

Plant-Based Foods Association v. Shufford

ALDF Updates: Advancing Animal Law
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Amanda Howell, Managing Attorney
Michael Swistara, Staff Attorney
Morgan Boutilier, Staff Attorney



Personal Views and Opinions

Opinions are personal
and not necessarily
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Animal Legal Defense Fund
or any clients.





*Plant-Based Foods Association
v. Shufford*

“Tag-Gag” Laws

Applicable labeling laws

Federal food laws

- FDA:
 - Federal Food, Drug and Cosmetic Act (21 U.S.C. ch.9)
 - Food labeling regs: 21 C.F.R. 101 *et seq.*
 - Guidance docs and FDA policy docs
- USDA:
 - Poultry Products Inspection Act (PPIA) 21 USC 451-471
 - Federal Meat Inspection Act (FMIA) 21 USC 601-695
 - Egg Products Inspection Act (EPIA) 21 USC 1031-1056
- FTC: food marketing (FDA + FTC MOU)

FDA

- Prohibits labeling that is “false or misleading in any particular” 21 USC 343(a)

USDA

- prohibits “marking or labeling that is . . . false or misleading in any particular” (FMIA 21 USC 607; PPIA 21 USC 457)

State laws:

- UDAP prohibiting false advertising
- State analogues of federal law (e.g., CA’s Sherman Law)



Animal agribusiness efforts against plant-based labeling

- Dairy
 - *FDA guidance on “Labeling of Plant-based Milk Alternatives” and “Labeling of Plant-Based Alternatives to Animal-Derived Foods”*
 - *NMPPF letters to FDA*
 - *FDA SOIs and requests for comment*
 - *DAIRY Pride Act*
 - *Miyoko’s*
- Meat
 - *US Cattlemen’s Petition to USDA*
 - *REAL MEAT Act*
 - *Missouri/Arkansas/Mississippi/Oklahoma/Louisiana meat labeling cases*



Missouri Mo. Rev. Stat. § 265.494(7):

- *No person . . . shall engage in any misleading or deceptive practices, including, but not limited to, any one or more of the following: . . . misrepresenting a product as meat that is not derived from harvested production livestock or poultry . . .*

Arkansas Act 501, Ark. Code Ann. §2-1-301 et seq. prohibits:

- *Representing the agricultural product as meat or a meat product when the agricultural product is not derived from harvested livestock, poultry, or cervids*
- *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.*

Louisiana La. Rev. Stat. sec. 3:4744(B) prohibits:

- *Representing a food product as meat or a meat product when the food product is not derived from a harvested beef, pork, poultry, alligator, farm-raised deer, turtle, domestic rabbit, crawfish, or shrimp carcass*
- *Representing a food product as rice when the food product is not rice*
- *Utilizing a term that is the same as or deceptively similar to a term that has been used or defined historically in reference to a specific agricultural product*



Oklahoma Okla. Stat. Ann. tit. 2, § 5-107

Misrepresenting the cut, grade, brand, trade name or weight or measure of any meat, or *misrepresenting a product as meat that is not derived from harvested production livestock*; provided, product packaging for *plant-based items shall not be considered in violation of the provisions of this paragraph so long as the packaging displays that the product is derived from plant-based sources in type that is uniform in size and prominence to the name of the product*

Texas Health & Safety Code § 431.082(d-1), § 433.0415(b)

if it is *an analogue product of meat*, a meat food product, poultry, a poultry product, an egg product, or fish, unless its *label bears in prominent type equal to or greater in size than the surrounding type* and in close proximity to the name of the product one of the following: (1) “*analogue*”; (2) “*meatless*” (3) “*plant-based*” (4) “*made from plants*”; or (5) *a similar qualifying term* or disclaimer intended to clearly communicate to a consumer the contents of the product. . .

in prominent type equal to or greater in size than the surrounding type and in close proximity to the name of the product using one of the following: (1) “*cell-cultured*”; (2) “*lab-grown*”; or (3) a *similar qualifying term* or disclaimer intended to clearly communicate to a consumer the contents of the product



Constitutional Challenges:

- *Turtle Island Foods v. Locke Thompson*, W.D. Mo., Aug. 27, 2018
- *Turtle Island Foods v. Nikhil Soman*, E.D. Ark., July 22, 2019
- *Miyoko's Kitchen v. California Dep't of Food and Agriculture*, N.D. Cal., Feb. 6, 2020
- *Turtle Island Foods v. Strain*, M.D. La., Oct. 7, 2020
- *Plant Based Foods Association v. Stitt*, W.D. Okla. Nov. 9, 2021.
- *Turtle Island Foods v. Shuford*, W.D. Tx., Aug. 31, 2023



Louisiana ruling on Motion for Summary Judgment

“Plaintiff presents compelling evidence indicating that consumers are not confused by its labeling. In response, Defendant fails to produce evidence indicating that consumers are confused by plaintiff’s labeling.”

