

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

UPTON'S NATURALS CO.; and
THE PLANT BASED FOODS
ASSOCIATION,

Plaintiffs,

vs.

Civil Action No. CIV-20-938-F

KEVIN STITT, in his official
capacity as Oklahoma Governor; and
BLAYNE ARTHUR, in her official
capacity as Oklahoma Commissioner
of Agriculture,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Upton's Naturals Co. and the Plant Based Foods Association, by and through their undersigned counsel, hereby file this Complaint for Declaratory and Injunctive Relief and sue Oklahoma Governor Kevin Stitt and Oklahoma Commissioner of Agriculture Blayne Arthur, in their respective official capacities, as follows:

INTRODUCTION

1. This is a First Amendment challenge on behalf of plant-based food sellers against Oklahoma's recently enacted law that requires food companies to alter the content of their speech. Through messages on their labels, Plaintiffs clearly identify their products as plant-based. Oklahoma is nonetheless requiring Plaintiffs to enlarge these disclaimers to the size and prominence of their labels' largest text—their product names.

But there is no legitimate reason for this oversized-warning requirement, which treats Plaintiffs' healthy products like cigarettes or alcohol.

PARTIES

2. Plaintiff Upton's Naturals Co. ("Upton's Naturals") is an Illinois corporation that sells plant-based foods in many states, including Oklahoma, and is being harmed by the challenged law.

3. Plaintiff Plant Based Foods Association ("PBFA") is the national association of plant-based food manufacturers, ingredient suppliers, restaurants, and distributors. The Association consists of over 170 members, a substantial number of which sell plant-based foods in Oklahoma and are being harmed by the challenged law. PBFA is a California nonprofit corporation.

4. Defendant Kevin Stitt ("Governor Stitt") is the Governor of Oklahoma. As Governor, he has direct authority over executive branch personnel and law enforcement officers charged with enforcing the challenged law. He is being sued only in his official capacity.

5. Defendant Blayne Arthur ("Commissioner Arthur") is the Oklahoma Commissioner of Agriculture. Commissioner Arthur has direct authority over the Oklahoma Department of Agriculture, Food and Forestry's personnel and is charged with the responsibility of enforcing the related laws, regulations, and policies. She is being sued only in her official capacity.

JURISDICTION AND VENUE

6. Plaintiffs bring this civil rights lawsuit pursuant to the First Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02, for violations of the First and Fourteenth Amendments to the United States Constitution.

7. Plaintiffs seek declaratory and injunctive relief against Oklahoma’s so-called “Meat Consumer Protection Act” (the “Act”). As of November 1, 2020, this Act will prohibit sellers of plant-based foods from using meat terms to describe their foods unless they have a disclaimer—in the same “size and prominence” as their product names—that their products are plant-based.

8. This Court has subject-matter jurisdiction under 28 U.S.C. § 1331, as Plaintiffs’ claim arises under federal law.

9. Venue lies in this Court pursuant to 28 U.S.C. § 1391(b)(2) and 28 U.S.C. § 1391(e)(1), as a substantial part of the events giving rise to Plaintiffs’ claims occurred in this Court’s District.

STATEMENT OF FACTS

The Oklahoma Legislature passed the Act to protect the meat industry from competition

10. Prior to and during Oklahoma’s 2020 Legislative Session, powerful meat-industry lobbying groups asked the Oklahoma Legislature to make it more difficult for sellers of meat alternatives to compete with the meat industry.

11. The meat-industry groups advocating in favor of the Act included the Oklahoma Cattlemen’s Association and Oklahoma Pork Council.
12. The Act was passed as part of House Bill 3806.
13. According to the Oklahoma Cattlemen’s Association, it “brought” House Bill 3806 to the Oklahoma Legislature.
14. The lead sponsor for House Bill 3806 in the Oklahoma House of Representatives—Representative Toni Hasenbeck—was one of the Oklahoma Cattlemen’s Association’s members.
15. In lobbying for House Bill 3806, the Oklahoma Cattlemen’s Association worked closely with the Oklahoma Pork Council and the Oklahoma Department of Agriculture, Food and Forestry.
16. As a direct result of meat-industry groups’ lobbying, the Oklahoma Legislature passed the Act during its 2020 Legislative Session.
17. The Oklahoma Legislature passed the Act to protect meat-industry groups from competition by plant-based food sellers.
18. Representative Hasenbeck has said: “I am always willing to help our beef producers as they toil to raise a great product for our consumers.”
19. In August 2020, the Oklahoma Cattlemen’s Association recognized Representative Hasenbeck with a “Legislative Appreciation Award” for shepherding House Bill 3806 through the Oklahoma Legislature.
20. After the Oklahoma Legislature passed the Act, Governor Stitt signed the Act into law.

