NOTE

From Organic to Humane: Expanding the National Organic Program to Curb Misleading Labeling

Colton McRae[*]

ABSTRACT

In recent years, retail consumers have become increasingly aware of the practices employed by factory farms in the production of meat, eggs, and other animal-derived food products. Although some consumers choose to abstain entirely from foods derived from animals, many others instead seek out products they perceive to be ethically sourced. Products that come from humane farms, however, are more expensive to produce and thus command a higher price. Some producers, seeking to capitalize on this consumer demand, market their products as humanely sourced while continuing to engage in conventional factory-farming practices. Their ability to "humanewash" is protected by a federal regulatory landscape that leaves terms like "pasture-raised" and "free-range" undefined. This Note explores the market dynamics driving this increase in humanewashing and then analyzes the law governing food product labeling. It identifies the gaps in current law, including a lack of binding definitions and ineffective enforcement mechanisms. Finally, it recounts the success of the U.S. Department of Agriculture's ("USDA") National Organic Program in solving a similar problem regarding products marketed as "organic." Building on that model, this Note proposes expanding the National Organic Program to establish enforceable standards and permissible practices for products labeled as "humane."

* J.D. 2026, The George Washington University Law School; B.A. 2023, The University of Texas at Austin. I would like to extend gratitude to Madeline Smedley, Noah Fisher, Becca Richardson, Elianna Schiffrik, and the rest of the staff of *The George Washington Law Review* for their hard work reviewing and editing this piece. I am deeply grateful to my wife, Alden McRae, for her inspiration and unwavering support.

Table of Contents

Introduction

"Cage-free." "Free-range." "Pasture-raised." "Humanely raised." Although many companies, seeking to conjure images of small, welfare-conscious family farms, use packaging displaying "quaint red barns and green rolling hills," the truth is that an extremely small proportion of U.S. livestock is raised in such conditions.[1] Nonetheless, American consumers are increasingly placing great emphasis on these sorts of claims when browsing the aisles of their local grocery stores.[2] In one 2015 study, 81% of consumers responded that animal welfare is important to them when making food purchasing decisions.[3] In another study, the majority of respondents indicated a willingness to spend more for food products that have a certified welfare standard—and not just a little more, but up to a 32% premium for eggs and a 48% premium for chicken.[4]

---

1 Kenny Torrella, *Most "Humane" Farms Are Lying to You—and the Government Isn't Stopping Them*, Vox: Future Perfect (Nov. 14, 2024, at 12:42 ET), https://www.vox.com/future-perfect/384740/foster-farms-usda-humane-story [https://perma.cc/X5Y5-JJ29].

2 Erin Sutherland & Adrienne Craig, *Oversight of Animal Raising Claims on Product Packaging: A Review of Jurisdiction and Challenges to Label Claims*, 26 Animal L. 271, 272 (2020).

3 *Id.*

4 C. Victor Spain, Daisy Freund, Heather Mohan-Gibbons, Robert G. Meadow & Laurie Beacham, *Are They Buying It? United States Consumers' Changing Attitudes Toward More*

Unfortunately, the current realities of humane labeling—which feature a combination of third-party certifications, industry-defined terminology, and otherwise unregulated phrases—can leave consumers confused.[5] This confusion is because claims regarding animal welfare are a type of "credence attribute."[6] A credence attribute is a "food quality characteristic[] that cannot be judged or assessed independently by buyers at the time of sale through search (e.g., price, appearance) or experience (e.g., taste, texture) without additional, often costly, information."[7] Consumers can judge certain attributes of food products without any external information, either by examining the product before purchase—e.g., the color of a wine or firmness of an apple—or by purchasing the product and trying it—e.g., the taste of a spicy pepper.[8] In contrast, information about the source of a product, including the conditions in which the animal products were produced, requires external indicia for the consumer to make an informed choice.[9] In the current landscape, such indicia include welfare claims certified by third parties, claims certified by industry groups, and claims with no legal definition whatsoever.[10] Thus, food producers make a multitude of animal welfare claims that leave consumers confused because the same phrase can have different meanings depending on which organization provides the definition or certification.

For instance, according to one 2021 survey, 38% of consumers were confused by the term "cage-free."[11] This was because three different third-party certifiers (Global Animal Partnership, American Humane Certified, and One Health Certified) use three different standards for certifying cage-free eggs.[12] In addition, producers can use the term

---

Humanely Raised Meat, Eggs, and Dairy, Animals, Aug. 2018, at 1, 6, https://www.mdpi.com/2076-2615/8/8/128/pdf [https://perma.cc/29SP-WAW4].

5 *See* Farm Forward, Humanewashing's Effect on Consumers: Survey of Consumer Beliefs About Welfare Certifications 3–4 (2021), https://www.farmforward.com/wp-content/uploads/2022/09/Farm-Forward-Humanewashings-Effect-on-Consumers.pdf [https://perma.cc/8DL3-V4ZU].

6 Peggy Schrobback, Airong Zhang, Barton Loechel, Katie Ricketts & Aaron Ingham, *Food Credence Attributes: A Conceptual Framework of Supply Chain Stakeholders, Their Motives, and Mechanisms To Address Information Asymmetry*, 12 Foods, Feb. 2023, at 1, 2, https://www.mdpi.com/2304-8158/12/3/538/pdf [https://perma.cc/G24V-UAKD].

7 *Id.*

8 Sylvette Monier-Dilhan, *Food Labels: Consumer's Information or Consumer's Confusion*, Oilseeds & Fats, Crops & Lipids, Mar.–Apr. 2018, at 1, 1–2, https://www.ocl-journal.org/articles/ocl/pdf/2018/02/ocl170055.pdf [https://perma.cc/U2HM-UME5].

9 *Id*.

10 *See infra* Section II.B.

11 *Farm Forward Survey Reveals Widespread Confusion over Welfare Labels*, Farm Forward, https://www.farmforward.com/issues/animal-product-labeling/survey-confusion-welfare-labels/ [https://perma.cc/6K7V-79TC] (last visited Feb. 23, 2026).

12 *See id.*

without any certification, defining "cage-free" as they see fit.[13] Although consumers believed that the term meant that chickens were raised on a pasture, this is typically not the case.[14] Thus, consumers often end up paying more for eggs they believe were produced by chickens raised with access to the outdoors and the ability to forage, but in fact were not.[15]

It is harmful enough to mislead a consumer into purchasing a product that does not meet a standard they thought they were paying for. For many consumers, animal welfare is a deep, moral issue.[16] However, this concern goes beyond the ethical implications. Studies have consistently demonstrated that animal food products from animals raised in a natural environment are healthier and safer than factory-farmed products.[17] For example, eggs from free-range hens are significantly less likely to transmit Salmonella and contain much higher nutrient contents as compared with their caged counterparts.[18] Thus, it is imperative that consumers be able to understand exactly what they are purchasing.

This Note proposes that the United States Department of Agriculture ("USDA") should regulate the use of animal welfare claims on labels. Part I explores the animal food products industry, highlighting the rise of animal-welfare-focused companies and efforts to market products as "humane." It then explains the current state of the law regarding false and misleading labeling claims, particularly in the area of food labeling. Part II highlights the issues private litigants and consumer advocacy groups face when attempting to prevent large agricultural corporations from engaging in humanewashing. Part III looks to the USDA's Organic Program as an example of an existing solution to an analogous problem and recommends a similar approach to dealing with this issue. Importantly, this Note does not touch on the issue of animal welfare law per se. Rather than arguing for increased governmental protection of livestock, this Note argues for regulation aimed at safeguarding the free-market system from fraudulent actors by protecting the consumer's right to choose products that align with their preferences.

---

13 *See* Torrella, *supra* note 1.

14 Farm Forward, *supra* note 5, at 13.

15 *See id.*; Monier-Dilhan, *supra* note 8, at 2.

16 *See generally Consumer Perceptions of Farm Animal Welfare*, Animal Welfare Institute (Sep. 2022), https://awionline.org/sites/default/files/uploads/documents/ConsumerPerceptions-FarmWelfare.pdf [https://perma.cc/C3NM-NQ3W] (collecting survey results showing that consumers care about farm animal welfare).

17 *See* Aurora Paulsen, *Catching Sight of Credence Attributes: Compelling Production Method Disclosures on Eggs*, 24 Loy. Consumer L. Rev. 280, 292 (2011).

18 *Id.*

I. The Animal Food Products Industry and the Current State of the Law

Since the dawn of civilization, humans have domesticated animals and farmed them for sustenance.[19] In ancient Rome, roughly 80–90% of the population worked in agriculture, usually on small farms, providing for themselves and their families.[20] In the United States, the percentage of the population working in agriculture was 47% in 1880.[21] By 1940, this number had declined to 15%, and in 2021, it was only 1.3%.[22]

As a result of the Industrial Revolution, agriculture has become increasingly concentrated in a handful of private companies.[23] Though productivity has grown substantially,[24] problems inevitably arise when an economic sector is concentrated in the hands of a few firms.[25] Four firms now control more than half of the poultry market, almost 70% of the pork market, and nearly 75% of the beef market.[26] Therefore, one of the few ways emerging companies can compete is by accepting that they cannot sell their products as cheaply as the giants and instead pivoting to more niche, welfare-focused products.[27] These smaller companies can concentrate on capturing the segment of the market that is not as price sensitive and instead cares more about the quality of the product.[28] The

---

19 *See Early Agricultural Communities*, Nat'l Geographic (Oct. 19, 2023), https://education.nationalgeographic.org/resource/early-agricultural-communities/ [https://perma.cc/72H5-PA2C].

20 *See* Kim Bowes, Rural Poverty in the Roman Empire 1–2 (2011) (unpublished manuscript), https://bpb-us-w2.wpmucdn.com/u.osu.edu/dist/a/49661/files/2017/08/bowes-rural-poor-243zk6w.pdf [https://perma.cc/BEC6-DLFR].

21 Shakked Noy, *Urbanizing the US: From Agriculture to Manufacturing to Services*, Nat'l Bureau Econ. Rsch. Dig., Mar. 2023, at 6, 6, https://live-nber.pantheonsite.io/sites/default/files/2023-02/mar23.pdf [https://perma.cc/3QVE-MDXL].