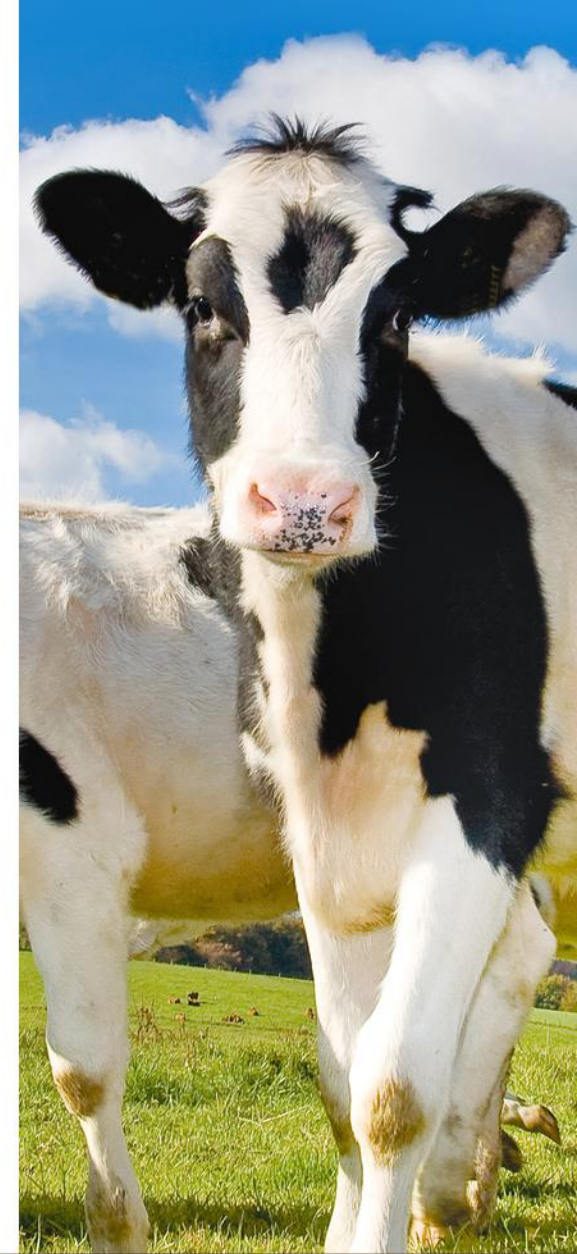
“the Act impermissibly restricts commercial speech because the speech at issue is not misleading, and while the governmental interest is likely substantial, the Act is more extensive than necessary to further the Government’s interest”



Louisiana 5th Cir ruling vacating

Tofurky has standing to challenge Louisiana's Truth in Labeling of Food Products Act (holding intent to engage in proscribed conduct, Act applies to Tofurky, and credible threat of enforcement)

"Tofurky need not establish that it openly intends to violate the Act. As the Supreme Court has stressed time and again, '[n]othing in [its] decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law.'"



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“the Act only applies to actually misleading representations that fall outside the First Amendment’s protection for commercial free speech as defined by Central Hudson.”

“The district court erred in ignoring the State’s limiting construction and in implementing its own interpretation of the Act. That narrower interpretation regulates content that falls outside the purview of Central Hudson. Consequently, we conclude that the Act, when narrowly construed, does not violate the First Amendment’s protection of commercial free speech.”



Arkansas ruling on motion for summary judgment

The State appears to believe that the simple use of the word “burger,” “ham,” or “sausage” leaves the typical consumer confused, but such a position requires the assumption that a reasonable consumer will disregard all other words found on the label.

Here, “[t]here is no contention that any [consumer or potential consumer] was actually misled or deceived by” Tofurky’s packaging, labeling, or marketing

The Eleventh Circuit noted that “[i]t is undoubtedly true that a state can propose a definition for a given term. However, it does not follow that once a state has done so, any use of the term inconsistent with the state’s preferred definition is inherently misleading.”

Here, the State has not made an adequate showing that the challenged provisions of Act 501 are a “reasonable fit,” because the challenged provisions, which are predicated upon preventing misleading commercial speech, are outright bans on what the Court has concluded on the record before it is non-misleading commercial speech



Miyoko's Kitchen v. CDFR ruling on motion for preliminary injunction and motion for summary judgment

MPI: Miyoko's motion is granted as regards the phrases "butter," "lactose free," and "cruelty free," and denied as regards the materials on its website and the phrases "hormone free" and "revolutionizing dairy with plants"

"the State's showing of broad marketplace confusion around plant-based dairy alternatives is empirically underwhelming"

MSJ: "Miyoko's use of 'butter' is constitutionally protected"

"Here, the State's sole asserted interest is 'avoid[ing] consumer confusion.' Because the record lacks material reasonably supporting the conclusion that removing [the representations] from Miyoko's labeling 'will in fact' advance that interest 'to a material degree,' the State may not enforce any order to that effect."

