No. 22-11330

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AIA BURRITO WORKS, INC.,
A1A BURRITO WORKS TACO SHOP 2, INC.,
JUNIPER BEACH ENTERPRISES, INC., and
on behalf of themselves and those similarly situated,
Plaintiffs – Appellants,

v.

SYSCO JACKSONVILLE, INC.,
Defendant – Appellee.

Consolidated Appeals from the United States District Court
for the Middle District of Florida
Case No. 3:21-cv-00041-TJC-JBT

BRIEF OF AMICUS CURIAE PUBLIC JUSTICE FOUNDATION IN SUPPORT OF APPELLANTS

Leah M. Nicholls
PUBLIC JUSTICE, P.C.
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 797-8600
lnicholls@publicjustice.net

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for Amicus Curiae Public Justice Foundation certifies that the following have an interest in the outcome of *A1A Burrito Works, Inc. v. Sysco Jacksonville, Inc.*, No. 22-11330:

A1A Burrito Works, Inc.

A1A Burrito Works Taco Shop 2, Inc.

Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.

Chhabra Gibbs & Herrington PLLC

Docheva, Desislava K.

Felker, Samuel L.

Herrington, Brian K.

Juniper Beach Enterprises, Inc.

Kim, Tony K.

Nicholls, Leah M.

Peterson, Matthew T.

Public Justice Foundation

Public Justice, P.C.

Sysco Jacksonville, Inc,

Tadler Law LLP

Tadler, Ariana J.

Toomey, Hon. Joel B. (U.S. Magistrate Judge)

Varnell & Warwick, P.A.

Warwick, Brian W.

Willis, Erika R.

Amicus Curiae Public Justice Foundation has no parent company and no publicly traded stock.

July 29, 2022

/s/Leah M. Nicholls
Leah M. Nicholls

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTEREST OF AMICUS PUBLIC JUSTICE FOUNDATION

Public Justice Foundation is a national public interest advocacy organization that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting to preserve access to justice for victims of corporate and governmental misconduct. Federal preemption of state-law claims is a barrier to justice for victims of corporate misconduct—including consumers harmed by misbranded food products. As such, Public Justice has extensive experience representing consumers, employees, and others bringing state-law claims against corporations who raise federal preemption as a defense.

Public Justice's particular concern in this case is to ensure that consumers, like Plaintiffs here, are not barred from bringing state-law claims because they necessarily lack access to the same methods to assess compliance with federal standards that corporations and governments have. The victims of misbranding—like the overcharged consumers here—should be able to bring claims under state law that mirror federal-law requirements based on information accessible to them, where that information plausibly shows failure to comply with state and federal requirements.[1]

[1] No party's counsel authored this brief in whole or in part nor did a party, its counsel, or any other person contribute money to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4). All parties consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The plaintiff restaurants are victims of Sysco Jacksonville, Inc.'s misbranding. Sysco purports to sell 40-pound boxes of chicken, but Plaintiffs found that those boxes were often substantially underweight—they were paying for far more chicken than they actually received. There's no dispute that both state and federal law prohibit Sysco from systematically underfilling boxes of chicken. Indeed, Plaintiffs' claims under Florida consumer-protection law reflect the prohibition in federal law on misbranding as to a product's weight. Because Plaintiffs' state-law claims do not seek to impose an additional or different requirement than what is required of Sysco under federal law—that Sysco accurately label the amount of chicken in the package—Plaintiffs' claims are not preempted. *How* Plaintiffs prove that Sysco's products are misbranded is irrelevant; regardless of the method, Sysco is being held to the same requirements under state and federal law and there is no preemption.

But even if, as the district court held, Plaintiffs must prove misbranding using the inspection methods outlined in the federal regulations and designed for use by government inspectors, that court erred in requiring Plaintiffs to have already conducted those inspections prior to filing suit, inspections that they could not have done prior to discovery. Plaintiffs need only allege facts demonstrating that it is plausible Sysco's chicken boxes fail inspection when subjected to government

inspection methods to survive a motion to dismiss. Given the little room for error permitted by the federal inspection methods, and the large and frequent discrepancies alleged by Plaintiffs, they have more than done so here.