22 *Id.*; Mark White & Andrew Van Leuven, *Changes in Farm Employment, 1969 to 2021*, Farmdoc Daily, July 14, 2023, at 1, 1, https://farmdocdaily.illinois.edu/wp-content/uploads/2023/07/fdd071423.pdf [https://perma.cc/4G49-P4GJ].

23 *See* Lisa Held, *Just a Few Companies Control the Meat Industry. Can a New Approach to Monopolies Level the Playing Field?*, Civil Eats (July 14, 2021), https://civileats.com/2021/07/14/just-a-few-companies-control-the-meat-industry-can-a-new-approach-to-monopolies-level-the-playing-field/ [https://perma.cc/SB33-T8MU].

24 *See* Eric Njuki, *A Look at Agricultural Productivity Growth in the United States, 1948–2017*, U.S. Dep't of Agric.: Blog (Mar. 5, 2020, at 11:05 ET), https://www.usda.gov/about-usda/news/blog/look-agricultural-productivity-growth-united-states-1948-2017 [https://perma.cc/TQ7K-HUMK].

25 *See* Held, *supra* note 23.

26 *Id.*

27 *See* Evie Liu, *Eggs Prices Are Soaring—and This Premium Producer Could Benefit*, Barron's (Feb. 14, 2025, at 00:30 ET), https://www.barrons.com/articles/bird-flu-egg-prices-rising-ba627680 [https://perma.cc/DWL6-M8GS].

28 *See* Hendrik Döpper, Alexander MacKay, Nathan H. Miller & Joel Stiebale, *Rising Markups and the Role of Consumer Preferences* 8 (Harvard Bus. Sch., Working Paper No. 22-025, 2023).

giants, however, have caught on, and many have also begun marketing their products as humanely raised.[29]

Although labeling food products with claims such as "pasture-raised" or "humane" is a relatively recent trend, companies labeling their products to appeal to consumers is nothing new.[30] Labeling is distinct from other forms of advertising.[31] Advertising—such as television commercials or internet advertisements—is governed by the Federal Trade Commission.[32] Labels, which are the focus of this Note, are "display[s] of written, printed, or graphic matter upon the immediate container of any article."[33]

Food labeling law in the United States is confusing at best. To begin, claims made on labels, like most marketing claims, can be challenged via traditional fraud suits, in which a plaintiff alleges that he has been defrauded into purchasing a product by the sellers' false claims.[34] In addition, the Federal Trade Commission, though primarily focused on advertising, has at times exerted jurisdiction over labels.[35] The Food and Drug Administration ("FDA") is responsible for much of food labeling,[36] while the USDA also has authority over labeling of meat, poultry, and egg products—as opposed to shell eggs, which are regulated by the FDA.[37] Understanding which agency regulates which products is one major part of the challenge plaintiffs face when litigating deceptive labels.[38]

A. Common Law Fraud Claims

Generally, a claim for false or misleading advertising can be brought under the common law tort of fraud, which is a claim that a defendant has made "a false representation of material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to his damage."[39] For several reasons, however, such suits are unattractive

---

29 *See* Torrella, *supra* note 1.

30 *See* Sutherland & Craig, *supra* note 2, at 287–99.

31 *See id.* at 273–74; George A. Kimbrell, *Cutting Edge Issues in 21st Century Animal Food Product Labeling*, 27 DRAKE J. AGRIC. L. 179, 197 (2022).

32 *See* Sutherland & Craig, *supra* note 2, at 273.

33 21 U.S.C. § 321(k).

34 *See infra* Section I.A.

35 *See* Kimbrell, *supra* note 31, at 197.

36 *See id.* at 189. The FDA regulates approximately 80% of domestic and imported food supply in the United States. *Id.*

37 *Id.* at 188–89, 201. The USDA regulates the remaining 20% of the U.S. food supply. *Id.* at 189.

38 *See* Sutherland & Craig, *supra* note 2, at 274.

39 Dr. Franklin Perkins Sch. v. Freeman, 741 F.2d 1503, 1522 (7th Cir. 1984) (quoting Slaney v. Westwood Auto, Inc., 322 N.E.2d 768, 779 (Mass. 1975)); *see* 2 JAMES B. ASTRACHAN, DONNA

to plaintiffs and inefficient if the goal is to substantially reduce false labeling.[40]

First, when a product is relatively cheap, as food products are, then the incentive to pursue an action is reduced.[41] Legal costs are high, and it is often not worth the effort to bring a claim when the damages could be trivial.[42] Though class action certification might seem to be a potential solution to this issue, courts often refuse to permit class actions for numerous reasons, including an insufficient ability to show the nature or size of a class or differing state consumer protection laws resulting in too little commonality among claims.[43]

Second, defendants, particularly in the food and beverage sphere, often raise a doctrine known as "primary jurisdiction."[44] This doctrine is typically used by courts when they believe an issue is better suited to the discretion of an agency that typically regulates the issue at hand.[45] Thus, it is common for food and beverage companies to assert primary jurisdiction in an effort to have courts dismiss the case and leave the contested issue to the FDA or the USDA.[46] Defendants are not always successful in raising this defense, but when they are, it can be a deathblow to litigants because the court may dismiss the case and thus never reach the merits of the fraud claim.[47]

Third, the elements of common law fraud are rigorous—a plaintiff must show scienter and actual, reasonable reliance.[48] To establish scienter, a plaintiff needs to show that the producer intended to deceive the consumer, rather than simply believed that the representation was true

---

THOMAS, ERIC B. EASTON, GEORGE ERIC ROSDEN & PETER ERIC ROSDEN, THE LAW OF ADVERTISING § 14.02, LEXIS (database updated Dec. 2025).

40 *See* ASTRACHAN ET AL., *supra* note 39, § 14.02.

41 *Id.*

42 *See id.*

43 *Id.*; *see also, e.g.*, Schwartz v. Lights of Am., No. CV 11-1712, 2012 WL 4497398, at *1, *3 (C.D. Cal. Aug. 31, 2012) (finding that "a material difference in the consumer protection laws of each state would affect the outcome in this case").

44 Zoe Wolkowitz, *A Recipe for Chaos and Confusion: Consumers, Companies, and Courts Are Hungry for Improved U.S. Food and Beverage Regulations*, 54 J. MARSHALL L. REV. 567, 587 (2021).

45 *Id.* at 588; *see also id.* at 588 n.202 (providing *Coyle v. Hornell Brewing Co.*, No. 08-cv-02797, 2010 WL 2539386, at *4 (D.N.J. June 15, 2010), as an example of a court invoking the primary jurisdiction doctrine by holding "that whether high-fructose corn syrup is 'natural' or artificial is a task for the regulatory agency and not the courts").

46 *See id.* at 587–88.

47 *See Id.*

48 *See, e.g.*, Pro. Cleaning & Innovative Bldg. Servs., Inc. v. Kennedy Funding, Inc., 245 F. App'x 161, 166 (3d Cir. 2007). In addition, the plaintiff must show "a material misrepresentation of a presently existing or past fact; . . . an intention that the other person rely on it; . . . and . . . resulting damages." *Id.*

or carried little meaning to begin with.[49] Reliance can be similarly difficult to prove because many consumers do not document their reasons for certain purchases.[50]

Fourth, defendants can raise the defense of "puffery."[51] "Puffery" refers to claims such as "World's Best!"—that is, statements that are exaggerated opinions or vague claims of superiority upon which a reasonable buyer would not be justified in relying.[52] In any given case, however, whether a statement truly is "puffery" or whether a consumer would be justified in reasonably attributing some meaning to such a statement can be hotly contested, and the line is often blurry.[53]

Even if a statement is not held to be puffery, plaintiffs may still fail. The case *Rusoff v. Happy Group, Inc.*[54] is illustrative of this phenomenon. There, the plaintiff purchased eggs from The Happy Group, which labeled its eggs as "Pasture Raised."[55] The plaintiff contended that, when purchasing these eggs, he did so, and paid the associated higher price, because he believed that this meant the hens had the ability "to roam outside on pasture during the day" and forage for natural vegetation and insects.[56] The plaintiff understood that hens with access to pastures are healthier, and the eggs are thus higher quality.[57] This is because pasture-raised hens have access to a more natural diet—compared with the bulk of egg-laying hens, which are fed a corn and soy diet—and the

---

49 *See, e.g.*, Lee v. Mondelez Int'l, Inc., 637 F. Supp. 3d 116, 138–39 (S.D.N.Y. 2022) (granting a motion to dismiss because the plaintiff pleaded "purely conclusory allegations with respect to intent" rather than the requisite "facts that give rise to a strong inference of fraudulent intent," such as facts that showed the producer "had both motive and opportunity to commit fraud" or facts constituting "strong circumstantial evidence of conscious misbehavior or recklessness" (quoting Hesse v. Godiva Chocolatier, Inc., 463 F. Supp. 3d 453, 472 (S.D.N.Y. 2020))); Ryan v. Brookdale Int'l Sys. Inc., No. H-06-01819, 2008 WL 2405970, at *4–5 (S.D. Tex. June 11, 2008) (granting a motion to dismiss because plaintiffs could not prove that the defendants knew the statements in their advertisements were false).

50 *See* Hoffman v. Hampshire Labs, Inc., 963 A.2d 849, 855 (N.J. Super. Ct. App. Div. 2009) (holding that the plaintiff failed to state a claim for common law fraud because he could not demonstrate that he relied upon the defendant's advertisement claims in purchasing the product).

51 *See* Caitlin M. Ajax & Diane Strauss, *Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere "Puffery"?*, 45 Ecology L.Q. 703, 720, 725–26 (2018).