Court held that "language evolves" and to hold otherwise "defies common sense"



Missouri Tag-Gag ruling on motion for summary judgment (March 2024)

Plaintiff's as-applied challenge is impeded by the fact that there is a significant doubt surrounding whether the Statute would ever, or could ever, be applied to their speech.

the Court finds that the Act provides sufficient guidance that *it only applies to "person[s] advertising, offering for sale or selling all or part of a carcass or food plan.*

In the instant case, the Missouri Statute does not confer any advantage on Missouri producers of lab grown or cultivated meat vs. out-of-state producers of lab grown or cultivated meat.

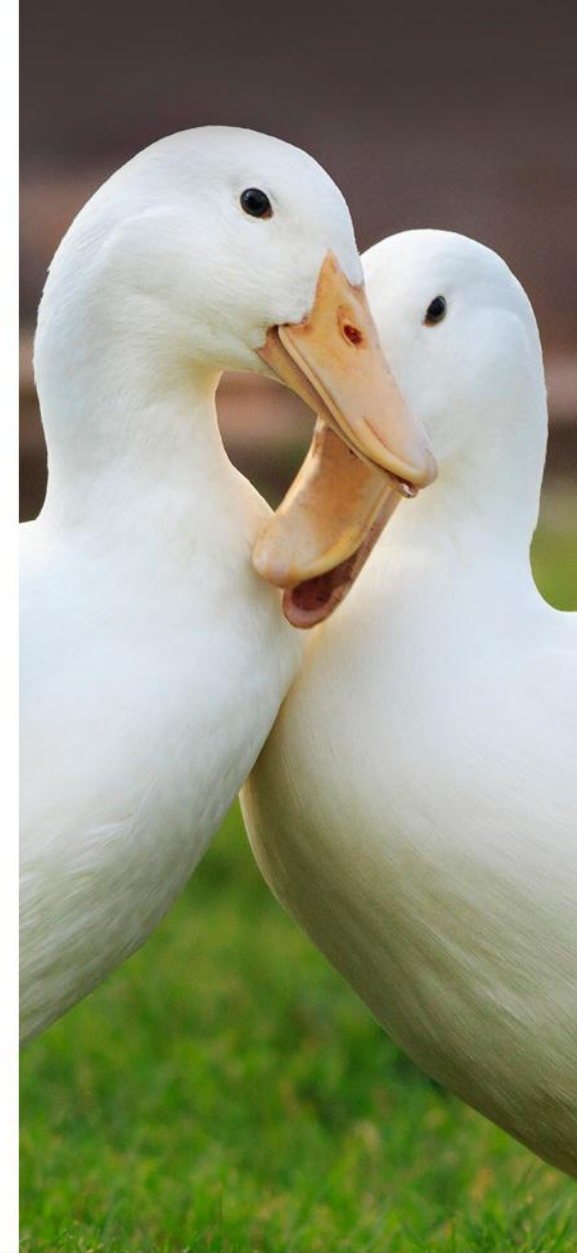
However, the Court does not find that these statements show a discriminatory purpose, these statements simply show the reason the law was enacted



Oklahoma Tag-Gag ruling on motion for summary judgment (June 2024)

“[b]y the plain terms of the statute, the prohibition” set forth in the Act --- “a product cannot be represented as meat if it ‘is not derived from harvested production livestock’” --- **“applies only to persons ‘advertising, offering for sale or selling meat.’”** Doc. no. 190, pp. 1-2 (quoting doc. no. 123). In the court’s view, “there may be a serious question as to whether plaintiffs are really exposed to the kind of concrete harm they complain about (and, under Article III, must show) in this case.””

What plaintiffs want the court to do is judicially amend the statute, and then declare it unenforceable as judicially amended. Defendants, for their part, want the court to judicially amend the statute, and then bestow the court’s blessing on the judicially amended version. The court declines to take either course.