21. The Act will take effect on November 1, 2020.

22. The Act is to be codified through Sections 1-3 and 5-107 of Title 2 of the Oklahoma Statutes.

23. The Act expressly prohibits advertising “a product as meat that is not derived from harvested production livestock.”

24. However, “product packaging for plant-based items shall not be considered in violation of [the Act] 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.”

25. Reading these provisions together, labels for plant-based foods may not use meat terms unless they have a disclaimer “that the product is derived from plant-based sources in type that is uniform in size and prominence to the name of the product” (the “Compelled Disclaimer”).

26. The Act defines “meat” as “any edible portion of livestock or part thereof.”

27. The Act defines “livestock” as “any cattle, bison, horses, sheep, goats, asses, mules, swine, domesticated rabbits, and chickens, turkeys, and other domesticated fowl, and any animal or bird in captivity.”

28. For purposes of the Act, beef is a type of meat.

29. The Act defines “beef” as “the flesh of a bovine animal.”

30. The Act defines “beef product” as an “edible product[] produced in whole or in part from beef, excluding milk and milk products.”

31. For purposes of the Act, chicken is a type of meat.

32. For purposes of the Act, pork is a type of meat.

33. The Act defines “pork” as “the flesh of a porcine animal.”

34. The Act defines “pork product[]” as a “product or byproduct produced in whole or in part from pork.”

35. For purposes of the Act, burgers are meat.

36. For purposes of the Act, hot dogs are meat.

37. For purposes of the Act, meatballs are meat.

38. For purposes of the Act, jerky is meat.

39. For purposes of the Act, sausages are meat.

40. For purposes of the Act, chorizo is meat.

41. For purposes of the Act, steaks are meat.

42. For purposes of the Act, bacon is meat.

43. For purposes of the Act, corned beef is meat.

44. The Act is unequivocal in its requirement that, without the Compelled Disclaimer, plant-based foods cannot be labeled through these terms.

45. The Act has no exception for the context in which these terms are used without the Compelled Disclaimer.

46. The Act prohibits plant-based foods from being labeled as “beef” without the Compelled Disclaimer, even if they are otherwise labeled as “meatless,” “vegan,” or “plant-based.”

47. The Act prohibits plant-based foods from being labeled as “chicken” without the Compelled Disclaimer, even if they are otherwise labeled as “meatless,” “vegan,” or “plant-based.”

48. The Act prohibits plant-based foods from being labeled as “pork” without the Compelled Disclaimer, even if they are otherwise labeled as “meatless,” “vegan,” or “plant-based.”.

49. The Act prohibits plant-based foods from being labeled as “burgers” without the Compelled Disclaimer, even if they are otherwise labeled as “meatless,” “vegan,” or “plant-based.”

50. The Act prohibits plant-based foods from being labeled as “hot dogs” without the Compelled Disclaimer, even if they are otherwise labeled as “meatless,” “vegan,” or “plant-based.”

51. The Act prohibits plant-based foods from being labeled as “meatballs” without the Compelled Disclaimer, even if they are otherwise labeled as “meatless,” “vegan,” or “plant-based.”

52. The Act prohibits plant-based foods from being labeled as “jerky” without the Compelled Disclaimer, even if they are otherwise labeled as “meatless,” “vegan,” or “plant-based.”

53. The Act prohibits plant-based foods from being labeled as “sausages” without the Compelled Disclaimer, even if they are otherwise labeled as “meatless,” “vegan,” or “plant-based.”

54. The Act prohibits plant-based foods from being labeled as “chorizo” without the Compelled Disclaimer, even if they are otherwise labeled as “meatless,” “vegan,” or “plant-based.”

55. The Act prohibits plant-based foods from being labeled as “steaks” without the Compelled Disclaimer, even if they are otherwise labeled as “meatless,” “vegan,” or “plant-based.”

56. The Act prohibits plant-based foods from being labeled as “bacon” without the Compelled Disclaimer, even if they are otherwise labeled as “meatless,” “vegan,” or “plant-based.”

57. The Act prohibits plant-based foods from being labeled as “corned beef” without the Compelled Disclaimer, even if they are otherwise labeled as “meatless,” “vegan,” or “plant-based.”

58. By prohibiting the use of these terms without the Compelled Disclaimer, the Act creates consumer confusion among reasonable consumers where none existed.

