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

PLANT-BASED FOODS ASSOCIATION and TURTLE ISLAND FOODS SPC, *Plaintiffs,* v. KEVIN STITT, *in his official capacity*; and BLAYNE ARTHUR, *in her official capacity*, *Defendants.*	No. 20-cv-0938-F

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs attempt to dress up diverging legislative preferences of two distinct national industries—the plant-based meat alternative industry and the meat industry—as a constitutional crisis requiring this Court's urgent intervention. When the Oklahoma Legislature unanimously passed the Oklahoma Meat Consumer Protection Act (the Oklahoma Act), Plaintiffs challenged the law as unconstitutional under the First Amendment. *See generally* Doc. 1. When their push for a preliminary injunction failed, *see* Doc. 26, Plaintiffs pivoted to theories under the dormant Commerce Clause, Supremacy Clause (preemption), and Due Process Clause (vagueness). *See generally* Doc. 59.

The Oklahoma Act requires plant-based meat alternatives to accurately disclose "the product is derived from plant-based sources in type that is uniform in size and prominence to the name of the product . . . ." OKLA. STAT. tit. 2, § 5-107(C)(1). This reasonable requirement furthers the important and well-established state interest of protecting consumers against misleading or deceptive food sale practices. Furthermore, it burdens or benefits similarly situated in-state and out-of-state entities in the exact same manner. Because the law does not discriminate—on its face or in any practical effect—against *interstate commerce*, it must be upheld. After all, the purpose of the dormant Commerce Clause is to protect the *interstate* market, not certain interstate firms. *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128 (1978). Plaintiffs' secondary constitutional theories also fail as a matter of law. Because there is no substantial controversy as to any material fact, and the Defendant State Officials are entitled to judgment as a matter of law, Defendants respectfully request this Court grant summary judgment in their favor pursuant to Fed. R. Civ. P. 56.

STATEMENT OF MATERIAL FACTS AS TO WHICH NO GENUINE DISPUTE EXISTS

1. On May 19, 2020, Governor Kevin Stitt signed H.B. 3806, also known as the Oklahoma Meat Consumer Protection Act into law. *See* Okla. Enr. H.B. No. 3806 (Reg. Sess. 2020), attached as Ex. 1; *see also* OKLA. STAT. tit. 2, § 5-107.

2. The Act passed the Oklahoma House of Representatives and the State Senate with unanimous, bipartisan support. *See* HB 3806 Bill Information, attached as Ex. 2.

3. The purpose of the Act is to prohibit "person[s] advertising, offering for sale or selling meat" from "engag[ing] in any misleading or deceptive practices," including:

> 1. 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 . . . .

Ex. 1 at p. 4; OKLA. STAT. tit. 2, § 5-107(C)(1).

4. The Oklahoma Act "does not ban speech," Doc. 59 at ¶ 63, and does not require nor prohibit product packaging labels from using any specific words or language, or for that matter any particular order or placement of words. *See* OKLA. STAT. tit. 2, § 5-107.

5. The Oklahoma Act simply requires plant-based meat alternative packaging labels to disclose that the product is "not actually meat derived from animals" (or "is derived from plant-based sources," OKLA. STAT. tit. 2, § 5-107(C)(1)) "in the same type size and prominence to the 'name of the product' . . . ." Doc. 59 at ¶ 5.

6. In other words, "Plaintiffs can use any words they choose to convey their foods are derived from plant-based sources. No specific font or font size is mandated. All that is

required is that the disclosure of information be in uniform . . . size and prominence to the product name." Doc. 26 at 10.

7. Prior to the passage of the Oklahoma Act, a 2019 predecessor law required a plant-based meat producers' "product packaging" to "display[] that the product is derived from plant[-]based sources[,]" although it did not require the disclosure be uniform in size and prominence to the name of the product. OKLA. STAT. tit. 63, § 317(7) (repealed 2020).

8. "Plaintiffs had no problems complying with that law." Doc. 26 at 2 n.3

9. Since the Federal Food, Drug, and Cosmetic Act ("FDCA") passed in 1938, federal law has likewise provided that "[a] food shall be deemed to be misbranded" if it, among other things, "is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated." 21 U.S.C. § 343 (original version at ch. 675, § 402, 52 Stat. 1040, 1047 (1938)).

10. Nearly every state has adopted a similar provision to 21 U.S.C. § 343. *See, e.g.*, State Labeling Laws Demonstrative Chart, attached as Ex. 3 at 1-3.

11. Many other states have adopted provisions that govern deceptive labeling of meat products or even plant-based meat alternatives. *See, e.g.,* Ex. 3 at 4-7.

12. As Plaintiffs describe, the Oklahoma Act is one of many in "the patchwork of labeling laws[,]" and "Oklahoma's Act, along with other states' new laws," affect plant-based meat producers. Doc. 59 at ¶ 81; *see also id.* at ¶¶ 7, 11.

13. "Tofurkey's business model relies entirely on consumers who are seeking plant-based alternatives being able to clearly distinguish its products from animal meat products." *Id.* at ¶ 29.

14. In other words, "plant-based meat products' sales depend on their ability to differentiate themselves from animal-based meat for consumers who are seeking *alternatives* to animal-based meat[,]" *id.* at ¶ 32, and the primary appeal of plant-based meat alternatives is "that they are not from animals." *Id.* at ¶ 29.

15. In a version of its voluntary standards for the labeling of meat alternatives in the United States, PBFA says that a plant-based meat alternative "should clearly indicate that the product is plant-based or vegetarian . . . in the statement of identity or otherwise in a prominent position on the principal display panel and, where feasible, be shown in similar font size and type as the descriptors." PBFA Voluntary Standards, attached as Ex. 4.

16. "Consumers need truthful and non-misleading information about the nature and use of food products they buy in order to make informed purchasing decisions." Doc. 59 at ¶ 30.

17. Oklahoma has a legitimate interest in reducing and eliminating deceptive and misleading product packaging labels, including ensuring alternative meat products "are clearly marketed and labeled as 'plant-based,' or 'vegan,'" so that "no consumer would mistakenly buy these products thinking they were meat from slaughtered animals." *Id.* at ¶ 27; *see also* Doc. 26 at 10 n.12 ("[T]he state has [an] interest in preventing consumer confusion or deception.").

