No. 12-761

IN THE

Supreme Court of the United States

POM WONDERFUL LLC,

Petitioner,

v.

THE COCA-COLA COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICUS CURIAE INTERNATIONAL TRADEMARK ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Founded in 1878, the International Trademark Association ("INTA") is a global organization dedicated to supporting trademarks and related

[1] In accordance with Supreme Court Rule 37.6, amicus curiae states that this brief was authored solely by INTA and its counsel, and no part of this brief was authored by counsel to a party. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, and its counsel made such a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, and letters indicating the consent are filed with this brief.

intellectual property in order to protect consumers and to promote fair and effective commerce. INTA has more than 6,400 members in more than 190 countries. Its members include trademark and brand owners, as well as law firms and other professionals who regularly assist brand owners in the creation, registration, protection, and enforcement of their trademarks. All INTA members share the goal of promoting an understanding of the essential role that trademarks and goodwill play in fostering commerce, fair competition, and informed decision-making by consumers.

INTA was founded in part to encourage the enactment of federal trademark legislation after invalidation on constitutional grounds of the United States' first trademark act. Since then, INTA has been instrumental in making recommendations and providing assistance to legislators in connection with major trademark and related legislation. INTA members are frequent participants in Lanham Act–related litigation as both plaintiffs and defendants. INTA has also participated as amicus curiae in numerous cases involving significant Lanham Act issues in this Court and others.[2]

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[2] INTA has filed amicus briefs in this Court in the following matters: *Lexmark Int'l* v. *Static Control Components*, No. 12-873 (Sup. Ct., pet. granted June 3, 2013); *Already, LLC* v. *Nike, Inc.*, 133 S. Ct. 721 (2013); *KP Permanent Make-Up, Inc.* v. *Lasting Impression I, Inc.*, 543 U.S. 111 (2004); *Dastar Corp.* v. *Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *Moseley* v. *V Secret Catalogue, Inc.*, 537 U.S. 418 (2003); *TrafFix Devices, Inc.* v. *Mktg. Displays, Inc.*, 532 U.S. 23 (2001); *Wal-Mart Stores, Inc.* v. *Samara Bros.*, 529 U.S. 205 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd.* v. *Coll. Sav. Bank*, 527 U.S. 627 (1999); *Qualitex Co.* v. *Jacobson Prods. Co.*, 514 U.S. 159 (1995); *Two Pesos, Inc.* v. *Taco Cabana, Inc.*, 505 U.S.

INTA and its members have a particular interest in this case because the Ninth Circuit's decision risks undermining the protection of consumers and promotion of fair and effective commerce that INTA's members value, and risks undermining the goal of informed decision-making by consumers. INTA (then known as the United States Trademark Association, or "USTA") was instrumental in the comprehensive revisions to the Lanham Act in 1988, including revisions to Section 43(a).[3] INTA takes no position with respect to the plausibility of the petitioner's allegations or the merits of its substantive claims. However, INTA is deeply concerned that the Ninth Circuit's ruling, which bars Section 43(a) suits when a product's naming and labeling are regulated under the Federal Food Drug & Cosmetic Act ("FDCA") and by the Food and Drug Administration ("FDA"), will eliminate the ability of businesses to promote fair competition and protect against consumer confusion by combatting false and misleading advertising. This is not what Congress intended and it is at odds with the interests of businesses, including many of INTA's members.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision needlessly, and erroneously, eliminates an important, Congressionally-authorized tool that promotes fair

763 (1992); and *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281 (1988).

[3] The USTA's 1987 Trademark Review Commission was a precursor to the Trademark Law Revision Act of 1988. *See* USTA, *Trademark Review Commission Report and Recommendations to USTA President and Board of Directors*, *reprinted in* The Trademark Law Revision Act of 1988 (1989) ("Commission Report").

competition through challenges to false and misleading advertising. The court of appeals' holding that the claim of Pom Wonderful ("Pom") under Section 43(a) of the Lanham Act was barred by the FDCA's juice labeling scheme disregards this Court's well-established rule that courts must give full effect to allegedly competing federal statutes unless they are in "irreconcilable conflict." *Branch* v. *Smith*, 538 U.S. 254, 273 (2003).

The Lanham Act and the FDCA can and do coexist without conflict. Congress intended Section 43(a) to give businesses a right to challenge false and misleading advertising through private actions. By contrast, the FDCA and the FDA's regulation of "misbranded" food is not intended to be—and has never been—an effective substitute for Lanham Act suits. If the FDA's regulatory authority is permitted to trump the Lanham Act, then U.S. businesses will be left without a federal remedy for false advertising of many types, contrary to Congress's intent, and at odds with the interests of businesses and consumers.