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Texas' Law

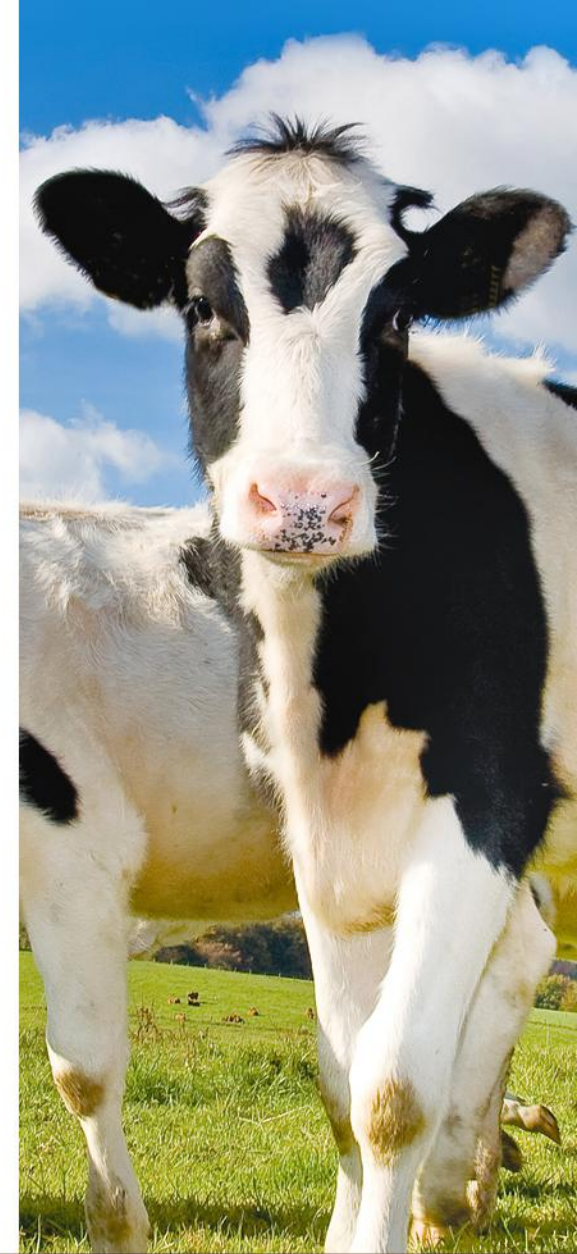
Texas SB 664: The Law

Tex. Health & Safety Code § 431.082(d-1)

A food shall be deemed misbranded if:

(d-1) if it is an analogue product of meat, a meat food product, poultry, a poultry product, an egg product, or fish, **unless its label bears in prominent type equal to or greater in size than the surrounding type and in close proximity to the name of the product one of the following:**

- (1) "analogue";
- (2) "meatless";
- (3) "plant-based";
- (4) "made from plants"; or
- (5) a similar qualifying term or disclaimer intended to clearly communicate to a consumer the contents of the product;



Texas SB 664: The Law

- *Criminal penalties for non-compliance Tex. Health & Safety Code § 431.059*
- *No intent required. Tex. Health & Safety Code § 431.059*





Our Clients' Labels

Ways these labels clearly communicate what these products are:

- “Tofurky”
- “Plant-Based”
- “vegan”
- “friendliest food on the plate”
- “good food is kind to people, animals, the environment...”

Tex. Health & Safety Code § 431.082

A food shall be deemed misbranded:

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- (1) "analogue";
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Compliance with Tex. Health & Safety Code § 431.082 ?

“...unless its label bears in prominent type equal to or greater in size than the surrounding type and in close proximity to the name of the product one of the following:

- (1) ‘analogue’;
- (2) ‘meatless’;
- (3) ‘plant-based’;
- (4) ‘made from plants’; or
- (5) a similar qualifying term or disclaimer intended to clearly communicate to a consumer the contents of the product;”

An Impossible Choice

Tofurky's options under SB 664 :

1 Keep Labels as-is

- Continue selling in Texas
- But risk criminal prosecution under SB 664

2 Go Texas-specific

- Create Texas- only packaging
- but distributors want uniform labels that can be sold in all states
- Risk getting dropped by major distributors and retailers

3 Redesign all labels

- Redesign labels nationwide
- But spend \$75-\$100K per product in redesign costs
- Write off up to 2 years of existing packaging inventory
- Sell existing stock at markdown
- Risk conflicts with other state laws

The “Consumer Confusion” Myth

What they claimed:

One out of every five Texans are deceived by misleading meat substitute food product packaging, according to a statewide survey conducted by TFB and Texas Cattle Feeders Association in 2020.

“That survey was really an eye-opener for me. It really told me that this was legislation that’s good for Texans,” [Rep.] Buckley said. “When folks feel that they’re really not sure what they’re purchasing, that much of the label is ambiguous and not accurate, the time is definitely now for this legislation.”

Source: <https://texasfarmbureau.org/meat-labels-subject-of-truth-in-labeling-bill/>

What the evidence shows:

96% of Texas consumers correctly identified plant-based products (Feltz & Feltz)

0 Consumer complaints received by Texas regulators – ever

States own reps admitted they’d never reviewed any study on consumer confusion

Misleading Labels Are Already Illegal in Texas

SB 664 solves a problem that either doesn't exist – or is already addressed by existing law

Federal Food Drug and Cosmetic Act

categorizes a food product as “misbranded” if “its labeling is false or misleading in any particular.” 21 U.S.C. § 343(a)(1).

