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The Cow Has Left the Barn: Updating Standards of Identity to Reflect Consumer Understanding of Plant-Based Foods

Nicholas G Miller*

Introduction

Have you ever seen “tofurkey” at the supermarket and thought it was a rare, delicious cousin of the turkey? The animal-based food industries, led by milk and meat producers, are claiming that the reasonable consumer might. On the other hand, the plant-based food substitutes are appearing on supermarket shelves with increasingly bold names for their products that tap into our familiarity with animal-based foods, using names like “Beyond Meat.” So, who is right? Where do we draw the line on what plant-based food can be called? And who should draw that line?

This paper examines the debate surrounding the labeling of plant-based alternatives to animal-based products, and proposes a path forward, led by the Food and Drug Administration (“FDA”). Part I will describe the history of “standards of identity” (defined parameters for what a food product must contain to use a particular name) that arose in the 1900’s, promoted by both consumers and well-established industries. Part I will trace the rise in labeling authority for regulatory agencies such as the FDA, along with the failure of these agencies to create adequate standards of identity to keep up with new products.

Part II will examine the decades-long war between the animal-based and plant-based food industries, which has rapidly intensified because of the recent rise in popularity of milk alternatives and meat substitutes. This part exams the two sides separately, analyzing how each side has framed the debate. The animal-based product industry models itself as an advocate for consumer protection from deceptive products, while the plant-based industry argues it is defending freedom of speech and market competition.

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Part III then proposes a reexamination of the central debate, removed from the framing of these two industry behemoths. Section A builds on the history described in Part I, to assert that the FDA is the clear authority on standards of identity for plant-based foods, rather than the U.S. Department of Agriculture (“USDA”) and has preemptive authority over states and localities. Section B analyzes the existing evidence on consumer understanding of plant-based foods, and the scientific evidence on the health effects of these alternative products. This part then incorporates the burgeoning focus on sustainability that is emerging in major countries around the world, supported by expert reports on both health and the environment.

Finally, Part III concludes with proposed actions that the FDA could take, consistent with the previously summarized findings, such as allowing plant-based foods to use any food term but disallowing product names that use actual animal source terms. (e.g., “soy nuggets” are allowed, but “awesome chicken” is not).

I. Planting the Seeds for Standards of Identity

A. Pressures to Standardize

Many popular accounts of food law in the United States begin with the sensational account of the horrifically unsanitary and exploitative Chicago meat processing plants that Upton Sinclair vividly painted in his novel, *The Jungle*, published in 1906.¹ However, decades before Sinclair’s exposé for the American public, industries were already organizing into the “Pure Food Movement.” These industrialists sought to protect their lucrative markets from imitation products (e.g., keeping oleomargarine out of the butter market), and they sought to achieve that through standardization of the otherwise patchwork system of state regulations.² Their cause was aided by the advent of dubious products like “Bred Spred,” which was marketed as a jelly, but contained no fruit.³

¹ UPTON SINCLAIR, *THE JUNGLE* (Project Gutenberg 1906) (1906) (Sinclair’s description, while intended to showcase the abuses suffered by a working class of mostly immigrants, was widely understood by the public and eventually by Congress as an indictment of the unseemly food production process).

² Wallace F. Janssen, *The Story of the Laws Behind the Labels*, FOOD & DRUG ADMIN., June 1981, <https://www.fda.gov/media/116890/download> (last visited September 6, 2022) (in addition to dairy, the sugar industry was involved as well, trying to keep out producers of glucose as a substitute product).

³ RENEE JOHNSON, CONG. RSCH. SERV., IF10811, STANDARDS OF IDENTITY FOR FOODS AND PLANT-BASED FOOD PRODUCTS 1 (2018).

Their efforts began to bear fruit through increasingly protective Supreme Court decisions, and with the passage of a series of federal laws in the early 20th century, culminating in the 1938 Federal Food Drug and Cosmetics Act (“FFDCA”).⁴ The FFDCA updated existing federal law and gave the FDA authority to create standards of identity and quality where it deemed it necessary to “promote honest and fair dealings in the interest of consumers.” The Act also gave courts the power to issue injunctive relief.⁵

B. Expansion of Regulatory Authority

While food safety responsibility is now spread over a network of federal agencies, the default agency is the Food and Drug Administration, which was empowered by the FFDCA and its subsequent amended versions.⁶ The main carveout to the FDA’s default authority over food is the U.S. Department of Agriculture (“USDA”), which oversees the regulation of most animal-based products such as meat and poultry.⁷ The division between the FDA and USDA is longstanding and has been continually reinforced by statute, though some now question the efficiency of a bifurcated regulatory system.⁸ The authority of these agencies expanded throughout the first half of the 20th century, with almost half of the U.S. food supply subject to specific standards by the 1960’s.⁹

⁴ See e.g. *United States v. Ninety-Five Barrels*, 265 U.S. 438, 443 (1924) (ruling against an apple cider vinegar producer as an imitation product because “The vinegar made from dried apples was not the same as that which would have been produced from the apples without dehydration.”); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–392 (1938); see also *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938) (in which the court upheld the power of the federal government to control the shipping of adulterated “filled milk” in interstate commerce).

⁵ 21 U.S.C. § 341; *Milestones in U.S. Food and Drug Law History*, FOOD & DRUG ADMIN., <https://www.fda.gov/about-fda/fdas-evolving-regulatory-powers/milestones-us-food-and-drug-law-history> (last visited Sept. 11, 2022).

