

No. 15-35960

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ANIMAL LEGAL DEFENSE FUND; *et al.*,

Plaintiffs/Appellees,

v.

LAWRENCE G. WASDEN, in his official capacity as the Attorney General of
Idaho,

Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
CASE NO. 1:14-cv-00104-BLW

**AMICUS BRIEF OF THE PLANT BASED FOODS
ASSOCIATION IN SUPPORT OF PLAINTIFF-
APPELLEES REQUEST TO AFFIRM THE
DISTRICT COURT'S RULING**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned *amicus* states that it is not a corporation that issues stock and has no parent corporation.

STATEMENT OF COMPLIANCE WITH RULE 29(C)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* certifies that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than *amicus*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

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INTEREST OF THE PLANT BASED FOODS ASSOCIATION

The Plant Based Foods Association (PBFA) is a membership trade organization representing the fast-growing, \$3.6 billion plant-based foods industry. Recently launched in March 2016, PBFA consists of 48 voting business members and 10 affiliate members, representing the leading packaged food companies, plant-based restaurants, meal delivery services, ingredient suppliers, and distributors. One of PBFA's missions is to ensure a fair and competitive marketplace for businesses selling plant-based foods intended to replace animal products. PBFA advocates for the elimination of policies and practices that place plant-based meats, milks, eggs, and butters at an economic disadvantage. Idaho's statute barring "interference with agricultural production," Idaho Code § 18-7042, does precisely this: it prevents consumers from receiving and evaluating truthful information about how animal products are made. As many consumers eat both plant-based foods and animal products, PBFA's members compete in the same marketplace as animal agriculture producers and seek to ensure a level playing field. Hiding from public view the manner and methods producers use to raise and slaughter food animals denies consumers the information they need to make informed purchasing decisions about both animal products and their plant-based alternatives, and impedes market efficiency and competition. All parties have consented to the filing of this brief.

ARGUMENT

I. Truthful Information about Food Production is Critically Important to Consumers and Competition

As the District Court recognized, the food we put into our bodies is a matter of essential public interest.¹ Even though the First Amendment reaches nearly all speech, speech about food production is particularly important because of the crucial role that food plays in our society.

Food related illnesses and food poisoning cause significant harm.² New research is constantly uncovering links between the food we eat and chronic diseases.³ Consumers rightfully regard the food production processes, including the way food animals are raised and processed, to impact the safety of their food.⁴

¹ *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1204 (D. Idaho 2015); *see also Dairy Stores, Inc. v. Sentinel Publ'g Co.*, 516 A.2d 220, 230 (N.J. 1986); *People v. B.M. Reeves, Inc.*, 5 N.Y.S.2d 144, 152 (N.Y. Ct. Spec. Sess. 1938) (“There is no higher ‘public interest’ than the health and safety of the community, which can so readily be affected by the nature and quality of its food and drink.”).

² CTRS. FOR DISEASE CONTROL AND PREVENTION, CDC ESTIMATES OF FOODBORNE ILLNESS IN THE UNITED STATES, CS218786-A (Feb. 2011) (noting 1 in 6 Americas is affected by food poisoning each year, 128,000 are hospitalized and 3000 die).

³ Walter C. Willett et al., *Prevention of Chronic Disease by Means of Diet and Lifestyle Changes* in DISEASE CONTROL PRIORITIES IN DEVELOPING COUNTRIES (Jamison DT et al. eds., 2006).

⁴ *See Treat My Chicken Right: ASPCA Survey Shows Consumers Want More Humanely Raised Chicken, Feel it Leads to Safer Chicken Products*, THE AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS (Sept. 2, 2014) (finding three quarters of respondents believe humane production processes are safer); Jayson L. Lusk et al., *Consumer Perceptions for Farm Animal Welfare: Results of a Nationwide Telephone Survey*, CRATEFREEFUTURE 22 (Aug. 17, 2007) (“Lusk et al.”).