Not only is there no inherent conflict, the Lanham Act and FDCA actually work in tandem to ensure accurate and fair promotion of food, drugs and cosmetics. While FDA regulation plays an essential regulatory role, private business competitors are in the best position to understand the perpetual threats of false and misleading advertisements as they arise, and to contest them through Lanham Act suits. Businesses are better suited than the federal government to expend the resources needed to challenge specific instances of false and misleading advertising. By contrast, the FDA and other federal agencies will never be able to devote the same resources to combat particular advertisements, or

provide the remedies that the Lanham Act authorizes. The FDA is well-suited to promulgate and enforce minimum standards that promote the accuracy and clarity of food, drug and cosmetic labeling, but not to investigate whether a specific label that meets those standards nonetheless misleads or confuses consumers.

Section 43(a) harnesses the interests of competitors to enable them to act as the avengers of the public interest by reducing consumer confusion and ensuring accurate and fair advertising. The Ninth Circuit eliminates this benefit to the public, relying on federal agencies to police false and misleading advertising through the slow channels of regulation and enforcement. Because the FDA has not vigorously pursued misleading food labels, the Ninth Circuit's ruling would, in practice, leave beverage labeling largely un-policed. Moreover, the decision's sweeping reasoning could extend to other food and drug items, and to other federal agencies. By reversing the Ninth Circuit's decision, the Court recognizes Congress's intent to enact a broad, federal unfair competition law that promotes fair business competition and benefits the public interest.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION ERRONEOUSLY ELIMINATES AN IMPORTANT TOOL FOR COMBATTING FALSE OR MISLEADING ADVERTISING AND PROMOTING A FAIR MARKETPLACE.

The decision below gives broad preclusive effect to the FDCA's juice labeling scheme over claims for false and misleading advertising under Section 43(a)

of the Lanham Act. That holding and its sweeping reasoning should not stand. Congress endowed the Lanham Act and the FDCA (and the FDA's implementing regulations) with different purposes. As applied here, the statutes have no conflict—much less an "irreconcilable" conflict. To the contrary, Section 43(a) and the FDCA complement one another, and work in tandem to promote fair commerce and protect the public. This Court, unlike the court of appeals, should give both statutes full effect.

A. The Lanham Act And The FDCA Have Different Purposes.

In enacting the Trademark (Lanham) Act of 1946, Ch. 540, 60 Stat. 427, as amended, Congress intended to "regulate commerce * * * by making actionable the deceptive and misleading use of marks in such commerce * * *" and "protect persons engaged in such commerce against unfair competition." 15 U.S.C. § 1127.[4] Since its enactment in 1946, courts have widely interpreted Section 43(a) of the Lanham Act "as creating, in essence, a federal law of unfair competition." S. Rep. No. 515, 100th Cong., 2nd Sess. 1988 (Sept. 15, 1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5603, 1988 WL 170248. By the 1970s, the courts' broad interpretations of Section 43(a) had transformed the provision into "a potent, far-reaching, commercial Bill of Rights for

[4] Congressman Fritz Lanham, the bill's sponsor, stated that "[t]he purpose of [the Act] is to protect legitimate business and the consumers of the country." 92 Cong. Rec. 7524 (1946). *See also Two Pesos, Inc.*, 505 U.S. at 782 n.15 (Stevens, J., concurring) (noting Congress's intent to advance the dual goals of fostering fair competition and protecting the public from deceit).

the honest businessman," that reached "almost towering stature as a weapon to combat * * * unfair competition." *See* Commission Report, *supra*, at 378.

In 1988, with INTA's active support, Congress amended Section 43(a) "to codify the interpretation it has been given by the courts." S. Rep. No. 515, 100th Cong., 2nd Sess. 1988, *supra*; *see also Two Pesos, Inc.*, 505 U.S. at 783 ("[I]n the Trademark Law Revision Act of 1988 * * * Congress codified the judicial interpretation of § 43(a), giving its *imprimatur* to a growing body of case law from the Circuits that had expanded the section beyond its original language.").

As amended, Section 43(a) of the Lanham Act creates a private civil action against "[a]ny person who, on or in connection with * * * any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof * * * which * * * misrepresents the nature, characteristics, (or) qualities * * * of his * * * goods." 15 U.S.C. § 1125(a)(1). An action may be brought "by any person who believes that he or she is likely to be damaged by such an act." *Id*. The Lanham Act authorizes injunctive relief, as well as damages and disgorgement of a defendant's profits. 15 U.S.C. § 1117(a).

The Lanham Act is designed to "protect persons engaged in * * * commerce against unfair competition.'" *Dastar Corp.*, 539 U.S. at 28 (quoting 15 U.S.C. § 1127). Among its "salutary purposes" is "to promote fair competition in the marketplace," *Zenith Elecs. Corp.* v. *Exzec, Inc.*, 182 F.3d 1340, 1354 (Fed. Cir. 1999), and "to promote fair business dealing." *Parkway Baking Co.* v. *Freihofer Baking Co.*, 255 F.2d 641, 649 (3d Cir. 1958); *AT & T* v.

