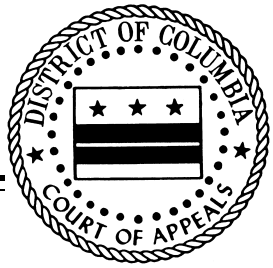
No. 19-CV-0397



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)

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INTRODUCTION

The parties agree ALDF may proceed and litigate its CPPA claims if it has Article III standing. In an ironic twist, the undisputed facts recognized by the lower court establish ALDF's Article III standing.[1] It was only through the lower court erroneously, narrowly construing standing law that it held otherwise. Hormel's request that this Court repeat those errors is particularly peculiar in light of the 2012 amendments to the CPPA that, at a minimum, state the statute should be interpreted to "allow[] for non-profit organizational standing to the fullest extent recognized by the D.C. Court of Appeals in its past and future decisions addressing the limits of constitutional standing under Article III." A190.

Were that not enough to reverse (and it is), the lower court also committed legal error in excluding declarations that further establish ALDF's standing, and

[1] Hormel makes the odd argument that because the lower court determined there was no dispute of material fact, it made factual findings that can only be reviewed for clear error. However, it is well established that although "[s]ummary judgment is . . . appropriate only when there are no material facts in issue[,]" this court "review[s] the trial court's grant of summary judgment *de novo*, making our own independent inquiry to determine whether the trial court correctly concluded that the movant was entitled to judgment." *Copeland v. Cohen*, 905 A.2d 144, 146 (D.C. App. 2006) (cleaned up). Summary judgment is a determination that the successful party is entitled to relief "as a matter of law" and thus it is a legal determination reviewed *de novo*. *Id.* Regardless, for the reasons stated below, ALDF is *not* contesting the lower court's factual findings; those findings establish ALDF prevails. ALDF is arguing the lower court reached the contrary conclusion by applying the incorrect legal standard, including in excluding ALDF's declarations. *Galvin v. Eli Lilly & Co.*, 488 F.3d 1026, 1030 n.* (D.C. Cir. 2007) ("the [sham affidavit] determination is part of [the] overall review of summary judgment and accordingly subject to de novo review.").

holding that § 28-3905(k)(1)(D) only allows public interest organizations to proceed if they satisfy Article III. Hormel fails to point to a single case justifying the exclusion of ALDF's declarations, and its insistence that (k)(1)(D) does not expand standing beyond Article III rests on misrepresenting the legislative history.

Hormel's fallback, that this Court should sustain the lower court's decision based on a preemption analysis the lower court itself stated it should not have performed, is similar. Hormel blatantly rewrites the two federal meat labeling laws to make their rules governing *labels* appear to apply to the advertisements at issue here. The lower court's decision cannot stand.

ARGUMENT

I. ALDF Has Article III Standing Based on the Undisputed Facts.

Under this Court's precedent, an organization has Article III standing if a defendant's unlawful conduct spurs the organization to counteract that conduct through mission-driven advocacy, impeding the organization's work by leading it to expend resources it would otherwise place elsewhere. *See* ALDF Br. 25-26 (citing *Equal Rights Ctr. v. Props. Int'l*, 110 A.3d 599, 604 (D.C. App. 2015); *Molovinsky v. Fair Empl. Council*, 683 A.2d 142, 147 (D.C. App. 1996)). As ALDF explained in its opening brief, the facts found to be undisputed by the lower court fully establish ALDF meets this test. The lower court stated ALDF "fulfills its mission[,]" in part, by "educating consumers about the conditions and practices of factory farming[,]"

which it believes will reduce demand for factory-farmed animal products. A105. ALDF "started working against Hormel's 'Make the Natural Choice' advertising campaign in 2015[,]" and engaged in educational and advocacy efforts regarding Hormel's pig raising practices and misleading "natural" claims for its "factory farmed" Natural Choice products. A106. These activities took significant staff resources, keeping ALDF from other activities. A269 (Decl. of Elizabeth Putsché ISO ALDF's MSJ ¶¶ 13-14).[2]

And, the undisputed facts the lower court found demonstrate that Hormel's misleading ads burden ALDF's consumer education efforts in a sufficiently specific manner to provide standing. *Equal Rights Ctr.*, 110 A.3d at 604. Contrary to Hormel's assertion, these facts readily demonstrate a conflict between ALDF's substantive mission and Hormel's unlawful conduct—that ALDF's mission is not "neutral" with respect to the 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. App. 2012).