Modern industrial food production provides opportunities for contamination at each point on the food chain.⁵ Improved animal welfare can improve public health by reducing the likelihood of disease and infection in livestock.⁶ In short, animals raised in better conditions are often safer to the consumer.

Beyond food safety, Americans are increasingly concerned about the ethical ramifications of animal husbandry practices.⁷ Americans are concerned about production processes that can impact their health, such as the practice of giving hormones and antibiotics to food animals.⁸

In light of these concerns, consumers often seek out information about the way animal products they purchase are raised. For example, in one study, more than two-thirds of survey respondents indicated that they wanted to receive more information about the ways farmers “ensure animal care,” and more than three-

⁵ See T.A.B. Sanders, *Food Production and Food Safety*, 318 BRIT. MED. J. 1689, 1689 (1999) (discussing health challenges related to modern food production).

⁶ A.M. de Passillé & J. Rushen, *Food Safety and Environmental Issues in Animal Welfare*, 24 REV. SCI. TECH. INT. EPIZ. 757, 759 (2005).

⁷ ANIMAL WELFARE INST. CONSUMER PERCEPTIONS OF FARM ANIMAL WELFARE, available at https://awionline.org/sites/default/files/uploads/documents/fa-consumer_perceptionsoffarmwelfare_-112511.pdf (last visited June 20, 2016) (summarizing studies documenting consumer concerns).

⁸ HARTMAN GRP., ANIMAL PROTEINS: THE CONSUMER-DRIVEN DEMAND FOR TRANSPARENCY, (Aug. 18, 2015) (“HARTMAN GRP. STUDY”), available at <http://hartbeat.hartman-group.com/article/613/Animal-Proteins-The-Consumer-Driven-Demand-ForTransparency>.

fourths wanted to know more about measures used to ensure food safety.⁹ Another study found that almost half of the respondents wanted to know more about how food companies treat animals used in their products.¹⁰

Consumers' purchasing decisions are heavily influenced by the information they have on the ways in which the animal products they purchase are produced. Half of the respondents in one survey indicated they consider the well-being of farm animals when making purchasing decisions.¹¹ Further, more than two-thirds of those polled in another study stated that they would pay more for high quality, humanely raised animal products.¹² Finally, almost two-thirds of consumers in a study by the Hartman Group responded that they are more likely to buy products that come from animals raised in as natural an environment as possible, as well as from animals that are not given hormones or antibiotics.¹³

⁹ DEMETER COMMUNICATIONS, WHAT "INDICATOR CONSUMERS" WANT TO KNOW MOST ABOUT HOW U.S. FOODS ARE PRODUCED 13 (June 2010) ("DEMETER COMMUNICATIONS STUDY"), available at http://demetercommunications.com/wp-content/uploads/2011/05/FINAL.Demeter.SegemenTrak.Full_Report.June2010.pdf

¹⁰ HARTMAN GRP. STUDY.

¹¹ Lusk et al., at 15.

¹² *Humane Heartland Farm Animal Welfare Survey*, AM. HUMANE ASS'N 5 (2013), <http://www.americanhumane.org/assets/humane-assets/humane-heartland-farm-animals-survey-results.pdf> (28% were willing to pay 20-30% more).

¹³ HARTMAN GRP. STUDY.

The market for meat alternatives and plant-based foods in general is growing rapidly.¹⁴ Consumers increasingly purchase non-meat proteins, believing they can provide the same benefits as meat protein, without added antibiotics or hormones, while alleviating any animal welfare or environmental sustainability concerns.¹⁵

Given this shifting market, meat alternatives often compete in the same market with animal products for the same consumer dollars.¹⁶ More than one hundred million Americans consume meat alternatives, but only about twenty million are vegetarians or vegans.¹⁷ Thus, most consumers who purchase meat alternatives, purchase meat regularly as well. Moreover, dairy products are increasingly facing competition from non-dairy alternatives, such as milk, butter, and cheese made from soy, almonds, and coconut.¹⁸ Finally, producers of egg

¹⁴ *More than One-Third of Americans Consume Meat Alternatives, but only a Fraction are Actually Vegetarians*, MINTEL (Aug. 12, 2013) (“*Mintel Study*”); *Why Plant Based – Growing Industry*, PLANT BASED FOODS ASS’N, <https://www.plantbasedfoods.org/why-plant-based/> (last visited June 13, 2016) (citing various sources recording such a growth).

