The Meat of the Matter: Shoring Up Animal Agriculture at the Expense of Consumers, Animals, and the Environment

by Amanda Howell

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SUMMARY

This Article analyzes the recent proliferation of "tag-gag" laws aimed at undermining the emerging plant-based and cell-based food industries. It examines potential constitutional challenges to these laws, including those based on the First Amendment, the dormant Commerce Clause, Supremacy Clause, and Due Process Clause, as well as the likely arguments that states will proffer in their defense. It concludes with a discussion of the consequences and implications of various outcomes of these cases, and how animal advocates can responsibly bring these types of constitutional challenges. The Article was adapted from Chapter 11 of *What Can Animal Law Learn From Environmental Law,* 2d Edition (ELI Press, forthcoming 2020).

This Article analyzes the recent proliferation of laws aimed at undermining the plant-based and cell-based food industries. It examines the potential constitutional challenges to these laws, as well as the likely arguments that states will proffer in their defense. It considers arguments based on the First Amendment, the dormant Commerce Clause, Supremacy Clause, and Due Process Clause that have been used to support and attack the improvement of animal welfare and the proliferation of plant-based foods.

Part I discusses the recent growth of plant-based meat and dairy products, as well as the corresponding federal and state-level backlash that has been fueled by the animal agriculture industry. It also reviews the legislative history of two of these "tag-gag" laws in Missouri and Arkansas. Part II provides a brief overview of pending or passed legislation in more than a dozen other states, including the various types of laws that take aim at plant- and cell-based products.

Part III reviews the existing legal landscape that renders these state-level laws unnecessary if they truly seek to prevent consumer confusion, and Part IV discusses the pending constitutional challenges, including how these tag-gag laws differ from those that seek to improve animal welfare and food safety. The Article concludes with a discussion of the consequences and implications of various outcomes of these cases, and how animal advocates can responsibly bring these types of constitutional challenges.

I. Background: No Consumer Confusion, but Yes, Industry Collusion

Plant-based meat products have reliably grown 11% year after year.[1] In 2018, the plant-based meat market reached $4.63 billion, and industry experts estimate it will rise to $6.43 billion by 2023.[2] Market research firms have corroborated this shift away from "traditionally harvested" meat products, as well as the meat industry's corresponding anxiety over its subsequent loss of market share.[3]

Rabobank, a banking and financial services company for the agriculture sector, recently published a report entitled *Watch Out . . . or They Will Steal Your Growth! Why Alternative Proteins Are Competing So Successfully for the Centre of the Plate*—asserting that plant-based meats are "stealing" growth from meat products.[4] That may very well be true: In 2018, sales for plant-based foods grew by about

1. *Fresh Meat and Plant-Based Meat Alternatives on the Rise, According to New Acosta Research*, Acosta, https://www.acosta.com/news/fresh-meat-and-plant-based-meat-alternatives-on-the-rise-according-to-new-acosta-research.
2. Michelle Neff, *Plant-Based Meats Are Taking Over With Market Set to Hit $6.43 Billion by 2023!*, One Green Planet, Feb. 6, 2018, http://www.onegreenplanet.org/news/meat-substitute-market-worth-billions/ (last visited Nov. 30, 2019).
3. *E.g.*, Thea Halpin, *Can Plant-Based Meat Be Better Than the Real Thing?*, ABC News, June 16, 2016, http://www.abc.net.au/news/2016-06-17/the-rise-and-rise-of-plant-based-food/7508752.
4. *Watch Out . . . or They Will Steal Your Growth! Why Alternative Proteins Are Competing So Successfully for the Centre of the Plate*, Rabobank (Nov. 2017), https://research.rabobank.com/far/en/sectors/animal-protein/why-alternative-proteins-are-competing-for-the-centre-of-the-plate.html; *see also* Amanda Radke, *Investment in Lab Meat Takes Off*, Beef (Magazine), Aug. 30, 2017, http://www.beefmagazine.com/outlook/investment-lab-meat-takes. Meatingplace, a trade publication covering the meat industry, pub-

20%, while total U.S. retail food sales grew by only 2%.[5] Plant-based milks grew 9% in 2018 (compared to cow milk's decline of 6%); plant-based meats grew by 24%—while slaughtered meat only grew by 2%.[6] Comparing the increasing popularity of plant-based alternatives with the relative stagnation of animal products, the animal agriculture industry has cause to worry about competition from their plant-based counterparts.[7]

A. *Industry Action at the Federal Level*

The meat and dairy industry actors have not been sitting idly by simply watching plant-based alternatives and interest in cell-based alternatives grow in the past several years. The North American Meat Institute (NAMI), the U.S. Cattlemen's Association (USCA), the National Milk Producers Federation (NMPF), and others have attempted to turn federal law and agencies into weapons for their cause. Their success, however, has been limited.

1. DAIRY PRIDE Act

On January 12, 2017, Senator Tammy Baldwin (D-Wis.) introduced the Defending Against Imitations and Replacements of Yogurt, Milk, and Cheese to Promote Regular Intake of Dairy Everyday Act (the DAIRY PRIDE Act). The chief objective of the Act was to require the federal Food and Drug Administration (FDA) to bring enforcement actions against plant-based dairy products for using terms traditionally associated with dairy products from animals in their own naming conventions.[8] Under the Act, if "misbranded food," i.e., plant-based dairy food, is offered for sale in interstate commerce, FDA should include in its report an updated plan for enforcement with respect to that food. The Act essentially forces FDA to issue guidance on "imitation dairy products" within 90 days and to report to the U.S. Congress after two years on its enforcement efforts against such products.

In 2017, Senator Baldwin's efforts did not go very far: the Act was read twice and referred to the Committee on Health, Education, Labor, and Pensions. On March 14, 2019, despite past failures, Senator Baldwin, once again put forth the Act.[9]

As of this writing, these protectionist efforts have failed on the legislative front. As a next resort, the dairy industry has also directly pressured federal agencies to take up its cause of preventing plant-based dairy products from using dairy terminology in their names.

2. The National Milk Producers Federation's (Many) Letters to FDA

For almost two decades, NMPF has engaged in a near-constant onslaught of letters to FDA, asking FDA to enforce Standards of Identity against plant-based dairy products.[10] According to NMPF, plant-based dairy products run afoul of FDA laws that prohibit products from "purport[ing] to be . . . a food for which a definition and standard of identity has been prescribed."[11]

Standards of Identity are essentially "definitions prescribing regulatory 'recipes' for the production of individual foods."[12] The statutory purpose of Standards of Identity was "to promote honesty and fair dealing in the interest of consumers,"[13] and FDA intended to use Standards of Identity "to protect consumers from contaminated products and economic fraud."[14] At the time, products that used hidden fillers, water, or less of the characterizing ingredients consumers expected to find were rampant in the marketplace.