Hormel's claim that ALDF's expenditures on advocacy and education efforts cannot constitute a diversion for standing purposes has been flatly rejected. *See Equal Rights Ctr.*, 110 A.3d at 604 (explaining there are a "wide range" of activities that can constitute a diversion of resources establishing standing, including animal

[2] Unlike the declarations discussed below, the declaration of ALDF Associate Director of Communications Elizabeth Putsché was accepted and cited by the lower court. *See, i.e.,* A115; A117.

welfare advocacy) (citing *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011)); *D.C. Appleseed Ctr.*, 54 A.3d at 1208 (finding standing where agency decision would force organization to "devote significant additional resources to *advocate on behalf of*" low income residents (emphasis added)); *Molovinsky*, 683 A.2d at 147 (finding standing where plaintiff increased its educational efforts "to counteract the negative message, sent" by defendant's conduct))); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990) (Bader Ginsburg, J.) (recognizing standing where defendant's advertising "requir[ed] a consequent increase in the [plaintiff] organizations' educational programs on the illegality of housing discrimination").

Hormel's additional contention that ALDF's diversion of resources constituted preplanned efforts unaffected by Hormel, or activities solely in service of this litigation, ignores the facts recognized by the lower court. Hormel Br. 29-30. ALDF publicized Hormel's connection to the cruel and unnatural pig breeder ALDF investigated (The Maschhoffs) as soon as it realized the connection. A268 (Putsché Decl. ¶ 9). The record establishes ALDF did so 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." *Id.*; *see also* A1202-03 (Putsché depo. 151:22-152:1). Likewise, ALDF researched and highlighted, as part of its

regulatory advocacy to the FDA and USDA, how Hormel Natural Choice's "natural" claims mislead consumers because the products are from factory farms. A106.

Hormel's only basis to claim that these were litigation expenses is that ALDF's attorneys advised on these matters. Hormel Br. 33. But it is self-evident that an attorney working on an issue does not automatically convert it into a litigation activity. *Equal Rights Ctr.*, 110 A.3d at 604 n.3 (explaining expenditures only excluded where they are "'*on th[e] very suit*'" filed (emphasis added) (quoting *D.C. Appleseed Ctr.*, 54 A.3d at 1209)). Moreover, ALDF devoted substantial non-attorney resources on Hormel-specific education efforts. *See, i.e.,* A362 (describing ALDF funds paid for a Hormel-specific graphic).

Hormel further argues that because *some* of ALDF's Hormel-specific work was performed as part of regulatory comments, it is unrelated to Hormel. Of course, Hormel's Natural Choice claims were the obvious motivation for ALDF to devote resources to highlighting those exact claims in ALDF's advocacy. As part of its mission-driven work, ALDF spent resources to provide a counterpoint to Hormel's misleading "natural" message—the exact diversion of resources that establishes organizational standing. *See ASPCA*, 659 F.3d at 27-28. Indeed, the D.C. Circuit has held when an organization spends resources to counteract or address a public misconception to which the defendant contributed, that injury is "fairly traceable" to the defendant. *See*, *e.g.*, *Spann*, 899 F.2d at 27; *see also ASPCA*, 659 F.3d at 27-28.