¹⁵ Elizabeth Crawford, *Americans’ Demand for Protein is Evolving Towards Plant-based Options, Packaged Facts Finds*, FOODNAVIGATOR-USA.COM (Mar. 3, 2016), <http://www.foodnavigator-usa.com/R-D/Americans-evolve-towards-plant-based-proteins-Packaged-Facts-finds>.

¹⁶ *See Animal Legal Def. Fund v. HVFG LLC*, 939 F. Supp. 2d 992, 1000-01 (N.D. Cal. 2013) (denying a motion to dismiss and finding that a producer of “faux gras,” a plant-based foie gras, “is plausibly an indirect competitor” of a producer of foie gras).

¹⁷ *Mintel Study*.

¹⁸ The Associated Press, *Milk Industry Fights Back Against Vegan Groups, ‘Anti-Dairy Folks’*, NOLA (Jan. 26, 2015), http://www.nola.com/food/index.ssf/2015/01/milk_get_real_campaign_fight.html; *New Competition: Dairy and Dairy*

alternatives are perceived as a major competitor to the egg market—even spurring egg producers to take radical actions to fend off the competition.¹⁹

Because of consumers’ concerns about how the animal products they consume are treated, the availability of information about animal production in the marketplace impacts the competitiveness of plant-based foods.²⁰ This market concern is what motivates the PBFA here to respectfully urge this Court to sustain the District Court’s ruling.

II. By Severely Limiting the Available Information About Food Production the Idaho Statute Harms Consumers and Competition

a. Speech to Promote Competition is Protected by the Constitution, and Federal and State Laws.

The “marketplace of ideas” is among the fundamental principles underlying the First Amendment. Justice Holmes famously advocated that society was best served when individuals could make decisions for themselves based on a “free trade in ideas.”²¹ As Justice Holmes remarked, “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”²² The importance

Alternatives, PREPARED FOODS (June 1, 2015), <http://www.preparedfoods.com/articles/116469-new-competition-dairy-and-dairy-alternatives>.

¹⁹ Sam Thielman, *US-Appointed Egg Lobby Paid Food Blogs and Targeted Chef to Crush Vegan Startup*, THE GUARDIAN (Sept. 6, 2015).

²⁰ *Cf. Animal Legal Def. Fund*, 939 F. Supp. 2d at 1000-01.

²¹ *Abrams v. United States*, 250 U.S. 616, 625-26, 629 (1919) (Holmes, J., dissenting).

²² *Id.* at 630.

of the “marketplace of ideas” goes beyond political speech; providing comprehensive information about food production is essential to protecting consumer choice in the marketplace and robust competition among producers of animal products and plant-based alternatives.

The more information consumers have, the more equipped they are to make decisions about matters of crucial importance to their lives—such as the products that they buy for their families. In a market economy, perfect information “is assumed as a condition of the optimal operation of the market,” and as such, information must be protected.²³ This is because “accurate information about the quality and characteristics of the products offered for sale” is necessary for buyers to make decisions.²⁴ Without such information, consumers are unable to “make purchases maximizing their welfare.”²⁵ With laws such as Idaho Code § 18-7042, “the marketplace of ideas principle malfunctions insofar as the free speech liberties of a community succumb to isolated economic interests.”²⁶ By preventing investigative journalists and whistleblowers from revealing true information about

²³ Alvin I. Goldman and James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1, 20 (1996).

²⁴ Tamara R. Piety, *Market Failure in the marketplace of Ideas: Commercial Speech and the Problem that Won’t Go Away*, 41 LOY. L.A. L. REV. 181, 187 (2007) (quoting Richard A. Posner, REGULATION OF ADVERTISING BY THE FTC 3 (1973)).

