organic Consumers Ass'n v. Bigelow Tea Co*., 2018 D.C. Super. LEXIS 11, *5 (D.C. Super. Oct. 30, 2018) (finding "Plaintiff's mission and work of protecting consumers through promoting accurate labeling of consumer goods shows sufficient nexus to satisfy § 28-3905(k)(1)(D)(ii).").

ALDF accurately predicted and took steps to combat the harm D.C. consumers are suffering, culminating in this lawsuit. Section 28-3905(k)(1)(D) was designed for ALDF to do exactly that. Therefore, it can proceed.

ii. ALDF Further Has Article III Standing.

Even if the Court were to find that D.C. Code § 28-3905(k)(1)(D) does not establish ALDF's standing, the lower court's decision merits reversal because ALDF *also* demonstrated its standing under Article III.[4] ALDF proved an (1) injury in fact, that is (2) fairly traceable to the challenged action, and (3) likely to be redressed by a favorable ruling, *Grayson*, 15 A.3d at 246, particularly in light of the instruction that standing for organizations proceeding under § 28-3905(k)(1)(C) be recognized "to the fullest extent recognized by the D.C. Court of Appeals in its past and *future* decisions[,]" A190 (Alexander Report at 5 (emphasis added)). ALDF demonstrated its diversion of resources to counteract Hormel's illegal

[4] In this manner, ALDF also falls within §28-3905(k)(1)(C), providing, among other things, that an organization can proceed using traditional Article III standing.

conduct, which "frustrate[d]" the organization's mission by, for example, making its advocacy and educational efforts less effective. *Equal Rights Ctr.*, 110 A.3d at 602-04 (citing *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379, 102 S.Ct. 1114 (1982)) ("Generally, when an organization is forced to divert resources to counteract the effects of another's unlawful acts, it has suffered a sufficiently concrete injury to bestow standing."); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (Bader Ginsburg, J.).

ALDF has standing so long as there is a "direct conflict between the defendant's conduct" against which it diverted resources and the organization's "substantive mission," or, in other words, the organization's mission is not merely "neutral" with regard to the challenged unlawful conduct. *D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins., Sec. & Banking*, 54 A.3d 1188, 1209 (D.C. 2012) (quotation marks omitted). Most relevant here, when Hormel's misleading claims threaten to "undo" ALDF's dogged work to empower consumers with "truthful information," ALDF has standing to pursue a CPPA claim on behalf of itself and the general public. *Id.* at 1208; D.C. Code § 28-3905(k)(1)(C); *see also* A190 (Alexander Report at 5).

a. The facts recognized as undisputed by the lower court establish ALDF has been injured by Hormel's ads.

Even the abridged facts accepted as undisputed by the lower court show that ALDF suffered the minima of injury required for standing, i.e., that ALDF

"divert[ed] resources to counteract the effects of [Hormel]'s unlawful acts, [and therefore] suffered a sufficiently concrete injury to bestow standing." *Equal Rights Ctr.*, 110 A.3d at 603 (citing *Havens Realty,* 455 U.S. at 379). The lower court stated it is undisputed that:

- ALDF is a non-profit organization that "fulfills its mission," in part, "through public outreach, including educating consumers about the conditions and practices of factory farming." A105 (Order at 8).
- "ALDF believes that providing consumers with accurate information about factory farming conditions and practices will reduce consumer demand for factory-farmed products." *Id.*
- "ALDF became aware of and started working against Hormel's 'Make the Natural Choice' advertising campaign in 2015." A106 (*id.* at 9).
- "In May 2016, ALDF advocated to the [FDA] and USDA to prohibit the use of the term 'natural' on labels of products that are 'factory farmed,' including Hormel's Natural Choice products," and ALDF publicized this advocacy. *Id*.
- "In May 2016, ALDF publicized an undercover investigation of a pig breeding facility in Nebraska, identifying Hormel as one of the breeder's largest customers." *Id*.

ALDF spent significant funds and hours of staff time to educate consumers that Hormel's products are from unsanitary, cruel, and unnatural factory farms, at least in part to counteract Hormel's misleading statements, establishing its injury.

Yet more specifically, the record shows ALDF devoted time and resources to researching Hormel's claims and production practices, and then explained to FDA that Hormel's "100% Natural" claims are a prime example of misleading "natural" marketing. *Id.* ALDF diverted additional resources to publicize its comments, broadly disseminating its message about misleading "natural" claims.

Id. ALDF then discovered that Hormel was a chief customer of The Maschhoffs, a factory farming pig breeding company that ALDF had investigated. *See id.* Thus, ALDF devoted further resources to highlight that Hormel manufactures meat from this factory farm because ALDF believed informing consumers about Hormel's production methods would affect purchasing. *See* A105-6, 115 (*id.* at 8-9; 18).

ALDF's injury is no different than others this Court has found establish standing. *See Equal Rights Ctr.*, 110 A.3d at 604 (noting that "on several occasions [this Court held] that organizations have standing to challenge unlawful practices they oppose, provided the practices burden them in a sufficiently specific way"). For example, in *Molovinsky v. Fair Employment Council*, the plaintiff organization established injury-in-fact when it "had to increase its counseling … and its educational efforts to counteract the negative message sent to the public by [the defendant's] conduct. 683 A.2d 142, 147 (D.C. 1996). Just as Molovinsky's conduct led the plaintiff organization to devote resources to counteract that defendant's message and to reinforce the plaintiff's advocacy, ALDF diverted resources to counteract Hormel's messages that tell consumers its Natural Choice products are something they are not—*i.e.*, that they are "natural" and superior to factory farmed products—education ALDF believes will move consumers away from factory-farmed meat. *See* A105-6 (Order at 8-9). Despite the D.C. Council's intent that even under § 28-3905(k)(1)(C) organizations have standing to the

"fullest extent" of the case law, the lower court ignored on-point precedent.