52 *See, e.g.*, Melissa Landau Steinman, *The Absolute Best Puffery Panel Ever!*, Venable LLP: All About Advert. L. (Sep. 29, 2015), https://www.allaboutadvertisinglaw.com/2015/09/the-absolute-best-puffery-panel-ever.html [https://perma.cc/V2QE-87PG] (discussing a dispute where the National Advertising Division of the Better Business Bureau found that Tropicana's claim of "World's Best" juice was puffery); *see also* Solum v. CertainTeed Corp., 147 F. Supp. 3d 404, 412 (E.D.N.C. 2015) (finding it per se unreasonable to rely on puffery under state law).

53 *See* Courtland L. Reichman & M. Melissa Cannady, *False Advertising Under the Lanham Act*, 21 Franchise L.J. 187, 189 (2002) ("The line between actionable statements of fact and mere puffery can be difficult to find.").

54 Rusoff v. Happy Grp., Inc., No. 21-cv-08084, 2024 WL 5339463 (N.D. Cal. Sep. 27, 2024).

55 *Id.* at *1.

56 Class Action Complaint at 1, 6, *Rusoff*, 2024 WL 5339463 (No. 21-cv-08084).

57 *Id.* at 1, 12.

opportunity to engage in natural behaviors.[58] In reality, Happy Group's hens were not consistently provided with outdoor access.[59] And even when they were, the hens were not provided access to anything one would normally call a "pasture" because there was no living vegetation.[60] However, the court found that there was no industry standard for the term "pasture raised," which was what the plaintiff's theory of liability rested upon.[61] In sum, plaintiffs struggle to bring state common law fraud claims, especially in the field of food products litigation.

B. The Lanham Act and the FDA

The Lanham Act (officially the Trademark Act of 1946)[62] provides another potential avenue for redressing mislabeling.[63] Congress described the purpose of the law as twofold: to protect consumers in acquiring the product they believe they are getting and to protect proprietors from unfair misappropriation.[64] To that end, the statute designates a cause of action for unfair competition due to misleading advertising or labeling that harms the plaintiff company.[65] Unfortunately, however, this cause of action is only available to competitors in the industry; consumers are excluded.[66] Because the congressional intent behind the Lanham Act is specifically to protect against unfair competition, consumers who are misled as a result of false labeling do not fall within the "zone of interests" that the statute protects.[67]

Ideally, despite consumers' inability to enforce the law themselves, competitors that are well incentivized and have more detailed knowledge of the market would provide much-needed monitoring and enforcement functions.[68] Indeed, the landmark case *POM Wonderful LLC v. Coca-Cola Co.*[69] held that competitors may bring claims under the Lanham Act for labels that are regulated by the FDA.[70] In that

---

58 *Id.* at 6, 12.

59 *Id.* at 11.

60 *Id.*

61 *Rusoff*, 2024 WL 5339463 at *12.

62 15 U.S.C. §§ 1051–1141n.

63 *See* Stephen J. White Jr., Note, *How Far Does the Apple (Pomegranate) Fall from the Tree? Preclusion of Lanham Act Claims by the Food, Drug, & Cosmetic Act and* POM Wonderful, LLC v. Coca-Cola Co., 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 262, 267–68 (2015).

64 *Id.* at 267 (citing S. REP. NO. 79-1333, at 3 (1946)).

65 *Id.* at 268.

66 *See* Jessica Guarino, Nabilah Nathani & A. Bryan Endres, *What the Judge Ate for Breakfast: Reasonable Consumer Challenges in Misleading Food Labeling Claims*, 35 LOY. CONSUMER L. REV. 82, 98 (2023).

67 *Id.*

68 *See id.* at 99.

69 573 U.S. 102 (2014).

70 *Id.* at 106.

case, POM Wonderful, a producer of a pomegranate-blueberry juice blend, brought a Lanham Act claim against The Coca-Cola Company, which at the time was also marketing a pomegranate-blueberry juice blend—though Coca-Cola's only contained 0.3% pomegranate juice and 0.2% blueberry juice.[71] Coca-Cola countered that the Federal Food, Drug, and Cosmetic Act ("FDCA")[72] precluded any Lanham Act claim because Coca-Cola's product labeling was regulated by the FDCA.[73] The Supreme Court held that this was not the case, as both statutes can work in a complementary manner.[74] In theory, therefore, consumers should be able to rely on intra-industry enforcement by competitors.

However, some lower courts applying *POM Wonderful* have limited its scope.[75] For example, the district court in *Saubers v. Kashi Co.*[76] held that under *POM Wonderful*, Lanham Act claims for misleading food labels are merely not *precluded* by the FDA's regulation thereof.[77] The court stressed that such claims are still subject to the primary jurisdiction doctrine and dismissed the claim, reasoning that food labeling falls "within the special competence of the FDA" and that "'Congress vested the FDA with comprehensive regulatory authority' over the 'proper declaration of ingredients on food labels.'"[78] The result of such lower court rulings is that consumers are less able to depend on intra-industry competitors to regulate one another under the Lanham Act. With cases like *Saubers* standing in the way, competitors face a lower likelihood of success in bringing a Lanham Act claim, altering the calculus and making it less rational to bring some suits in the first place. Consumers, therefore, cannot simply rely on industry to police itself.

C. Laws and Regulations Administered by the FDA

In 1938, Congress passed the FDCA.[79] Under the FDCA, the FDA is primarily concerned with ensuring the safety and nutrition of food products.[80] The FDA has jurisdiction over "all domestic and imported

---

71 *Id.* at 110.

72 21 U.S.C. §§ 301–399i.

73 *See POM Wonderful*, 573 U.S. at 108.

74 *Id.* at 106.

75 *See* White, *supra* note 63, at 283.

76 39 F. Supp. 3d 1108 (S.D. Cal. 2014).

77 *See id.* at 1113.

78 *Id.* at 1111–12 (quoting Swearingen v. Santa Cruz Nat., Inc., No. C 13-04291, 2014 WL 1339775 (N.D. Cal. Apr. 2, 2014)). The distinction here appears minor at first glance but is impactful: Dismissal based on the primary jurisdiction doctrine is without prejudice (meaning the claim can later be refiled), while dismissal based on preclusion is with prejudice. *See id.* at 1113.

79 Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301–399i).

80 *See* Renée Johnson, Cong. Rsch. Serv., RS22600, The Federal Food Safety System: A Primer 4 (2016).

food products[,] except for most meats and poultry"—though its jurisdiction does include shell eggs and dairy products.[81] The FDA is tasked with conducting inspections of food manufacturing, processing, packing, and storage facilities, as well as any trucks, railcars, or other conveyances used for transporting foods in interstate commerce.[82]

In addition to its safety and nutrition goals, the FDA is also tasked with regulating food labeling for those foods falling under its jurisdiction.[83] Accordingly, the FDA prohibits labels that are "false or misleading."[84] To effectuate this prohibition, the FDA works with over 400 state agencies.[85] Under this regime, the FDA has a broad range of powers at its disposal, including the power to "recommend injunctions," inspect product facilities, seize products, "recommend criminal charges," and assess civil penalties.[86] However, as Part II discusses, these broad powers are limited by the FDA's discretionary policies and lack of enforcement resources.[87]

The FDCA was passed with the intention that its regulations would be comprehensive.[88] Per the legislative record, it was designed to apply to all misleading claims—including claims about origin, quality, or identity—and was intended to cover both direct statements and implied representations.[89] The FDCA requires that producers label their products with certain information, including the ingredients and the name of

---

81 *Id.*

82 *Id.* (citing MOU 225-99-2001, Memorandum of Understanding Between the Food Safety and Inspection Service of USDA and the FDA (Feb. 23, 1999), https://www.fda.gov/about-fda/domestic-mous/mou-225-99-2001 [https://perma.cc/ST3N-RSYF]).

83 *See* Jennifer Thurswell Radis, Note, *The Lanham Act's Wonderful Complement to the FDCA:* POM Wonderful v. Coca-Cola *Enhances Protection Against Misleading Labeling Through Integrated Regulation*, 47 Loy. U. Chi. L.J. 369, 379 (2015).

84 *Id.* at 380–81; *see also* 21 U.S.C. § 343 (containing the statutory definitions for when food is misbranded). Note that although the FDA "exercises primary responsibility" over food labeling, the Federal Trade Commission is the key player in the regulation of food advertising (e.g., television commercials, newspaper ads, etc.). *See* Nicole E. Negowetti, Brookings Inst., Food Labeling Litigation: Exposing Gaps in the FDA's Resources and Regulatory Authority 3 (2014), https://www.brookings.edu/wp-content/uploads/2016/06/Negowetti_Food-Labeling-Litigation.pdf [https://perma.cc/N323-SJL8]. Though much of what this Note discusses is relevant to advertising, its primary focus is on labeling.

85 *See* Johnson, *supra* note 80, at 5.

86 Jeffrey N. Gibbs & John R. Fleder, *Can FDA Seek Restitution or Disgorgement?*, 58 Food & Drug L.J. 129, 129 (2003).

87 *See infra* Part II.

88 Mario Moore, Food Labeling Regulation: A Historical and Comparative Survey 22 (2001) (J.D. third-year paper, Harvard Law School), https://dash.harvard.edu/server/api/core/bitstreams/7312037c-ad60-6bd4-e053-0100007fdf3b/content [https://perma.cc/TT48-9BF2].

