BURGERS, CHOPS, & VEGETABLE CROPS: CONSTITUTIONAL RIGHTS AND THE "WAR" ON PLANT-BASED "MEAT"

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ABSTRACT

The Arkansas State Legislature has passed a new law called Act 501 (hereinafter referred to as "the Act"), "The Arkansas Truth in Labeling Law."[2] *The Act prohibits labeling any food products as "meat" or similarly descriptive words if the product is not derived from livestock or poultry.*[3] *Some "similarly descriptive" words include, without limitation, "burger," "sausage," and "deli slice."*[4] *The Act also applies to dairy products such as milk, butter, and cheese.*[5] *Additionally, the Act applies to vegetable products that serve as alternatives to grains and dairy, such as cauliflower rice and nut "milks."*[6] *Every violation of the Act is met with a $1,000 civil fine for each plant-based product packaged and labeled as meat.*[7] *Many other states such as Mississippi, Louisiana, and South Dakota have passed substantially similar laws that affect the way food products are marketed and sold within their states.*[8] *Act 501 was passed after heavy lobbying of the Arkansas State Legislature by the animal agriculture industry.*[9] *After a subsequent action by the American Civil Liberties Union, the Good Food Institute, the Animal Legal Defense Fund, and the Tofurky Company, the District Court granted a preliminary injunction temporarily halting the enforcement of the law.*[10] *The plaintiffs ultimately seek a permanent injunction banning Act 501.*[11] *The purpose of this note is to explore the constitutionality of Act 501 as it pertains to the challenges on the First and Fourteenth Amendment's freedom of speech (specifically commercial speech), freedom from vague statutes, and violations of the Dormant Commerce Clause.*

INTRODUCTION

Plant-based "meats" are products that mimic the texture, flavor, and appearance of meat that comes from live animals.[12] Tofurky uses terms like "chorizo," "hot dogs," and "ham" to describe its products.[13] All of their products unambiguously indicate that they are

[2] Complaint for Declaratory and Injunctive Relief at 1, Turtle Island Foods v. Soman, 424 F. Supp. 3d 552 (E.D. Ark. 2019) (No. 4:19-cv-514-KGB).
[3] *Id*.
[4] *See* Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction at 1, Turtle Island Foods v. Soman, 424 F. Supp. 3d 552 (E.D. Ark. 2019) (No. 4:19-cv-514-KGB).
[5] *See* Ben Kesslen, Tofurky and ACLU Cook Suit Up Against Arkansas Law Banning 'Veggie Burger' Labels, NBC News (July 22, 2019, 2:27 PM), https://www.nbcnews.com/news/us-news/tofurky-aclu-cook-suit-against-arkansas-law-banning-veggie-burgers-n1032456.
[6] *Id.*
[7] *Id.*
[8] Jennifer Shike, *Federal Judge Halts Arkansas from Enforcing Meat-Labeling Law,* DROVERS: DRIVING THE BEEF MARKET (December 12, 2019 10:34 AM), https://www.drovers.com/article/federal-judge-halts-arkansas-enforcing-meat-labeling-law.
[9] Memorandum, *supra* note 4, at 2.
[10] Turtle Island Foods v. Soman, 424 F. Supp. 3d 552, 579 (E.D. Ark. 2019).
[11] Complaint, *supra* note 2, at 2.
[12] *Id*. at 3.
[13] *Id.* at 9.

plant-based, meatless, vegetarian, or vegan.[14] This note will analyze the constitutionality of Act 501, and substantially similar laws that may threaten the constitutionally protected rights of Freedom of Speech and Due Process guaranteed under the First and Fourteenth Amendments. It will also analyze the possible implication of the Dormant Commerce Clause.

