

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

Introduction

Plant-based meat has secured a foothold in the U.S. market and is increasingly popular among consumers. The rising success of plant-based meat and the looming competition of cell-cultured meat has sparked state legislation censoring the words that can be used on labels for these foods. Lawsuits have been brought in five states, challenging label censorship laws as an unconstitutional infringement of producers’ First Amendment right to free speech, among other claims. The Animal Legal Defense Fund (ALDF), the Good Food Institute (GFI), and the Plant Based Foods Association (PBFA) are working alongside other organisations to challenge unconstitutional and anti-competitive laws and to protect plant-based meat producers’ rights to communicate clearly with consumers.

This paper provides an overview of the current state of play of plant-based meat labelling in the U.S. Part I provides an introduction to the plant-based meat industry. Part II provides an overview of recently introduced state labelling censorship laws. Part III outlines lawsuits challenging these laws. Part IV touches on aspects of the federal landscape relevant to plant-based food labeling, and Part V offers some concluding thoughts regarding the future of plant-based meat labeling.

Part I – The plant-based meat industry

1.1 What is plant-based meat?

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

Plant-based meat is designed to be a functional meat replacement. It emulates the appearance, taste and texture of animal-derived protein but is entirely plant-based.¹ Examples include the Beyond Burger, the Impossible Burger, and the many varieties of plant-based ham, bacon, chicken and other meat alternatives commonly found in grocery stores.²

1.2 A foothold in the market

During 2019, plant-based food³ retail sales in the U.S. increased five times faster than total food sales for the second consecutive year.⁴ In 2019, U.S. plant-based food retail sales reached \$5 billion, representing an eleven percent increase from 2018 and a 29 percent increase from 2017.⁵ By comparison, total U.S. retail food sales in 2019 increased by just two percent from 2018 and four percent from 2017.⁶

Plant-based milk dominates as the largest and “most developed” plant-based food category, with \$2 billion in retail sales in 2019.⁷ However, with retail sales reaching \$939 million in 2019, plant-based meat is one of the rising stars of the plant-based food world.⁸ U.S. retail sales of plant-based meat increased by eighteen percent from 2018 to 2019, and by 38 percent from 2017 to 2019,⁹ and acceleration is expected to continue.

¹ The Good Food Institute (GFI). (2020). *2019 U.S. State of the Industry Report: Plant-based Meat, Eggs, and Dairy*, at 6, <https://gfi.org/resource/plant-based-meat-eggs-and-dairy-state-of-the-industry-report/>.

² The GFI’s plant-based product database contains many of these options, <http://goodfoodscorecard.org/products/>.

³ In this context, “plant-based food” includes: plant-based meat, egg, and milk substitutes; tofu and tempeh; plant-based meals; plant-based dairy alternatives such as plant-based cheese, yoghurt, butter, ice-cream, spreads, condiments, and dressings. It does not include inherently plant-based foods such as vegetables and legumes.

⁴ GFI. (2020). *Plant-Based Retail Market Overview*, <https://www.gfi.org/marketresearch>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ The GFI identifies plant-based eggs as the “least developed, but fastest-growing category” of plant-based food. *Id.*

⁹ *Id.*

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

Although the plant-based meat category currently represents only one percent of the total retail meat market, experts believe it has the potential to reach market share parity with the plant-based milk category, which now accounts for fourteen percent of the total retail milk market.¹⁰

Vegetarian burgers¹¹ and other mock meats have been available for decades but traditionally have been marketed towards vegetarians and vegans.¹² The market for the newer generation of plant-based products, which are designed to be as “meaty” as possible, largely comprises omnivores and flexitarians.¹³ Indeed, both Beyond Meat and Impossible Foods report that over 90 percent of consumers who purchase their products also consume animal products.¹⁴ This mirrors data gathered from quick service restaurants (fast food establishments), indicating that 95 percent of plant-based burger consumers had also purchased a beef burger within the past year.¹⁵ Given that only around five percent and three percent of Americans self-identify as vegetarians and vegans respectively,¹⁶ continued growth of the plant-based meat industry will likely require increased uptake of these products by omnivores.

1.3 *Cell-cultured meat*

¹⁰ *Id.*

¹¹ Smith, K. Annabelle. (19 March 2014). The History of the Veggie Burger. *Smithsonian Magazine*, <https://www.smithsonianmag.com/arts-culture/history-veggie-burger-180950163/>.

¹² Prichet, D. (2 September 2017). The Rise of Mock Meat: How Its Story Reflects America’s Ever-Changing Values. *NPR*, <https://www.npr.org/sections/thesalt/2017/09/02/547899191/the-rise-of-mock-meat-how-its-story-reflects-americas-ever-changing-values>.

¹³ GFI. (2020). *2019 U.S. State of the Industry Report: Plant-based Meat, Eggs, and Dairy*, at 18, 23, 41, 47, & 55, <https://gfi.org/resource/plant-based-meat-eggs-and-dairy-state-of-the-industry-report/>.

¹⁴ Todd, C. L. (25 July 2019). How Impossible Foods and Beyond Meat Convinced Meat-Lovers to Eat Plant Burgers. *SELF*, <https://www.self.com/story/impossible-burger-beyond-meat>.

¹⁵ GFI. (2020). *2019 U.S. State of the Industry Report: Plant-based Meat, Eggs, and Dairy*, at 41, <https://gfi.org/resource/plant-based-meat-eggs-and-dairy-state-of-the-industry-report/>.

¹⁶ Gallup. (2018). *Nutrition and Food*, <https://news.gallup.com/poll/6424/Nutrition-Food.aspx>.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

Cell-cultured meat is a fundamentally different product to plant-based meat, the latter being the focus of this paper. However, cell-cultured meat is touched on here as it will be a part of the future landscape of ‘alternative’ meat. It also comes within the purview of many of the recently introduced state label censorship bills discussed in Part II of this paper.

Cell-cultured meat products¹⁷ are made from actual animal tissue, using cells extracted from an animal and grown in a laboratory culture.¹⁸ While still a nascent industry, cell-cultured meat promises a range of environmental, public health, and animal welfare benefits,¹⁹ as well as greater food security.²⁰ Challenges remain in relation to regulatory approval and scaling up production in a cost-efficient and environmentally sustainable way.²¹ However, technology to produce cell-cultured meat is developing rapidly and investment in cell-cultured meat companies is increasing.²² Cell-based fish is also poised for dynamic growth.²³

¹⁷ There are various alternative terms for cell-cultured meat, including: cell-based meat, lab-grown meat, clean meat., slaughter-free meat, cultured meat, synthetic meat, and *in vitro* meat.

¹⁸ Specht, L. (January 2018). Is the future of meat animal-free? *Food Technology*, 72(1), <https://www.ift.org/news-and-publications/food-technology-magazine/issues/2018/january/features/cultured-clean-meat#anchor-55d1bf45-d636-4eb6-9150-3bfc4f8e34f8>.

¹⁹ GFI. (2018). *Growing Meat Sustainably: The Clean Meat Revolution*, <https://www.gfi.org/images/uploads/2018/10/CleanMeatEnvironment.pdf>.

²⁰ Specht, L. (January 2018). Is the future of meat animal-free? *Food Technology*, 72(1), <https://www.ift.org/news-and-publications/food-technology-magazine/issues/2018/january/features/cultured-clean-meat#anchor-55d1bf45-d636-4eb6-9150-3bfc4f8e34f8>.

²¹ GFI. (2020). *2019 State of the Industry Report: Cultivated Meat*, <https://gfi.org/resource/cultivated-meat-eggs-and-dairy-state-of-the-industry-report/>.

²² GFI. (2020). *2019 State of the Industry Report: Cultivated Meat*, <https://gfi.org/resource/cultivated-meat-eggs-and-dairy-state-of-the-industry-report/>. See also GFI. (18 March 2021). *Record \$3.1 billion invested in alt proteins in 2020 signals growing market momentum for sustainable proteins*, https://gfi.org/blog/2020-state-of-the-industry-highlights/?utm_source=Newsletter&utm_medium=Email&utm_campaign=March_19_Newsletter (“Cultivated meat companies received more than U.S \$360 million in investments in 2020, which is six times the amount raised in 2019 and 72 percent of the amount raised in the industry’s history (2016 – 2020)).