89 *Id.*; *see also* Martha McElroy, Note, *Misleading Food Labels: How Current Litigation Trends Are Exposing a Gap in Consumer Protection Enforcement*, 20 J. Health & Biomed. L. 99, 105 (2023) (stating that the FDCA was passed in 1938 and "expanded" the FDA's power beyond the Food and Drugs Act of 1906).

the manufacturer.[90] The FDCA gives the FDA the power to require disclosure of "material" facts, including facts that are "material" because of the producer's own representations about its product.[91]

The FDCA has also been expanded by the addition of the Nutrition Labeling and Education Act of 1990 ("NLEA").[92] These provisions were added in response to the proliferation of processed, packaged foods beginning in the 1960s.[93] Unlike "natural" foods, the ingredients contained in processed foods are often unknown to consumers, and thus, processed foods require more disclosure for consumers to know exactly what they are purchasing.[94] With this goal of disclosure in mind, the NLEA provided the FDA with "explicit authority to develop [a regime of] uniform labeling laws."[95] The NLEA is the reason that nearly every food package found in a supermarket today displays the well-known white panel with black text containing nutritional information.[96] However, as Part II demonstrates, this regime has had little impact on animal welfare claims. Instead, the FDA has focused its efforts on nutritional and safety information.[97]

D. Laws and Regulations Administered by the USDA

Consumers also rely upon the USDA and its numerous regulations to deter false or misleading advertising. The USDA's Food Safety and Inspection Service ("FSIS") is responsible for, among other things, ensuring the safety and quality of meat, poultry, and egg products—excluding shell eggs.[98] FSIS does this by enforcing the Federal Meat Inspection Act ("FMIA");[99] the Poultry Products Inspection Act ("PPIA");[100] and, less commonly, the Egg Products Inspection Act ("EPIA").[101]

The FMIA, passed in 1906, requires the USDA "to inspect all cattle, sheep, swine, goats, horses, [and] mules . . . slaughtered and processed for

---

90 Paulsen, *supra* note 17, at 286.

91 *Id.*

92 Pub. L. No. 101-535, 104 Stat. 2353 (codified as amended in scattered sections of 21 U.S.C.).

93 *See* Wolkowitz, *supra* note 44, at 571–72.

94 *See id.* at 571 n.28.

95 *Id.* at 572.

96 *See id.*

97 *See infra* Section II.A.

98 *See* JOHNSON, *supra* note 80, at 2, 5; *see also* Kimbrell, *supra* note 31, at 188 (describing FSIS as a "USDA sub-agency" responsible for making sure that meat and poultry products under USDA jurisdiction "are wholesome, not adulterated, and properly marked, labeled, and packaged").

99 21 U.S.C. §§ 601–695.

100 21 U.S.C. §§ 451–473.

101 21 U.S.C. §§ 1031–1056; *see also* MOU 225-99-2001, MEMORANDUM OF UNDERSTANDING BETWEEN THE FOOD SAFETY AND INSPECTION SERVICE OF USDA AND THE FDA, *supra* note 82 (listing FSIS's enforcement responsibilities and statutory authorizations).

human consumption."[102] The PPIA, passed in 1957, requires the USDA to conduct similar inspections for all poultry meat.[103] The PPIA also mandates such inspections for all domesticated birds, including turkeys, ducks, and geese.[104] Finally, the EPIA provides the USDA authority to inspect all "liquid, frozen, and dried egg products."[105]

The USDA and its governing laws are much stricter than those of the FDA. For companies regulated by the USDA, safety inspections are mandatory, not optional.[106] In fact, for meat and poultry products overseen by the USDA, no animal may be slaughtered or processed until an inspector has examined it.[107] On the other hand, the FDA only conducts periodic compliance inspections, and the FDA's own official estimates are that any given establishment is inspected only once every five to ten years.[108] Whereas the FDA mainly relies upon complaints or reports filed by other state or federal inspection personnel, competitors, or consumers, the USDA relies on its own supervision capabilities.[109] For all products that fall under USDA jurisdiction, the USDA, through its FSIS arm, also regulates their labeling.[110] The statutes under which FSIS operates—the FMIA and PPIA—establish specific requirements for labeling meat and poultry, including provisions that require labels not be misleading.[111] In addition to the abovementioned difference in stringency, another major difference between the FDA and USDA methods of label regulation is that FSIS requires premarket approval of labels.[112] This requirement places a greater onus on the USDA to ensure labels are accurate, rather than relying solely on post hoc complaints and subsequent investigation.

Finally, FSIS also plays a role in regulating shell eggs. Though primary responsibility for shell eggs falls to the FDA, the USDA also exerts some control over shell eggs via its grading services.[113] Through its

---

102 JOHNSON, *supra* note 80, at 5.

103 *Id.*

104 *Id.* at 5–6.

105 *Id.* at 6.

106 U.S. DEP'T OF AGRIC. FOOD SAFETY AND INSPECTION SERV., INSPECTION & GRADING OF MEAT AND POULTRY: WHAT ARE THE DIFFERENCES? 1 (2008), https://www.govinfo.gov/content/pkg/GOVPUB-A110-PURL-gpo16831/pdf/GOVPUB-A110-PURL-gpo16831.pdf [https://perma.cc/ZR6N-YB2N].

107 JOHNSON, *supra* note 80, at 6.

108 *Id.* at 11.

109 *Id.* at 5–6, 11.

110 *Id.* at 6. Note that shell eggs are unique in that jurisdiction over them is shared by the FDA and the USDA. *See id.* at 6, 8. The FDA has primary jurisdiction over labeling, but the USDA also plays a role in grading the eggs. *See id.*

111 Kimbrell, *supra* note 31, at 189.

112 *Id.* at 193; *see also* JOHNSON, *supra* note 80, at 18 (comparing the activities of FSIS and the FDA in a side-by-side chart).

113 *See* JOHNSON, *supra* note 80, at 6, 8.

Agricultural Marketing Service wing, the USDA creates "grades" and "standards" for shell eggs, in addition to meat, poultry, and dairy products.[114] One such grading system that is highly pertinent to this Note is the USDA's "Organic" program.[115] Acting pursuant to the National Organic Foods Production Act of 1990 ("OFPA"),[116] the USDA created a system of labeling that focuses specifically on methods of production.[117] Products labeled as "organic" are subject to strict requirements and may contain only organic ingredients, which means "no antibiotics, hormones, genetic engineering, radiation, or synthetic pesticides, or fertilizers" are permitted.[118] Producers are not permitted to label their products as "organic," regardless of whether they opt in to use the official USDA Organic Seal, unless their production methods meet the requirements that the USDA has laid out in defining "organic."[119] This program stands in stark contrast to the current system of regulating animal welfare claims, which has no such program in place.

II. How The Current Regulatory Regime Fails Consumers

Part I outlined the regulatory environment surrounding the labeling of animal-derived food products. Part II details how, despite multiple agencies overlapping in their mission to regulate food product labeling, consumers are often left without adequate protection from misleading claims.

A. The FDA's Inadequate Enforcement

Despite the success of its nutrition labeling requirements, the FDA has been repeatedly criticized regarding animal welfare claims, both

---

114 *See* Sheila Rodriguez, *The Morally Informed Consumer: Examining Animal Welfare Claims on Egg Labels*, 30 Temp. J. Sci. Tech. & Env't L. 51, 64 (2011); Kimbrell, *supra* note 31, at 198–99. These programs are voluntary, so producers are not obligated to, for example, comply with the requirements for labeling meat as "USDA Prime." *Id.* The label "prime" indicates high-quality beef with abundant marbling, as evaluated by USDA graders. *See* Indep. Meat Packers Ass'n v. Butz, 526 F.2d 228, 232 (8th Cir. 1975). Producers pay a fee for the service, and the USDA's graders determine if carcasses meet the standard. *See id.*

115 Rodriguez, *supra* note 114, at 73.

116 7 U.S.C. §§ 6501–6524.

117 Rodriguez, *supra* note 114, at 64.

118 *Id.*

119 *See* 7 U.S.C. § 6505(a)(1)(A)–(B) ("[A] person may sell or label an agricultural product as organically produced only if such product is produced and handled in accordance with this chapter; and . . . no person may affix a label to, or provide other market information concerning, an agricultural product if such label or information implies . . . that such product is produced and handled using organic methods, except in accordance with this chapter.").

for its ineffective standards and its ineffective enforcement of those standards.[120]

First, the FDA suffers from multiple structural issues. The agency is limited in its ability to enforce its regulations due to insufficient funding for stringent inspections.[121] Further, although the FDA does have strong remedies available, its permissible routes to enforcement and obtaining those remedies are often limited.[122] Finally, some scholars have argued that the FDA may suffer from a degree of agency capture.[123]

There are also numerous procedural issues regarding FDA enforcement. One such issue is that producers need not seek FDA approval before putting their products into the marketplace, and thus, either a consumer must file a report—raising the obvious question of how a consumer is supposed to know whether credence attribute claims on labels are true—or an inaccuracy must be discovered during a periodic inspection.[124] Compounding this problem is the fact that FDA inspections of food facilities are mainly focused on food safety, not on whether facility conditions substantiate the claims made on labels.[125] There are too few FDA inspectors compared with the growth in food producers, and inspectors lack adequate guidance when it comes to inspecting food labels because their manuals contain no guidance on how inspectors are to determine whether labels are false or misleading.[126] For example, a report by the Government Accountability Office found that the FDA "has consistently fallen short of meeting its annual targets" for the number of inspections performed.[127] Another report found that FDA inspectors understand the nutritional content to identify, but they are ill-equipped to judge whether labeling claims are misleading.[128]

Additionally, the broad range of powers afforded to the FDA, as discussed above, is substantially reduced in the context of food labeling.[129] This is the case because the FDA's authority to enforce recall

---

120 *See, e.g.*, NEGOWETTI, *supra* note 84, at 2 (arguing that "the FDA lacks the resources and regulatory authority to effectively monitor false and misleading labeling practices").

121 *See* Radis, *supra* note 83, at 372.

122 *See id.*

123 *Id.*; *see also* RICHARD J. PIERCE JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 1.7.2 (2d ed. 1992) ("An agency is captured when it favors the concerns of the industry it regulates, which is well-represented by its trade groups and lawyers, over the interests of the general public, which is often unrepresented.").

124 *See* Radis, *supra* note 83, at 382.

125 *Id.* FDA inspectors are instructed, however, to examine at least three labels per inspection. *Id.*

126 *See* McElroy, *supra* note 89, at 117–18, 130–31 n.168.

127 U.S. GOV'T ACCOUNTABILITY OFF., GAO-25-107571, FOOD SAFETY: FDA SHOULD STRENGTHEN INSPECTION EFFORTS TO PROTECT THE U.S. FOOD SUPPLY 1 (2025).

128 U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-102, FOOD LABELING: FDA NEEDS TO REASSESS ITS APPROACH TO PROTECTING CONSUMERS FROM FALSE OR MISLEADING CLAIMS 29 (2011).

