

OKLAHOMA CITY UNIVERSITY LAW REVIEW

VOLUME 47

WINTER 2022

NUMBER 1

NOTE

THE OKLAHOMA MEAT CONSUMER PROTECTION ACT: THE ACT AND THE CHALLENGES IT FACES

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I. INTRODUCTION

People seem to have strong opinions about their preferred protein source. Oklahomans are no exception. In May 2021, People for the Ethical Treatment of Animals (PETA) put up a billboard in Oklahoma City that proclaimed: “Oklahoma, Home of Meathead Gov. Kevin Stitt!”¹ This came after Governor Stitt took actions to promote the state’s agriculture industry, such as naming a week in March “Meat All Week.”² The

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1. Carmen Forman, *Oklahoma Gov. Kevin Stitt Grills Burgers, Steaks Under PETA Billboard*, THE OKLAHOMAN (May 12, 2021, 6:07 PM), <https://www.oklahoman.com/story/news/2021/05/12/oklahoma-gov-kevin-stitt-grills-burgers-steaks-under-peta-billboard/5059458001/>.

2. *Id.*

governor responded by tweeting pictures of the billboard and saying, “[I]ooks like a great spot to grill some burgers...”³ Governor Stitt wasted no time in setting up a cookout in front of the PETA billboard.⁴ The war really seemed to be heating up as Stitt grilled hamburgers, hotdogs, and steaks to serve to his cookout guests.⁵ Still, Stitt reassured reporters that the cookout was “all in good fun.”⁶

Other meat-related issues have recently been analyzed by Oklahoma’s state government. On November 1, 2020, the Oklahoma Meat Consumer Protection Act went into effect.⁷ The law creates heightened labeling requirements for food products that are derived from non-animal protein sources.⁸ This Note will analyze the new law. Part I will explain the purpose of the Oklahoma Meat Consumer Protection Act, and how different groups have reacted to the law. Part II will analogize the law to similar statutes that other states have passed, as well as proposed federal legislation. Looking to the obstacles those laws have faced will help predict the likelihood of the Oklahoma Act’s success.

Part III will address the outcome of a preliminary injunction request made against the Oklahoma Meat Consumer Protection Act. Part IV will provide an analysis of the Oklahoma Act considering the earlier discussion of the text, purpose, and similar legislation. It will also present the background of a current legal challenge to the Act: a lawsuit arguing that the Act violates the Due Process Clause, the Dormant Commerce Clause, and the Supremacy Clause of the United States Constitution.⁹

II. BACKGROUND: THE OKLAHOMA MEAT CONSUMER PROTECTION ACT

House Bill 3806 was authored by Senator Micheal Bergstrom and Representative Toni Hasenbeck.¹⁰ The bill was passed by both houses and

3. Kevin Stitt (@GovStitt), TWITTER (May 12, 2021, 8:56 AM), <https://twitter.com/govstitt/status/1392478746318446596?lang=en>.

4. See Forman, *supra* note 1.

5. *Id.*

6. *Id.*

7. OKLA. STAT. tit. 2, § 5-107 (2020).

8. See *id.*

9. Press Release, Animal Legal Defense Fund, Tofurky and Plant Based Foods Association Team Up to Challenge Unconstitutional Oklahoma Censorship Label Law (Nov. 10, 2021).

10. Press Release, Okla. Senate, Oklahoma Meat Consumer Protection Act Heads to Governor’s Desk (May 13, 2021).

signed by Governor Stitt on May 19, 2020.¹¹ The definitions pertaining to the Oklahoma Meat Consumer Protection Act are given in Title 2 of the Oklahoma statutes in Section 1-3¹² while the act itself is codified at Section 5-107.¹³ It defines “livestock” or “animals” as “any cattle, bison, horses, sheep, goats, asses, mules, swine, domesticated rabbits, and chickens, turkeys, and other domesticated fowl, and any animal or bird in captivity.”¹⁴ “Meat” is defined as “any edible portion of livestock or part thereof.”¹⁵ Definitions are also given for “beef,”¹⁶ “beef product,”¹⁷ “pork,”¹⁸ and “pork product.”¹⁹

The Act goes on to prohibit misrepresenting a product as meat if it is not derived from harvested livestock.²⁰ “Misrepresent” is defined as “the use of any untrue, misleading or deceptive oral or written statement, advertisement, label, display, picture, illustration or sample.”²¹ However, plant-based protein sources can be saved from the prohibition if the packaging says that it is derived from plant-based sources, “in type that is uniform in size and prominence to the name of the product.”²² The penalties for violating the Act include an administrative penalty of at least \$100 and not more than \$10,000 for each violation.²³ Further, any person that violates the Act is guilty of a misdemeanor, which is punishable by imprisonment for up to one year or by a fine not to exceed \$500.²⁴

Senator Bergstrom explained his view as coauthor, “[c]lever marketing practices and deceptive labeling on plant-based meat alternatives can be confusing for shoppers looking to purchase meat-based items at the grocery store.”²⁵ Representative Hasenbeck likewise stated,

11. Cancey Hanson, *Cattlemen Applaud Governor Stitt’s Signature on the Oklahoma Meat Consumer Protection Act*, (May 19, 2020) https://www.okcattlemen.org/assets/docs/PressReleases/2020/05_19_Governor%20signs%20HB3806.pdf.

12. OKLA. STAT. tit. 2, § 1-3 (2020).

13. *Id.* § 5-107.

14. *Id.* § 1-3(9).

15. *Id.* § 5-107(B)(2).

16. *Id.* § 1-3(2).

17. *Id.* § 1-3(3).

18. *Id.* § 1-3(13).

19. *Id.* § 1-3(14).

20. *Id.* § 5-107(C)(1).

21. *Id.* § 5-107(B)(3).

22. *Id.* § 5-107(C)(1).

23. *Id.* § 2-18(A).

24. OKLA. STAT. tit. 2, § 2-18(C) (2020); OKLA. STAT. tit. 21, § 10 (2018).

25. Press Release, Okla. Senate, *supra* note 10.

“[f]ood items need to be properly labeled so consumers can avoid any confusion regarding what type of product they are consuming.”²⁶ Thus, the purpose behind the Act is to protect consumers from confusion and deception if they wish to purchase meat products derived from animal sources. The statute is likely a response to the growth in availability and popularity of non-meat protein sources.

A. Types of Products at Issue

Much of the discussion surrounding the Oklahoma law has been focused on plant-based protein sources. Still, the Oklahoma law as written seems to apply to other alternative proteins as well, such as protein sources that are cell-cultured and insect-based protein.²⁷ The markets for cell-cultured and insect-based protein sources are more limited than for plant-based protein sources.²⁸ This is largely due to consumer preferences and the costs involved.²⁹ Since insect-based and cell-cultured options are not as popular as the plant-based proteins, there is less certainty regarding how they will be regulated and if they will be treated differently than plant-based proteins for other purposes.

Insect-based protein has not been well-received by Americans.³⁰ One study analyzed consumers’ preferences for insect-based protein by asking how the products are perceived in terms of health and how disgusting they are.³¹ The result was that most consumers thought insect protein was slightly healthier than typical beef, but that it was also more disgusting.³² Without society’s views on insect protein changing, it is unlikely that many insect-based products will be around to confuse consumers. Yet, the example demonstrates that there are some forms of protein that American consumers are not comfortable with consuming, and that is the exact situation that the Oklahoma Meat Consumer Protection Act is designed to address.