18. "[N]either the FDA, the FTC, the Oklahoma state Attorney General's office, or any consumer-led lawsuits have ever opted to take enforcement action against a plant-based meat product . . . ." Doc. 59 at ¶ 82.

19. "[I]f the Oklahoma Act applies to plant-based meat producers, it applies in the same manner to both in-state and out-of-state plant-based meat producers if in-state plant-

based meat producers exist." PBFA's Resp. to Def.'s First Disc. Reqs. (Supplemental), attached as Ex. 5, at 6; Tofurky's Resp. to Def.'s First Disc. Reqs., attached as Ex. 6, at 44-45.

20. "[I]f the Oklahoma Act applies to animal-based meat producers, it applies in the same manner to both in-state and out-of-state animal-based meat producers . . . ." Ex. 5 at 7; Ex. 6 at 45.

21. Plaintiffs are "unaware of a single plant-based meat producer based in the state of Oklahoma." Ex. 6 at 14.

22. Plaintiff Tofurky has "not 'create[ed] one set of labels' for [its] plant-based meat products for use or sale only in Oklahoma." *Id.* at 45 (citing Doc. 59 at ¶ 76).

23. According to statistics released from the National Agricultural Statistics Service, nine other states held greater cattle inventory for slaughter in 2022 when compared to Oklahoma. *See* NASS Table, attached as Ex. 7.

STANDARD OF REVIEW

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Although courts will "view[] the evidence and draw[] reasonable inferences therefrom in the light most favorable to the nonmoving party[,]" to defeat summary judgment a nonmovant must do "more than 'simply show that there is some metaphysical doubt as to the material facts.'" *S.E.C. v. Thompson*, 732 F.3d 1151, 1157 (10th Cir. 2013) (quotations omitted). Once the movant makes a *prima facie* showing of entitlement to summary judgment, the nonmovant "must 'make a showing sufficient to establish the existence of an element

essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

Even then, an issue of fact is only material "if under the substantive law it is essential to the proper disposition of the claim." *Adler v. Wal–Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). When disposition of the claim turns on a question of law, such as statutory interpretation, the claim is ripe for resolution on summary judgment. *See Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1160 (10th Cir. 2011). Finally, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

ARGUMENT AND AUTHORITIES

I. THIS COURT SHOULD GRANT SUMMARY JUDGMENT TO DEFENDANTS ON COUNTS III AND IV BECAUSE THE OKLAHOMA ACT DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

Although the Commerce Clause does not expressly restrain the power of the States, the Supreme Court has "long interpreted the Commerce Clause as an implicit restraint on state authority" to regulate interstate commerce. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). This so-called "dormant" or "negative" aspect of the Commerce Clause prohibits states from unjustifiably discriminating against interstate commerce. *See Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008); *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 98 (1994). The dormant Commerce Clause "is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit

in-state economic interests by burdening out-of-state competitors.'" *Davis*, 553 U.S. at 337-38 (citation omitted).

At the same time, "[t]he dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition." *United Haulers Ass'n*, 550 U.S. at 343. Indeed, the Commerce Clause was "never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 306–07 (1997) (quotation omitted). Accordingly, courts should reject "invitations to rigorously scrutinize economic legislation passed under the auspices of the police power . . . under the banner of the dormant Commerce Clause." *United Haulers Ass'n*, 550 U.S. at 347.

Relevant here, the Supreme Court has explained that "the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern[,]" and states "have always possessed a legitimate interest in 'the protection of (their) people against fraud and deception in the sale of food products . . . ." *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963) (quotation omitted); *see also Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 43 (1980) ("Discouraging economic concentration and protecting the citizenry against fraud are undoubtedly legitimate state interests."); and *Plumley v. Massachusetts*, 155 U.S. 461, 472 (1894) ("If there be any subject over which it would seem the states ought to have plenary control . . . it is the protection of the people against fraud and deception in the sale of food products."). "[B]ecause consumer protection is a field traditionally subject to state regulation," courts should be "'particularly hesitant to interfere with the [state's consumer protection]

efforts under the guise of the Commerce Clause.'" *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 194 (2d Cir. 2007) (quoting *United Haulers Ass'n, Inc.*, 550 U.S. at 344).

The dormant Commerce Clause encompasses a two-step inquiry. *See generally United Haulers Ass'n, Inc.*, 550 U.S at 338, 346. First, courts consider whether the challenged law facially discriminates against interstate commerce or provides "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* at 338 (citation omitted). If the statute is not facially discriminatory, then courts consider whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id.* at 346 (citing *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970)); *see also Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1139 (10th Cir. 2016) ("A state law generally violates the dormant Commerce Clause if it discriminates [against interstate commerce] … either on its face or in its practical effects").[1] "The burden to show discrimination rests on the party challenging the validity of the statute . . . ." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

[1] Importantly, the Tenth Circuit has never adopted the view that a state law can violate the dormant Commerce Clause a third way: in its purpose. *Contra Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 648 (6th Cir. 2010). A view that an allegedly discriminatory purpose alone can violate the dormant Commerce Clause, if not foreclosed by Tenth Circuit precedent, would clash with Supreme Court precedent holding that "a court need not inquire into the purpose or motivation behind a law to determine that in actuality it impermissibly discriminates against interstate commerce." *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 653 (1994) (collecting cases); *see also City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978) (describing "legislative purpose" as "not . . . relevant to the constitutional issue to be decided"). Even if legislative purpose were relevant, it is determined through the text and cannot be second-guessed. *See Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 561 n.4 (2015) ("The Commerce Clause regulates effects, not motives, and it does not require courts to inquire into voters' or legislators' reasons for enacting a law that has a discriminatory effect.").

A. The Oklahoma Act does not facially burden interstate commerce.

To succeed on the first prong of the dormant Commerce Clause analysis, Plaintiffs must establish that the Oklahoma Act facially discriminates against interstate commerce. *See Or. Waste Sys.*, 511 U.S. at 99. Discrimination against interstate commerce requires *differential treatment* between *in-state* and *out-of-state* entities. *See id.* In the absence of such differential treatment, or when the law "treat[s] in-state private business interests exactly the same as out-of-state ones," it "do[es] not 'discriminate against interstate commerce . . . .'" *United Haulers Ass'n*, 550 U.S. at 345 (citation omitted).