129 *See supra* Section I.C.

orders and to impose fines is limited to situations in which mislabeling "'will cause serious adverse health consequences [or] death,' such as when a label is missing allergen information."[130] In that same vein, injunctions and criminal prosecutions for mislabeling are exceedingly rare because the FDA reserves those powers for major violations that pose a health and safety risk to the public.[131] For instance, in 2024, the FDA recalled thousands of cases of Coca-Cola's Minute Maid Zero Sugar Lemonade after it was discovered that regular lemonade containing sugar had been mistakenly packaged in the "zero sugar" bottles, endangering diabetics.[132]

In addition to the abovementioned procedural issues, researchers have also pointed out that the FDA fails when it comes to substance.[133] Although the NLEA has been successful in regulating nutrition labeling, regulation of so-called "front-label" claims has been sorely lacking.[134] Regarding front-label "buzzwords"—a category that could fairly include claims like "humanely raised"—the most the FDA has done is to include some regulations governing the word "healthy" in the NLEA.[135] As for terms like "cage-free" on shell eggs, the FDA has refused to engage.[136] For example, in *Compassion Over Killing v. FDA*,[137] the plaintiffs petitioned the FDA to institute rulemaking proceedings to address the labeling of egg cartons with misleading claims about the living conditions of egg-producing hens.[138] The FDA denied their petition, citing its own limited resources and its policy of focusing more on health and safety rather than label accuracy.[139] Therefore, although the FDA may have the legal authority to regulate animal welfare claims on labels, at this time, that proposition seems unlikely.

There exists no private right of action under the FDCA either.[140] Thus, with consumers unable to move the needle on their own and the

---

130 Negowetti, *supra* note 84, at 4 (footnote omitted) (quoting 21 C.F.R. § 7.3(m)(1) (2025)).

131 *See id.* (citing 21 U.S.C. § 336).

132 Adriana Diaz, *Thousands of Cases of 'Zero Sugar' Soda Recalled After Ugly Truth Discovered*, N.Y. Post (Oct. 16, 2024, at 12:16 ET), https://nypost.com/2024/10/16/lifestyle/coca-cola-recalls-over-13k-no-sugar-drinks-that-contain-sugar/ [https://perma.cc/E3B2-TZB4].

133 *See* Wolkowitz, *supra* note 44, at 573.

134 *See id.*

135 *Id.* at 574.

136 *See, e.g.*, Compassion Over Killing v. FDA, No. 13-cv-01385, 2014 WL 7336231, at *1 (N.D. Cal. Dec. 23, 2014). In this case, the FDA denied a petition requesting regulation of terms such as "free range" and "cage free." *Id.*

137 849 F.3d 849 (9th Cir. 2017).

138 *Id.* at 853.

139 *Id.* The FDA seemingly gave little weight to the plaintiff's evidence that cage-free eggs are safer because they carry a lower risk of salmonella. *Id.* For further evidence of the link between salmonella and caged eggs, see Paulsen, *supra* note 17, at 292.

140 *See, e.g.*, Spano *ex rel.* C.S. v. Whole Foods, Inc., 65 F.4th 260, 262, 265 (5th Cir. 2023) ("It is indisputable that to the extent that the Appellants seek to enforce the FDCA against Whole

FDA sitting on the sidelines, the FDCA fails to provide meaningful aid to litigants seeking to prevent deceptive humanewashing claims. Though the FDA at first glance appears to have adequate power to enforce truthfulness in food labeling, the agency's primary focus on food safety means that ensuring the accuracy of food labeling is often left to industries' voluntary compliance—or lack thereof.[141] Structural deficiencies and a narrow focus on food safety combine to prevent the FDA from entering this domain.

B. The USDA's "Define-It-Yourself" Regime

Like the FDCA, there are a host of issues with the FMIA and the PPIA. As with the FDCA, there is no private right of action for individual consumers under the USDA's acts.[142] However, FSIS does inspect all meat and poultry products that fall within its jurisdiction.[143] These inspections are done primarily to prevent disease and contamination.[144] The USDA, therefore, is similar to the FDA insofar as its focus is primarily on the safety and quality of meat and poultry products, not on truth in labeling.

Although the USDA's primary focus is on the safety and quality of products, its jurisdiction also extends to the labeling of those products. As noted in Part I, "FSIS requires pre-market approval of labels."[145] When it comes to this premarket approval process, FSIS has guidelines for producers to turn to when deciding what they may call their product: The FSIS "Food Standards and Labeling Policy Book" sets standards

---

Foods, they cannot maintain their claims. . . . If, as the case develops, it becomes clear that there is no independent state duty upon which the Spanos can hang a particular claim, that claim will be preempted.").

141 NEGOWETTI, *supra* note 84, at 4.

142 Jana Caracciolo, *The Legality of Food Labeling Claims: Claims Brought by Competitors and Consumers*, NAT'L AGRIC. L. CTR. (July 19, 2022), https://nationalaglawcenter.org/the-legality-of-food-labeling-claims-claims-brought-by-competitors-and-consumers/ [https://perma.cc/8UZR-AFW3].

143 JOHNSON, *supra* note 80, at 5.

144 *Id.* at 6.

145 Kimbrell, *supra* note 31, at 193; *see supra* Part I.

for terms ranging from "Aged Beef" to "Thai Style."[146] However, the FSIS regime is not without its own critics.[147]

The FSIS Policy Book contains a litany of definitions for product names, but it does not contain any definitions for animal-raising or welfare terms, such as "free-range" or "pasture-raised."[148] In FSIS's own words, "FSIS does not define animal welfare claims in its regulations or guidance."[149] For claims like "humanely raised"—which FSIS describes as "Animal Welfare Claims"—producers create a sketch of their desired label, define any such claims themselves, and provide evidence that they are meeting their own definition.[150] For claims that animal-derived products are sourced from animals that are "free-range" or "cage-free"—which FSIS describes as "Living or Raising Conditions Claims"—FSIS requires that producers provide documentation substantiating the claim.[151] According to FSIS, such substantiation must demonstrate that animals have "free access" to the outdoors.[152] However, FSIS does not define "free access," meaning that the goalposts of self-definition have simply been moved back.[153]

---

146 Food Safety & Inspection Serv., U.S. Dep't of Agric., Food Standards and Labeling Policy Book 7, 173 (2025), https://www.fsis.usda.gov/sites/default/files/import/Labeling-Policy-Book.pdf [https://perma.cc/A83S-D62X]. To illustrate how detailed the FSIS Policy Books gets: "AGED BEEF" must be "maintained in a fresh unfrozen state for a minimum of 14 days from the day of slaughter," and a product designated as "THAI STYLE" must contain "at least five of the following: [b]asil, chilies or chili products, cilantro, coconut or coconut products, coriander, cumin, fish sauce, galangal, garlic, ginger, green onions, jasmine rice, lemon grass, peanuts or peanut products, rice noodles, shallots, or soy sauce." *Id.* The latter example demonstrates FSIS's ability to take a somewhat ambiguous term, open to reasonable disagreement as to a precise definition, and define it with objective metrics. Although some nuance may be lost, administrability and simplicity is gained.

147 *See, e.g.*, Allyson Weaver, Note, *"Natural" Foods: Inherently Confusing*, 39 J. Corp. L. 657, 658, 671–72 (2014) (criticizing labeling practices in relation to the term "natural"); Jessica Scott-Reid, *The "Humanewashing" of America's Meat and Dairy, Explained*, Vox (Dec. 21, 2021, at 08:00 ET), https://www.vox.com/22838160/animal-welfare-labels-meat-dairy-eggs-humane-humanewashing [https://perma.cc/44VT-EP6W] (broadly criticizing labeling practices in the meat and dairy industry).

148 Food Safety & Inspection Serv., *supra* note 146.

149 Food Safety & Inspection Serv., U.S. Dep't of Agric., FSIS Guideline on Substantiating Animal-Raising or Environment-Related Labeling Claims 8 (2024), https://www.fsis.usda.gov/sites/default/files/media_file/documents/FSIS-GD-2024-0006.pdf [https://perma.cc/AZF4-85N5]. Further, these guidelines "do not have the force and effect of law." *Id.* at 3.

150 *Id.* at 8–10; *see also* Kimbrell, *supra* note 31, at 217 (criticizing the lack of standards for how industries define their own animal welfare labels).

151 Food Safety & Inspection Serv., *supra* note 149, at 15–16.

152 *Id.* at 16–17.

153 *Id.*; *see also, e.g.*, Press Release, Animal Welfare Inst., Investigation Sheds Light on Deception of "Free Range" Poultry Labels (Dec. 17, 2015), https://awionline.org/press-releases/investigation-sheds-light-deception-free-range-poultry-labels [https://perma.cc/X5DJ-3X4E] (describing that "access" on poultry labels does not mean that animals had access to the outdoors in any true sense).

FSIS does not inspect farms or facilities to ensure that producers comply with their stated definitions.[154] Instead, FSIS merely reviews affidavits from producers.[155] Furthermore, outside investigations have revealed that, for a significant portion of submitted claims and definitions, "substantiating documentation" is missing.[156] Producers may also request to include a third-party certification on the label, and all FSIS requires is a copy of the certificate from the private organization.[157] Some of these third-party certifications are rigorous, but many are organized by industry groups and merely codify standard factory farming practices as humane.[158] Thus, as of now producers are permitted to apply for a label, define a term like "humanely" themselves—or use an industry-aligned third-party certification—and need only demonstrate to FSIS that they have met their own definition.[159] As an example, a scenario like this occurred in *Leining v. Foster Poultry Farms, Inc.*,[160] a recent case out of California. The plaintiff alleged that the producer's factory farming practices were far from the humane standard claimed, but FSIS, having no substantive guidelines for use of the term, approved the label.[161] Due to preemption, discussed below, the plaintiff's claim was barred.[162] If FSIS had more substantive regulations defining the term at issue, the producer may have failed to obtain label approval in the first place, or the plaintiff may have had a claim to enforce FSIS standards.[163]

C. Preemption

Given that there are no private rights of action under the FDCA or USDA enabling acts, consumers are, in large part, forced to rely on the agencies' regulations, which are currently lacking in the sphere of animal-welfare-related claims.[164] As mentioned in Part I, consumers and advocacy groups should still be able to bring state law claims—the aforementioned difficulties notwithstanding.[165] However, the structures of both the FDCA and the USDA acts all but foreclose that possibility.