59. The Act’s requirements conflict with the common understanding of these terms by the consuming public.

60. Penalties for violating the Act can include fines of up to \$10,000 per offense.

61. Violations of the Act are misdemeanors, which can entail up to a year in prison.

62. The Act would fail any level of First Amendment scrutiny.

63. The Act is a content-based regulation of speech.

64. The Act is unreasonable, unnecessary, does not advance any legitimate government interest, and is not tailored to any legitimate government interest.

65. The Act does not address any real problem in a meaningful way.

66. The Act is not in the public interest.

67. The Act has no positive impact on society.

68. Instead, the Act harms society.

69. The Act is more burdensome than numerous other alternatives, including but not limited to a requirement that sellers of plant-based foods use meat terms in context so as to not mislead consumers, which they are already doing.

70. Under its 2019 statutes, Oklahoma already required plant-based foods to “display[] that the[ir] product is derived from plant-based sources,” but without requiring this display to be “uniform in size and prominence” to their product names. Okla. St. Ann. tit. 63, § 317(7).

71. No state besides Oklahoma requires that labels for plant-based foods have disclaimers “uniform in size and prominence” to their product names.

72. There are cigarette labels that have product names the same size as mandatory disclaimers on the labels.

73. Also, alcohol labels’ product names are typically larger than other text on the labels, including mandatory disclaimers.

The Plaintiffs and Their Labels

Upton's Naturals

74. Plaintiff Upton's Naturals is located in Chicago, Illinois, and was founded upon vegan values in 2006 to sell a variety of entirely plant- and fruit-based foods.

75. Although Upton's Naturals is relatively small in size, its foods have become popular throughout much of the United States. Oklahoma is among the many locations where Upton's Naturals sells its foods.

76. Upton's Naturals' foods are legal to sell in Oklahoma.

77. Upton's Naturals' foods are marketed to consumers who are looking for alternatives to meat-based products.

78. It is extremely important to Upton's Naturals that customers understand that its foods do not contain meat.

79. It would be a disaster for Upton's Naturals if the public were to think that the company had started selling meat.

80. Consequently, Upton's Naturals makes sure that its food labels are proudly marked as "vegan" and clearly state that the foods do not contain meat.

81. Upton's Naturals' labels include additional words, phrases, and information to further show that the foods do not contain any meat, like "Try All Our Great Vegan Products," "Vegan For A Reason," and the following message: "At Upton's Naturals, veganism is a way of life, and every meal is an opportunity to show compassion for animals. Thank you for supporting our mission to make delicious vegan foods that anyone can enjoy."

82. While Upton's Naturals' food labels are clearly marked as "vegan," the company's product names are the largest text on most of its labels.

83. In order to describe its foods in the clearest possible manner, Upton's Naturals uses meat terms as part of its descriptions on its labels.

84. These terms include, but are not limited to, "bacon," "hot dog," and "chorizo."

85. Upton's Naturals' uses of these terms include, but are not limited to, its vegan "ch'eesy bacon mac" and "vegan hot dog."

86. No reasonable consumer would be misled by the way Upton's Naturals uses these terms.

87. These terms, as used by Upton's Naturals, increase consumer understanding of the foods' characteristics.

88. On the front of Upton's Naturals' "ch'eesy bacon mac" label, there are conspicuous disclaimers that the product is "Vegan," and the product name is in larger type:



89. Under the Act, Upton's Naturals' "ch'eesy bacon mac" label will be illegal as of November 1, 2020.

90. On the front of Upton's Naturals' "vegan hot dog" label, there is a conspicuous disclaimer that the product is vegan, and the product name—"Updog"—is in larger type:



91. Under the Act, Upton’s Naturals’ “vegan hot dog” label will be illegal as of November 1, 2020.

92. Soon, Upton’s Naturals intends to sell its “jerky bites” product.

93. On the front of Upton’s Naturals’ “jerky bites” labels, there will be a conspicuous disclaimer that the product is vegan, and the product name will be in larger type:



94. Under the Act, Upton's Naturals' "jerky bites" label will be illegal as of November 1, 2020.

95. If Upton's Naturals' labels did not describe foods using meat terms, the labels would not be in violation of Oklahoma law.

96. But for the Act, Upton's Naturals' labels would not be in violation of Oklahoma law.

97. But for the Act, Upton's Naturals' foods are legal to sell in Oklahoma.

98. Reasonable consumers are not misled by the way Upton's Naturals uses terms like "bacon," "hot dog," "jerky," and "chorizo" in context on its labels.

99. When used by Upton's Naturals in context on their labels, these terms provide useful information to reasonable consumers.

