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Which Came First: the Chicken or the Chick'n? An FDA Amendment Proposal to Reconcile Conflicting Interests in Plant-Based Meat Labeling

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WHICH CAME FIRST: THE CHICKEN OR THE CHICK'N?
 AN FDA AMENDMENT PROPOSAL TO RECONCILE
 CONFLICTING INTERESTS IN PLANT-BASED
 MEAT LABELING

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INTRODUCTION

“The issue is, what is chicken?”¹ As the market for plant-based meats grows, state legislators are left with the question of what the words “chicken” and “burger” mean on food labels. In response to lobbying from the traditional meat industries, states followed suit with the dairy industry and created regulations and restrictions that carve out a meat industry monopoly on meat-related terms.² Commercial speech restrictions such as these are guided by the *Central Hudson* test. Using that test, this Note will argue that while certain state regulations pass constitutional muster, others impose unconstitutional speech restrictions. This Note will draw particularly from the analysis employed by courts within the Ninth Circuit by addressing similar dairy regulations, commentary from interest groups, and FDA history. Finally, this Note will propose an FDA amendment and final notice that would create independent plant-based standards of identification and labeling guidance. An FDA amendment is necessary because, as demonstrated by the case studies, district courts have shied away from engaging in a thorough *Central Hudson* analysis. This separate regulation would allow plant-based food producers to use traditional meat language with the appropriate modifiers, as well as stand-alone “vegan terminology.”

I. COMMERCIAL SPEECH AND THE FIRST AMENDMENT

Although commercial speech is protected, it generally enjoys less protection than other constitutionally guaranteed forms of expression.³ Commercial speech protections are an extension of the First Amendment.⁴ This is justified by what the courts consider a

1. *Frigalment Importing Co. v. BNS Int'l Sales Corp.*, 190 F. Supp. 116, 117 (S.D.N.Y. 1960).

2. *See, e.g., infra* note 61 and accompanying text.

3. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980).

4. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985) (“[T]he extension of the First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.” (citing *Va. Pharmacy Bd. v. Va. Citizens*

distinction between speech for a commercial transaction and other types of speech because commercial transactions are typically subject to government regulation.⁵ The Supreme Court has held that “[t]he protection available for commercial expression turns on the nature both of the expression and of the governmental interest served by its regulation.”⁶ Further, the government may ban misleading or deceptive speech, as First Amendment protections for commercial speech depend on the informational function of the speech.⁷ The Court also noted that excessive restrictions are not permissible if there are less restrictive means with which the government could achieve its substantial interest.⁸ However, required disclosures for commercial speech constitute less of a burden on an advertiser than prohibitions of speech.⁹ Specifically regarding commercial speech expressed by food labels, courts view the label as a whole to determine if an ordinary, reasonable consumer would be misled or confused.¹⁰

The *Central Hudson* test provides a comprehensive mechanism to analyze a state’s regulation of commercial speech under intermediate scrutiny for speech that is not misleading or relating to illegal activity.¹¹ After determining that the speech is neither misleading nor related to unlawful activities, the burden shifts to the government to demonstrate a substantial interest in regulating the speech.¹² Next, the reviewing court “must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”¹³ In *Central Hudson*, the Supreme Court held that despite furthering a legitimate state interest, a complete ban on advertising was unconstitutional because the State could not show that a lesser

Consumer Council, Inc., 425 U.S. 748 (1976))).

5. *Cent. Hudson*, 447 U.S. at 562.

6. *Id.* at 563.

7. *Id.*; *Friedman v. Rogers*, 440 U.S. 1, 15-16 (1979) (emphasizing the importance of the state interest in protecting the public from deceptive and misleading commercial speech).

8. *Cent. Hudson*, 447 U.S. at 564.

9. *Zauderer*, 471 U.S. at 651.

10. *Turtle Island Foods SPC v. Soman*, 424 F. Supp. 3d 552, 574 (E.D. Ark. 2019).

11. 447 U.S. at 564.

12. *Id.* at 563.

13. *Id.* at 566.

restriction would have been ineffective.¹⁴ Finally, the Court later held in *National Institute of Family & Life Advocates v. Becerra* that in order to determine if the regulations are reasonably related to preventing deception, the State must offer evidence beyond mere hypothetical assertions.¹⁵ This highlights the level of scrutiny a reviewing court applies to a regulation under the *Central Hudson* test; the government bears a heavy burden.¹⁶

II. HISTORY OF LEGISLATION AND LITIGATION

This Part will trace the complex regulatory and social history which sets the scene for modern-day label regulations in the evolving market of plant-based meat. Dairy industry legislation and lawsuits provide not only a framework with which to analyze plant-based meats but also relevant doctrine that provides a nuanced understanding of this novel issue.

A. *Early Attacks Against Dairy Alternatives*

While new technology is enabling the development and expansion of plant-based alternatives, lobbying efforts to hinder their market growth are not a new phenomenon.¹⁷ The first example of legislative bodies imposing severe restrictions on, or even banning, dairy alternatives occurred during the “Butter Wars,” which began in the late nineteenth century.¹⁸ At the federal level, Congress passed the Margarine Act, which imposed steep licensing fees and restrictive taxes on margarine producers to discourage the industry.¹⁹ At the state level, legislatures imposed further restrictions. A handful of states completely banned margarine, and by 1902, thirty-two states had created regulations requiring margarine be dyed unappealing

14. *Id.* at 570-71.

15. 138 S. Ct. 2361, 2377 (2018).

16. *See* *Kitchen v. Ross*, No. 20-cv-00893, 2021 U.S. Dist. LEXIS 193462, at *7 (N.D. Cal. Aug. 10, 2021).

17. *See* Rebecca Rupp, *The Butter Wars: When Margarine Was Pink*, NAT'L GEOGRAPHIC (Aug. 13, 2014), <https://www.nationalgeographic.com/culture/article/the-butter-wars-when-margarine-was-pink> [<https://perma.cc/H359-TCBP>].

18. *Id.*

19. *Id.*

shades of pink.²⁰ The Supreme Court later held that the so-called “pink laws” were unconstitutional, and the Great Depression and World War II led to a boom in margarine sales due to the lessening of restrictions and the societal needs at the time.²¹ However, despite the boom in margarine sales, even with lessened restrictions on the product, butter still remains the most popular spread that Americans use.²²

B. Dairy Alternatives Lawsuits

The dairy lobby carried such great weight that the last margarine-color law was not repealed until 1967,²³ highlighting the institutional background that current plant-based regulations function in, with the beef and dairy industries historically dominating in the market and courtroom. However, in the years leading up to *Miyoko’s Kitchen v. Ross*, a groundbreaking commercial speech case, California courts signaled that the institutional foundation upon which the dairy industry relied was beginning to crack.²⁴

In 2013, the U.S. District Court for the Northern District of California granted a motion to dismiss in a suit alleging the mislabeling of soy, almond, and coconut milks.²⁵ The plaintiffs argued there was mislabeling because plant-based milks do not fall into the definition of milk, defined as the “lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows” under 21 C.F.R. § 131.110.²⁶ However, the court reasoned that § 131.110 “pertains to what milk is, rather than what it is not, and makes no mention of non-dairy alternatives.”²⁷ Relying on the fact that the FDA had not set a name for plant-based milk products, the court held that the common name on the label would

20. *Id.*

21. *See id.*

22. *Id.*

23. *Id.*

24. *See, e.g.*, *Ang v. Whitewave Foods Co.*, No. 13-cv-1953, 2013 U.S. Dist. LEXIS 173185, at *12-13 (N.D. Cal. Dec. 10, 2013); *Painter v. Blue Diamond Growers*, 757 F. App’x 517, 519 (9th Cir. 2018).

25. *Ang*, 2013 U.S. Dist. LEXIS 173185, at *15.

26. *Id.* at *10 (quoting 21 C.F.R. § 131.110).

27. *Id.* at *11.

not confuse a reasonable consumer.²⁸ This monumental line of analysis shifted the doctrine from attempting to fit plant-based options into the confines of traditional dairy definitions to recognizing the need for a distinct category of definitions.