The American Civil Liberties Union, The Good Food Institute, the Animal Legal Defense Fund, and the Tofurky Company filed a complaint against the Director of the Arkansas Bureau of Standards, Nikhil Soman, in the U.S. District Court for the Eastern District of Arkansas.[15] Turtle Island Foods, SPC (doing business as The Tofurky Company) is one of the many companies throughout the United States that sell plant-based meat products - including in the state of Arkansas.[16] The plaintiffs in the suit claim that Act 501, and laws similar to it, confuse, rather than inform consumers.[17] The plaintiffs allege that many consumers purchase plant-based meat products precisely because they do not wish to consume meat from slaughtered animals.[18] The plaintiffs also claim that anti-plant-based meat laws are, ironically, more likely to confuse consumers by not allowing producers to use terms that are self-evident to describe their products.[19] For example, "vegan sausage" or "veggie burger" would denote that the food product is derived from plants mimicking the appearance of meat. Plant-based "meat" products are usually made from soy, wheat, jackfruit, textured vegetable protein, or other vegan ingredients.[20] Companies like Tofurky already comply with various food labeling regulations as well as state and federal consumer protections laws.[21] Laws such as Act 501 could require companies to completely overhaul their current practices in an attempt to comply, at the potential cost of diminishing the capacity to accurately describe their products to consumers.[22]

This note takes the position that Act 501 may be found to be unconstitutional under the First and Fourteenth Amendments. Thus, the District Court would likely rule that the law is unconstitutional. The Arkansas state legislature, and other jurisdictions like it, should then repeal any unconstitutional laws that unfairly limit good faith practices of companies to adequately inform their consumers of the type and nature of their products.

This article is comprised of four parts. Part I will focus on the new perceived "threat" and emergence of plant-based products and its place in the agriculture and consumer market. Part II will discuss the plaintiff's First Amendment claim and the prayer for relief

[14] *Id.*
[15] *Id.* at 2.
[16] *Id.*
[17] Memorandum, *supra* note 4, at 1.
[18] *Id.*
[19] *Id.* at 1.
[20] *Id.* at 3.
[21] *Id.*
[22] *Id.* at 16.

that allegedly protects freedom of speech and expression, which extends to the good faith labeling of food products. Part III will cover the Fourteenth Amendment Due Process violation the plaintiffs assert in their complaint and memorandum in support of plaintiff's motion for preliminary injunction.[23] The Due Process Clause of the Fourteenth Amendment prohibits against vague statutes.[24] This note will also discuss what constitutes a vaguely written statute, including an assessment of whether or not the plaintiff could prevail on their motion for a preliminary injunction on that claim and additionally, whether or not a court would find the statute unconstitutional. Part IV will cover the public policy implications of upholding Act 501, and substantially similar laws in the United States, and reasons for possibly allowing environmentally friendly companies like Tofurky to promote, advertise and sell their products to the general public.

ANALYSIS

I. The New Emergence & Threat of Plant-Based "Meat"

A. History of Plant-based Foods

Fake meat derived from plants dates back to ancient China in 535 B.C.E., where Chinese cooks discovered that wheat flour can be soaked in water and rinsed until all the starches are washed away, leaving a mixture of gluten proteins behind.[25] In the United States in 1896, John Harvey Kellogg, a member of the mostly vegetarian Seventh-Day Adventists, invented "Nuttose," a plant-based "meatless meat."[26] From then on, plant-based meats have come leaps and strides to become some of the most notable products in the category that we see today. From, the "Gardenburger" in 1985, and "Tofurky" in 1995, to the "Impossible Burger" in 2016, "meatless meat" is all the craze.[27]

Since April 2017, the sale of plant-based food products has increased 31%.[28] This brings the current market value for the industry to $4.5 Billion.[29] Plant-based unit sales are also up 8.5%, compared to U.S. food sales as a whole, which have flattened out within that same time period.[30] The plant-based meat category alone is worth $800 million, with sales increasing 10% in the past year alone.[31] Competitors within the animal meat

[23] *Id.* at 1.
[24] *Id.* at 13.
[25] Pacific Standard Staff, *A Brief History of Fake Meat*, PACIFIC STANDARD (Jun. 14, 2017), https://psmag.com/news/a-brief-history-of-fake-meat.
[26] *Id.*
[27] *Id.*
[28] *U.S. Plant-Based Retail Market Worth $4.5 Billion, Growing at 5X Total Food Sales*, PLANT BASED FOODS ASS'N (Jul. 12, 2019), https://plantbasedfoods.org/2019-data-plant-based-market/.
[29] *Id.*
[30] *Id.*
[31] *Id.*

industry have taken notice of the stellar growth from that of the plant-based.[32] Over the years, products containing meat and animal products have been virtually the only option in the category available to consumers.[33] For some time, plant-based products were not mainstream and could only be purchased in the specialty food section of grocery stores.[34]