²³ Bedingfield, W. (23 March 2021). Lab-grown tuna steaks could reel in our overfishing problem. *Wired*, <https://www.wired.co.uk/article/blue-nalu-lab-grown-fish>; Leschin-Hoar, C. (5 May 2019) *Seafood Without the Sea: Will Lab-Grown Fish Hook Consumers?* *NPR*, <https://www.npr.org/sections/thesalt/2019/05/05/720041152/seafood-without-the-sea-will-lab-grown-fish-hook-consumers>.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

In December 2020, the Singapore Food Agency granted regulatory approval to U.S. company Eat Just to sell its cell-based ‘chicken bites.’²⁴ Hailed as “a watershed moment for the future of meat,”²⁵ Singapore has become the first country in the world to commercialize cell-based meat products and approve them for human consumption.

1.4 *Comparative impacts of the meat and meatless industries*

Consumers are increasingly motivated to eat plant-based meat as a result of ethical, health and environmental concerns, changing taste preferences, or just sheer curiosity.²⁶

Globally, an estimated 70 billion terrestrial animals are killed for food every year.²⁷ While official data do not count aquatic animals as individuals,²⁸ it is estimated that between 51 and 167 billion farmed fish²⁹ and up to three trillion wild-caught fish³⁰ are killed for food annually. Animals

²⁴ Scattergood, G. (2 December 2020). World first: Eat Just gets regulatory approval for cell-based chicken ingredient in Singapore, *Food Navigator*, <https://www.foodnavigator-usa.com/Article/2020/12/02/World-first-Eat-Just-gets-regulatory-approval-for-cell-based-chicken-ingredient-in-Singapore>.

²⁵ Bryant, C. (4 December 2020). Singapore approves cell-cultured chicken bites – who will be the first to try them? *The Conversation*, <https://theconversation.com/singapore-approves-cell-cultured-chicken-bites-who-will-be-the-first-to-try-them-151388>.

²⁶ Olayanju, J.B. (30 July 2019). Plant-based Meat Alternatives: Perspectives on Consumer Demands and Future Directions. *Forbes*, <https://www.forbes.com/sites/juliabolayanju/2019/07/30/plant-based-meat-alternatives-perspectives-on-consumer-demands-and-future-directions/#7bcead3a6daa>; Byington, L. (4 February 2020). Study: Consumers try plant-based meat because they’re curious. *Food Dive*, <https://www.fooddive.com/news/study-consumers-try-plant-based-meat-because-theyre-curious/571615/>.

²⁷ Faunalytics. (10 October 2018). *Global Animal Slaughter Statistics and Charts*, <https://faunalytics.org/global-animal-slaughter-statistics-and-charts/>. (This includes cattle, chickens, goats, pigs and sheep).

²⁸ Official data estimates global fish production in 2018 to be 178.5 million tons – 96.4 million tons from capture fisheries and 82.1 million tons from aquaculture (where ‘fish’ includes fish, crustaceans, molluscs and other aquatic animals but excludes aquatic mammals, reptiles, and aquatic plants). Food and Agriculture Organization of the United Nations (FAO). (2020). *The State of World Fisheries and Aquaculture 2020. Sustainability in action*, at 3, www.fao.org/3/ca9229en/ca9229en.pdf.

²⁹ Fishcount. (2019). *Numbers of Farmed Fish Slaughtered Each Year*, <http://fishcount.org.uk/fish-count-estimates-2/numbers-of-farmed-fish-slaughtered-each-year>.

³⁰ Fishcount. (2019). *Numbers of Fish Caught From the Wild Each Year*, <http://fishcount.org.uk/fish-count-estimates-2>. (An estimated 0.79 to 2.3 trillion fish are caught from the wild every year. This estimate excludes fish caught illegally, or caught as bycatch and discarded).

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

raised in intensive confinement such as battery cages, farrowing crates, and in cages on fish farms are deprived the opportunity to exhibit their natural behaviors, routinely undergo painful physical alterations without pain relief, suffer chronic stress, and are subjected to inhumane handling, transport, and slaughter.³¹ Transitioning to plant-based meat alternatives is one way to reduce the scale of this suffering.

In terms of public health impacts, industrialized animal farming contributes to food-borne infections, antibiotic resistance, and zoonotic diseases.³² Between 70 and 80 percent of antibiotics sold in the U.S. are consumed by animals farmed for human consumption.³³ Plant-based meat production does not require the use of antibiotics, thereby helping change our trajectory towards antibiotic-resistant superbugs and reducing the risk of future pandemics.³⁴

The contribution of animal agriculture to the climate crisis is well documented.³⁵ According to the Food and Agriculture Organization of the United Nations, livestock accounts for 14.5 percent of all anthropogenic greenhouse gas emissions, with cattle producing around 65 percent of livestock emissions.³⁶ A 2018 study of the environmental impact of food production found that the “impacts of the lowest-impact animal products typically exceed those of vegetable

³¹ Pew Commission on Industrial Farm Animal Production. (2008). Putting Meat on the Table: Industrial Farm Animal Production in America, at 30-39, https://www.pewtrusts.org/-/media/legacy/uploadedfiles/phg/content_level_pages/reports/pcfifapfinalpdf.pdf.

³² *Id.*, at 10-21.

³³ Hakim, D. (23 March 2018). At Hamburger Central, Antibiotics for Cattle That Aren’t Sick. *The New York Times*, <https://www.nytimes.com/2018/03/23/business/cattle-antibiotics.html>.

³⁴ Specht, L. (13 March 2020). Modernizing Meat Production Will Help Us Avoid Pandemics. *Wired*, <https://www.wired.com/story/opinion-modernizing-meat-production-will-help-us-avoid-pandemics/>.

³⁵ Institute for Agriculture & Trade Policy (IATP). (7 November 2017). New research shows the industrial livestock industry is creating a climate crisis. IATP, <https://www.iatp.org/new-research-shows-industrial-livestock-industry-creating-climate-crisis>.

³⁶ Gerber, P.J., Steinfeld, H., Henderson, B., et al. (2013). Tackling Climate Change Through Livestock: A Global Assessment of Emissions and Mitigation Opportunities. Food and Agriculture Organization of the United Nations (FAO), at 15 & 23, <http://www.fao.org/news/story/en/item/197623/icode/>.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

substitutes,”³⁷ leading the study’s co-author to conclude that “[a]voiding meat and dairy products is the single biggest way to reduce your environmental impact on the planet.”³⁸

An analysis of the Impossible Burger found that its carbon footprint is 89 percent smaller than a beef burger; the plant-based burger uses 87 percent less water, 96 percent less land, and results in 92 percent less water contamination than a beef burger.³⁹ A comparison of the environmental impact of the Beyond Burger with a similar beef product revealed that the Beyond Burger generated 90 percent less greenhouse gas emissions, required 46 percent less energy, and had significantly less impact on land and water use than its beef counterpart.⁴⁰ Other analyses indicate that plant-based meat production uses 47 to 99 percent less land, 72 to 99 percent less water, emits 30 to 90 percent fewer greenhouse gases, and causes 51 to 91 percent less water pollution compared to meat production.⁴¹

In the aquatic realm, increasing awareness of the environmental impacts of capture fisheries⁴² and aquaculture,⁴³ along with growing concerns about the health implications of toxins

³⁷ Poore, J. & Nemecek, T. (1 June 2018). Reducing food’s environmental impacts through producers and consumers. *Science*, Vol. 360, Issue 6392, at 987-992, <https://science.sciencemag.org/content/360/6392/987>.

³⁸ Carrington, D. (31 May 2018). Avoiding meat and dairy is ‘single biggest way’ to reduce our impact on Earth. *The Guardian*, <https://www.theguardian.com/environment/2018/may/31/avoiding-meat-and-dairy-is-single-biggest-way-to-reduce-your-impact-on-earth>.