FDA itself has acknowledged, however, that Standards of Identity represent a flawed process, and that times have changed.[15] For decades, FDA has since relied on *statements* of identity—or the "common or usual name of a food"[16]—to inform consumers of the nature and contents of food products. And the current naming conventions for plant-based products do serve to ensure that consumers get what they expect when purchasing plant-based dairy products. This is because plant-based dairy products comply with current FDA labeling regulations governing statements of identity.[17] They also do not violate dairy's Standards of Identity: "soy milk" is not being called "milk" and "mozzarella style shreds" are not being referred to simply as "mozzarella." Moreover, statements of identity can include

lished 18 articles about plant-based meats and clean meat from September to November 2019.

5. Elaine Watson, *U.S. Retail Sales of Plant-Based Milk Up 9%, Plant-Based Meat Up 24% Year Over Year*, Food Navigator (July 30, 2018), https://www.foodnavigator-usa.com/Article/2018/07/30/US-retail-sales-of-plant-based-milk-up-9-plant-based-meat-up-24-YoY.
6. *Id.*
7. Although the industry—namely the large mega-agribusinesses that account for the lion's share of animal products produced—may have producers worried about the infringement of plant-based products on their bottom lines, dairy farmers have been put out of business by big dairies, and by big business, more than by plant-based competition. *See, e.g.*, Rebecca Sananes, *As Big Milk Moves In, Family-Owned U.S. Dairy Farms Rapidly Fold*, Nat'l Pub. Radio (Jan. 11, 2017), https://www.npr.org/sections/thesalt/2017/01/11/509135189/as-big-milk-moves-in-family-owned-u-s-dairy-farms-rapidly-fold.
8. Press Release, Tammy Baldwin, U.S. Senators Tammy Baldwin and Jim Risch Stand Up for America's Dairy Farmers (Mar. 14, 2019), https://www.baldwin.senate.gov/press-releases/dairy-pride-2019.
9. *Id.*
10. *E.g.*, Letter from NMPF President/CEO, to Sylvia Mathew Burwell, Secretary HHS and Thomas Vilsack, Secretary, USDA (May 8, 2015); Letter from Dr. Beth Briczinski, Vice President, Dairy Foods & Nutrition, NMPF, to Docket No. FDA-2012-N-1210 (Aug. 1, 2014); Letter from Dr. Beth Briczinski, Director, Dairy Foods & Nutrition, NMPF, to Docket No. FDA-2010-N-0210 (July 28, 2010); Letter from Dr. Beth Briczinski, Director, Dairy Foods & Nutrition, NMPF, to Kathleen Sebelius, Secretary, HHS and Thomas Vilsack, Secretary, USDA (July 15, 2010); Letter from Jerry Kozak, Present/CEO, NMPF, to Margaret Hamburg, Commissioner, FDA (Apr. 28, 2010); Letter from Dr. Robert Byrne, Vice President, Regulatory Affairs, NMPF, to Dr. Christine Lewis, Director, Office of Nutritional Products, Labeling, and Dietary Supplements (Nov. 2, 2011); Letter from Dr. Robert Byrne, Vice President, Regulatory Affairs, NMPF, to Joseph Levitt, Director, CFSAN (Feb. 14, 2000).
11. 21 U.S.C. §343(g) (2018).
12. Angie M. Boyce, *When Does It Stop Being Peanut Butter?: FDA Food Standards of Identity, Ruth Desmond, and the Shifting Politics of Consumer Activism*, 57 Tech & Culture 54, 61 (2016).
13. 21 U.S.C. §341.
14. FDA, FDA's Standards for High Quality Foods (June 18, 2007).
15. *See id.* (emphasis added).
16. 21 C.F.R. §102.5 (2018).
17. *Id.* §101.3; *id.* §102.5.

the name of a standardized food; in fact, FDA has a long history of authorizing and even encouraging this practice.[18]

Seeing the writing on the wall, NMPF has changed its tack and recently focused its arguments on the contention that consumers are confused because they expect plant-based dairy products to have the same nutritional profiles of conventional dairy products.[19] But survey evidence, along with U.S. Court of Appeals for the Ninth Circuit case law, is clear: consumers do not expect different products to have the same nutrition.[20] Unfortunately, this has not stopped FDA from releasing three separate requests for comment on the issue.[21]

3. The U.S. Cattlemen's Association's Petition to the Food Safety Inspection Service

On February 9, 2018, USCA sent a petition to the U.S. Department of Agriculture's (USDA's) Food Safety Inspection Service (FSIS), requesting that FSIS limit the definition of beef to "product from cattle born, raised, and harvested in the traditional manner." The petition further asked FSIS to require that any product labeled as "beef" or "meat" come from the "flesh of animals that have been harvested in the traditional manner," rather than coming from "alternative sources such as a synthetic product from plant . . . or other non-animal components and any product grown in labs from animal cells."[22]

Unfortunately for USCA, FSIS is a branch of USDA tasked with ensuring that the products under USDA's jurisdiction (meat, poultry, and egg products) are safe and that their labeling complies with applicable regulations.[23] FSIS' jurisdiction over labeling is limited to regulatory authority under the Federal Meat Inspection Act (FMIA), Poultry Products Inspection Act (PPIA), and Egg Products Inspection Act (EPIA).[24] Plant-based products are not subject to FSIS' labeling oversight; FSIS has no jurisdiction over products that do not contain animal parts, no matter how they may be labeled.[25] This conclusion was even inescapable for some in the meat industry, as reflected by the National Cattlemen's Beef Association's opposition to the USCA's petition to FSIS.[26]

In short, plant-based meat is squarely within FDA's—not USDA's—jurisdiction. USDA could not comply with USCA's request even if it wanted to.

Given these rather frustrating efforts at the federal level, it makes sense that the animal agriculture industry shifted its focus to lawmakers and agencies at the state level. Rather than policing semantics and disputing etymology, the meat and dairy industry might be better served by addressing the root causes that turn so many consumers away from the products: harm to animals, the environment, and human health. Moreover, vegan meats have been on the market in the United States for almost a century,[27] and plant-based dairy products have existed since time immemorial.[28] Not only does it strain credulity to take the position that consumers are confused by plant-based products' labeling, it also fails to address the underlying consumer preference driving animal products' decreased popularity. Nevertheless, the industry has soldiered down this path and has sought to undermine the spike in popularity of plant-based dairy and meat products, as well as the looming availability of cell-based meat on the state level

B. State (Industry?) Action

In June 2018, Missouri enacted a law that criminalized "misrepresenting a product as meat that is not derived from harvested production livestock or poultry."[29] Lawmakers claimed that the justification for the law was to protect consumers from confusing vegan meat products with meat from slaughtered animals—as though there were countless Missouri consumers hapless enough to have bought veggie burgers when they really wanted ground beef.