There has been evidence to support speculation that the animal agriculture industry is fighting to suppress the growth of alternative products.[35] One of the primary reasons alleged as to why both the dairy and meat industry have been fighting the rollout of competitive plant foods has to do with money.[36] The dairy and meat industries have declined in growth over time while the plant-based food industry is seeing increases in revenue.[37] New emerging companies in the plant-based meat industry such as "Impossible Foods" and "Beyond Meat" have taken the industry by storm and have been growing rapidly.[38] One of the alleged "drivers" behind laws such as Act 501 and substantially similar laws is the heavy lobbying by the meat industry to censor and slow the growing plant-based food industry.[39] Within these states, there has been a strong lobby from special interest groups to propose and pass legislation that would limit the ability of these competitor plant-based companies from effectively marketing their products to the consumers.[40]

B. Market Share with Animal Meat Products

According to a 2016 study conducted by John Dunham and Associates, the United States meat and poultry industry accounted for over $1 trillion in economic output or 5.6% of the total U.S. Gross Domestic Product (GDP).[41] The retail market for plant-based

[32] *See* Complaint, *supra* note 2, at 7.

[33] Katrina Fox, *Should Vegan Products be Sold Along Meat and Dairy Items in Retail Stores?*, FORBES (May 7, 2018, 8:43 AM), https://www.forbes.com/sites/katrinafox/2018/05/07/should-vegan-products-be-sold-alongside-meat-and-dairy-items-in-retail-stores/#6a97a.

[34] *Id.*

[35] *See generally* Jacob Bunge and Heather Haddon, *America's Cattle Ranchers Are Fighting Back Against Fake Meat*, WALL ST. J. (Nov. 27, 5:30 AM), https://www.wsj.com/articles/americas-cattle-ranchers-are-fighting-back-against-fake-meat-11574850603.

[36] *See id.*

[37] *Id.*

[38] Amanda Capritto, *Impossible Burger vs. Beyond Meat Burger: Taste, Ingredients and Availability, Compared,* CNET (Oct. 25, 2019 11:09 PM), https://www.cnet.com/news/beyond-meat-vs-impossible-burger-whats-the-difference/.

[39] *See generally* Arwa Mahdawi, *Why is Arkansas Waging War on Veggie Burgers?*, THE GUARDIAN (July 25, 2019, 2:00 AM), https://www.theguardian.com/commentisfree/2019/jul/25/veggie-burgers-law-arkansas-big-meat-why-waging-war; Nathan Owens, *Truth in Labeling Inked by Governor*, ARKANSAS DEMOCRAT GAZETTE (Mar. 20, 2019, 1:59 AM), https://www.arkansasonline.com/news/2019/mar/20/truth-in-labeling-inked-by-governor-201/; Memorandum, *supra* note 4, at 2.

[40] *See* Memorandum, *supra* note 4, at 2.

[41] *New Economic Impact Study Shows U.S. Meat and Poultry Industry Represents $1.02 Trillion in Total Economic Output,* N. AM. MEAT INST. (June 14, 2016), https://www.meatinstitute.org/index.php?ht=display/ReleaseDetails/i/122621/pid/287.

foods is worth almost $5 billion.[42] Furthermore, sales of plant-based products increased 11% from 2018 to 2019 and 31% from 2017 to 2019.[43] To put that growth into perspective, U.S. retail food sales as a whole grew only by 2% and 4% within the same respective time periods.[44] More specifically, plant-based milk alternative products (cashew, almond, etc.) are the most market-developed out of all the plant-based food categories.[45] Those products are followed by other plant-based dairy and meat products.[46] Across "key categories" of comparable products (yogurt, eggs, ice cream, cheese, meat, milk, and butter), sales of these plant-based products are increasing substantially while sales of more "traditional" animal products are falling or only growing at modest rates.[47] The plant-based products compared in this study were of the type that could replace animal products directly.[48]

