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

PLANT BASED FOODS ASSOCIATION, and TURTLE ISLAND FOODS d/b/a THE TOFURKY COMPANY, Plaintiffs, v. KEVIN STITT, in his official capacity as Oklahoma Governor, and BLAYNE ARTHUR, in her official capacity as Oklahoma Commissioner of Agriculture, Defendants.	Case No. CIV-20-938-F

Plaintiffs' Combined Brief in opposition to Defendants' Motion for Summary Judgment and Defendants' Notice of Supplemental Authority and Supplemental Brief and in support of Plaintiffs' Cross-Motion for Summary Judgment

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INTRODUCTION

This case is about the State of Oklahoma's decision to impose burdensome, prescriptive, and unnecessary marketing and labeling requirements for plant-based meat products. Although the Act attempts to provide a safe harbor for products whose labels "display[] that the product is derived from plant-based sources in type that is uniform in size and prominence to the name of the product," it provides absolutely no guidance for plant-based meat producers for what marketing or advertising conduct constitutes "misrepresenting as meat" generally.

The Act applies to marketing (whether it appear online, in print, on television, or on in-person grocery store displays) as well as product packaging. It includes no provision limiting the reach of the Act to the borders of Oklahoma. This means that all marketing materials (even those found online) are subject to the law—regardless of whether those products are sold in Oklahoma. The Act also applies to any products obtainable by Oklahoma consumers—regardless of whether producers even know that third parties are selling their products within the state. The Act was developed and written by trade groups representing in-state animal meat producers to target out-of-state plant-based meat products—products these groups have admitted they're in "direct competition" with.

For the past half-century, Oklahoma has had state laws preventing food companies from making any "false or misleading representation[s]." OKLA. STAT. tit. 15, § 753. The Food, Drug and Cosmetic Act (FDCA) and the Federal Trade Commission Act (FTCA) have likewise prohibited food producers from using false or deceptive marketing or packaging for the past century. 21 U.S.C. § 343(a); 15 U.S.C. § 45 *et seq*. Oklahoma has never

used these laws to address any allegedly misleading plant-based label or advertisement. Yet Defendants now take the position that the Act is somehow imperative to accomplishing a substantial state interest. There is no evidence that a single Oklahoma (or U.S.) consumer has ever been confused into purchasing a plant-based meat product thinking that product was made from slaughtered animals, and all the evidence in the record confirms that consumers are not confused or misled by plant-based products' marketing and labeling conventions. Instead, any attempt to comply with the law seems to affirmatively *cause* consumer confusion where there was none before.

STATEMENT OF UNCONTESTED FACTS

1. The asserted State interest for the Act is "to prevent consumer confusion." Doc. 141 at 4, 19 (citing Doc. 26 at 10).

2. The State did not consider any evidence of consumer confusion at the time of the Act's passage. Doc. 118-3 at 7, 10.

3. The State is still unaware of any instances of consumer confusion. *Id.*

4. Defendants have not provided any evidence of consumer confusion. *Id.*

5. The State has received no complaints from consumers relating to the marketing or labeling of plant-based meat products. *Id.*; Ex. 1, Rowlett Dep. 61:1-4.

6. There is empirical evidence that consumers are not confused by plant-based products. Ex. 3 at 8-13.

7. There is empirical evidence that compliance with the Act causes consumer confusion. Ex. 3 at 13-18.

8. The Act was drafted by the Oklahoma Cattleman's Association (OCA) and the Oklahoma Pork Council (OPC), with help from the Oklahoma Department of Agriculture (ODAFF). Ex. 1, Rowlett Dep. 42:20-43:8; Ex. 2.2; Ex. 2.3; Ex. 2.4.

9. The OCA and OPC are member-driven organizations that promote the interests of Oklahoma beef and pork producers. Docs. 86-3–86-6 ¶ 2.

10. ODAFF admitted it has no experience or expertise in the area of consumer understanding or label-reading behavior. Ex. 4, Yates Dep. 58: 21-24; 59 1-3.

11. ODAFF's Food Safety division is tasked with enforcement of the Act. Ex. 4, Yates Dep. 24:7-14, 44:9–45:10; Ex. 5, Defs.' Resp. Pls.' First Set Req. Admis. No. 3.

12. Existing federal and state laws, including the FDCA, FTCA, and state consumer protection laws, already require truthful, non-misleading marketing and labeling of plant-based meat products. Doc. 59 ¶¶ 42-46, 48, 52, 99.

13. The Act applies to plant-based meat products. Ex. 4, Yates Dep. 32:16-22, 33:8-13.

14. ODAFF intends to enforce the Act against plant-based meat products. *Id*.

15. ODAFF confirmed that the penalties for the Act are found at § 5-106. *Id.* at 30:2-14, 47:15-24.

16. The OCA and the OPC designed the 2020 Act to differ from a 2019 law to put enforcement of the Act under ODAFF jurisdiction. Ex. 1, Rowlett Dep. 42:20-43:8.

17. Plaintiffs have standing to challenge the Act. Doc. 126.

18. Tofurky's and PBFA members' products are direct competitor products to animal-based meat products. Doc. 121; Ex. 2.1; Ex. 2.5; Ex. 2.6.

19. At least "some members" of the legislature supported the Act to address animal-based meat producers' concerns about competition from plant-based products. Doc. 121; Ex. 14, Tr. Mots. Quash Subpoenas at 47; Ex. 2.6; Ex. 2.7; Ex. 2.8.

20. The Act applies to activities outside of Oklahoma. Ex. 6, Athos Decl. ¶ 3, 11.

21. Data from the National Agricultural Statistics Service lists Oklahoma as the fourth largest total cattle inventory, including the second largest inventory of beef cows, and the fifth largest inventory of breeding pigs in the country. Ex. 7, NASS tables.

OBJECTIONS TO DEFENDANTS' STATEMENT OF UNCONTESTED FACTS

Plaintiffs submit these Responses to Defendants' Statement of Uncontested Material Facts, Doc. 141.

1. Undisputed.

2. Undisputed.

3. Undisputed as to the text of the Act; disputed that the prohibited conduct is the "purpose" of the Act.

4. Disputed that the Act "does not require . . . any specific words or language." The Act does require specific language in the form of a disclosure that the product is derived from plant-based sources. *See* OKLA. STAT. tit. 2, § 5-107.

5. Plaintiffs dispute the characterization of the Act's requirements as simple. The onerousness of this label requirement is the subject of the dispute. *See* Doc. 59 ¶ 4.

6. Disputed that Plaintiffs can use "any words" of their choosing. The Act requires that the words communicate that "the product is derived from plant-based sources."

Plaintiffs also dispute the assertion that no font size is mandated. The Act requires the font size to match that used for the name of the product. *See* OKLA. STAT. tit. 2, § 5-107(C).

7. Undisputed.

8. Disputed. Tofurky was not a party to the lawsuit cited by Defendants. Plaintiffs do not admit Plaintiffs "had no problems complying with" the previous law.