26. *Id.*

27. Isaac S. Conzatti, *Litigation Review*, 2020 *Litigation Review*, 27 *Animal L.* 115, 124.

28. See P. Marijn Poortvliet et al., *Healthy, but Disgusting: An Investigation Into Consumers’ Willingness to Try Insect Meat*, 112 *J. OF ECON. ENTOMOLOGY* 1005 (2019).

29. *See id.*

30. *Id.* at 1005.

31. *See id.*

32. *Id.* at 1008-09.

Similarly, cell-based meat has received skepticism from consumers.³³ As with eating insects, Americans have been slow to accept food made in a lab, and they have given the new food innovations the nickname “Frankenfoods.”³⁴ Scientists are still working to make cell-based meat that is high quality and cost-effective.³⁵ Another similar product, using “acellular agriculture,” will likely hit grocery shelves sooner.³⁶ Acellular agriculture uses “cells or microbes, such as yeast or bacteria, to reproduce fats and proteins.”³⁷ This technique has been used to create insulin in a way that no longer requires the slaughter of pigs.³⁸ Still, neither of these technology-driven sources has gained much traction with American consumers.³⁹

Compared to insect or cell-based proteins, plant-based protein sources are becoming more popular.⁴⁰ They have more recognizable sources, including pea, soy, or wheat protein.⁴¹ From 2018 to 2020, plant-based food sales grew almost two-and-a-half times faster than total food sales.⁴² Further, the total market for plant-based foods was \$7 billion in 2019.⁴³ Many argue that plant-based protein sources are more humane, healthier for consumers, and that they will help in fighting climate change. Still, only a portion of this growth is contributed by plant-based meat.⁴⁴ Thirty-five percent of the total plant-based food market is plant-based milk.⁴⁵

B. Which Consumers Would be Affected?

Labeling requirements, like those mandated by the Oklahoma Meat Consumer Protection Act, would likely be noticed by consumers seeking

33. See Nicole E. Negowetti, *A Planetary Health Approach to the Labeling of Plant-Based Meat*, 75 *FOOD & DRUG L.J.* 142 (2020).

34. *Id.*

35. *Id.* at 146, 148.

36. *Id.* at 148.

37. *Id.*

38. *Id.*

39. *Id.*

40. *2020 U.S. Retail Market Data for the Plant-Based Industry*, GOOD FOOD INST., <https://gfi.org/marketresearch/>.

41. Andrew Krososky, *What is Plant-Based Meat Made From?*, GREENMATTERS (June 3, 2021, 5:02 PM), <https://www.greenmatters.com/p/plant-based-meat-ingredients>.

42. *2020 U.S. Retail Market Data for the Plant-Based Industry*, *supra* note 40.

43. *Id.*

44. *Id.* (about 1.4 billion dollars).

45. *Id.*

out alternative-protein foods and those who do not wish to purchase them. Plant-based food companies have a few different groups of consumers that they are likely trying to attract to their products. For example, they want to maintain their customer base, which likely includes many vegetarians and vegans. At the same time, they want to appeal to those who feel that eating plant-based is better for the environment and those who view plant-based foods as being healthier than animal protein.

Surprisingly, there is another group that plant-based food companies are trying to reach: the especially carnivorous. Plant-based food companies have an incentive to market their products as plant-based for their vegan and vegetarian consumers. These companies often argue that there is no risk of confusion for consumers since they include words like “vegan” on their labels to appeal to their non-meat-eating customers. Yet, in order to grow their consumer base, they need to appeal to people that are not currently consuming plant-based protein. The Executive Director of the Plant Based Foods Association, Michele Simon, explained this need: “it will be difficult to trade hamburgers for salad, and this next generation of companies is trying to reach the hard-core meat eaters.”⁴⁶

One of the simplest ways for these companies to appeal to hard-core meat eaters is by demonstrating ways in which plant-based meat is similar to the meat that the consumers are familiar with. Impossible Meat showcased this strategy with their “We Are Meat” campaign.⁴⁷ Their commercial begins with burgers sizzling on a grill.⁴⁸ “We love meat,” a voice proclaims.⁴⁹ After thirty seconds of watching the meat cook and hearing the narrator describe meat, a hand places a “made from plants” label on the Impossible Meat label.⁵⁰

The advertisement could be a surprise for those who consider meat superior to plant-based alternatives. It attempts to convince consumers that plant-based meats are not so different from their animal-sourced counterparts. Rachel Konrad, Impossible’s Chief Communications Officer, stands by the marketing strategy as true and not misleading:

46. Alina Tugend, *Is the New Meat Any Better Than the Old Meat?*, N.Y. TIMES (Sept. 21, 2019), <https://www.nytimes.com/2019/09/21/climate/plant-based-meat.html>.

47. *Id.*; Joe Fassler, *In a New Ad Campaign, Impossible Foods Calls its Plant-Based Burger “Meat.” Can it do That?*, THE COUNTER (Apr. 27, 2021, 6:01 AM), <https://thecounter.org/impossible-foods-ad-campaign-plant-based-meat-labeling/>.

48. Impossible Foods, *We Love Meat*, YOUTUBE (Apr. 6, 2021), <https://www.youtube.com/watch?v=1Fouf3WGbd8>.

49. *Id.*

50. *Id.*

“Anatomically, molecule for molecule, our product—and our product uniquely—has the secret sauce of what makes meat meat.”⁵¹

Even fast-food patrons could see changes at the drive-thru if these types of labeling laws remain in place. Fast-food chains have taken advantage of the plant-based foods trend. Examples of fast-food innovations in the area include options like Burger King’s Impossible Whoppers⁵² and breakfast sandwiches,⁵³ Del Taco’s Beyond Meat tacos and burritos,⁵⁴ and Little Caesars’s plant-based pepperoni.⁵⁵ Many of these plant-based alternatives offered at the fast-food chains come from Beyond Meat and Impossible Foods, two of the leading plant-based meat companies. Perhaps the large growth in plant-based protein products justifies a shift in labeling requirements, like the Oklahoma law. On the other hand, some argue that plant-based protein is not as popular with consumers as the “buzz” surrounding the topic makes it seem.⁵⁶ This past year, Americans bought over \$172 of meat products for every \$1 spent on plant-based proteins.⁵⁷

C. The Agriculture Industry in Oklahoma

Plant-based protein may be growing in popularity, but agriculture has long been a major part of Oklahoma’s economy and lifestyle. In 2020, Oklahoma generated about \$6.2 billion in agricultural cash receipts, with meat animals being the greatest contributors at about \$4.6 billion.⁵⁸ After Texas, Oklahoma also has the second most beef cattle of any state in the

51. Fassler, *supra* note 48.

52. *Impossible Whopper*, BURGER KING, <https://www.bk.com/menu/picker-95eb0a67-9e69-4849-9bc6-6715b3790e9a> (last visited Feb. 2, 2022).

53. *Breakfast Sandwiches*, BURGER KING, <https://www.bk.com/menu/picker-c6fd7b4e-a96e-43ba-bc06-9b539bd03ad3> (last visited Feb. 2, 2022).

54. *Beyond Meat FAQ*, DEL TACO, <https://www.deltaco.com/beyond> (last visited Feb. 2, 2022).

55. Susan Selasky, *Little Caesars Debuts Newest Pizza with Plant-Based Pepperoni*, DET. FREE PRESS (July 12, 2021, 6:00 AM), <https://www.freep.com/story/entertainment/dining/2021/07/12/little-caesars-plant-based-pepperoni-pizza-taste-test-planteroni/7930443002/>.

56. Press Release, Okla. Farm Rep., OCA and OPC Respond to Refiled Plant Based Foods Assn. Labeling Complaint (Dec. 1, 2021, 3:16 PM).