Additionally, the Ninth Circuit in *Painter v. Blue Diamond Growers* weighed in by affirming a motion to dismiss in a similar case involving the alleged mislabeling of almond milk.²⁹ The court affirmed the district court's finding that no reasonable consumer would be misled as to the contents or nutritional value of the almond milk based on the label.³⁰ The court distinguished this from *Williams v. Gerber Products Co.*, a case in which it did find that a reasonable consumer would be misled or confused.³¹

In *Williams*, the Ninth Circuit held that Gerber's "fruit juice snacks" were labeled in a way that made it likely to deceive a reasonable consumer.³² The complaint alleged various components of the label would confuse a reasonable consumer.³³ The plaintiffs argued that the words "fruit juice" next to images of various fruits, as well as statements on the packaging, led them to believe the product was a healthy snack—which it was not.³⁴ The key characteristics of the label that the court considered included pictures of fruits on their package, as well as the statement that the snack was made with "fruit juice and other all natural ingredients."³⁵ In describing the potential for misrepresentation, the court explained that

[t]he product is called "fruit juice snacks" and the packaging pictures a number of different fruits, potentially suggesting (falsely) that those fruits or their juices are contained in the product. Further, the statement that Fruit Juice Snacks was made with "fruit juice and other all natural ingredients" could easily be interpreted by consumers as a claim that all the

28. *Id.* at *12-13.

29. 757 F. App'x at 518.

30. *Id.* at 519.

31. *Id.*

32. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 (9th Cir. 2008).

33. *Id.* at 936.

34. *Id.*

35. *Id.*

ingredients in the product were natural, which appears to be false.³⁶

The court in *Painter* carved out the precedent for almond milk labels by distinguishing them from another category of potentially misleading labels.³⁷ Through the juxtaposition with the Gerber fruit snacks, the court clearly identified the label of “almond milk” as being unambiguous in a way that the fruit snacks were not.³⁸

C. *Miyoko’s Kitchen v. Ross as a Turning Point for Alternative Dairy Product Labeling*

California has historically enacted the strictest false advertising laws in the country, creating ongoing tension between plant-based food producers and the enforcement of state law, which producers argue is unconstitutionally restrictive.³⁹ This tension came to a head when Miyoko’s Kitchen brought suit against the State for restrictive false advertising laws.⁴⁰ While there is still more litigation to come in the case, that the court granted a preliminary injunction and later granted summary judgment highlights a potential turning of the tide in the latest iteration of the “butter wars.”⁴¹ The court granting a preliminary injunction protecting Miyoko’s from these restrictions was monumental for the plant-based food industry and the First Amendment. The market for plant-based products is quickly expanding, and decisions like *Miyoko’s* stop companies from having to spend large sums of money to tailor labels to each state’s regulations.⁴² Following the announcement that the preliminary injunction had been granted, the plaintiffs and their supporters believed “[c]ompanies that make (and label) similar products now

36. *Id.* at 939.

37. *See Painter v. Blue Diamond Growers*, 757 F. App’x 517, 519 (9th Cir. 2018).

38. *Id.*

39. Katherine McKeen, *Are Vegan “Butter” and “Meat” Labels Protected as Free Speech?*, REGUL. REV. (Dec. 9, 2020), <https://www.theregreview.org/2020/12/09/mckeen-vegan-butter-meat-labels-protected-free-speech/> [<https://perma.cc/GZL4-83QY>].

40. *See Miyoko’s Kitchen v. Ross*, No. 20-cv-00893, 2020 U.S. Dist. LEXIS 249119, at *1 (N.D. Cal. Aug. 21, 2020).

41. *See McKeen*, *supra* note 39.

42. *See id.*

know any attempt to enforce the FDA regulations in this manner is likely unlawful under the First Amendment.”⁴³

The lawsuit began after the California Department of Food and Agriculture notified Miyoko’s that their vegan butter label violated state and federal regulations and that the company needed to change their labels to comply.⁴⁴ In response, Miyoko’s filed a First Amendment challenge in federal court, seeking a preliminary injunction to prevent the State from taking enforcement action.⁴⁵ Miyoko’s motion was granted as applied to the phrases “butter,” “lactose free,” and “cruelty free,” but was denied for “hormone free” and “revolutionizing dairy with plants.”⁴⁶

The analytical steps utilized by the *Miyoko’s Kitchen* court are crucial for understanding the relationship between commercial speech and food label regulations. When applying the *Central Hudson* test, the court focused primarily on factor three, determining whether the restriction directly advanced the identified state interest.⁴⁷ The court explained that “[t]o sustain its ‘butter’ ban in this action, the State eventually ‘must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree.’”⁴⁸ While the State did identify interests such as regulating food sales and safeguarding consumers,⁴⁹ the court held that the plaintiffs were likely to prevail under the *Central Hudson* test because of the lack of evidence provided by the State that labeling regulations, such as the one preventing Miyoko’s from using the term “vegan butter,” actually safeguard consumers.⁵⁰ Here, the State offered no independent empirical evidence of consumer confusion but rather attempted to turn the plaintiff’s

43. Elaine Watson, *‘This is a Huge Victory...’ Judge Rules in Miyoko Plant-Based Butter Case*, FOOD NAVIGATOR USA (Aug. 24, 2020, 7:25 PM), <https://www.foodnavigator-usa.com/Article/2020/08/23/Judge-rules-in-Miyoko-plant-based-butter-case-This-is-a-huge-victory> [<https://perma.cc/4JJ2-9S5E>].

44. *Miyoko’s Kitchen*, 2020 U.S. Dist. LEXIS 249119, at *1.

45. *Id.* at *2.

46. *Id.*

47. *Id.* at *16.

48. *Id.* (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).

49. *Id.* at *6.

50. *Id.* at *16-17 (“Nowhere, for instance, does the State present testimony from a shopper tricked by Miyoko’s vegan butter, or otherwise make the case that Miyoko’s substitute spread is uniquely threatening to the public.”).

evidence against them.⁵¹ The court took this study into consideration as a whole and was not compelled by the argument that consumers are confused by both plant-based and dairy products, especially when weighed against the First Amendment.⁵²

The case moved forward, and the court granted summary judgment to Miyoko's.⁵³ When granting summary judgment, the court went through an extensive application of the *Central Hudson* test to the word "butter" as it appeared on the label.⁵⁴ For Miyoko's to succeed under *Central Hudson*, the speech could not be misleading or related to unlawful activity.⁵⁵ Importantly, the court began by noting the precedent that simply because the State defines a term in a certain way, that does not immediately make all other uses inherently misleading.⁵⁶ In response to the State's assertion that the long-lasting definition should be viewed as how consumers define butter, the court held that "[a]bsent anything from the State revealing why old federal food definitions are more faithful indicators of present-day linguistic norms, neither the fact nor the vintage of the federal definition of 'butter' counts against Miyoko's at *Central Hudson*'s first step."⁵⁷ Because Miyoko's usage of the term "butter" was not misleading, it was likely to succeed under the first step of the *Central Hudson* test, and the court continued with the rest of the analysis.

In order for the restriction to stand, the State also had to prove that preventing Miyoko's from using the term "butter" would serve its asserted interest of avoiding consumer confusion.⁵⁸ Here, because the State was relying upon definitions and the plaintiff's study, it failed to meet this burden because it did not have sufficient evidence to show that changing the label would actually advance

51. *Id.* at *13-14 (citing a study that consumers accurately identified plant-based cheese 74 percent of the time).

52. *Id.* at *14.

53. *Kitchen v. Ross*, No. 20-cv-00893, 2021 U.S. Dist. LEXIS 193462, at *2 (N.D. Cal. Aug. 10, 2021).

54. *Id.* at *10-16.

55. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980).

56. *Kitchen*, 2021 U.S. Dist. LEXIS 193462, at *10 (citing *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1238 (11th Cir. 2017)).

57. *Id.* at *11.

58. *Id.* at *15.

that interest to a material degree.⁵⁹ This is an example of a case in which the state had insufficient proof that its interests were served by the policy, showcasing the heavy burden associated with the *Central Hudson* test when applied to food label regulations. While the *Miyoko's* case applied to the dairy industry, this landmark decision frames how the *Central Hudson* test can be applied to other nontraditional food products implicated by commercial speech restrictions.

III. RISE IN LEGISLATION REGULATING PLANT-BASED MEAT

This Part will provide case studies of legislation and lawsuits from two key states, Missouri and Arkansas. These states provide contrasting analyses, with Missouri implementing a constitutional regulatory scheme, whereas federal courts have found that the Arkansas statute is unconstitutional.⁶⁰ These case studies are contextualized by Mississippi's dynamic process employed to create a constitutional statute.