Moreover, the rule adopted by the district court—that Plaintiffs must plead information that they could not get access to prior to discovery—threatens to gut private enforcement in this area. By giving states concurrent jurisdiction over poultry misbranding, Congress invited private enforcement under state law as an important complement to the limited resources of federal enforcement. Requiring consumers to have conducted an inspection or otherwise have access to information held by poultry companies prior to filing suit makes it all but impossible for private enforcement to succeed, even when misbranding is egregious. That cannot and should not be the law.

ARGUMENT

I. Plaintiffs' Claims Are Not Preempted Because State Law Imposes the Same Standards as Federal Law.

Plaintiffs' state-law claims are not preempted because the state-law standards that Plaintiffs seek to impose on Sysco are identical to the standards imposed on Sysco by the Poultry Products Inspection Act (PPIA). At their core, both Florida law and the PPIA prohibit misbranding, including misbranding as to the quantity of a package's contents. Here, Plaintiffs identified seventeen examples of Sysco boxes of chicken that weighed substantially less than the weight listed on the label—in

each of the examples in the amended complaint, the amount of underfill was more than six *times* the federal maximum allowable variation (MAV). Nothing in the PPIA immunizes Sysco from state-law liability for regularly and grossly misrepresenting the contents of its packages.

Preemption hinges on the intent of Congress, as expressed through the text of the statute, and the text of the PPIA indicates that Congress intended to eliminate misbranding and intended to do so in cooperation with the states. In its statement of findings, Congress explained that "misbranded poultry products . . . destroy markets for wholesome, not adulterated, and properly labeled and packaged poultry products, and result in sundry losses to poultry producers and processors of poultry and poultry products, as well as injury to consumers." 21 U.S.C. § 451. Congress went on to find "that regulation by the Secretary of Agriculture *and cooperation by the States* . . . are appropriate to prevent" misbranding. *Id.* (emphasis added). In other words, here and throughout the PPIA, Congress expressly contemplated that states would assist in the federal efforts to eliminate misbranding. *See, e.g.*, 21 U.S.C. § 454(a) ("It is the policy of the Congress to protect the consuming public from poultry products that are adulterated or misbranded and to assist in efforts by State and other government agencies to accomplish this objective."); § 467e (conferring concurrent enforcement jurisdiction to the states).

The PPIA's core misbranding provision states that "No person shall sell, transport, offer for sale or transportation, or receive for transportation, in commerce, any poultry products which are . . . misbranded." 21 U.S.C. § 458(a)(2)(A) (subsections omitted); *see also* 21 U.S.C. § 457 ("No article subject to this chapter shall be sold or offered for sale by any person in commerce, under any names or other marking or labeling which is false and misleading."). On the flip side, marking and labeling "which are not false or misleading and which are approved by the Secretary are permitted." *Id.* In turn, "misbranded" applies to a poultry product "if its labeling is false or misleading in any particular" or "unless it bears a label showing . . . an accurate statement of the quantity of the product in terms of weight, measure, or numerical count," with allowances for reasonable variations established by regulation. 21 U.S.C. § 453(h)(1), (h)(5)(B).

The implementing regulations reflect the statutory requirements, providing that "[t]he statement [of weight] as it is shown on a label shall not be false or misleading and shall express an accurate statement of the quantity of the contents of the container." 9 C.F.R. § 317.2(h)(i). Like the statute, the regulations go on to prohibit false or misleading labeling. 9 C.F.R. § 381.129(a).