Winback and Conserve Program, Inc., 42 F.3d 1421, 1433-34 (3d Cir. 1994) ("The Lanham Act has the broad purpose of protecting competitors from a wide variety of misrepresentations of products and service[s]"); *Allsup, Inc.* v. *Advantage 2000 Consultants, Inc.*, 428 F.3d 1135, 1138 (8th Cir. 2005) (purpose of the Act is "to protect persons engaged in commerce against false advertising and unfair competition"). In particular, the purpose of Section 43(a)'s false advertising provisions "is to protect sellers from having their customers lured away from them by deceptive ads." *Schering-Plough Healthcare Prods.* v. *Schwarz Pharma, Inc.*, 586 F.3d 500, 512 (7th Cir. 2009).

By contrast, the FDCA has the "overriding purpose to protect the public health." *United States* v. *Bacto-Unidisk*, 394 U.S. 784, 798 (1969). The FDCA "safeguard[s] the consumer by applying the [FDCA] to articles from the moment of their introduction into interstate commerce all the way to the moment of their delivery to the ultimate consumer." *United States* v. *Sullivan*, 332 U.S. 689, 696 (1948); *see also United States* v. *Articles of Drug Consisting of Following: 5,906 Boxes*, 745 F.2d 105, 113 (1st Cir. 1984) (describing FDCA as a "comprehensive regulatory statute concerned with public safety").

Congress first regulated food and beverage labeling in the Federal Food and Drugs Act of 1906, Ch. 3915, 34 Stat. 768. It later enacted the FDCA, Ch. 675, 522 Stat. 1040, 21 U.S.C. § 301 *et seq.*, and has amended the act numerous times. Relevant here, in 1990 Congress amended the FDCA to address nutrition labeling for nearly all food products for human consumption, including juices. Nutrition

Labeling and Education Act of 1990 ("NLEA"), Pub. L. No. 101-535, 104 Stat. 2353.

While Section 43(a) of the Lanham Act bans false and misleading advertising, the FDCA bans the introduction into or receipt in commerce of "misbranded" foods. 21 U.S.C. § 331(a), (c). "Food" includes any "article [ ] used for * * * drink." 21 U.S.C. § 321(f). In regulating food and beverage labeling, the FDCA provides that food is "deemed to be misbranded" in several ways. 21 U.S.C. § 343. Food is misbranded if "its labeling is false or misleading in any particular," if required information is not sufficiently prominent and conspicuous on the labeling, or if its label fails to bear "the common or usual name of the food, if any there be, and * * * in case it is fabricated from two or more ingredients, the common or usual name of each ingredient." 21 U.S.C. § 343(a), (f), (i). The FDA has implemented numerous regulations of the naming and labeling of juices "to promote honesty and fair dealing in the interest of consumers." 21 U.S.C. § 341. *See* 58 Fed. Reg. 2898-2926 (Jan. 6, 1993); *see generally* 21 C.F.R. pts. 101, 102. The particular provision at issue in this case addresses the naming and labeling of multi-juice beverages. 21 C.F.R. § 102.33.

The FDCA and FDA regulations address the "misbranding" of juice labels, which has an obvious overlap with the false and misleading advertising forbidden by Section 43(a). Importantly, however, the FDCA and FDA regulations do not allow a private party to sue to remedy harms from misbranding. *See* 21 U.S.C. § 337(a) ("[A]ll such proceedings for the enforcement, or to restrain violations [of the FDCA] shall be by and in the name

of the United States."); *cf. Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 349 n.4 (2001) ("The FDCA leaves no doubt that it is the Federal Government rather than private litigants who are authorized to file suit for noncompliance."). By contrast, a Lanham Act plaintiff who establishes that a defendant has falsely advertised or promoted its food product may be entitled to recover, in addition to broad injunctive relief, monetary relief in the form of damages and the disgorgement of the defendant's profits. 15 U.S.C. § 1117(a).

The FDCA permits a competitor to petition the FDA to undertake rulemaking to revise its labeling regulations for juice mixtures, 21 U.S.C. § 371(e)(1)(b), but such a rule would not redress the injuries to a Lanham Act plaintiff's business interests. A citizen's petition could only be used to ask the FDA to "[p]ublish a proposal to issue, amend, or revoke * * * a regulation," 21 C.F.R. § 102.19(a), not to stop a particular instance of false advertising. At best, the result of the petition might be a sledgehammer when a laser is called for. *See also* U.S. Amicus Br. 15. While the FDA can seek to enjoin a defendant promoting its food product with a label that is false or misleading, the agency does not have authority to seek civil monetary penalties for such conduct.[5] Nor can the FDA compensate a