²⁵ *Id.*

²⁶ See Ronald K.L. Collins, *Free Speech, Food Libel, & the First Amendment . . . in Ohio*, 26 OHIO N.U. L. REV. 1, 1 (2000).

how food animals are raised and slaughtered, consumers cannot make fully informed decisions about food purchases. The First Amendment therefore serves as a crucial shield in preventing dominant competitors from crushing consumer choice and its importance to competition further supports upholding the District Court’s ruling.

The Supreme Court has recognized the importance of the free flow of information for consumer competition by protecting commercial speech under the First Amendment. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, for example, the Supreme Court recognized that a “consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”²⁷ For consumers to be able to make “intelligent and well informed” decisions, the Court held, free flow of commercial speech is “indispensable.”²⁸ This is because, the Court reasoned, “the allocation of our resources [is] made through numerous private economic decisions,” and as a “matter of public interest” free expression is necessary.²⁹ In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court held that reducing “information available for consumer decisions . . . defeats the purpose of the First

²⁷ 425 U.S. 748, 763 (1976).

²⁸ *Id.* at 765.

²⁹ *Id.*

Amendment.”³⁰ The Supreme Court has also recognized that promoting the widespread dissemination of information from a multiplicity of sources and promoting fair competition are governmental interests to be considered in the context of any First Amendment analysis.³¹

Restrictions on speech about food should be entitled to more rigorous scrutiny than ordinary commercial speech because of the central importance of food to human life. Indeed, one court has recognized that “news stories about the quality or contents of products and services . . . should receive the same protection as those dealing with public officials and public figures.”³²

At the same time, considering the importance of speech about food production, it is crucial that consumers are not misled and have access to truthful information about such production. In *Nike, Inc. v. Kasky*, a case regarding statements made about labor practices, Justice Stevens opined that that “[t]he regulatory interest in protecting market participants from being misled by such misstatements is of the highest order.”³³

³⁰ 447 U.S. 557, 567 (1980).

³¹ *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 189-90 (1997) (upholding restrictions on speech imposed to promote fair competition).

³² *Dairy Stores, Inc. v. Sentinel Publ’g Co.*, 465 A.2d 953, 955 (N.J. Super. Ct. Law Div. 1983), *aff’d*, 516 A.2d 220 (N.J. 1986).

³³ 539 U.S. 654, 664 (2003) (Stevens, J., concurring) (per curiam), *dismissing cert. as improvidently granted* to 45 P.3d 243 (Cal. 2002), *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring) (“Such a measure could be justified as a means to ensure that consumers are not led, by incomplete or

b. Idaho Code § 18-7042 Directly Contradicts these Basic Principles

In preventing information about the agricultural products they purchase from reaching consumers, Idaho Code § 18-7042 subverts the large and historic body of case law and commentary favoring access to truthful information in the commercial context. Because animals used to make agricultural products are raised, slaughtered, and processed in near secrecy, consumers have little information regarding the ways their food is produced—despite the fact that consumers overwhelmingly want to make decisions based on such information. Thus, the purpose and effect of the Idaho statute and other state laws like it—known as “ag-gag laws”—is to prevent journalists and whistleblowers from disclosing information about animal agriculture which negatively impacts the competition and the marketplace.³⁴

The Idaho statute prevents consumers from learning about the actual conditions of industrial animal agriculture production and processing facilities, leaving purchasers with only the representations from those self-interested entities operating such facilities. For at least three reasons, the market becomes distorted when consumers have access only to the narrative of the animal agricultural sector.

inaccurate information, to purchase products they would not purchase if they knew the truth about them.”).

³⁴ Nicole E. Negowetti, *Opening the Barnyard Door: Transparency and the Resurgence of Ag-Gag & Veggie Libel Laws*, 38 SEATTLE U. L. REV. 1345, 1376 (2015).