---

154 Kimbrell, *supra* note 31, at 217.

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*; *see also* Animal Welfare Inst., A Consumer's Guide to Food Labels and Animal Welfare (2024), https://www.awionline.org/sites/default/files/publication/digital_download/awi-food-label-guide.pdf [https://perma.cc/L5JC-VVEN] (breaking down the common animal welfare labels applied to animal products).

159 *See* Food Safety & Inspection Serv., *supra* note 149, at 8–10.

160 61 Cal. App. 5th 203 (2021).

161 *Id.* at 206–07.

162 *Id.* at 216.

163 *See id.* at 215.

164 *See supra* Sections II.A–.B.

165 *See supra* Section I.A.

Preemption is a doctrine, rooted in the Supremacy Clause of the United States Constitution, that "invalidates state laws that interfere with, or are contrary to, federal law."[166] Regarding the FDCA, some courts have held that labels approved by the FDA may not be challenged on state law grounds.[167] Indeed, the 1990 amendment to the FDCA adding the NLEA provided an express preemption provision.[168] However, some courts have construed this narrowly, holding that labels that have not been explicitly approved by the FDA can still be subject to state law claims, so long as state law does not impose different requirements than federal law.[169] Nonetheless, once a label has been approved by the FDA, it is nearly impossible for a claimant to bring an action. Plaintiffs are forced to navigate the numerous statutes and amendments under which the FDA operates, and at some point, they usually encounter either an express preemption provision or an implied preemption due to some FDA action on the issue.

The preemption issue is even worse for meat and poultry under the USDA's FSIS regulations. FSIS's preapproval process means that every label on every package has been expressly approved, and thus any state law claim regarding the label is preempted.[170] The Supreme Court has characterized the preemption that occurs under the FMIA and PPIA as one that "sweeps widely" and that "prevents a State from imposing any additional or different—even if nonconflicting—requirements that fall

---

166 *See* Am. Apparel & Footwear Ass'n, Inc. v. Baden, 107 F.4th 934, 938 (9th Cir. 2024) (quoting Hillsborough County v. Automated Med. Lab'ys, Inc., 471 U.S. 707, 712–13 (1985)); *see also* Radis, *supra* note 83, at 430 (discussing the NLEA's preemption provision as a bar to label challenges by consumers).

167 *See* Kimbrell, *supra* note 31, at 208; *see also* Bradach v. Pharmavite, LLC, 735 Fed. App'x 251, 253 (9th Cir. 2018) ("[S]tates are prohibited from legislating food labeling laws that are not identical to federal requirements."). *But see* Chavez v. Blue Sky Nat. Beverage Co., 268 F.R.D. 365, 369 (N.D. Cal. 2010) (holding that plaintiffs may still bring state law claims for false or misleading labels if the label alleged to be false or misleading falls within a provision of one of the federal statutes). Accordingly, though there is no private right of action under the FDA, the plaintiff was able to bring a state unfair trade practices claim based on the violation of a precise FDA regulation. *Id.*

168 *See* 21 U.S.C. § 343-1(a); *see also* 21 U.S.C. § 337(a) (limiting states' ability to bring labelling challenges).

169 *See* Kimbrell, *supra* note 31, at 208; *see also* Bell v. Publix Super Mkts., Inc., 982 F.3d 468, 484 (7th Cir. 2020) (permitting state law claim to proceed when the plaintiffs sought only "to stop defendants from voluntarily adding deceptive language to the federally permitted labels"). In essence, state law could not impose an additional disclosure requirement such as 'country of origin' if federal law did not require as much, however, in the absence of federal law on the issue, state law claims alleging that a 'country of origin' label is misleading can still go forward. *See Bell*, 982 F.3d at 484.

170 *See* Kimbrell, *supra* note 31, at 214–15. The FMIA and PPIA "permit some concurrent state enforcement, but expressly declare that state laws regulating the labeling of meat and poultry products 'may not be imposed by any State' if they set forth 'marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under'" the Act. *Id.* at 214 (emphasis omitted) (quoting 21 U.S.C. §§ 678, 467e).

within the FMIA's scope."[171] For example, in one case involving a claim of misleading labeling, much of the dispute turned on whether FSIS had in fact reviewed the label.[172] Simply demonstrating that FSIS had reviewed its label was all the defendant needed to vanquish a state law claim,[173] despite the fact that FSIS does not define welfare labeling terms and does not even ensure that producers meet their own definitions.[174]

It appears then that consumers' best hope as of now is to bring non-preempted state law claims for products that fall under the FDA's jurisdiction, which excludes most animal products except shell eggs. However, apart from this lack of litigatory options, there is another issue with such a futile system: Food producers can weigh the probability of a suit and the expected settlement value thereof against the potential profits to be garnered by making a dubious claim—with a concomitant increase in prices—and may calculate that making the false claim is worth it.[175] In other words, the issue is not only the lack of avenues for redressing misleading claims on labels but also a likely increase in the use of such claims on products. A regulatory body is better suited to pursue the most efficient course of litigation and set fines high enough to disincentivize deceptive labeling in the first place.[176]

III. The National Organic Program and the Potential To Expand It

Part II examined the gaps in the current regulatory framework surrounding the use of animal welfare claims by food producers. Part III describes how the National Organic Program ("NOP") tackled a similar issue in the realm of "organic" labeling. It then proposes a novel solution to the animal welfare labeling issue: grafting animal welfare labeling regulations onto the NOP's existing—and successful—structure.

A. The Success of the National Organic Program

As briefly mentioned in Part II, a problem similar to the one this Note tackles arose in the late 20th century surrounding the use of the term "organic" in food labeling.[177] At the time, use of the term "organic" was growing, but as there was no singular standard for what constituted

171 Nat'l Meat Ass'n v. Harris, 565 U.S. 452, 459–60 (2012).

172 *See* Cohen v. ConAgra Brands, Inc., 16 F.4th 1283, 1289 (9th Cir. 2021).

173 *See id.* at 1290.

174 *See supra* Section II.B.

175 *See* Radis, *supra* note 83, at 414–15 ("[T]he sales generated from the misleading labeling may exceed the cost of a settlement . . . .").

176 *See id.* at 415.

177 *See* Wolkowitz, *supra* note 44, at 575–76.

an "organic" product, consumer confusion was widespread.[178] Like the realm of animal welfare labeling today, there were numerous organizations that certified producers' "organic" claims, but every organization had its own definitions and regulations.[179] Thus, a certain level of pesticide use in growing products may have met the standard for one certifier, but not another.[180]

In response to consumer desire for a uniform labeling standard for this amorphous term, Congress passed the National Organic Foods Production Act of 1990, or OFPA.[181] This Act tasked the Secretary of Agriculture with establishing the National Organic Standards Board ("NOSB").[182] The NOSB is made up of fifteen volunteer members.[183] These members include farmers, consumer advocates, retailers, scientists, and environmentalists.[184] This diverse body is intended to reflect the various stakeholders in the organic food marketplace and ensure that the resultant policies are not biased toward any single interest group.[185] The members of the NOSB work together to advise the Secretary on standards for organic products.[186]

After years of collaboration between the Secretary and the NOSB, the USDA promulgated its key regulations regarding organic products with the issuance of the NOP in 2002.[187] The NOP regulations set out a detailed description of the substances that an organic product may and may not contain.[188] These provisions are part of the National List of Allowed and Prohibited Substances ("National List").[189] In addition, the NOP sets guidelines for permissible organic food production practices, including prohibitions on genetic modification and synthetic pesticides.[190] The NOP's stated goal is to "protect organic integrity" and thus increase consumer trust.[191]

Under the NOP regime, a producer may not label its products as "organic" unless it strictly adheres to all NOP regulations.[192] Among

---

178 *See* Rodriguez, *supra* note 114, at 64.

179 *See* Sarah J. Morath, *Regulating Organic*, 73 Am. U. L. Rev. 145, 161 (2023).

180 *See id.*

181 7 U.S.C. §§ 6501–6523; *see* Rodriguez, *supra* note 114, at 64.

182 Rodriguez, *supra* note 114, at 64–65.

183 Wolkowitz, *supra* note 44, at 576.

184 *Id.* at 576–77.

185 *Id.* at 577.

186 7 U.S.C. § 6518(a) (establishing the NOSB "to assist in the development of standards for substances to be used in organic production and to advise the Secretary [of Agriculture]").

187 Rodriguez, *supra* note 114, at 64–65.

188 Wolkowitz, *supra* note 44, at 576.

189 *Id.*

190 *See id.* at 577.

191 Zachary T. Neuhofer, Cong. Rsch. Serv., R48379, Organic Agriculture Standards: Oversight and Enforcement 1 (2025).

192 Rodriguez, *supra* note 114, at 64–65, 64 n.125.

other things, the NOP regulations prohibit the use of biotechnology, growth hormones, antibiotics, or synthetic chemicals.[193] Organic producers also must go through a certification process approved by the NOP.[194] The NOP grants certain certifying agents accreditation status, and producers must utilize one of these agents to confirm compliance.[195] These certifying agents are analogous to the third-party humane certifiers discussed throughout this Note.

The NOP regulations are enforced by both the USDA and the USDA's accredited certifiers, which are authorized to inspect and investigate the operations of organic producers.[196] The USDA has created an online public database identifying all certified organic operations, known as the Organic Integrity Database.[197] Additionally, individuals can petition the NOSB to evaluate substances or products that may have been previously un- or under-addressed.[198] Thus, the NOP and its National List are dynamic and responsive to an ever-changing market.