[5] Congress has authorized the FDA to seek civil monetary penalties for violations of certain specific provisions of the FDCA, but has chosen not to do so with respect to food labeling provisions. *See*, *e.g.*, 21 U.S.C. § 333(b)(2) (drug marketing violations); § 333(f)(9) (tobacco product violations); 21 C.F.R. § 17.1 (listing "the statutory provisions that authorize civil money penalties"); *but see* 21 U.S.C. § 343 (food labeling, with no provision for civil monetary penalties).

business for lost sales or goodwill resulting from false food advertising or for the costs a business incurs responding to false advertising. "An injunction can halt a wrongful activity but it will not correct its effects." *Balance Dynamics Corp.* v. *Schmitt Indus.*, 204 F.3d 683, 698 (6th Cir. 2000).

Thus, Section 43(a) of the Lanham Act and the FDCA's and FDA's "misbranding" scheme serve different purposes. The Lanham Act promotes a fair marketplace, and protects businesses by enabling them to sue for false and misleading advertising to stop and redress those harms. The FDCA is a public safety statute, concerned with ensuring that food, drugs and cosmetics are safe and that their labels do not misrepresent the nature of the products; it is not concerned with whether false and misleading advertising harms the manufacturer's or producers' business interests. Rather than providing private remedies, Congress reserved enforcement for the FDA, leaving private parties to petition the FDA and seek broad regulatory changes through the agency's rulemaking.

Courts have also recognized the divergence of purposes between the Lanham Act and the FDCA's drug labeling provisions. The FDCA "'is not focused on the truth or falsity of advertising claims,' but is * * * directed to protecting the public by ensuring that drugs sold in the marketplace are 'safe, effective and not misbranded,' a task vested in the FDA to implement and enforce." *Mut. Pharm.* v. *Ivax Pharm., Inc.*, 459 F. Supp. 2d 925, 933 (C.D. Cal. 2006) (quoting *Sandoz Pharm.* v. *Richardson-Vicks, Inc.*, 902 F.2d 222, 230 (3d Cir. 1990)). "[T]he main purpose of the advertising restrictions set forth in the FDCA and its accompanying regulations is not to

protect consumers from deceptive advertising, but rather to further the FDCA's underlying goal of ensuring the safety of prescription drugs." *In re Epogen & Aranesp Off-Label Mktg. & Sales Practices Litig.*, 590 F. Supp. 2d 1282, 1290 (C.D. Cal. 2008); *see also Iams Co.* v. *Nutro Prods., Inc.*, No. C–3–00–566, 2004 WL 5780000, at * 2 (S.D. Ohio July 19, 2004) (stating that FDCA "is not focused on the truth or falsity of advertising claims").

The statutes are capable of coexisting and Congress has never indicated that they should not coexist. Indeed, Congress created the Lanham Act's private right of action after authorizing the FDA to regulate the misbranding of food products. 21 U.S.C. §§ 331-334, 343, 371 (Supp. IV 1938); 15 U.S.C. § 1125 (1946). Congress has amended both laws on multiple occasions without attempting to eliminate any overlap between the statutes. Had Congress intended to eliminate Lanham Act suits related to misbranding, it knew how to do so. *Cf. Wyeth* v. *Levine*, 555 U.S. 555, 574 (2009) ("If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA's 70-year history."). As the United States argues, "nothing in the FDCA, the NLEA, FDA's regulations, or the preambles to those regulations suggests that FDA has marked the metes and bounds of all possible misleading material on juice labels, or that its authority must be deemed exclusive even as to matters the agency has never specifically addressed." U.S. Amicus Br. 12.

In sum, the Lanham Act and the FDCA serve different purposes. With respect to juice labeling, there is overlap where both statutes address naming

or labeling of products. A primary purpose of the Lanham Act is to protect private competitors by enabling them to challenge false or misleading advertising. The purpose of the FDCA and FDA regulations is to specify standards for labeling for the purpose of keeping the public safe, with compliance enforced by the FDA.

B. The Ninth Circuit's Decision Fails To Identify Any Irreconcilable Conflict Between Section 43(a) And The FDCA's Misbranding Scheme.

In reconciling potentially overlapping federal statutes, this Court requires courts to give full effect to allegedly competing federal statutes unless they are in "'irreconcilable conflict.'" *Branch*, 538 U.S. at 273 (quoting *Posadas* v. *Nat'l City Bank*, 296 U.S. 497, 503 (1936)). "[W]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). Courts are "not at liberty to pick and choose among congressional enactments." *Id.*; *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible."). Statutes that "overlap" or may appear to be somewhat "redundan[t]" can be "fully capable of coexisting." *United States* v. *Batchelder*, 442 U.S. 114, 118, 122 (1979).