³⁹ Peters, A. (20 March 2019). Here’s how the footprint of the plant-based Impossible Burger compares to beef. *Fast Company*, <https://www.fastcompany.com/90322572/heres-how-the-footprint-of-the-plant-based-impossible-burger-compares-to-beef>.

⁴⁰ Heller, M.C. & Keoleian, G.A. (14 September 2018). *Beyond Meat’s Beyond Burger Life Cycle Assessment: A detailed comparison between a plant-based and an animal-based protein source* (Report No. CSS18-10), at 7, 27-28 & 36, <http://css.umich.edu/sites/default/files/publication/CSS18-10.pdf>.

⁴¹ GFI. (2019). *Plant-Based Meat For A Growing World*, <https://gfi.org/wp-content/uploads/2021/02/GFI-Plant-Based-Meat-Fact-Sheet-Environmental-Comparison.pdf>.

⁴² National Geographic. (17 March 2021). *Study in Nature: Protecting the Ocean Delivers a Comprehensive Solution for Climate, Fishing and Biodiversity*, <https://blog.nationalgeographic.org/2021/03/17/study-in-nature-protecting-the-ocean-delivers-a-comprehensive-solution-for-climate-fishing-and-biodiversity/>.

⁴³ Harvey, F. (11 February 2021). Global salmon farming harming marine life and costing billions in damage. *The Guardian*, <https://www.theguardian.com/environment/2021/feb/11/global-salmon-farming-harming-marine-life-and-costing-billions-in-damage>.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

such as mercury⁴⁴ and microplastic contamination⁴⁵ in fish, have contributed to a recent surge in demand for plant-based fish and shellfish products.⁴⁶

The past year has seen a record-breaking \$3.1 billion invested in the alternative protein industry⁴⁷ – triple the amount invested in any single previous year.⁴⁸ Indeed, “[a]s the world grapples with a global pandemic, the prospect of meat produced with zero risk of contributing to zoonotic disease transmission or antibiotic resistance has even greater relevance.”⁴⁹

Part II – State label censorship laws

It is against this backdrop that the U.S. has seen a wave of states introducing laws that restrict the use of certain descriptors on product labels.⁵⁰ Missouri was the first state to enact such

⁴⁴ McGlade, J. & Landrigan, P. (1 February 2021). Why ocean pollution is a clear danger to human health. *The Conversation*, <https://theconversation.com/why-ocean-pollution-is-a-clear-danger-to-human-health-152641>.

⁴⁵ McInturf, A. & Savoca, M. (10 February 2021). Hundreds of fish species, including many that humans eat, are consuming plastic. *The Conversation*, <https://theconversation.com/hundreds-of-fish-species-including-many-that-humans-eat-are-consuming-plastic-154634>.

⁴⁶ Simke, A. (21 October 2020). Everything You Need To Know About Plant-Based Seafood, <https://www.forbes.com/sites/ariellasmike/2020/10/21/everything-you-need-to-know-about-plant-based-seafood/?sh=60ef5c207655>.

⁴⁷ This includes plant-based meat, dairy, and egg (<https://gfi.org/plant-based/>); cultivated meat (<https://gfi.org/cultivated/>); and fermentation (<https://gfi.org/fermentation/>).

⁴⁸ GFI. (18 March 2021). *Record \$3.1 billion invested in alt proteins in 2020 signals growing market momentum for sustainable proteins*, https://gfi.org/blog/2020-state-of-the-industry-highlights/?utm_source=Newsletter&utm_medium=Email&utm_campaign=March_19_Newsletter.

⁴⁹ *Id.*

⁵⁰ Such laws and conflicts over the labeling of plant-based meat products are not unique to the U.S. For example, in 2019, the European Parliament’s Committee on Agriculture and Rural Development adopted a report which, among other things, sought to ban the use of meat nomenclature such as “steak,” “sausage,” “escalope,” “burger” and “hamburger” on plant-based products. Boffey, D. (4 April 2019). ‘Veggie discs’ to replace veggie burgers in EU crackdown on food labels. *The Guardian*, <https://www.theguardian.com/food/2019/apr/04/eu-to-ban-non-meat-product-labels-veggie-burgers-and-vegan-steaks>. However, in October 2020, the European Parliament rejected this proposal, stating that such a ban would undermine the EU’s efforts to promote plant-based diets as part of its Farm to Fork Strategy to improve the sustainability and nutrition of the continent’s food. Humane Society International. (23 October 2020). *MEPs thwart meat industry attempts to ban use of ‘meat’ names for plant-based foods*, <https://www.hsi.org/news-media/meps-thwart-meat-industry-attempts-to-ban-use-of-meat-names-for-plant-based-foods/>. There are tensions in Australia and New Zealand over the use of terms such as “meat” and “milk” on plant-

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

a law, in August 2018.⁵¹ Senate Bill (SB) 627 amended the Missouri Meat Advertising Law to prohibit “misrepresenting a product as meat [any edible portion of livestock, poultry or captive cervid carcass, or part thereof] that is not derived from harvested production livestock [cattle, calves, sheep, swine, and other listed animals raised in confinement for human consumption] or poultry [any domesticated bird intended for human consumption].”⁵²

More than 20 other states have since introduced so-called “truth in labeling” laws,⁵³ and around a dozen more have attempted but failed to enact such laws.⁵⁴ These statutes prescribe requirements as to the type of food that can be advertised using specific words or phrases and generally provide that it is unlawful to represent a food product as meat unless it satisfies a definition prescribed by statute. The statutory definition of “meat” is typically a variation of “any

based food labels, with concerns raised by “some stakeholders” that such labeling “may be misleading to consumers.” There are also “claims that manmade and synthetic foods are trading on the intellectual properties of primary producers and appealing to the unconscious values consumers attach to natural products like dairy and meat products.” Food Safety Australia New Zealand. (15 November 2019). *Australian and New Zealand Ministerial Forum on Food Regulation Communiqué of outcomes*,

<https://foodregulation.gov.au/internet/fr/publishing.nsf/Content/forum-communique-2019-November>. In 2017, the Poultry Industry Association New Zealand brought a Commerce Commission complaint against Sunfed Meats in relation to the labelling of the company’s ‘chicken free chicken.’ The labeling was found to meet legislative requirements with regard to how the product is described. Nichol, T. (16 November 2017). Sunfed Meats taken to Commerce Commission over labelling. *NZ Herald*, <https://www.nzherald.co.nz/nz/sunfed-meats-taken-to-commerce-commission-over-labelling/TH3PALOJF46EFQFVQDIKTKPHZ4/>.

⁵¹ Meyer, Z. (28 August 2018). Missouri becomes first state to regulate use of the word ‘meat.’ *USA Today*, <https://www.usatoday.com/story/money/2018/08/28/animal-meat-missouri-law/1114285002/>.

⁵² Revised Statutes of Missouri (RSMo) § 265.494(7), <https://www.senate.mo.gov/18info/pdf-bill/tat/SB627.pdf>.

⁵³ This does not include bills that censor plant-based dairy labels. *See, e.g.*: The National Agricultural Law Center. (November 2019). *Defining “Meat”: Enacted Laws Regulating Labelling*, <https://nationalaglawcenter.org/wp-content/uploads/2019/11/Defining-Meat-Enactments.pdf>; The National Agricultural Law Center. (November 2019). *Defining “Meat”: Proposed Laws Regulating Labelling*, <https://nationalaglawcenter.org/wp-content/uploads/2019/11/Defining-Meat-Proposals.pdf>; and Gutierrez D.A. & Cregger, B. (2020). 2019 State Legislative Review, *Animal Law Review*, Vol. 26, Issue 2, at 512-515, https://law.lclark.edu/law_reviews/animal_law_review/.

⁵⁴ States with failed bills in 2019 and 2020 include: Arizona HB 2604; Colorado HB 19-1102; Hawaii SB 1425; Illinois HB 2556; Indiana HB 1414; Iowa SB 404; Nebraska LB 14 & LB 594; New Mexico SB 319; Tennessee SB 304 & HB 1178; Texas HB 3799 & SB 2035; Vermont HB 233; and Virginia HB 2274.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

edible portion of a livestock carcass”⁵⁵ and food is deemed to be “misbranded” if it is labeled as meat but is not derived from a livestock carcass. The language and scope of these laws are broadly comparable across states, but it is worth noting a few points of commonality and difference.