Federal Trade Commission Act

prohibits “unfair or deceptive acts or practices” in or affecting commerce. 15 U.S.C. § 45

Texas Deceptive Trade Practices Act

prohibits “false, misleading, or deceptive acts.” Tex. Bus. & Com. Code § 17.46.

Texas Health & Safety Code

Texas DSHS acknowledged it already had authority to regulate labelling of meat alternatives.



Who Pushed for This Law and Why

- Texas = #1 cattle producer in the U.S.
- Bill Sponsors are cattle ranchers themselves
- The Texas Cattle Feeders Association played a central role in drafting SB 664
- Texas Farm Bureau, Texas Cattle Feeders Association commissioned “1 in 5 Texans confused” survey
- Lawmakers and regulators spoke negatively about the plant-based sector, and spoke about the importance of protecting in-state ag interests



The Parties

Plaintiffs

- **Turtle Island Foods, Inc.**
 - d/b/a The Tofurky Company
- **Plant Based Foods Association**
 - 300+ member companies
- **Represented By:**
 - Animal Legal Defense Fund
 - Good Food Institute
 - Kitner Woodward PLLC
 - Jones Walker LLP

v.

Defendants

- **Jennifer Shuford**
 - Commissioner, TX Dept. of State Health Services
- **Cecile Erwin Young**
 - Executive Commissioner, TX Dept. Health and Human Services Commission
- **Ken Paxton**
 - On behalf of himself and all Texas prosecuting attorneys



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The Case

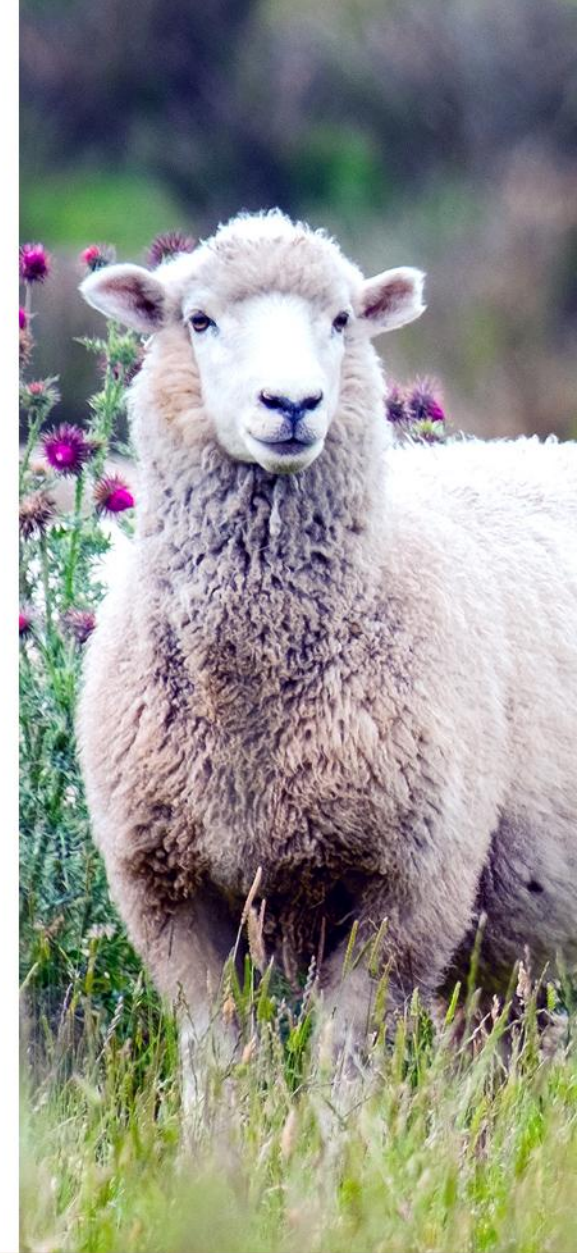
Claims

1. The Law violates the First Amendment
2. The Law is unconstitutionally vague (Due Process Clause)
3. The Law is preempted by the federal Food, Drug, and Cosmetic Act
4. The Law violates the Dormant Commerce Clause



1. The Law violates the First Amendment

- Tofurky's commercial speech is neither misleading nor related to unlawful activity, and as such is entitled to First Amendment protection
- The Texas Law impermissibly restricted commercial speech
 - *Central Hudson* test: (1) substantial government interest, (2) restriction directly and materially advances that interest, and (3) restriction is not more extensive than necessary
 - There is no evidence that consumers are confused by plant-based labels
 - There is no evidence that altering font size or placement would alleviate this (non-existent) confusion – in fact, the Law's changes might *increase* or create new consumer confusion
 - Misleading labels are already illegal – and Texas' Law is more specific and burdensome than other state laws