100. Upton's Naturals invested significant time and money into designing its labels.

101. Upton's Naturals believes that its labels explain its products better than alternative labels would.

102. Upton's Naturals also believes that its labels are better at persuading consumers to buy its products than alternative labels would be.

103. Accordingly, Upton's Naturals does not want to redesign its labels with the Compelled Disclaimer, which would require either new labels nationwide or special labels for Oklahoma.

104. If relief is not granted by this Court, the Act will force Upton's Naturals to stop advertising (and selling) its products in Oklahoma.

105. If relief is not granted by this Court, the Act will harm Upton's Naturals' business.

106. If, as a result of the Act, Upton's Naturals is forced to stop advertising (and selling) in Oklahoma, consumers will be harmed.

PBFA

107. Plaintiff PBFA has over 170 members, all of which sell plant-based foods.

108. Many of PBFA's members sell their foods in Oklahoma.

109. PBFA members' foods are legal to sell in Oklahoma.

110. It is extremely important to PBFA's members that their respective customers understand that their foods do not contain meat.

111. Consequently, PBFA's members clearly label their foods as "vegan," "meatless," "plant-based," or with a similar term that lets customers know that the foods do not contain meat. The labels also typically include additional words, phrases, and information to further show that the foods do not contain any meat.

112. While PBFA's members' labels tell customers that their foods do not contain meat, their product names are usually the largest text on these labels.

113. In order to describe the foods to customers in the clearest possible manner, many of PBFA's members also use meat terms as part of their labels.

114. Some PBFA members' labels include "beef" in their product names, with a qualifier—sometimes in type smaller than their product names—that the products are plant-based.

115. In addition to "beef," the meat terms used by PBFA's members include, but are not limited to, "hot dogs," "burgers," "bacon," "meatballs," "jerky," and "steaks."

116. No reasonable consumer would be misled by these uses of these terms.

117. Reasonable consumers are not misled by the way PBFA's members use these terms in context on their labels.

118. When used by PBFA members in context on their labels, these terms provide useful information to reasonable consumers.

119. These terms increase consumer understanding of the foods' characteristics.

120. As of November 1, 2020, PBFA members' use of these terms will be prohibited unless their labels have a disclaimer—"uniform in size and prominence" to their product names—that their product is plant-based.

121. For example, some PBFA member labels with "beef" in their product names will be prohibited under the Act as of November 1, 2020, even though their labels have conspicuous qualifiers (sometimes in smaller type than their product names) that their products are "plant-based."

122. If PBFA members' labels did not describe foods using meat terms, the labels would not be in violation of Oklahoma law.

123. But for the Act, PBFA members' labels would not be in violation of Oklahoma law.

124. But for the Act, PBFA members' foods are legal to sell in Oklahoma.

125. If relief is not granted by this Court, the Act will force many of PBFA's members to either change their labels or to stop advertising (and selling) their products in Oklahoma.

126. If relief is not granted by this Court, the Act will harm many of PBFA's members' businesses.

127. If, as a result of the Act, PBFA's members are forced to change their labels or stop advertising (and selling) in Oklahoma, consumers will be harmed.

Oklahoma already prohibits misleading commercial speech

128. Separate from the Act, Oklahoma already has laws that prohibit misleading commercial advertising (the "Consumer Protection Laws").

129. The Consumer Protection Laws include prohibitions on misleading labels.

130. The Consumer Protection Laws include Okla. Stat. Ann. tit. 63, § 1-1110(a).

131. Plaintiffs are not challenging the Consumer Protection Laws.

132. Plaintiffs abide by the Consumer Protection Laws and will continue to do so.

INJURY TO PLAINTIFFS

133. Plaintiffs do not want to add the Compelled Disclaimer to their product labels.

134. Plaintiffs' current labels are their preferred means of communicating with consumers.

135. The process of designing food labels is lengthy and cumbersome.

136. Even if Plaintiffs were to start redesigning their labels today, the process would not be complete in a timely manner.

137. If Plaintiffs were to redesign their labels to comply with the Act, the Act's Compelled Disclaimer requirement would crowd out speech in their current labels.

138. If Plaintiffs were to redesign their labels to comply with the Act, Plaintiffs would incur ongoing extra expenses by being forced to use different labels in Oklahoma than in other states.

139. Plaintiffs are concerned and afraid that using terms like "beef," "bacon," "chorizo," "hot dog," and "jerky" without the Compelled Disclaimer on their labels would subject them to severe criminal and civil penalties.