There is no "irreconcilable conflict" between Section 43(a) of the Lanham Act and the FDCA. *Branch*, 538 U.S. at 273. In fact, the court of appeals' opinion fails even to address whether the statutes meet this standard. Instead, the court of appeals gave effect to the FDCA, and not the Lanham Act, by precluding

the application of Section 43(a) to a broad range of potentially misleading statements solely on the ground that they are subject to FDA regulation. Pet. App. 8a ("[T]he Lanham Act may not be used as a vehicle to usurp, preempt, or undermine FDA authority."). The court of appeals concluded that "the FDCA and its regulations bar pursuit of both the name and labeling aspects of [Pom's] Lanham Act claim." Pet. App. 9a.

With respect to the name of the product at issue, the court explained that because 21 C.F.R. § 102.33(d) permits a manufacturer to name a beverage using the name of a flavoring juice that is not predominant, "as best we can tell, FDA regulations authorize the name [Coca-Cola] has chosen." Pet. App. 9a. According to the court of appeals, Pom's challenge to the common name "Pomegranate Blueberry Flavored Blend of 5 Juices" would create a conflict with FDA regulations and would "require [the court] to undermine the FDA's apparent determination that so naming the product is not misleading." *Id.*[6]

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[6] There are some recognized limits on a Lanham Act plaintiff's ability to sue in areas the FDA regulates. A plaintiff may not, for example, sue under the Lanham Act claiming that an advertisement is false or misleading because it violates the FDCA or its regulations — allowing such a suit could conflict with Congress's decision to limit enforcement of the FDCA to the federal government. *See*, *e.g.*, *Mylan Labs., Inc.* v. *Matkari*, 7 F.3d 1130, 1149 (4th Cir. 1993). This is particularly true where a Lanham Act claim is based on an alleged violation of an FDCA provision and would require the court to preemptively interpret and apply ambiguous FDA regulations or to predict the FDA's future and discretionary decisions. *See*, *e.g.*, *Sandoz*, 902 F.2d at 231-32 (claim that drug label falsely described ingredient as "inactive" was barred because the issue of whether the ingredient was active or inactive was under FDA

With respect to Coca-Cola's labeling of the product, the court of appeals concluded that Pom's Lanham Act claim was precluded with respect to the label's presentation of the words "Pomegranate Blueberry" in "larger, more conspicuous type" than the words "Flavored Blend of 5 Juices" appearing below them. Pet. App. 10a. The FDCA and its implementing regulations "have specified how prominently and conspicuously those words and statements must appear." *Id.* (citing 21 U.S.C. § 343(f), (i) and 21 C.F.R. § 102.33(c), (d)). "Congress and the FDA have thus considered and spoken to what content a label must bear, and the relevant sizes in which the label must bear it, so as not to deceive," but "ha[ve] not (so far as we can tell) required that all words in a juice blend's name appear on the label in the same size." *Id.* "[I]f the FDA believes more should be done to prevent deception, or that [Coca-Cola's] label misleads consumers, it can act." *Id.* at 11.

In the court of appeals' view, allowing Pom's Lanham Act challenge to Coca-Cola's label would "risk undercutting the FDA's expert judgments and authority." Pet. 9a-11a. The court did not want to contravene what it perceived to be "Congress's decision to entrust matters of juice beverage labeling to the FDA and * * * the FDA's comprehensive regulation of that labeling." *Id.* at 12a.

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review). However, a Lanham Act claim may proceed even when it "turns on the meaning of [FDA] publications in the Federal Register and Code of Federal Regulations." *See Alpharma Inc.* v. *Pennfield Oil Co.*, 411 F.3d 934, 939 (8th Cir. 2005) ("Interpretation of such materials is well within the conventional experience of judges") (internal quotation omitted). Because such claims do not depend upon proving an FDCA violation, they are "fully capable of coexisting" with that statute. *See Batchelder*, 442 U.S. at 118.

The court of appeals specifically emphasized that it was not "hold[ing] that [Coca-Cola's] label is non-deceptive," or that "mere compliance with the FDCA or with FDA regulations will always (or even generally) insulate a defendant from Lanham Act liability." Pet. App. 11a-12a.

But in light of the court's otherwise sweeping reasoning, the latter caveat is toothless. The court stated that it was guided by what it understood to be "Congress's decision to entrust matters of juice beverage labeling to the FDA and by the FDA's comprehensive regulation of that labeling." *Id.* at 12a. From the perspective of market participants such as INTA's members, that reasoning would "insulate a defendant from Lanham Act liability," Pet. App. 12a, in essentially every instance of juice labeling as well as labeling of most other products the FDA regulates. If the FDA's juice regulations at issue here—which the parties agree only permitted, but did not require, Coca-Cola's labeling—are "comprehensive regulation" of labeling, then there is a risk that nearly anytime the FDA regulates an aspect of a product with some degree of specificity, then FDA's regulation may be deemed "comprehensive" enough to preclude a Lanham Act suit.