2. The Law is unconstitutionally vague

- The Law fails to properly articulate what is and is not prohibited
 - Phrases like “name of the product” and “surrounding type” – the yardsticks against which compliant conduct is measured – are not defined
- This allows for arbitrary and discriminatory enforcement



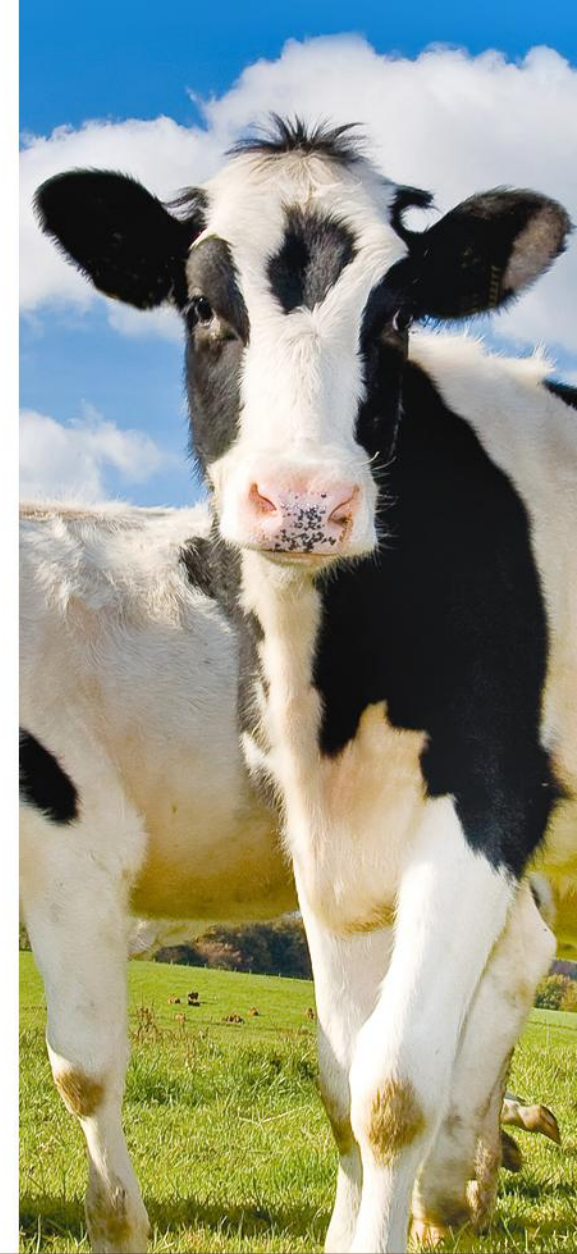




3. The Law is preempted by the FDCA

- The FDCA was modified by the Nutritional Labeling and Education Act of 1990 because of the need for “national uniformity in certain aspects of food labeling, so that the food industry can market its products efficiently in all 50 States in a cost-effective manner”
 - It contains an **express preemption** provision:

No state may “directly or indirectly establish . . . or continue in effect as to any food in interstate commerce . . . any requirement for the labeling of food that is not identical” to the requirements cited by the preemption provision.
- Defendants acknowledged that the Law imposed different or additional requirements



4. The Law violates the Dormant Commerce Clause

- The Commerce Clause:
 - *“The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .”*
- The negative implication, that states **cannot** regulate commerce between the states, is referred to as the Dormant Commerce Clause



4. The Law violates the Dormant Commerce Clause

- The Law purposefully discriminates against interstate commerce
 - It was drafted with help from the Texas Cattle Feeders Association
 - Lawmakers and regulators spoke negatively about the plant-based sector, and spoke about the importance of protecting in-state ag interests
- The Law effectively discriminates against interstate commerce
 - It makes the interstate trade of plant-based products “technically impossible,” given the nature of modern distributor networks and online resellers



4. The Law violates the Dormant Commerce Clause

- The Law burdens interstate commerce in excess of any local interest
 - Significantly hinders the ability for plant-based companies to engage in the interstate market
 - Texas did not produce a shred of evidence that there was a legitimate local interest (*e.g.*, that consumers were confused) or that the Law would advance said interest
 - This is called the *Pike* balancing test



Litigating the Case

- Filed Amended Complaint on October 10, 2023
- Order Denying Motion to Dismiss on September 23, 2024
- Discovery
- Filed Cross-Motion for Summary Judgment on August 28, 2025
- Filed Supplemental Brief on January 16, 2026
- Final Order issued on January 28, 2026