A. *The Mississippi Lawsuit*

One of the first states to attempt to restrict plant-based food labels through the imposition of criminal penalties for using meat food terms was Mississippi.⁶¹ This ban included the language that “[a] plant-based or insect-based food product shall not be labeled as meat or a meat food product.”⁶² This severe restriction was quickly challenged in court by Upton's Naturals, a plant-based food producer who argued that this ban prevents them from using “meaty” terms as qualifiers and that this extreme ban violates the First

59. *Id.*

60. *Turtle Island Foods, SPC v. Richardson*, 425 F. Supp. 3d 1131, 1140 (W.D. Mo. 2019), *aff'd sub nom. Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694 (8th Cir. 2021); *Turtle Island Foods SPC v. Soman*, 424 F. Supp. 3d 552, 561 (E.D. Ark. 2019).

61. See Elaine Watson, *PBFA and Upton's Naturals Challenge Mississippi Law Restricting Plant-Based and Cell-Cultured 'Meat' Labeling*, FOOD NAVIGATOR USA (July 2, 2019, 6:18 PM), <https://www.foodnavigator-usa.com/Article/2019/07/02/PBFA-and-Upton-s-Naturals-challenge-Mississippi-law-restricting-plant-based-and-cell-cultured-meat-labeling> [<https://perma.cc/FHU3-ZSEG>].

62. *Id.*

Amendment.⁶³ The plaintiffs asserted that terms such as “vegan bacon,” which would now be impermissible under the statute, do not confuse the reasonable consumer.⁶⁴ Also, the company insisted that it had no desire to mislead the public.⁶⁵ Plant-based food producers suggested, on the contrary, that consumer confusion would actually increase following the label changes they would have to make based on the legislation.⁶⁶ Potential label changes that would have to be made in order to comply with the law would include changing product names to things such as “veggie discs” or “vegetable protein tubes.”⁶⁷

In response to the lawsuit, Mississippi replaced the law shortly after it became effective, marking a huge success for the plant-based food industry.⁶⁸ The new legislation allows for plant-based products to use meat terminology as long as their labels include descriptors such as “meatless,” “plant-based,” or “vegan”;⁶⁹ this change suggests that the legislature deems this sufficient to serve the purpose of consumer protection while not violating the First Amendment.⁷⁰

B. Missouri as a Case Study

1. Statute & Commentary

In 2018, Missouri passed a landmark statutory amendment regarding misrepresentation of meat that plant-based food producers quickly commented on and challenged in federal court.⁷¹ Section

63. *Id.*

64. *Id.*

65. *Id.* (“It would be a disaster for Upton’s Naturals if the public were to think that the company has started selling meat.”).

66. McKeen, *supra* note 39.

67. *Id.*

68. *Id.*

69. *Id.*

70. See Andrew Wimer, *Victory for Vegan Burgers: New Mississippi Labeling Regulations Will Not Punish Plant-Based Meat*, INST. FOR JUST. (Nov. 7, 2019), <https://ij.org/press-release/victory-for-vegan-burgers-new-mississippi-labeling-regulations-will-not-punish-plant-based-meat/> [<https://perma.cc/RH7S-3ZH8>] (quoting the plaintiff: “We hope that other states considering similar legislation will follow Mississippi’s lead in allowing clear qualifying terms that our members are already using to communicate to consumers”).

71. Alexa Lardieri, *Missouri Is First State to Regulate Use of ‘Meat’ on Food Labels*, U.S. NEWS & WORLD REP. (Aug. 28, 2018, 2:36 PM), <https://www.usnews.com/news/national-news/articles/2018-08-28/missouri-is-first-state-to-regulate-use-of-meat-on-food-labels>

265.494 of the Missouri Code governs prohibited practices in and required disclosures for meat advertising.⁷² Before the 2018 amendment created by Senate Bill 627, this statute included traditional prohibitions, such as regulating the impermissible use of USDA meat quality grades.⁷³

The contested language added to the statute by the 2018 amendment provided that producers could not engage in misleading or deceptive practices, including “[m]isrepresenting the cut, grade, brand or trade name, or weight or measure of any product, or mispresenting a product as meat that is not derived from harvested production livestock or poultry.”⁷⁴ According to the statute, “[m]isrepresent” is defined as “the use of any untrue, misleading or deceptive oral or written statement, advertisement, label, display, picture, illustration, or sample.”⁷⁵ The litigation turned on the crucial language change that added a prohibition on misrepresenting a food as meat.⁷⁶ Notably, a violation of section 265.494 is a class A misdemeanor, with a potential sentence of up to one year of imprisonment and a fine of up to \$1,000.⁷⁷

The commentary from interest groups and the government provides important insight as to the intent behind the legislation, as well as the real-world implications. The key plaintiffs leading the charge against the legislation included plant-based food producer Tofurky, The Good Food Institute, the American Civil Liberties Union of Missouri, and the Animal Legal Defense Fund.⁷⁸ Tofurky voiced its concern by suggesting that under the new law, the deli slices they produced would have to be renamed from “meaty” or “soy roast beef” to something like “protein textured” soy.⁷⁹ Tofurky was further concerned about the vagueness of the statute and the

[<https://perma.cc/U2WY-2JZB>].

72. MO. REV. STAT. § 265.494 (2022).

73. *Id.* § 265.494(9).

74. *Id.* § 265.494(7).

75. *Id.* § 265.490(6).

76. *Turtle Island Foods, SPC v. Richardson*, 425 F. Supp. 3d 1131, 1134 (W.D. Mo. 2019), *aff'd sub nom. Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694 (8th Cir. 2021).

77. *Id.*

78. Emily Sullivan, *What's Meat, Anyway? Missouri Label Law Says It Comes from an Animal; Some Disagree*, NPR (Aug. 29, 2018, 2:46 PM), <https://www.npr.org/2018/08/29/642937901/whats-meat-anyway-missouri-label-law-says-it-comes-from-an-animal-some-disagree> [<https://perma.cc/SY45-K282>].

79. *Id.*

potential difficulty the company would have relabeling their products for sale in Missouri.⁸⁰ The plaintiffs argued that these labeling requirements were a veiled attempt to diminish the growing market for meat alternatives.⁸¹

The response from the beef industry that lobbied for the amendment as well as the state government has been mixed, adding to the confusion regarding the potential vagueness of the statute.⁸² The National Cattlemen's Association at the national and state level was a key advocate for the Missouri legislation.⁸³ The Association, which considers protecting consumers from misleading labels a key policy concern, weighed in on the legislation and questioned why plant-based producers would want to mimic the beef industry.⁸⁴ However, the Association's president noted that the organization was not targeting producers like Tofurky that label their products as plant-based.⁸⁵ Instead, "the concern is over the new science of meat grown in labs by culturing animal cells."⁸⁶

Finally, the Missouri Department of Agriculture affirmed that it would implement and defend the new misrepresentation-as-meat clause of the statute.⁸⁷ In order to facilitate implementation, the Missouri Department of Agriculture released a memorandum describing how it would enforce the statute.⁸⁸ This memorandum includes two exceptions not in the statute describing labels that the Missouri Department of Agriculture will not refer for prosecution. Products that will not be referred include those with a "[p]rominent statement on the front of the package, immediately before or immediately after the product name, that the product is 'plant-based,'

80. Lardieri, *supra* note 71.

81. Sullivan, *supra* note 78 ("This law has nothing to do with consumer protection,' the GFI said in a statement. 'No one buys Tofurky "PLANT-BASED" deli slices thinking they were carved from a slaughtered animal any more than people are buying almond milk thinking it was squeezed from a cow's udder.'").

82. *See id.*; Lardieri, *supra* note 71; Memorandum from the Dir.'s Off., Dep't of Agric., State of Mo., to Meat Inspection Program (Aug. 30, 2018), <https://agriculture.mo.gov/animals/pdf/missouri-meat-advertising-guidance.pdf> [<https://perma.cc/4ABF-SAXV>].

83. Sullivan, *supra* note 78. The National Cattlemen's Association dedicated protecting consumers from fake meat and misleading labels as one of its top priorities in 2018. *Id.*

84. *Id.*

85. *See* Lardieri, *supra* note 71.