2.1 Disclaimers (Qualifiers)

A handful of states allow the use of meat nomenclature on plant-based meat packaging, provided the label includes a disclaimer or qualifier that discloses the product is plant-based.

For example, Oklahoma House Bill (HB) 3806, which creates the Oklahoma Meat Consumer Protection Act,⁵⁶ provides that the use of meat terms on plant-based meat labels will not violate the Act, provided the label “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.”⁵⁷ Similarly, Georgia SB 211 amends the Official Code of Georgia Annotated to make it unlawful to label, advertise, or otherwise represent plant-based products “as meat or any product from an animal” without also “displaying... prominently and conspicuously on the front of the package” the term “vegetarian,” “veggie,” “vegan,” “plant based,” or another similar term indicating that the product is plant-based.⁵⁸

⁵⁵ The definition of “meat” in these state bills is generally consistent with, or imported from, the Federal Meat Inspection Act, 9 CFR § 301.2, which defines “meat” as “[t]he part of the muscle of any cattle, sheep, swine, or goats which is skeletal or which is found in the tongue, diaphragm, heart, or esophagus, with or without the accompanying and overlying fat, and the portions of bone..., skin, sinew, nerve, and blood vessels which normally accompany the muscle tissue and that are not separated from it in the process of dressing...”, <https://www.govinfo.gov/app/details/CFR-2012-title9-vol2/CFR-2012-title9-vol2-sec301-2>.

⁵⁶ Morning Ag Clips. (13 May 2020). *Oklahoma Senate votes on beef bills*, <https://www.morningagclips.com/oklahoma-senate-votes-on-beef-bills/> (reporting that HB 3806 “cleared the Senate with a unanimous vote” on 12 May 2020).

⁵⁷ Oklahoma Statutes (OK Stat) § 2-5-107(C)(1), [http://webserver1.lsb.state.ok.us/cf_pdf/2019-20 INT/hB/HB3806 INT.PDF](http://webserver1.lsb.state.ok.us/cf_pdf/2019-20%20INT/hB/HB3806%20INT.PDF).

⁵⁸ Official Code of Georgia Annotated (O.C.G.A) § 26-2-152(c)(2), <https://www.legis.ga.gov/api/legislation/document/20192020/183958>.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

Kansas HB 2204⁵⁹ and Washington SB 6329⁶⁰ are more prescriptive. Both stipulate that a food shall be deemed to be misbranded if it is a “meat analog”⁶¹ and its labeling utilizes an “identifiable meat term”⁶² and does not have a disclaimer in the same font, style and size, immediately before or after the identifiable meat team, stating “this product does not contain meat” or alternatively, in the Kansas statute, “meatless,” or “meat-free.”

Texas HB 2277 goes a step further, prohibiting the use of “an image, depiction, or graphic of a livestock animal” on the label of a product that is not derived from a livestock animal,⁶³ unless it is labeled with the word “imitation” immediately followed by the name of the product imitated and, as applicable, the words “this product does not contain animal protein,” “meatless,” “meat free,” or “egg free.”⁶⁴

The Kansas and Washington statutes also provide that if a product is clearly labeled as “imitation” – that is, if “its label bears, in type of uniform size and prominence the word ‘imitation’ and, immediately thereafter, the name of the food imitated” – it complies with the statute and is therefore not deemed to be misbranded.⁶⁵

⁵⁹ Kansas Statutes Annotated (K.S.A.) § 65-665(m),

http://www.kslegislature.org/li/b2021_22/measures/documents/hb2204_00_0000.pdf.

⁶⁰ Revised Code of Washington (RCW) § 15.130.210(1), <http://lawfilesexxt.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate/Bills/6329.pdf> - page=1.

⁶¹ Defined in K.S.A. § 65-656(ee) as “any food that approximates the aesthetic qualities, primary texture, flavor and appearance, or the chemical characteristics of any specific type of meat, meat food product, poultry product or poultry food product, but does not contain any meat, meat food, poultry product or poultry food product.”

⁶² Defined in K.S.A. § 65-656(ff) and RCW § 15.130.110(20) to include, but not limited to, “terms such as meat, beef, pork, poultry, chicken, turkey, lamb, goat, jerky, steak hamburger, burger, ribs, roast, bacon, bratwurst, hot dog, ham, sausage, tenderloin, wings, breast and other terms for food that contain any meat, meat food product, poultry product or poultry food product.”

⁶³ Texas HB 2277, amending Section 1, Subchapter B, Chapter 18, Agriculture Code by adding § 18.0521(2), <https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB02277L.pdf#navpanes=0>.

⁶⁴ Texas HB 2277, § 18.0521(2)(A) and (B).

⁶⁵ K.S.A. § 65-665(c) and RCW § 15.130.210(2).

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

2.2 *Cell-cultured meat*

While most of the statutes apply to both plant-based meat and cell-cultured meat, some apply only to cell-cultured meat.⁶⁶ That so many states are pre-emptively restricting the labeling of products not yet on the market may signal the emerging threat this technology represents to the meat industry.

2.3 *Insect-based products*

Several states include insect products in their label censorship laws. Interestingly, three states – Maryland SB 188,⁶⁷ Mississippi SB 2922,⁶⁸ and Nebraska LB 594⁶⁹ – categorize insect protein together with plant-based and cell-cultured meat. These states prohibit the use of meat nomenclature on insect-based product labels.⁷⁰

In contrast, Wisconsin SB 464 draws a line between insects and animals on the one hand, and plant-based and cell-cultured products on the other hand. While “insect” is defined separately from “animal,” insects and (other) animals are treated similarly for the purposes of the labeling

⁶⁶ For example, Alabama HB 518 (<https://legiscan.com/AL/text/HB518/id/2049764>), Kentucky HB 311 (<https://legiscan.com/KY/text/HB311/id/1983843>), Michigan HB 4947 (<http://www.legislature.mi.gov/documents/2019-2020/billintroduced/House/pdf/2019-HIB-4947.pdf>), and North Dakota HB 1400 (<https://legiscan.com/ND/text/1400/id/1948923>) do not mention plant-based meat, whereas South Carolina HB 4245 (Act No. 79) explicitly excludes “plant-based meat substitutes” from its ambit – see South Carolina Code (SC Code) § 47-17-520 (<https://legiscan.com/SC/text/H4245/id/2013234>).

⁶⁷ Annotated Code of Maryland (Md. Code) § 21-210(14), <https://legiscan.com/MD/text/SB188/2020>.

⁶⁸ Mississippi Code (MS Code) § 75-35-15(4), <https://legiscan.com/MS/text/SB2922/id/1948120>.

⁶⁹ Nebraska LB 594, which is currently stalled in the legislature, proposes to amend Nebraska Revised Statutes (NE Code) § 87-302(a)(23), <https://legiscan.com/NE/bill/LB594/2019>.

⁷⁰ For example, Maryland SB 188, which repeals and re-enacts the Annotated Code of Maryland (Md. Code) § 21-210(14): “A food is misbranded if ... it is offered for sale in the state with a label that identifies the product as a meat or a meat product and the product: (i) contains animal tissue cultured from animal cells outside the animal from which the tissue is derived; or (ii) is made from plants or insects.” <https://legiscan.com/MD/text/SB188/2020>.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

legislation; food products derived from animal flesh and those derived from the parts of an insect are both excluded from the label censorship regime.⁷¹

Insects are touted by some as a cheaper and more sustainable source of human nutrition than traditional livestock.⁷² However, given the unknown impacts of the mass production of insects on the ecosystem, the viability of a large-scale edible insect industry is still uncertain.⁷³ If the market for edible insects expands in coming years, it will be interesting to monitor how labeling laws are applied to insect products and whether these laws will support or undermine the growth of the insect food industry.