Inspection and enforcement of poultry products is handled by the Food Safety and Inspection Service (FSIS), a division of the U.S. Department of Agriculture. The PPIA regulations explain how a government inspector determines whether a

particular lot of product is in compliance with the regulatory requirements that weight statements on a package be accurate. *See* 9 C.F.R. § 442.1 *et seq.* Because those methods are written for official inspectors and the producers they regulate, they presume that the entity doing the testing has access to lots of product at the wholesale level and the ability to re-label products that are not in compliance. *See* 9 C.F.R. § 442.5 (re-labeling of inaccurately labeled product). The regulations incorporate the National Institute of Standards and Technology (NIST) Handbook 133, which lays out the method for determining the weight of a package's contents, including scale requirements, tare calculations, MAVs, and plans for how to sample various-sized lots. *See* 9 C.F.R. § 442.2. The NIST handbook is *expressly* written for the benefit of an official inspector. Indeed, the handbook's section entitled "Evaluate for Compliance" explains, "The following steps lead *the inspector* through the process to determine if a sample passes or fails." NIST Handbook 133 (2020), 2.3.7 (emphasis added); *see also id.* at 2.3.1 ("The official defines which packages are to be tested and the size of the inspection lot."); *id.* at 2.3.3 ("Use an official inspection report to record information."); *id.* at 2.3.5(c) (explaining that "the inspector" must allow for moisture loss when determining wet tare under some circumstances).[2]

[2] The PPIA defines "inspector" as "(1) an employee or official of the United States Government authorized by the Secretary to inspect poultry and poultry products under the authority of this chapter, or (2) any employee or official of the government of any State or territory or the District of Columbia authorized by the Secretary to inspect poultry and poultry products under authority of this chapter, under an

Sysco contends that because Plaintiffs did not follow these procedures designed for use by official inspectors and producers, their claims that Sysco misbranded its chicken by grossly underfilling its packages are preempted. But that position conflates the prohibition on misbranding with the *method* government actors use to determine compliance with that prohibition. The PPIA's preemption provision provides that "[m]arking, labeling, packaging, or ingredient requirements . . . in addition to, or different than, those made under this chapter may not be imposed by any State." 9 U.S.C. § 467e. Here, Plaintiffs' Florida law claims are not imposing a different requirement on Sysco. Rather, they are enforcing the same misbranding requirements contained in the statute and the regulations: That the poultry products not contain less product than what the label states. However, because Plaintiffs are not government inspectors, they cannot access the government's methods of determining compliance. Contrary to the district court's conclusion, that does not make Plaintiffs' claims preempted. Indeed, it would be quite odd—and contrary to the purpose of the statute—to foreclose the victims of misbranding from bringing claims under state law where the statute expressly preserves concurrent state jurisdiction. *See infra* Part III*; see also Thornton v. Tyson Foods, Inc.*, 28 F.4th 1016, 1032 (10th Cir. 2022) (Lucero, J., dissenting) ("In this

agreement entered into between the Secretary and the appropriate State or other agency." 9 U.S.C. § 453.

context, the most natural reading of [the] concurrent jurisdiction clause is as an attempt to close the resulting gap by allowing states to enforce the Act's prohibition against misleading labels when the agency declines to do so.").

In short, the PPIA text makes two things clear: First, it welcomes state-law enforcement, and second, it prohibits the sale of poultry products that misstate the weight of its contents. Here, allowing Florida-law claims that Sysco's chicken products are misbranded because they misstate the weight of the products is entirely consistent with federal law and not preempted.

II. The District Court's Decision Conflates Preemption with Pleading Standards.

The district court erroneously conflated preemption, which concerns *what* the law requires, with pleading standards, or *how* a violation of law can be proved, when it held that the Plaintiffs' claims were preempted because they did not allege in their complaint that they used the exact sampling procedures provided in the NIST Handbook. As described in Part I above, there is no preemption here because Plaintiffs' state-law claims are based on Sysco's failure to comply with the federal law against misbranding; they do not impose any additional requirements on Sysco. Instead, what is framed as a preemption analysis is really the application of a pleading standard so high that it could never be met by any plaintiff. By requiring Plaintiffs to undertake the impossible task of gaining access to Sysco's facilities to make wholesale-level measurements *before* filing suit, the court eviscerated private

enforcement under state law of the requirements of the PPIA and other federally enforced laws and disregarded the standards for deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