As the Tenth Circuit observed: "when the Supreme Court has concluded a law facially discriminates against interstate commerce, it has done so based on statutory language explicitly identifying geographical distinctions." *Direct Mktg. Ass'n*, 814 F.3d at 1141. Take the case of *Oregon Waste Systems*, where the Supreme Court held an Oregon surcharge law was facially invalid under the dormant Commerce Clause. The Court had little trouble concluding that the Oregon law was discriminatory on its face because it imposed an additional fee, or surcharge, on "every person who disposes of solid waste generated *out-of-state* in a disposal site or regional disposal site." *Or. Waste Sys.*, 511 U.S. at 96 (emphasis added). Such a law is clearly discriminatory because it "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Id.* at 99 (quotation and citation omitted). The Court therefore held "the surcharge patently discriminates against interstate commerce." *Id.* at 100.

The Oklahoma Act does not draw any geographical distinctions, nor does it make any reference to in-state and out-of-state entities. The law makes no mention whatsoever of

geographical boundaries, states, or locations, and it applies equally to those producing plant-based meat alternatives in-state as those out-of-state. Similar to the Colorado law at issue in *Direct Marketing Ass'n*, the Oklahoma Act, at most, distinguishes between those entities that produce and sell plant-based meat alternatives and those that do not. *See Direct Mktg. Ass'n,* 814 F.3d at 1141 (explaining that "the Colorado Law distinguishes between those retailers that collect Colorado sales and use tax and those that do not."). Such a distinction does not implicate interstate commerce, as it does not draw geographical distinctions or treat in-state entities differently from out-of-state entities. Therefore, the Oklahoma Act is facially neutral.

B. The Oklahoma Act does not burden interstate commerce through its effects.

Even "[i]n the absence of facial discrimination, a state law may nonetheless discriminate against interstate commerce in its direct effects." *Id.* at 1142. In this inquiry, the Tenth Circuit has explained that "the critical consideration is the overall effect of the statute on both local and interstate activity." *Id.* (citation omitted). Again, and importantly, the discriminatory effect that triggers the dormant Commerce Clause is a "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys.*, 511 U.S. at 99; *see also Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040 (10th Cir. 2009). Put differently, state laws that "raised the cost of doing business for out-of-state dealers, and, in various other ways, favor[ ] the in-state dealer in the local market," have a discriminatory effect. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978).

To this point, the fact that a law may create an adverse effect or burden on *competition*, even when borne entirely by out-of-state competitors, is irrelevant. *See id.* ("The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a

claim of discrimination against interstate commerce."); *see also CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987). The purpose of the dormant Commerce Clause is to "protect[] the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon Corp.*, 437 U.S. at 127-28. Otherwise, if "an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." *Id.* at 133. Instead, "the Supreme Court has consistently held that protecting or favoring one particular intrastate industry, absent a specific federal constitutional or statutory violation, is a legitimate state interest." *Powers v. Harris*, 379 F.3d 1208, 1220 (10th Cir. 2004).

Moreover, the Tenth Circuit has clarified that "the party claiming discrimination has the burden to put on evidence of a discriminatory effect on commerce that is 'significantly probative, not merely colorable.'" *Kleinsmith*, 571 F.3d at 1040 (citation omitted). Again, this requires the plaintiff establish "both how local economic actors are favored by the legislation, and how out-of-state-actors are burdened." *Id.* at 1041 (citation omitted). A plaintiff cannot succeed without establishing in-state entities receive some "preferential advantages" or "local preference, whether by express discrimination against interstate commerce or undue burden upon it . . . ." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299-300 (1997) (citation omitted).

Here, Plaintiffs can do nothing more than show the Oklahoma Act imposes a burden on competition, not interstate commerce. Any effect or burden flowing from the Oklahoma Act is equally borne by all plant-based meat producers, whether in-state or out-of-state. *See,*

e.g., Ex. 5 at 6; Ex. 6 at 44-45. To the extent any in-state plant-based meat producer existed,[2] that producer would be burdened—not benefitted—by the Oklahoma Act in the same manner Plaintiffs claim they are. Moreover, the absence of any in-state plant-based meat producer forecloses any argument that the Oklahoma Act bestows some preferential, local advantage.

Likewise, any benefit or relative advantage would be borne equally by any producers of substitute products, whether in-state or out-of-state. To be sure, Plaintiffs generically complain that the Oklahoma Act is protectionist in favor of the "meat industry." Doc. 59 at ¶¶ 56-57; *see also id.* at ¶ 60 (alleging "the true protectionist nature of the Act" was to "protect[] animal-based meat producers from the growing competition posed by plant-based meat producers"). Yet, Plaintiffs also recognize that the meat industry is national, claiming that "the State of Oklahoma has bowed to pressure from cattle industry lobbyists and taken sides in a heated *national campaign* by proponents of animal-based foods against plant-based products." *Id.* at ¶ 10 (emphasis added). In other words, even accepting Plaintiffs' claim that the "meat industry" gains some unidentified benefit through the Oklahoma Act, that benefit would fall on a national industry, equally applying to in-state and out-of-state entities. Plaintiffs themselves concede that the Oklahoma Act would apply in the same manner to in-state and out-of-state meat producers. *See, e.g.,* Ex. 5 at 6-7; Ex. 6 at 44-45.

Plaintiffs cannot identify a single in-state meat producer receiving some preferential advantage under the Oklahoma Act. Such a claim would likewise be foreclosed by the fact that nine other states held greater cattle inventory for slaughter in 2022 according to statistics

[2] Plaintiffs concede they are unaware of a single in-state plant-based meat producer. *See, e.g.,* Ex. 6 at 14; Doc. 59 at ¶ 40.

released from the National Agricultural Statistics Service. *See* Ex. 7. To the extent the Oklahoma Act benefits cattle producers, producers located out-of-state in Texas, Nebraska, Kansas, Iowa, Colorado, California, South Dakota, Minnesota, and Idaho—or any state for that matter—benefit to an equal degree as those located in Oklahoma.[3] To summarize, even accepting Plaintiffs' position that the Oklahoma Act may hinder the sale of plant-based meat alternatives, Plaintiffs cannot establish consumers will turn to an in-state producer, and therefore, an in-state entity will gain preferential advantage over out-of-state counterparts.[4]

The Supreme Court dealt with a similar issue to the one presented here in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). There, the Court noted that "[s]ince Maryland's entire gasoline supply flows in interstate commerce and since there are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless." *Id.* at 125. With the absence of in-state producers, "in-state independent dealers will have no competitive advantage over out-of-state dealers." *Id.* at 126.