The United States also argues that the court of appeals' "reasoning is too broad." *See* U.S. Amicus Br. 10-15. In the government's view, the court of appeals should have permitted Pom's Lanham Act challenge insofar as it concerns features of the juice's label that are not specifically addressed by the FDCA or the FDA's regulations. U.S. Amicus Br. 8. The Ninth Circuit's observation that the FDA had not, but could have, regulated the aspects of the label to

which Pom objected "endowed the FDCA's food labeling provisions with too broad a preclusive reach." *Id.* The mere existence of a federal regulatory or enforcement scheme does not create a conflict between federal statutes. To hold otherwise, the government correctly argues, would be "tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive." U.S. Amicus Br. 11 (quoting *Hillsborough Cnty.* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 717 (1985)). The Ninth Circuit was too quick to regard the commitment of authority to the FDA as exclusive. *Id.*

Furthermore, the Ninth Circuit's reasoning conflicts with other circuit courts that have rejected similarly overbroad preclusion of Lanham Act claims. In *Cottrell, Ltd.* v. *Biotrol Int'l, Inc.*, 191 F.3d 1248 (10th Cir. 1999), the Tenth Circuit approved of the general view that "[a]ffirmative misrepresentations * * * are generally actionable under the Lanham Act, even if the product is regulated by the FDA," *id.* at 1254 (internal citation and quotation omitted), and recognized the difference between a Lanham Act plaintiff's impermissible "attempt[ ] to enforce" federal regulations and "vindicat[ing] its rights under the Lanham Act independent of the regulation." *Id.* at 1254. The court rejected the view (indistinguishable from the Ninth Circuit's) that a Lanham Act claim must be dismissed because it "touches on issues" covered by federal regulatory authority, *id.* at 1256, and refused to preclude the Lanham Act claim where (like here) the agency's authority "nowhere explicitly precludes Lanham Act coverage." *Id.* at 1256.

Similarly, the Third Circuit permitted a Lanham Act false advertising claim to proceed notwithstanding the FDA's authority to regulate the advertising at issue, *Sandoz*, 902 F.2d at 228-29, but barred a claim based on defendant's alleged violation of an FDCA provision that would have required the court to "determine preemptively" how the FDA would "interpret and enforce its own regulations," *id.* at 231. *See also Alpharma,* 411 F.3d at 940-41 (refusing to preclude Lanham Act claim that did not require a determination by the court of how the FDA would interpret and enforce its own regulations).

The court of appeals' overbroad interpretation of the FDCA's preclusive effect is erroneous, and should be reversed. Section 43(a) of the Lanham Act and the FDCA's "misbranding" regulations have no conflict, much less an "irreconcilable" conflict, and the statutes are "fully capable of coexisting," *Batchelder*, 442 U.S. at 118, 122; *Silver* v. *N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963) ("the proper approach to this case, in our view, is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted"). More than that, they harmoniously work together to enable businesses to promote a fair marketplace, and protect consumers from confusion about products.

C. The Lanham Act And The FDCA Work In Tandem.

Private Lanham Act suits should not be banished from the domain of food and beverage labeling, and, to the contrary, should be allowed to work in tandem with the FDCA to promote the purposes Congress intended them to serve.

In this case, the dispute is whether the name and labeling of the "Pomegranate Blueberry" product are misleading to consumers. Under the Ninth Circuit's ruling, Pom is precluded from using its resources to survey consumers to build a Lanham Act Section 43(a) case that challenges its competitor's product's name and labeling as misleading based on actual evidence of deception.[7] Pom is also precluded from seeking damages or other relief for any harm caused. Instead, Pom is left to await a time when "the FDA believes that more should be done to prevent deception," and "act[s]." Pet. App. 11a. The court of appeals concluded that "[i]n the circumstances here, the appropriate forum for [Pom's] complaints is the FDA." *Id.* (quoting *PhotoMedex, Inc.* v. *Irwin*, 601 F.3d 919, 929 (9th Cir. 2010)).

By limiting the ability of private parties to challenge false and misleading advertising only through a petition to the FDA, the Ninth Circuit eliminates—for all practical purposes—the Lanham Act as a tool for private parties to fight such advertising's effects. The slow wheels of federal rulemaking and the floor they set can never keep pace with the threats false advertising pose to a fair marketplace, and the necessarily broad scope of regulation cannot evaluate an actual likelihood of deception or confusion in specific instances of false advertising. Products are introduced or relabeled all the time. Disputes over labels, such as the juice label in this case, flare up quickly, and the harms from unfair competition quickly take their toll on market participants and consumers. The entities

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[7] As noted, INTA takes no position on the substantive merits of Pom's claim, which were not reached by the Ninth Circuit.

best positioned to understand and investigate instances of false advertising are the businesses whose interests are injured, even though the labeling at issue will often concern an area important enough for the FDA to have issued broad, relevant regulations. *See Coca-Cola Co.* v. *Procter & Gamble Co.*, 822 F.2d 28, 31 (6th Cir. 1987) ("Under our economic system, competitors have the greatest interest in stopping misleading advertising, and a private cause of action under section 43(a) allows those parties with the greatest interest in enforcement and in many situations with the greatest resources to devote to a lawsuit, to enforce the statute rigorously").