As the Supreme Court has explained, "a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Here, even if the district court were correct that Plaintiffs must demonstrate that Sysco's chicken boxes are underweight using the federal sampling procedures to prevail on their state-law claim, Plaintiffs have met the plausibility bar at the motion to dismiss stage. Neither Sysco nor the district court took issue with Plaintiffs' actual method of weighing Sysco's products; they do not contend that Plaintiffs used an insufficiently precise scale or that they failed to account for tare weight or moisture loss. Nor could they: Plaintiffs alleged that the method of weighing the packages they used was "consistent in all material respects" with the NIST Handbook. Second Amended Complaint (SAC) ¶ 5. Rather, the district court held that Plaintiffs claims should be dismissed solely because they did not use the sampling plan outlined in the NIST Handbook.

But under those sampling procedures, there is simply no room for the massive disparities in weight that Plaintiffs allege. For 40-pound units of poultry, the MAV is just 0.4 pounds (one percent of the labeled weight). NIST Handbook 133 (2020),

Appx. A, Table 2-9. *All* seventeen examples cited by Plaintiffs in their complaint exceed the MAV by orders of magnitude. *See* SAC ¶¶ 6-7. The smallest variation was 2.7 pounds—nearly *seven times* the MAV—and the largest deficit was 5.3 pounds, more than *thirteen times* the MAV. *Id.* In other words, it isn't close.

Meanwhile, the NIST sampling procedures allow for only a miniscule number of packages to be underweight beyond the MAV. The sampling plans do not allow for *any* packages to be underweight beyond the MAV until the lot size exceeds 3,200 and the sample size is 48. *See* NIST Handbook 133 (2020), Appx. A, Table 2-1. Even then, the lot being inspected fails if more than a single package is underfilled beyond the MAV. *Id.*

Plaintiffs' detailed factual allegations of *seventeen* specific instances in which Sysco's chicken was underweight far in excess of the MAV are more than enough to support the plausible—if not probable—inference that, if Sysco's products were sampled using the protocol in the NIST Handbook, they would be found to be underweight in violation of both the state and federal prohibitions on misbranding.

Contrary to the district court's conclusion, the Plaintiffs did not need to allege that, before filing the complaint, they had *already* conducted a full wholesale-level sampling of Sysco's products as provided in the NIST Handbook and found that the products were out of compliance. They simply needed to allege facts supporting the plausible inference that such an inspection would find the products to be

underweight and misbranded, which they did by alleging a consistent pattern of products that were so underweight they could not have been mere outliers. To require plaintiffs to replicate the government's inspection procedures before filing the complaint would render private enforcement virtually obsolete in this and similar contexts. Private plaintiffs rarely have access to the information that commercial sellers or the federal government use to measure compliance with federal statutes and regulations, but they do have access to facts that can strongly support an inference that federal standards are being violated by the seller. This case is a good example: If several Sysco customers consistently received products that were significantly underweight, that is an indicator that Sysco's practice of delivering underweight packages was widespread. Thus, even without measuring the products at the wholesale level, Plaintiffs can still allege facts that make it plausible, or even probable, that Sysco is violating federal standards.

Plaintiffs may very well need additional discovery to prove their claims at trial, including potential data about the weight of Sysco's products at the wholesale level. But *Iqbal* does not impose a requirement that plaintiffs prove their entire case at the pleading stage without first engaging in discovery, especially where, as here, the information needed to confirm the defendant's liability is in the defendant's sole possession. *See, e.g.*, *Menard v. CSX Transp., Inc.*, 698 F.3d 40, 45 (1st Cir. 2012) (after *Iqbal*/*Twombly* "some latitude may be appropriate where a plausible claim

may be indicated based on what is known, at least where . . . some of the information needed may be in the control of the defendants" (cleaned up)). Only through discovery can Plaintiffs get the wholesale data they need to confirm that, as measured using the NIST sampling protocol, Sysco violated the state and federal prohibitions on misbranding. That does not mean that Plaintiffs' state claims are preempted by federal law or that they are not plausible; it means that they may not yet have the evidence they need to prove by a preponderance of the evidence that Sysco is liable, which is far from unusual at the motion to dismiss stage of the case.