Importantly, the NOP is not an all-or-nothing regime. That is, there are tiers of organic certification available.[199] As previously mentioned, to label a product as "100% organic" or "organic" outright—and be permitted to affix the official USDA Organic Seal—a producer must adhere to all NOP regulations.[200] If the product is a processed food, then it must be made with at least 95% organic ingredients.[201] If a producer's product is made with between 70% and 95% organic ingredients, it may label the product as "made with organic" ingredients, specifying which ingredients in the mix are organic.[202] However, it may not affix the USDA Organic Seal or represent the product as wholly organic.[203]

In this bifurcated enforcement system, the USDA itself investigates complaints submitted to the NOP, oversees the certifiers and conducts audits of them, issues warning letters and cease-and-desist orders, suspends or revokes the accreditation of certifiers that repeatedly fail audits or investigations, and issues civil penalties.[204] The certifying agents, meanwhile, conduct standard annual inspections, unannounced

193 *See id.* at 64; NEUHOFER, *supra* note 191, at 1–2.

194 Rodriguez, *supra* note 114, at 65 n.131.

195 *Id.* As of this writing, there are currently seventy-two NOP-approved certifying agents. *See* Organic Integrity Database, Certifier Locator, U.S. DEP'T OF AGRIC., https://organic.ams.usda.gov/integrity/Certifiers/CertifiersLocationsSearchPage [https://perma.cc/7A4F-TQNF] (last visited Feb. 23, 2026).

196 NEUHOFER, *supra* note 191, at 1–2.

197 *Id.* at 6.

198 Morath, *supra* note 179, at 163.

199 *Id.* at 164.

200 *Id.* at 164–65.

201 *Id.* at 165.

202 *Id.* (citing 7 C.F.R. § 205.301(c) (2022)).

203 *Id.*

204 NEUHOFER, *supra* note 191, at 4.

inspections, and compliance inspections when necessary.[205] They also collect samples to analyze to ensure that no prohibited substances or chemicals have been used.[206] When an agent discovers noncompliance with the NOP, it may issue notices and, if that route fails, revoke certifications—leaving the producer at risk of even harsher penalties if it continues to claim "organic" thereafter, including civil penalties or criminal liability.[207]

In order to become a certifying agent, an organization must first be approved by the USDA.[208] Agents can be private entities or governmental agencies.[209] The USDA will assess whether the agent possesses expertise in organic production and handling and can sufficiently train personnel to implement the NOP regulations.[210] The USDA maintains oversight of accredited certifying agents and performs reviews to ensure that agents maintain expertise and integrity.[211] If not, the USDA may revoke accreditation.[212]

Recent experience demonstrates the success of the NOP in ensuring compliance with organic regulations.[213] Despite overseeing a market in excess of fifty billion dollars, NOP certifiers have demonstrated the ability to rigorously enforce compliance and weed out bad actors.[214] For example, the NOP discovered systemic noncompliance in Turkey's Black Sea region, resulting in the revocation of organic status for more than 180 operations there between 2016 and 2019.[215] The NOP is efficient because it uses a risk-based analysis system.[216] Lower-level staff handle simple inquiries by the public, while complaints about uncertified producers marketing their products as organic are handled by a specialized team trained to minimize case processing time.[217] They are able to minimize processing time because, in a majority of cases, producers were simply unaware of the NOP requirements and, thereafter, either eliminated their organic labeling or successfully sought NOP

---

205 *Id.*

206 *Id.*

207 *Id.*

208 *Id.* at 5–6.

209 *Id.* at 5. For example, some large agricultural counties have a department that is accredited to certify organic production. *See* Organic Integrity Database, *supra* note 195.

210 NEUHOFER, *supra* note 191, at 5.

211 *Id.*

212 *Id.* at 5–6.

213 *See Assessing the Effectiveness of the National Organic Program: Hearing Before the Subcomm. on Biotechnology, Horticulture, and Rsch. of the H. Comm. on Agric.*, 116th Cong. 5 (2019) (statement of Hon. Greg Ibach, Under Sec'y, Mktg. & Regul. Programs, U.S. Dep't of Agric.).

214 *Id.*

215 *Id.* at 5, 8.

216 *See id.* at 7.

217 *Id.*

approval.[218] Finally, cases that the NOP determines present a high risk of intentional fraud are handled by the most experienced investigators.[219] Thus, the NOP owes its success to a combination of comprehensiveness, dynamism, and efficiency.

B. Expanding the NOP To Encompass Animal Welfare Labeling

The NOP is an example of a successful, well-designed regulatory scheme controlling the use of a term that is, on its own, open to reasonable debate. This Note proposes a similar solution for regulating terms such as "pasture-raised," "free-range," and "humanely raised," that, like "organic," are difficult to define and regulate.

The stated purpose of the OFPA is "to establish national standards governing the marketing of certain agricultural products as organically produced products" and to ensure that such products "meet a consistent standard."[220] Producing and marketing products as "free-range" or "pasture-raised" could be considered a variant of organic production. "Organic" is not defined by the OFPA; rather, the OFPA simply dictates that a product is "organically produced" if the production thereof complies with the statute.[221] The OFPA prohibits a producer from using any label that "*implies, directly or indirectly*, that such product is produced and handled using organic methods" except as provided for in the Act.[222] The animal welfare terms that this Note discusses imply a type of production that, in the mind of a consumer, conjures up the same expectations as the word "organic."[223]

Consumers often interpret "organic" as implying that products are free from "chemicals" and "growth hormones," *and* "produced naturally."[224] And consumers are also motivated by "standards of animal welfare" in purchasing "organic" products.[225] Since consumers "associate pasture-raised production methods with organic production,"[226]

---

218 *Id.*

219 *See id.*

220 7 U.S.C. § 6501(1)–(2).

221 7 U.S.C. § 6502(15).

222 7 U.S.C. § 6505(a)(1)(B) (emphasis added).

223 *See* Gemma C. Harper & Aikaterini Makatouni, *Consumer Perception of Organic Food Production and Farm Animal Welfare*, 104 BRIT. FOOD J. 287, 287 (2002) (finding that "consumers often confuse organic and free-range products because they believe that 'organic' is equivalent to 'free-range' food"); *see also* Chad M. Kruse, Comment, *The Not-So-Organic Dairy Regulations of the Organic Food Production Act of 1990*, 30 S. ILL. U. L.J. 501, 526 (2006) ("[C]onsumers are justified in believing the USDA organic label indicates more humane and natural treatment . . . .").

224 Harper & Makatouni, *supra* note 223, at 292.

225 *Id.* at 297.

226 Ekaterina Stampa, Christin Schipmann-Schwarze & Ulrich Hamm, *Consumer Perceptions, Preferences, and Behavior Regarding Pasture-Raised Livestock Products: A Review*, FOOD QUALITY & PREFERENCE, June 2020, at 1, 2.

"better animal welfare" is cited as a motivation for purchasing both "free-range" and "organic" products.[227] To an average consumer, terms relating to animal welfare therefore imply the same kinds of production methods as the term "organic." Thus, under the OFPA, the USDA has the power to regulate the use of terms relating to animal welfare.[228]

The NOP already, to a certain extent, regulates the *treatment* of animals whose products are labeled as "organic." For example, chicken marketed as "organic" would require an NOP certifying agent to ensure that the birds are housed in a facility spacious enough "to allow all birds to move freely" and "stretch both wings simultaneously."[229] Though this is far from "free-range," it demonstrates that the USDA understands that humane practices are implicit in "organic" livestock rearing and that consumers view the two somewhat synonymously. Thus, the USDA should use its discretionary rulemaking power under the OFPA to regulate the use of terms relating to animal welfare on labels because they *imply* that the products are produced in the same manner organic products are to be produced. The implementation of this proposed solution is as simple as the USDA, through the NOP, issuing regulations that set standards for the use of terms such as "humanely raised" or "free-range."

The current lack of restriction on the use of terms relating to animal welfare is a gap in the pre-existing NOP framework that necessitates action by the USDA. As previously mentioned, current NOP regulations do specify some standards for the raising of animals to be sold as "organic."[230] Currently, however, a producer can opt not to meet this standard, forgo usage of the "organic" label, yet still label their product as "free-range" or something similar.[231] In the mind of the consumer, however, these terms are often perceived as equivalent.[232] A shopper may not recognize the import of the omission of the USDA Organic Seal, instead thinking that "free-range" is just as good if not better.[233]

Under the OFPA, the USDA has the statutory authority to regulate these terms. As previously mentioned, the OFPA grants the USDA the power under the NOP regime to prohibit labeling that even *indirectly implies* that a product was produced using organic methods.[234] The OFPA further grants the USDA the power to "require such other terms

---

227 Sabrina Spartano & Simona Grasso, *Consumers' Perspective on Eggs from Insect-Fed Hens: A UK Group Study*, Foods, Feb. 2021, at 1, 5.

228 *See generally* Kruse, *supra* note 223, at 526–29 (arguing that the OFPA should regulate livestock based on their natural behaviors).

229 7 C.F.R. § 205.241(b)(1) (2025).

230 *See supra* note 229 and accompanying text.

231 *See supra* Section II.B.

232 *See* Harper & Makatouni, *supra* note 223, at 287.

233 *See id.*

234 7 U.S.C. § 6505(a)(1)(B).

and conditions as may be determined by the Secretary to be necessary" in establishing an organic program.[235] Thus the Secretary, after making a finding that the use of terms relating to animal welfare on certain food products highlights a gap in the existing regulatory framework, may issue regulations relating to the use of said terms. The OFPA further mandates that any organic livestock plan under the statute "contain provisions designed to foster the organic production of livestock consistent with the purposes" of the OFPA.[236] The OFPA announces its purpose as "establish[ing] national standards governing the marketing of . . . organically produced products" and "assur[ing] consumers that organically produced products meet a consistent standard."[237] Thus, an adequate organic livestock plan under the Act must also ensure some consistency in the use of organic-adjacent terms like "pasture-raised."