140. The uncertainty caused by the Act is interfering with Plaintiffs' ability to expand their activities in Oklahoma.

141. Defendants' actions have created a doubt that requires a resolution by this Court regarding Plaintiffs' right to communicate.

142. If the Act goes into effect, it will chill Plaintiffs' speech.

143. Without a declaration from this Court declaring the Act unconstitutional, the Act will chill Plaintiffs' speech.

144. Without a declaration concerning the constitutionality of the Act, Plaintiffs are concerned that Defendants would consider their product labels illegal.

145. If this Court declared that the Act was unconstitutional, the declaration would clarify Plaintiffs' rights and conclusively determine whether they can use non-misleading terms of their choice on their product labels.

146. The Act is causing irreparable harm to Plaintiffs and to the consuming public.

147. The irreparable harm increases every day.

148. If the Act goes into effect, Plaintiffs would be forced to stop advertising (and selling) several of their products in Oklahoma.

149. But for the Act, Plaintiffs would continue communicating in Oklahoma through their non-misleading labels for plant-based meat alternatives.

150. If this Court enjoined Defendants from enforcing the Act against Plaintiffs, Plaintiffs would continue advertising (and selling) their products in Oklahoma in a non-misleading way.

CAUSE OF ACTION

The Act violates Plaintiffs' right to free speech

151. Plaintiffs reassert and reallege paragraphs 1 through 150 as if fully set forth therein.

152. According to the First Amendment to the United States Constitution, "Congress shall make no law . . . abridging the freedom of speech."

153. The First Amendment has been incorporated to apply to the states through the Fourteenth Amendment.

154. Plaintiffs' labels are non-misleading speech about a lawful activity.

155. The Act has abridged Plaintiffs' freedom of speech and the freedom of speech of anyone else who would communicate in a similar and non-misleading way.

156. The Act is a content-based regulation of speech; the Act forces Plaintiffs to alter the content of their speech.

157. The Act suppresses helpful, non-misleading speech about the sale of a lawful item.

158. The Act is not reasonably related to preventing or correcting any misleading or deceptive speech.

159. The interests being furthered by the Act are not legitimate, substantial, or compelling.

160. The only interest furthered by the Act is economic protectionism, which is not a legitimate government interest.

161. The Act is not appropriately tailored to any legitimate government interest.

162. The Act does not directly or materially advance any legitimate government interest.

163. The Act is overly extensive and unduly burdensome.

164. The Act's Compelled Disclaimer is not a health or safety warning.

165. Both on its face and as applied to Plaintiffs, the Act violates Plaintiffs' right to free speech guaranteed by the First Amendment to the United States Constitution.

166. Unless Defendants are enjoined from enforcing the Act, Plaintiffs will continue to suffer irreparable harm.

167. The Act harms the public interest by depriving the public of speech. Unless Defendants are enjoined, the public will continue to suffer this harm.

168. If Defendants are enjoined from enforcing the Act, Defendants stand to suffer no harm—there is no risk of financial harm to them because an injunction would not compel them to take any action or obligate any resources.

REQUEST FOR RELIEF

Therefore, Plaintiffs respectfully request the following relief:

A. A declaratory judgment that, facially and as applied to Plaintiffs, the Act violates the First and Fourteenth Amendments to the United States Constitution;

B. A preliminary injunction prohibiting Defendants and their agents from enforcing the Act for the duration of this litigation;

C. A permanent injunction prohibiting Defendants and their agents from enforcing the Act;

D. An award of attorney's fees, costs, and expenses in this action; and

E. Any other legal or equitable relief to which Plaintiffs may show themselves to be justly entitled.

DATED: September 16, 2020.

Respectfully submitted,

/s/ Adam C. Doverspike

Adam C. Doverspike, OBA No. 22548

GABLEGOTWALS

1100 ONEOK Plaza

100 West Fifth Street

Tulsa, Oklahoma 74103

Tel.: (918) 595-4800

Fax: (918) 595-4990

Email: adoverspike@gablelaw.com

Milad Emam*

VA Bar No. 83861

INSTITUTE FOR JUSTICE

901 North Glebe Road, Suite 900

Arlington, VA 22203

Tel.: (703) 682-9320

Fax: (703) 682-9321

Email: memam@ij.org

Justin Pearson*

FL Bar No. 597791

INSTITUTE FOR JUSTICE

2 South Biscayne Boulevard

Suite 3180

Miami, FL 33131

Tel.: (305) 721-1600

Fax: (305) 721-1601

Email: jpearson@ij.org

**Pro Hac Vice Application To Be Filed*

Counsel for Plaintiffs