9. Undisputed as to FDCA provisions. Plaintiffs dispute any assertion that plant-based milk is an "imitation" of dairy milk. *Painter v. Blue Diamond Growers*, 757 Fed. Appx. 517, 519 (9th Cir. 2018). Reference to this provision of the FDCA is irrelevant here.

10. Undisputed.

11. Disputed. Defendants' Ex. 3 is inaccurate. Most of the state laws included in the cited table are inapplicable to plant-based meats.[1] Defendants' Ex. 3 includes Arkansas' labeling law, which was deemed unconstitutional as applied to Plaintiff Tofurky's naming conventions. *See Turtle Island Foods SPC v. Soman*, No. 4:19-cv-00514-KGB, 2022 WL 4627711 (E.D. Ark. Sept. 30, 2022). Plaintiffs further dispute this statement for vagueness; it is unclear what Defendants mean by "provisions that govern deceptive labeling."

12. Disputed. A patchwork of new state laws does not make the Act acceptable. Tofurky is actively challenging (or has successfully challenged) several of the referenced laws in other states. Doc. 59 ¶¶ 62, 64. Further disputed to the extent it implies "the patch-work" of state laws is inclusive of state adoption of language found at 21 U.S.C. § 343.

[1] Alabama, Arizona, California, Delaware, Iowa, Louisiana, Maine, Maryland, Missouri, Montana, Nevada, New Hampshire, North Carolina, North Dakota, South Carolina, South Dakota, Utah, Vermont, Virginia, and West Virginia.

13. Undisputed.

14. Undisputed.

15. Disputed. PBFA voluntary standards recommend that indications should be made "in the statement of identity *or* on the principal display panel" Doc. 141, Ex. 4; 2-3.

16. Undisputed.

17. Disputed. There is no valid of concern that any consumer has or will buy a plant-based product thinking it is slaughter-based meat. Doc. 59 ¶¶ 3, 30, 34-38. Plaintiffs dispute that any misleading labels exist, *see id.*, and that there is a legitimate interest here.

18. Undisputed.

19. Undisputed.

20. Disputed. Certain out-of-state companies produce both animal-based and plant-based meat; they are treated differently under the Act than in-state producers that only produce animal-based meat products.

21. Undisputed.

22. Undisputed. The Act does not make clear what labeling changes it requires. Tofurky also cannot ensure only certain labels enter Oklahoma due to the nature of distributor relationships, online sales, and other logistical impossibilities. Doc. 59 ¶ 6.

23. Undisputed only as to cattle inventory *for slaughter* as of January 2022, per the National Agricultural Statistics Service.

ARGUMENT

I. Plaintiffs Have Article III Standing.

This Court has found that Tofurky, a member of PBFA, sufficiently demonstrated standing to challenge the Act. Doc. 126 at 2–3. Defendants do not challenge PBFA's or Tofurky's standing now. *See* Doc. 141. PBFA, a nonprofit trade association, has standing to challenge the Act on its own behalf and on behalf of its members. PBFA has had to divert and expend organizational resources to combat the harms the Act is causing PBFA and its members. Doc. 122 at 4–7; Doc. 122-1 ¶¶ 13–19. PBFA's plant-based meat producing members fear prosecution under the Act, both from the sale of their products in Oklahoma and from their online marketing, which may be accessed by Oklahoma consumers. Doc. 122 at 7–17; Ex. 6, Athos Decl. ¶¶ 3, 9, 11, 13; Ex. 8, Christoffel Decl. ¶¶ 9–14; Ex. 9, Chase Decl. ¶¶ 9–13, 15; Ex. 10, Sopko Decl. ¶¶ 8–14; Ex. 11, Schadel Decl. ¶ 10.

II. The Act Violates the Dormant Commerce Clause.

The Commerce Clause is both an express grant of power to Congress and an implicit limit on the power of state and local government. *Comptroller of the Treasury of Md. V. Wynne*, 575 U.S. 542, 548-49 (2015). Its dormant implication prohibits economic protectionism or state regulations that "impede[] free private trade in the national marketplace"—*i.e.*, any state law that has the purpose or effect of discriminating against or unduly burdening interstate commerce.

"[A] discriminatory law is virtually per se invalid ... and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable non-

discriminatory alternatives." *Dep't of Revenue v. Davis,* 553 U.S. 328, 338 (2008). The state bears the burden of showing legitimate local purposes and the lack of non-discriminatory alternatives—a burden they are rarely able to satisfy. *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564, 581–82 (1997).

Although Defendants attempt to argue otherwise, Doc. 170 at 4-5, "a majority of the Court acknowledges . . . that even nondiscriminatory burdens on commerce may be struck down under on a showing that those burdens clearly outweigh the benefits of a state or local practice." *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1168-69 (2023) (Roberts, C.J., concurring in part) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)); *see Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1145 (10th Cir. 2016) (applying this rule in the Tenth Circuit).

Regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors—precisely the case here—are exactly the type of economic protectionism prohibited by the dormant Commerce Clause. *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994). Oklahoma has a vested interest in its in-state meat producers, who directly compete with exclusively out-of-state plant-based meat producers. The Act was designed by Oklahoma meat producers to address concerns about competition from plant-based meat products that both they and ODAFF acknowledge are their direct competitors. Pls.' Statement of Uncontested Facts Nos. 18-19. The Act was created by one part of an industry to stymie an entire sector of competition, all of which is located outside the state. As set forth below, the law works as intended: once enforced, it diminishes the ability of out-of-state plant-based meat producers to do business in Oklahoma.

Defendants ask the Court to ignore these facts as irrelevant, contending there can be no "discriminatory effect" against plant-based meat producers—all of which are located outside the state—because the Act confers benefits on both in and out-of-state animal-based meat producers. Doc. 141 at 12-13. But courts have "rejected the notion that a favored group must be *entirely* in-state for a law to have a discriminatory effect on commerce." *Fam. Winemakers of Calif. V. Jenkins*, 592 F.3d 1, 10, 13-17 (1st Cir. 2010). In *Jenkins*, the court found that a law that burdened "large wineries" (all of which were located outside the state), while benefiting "small wineries" (which were located both in and out-of-state), imposed "disproportionate burdens on out-of-state interests." *Id.* Such a scheme was found to be discriminatory in purpose and effect. *Id.* at 10-17. The same was true in *Hunt v. Washington State Apple Advertising Comm'n*, where the Supreme Court invalidated a facially neutral North Carolina law on the grounds that it discriminated against interstate commerce because it required *some* out-of-state apple growers, but no in-state growers, to alter their food labels—an extremely burdensome endeavor. 432 U.S. 333, 337-38, 349-53 (1977); *cf. Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) (invalidating state law that promoted production of local brandy, to the detriment of both in and out-of-state producers of competing liquors).[2] The same is true here.