⁶ RENEE JOHNSON, CONG. RSCH. SERV., RS22600, *THE FEDERAL FOOD SAFETY SYSTEM: A PRIMER 1* (2016) (Primer from Congressional Research Service providing an overview of the regulatory bodies and legislative jurisdiction within Congress for food safety. The other primary agencies within this sprawling network include the U.S. Department of Agriculture, tasked primarily with the regulation of animal products, and the Federal Trade Commission, which regulates the advertising of all products.).

⁷ Federal Meat Inspection Act, 21 U.S.C. §§ 601–695 (1906); JOHNSON, *supra* note 6, at 10.

⁸ *Id.*

⁹ *Part III: Drugs and Foods Under the 1938 Act and Its Amendments*, FOOD & DRUG ADMIN. (Feb. 1, 2018), <https://www.fda.gov/about-fda/changes-science-law-and-regulatory-authorities/part-iii-drugs-and-foods-under-1938-act-and-its-amendments>.

C. The Rise of Labeling Authority and Common Names for Products

Since the 1960's, Congress has primarily granted the FDA greater authority over labeling, through a series of acts such as the Nutrition Labeling and Education Act in 1990.¹⁰ The Act gave the FDA's regulations preemptive power over state law in the labeling domain, and began standardizing descriptors such as "low fat," in an effort to protect consumers from being misled.¹¹ Thus, labeling rules promulgated by the FDA have considerable weight, such as 21 C.F.R. 101, which requires that the principal display of products contain a "statement of identity" with the name required by federal law, or if not provided, the "common or usual name of the food."¹² Unsurprisingly, the FDA has not been able to come up with standards of identity for all of the many products in the market, leaving courts to interpret whether particular names are "common or usual," per broad FDA guidelines such as the following:

The 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. The name shall be uniform among all identical or similar products and may not be confusingly similar to the name of any other food that is not reasonably encompassed within the same name.¹³

Because the FDA has thus far failed to explicitly incorporate or exclude plant-based food into the standards of identity lexicon and left courts to interpret these broad standards for common names, the result has been uncertainty and increased litigation in the disputes

¹⁰ Nutrition Labeling and Education Act of 1991, 21 U.S.C. §§ 301; *see also* Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-1461 (requiring products shipped in interstate commerce to be informative and fair); *see also* Food Allergy Labeling and Consumer Protection Act, Pub. L. 108-282 (amended 2004).

¹¹ Nutrition Labeling and Education Act § 301; *Milestones in U.S. Food and Drug Law History*, *supra* note 5.

¹² 21 C.F.R. § 101.3(a)-(b).

¹³ 21 C.F.R. § 102.5(a); *See also* 21 C.F.R. 102.5(d) ("A common name or usual name of a food may be established by common usage"); *see* JOHNSON, *supra* note 3 (the FDA has come up with just over 300 standards of identity for products).

between producers of animal-based products and producers of plant-based alternatives.¹⁴

II. Animal-based Product Industry and the Plant-based Product Industry Spar Over Shared Terminology as the FDA Mulls New Standards of Identity

Despite its broad authority over food, the FDA has been outpaced by the food advertising industry and evolving consumer knowledge, leading to the present conflicts over the proper labeling of innovative new plant-based products. Answering the question of whether or not to restrict the naming conventions for these products to exclude historically animal-associated terms like “milk” or “meat” can depend on how the issue is framed.

A. Industry Framing of the Debate – Consumer Protection v. Free Market and Free Speech

An ongoing debate is raging between the entrenched dairy and animal-based products industries and the plant-based alternative newcomers. Usage of terms like “burger” are on the front lines of that war.¹⁵ The resolution of these debates may be existential, particularly for the animal-based product industry, which is losing market share each year to plant-based alternatives.¹⁶ The type of question that needs to be answered is whether enough consumers understand what a “black bean burger” contains, and if there is a less confusing way to describe it.¹⁷

Both sides are seeking to gain the legal high ground and attempting to galvanize consumers, judges, and lawmakers, often with reliance on the limited and constantly evolving evidence of whether consumers are being misled. The animal-based product

¹⁴ PERKINS COIE, FOOD LITIGATION 2019 YEAR IN REVIEW 14 (2020); *see also* *Guidance Documents & Regulatory Information by Topic (Food and Dietary Supplements)* FOOD & DRUG ADMIN. <https://www.fda.gov/food/guidance-regulation-food-and-dietary-supplements/guidance-documents-regulatory-information-topic-food-and-dietary-supplements> (last visited June 19, 2022) (the FDA has yet to address the issues head on, even in their industry guidance documents).

¹⁵ Alina Selyukh, *What Gets To Be A ‘Burger’? States Restrict Labels On Plant-Based Meat*, NATL. PUB. RADIO (July 23, 2019), <https://www.npr.org/sections/thesalt/2019/07/23/744083270/what-gets-to-be-a-burger-states-restrict-labels-on-plant-based-meat>.

¹⁶ *Id.*

¹⁷ *Id.*

industry argues on the basis of protecting consumers from being defrauded by “fake meat” producers.¹⁸ The plant-based industry and individual producers have mostly defended themselves on the basis of free speech, sometimes with the aid of advocates like the American Civil Liberties Union.¹⁹

i. Animal-based Food Industry and Consumer Plaintiffs Claim Deception

The animal-based food industry has taken action against plant-based alternatives in both private suits and more recently by seeking broad legislative action at the state and federal level.

