

No. 17-55901

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

CYNTHIA CARDARELLI PAINTER, an individual, and on behalf of
other members of the general public similarly situated,
Plaintiff-Appellant,

v.

BLUE DIAMOND GROWERS,
Defendant-Appellee.

**REPLY TO PLAINTIFF-APPELLANT’S OPPOSITION TO
MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
IN SUPPORT OF DEFENDANT-APPELLEE**

The Good Food Institute (GFI) respectfully submits this reply to Plaintiff-Appellant Painter’s opposition (Dkt. No. 30, “Opp.”) to GFI’s motion (Dkt. No. 25-1, “Mot.”) for leave to file a brief as amicus curiae (Dkt. No. 25-2, “Proposed Brief”). In her opposition, Painter argues that the proposed brief should not be filed because (1) GFI’s arguments are irrelevant to the issues before the Court; (2) GFI’s arguments are “premature”; and (3) GFI improperly “raise[s] new issues on appeal.” Her arguments lack merit.

I. GFI’S PROPOSED BRIEF SQUARELY ADDRESSES THE ISSUES BEFORE THE COURT.

First, Painter objects to GFI’s description of the “core issue” in this case as “interpreting the law’s imitation provision and FDA’s regulation thereunder.” Opp. at 3–5 (quoting Mot. at 4–5). Painter argues that, in analyzing the law governing imitation labeling, GFI neglects the “real” issues in this case: preemption and the plausibility of Painter’s claim. In short, Painter suggests that an analysis of the applicable substantive law is irrelevant to the issues on appeal.

This argument is without merit. As the district court recognized, Painter’s claim is preempted because it is inconsistent with federal law — a question that simply cannot be decided without first determining what the applicable federal law is. Likewise, the district court found that Painter did not state a plausible claim under federal law, and the Court cannot evaluate the plausibility of Painter’s claim without analyzing the relevant law that may (or may not) apply. An analysis of the federal definition of “imitation” is not merely relevant, but *essential* to deciding the questions of preemption and plausibility.

Moreover, GFI’s proposed brief *does* address preemption and plausibility directly, notwithstanding Painter’s claim to the contrary.

Painter herself even acknowledges that GFI addresses preemption, though she implies that GFI's analysis adds nothing because it is "hardly a novel argument." Opp. at 4 n.5. But GFI does not assert that its analysis is "novel," only that it includes considerations (and relevant statutory provisions) not supplied by either party. Mot. at 5. It therefore "brings relevant matter to the attention of the Court." Mot. at 6. GFI's brief also directly discusses why Painter's claim is implausible under the law of "imitation," as the district court correctly recognized. Proposed Brief at 25–26.

In short, though the proposed brief is largely devoted to analyzing the statutory "imitation" provision and FDA's regulation, GFI's analysis will aid the Court in determining the scope of federal law for the plausibility and preemption analyses (as the proposed brief itself explains). Painter's argument — in essence, that the substance of the law is irrelevant to this case — must be rejected.

II. GFI'S PROPOSED BRIEF ADDRESSES ISSUES PROPERLY BEFORE THIS COURT.

Painter's next argument is that the Court should not "resolve the issue of whether ... [the name] 'almond milk' is a violation of the imitation provision," arguing that to do so would "[u]surp" the FDA's

authority. Opp. at 5. And because GFI's brief addresses the issue of "imitation," Painter argues that the proposed brief is "premature and of little value," *id.* at 7. Painter appears to elevate her short alternative argument on "primary jurisdiction" (Painter Brief at 35–37) above her lawsuit's entire premise that almond milk is an "imitation milk" (*id.* at 14–15, 18–21, 22, 27, 29–31) — up to the point of arguing that the latter question should not even be before the courts. Painter's contention is rather puzzling, because Painter *herself* asked the courts to decide whether almond milk is an "imitation" by filing this lawsuit.

In other words, while Painter asks this Court to rule that her lawsuit may proceed on the theory that almond milk is "imitation milk," she also argues that any decision *against* her theory would "usurp the FDA's jurisdiction." Thus, she is happy to have the Court exercise jurisdiction over the issue — so long as the Court's decision agrees with her. This is untenable: Painter herself has invited the courts to address the issue, so she faces the risk of a ruling against her. She cannot have her milk and drink it, too. And at the very least, her alternative "primary jurisdiction" argument provides no apparent basis for denying GFI leave to file a brief addressing her main theory of the case.

Painter also uses her opposition to argue anew the merits of her “primary jurisdiction” argument, an argument that (as Painter correctly notes) GFI’s proposed brief does not even address. Opp. at 5–7. To the extent that Painter objects to GFI’s failure to address this argument, GFI is unaware of any authority for the notion that an amicus brief must address every alternative argument presented. Here, GFI did not address the issue simply because it found Blue Diamond’s treatment sufficient: Blue Diamond correctly points out that Painter opposed the invocation of “primary jurisdiction” below, and she is therefore estopped from arguing it on appeal. BD Brief at 46–47.

Painter also tries to manufacture a concession of sorts from GFI on this “primary jurisdiction” question. Opp. at 2, 5–6. Painter argues that a citizen petition filed by GFI constitutes some sort of admission that the question presented in *this* case must be resolved by FDA. This is far from the truth — GFI has never suggested that the “imitation” provision involves “technical questions of fact” that require the “expertise” of FDA. In fact, GFI’s petition noted (with approval) that courts had little trouble disposing of lawsuits over the nomenclature of plant-based alternative products, calling such lawsuits “meritless.” GFI

Petition¹ at 16. More broadly, GFI’s petition proposed a general regulation that would prospectively address the nomenclature of countless products (not just established products like almond milk), *id.* at 2, 7–12, and described how such a regulation would only codify the “existing law and practice” of the agency, *id.* at 13–14. Further, GFI’s petition addressed numerous different provisions of the FDCA and regulations, and among these, GFI considered an “imitation”-based argument to be the least substantial argument against compound food nomenclatures — one that GFI disposed of in slightly more than two pages of the 38-page petition. *Id.* at 23–26. In sum, GFI’s petition cannot reasonably be treated as proof that the name “almond milk” in particular — or imitation labeling in general — raises complex technical questions that can only be resolved by FDA.