Moreover, the lower court erred in holding that ALDF's "advocacy" efforts—its work to change how FDA and USDA treat "natural" claims—can never count as the diversion of resources establishing Article III standing. A114-5 (*id.* at 17-18). The cases on which the lower court relied for that proposition concern organizational expenditures *in anticipation of litigation*, not as advocacy. *See Equal Rights Ctr.*, 110 A.3d at 605. Indeed, the primary authority on which the lower court relied explains an organization could not lobby the government against a policy and then use that lobbying to justify litigation *against that agency* concerning the same policy, because this is not different than relying on expenditures for "litigation or administrative proceedings." *Turlock Irr. Dist. v. F.E.R.C.*, 786 F.3d 18, 24 (D.C. Cir. 2015). But ALDF is not relying on its lobbying to bring a suit against the lobbied agency; it is relying on lobbying before agencies to bring suit against a private party. *See, i.e.*, *Animal Legal Def. Fund v. Great Bull Run, LLC*, No. 14-CV-01171-MEJ, 2014 WL 2568685, at *2, 4 (N.D. Cal. June 6, 2014) (finding ALDF's standing when Defendants' acts perceptibly impaired its outreach efforts and in response, ALDF diverted resources to lobbying state agencies and local officials about the Great Bull Run); *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 189 F. Supp. 3d 1327, 1338 (S.D. Fla. 2016), *aff'd sub nom. People for Ethical Treatment of Animals, Inc. v.*

Miami Seaquarium, 879 F.3d 1142 (11th Cir. 2018) (finding PETA's standing at summary judgment stage where, in response to Defendant's mistreatment of captive orca, it diverted resources to federal regulatory advocacy, which impaired PETA's mission).[5] Indeed, contrary to the cases cited by the lower court, the facts the court recognized as undisputed make clear ALDF did not manufacture an injury for this case. ALDF began working against Hormel's false claims in 2015 and continued that work after the litigation was filed, including sustained public outreach regarding Hormel's mistreatment of pigs as revealed in ALDF's undercover investigation.

The lower court also mischaracterized ALDF's work as done in response to "the type of abstract concern that does not impart standing." A114 (Order at 17 (citing *Food & Water Watch, Inc v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015))).[6] While an organization must show that the challenged conduct does more than "mere[ly] frustrat[e]" its general societal goals, when a defendant's conduct "would undo the dogged and concrete work that [the organization] has undertaken"

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[5] *See also Organic Consumers Ass'n v. Hain Celestial Grp., Inc.*, 285 F. Supp. 3d 100, 102–03 (D.D.C. 2018) and *People for the Ethical Treatment of Animals, Inc. v. Dade City's Wild Things, Inc.*, No. 8:16-CV-2899-T-36AAS, 2018 WL 7253076, at *3 (M.D. Fla. Oct. 10, 2018) (finding similar injuries).

[6] *Food & Water Watch* is entirely distinct, as the plaintiff there had not yet expended *any* resources as a result of the misconduct; the allegation was that it "will spend resources." *Food & Water Watch*, 808 F.3d at 921. The D.C. Circuit logically concluded the organization could not establish its "activities ha[d] been perceptibly impaired in any way" because it had not yet undertaken them. *Id.*

to further its mission, that is cognizable harm. *D.C. Appleseed*, 54 A.3d at 1207-08; *Friends of Tilden Park, Inc. v. D.C.*, 806 A.2d 1201, 1207 (D.C. 2002). Hormel does not simply harm ALDF by harming animals; Hormel thwarts ALDF's specific consumer education efforts about factory farming, making ALDF's diversions of resources in response an injury-in-fact. *See Spann*, 899 F.2d at 27 (illegal advertising requiring organization "to devote more time, effort, and money" to education efforts to counteract defendant's message established standing).

1. Hormel's Conduct and ALDF's Mission Are at Loggerheads.

The lower court further misapplied the law and discounted facts it recognized as undisputed to find that Hormel's unlawful conduct does not conflict with ALDF's mission. As explained above, the "direct conflict" requirement ensures the proper connection between the plaintiff's mission and the challenged conduct, so that frustration of the plaintiff's mission-driven activities is not speculative. *D.C. Appleseed*, 54 A.3d at 1209; *see also Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011) ("*ASPCA*"). Under the lower court's undisputed facts, ALDF's mission and goals include empowering consumers with truthful information about factory farming to raise consumer awareness and reduce demand for these products. A105 (Order at 8). ALDF (accurately) believes Hormel's "Make the Natural Choice" advertising increases demand for such products via misleading messaging and ALDF has

worked to counteract its effects, which directly conflicts with and frustrates ALDF's mission. *See* A105-06 (*id.* at 8-9).

ALDF has suffered an injury-in-fact. Indeed, courts have found ALDF had standing in analogous scenarios. *See*, *i.e.*, *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 223 F. Supp. 3d 1008, 1017-18 (C.D. Cal. 2016); *Great Bull Run,* 2014 WL 2568685 at *4-5; *Animal Legal Def. Fund v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270, 1282-83 (2015).

b. The lower court's undisputed facts establish ALDF's injury is traceable to Hormel's misconduct.