1. Private Suits via State Law Bars on Unfair and Deceptive Practices

Typically, food litigation against brands is brought under state laws that prohibit deceptive or unfair business practices that mislead consumers, often mirroring the Federal Trade Commission’s standards.²⁰ Because litigation occurs primarily in California and New York, the leading authority for the courts was set in the Ninth Circuit case *Williams v. Gerber Prods. Co., Inc.*, which ruled that disputed statements must be likely to mislead a “reasonable consumer.”²¹ Under this standard, falsity of the actual statement is not decisive, as the court clarifies in *Williams* that liability can be found where a statement “although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.”²² Even statements that are false though are still examined through the reasonable consumer lens, such as the 2021 case *Moore v. Trader Joe’s Co.*, in which the Ninth Circuit found that honey advertised as “Manuka Honey” was not misleading, in

¹⁸ See NAT’L CATTLEMEN’S BEEF ASS’N, *Policy*,

<https://policy.ncba.org/home/issues/fake-meat> (last visited June, 19 2022) (The National Cattlemen’s Beef Association is a leading industry group seeking policy changes to restrict plant-based products).

¹⁹ See, e.g., *Federal Court Block ‘Veggie Burger’ Censorship Law*, ACLU (December 11, 2019), <https://www.aclu.org/press-releases/federal-court-blocks-veggie-burger-censorship-law>.

²⁰ See, e.g., 15 U.S.C. § 52 (prohibiting false advertisements to induce the purchase of food); 15 U.S.C. § 45 (restriction against “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices affecting commerce”).

²¹ *Williams v. Gerber Prods. Co.*, 523 F.3d 934, 938 (9th Cir. 2008); Michael R. Reese, *Starting a Niche Practice in Food Law*, GP SOLO, Nov.–Dec. 2017, at 11.

²² *Williams*, 523 F.3d at 938.

part because that would require a consumer to unreasonably believe that the bees had only interacted with one type of flower.²³ Such an assumption was deemed unreasonable, especially in light of the low price, and the dismissal of the complaint by the district court was affirmed.²⁴

On the whole, the milk and meat industries' efforts have largely been rebuffed in court when they try to directly challenge plant-based alternatives, using laws designed to protect consumers. This may be due in part to their lack of standing to intervene on behalf of consumers.²⁵ Instead, the major cases against plant-based alternatives have come from consumer class action suits.²⁶ Class-action consumer plaintiffs have found the most success in cases where the information appears false, such as *Dumont v. Reily Foods Company*, where the First Circuit saw a plausible allegation of fraud over a label for "Hazelnut Crème" flavored coffee, that contained no hazelnuts.²⁷ But even those types of consumer-driven suits have had little success against plant-based products, and the animal-based industry now has placed most of their eggs in a single basket: direct lobbying for policy change.²⁸

2. Legislative Action to Restrict Usage of Meat and Dairy Terms

The meat and dairy industries have both pushed aggressively for state and federal protection of their respective industries, by seeking restrictions on plant-based alternatives. For the meat industry, they have found success in several states, including Mississippi, Louisiana, Missouri, Oklahoma, and Arkansas, with

²³ See *Moore v. Trader Joe's Co.*, 4 F.4th 874 (9th Cir. 2021).

²⁴ See *id.*

²⁵ See, e.g., *Nat'l Milk Producers Fed'n v. Harris*, 653 F.2d 339, 344 (8th Cir. 1981) (affirming dismissal of the request by the National Milk Producers Association for mandatory action against plant-based cheese alternatives).

²⁶ See Michelle E. Hoffer, *Almond Beverage, Oat Water, and Soaked Soybean Juice: How the Dairy Pride Act Attempts to Remedy Consumer Confusion About Plant-Based Milks*, 55 U. RICH. L. REV. 657, 671 (2021).

²⁷ *Dumont v. Reily Foods Co.*, 934 F.3d 35 (1st Cir. 2019); see also *Bell v. Publix Super Mkts., Inc.*, 982 F.3d 468, 484 (7th Cir. 2020) (finding that consumer class had adequately alleged deceptive labeling on a label that claimed to be "100% Grated Parmesan Cheese" that also contained other ingredients).

²⁸ See, e.g., *Ang v. Whitewave Foods Co.*, No. 13-CV-1953, 2013 WL 6492353 (N.D. Cal. Dec. 10, 2013) (dismissing claim by consumers who alleged they were deceived by Silk Products that used the word "milk" for a non-dairy product); see also Hoffer, *supra* note 26, at 671.

laws introduced to restrict usage of terms associated with meat.²⁹ However these laws have faced pushback from industry groups such as the Plant Based Food Association, in some cases leading to their withdrawal, as was the case in Mississippi.³⁰ Individual companies have also challenged these state restrictions with mixed results. In a 2020 case, the Tenth Circuit denied relief to a plant-based meat brand – “Upton’s Naturals” – which sought to challenge Oklahoma’s restrictions on its use of terms like “bacon” or “classic burger.”³¹ By contrast, in the 2021 case, *Turtle Island Foods SPC v. Strain*, a district court in Louisiana enjoined the state from enforcing new provisions of its Truth in Labeling of Food Products Act against the Tofurkey brand, for their use of “meat terms” on plant-based products.³² The district court there found that “plaintiff presents compelling evidence indicating that consumers are not confused by its labeling. In response, Defendant *fails* to produce evidence indicating that consumers are confused by Plaintiffs labeling.”³³