In an attempt to get around this conclusion, Hormel repeatedly cites to *Food & Water Watch*, *Inc. v. Vilsack*, 808 F.3d 905 (D.C. Cir. 2015), but, as ALDF already explained, ALDF Br. 27 n.6, *Food & Water Watch* is inapposite. The court there held the plaintiff's injury was too abstract because it stated it "*will* spend resources" in the future, not that it already had. 808 F.3d at 921 (emphasis added). The court did not find that if the group *had* devoted the resources prior to suit, that expenditure would not have been traceable to the defendant's conduct. *Id.* ALDF's 2015 and 2016 *pre-filing* diversion of resources to educate the public regarding Hormel's factory farming practices and misleading Natural Choice claims is entirely distinct.

Hormel's related argument, that ALDF failed to demonstrate redressability, is equally meritless. Hormel Br. 30-31. The "proof" Hormel cites for lack of redressability is that ALDF stated its future activities regarding Hormel's Natural Choice claims would "depend on the status, progress, and outcome of this Action." A368-69. ALDF then described regulatory and public advocacy to combat misleading "natural" labeling claims it might have to undertake depending on that outcome. A369-71. That ALDF may be compelled to continue certain activities—depending on the outcome of this case—*proves, not disproves, redressability*.[3]

[3] Moreover, as ALDF noted in its opening brief (31-33), "the very design of the CPPA's injunctive remedy serves to sufficiently redress the alleged threatened statutory injury," such that the Court need not measure the plaintiff's specific benefit from the injunction. *Grayson v. AT&T Corp.*, 15 A.3d 219, 250 (D.C. App. 2011).

A. ALDF Need Not Show That Hormel's Illegal Conduct Poses a Mortal Threat.

Hormel insists ALDF can only proceed if it shows Hormel's ads are so harmful that they undermine ALDF's ability to pursue any other work or threaten ALDF's daily function. Hormel Br. 35. But this is not the standard set out by *Equal Rights Center*, *Molovinksy*, or *Spann*, in which organizations' standing was recognized when certain of their activities were made more difficult by defendants' conduct. ALDF meets that standard here because it expended resources to counteract Hormel's claims it would have placed elsewhere, including in other education efforts. This high bar Hormel posits is what the D.C. Council set out to avoid when it adopted (k)(1)(C), finding that *National Consumer League v. General Mills*, 680 F. Supp. 2d 132 (D.D.C. 2010), applied a too restrictive version of Article III, thereby inhibiting organizations from vindicating CPPA violations. A191 (Alexander Report at 6). The Council clarified that all a plaintiff need show is that the challenged conduct "interfere[s] with one of its many projects." *Id*.

B. ALDF Did Not Waive Standing.

Hormel also leans on what it believes to be a "gotcha" moment—purporting ALDF admitted "the Product Claims" do not "'conflict with' ALDF's organizational mission." Hormel Br. 34. But the *next sentence* in the interrogatory on which Hormel

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When the general public stands to benefit from an injunction curbing a CPPA violation, redressability for the plaintiff organization is a low bar. *Id*.

relies states, "ALDF does not allege that the Product Claims themselves 'conflict with' ALDF's organizational mission; ***rather, ALDF alleges that the Product Claims are false, thus forcing the organization to divert resources to counteract the false claims***." A288 (emphasis added). ALDF immediately continues:

> ALDF works to protect farm animals from abuse and to promote transparency in the meat industry by fighting efforts to hide and advocating for the truth about factory farming and educating the public about its broad ill effects, including on animal welfare, food safety, environmental concerns, and human health. Hormel's Natural Choice advertisements, promoting factory-farmed products with false and deceptive claims that such products are "natural," frustrate these efforts.

A288-89. The notion that ALDF brought this suit based on Hormel's injury to it, but then conceded its standing in this interrogatory response, is absurd.