2.4 *Rice...and other products*

Rice falls within the scope of the label censorship laws of Louisiana and Arkansas, which prohibit the use of the word “rice” for rice alternatives such as cauliflower rice.⁷⁴ These states are

⁷¹ Wisconsin SB 464 creates Wisconsin Statutes & Annotations (WI Stat § 97.45(2): “No person may label a food product as, or sell or offer for sale a food product that is labeled as, any type of meat product, ‘meat,’ or a similar term unless the food product is derived from an edible part of the flesh of an animal or any part of an insect, as defined in s. 94.67 (18), and does not include cultured animal tissue that is produced from animal cell cultures.” <http://docs.legis.wisconsin.gov/2019/related/proposals/sb464>.

⁷² Banks, A. (September 2019). Farming insects for food: opportunities and challenges. *The Nuffield Farming Scholarships Trust*, <https://nuffieldinternational.org/live/Reports>; Dickie, F.L., Miyamoto, M., & Collins, C.M. (14 August 2019). *The Potential of Insect Farming to Increase Food Security*. DOI: 10.5772/intechopen.88106, <https://www.intechopen.com/books/edible-insects/the-potential-of-insect-farming-to-increase-food-security>.

⁷³ Win, T.L. (15 January 2019). Farming insects may solve one problem but create others, scientists warn. *Reuters*, <https://www.reuters.com/article/us-global-insects-food/farming-insects-may-solve-one-problem-but-create-others-scientists-warn-idUSKCN1P81VM>.

⁷⁴ Louisiana Revised Statutes (LA Rev Stat) § 4744(5) & (10), <http://legis.la.gov/legis/ViewDocument.aspx?d=1144034>; Arkansas Code Annotated (Ark. Code. Ann.) § 2-1-302(15) & § 2-1-305(11), <https://legiscan.com/AR/text/HB1407/id/1963740>.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

among the top rice producing regions in the U.S.,⁷⁵ and it is clear that protection of the rice farming and other agricultural industries is a key driver of the bills.⁷⁶

Louisiana seeks to protect a range of agricultural products, including sugar, crawfish and alligator.⁷⁷ Act 273 defines “meat” as “a portion of a beef, pork, poultry, alligator, farm-raised deer, turtle, domestic rabbit, crawfish, or shrimp carcass that is edible by humans,”⁷⁸ but excludes a “synthetic product derived from a plant, insect, or other source”⁷⁹ or a “cell cultured food product grown in a laboratory from animal cells.”⁸⁰ As well as prohibiting the use of the term “meat” for plant-based, cell-based, and insect-based foods, the law prohibits the use of the term “rice” unless the product is, or is derived from, rice⁸¹ and “sugar” unless the product is “an unaltered plant-based simple sugar or sucrose.”⁸²

Arkansas’ Act 501, the Truth in Labeling Bill, is one of the broadest of those enacted to date. It defines “meat” as “a portion of a livestock, poultry, or cervid carcass that is edible by humans”⁸³ and “meat product” as “an agricultural product that is edible by humans and made

⁷⁵ United States Department of Agriculture Economic Research Service. (20 August 2019). *Rice Sector at a Glance*, <https://www.ers.usda.gov/topics/crops/rice/rice-sector-at-a-glance/#production>.

⁷⁶ Watkins, W. (26 June 2019). “Truth in Labeling” Law Is a Win for Louisiana Farmers, but Key Questions Remain. *WWNO*, <https://www.wwno.org/post/truth-labeling-law-win-louisiana-farmers-key-questions-remain> (citing Michael Deliberto, an agricultural economist, as saying “popular rice alternatives like cauliflower rice pose a new threat” to an industry that is “already struggling” to compete with foreign-grown rice varieties such as basmati and jasmine). See also Owens, N. (20 March 2019). Truth in labeling inked by governor. *Arkansas Online*, <https://www.arkansasonline.com/news/2019/mar/20/truth-in-labeling-inked-by-governor-201/> (citing farmers and members of the state’s rice association as saying “they did not want companies to piggyback on the name of products such as rice”).

⁷⁷ Act 273 (Louisiana SB 152), <http://legis.la.gov/legis/ViewDocument.aspx?d=1144034>.

⁷⁸ LA Rev Stat § 4743(10).

⁷⁹ LA Rev Stat § 4743(10)(a).

⁸⁰ LA Rev Stat § 4743(10)(b).

⁸¹ LA Rev Stat § 4744(5) & (10).

⁸² LA Rev Stat § 4744(12).

⁸³ Ark. Code. Ann. § 2-1-302(7)(A), <https://legiscan.com/AR/text/HB1407/id/1963740>.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

wholly or in part from meat or another portion of a livestock, poultry, or cervid carcass.”⁸⁴ The statute provides that “meat” does not include a “synthetic product derived from a plant, insect, or other source”⁸⁵ or a “product grown in a laboratory from animal cells.”⁸⁶

The Arkansas statute also defines “beef” (“the flesh of a domesticated bovine, such as a steer or cow, that is edible by humans”)⁸⁷ and “beef product” (“an agricultural product that is edible by humans and produced in whole or in part from beef, including ... beef jerky, beef patties, chopped beef, fabricated steak, hamburger, ground beef, ribs, and roast”)⁸⁸ as well as “pork” (“the flesh of a domesticated swine that is edible by humans”),⁸⁹ “pork product” (“an agricultural product that is edible by humans and produced in whole or in part from pork, including ... bacon, bratwurst, ground pork, ham, pork chops, ribs, roast, and sausage”),⁹⁰ and “poultry” (“domestic birds that are edible by humans”).⁹¹ The statute prohibits the use of any of these defined terms on the label of a plant-based, cell-based, or insect-based product.⁹²

The Arkansas and Louisiana statutes then goes a step further; they prohibit “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.”⁹³ No statutory definition or guidance is provided as to what terms would be prohibited. However, one can expect that the laws will be used to protect producers of certain state-favored agricultural products, including meat, rice and sugar.

⁸⁴ Ark. Code. Ann. § 2-1-302(8).

⁸⁵ Ark. Code. Ann. § 2-1-302(7)(B)(i).

⁸⁶ Ark. Code. Ann. § 2-1-302(7)(B)(ii).

⁸⁷ Ark. Code. Ann. § 2-1-302(2).

⁸⁸ Ark. Code. Ann. § 2-1-302(3).

⁸⁹ Ark. Code. Ann. § 2-1-302(12).

⁹⁰ Ark. Code. Ann. § 2-1-302(13).

⁹¹ Ark. Code. Ann. § 2-1-302(14).

⁹² Ark. Code. Ann. § 2-1-305(6), (8), & (9).

⁹³ Ark. Code. Ann. § 2-1-305(10) and LA Rev Stat § 4744(9).

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

2.5 Purpose of the statutes

One important similarity to note between the statutes is that they were ostensibly introduced, in part, to prevent consumer confusion. The stated purpose of Arkansas’ statute is “to protect consumers from being misled or confused by false or misleading labeling of agricultural products that are edible by humans.”⁹⁴ Proponents of label censorship laws claim that using animal-related terminology (and images) on plant-based products misleads consumers into believing they are purchasing animal products. Arkansas state Rep. David Hillman, for example, stated that his bill would only affect producers “who want to deceive the public about how their food originated.”⁹⁵

Surely though, misleading consumers as to the origin of their products would undermine the interests of plant-based food companies? Terms such as “steak,” “mince,” or “rashers” simply describe the type of product consumers can expect and inform them of the product’s function. A seitan “steak” can be grilled, vegetable “mince” can be cooked and served with spaghetti or used in a “beef” lasagne, and pork-free “rashers” can be fried as part of a vegetarian breakfast. Given the high uptake of plant-based meat by omnivores, meat-like descriptions are especially important in providing a sense of familiarity and guidance to consumers.

It is also patronizing to suggest that consumers will be unable to navigate plant-based meat labels. Words such as “burger” and “sausage” are now so prevalent and well-established in relation

⁹⁴ Ark. Code. Ann. § 2-1-301.