57. *Id.*

58. ECON. RSCH. SERV., U.S. DEP’T OF AGRIC., ANNUAL CASH RECEIPTS BY COMMODITY, https://data.ers.usda.gov/reports.aspx?ID=17832#P22dfa84b6efe4ec286475a4144415d82_2_17iT0R0x36.

United States.⁵⁹ In 2020, agricultural production and processing contributed 3.3 percent of Oklahoma's total Gross Domestic Product (GDP).⁶⁰ Further signifying the strength of the Oklahoma agriculture industry, a major push for the Act came from agricultural groups like the Oklahoma Cattlemen's Association and the Oklahoma Pork Council.⁶¹ Although the Act has since caused some controversy, it was well-received by Oklahoma legislators, unanimously passing in both houses.⁶²

D. The Health Concern

There are other groups beyond plant-based businesses and agriculturists that have strong views on how plant-based meats affect consumers. For example, some argue that consumers may think plant-based foods are healthier than they really are, based on their perception of plant-based foods.⁶³ The reality is more complicated. Recently developed plant-based products often aim to mirror harvested livestock meat in taste and appearance. The process of adding to and changing the plant sources in order to mimic meat often leads to a highly processed end product. Fast-food plant-based options show that these meat substitutes are not necessarily healthier.⁶⁴

For example, Burger King's Impossible Whoppers have 630 calories while the traditional Whoppers have 660 calories, making the two pretty comparable in terms of calories.⁶⁵ The Impossible Whoppers also have slightly less total fat—34 grams, compared to the traditional Whopper's

59. Todd Pendleton, *Grading Oklahoma: This State has the Second-Most Beef Cows in the Nation*, THE OKLAHOMAN (Sept. 20, 2021, 4:38 AM), <https://www.oklahoman.com/story/news/2021/09/20/grading-oklahoma-state-behind-texas-number-beef-cows/8332226002/>.

60. *Economic Impact of Agriculture*, U. OF ARK. DIV. OF AGRIC., <https://economic-impact-of-ag.uada.edu/oklahoma/>.

61. *OCA and OPC Respond to Refiled Plant Based Foods Assn. Labeling Complaint*, *supra* note 57.

62. AGRIC. & RURAL DEV. COMM., CREATING THE OKLAHOMA MEAT CONSUMER PROTECTION ACT, H.B. 3806, 57th Leg., 2nd Reg. Sess. (Okla. 2020).

63. Abrar Al-Heeti, *Whole Foods CEO Says Plant-based 'Meat' is Unhealthy*, CNET (Aug. 28, 2019, 4:24 PM), <https://www.cnet.com/health/nutrition/whole-foods-ceo-says-plant-based-meat-is-unhealthy/>.

64. *See USA Nutritionals: Core, Regional and Limited Time Offerings*, BURGER KING, <https://company.bk.com/pdfs/nutrition.pdf> (last visited Feb. 22, 2022).

65. *Id.*

40—and double the fiber.⁶⁶ On the other hand, the traditional Whoppers have the advantage in sodium, with 980 milligrams compared to the 1,080 milligrams in the Impossible version, and contain 3 more grams of protein and slightly less sugar than their plant-based counterparts.⁶⁷

While there are some tradeoffs, Burger King’s menu demonstrates that purchasing plant-based meat does not guarantee a healthier product.⁶⁸ This is especially true for highly processed fast-food products. However, some argue that consumers associate plant-based products with general health, which could lead them to make ill-informed decisions, thus further complicating the issue. This is an area where more strenuous labeling requirements may be helpful. Plant-based protein is a rapidly growing industry. This makes it more challenging for consumers to keep up with the latest products, and to know exactly what they are consuming, especially when these products are competing together in fast-paced drive-thrus. Labels that clearly state what the foods contain could help manage some of the confusion.

III. LAWS IN OTHER JURISDICTIONS

Oklahoma was not the first state to pass a labeling law targeted at non-animal protein sources. Some other states include Alabama, Kentucky, Montana, North Dakota, South Dakota, South Carolina, and Wyoming.⁶⁹ Additionally, a few other states that have passed these types of labeling laws have faced constitutional challenges, including Missouri, Arkansas, Mississippi, and Louisiana.⁷⁰ These laws all impose different requirements, leading to differing outcomes across jurisdictions based on the language of the statutes and the factual basis in each case.

This section will describe each of the challenged laws and explain how the courts have ruled. None of the cases have statutory language or fact patterns identical to the cases involving the Oklahoma Meat Consumer Protection Act, but these cases can help understand the issues relevant to the labeling laws. After going through the lawsuits from a few other states, there will be a discussion of some activity in the federal legislative and

66. *Id.*

67. *Id.*

68. *Id.*

69. Shareefah Taylor, Note, *Meat Wars: The Unsettled Intersection of Federal and State Food Labeling Regulations for Plant-Based Meat Alternatives*, 15 U. MASS. L. REV. 269, 276 (2020).

70. *Id.* at 269.

administrative realms.

As different courts have addressed the labeling laws of various states, they have relied on many of the same tests. In some of the cases, the courts had to make a preliminary decision on standing. Article III of the Constitution grants the judiciary power to decide the resolution of cases and controversies.⁷¹ Therefore, the courts ensure that standing requirements are met to “confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.”⁷² Additionally, the *Dataphase Systems v. C L Systems* test was used by several courts in these cases to determine whether a preliminary injunction is appropriate.⁷³ One prong of the test under *Dataphase* is to determine the likelihood of success on the merits of the claim.⁷⁴

In determining the likelihood of success, courts have considered what rule to apply for an alleged restriction on commercial speech. Commercial speech is “expression related solely to the economic interests of the speaker and its audience.”⁷⁵ Courts have treated the labels affected by these types of laws as commercial speech. Some have opted for the *Central Hudson* test,⁷⁶ while the Oklahoma law has been analyzed under the *Zauderer* rule.⁷⁷ Each test used by the courts will be analyzed separately under each applicable state law since the consideration of the tests varied slightly in the different courts.

A. Missouri

On August 27, 2018, Turtle Island Foods, doing business as Tofurky, and the Good Food Institute filed a lawsuit against the state of Missouri in the United States District Court for the Western District of Missouri Central Division.⁷⁸ Tofurky is a producer of plant-based protein products,

71. U.S. CONST. art. III, § 2.

72. *Flast v. Cohen*, 392 U.S. 83, 97 (1968).

73. *See Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc).

74. *Id.*

75. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561 (1980).

76. *Id.* at 566.

77. *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 638 (1985).

78. Plaintiffs’ First Amended Complaint for Declaratory and Injunctive Relief at 1, *Turtle Island Foods v. Richardson*, 425 F. Supp. 3d 1131 (W.D. Mo. 2019) (No. 18-cv-

and the Good Food Institute is a non-profit advocacy organization.⁷⁹ The complaint challenged Mo. Rev. Stat. § 265.494(7).⁸⁰ That Missouri Act prohibits “[m]isrepresenting a product as meat that is not derived from harvested production livestock or poultry.”⁸¹ Tofurkey challenged the law, arguing that it violated the First Amendment, the Dormant Commerce Clause, and the Due Process Clause.⁸² It sought a preliminary and permanent injunction preventing enforcement of the Act, a declaration that the Act was unconstitutional on its face and as applied to the plaintiffs, and an award of costs and attorneys’ fees.⁸³

The court applied the *Dataphase* factors to determine if the preliminary injunction should be granted.⁸⁴ The factors are: “(1) the probability of the movant’s success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) whether the issuance of the preliminary injunction is in the public interest.”⁸⁵ The court found that the challengers were unlikely to succeed on the merits because commercial speech receives less protection than other forms of protected expression. For commercial speech to be protected, “it at least must concern lawful activity and not be misleading.”⁸⁶

The challengers argued that they wanted to engage in truthful, non-misleading speech through labeling their food. Since the statute only prohibited misleading speech, the court found that they were unlikely to succeed on their First Amendment claim as applied to them.⁸⁷ Similarly, the court found that they were unlikely to succeed on the facial challenge.⁸⁸ “A facial challenge ‘must establish that no set of circumstances exists under which the Act would be valid.’”⁸⁹ Missouri argued that the statute would be valid if the label of a plant-based or cell-based product

4173).