II. ALDF's Improperly Excluded Declarations Further Establish Its Article III Standing.

An independent basis to reverse the decision below is that the Court wrongly excluded two of ALDF's declarations as "shams"—which although not necessary to prove ALDF's Article III standing, independently establish ALDF can proceed. As Hormel's authority shows, only "flatly contradict[ory]" statements between witnesses' prior testimony and current declarations trigger the sham affidavit doctrine. *Daubert v. NRA Group, LLC,* 861 F.3d 382, 392 (3d Cir. 2017) (applying doctrine when one witness swore "that the [electronic] Dialer can make calls without human intervention[,]" while another "later swore it can't"). And "because of the

harsh effect it may have on a party's case[,]" the doctrine is "applied 'sparingly[.]'" *Allen v. Bd. Of Pub. Educ.*, 495 F.3d 1306, 1316 (11th Cir. 2007) (quoting *Rollins v. TechSouth*, 833 F.2d 1525, 1530 (11th Cir. 1987)).

Neither the Walden nor Dillard declaration is a "sham." Indeed, Hormel fails to respond to ALDF's evidence that Mr. Walden's declaration was *consistent* with his testimony. Rather than try to meet the legal standard, Hormel complains Mr. Walden's declaration was "unfair" because of privilege objections made in one of his two depositions. Hormel Br. 38. Beyond this not being a basis to invoke the "sham affidavit" doctrine, the idea that objections kept Hormel from learning the facts underlying ALDF's standing is fanciful. At Hormel's demand, ALDF spent well over a year providing detailed explanations of and context for the diversions of resources described in Mr. Walden's declaration. *See*, *e.g.*, A357-80.[4] Crystallizing evidence produced in discovery into a corporate witness's declaration is routine.

Hormel's attacks on Mr. Dillard's declaration are even more far-fetched, as Hormel did not depose Mr. Dillard and therefore cannot establish a contradiction

[4] *See* ALDF's Reply in Supp. of its Mot. for Summ. J. 19, n.23 (citing interrogatory and deposition testimony explaining why ALDF initiated investigation of the Maschhoffs and when it identified their relationship to Hormel; why ALDF opposes the HIMP program; why ALDF focused on Hormel in media related to the Maschhoffs investigation; and the role Hormel played in ALDF's decision to submit comments to FDA regarding use of "natural" on meat and poultry products).

undermining his declaration.[5] Thus, Hormel plays the unfairness card again, claiming Mr. Dillard was not deposed because ALDF hid him. However, in *February 2018* (well before any deposition was put on the calendar), ALDF wrote to Hormel, "ALDF identifies here Carter Dillard . . . as someone particularly knowledgeable about ALDF's work to combat factory farming and false and misleading advertising in the meat industry." ALDF Feb. 5, 2018 Letter 3; *see also* ALDF Feb. 13, 2018 Letter (noting Mr. Dillard's "key" role in these matters).[6]

Perhaps sensing the "sham affidavit" holding will not survive, Hormel attempts to avoid the necessary reversal to correct this error by claiming the Walden and Dillard declarations would have been excluded anyway because they are "conclusory." Yet, that argument itself is conclusory, failing to provide any support

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[5] Hormel claims that a non-deposed person's declaration can *also* be discarded if inconsistent with prior corporate testimony, Hormel br. 39, but the Supreme Court and several other federal circuits have stated the opposite. *See Quest Integrity USA, LLC v. Cokebusters USA Inc.*, 924 F.3d 1220, 1232-33 (Fed. Cir. 2019); *Nelson v. City of Davis*, 571 F.3d 924, 926 (9th Cir. 2009); *see also Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999) (describing doctrine as preventing party from "creat[ing] a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity"). Moreover, even under Hormel's authority, Mr. Dillard's declaration should not have been discarded because it was perfectly consistent with Mr. Walden's 30(b)(6) testimony, not "flatly contradict[ory]." *Daubert*, 861 F.3d at 392.

[6] *See* Exhibit L to Demoret declaration in support of Hormel's Apr. 19, 2018 Motion to Compel; Exhibit X to Nicholls declaration in ALDF's May 3, 3018 opposition to Hormel's motion.

for its characterization of the declarations, because none exists. Mr. Walden's declaration was 9 pages, containing 26 paragraphs, and Mr. Dillard's was 7 pages containing 27 paragraphs. Both are replete with specific dates, citations to supporting documents, figures, and explanations.