Before passing the law, the Missouri Legislature considered no evidence about consumer confusion, although it did discuss legislators' musings and "anecdotal evidence

18. *See* ALDF comments Re: FDA's Comprehensive, Multi-Year Nutrition Strategy, Request for Comment; Docket ID: FDA-2018-N-2381.
19. 21 C.F.R. §101.3
20. Research submitted in its entirety by the University of California at Los Angeles School of Law's Animal Law and Policy Program as a comment on Oct. 5, 2018, ID: FDA-2018-N-2381-1104, *available at* https://www.regulations.gov/document?D=FDA-2018-N-2381-1104; Painter v. Blue Diamond Growers, No. 17-55901 (9th Cir. Dec. 20, 2018) (additionally holding that a reasonable jury could not conclude that almond milk is "nutritionally inferior" to dairy milk within the meaning of 21 C.F.R. §101.3(e)(4), as two distinct food products necessarily have different nutritional profiles. As the district court concluded, it is not plausible that a reasonable consumer would "assume that two distinct products have the same nutritional content").
21. FDA Request for Public Comments Re: Horizontal Approaches to Food Standards of Identity Modernization, Docket ID: FDA-2018-N-2381-1371; FDA Request for Public Comments Re: Use of the Names of Dairy Foods in the Labeling of Plant-Based Products, Docket ID: FDA-2018-N-3522; FDA Request for Public Comments Re: FDA's Comprehensive, Multi-Year Nutrition Strategy, Request for Comment; Docket ID: FDA-2018-N-2381.
22. U.S. Cattlemen's Ass'n, Petition for the Imposition of Beef and Meat Labeling Requirements: To Exclude Product Not Derived Directly From Animals Raised and Slaughtered From the Definition of "Beef" and "Meat," https://www.fsis.usda.gov/wps/wcm/connect/e4749f95-e79a-4ba5-883b-394c8bdc97a3/18-01-Petition-US-Cattlement-Association020918.pdf?MOD=AJPERES.
23. The formal title of the petition: USCA Petition for the Imposition of Beef and Meat Labeling Requirements: To Exclude Products Not Derived Directly From Animals Raised and Slaughtered From the Definition of "Beef" and "Meat," Petition 18-01, https://www.fsis.usda.gov/wps/wcm/connect/e4749f95-e79a-4ba5-883b-394c8bdc97a3/18-01-Petition-US-Cattlemens-Association020918.pdf?MOD=AJPERES.
24. FMIA, 21 U.S.C. §§601-695 (2018); PPIA, 21 U.S.C. §§451-472 (2018).
25. *See id.* §601(j) & (w) (FMIA); *id.* §453(e) & (f) (PPIA); *id.* §1033(f) & (g) (EPIA) (providing that amenable species are cattle, sheep, swine, goats, equines, exotic species used for human food, fish of the order Siluriformes, and "any additional species of livestock that the Secretary considers appropriate"), *id.* §601(w). "Poultry" refers to "any domesticated bird." *Id.* §453(e). "Egg" means "the shell egg of the domesticated chicken, turkey, duck, goose, or guinea." *Id.* §1033(g). Food products that do not contain one of these animal-derived products are not under USDA jurisdiction. This would include foods made from insects.
26. Kevin Kester, National Cattlemen's Beef Ass'n, Opposition to FSIS Petition No. 18-01 (Apr. 10, 2018), https://www.fsis.usda.gov/wps/wcm/connect/6372c970-c9c0-421f-aaa6-e25255663cee/18-01-NCBA-Comments-Opposition-Petition-041018.pdf?MOD=AJPERES.
27. Matt Connolly, *Timeline: A Short History of Fake Meat*, Mother Jones, July 26, 1999, *available at* https://www.motherjones.com/environment/2013/12/history-fake-meat/.
28. To illustrate, "almaund mylke" and "almaunde mylke" appear repeatedly in one of the oldest-known English language cookbooks. The Forme of Cury: A Roll of Ancient English Cookery Compiled (1390), https://archive.org/stream/theformeofcury08102gut/7cury10.txt.
29. Mo. Rev. Stat. §265.494(7), *as amended by* Senate Bills 627 & 925 (2018).

and educated guesses."[30] Thus, the legislative history for this law reveals no evidence of consumer confusion, and only a very limited discussion of such.[31] What the legislative record does reveal is that by passing this law, Missouri lawmakers intended to protect its livestock producers, which is an industry worth about $2 billion in the state.

On March 18, 2019, Arkansas followed Missouri's lead and passed a nearly identical law. As in Missouri, Arkansas lawmakers cited consumer confusion as the justification for a broad ban on the commercial speech of plant-based meat producers, again without any evidence of consumer confusion. Like Missouri, the underlying economic circumstances in Arkansas paired with Arkansas' legislative history lend credence to the notion that this law was passed with livestock producers—rather than the Arkansas consumer—in mind.

1. Missouri

In Missouri, Sen. Sandy Crawford (R) sponsored Senate Bill 977, which was ultimately incorporated into an omnibus agriculture bill sponsored by fellow Republican, Sen. Brian Munzlinger. Senator Crawford openly admitted to the press that the bill came from the state's Cattlemen's Association,[32] which is a "livestock commodity group . . . with a primary mission to promote and protect the beef-producing industry."[33] Senator Crawford even went so far as to acknowledge that she was championing the law out of a desire "to protect our cattlemen in Missouri and protect our beef brand."[34] This position turns out to be rather self-serving. Cursory research reveals that the three lawmakers who championed the legislation—Senator Crawford, Rep. Jeff Knight (R), and Rep. Warren Love (R)—have extensive ties to the animal agriculture industry, and some are even members of the Missouri Cattlemen's Association itself.[35]

Mike Deering, Executive Vice President of the Missouri Cattlemen's Association, said the law was "key to protecting livestock producers' livelihoods and investments."[36] And even before it was passed, the Cattlemen's Association touted the law as a "SUCCESS" in its "Policy Priorities":

> Major companies are investing in developing laboratory grown meat and calling it "beef." MCA will push for a protection of its nomenclature by protecting the word beef to only include food derived from actual livestock production. This is all about marketing with integrity. MCA will not stand for laboratory-grown food or plant-based meat alternatives to be marketed as something it's not.[37]

The legislative history surrounding the law is equally telling. During a May 2018 legislative session, when discussing the perceived need for the law to be enacted, Representative Knight admitted "all we're trying to do is basically just protect our meat industry . . . we're just trying to protect our product."[38] During that same legislative session, Rep. Jay Houghton (R) argued that the law was necessary to "protect the 45,000 jobs that we have right now involved in the beef industry." Rep. Greg Razer (D) agreed, saying: "We have to protect our cattle industry, our hog farmers, our chicken industry."[39] In short, the law's legislative history underscores that the law was introduced with the explicit intent of supporting animal producers in Missouri by commercially undermining plant- and cell-based meat industries.