The absence of any in-state plant-based meat producer who would benefit from the Oklahoma Act also distinguishes this case from cases such as *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977). In *Hunt*, in-state North Carolina apple producers clearly benefited from the challenged North Carolina law that prohibited apple producers from

[3] Even Plaintiffs' poorly sourced claim that Oklahoma is "the fifth largest producer of cattle in the United States (as well as the tenth for pig production)," Doc. 59 at ¶ 59, would be dispositive for the same reasons: producers from any other state would benefit to an equal degree as those in Oklahoma. The same would hold true even if Oklahoma was the largest cattle producer: the number of in-state producers does not alter the equal effect of the law.

[4] In fact, Plaintiffs fail to identify a single Oklahoma meat producer, instead complaining only about purported benefits to lawmakers and advocacy groups such as the Cattlemen's Association (who like PBFA, presumably do not actually produce any products).

displaying Washington State apple grades on product containers. Washington apple producers, for example, included Washington State grades on preprinted containers, while the in-state apple producers did not. *Id.* at 337-38, 340. Thus, the law had a discriminatory impact on out-of-state apple producers by requiring them to incur costs—e.g., altering marketing practices in order to comply with the North Carolina statute—in-state apple producers did not incur. *See id.* at 350-51.[5] The court observed: "the increased costs imposed by the statute would tend to shield the local apple industry from the competition of Washington apple growers and dealers who are already at a competitive disadvantage because of their great distance from the North Carolina market." *Id.* at 351 (emphasis added).

In comparison, in a case with a similar fact pattern to the present dispute, the Ford Motor Company argued that a Texas licensing law which prohibited dealers from owning showrooms violated the dormant Commerce Clause and discriminated against interstate commerce. *See Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493 (5th Cir. 2001). Like Plaintiffs here, Ford attempted to use "the fact that Texas has no motor vehicle manufacturers as evidence of the law's discriminatory purpose and effect." *Id.* at 502. The Fifth Circuit disagreed, observing that "the [Supreme] Court rejected a similar assertion in *Exxon*, finding of no consequence that there were no Maryland oil producers or refiners." *Id.* The court therefore concluded the law "does not discriminate against independent automobile dealers seeking to operate in Texas[,]" and instead applied to all "manufacturers, regardless of their

[5] The Washington apple producers also produced concrete evidence of actual losses incurred from the North Carolina statute, including evidence "that individual growers and shippers lost accounts in North Carolina as a direct result of the statutes[,]" unlike the speculation and hypotheticals Plaintiffs present here. *Compare id.* at 347 *with* Doc. 59 at ¶¶ 6, 55, 64, 73.

domicile . . . ." *Id.* Put differently, the law "does not protect dealers from out-of-state competition, it protects *dealers* from competition from *manufacturers*. Out-of-state corporations, which are non-manufacturers, have the same opportunity as in-state corporations to obtain a license and operate a dealership in Texas." *Id.* (emphases added).

Similarly, in *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 649 (6th Cir. 2010), the Sixth Circuit observed the challenged Ohio rule regulating dairy producers' product labels:

> burdens Ohio dairy farmers and processors who do not use rbST in their production of milk products to the same extent as it burdens out-of-state farmers and processors not using rbST. Conversely, the Rule favors out-of-state farmers and processors who *do* use rbST in the same way that it favors Ohio farmers and processors who use rbST.

Because "[b]oth Ohio and out-of-state processors are in effect either benefitted or burdened equally[,]" the court concluded, "the Processors' claim that the Rule is protectionist and thus per se invalid is without merit." *Id.* The court further found that "the alleged burdens on interstate commerce are not excessive in relation to the putative local benefits." The court observed "Ohio has a reasonable basis to believe that the Rule's intended benefit—consumer protection—is significant." *Id.* at 649-50 (citation omitted).

Here, like the laws at issue in *Exxon*, *Ford Motor Co.*, and *Boggs*, the Oklahoma Act bestows no advantage on any local plant-based meat producers, or any local meat producer for that matter. Moreover, there is no discriminatory impact, effect, or burden on *interstate* commerce. Because the Oklahoma Act applies equally to, or burdens equally, in-state and out-of-state entities, Plaintiffs cannot establish discrimination against interstate commerce. Therefore, Defendants are entitled to judgment as a matter of law.

Perhaps just as crucial here, "any notion of discrimination assumes a comparison of substantially similar entities." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997). As a threshold matter, a plaintiff must establish the competing in-state and out-of-state entities "are indeed similarly situated for constitutional purposes." *Id.* at 299. If the entities serve different markets or provide different products, "eliminating the . . . regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Id.*

Thus, Plaintiffs cannot prop up their dormant Commerce Clause claim by attempting to compare out-of-state plant-based meat producers to in-state meat producers, or vice-versa. As Plaintiffs themselves concede, these are distinct industries that serve distinct consumer bases. For example, Plaintiffs admit "Tofurky's target market is people who want to avoid meat made from animals." Doc. 59 at ¶ 20. Plaintiffs likewise admit that "Tofurky's business model relies entirely on consumers who are seeking plant-based alternatives being able to clearly distinguish its products from animal-based meat products." *Id.* at ¶ 29; *see also id.* at ¶ 32 ("[P]lant-based meat products' sales depend on their ability to differentiate themselves from animal-based meat for consumers who are seeking alternatives to animal-based meat."). Consequently, Tofurky's "products are all prominently marketed and packaged as vegan and 100% plant-based, with labels that unmistakably convey that they are 'PLANT-BASED.'" *Id.* at ¶ 20; *see also id.* at ¶¶ 25-26. Plaintiffs likewise recognize that the "meat industry" is distinct from the "plant-based industry." *See* Doc. 59 at ¶¶ 10, 15-16, 39, 56-57, 103. Thus, Plaintiffs admit their marketing strategies are predicated on the innate differences between plant-based

meat alternatives and meat. As a result, plant-based meat alternatives are not similarly situated to meat products and plant-based meat producers are not similarly situated to meat producers for purposes of the dormant Commerce Clause. Because Plaintiffs cannot tether their complaints of discrimination to any differential treatment between similarly situated in-state entities and out-of-state entities, their dormant Commerce Clause claim must fail.