⁹⁵ Judkis, M. (11 April 2019). What’s in a name? The battle over alternative meat, milk and rice labeling rages on. *Washington Post*, <https://www.washingtonpost.com/news/voraciously/wp/2019/04/11/whats-in-a-name-the-battle-over-alternative-meat-milk-and-rice-labeling-rages-on/>.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

to plant-based products that they are as much a part of the lexicon as “soy milk.” Claims of consumer confusion in relation to plant-based milk terms were put to rest some years ago. In dismissing a claim that consumers would confuse soy and almond milk for dairy milk because of the use of the word “milk,” the court in *Ang v Whitewave Foods* stated:

The Court finds such confusion highly improbable because of the use of the words “soy” and “almond.” Plaintiffs essentially allege that a reasonable consumer would view the terms “soymilk” and “almond milk,” disregard the first words in the names, and assume that the beverages came from cows. The claim stretches the bounds of credulity. Under Plaintiffs’ logic, a reasonable consumer might also believe that veggie bacon contains pork, that flourless chocolate cake contains flour, or that e-books are made out of paper.⁹⁶

Surely the same logic applies to plant-based meat labeling, which typically clearly indicates that the product does not contain meat by including qualifiers such as “meatless,” “plant-based” or “vegan.”⁹⁷

It is evident that the recently introduced label censorship bills are designed to stifle competition and protect animal agriculture rather than protect consumers – and many legislators have openly admitted as much. For example, following the passing of Mississippi’s label censorship law (SB 2922), Mississippi Farm Bureau Federation President Mike McCormick stated

⁹⁶ *Ang v Whitewave Foods Co.*, Case No. 13-CV-1953 (N.D. Cal. Dec. 10, 2013), at 4.

⁹⁷ See for example Tofurky’s (<https://tofurky.com/#products>) and Beyond Meat’s (<https://www.beyondmeat.com/products/>) product labeling.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

that the law would “protect our cattle farmers from having to compete with products not harvested from an animal.”⁹⁸

Part III – Lawsuits challenging label censorship laws

Lawsuits have been brought against plant-based meat label censorship laws in Arkansas, Mississippi, Missouri, Oklahoma and Louisiana, the key aspects of which are explored in this section.

3.1 Arkansas: Turtle Island Foods, SPC v Soman

In July 2019, ALDF, GFI, the American Civil Liberties Union (ACLU), and the Arkansas ACLU sued the state of Arkansas on behalf of plant-based meat company Tofurky.⁹⁹ Aside from being one of the broadest label censorship laws enacted to date, Act 501 imposes fines of up to \$1000 per day for every advertisement or sale of plant-based meat product in violation of the statute.¹⁰⁰

Tofurky alleged that the Arkansas statute is unconstitutional as it infringes upon Tofurky’s First Amendment right to share truthful, non-misleading information about its products and would

⁹⁸ Shanker, D. & Mulvany, L. (3 July 2019). Vegan ‘Meat’ Makers Sue Mississippi Over What to Call It. *Bloomberg*, <https://www.bloomberg.com/news/articles/2019-07-02/vegan-meat-makers-sue-mississippi-over-what-to-call-it>.

⁹⁹ *Turtle Island Foods, SPC v Soman*, No. 4: 19-CV-00514-KGB, 2019 WL 7546141 (E.D. Ark. Dec. 11, 2019).

¹⁰⁰ Ark. Code. Ann. § 2-1-306.

**Defining “Meat”:
Plant-based Meat Label Censorship in the United States**

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

actually create consumer confusion. Tofurky also argued that the statute violates the Due Process Clause of the Fourteenth Amendment and the Dormant Commerce Clause.¹⁰¹

The District Court for the Eastern District of Arkansas considered, among other factors, the likelihood that Tofurky would succeed on the merits of its First Amendment challenge. It applied the Supreme Court’s intermediate scrutiny, four-part *Central Hudson* test to determine whether Tofurky’s labeling is protected commercial speech. Under *Central Hudson*, a court will consider whether: (1) the commercial speech at issue concerns lawful activity and is not misleading; (2) the government has a substantial interest in regulating the speech; (3) the challenged regulation directly and materially advances the government’s asserted interest; and (4) the regulation is no more extensive than necessary to serve that interest.¹⁰²

The court started its analysis by “considering the label as a whole” and determining whether “an ordinary consumer would be...deceived as to the nature of the product.”¹⁰³ It stated that, under the first prong of *Central Hudson*, unless the speech relates to “unlawful activity” or is “inherently misleading,” the government has limited power to restrict the speech and the court should proceed to a full *Central Hudson* analysis. The court rejected the state’s assertion that terms like “Deli Slices” and “Chorizo Style Sausage” were inherently misleading and thus deserved no constitutional protection. Although Tofurky’s labeling contains words such as “meat,” “sausage” and “hot dog,” these words are modified or accompanied by words such as “plant-based” or

¹⁰¹ *Id.* at 1-2.

¹⁰² *Id.* at 19-22, citing *Central. Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). *Central Hudson* is the landmark case addressing constitutional protection of commercial speech. The Supreme Court set out a four-part test for whether governmental regulation of commercial speech is constitutional and held that although commercial speech is protected, it is subject to higher degrees of government regulation compared to other forms of speech.

¹⁰³ *Id.* at 24.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

“vegan,” thereby repeatedly indicating to the reasonable consumer that the products do not contain meat.¹⁰⁴ The court concluded 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.”¹⁰⁵

Under the second prong, the court agreed with the state that protecting consumers from false or misleading labeling of agricultural products is a legitimate state interest.¹⁰⁶

However, under the third prong, the court found that the Arkansas statute does not “directly and materially” advance the state’s asserted interest in alleviating consumer deception because Tofurky’s labeling is neither false nor misleading.¹⁰⁷

Finally, the legislation failed the fourth prong as its “blanket restriction is far more extensive than necessary.”¹⁰⁸ The court reasoned that the state could have pursued less restrictive means to achieve its asserted interest such as creating a symbol to indicate a product is vegan or requiring “more prominent disclosures of the vegan nature of plant-based products.”¹⁰⁹

Since Arkansas’ law did not pass all four *Central Hudson* prongs, the court held that Tofurky’s First Amendment claim was likely to succeed.¹¹⁰ Tofurky’s motion for a preliminary injunction was granted, preventing the state from enforcing the statute.¹¹¹ This preliminary ruling in Tofurky’s favor is a positive first step for plant-based meat companies, and highlights the

¹⁰⁴ *Id.*, at 23-24.

¹⁰⁵ *Id.*, at 23.

¹⁰⁶ *Id.*, at 26.

¹⁰⁷ *Id.*, at 26.

¹⁰⁸ *Id.*, at 26.

¹⁰⁹ *Id.*, at 27.

¹¹⁰ *Id.*, at 27-28. As the court found Tofurky was likely to prevail on the merits of its First Amendment claim, Tofurky’s other claims – violation of the Due Process Clause of the Fourteenth Amendment and violation of the Dormant Commerce Clause – were not examined by the court. Tofurky’s arguments relating to these claims mirror those in *Turtle Island Foods, SPC and the Good Food Institute v Richardson*, discussed below. To avoid repetition, these arguments are not covered here.

¹¹¹ *Id.*, at 33.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

strength of constitutional arguments against label censorship.¹¹² However, the decision has not dissuaded other states from enacting label censorship laws.