Animal agriculture, in terms of gross regional product, provides about $11.682 billion to Missouri's economy.[40] The cattle industry represents the largest share of that, comprising about $2 billion,[41] and Missouri is the second largest producer of cattle in the country.[42]

2. Arkansas

Arkansas' law[43] on this issue takes a page from Missouri's book. But in Arkansas, the lawmakers decided to go even further by adding language aimed at plant-based dairy products and even cauliflower rice. The law makes it illegal for any person to

> misbrand or misrepresent an agricultural product that is edible by humans, including without limitation, by . . . (2) Selling the agricultural product under the name of another food . . . (6) Representing the agricultural product as meat or a meat product when the agricultural

30. Rubin v. Coors Brewing Co., 514 U.S. 476, 490 (1995) ("anecdotal evidence" and "educated guesses" are not sufficient).
31. *See infra* notes 38-39 and accompanying text.
32. Sara Brown, *How Missouri Began to Tackle Fake Meat: Missouri Sen. Sandy Crawford*, Drovers (May 31, 2018), https://www.drovers.com/article/how-missouri-began-tackle-fake-meat-missouri-sen-sandy-crawford (noting that beef cattle represent $2 billion of an $88 billion agriculture industry in Missouri, she added: "That's just the cattle themselves . . . so it is huge for the state of Missouri.").
33. Missouri Cattlemen's Ass'n, *About Us*, https://www.mocattle.org/about-us (last visited Nov. 30, 2019).
34. Brown, *supra* note 32 (quoting Senator Crawford as stating that the beef industry trade group approached her "with an idea for a bill . . . and that bill was what we dubbed the fake meat bill").
35. Representative Knight received backing from individuals working in the agriculture industry, including from Dwight Cox, a rancher at Cox Cattle Company, and the Missouri agriculture political action committee. Representative Love is a rancher and member of the Missouri Cattlemen's Association, and has received over $8,000 from meat producers and lobby groups. Senator Crawford herself raises cattle and is a member of the Dallas County Cattlemen's Association. Senator Munzlinger is a member of the Missouri Cattlemen's Association.
36. Erica Hunzinger, *Missouri May Be First State to Get Serious About the Definition of Meat*, NPR: The Salt (May 23, 2018), https://www.npr.org/sections/thesalt/2018/05/23/613393904/missouri-may-be-first-state-to-get-serious-about-the-definition-of-meat.
37. MCA Policy & Resolutions, Feb. 21, 2018, on file with author.
38. Third Reading of Senate Bills in House (May 17, 2018). Alisha Shurr, *General Assembly: Missouri Meat Must Meet Meat Definition*, Missouri Times, May 17, 2018, *available at* https://themissouritimes.com/51224/general-assembly-missouri-meat-must-meet-meat-definition/.
39. *Id.* Both Representative Houghton and Representative Razer have received donations from the Missouri Cattlemen's Association, https://www.followthemoney.org/entity-details?eid=6684756. Senator Munzlinger received over $13,000 from the Cattlemen's Association, Grassland Beef, Missouri's Farm Bureau, and Missouri Pork Producers combined, https://www.followthemoney.org/entity-details?eid=3693614&default=candidate; http://www.senate.mo.gov/mem18/.
40. *Economic Contribution of Animal Agriculture to Missouri*, Missouri Soybean Merchandising Council (May 2016), https://mosoy.org/wp-content/uploads/2016/05/Animal-Ag-Contribution-Report-5.9.16.pdf.
41. *Id.* (beef cattle ranching and farming is also the largest overall employment industry sector in Missouri).
42. *Missouri Claims No. 2 Spot in Beef Cattle Production*, Feedstuffs (May 11, 2014), https://www.feedstuffs.com/story-missouri-claims-2-spot-beef-cattle-production-45-109760.
43. *See* https://legiscan.com/AR/bill/HB1407/2019.

> product is not derived from harvested livestock, poultry, or cervids . . . (8) Representing the agricultural product as beef or a beef product when the agricultural product is not derived from a domesticated bovine; (9) Representing the agricultural product as pork or a pork product when the agricultural product is not derived from a domesticated swine; (10) Utilizing 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.[44]

Unlike Missouri's statute, the Arkansas law imposes civil penalties rather than criminal. But portions of the law's language are nearly identical to that in Missouri. Also like Missouri, the Arkansas Legislature cited consumer confusion as its motivation, while being backed by the Arkansas Cattlemen's Association.[45] Apparently misery—and economic protectionism—make strange bedfellows. While one of the Arkansas law's sponsors has close ties with the Cattlemen's Association, another sponsor championed the bill as a way to protect rice farmers, such as himself, from the economic threat posed by cauliflower rice.[46]

3. Other States

In 2019, a total of 11 states passed laws that adopted various prohibitions relating to the marketing and labeling of plant-based and cell-based meat products. Thus, Arkansas' and Missouri's laws present just two pieces of a current patchwork of state laws that take aim at plant- and cell-based meats. With dozens of bills proposed last year, it stands to reason that more states will follow in the coming years, and the legal landscape will become nearly impossible for companies to navigate.[47]

Nevertheless, thanks in large part to efforts by the Plant Based Foods Association (PBFA), some of the recent laws were passed with amendments as to plant-based meats. These amendments make it a requirement that plant-based meat producers need only inform consumers on their front of package displays, also known as principal display panels (PDPs), that they are vegan/vegetarian/plant-based in order to comply with these laws. This requirement does little to change the landscape for plant-based meats given that these products already tout the fact that they do not contain meat from slaughtered animals.

Notably, some of these state laws were also drafted to apply to plant-based dairy products, as well as plant-based meat products. Plant-based dairy products have grown dramatically in recent years. As such, it should come as no surprise that the animal agriculture industry would want to address this prohibition threat in these protectionist laws as well.

II. Types of Laws

While the objectives of animal agribusiness may be the same regardless of state, state legislatures have adopted different tactics to address the growing threat from plant- and cell-based products. Some states have adopted outright bans on speech—essentially preventing plant- or cell-based products from using terms like "meat," "sausage," or "milk" at all. Others, perhaps out of fear of inevitable constitutional challenges, have struck a compromise and passed laws that do single out plant- and cell-based products, but only would require that they carry disclosures distinguishing those products from "traditional" meat and dairy products. The final category of laws take aim solely at cell-based products, presumably because the animal industry in these states is most concerned about competition from products that are indistinguishable from meat, except insofar as it would avoid animal death and many public safety hazards.

A. Bans on Speech

Laws like Missouri and Arkansas present blanket bans on truthful commercial speech, banning anything that could be construed as "misrepresenting [plant- or cell-based products] as meat." This essentially gags plant-based meat producers from truthfully marketing and labeling their products. For example, Missouri prosecutors could decide that using the term "sausage"—even when paired with a term like "veggie" or "vegan"—qualifies as a violation of the law. These prosecutors could decide that compliance with the law would mean that plant-based producers could never use terms like "veggie sausage," "beefless beef," or "vegan ham style roast" at all. But these representations are truthful and non-misleading.

In fact, the current labeling and naming conventions of plant-based meats are designed to communicate to con-

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44. Ark. Code Ann. §2-1-305 (Michie 2019). The definitions are also problematic:
> "Meat" means a portion of a livestock, poultry, or cervid carcass that is edible by humans. (B) "Meat" 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; . . . (8) "Meat product" means an agricultural product that is edible by humans and made wholly or in part from meat or another portion of a livestock, poultry, or cervid carcass.