First, animal agriculture producers and processors may hide information about the way their products are raised and slaughtered when such methods would reveal certain types of animal confinement and other practices that consumers may view as undesirable, distasteful, cruel, and even shocking.³⁵ State and federal regulation cannot fill this informational void. Many statutes and regulations that address the treatment of animals raised for food fall short of consumers' beliefs about how animals raised for food should be treated.³⁶

Second, recent studies have demonstrated that consumers are confused about husbandry practices on food labels, depriving them of full information necessary to make decisions about what they eat. For example, an April 2015 Washington Post survey found that fewer than half of polled consumers were familiar with the term 'pasture raised,' and the majority thought that 'cage-free' and 'free-range' mean the birds have been raised outdoors, although cage-free hens are housed on an average of one square foot of indoor space and never go outdoors.³⁷ Likewise, a survey found that most respondents understood the term "humanely raised" to mean a farm

³⁵ See Lorraine Mitchell, *Impact of Consumer Demand for Animal Welfare on Global Trade*, in Anita Regmi, Economic Research Service U.S. Dept. of Agriculture, CHANGING STRUCTURE OF GLOBAL FOOD CONSUMPTION AND TRADE WRS-01-1, 83 (2012) ("Mitchell").

³⁶ Gaverick Matheny and Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 WTR LAW & CONTEMP. PROBS. 325, 333 (2007).

³⁷ Jane Black, *Scratching out a market eager for 'pasture-raised' eggs*, THE WASH. POST. (Apr. 8, 2015).

was inspected to verify that claim, 90% believed such animals had adequate living spaces, 88% believed the term meant animals were humanely slaughtered, and 79% believed it meant animals had access to the outdoors.³⁸ None of those statements are necessarily true because there are no federal or state regulations defining “humanely raised.”³⁹ Consumers are also confused by the label “natural” used on many meat labels.⁴⁰ Moreover, many organizations claim to certify humane practices regarding animal products, without external oversight, causing confusion in the marketplace due to the lack of regulated or accepted standards.⁴¹

Third, producers sometimes make false claims that are never exposed—in part due to limited enforcement by the regulators.⁴² For example, egg producers are incentivized to falsely advertise eggs as “free-range” or “cage-free,” because of

³⁸ Press Release, Consumer Reports, Consumer Reports Aims to Ban ‘Natural’ Label, Meat & Poultry (June 16, 2014), *available at* <http://www.prnewswire.com/news-releases/consumer-reports-survey-majority-of-americans-look-for-natural-label-when-shopping-believe-it-carries-benefits-despite-the-contrary-263259671.html>.

³⁹ *Id.*

⁴⁰ Consumer Reports, NATURAL FOOD LABELS SURVEY, 2 (2015) (demonstrating that consumers believe “natural” animals are raised without hormones).

⁴¹ See Dena Jones, *American Humane Certified is Out of Step with the Meaning of “Humane,”* HUFFINGTON POST (Jul. 28, 2015), http://www.huffingtonpost.com/dena-jones/american-humane-certified-is-out-of-step-on-the-meaning-of-humane_b_7859634.html.

⁴² The Food Safety and Inspection Service for example, relies on self-reporting to demonstrate compliance with voluntary claims relevant to animal welfare such as “free range,” “hormone free,” and “cage free.” See U.S. DEP’T AGRIC., MANDATORY LABELING REQUIREMENTS 5 (2015).

known consumer preferences for products from animals raised humanely, the higher prices that “humanely-raised” animal products command, and the low risk that the truthfulness of such claims will ever be disclosed.⁴³