[2] Defendants misleadingly argue that "protecting or favoring" an "intrastate industry" from "competition" is permitted under the dormant Commerce Clause. Doc. 141 at 11 (citing *Exxon v. Governor of Maryland*, 437 U.S. 117, 133 (1978) and *Powers v. Harris*, 379 F.3d 1208, 1220 (10th Cir. 2004)). The citations they provide are not about the Commerce Clause: the *Exxon* quote about "adverse effects on competition" is from a discussion about the Sherman Act and the Robinson-Patman Act, while the *Powers* quote about "protecting or favoring" intrastate industry is about the Equal Protection Clause. *Id.* As *Powers*

This set of facts distinguishes this case from the Supreme Court's decision in *Exxon*, 437 U.S. 117, which Defendants rely on throughout their brief. Doc. 141 at 10-11, 13-15. In *Exxon*, Maryland's gasoline supply was provided entirely by out-of-state suppliers, such that any "claims of disparate treatment between interstate and local commerce would be meritless" because "there are no local producers or refiners" who received a comparative benefit under the law. Doc. 141 at 13 (citing *Exxon*, 437 U.S. at 125). That is unlike the situation in this case, where Oklahoma *does* have an in-state industry that receives a benefit under the Act. Pls.' Statement of Uncontested Facts No. 19 (OCA and OPC "thought the legislation would be beneficial to their commercial interests and supported it for that reason"). As the First Circuit recognized, "*Exxon* is not apposite where, as here, there is an in-state market and the law operates to its competitive benefit." *Jenkins*, 592 F.3d at 13.

Despite the Act's disproportionate burden on out-of-state interests, Defendants argue that the Court cannot compare burdens and benefits in this case. Doc. 141 at 16. They claim that Oklahoma's animal-based meat producers "provide different products" than the out-of-state plant-based meat producers, and therefore are not "similarly situated" for purposes of a discrimination claim under the dormant Commerce Clause. Doc. 141 at 16. Whether in-state and out-of-state industries are "similarly situated," however, does not turn on whether they sell identical products; instead, the test considers whether producers have the potential to compete with one another—even to a small degree. *Bacchus Imports*, 468

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elsewhere provides, a state act whose "primary purpose" is "the prohibition of competition" is unconstitutional under the dormant Commerce Clause. *Id.* at 1219 (quoting *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949)).

U.S. at 269, 271. As the OCA, OPC, and ODAFF all testified, Oklahoma's animal-based meat producers are "direct competitors" with Plaintiffs. Doc. 121; Pls.' Statement of Uncontested Facts Nos. 18-19. In addition to striking down laws that discriminate against interstate commerce, the Tenth Circuit routinely invalidates laws when they: (1) regulate conduct occurring wholly outside of the state; (2) constitute an unreasonable and undue burden on interstate or foreign commerce; and (3) subject interstate use of the Internet to inconsistent state regulation. *ACLU v. Johnson*, 194 F.3d 1149, 1160 (10th Cir. 1999). The Act does all three.

A. The law gravely burdens interstate commerce.

1. The Act directly interferes with online sales and advertising, which are instrumentalities of commerce.

Laws affecting the instrumentalities, or the *flow*, of interstate commerce are of particular concern in dormant Commerce Clause jurisprudence. Courts have long recognized that railroads, trucks, and highways are themselves "instruments of commerce," and deserve heightened scrutiny under the dormant Commerce Clause; because they serve as conduits for the "flow of interstate goods" they carry with them the strong interests of national uniformity. *See Ross*, 143 S. Ct.at 1158 n.2. Because of its unique structure, operation, and susceptibility for use as a business tool, courts have also recognized that the internet is an instrument of interstate commerce. *Am. Libr'. Ass'n v. Pataki*, 969 F. Supp. 160, 173 (S.D.N.Y. 1997); *ACLU v. Johnson*, 194 F.3d at 1161. Thus, the long line of Supreme Court transportation cases provides an appropriate framework for a dormant Commerce Clause analysis of state internet regulation. Regulations of even *online* interstate traffic

("whether that traffic be in goods, services, or ideas") cannot survive dormant Commerce Clause scrutiny when they burden online conduct. *Pataki*, 969 F. Supp. at 173. *United States v. Lewis*, 554 F.3d 208, 211 (1st Cir. 2009) (the internet "was not established with state boundaries in mind, nor does it even recognize them").

The Act proscribes any conduct that could be construed as "misrepresenting a product as meat." OKLA. STAT. tit. 2 § 5-107(C)(1). Online activity nationwide is subject to this Oklahoma regulation—to trigger regulation, the online marketing content need only be accessible from Oklahoma. For example, a local plant-based meat producer who only exists and sells within Texas could be liable under the Act if their company has a website that an Oklahoma consumer can visit. The Tenth Circuit has confirmed that "[t]he unique nature of the Internet highlights the likelihood that a single actor might be subject to haphazard, uncoordinated, and even outright inconsistent regulation by states that the actor never intended to reach and possibly was unaware were being accessed. Typically, states' jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet." *ACLU v. Johnson*, 194 F.3d at 1160–61.

Given the realities of the internet, it is also unrealistic to believe that producers can screen or block their online marketing images or otherwise prevent them from reaching Oklahomans. *See Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1311–12 (10th Cir. 2008) (reiterating Tenth Circuit's belief that the dormant commerce clause prevents laws from "govern[ing] websites, bulletin-board services, and chat rooms, which can be accessed by virtually anyone, anywhere, without control by the one posting the information"). As confirmed both by expert evidence and common sense, plant-based meat products cannot block

Oklahomans from viewing their online advertising (for example, by visiting their websites or social media accounts, or being exposed to banner advertisements).[3] They likewise cannot block, avoid, or somehow guarantee that their products will not reach Oklahomans through online sales platforms like Amazon marketplace. Doc. 122-4 ¶¶ 25, 38; Doc. 122-5 ¶ 5; Ex. 6, Athos Decl. ¶¶ 3, 11, 13; Ex. 8, Christoffel Decl. ¶¶ 9–10; Ex. 9, Chase Decl. ¶ 6.

Oklahoma is attempting to dictate to the entire nation what representations, wording, and images may be used to market plant-based meat products. The Act is a clear example of a state attempting to export its domestic law and directly supplant other state and federal laws. *See McLemore v. Gumucio*, No. 3:19-CV-00530, 2019 WL 3305131, at *9 n.8 (M.D. Tenn. July 23, 2019) (noting that "courts in several circuits," including the Tenth, "have invalidated state laws regulating the internet on the grounds that any regulation of the internet regulates conduct occurring outside the borders of the state"). "[B]ecause the internet does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without projecting its legislation into other states." *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003) (quoting *Healy v. Beer Inst. Inc.*, 491 U.S. 324, 334 (1989)).

Defendants do not, and cannot, contend that the Act only addresses intrastate conduct. The Act contains no express limitation confining it to communications which occur

[3] While some courts have noted that geofencing technology exists, it is by no means infallible. A simple VPN would defeat anyone's ability to bar internet traffic from their website based on geolocation. To say nothing of internet sites that are not under the direct control of plant-based companies.

wholly within its borders; instead, it applies to any communication that fits within its prohibitions. Courts have rejected state arguments attempting to geographically limit internet regulations, noting they are "unsupportable in light of . . . the reality of Internet communications." *ACLU v. Johnson*, 194 F.3d at 1161 (citation omitted). Because the internet does not recognize geographic boundaries—and because the Act attempts to regulate the content of the internet, it regulates conduct beyond Oklahoma's borders in violation of the dormant Commerce Clause.