45. *See, e.g.*, Facebook video of Cody Burkham, Executive Vice President, Arkansas Cattlemen's Ass'n:
> This is a bill that we've supported from the beginning. We feel as cattlemen that it's an important bill to our industry. [I]t] will just make sure that those products that are out there that want to use our good name to sell their products cannot do that if they're not actually a true beef, poultry, or pork product, or if it's not true rice so something . . . . We're definitely going to be there to support it . . . .

46. Sen. Bruce Maloch (D-Ariz.) is actively involved with the Cattlemen's Association and served as Secretary-Treasurer for the state group for four years and was President of the Columbia County affiliate from 1990-1991. https://votesmart.org/candidate/biography/27919/bruce-maloch#.XPAFe4hKiUk. In 2017, the Arkansas Cattlemen's Association presented Senator Maloch with the award of "Legislator of the Year," http://www.magnoliareporter.com/news_and_business/article_902c1944-ffe4-11e6-b004-4fc506ff168e.html.

47. To illustrate, Jerome Rosa, the executive director of the Oregon Cattlemen's Association, said "the group had a similar legislative concept for meat label restrictions that it considered moving forward in the last session of the Oregon Legislature . . . and it might push for labeling laws next session." Elise Herron, *Who's Afraid of Tofurky? Oregon's Soy Food Pioneer Fights for the Right to Label Its Product as Meat*, Willamette Wk., Sept. 18, 2019, *available at* https://www.wweek.com/news/2019/09/18/who-is-afraid-of-tofurky-oregons-soy-food-pioneer-fights-for-the-right-to-label-its-product-as-meat/. Like his predecessors, Rosa also admits the protectionist bent of these laws: "We see cow's milk has lost about 13 percent of the shelf space to other products such as almond, coconut and soy milk, we see the same thing happening with [the meat industry]."

sumers the nature and contents of the products, including an indication of what the product will taste like, how to use it in recipes, and what product it is designed to be used as. Without terms like "sausage," it would be impossible for producers to convey all of that meaningful information to consumers. So, instead of preventing consumer confusion, these blanket bans likely contribute to it.

B. Required Disclosures

Many laws—including the regulations proposed in Mississippi PBFA's lawsuit—explicitly exempt plant-based meat producers from being considered in violation of the law if they disclose the fact that they are plant-based on their PDPs. For instance, Mississippi's proposed regulations read:

> For purposes of this section, a plant-based food product 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."[48]

Oklahoma's law passed with similar language that clarified that "product packaging for plant-based items shall not be considered to be in violation of the provisions of this paragraph so long as the packaging displays that the product is derived from plant-based sources."[49]

Adding these caveats does not necessarily change the current labeling landscape for plant-based meat producers—these producers have always clearly indicated to consumers that their products are plant-based. At the same time, these required disclosures (while a reasonable compromise given the other laws being advocated) always do represent a state-imposed burden specific to plant-based meat producers. And it is a burden that lacks any justification and is not imposed on other similar producers. For example, tofu or black beans producers need not indicate that their products are plant-based, and ground beef or frozen chicken producers need not indicate that their products are actual animal carcasses. Moreover, the specifics of such required disclosures matter greatly—small changes in their language could mean that these "disclosures" become overly proscriptive and limit plant-based meat producers from changing the style, location, and methods they use to truthfully indicate to consumers the nature and contents of their products.

C. Taking Aim Exclusively at Cell-Based Meat

Some laws passed in 2019 exempt plant-based meats entirely, setting their sights exclusively on cell-based meats that have not yet come to market. Because cell-based meat is cultured in vitro from animal cells—simply grown without having to grow an entire conscious animal—it *is* real meat. Even in the scientific sense, it is indistinguishable from slaughtered meat. Both Missouri and Arkansas' laws take aim at both plant- and cell-based meat. Nevertheless, of the 11 states that passed laws in 2019, only 4 take aim at cell-based meat.

Kentucky's law provides: "A food shall be deemed to be misbranded . . . if it purports to be or is represented as meat or a meat product and it contains any cultured animal tissue produced from in vitro animal cell cultures outside of the organism from which it is derived."[50] Alabama is even more succinct: "A food product that contains cultured animal tissue produced from animal cell cultures outside of the organism from which it is derived may not be labeled as meat or a meat food product."[51]

Unfortunately for the livestock producers and lawmakers in these states, their efforts at getting these laws passed will likely be for naught. At the time Missouri passed its law, it was unclear whether FDA or USDA would be tasked with regulating the food safety and labeling of cell-based meat products. But on March 7, 2019, USDA and FDA announced a formal agreement to regulate cell-based meats—and USDA will be regulating the labeling of cell-based meats—and will require premarket label approval for any of these products.[52] Because cell-based meat labels will be expressly approved by USDA, labeling restriction laws will be preempted. In other words, for cell-based meats to be on the market, USDA will have already approved their labels. Any different or additional label restriction that state laws pose will be preempted, and cell-based producers will have a winning defense against any state enforcement action thanks to the Supremacy Clause.

So, what does it mean that so many states became uniformly—and suddenly—concerned about consumer confusion despite the fact that (1) these products have been on the market using these naming conventions for decades, (2) no evidence of consumer confusion exists, and (3) state and federal laws already exist that prohibit naming conventions (marketing or labeling of food products) that are "false or misleading in any particular [manner]"?

As with so many things, here the simplest explanation is the most accurate. The motivation for these laws, rather than concern about consumer confusion, is a concern about plant-based and cell-based meats impinging on the market share of slaughter-based meat.

III. Legal Backdrop: FDA, USDA, the Federal Trade Commission, and State Consumer Protection Laws

One fundamental flaw to the "consumer confusion" justification for the state bans on speech is the fact that there

48. *See* Press Release, Institute for Justice, Victory for Vegan Burgers: New Mississippi Labeling Regulations Will Not Punish Plant-Based Meat (Nov. 7, 2019) and Michele Simon, *PBFA Drops Mississippi Lawsuit After Labeling Victory!*, PBFA (Nov. 7, 2019).
49. Okla. Senate Bill 392 (Apr. 26, 2019).
50. Ky. House Bill 311 (Mar. 21, 2019).
51. Ala. House Bill 518 May 23, 2019).
52. Formal Agreement Between the U.S. Dep't of Health & Human Servs., FDA, & USDA, Office of Food Safety (May 7, 2019), https://www.fsis.usda.gov/wps/wcm/connect/0d2d644a-9a65-43c6-944f-ea598aacdec1/Formal-Agreement-FSIS-FDA.pdf?MOD=AJPERES.

are already federal and state laws that prevent misleading marketing and labeling of plant- and cell-based products.

A. *Existing Laws That Protect Against Consumer Confusion*

FDA regulates plant-based meats and dairy products. The Federal Food, Drug, and Cosmetic Act (FFDCA) already prohibits regulated food products from labeling anything in a way that is "false or misleading in any particular [manner]."[53] If FDA considers plant-based dairy or meat products as violating this provision, it is charged with taking enforcement action against misleading products. To date, it has not done so.