The district court relied heavily on *Webb v. Trader Joe's*, 999 F.3d 1196 (9th Cir. 2021), but that case made the same fundamental error. There, as here, the data collected by the plaintiff and alleged in the complaint was more than sufficient to support the plausible inference that the products were misbranded, and thus the plaintiff should have been allowed to proceed to discovery. The plaintiff alleged that she bought multiple poultry products from several different Trader Joe's stores in her area and then submitted them to a lab for testing for water content. *Id.* at 1199. The test results showed that the water content in the products tested was significantly higher than the water content listed on the label. *Id.* Like the district court in this case, the Ninth Circuit conflated preemption and pleading standards, holding that because the plaintiff alleged that she used a different method than approved by

federal regulators to measure the water content of the products, her state claims were preempted. *Id.* at 1202.

The court overlooked that the data alleged in the complaint supported the inference that, if the federally approved method for measuring water content were used, the product would be found to be misbranded. Instead, the court required the plaintiff to meet the impossibly high standard of pleading "that her retained water data collection protocol was *the same* as Trader Joe's protocol" even though she had no access to information about what the Trader Joe's protocol even was or the ability to measure its products on a mass scale. *Id.* at 1204 (emphasis in original). By holding that the plaintiff can state a claim only by alleging use of the same method as a commercial seller or the federal government, the court impermissibly moved the pleading standard from plausibility to probability—or even certainty—in contravention of Supreme Court precedent. *See Iqbal*, 556 U.S. at 678 ("The plausibility standard is not akin to a 'probability requirement.'").[3]

[3] As Plaintiffs explain in their brief, even if this Court agrees with the outcome in *Webb*, the arguments for preemption in that case were stronger than Sysco's arguments here because the water content measurements and label had been submitted to the federal agency for approval, and the method of measurement used by the plaintiff was different than the requirements imposed on the seller by law. Here, on the other hand, Sysco was required to put an accurate weight on its products, but it was never required to seek agency confirmation that the weight it listed was accurate. Moreover, Plaintiffs' method of measuring weight was consistent with the NIST standards imposed on Sysco; they simply could not measure at the same scale.

In short, because Plaintiffs alleged data which, taken as true, supported the inference that Sysco's products were misbranded under federal law, their claims were not preempted, and they should have been permitted to proceed with their case and take discovery that would allow them to definitively prove that Sysco's products violated both state and federal standards.

III. If Upheld, the District Court's Decision Threatens to Substantially Curtail Enforcement of Congress's Prohibition on Misbranded Products and Will Harm Compliant Businesses.

If the district court's decision is left to stand, private enforcement of misbranding will grind to a halt because potential plaintiffs will never have the access they need to replicate the testing protocols used by government inspectors. Under the district court's reasoning, even if the packages Plaintiffs received contained only five pounds of chicken instead of forty, Plaintiffs' claims would not survive a motion to dismiss because they would still not be able to replicate the NIST Handbook procedures without access to Sysco's wholesale facilities. As a result, they would be powerless to enforce the law against Sysco even in the face of an egregious violation.