2. The Act would prevent nationwide distribution of plant-based meat products.

The nature of food distribution in this country makes it impossible for plant-based meat producers to avoid Oklahoma markets. The Act prevents the nationwide distribution of plant-based meats by imposing marketing and labeling requirements different from those established under federal law. "It is an insurmountable burden in terms of sales and distribution to have brands fundamentally change their label . . . for one state alone." Ex. 12, Emmett Report ¶ 40. This is because the U.S. supply chain system depends on middlemen to make sure products get from the manufacturer to the hands of consumers. Ex. 8, Christoffel Decl. ¶¶ 5, 6; Ex. 9, Chase Decl. ¶ 6; Ex. 10, Sopko Decl. ¶ 10; Ex. 11, Schadel Decl. ¶ 4; *id.* ¶¶ 20–25 (explaining that most packaged food products go from the manufacturer to transporters to regional warehouses to transporters to retail stores to the final consumer); Tofurky and other plant-based meat producers do not sell their products directly to consumers. Ex. 6, Athos Decl. ¶ 4; Ex. 10, Sopko Decl. ¶ 10; Ex. 13, Athos Dep. 57:19-21. The food product supply chain system can only operate as an interstate model because

packaged foods are not sold and distributed on a state-by-state basis but are sold to retail store chains, which have locations nationwide, and are then distributed by the geographic region of the country. Ex. 12, Emmett Report ¶ 36. "Retailers do not have a system to warehouse certain labels only for stores in . . . Oklahoma. If a brand must have certain labeling for Oklahoma alone, a retailer will not accept that brand for distribution." *Id.* ¶ 38.

Plant-based meat companies have no control over where their products are ultimately sold. Sometimes wholesale distribution companies purchase products and then resell them to retail stores. *Id.* ¶ 24. Retail stores also have discretion in where plant-based products end up. Ex. 6, Athos Decl. ¶ 11; Doc. 122-4 ¶¶ 28, 35–38. Online retailers are similar—if plant-based meat companies sell products on Amazon, "only Amazon's algorithms control where the products are marketed and where they ultimately get delivered." Doc. 122-4 ¶ 25. Plant-based sellers on Amazon have no way of knowing where in the United States their buyers are, and it is technologically impossible for sellers to choose which states Amazon can distribute products to.[4] Thanks to the nature of these relationships, plant-based meat producers would have to cease their operations completely if they had to keep their products out of Oklahoma stores or anywhere Oklahoma residents may shop. Ex. 8, Christoffel Decl. ¶ 10; Ex. 9, Chase Decl. ¶ 9; Ex. 10, Sopko Decl. ¶ 12.

3. The Act directly regulates out-of-state transactions with no connection to Oklahoma.

Considerable Supreme Court jurisprudence supports the notion that extraterritorial regulation or effects are a per se violation of the dormant Commerce Clause. *Edgar v.*

[4] Sellers also cannot cancel orders placed from certain states after the fact. Ex. 8 ¶¶ 8, 9.

MITE Corp., 457 U.S. 624, 642–43 (1982); *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976); *S. Pac. Co. v. Arizona*, 325 U.S. 761, 775 (1945). The Court's recent decision in *Ross*,[5] however, seemingly supports the notion that extraterritorial regulation—whether direct or in practical effect—should instead be considered as a severe burden on interstate commerce to be weighed against the local benefit of the challenged law under *Pike*.

The Act regulates extraterritorially: Both directly (affecting online sales and marketing), and in effect (creating requirements that preclude nationwide distribution of plant-based meat products). *See* Doc. 122-4 ¶¶ 25, 36-42, 45-47. Under either theory, the Act's direct extraterritorial regulation and extraterritorial effects render it an unconstitutional violation of the Commerce Clause. The Act regulates online sales, online marketing, and product packaging used in all states (due to the nature and logistics of third-party distribution); by default, it applies nationwide. Ex. 6, Athos Decl. ¶¶ 3, 4, 11, 13; Doc. 122-4 ¶¶ 25, 36-38. Regardless of whether a plant-based business intends to have contacts with Oklahoma, the Act governs interstate conduct—subjecting businesses to regulation on the

[5] 143 S. Ct. 1142. Contrary to Defendants' suggestion, Doc. 170 at 5, a majority of the *Ross* Court believed that California's law imposed a substantial burden on interstate commerce. *See Ross*, 143 S. Ct. at 1167 (Barrett, J., concurring); *id.* (Roberts, C.J., concurring). Despite such burden, Justice Barrett voted to uphold the law because there was no way of measuring California's moral interest in the reduction of animal cruelty, making it impossible to compare the law's benefits and burdens under *Pike*. *Id.* at *1166-67. *But see id.* at *1166 (Sotomayor, J., concurring) (a majority agrees that "courts generally are able to weigh disparate burdens and benefits against each other"). In this case, by contrast, the Act's purported benefits can be, and have been, measured. Ex. 3 (analyzing the Act's likely effect on consumer understanding); *see* Ex. 14 at 47 (admitting OCA and OPC anticipated commercial benefits from the Act).

basis of ubiquitous online sales and marketing, or in-person sales controlled entirely by third parties. Plant-based meat producers cannot simply avoid Oklahoma to escape its burdensome regulations—the Act follows them wherever they go. The Act then is a particularly burdensome one that can "regulate out of existence" plant-based businesses. As such, it must be struck down. To hold otherwise would allow a particular state to dictate to the entire country the regulatory standards for any activity. This is particularly true here because the Act attempts to control the instrumentalities of commerce and imposes restrictions in an area that requires a uniform regulatory scheme.

4. The Act overlaps with existing laws to create a patchwork of inconsistent state and federal laws.

The burden to interstate commerce can scarcely be overstated in situations where regulations are inconsistent from state to state. In the instant case, Oklahoma requires disclosure of certain facts about a plant-based product, but other jurisdictions like Missouri forbid such language entirely.[6] In such instances, being unable to predict which jurisdiction's regulation might apply, and being unable to comply with every state's potential requirements at once, plant-based meat producers would simply be forced out of business altogether. Because the Act can destroy an entire industry, it is certainly a "grave" burden on interstate commerce. And contrary to Defendants' position, the fact that there are other state laws that similarly burden plant-based meat products with conflicting requirements means that these harms are *compounding*, not redundant.[7]

[6] Mo. Ann. Stat. § 265.494.

[7] *See* Pls.' Objs. to Defs.' Statement of Uncontested Fact ¶ 11.

The Supreme Court has long held that "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy*, 491 U.S. at 336 (contextual analysis was critical to prevent "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another state"); *see also Shaffer*, 433 U.S. at 197. When analyzing the burden of a law on interstate commerce, courts necessarily consider the law in a national context—and acknowledge that laws can be burdensome (and even create discriminatory effects) due to the interplay between a challenged law and other existing state and federal laws. *Brohl*, 814 F.3d at 1143–44; *North Dakota v. United States*, 495 U.S. 423, 435 (1990).