In sum, both the evidence the lower court accepted as true, and that it wrongly excluded, dictate one conclusion: that ALDF has Article III standing.

III. ALDF Also Has Standing Under D.C. Code § 28-3905(k)(1)(D).

A. ALDF Has Not Waived Reliance on § 28-3905(k)(1)(D) as a Ground for Standing.

Hormel argues that ALDF cannot rely on the standing provisions of (k)(1)(D) because, allegedly, ALDF waived reliance on it. That is false. First, contrary to Hormel's suggestion, there is no "magic words" requirement that a party expressly recite each statutory basis for standing in its pleading. In *District of Columbia v. ExxonMobil Oil Corp*., 172 A.3d 412 (D.C. App. 2017), this Court held that standing may be found in a pleading's fact allegations, without reliance on specific legal theories articulated in briefing. *See id*. at 425.[7] And ALDF fully pled and proved the

[7] In suggesting that ALDF wrongfully raises a "new theory of standing," Hormel mischaracterizes two out-of-district cases. In *Blunt v. Lower Merion Sch. Dist.*, the Third Circuit specifically clarified that its holding was "*not* to say that a plaintiff never can cure a pleading with respect to a standing issue in response to a motion for summary judgment challenging its standing." 767 F.3d 247, 286 n.57 (3rd Cir. 2014) (emphasis added). And *La Asociacion De Trabajadores de Lake Forest v. City of Lake Forest,* 624 F.3d 1083, 1088-89 (9th Cir. 2010), has been held to be limited to cases where "the plaintiffs failed to *allege facts* in their complaints supporting

factual support for (k)(1)(D) standing.[8]

Second, Hormel asserts that because ALDF has not pursued a Rule 23 class action, it cannot act as a private attorney general to represent the interests of a "class of consumers" under (k)(1)(D). This is wrong for several reasons: First, it misconstrues the CPPA, which explicitly creates a representative action that is "a separate and distinct procedural vehicle from a class action." *Breakman v. AOL, LLC*, 545 F. Supp. 2d 96, 101 (D.D.C. 2008); *see also, e.g.*, *Margolis v. U-Haul Int'l, Inc.*, 818 F. Supp. 2d 91, 96 n.3 (D.D.C. 2011); *Nat'l Consumers League v. General Mills, Inc.*, 680 F. Supp. 2d 132, 137-38 (D.D.C. 2010). And ALDF did not, as Hormel claims, use the absence of a "representational claim" to oppose removal to federal court. ALDF merely explained to the federal district court that it brought suit on behalf of D.C. consumers who may be misled by Hormel's advertising, *see, e.g.*, A28 (Compl. ¶ 31), without needing to bring a Rule 23 class action. And then, the court agreed with ALDF that CPPA actions brought on behalf of the public for

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necessary elements of their theories . . . ." *Muffett v. City of Yakima ex. rel. members of its City Council*, No. CV-10-3092, 2012 U.S. Dist. LEXIS 99182, at *13 (E.D. Wash. July 17, 2012) (emphasis added).

[8] *See* A27-A31 (Compl.) (alleging, *inter alia*, ALDF's long history of work on "consumer safety" (¶ 30), "transparency in the meat industry" (¶ 31), "educating consumers" (¶ 32) etc.); *see also* A73 (MTD Order) (finding ALDF sufficiently pled its mission "includes consumer education and advocacy"); ALDF Br. 20-22.

injunctive relief are *not* Rule 23 class actions. *Animal Legal Def. Fund v. Hormel Foods Corp.*, 249 F. Supp. 3d 53, 64 (D.D.C. 2017).[9]