Dairy milk sales have been on a steady decline for the past decade.[49] According to the Dairy Farmers of America, total sales of milk fell $1.1 billion in 2018.[50] The organization points to an increase in demand from consumers for milk alternatives such as oat, nut, soy, and rice milks.[51] In fact, in 2018, demand for oat milk specifically was so strong that it led to a shortage of product.[52] During this time, sales of oat milk on Internet marketplaces went for as high as $200 or more per case.[53] These changes in market trends have caused trade groups for the dairy industry to get the Food and Drug Administration to restrict "non-dairy options from using the term 'milk' on its labels."[54]

Furthermore, as an increasingly growing market within the protein industry, namely meat and other animal products, this trend within America's food industry posed a clear and ever-present threat to the animal agriculture industry as a whole.[55] If consumers could begin obtaining their protein needs from other non-traditional sources then the demand for the animal agriculture industry's products would begin to decline.[56]

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[42] *Plant-Based Market Overview,* THE GOOD FOOD INST., https://www.gfi.org/marketresearch.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *See id.*
[49] Brenna Houck, *America's Obsession with Oat Milk Is Hurting the Dairy Industry,* EATER (Mar. 26, 2019, 5:46 PM), https://www.eater.com/2019/3/26/18282831/milk-sales-fall-2018-plant-based-alternatives.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *See* Maeve Henchion et al., *Future Protein Supply and Demand: Strategies and Factors Influencing a Sustainable Equilibrium*, FOODS, 158-59 (2017).
[56] *Id.*

II. First Amendment Violation

A. Freedom to Label

The First Amendment guarantees and secures United States citizens the right to freedom of speech under the law.[57] The Supreme Court has previously stated "The freedom of speech and of the press secured by the First Amendment against abridgement by the United States is similarly secured to all persons by the Fourteenth Amendment against abridgement by the state."[58] The freedom of expression is implicit in that right.[59] The First Amendment protects the ability of a private entity of United States citizens to express their work product in a way that they feel accurately represents their product or service.[60] However, the Arkansas state legislature has enacted a law that restricts that ability.[61] This new law may effectively prohibits the exercise of commercial free speech.[62] Using the direct language of the Constitution alone, the Act could be found to be unconstitutional based on what it seeks to prohibit; the freedom of private U.S. entities to be able to properly label their products.[63]

B. Restriction of Commercial Speech

The First Amendment protects citizens' right to engage in truthful and non-misleading commercial speech while conducting a lawful activity.[64] The plaintiffs allege that Act 501 is unconstitutionally prohibits free speech.[65] Furthermore, they allege that Act 501 may prevent entities operating within the state of Arkansas from making statements about products to consumers that the entity believes accurately conveys the product's contents and purpose.[66] The law may also prevent businesses from truthfully packaging and marketing plant-based meat products in a manner that describes them as alternatives or replacements for conventional, animal-based proteins.[67]

Commercial speech in this context is "expression related solely to the economic interests of [the] speaker and its audience".[68] The ability of people, businesses, and entities to engage in the practice of free commercial speech is protected by the First Amendment.[69] In *Rubin v. Coors Brewing Company*, the respondent, a beer brewing company, applied to the Bureau of Alcohol, Tobacco, and Firearms for the "approval of

[57] *See* Schneider v. State, 308 U.S. 147, 160 (1939).
[58] *Id.*
[59] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (explaining how citizens have freedom of expression).
[60] *Id.*
[61] *See id.* (explaining how citizens have freedom of expression).
[62] *See id.* (explaining the implicit rights within the First Amendment); Complaint, *supra* note 2, at 13-14.
[63] *See Sullivan*, 376 U.S. at 269; Complaint, *supra* note 2, at 13-14.
[64] *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 482 (1995).
[65] Complaint, *supra* note 2, at 13-14.
[66] *Id.*
[67] *Id.*
[68] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561 (1980).
[69] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

proposed labels and advertisements that disclosed the alcohol content of its beer."[70] The Bureau rejected the application because the Federal Alcohol Administration Act (FAAA) barred the disclosing of alcohol content levels on the labels of beer or in advertising.[71] The regulation was enacted to control and prevent "strength wars" among brewers or, to describe it another way, contests between producers to create the beer with the highest alcohol content by volume in order to attract consumers.[72] Coors Brewing Company (Respondent) then brought suit against the federal government asserting that the relevant provisions of the FAAA violated the First Amendment and were facially unconstitutional.[73]