This is precisely why Congress established the federal FDCA. A uniform nationwide food labeling scheme is necessary to "prevent states from adopting inconsistent requirements with respect to the labeling" of foods. *Farm Raised Salmon Cases*, 175 P.3d 1170 (Cal. 2008); *Turek v. Gen. Mills, Inc.*, 662 F.3d 423, 425-26 (7th Cir. 2011) ("[It is] easy to see why Congress would not want to allow states to impose disclosure requirements of their own on packaged food products, most of which are sold nationwide. Manufacturers might have to print 50 different labels, driving consumers who buy food products in more than one state crazy.").

The FDCA already addresses what information and product names (*i.e.*, statement of identity or "common or usual names") plant-based meat companies must include on the front of each package. For Oklahoma impose additional terminology or secondary product

name disclosures as part of plant-based products' principal display panels contravenes federal labeling requirements and directly interferes with existing uniform nationwide food labeling laws.

5. The Act directly interferes with our nationwide federal labeling scheme.

In 1990, Congress passed the Nutrition Labeling and Education Act (NLEA) in order to ensure "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." 58 Fed. Reg. 2462, 2462 (Jan. 6, 1993) (codified at 21 C.F.R. pt. 100). Congress maintains that this uniform labeling scheme is necessary to enable the nationwide sale of goods, without the burden of inconsistent regulations. *E.g.*, *Perea v. Walgreen Co*., 939 F. Supp. 2d 1026, 1038 (C.D. Cal. 2013) (the "purpose of the NLEA [is] to promote uniformity in food labeling … [and that] uniformity …prevents states from establishing standards or regulations that serve no other purpose than to protect local business from interstate commerce.").

Congress took this resolve further and designated 12 specific requirements where states cannot create regulations "different from or in addition to" those established by federal lawmakers. 21 U.S.C. § 343-1. This express preemption provision was necessary to prevent states having their own separate labeling requirements, which would prevent food producers from being able to market and sell their products nationwide. *See* 136 Cong. Rec. H12951-02, H12954 (Oct. 26, 1990) (Rep. Henry Waxman explained that the preemption provision prevented "burdensome State laws that interfered with [the food industry's] ability to do business in all 50 States.").

Although Defendants hint that producers could simply check with ODAFF to verify compliance with the Act, the Commerce Clause dictates that "no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Healy*, 491 U.S. at 336–37. Defendants also seem to dip a toe into the argument that they are simply effectuating FDA's federal scheme—likely in an attempt to avoid scrutiny under the dormant Commerce Clause. But in response to similar arguments, courts have determined that "[t]he answer is that there can be no justification for the exercise of a power that is not possessed." *Shafer v. Farmers' Grain Co. of Embden*, 268 U.S. 189, 202 (1925) ("If the evils suggested are real, the power of correction does not rest with North Dakota but with Congress, where . . . it shall be exercised with impartial regard for the interests of the people of all the states that are affected.").[8]

B. The Act does not accrue any non-protectionist benefits to consumers or the State.

Defendants have entirely abdicated their burden to establish that there exists a real state interest underlying the Act—failing to introduce any evidence of consumer confusion or demonstrate that consumer protection cannot be accomplished by any other means, including existing state and federal law.[9]

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[8] Defendants' claim that there is not "a single financial harm resulting from the Oklahoma Act after two years" is wrong; but it is also irrelevant. Doc. 170 at 4. The State admits that it has not yet begun enforcement proceedings. Ex. 4, Yates Dep. 30:16-21, 31:16-21. In any event, the dormant Commerce Clause is designed to *prevent* laws from crippling interstate commerce. *See, e.g.*, *Pike*, 397 U.S. at140 (emphasis added) (noting that "the practical effect [of the law] *would be* to compel the company to build packing facilities . . . that would take many months to construct and would cost approximately $200,000").

[9] Doc. 120 (ordering that "Defendants are bound by the representation to the court" as to lack of knowledge of consumer confusion).

Regulations that interfere with or burden interstate commerce survive constitutional scrutiny only if the state can show that the regulation "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Brohl*, 814 F.3d at 1136. Even under *Pike* balancing, any "legitimate local purpose" or putative local benefits must *actually* be furthered by the state law. *Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs of Cnty. Of Rogers*, 27 F.3d 1499, 1512 (10th Cir. 1994) (quoting *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981)) ("The mere 'incantation of a purpose . . . does not insulate a state law from Commerce Clause attack. Regulations designed for [a] salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause.'"); *ACLU v. Johnson*, 194 F.3d at 1161-62 (emphasis added) ("We agree that the protection of minors . . . is an undeniably compelling government interest, but the question . . . is whether the means chosen to further that interest . . . excessively burden interstate commerce compared to the local benefits the statute *actually* confers.").

Accordingly, Defendants' reliance on speculative benefits alone does not suffice. *See, e.g.*, *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447–48 (1978) (invalidating law that made "speculative contribution" to highway safety"); *MITE Corp.*, 457 U.S. at 645 (invalidating law that did not provide benefits over those already provided by federal law); *Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs of Cnty. of Rogers*, 917 F. Supp. 1514, 1523 (N.D. Okla. 1995) (invalidating law because "no specific safety and health benefits have been identified"). If the rule were otherwise, rote invocation of any

commonly accepted, but obviously unsupported, attenuated, or pretextual state interest would be enough to survive dormant Commerce Clause scrutiny. Doc. 141 at 17.

1. The purported aims of the Act are already accomplished by existing State and federal laws.

Federal and state laws have long prohibited any misrepresentations in the marketing or packaging of food products, Doc. 59 ¶ 41, and Defendants admit as much.[10] If Defendants were to take the position that the Act is necessary to protect consumers from a spate of suddenly misleading plant-based meat products,[11] they would have to address the fact that established laws prohibit misleading or deceptive marketing and labeling. There is no local benefit at all if a challenged law is redundant with existing state or federal laws. *See Pataki*, 969 F. Supp. at 179 (noting that several laws in New York's statute books already exist to protect children against sexual exploitation, thus the benefit of the challenged law would be extremely limited or nonexistent). Because the Act adds nothing new to the state and federal governments' existing prohibitions on misleading and deceptive food labels, it does not serve a legitimate local purpose that could outweigh its burden on interstate commerce.

[10] Doc. 141 at 23; Ex. 5, Defs.' Resp. Pls.' First Set Req. Admis. No. 4; Pls.' Statement of Uncontested Facts ¶ 11; Doc. 59 ¶¶ 41-46; OKLA. STAT. tit. 63, § 1-1110(a) (prohibiting "false or misleading" labeling of food products); OKLA. STAT. tit. 15, § 753(5) (prohibits, among other things, "false representation as to the characteristics, ingredients, uses, [and] source" of goods).

[11] Notably, Defendants admit they have not received any consumer complaints regarding misleading plant-based labels or advertisements. Doc. 118-3 at 7, 10; Ex. 1, Rowlett Dep. 61:1-4.