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Final Order

Standing

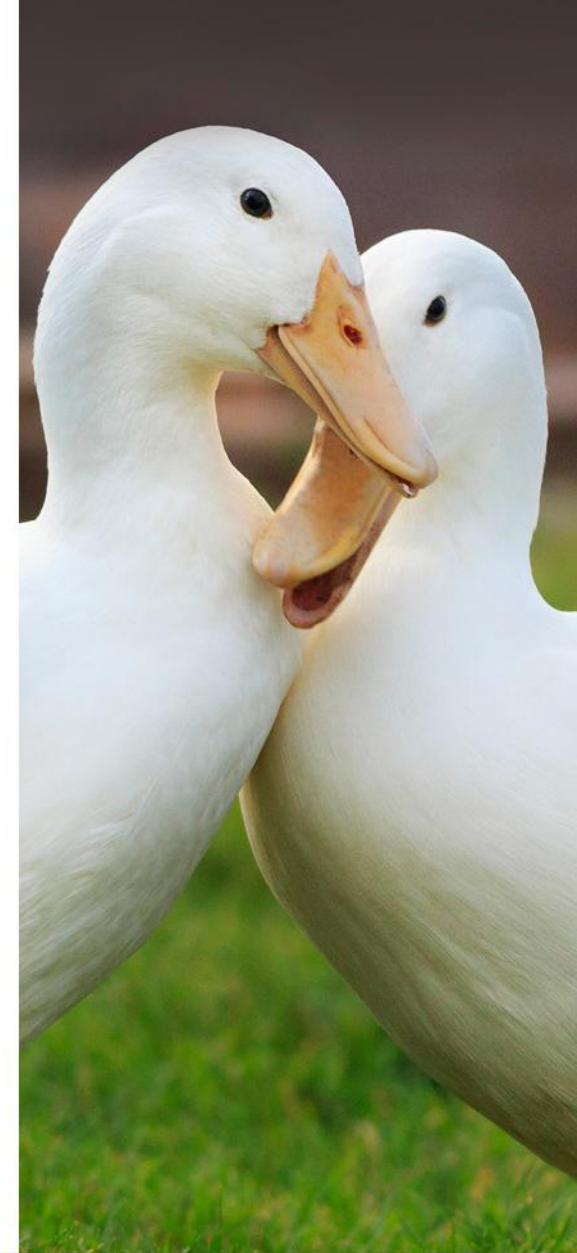
- To bring a pre-enforcement challenge, a Plaintiff must show:
 1. They intend to engage in a course of conduct arguably affected with a constitutional interest;
 2. That the course of action is arguably proscribed by statute; and
 3. That there exists a credible threat of prosecution under the statute

Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158-59 (2014).



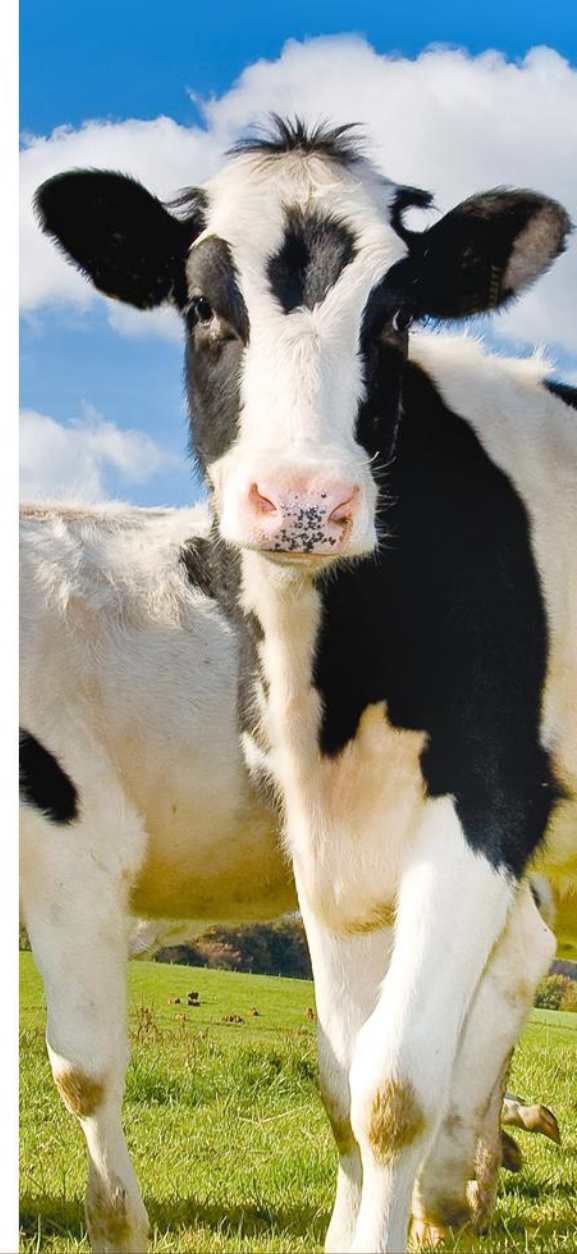
Standing

- “[T]he Fifth Circuit has already held in a previous case involving Tofurky that ‘Tofurky’s labels and marketing . . . are just the kind of commercial activity the First Amendment protects.’” Order on MSJ at 6.
- “As this Court has noted, Tofurky has a product where the word ‘plant-based’ on the label is smaller than the word ‘burger.’ . . . There is no material dispute of fact that Tofurky’s labels are arguably proscribed by SB 664.” *Id.*
- Courts assume a credible threat of prosecution. Here, no evidence exists to counteract that assumption. “Rather, the Rule 30(b)(6) representative of the Texas Department of Health and Human Services testified that its enforcement officers are actively looking for violations and that the law is currently being enforced.” *Id.* at 7.