79. *Id.* at 2.

80. *Id.* at 1.

81. MO. REV. STAT. 265.494(7) (2022).

82. Complaint for Declaratory and Injunctive Relief, *supra* note 79, at 2.

83. *Id.* at 21-22.

84. *Turtle Island Foods v. Richardson*, 425 F. Supp. 3d 1131, 1136 (W.D. Mo. 2019).

85. *Id.* (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)).

86. *Id.* at 1140.

87. *Id.*

88. *Id.*

89. *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

misrepresented it as meat without any disclaimer. The court agreed that in that circumstance, the label would be valid, so a facial challenge would be unlikely to succeed.⁹⁰ The court did not address the probability of success for the Dormant Commerce Clause or Due Process challenges because the challengers did not assert the claims as a basis for requesting the preliminary injunction.⁹¹

The court then turned to the irreparable harm factor, finding that the plaintiffs did not face irreparable harm without the injunction. The Missouri Department of Agriculture (MDA) issued guidelines days before the Missouri statute went into effect.⁹² The MDA was tasked with reporting violations to prosecuting attorneys.⁹³ The MDA provided guidance to food companies by providing a list of statements that they can put on their labels to avoid being reported.⁹⁴ Some of these included a prominent statement of “plant-based,” “lab-created,” or “made from plants.”⁹⁵ Since the plaintiff company used these labels to truthfully identify their products as plant-based, they did not face irreparable harm.⁹⁶ The labels would not be prohibited, and the court found that there was no realistic risk of enforcement based on a contrary reading of the statute.⁹⁷

In balancing the equities between the parties and considering the public interest, the court found that the last two factors favored Missouri. The plaintiffs argued that Tofurky would have to spend more money, on top of the time and resources spent on previous marketing strategies, to bring their products into compliance.⁹⁸ The Good Food Institute said that it would have to use resources in response to the Act that otherwise could go toward advocacy efforts.⁹⁹ Still, the court agreed with Missouri. “Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.”¹⁰⁰ Therefore, the court found that the balance of equities and the public interest supported upholding the state’s sovereignty to enact and enforce

90. *Id.*

91. *Id.*

92. *Id.* at 1140-41.

93. *Id.*

94. *Id.*

95. *Id.* at 1141.

96. *Id.*

97. *Id.* at 1140-41.

98. *Id.* at 1141.

99. *Id.*

100. *Id.* at 1141 (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)).

laws.

On October 2, 2019, the plaintiffs filed an appeal with the United States Court of Appeals for the Eighth Circuit.¹⁰¹ The circuit court affirmed the district court's denial of a preliminary injunction.¹⁰² The first issue that the court had to address was standing. To have standing, plaintiffs must show that there is an "injury in fact to the plaintiff that is fairly traceable to the challenged action of the defendant, and likely to be redressed by a favorable decision."¹⁰³ The defendants argued that the plaintiffs lacked standing because they could not show that they suffered an injury in fact. Still, the Eighth Circuit found that the plaintiff stated an injury in fact because it "allege[d] 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exist[ed] a credible threat of prosecution thereunder.'"¹⁰⁴

The court then moved to the primary issue on appeal: the denial of the preliminary injunction. The Eighth Circuit agreed with the district court that *Central Hudson* governed the commercial speech at issue.¹⁰⁵ It further affirmed that the products at issue would not likely be seen as a misrepresentation under the statute, so the plaintiffs were unlikely to prevail on the merits.¹⁰⁶ The Eighth Circuit affirmed the district court's denial of a preliminary injunction, but cautioned that the issue was limited on appeal and that nothing it said should be taken as an indication of how the case should be decided on the merits.¹⁰⁷

B. Arkansas

On July 22, 2019, Tofurky and the Good Food Institute again filed a lawsuit seeking declaratory and injunctive relief, this time challenging an Arkansas statute.¹⁰⁸ The Act prohibits misrepresenting a product as meat

101. Notice of Appeal at 1, *Turtle Island Foods v. Thompson*, 425 F. Supp. 3d 1131 (W.D. Mo. 2019) (No. 18-cv-4173-FJG).

102. *Turtle Island Foods v. Thompson*, 992 F.3d 694, 696-97 (8th Cir. 2021).

103. *Id.* at 699 (quoting *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 591 (8th Cir. 2009)).

104. *Id.* at 699 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

105. *Id.* at 701.

106. *Id.*

107. *Id.* at 702.

108. Complaint for Declaratory and Injunctive Relief at 1, *Turtle Island Foods v. Soman*, 424 F. Supp. 3d 552 (E.D. Ark. Cent. Div. 2019), (4:19-cv-514-KGB).

when “the agricultural product is not derived from harvested livestock, poultry, or cervids.”¹⁰⁹ It makes clear that “[m]eat does not include a: (i) Synthetic product derived from a plant, insect, or other source; or (ii) Product grown in a laboratory from animal cells.”¹¹⁰ The plaintiffs requested a preliminary injunction, arguing that the Act is a restriction on commercial speech that violates the First Amendment, the Due Process Clause, and the Dormant Commerce Clause.¹¹¹ The Arkansas court also applied the *Dataphase* factors, but it reached the opposite result of the Missouri court.¹¹² The court found that the challengers were likely to succeed on the First Amendment claim as applied, so it did not reach the merits of the Due Process claim.

In considering the first *Dataphase* factor, the probability of success on the merits, the court applied the intermediate scrutiny framework given by the Supreme Court in *Central Hudson* for commercial speech.¹¹³ Under that test, courts analyze the constitutionality of laws restricting commercial speech by asking: “(1) whether the commercial speech at issue concerns unlawful activity or is misleading; (2) whether the governmental interest is substantial; (3) whether the challenged regulation directly advances the government’s asserted interest; and (4) whether the regulation is no more extensive than necessary to further the government’s interest.”¹¹⁴

On the first factor, the court determined that the regulated speech was not misleading. The state had argued that the commercial speech was inherently misleading since the packaging used terms like “chorizo,” “hot dogs,” “sausage,” and “ham roast” when the products did not contain those meat sources.¹¹⁵ The court analyzed seven different labels that were given in the record and found that they were not inherently misleading. It said that the state was correct that the words are often used in relation to traditional sources of animal protein, but that “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.”¹¹⁶ The court also

109. ARK. CODE ANN. § 2-1-305(6) (2019).

110. *Id.* § 2-1-302(7)(B)(i-ii).

111. Complaint for Declaratory and Injunctive Relief, *supra* note 109, at 1-2.

112. *Turtle Island Foods v. Soman*, 424 F. Supp. 3d 552, 570 (E.D. Ark. Cent. Div. 2019).

113. *Id.* at 571.

114. *Id.*

115. *Id.* at 573.