Hormel next faults ALDF for failing to "identify" the relevant "class of consumers," but that class is simply the segment of the general public targeted by Hormel. *See, e.g.*, *Nat'l Consumers League v. Flowers Bakeries, LLC*, 36 F. Supp. 3d 26, 31 (D.D.C. 2014) ("This type of case is often referred to as a private attorney general suit brought to enforce the rights of the general public."); *id.* at 35-36 (distinguishing class action from "class of consumers" as used in CPPA).[10] And indeed, ALDF consistently described the "class of consumers" whose interests it represents as the members of the D.C. public targeted by Hormel's marketing. *See, e.g.*, ALDF Opp. MSJ 22-23 (arguing the "CPPA empowers ALDF to vindicate the interests of the public who will be deceived by Hormel's campaign").[11] Hormel knows this, because it specifically agreed to "rely on and accept that for purposes of

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[9] Class-action requirements come into play only when an individual plaintiff attempts to seek *damages* on behalf of himself and the general public, as in *Rotunda v. Marriott International, Inc.*, 123 A.3d 980, 986 (D.C. App. 2015). *See, e.g.*, *Hackman v. One Brands, LLC*, No. 18-2101, 2019 U.S. Dist. LEXIS 55635, at *11-12 (D.D.C. Apr. 1, 2019); *Smith v. Abbott Labs., Inc.*, No. 16-501, 2017 U.S. Dist. LEXIS 135478, at *5 (D.D.C. Mar. 31, 2017).

[10] Hormel does not cite to a single case that was dismissed on the grounds that the plaintiff insufficiently identified the relevant "class of consumers" under (k)(1)(D).

[11] Neither, as Hormel claims, did ALDF use the absence of a "representational claim" to limit discovery. ALDF complied with all discovery regarding its nexus to D.C. consumers. ALDF Br. 20-22 (citing evidence of nexus produced by ALDF).

summary judgment," that ALDF seeks injunctive relief for "the consumers that ALDF is suing on behalf of," *i.e.*, "the public that [ALDF] allege[s] is being misled by the misleading advertising." *See* Hormel MSJ 24.

A. The "Public Interest Organization" and "Sufficient Nexus" Requirements Under D.C. Code § 28-3905(k)(1)(D) Substitute for Article III Standards.

D.C. Code § 28-3905(k)(1)(D) provides standing under two conditions: the plaintiff must be a "public interest organization" and must have a "sufficient nexus" to the relevant interests of the consumers it represents. These requirements are intended to substitute for traditional Article III standing requirements, to provide an alternate basis to test a plaintiff's stake in the action, not, as Hormel contends, to add an *extra* burden. The D.C. Council was explicit about this: it stated that (k)(1)(C) confers standing "to the fullest extent" allowed by Article III, and that (k)(1)(D) confers standing "beyond what would be afforded under subparagraphs (A)-(C)[.]" A190, A191 (Alexander Report at 5, 6); *cf. Clean Label Project Found., et al. v. Panera LLC,* No. 2019 CA 001898 B, 2019 WL 5586555 (Oct. 11, 2019) (stating that public interest organizations possess "statutory right to bring a CPPA action" under (k)(1)(D), which is "sufficient to establish standing, even though Plaintiffs" may not have "suffered a judicially cognizable injury in the absence of the statute") (citing *Shaw v. Marriott Int'l, Inc.*, 605 F.3d 1039, 1042 (D.D.C. 2010))). This Court's directive to "construe each provision of" the CPPA so as not to "render[]

any provision superfluous" necessitates the conclusion that (k)(1)(D) extends standing beyond Article III. *Grayson*, 15 A.3d at 245 (cleaned up).

Hormel's contrary argument relies on a false recounting of (k)(1)(D)'s history. Hormel contends the D.C. Council "removed" a provision that would have eliminated the injury-in-fact requirement, thereby indicating it intended Article III's requirements to remain. Hormel Br. 25. In actuality, the original language allowed *any* non-profit to bring an action on behalf of the general public, without limitation, as long as any particular member of the general public would have had standing. A197 (Alexander Report at 3). The Council, recognizing that an organizational plaintiff must have a "sufficient stake of its own to pursue the case with appropriate zeal," A187 (Alexander Report at 2), restructured the bill to include Article III injury-in-fact analysis as *one* avenue to organizational standing, under D.C. Code § 28-3905(k)(1)(C), and *also*—to institute "maximum standing" for a "public interest organization" with a "sufficient nexus to the interests . . . of the consumer or class[,]" A191 (Alexander Report at 6). D.C. Code § 28-3905(k)(1)(D) enacts the Council's intent to provide this distinct basis for standing for public interest organizations. *Id*.