3.2 *Missouri: Turtle Island Foods, SPC and The Good Food Institute v Richardson*

In August 2018, ALDF, GFI and Missouri ACLU sued the state of Missouri (the first state to pass a label censorship law) on behalf of Tofurky.¹¹³ The challenges mirror those in the Arkansas lawsuit, namely that the law violates the Free Speech Clause of the First Amendment, the Due Process Clause of the Fourteenth Amendment, and the Dormant Commerce Clause.¹¹⁴

Tofurky argued that the Missouri statute is “a content-based, overbroad, and vague criminal law that prevents the truthful sharing of information and impedes competition by plant-based and clean-meat companies in the marketplace.”¹¹⁵ Tofurky further argued that the statute excessively burdens interstate commerce to protect in-state meat producers. This is detrimental to consumers and interstate commerce, and violates the Dormant Commerce Clause.¹¹⁶ Finally, Tofurky alleged that the vague language of the statute fails to afford companies a reasonable opportunity to understand what constitutes a violation of the law, thereby encouraging or allowing “arbitrary and discriminatory enforcement,” and violating the Due Process Clause.¹¹⁷ Tofurky sought an

¹¹² In 2017, the free speech argument prevailed in a dispute over what constitutes “skim milk.” A Florida law stipulated that only skim milk containing added Vitamin A could be labeled “skim milk” and that products without the additional Vitamin A must be labeled “imitation skim milk.” A Florida milk producer sued the state, arguing that her product was skim milk and she should be able to label it as such. The Eleventh Circuit found that the state’s restriction on the term “skim milk” was more extensive than necessary to serve its asserted interest in preventing deception and ensuring adequate nutritional standards (*Ocheese Creamery LLC v Putnam*, 851 F.3d 1228 (11th Cir. 2017)).

¹¹³ Complaint for Declaratory and Injunctive Relief, *Turtle Island Foods, SPC and The Good Food Institute v Richardson*, No. 18-CV-4173 (W.D. Mo. Aug. 27, 2018).

¹¹⁴ *Id.*, at 2.

¹¹⁵ *Id.*, at 1.

¹¹⁶ *Id.*, at 20.

¹¹⁷ *Id.*, at 21.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

injunction preventing the state from enforcing the law and a declaration that the law is unconstitutional.¹¹⁸

In considering Tofurky’s motion for a preliminary injunction, the court considered: (1) the threat of irreparable harm to the plaintiffs; (2) the state of the balance between this harm and the injury that granting the injunction would inflict on the other party; (3) the probability the plaintiff would succeed on the merits; and (4) public interest.¹¹⁹

In determining the likelihood of success on the merits, the court applied the *Central Hudson* test to the undisputed facts, reasoning that the plaintiffs’ claims were unlikely to succeed because Missouri’s “statute only prohibits speech which would be misleading” and therefore the statutory restriction was not unconstitutional.¹²⁰ In fact, the court stated that the plaintiffs were unlikely to succeed because both parties conceded that Tofurky’s labeling complied with the Missouri statute and were not misleading, given that Tofurky typically uses the terms “plant-based” or “veggie” alongside the term “meat” on its labels.¹²¹ Since Tofurky’s labeling complied with the statute, the plaintiffs failed to demonstrate that the statute would cause them irreparable harm.¹²² Furthermore, the court held that issuing an injunction would cause the state irreparable harm because it “would invade its sovereign authority to enact and enforce its own laws.”¹²³ Tofurky’s motion for a preliminary injunction was thus denied.¹²⁴

¹¹⁸ *Id.*, at 21.

¹¹⁹ *Turtle Island Foods, SPC v Richardson*, No. 2:18-CV-04173 (W.D. Mo. Sept. 30, 2019), at 4, citing *Dataphase Sys., Inc. v C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981).

¹²⁰ *Id.*, at 12.

¹²¹ *Id.*, at 3.

¹²² *Id.*, at 14.

¹²³ *Id.*, at 15.

¹²⁴ *Id.*, at 15.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

3.3 *Mississippi: Upton’s Naturals Co. and the Plant Based Foods Association v Bryant et al.*

In July 2019, plant-based food company Upton’s Natural’s and the PBFA filed a federal suit against the state of Mississippi. Among other claims, Upton’s and the PBFA argued that Mississippi’s label censorship law (SB 2922) violates their First Amendment right to engage in non-misleading speech as it prevents them from using the labels that are best understood by their customers.¹²⁵ In the complaint, Upton’s states that its use of terms such as “vegan burgers,” “vegan bacon” and “vegan chorizo,” in context on its labels, do not mislead the reasonable consumer and that prohibiting the use of such terms will create, not alleviate, consumer confusion.¹²⁶ Upton’s and the PBFA sought a declaratory judgment that SB 2922 is unconstitutional and an injunction blocking the law’s enforcement.¹²⁷

In response to the litigation, the Mississippi Department of Agriculture withdrew regulations it had proposed to enforce SB 2922, and introduced a new set of more favorable regulations. The new regulations still prohibit the use of meat nomenclature for plant-based food labels. However, the use of such terms is permitted if a qualifier such as “vegetarian,” “meatless” or “made from plants” is “prominently displayed on the front of the package.”¹²⁸

This is a positive outcome for the plant-based food industry. Given that Upton’s and other plant-based food companies already comply with these regulations, they will be able to continue selling their products in Mississippi without having to alter their labeling.

¹²⁵ Complaint for Declaratory and Injunctive Relief, *Upton’s Naturals Co. and the Plant Based Foods Association v Bryant et al.*, No. 3:19-CV-462-HTW-LRA (S.D. Miss. July 1, 2019), at 2.

¹²⁶ *Id.*, at 13.

¹²⁷ *Id.*, at 18-19.

¹²⁸ MS Code § 75-35-15(5), Reg. 112-01, <https://www.sos.ms.gov/adminsearch/ACProposed/00024402b.pdf>.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

3.4 *Oklahoma: Upton’s Naturals Co. and the Plant Based Foods Association v Stitt et al.*

In September 2020, Upton’s Natural’s and the PBFA filed a federal lawsuit against the state of Oklahoma, challenging the state’s new label censorship law (HB 3806 or the Meat Consumer Protection Act) as a violation of their First Amendment right to engage in non-misleading speech.¹²⁹ While the Oklahoma law allows the use of terms such as “meat” and “bacon” on plant-based food labels, it also requires the inclusion of a disclaimer stating the product is plant-based “in type that is uniform in size and prominence to the name of the product.”¹³⁰ According to the PBFA, the Oklahoma statute is the meat industry’s attempt “to thwart honest competition” and “to make current labels illegal by micromanaging their content.”¹³¹

In the complaint, Upton’s states that their labels already clearly identify their products as plant-based. Upton’s challenges the requirement to enlarge these disclaimers to the size and prominence of the largest text on their labels – their product names – arguing that “there is no legitimate reason for this oversized-warning requirement, which treats Plaintiffs’ healthy products like cigarettes or alcohol.”¹³² The plaintiffs state that Oklahoma’s Consumer Protection Laws already prohibit misleading commercial speech, which includes prohibitions on misleading labels, and that the plaintiffs abide by these laws and will continue to do so.¹³³

¹²⁹ Complaint for Declaratory and Injunctive Relief, *Upton’s Naturals Co. and the Plant Based Foods Association v Stitt et al.*, No. 5:20-CV-00938-F (W.D. Ok. September 16, 2020).

¹³⁰ OK Stat § 2-5-107(C)(1).

¹³¹ Plant Based Foods Association (PBFA). (16 September 2020). New Lawsuit Challenges Unconstitutional Oklahoma Plant-Based Foods Labeling Law Supported by the Meat Lobby. *PBFA Press Release*, <https://www.plantbasedfoods.org/pbfa-sues-ok-over-unconstitutional-plant-based-labeling-law/>.

¹³² Complaint for Declaratory and Injunctive Relief, *Upton’s Naturals Co. and the Plant Based Foods Association v Stitt et al.*, No. 5:20-CV-00938-F (W.D. Ok. September 16, 2020), at 2.

¹³³ *Id.*, at 17-18.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

Upton’s argues that the new statute would force them to redesign their product labels, which they would be unable to afford. They would therefore be forced to stop advertising and selling some of their products in Oklahoma, thereby causing them irreparable harm.¹³⁴ The plaintiffs also claim that the retailers that sell plant-based meat products in Oklahoma may no longer be able to carry these products, which would cause significant hardship to the retailers as well as depriving Oklahoma residents access to plant-based alternatives.¹³⁵

The complaint is pending the defendants’ response.