116. *Id.* at 574.

emphasized that the packaging included qualifiers that identify the products as plant-based, further reducing any confusion.¹¹⁷ Looking at the label as a whole, the court found that the ordinary consumer would not be misled by the commercial speech.¹¹⁸

As to the second factor, the court assumed, without deciding, that the state had a substantial interest in “protect[ing] consumers from being misled or confused by false or misleading labeling of agricultural products that are edible by humans.”¹¹⁹ Still, on the third factor, the court found that the challenger would likely prevail on the claim that the Act does not directly advance the state’s purpose.¹²⁰ The court also found that the challenger was likely to prevail on the fourth factor by arguing that the Act is “more extensive than necessary to serve the State’s interest.”¹²¹ It reasoned that the challengers would likely be able to show that their labels would be invalid under the statute, even though the plaintiffs’ labels were not misleading.¹²² Since the purpose of the statute was to prevent misleading labeling, the Act was likely more extensive than necessary since it would invalidate non-misleading labels as well, rather than just misleading labels.

After balancing the factors, the plaintiffs asked the court to consider whether “it appears that the stated interests are not the actual interests served by the restriction.”¹²³ Tofurky argued that the Act’s “true purpose is not to protect consumers, but to stoke confusion in order to benefit the economic interests of the meat industry.”¹²⁴ Yet, the court ultimately found it unnecessary to reach the issue of whether the stated purpose was the actual purpose of the Act since it was confident that the *Central Hudson* framework was met without reaching the secondary issue of if the stated legislative purpose was genuine.¹²⁵

Having decided that the plaintiff was likely to succeed on the merits, the court moved on to the second *Dataphase* factor, the threat of irreparable harm. The court found that the factor supported Tofurky because the Supreme Court has made clear that losing First Amendment

117. *Id.*

118. *Id.* at 574-75.

119. *Id.* at 575.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 576.

124. *Id.*

125. *Id.*

rights, even if only for a limited time, is an irreparable injury.¹²⁶ Further, the court noted that Tofurky was likely in violation of the statute, and each violation can “result in a fine of up to \$1,000.”¹²⁷ If the Act is enforced, “Tofurky likely faces ruinous civil liability, enormous operational costs, or a cessation of in-state operations.”¹²⁸ Therefore, if the Act is upheld, Tofurky could be liable for violations since the Act went into effect on July 23, 2019, if no injunctions were granted.

In balancing the equities, the court held that the factor favored Tofurky.¹²⁹ The court agreed with the challengers that if the law is upheld, Tofurky would have to decide if they wanted to risk being penalized for violating the Act, bear added costs in adapting their labeling and marketing, or leave the Arkansas market altogether.¹³⁰ The court said that “[e]ach of these options represent[s] a potential burden, and corresponding chilling effect, on Tofurky’s commercial speech rights.”¹³¹ In considering the final factor, the public interest, the court decided that it supported granting a preliminary injunction until the issues dealing with the Act’s constitutionality could be resolved.¹³² The court granted the preliminary injunction, preventing Arkansas from enforcing their Act until the constitutional challenge is resolved.¹³³

C. Mississippi

On July 1, 2019, Upton’s Naturals Co. and the Plant Based Foods Association filed a complaint for declaratory and injunctive relief arguing that Miss. Code § 75-35-15(4) was a violation of their freedom of speech.¹³⁴ The Mississippi Act prevents “[a] food product that contains cultured animal tissue produced from animal cell cultures outside of the organism from which it is derived” from being “labeled as meat or a meat food product.”¹³⁵ It also prevents plant-based and insect-based food

126. *Id.* at 577 (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)).

127. *Id.*

128. *Id.*

129. *Id.* at 578.

130. *Id.*

131. *Id.*

132. *Id.* at 579.

133. *Id.*

134. Complaint for Declaratory and Injunctive Relief at 1, *Upton’s Naturals Co. v. Bryant*, (S.D. Miss. 2019) (3:19-cv-462-HTW-LRA).

135. MISS. CODE ANN. § 75-35-15(4) (2019).

products from being labeled as meat or meat products.¹³⁶

On November 7, 2019, the plaintiffs filed a stipulation of dismissal withdrawing the claims.¹³⁷ In a press release, the Mississippi Agriculture and Commerce Commissioner, Andy Gipson addressed the settlement, saying that the “veggie burger gang” filed a lawsuit without reviewing the proposed rules and offering comments.¹³⁸ “I said their lawsuit was ‘hogwash.’ Now, they have withdrawn their lawsuit because they did what I said they should have done, work with us on the proposed rules.”¹³⁹ The state law remains in effect, with a new qualification. The challengers and the state agreed to add an exception that products “will not be considered to be labeled as a “meat” or “meat food product” if one or more of the following terms, or a comparable qualifier, is prominently displayed on the front of the package: “meat free,” “meatless,” “plant-based,” “veggie-based,” “made from plants,” “vegetarian,” or “vegan.”¹⁴⁰

D. Louisiana

On October 7, 2020, Turtle Island Foods SPC, doing business as Tofurky Company, filed suit challenging the constitutionality of Louisiana’s 2019 Act No. 273.¹⁴¹ The Louisiana Act prevents representing products as meat or a meat product if it is not derived from a harvested domesticated bird, “beef, pork, poultry, alligator, farm-raised deer, turtle, domesticated rabbit, crawfish, or shrimp carcass.”¹⁴² The definition of meat is also given to specifically exclude products from plants, insects, and cell-cultured sources.¹⁴³ The statute designated the Department of Agriculture and Forestry Commissioner (LDAF) to administer and enforce

136. *Id.*

137. Stipulation of Dismissal at 1, *Upton’s Naturals Co. v. Bryant*, (S.D. Miss. 2019) (3:19-cv-462-HTW-LRA).

138. Kaitlin Howell, *Plaintiffs Withdraw Lawsuit Against State’s Meat Labeling Law*, WJTV (Nov. 7, 2019, 4:06 PM), <https://www.wjtv.com/news/plaintiffs-withdraw-lawsuit-against-states-meat-labeling-law/> (Plaintiffs who filed a lawsuit regarding Mississippi’s meat labeling law withdrew their lawsuit in federal court).

139. *Id.*

140. Truth in Labeling Lawsuits – Update, THE NAT’L AGRIC. L. CENT., (Dec. 10, 2021), <https://nationalaglawcenter.org/truth-in-labeling-lawsuits-update/>.

141. Complaint for Declaratory and Injunctive Relief at 1, *Turtle Island Foods v. Strain*, No. 3:20-cv-00674-BAJ-EWD, 2022 WL 909039 (M.D. La. 2022).

142. LA. STAT. ANN. § 3:4744(B)(4)-(8) (2020).

143. *Id.* §3:4743(10)(a)-(b) (2020).

the Act.¹⁴⁴ The challenger sought injunctive and declaratory relief, arguing that the Act violated the First Amendment and the Due Process Clause.¹⁴⁵ The Louisiana Department of Agriculture agreed to delay enforcing the Act until the constitutional challenge was resolved.¹⁴⁶

When the United States District Court for the Middle District of Louisiana issued its opinion on March 28, 2022, no enforcement action had been brought against the plaintiffs by the LDAF or any other government body.¹⁴⁷ The defendant reviewed the plaintiff's labels and determined that they did not violate the Act. Still, the plaintiff argued that the statute acted as a threat of enforcement.¹⁴⁸ The court began by determining whether the plaintiffs had legal standing when the defendants already stated that the plaintiff's labels were not proscribed by the Act.¹⁴⁹ For a plaintiff to have legal standing, she must demonstrate "(1) an 'injury in fact' that is 'concrete and particularized' and 'actual or imminent'; (2) is fairly traceable to the defendant's actions; and (3) is likely to be redressed by a favorable decision."¹⁵⁰

In pre-enforcement cases, chilled speech is a sufficient injury in fact to confer standing.¹⁵¹ With pre-enforcement cases, the plaintiff does not need to have been arrested, prosecuted, or have other enforcement actions brought against them.¹⁵² A plaintiff can show injury in fact by showing he: "(1) has an 'intention to engage in a course of conduct arguably affected with a constitutional interest'; (2) its intended future conduct is arguably proscribed by the policy at issue; and (3) the threat of future enforcement of the challenged policy is substantial."¹⁵³ The court agreed with the plaintiff that the first two elements were likely met.¹⁵⁴

As to the third element, the court ultimately found that the threat of

144. *Turtle Island Foods v. Strain*, (M.D. La. Mar. 28, 2022) (No. 20-00674-BAJ-EWD), 2022 WL 909039 at *2.