B. ALDF Is a "Public Interest Organization" With "Sufficient Nexus" to the Interests of D.C. Consumers Targeted by Hormel.

ALDF plainly satisfies (k)(1)(D)'s text as a public-interest organization with a nexus to the interests of the "class" of consumers targeted by Hormel's marketing. First, the Superior Court found it undisputed that ALDF "fulfills its mission," in part,

"through public outreach, including educating consumers about the conditions and practices of factory farming[,]" A105 (Order at 8), which makes ALDF a public-interest organization under the CPPA. Hormel's suggestion that organizations that protect consumer interests in addition to or in service of other social goals—such as promoting animal welfare—are excluded from (k)(1)(D) defies the plain text of the statute, which defines a "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." § 28-3901(a)(15) (emphasis added).

Second, the Superior Court also found undisputed facts demonstrating ALDF's "sufficient nexus" to the interests of D.C. consumers targeted by Hormel: that "ALDF believes that providing consumers with accurate information about factory farming conditions and practices will reduce consumer demand for factory-farmed products[,]" and thus it sought to educate consumers regarding the truth about Hormel's Natural Choice products. A105 (Order at 8). This is in keeping with ALDF's long history of vindicating consumers' interests in ethically raised and truthfully labeled meat. *See, i.e.,* A343-56 (ALDF's Resp. to Interrog. No. 3) (cataloguing years of such advocacy activities). Thus, in addition to demonstrating Article III standing, ALDF demonstrated a "sufficient stake in the action . . . to be relied upon to pursue the action with the requisite zeal and concreteness[,]" A191 (Alexander Report at 6), exactly as the D.C. Council envisioned under (k)(1)(D).

IV. ALDF's Claims About Hormel's Advertising Are Not Preempted by Federal Labeling Law.

To establish the federal meat labeling statutes impliedly preempt ALDF's false advertising claims, Hormel concedes it must prove ALDF's state law claim poses an obstacle to Congress' intent in enacting the PPIA and FMIA. Hormel Br. 50; *see also, e.g.*, *Arizona v. United States*, 567 U.S. 387, 403-07 (2012) (looking for affirmative evidence of "a conflict with the plan Congress put in place"); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374-80 (2000) (same). Hormel tries to demonstrate such intent by replacing the word "labeling" in the statutes with "description," stating: Congress' intent with the laws was to "establish reliable, uniform *descriptions* of meat products." Hormel Br. 47; *see id.* at 50. But, beyond its misleading edits, neither Hormel nor its amici point to any evidence suggesting Congress viewed descriptions in advertisements as equivalent to those on labels, what the PPIA and FMIA actually state they regulate.

In fact, courts and the FTC have repeatedly explained labeling is not the same as advertising; the same descriptor may be approved by a label regulator, but not permitted in an advertisement because it is misleading. *See, e.g.*, FTC, Enforcement Policy Statement on Food Advertising (May 13, 1994), https://www.ftc.gov/public-statements/1994/05/enforcement-policy-statement-food-advertising; *Nat'l Broiler Council v. Voss*, 44 F.3d 740, 748-49 (9th Cir. 1994); *Organic Consumers Ass'n v. Sanderson Farms, Inc.*, 284 F. Supp. 3d 1005, 1014 (N.D. Cal. 2018); *In re Bayer*

Corp., 701 F. Supp. 2d 356, 376 (E.D.N.Y. 2010); *Sanderson Farms, Inc. v. Tyson Foods, Inc.*, 549 F. Supp. 2d 708, 719 (D. Md. 2008).[12]