The court applied a test previously established in *Central Hudson Gas & Electric Corp. v. Public Service Commission.*[74] The Supreme Court outlined this test to determine whether government regulatory burden on commercial speech was unconstitutional.[75] The test has four prongs which must all be satisfied for the government regulation to be permissible.[76] The prongs are: "(1) whether the speech is protected by the First Amendment; (2) whether the asserted government interest that the regulation seeks to protect is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is more extensive than necessary to serve that interest."[77]

First, to determine when the First Amendment protects speech, the nature of the speech needs to be determined and the speech must concern lawful activity and not be misleading.[78] In *Rubin,* both parties stipulated that the beer labels were commercial speech protected by the First Amendment.[79] The precedent that covered labeling as commercial speech was created in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*.[80] There, the court noted "the free flow of commercial information is indispensable to the proper allocation of resources in a free enterprise system."[81] The court found that a consumer's interest in commercial information, the alcohol content of beers available on the open market, was essentially more important than the "urgent

[70] *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 478 (1995).
[71] *Id.*
[72] *Id.* at 478-80 (explaining that consumers wanted to purchase beers with higher alcohol content potentially fueling a race between brewers to produce and market beers with the highest possible alcohol content).
[73] *Id.* at 478-479.
[74] *Id.* at 482.
[75] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).
[76] *Id.*
[77] *Id.*
[78] Rubin v. Coors Brewing Co., 514 U.S. 476, 482 (1995).
[79] *Id.* at 481.
[80] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).
[81] *Rubin*, 514 U.S. at 481 (internal quotations omitted).

political debate" of the time, the policy debate over regulating the beer industry to prevent "strength wars."[82]

Secondly, in *Rubin*, the court found that the governmental interest, the prevention of "strength wars" to mitigate alcoholism and alcohol-related social issues, was a substantial interest that the FAAA's regulation sought to protect.[83] However, with respect to the third prong, the court found that the government failed to demonstrate how the regulation directly advanced that interest.[84] The government had argued that the regulation advanced Congress' goal of curbing "strength wars" by preventing beer brewers from competing for customers by marketing and labeling their beer as having the highest alcohol content.[85] In addition, the government argued that the law helped facilitate state efforts to regulate alcohol under the Twenty-First Amendment.[86] The government cited *United States v. Edge Broadcasting* Company, a case in which the Supreme Court upheld a federal law that banned the radio advertising of the lottery in states that do not have a state lottery.[87] The government asserts that the case is analogous to *Rubin* because it involves the Court upholding a federal law that only prohibits the advertising of alcohol content in states that do not already "affirmatively require" it.[88] It is the government's belief that the FAAA saves state legislatures wishing to prohibit the disclosure of alcohol content the trouble of drafting and enacting their own state laws.[89]

The *Rubin* Court did not find these arguments to be persuasive.[90] To begin with, the government presented nothing that suggested that the states are in need of federal assistance as it pertains to enforcing alcohol content disclosure laws.[91] The states are within their power to legislate these laws themselves, and the policies of some states do not prevent others from pursuing their own sets of alcohol advertisement related laws.[92] Furthermore, the burden is on the government to show that its regulation "directly and materially advance[s] its asserted interest."[93] FAAA's regulation prohibits the disclosure of alcohol content with respect to the labeling on only beer.[94] Companies are free to advertise their product's strength in other forms of advertising.[95] It would be contrary to