C. Even assuming the Oklahoma Act burdens interstate commerce, that burden is not clearly excessive in relation to the putative local benefits.

Even if Plaintiffs could establish that the Oklahoma Act burdens interstate commerce, the law "will be upheld" unless Plaintiffs can establish that burden is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).[6] Because this standard is stringent, "[s]tate laws frequently survive this *Pike* scrutiny. . . ." *Dep't of Revenue of Ky. v. Davis,* 553 U.S. 328, 339 (2008). In *Pike* balancing, courts consider "(1) the nature of the putative local benefits advanced by the [law]; (2) the burden the [law] imposes on interstate commerce; (3) whether the burden is 'clearly excessive in relation to' the local benefits; and (4) whether the local interests can be promoted as well with a lesser impact on interstate commerce." *Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs*, 27 F.3d 1499, 1512 (10th Cir. 1994) (quoting *Pike*, 397 U.S. at 142).

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[6] This Court need not undertake *Pike* balancing: such balancing is proper "*only* when the challenged law *discriminates* against interstate commerce in practical application. *Pike* is not the default standard of review for any state or local law that affects interstate commerce." *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 502 (7th Cir. 2017) (emphasis in original). If Plaintiffs fail to establish the Oklahoma Act "discriminates against interstate commerce in practical effect, the dormant Commerce Clause does not come into play and *Pike* balancing does not apply." *Id.* at 502. Similarly, in practice there is "no clear line between" *Pike*'s "clearly excessive" burden test and the facial discrimination test, as both inquiries "arguably turn[] in whole or in part on the discriminatory character of the challenged state regulations . . . ." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 299 n.12 (1997).

Important to *Pike* balancing is the Supreme Court's use of the term "putative" when describing the identified local benefit. Consistent with the plain meaning of the term, the Court's inquiry is not designed to "second guess the empirical judgment of lawmakers concerning the utility of legislation." *CTS Corp.*, 481 U.S. at 92 (citation omitted); *see also Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 313 (1st Cir. 2005) ("[U]nder *Pike*, it is the *putative* local benefits that matter. It matters not whether these benefits actually come into being at the end of the day."). As Justice Brennan explained in his concurring opinion in *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 680-81 (1981) (citations omitted):

> Since the court must confine its analysis to the purposes the lawmakers had for maintaining the regulation, the only relevant evidence concerns whether the lawmakers could rationally have believed that the challenged regulation would foster those purposes. It is not the function of the court to decide whether *in fact* the regulation promotes its intended purpose, so long as an examination of the evidence before or available to the lawmaker indicates that the regulation is not wholly irrational in light of its purposes.

As a result, Plaintiffs cannot second-guess, or create an alleged factual dispute over, whether the Oklahoma Act achieves its putative local purpose in every instance.

Here, all *Pike* factors favor the Oklahoma Act and support summary judgment in Defendants' favor. The nature and importance of the putative local benefit advanced by the Oklahoma Act cannot be denied. The purpose of the Act, which is to prohibit "person[s] advertising, offering for sale or selling meat" from "engag[ing] in any misleading or deceptive practices" is plainly legitimate. OKLA. STAT. tit. 2, § 5-107(C); *see also supra* at pp. 7-8 (describing the state's legitimate interest in preventing fraud and deception in the sale of food products); *Corn Prod. Ref. Co. v. Eddy*, 249 U.S. 427, 431 (1919) ("it is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the

purchaser fair information of what it is that is being sold."); Doc. 26 at 10 n.12 ("[T]he state has [an] interest in preventing consumer confusion or deception."). Plaintiffs themselves acknowledge the importance of truthful and accurate product labeling to prevent consumer deception. *See, e.g.,* Doc. 59 at ¶¶ 16, 30, 37, 77.

This Court has further explained that "the possibility of deception flowing from the use of meat-related terms for the plant-based products is self-evident from the natural inference a consumer would draw from the meat-related terms used." Doc. 26 at 7-8. That "likelihood of deception 'is hardly a speculative one.'" *Id.* at 8 (citation omitted). Because the interest promoted through the Oklahoma Act is readily apparent, the Oklahoma Legislature—and all the legislators who unanimously approved the law—could rationally believe the Oklahoma Act promotes its intended purpose: preventing consumer deception. *See* Exs. 1-2.[7]

Plaintiffs' own defense of Tofurky's product labels (unwittingly) supports the sensibility of the Oklahoma Act. After all, it appears that Tofurky's product labels *comply* with the Oklahoma Act by disclosing the fact their products are "plant-based" in uniform size and prominence to the name of the product. *See, e.g.,* Doc. 59 at ¶ 20 (describing that Tofurky products "are all prominently marketed and packaged as vegan and 100% plant-based, with

[7] Of course, the State need not conduct statistical surveys, nor overcome some statistical threshold, to establish the purpose advanced by a law is legitimate. *See, e.g.,* Doc. 26 at 7-8 (citing *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 652-53 (1985)); *Powers v. Harris*, 379 F.3d 1208, 1217 (10th Cir. 2004) ("Nor can we overturn a statute on the basis that no empirical evidence supports the assumptions underlying the legislative choice.") (citation omitted). For example, that only a small percentage of the populace may be the victim of a specific type of crime does not render the purpose advanced by that criminal law any less legitimate. Likewise, even if only a small percentage of the populace would be deceived by labels violating the Oklahoma Act, that does not render the purpose of preventing consumer deception any less legitimate.