It is unsurprising then that investigative journalists and whistleblowers have exposed conditions in animal agriculture facilities previously unknown to consumers, spurring both regulatory and marketplace improvements.⁴⁴ For example, over a hundred years ago, Upton Sinclair’s undercover investigation of the conditions in Chicago slaughterhouses exposed, amongst others, health violations and unsanitary practices and provided impetus for federal food and drug legislation.⁴⁵ Moreover, the investigative work of various animal welfare groups, including for example the Humane Society of the United States, has contributed to the increase in animal-welfare labels on animal products.⁴⁶ “Ag-gag” laws like Idaho Code § 18-7042, would have prevented the Humane Society of the United States from exposing the forced cannibalism at Kentucky’s Iron Maiden Hog Farm, where piglets’ intestines were ground and fed to sows, the abuse of calves at a Vermont veal slaughter plant, or a California slaughter plant practice of processing

⁴³ See Mitchell at 81-83 (explaining that cases of fraud are costly to prove).

⁴⁴ Cf. C. Thomas Dienes, Protecting Investigative Journalism, 67 GEO. WASH. L. REV. 1139, 1143 (1999) (providing examples of cases in which investigative journalism spurred positive change).

⁴⁵ *Animal Legal Defense Fund*, 118 F. Supp. 3d at 1201.

⁴⁶ Andrew Martin, *Meat Labels Hope to Lure the Sensitive Carnivore*, N.Y. TIMES, Oct. 24, 2006.

meat from sick “downer” cattle (those unable to walk) and selling it to the nation’s school breakfast and lunch programs.⁴⁷

The investigative journalism that Idaho’s ag-gag law would foreclose impacts consumer purchasing decisions. For example, Kansas State University found that media attention to animal welfare has significant negative effects on meat demand.⁴⁸ Indeed, television and newspapers are the second and third most important sources from which consumers obtain information about how their food is produced.⁴⁹

Considering that the Idaho statute prevents truthful information about animal agriculture from reaching consumers, this law thwarts consumers from making informed purchasing decisions based on such data and impedes competition from plant-based food companies, distorts the market, and creates inefficiencies. These market concerns provide a further and independent basis for this Court to affirm the District Court’s ruling.

⁴⁷ *Ag-Gag Laws Keep Animal cruelty Behind Closed Doors*, THE HUMANE SOCIETY OF THE U.S., http://www.humanesociety.org/issues/campaigns/factory_farming/factsheets/ag_gag.html (last visited June 14, 2016).

⁴⁸ Glynn T. Tonsor & Nicole J. Olynk, KAN. STATE UNIV, U.S. MEAT DEMAND: THE INFLUENCE OF ANIMAL WELFARE MEDIA COVERAGE 2 (Sept. 2010); *see also* *Vegetarian Resource Group Survey Results from Veggie Fest, Naperville, IL, August 8-9, 2009*, VRG.ORG (Aug. 31, 2009), http://www.vrg.org/nutshell/veggiefest_poll_09.php (reporting that viewing videos or photos of animal cruelty was a key motivation for vegetarians).

⁴⁹ DEMETER COMMUNICATIONS STUDY at 6.

III. Conclusion

Consumers are increasingly cognizant of and concerned about both the safety of the food they consume and the ethical issues surrounding how food animals are treated. In a true “marketplace of ideas,” where consumers have perfect information about the food they purchase, humanely-produced animal products and plant-based alternatives would spur more robust competition because consumers have expressed a clear desire for these choices. The growing demand for plant-based alternatives to meat, eggs, and dairy products needs to be met in a robust marketplace where all companies can compete on a level playing field. The Idaho Statute prevents important information from reaching the marketplace and inhibits competition. Thus, for the reasons stated herein and by the appellees and other *amici* in support thereof, the judgment of the District Court should be affirmed.

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Respectfully submitted,

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CERTIFICATE COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4557 words, excluding the portions of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionately spaced typeface using Microsoft Word 2014 in 14-point Times New Roman font.

CERTIFICATE OF SERVICE

I, James J. Pizzirusso, hereby certify that I caused a true and correct copy of the foregoing **AMICUS BRIEF OF THE PLANT BASED FOODS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLEES REQUEST TO AFFIRM THE DISTRICT COURT'S RULING** to be served on all counsel of record via CM/ECF on June 20, 2016.

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