2. The asserted State interest is pretextual and the law does not serve to correct nonexistent consumer confusion.

Despite the immense burdens on commerce, Defendants possess no evidence of consumer confusion. ODAFF is not aware of a single instance of consumer confusion about plant-based meat products, Doc. 118-3 at 7, 10; Ex. 1, Rowlett Dep. 61:1-4; 42:20-43:8, and the industry groups that crafted the law likewise are not aware of a single consumer that has ever been confused into thinking a vegetarian product was made of animal-based meat (let alone any empirical evidence demonstrating confusion on a systematic basis). Doc. 118-3 at 7.

Plaintiffs' experts, Drs. Adam Feltz and Silke Feltz, both professors at the University of Oklahoma with expertise in consumer understanding and behavior, synthesized the existing scholarly literature studying consumer understanding of plant-based product labels and conducted studies testing consumer understanding of Plaintiff Tofurky's labels, other plant-based meat product labels, and animal-based meat labels. *See* Ex. 3. They found that "not only are consumers not confused on average by plant-based products, but also that changing some naming conventions would actually increase consumer confusion about plant-based products." *Id.* at 7–8.[12] The Professors found that there was no "compelling, systematic evidence indicating that consumers are more confused about plant-based

[12] For example, their literature review showed that consumers are not confused by plant-based meat products' labels or naming conventions, including when such labels incorporate words traditionally associated with animal products compared to if they do not. *See* Jareb A. Gleckel, *Are Consumers Really Confused by Plant-Based Food Labels? An Empirical Study*, J. ANIMAL & ENVTL. L. (2021), *available at* https://perma.cc/V7HH-JGSA.

products than animal-based products," and that "people were sometimes *better* at answering questions correctly about plant-based products than animal-based products." *Id.* at 13.

The Professors conducted a second consumer study to see if modifying labels to increase emphasis on the term "plant-based"—in a way the Act might require—would increase consumer understanding of the products. *Id.* The Professors found that "consumers had fewer correct responses to the modified [labels] compared to the original [labels]," and that "the only possible effect [was] that the modified labels made consumers' understanding worse," although the difference between the two were minimal. *Id.* at 17–18.

Ultimately, the Professors opined that we are at a "ceiling" of consumer understanding; any changes would only serve to decrease consumer understanding. *Id.* at 7. The extensive empirical data are consistent with the experience of plant-based meat producers. In the decades that plant-based meat producers have been in business, they have not received a single complaint from a consumer who purchased their products thinking they came from slaughtered animals. Doc. 122-1 ¶ 10; Doc. 122-5 ¶¶ 9, 11; Ex. 15, Negowetti Dep. 86:22-87:9; Ex. 6, Athos Decl. ¶ 18; Ex. 8, Christoffel Decl. ¶ 14; Ex. 9, Chase Decl. ¶ 14; Ex. 10, Sopko Decl. ¶ 6; Ex. 11, Schadel Decl. ¶ 11.

With no evidence of consumer confusion and no evidence that the Act would increase consumer understanding of plant-based meats, it is evident that the state interest is pretextual and invented for the purposes of defending the Act when faced with litigation. Defendants have put forth no evidence suggesting its interest is legitimate,[13] so its motion

[13] Instead, Defendants argue that they have no need to put forth evidence showing the claimed interest is legitimate. Doc. 141 at 19 n.7.

must be denied. *Rice*, 434 U.S. at 447–48 & n.25; *Blue Circle Cement*, 917 F. Supp. at 1523 (holding that since "no specific safety and health benefits have been identified" from a challenged ordinance, the identified burdens were "clearly excessive").

3. Any interest in preventing consumer confusion could be accomplished with alternative means that do not harm or restrict interstate commerce.

In assessing the state interest underlying a burdensome regulation, the Tenth Circuit examines whether there would be less burdensome means to accomplish the same interest. *Am. Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1254 (10th Cir. 2000) ("Thus, we must consider whether the identified public purpose could 'be promoted as well with a lesser impact on interstate activities.'") (quoting *Pike*, 397 U.S. at 142)). Laws that burden interstate commerce when there are alternative means to accomplish the same goal must be stricken. *ACLU v. Johnson*, 194 F.3d at 1162; *ACLU v. Reno*, 929 F. Supp. 824, 882 (E.D. Pa.1996), *aff'd*, 521 U.S. 844 (1997). Here, existing laws that prohibit deceptive and misleading labels and advertisements accomplish the state's supposed interest in accurate labeling of plant-based meat products. Those existing laws are fairly uniform across states and the federal government and accomplish Oklahoma's purported interest in preventing misleading labeling of those products without burdening interstate commerce.

Courts also look to whether a state law regulates in an area that requires "a uniform system of regulation." *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Bonta*, 33 F.4th 1107, 1118 (9th Cir. 2022), *cert. denied sub nom. Ass'n des Eleveurs v. Bonta*, No. 22-472, 2023 WL 3571483 (U.S. May 22, 2023). Conveniently, the dormant Commerce Clause and preemption under the Supremacy Clause work in parallel—often courts will

note that if uniform regulatory scheme were necessary, then Congress would have created such a scheme. *E.g.*, *Ross*, 143 S. Ct. at 1160-61. Citing the need for uniform, nationwide regulation, this is precisely what happened in the case of food labeling. The Act's restrictions on plant-based meat labels directly contradict Congress's explicit intent to regulate food labeling in a uniform manner.

In sum, the Act favors in-state interests (conventional meat producers) over out-of-state interests (plant-based meat producers) that are in competition for the same business. The Act is also discriminatory in its effect. Due to the nature of online sales and advertising, as well as regional and national product distribution networks, it is impossible for out-of-state plant-based meat producers to comply with the Act and the law risks putting them out of business in the region or the nation as a whole. Even under the *Pike* balancing test, the Act cannot survive. It advances no legitimate state interest that is not already fully realized through existing state and federal law. The state's purported interest in accurate labeling is fulfilled without the Act's additional burdens on interstate commerce. Finally, the Act contravenes Congress's clear intent to regulate food labels in a uniform manner. For all these reasons, the Act violates the dormant Commerce Clause and cannot stand.

III. The Act Establishes Additional or Different Requirements for Food Labels Than Those Set by the Express Preemption Provision of the FDCA.

While the NLEA established a federal uniform food labeling scheme, Congress placed particular importance on all the information that food producers must include on their products' principal display panels by adopting an express preemption provision. 136 Cong. Rec. at s16609 (Sen. Mitchell); *see also* 136 Cong. Rec. at s16611 (the NLEA's

preemption provision was "refined to provide national uniformity where it is most necessary"). 21 U.S.C. § 343-1 (listing 12 provisions, including one setting forth regulations for any information relating to food products' common or usual name).

21 U.S.C. § 343(i)(1) lists labeling requirements which mandate the appearance of the common or usual name of a food if the food lacks a standard of identity. *Perea*, 939 F. Supp. 2d at 1038 (finding that 21 U.S.C. § 343–1(a)(3) applies to statements of identity, "to find otherwise would allow the states to establish different or arbitrary labeling requirements for those products without a federal standard of identity, which would undermine the purpose of the NLEA to promote uniformity in food labeling.").