labels that unmistakably convey that they are 'PLANT-BASED.'"); *id.* at pp. 9-11 (displaying images of product packaging). Accordingly, when Plaintiffs explain that "courts *have* recognized that . . . labeling conventions using qualifying language in addition to animal-based terms like 'milk' are not likely to mislead reasonable consumers[,]" they themselves defend the Oklahoma Act, which requires just that. *Id.* at ¶ 33 (emphasis in original). Even Plaintiffs' own flawed studies support the Oklahoma Act for the same reason: when consumers[8] were asked questions about a product name that contained a "plant-based" disclosure like the one required by the Oklahoma Act, the "[r]esults showed that consumers understand that the products did not come from animals . . . ." *Id.* at ¶ 36.[9]

As to the purported burden imposed on out-of-state plant-based meat producers under the Oklahoma Act, that burden is minimal and likely non-existent. Although Plaintiffs allege that the law would purportedly "force companies like Tofurky to consider creating one set of labels for Oklahoma and another set for other states, which would raise the cost to come to market[,]" *Id.* at ¶ 75, Plaintiff Tofurky has failed to present anything establishing that they are not already in compliance with the Oklahoma Act. Tofurky even concedes that it has not created one set of product labels solely from Oklahoma; thus, it has yet to spend a single cent on compliance in the two years since the Oklahoma Act has been in effect. *See* Ex. 6 at 45.

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[8] The Gleckel study cited by Plaintiffs had a total of 155 participants, only 96 who were asked about the relevant label. *See* Jareb A. Gleckel, *Are Consumers Really Confused by Plant-Based Food Labels? An Empirical Study* (Nov. 17, 2020) available at https://tinyurl.com/mvrff87c.

[9] Plaintiffs at times appear to engage with a strawman argument about a law that restricts "plant-based producers' use of 'meat' terminology . . . ." Doc. 59 at ¶ 36; *see also id.* at ¶ 35 (citing an inapposite California district court case relating to an "attempt to prevent vegan dairy producers from calling products 'vegan butter'"). The Oklahoma Act does not restrict the use of "meat" terminology. *See id.* at ¶ 63; OKLA. STAT. tit. 2, § 5-107(C)(1).

Even if Plaintiff Tofurky could theoretically establish it changed its product labels, it would face the impossible task of proving that the Oklahoma Act—and not a number of other intervening factors or laws—directly caused the action. For example, Plaintiffs recognize that Oklahoma's law is only one in a "patchwork of labeling laws" applying to plant-based meat alternatives. Doc. 59 at ¶ 81; *see also id.* at ¶¶ 4, 7, 11 57-58, 64, 87; Ex. 6 at 7-8; *see also* Ex. 3 at 4-7. Moreover, Plaintiffs themselves acknowledge their own desire to distinguish their products from meat products and achieve clear and accurate marketing. Plaintiffs' purported burdens are not significantly probative at best, *see Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040 (10th Cir. 2009), and non-existent at worst.

Even if the purported burdens on interstate commerce were cognizable, those burdens are nominal in comparison to the important putative local benefit of protecting against consumer confusion. They are not "clearly excessive." As this Court described:

> The size and prominence requirement is justified and not unduly burdensome. That requirement is intended to ensure that a reasonable consumer will not be misled by the product name, which uses an animal-based term when the product itself is plant-based. The disclosure requirement seeks to inform the grocery shopper about the nature of the product purchased. In addition, the disclosure requirement does not hinder plaintiffs' ability to communicate effectively. The information to be conveyed is not scripted by the government. Plaintiffs can use any words they choose to convey their foods are derived from plant-based sources. No specific font or font size is mandated. All that is required is that the disclosure of information be in uniform in a size and prominence to the product name. The disclosure requirement is not such that it "effectively rules out" plaintiffs' ability to include the information they want to convey on their product labels.

Doc. 26 at 9-10 (citation omitted). Additionally, this Court previously held that "[r]equiring the disclosure of the plant-based nature of the product to be the same size and have the prominence as the product name is reasonably related to the state's interest of ensuring

accurate commercial information on food labels." *Id.* at 10. Because the purported burdens on interstate commerce, to the extent they exist at all, are not clearly excessive in relation to the putative local benefit, summary judgment is proper in Defendants' favor.

II. THIS COURT SHOULD GRANT SUMMARY JUDGMENT TO DEFENDANTS ON COUNTS I AND II BECAUSE THE OKLAHOMA ACT IS NOT PREEMPTED BY FEDERAL LAW.

Plaintiffs cannot establish that the Oklahoma Act is expressly preempted by the FDCA, as amended by the Nutrition Labeling and Education Act (NLEA), as a matter of law. To establish that the Oklahoma Act is facially and "expressly preempt[ed]" by the FDCA "disclosure requirements[,]" Doc. 59 at ¶ 85, Plaintiffs must establish that the law "fall[s] within the scope of a federal provision explicitly precluding state action." *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 765 (10th Cir. 2010); *see also Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008). Because "preemption is ultimately a question of congressional intent[,]" *U.S. Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1324 (10th Cir. 2010), courts "apply ordinary principles of statutory interpretation, looking initially to the plain language of the federal statute." *Edmonson*, 594 F.3d at 765. After all, "the plain wording of the clause . . . necessarily contains the best evidence of Congress' pre-emptive intent." *Boyz Sanitation Serv., Inc. v. City of Rawlins, Wyoming*, 889 F.3d 1189, 1198 (10th Cir. 2018) (citation omitted).

In determining whether state law is preempted, courts should "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citation omitted). If the text of the law is susceptible to more than one plausible reading, courts "have a duty to accept the reading that disfavors pre-emption." *Bates*

v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005); *see also CTS Corp. v. Waldburger*, 573 U.S. 1, 19 (2014). Here, nothing in the language of the FDCA or NLEA establishes a "clear and manifest" intent by Congress to expressly preempt the states' established power over misleading or deceptive food labeling practices.