Contrary to the lower court's ruling, the facts it acknowledged as undisputed establish ALDF's injury is "fairly traceable" to Hormel's misleading Natural Choice advertisements. *See Grayson*, 15 A.3d at 246. When an organization's injury stems from its expenditure of resources to counteract misconception to which the defendant contributed, the organization's injury is traceable to the defendant. *See*, *e.g.*, *ASPCA*, 659 F.3d at 27-28; *Spann*, 899 F.2d at 27. Courts "focus[] on whether [an organization] pundertook the expenditures in response to, and to counteract, the effects of" the defendant's illegal conduct. *Equal Rights Ctr.*, 633 F.3d at 1136. In *Spann*, upon finding that the defendant's advertising depicting only white people could foster the misconception that "segregation in housing is legal, thus facilitating discrimination by defendants or other property owners," the court found that such advertising "requir[ed] a consequent increase in the

[plaintiff] organizations' educational programs on the illegality of housing discrimination," making their advocacy traceable to the defendant's behavior. 899 F.2d at 27; *see also Molovinsky*, 683 A.2d at 147 (plaintiff had standing because it "had to increase its counseling . . . and its educational efforts to counteract the negative message, sent" by defendant's conduct). Here, Hormel's marketing of its Natural Choice products contributed to misconceptions about those products and the manner in which the animals were raised. *See § IV.A, supra*. Thus, ALDF's court-recognized undisputed diversion of resources to counteract the misconceptions is fairly traceable to Hormel's misconduct.

The lower court ironically made a distinction between labeling and advertising, holding ALDF's activities were not traceable to Hormel's misleading advertisements because one of ALDF's diversions of resources focused on the Natural Choice labeling claims rather than the "natural" claims in Hormel's ads. A114 (Order at 17). But, even though this would not vitiate traceability, as the lower court *also* found, ALDF expended additional resources to publicize its comments, A106 (*id.* at 9), to call greater attention to misleading "natural" claims.

Moreover, the relevant question is whether the misleading ads contributed to ALDF's diversion of resources, not (as the lower court suggested, *see* A112-13 (*id.* at 15-16)) whether ALDF counteracted them in a particular manner. Traceability is not tort causation; it does not require proximate cause. "[H]arms that flow indirectly from the action in question can be said to be 'fairly traceable' to that

action for standing purposes." *Rothstein v. UBS AG*, 708 F.3d 82, 92 (2d Cir. 2013) (cleaned up, collecting cases). The lower court questioned whether ALDF "conducted the undercover investigation of a pig breeder for the purpose of counteracting Hormel's advertisements," but that is beside the point; no one disputes ALDF designed its public relations effort for the investigation to emphasize to consumers that the conditions ALDF uncovered reflect *Hormel's* treatment of animals, A115 (Order at 18), which showed that Hormel's products are not "natural."

ALDF's diversion of its resources to activities designed to "counteract the effects of" Hormel's misleading advertisements is "fairly traceable" to Hormel's misleading Make the Natural Choice ads. *Equal Rights Ctr.*, 110 A.3d at 605-06.

c. The undisputed facts recognized by the lower court establish ALDF's injury will be redressed by the relief sought here.

An injunction that stops Hormel from using misleading advertising claims for its Natural Choice products is "likely to [] redress[]" the injury ALDF has suffered. *Grayson*, 15 A.3d at 246. For redressability, ALDF need only show "a substantial probability that [its] requested" remedies would "alleviate," or lessen, its injury. *D.C. Appleseed*, 54 A.3d at 1203.

Under the facts recognized as undisputed by the lower court, stopping Hormel from disseminating misleading advertising to consumers about its products

would decrease the amount of false information about factory-farmed meat that ALDF must work against, reducing its diversion of resources. *See id.* In fact, ALDF seeks not only an injunction, but corrective advertising, in which Hormel would inform consumers about its misrepresentations, further alleviating the need for ALDF to counteract Hormel's messages. A64 (Complaint at 41). The lower court did not consider the benefit that would flow from that relief at all.

The lower court held an injunction would not redress ALDF's harm because ALDF is not also seeking an injunction against Hormel's "natural" *label* claims, and thus the injunction would not lead ALDF to cease its work altogether. A116-7 (Order at 19-20). But there is no support for the proposition that an organization's ongoing dedication to combatting a problem means that an injunction stopping part of the harm does not redress the injury. *See Humane Soc'y of U.S. v. United States Postal Service*, 609 F. Supp. 2d 85, 92 (D.D.C. 2009). As with any case, a remedy need not be complete to be sufficient. *See, e.g.*, *Calderon v. Moore*, 518 U.S. 149, 150 (1996) ("partial remedy" sufficient for standing).

The lower court's contrary holding also ignores the CPPA's text and legislative history demonstrating that relief can be sought on behalf of and to benefit the general public. In *Grayson*, the consumer plaintiff, having purchased and used defendant's calling cards, which he alleged were misleadingly marketed, sought an injunction and statutory damages. *Grayson*, 15 A.3d at 250. This Court

found that "the very design of the CPPA's injunctive remedy serves to sufficiently redress the alleged threatened statutory injury." *Id.* Grayson was not required to show that he would personally benefit from the injunction. As here, Grayson could seek such relief because his fellow D.C. consumers would benefit from the cleansing of the marketplace. *See id.*

d. ALDF's standing is confirmed by its declarations the lower court wrongly labeled "sham affidavits."

The lower court's decision is also erroneous because it relied on the "sham affidavit" doctrine to ignore the declarations of two ALDF witnesses, thereby creating an artificially sparse record to underlie its decision. It excluded unspecified portions of the declarations of Mark Walden, ALDF's Chief Programs Officer and corporate witness, and Carter Dillard, ALDF Senior Policy Advisor, by "exceed[ing] the permissible limits of use of" the sham affidavit doctrine. *See Hinch*, 814 A.2d at 931. Had the court properly considered ALDF's evidence, granting Hormel summary judgment on standing would have been impossible.