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. 21 U.S.C. § 343–1(a)(1)-(5). Any requirement for product names "not imposed by or contained in the applicable [federal regulation] ... or [d]iffer[ent] from those specifically imposed by or contained in the applicable [federal regulation]" are preempted. 21 C.F.R. § 100.1(c)(4). *Lilly v. ConAgra Foods, Inc*., 743 F.3d 662, 664–65 (9th Cir. 2014).

Because the purpose of the NLEA was to prevent states from adopting inconsistent labeling requirements, *Farm Raised Salmon Cases,* 175 P.3d at 1175, state regulations cannot displace federal labeling requirements. *Turek*, 662 F.3d at 425-26 (noting that it is "easy to see why Congress would not want to allow states to impose disclosure requirements of their own on packaged food products, most of which are sold nationwide. Manufacturers

might have to print 50 different labels, driving consumers who buy food products in more than one state crazy").

In relevant part, 21 C.F.R. § 101.3 requires all food products regulated by FDA to carry a product name, or "statement of identity," which may be common or usual name of a product. This provision sets forth the size, font, and placement of this product name as it should appear. In tandem, § 102.5 requires that this statement of identity also "accurately identify or describe, in as simple and direct terms as possible, the basic nature of the food or its characterizing properties or ingredients."

Oklahoma's attempt to force a disclosure requirement as a part of a statement of identity that does not exist in federal regulations is necessarily preempted. First, FDA does not require any such disclosure, and in fact allows for "fanciful" statements of identity as long as "the nature of the food is obvious." 21 C.F.R. § 101.3(b)(3)). And second, courts have already held that state labeling disclosures for products' statements of identity are preempted because they are not identical to the labeling requirement set forth by the NLEA. *Regan v. Sioux Honey Ass'n Co-op.*, 921 F. Supp. 2d 938, 944 (E.D. Wis. 2013) (citing *Nat'l Council for Improved Health v. Shalala*, 122 F.3d 878, 880 (10th Cir. 1997).

Producers decide what a products' statement of identity should be,[14] and common usage determines the "common or usual name" of a product. Terms like "veggie burger" and "vegan sausage" are the common or usual names of plant-based meat products because

[14] Examples of creative statements of identity created by food manufactures include "nutrient enhanced water beverage," for vitaminwater drinks, "Nilla wafers" for vanilla cookies, and "whole grain crispy snack" for CLIF protein bars.

those are the names most often used and best understood by consumers. Ex. 3 at 21-29. FDA recently confirmed in a guidance document that parallel naming conventions for plant-based dairy milks (*e.g.*, "soy milk" and "almond milk") constitute the "common or usual name" of these products. Draft Guidance for Industry: Labeling of Plant-Based Milk Alternatives and Voluntary Nutrient Statements, 88 Fed. Reg. 11449 (Feb. 23, 2023). Terms like "plant-based ham roast," "vegan sausage," or "chik'n strips" (in the prominence and font required by FDA) fulfill producers' labeling obligations, and any additional or different requirements about those names are preempted.

If Oklahoma argues "product name" somehow differs from a product's statement of identity, forcing food producers to add a second, additional product name alongside a "statement of identity" is *also* preempted, as such a requirement is additional to FDA regulations that dictate the names of food (and the appearance of those names) producers must include on labels. Such a requirement would also worsen consumer understanding. Ex. 3 at 16-18.

Although State now takes the position that the Act does not "dictate the location, configuration, or specific phrasing of the disclosure," "does not require plant-based meat producers [to] incorporate the disclosure into the name of their product," and that the Act "does not modify the product name," Doc. 141 at 33, ODAFF has provided no such assurance. Ex. 4, Yates Dep. 38: 7-12; 45:9-46:10; 48:15-24; 49:11-51:7. ODAFF cannot even disclose to plant-based meat producers what "product name" refers to in the text of the Act. *Id.* 70:1-24.

The common thread behind these court decisions examining express preemption provision of the FDCA is that the viability of a finding of federal preemption largely turns on whether the label or statement at issue is directly governed by the terms of the FDCA. Because the FDCA had multiple regulations laying out specific requirements for a product's name, The Act's safe harbor provision is preempted.

IV. The Act is Unconstitutionally Vague on its Face and as Applied.

"In our constitutional order, a vague law is no law at all." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). A law can be unconstitutionally vague "for either of two independent reasons." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). A law is impermissibly vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, *or* is so standardless that it authorizes or encourages seriously discriminatory enforcement." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (emphasis added) (citation omitted). The Act fails both elements.

A. The Act Fails to Provide People of Ordinary Intelligence Reasonable Notice to Understand What Conduct it Prohibits.

A facial challenge to a law as void for vagueness need not show that a law is vague in all its applications to succeed. *See Johnson v. United States*, 576 U.S. 591, 602–03 (2015). Instead, a law is unconstitutionally vague when people cannot reasonably predict "the line between the allowable and the forbidden." *Winters v. New York*, 333 U.S. 507, 519 (1948); *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

1. The Act does not define who it applies to.

At first blush, the Act could be read as *only* applying to edible portions or parts of

livestock.[15] However, ODAFF understands the Act's requirements to apply to plant-based meat products and intends to enforce the Act accordingly.[16] Ex. 4, Yates Dep. 32:16-22, 33:8-13. Because Tofurky uses meat-like terminology in its marketing and labeling, it may be liable under the Act. Ex. 2.9; Ex. 6, Athos Decl. ¶ 7.

Companies that assist Tofurky and PBFA members to advertise or sell plant-based products may also be liable under the Act.[17] Tofurky advertises its products through social media websites like Facebook and Instagram. Ex. 6, Athos Decl. ¶ 10; Ex. 16, Ransom Dep. 72:14-18. Because the Act is so vague, it is unclear if *both* Tofurky *and* the websites it advertises on could be liable under the Act. Third party distributors and retail grocery stores could also be liable for selling plant-based products that ODAFF inspectors decide are deceptive or misleading.[18] This vague but substantial threat of liability to the entire supply chain may mean distributors and retailers become unwilling to buy and sell plant-based products entirely. Doc. 122-4 ¶ 36; Ex. 6, Athos Decl. ¶ 14; Ex. 8, Christoffel Decl. ¶ 13; Ex. 9, Chase Decl. ¶ 8, 15; Ex. 10, Sopko Decl. ¶ 11; Ex. 11, Schadel Decl. ¶ 6.

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[15] The Act applies to "person[s] advertising, offering for sale or selling" meat, and defines "meat" as "any edible portion of livestock or part thereof," OKLA. STAT. tit. 2 § 5-107(2).
[16] The industry groups who drafted the Act also intended the Act to apply to plant-based meat products. OAG-0005622 (OCA stating purpose of bill was to regulate plant-based meat companies).
[17] The Act in no way attempts to cabin or define "person advertising, offering for sale or selling meat." OKLA. STAT. tit. 2 § 5-107(c)(1).
[18] In fact, companies like Nestle and Wal-Mart reached out to ODAFF and legislators after the Act passed, fearing prosecution. Ex. 1, Rowlett Dep. 52:17-53:3, 88:15-25, 89:6-8; Ex. 2.10; Ex. 4, Yates Dep. 41:1-5, 43:2-10.