Sharing concurrent jurisdiction with FDA is Federal Trade Commission (FTC), the agency responsible for ensuring that consumer products (including food products) are marketed truthfully. The Federal Trade Commission Act (FTCA) prohibits "unfair or deceptive acts or practices" in or affecting commerce.[54] The FTCA's prohibition on "unfair or deceptive acts or practices" encompasses food marketing.[55] Regarding cell-based meats, USDA governs food labels for meat and egg products—and similarly prohibits labels or product names that are false or misleading.[56]

Furthermore, there are consumer protection laws in each state[57] that prohibit deceptive or misleading representations to consumers, and provide consumers with a private right-of-action to enforce these laws. In fact, there is a long history of case law where consumers have used these laws, generally in a class action lawsuit, to address confusing food labeling. In Missouri, the first state to pass a law against plant-based meats' labeling conventions, the law already prohibits "false or misleading statement[s]" in the promotion of goods for sale.[58] Tellingly, there have never been any such cases against plant-based meat producers in the many decades that these products have been on the market.

B. *Not Only Unnecessary, but Unconstitutional*

There is one key difference between these state and federal catchall provisions governing the marketing and labeling of food products and the recent state meat labeling laws. Under the FFDCA, the FTCA, and state consumer protection laws, companies whose labels or marketing are deemed to be "false or misleading" need to be sued on a case-by-case basis (as is the case for any misleading consumer good). In an acknowledgment of the implications for the First Amendment commercial speech doctrine, FTC recognized that

> [I]n practice, consumer protection agencies often must choose between the risk of allowing commercial speech that might prove to be false or misleading and the risk of banning commercial speech that might prove to be true. . . . Available evidence suggests . . . that *the general benefits of an enforcement approach that encourages dissemination of truthful information, while vigorously attacking misleading claims when they occur, produces benefits for consumers*.[59]

Similarly, at the state level, it would be incumbent on states' attorneys general or individual consumers suing for misleading marketing or labeling to show that consumers are likely to be misled by the conduct at issue.

Perhaps, the most fundamental problem with the state laws attacking plant- and cell-based meat is that they skip an important step: they *presume* without any evidence whatsoever (and commonsense evidence to the contrary) that plant-based meats' labeling conventions are misleading. They then proceed to impose a blanket ban on those producers' speech. They have imposed these bans without ever having proffered any evidence whatsoever that the consumer is indeed confused.

This is why these laws have been challenged on constitutional grounds. Given that protected speech is involved, it is essential to require the government to provide empirical evidence proving consumer deception before blanket bans can be imposed.

It is rare for states or the federal government to impose sweeping bans on truthful commercial speech. At the same time, courts are no stranger to constitutional challenges to food labeling laws. First Amendment challenges to compelled speech—in the food context, it's often required disclosures on food labels—are common. Challenges based on the Due Process Clause and the dormant Commerce Clause are also often used in an attempt to stifle or undermine state laws that would require companies to provide additional information to consumers (as in Vermont's genetically modified organism (GMO) labeling law)[60] or that would require companies to engage in more humane animal raising practices (like California and Massachusetts' egg and crate laws).[61] More recently, these arguments have even been used by the industry to challenge voter initiatives that set more humane standards for animals.[62] Although any constitutional challenge brought by plant-based meat producers may rely on the same general theories as those brought by Big Food or the animal agriculture industry, they are, however, distinguishable on both the facts and the law.

53. 21 U.S.C. §343(a) (prohibiting labeling that is "false or misleading in any particular [manner]").
54. 15 U.S.C. §45 (2018) (prohibiting "unfair or deceptive acts or practices" in or affecting commerce).
55. *See* Memorandum of Understanding Between the Federal Trade Commission and the Food and Drug Administration, MOU 225-71-8003 (June 1954), https://www.fda.gov/aboutfda/partnershipscollaborations/memorandaofunderstandingmous/domesticmous/ucm115791.htm; Fresh Grown Preserve v. FTC, 125 F.2d 917 (2d Cir. 1942).
56. 21 U.S.C. §§451-471; *id.* §§601-695; *id.* §§1031-1056.
57. *See, e.g.*, California's Consumer Legal Remedies Act, Cal. Civ. Code §1750; Mass. Ann. Laws ch. 93A; New Jersey's Consumer Fraud Act, N.J. Stat. Ann. §§56:8-1-56:8-184.
58. Mo. Rev. Stat. §570.140.
59. FTC Staff Provides the FDA With Comments on First Amendment Commercial Speech Doctrine, 2002 WL 31106156 (May 16, 2002) (emphasis added).
60. 2014 Vt. Acts & Resolves No. 120, §2, codified at 9 Vt. Stat. Ann. §3043(a), (b).
61. Mass. Gen. Laws Ann. ch. 129 app., §1-1 (2017); Cal. Code Regs. tit. 3, §1350 (Jan. 13, 2017).
62. North American Meat Inst. v. Becerra, No. 2:19-cv-8569 (C.D. Cal. Oct. 4, 2019).

IV. Constitutional Challenges to State "Tag-Gag" Laws

In August 2018, the Animal Legal Defense Fund, the ACLU of Missouri, and The Good Food Institute sued all Missouri prosecutors responsible for enforcing Missouri's meat labeling law. A little less than a year later, the same coalition sued the director of the Arkansas Bureau of Standards for a nearly identical law. The plant-based meat producer Turtle Island Foods—better known as Tofurky—is the plaintiff in both lawsuits.[63]

A. First Amendment

The lawsuits in Missouri and Arkansas both allege that these meat-labeling bans violate Tofurky (and other plant-based meat producers') right to free speech. Commercial speech, including words on labels and in marketing, is protected by the First Amendment as long as that speech relates to lawful activity and is not inherently misleading.[64] The U.S. Supreme Court has recognized that there are "material differences between disclosure requirements and outright prohibitions on speech."[65] Under the First Amendment, broad prophylactic rules against truthful claims—exactly how the Missouri and Arkansas laws operate here—are not authorized merely because those claims may have some undefined potential to mislead consumers.[66] Perhaps, this is one reason why First Amendment challenges usually involve compelled—rather than banned—speech, as the following example from Vermont illustrates.

In 2014, Vermont passed a statute that required food sold in Vermont that was made entirely or in part with GMOs to use a label disclaimer stating "partially produced with genetic engineering," "may be produced with genetic engineering," or "produced with genetic engineering."[67] The Grocery Manufacturers Association, Snack Food Association, International Dairy Foods Association, and the National Association of Manufacturers sued the state, alleging the labeling law violated the First Amendment. Ultimately, the district court applied a reasonable relationship test, which only requires that "disclosure requirements [must be] reasonably related to the State's interest in preventing deception of consumers."[68]

Unlike Vermont's GMO labeling law, which involved compelled speech, here there is a ban on an entire category of commercial speech. Because the meat-labeling constitutional lawsuits so far are challenging only bans on truthful commercial speech, not laws that compel speech in the form of disclosures for plant- or cell-based products, *Zauderer v. Office of Disciplinary Counsel*[69] is not the appropriate standard.