First, Plaintiffs are incorrect to suggest the requirements of 21 U.S.C. § 343(a)(1) expressly preempt the Oklahoma Act. *See* Doc. 59 at ¶¶ 3, 42, 51, 85. Although Section 343(a)(1) does deem a food misbranded if "its labeling is false or misleading in any particular," Doc. 49 at ¶ 42, Subsection 343(a) is not one of the misbranding provisions contained in the express preemption clause of 21 U.S.C. § 343-1. Instead, the express preemption provision clause prohibits states from establishing requirements for the labeling of food "of the type required by section 343(c), 343(e), 343(i)(2), 343(w), or 343(x)" and "343(b), 343(d), 343(f), 343(h), 343(i)(1), or 343(k) of this title that is not identical to the requirement of such section . . . ." 21 U.S.C. § 343-1(a)(2)-(3).

"[I]n any inquiry respecting the likely or probable intent of Congress, the silence of Congress is relevant . . . ." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017). When it comes to express preemption, "as in any field of statutory interpretation, it is our duty to respect not only what Congress wrote but, as importantly, what it didn't write." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019). Here, Subsection 343(a) is conspicuously absent from the express preemption clause. That must mean something. As a result, even a clear conflict

between a state law and Section 343(a) in the NLEA cannot support a finding of express preemption.[10]

Importantly, the express savings clause in the amended FDCA provides: "The [NLEA] shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under [21 U.S.C. § 343-1(a)]." Pub. L. No. 101-535, § 6(c)(1) (1990) (21 U.S.C.A. § 343-1 note). Again, Congress has expressed its intent and purpose to preempt state laws conflicting only with those subsections of the NLEA included within the text of Section 343-1. This clearly manifested intent, paired with the presumption against preemption, requires a conclusion that the Oklahoma Act falls outside of the express preemption clause, and is therefore not superseded. Broad statements of purpose, *see* Doc. 59 at ¶ 49, are simply insufficient to support a contrary conclusion in the face of clear statutory language. *See also id.* at ¶ 50 (describing that the express preemption clause of the NLEA was intended "to preempt '**some state laws** that interfered with [companies'] ability to do business in all 50 states." (citation omitted) (emphasis added)).

Second, Plaintiffs are incorrect to suggest the requirements of 21 U.S.C. § 343(i)(1) expressly preempt the Oklahoma Act. *See* Doc. 59 at ¶¶ 51-53, 85. Although the express preemption clause indeed prohibits states from imposing labeling requirements not identical to those required in Section 343(i)(1), *see* Doc. 59 at ¶ 53 (citing 21 U.S.C. § 343-1(a)(3)), Plaintiffs fail to acknowledge that the FDA has not created any applicable standards of identity, nor defined the common or usual name of the food, for plant-based meat alternatives. Section

[10] Almost every state has enacted a similar prohibition of misleading labeling, *see* Ex. 3 at 1-3, further undermining a conclusion that 343(a) has preclusive effect.

343(i) provides that "[a] food shall be deemed to be misbranded . . . [u]nless its label bears (1) the common or usual name of the food, if any there be . . . ." 21 U.S.C. § 343(i). Yet, no federal statute or regulation defines the "common or usual name" for plant-based meat alternatives, meaning there isn't any "common or usual name of the food" in federal law. In the absence of federal law defining the common or usual name for plant-based meat alternatives, Plaintiffs cannot identify a conflict between that and the Oklahoma Act to establish express preemption.

In addition, even if a "common or usual name of the food" did exist for plant-based meat alternatives outside of the express terms of federal law, nothing in the Oklahoma Act is inconsistent with the common or usual name of plant-based meat alternatives. Under FDA regulations: "[t]he common or usual name of a food, which may be a coined term, shall **accurately identify or describe**, in as simple and direct terms as possible, the basic nature of the food or its characterizing properties or ingredients." 21 C.F.R. § 102.5(a) (emphasis added). As evidenced by Plaintiff Tofurky's own label submissions, disclosing plant-based meat alternatives as "derived from plant-based sources" is reflective of the common or usual name, "if any there be," (21 U.S.C. § 343(i)) for these products. *Compare* Doc. 59 at pp. 9-12 with OKLA. STAT. tit. 2, § 5-107. In other words, the Oklahoma Act simply requires plant-based meat producers to do that which they already claim to do: accurately identify or describe their products.

In a relevant case out of the Southern District of Florida, a defendant argued that a Florida honey standard was expressly preempted by Section 343-1 of the NLEA. *See Guerrero v. Target Corp.*, 889 F. Supp. 2d 1348, 1360 (S.D. Fla. 2012). The defendant argued that the plaintiff's state law claims were preempted "because 21 U.S.C. § 343(i)(1) allows foods to be

labeled according to their common name and 'honey' is indisputably the common name for the product it sold and marketed . . . ." *Id.* at 1361. The plaintiff argued that Section 343(i) is "triggered only in the absence of any standard of identity, state or federal." *Id.* at 1361-62. The court agreed with the plaintiff, citing the express savings clause and the fact that "Congress could have banned all state standards of identity, [but] it did not do so." *Id.* at 1362. The court further cited several district court cases holding "the only State requirements that are subject to preemption are those that are affirmatively different from the Federal requirements." *Id.* (citation omitted). Because there was "no federal standard of identity for honey[,]" the Florida honey standard did not conflict with the NLEA and was not preempted. *Id.*

In another analogous case, a federal district court rejected plaintiffs' claim that Vermont's state law requiring mandatory labeling of "genetically engineered" ("GE") foods was preempted by the FDCA and NLEA. *Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583 (D. Vt. 2015). The plaintiff in that case argued that the state law "disclosure requirement force[d] them to modify the 'standard of identity' for some products, 'the common or usual name' for other products, and the 'list of ingredients' for all products." *Id.* at 612. In concluding that the state law was not preempted, the court emphasized that it could not "extend preemption beyond NLEA's express preemption provisions[,]" and that "*not all* state labeling requirements that provide more or different information from the FDCA are preempted." *Id.* at 613 (emphasis in original). The court explained that "for preemption to apply, the FDCA must require the labeling information at issue; the NLEA must indicate that the mandatory federal labeling requirement is entitled to preemptive effect; and [the state law's] disclosure requirement must govern this same information." *Id.* at 613-14. The court rejected the

plaintiff's argument that because the "disclosure requirement must accompany every federal standard of identity, [the law] impermissibly modif[ied] its contents" as implausible under the plain language of the state law and the express preemption clause of the NLEA. *Id.* at 614. The court highlighted that "[b]ecause the FDA has promulgated standards of identity for only some foods and beverages, the absence of a federal standard of identity obviates any claim that a state requirement is 'not identical' to it." *Id.* The same result is warranted here in the absence of any federal standard of identity or common name governing plant-based meat alternatives.