2. The Act's vague 'safe harbor' provision applies only to plant-based meat product packaging and conflicts with federal law.

The Act's attempted "safe harbor" for plant-based meat labels[19] is anything but safe, as it only applies to product labels; it gives no assurance or guidance for the majority of conduct regulated under the law—*i.e.*, oral or written statements, advertisements, displays, pictures, illustrations, or samples. OKLA. STAT. tit. 2 § 5-107(b)(3)–(4). What's more, safe harbor provisions are insufficient to cure vague statutes. *See, e.g.*, *Pernell v. Fla. Bd. of Governors of State Univ. Sys.*, No. 4:22-cv-304, 2022 WL 16985720, at *45 (N.D. Fla. Nov. 17, 2022).[20]

Within this supposed safe harbor, the phrase "name of the product" is undefined and ambiguous.[21] Tofurky "lack[s] any clarity" about what the Act requires. Doc. 122-5 ¶ 9; Ex. 6, Athos Decl. ¶ 1; Ex. 13, Athos Dep. 137:14-18. Even ODAFF is "not exactly sure [] what" the Act meant by "name of the product." Ex. 4, Yates Dep. 70:20-71:6. Without a

[19] Providing that "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." OKLA. STAT. tit. 2 § 5-107(C)(1) (emphasis added).

[20] While "a scienter requirement may mitigate a law's vagueness," *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982); *see Ward v. Utah*, 398 F.3d 1239, 1252 (10th Cir. 2005), the Act contains no such requirement. This contrasts the Act with the law challenged in *United States v. Franklin-El*, in which the Tenth Circuit held specific intent ("knowingly and willfully") was a scienter requirement that mitigated the statute's vagueness. 554 F.3d 903, 911 (10th Cir. 2009).

[21] It is unclear if "name of the product" refers to the category (*e.g.*, "deli slices" or "burgers"), the flavor (*e.g.*, "hickory smoked" or "smoky maple"), the brand (*e.g.*, "Tofurky"), the ingredients (*e.g.*, "tempeh"), or some combination of all these phrases (*e.g.*, "Tofurky plant-based hickory smoked deli slices").

concrete meaning of "name of the product," producers have no idea how to comply with the Act.

Oddly, Defendants take the position that defining the phrase "name of the product" within the Act would be "futile," as the Act does not regulate the product name. Doc. 141 at 29. Yet they also agree that "name of the product" is the comparison to which the "size and prominence" of the disclosure shall be measured. *Id.* Thus, knowing specifically what "name of the product" means is essential for regulated entities to begin to understand their requirements for compliance. If the yardstick against which compliant conduct will be measured is not clear and readily understandable, the Act is unconstitutionally vague. *See Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926).

Contrary to Defendants' assertion, Doc. 141 at 28, whether a word or phrase can be "easily understood" is not dispositive of whether its use in a statute is vague. It is possible to understand the *definition* of a word without understanding its *use* in the statute. "[T]he fact that [a statute] uses real words found in an English dictionary does not magically extinguish vagueness concerns." *Pernell*, 2022 WL 16985720, at *44; *Honeyfund.com, Inc. v. DeSantis*, No. 4:22-cv-227, 2022 WL 3486962, at *12 (N.D. Fla. Aug. 18, 2022) (same); *see United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012) ("Dictionary definitions are acontextual"); *United States v. Walsh*, 156 F. Supp. 3d 374, 382-83 (E.D.N.Y. 2016).

Defendants' citations are a good example. Defendants note that name of the product is defined as "a word or phrase that constitutes the distinctive designation of . . . something produced." Doc. 141 at 28-29. But is the "distinctive designation" the brand, the flavor, the category, the characterizing ingredient? "Name of the product" could refer to any or all of

these different concepts. Ironically, this is the very definition of ambiguity.[22] When a phrase has multiple plausible definitions and is not defined in the statute, its use is unconstitutionally ambiguous. *E.g.*, *Dep't of Hum. Servs., Div. of Vocational Rehab., Hoopono-Servs. for the Blind v. U.S. Dep't of Educ., Rehab. Servs. Admin.*, 46 F.4th 1148, 1155 (9th Cir. 2022). The Act creates confusion in more than only "marginal scenario[s]." Doc. 141 at 30. And a statute is unconstitutionally vague even if there are some hypothetical scenarios that clearly violate the law. *See Johnson v. United States*, 576 U.S. at 602-03.

It is also unclear whether "name of the product" is distinct from a product's common or usual name or its statement or standard of identity under federal law. Ex. 4, Yates Dep. 71:8-23 ("could be synonymous with statement of identity or it could not be"). A lack of clarity in how to reconcile the requirements of a statute with existing law may make a statute unconstitutionally vague. *E.g.*, *Isaacson v. Brnovich*, 610 F. Supp. 3d 1243, 1253 (D. Ariz. 2022). Here, the ambiguous meaning of the term "name of the product" and the undefined "prominence" requirement make it impossible to reconcile with federal labeling requirements, including whether the Act is different from, or in addition to, existing federal labeling requirements. To illustrate, it is unclear whether FDA's prominence requirement for statements of identity would be sufficient under the Act.

[22] *See Ambiguous*, MERRIAM-WEBSTER ("doubtful or uncertain," or "capable of being understood in two or more possible [] ways"), https://www.merriam-webster.com/dictionary/ambiguous.

B. The Act Encourages Arbitrary and Discriminatory Enforcement.

A law is also impermissibly vague if it fails to "establish minimal guidelines to govern" enforcement of the law. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). In the context of a pre-enforcement vagueness challenge, "[t]he question is not whether discriminatory enforcement occurred here, . . . but whether the [law] is so imprecise that discriminatory enforcement is a real possibility." *Gentile v. State Bar*, 501 U.S. 1030, 1051 (1991).

The Act creates exactly this "real possibility." ODAFF has discretion both how to interpret the Act and how to enforce it. *See* Ex. 4, Yates Dep. 60:15–61:8. Yet the Act does not specify what "product name means," *id.* 70:1–16, or what it means for a product to display "that the product is derived from plant-based sources." *Id.* 36:17-37:16. ODAFF admits it can give no guidance regarding what it means for a disclosure to be in a "type that is uniform with the name of the product." *Id.* 78:8-18. ODAFF even admits there's no way for producers to determine from the text of the Act what type of conduct constitutes "misrepresenting a product as meat." *Id.* 34:3-35:17. In fact, ODAFF cannot provide any guidance to plant-based companies with how to comply at all. *E.g.*, *id.* 45:9-18, 78:8-79:14, 80:10-19. Despite this, the Act "vests virtually complete discretion in the hands" of ODAFF to determine whether plant-based meat products run afoul of the law. *Kolender*, 461 U.S. at 358. The Due Process Clause forbids such unbridled discretion.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Summary Judgment that the Act is void as an unconstitutional violation of the dormant Commerce Clause and because it is preempted and unconstitutionally vague.

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Respectfully submitted,

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