A more exacting form of review applies to outright bans on speech. Instead of rational basis scrutiny (applied to compelled commercial speech), *intermediate* scrutiny at least must be applied to prohibitions on commercial speech.[70] This is the standard derived from the well-established principle that disclosure is "constitutionally preferable to outright suppression" in the context of commercial speech.[71]

The standard set forth by *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[72] and the standard that applies to the constitutional challenges to Missouri's and Arkansas' law, states that government can only regulate commercial speech if: (1) the government has a substantial interest in prohibiting the speech; (2) the government's regulation directly advances the asserted government interest; and (3) the regulation is not more extensive than is necessary to serve that interest.[73]

Applying this standard, these laws that restrict the truthful commercial speech of plant-based meat producers should not survive a constitutional challenge based on First Amendment grounds, even if the states' cited justifications of protecting consumers and not the states' livestock producers are accepted as true.

First, the government must show that using meat terminology on plant-based meats is inherently misleading. But there is no evidence that consumers are confused by the use of the word "meat" on plant-based products. Thus, paired with the dearth of enforcement at the state and federal level (from state attorneys general, FDA, and FTC), it seems unlikely that these states will be able to show that this speech is not protected.

So, if Tofurky's speech is protected, then Missouri and Arkansas must demonstrate that their laws advance a substantial government interest. They also must show that the laws are no more restrictive than necessary to sustain the interest they are asserting—in this case, consumer confusion.[74] On December 11, 2019, Judge Kristine G. Baker, the federal distict judge in Arkansas, determined that the state will be unlikely to do just that. Judge Baker determined that the Tofurkey is "likely to prevail on the merits of its First Amendment claim" because the Arkansas law does not directly and materially advance the goal of preventing consumer confusion and is more extensive than necessary to achieve that stated goal.[75]

63. *See* Turtle Island Foods, SPC et al. v. Richardson, No. 2:18-cv-4173 (W.D. Mo. Aug. 27, 2018) and *Turtle Island Foods, SPC v. Soman, No.* 4:19-cv-514 (E.D. Ark. July 22, 2019).
64. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980); Friedman v. Rogers, 440 U.S. 1, 11 (1979).
65. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 650 (1985) (holding that commercial disclosure requirements must compel only truthful, accurate information, not opinions).
66. Ibanez v. Florida Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 143 (1994).
67. 2014 Vt. Acts & Resolves No. 120, §2, codified at 9 Vt. Stat. Ann. §3043(a), (b).
68. *Zauderer*, 471 U.S. at 646, 651.
69. *Id.* at 646.
70. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980).
71. Pearson v. Shalala, 164 F.3d 650, 657 (D.C. Cir. 1999) (citing Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 110 (1990)).
72. 447 U.S. 557 (1980).
73. *Id.*
74. *Central Hudson*, 447 U.S. at 566. This prong of the *Central Hudson* test is "not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield v. Fane, 507 U.S. 761, 770-71 (1993).
75. *Turtle Island Foods SPC v. Soman*, No. 4:19-CV-00514-KGB, 2019 WL 7546141, at **9, 14 (E.D. Ark. Dec. 11, 2019) (The motion for preliminary injunction was based on plaintiff's First Amendment and Due Process Clause claims. The Court considered Tofurky's likelihood of success on the

Moreover, these laws restricting truthful commerical speech do not prevent consumer confusion, but in fact, they are more likely to cause it. If plant-based producers could not use terms like "sausage" or "ham-style" in conjunction with qualifiers that make clear that the products are plant-based, they have no real way of telling consumers what the product will taste like or how to use it. In short, these state laws have the effect (and probably purpose) of making it much more difficult for consumers to determine which plant-based meats to buy and what to expect from the ones that they do purchase.

This commonsense deduction illuminates the true purpose of these laws. They were not adopted and they are not in place to protect consumers, but instead to protect livestock producers by *causing* consumer confusion and by placing plant-based producers at an unfair disadvantage.[76] Finally, these states are implementing widespread bans on an entire category of speech (in a vague and all-encompassing way). They will be unable to address why compelled speech in the form of mandatory disclosures would not cure consumer deception. And given the fact that FDA, FTC, and state consumer protection laws all prohibit marketing and labeling that is false or misleading to consumers, it is even unclear why any additional laws would be necessary to ensure truthful commercial speech, and why they need to specifically target plant-based meats.

B. Due Process: Void for Vagueness

These protectionist laws also violate the Fourteenth Amendment Due Process Clause's prohibition against vague statutes. The laws are anything but "clearly defined,"[77] as anyone of "ordinary intelligence" could not possibly figure out what exact marketing and labeling practices the laws prohibit. To illustrate, Arkansas' statute prohibits the use of any "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," as well as the use of terms "similar" to those historically used in reference to specific agricultural products. Missouri leaves up to 115 individual county prosecutors to determine what conduct, including marketing and labeling practices, would constitute "misrepresenting" a plant- or cell-based product as meat.

In short, these laws tend to "authorize[ ] or even encourage[ ] arbitrary and discriminatory enforcement."[78] The lack of clear guidance on these laws also means that the states—and the prosecutors and agencies assigned with enforcing these laws—have almost absolute discretion to prosecute plant-based companies criminally in Missouri, and with potentially millions of dollars of fines in Arkansas, for conduct that was never even clearly prohibited under the law.[79]

C. Dormant Commerce Clause

The "meatiest"[80] issue remains: the use of the dormant Commerce Clause argument to challenge state protectionist measures against plant-based meat producers. The dormant Commerce Clause has long been a favorite of Big Food in its attempts to overcome state regulations that would improve animal welfare, provide more desired information to consumers, and allow voters to decide what food processes are too cruel or unsafe to stomach.

The Commerce Clause gives Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[81] The Supreme Court has since read into the clause a "dormant" provision that prohibits states from passing legislation that discriminates against or excessively burdens interstate commerce.[82] As noted above, animal interests have used this provision to challenge California's and Massachusetts' egg and crate laws[83] as well as California's Proposition 12 that sets certain humane standards for animal producers.[84]

The case law surrounding the dormant Commerce Clause is anything but simple. Courts have used two different tests to determine whether a law violates the clause. The theory is that if a law discriminates against out-of-state commerce on its face or in its effect, the law receives very rigorous review. But if a law burdens interstate commerce in a nondiscriminatory way, courts should apply a lesser balancing test.[85]

Under the first, stricter test, the government bears the burden of proving that the challenged law (1) serves a legitimate local purpose, and (2) such purpose cannot be adequately served by reasonable, nondiscriminatory, alternative means. In practice, this standard has been said to amount to per se invalidity because it is near impossible to satisfy. Under *Pike v. Bruce Church*[86] balancing, however, one needs to weigh the burden on interstate commerce against any putative local benefit. There is an argument that the Missouri and Arkansas statutes, as well as other state laws passed in 2019, are discriminatory and should be subject to the stricter test.