86. *Id.*

87. Sullivan, *supra* note 78.

88. Memorandum from the Dir.'s Off. to Meat Inspection Program, *supra* note 82.

‘veggie,’ ‘lab-grown,’ ‘lab-created,’ or a comparable qualifier.”⁸⁹ The other exception provided in the memorandum applies to products with a “[p]rominent statement on the package that the product is ‘made from plants,’ ‘grown in a lab,’ or a comparable disclosure.”⁹⁰ The State asserts that labels with those statements are not misrepresenting the product as meat and therefore do not violate section 265.494(7).⁹¹

2. *Litigation*

Despite the memorandum from the Missouri Department of Agriculture clarifying the intended scope of enforcement of the law, the plaintiffs filed suit in federal court seeking a preliminary injunction shielding them from the legislation for the duration of their § 1983 claim.⁹² Amongst other claims, the plaintiffs alleged that the statute violated their First Amendment right to engage in commercial speech.⁹³ Here, the court denied the preliminary injunction because the statute served to restrict misleading speech, which is permissible and outside of the scope of *Central Hudson*.⁹⁴ Additionally, the plaintiffs argued that their labels did not mislead or cause consumer confusion, so the statute did not prohibit this speech.⁹⁵ Because the speech is unlikely to be considered within the scope of the statute, the plaintiffs will likely not succeed on their First Amendment claims.⁹⁶

3. *Central Hudson Test*

The key language on which the analysis of Missouri’s statute turns restricts food producers from “misrepresenting a product as meat that is not derived from harvested production livestock or

89. *Id.* at 2.

90. *Id.*

91. *Id.*

92. *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 696-97 (8th Cir. 2021); *Turtle Island Foods, SPC v. Richardson*, 425 F. Supp. 3d 1131, 1134-35 (W.D. Mo. 2019), *aff’d sub nom.* *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694 (8th Cir. 2021).

93. *Richardson*, 425 F. Supp. 3d at 1139.

94. *Id.* at 1140; *Friedman v. Rogers*, 440 U.S. 1, 15-16 (1979).

95. *Richardson*, 425 F. Supp. 3d at 1140.

96. *Id.*

poultry.”⁹⁷ Here, the district court did not apply the *Central Hudson* test because it held that the plaintiffs’ labels did not fall within the scope of the statute.⁹⁸ However, as the plaintiffs contend, the statute alone is vague enough that it could be construed to cover their labels for products such as “meaty” or “soy roast beef.”⁹⁹ The plain language of the statute could be problematic if Missouri began enforcing it like the Arkansas statute.¹⁰⁰ Considering the statute standing alone, the State could run into constitutional issues, but with the enforcement language from the memorandum given by the Director of Agriculture, the statute is constitutional. For the purposes of the *Central Hudson* test’s application, this Note will analyze a hypothetical in which the exceptions contained in the Director of Agriculture’s memorandum are part of the statute.¹⁰¹

Applying the first step of the *Central Hudson* test, the plaintiffs’ label is not misleading or relating to illegal activity. The State correctly indicates that because the statute seeks to only restrict false or inherently misleading speech, the First Amendment is not implicated, as it is entirely permissible for the State to restrict such speech.¹⁰² However, due to the vagueness of the statute, going through the *Central Hudson* analysis is still worthwhile because a plain language reading, without including the exceptions, could give rise to a court finding that Tofurky’s not inherently misleading labels are still implicated by the statute.¹⁰³ At no point in the litigation did Missouri argue that Tofurky misrepresented their products as meat, and the Eighth Circuit noted that none of the seven labels the plaintiffs submitted in their complaint misrepresented their

97. MO. REV. STAT. § 265.494(7) (2022).

98. *Richardson*, 425 F. Supp. 3d at 1140.

99. Sullivan, *supra* note 78; Lardieri, *supra* note 71.

100. *See infra* note 104 and accompanying text.

101. This hypothetical treats the following exceptions from the guidance as law: products that will not be referred include those with a “[p]rominent statement on the front of the package, immediately before or immediately after the product name, that the product is ‘plant-based,’ ‘veggie,’ ‘lab-grown,’ ‘lab-created,’ or a comparable qualifier” or a “[p]rominent statement on the package that the product is ‘made from plants,’ ‘grown in a lab,’ or a comparable disclosure.” Memorandum from the Dir.’s Off. to Meat Inspection Program, *supra* note 82, at 2.

102. *Richardson*, 425 F. Supp. 3d at 1140.

103. *See id.*; MO. REV. STAT. § 265.494(7) (2022).

products as meat and had ample indicators that the products were plant-based, vegan, or vegetarian.¹⁰⁴

Next, the burden shifts to Missouri to demonstrate that the State has a substantial interest in regulating commercial speech that misrepresents a product as meat. Precedent indicates that states have a compelling interest in preventing consumer confusion through restricting misleading advertising.¹⁰⁵ Because the State can establish a compelling interest in regulating misleading food labels, the analysis shifts to the third prong. Under the third step in *Central Hudson*, the regulation must directly advance the State's interest.¹⁰⁶ The combined language from the statute and the memorandum exempting plant-based food producers does, in fact, directly further the State's interest in preventing the misrepresentation of meat. Other statutes run into constitutional difficulty on this issue when they restrict plant-based food producers based on antiquated food definitions for products such as meat or dairy.¹⁰⁷ Unconstitutional statutes do not materially further a state interest because states have not been able to show that restricting plant-based food labels actually prevents consumer confusion.¹⁰⁸ Here, however, exemptions for labels that indicate the plant-based nature of the product leave the statute to target only food products that are misleading or misrepresentations of meat.¹⁰⁹

Finally, were the exemptions from the memorandum to be combined with the statute, the State can succeed in showing that the regulation is no more expansive than necessary to prevent misleading food labels. Again, the issues of unconstitutionality that other states face are implicated by overbroad policies that include plant-based food labels within their scope when there is no demonstrated

104. *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 701 (8th Cir. 2021) (“Tofurky alleges its products are labeled in such a way as to ‘clearly indicate that the products do not contain meat from slaughtered animals’ and are otherwise ‘clearly labeled as plant based, vegan, or vegetarian.’”).

105. *See Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985).

106. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

107. *See Watson*, *supra* note 61; *Turtle Island Foods SPC v. Soman*, 424 F. Supp. 3d 552, 573-74 (E.D. Ark. 2019).

108. *Soman*, 424 F. Supp. 3d at 575.

109. *See Lardieri*, *supra* note 71 (“[T]he concern is over the new science of meat grown in labs by culturing animal cells.”); *see also* *McKeen*, *supra* note 39 (providing the revised language of the similar Mississippi statute).

evidence that the labels are misleading.¹¹⁰ Here, however, Missouri would successfully navigate the constitutional inquiry even under intermediate scrutiny by excluding plant-based products with labels that clearly identify them as such. Provisions providing exceptions for clear plant-based labeling ensure that the policy is not overbroad and that the State is using the least restrictive means to target truly misleading and false commercial speech on food labels.

Thus, going through the *Central Hudson* analysis for the combined statute with the enforcement memorandum from the State of Missouri demonstrates how a state could succeed under *Central Hudson* and intermediate scrutiny. Here, the statute is not likely to be found to apply to the plaintiffs and will most likely be interpreted as only restricting misleading speech and not implicating the First Amendment. However, analysis of a hypothetical such as this demonstrates how a state can craft a constitutional statute to survive intermediate scrutiny, were a court to find that a similarly situated plaintiff was implicated by the statute while not engaging in misleading commercial speech.

C. Arkansas as a Case Study

1. Statute

In 2019, Arkansas passed a similar—but even more restrictive—statute to Missouri’s, against which a federal court granted a preliminary injunction.¹¹¹ This statute went beyond the scope of other similar ones and notably included language such as “[r]epresenting the agricultural product as meat or a meat product when the agricultural product is not derived from harvested livestock, poultry, or cervids” and “[u]tilizing a term that is the same as or similar to a term that has been used or defined historically in reference to a specific agricultural product.”¹¹² In practice, this statute would prevent plant-based food producers from using the word “meat” or any other

110. See *Soman*, 424 F. Supp. 3d at 574-75 (noting the State of Arkansas offered no evidence of consumer confusion to support its statute).