Moreover, here, as with the GE disclosure requirement upheld by the District of Vermont, the Oklahoma Act does not require plant-based meat producers incorporate the disclosure into the name of their product. Nor does the Oklahoma Act dictate the location, configuration, or specific phrasing of the disclosure; only that it must be displayed "in type that is uniform in size and prominence to the name of the product . . . ." OKLA. STAT. tit. 2, § 5-107(C)(1). In other words, the disclosure required by the Oklahoma Act does not modify the product name, and therefore does not implicate Section 343(i)(1). Again, Plaintiffs fail to provide anything to establish any conflict existing between the Oklahoma Act and the FDCA or NLEA. Because a plausible interpretation of both the state and federal laws that avoids preemption exists, Plaintiffs' claims must fail as a matter of law.

III. THIS COURT SHOULD GRANT SUMMARY JUDGMENT TO DEFENDANTS ON COUNT V BECAUSE THE OKLAHOMA ACT IS NOT UNCONSTITUTIONALLY VAGUE IN VIOLATION OF THE DUE PROCESS CLAUSE.

The constitutional vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is

prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *United States v. Hunter*, 663 F.3d 1136, 1141 (10th Cir. 2011) (citation omitted). A court reviewing a statute for unconstitutional vagueness must "must begin with 'the presumption that the statute comports with the requirements of federal due process and must be upheld unless satisfied beyond all reasonable doubt that the legislature went beyond the confines of the Constitution.'" *Id.* (quoting *United States v. Welch*, 327 F.3d 1081, 1094 (10th Cir. 2003)). A law will be upheld so long as "the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . .'" *Id.* (quoting *Roth v. United States*, 354 U.S. 476, 491 (1957)).

Here, the Oklahoma Act provides a sufficiently definite warning about the proscribed conduct so that ordinary people can understand what is prohibited. In fact, Plaintiffs themselves accurately summarize the Oklahoma Act in their own words in the Complaint:

> In other words, the Act forbids plant-based meat producers from using meat terms unless they include a disclaimer on their product labels in the same type size and prominence to the "name of the product" that their plant-based products are not actually meat derived from animals.

Doc. 59 at ¶ 5. Therefore, Plaintiffs themselves reveal that they are perfectly capable of understanding the ordinary meaning of the Oklahoma Act.

Plaintiffs' void-for-vagueness complaint boils down to feigned confusion over the phrase "name of the product" used in the statute. *Id.* at ¶¶ 71, 109. Yet, the phrase "name of the product" is self-explanatory and easily understood by ordinary people. *See also* MERRIAM-WEBSTER, NAME, ("a word or phrase that constitutes the distinctive designation of a person

or thing"); MERRIAM-WEBSTER, PRODUCT ("something produced").[11] As an example, Plaintiffs themselves use the phrase "product name[s]" when describing FDA inaction (Doc. 59 at ¶ 31), an alleged lack of consumer confusion (*id.* at ¶¶ 35, 99), and their FDCA preemption claim (*id.* at ¶¶ 54, 85). *See also id.* at ¶ 34 (claiming that product "names" invoking animal-based language do not cause consumer confusion); *id.* at ¶ 48 (describing that "plant-based meat producers are also governed by FDCA provisions surrounding the names of products."). Courts have "consistently held statutes sufficiently certain when they employ words or phrases with 'a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ . . . ." *United States v. Gaudreau*, 860 F.2d 357, 362 (10th Cir. 1988) (citation omitted).

The context of the phrase is also important to the interpretive exercise. The Oklahoma Act requires a disclosure "that the product is derived from plant-based sources in type that is uniform in size and prominence to the name of the product . . . ." OKLA. STAT. tit. 2, § 5-107(C)(1). In other words, the Oklahoma Act does not actually modify the "name of the product." Instead, the "name of the product" serves as a guide for the "size and prominence" of the disclosure required by the Oklahoma Act. Further defining the phrase would be futile, as the purpose of the statute is not to regulate the product name, but to impose a disclosure requirement "that is uniform in size and prominence *to the* name of the product . . . ." *Id.* (emphasis added). Indeed, the law places no limitation on the producer's choice of size and prominence for the name of the product. In sum, Plaintiffs' feigned confusion over whether

[11] Available at https://tinyurl.com/24bmbprn and https://tinyurl.com/3asfm9bu.

the "name of the product" "is the same or distinct from a product's common or usual name" is misplaced, as the law does not directly govern the product name. Doc. 59 at ¶ 109.[12]

Even if the phrase "name of the product" were ambiguous, or some marginal scenario of confusion arose over the meaning of the phrase, simple ambiguity does not render a statute *unconstitutionally vague*. "[P]erfect clarity and precise guidance have never been required[,]" and courts "can never expect mathematical certainty in our language." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) (citation omitted). A statute "will not be struck down as vague even though marginal cases could be put where doubts might arise." *United States v. Harriss*, 347 U.S. 612, 618 (1954). Put differently, a law is not unconstitutionally vague if "it requires a person to conform his conduct to an imprecise but comprehensible normative standard," but instead if "no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). Here, Plaintiffs have failed to establish that "no standard of conduct is specified at all" in the Oklahoma Act. Accordingly, Plaintiffs cannot establish the Oklahoma Act is unconstitutionally vague in violation of the Due Process Clause.

CONCLUSION

For these many reasons, the Defendant State Officials respectfully request this Court enter an order granting summary judgment in their favor against the Plaintiffs on all claims, and for all such other and further relief as this Court deems just and equitable.

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[12] Plaintiffs also feign confusion over "where producers must display" the required disclosure on the package. Doc. 59 at ¶ 71. But silence does not render a law unconstitutionally vague. *See, e.g., Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014) ("[T]his Court does not revise legislation . . . just because the text as written creates an apparent anomaly as to some subject it does not address. Truth be told, such anomalies often arise from statutes, if for no other reason than that Congress typically legislates by parts . . . .").

Respectfully submitted,

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