The system Congress set up under the FMIA and PPIA further evinces those laws do *not* preempt state advertising claims. As Hormel's amici explain, USDA approves the use of terms only as part of its review of meat labels as a whole, and, for the terms at issue here, will only approve the label provided that certain disclaimers are present. N. Am. Meat Institute, et al. Br. 9-11. USDA provides *no* approval for a company to use a term willy-nilly. Since it is undisputed that Hormel's ads do *not* contain the disclaimers USDA requires on labels, Hormel's claim that its ads are protected by a USDA regulatory regime is silly. *See* ALDF Br. 49-50.[13]

As has always been the case, the only authority that agrees with Hormel is a short footnote in *Phelps v. Hormel Foods Corp.*, 244 F. Supp. 3d 1312, 1317 n.2 (S.D. Fla. 2017). *Phelps* cites *no* authority for its conclusion that state regulation of advertising is preempted by the PPIA or FMIA, and it does not appear that the plaintiff argued advertising should be treated differently than labeling.

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[12] Hormel claims that *Organic Consumers* and *Sanderson Farms* agree "that a state cannot prohibit an ad using the same term, with the same meaning, as [USDA] approved for use on the label[,]" but those cases do not say that or anything approximating that—Hormel is grossly mischaracterizing them. Hormel Br. 46.

[13] As such, Hormel's amici are wrong when they state that the advertisements use the terms "in the same way" or "in the same manner" as the terms are used on the label. N. Am. Meat Institute, et al. Br. 17, 18.

Hormel's amici further demonstrate why preemption would be improper here. They explain their goal is to "maintain[] the uniform federal standards for labeling" found in the PPIA and FMIA. N. Am. Meat Institute, et al. Br. 1; *see id.* at 8, 11. ALDF's suit will do *nothing* to impact meat companies' ability to label their products as USDA allows. ALDF is not challenging any label or USDA's authority to make labeling decisions. Thus, Hormel's amici argue that if they cannot use the same words that appear on their label in the distinct context of their advertisements, that would be just as "disruptive" to Congress' goal of uniform label standards as an attack on the label. N. Am. Meat Institute, et al. Br. 17. False. If ALDF can proceed, Hormel will not have to alter a label. Hormel will merely have to face the claim its *ads* mislead consumers, and, if ALDF prevails, cease that fraud.

National Meat Association v. Harris, 565 U.S. 452 (2012), which is cited in support of preemption, concerned express, not obstacle, preemption—which no one contends applies here. *Id.* at 459-60. Federal law regulates the handling of non-ambulatory animals, permitting their slaughter for sale in some circumstances, and expressly preempts state laws to the contrary. *Id.* at 460. The state law in question prohibited the slaughter and sale of non-ambulatory animals. *Id.* at 458-59. Hormel's amici latch on to the fact that the Court struck down the state sales ban, even though federal law did not directly regulate sales. But, as the Court explained, because the sales ban was equivalent to prohibiting slaughtering for sale it was expressly

preempted. *Id.* at 464. There is no such tension between ALDF's false advertising claims and federal labeling law.[14]

The amici's analogy to the Organic Food Production Act (OFPA) further highlights the distinctions between this case and one where preemption might be present. The OFPA "establish[es] national standards governing the *marketing* of" organic food products. 7 U.S.C. § 6501(1) (emphasis added). It also *explicitly* precludes states from imposing differing standards for marketing "organics." *See Quesada v. Herb Thyme Farms, Inc.*, 361 P.3d 868, 874 (Cal. 2015) (citing 7 U.S.C. § 6505(a)(1)). The PPIA and FMIA contain no such regulation of "marketing," *only* labeling, and thus do not usurp state law meant to protect consumers from misleading advertising like Hormel's Natural Choice campaign.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

[14] Hormel's amici also contend that ALDF's claims should be preempted because there is a "strong public policy against intrusion on USDA authority." N. Am. Meat Institute, et al. Br. 20. But there is no USDA authority over advertisements, and so there is no intrusion. *See* ALDF Br. 44.

November 4, 2019

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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 **4th Day of November, 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 **REPLY BRIEF** 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.

November 4, 2019

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