111. ARK. CODE ANN. § 2-1-305 (2022); *Soman*, 424 F. Supp. 3d at 561.

112. ARK. CODE ANN. § 2-1-305(6), (10).

meat-related terminology, even with the inclusion of words on the label that make it clear the product is plant-based.¹¹³

2. *Litigation*

Following the enactment of Arkansas's law, Tofurky, a plant-based food producer, quickly filed suit in federal court and sought a preliminary injunction, which the court granted.¹¹⁴ The plaintiffs utilized a First Amendment argument and alleged that "these provisions represent a restriction on commercial speech that prevents companies from sharing truthful and nonmisleading information about their products, does nothing to protect the public from potentially misleading information, and creates consumer confusion where none existed before in order to impede competition."¹¹⁵ At the time of litigation, Tofurky utilized meat-based terms such as "hot dogs" and "chorizo" that were placed on the label next to vegan qualifiers like "plant based" or "vegetarian."¹¹⁶ The company asserted that those labels comply with federal regulations and are the only way the company can accurately convey to the consumer what their product is.¹¹⁷ Were the Arkansas law to be upheld, the company would need to change their labels for products sold in Arkansas or stop selling in the state altogether.¹¹⁸ On the other hand, the State has asserted that the legislative purpose of the statute is "to protect consumers from being misled or confused by false or misleading labeling of agricultural products that are edible by humans."¹¹⁹ This asserted justification rests on a foundation of precedent that presumes consumer protection is a legitimate and substantial interest.¹²⁰

To determine if a preliminary injunction should be granted, the court went through the *Central Hudson* analysis. Unlike the litigation in Missouri, here, the State did not concede the first prong of the test and argued that the wording on Tofurky's packaging is

113. McKeen, *supra* note 39.

114. *Soman*, 424 F. Supp. 3d at 561.

115. *Id.*

116. *Id.* at 562.

117. *Id.*

118. *Id.* at 563-64.

119. *Id.* at 563.

120. *See id.* at 575; *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985).

inherently misleading and thus does not enjoy First Amendment protections.¹²¹ The State argued that the inclusion of traditional meat terminology, combined with the nature of Tofurky's food being such that they imitate meat products, yields a label that is inherently misleading.¹²² The court, however, did not find the labels to be inherently misleading and thus that the plaintiff likely would have satisfied the first step of the *Central Hudson* test.¹²³ The court noted "the simple use of a word frequently used in relation to animal-based meats does not make use of that word in a different context inherently misleading."¹²⁴

For the second prong, the court presumed that the State's asserted interest in consumer protection was legitimate and compelling.¹²⁵ However, the court held that the plaintiff was likely to succeed under the second prong, finding that the statute did not directly and materially advance the stated interest.¹²⁶ Finally, the court concluded that the statute, as it stands, is not the least restrictive means the State could use to further consumer protection, assuming the label regulations serve that function.¹²⁷ The court concluded by offering a potential solution that could further the state interest in consumer protection without violating the First Amendment.¹²⁸ As a viable policy alternative, "the State could require more prominent disclosures of the vegan nature of plant-based products, create a symbol to go on the labeling and packaging of plant-based products indicating their vegan composition, or require a disclaimer that the products do not contain meat."¹²⁹

121. *Soman*, 424 F. Supp. 3d at 573.

122. *Id.*

123. *Id.* at 573-74.

124. *Id.* The court also noted that "[e]ach of these labels also feature the letter 'V' in a circle on the front of the packaging, a common indicator that a food product is vegan or vegetarian."
Id.

125. *Id.* at 575.

126. *Id.*

127. *Id.*

128. *Id.* at 576.

129. *Id.*

3. Central Hudson Test

The district court in *Turtle Island Foods SPC v. Soman* properly applied the intermediate scrutiny framework set out in *Central Hudson* to the statute and found the plaintiff likely to succeed on the First Amendment challenge for the purposes of granting a preliminary injunction.¹³⁰ The *Central Hudson* test is appropriate because the restriction serves to regulate the content of the commercial speech, and it is not a regulation that compels disclosures.¹³¹ Here, the State should fail under every requirement of the *Central Hudson* test, making Arkansas's commercial speech restrictions unconstitutional.

For the first step in the *Central Hudson* test, the plaintiffs should prevail over the State's objections as applied to the challenged statute. For *Central Hudson* to apply, the speech that is being regulated must not be misleading or related to unlawful activity.¹³² Here, for the first step of analysis, the district court noted that simply because a labeling word is typically used in context with traditional meat does not make using that word in a different context inherently misleading.¹³³ Further, generally speaking, deviations from state-provided definitions are not inherently misleading.¹³⁴ This approach to determining the potential misleading nature of use of definitions is consistent with the Ninth Circuit and other district courts' similar analyses regarding almond milk and vegan butter labels.¹³⁵ Under the statute as it stood, Tofurky's

130. *Id.* at 571.

131. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563-64 (1980). If the statute merely compelled disclosures, *Zauderer* would be the appropriate test. *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985).

132. *Soman*, 424 F. Supp. 3d at 572-73.

133. *Id.* at 573; *see also* *Miyoko's Kitchen v. Ross*, No. 20-cv-00893, 2020 U.S. Dist. LEXIS 249119, at *16-17 (N.D. Cal. Aug. 21, 2020) ("Nowhere, for instance, does the State present testimony from a shopper tricked by Miyoko's vegan butter, or otherwise make the case for why Miyoko's substitute spread is uniquely threatening to the public.").

134. *Soman*, 424 F. Supp. 3d at 575.

135. *See, e.g.*, *Kitchen v. Ross*, No. 20-cv-00893, 2021 U.S. Dist. LEXIS 193462, at *11 (N.D. Cal. Aug. 10, 2021) ("Absent anything from the State revealing why old federal food definitions are more faithful indicators of present-day linguistic norms, neither the fact nor the vintage of the federal definition of 'butter' counts against Miyoko's at *Central Hudson*'s first step."); *Painter v. Blue Diamond Growers*, 757 F. App'x 517, 519 (9th Cir. 2018); *Ang v. Whitewave Foods Co.*, No. 13-cv-1953, 2013 U.S. Dist. LEXIS 173185, at *12-13 (N.D. Cal. Dec. 10, 2013).

current use of words such as “burger” or “hot dog” would be prohibited by the statute, even if the label also contained modifiers such as “veggie” or “vegan.”¹³⁶

One example of a case in which the label was considered inherently misleading is *Williams v. Gerber Products Co.*, which this Note referred to earlier when considering the Ninth Circuit’s analysis of almond milk labeling.¹³⁷ There, the issue was that fruit snacks were labeled in a way that suggested through words and pictures that the products were made with the fruits displayed on the label.¹³⁸ The Ninth Circuit held that the images of fruit on the label could reasonably mislead a consumer into believing that the “fruit juice snacks” contained the depicted fruit.¹³⁹

Williams shines a light on how the labels that contain a traditional meat term combined with images of both plants and animals should be approached. Proponents of the legislation could argue that the images of cows and chickens on the plant-based meat labels make this indistinguishable from the *Williams* case.¹⁴⁰ The labels do contain pictures of the corresponding animals for the type of meat their product is replicating.¹⁴¹ However, these labels are distinguishable from the fruit snack labels due to the additions of veggie-modifiers, the vegan symbol, and other images that signal their plant-based nature.¹⁴² If the labels only had meat-related terms and images on them, then the case would be synonymous to *Williams*. In order to find that these labels are equally misleading, a court would have to accept the preposterous assumption that after reading words like “burger” on a label, a consumer would completely disregard all other plant-related words.¹⁴³

136. See *Soman*, 424 F. Supp. 3d at 562; McKeen, *supra* note 39.

137. 552 F.3d 934, 939 (9th Cir. 2008); *Painter*, 757 F. App’x at 519.

138. *Williams*, 552 F.3d at 939.

139. *Id.*

140. See Sullivan, *supra* note 78, for similar commentary relating to the Missouri statute (“‘Why try to mimic the traditional meat industry?’ spokesman Mike Deering of the Missouri Cattlemen’s Association told NPR in May. ‘Why put pictures of cattle and pictures of chicken on their product?’”).

141. *Id.*

142. *Turtle Island Foods SPC v. Soman*, 424 F. Supp. 3d 552, 562 (E.D. Ark. 2019).