1. The Sham Affidavit Doctrine.

On summary judgment, courts may disregard a declaration under the "sham affidavit doctrine" only when, after viewing the declaration in the light most favorable to the non-movant, it "contradicts prior *deposition testimony* without adequate explanation and creates only a sham issue of material fact." *Destefano v. Children's Nat. Med. Ctr.*, 121 A.3d 59, 70 (D.C. 2015) (emphasis added, cleaned

up); *Hinch*, 814 A.2d at 929-30. "[T]here must be a clear and explicit contradiction between what is said *at the deposition* and what is said in the affidavit," and the purportedly inconsistent prior testimony must be clear and unambiguous. *Hinch*, 814 A.2d at 930-31 (emphasis added); *see also Tippens v. Celotex Corp.*, 805 F.2d 949, 954 (11th Cir. 1986). The doctrine allows courts to exclude statements made by the witness for whom there is a conflict; not to "preclude the introduction of testimony from other witnesses that is arguably inconsistent with a plaintiff's deposition testimony." *Quest Integrity USA, LLC v. Cokebusters USA Inc.*, 924 F.3d 1220, 1233 (Fed. Cir. 2019) (cleaned up).

2. Walden's declaration is not a sham.

Walden's declaration should not have been excluded because it is *consistent* with his deposition testimony. The lower court repudiated Walden's declaration as part of its discussion of whether there is a "direct conflict" between ALDF's mission and Hormel's misconduct. A111 (Order at 14). Walden's testimony in his declaration, however, is nearly identical to that in his deposition.[7] The lower court

[7] *Compare* A274 (Walden decl. ¶ 10) ("ALDF's mission…runs directly counter to, and is materially impeded by, the false and misleading advertising of factory-farmed meat and poultry products as 'natural' and other claims which imply the product is superior to factor[y] farmed ones, and in particular by Hormel's Make the Natural Choice advertising campaign."), *with* A1184 (Walden Dep. at 27:14-25) ("[G]oing to the core of [ALDF's] mission is transparency and truth in advertising and dissemination of accurate information. So to the extent there are false and misleading statements propagated that encourage reasonable customers to procure product under misleading circumstances, that increases artificially, or even

insisted there was no conflict because ALDF (accurately) stated in its *objections* to an interrogatory that Hormel's "Product Claims"—that is, the mere word "natural" and the like—standing alone, do not conflict with ALDF's mission. Yet, in harmony with Walden's declaration, that same interrogatory explains: "In furtherance of its mission, ALDF…fight[s] efforts to hide and advocat[es] for the truth about factory farming and educat[es] the public about its broad ill effects…Hormel's Natural Choice advertisements, promoting factory-farmed products with false and deceptive claims that such products are 'natural,' frustrate these efforts." *Compare* A288-89 (Hormel MSJ Ex. A, ALDF Response to Interrogatory No. 1, at 5-6) *with* A274 (Walden decl. at ¶ 10).

The lower court apparently believed that because neither the interrogatory response nor Walden used the magic words "direct conflict" to describe how Hormel's conduct thwarts ALDF's activities, A110-13 (Order at 13-16), Walden's declaration cannot be used to explain ALDF's objectives and activities that demonstrate a "direct conflict." That does not create an inconsistency, let alone the "clear and explicit contradiction" the sham affidavit doctrine requires. *Hinch*, 814 A.2d at 931.[8]

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fraudulently, demand for product that goes through an abusive, inhumane, and unsanitary process, that does frustrate Animal Legal Defense Fund's mission.").

[8] In fact, ALDF objected to this interrogatory to the extent it called for ALDF to agree to the standards for the standing analysis. A288 (ALDF Response to Interrogatory No. 1, at 5)

3. Dillard's declaration is not a sham.

Excluding any part of Dillard's declaration—which elaborated on how ALDF worked against Hormel to combat the harm to ALDF's mission, draining its resources—was the clearest of errors because Dillard was never deposed. Thus, there can be no contradiction between any prior and subsequent testimony. *See Quest Integrity*, 924 F.3d at 1223 ("sham affidavit" doctrine cannot apply to arguably inconsistent evidence from other witnesses); *Nelson v. City of Davis*, 571 F.3d 924, 928 (9th Cir. 2009) (same). The lower court failed to cite a single case—and ALDF can find none—in which a reviewing court upheld the exclusion of a witness's declaration based on the deposition testimony of a different witness. *See Crawford v. Franklin Credit Mgmt. Corp.*, 758 F.3d 473, 482 (2d Cir. 2014) (concern of "sham" issue of fact alleviated when testimony "contradicted by evidence other than the deponent's subsequent affidavit" (cleaned up)). Regardless, there is no conflict between Dillard's declaration describing ALDF's mission-driven work against Hormel and ALDF's other testimony and evidence.

4. Improper exclusion mandates reversal.

If, as here, a court impermissibly excludes declarations, its decision must be vacated. *See, e.g.*, *Hinch*, 814 A.2d at 927. That remedy is especially appropriate, as Walden and Dillard's declarations further make clear ALDF's standing. As far back as 2004, Dillard explained, he concluded that when meat companies like

Hormel "misleadingly advertis[e] meat products as more humanely and responsibly produced than they actually are," this harms conscientious consumers and hinders ALDF's work. A260-61 (Dillard decl. ¶¶ 6-7). Therefore, both declarants stated that they concluded ALDF should work against Hormel's false and misleading advertising. A274-75 (Walden decl. ¶¶ 10-12); A261 (Dillard decl. ¶ 8). Both catalogued the diversion of resources that followed, identifying mission-driven activities ALDF forewent as a result. A275-78 (Walden decl. ¶¶ 13-17, 20); A261-65 (Dillard decl. ¶¶ 9-14, 18-19 (citing concrete monetary expenditures)).[9]

These declarations alone are more than sufficient to show a "minima of injury in fact" traceable to Hormel's falsehoods and redressable by the relief sought here. *See Floyd*, 70 A.3d 246. They certainly prevent summary judgment.[10]

e. Additional evidence the lower court failed to consider further establishes ALDF's standing.