Indeed, this case well illustrates how a business can use a Lanham Act claim to address relatively quickly a specific instance of potentially misleading advertising. As a party typically does in preparing a Lanham Act suit, Pom commissioned a marketing and public opinion research firm to conduct a field survey to test whether consumer confusion about the product exists. Pet. App. 32. *Hickson Corp.* v. *N. Crossarm Co., Inc.*, 357 F.3d 1256, 1261 (11th Cir. 2004) ("Consumer survey research often is a key part of a Lanham Act claim alleging that an advertisement is misleading or deceptive."); *Johnson & Johnson Merck Consumer Pharms. Co.* v. *Smithkline Beecham Corp.*, 960 F.2d 294, 298 (2d Cir. 1992) ("[T]he success of a plaintiff's implied falsity claim usually turns on the persuasiveness of a consumer survey."). Pom contends that the survey demonstrates that "a substantial proportion of potential purchasers of pomegranate and blueberry juice blends are likely to mistakenly believe" Coca-Cola's juice consists mainly of pomegranate and

blueberry juice, rather than other cheaper juices. Pet. App. 33a.

When Lanham Act suits are not barred (as the Ninth Circuit has done), a business can take such evidence to trial and resolve the dispute. If it prevails, it can obtain injunctive relief, damages and remedies such as disgorgement that can resolve the dispute. Or if the claim cannot be proven, the dispute may go away. The private parties who have the most direct interest in the dispute bear the brunt of the costs of the litigation. The federal government cannot hope to devote similar resources and sustained focus on particular advertisements. In effect, the Lanham Act harnesses a market-type mechanism to enable businesses to act on their own interests to police false and misleading advertising. And the threat of such litigation can help promote a fair marketplace because businesses know they risk a Lanham Act suit if they promote products with false and misleading labels.

Allowing the Lanham Act to harness the interests of businesses in this manner to police false and misleading advertising does not mean the FDCA and FDA regulations have no role to play. They have a unique and indispensable regulatory role. For example, 21 C.F.R. § 102.33(d) permits a manufacturer to name a beverage using the name of a flavoring juice that is not predominant. It may be that "FDA regulations authorize the name [Coca-Cola] has chosen." Pet. App. 9a. The FDA has considered naming and issued a broad regulation, and Coca-Cola has apparently complied with it, but that alone does not require the conclusion that Pom could never prove through surveys and other evidence that the specific name is not misleading.

And the FDCA does not address whether Pom has suffered commercial harm from the misleading name, and how the harm can be redressed.

Similarly, the court of appeals concluded that Pom's Lanham Act claim was precluded with respect to the label's presentation of the words "Pomegranate Blueberry" in "larger, more conspicuous type" than the words "Flavored Blend of 5 Juices" appearing below them. Pet. App. 10a. It may be that the FDCA and its implementing regulations "have specified how prominently and conspicuously those words and statements must appear." *Id.* (citing 21 U.S.C. § 343(f), (i) and 21 C.F.R. § 102.33(c), (d)). And this might reflect the fact that "Congress and the FDA have thus considered and spoken to what content a label must bear, and the relevant sizes in which the label must bear it, so as not to deceive," but not "required that all words in a juice blend's name appear on the label in the same size." *Id.* But it does not follow that Pom must wait until the FDA "believes more should be done to prevent perceived * * * deception," and decides to "act." *Id.* at 11. The FDCA contains provisions regarding the prominence of information on food labels (*e.g.*, 21 U.S.C. § 343(f)), and there is no dispute that the product at issue complies, or is not inconsistent, with them. But this is a different inquiry than whether the accused product name and labeling are in fact likely to mislead the consumer. A plaintiff should be permitted to take its claims and its proof of consumer deception to trial, and if it establishes its case, it should be entitled to redress under the Lanham Act. In that way, Congress's purposes under both the Lanham Act and the FDCA

are given full effect, as the Court must do. *Branch*, 538 U.S. at 273.

Allowing private parties to pursue remedies under Section 43(a) does not result in a corresponding reduction in the public safety that the FDCA is designed to protect. In this case, Pom argues that Coca-Cola could have complied with both the Lanham Act's and the FDA's requirements. Pet. 14. Indeed, there are also benefits to consumer safety that result from the Lanham Act. *Schering-Plough*, 586 F.3d at 512 ("[I]f no one is or could be fooled, no one is or could be hurt."). Whenever a Lanham Act plaintiff is vindicated in litigation, consumers benefit because the false or misleading advertising has been made known to the public and in most instances is corrected. Also, the potential risk of being sued under the Lanham Act discourages businesses from using false or misleading advertising to market their products.