A natural place for the USDA to place these regulations would be in 7 C.F.R. Part 205 Subpart D.[238] This section of the NOP regulations details the mechanics for producers to label their products as "organic" or "made with organic" ingredients or to use the USDA Organic Seal.[239] A new subsection can be added at 7 C.F.R § 205.312, mirroring the existing structure of the organic terminology regulations, except here the rules would lay out what producers must do to gain permission to label their products with animal welfare terminology. The requirements here would then reference the livestock sections of the NOP regulations, 7 C.F.R. §§ 205.236–.242. These are the current regulations that govern livestock production and handling for products to be sold as "organic."[240] Additional regulations would be necessary to provide for the numerous options producers have when marketing their products as humane. For example, a subsection listing the requirements for a "pasture-raised" label would be added. In the end, however, this solution eliminates as much complexity as possible by using the existing NOP framework to regulate animal welfare terms.

So, for example, a producer seeking to market their eggs as coming from "free-range" hens would look to 7 C.F.R. Part 205 Subpart D, finding a new subsection that would mandate that "the term, '[free-range],' may only be used on labels and in labeling of raw or processed agricultural products . . . that have been produced and handled in accordance with the regulations in this part."[241] Turning to the livestock handling section of the NOP regulations, a new subsection under 7 C.F.R. Part

---

235 *Id.* § 6506(a)(11).

236 *Id.* § 6513(c).

237 *Id.* § 6501(1)–(2).

238 7 C.F.R. §§ 205.300–.399.

239 *Id.* §§ 205.300, 205.303–.304, 205.311.

240 Organic Production and Handling Requirements, 7 C.F.R. §§ 205.200–.299.

241 This proposed language mirrors 7 C.F.R. § 205.300(a).

205 would mandate that any "producer of [a free-range egg operation] must establish and maintain year-round [hen] living conditions, which accommodate the wellbeing and natural behavior of [the hens], including"[242] a list of free-range requirements thereafter, such as spacing, access, shelter, and feeding specifications. This proposed solution cleanly wraps humane terms into the existing "organic" framework.

Just as "organic" labeling requires certification by an accredited certifying agent,[243] humane labeling would likewise require certification by USDA-approved certifiers. The use of certification agents eases the burden on the USDA and better ensures compliance. The current problem with the multitude of third-party certifiers of animal welfare claims is that each organization sets its own standards and, as previously mentioned, many are industry funded and merely codify standard factory farming practices as humane.[244] Under the NOP, however, third-party certifiers instead enforce the standards the NOP sets.[245] This dynamic ensures that "free-range" has one consistent baseline meaning. Rather than having to compare a dozen different third-party certifiers to decipher which ones are legitimate and which are misleading, consumers would instead be able to rely on a single NOP definition for each animal welfare term.

One difficulty this solution may pose is determining precisely which terms the USDA has the authority to regulate. For example, although "pasture-raised" may fall more easily within the category of terms that "indirectly impl[y]" organic production, descriptors like "ethically raised" or "raised with love" may fall more in the category of puffery.[246] The latter phrase would almost certainly be held to be mere puffery because it is unlikely that a reasonable consumer would infer that anything factual was being alleged; instead, they would understand this to be a vague marketing term that provides little substance.[247] Phrases such as "humanely raised," however, may fare better, as multiple courts have held that phrase to be more than "mere puffery."[248] Ultimately, the line between puffery and actionable statements is not bright. Knowing this, the USDA should focus first on terms that can easily be standardized,

---

242 This proposed language mirrors 7 C.F.R. § 205.239.

243 *See* Rodriguez, *supra* note 114, at 65; *supra* notes 192–95 and accompanying text.

244 *See* Animal Welfare Inst., *supra* note 158.

245 *See supra* notes 205–07 and accompanying text.

246 *See supra* note 52 and accompanying text.

247 *Id.*

248 *See* Takahashi-Mendoza v. Coop. Regions of Organic Producer Pools, 673 F. Supp. 3d 1083, 1095 (N.D. Cal. 2023) (holding that the claim of "Humane Animal Practices" was not puffery); *see also* Animal Legal Def. Fund v. HVFG LLC, 939 F. Supp. 2d 992, 1002 (N.D. Cal. 2013) (holding that the claim "the humane choice" was not puffery). *But see* Altayyar v. Etsy, Inc., 242 F. Supp. 3d 161, 174 (E.D.N.Y. 2017) (holding that the term "humane" was puffery when used as part of a prospectus in a securities offering).

such as "pasture-raised," both because they are more easily defined and because they will withstand puffery defenses.

One counterargument to this proposal is that the USDA may not define the terms as strictly as some animal rights activists would prefer. For example, in defining "pasture-raised," the USDA may set a square-foot-per-animal threshold that animal rights activists claim is too low. However, this argument fails for three reasons.

First, some level of protection is better than none. Even a "weak" definition entails more protections for consumers than a lack of a definition. Second, the standardization of these terms under the NOP only sets a floor, not a ceiling. For example, though any produce labeled "organic" must meet the NOP's requirements, producers can still opt for a higher bar, such as Regenerative Organic Certified from the Regenerative Organic Alliance, which provides for even more ecologically healthy and sustainable farming practices.[249] Third-party animal welfare certifiers, such as Certified Humane, could still provide additional seals of approval for products. Thus, for the well-informed consumer who seeks a level of animal welfare above whatever standard the NOP sets, this option will still be available.

Third, defining these terms under the NOP may afford consumers and consumer advocacy groups with more opportunities to enforce compliance themselves. As noted in Section II.C, preemption has been a major hurdle for consumers bringing claims of misleading or deceptive labeling. In cases that involve compliance with the NOP, however, litigants have fared better. For example, in *In re Aurora Dairy Corp. Organic Milk Marketing*,[250] plaintiffs alleged that an "organic" milk producer was failing to comply with the requirements of the NOP.[251] Although the court there held that claims specifically attacking the "organic" certification itself were preempted, it held that the plaintiffs were not preempted from bringing their state law claims, because the OFPA was not "so pervasive . . . that Congress left no room for the States to supplement it" and thus the plaintiffs could still allege state law claims that the producer's labels were misleading.[252] Similarly, in *Segedie v. Hain Celestial Group, Inc.*,[253] the plaintiffs brought state law claims against a producer that failed to comply with the NOP.[254] The court held that their claims were not preempted because they were not attempting to enforce a standard of "organic" different from the NOP's

---

249 *See* Regenerative Organic All., Framework for Regenerative Organic Certified 3 (2023), https://regenorganic.org/wp-content/uploads/2023/03/Regenerative-Organic-Certified-Framework.pdf [https://perma.cc/M639-YT5E].

250 621 F.3d 781 (8th Cir. 2010).

251 *Id.* at 787–88.

252 *Id.* at 794, 796, 798.

253 No. 14-cv-5029, 2015 U.S. Dist. LEXIS 60739 (S.D.N.Y. May 7, 2015).

254 *See id.* at *1–2, *7–8.

but rather were furthering the NOP's own definition and broader statutory purpose.[255] Finally, the NOP's more limited scope allows consumers a greater chance of having noncompliant producers' certifications revoked.[256]

Another objection may be that there are too many possible terms to define and that some terms are so vague as to be impossible to define. Although this could certainly be an issue, utilizing the NOP's existing framework will minimize it. As noted above, the NOP requires third-party certification of "organic" claims.[257] Likewise, the proposed solution also requires independent certification. There is already an abundance of third-party certifiers that provide this service for producers who volunteer to meet their standards.[258] For example, the "Certified Animal Welfare Approved" certification by the organization A Greener World is nuanced and comprehensive.[259] Their certification for beef includes a prohibition on tail docking, requirements for spacing allowances, and a prohibition on confinement feeding operations.[260] Certified Humane, a similar organization, sets a minimum threshold of 2.5 acres per 1,000 birds for claiming "pasture-raised."[261] Utilizing these third-party certifiers, which have built up experience and expertise in this industry, will allow the USDA to seamlessly integrate humane standards into the existing "organic" framework. The USDA can look to the multitude of standards that have been promulgated by these organizations when selecting which standards to implement under the NOP. Unlike the status quo, industry-funded "certifiers" will not be able to undercut the standards developed by good-faith organizations because the NOSB is made up of a body of organic farmers, environmentalists, ecologists, and consumer interest representatives.[262]

---

255 *See id.* at *34–35.

256 U.S. Dep't of Agric., Strengthening Organic Enforcement 1 (2023), https://usdaoig.oversight.gov/sites/default/files/reports/2024-11/01801-0001-21finaldistribution-81324.pdf [https://perma.cc/55FE-8AWJ].

257 *See supra* note 192 and accompanying text.

258 *See generally* Animal Welfare Inst., *supra* note 158 (breaking down the different animal welfare labels and certifications).

259 *AWA Standards*, A Greener World, https://agreenerworld.org/certifications/animal-welfare-approved/standards/ [https://perma.cc/X939-6XUF] (last visited Mar. 12, 2026).

260 A Greener World, Certified Animal Welfare Approved by AGW Standards for Beef Cattle 11, 13, 18 (2024), https://agreenerworld.org/wp-content/uploads/2025/10/AWA-Beef-Cattle-Standards-2025-v1.pdf [https://perma.cc/P2B9-52YT].

261 Animal Welfare Inst., *supra* note 158.

262 *NOSB Member Bios*, U.S. Dep't of Agric.: Agric. Mktg. Serv., https://www.ams.usda.gov/rules-regulations/organic/nosb/current-members [https://perma.cc/2R3G-PXKJ] (last visited Feb. 23, 2026).

Conclusion

Modern farming practices have supplied millions with access to low-cost meat, eggs, and dairy, providing protein and nutrition that many would otherwise be unable to afford. At the same time, many consumers, aware of what goes into intensive factory farming, desire alternative options that fulfill both their material and moral desires. Thankfully, the free market has responded by providing a new array of animal-derived food products sourced from small- and medium-sized farms that place an emphasis on animal welfare. As with any market, however, some bad actors have sought to take advantage of consumers' lack of knowledge regarding what occurs in the early steps of the supply chain. Unfortunately, the United States's current food regulation system is ill-equipped to handle this issue. Problems with different causes of action, preemption, and difficulty defining terms have left some producers able to exploit gray areas in the law. Luckily, this is not the first time that such an issue has occurred. "Organic" was once a novel phrase, and it took time for industry, consumers, and regulators to come together and concretize the concept. The same can be done with animal welfare claims.