143. *Id.* at *14-15; *Ang v. Whitewave Foods Co.*, No. 13-cv-1953, 2013 U.S. Dist. LEXIS 173185, at *14-15 (N.D. Cal. Dec. 10, 2013) (“Under Plaintiffs’ logic, a reasonable consumer might also believe that veggie bacon contains pork, that flourless chocolate cake contains flour, or that e-books are made out of paper.”).

Because the plaintiff prevails on demonstrating that the speech in question is not misleading or related to unlawful activity, the burden shifts to the State to demonstrate it has a substantial interest in regulating the commercial speech.¹⁴⁴ The State has asserted a recognized compelling interest in preventing misleading advertising.¹⁴⁵ While the State has asserted the compelling interest, this assertion is not taken at face value, and the State eventually “must demonstrate that the harms it recites are real and that its restrictions will *in fact* alleviate them to a material degree.”¹⁴⁶

Here, the State did not meet its burden of demonstrating that the commercial speech restriction directly advances its interest in preventing consumer confusion and misleading advertisements. First, the State did not proffer any evidence that consumers were actually misled by Tofurky’s labels.¹⁴⁷ Because the State had not proven the underlying evidentiary assertion that consumers were being misled, it is difficult to see how the policy could directly and materially further that interest. Stated differently, Arkansas had not been able to show that taking out meat-related terms from the plant-based meat products would confuse consumers less than in the status quo. If anything, the implementation of this statute could have the outcome of confusing consumers more.¹⁴⁸

Finally, at the preliminary injunction stage, the State failed to prove that the regulation was not more extensive than necessary to serve its interest in protecting consumers. The court correctly considered that there are a myriad of state and federal laws across the country that target product mislabeling and do not put such an extreme burden on food producers.¹⁴⁹ The State here did not provide any evidence as to why these less restrictive counterparts are insufficient at furthering its interest.¹⁵⁰ In creating a categorical ban

144. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980).

145. ARK. CODE ANN. § 2-1-301 (2022); *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985).

146. *Kitchen v. Ross*, No. 20-cv-00893, 2021 U.S. Dist. LEXIS 193462, at *13 (N.D. Cal. Aug. 10, 2021) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)).

147. *Soman*, 424 F. Supp. 3d at 574.

148. See *McKeen*, *supra* note 39 (discussing the confusing terminology plant-based food producers would have to use to avoid consequences under Mississippi’s first regulation).

149. *Soman*, 424 F. Supp. 3d at 576.

150. *Id.*

on plant-based food producers using traditional meat terms, Arkansas employed a mechanism that went well beyond the least restrictive means for a policy it could not show the statute actually served.

Recently, three years following the preliminary injunction, the court readdressed the issue by issuing a final order on the question of a permanent injunction.¹⁵¹ In a groundbreaking decision, the court held that the section of the statute which prohibits the use of “a term that is the same as or similar to a term that has been defined historically in reference to a specific agricultural product” was facially unconstitutional.¹⁵² Critically, the constitutional grounding of the permanent injunction against the enforcement of section 2-1-305(10), the provision prohibiting the use of a traditional meat term, means that it applies statewide.¹⁵³ Specifically applied to Tofurky, the court granted a permanent injunction from enforcing sections 2-1-305(6), 2-1-305(8), and 2-1-305(9), regarding the misrepresentation of food products, generally, as well as sections 2-1-305(2) and 2-1-305(5) regarding the specific labels in the record as well as future similar materials.¹⁵⁴ The court grounded these specific, as-applied permanent injunctions appropriately in a *Central Hudson* analysis, similar to the one it engaged in when granting the preliminary injunction.¹⁵⁵

The final order in this case demonstrates the need for an FDA amendment in addition to the *Central Hudson* test, as even when coming to a favorable outcome on section 2-1-305(10), the court dodged the issue of protected commercial speech. Instead of holding that section 2-1-305(10) is unconstitutional as an impermissible restriction of commercial speech, the court found that it was unconstitutional under the Due Process Clause.¹⁵⁶ The court took issue with the terminology used in the subsection, because “as Tofurky points out there are many other terms for ‘agricultural product[s]’ left undefined by the statute which have been used or defined

151. *Turtle Island Foods SPC v. Soman*, No. 19-cv-00514, 2022 U.S. Dist. LEXIS 179206, at *1-2 (E.D. Ark. Sept. 30, 2022).

152. *Id.* at *76; ARK. CODE ANN. § 2-1-305(10) (2022).

153. *Turtle Island Foods*, 2022 U.S. Dist. LEXIS 179206, at *76.

154. *Id.*

155. *Id.* at *33.

156. *Id.* at *69-74.

historically in multiple ways.”¹⁵⁷ The court thus determined that section 2-1-305(10) was void for vagueness as a matter of due process.¹⁵⁸

The court did engage primarily in a *Central Hudson* analysis for the facial challenge of section 2-1-305 but in the end was not persuaded because “Tofurky cannot rely on its labels to establish that no set of circumstances exists under which Act 501 would be valid in the context of a facial challenge.”¹⁵⁹ With *Central Hudson* as the appropriate test for the constitutionality of Arkansas’s commercial speech restrictions, however, section 2-1-305 should be deemed unconstitutional. As explained above, *Central Hudson* applies because the speech that the state is seeking to regulate is neither misleading nor related to unlawful activity.¹⁶⁰ The State fails under *Central Hudson* because it cannot prove that this policy directly and materially furthers a compelling state interest using means that are no more expansive than necessary. The result the court came to resting on due process, unfortunately, dodges the constitutional issue of commercial speech because as explained above, the policy is arguably unconstitutional under the *Central Hudson* test as well.

IV. FDA AMENDMENT PROPOSAL

This Note proposes an FDA amendment and final notice guidance that would be controlling for plant-based food labels. The amendment and guidance would first create an entirely independent standard of identity for plant-based meat, taking it outside of the scope of the traditional definition of meat. Second, the proposal would dictate that plant-based meat labels may use traditional meat terminology so long as the label also contains an appropriate plant-based modifier, such that a reasonable consumer would not be confused. Finally, the guidance would permit plant-based food producers to use what this Note calls stand-alone “vegan

157. *Id.* at *72.

158. *Id.* at *74.

159. *Id.* at *66. The court took particular issue with the potential for future products labeled “without qualifiers on their packaging identifying the products as ‘plant-based’ or ‘vegan.’” *Id.*

160. *See supra* notes 132-43 and accompanying text.

terminology,”¹⁶¹ with only the additional inclusion of a vegan certification being required.

A. Procedure & History of Amending FDA Regulations

Food and drug regulations employ a complex federalist system to maintain a safe and accurate regulatory scheme. The risks that come with the United States’ robust food and drug market are “addressed through a two-pronged approach: a stringent *ex ante*, centralized regulatory regime led by the Food and Drug Administration (FDA) and a robust *ex post*, decentralized system enforced primarily by private litigants.”¹⁶² The relationship between FDA regulations and state tort law creates a dual system by which food and drug producers are held accountable.¹⁶³ However, the FDA and other government agencies have the capacity to create rules and regulations that expressly preempt state law.¹⁶⁴ For example, in the context of food label regulations, “[f]ederal food labeling laws preempt state laws that impose requirements different from or in addition to those established by federal law.”¹⁶⁵ Typically, preemption is a question of law, and courts should consider the nature of the FDA regulation with a plain text reading.¹⁶⁶

FDA amendments and final rules have historically served as the vehicle by which the federal government preempts state regulations of food labeling and addresses novel concerns. For example, the FDA recently issued a final rule to amend the standards for defining yogurt.¹⁶⁷ The FDA uses the terminology “standard of identity” to define various food types.¹⁶⁸ Before this amendment, FDA regulations included three different definitions for yogurt: yogurt, low-fat

161. “Vegan terminology” as defined by this Note includes labeling terms such as “turk’y,” “chick’n,” “be’f,” “p’rk,” “f’sh,” and “cr’b.”

162. Catherine M. Sharkey, *States Versus FDA*, 83 GEO. WASH. L. REV. 1609, 1610 (2015).

163. *Id.* at 1611.

164. *Id.*

165. Jane Metcalf & Brandon Trice, *Food Label Ruling Shows How to Make Preemption Stick*, LAW360 (Sept. 15, 2020, 5:39 PM), <https://www.law360.com/articles/1310095/print?section=appellate> [<https://perma.cc/ZP82-UG3V>].