3.5 *Louisiana: Turtle Island Foods, SPC v Strain*

In October 2020, ALDF and GFI filed sued against the state of Louisiana on behalf of Tofurky, challenging Louisiana’s new labeling censorship law (Act 273).¹³⁶ Aside from imposing broad restrictions on representing a food product as meat and prohibiting the use of any language that “has been used or defined historically in reference to a specific agricultural product,”¹³⁷ the statute imposes fines of up to \$500 per day for every advertisement or sale of plant-based meat products that use terms such as “sausage” or “burger” – even when paired with qualifiers such as “vegan,” “veggie,” or “plant-based.”¹³⁸

In the complaint, Tofurky argues that the Louisiana statute violates their First Amendment right to free speech by improperly censoring truthful commercial speech. Tofurky further argues

¹³⁴ *Id.*, at 19.

¹³⁵ PBFA. (16 September 2020). New Lawsuit Challenges Unconstitutional Oklahoma Plant-Based Foods Labeling Law Supported by the Meat Lobby. *PBFA Press Release*, <https://www.plantbasedfoods.org/pbfa-sues-ok-over-unconstitutional-plant-based-labeling-law/>.

¹³⁶ Complaint for Declaratory and Injunctive Relief, *Turtle Island Foods, SPC v Strain.*, No. 3:20-CV-00674-BAJ-EWD (M.D. La. October 7, 2020).

¹³⁷ LA Rev Stat § 4744(9).

¹³⁸ LA Rev Stat § 4744(9),

**Defining “Meat”:
Plant-based Meat Label Censorship in the United States**

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

that there is no evidence that their current labeling misleads consumers, noting that Tofurky’s products are clearly labeled as plant-based, vegetarian, vegan, or meatless.¹³⁹ Tofurky states that “[b]y censoring terms...that any reasonable consumer understands, the Act only creates needless consumer confusion. And it does so with the clear purpose of suppressing free market competition for the benefit of specific state-defined competitors.”¹⁴⁰

This complaint is also pending the defendant’s response.

Part IV – The federal landscape

It is beyond the scope of this paper to provide an in-depth analysis of the federal legislative and regulatory landscape. However, for the sake of completeness two issues will be briefly highlighted as they are likely to impact the future of plant-based meat labeling.

4.1 The FDA, FDCA and pre-emption

The Food and Drug Administration (FDA) has broad pre-emptive powers in relation to food labeling pursuant to the federal Food, Drug, and Cosmetic Act’s (FDCA) pre-emption provision. This provision prohibits states from imposing labeling requirements that are not identical to those in the FDCA.¹⁴¹

¹³⁹ Complaint for Declaratory and Injunctive Relief, *Turtle Island Foods, SPC v Strain.*, No. 3:20-CV-00674-BAJ-EWD (M.D. La. October 7, 2020), at 14-15.

¹⁴⁰ *Id.*, at 2.

¹⁴¹ 21 U.S.C. § 343-1(a)(1)-(5), <https://www.law.cornell.edu/uscode/text/21/343-1>.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

State legislators may struggle to avoid the FDCA’s pre-emption clause, particularly where state legislative labeling requirements conflict with a federal requirement. As such, pre-emption may represent another constitutional ground on which plant-based companies can challenge state laws in the future.

The FDA also has the authority to set “food standards” that define foods according to their ingredients and composition.¹⁴² However, these “definitions and standards for food” do not appear to contemplate modern plant-based meat products.

Finally, the FDA has enforcement authority over food labeling via the FDCA’s misbranding provision, which states that “a food shall be deemed to be misbranded if...its labeling is false or misleading in any particular.”¹⁴³ However, there are no known cases of the FDA taking enforcement action against plant-based meat labels using meat nomenclature.¹⁴⁴

It is unclear whether the FDCA pre-empts states from passing label censorship laws for plant-based meat products. If legal challenges to state laws continue, the FDA may well need to develop a stance on plant-based meat labeling.

4.2 *Proposed federal bill*

In October 2019, the Real Marketing Edible Artificials Truthfully Act (Real MEAT Act) was proposed in Congress.¹⁴⁵ The bill, which would amend the FDCA, closely resembles the state

¹⁴² 21 U.S.C. § 341, <https://www.law.cornell.edu/uscode/text/21/341>.

¹⁴³ 21 U.S.C. § 343(a)(1), <https://www.law.cornell.edu/uscode/text/21/343>.

¹⁴⁴ Hibbert, R.G. & Fournier, R.M. (Nov 2019). Meat alternative labeling wars: State action vs. federal pre-emption. *Insider*, <https://www.morganlewis.com/-/media/files/publication/outside-publication/article/2019/fournier-hibbert-natural-products-insider.ashx?la=en&hash=C3C38A081918879E12C539A85B21666E7E13F254>.

¹⁴⁵ HR 4881, Real Marketing Edible Artificials Truthfully Act (Real MEAT Act) of 2019, https://gallery.mailchimp.com/c35966bef9b816acff772766f/files/8e733569-86a4-48ee-ac66-c5deafb8ab3d/Real_MEAT_Act_final.pdf.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

laws outlined above. It seeks to codify the definition of “meat” for labeling purposes and states that “any imitation meat food product, beef, or beef product shall be deemed to be misbranded unless its label bears...the word ‘imitation’ immediately before or after the name of the food and a statement that clearly indicates the product is not derived from and does not contain meat.”

The bill states that the lack of a federal definition of beef or beef products has created “the opportunity for marketplace confusion and consumer fraud,” and that the Act will “ensure...consumers can make informed decisions in choosing between meat products such as beef and imitation meat products.” Described by opponents as “a vicious political attack on plant-based meat,”¹⁴⁶ the bill is yet to be assigned to committee.

Part V – Future directions and concluding thoughts

Plant-based meat holds great promise as a more ethical and sustainable alternative to animal protein. However, the continued growth of the plant-based food industry requires support from consumers, investors, and legislators. Legislators should take care not to enact laws that violate the First Amendment protection of truthful commercial speech. Where such laws are passed and challenged in court, they should be declared unconstitutional.

Lawsuits such as those in Missouri, Mississippi, Arkansas, Oklahoma and Louisiana will no doubt shape the trajectory of the plant-based meat labeling debate. It would be preferable, however, for the FDA to proactively provide guidance and oversight of plant-based meat labeling.

¹⁴⁶ D’Souza, B. (27 December 2019). The Real MEAT Act of 2019: A Vicious Attack on Plant-Based Meat. *The Rising*, <https://therising.co/2019/12/27/real-meat-act-2019/>.

Defining “Meat”: Plant-based Meat Label Censorship in the United States

Bianka Atlas – LLM Animal Law 2020 (Lewis & Clark)

This would help ensure fair and consistent regulation across states and facilitate the interstate trade of plant-based meat products.

Equally, plant-based food companies have a responsibility to continue marketing their products in a way that is clear and transparent to consumers. The PBFA’s development of the first-ever Plant-Based Meat Labeling Standards¹⁴⁷ is an excellent step towards ensuring consistency and clarity in labeling. These voluntary Standards allow for reference to the type of animal meat (e.g. “chicken” or “meat”) and the form of the product (e.g. “nuggets”), accompanied by a qualifier that clearly indicates the food is plant-based (e.g. “meat-free” or “made from plants”). The Standards are broadly consistent with the state laws that allow meat nomenclature on plant-based products, provided the label also contains a qualifier. As such, these Standards should be (in theory at least) relatively uncontroversial to the meat industry.

As the world struggles with a global pandemic and our planet suffers from unprecedented anthropogenic biodiversity loss, calls to reduce our reliance on intensive animal agriculture have never before been so urgent. And, with previously unimaginable technologies, increasing investor confidence, and growing consumer interest in plant-based meat, never has there been a moment of greater potential to radically overhaul our food system.

Given the public health, environmental, and animal welfare costs associated with industrialized animal agriculture, it is hoped that disputes over plant-based meat labeling can be resolved to support the continued growth of the plant-based meat industry.

¹⁴⁷ PBFA. (December 2019). *Voluntary Standards for the Labeling of Meat Alternatives in the United States*, <https://plantbasedfoods.org/wp-content/uploads/PBFA-Labeling-Standards-for-Meat-Alternatives.pdf>.