[82] *Id*. at 486 (explaining how consumer access to commercial information was more important than policy debates).
[83] *Id.* at 485.
[84] *Id.* at 486.
[85] *Id*. at 485.
[86] *Id*.
[87] *Id.*
[88] *Id.*
[89] *Id.* at 485-86.
[90] *See id*. at 486 (explaining how the court does not find the government's interest is not sufficiently substantial to meet the requirements of *Central Hudson*).
[91] *Id*.
[92] *Id*. (explaining how the states can make their own laws to combat "strength wars").
[93] *Id*. at 488.
[94] *Id.* at 488-89.
[95] *Id.*

the interest of the government to not regulate the advertising of alcohol content but instead the listing of that content on the label of beer, when the government interest is to prevent "strength wars" to start as a result of consumers looking for a "stronger" beer.[96] The use of advertising would probably have a greater ability to reach, influence, and entice a consumer than simply listing the alcohol by volume directly on a label.[97] Furthermore, the government allows breweries to signal products containing high volumes of alcohol to use of the phrase "malt liquor."[98] The court also found these facts to contradict the intent of the government because the use of a phrase to signify high-alcohol content was permitted, yet the actual disclosure of the number was prohibited.[99] If the government's aim was to prevent strength wars then it would be rational to prohibit the use of phrases the indicate alcohol strength.[100]

A court may find that the ability to label plant-based food products is protected by the First Amendment.[101] As was discussed in precedent outlined in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, commercial speech, such as the labeling of food products in marketing, falls under the protections of the First Amendment.[102] Consumers of plant-based food products have an interest in knowing what their food is made out of and where it comes from.[103] This is true especially considering that a fair amount of consumers of these products have a personal interest in consuming less animal proteins.[104] A court could find that the Arkansas state government does have a substantial interest in protecting its residents from potential confusion or deception created in the products they consume.[105] The state government clearly has a responsibility to its residents to ensure that they are properly and adequately protected from harm.[106] A court would most likely find that the second prong has been satisfied.[107]

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[96] *See id.*
[97] *See id.*
[98] *Id.* at 489.
[99] *Id.*
[100] *Id.*
[101] *See id.*
[102] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).
[103] *See* Emma Liem Beckett, *What's Driving Consumer Desire for Plant-Based Foods?*, FOOD DIVE (July 5, 2017), https://www.fooddive.com/news/whats-driving-consumer-desire-for-plant-based-foods/446183/.
[104] *See* Kelsey Piper, *Can you Guess Which Americans Are Most Into Plant-Based Meat?*, VOX, (Jan. 29, 2020), https://www.vox.com/future-perfect/2020/1/29/21110967/gallup-poll-plant-based-meat-vegan-climate-animals.
[105] *See id.*; *Va. State Bd. of Pharmacy*, 425 U.S. at 770.
[106] *See Va. State Bd. of Pharmacy*, 425 U.S. at 770.
[107] *Id.*

However, a court may find that Act 501 does not directly or materially advance any substantial government interest.[108] Restricting commercial speech cannot survive *Central Hudson* scrutiny if there are alternatives to the regulation that can still advance the government's interest.[109] The word "meat" and similarly descriptive words are common in the English language and have colloquial use. Sources from the King James Bible to guidance documents from the FDA use "meat" as a word to describe the "flesh of fruits or nuts."[110] In addition, since the 1930s "burger" has been used to describe sandwiches "including nut burgers, fish burgers, turkey burgers, and veggie burgers."[111] Terms like "burger" and "meat" have double meanings in the English language.[112] Furthermore, companies like Tofurky use additional descriptive words to add to those common words and supplement a consumer's understanding.[113] For example, Tofurky uses the phrase "plant-based" on the front of its packaging for its products in addition to the product's actual name.[114] Prohibiting the use of these words and words similar to them would most likely indirectly and materially advance the government's interest. These words have been used in alternative forms for decades and, where there are consumers who may confuse the terms, Tofurky's products are clearly labeled "plant-based" to clarify.[115] Thus, a court may find that the defendants would fail to meet their burden to satisfy the regulation of commercial speech outlined in *Central Hudson.*[116]

C. Consumer Confusion

Ironically, Act 501 may actually create the confusion that it was intended to dispel.[117] Act 501 would prevent consumers who are used to seeing and purchasing food alternatives from accessing the products that are familiarly and accurately named to describe the lack of meat within them.[118]

According to Jessica Almy, the Director of Policy at the Good Food Institute, the standard identity of dairy milk only applies to the word "milk."[119] She argued that modifiers to the word "milk" have been used and permitted by regulatory agencies like the FDA for years.[120] She further argued that by permitting the dairy industry to modify