Finally, while it cited the declaration of Elizabeth Putsché, ALDF's

[9] In light of the declarations' record citations, the Court's statement that the declarations were "conclusory" and lacked documentary evidence was incorrect.
[10] The lower court stated that because ALDF's Executive Director Wells did not immediately recall at his deposition, "Hormel-related activities" from two years earlier, as a matter of law this established "any work that specifically responded to Hormel's marketing was not significant enough to ALDF's mission to warrant his attention." A113 (Order at 16). However, Wells, whose chief responsibilities are liaising with ALDF's board and fundraising, testified he lacked knowledge of even ALDF's *present* day-to-day activities across eight departments and more than 60 employees. *See* A281 (Wells decl. ¶ 4-5 (submitted with ALDF's Opp. to Hormel's MSJ, and originally in support of ALDF's Motion for a Protective Order)).

Associate Director of Communications, in its explicit findings of undisputed fact, the lower court similarly went on to ignore these very facts to deny ALDF's standing. For example, although Ms. Putsché personally engaged in ALDF's outreach to connect its pig breeding investigation to Hormel because "Hormel is a household name, and ALDF wanted to provide information to the public about the treatment and living environments of pigs raised for Hormel's products to empower consumers to" alter their "purchasing decisions," A268 (Decl. of Elizabeth Putsché ISO ALDF's MSJ ¶ 9), the lower court suggested the isolated phrase "Hormel is a household name" somehow *undermines* ALDF's standing. A115 (Order at 18).[11] And belying the court's claim that ALDF's Hormel-oriented diversions of resources were insignificant, Putsché explained the work educating the public about Hormel's production practices lasted "for weeks" after the release of the investigation. A268-69 (Putsché decl., ¶¶ 10-11) (identifying specific costs).

Declarations such as this, made under penalty of perjury, are evidence required to be considered in assessing a motion for summary judgment, unless properly found to be inadmissible. D.C. R. Civ. P. 56(c)(1)(A); *Wallace v. Eckert,*

[11] Ms. Putsché's statements are also consistent with her deposition testimony: "In providing information to the public for education purposes, we want the information to be as relatable as possible, and for people to identify how it may be impacting the products they purchase." A1202-3 (Putsché depo. 151:22-152:1).

Seamans, Cherin & Mellott, LLC, 57 A.3d 943, 949 (D.C. 2012).[12] Therefore, based on the record before the court, ALDF's standing was established.

B. ALDF's False Advertising Claims Are Not Preempted.

The lower court also wrongly held ALDF's false advertising claims preempted by federal meat and poultry labeling laws.[13] Although it accurately noted the PPIA and FMIA do not apply to advertisements, it stated—without citation to any authority—that state regulation of meat ads would conflict with what (the court speculated) Congress wished to accomplish through regulating meat labels. This is not how preemption works. Our federalist system demands that preemption only exists where Congress intends to set aside state law.

i. Preemption Analysis.

"Courts have identified three ways in which … federal law may preempt state law." *Murray v. Motorola, Inc.*, 982 A.2d 764, 771 (D.C. 2009). There is (1) "[e]xpress pre-emption where statutory language reveals an explicit congressional

[12] The two cases the lower court cited to support its sweeping rejection of ALDF's evidence are easily distinguishable. In *Mokhtar v. Kerry*, "self-serving statements" were "rendered unreasonable given other undisputed evidence in the record," which does not exist here. *See* 83 F. Supp. 3d 49, 74 (D.D.C. 2015). In *Montgomery v. Risen*, the issue was not what could substantiate standing; instead, in a defamation case, the plaintiff sought to establish the defendant's "actual malice" entirely through the plaintiff's assertions, which, unsurprisingly, was rejected. 197 F. Supp. 3d 219, 262 (D.D.C. 2016).

[13] Because the lower court held that ALDF lacked standing, under its ruling, it lacked jurisdiction to make its subsequent determinations regarding preemption and sanctions, and those decisions can be vacated on that ground alone.

intent to pre-empt state law;" (2) "[c]onflict preemption" "where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress;" and (3) "field preemption" "when federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Id.* (cleaned up).[14]

No matter the type of preemption, the Supreme Court has made clear the analysis "must be guided by two cornerstones": (1) "the purpose of Congress is the ultimate touchstone"; and (2) "particularly in those [cases] in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565 (cleaned up). This Court has elaborated that the second "cornerstone" guides the first, requiring judges to construe any preemptive intent and its scope narrowly. *Traudt v. Potomac Elec. Power Co.*, 692 A.2d 1326, 1332 (D.C. 1997). Moreover, regulation of advertising traditionally has been within the purview of the states, making the presumption against preemption particularly strong. *See Farm Raised Salmon Cases*, 175 P.3d 1170, 1176 (Cal. 2008) ("Laws

[14] Hormel did not argue, nor did the lower court hold, that ALDF's claims are field preempted. Therefore, ALDF does not address it here.

regulating the proper marketing of food, including the prevention of deceptive sales practices, are likewise within states' historic police powers."); *Chae v. SLM Corp.*, 593 F.3d 936, 944 (9th Cir. 2010) (consumer protection traditionally in "state law enforcement hands"); *accord Nat'l Consumers League v. Doctor's Assoc.,* 2014 D.C. Super. LEXIS 15, *11 (Sept. 12, 2014) (courts "well-suited" to resolve false advertising claims).[15]

ii. The CPPA's Prohibitions on False Advertising Are Not Preempted by Express or Impossibility Preemption.

The lower court correctly held the PPIA and FMIA do not expressly preempt state false advertising laws. A119 (Order at 22). By their plain terms, the PPIA and FMIA are limited to regulating claims that appear on the labels of poultry and meat products. *Id.* The statutes contain largely identical preemption provisions: State-imposed "[m]arking, labeling, packaging, or ingredient requirements" are preempted to the extent they are "in addition to, or different than," those under the statutes. 21 U.S.C. §§ 467e (PPIA), 678 (FMIA). The preemption provisions make no mention of state rules governing advertising, which have long operated in the background. Because the CPPA provisions at issue here do not regulate "marking, labeling, packaging, or ingredient requirements," they are not expressly preempted.