At the federal level, the meat industry has lobbied for the “REAL Meat Act,” which was introduced in the House of Representatives in 2019 to require new restrictions, such as the placement of the word “imitation” on plant-based alternatives.³⁴ The Act’s stated goal is to “amend the Federal Food, Drug, and Cosmetic Act to ensure that consumers can make informed decisions when choosing between meat products such as beef and imitation meat products.”³⁵ The bill has not yet advanced to a formal vote as of July 2022, and it is unclear whether it would have the requisite support.³⁶

Similarly, the dairy industry has lobbied congress for the “Defending Against Imitations and Replacements of Yogurt, Milk, and Cheese to Promote Regular Intake of Dairy Everyday Act” – or its more concise name, the “DAIRY PRIDE Act,” introduced in

²⁹ See PERKINS COIE, *supra* note 14, at 14; see also, e.g., Act of Mar. 12, 2019, ch. 303, § 1, 2019 Miss. Gen. Laws 303 (codified as amended at Miss. Code § 75-35-15(4) (2022)).

³⁰ Megan Silverman, *The FDA Should Regulate to End the Plant-Based Meat Labeling Controversy*, LEWIS & CLARK L. SCH., (Aug. 19, 2020) <https://law.lclark.edu/live/blogs/136-the-fda-should-regulate-to-end-the-plant-based>.

³¹ *Upton's Nats. Co. v. Stitt*, No. CIV-20-938-F, 2020 WL 6808784, at *3 (W.D. Okla. Nov. 19, 2020) (court found that a reasonable consumer could be misled by these terms, even with qualifiers like “vegan”).

³² *Turtle Island Foods SPC v. Strain*, Civil Action 20-00674-BAJ-EWD, 2022 WL 909039, at 8 (M.D. La. Mar. 28, 2022).

³³ *Id.* at 19.

³⁴ Real MEAT Act of 2019, H.R. 4881, 116th Cong. § 403D(a) (2019); see Silverman, *supra* note 30.

³⁵ H.R. 4881.

³⁶ See *Id.*

2019.³⁷ The Act would require enforcement against plant-based products that use dairy-associated terms, calling them “misbranded milk alternatives.”³⁸ Similar to the REAL Meat Act, the Dairy Pride Act has been referred to subcommittees on Health and Commerce, but has not been brought to a vote.³⁹ This kind of legislation would not be unprecedented, given previously enacted legislation such as 15 U.S.C. § 55, with its amendment passed in 1950 that prohibited advertisements that might suggest margarine was a dairy product, rather than oil-based.⁴⁰

ii. Plant-based Producers and Free Speech Advocates Push Back

1. Anti-Competitive Argument and Voluntary Standards

Like the meat industry, the plant-based food industry has sought greater clarity from authorities like the FDA and formed their own industry group known as the Plant Based Foods Association.⁴¹ The group is made up of several dozen brands, which have banded together to fight lawsuits and policy efforts by the meat and dairy industries. They view these efforts by the meat and dairy industries as anti-competitive measures to keep them out of the market, veiled as consumer protection.⁴² Instead of the restrictions advocated by meat and dairy producers, the Plant Based Food Association has come up with their own voluntary standards to differentiate their products, using qualifiers to indicate plant-based status.⁴³

³⁷ See DAIRY PRIDE Act, H.R. 1769, 116th Cong. §1 (2019).

³⁸ *Id.*

³⁹ See *id.*

⁴⁰ 15 U.S.C. § 55(a)(2).

⁴¹ See PLANT BASED FOODS ASS'N, *About* <https://www.plantbasedfoods.org/about/> (last visited Sept. 13, 2022).

⁴² See e.g., Elaine Watson, *PBFA slams 'anti-competitive, anti-free market' Wisconsin bills targeting plant-based dairy and meat*, FOOD NAVIGATOR (April 8, 2021) <https://www.foodnavigator-usa.com/Article/2021/04/08/PBFA-slams-anti-competitive-anti-free-market-Wisconsin-bills-targeting-plant-based-dairy-and-meat> (arguing against proposed Wisconsin bill that would restrict use of “milk,” “cheese,” and “dairy” to products sourced from “hooved animals”).

⁴³ *Voluntary Standards for the Labeling of Meat Alternatives in the United States*, PLANT BASED FOODS ASS'N, <https://www.plantbasedfoods.org/wp-content/uploads/PBFA-Labeling-Standards-for-Meat-Alternatives.pdf> (Last visited Sept. 13, 2022) (groups suggests disclaimers like “vegan” or “meatfree” as modifiers to go alongside traditional meat terms).