Holding private enforcers to a standard so high that enforcement is virtually impossible is directly contrary to Congress's intent in passing the PPIA, which was to provide for concurrent enforcement under state law. *See* Part I *supra*. Indeed, here, state inspectors exercised that concurrent enforcement authority to check several of

Sysco's packages for misbranding, and they found the packages to be underweight. Despite that finding by state inspectors, the district court's holding forecloses any private enforcement under state law because Plaintiffs were unable to replicate the exact procedures the NIST Handbook imposes on Sysco. Thus, the district court's decision frustrates Congress's purpose to "explicitly enlist[] states in the fight to protect consumers by creating concurrent jurisdiction to regulate misleading labels." *Thornton*, 28 F. 4th at 1032 (Lucero, J., dissenting).

Moreover, private enforcement under state law by purchasers is an important tool to effectuate Congress's purpose in enacting the PPIA: "to prevent the movement or sale in interstate or foreign commerce of, or the burdening of such commerce by, poultry products which are adulterated or misbranded." 21 U.S.C. § 452. Often, purchasers of poultry products, like the restaurants in this case, are in the best position to identify products that have been adulterated or misbranded, and they have an incentive to strictly enforce compliance with the law because their finances, their customers' safety, and their reputation are on the line. Empowering purchasers to bring private state-law actions when the federal law has been violated promotes robust enforcement that the federal government would otherwise lack the resources to accomplish.[4] *See Smith v. Coldwell Banker Real Estate Servs.*, 122 F.

[4] In the first two quarters of FY 2022, the FSIS initiated no new civil or criminal actions against any meat or poultry company. *See* USDA Food Safety and Inspection Service, Quarterly Enforcement Reports, https://www.fsis.usda.gov/inspection/

Supp. 2d 267, 274 (D. Conn. 2000) (explaining that private enforcement of a federal statute complements federal government enforcement by "increasing the likelihood that the violator is discovered and such illegal conduct is discouraged"). And potential liability to private purchasers provides a financial incentive for poultry companies to avoid selling misbranded products, therefore deterring violations without the need to expend additional government resources.

The district court's decision virtually eliminates all private enforcement under state law and places the burden of enforcement solely on the federal government, thus undermining Congress's purpose of preventing as many misbranded or adulterated products from entering the market as possible. Not only will the lack of private enforcement strain the resources of the federal government, but companies will have little incentive to comply with the law in the first place, thus selling more misbranded products. And companies that seek to comply with the law and not sell misbranded products will be at a competitive disadvantage, creating a race to the bottom. For example, if Sysco is allowed to sell underweight packages of chicken with impunity in this case, its competitors will have to choose between, on the one hand, complying with the law and making less profit per pound of chicken than Sysco does, or, on the other hand, engaging in the same misbranding practice of

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regulatory-enforcement/quarterly-enforcement-reports. And FSIS's stated policy is to take enforcement action only "[w]hen noncompliance occurs repeatedly." *Id.*

overstating the weight of its chicken. That dilemma harms both the poultry companies and consumers.

In short, the district court's decision eliminates the important tool of private enforcement under state law, undermining Congress's purpose in enacting the PPIA and its express intent to provide for concurrent state jurisdiction.

CONCLUSION

For these reasons, and the reasons stated in Plaintiffs-Appellants' brief, this Court should reverse the district court's decision.

Respectfully submitted,

Leah M. Nicholls
PUBLIC JUSTICE, P.C.
1620 L Street NW, Suite 630
Washington, DC 20036
(202) 797-8600
lnicholls@publicjustice.net

Counsel for Amicus Curiae Public Justice

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because this brief contains 4,018 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by Microsoft Word 2016. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a) because this brief has been prepared in proportionally spaced typeface using 14-point Times New Roman font.

July 29, 2022

/s/ Leah M. Nicholls
Leah M. Nicholls
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 797-8600
LNicholls@publicjustice.net

Counsel for Amicus Public Justice

CERTIFICATE OF SERVICE

I certify that on July 29, 2022, the foregoing document was filed with the Clerk of the United States Court of Appeals for the Eleventh Circuit via the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

July 29, 2022

/s/ Leah M. Nicholls
Leah M. Nicholls
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 797-8600
LNicholls@publicjustice.net

Counsel for Amicus Public Justice