II. PREVENTING PRIVATE LANHAM ACT SUITS WOULD HAVE FAR-REACHING IMPLICATIONS FOR THE PROTECTION OF CONSUMERS.

For decades, INTA has vigorously advocated in support of the Lanham Act not only because it promotes the commercial interests of its member businesses, but also because the law benefits the informed decision-making of the consumers who buy their products. If the Ninth Circuit's decision is allowed to stand, it would significantly diminish the statute's protection of consumers.

It was once the view that "the law does not allow [the federal false advertising plaintiff] to sue as a vicarious avenger of the defendant's customers." *Ely-*

Norris Safe Co. v. *Mosler Safe Co.*, 7 F.2d 603, 604 (2d Cir. 1925) (Hand, L., J.), *rev'd on other grounds by Mosler Safe Co.* v. *Ely-Norris Safe Co.*, 273 U.S. 132 (1927). Today, Section 43(a)'s false advertising prohibitions are understood to "allow[ ] a commercial plaintiff to act as a vicarious avenger of the consumer interest in not being deceived by false advertising." 5 McCarthy on Trademarks and Unfair Competition § 27:2 (4th ed. 2009).

"While unarticulated in the Act itself," Section 43(a)'s purpose includes the "protection of the consuming public from false representations and descriptions in connection with the advertising of goods and services." *Ames Pub. Co.* v. *Walker-Davis Publ'ns, Inc.*, 372 F. Supp. 1, 13-14 (E.D. Pa. 1974); *U-Haul Int'l, Inc.* v. *Jartran, Inc.*, 681 F.2d 1159, 1162 (9th Cir. 1982) (noting that the Lanham Act is directed toward protecting the consumer as well as business from false and deceptive advertising, and observing that Congress intended "'to protect the public from imposition by the use of * * * false trade descriptions.'") (internal citation omitted). The policy behind the Lanham Act is "to balance the protection of consumers from confusion, against the desired free competition within the market place." *Goddard, Inc.* v. *Henry's Foods, Inc.*, 291 F. Supp. 2d 1021, 1049 (D. Minn. 2003), *see also Coca-Cola Co.*, 822 F.2d at 31 (stating that "[p]rotecting consumers from false or misleading advertising * * * is an important goal of the statute and a laudable public policy to be served"). Thus, when the Ninth Circuit precluded private parties from challenging false and misleading advertising under the Lanham Act, it also eliminated businesses' ability to protect consumers.

The court of appeals decision most immediately and directly affects the labeling of food and beverage items. Eliminating Lanham Act claims means leaving more policing of misbranded foods to the FDA. As Pom has highlighted, *see* Pet. 25-27, the Government Accountability Office ("GAO") has specifically recognized that the FDA's efforts to regulate food labeling leave significant gaps, that the FDA is understaffed and underfunded, and that it was not aggressively policing food labeling. Precluding private parties from challenging food labels under the Lanham Act will have the practical effect of leaving food labels almost entirely unregulated. Pet. 27. The FDA "generally does not address misleading food labeling because it lacks the resources to conduct the substantive, empirical research on consumer perceptions that it believes it would need to legally demonstrate that a label is misleading." GAO 08-597, *Food Labeling: FDA Needs to Better Leverage Resources, Improve Oversight, and Effectively Use Available Data to Help Consumers Select Healthy Foods* 30 (2008) (www.gao.gov/ assets/290/280466.pdf).

Although the court of appeals limited its holding to "matters of juice beverage labeling," Pet. App. 12a, the deference given to the FDA's unexercised authority would arguably preclude a Lanham Act challenge to the label of any food, including foods that the FDA has not yet specifically addressed by regulation at all. *See* U.S. Amicus Br. 12.

The problem could be broader still, as the court of appeals' reasoning could extend to other agencies. One district court has already applied the Ninth Circuit's decision to the USDA. *See All One God Faith, Inc.* v. *Hain Celestial Grp., Inc.*, No. 09-3517,

2012 WL 3257660, at *1-11 (N.D. Cal. Aug. 8, 2012) (precluding Lanham Act claim challenging the labeling of personal care and cosmetic products as "organic" in light of the USDA's regulation of such products under the Organic Food Products Act of 1990).

While the reach of the Ninth Circuit's broad reasoning is still unknown, any preclusion of Lanham Act claims on the grounds identified by that court is too high of a price for consumers to pay. Congress enacted Section 43(a) of the Lanham Act and the FDCA for different, although in many ways complementary, purposes. This Court should give them full effect and restore to the nation's businesses and consumers the much-needed protection against the ills of false and misleading advertising.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

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