145. Complaint for Declaratory and Injunctive Relief, *supra* note 141, at 2.

146. *Truth in Labeling Lawsuits – Update*, THE NAT'L AGRIC. L. CENT., (Dec. 10, 2021), <https://nationalaglawcenter.org/truth-in-labeling-lawsuits-update/>.

147. *Strain*, 2022 WL 909039, at *2.

148. *Id.*

149. *Id.*

150. *Id.* at *3 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

151. *Id.* at *5 (citing *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965)).

152. *Id.* at *3 (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)).

153. *Id.* at *3 (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

154. *Id.*

future enforcement was substantial.¹⁵⁵ It reasoned that the Tofurky's speech was chilled since it changed its labels to comply with the Act.¹⁵⁶ The court noted that while the current commissioner said he would not seek enforcement against the plaintiff based on the labels that it brought to the court's attention, the plaintiff did not have similar reassurance for how future commissioners may view the Act.¹⁵⁷ Additionally, the labels that the commissioner deemed compliant were only a limited selection of the company's labels used to illustrate the issue.¹⁵⁸ Therefore, the court determined that the plaintiff did have standing to bring the claim.

The court next turned to the alleged First Amendment violation. Like other courts, the labels were treated as commercial speech, and it applied the test from *Central Hudson*.¹⁵⁹ Beginning with the first prong of the test, the court found that the commercial speech was not misleading, as the defendant had already stated that the labels did not violate the Act.¹⁶⁰ Next, the court determined that there was likely also a substantial government interest in protecting consumers from confusion and deception about food products.¹⁶¹ It further found that the plaintiff submitted substantial evidence that consumers were not confused by the labels, and the defendant did not rebut this evidence.¹⁶² Therefore, the court reasoned that the Act's restrictions on commercial speech did not directly advance the government interest of protecting consumers from confusion and deceit.¹⁶³

The court also found that the regulation was more extensive than necessary to further the government's interest.¹⁶⁴ The plaintiff argued that less restrictive means could have been used, like requiring "more prominent disclosures of the vegan nature of plant-based products, creat[ing] a symbol to go on the labeling and packaging of plant-based products indicating their vegan composition, or require[ing] a disclaimer

155. *Id.* at *5-6.

156. *Id.* at *5.

157. *Id.*

158. *Id.* at *6.

159. "Each of these latter three inquiries- whether (1) 'the asserted governmental interest is substantial,' (2) the regulation 'directly advances' that interest, and (3) the regulation 'is not more extensive than is necessary to serve that interest'-must be answered in the affirmative for the regulation to be found constitutional." *Id.* (citing *Central Hudson*, 447 U.S. at 566).

160. *Id.* at *7.

161. *Id.*

162. *Id.* at *7-8.

163. *Id.*

164. *Id.* at *8-9.

that the products do not contain meat.”¹⁶⁵ The defendant failed to state why alternative, less restrictive means would not accomplish the government interest of protecting consumers.¹⁶⁶ Therefore, the court found that the Act was “an impermissible restriction” on commercial speech.¹⁶⁷ The court did not address the second claim that the Act was unconstitutionally vague.¹⁶⁸

E. Federal Legislation

In addition to the state laws, bills have been introduced in the federal legislature to address these types of labeling concerns. In 2019, Representative Roger Marshall from Kansas introduced the Real Marketing Edible Artificials Truthfully Act of 2019 (Real MEAT Act).¹⁶⁹ A companion bill was also introduced in the Senate by Senator Deb Fischer from Nebraska.¹⁷⁰ The Real MEAT Act would have amended the Federal Food, Drug, and Cosmetic Act and created a prohibition on the sale of imitation meat unless the product’s label contained both the word imitation and a statement that the product does not contain meat.¹⁷¹ The Act also aimed to codify the definitions of beef and beef products as they relate to federal labeling laws.¹⁷² It would have required the Secretary of Health and Human Services (HHS) to notify the Secretary of Agriculture within 60 days of finding a product misbranded under the Act.¹⁷³ If HHS failed to initiate enforcement, the Secretary of Agriculture would have been allowed to treat the product as mislabeled.¹⁷⁴

Senator Fischer explained that beef products are regulated by the United States Department of Agriculture (USDA), which imposes strict inspection and labeling requirements. Alternatively, plant-based proteins are overseen by the Food and Drug Administration (FDA).¹⁷⁵ She said that the FDA’s requirements are far more relaxed than those imposed by the

165. *Id.* at *8 (quoting *Turtle Island Foods v. Soman*, 424 F. Supp. 3d 552, 576 (E.D. Ark. 2019)).

166. *Id.* at *9.

167. *Id.*

168. *Id.*

169. Real MEAT Act, H.R. 4881, 116th Cong. (2019).

170. Real MEAT Act, S. 3016, 116th Cong. (2019).

171. Real MEAT Act, H.R.4881, 116th Cong. § 403D(a) (2019).

172. *Id.* § 403D(d)(1).

173. *Id.* § 403D(b)(1).

174. *Id.* § 403D(b)(2).

175. Press Release, U.S. Sen. Deb Fischer for Neb., Senator Fischer Introduces Real MEAT Act to End Deceptive Labeling of Imitation Meat Products, (Dec. 11, 2019).

USDA.¹⁷⁶ This allows plant-based products to be labeled as beef while not being subject to the more strenuous labeling requirements that apply to livestock-derived beef.¹⁷⁷

The Real MEAT Act was sent to committees, and it has not been reintroduced in the current congressional session. Interestingly, other food products have spurred similar action by federal legislators. One example is the Defending Against Imitations and Replacements in Yogurt, Milk, and Cheese to Promote Regular Intake of Dairy Everyday (DAIRY PRIDE Act).¹⁷⁸ It was first introduced in 2017.¹⁷⁹ The Act would have created restrictions on labeling plant-based products with dairy-like words, making it the dairy equivalent to the meat labeling laws at issue.¹⁸⁰ Although it has been reintroduced a couple of times, the Act has not moved past committee.¹⁸¹

F. Federal Agencies

Federal agencies are also getting involved in the debate. In March 2019, the FDA and Food Safety and Inspection Service (FSIS) signed a formal agreement to jointly oversee the production of food products “comprised of or containing cultured cells derived from cell lines of those species covered under the Acts.”¹⁸² The “FSIS is the public health agency in the [USDA] responsible for ensuring that the nation’s commercial supply of meat, poultry, and eggs” meet labeling and packaging requirements.¹⁸³ On September 3, 2021, the FSIS published an advance notice of proposed rulemaking to request comments “pertaining to the labeling of meat and poultry products comprised of or containing cultured cells derived from animals subject to the Federal Meat Inspection Act or the Poultry Products Inspection Act.”¹⁸⁴

176. *Id.*

177. *Id.*

178. DAIRY PRIDE Act of 2017, H.R. 778, 115th Cong. (2017).

179. *Id.*

180. *Id.*

181. DAIRY PRIDE Act of 2021, S. 1346, 117th Cong. (2021).

182. Labeling of Meat or Poultry Products Comprised of or Containing Cultured Animal Cells, 86 Fed. Reg. 49491, 49493 (Nov. 2, 2021).