[108] *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 489 (1995) (explaining how the government failed to demonstrate the regulation would directly advance its interest because certain provisions undermined and contradicted the overall regulatory purpose).
[109] *See id*. at 491.
[110] Memorandum, *supra* note 4, at 14.
[111] *Id.*
[112] *See id*.
[113] Complaint, *supra* note 2, at 9-11.
[114] *Id.*
[115] *Id.*
[116] *See* Rubin v. Coors Brewing Co., 514 U.S. 476, 489 (1995).
[117] Complaint, *supra* note 2, at 1 (explaining how Act 501 confuses consumers in practice).
[118] *See id.*
[119] Umair Irfan, *"Fake Milk": Why the Dairy Industry is Boiling Over Plant-Based Milks,* VOX (Dec. 21, 2018, 3:25 PM), https://www.vox.com/2018/8/31/17760738/almond-milk-dairy-soy-oat-labeling-fda.
[120] *Id.*

the word "milk" in descriptions of their product but preventing plant-based producers from doing the same would "prejudice regulators against one industry as opposed to another, and it would violate the First Amendment."[121]

With respect to the labeling of dairy products, previous courts have dismissed lawsuits seeking to stop and prevent the use of plant-based milk products from using the term "milk" in their labeling.[122] In *Painter v. Blue Diamond Growers,* the Ninth Circuit court affirmed a district court's dismissal with prejudice for the plaintiff's claim that plant-based "milk" products were mislabeled.[123] In the complaint, the plaintiff claimed that Blue Diamond Growers, an agricultural company, mislabeled its beverages derived from almonds as "almond milk" when the plaintiff believed they should have been labeled "imitation milk."[124] The plaintiff's argument was that "almond milk" "substitute[s] for and resemble dairy milk but are nutritionally inferior to it."[125] The plaintiff also argued that a state law required that Blue Diamond comport with its labeling laws.[126]

The court held that the district court correctly determined that the Federal Food, Drug, and Cosmetic Act (FDCA) "prohibits a state from either directly or indirectly establishing food labeling requirements not identical to federal requirements," and that, therefore, the plaintiff's argument failed due to being preempted.[127] The FDCA also requires that foods imitating other foods be labeled with "imitation" and then the name of the food being imitated immediately after.[128] Therefore, the plaintiff also asserting that the word "milk" be removed from Blue Diamond's products or that Blue Diamond be required to include a comparison of their product with dairy milk is not consistent with federal law requirements under the FDCA.[129] The court also concluded that "Painter's complaint does 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."[130]

Here, Arkansas enacted its own definition of what constitutes a properly labeled food product.[131] The law prohibits the use of terms that are the same or similar to words historically used to describe meat.[132] However, would that mean that the terms "beetballs" (because they sound like meatballs) or "Tofurky" (a company's name that

[121] *Id.*
[122] *Id.*
[123] Painter v. Blue Diamond Growers, 757 Fed. Appx. 517, 518-19 (9th Cir. 2018).
[124] *Id.* at 518.
[125] *Id.*
[126] *Id.* at 519.
[127] *Id.* at 518 (internal quotations omitted).
[128] *Id.* at 519.
[129] *Id.*
[130] *Id.*
[131] *See* Complaint, *supra* note 2, at 14.
[132] *Id.*

sounds like the word "turkey") would be prohibited from being marketed or labeled within the state of Arkansas?[133] The law is not clear on that matter.

There is also data that may suggest that consumers may be confused by the labeling of plant-based meat products.[134] The dairy industry has been resistant to plant-based products as well.[135] The crux of the dairy industry's argument for restricting the use of labeling as it pertains to milk products is rooted in the potential confusion of nutritional values of plant-based "milk" as alternatives to cow's milk.[136] In a study by the Journal of Food Science and Technology, researchers found that "no plant-based milk product matches the nutrients provided by cow's milk."[137] Furthermore, according to a 2017 article in the Journal of Pediatric Gastroenterology and Nutrition, alternative "milk beverages vary in their nutritional contents" and "should not be considered nutritional substitutes for milk until their nutritional quality and bioavailability can be further assessed."[138] Those who make such arguments also analogize the situation to comparisons between margarine and butter.[139] Although margarine imitates butter, it is a non-dairy product that is made from vegetable oil.[140] The two products have different fat to protein ratios, and margarine cannot be used a replacement for butter in many recipes.[141] Because of this, margarine producers cannot call their product "butter."[142] Thus, here, a court may find that the plaintiffs lose on their argument that the use of meat, milk, and similarly descriptive words in their labeling would likely cause widespread consumer confusion.