[15] Preemption is also an affirmative defense, underscoring it is *Hormel's* burden—not ALDF's—to overcome the presumption against preemption and demonstrate that Congress intended to preempt these CPPA claims. *See*, *e.g.*, *N.Y. Pet Welfare Ass'n, Inc. v. City of New York*, 850 F.3d 79, 86-87 (2d Cir. 2017).

Cf. Nat'l Consumers League v. Bimbo Bakeries U.S., 2015 D.C. Super. LEXIS 5, *19 (Apr. 2, 2015).

The lower court further correctly held there is no conflict preemption on the basis that it is impossible for Hormel to comply with both federal and state law. A118 (Order at 21). Hormel can comply with federal law by submitting its labeling to USDA for approval and ensuring its labels comport with USDA requirements while, at the same time, ensuring any advertisements comply with the CPPA.

iii. There Is No Obstacle Preemption.

The lower court erred, however, in holding that ALDF's CPPA claim is conflict preempted because it (supposedly) poses an obstacle to the intent of Congress. State laws are obstacle preempted "where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399-400 (2012) (cleaned up). As with any type of preemption, the burden to demonstrate obstacle preemption falls on the party alleging preemption. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).

To determine whether a state law would stymie congressional intent, courts examine the statutory scheme, legislative history, and other indicia of legislative intent. For example, the Supreme Court found a state law was an obstacle to federal immigration law where the legislative history demonstrated Congress had

considered and rejected criminalizing certain actions that the state criminalized. *Arizona*, 567 U.S. at 403-07. Similarly, where state law sought to impose penalties for doing business with Burma, that law stood as an obstacle to the federal scheme, which the statute demonstrated was a carefully calibrated "middle path" that deliberately gave considerable flexibility to the President to manage Burma sanctions. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374-80 (2000); *see also Ass'n des Éleveurs de Canards et d'Oies du Québec v. Becerra*, 870 F.3d 1140, 1153 (9th Cir. 2017) (rejecting argument that state law governing animal treatment served as obstacle to PPIA); *N.Y. Pet Welfare*, 850 F.3d at 87-89 (following detailed analysis of statute, regulations, Federal Register statements, and other materials, rejecting argument that law governing sourcing of pets posed obstacle to federal licensing of breeders). Here, neither Hormel nor the lower court pointed to any evidence that the CPPA would pose an obstacle to the intent of Congress in establishing federal labeling laws under the PPIA and FMIA.

Indeed, nothing in the text of the PPIA or FMIA, or their legislative history, supports the lower court's conclusion, and the high bar for obstacle preemption cannot be met. The statutes, legislative history, and regulatory framework confirm the PPIA and FMIA are focused on regulating labeling—not advertising.

Under the statutes, USDA is exclusively empowered to review and reject "any marking or labeling or the size or form of any container in use or proposed

for use." 21 U.S.C. §§ 457(d) (PPIA), 607(e) (FMIA); *see also* Nutrition Labeling of Meat and Poultry Products, 58 Fed. Reg. 632, 634 (Jan. 6, 1993) (USDA has a "prior label approval program under which labeling to be used on, or in conjunction with, meat and poultry products must be approved by the Agency prior to their use."). Its powers are limited to information physically associated with the product. It is provided no "authority or jurisdiction" under the PPIA or FMIA to assess whether "*non-label advertising*" of meat products is "false or misleading to the consumer public." *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 549 F. Supp. 2d 708, 719 (D. Md. 2008) (emphasis in original); *see also* A78-79 (Order Denying Def.'s Motion to Dismiss at 5-6) (PPIA and FMIA "do not appear to have given Defendant any sort of approval to produce the *advertisements* challenged in this case." (emphasis in original)). *Hormel itself* testified that "advertising is not labeling and therefore technically" USDA's rules do not apply to Hormel's ads, as only "the product label is governed by USDA." A1171 (Forbes dep. 26:8-22).[16]

Hormel's exhibits demonstrate that the USDA approves labeling claims only in the context of how they appear on labels. A1130-1146 (Hormel's Application to USDA for approval of labels). For example, for the Natural Choice products at

[16] Indeed, agencies may preempt state law only if doing so is within the scope of their delegated authority. *See Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982). Because the PPIA and FMIA delegate only regulation of labeling, not advertising, USDA lacks authority to preempt state advertising law.

issue here, Hormel submitted an application to USDA that provided a "sketch" of its product label—which here appears on the packaging surrounding the plastic meat container—reproducing the exact coloring, fonts, wording, and placement of text and images it wanted USDA to approve. *Id.* USDA then reviewed and approved that label. *Id*.

Nevertheless, the lower court insisted that "if a producer can accurately use a term in a label, the producer should be able to use the same term in its advertising." A120 (Order at 23). This conclusion is based on a completely unsupported expansion of the statutes: that if USDA approved of a *label* it must have *also* "determine[d] that Hormel's use of the *terms* [at issue] to describe the products is not misleading*." Id.* (emphasis added). To the contrary, USDA does *not* approve "terms," or "claims," under the statutes. *See Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 554 (7th Cir. 2007) (if FMIA were "intended to forbid" certain conduct "it would have to set forth standard and procedures for determining" whether it is prohibited). The statutes authorize, and USDA engages in, review of claims only in the context of their appearance and placement on *specific labels*. 21 U.S.C. §§ 467e (PPIA), 678 (FMIA). In short, permission to use certain statements on a label does not mean those statements are permitted in advertising. *See In re Bayer Corp.*, 701 F. Supp. 2d 356, 376 (E.D.N.Y. 2010) (statements "could still be misleading under state law" even if they "met the FDA's threshold requirements").