183. Alfred A. Almanza, *FSIS 101: Mission of the Food Safety and Inspection Service*, (Mar. 17, 2016), <https://www.fsis.usda.gov/news-events/news-press-releases/fsis-101-mission-food-safety-and-inspection-service#:~:text=FSIS%20is%20the%20public%20health,and%20correctly%20labeled%20and%20packaged.>

184. *Id.* at 49491.

The FSIS asked for comments on fourteen specific issues.¹⁸⁵ Most of the issues addressed questions like what types of qualifiers should be included on labels to alert consumers that the product is comprised of cultured animal cells, and what effect these labels would have on relevant industries and consumers.¹⁸⁶ As mentioned in part I, cell-cultured food is not popular with American consumers, but the USDA and FDA seem to be trying to resolve some of the ambiguity over how the products will be regulated if they gain more traction.

IV. THE CHALLENGE TO THE OKLAHOMA MEAT CONSUMER PROTECTION ACT

A. Preliminary Injunction

On September 16, 2020, Upton's Naturals and the Plant Based Foods Association filed a complaint for declaratory and injunctive relief against enforcement of the Oklahoma Meat Consumer Protection Act.¹⁸⁷ Upton's Naturals is an Illinois Corporation that sells its food products in other states, including Oklahoma, and the Plant Based Foods Association is a trade association that represents the United States' leading plant-based food companies.¹⁸⁸ The plaintiffs argued that the Oklahoma Act violates the First and Fourteenth Amendments to the United States Constitution.¹⁸⁹ The plaintiffs felt that "the Act abridge[d] their freedom of speech because they [were] prohibited from communicating the name of their meatless product—such as 'Classic Burger'—in their preferred format."¹⁹⁰ The format that the plaintiffs wanted to use for their products displayed the meat term in the largest print on the label. Stipulations that were made on the labels to specify that they were vegan or plant-based were smaller than the meat terms, thus violating the Act.

The first issue for the court to address was the plaintiffs' request for a preliminary injunction under rule 65(a) of the Federal Rules of Civil

185. *Id.* at 49495.

186. *Id.*

187. Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction at 1-2, Upton's Naturals Co. v. Stitt, (5:20-cv-00938-F).

188. *About: Our Mission*, PLANT BASED FOODS ASS'N, <https://www.plantbasedfoods.org/about/> (last visited Mar. 19, 2022).

189. Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction, *supra* note 186, at 12.

190. Upton's Naturals Co. v. Stitt, 2020 WL 6808784, *2 (W.D. Okla. 2020).

Procedure to prevent the enforcement of the Act during the pendency of the lawsuit. Like other courts, the Western District of Oklahoma considered the “(1) likelihood of success on the merits; (2) [whether there was] irreparable harm; (3) [the] balance of equities; and (4) [the] benefit to the public.”¹⁹¹ The court found that the plaintiffs were unable to show they were likely to succeed on the merits, so the court did not address the other requirements. In examining the merits of the case, the court noted that the general First Amendment protection is broad, but the level of scrutiny that will be applied is lower in certain contexts, like with commercial speech. The parties in the case agreed that the speech at issue was commercial speech, but they disagreed about the appropriate test and level of scrutiny that the court should apply.

The plaintiffs argued that the intermediate scrutiny laid out in *Central Hudson* would apply.¹⁹² This test asks (1) “[if it] concern[s] lawful activity . . . [that is] not misleading;” (2) “whether the asserted governmental interest is substantial;” (3) “whether the regulation directly advances the governmental interest asserted, and [(4)] whether it is not more extensive than is necessary to serve that interest.”¹⁹³ The defendants urged the court to apply the lower level of scrutiny set forth in *Zauderer*.¹⁹⁴ Under that rule, “the government may require commercial speakers to divulge ‘purely factual and uncontroversial information’ about their products or services, so long as it is ‘reasonably related’ to a substantial government interest and is neither ‘unjustified [n]or unduly burdensome.’”¹⁹⁵ In that situation, a lower level of scrutiny is applied because the “constitutionally protected interest in *not* providing any particular factual information in [its] advertising is minimal.”¹⁹⁶

The court sided with the defendants, finding that the speech at issue was more akin to a requirement of disclosure under *Zauderer* than a restriction of speech like in *Central Hudson*.¹⁹⁷ It further found that *Zauderer* can apply both in situations where the speech is inherently misleading, and where it is potentially misleading. In addressing whether the speech at issue was potentially misleading, the court gave examples of

191. *Id.*

192. *Id.*; see also *Central Hudson*, 447 U.S. at 566.

193. *Central Hudson*, 447 U.S. at 566.

194. *Upton’s Naturals*, 2020 WL 6808784, *2 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)).

195. *Id.* (quoting *Zauderer*, 471 U.S. at 651).

196. *Id.* (quoting *Zauderer*, 471 U.S. at 651) (emphasis in original).

197. *Id.* at *2-3.

the type of product that the plaintiffs wished to market, in violation of the Act. One of which was Upton's product called "Ch'eesy Bacon Mac."¹⁹⁸ The plaintiff argued that it should be able to continue labeling the product as such in Oklahoma, although the product contained neither bacon nor cheese.

The plaintiff has numerous other products that it markets with "meaty" terms like "burger," "bacon," "chorizo," "hotdog," "jerky," "meatballs," and "steaks" that contain none of those meat ingredients.¹⁹⁹ They argued that they should be allowed to continue using these terms although their products do not have disclaimers that their products are plant-based or meatless in type "uniform in size and prominence" to the name of the product.²⁰⁰ Still, Judge Friot had "no trouble" determining that the speech on the plaintiff's labels was potentially misleading.²⁰¹ "Product packaging which labels a product as 'Ch'eesy Bacon Mac,' 'The Classic Burger,' 'Updog,' and 'Jerky Bites,' even with the use of the "VEGAN" term or the '100% VEGAN' term, remains potentially misleading to the reasonable consumer."²⁰²

In applying the *Zauderer* framework, the court began by stating that the disclosure required is factual and noncontroversial since the Act only requires that plant-based products be labeled as plant-based.²⁰³ In other words, the requirement only imposes a duty to disclose what actually makes up the product. Then, the court asked whether the defendants carried their burden of proving that the disclosure is not unjustified or unduly burdensome. It found that the defendants did carry their burden.²⁰⁴ The size requirement for the disclosure was justified because it would help notify consumers of the nature of the food product.

The requirement was not unduly burdensome because plaintiffs can choose the manner in which they want to state that their product is plant-based. "The disclosure requirement is not such that it 'effectively rules out' plaintiffs' ability to include the information they want to convey on their product labels."²⁰⁵ The plaintiffs are still allowed to include the information they want on their label and get to choose the design and style

198. *Id.* at *1.

199. *Id.* at *2.

200. *Id.*

201. *Id.* at *3.

202. *Id.* at *4.