Finally, Painter uses her opposition to advance an entirely new argument: that a detailed evidentiary record is required for the Court to compare almond milk and cow’s milk, to decide whether the former is an “imitation” of the latter. According to Painter, there is nothing in

¹ *Available at* www.regulations.gov/docket?D=FDA-2017-P-1298-0001.

the record “to compare the similarities and differences” of these products “other than the facts alleged in the complaint.” Opp. at 7. But as GFI has pointed out, Painter has not alleged *any* facts (in her complaint or even her brief) regarding any supposed resemblance between almond milk and cow’s milk. Proposed Brief at 21–22, 25.

Even now, in raising this point for the first time, Painter does not try to allege any specific resemblance, saying only that “there is no evidence of the olfactory properties of [the products] before this Court.” Painter is wise to avoid such allegations, because they (quite literally) would not pass the smell test. Almond milk (unsurprisingly) tastes and smells like almonds, not cow’s milk. Painter insists that the Court remain agnostic about facts obvious to any reasonable person, asking the Court to turn a blind eye to “experience and common sense.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). By contrast, GFI notes that the Court may properly take judicial notice of such obvious facts (Proposed Brief at 21–22 & n.9), but ultimately argues that doing so is unnecessary — FDA and the courts have established that foods may be “separate and distinct products” and not “imitations” *even when* they very closely resemble one another. Proposed Brief at 22–23, 25–26.

In sum, Painter’s alternative primary jurisdiction argument (which GFI did not address) provides no basis for denying leave to file. Additionally, GFI’s proposed brief addresses the argument raised for the first time in Painter’s opposition to GFI’s motion.

III. GFI’S PROPOSED BRIEF RAISES NO NEW ISSUES, ONLY NEW RELEVANT ARGUMENTS.

Amicus briefs are particularly “relevant” and “desirable” when they alert the Court “to possible implications of the appeal,” and do not merely “duplicate the arguments of the parties.” *See Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002); *see also Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997), Fed. R. App. P. 29 Advisory Comm. note (b) to 1998 Amendments. Notwithstanding the well-established judicial preference for amicus briefs that add something new to the arguments of the parties, Painter objects to the new, relevant matter presented by GFI, claiming it injects “new issues into the appeal,” Opp. at 8.

Painter misses the fundamental distinction between a new issue and a new argument. The cases cited by Painter involved entirely new claims or defenses asserted by amici but not asserted (and sometimes affirmatively waived) by the parties. Opp. at 7–8. More pertinently,

“[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.” *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 99 (1991). Each of the arguments in GFI’s proposed brief relates to the “proper construction of governing law,” and may therefore be considered by the Court.

Painter most specifically objects to GFI’s constitutional-avoidance argument: she argues that GFI is attempting to advance a new constitutional claim, Opp. at 8. But GFI does not argue that the “imitation” provision or FDA’s regulation are unconstitutional (facially or as-applied) — that *would* be a new claim. Instead, GFI applies a “cardinal principle” of statutory construction — that a court must construe a statute to avoid constitutional problems, whenever possible. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); Proposed Brief at 35, 41–42.

Looking to case law, this Court has indeed addressed (and adopted) similar statutory construction arguments, including those raised by amicus curiae. *See Spencer v. World Vision, Inc.*, 633 F.3d

723, 728, 732 (9th Cir. 2011) (adopting constitutional-avoidance argument raised by amicus United States); *Ma v. Reno*, 208 F.3d 815, 830–31 (9th Cir. 2000) (adopting amicus Human Rights Watch’s argument applying the *Charming Betsy* rule of statutory construction, construing statute to avoid violating international law). New arguments regarding statutory and regulatory construction do not inject any new issues into an appeal, and such new arguments can be especially helpful to the Court in identifying and applying governing law. Painter’s argument to the contrary is unpersuasive.

CONCLUSION

For the reasons stated above and in GFI’s motion, GFI respectfully requests that its motion for leave to file be granted.

Dated: March 26, 2018

Respectfully submitted,

s/ Nigel Barrella
Nigel A. Barrella
LAW OFFICE OF NIGEL A. BARRELLA
1001 Pennsylvania Ave. NW
Suite 1300N
Washington, DC 20004
(202) 768-7510
nigel@barrellalaw.com
Attorney for Amicus Curiae
Good Food Institute

**CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITS UNDER CIRCUIT
RULES 27-1 AND 32-3**

I hereby certify that this Reply complies with the length limits specified by Circuit Rules 27-1 and 32-3, and the type size and type face requirements of Fed. R. App. P. 32(a)(5) and (6). The Reply is 1,818 words (excluding the portions exempted by Fed. R. App. P. 32(f)), which divided by 280 is approximately 6.5, which does not exceed the 10-page limit specified for a reply to a response in Circuit Rule 27-1(d). *See* Circuit Rule 32-3.

Dated: March 26, 2018

s/ Nigel Barrella
Nigel A. Barrella
Attorney for Amicus Curiae
Good Food Institute

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: March 26, 2018

s/ Nigel Barrella
Nigel A. Barrella
Attorney for Amicus Curiae
Good Food Institute