166. *Id.*

167. *FDA Amends Standard of Identity for Yogurt*, FDA (June 9, 2021), <https://www.fda.gov/food/cfsan-constituent-updates/fda-amends-standard-identity-yogurt> [<https://perma.cc/9E4Y-A6ZG>].

168. *Id.*

yogurt, and nonfat yogurt.¹⁶⁹ Following this amendment, the three previous definitions will be consolidated simply as “yogurt.”¹⁷⁰ The FDA further allowed for recent innovations in the yogurt industry, such as the fortification of yogurt, to be permissible under the definitions encompassed in this amendment.¹⁷¹

The FDA is the appropriate actor for modifying regulations to best serve commercial interests of the consumer regarding product labeling. The statutory provisions governing the FDA and food provisions provide that “[w]henver in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity.”¹⁷² This authorizes the FDA to establish a standard of identity for the common names of foods,¹⁷³ which is what this Note proposes the FDA do in response to the growing plant-based food market. As explained regarding the changes to yogurt’s standard of identity, this is an authorized common practice used by the FDA to modernize standards of identity,¹⁷⁴ as is necessary for plant-based meats.

According to regulations, if there is not an applicable regulation creating a standard of identity, the “statement of identity” for a food can be “the common or usual name.”¹⁷⁵ As the case studies suggest, plant-based modified terms are trending toward having the same recognizability as dairy alternatives, such as almond milk.¹⁷⁶ In fact, the FDA recently released draft guidance for plant-based milk labels.¹⁷⁷ After reviewing more than 13,000 comments, the FDA concluded that “consumers generally understand that PBMA [plant-based milk alternatives] do not contain milk and choose PBMA because they are not milk.”¹⁷⁸ Further, these plant-based products

169. *Id.*

170. *Id.*

171. *Id.*

172. 21 U.S.C. § 341.

173. *Id.*

174. *Id.*

175. 21 C.F.R. § 101.3(b)(1)-(2) (2023).

176. See *supra* Part II for this Note’s discussion of cases concerning dairy alternatives.

177. *FDA Releases Draft Guidance on Labeling of Plant-Based Milk Alternatives*, FDA (Feb. 22, 2023), <https://www.fda.gov/food/cfsan-constituent-updates/fda-releases-draft-guidance-labeling-plant-based-milk-alternatives> [<https://perma.cc/A8G9-QB7R>].

178. *Id.*

do not fall within the standard of identity governing meat.¹⁷⁹ Thus, because there is no existing standard of identity, plant-based meats should, until such a standard of identity is created, be understood to be using their common or usual names. This is entirely permissible under § 101.3,¹⁸⁰ meaning that plant-based meat cannot be considered a misrepresentation of meat because the standard of identity is permissible as a separate category of food.

Further action should be taken by amending the United States Code in the interim while the new standard of identity is being formulated. Title 21, section 601 provides the statutory definition for the misbranding of meat.¹⁸¹ Although the statute as written is silent on both plant-based and lab-grown meats,¹⁸² this is a place in the legislation in which Congress could create a clear exception.¹⁸³ The House Appropriations Committee has expressed support for plant-based food producers and the modernization of food labels to keep up with the common understanding of terms like “veggie burger.”¹⁸⁴ In its statement, the committee “encourage[d] FDA to provide clarity around the labeling of plant-based foods that use traditional meat, dairy, and egg terminology, especially as it relates to such product labels with clear and conspicuous descriptors such [as] plant-based, veggie, vegetarian, or vegan.”¹⁸⁵ This highlights congressional desire to have food regulations modernized in a method that is consistent with this proposal.

Further, this is the appropriate timing for creating a separate standard of identity for plant-based meat. The FDA will be regulating lab-grown meat products, and “[i]n 2019, the FDA and USDA-FSIS established a formal agreement on how we would use our

179. See 21 U.S.C. § 601 (providing meat-related definitions).

180. 21 C.F.R. § 101.3(b)(1)-(2).

181. 21 U.S.C. § 601(n) (“The term ‘misbranded’ shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances: (1) if its labeling is false or misleading in any particular.”).

182. See *id.*

183. For example, Congress could insert language such as “601(n) shall not be interpreted to include plant-based meat products.”

184. See Elaine Watson, *Oatmilk or Oat Drink? House Appropriations Committee Encourages FDA to Provide Clarity Around the Labeling of Plant-Based Foods*, FOOD NAVIGATOR USA (July 2, 2021, 7:40 PM), <https://www.foodnavigator-usa.com/Article/2021/07/02/House-Appropriations-Committee-encourages-FDA-to-provide-clarity-around-the-labeling-of-plant-based-foods#> [<https://perma.cc/T9R5-DBQN>].

185. *Id.*

regulatory tools to help ensure that foods comprising or containing cultured animal cells entering the U.S. market are safe and properly labeled.”¹⁸⁶ Despite state statutes combining regulations for cell-based meat and plant-based meat,¹⁸⁷ the announcement of stand-alone regulations for lab-grown meat suggests the FDA implicitly separates the two types of products. The creation of separate regulations for cell-based products creates the ideal opportunity for the FDA to recognize the independent nature of plant-based meat products and create separate regulations for them as well.

B. Separate Regulation for Plant-Based Food

Given the history of the FDA utilizing final notices and amendments to modernize the federal code and preempt state law, this Note proposes an amendment of 21 U.S.C. § 343, regarding misbranded foods, and of § 601, which defines the standard of identity for meat products. The FDA would also employ its formal process for creating a new standard of identity and issuing a final notice to states on the labeling of vegan meat products. These actions would function in tandem to formally carve out a distinct and independent standard of identity for plant-based meat, precluding it from being considered a misrepresentation of traditional meat. Creating a separate standard of identity for plant-based meat is consistent with how various federal courts across the country have been addressing old food definitions and new products that do not fit neatly into existing standards of identity.¹⁸⁸ Importantly, plant-based meats

186. *Food Made with Cultured Animal Cells*, FDA (Oct. 6, 2020), <https://www.fda.gov/food/food-ingredients-packaging/food-made-cultured-animal-cells> [<https://perma.cc/AGJ6-J2BB>].

187. *See, e.g.*, ARK. CODE ANN. § 2-1-305 (2022).

188. *See, e.g.*, *Kitchen v. Ross*, No. 20-cv-00893, 2021 U.S. Dist. LEXIS 193462, at *11 (N.D. Cal. Aug. 10, 2021) (“Absent anything from the State revealing why old federal food definitions are more faithful indicators of ... linguistic norms, neither the fact nor the vintage of the federal definition of ‘butter’ counts against Miyoko’s at *Central Hudson’s* first step.”); *Ocheese Creamery LLC v. Putnam*, 851 F.3d 1228, 1238 (11th Cir. 2017) (“It is undoubtedly true that a state can propose a definition for a given term. However, it does not follow that once a state has done so, any use of the term inconsistent with the state’s preferred definition is inherently misleading.”); *Ang v. Whitewave Foods Co.*, No. 13-cv-1953, 2013 U.S. Dist. LEXIS 173185, at *15 (N.D. Cal. Dec. 10, 2013) (holding that the statutory definition of milk “pertains to what milk is, rather than what it is not, and makes no mention of non-dairy alternatives”); *Turtle Island Foods SPC v. Soman*, 424 F. Supp. 3d 552, 575 (E.D. Ark. 2019) (“Tofurky’s plant-based products are not beef, beef product, livestock, meat, meat product,

should be explicitly separated from the newly created lab-grown meats. Most of the state legislation being written to navigate these new forms of meat combines plant-based and lab-grown together in sweeping restrictions.¹⁸⁹ However, this is problematic, as many of the potential labeling issues that apply to lab-grown meat are not relevant for plant-based meat. Additionally, concerns from the beef industry tend to focus on cell-based meat separately from plant-based meat.¹⁹⁰ Thus, the two must be defined statutorily separately to address their distinctive characteristics and prevent the enforcement of overbroad legislative policies.