2. *Protected Commercial Speech Defense Faces Uncertainty*

While countering claims that their product labels are misleading consumers, the plant-based food industry has also successfully framed the new legislation that is designed to restrict them as a violation of their First Amendment right to commercial speech. Courts have found this persuasive in cases such as *Turtle Island Foods SPC v. Soman*, in 2019, where a district court awarded the maker of “Tofurkey” injunctive relief from enforcement of a restrictive new Arkansas law.⁴⁴ The court arrived at its decision using a test balancing the harm from potential deception of consumers with the harm of chilling free commercial speech, and found the latter weightier.⁴⁵ Similarly, freedom of commercial speech animated the decision of the court in the Middle District of Louisiana in 2022 where they also found for the Tofurkey brand in a suit against restrictive state labeling laws, designed to prevent the usage of meat-associated terms like “burger.”⁴⁶

The level of scrutiny to apply to restrictions on commercial speech has also been highly debated, though most courts follow the leading case, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*.⁴⁷ In *Hudson*, the Supreme Court laid out a four-part test, which amounted to an intermediate level of scrutiny, in which the government could restrict speech only when it had a substantial interest and did so with a narrowly tailored regulation that directly and materially advanced its goal.⁴⁸

However, *Hudson’s* first factor was a threshold requirement that the speech not be “inherently misleading,” which some lower courts have used to justify applying rational basis scrutiny, when the

⁴⁴ *Turtle Island Foods SPC v. Soman*, 424 F. Supp. 3d 552, 579 (E.D. Ark. 2019); see also Anna Starostinetskaya, *Tofurky Wins Historic Free Speech Lawsuit. Can Use “Burger” and “Sausage Labels on Plant-Based Meat.*, VEGNEWS (March 29, 2022), <https://vegnews.com/2022/3/tofurky-wins-historic-free-speech-lawsuit>.

⁴⁵ *Soman*, 424 F. Supp. 3d at 579.

⁴⁶ Strain, WL 909039, at 19; see also Starostinetskaya, *supra* note 44.

⁴⁷ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980).

⁴⁸ *Id.* (four part test laid out by the court for restrictions on commercial speech: 1) threshold requirement that the content must not be inherently misleading; 2) government must have a substantial interest; 3) regulation must directly and materially advance the government’s goal, and 4) the regulation must be narrowly tailored).

speech is “potentially misleading.”⁴⁹ Thus, rational basis was applied in the 2020 case brought by *Upton’s Naturals*, opposing restrictions from the Oklahoma Meat Consumer Protection Act.⁵⁰ Using this rational basis review, which follows an alternative Supreme Court case – *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* – the district court in Oklahoma denied *Upton* injunctive relief.⁵¹

On the other side, some courts have employed a heightened standard, beyond intermediate scrutiny.⁵² For example, some lower courts have interpreted the 2011 decision in *Sorrell v. IMS Health Inc.* to mean that heightened scrutiny can be applied whenever the state restricts commercial speech based on its content.⁵³ The Supreme Court in *Sorrell* made the following determination about a restriction on pharmaceutical ads: “Act 80 is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted.” (emphasis added).⁵⁴

Thus, courts appear somewhat split on what level of scrutiny ought to apply for commercial speech restrictions, and cases continue to rise through the appellate pipeline. One such case, is an ongoing one between the American Beverage Association and San Francisco over an ordinance requiring warnings on sugary drink signs. In that case the Ninth Circuit ruled against the ordinance, confirming the previous reversal, in a rehearing *en banc*.⁵⁵ Without a favorable resolution on what standard to apply, the plant-based industry may face difficulty in using the First Amendment as a shield against new restrictions.

⁴⁹ *Upton's Nats. Co.*, No. CIV-20-938-F, 2020 WL 6808784, at *3 (relying on precedent from the 6th circuit in *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 641 (6th Cir. 2010)).

⁵⁰ *Id.*

⁵¹ *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985) (applying the leading case for rational basis review to commercial speech).

⁵² See generally David L. Hudson Jr., *Central Hudson Test*, THE FIRST AMEND. ENCYCLOPEDIA, (2017), <https://www.mtsu.edu/firstamendment/article/1536/central-hudson-test>.

⁵³ See generally Micah L. Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. UNIV. J. OF L. & POL'Y 53, 54 (2016) (discussing lower court analysis of *Sorrell v. IMS Health Inc.*, 564 U.S. 552, (2011)).

⁵⁴ *Sorrell*, 564 U.S. at 565.

⁵⁵ See *Am. Beverage Ass'n v. San Francisco*, 916 F.3d 749, 753-58 (2019).

III. A Proposed Path Forward Outside of the Industry Battle for Market Share

Both the animal-based and plant-based food industries have their own biases as self-interested competitors jockeying for market share. Therefore, in order to determine the best path forward, it is necessary to examine how the regulators see their role and how consumers can be best served, by incorporating third party experts' determinations and international standards. Then, with those considerations in mind, the proper authority – in this case the FDA – can take definitive action to settle this dispute.

A. The FDA Should Take Definitive Action to Incorporate Plant-Based Foods

i. FDA, Not USDA

As previously discussed in Part I, the FDA has default authority over foods that are not sourced from animals.⁵⁶ Thus, in the case of plant-based food, it would seem obvious that they are the proper agency to regulate. However, powerful groups such as the National Cattlemen's Beef Association have been pushing for the USDA to take primary jurisdiction.⁵⁷ In response, however, third party scientific research organizations like the Center for Science in the Public Interest have argued that the USDA has no place in regulating plant-based foods, and that the FDA is the proper authority.⁵⁸

Finally, a recent memorandum of understanding between the FDA and the Food Safety and Inspection Service (the USDA's food health and safety regulatory division) from 2018 reinforced their discrete areas of authority and gave no indication that the USDA would have authority over meat substitutes. The memorandum once again demarcated that the USDA is limited to the authority granted under the Federal Meat Inspection Act, which carves out its authority over exclusively animal-based food products.⁵⁹

⁵⁶ See generally *supra* Part II.B.