203. *Id.*

204. *Id.*

205. *Id.*

of the meat-free disclaimer, so long as it meets the size requirements. Last, the court found that the requirement that the label must say that the product is derived from plant sources is reasonably related to the state's interest in preventing consumer confusion and deception. Therefore, the court denied the plaintiff's motion for preliminary injunction on November 19, 2020.²⁰⁶

B. The Appeal and Amended Complaint

The plaintiffs filed an appeal to the United States Court of Appeals for the Tenth Circuit, asking it to overturn the denial of the preliminary injunction.²⁰⁷ In June 2021, the plaintiffs voluntarily dismissed their appeal of the district court's November 19, 2020 decision denying their motion for preliminary injunction.²⁰⁸ Then, the United States District Court for the Western District of Oklahoma entered an order reopening the case for further proceedings, following the resolution of the appeal.²⁰⁹ The Plant Based Foods Association and Tofurky filed an amended complaint for declaratory and injunctive relief. The plaintiffs have changed strategies from their First Amendment challenge, now arguing that the law violates the Dormant Commerce Clause, the Due Process Clause, and the Supremacy Clause, and that it is preempted by federal law.²¹⁰ The complaint argues that "Oklahoma's Meat Consumer Protection Act . . . institutes a protectionist trade barrier that contravenes and is preempted by federal law and imposes vague standards on Tofurky and other PBFA members."²¹¹ Trial is now set for January 10, 2023.

V. ANALYSIS OF THE OKLAHOMA MEAT CONSUMER PROTECTION ACT

A. Unduly Burdensome Challenge

The Oklahoma Meat Consumer Protection Act was originally

206. *Id.* at *5.

207. Notice of Appeal at 1, *Upton's Naturals Co. v. Stitt*, (5:20-CV-00938-F), 2020 WL 6808784 (W.D. Okla. 2020).

208. *Upton's Naturals Co. v. Stitt*, No. 5:20-CV-00938-F, 2021 WL 5972086 (10th Cir. 2021).

209. Order at 1, *Upton's Naturals Co. v. Stitt*, (CIV-20-938-F), 2020 WL 6808784 (W.D. Okla. 2020).

210. Amended Complaint for Declaratory and Injunctive Relief at 1, *Upton's Naturals Co. v. Stitt*, (CIV-20-938-F), 2020 WL 6808784 (W.D. Okla. 2020).

211. *Id.*

challenged on First Amendment grounds. The court determined that the labels constituted commercial speech, which receives less rigorous protection than other areas of protected speech. In applying the rule from *Zauderer*, one of the questions addressed was whether requiring the disclosure would be unduly burdensome. The Act provides that a product cannot be represented as meat unless “the packaging displays that the product is derived from plant-based sources in type that is uniform in size and prominence to the name of the product.” The inquiry is similar under *Central Hudson* where the court must determine if there is a substantial government interest that is directly advanced by the law and if there is a less restrictive way to serve the interest.

In the case against the Arkansas statute, the court noted that it would be a less restrictive means of preventing confusion to “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.” This is an advantage of the Oklahoma Act over the laws in Arkansas and Louisiana, which ban the use of meat terms without a disclosure exception. Courts are more likely to favor a disclosure requirement over banning speech outright. Therefore, requiring a prominent disclosure of the protein source does not seem unduly burdensome, and courts are likely to prefer the disclosure requirement for labels that contain meat-like terms than bans on the meat-like terms entirely.

B. New Challenges

In the amended complaint against the Oklahoma Act, the plaintiffs have changed their strategy. The new claims are for preemption, violation of the Supremacy Clause, discrimination in violation of the Dormant Commerce Clause, excessive burden in violation of the Dormant Commerce Clause, and violation of the Fourteenth Amendment Due Process Clause. First, for the preemption claim, the plaintiffs seem to argue for both express and implied preemption, “the Act conflicts with, is expressly preempted by, and otherwise impedes the accomplishment and execution of the full purposes and objectives of federal law.” The complaint continues that the Act violates the Supremacy Clause since the state law is allegedly preempted by the Federal Food, Drug, and Cosmetic Act.

The plaintiffs' next claim is that the Act violates the Dormant Commerce Clause. The complaint argues that the Act violates the Dormant Commerce Clause "by discriminating against out-of-state producers of meat products." It says that the state has no legitimate local interest in preventing consumer confusion because consumers are not confused by the current labeling practices. The complaint also argues that under a balancing test, the burden put on interstate commerce by the Act clearly outweighs the putative local benefits. Last, the plaintiffs claim that the Act violates the Fourteenth Amendment Due Process Clause as unconstitutionally vague.

C. The Real Difference Between Plant-based and Animal-derived Meat

"[A]n almond doesn't lactate, I must confess."²¹² This joke was made by former FDA Commissioner Scott Gottlieb when speaking about the labeling issues in the dairy industry.²¹³ Similar to the issue with the meat industry, this statement shows that there is a difference between dairy sources and their plant-based counterparts. Still, it does not seem that the difference is so obvious that the heightened labeling requirements treat consumers as "meatheads."

Despite what Impossible's Chief Communications Officer Rachel Konrad says, plant-based proteins are not "molecule for molecule" equivalent to meat.²¹⁴ Some consumers prefer plant-based proteins and others prefer meat derived from animal sources. This is especially true in states like Oklahoma where agriculture is a major industry. In agriculture-driven states, it follows that many consumers in the state are involved in the industry or otherwise hope to support the local economy. Other consumers may prefer animal-derived protein because it is what they are used to or because they think that highly processed plant-based meats are less healthy. The government certainly has a legitimate interest in protecting consumers from confusion and deception. Therefore, there is a real difference between the protein sources that justifies the action taken by elected representatives.

212. Caleb Whitmer, *Consumers Understand that Almonds don't Lactate*, THE HILL (July 8, 2019, 1:00 PM), <https://thehill.com/opinion/healthcare/451870-consumers-understand-that-almonds-dont-lactate/>.

213. *Id.*

214. See Joe Fassler, *In a New Ad Campaign, Impossible Foods Calls its Plant-Based Burger "Meat." Can it do That?*, THE COUNTER (Apr. 27, 2021, 6:01 AM), <https://thecounter.org/impossible-foods-ad-campaign-plant-based-meat-labeling/>.

Still, would an ordinary consumer really be confused by the different protein options? The definition of a vegetarian is “a person who does not eat meat: someone whose diet consists wholly of vegetables, fruits, grains, nuts, and sometimes eggs or dairy products.”²¹⁵ The definition of a vegan is “a strict vegetarian who consumes no food (such as meat, eggs, or dairy products) that comes from animals.”²¹⁶ These definitions create a clear barrier between meat and nonmeat. The definitions also seem consistent with the ordinary use of the words vegan, vegetarian, and meat. If you ask a vegetarian if they eat meat, it seems unlikely that they would answer affirmatively just because they often order an Impossible Burger or purchase Upton’s meat-free Ch’eesy Bacon Mac at the grocery store. Likewise, these definitions assume that meat means animal-derived meat, since they rely on the word meat to define vegetarian and vegan diets. Yet, the terms are becoming less clear with the introduction of new alternative protein sources.

Plant-based food companies have admitted to marketing their products by associating them as closely to meat-based products as possible. The marketing strategy is likely innocent, as plant-based food companies seem to be trying to change consumers’ perceptions of what counts as meat. Rather than trying to trick consumers into thinking their products contain animal-derived meat, they seem to be easing their products into the definition of meat, as products that are so similar that they are essentially equivalent. Still, using terms like “meat,” “bacon,” or “sausage” can be confusing when their products are inconsistent with the core meanings of the words in dictionaries and in common usage.

VI. CONCLUSION

Meat has become a hot topic for legislatures, courts, and even billboards. As the divisions between traditional agriculture groups and supporters of alternative proteins grow, the distinction between the products of each becomes less clear. State and federal government bodies have sprung to action, but the success of the actions has varied. The challenges to these labeling laws have brought up many different causes of action. It may be some time before there is a clear approach to managing

215. *Vegetarian*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/vegetarian>.

216. *Vegan*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/vegan>.

these types of cases. In the meantime, both sides will continue to watch the cases currently ongoing in federal courts, including the case against the Oklahoma Meat Consumer Protection Act.