C. Traditional Meat Terms with Plant-Based Modifiers

In addition to creating a separate standard of identity, the FDA should provide mandatory guidelines for labeling plant-based meat products that explicitly preempt overbroad state restrictions.¹⁹¹ This proposed guidance would permit plant-based food producers to use traditional meat terms on their packaging, so long as they also use the appropriate plant-based modifiers. Traditional meat terms include words such as “meat,” “beef,” “sausage,” and “roast.”¹⁹² Examples of plant-based modifiers include but are not limited to words such as “plant-based,” “vegan,” “meatless,” “meat-free,” “veggie,”

pork, pork product, or poultry within Act 501’s definition of those terms. Though the State has defined these terms in Act 501, those definitions do not serve as trademarks on these terms.” (citation omitted)).

189. See MO. REV. STAT. § 265.494 (2021); Memorandum from the Dir.’s Off. to Meat Inspection Program, *supra* note 82 (combining exemptions for plant-based and lab-grown meat products); ARK. CODE ANN. § 2-1-305.

190. Lardieri, *supra* note 71 (providing commentary from the Missouri Cattlemen’s Association concerning lab-grown meat specifically). *But see* Leanna Garfield, *There’s a Growing Battle Between Fake Meat Startups and Big Beef, and Neither Side Is Backing Down*, BUS. INSIDER (June 10, 2018, 10:06 AM), <https://www.businessinsider.com/beef-companies-file-petition-against-lab-grown-meat-startups-2018-2> [<https://perma.cc/F4BE-45DD>] (including commentary grouping lab-grown and plant-based meats together as a concern).

191. This approach is consistent with existing FDA practices regarding food labeling. *Guidance for Industry: Food Labeling Guide*, FDA (Jan. 2013), <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-food-labeling-guide> [<https://perma.cc/8HHK-GXYG>] (providing the comprehensive uniform requirements for product food and nutrition labels).

192. For examples of what the district court considered traditional meat terms that would be implicated by Arkansas’s statute, see *Soman*, 424 F. Supp. 3d at 563.

“vegetarian,” or phrases such as “made from plants.”¹⁹³ Requiring the inclusion of plant-based modifiers satisfies *Central Hudson* while also effectively preventing consumer confusion.¹⁹⁴ As discussed regarding the combined Missouri statute and memorandum, regulations that allow for plant-based modifying language directly serve the state interest in preventing misleading labels while also being sufficiently narrowly tailored.¹⁹⁵ This requirement would also satisfy the concerns of the court in *Turtle Island Foods SPC v. Soman*, in which the court would not find section 2-1-305 facially unconstitutional under *Central Hudson* for fear of the creation of plant-based foods labeled without modifiers.¹⁹⁶

This proposed label regulation does not unduly burden plant-based food producers’ First Amendment commercial speech while also taking into consideration what courts have held across the board—that consumers are not confused when plant-based products indicate that they are plant-based.¹⁹⁷ Further, this regulation serves the interests of states, plant-based food producers, and the traditional meat industry.¹⁹⁸ Thus, this constitutional proposal of permitting the use of traditional meat terminology when combined with the appropriate plant-based modifier serves the interests of all parties involved while also preempting unconstitutional state restrictions that are unduly restrictive and do not serve a compelling interest, as required by the First Amendment.

193. See PLANT BASED FOODS ASS’N, VOLUNTARY STANDARDS FOR THE LABELING OF MEAT ALTERNATIVES IN THE UNITED STATES (2019), <https://www.plantbasedfoods.org/wp-content/uploads/PBFA-Labeling-Standards-for-Meat-Alternatives.pdf> [<https://perma.cc/NDM7-EKHY>] (providing a voluntary guideline to suggested nomenclature for the plant-based food industry).

194. See *supra* Part III.B.

195. See *supra* Part III.B.

196. No. 19-cv-00514, 2022 U.S. Dist. LEXIS 179206, at *66 (E.D. Ark. Sept. 30, 2022).

197. See *Painter v. Blue Diamond Growers*, 757 F. App’x 517, 519 (9th Cir. 2018); *Ang v. Whitewave Foods Co.*, No. 13-cv-1953, 2013 U.S. Dist. LEXIS, at *14-15 (N.D. Cal. Dec. 10, 2013) (considering plant-based milk labels); see also *Soman*, 424 F. Supp. 3d at 573; *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 701 (8th Cir. 2021).

198. See *McKeen*, *supra* note 39 (highlighting Mississippi’s new statute that includes an allowance for plant-based modifiers); Memorandum from the Dir.’s Off. to Meat Inspection Program, *supra* note 82 (indicating the intent of the Missouri Department of Agriculture to exempt labels with plant-based modifiers from prosecution); *Lardieri*, *supra* note 71 (“[T]he concern is over the new science of meat grown in labs by culturing animal cells.”); *Watson*, *supra* note 61 (“It would be a disaster for Upton’s Naturals if the public were to think that the company has started selling meat.”); PLANT BASED FOODS ASS’N, *supra* note 193.

D. Vegan Terminology

While federal courts and the plant-based industry have addressed the use of traditional meat terms combined with plant-based modifiers, this Note takes that analysis one step further to propose a solution to litigation that could foreseeably occur, given the expanding use of vegan terminology on plant-based products.¹⁹⁹ As part of the FDA amendment and final notices, plant-based food producers should be permitted to use vegan terminology standing alone, as long as the package also clearly displays the “certified vegan” logo. This proposal expands upon federal court doctrine and commentary regarding the use of definitions in food regulations.

In *Kitchen v. Ross*, the district court was particularly concerned about the evolution of language and modern linguistic terms.²⁰⁰ Simply put, the court emphasized that with changing food norms, consumers have come to understand that “butter” can have different meanings than purely dairy-based butter, depending on the context.²⁰¹ The Ninth Circuit in *Painter v. Blue Diamond Growers* furthered this line of reasoning when it held that almond milk could not be considered to be either an imitation of dairy milk or a substitute for dairy milk because it stood alone as its own category of milk.²⁰² Following the line of reasoning applied to dairy cases, labels using vegan terms, such as “chick’n,” should be understood to have their own independent linguistic norm. As more and more plant-based food producers utilize the same vegan terminology in their labeling, the terms continue to grow to have their own independent linguistic meaning for consumers. In order to mitigate concerns that vegan terminology has not reached the commonplace understanding that terms like “almond milk” have, the proposal would require that the product display the certified vegan logo “V” prominently enough such that if a reasonable consumer was unclear of the nature of

199. In the Turtle Island Food lawsuits, labels were included that used the term “chick’n,” however the use of such vegan terms was not addressed by the courts. See *Turtle Island Foods, SPC v. Richardson*, 425 F. Supp. 3d 1131, 1135 (W.D. Mo. 2019), *aff’d sub nom.* *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694 (8th Cir. 2021); *Thompson*, 992 F.3d at 698.

200. No. 20-cv-00893, 2020 U.S. Dist. LEXIS 193462, at *11 (N.D. Cal. Aug. 10, 2021).

201. *Id.*

202. 757 F. App’x at 519.

the product, they could identify the product as plant-based upon seeing the logo.

The court in *Turtle Island Foods SPC v. Soman* made particular note of the “V” logo on the label, suggesting that the presence of the certification is a common indicator of the plant-based nature of the product.²⁰³ Thus, to accommodate the changing linguistic norms, like in the dairy industry, this Note proposes FDA guidance which would allow for vegan terms on packaging without plant-based modifiers, so long as the package also clearly displays the certified vegan logo.

CONCLUSION

In response to an ever-growing market for plant-based meat and dairy alternatives, states have jumped to create legislation to fill the gaps of outdated federal guidance. These food labeling restrictions must be analyzed under the First Amendment and the *Central Hudson* test because food labels constitute commercial speech. While some of the state proposals pass constitutional muster, others present an unconstitutional burden on commercial speech. This Note traced the history of constitutional analysis for both meat and dairy labeling restrictions to distill the consensus amongst the federal courts as to what restrictions are permissible. Finally, this Note proposed an FDA amendment and final notice to create a separate standard of identity for plant-based meat as well as guidelines on plant-based meat labeling. This separate regulation would allow plant-based food producers to use traditional meat language with the appropriate modifiers, as well as stand-alone “vegan terminology.” As the plant-based meat market continues to evolve, the FDA must address this novel labeling issue to prevent the destruction of competition and First Amendment protections at the hands of state legislatures seeking to safeguard the traditional meat industry.

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203. 424 F. Supp. 3d 552, 574 (E.D. Ark. 2019) (“[E]ach of these labels also feature the letter ‘V’ in a circle on the front of the packaging, a common indicator that a food product is vegan or vegetarian.”).

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