⁵⁷ NAT'L CATTLEMEN'S BEEF ASS'N, *surpa* note 18.

⁵⁸ See Sarah Sorscher & Thomas Gremillion, *Re: Petition to Establish Beef and Meat Labeling Requirements*, CTR. FOR SCI. IN THE PUB. INT. (May 18, 2018), <https://cspinet.org/sites/default/files/attachment/usca-petition-fda-2018.pdf>.

⁵⁹ See *Memorandum of Understanding Between the Food Safety and Inspection Service United States Department of Agriculture and the Food and Drug Administration*, FOOD & DRUG ADMIN. (Feb. 23, 1999), <https://www.fda.gov/about-fda/domestic-mous/mou-225-99-2001>.

ii. Preemption Is Authorized and Will Provide Needed Uniformity

Another reason for the FDA to take action is to standardize the rules around labeling plant-based food, settling the contentious legal battle being waged across the United States.⁶⁰ The FDA has been given express preemptive authority in the area of labeling, through acts like the Nutrition Labeling and Education Act (NLEA), which ties in directly with standards of identity and the appropriate terminology for these new plant-based products.⁶¹ Case in point, §343(1) of the NLEA amendment states that:

*no State or political subdivision of a state may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce – (1) any requirement for a food which is the subject of a standard of identity established under section 341 of this title that is not identical to such standard of identity or that is not identical to the requirement of section 343(g) (emphasis added)*⁶²

This section strongly indicates that if the FDA were to create concrete standards of identity, it would nullify any state effort to create their own restrictions, providing a uniform and standardized system of labeling, as intended by Congress. In fact, one federal court recently addressed this gap directly, when ruling on the use of the word “milk” by the Silk Products brand, writing “§131.110 pertains to what milk is, rather than what milk is not, and makes no mention of non-dairy alternatives.”⁶³ The court then found that the local attempt to impose additional standards of identity at issue was preempted and therefore impermissible, given that “the FDA has yet to prescribe a name for the Silk Products.”⁶⁴

⁶⁰ See *supra* Part II.

⁶¹ See 21 U.S.C. § 343-1.

⁶² *Id.*

⁶³ Ang, No. 13-CV-1953, 2013 WL 6492353; see also 21 C.F.R. § 131.110 (“Milk is the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows.”).

⁶⁴ *Id.* But see *Bell v. Publix Super Mkt, Inc.*, 982 F.3d 468, 484 (7th Cir. 2020) (finding that “Absent contrary language in a standard of identity that protects a particular statement, § 343-1 does not expressly preempt state-law prohibitions on deceptive statements that sellers add voluntarily to their labels or advertising.”).

This need for clarity is exactly what drove the early efforts to create a national regulatory framework and would presumably reduce litigation and uncertainty for both the animal and plant-based industries.⁶⁵

B. A Closer Examination of Serving Consumer Interests

i. Consumer Perception and Interest

The meat and dairy industry have consistently argued that they are merely trying to prevent consumers from being misled, as consumers may be unable to differentiate animal-based products from plant-based substitutes. However, the evidence supporting that proposition is limited, with the majority of Americans now appearing knowledgeable about plant-based alternatives.⁶⁶ Further, 57 percent of American households are already purchasing plant-based alternatives.⁶⁷ The Center for Science in the Public Interest has also written directly to the FDA to call out beef industry groups for continuing to make the claim that consumers are confused without substantiation or rigorous evidence supporting that theory.⁶⁸

Even more pointedly, a study of over seven thousand randomly selected public comments solicited by the FDA about the use of dairy terms found that over three-quarters of commenters favored allowing plant-based products to use dairy terms, with only 13.5 percent opposed.⁶⁹ The analysis also tracked the opinions of commenters who specified their identity (of which there were thousands), finding that 99.8 percent of commenters who identified themselves as opposed to the use of dairy terms were themselves dairy farmers.⁷⁰ This lies in stark contrast to those who identified themselves and supported the use of dairy terms, of which 97.4 percent identified themselves as consumers.⁷¹ Thus, the animal-

⁶⁵ See discussion *supra* Section II.A.

⁶⁶ Christopher Bryant, et al., *A Survey of Consumer Perceptions of Plant-Based and Clean Meat in the USA, India, and China*, FRONTIERS SUSTAINABLE FOOD SYS (2019) (a survey in 2018 of just under 1,000 randomly selected Americans found that about two out of every three were familiar with plant-based meat).

⁶⁷ 2021 U.S. Retail Sales Data for the Plant-Based Foods Industry, PLANT BASED FOODS ASS'N, <https://www.plantbasedfoods.org/retail-sales-data/> (last visited Sept. 14, 2022).

⁶⁸ See Sorscher, *supra* note 58.

⁶⁹ *Consumers Support Use of Dairy Terms for Plant-Based Foods*, LINKAGE RSCH. & CONSULTING, <https://linkageresearch.com/fda-plant-based> (last viewed Sept. 13, 2022).