To begin, extrinsic evidence here, including legislative history and the extent these states' economies rely on animal livestock producers, shows a discriminatory effect on out-of-state commerce. Court should apply the "stricter" test if discrimination is evidenced: (1) when the state or local law discriminates

merits of its First Amendment claim, and did not reach the merits of Tofurky's Fourteenth Amendment Claim.).

76. *See supra* Part I.
77. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); *see also, e.g.*, Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1308 (8th Cir. 1997).
78. Hill v. Colorado, 530 U.S. 703, 732 (2000) (citing City of Chicago v. Morales, 527 U.S. 41, 56–67 (1999)). Indeed, the Missouri Attorney General has taken the position that the law does not apply to plaintiff Tofurky's labels because they are non-misleading, while the director of the Arkansas Bureau of Standards has taken the position that Tofurky's labels are misleading to consumers.
79. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1232 (2018) (Gorsuch, J., concurring).
80. Note that this actually should be an acceptable vegan term, since "mete" originally meant "food, nourishment, sustenance." *See* Etymonline.com.
81. U.S. Const. art. 1, §8, cl. 3.
82. Gibbons v. Ogden, 22 U.S. 1 (1824); Willson v. Black-Bird Creek Marsh Co., 27 U.S. 245 (1829).
83. Mass. Gen. Laws Ann. ch. 129 app., §1-1 (West 2017); Cal. Code Regs. tit. 3, §1350 (West 2017).
84. North Am. Meat Inst. v. Becerra, No. 2:19-cv-8569 (C.D. Cal. Oct. 4, 2019).
85. Pike v. Bruce Church, 397 U.S. 137, 142 (1970).
86. 397 U.S. 137 (1970).

against out-of-state commerce on its face,[87] or (2) when the state or local law is not discriminatory on its face but extrinsic evidence shows a discriminatory effect on out-of-state commerce.[88] In these types of cases, the burden of proof would fall on Missouri or Arkansas to demonstrate a legitimate objective that cannot be accomplished by alternative means.

Although these meat-labeling laws may appear facially neutral, they have the effect of burdening interstate sales and discriminating against such sales. This can be seen in *Hunt v. Washington State Apple Advertising Comm'n*.[89] Because these bans on commercial speech apply even to companies outside of Missouri or Arkansas, interstate commerce is burdened by the statutes. Moreover, Arkansas and Missouri are leading producers of animal products, while most vegan meat companies do not call these states home, or if they do, they account for a tiny percentage of the state's economy. These laws function to protect the main economic interests and heavy political hitters in the states.

More obviously, there are a number of nondiscriminatory alternatives to these laws that are already in place that are designed, and have for many decades, protected any state interest in preventing consumer deception/confusion. For example, Arkansas and Missouri both have state consumer protection laws that prohibit misleading consumer goods from being sold. All other states have similar provisions.[90]

Under Missouri's and Arkansas' laws, however, plant-based meat companies face burdens that are excessive as compared to any local benefits in Arkansas or Missouri in the form of protecting against consumer confusion. The far reach and broad drafting of these laws means that plant-based meat companies could conceivably be required to change their labels and marketing nationwide just because of one state's law. Or these companies could be required to stop selling in the entire region surrounding Arkansas or Missouri, even though preventing Arkansas or Missouri consumers from being exposed to a company's website or online marketing would be an impossible task. As Arkansas legislators admitted, these laws are in fact being passed in order to create an untenable patchwork of laws and spur federal action.[91]

This burdensome ban on speech is similar to one that has been found unconstitutional in the context of other state statutes. In *Healy v. Beer Institute*,[92] the Supreme Court held that

> the practical effect of the statute must be valuated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.[93]

Here, the consequences of these plant-based meat-labeling bans are already apparent, since similar versions of the laws have already been in other states. At present, all plant-based meat companies must comply with federal laws in addition to at least seven other distinct state laws laying out how they can and cannot label and market their products. Simply figuring out how to comply with these laws, or change marketing and packaging practice in an attempt to comply with them, may drive small plant-based meat producers out of business, prevent them from coming to market, economically decimate existing producers, and essentially eviscerate any purported benefit to consumers. In addition, because the laws may actually create more convoluted labeling practices, it is well within the realm of possibility that these laws actually create the harm they purport to protect against—consumer confusion.

V. Conclusion

First Amendment, Due Process, and dormant Commerce Clause litigation is usually found in the arsenals of animal agribusiness in their efforts to eschew pro-animal labeling requirements and consumer labeling initiatives.[94] Perhaps, because of this reality, some have suggested that the meat-labeling challenges on behalf of plant-based meat producers run the risk of falling on the side of, or further encouraging, bad case law.

The Missouri and Arkansas challenges are sufficiently different in their factual background and necessarily the applicable legal standards from laws that require more humane treatment of animals that this should not be a grave concern. In Missouri and Arkansas, the state interest cited is that of preventing consumer confusion. This flies in the face of the dearth of any evidence of consumer confusion and even commonsense reading of the labels that would be affected.

We can contrast this purported state interest with that of California and Massachusetts in protecting public health and preventing animal cruelty. While states have a legitimate interest in preventing against consumer confusion, there is no evidence of any existing in the plant-based meat context. But animal treatment laws are backed by concrete evidence that support the notion that the laws are necessary to protect consumers' health and safety from the sale of animal products that are produced in a way that worsens food safety, as well as the lives of animals. Moreover, states also have a legitimate interest in preventing animal cruelty.

Lastly, and perhaps most importantly, nondiscriminatory alternatives are often unavailable in animal treatment laws. This is simply not the case where required disclaimers or individual enforcement action against individual bad actors would equally serve the purported state interest of preventing against consumer confusion.

87. *See, e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); C&A Carbone v. Clarkstown, 511 U.S. 383, 24 ELR 20815 (1994); Hughes v. Oklahoma, 441 U.S. 322, 9 ELR 20360 (1979); and City of Philadelphia v. New Jersey, 437 U.S. 617, 8 ELR 20540 (1978).
88. *See, e.g.*, Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333 (1977); Bacchus Imports v. Dias, 468 U.S. 263 (1984).
89. 432 U.S. 333 (1977).
90. *See supra* Part I.B.
91. In Arkansas, when a senator asked how the law would affect goods distributed in interstate commerce, the law's primary sponsor, Senator Maloch, said that the purpose of the law is to spur federal regulation. *See* Third Senate Reading, Mar. 13, 2019, 1:48:30.
92. 491 U.S. 324, 336 (1989).
93. *Id.* at 336.
94. *E.g.*, Bethany Gullman, *Unburdening the Farm: A Dormant Commerce Clause Challenge to Conflicting Standards in Agricultural Production*, 43 Mitchell Hamline L. Rev. 5 (2017).