First Amendment

- Plaintiff Tofurky's labels are not misleading
- Applying the *Central Hudson* test:
 - Defendants have not demonstrated that SB 664's restrictions target a substantial government interest.
 - Defendants presented no evidence of consumer confusion whatsoever
 - Texas and federal law already regulates the same allegedly misleading behavior
 - A government "seeking to sustain a restriction on commercial speech must demonstrate that . . . its restrictions will in fact alleviate the harms to a material degree." (citing *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 283–84 (5th Cir.)).
 - Defendant unsupported assertion that "most disclaimers are so small that consumers can never even read the fine print" is not enough
- The Law is not narrowly tailored



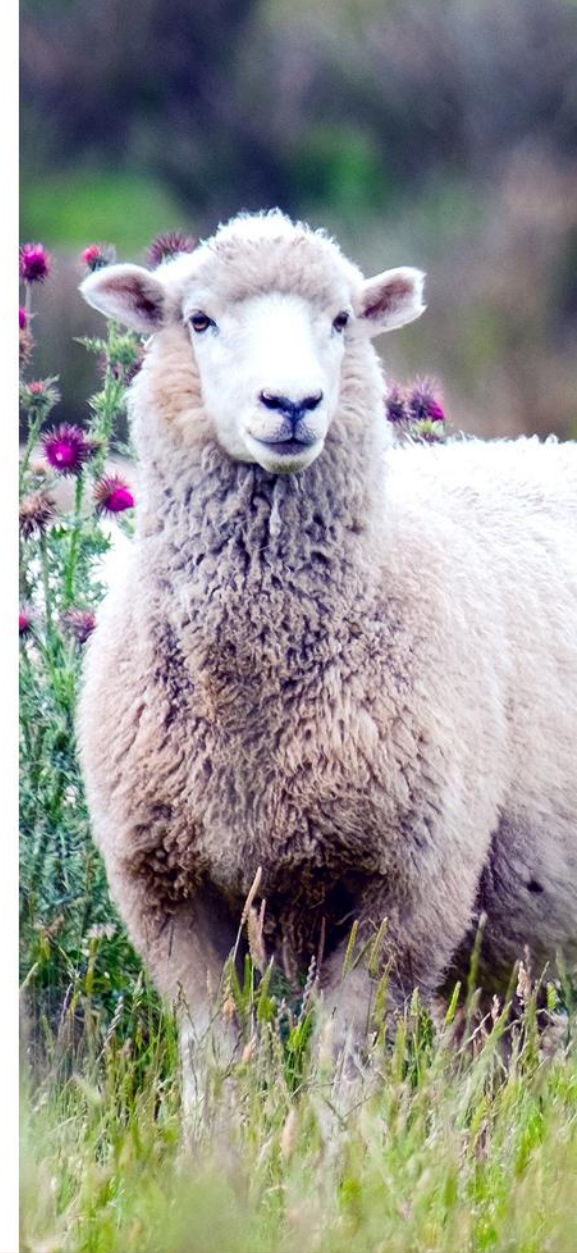
SB 664 is Facially Enjoined

- Applying *Moody v. NetChoice*, the Court asked whether “a substantial number of [SB 664’s] applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”
 - Step 1: “What activities, by what actors, do the laws prohibit or otherwise regulate?”
 - Step 2: “[W]hich of the laws’ applications violate the First Amendment, and [] measure them against the rest.”



SB 664 is Facially Enjoined

- Step 1: *What is regulated?*
 - SB 664 regulates the non-misleading labeling of analogue products by plant-based food manufacturers
- Step 2: *Do unconstitutional applications outweigh constitutional ones?*
 - “In sum, *even in situations, not apparent in the record, where a plant-based food product label misleads consumers, existing law would prohibit those labels* except in, possibly, a small minority of circumstances not made apparent to the Court. *The law is invalid in a substantial majority of all applications and is appropriately enjoined facially.*”



Thank you!

Q & A

Amanda Howell, Managing Attorney
ahowell@aldf.org

Michael Swistara, Staff Attorney
mswistara@aldf.org

Morgan Boutilier, Staff Attorney
mboutilier@aldf.org