⁷⁰ *Id.*

⁷¹ *Id.*

based food industry's argument about protecting consumers appears to be a flimsy façade for an anti-competitive and protectionist strategy, fueled mostly by the desire for self-preservation.

While the plant-based food market is still in its early stages, courts have already found consumers unlikely to be confused, though often based on the presiding judge's subjective personal opinion as consumers themselves. For example, in *Painter v. Blue Diamond Growers*, the Ninth Circuit affirmed dismissal of a consumer action claim against an almond milk provider. The court reasoned that the consumer class did “not plausibly allege that a reasonable consumer would be deceived into believing that Blue Diamond's almond milk products are nutritionally equivalent to dairy milk based on their package labels and advertising.”⁷² Thus, the consumer interest is not clearly served by restricting plant-based products from being labeled with meat and dairy terms and may in fact be harmed and lead to greater confusion.

ii. Health Effects of Reduced Meat and Dairy Consumption

Generally, to qualify for damages in federal court, one would have to allege that they suffered an injury.⁷³ The meat and dairy industries argue that the injury to consumers is a nutritionally inferior product.⁷⁴ But this conclusion is too sweeping, and not consistent with the evolving guidance from leading nutrition authorities. However, meat and dairy provide different nutritional benefits (or detriments) and their health effects are better discussed separately, as explained below.

⁷² *Painter v. Blue Diamond Growers*, 757 F. Appx 517, 518 (9th Cir. 2018); see also *Miyoko's Kitchen v. Ross*, No. 20-CV-00893-RS, 2020 WL 8361994, at *5 (N.D. Cal. Aug. 21, 2020) (“[A]s discussed above, the State's view of ‘butter’ stands largely by itself—unanchored by precedent, empirical research, or any other form of independently authoritative ballast—it does not disturb the weight of evidence tending to show that Miyoko's use of that word is likely not misleading. In this early phase of the litigation, it therefore appears Miyoko's decision to label its product as “butter” is entitled to First Amendment protection.”).

⁷³ *Miyoko*, WL 8361994 at 20.

⁷⁴ NAT'L MILK PRODUCERS FEDERATION, https://www.nmpf.org/policy_priorities/dairy-labeling-food-standards; Megan Silverman, *The FDA Should Regulate to End the Plant-Based Meat Labeling Controversy*, LEWIS & CLARK L. SCH., (Aug. 19, 2020), <https://law.lclark.edu/live/blogs/136-the-fda-should-regulate-to-end-the-plant-based>.

1. *Meat – We Overeat*

There is strong evidence that a plant-based diet is more healthful than one that is high in animal products – although there is admittedly less evidence on the effect of merely substituting meat with plant-based alternatives.⁷⁵ However, the leading authority and research body on American nutritional health is the U.S. Department of Health and Human Services, which publishes detailed guideline reports every five years. In their report for 2020 to 2025, they found that about 75 percent of Americans meet or exceed the recommendation for meat, poultry and eggs, whereas 50 percent do not get the recommended amount of nut, seed, and soy products.⁷⁶ The report states that “[s]hifts are needed within the protein foods group to add variety to subgroup intakes.”⁷⁷

These statements – made from a research arm within the USDA – demonstrate that Americans are overeating animal-sourced proteins and might actually benefit from plant-based protein in their diet, on average. The need for a more diverse source of proteins has also been advocated by global health expert panels from the United Nation, and is supported by the World Health Organization, which promotes eating animal-based foods in moderation.⁷⁸ This conclusion significantly undercuts the meat industry’s argument that consumers are being given an inferior product when they buy plant-based alternatives to animal protein.

2. *Milk – A Messier Story*

Unlike meat, milk presents a more complicated story, as not all substitutes are nutritionally equivalent. Further, the Dietary Guidelines Report indicates that Americans consume less than the recommended amount of dairy.⁷⁹ However, the report acknowledges that to address these deficiencies most consumers would benefit from consuming either fortified plant-based milks, like soymilk, or low-fat dairy milk.⁸⁰ This means that non-fortified plant-based milks like almond, rice, coconut, and hemp milks are not encouraged, in

⁷⁵ Rachel Tso et al, *A Critical Appraisal of the Evidence Supporting Consumer Motivations for Alternative Proteins*, FOODS – MULTIDISCIPLINARY DIGIT. PUBL’G INST., (Dec. 23, 2020) <https://doi.org/10.3390/foods10010024>.

⁷⁶ U.S. DEP’T. OF HEALTH AND HUM. SERVICES, DIETARY GUIDELINES FOR AMERICANS, 2020-2025, 9TH EDITION, 34 (December 2020).

⁷⁷ *Id.*

⁷⁸ See HLPE, NUTRITION AND FOOD SYSTEMS, 33 (2017).

⁷⁹ U.S. DEP’T. OF HEALTH AND HUM. SERVICES, *surpa* note 76 at 100.

⁸⁰ *Id.* at 33.

addition to cow milks with higher fat contents, like whole milk, that are also not encouraged.⁸¹ Thus, the assumption that plant-based milks are nutritionally inferior is also not completely supported, with the guidelines supporting consumption of nutrient dense, low fat varieties of both plant and animal-based milks.