Although the lower court stated, without support, it would be "inherently and inevitably confusing to consumers if the description of Hormel's products in its advertisements were materially different from the description in its labels," A120 (Order at 23), several courts recognize that "[c]ommon sense suggests" otherwise. *Organic Consumers Ass'n v. Sanderson Farms, Inc.*, 284 F. Supp. 3d 1005, 1014 (N.D. Cal. 2018) (addressing "100% Natural" claims). "'[L]anguage that is technically and scientifically accurate on a label can be manipulated in an advertisement to create a message that is false and misleading to the consumer.'" *Id.* (quoting *Sanderson*, 549 F. Supp. 2d at 720). That USDA determined Hormel could use particular words after analyzing the entirety of the label does not mean those words can never be used unlawfully in the advertising context.

Consistent with this, the Ninth Circuit upheld a state law restricting poultry "advertis[ing]," while striking down its provisions governing labeling as preempted. *Nat'l Broiler Council v. Voss*, 44 F.3d 740, 748-49 (9th Cir. 1994); *see also id.* at 749 (O'Scannlain, concurring) ("California stores can still be required by state law to tell the truth in advertising" of chicken, as anything else would be "a retreat from the battle scene of federalism."); *accord 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, nor have we found any cases" suggesting as much).

Moreover, the Federal Trade Commission Act ("FTCA") authorizes the FTC to regulate unfair or deceptive advertisements, including meat advertisements, 15 U.S.C. §§ 45(a)(2), 57a(a)(1), but the FTCA works in tandem with state false advertising statutes, like the CPPA. *Am. Fin. Servs. Ass'n v. F.T.C.*, 767 F.2d 957, 990 (D.C. Cir. 1985); *see* 16 C.F.R. § 0.17; *accord* D.C. Code § 28-3901(d). Put another way, Congress saw no risk of conflict by empowering a separate agency to regulate meat advertising when USDA reviews labels, and chose not to preempt state false advertising laws in the FTCA.

Phelps v. Hormel Foods Corp., 244 F. Supp. 3d 1312 (S.D. Fla. 2017), the lower court's sole affirmative support for its holding, A119-22 (Order at 22-25), should be treated as the unpersuasive precedent it is. In a two-sentence footnote, without examining the PPIA, FMIA or their legislative history, and seemingly without the plaintiff even arguing a distinction between its challenge to Hormel's advertising and that to its labels, the court stated meat advertising claims were preempted. 244 F. Supp. 3d at 1317 n.2. To the extent *Phelps* is read as broadly holding the PPIA and FMIA preempt state false advertising claims, it is in tension with the plethora of controlling authority above. More accurately, it should be read as a narrow statement of Florida consumer law, which provides a "safe harbor" for any claims "*permitted*" by federal law. Fla. Stat. § 501.212(1) (emphasis added).

a. The Decision Directly Conflicts with Controlling Precedent.

The lower court's decision is not only baseless, but also countermands the Supreme Court's most recent pronouncement on preemption. *Merck Sharp* explains that where, as here, preemption arises in connection with an area of law traditionally subject to state regulation, and where, as here, Congress must have been "aware of the prevalence of state tort litigation," "it surely would have enacted an express pre-emption provision" had it "thought state-law suits posed an obstacle to its objectives." *Merck Sharp*, 139 S. Ct. at 1677 (cleaned up) (quoting *Wyeth*, 555 U.S. at 574-75). Where there are many state rules and causes of action, as there are around food advertising, if Congress has had the opportunity to respond, and chosen not to, that is affirmative evidence *against* conflict preemption. Therefore, it is not merely that the lower court failed to cite a *single* piece of statutory text or legislative history in support (itself reversible error), its decision contradicts the Supreme Court's analysis of this sort of legislative record.

The lower court suggested ALDF could rely on these principles only if it "pointed to [] evidence that Congress intended to allow" state advertising claims to proceed, A121 (Order at 24), but that turns preemption on its head, ignoring the presumption against preemption. As *Merck Sharp* emphasizes, unless there is "clear and manifest" evidence Congress wished to preempt state law, preemption should not be found. 139 S. Ct. at 1667 (quoting *Wyeth*, 555 U.S. at 565).

The lower court's additional contention that *Wyeth,* and presumably *Merck Sharp*, do not apply because they address federal drug labeling, not meat labeling statutes, is illogical. A120-21 (Order at 23-24). There is no reason the Supreme Court would view Congress' failure to expressly preempt consumer protection laws governing meat and poultry products differently than its failure to expressly preempt those laws regulating pharmaceuticals. The lower court incorrectly insisted that unlike with drug labels, USDA "made an affirmative decision" that Hormel could use the "claims" at issue "as applied to these Hormel meat products." A121 (Order at 24). But again, USDA has no power to and does not approve meat "claims"; it approves meat labels. *See also Sanderson Farms*, 549 F. Supp. 2d at 719; A78-79 (Order Denying Def.'s Motion to Dismiss at 5-6).

iv. ALDF Can Proceed Under the Erroneous Test Below.

Finally, the lower court's decision is also improper because it stated "ALDF's claims would not be preempted if [it] offered evidence that Hormel's advertisements were different in material ways from its labels." A122 (Order at 25). ALDF has done so. Hormel's ads, by definition, differ dramatically from the labels, using the additional space and images to tell a broader story, which is why there should be no preemption. Moreover, Hormel admitted its ads can contain "100% Natural" claims and no "added preservatives" claims without the disclaimers USDA requires before it will approve that language on a label. A152

(RSUMF ¶¶ 77-78); *see also* USDA, *Meat and Poultry Labeling Terms* (listing required disclaimers to appear on labels, including for "natural" claims).[17] Thus, under the lower court's own analysis, its judgment must be reserved.

The lower court recognized this and added an additional hurdle holding that ALDF did not produce "evidence that the absence of the [USDA-required] disclaimer causes consumers to be misled." A122 (Order at 25). Yet, if the CPPA applies, whether it is being violated is determined by *its* standards, not federal standards. The relevant question is whether a reasonable consumer is misled by the ads, not whether USDA's required disclaimers for *labels* are sufficient. The lower court's contrary holding, that federal law can both preempt state law and rewrite state law, expands preemption in never-before-heard-of ways. *Cf. Traudt*, 692 A.2d at 1332 (requiring courts to interpret scope and reach of federal law narrowly).

VIII. CONCLUSION

ALDF has standing to pursue its CPPA claims against Hormel's misleading Natural Choice advertisements, and its claim is not preempted by federal meat and poultry labeling law. ALDF thus respectfully requests that the Court reverse the lower court's grant of summary judgment to Hormel.

[17] Available at https://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/meat-and-poultry-labeling-terms/meat-and-poultry-labeling-terms/ (last accessed July 28, 2019).

July 30, 2019

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STATUTORY ADDENDUM

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D.C. Code § 28–3905. Complaint procedures.

* * *

(k)(1)(A) A consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District.

(B) An individual may, on behalf of that individual, or on behalf of both the individual and the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District when that trade practice involves consumer goods or services that the individual purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.

(C) A nonprofit organization may, on behalf of itself or any of its members, or on any such behalf and on behalf of the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District, including a violation involving consumer goods or services that the organization purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.

(D)(i) Subject to sub-subparagraph (ii) of this subparagraph, a public interest organization may, on behalf of the interests of a consumer or a class of consumers, bring an action seeking relief from the use by any person of a trade practice in violation of a law of the District if the consumer or class could bring an action under subparagraph (A) of this paragraph for relief from such use by such person of such trade practice.

(ii) An action brought under sub-subparagraph (i) of this subparagraph shall be dismissed if the court determines that the public interest organization does not have sufficient nexus to the interests involved of the consumer or class to adequately represent those interests.

(2) Any claim under this chapter shall be brought in the Superior Court of the District of Columbia and may recover or obtain the following remedies:

(A) Treble damages, or $1,500 per violation, whichever is greater, payable to the consumer;

(B) Reasonable attorney's fees;

(C) Punitive damages;

(D) An injunction against the use of the unlawful trade practice;

(E) In representative actions, additional relief as may be necessary to restore to the consumer money or property, real or personal, which may have been acquired by means of the unlawful trade practice; or

(F) Any other relief which the court determines proper.

(3) Any written decision made pursuant to subsection (f) of this section is admissible as prima facie evidence of the facts stated therein.

(4) If a merchant files in any court a suit seeking to collect a debt arising out of a trade practice from which has also arisen a complaint filed with the Department by the defendant in the suit either before or after the suit was filed, the court shall dismiss the suit without prejudice, or remand it to the Department.

(5) An action brought by a person under this subsection against a nonprofit organization shall not be based on membership in such organization, membership services, training or credentialing activities, sale of publications of the nonprofit organization, medical or legal malpractice, or any other transaction, interaction, or dispute not arising from the purchase or sale of consumer goods or services in the ordinary course of business.

(6) The right of action established by this subsection shall apply to trade practices arising from landlord-tenant relations.

* * *

21 U.S.C. §678. Non-Federal jurisdiction of federally regulated matters; prohibition of additional or different requirements for establishments with inspection services and as to marking, labeling, packaging, and ingredients; recordkeeping and related requirements; concurrent jurisdiction over distribution for human food purposes of adulterated or misbranded and imported articles; other matters

Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any establishment under inspection in accordance with the requirements under subchapter I of this chapter, but any State or Territory or the District of Columbia may, consistent with the requirements under this chapter, exercise concurrent jurisdiction with the Secretary over articles required to be inspected under said subchapter I, for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

(Mar. 4, 1907, ch. 2907, title IV, §408, as added Pub. L. 90–201, §16, Dec. 15, 1967, 81 Stat. 600.)

§467e. Non-Federal jurisdiction of federally regulated matters; prohibition of additional or different requirements for establishments with inspection services and as to marking, labeling, packaging, and ingredients; recordkeeping and related requirements; concurrent jurisdiction over distribution for human food purposes of adulterated or misbranded and imported articles; other matters

Requirements within the scope of this chapter with respect to premises, facilities and operations of any official establishment which are in addition to, or different than those made under this chapter may not be imposed by any State or Territory or the District of Columbia, except that any such jurisdiction may impose recordkeeping and other requirements within the scope of paragraph (b) of section 460 of this title, if consistent therewith, with respect to any such establishment. Marking, labeling, packaging, or ingredient requirements (or storage or handling requirements found by the Secretary to unduly interfere with the free flow of poultry products in commerce) in addition to, or different than, those made under this chapter may not be imposed by any State or Territory or the District of Columbia with respect to articles prepared at any official establishment in accordance with the requirements under 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 this chapter for the purpose of preventing the distribution for human food purposes of any such articles which are adulterated or misbranded and are outside of such an establishment, or, in the case of imported articles which are not at such an establishment, after their entry into the United States. This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

(Pub. L. 85–172, §23, as added Pub. L. 90–492, §17, Aug. 18, 1968, 82 Stat. 807.)

District of Columbia Court of Appeals

ANIMAL LEGAL DEFENSE FUND,
Appellant,
v.
HORMEL FOODS CORPORATION,
Appellee.

No. 19-CV-0397

CERTIFICATE OF SERVICE

I, Melissa Pickett, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by ANIMAL LEGAL DEFENSE FUND, counsel for the Appellant to print this document. I am an employee of Counsel Press.

On the **30th Day of July, 2019**, this document will be filed via the Court's electronic filing system which will send a notice of filing to any of the following registered users:

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In addition to service via to the e-filing notice, I served the foregoing upon the above counsel **via Express Mail,** by causing a true copy to be deposited in an official depository of the U.S. Postal Service on this date. The required copies will be delivered to the Court within the time allowed by rule.

July 30, 2019

/s/ Melissa Pickett
Counsel Press