One solution to this problem, proposed by the Center for Science in the Public Interest, is to require front of label disclosures for any dairy substitute product which does not contain a substantially similar nutrient profile as dairy foods (e.g., oat milk). Their proposal to the FDA suggests allowing the use of dairy terms, because the evidence does not indicate consumers are unaware of what they are buying, but that they should be informed when a substitute is not nutritionally equivalent.⁸²

iii. Sustainability as a Consideration in Food Policymaking

Finally, as alternative proteins begin to emerge, more people are extolling the benefits to the environment of reducing human consumption of animals. Given the precarious position we have placed ourselves in by radically altering the climate, many now consider major changes in our food system as an essential component in reversing our destructive course.⁸³ We now know that meat consumption alone is a key driver for emissions.⁸⁴

Studies indicate that simply replacing animal-based food with plant-based foods would have significant positive environmental impact.⁸⁵ In fact, though there are limited studies on

⁸¹ *Id.*

⁸² *Use of the Names of Dairy Foods in the Labeling of Plant-Based Products*, CTR. FOR SCI. IN THE PUB. INT., (Jan. 28, 2019), <https://cspinet.org/sites/default/files/attachment/CSPI%20Dairy%20Alternatives%20Comment.pdf>.

⁸³ See Nicole E. Negowetti, *Taking (Animal-Based) Meat and Ethics off the Table: Food Labeling and the Role of Consumers as Agents of Food System Change*, 99 Or. L. Rev. 91, 92 (2020).

⁸⁴ Fabiano DeAndrade Correa et al. *Agriculture and climate change: Law and governance in support of climate smart agriculture and international climate change goals*, FAO (2020) (legislative study from the Food and Agriculture Organization of the UN on the law and governance in support of climate smart agriculture and international climate change goals).

⁸⁵ Lukasz Aleksandrowicz et al., *The Impacts of Dietary Change on Greenhouse Gas Emissions, Land Use, Water Use, and Health: A Systematic Review*, 11 PLOS ONE, Nov. 2016, at 7-8 (systemic review of 60 studies on environmental impact of sustainable diets, concluding that there are significant environmental, and potential health benefits to shifting Western dietary patterns towards more sustainable sources, with less animals-based food); HLPE *supra* note 78.

the effect of sustainable diets on health, many report lower mortality rates and better cardiovascular health.⁸⁶ This linkage to sustainability in dietary recommendations is already being considered in major countries around the world, with Germany, Brazil, Sweden, and Qatar stressing diets lower in red meat and higher in fruits and vegetables in order to promote a sustainability as well as health.⁸⁷

C. Proposal – Clear Guidelines That Allow Accurate and Descriptive Language

Having now established the clear authority and need for the FDA to regulate plant-based foods, the lack of consumer confusion about plant-alternatives, and the benefits of sustainable diets, I propose the FDA promulgate simple and clear-cut rules governing plant-based foods. As such, the FDA should update the outdated standards of identity for products like milk and set standards on the terminology that may be used for meat substitutes.⁸⁸

The FDA could, for example, allow continued use of terms descriptive of shape, style, preparation, consistency, or flavor, with required modifiers indicating the source or main ingredient (e.g., soy/almond/coconut milk, black bean burger, veggie sausage, soy nugget, vegan bacon, or other similar combinations). At the same time, they could disallow the use of the actual individual animal names if the food is not literally composed of that animal (e.g., chicken, cow, pig, beef, poultry, pork, turkey, duck etc.). This would strike the balance of allowing plant-based products to describe their food using food terms without misrepresenting the origin of that food and the associated health benefits (or detriments). This kind of flexibility in the names of food products is fairly standard and intuitive. As new foods have developed, we have allowed such products, like carrot chips (rather than potato) and corn nuts (a corn product only prepared in a similar way to a toasted nut) to proliferate,

⁸⁶ HLPE, *supra* note 78 at 61. *But see* Aleksandrowicz, *supra* note 85 (finding no statistically significant benefit to health associated with sustainable diet).

⁸⁷ Carlos Gonzalez Fisher & Tara Garnett, *Plates, Pyramids, Planet: Developments in national health and sustainable dietary guidelines: a state of play assessment*, FOOD & AGRIC. ORG. (2016) (FAO report on updating food-based dietary guidelines to promote health and environmental sustainability).

⁸⁸ 21 C.F.R. § 131.110 (2022) (existing regulation defining milk as “Milk is the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows.” with no reference to milk from other animals or its common usage to describe soy and nut products).

to the benefit of consumers and new entrants to the consumer food markets.⁸⁹

Conclusion

The regulation of food grew out of a desire to protect consumers from unseemly production conditions and adulterated products. The driving force for a national infrastructure was fueled by industries seeking standards that could be applied consistently across the country and preventing cheap knock-offs from entering lucrative markets. However, society has evolved in the intervening hundred years, with more efficient and sanitary conditions, and a rise in innovative new products meant to offer consumers new options – not trick them into buying a cheap substitute.

In response, the FDA needs to take the reins at this pivotal moment and offer clarity, with updated standards that reflect this new market of alternatives to traditional meat and dairy products. Those standards should be based on the available science pertaining to the health of the products, a rigorous survey of consumer perceptions, and consideration of the role that all consumers can have on combatting climate change through a sustainable diet.

⁸⁹ See Alison Spiegel, *What Exactly Are Corn Nuts, Anyway?*, HUFFPOST (Mar 6, 2015), https://www.huffpost.com/entry/what-are-corn-nuts_n_6810636.