III. 14th Amendment Due Process Violation

A. Freedom from Unconstitutionally Vague Statutes & Arbitrary and Discriminatory Enforcement

The Due Process Clause of the 14th Amendment protects citizens against unconstitutionally vague statutes.[143] The plaintiffs allege that Act 501 is unconstitutionally vague on its face as it does not clearly set out the prohibited conduct or speech that it intends to restrict. Laws regulating speech need a more stringent review

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[133] *See* Memorandum, *supra* note 4, 14.
[134] Laurie Bedord, *NCBA Surveys Reveals Widespread Confusion Among Consumers About Plant-Based Fake Meat,* SUCCESSFUL FARMING (Feb. 10, 2020), https://www.agriculture.com/news/livestock/ncba-survey-reveals-widespread-confusion-among-consumers-about-plant-based-fake-meat.
[135] *See* Irfan*, supra* note 119.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *See Due Process of Law*, CORNELL LEGAL INF. INST., https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/due-process-of-law (last visited Jan. 18, 2020).

than laws regulating conduct.[144] The "Constitution is designed to maximize individual freedoms within a framework of ordered liberty."[145] Simply put, this means that the Constitution was created to allow citizens to possess and be able to exercise as many individual rights as possible, within the ordered structure of a free, democratic, law-guided society.[146] The laws of the United States of America are to be legislated and passed with the principles of maintaining individual freedoms and autonomy, while at the same time keeping society just and functional.[147]

For laws to be constitutionally permissible, there must be a reasonable opportunity available to understand the law.[148] Act 501 may fail to provide persons of ordinary intelligence a reasonable opportunity to understand when or how their packaging or marketing materials violate the Act.[149] For example, under the provisions in the Act that layout prohibited definitions of products in food labeling, Act 501 does not make it clear whether or not Tofurky is prohibited from marketing and selling plant-based "deli slices" or "chick'n" (the labeled descriptions of two Tofurky's plant-based "meat" products).[150] Specifically, the law precludes the use of "a term that is the same as or similar to a term that has been used or defined historically in reference to a specific agricultural product."[151] This means that use of the term "chick'n" which is inconspicuously a play on the real word "chicken" would be banned because it is "similar to a specific agricultural product."[152] However, the plaintiffs argue that it is not clear that the phrase "deli slices" constitutes a term that has an historical reference to an agricultural product, as deli slices are arguably not a direct product of agriculture in the same manner as chicken is.[153] This vagueness may inadvertently lead to arbitrary and discriminatory enforcement.[154]

In assessing a challenge to a law being facially vague and overbroad, a court first determines whether the "enactment reaches a substantial amount of constitutionally protected conduct."[155] If it is determined that it does not, a court would assess the facial challenge on the law by determining whether or not the law is "impermissibly vague in all of its applications." If a court should only then uphold a challenge if it determines that the enactment is in fact impermissibly vague in all of its applications.[156] In *Village of*

[144] *See* Bradley E. Abruzzi, *Copyright & the Vagueness Doctrine,* 45 U. MICH. J.L. REFORM 351, 362 (2012).
[145] Kolender v. Lawson, 461 U.S. 352, 357 (1983).
[146] *See id.*
[147] *See* Abruzzi, *supra* note 144, 355-356.
[148] Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., 455 U.S. 489, 498 (1982).
[149] *See id.*
[150] Complaint, *supra* note 2, at 9.
[151] *Id*. at 14.
[152] *See id*.
[153] *See id.* at 14.
[154] *See Hoffman Ests.*, 455 U.S. at 498.
[155] *Id*. at 494.
[156] *Id.* at 494-495.

Hoffmann Estates v. Flipside, Hoffman Estates, Inc., a retail storeowner brought action against the Village Hoffman Estates seeking an injunction and declaratory judgment against enforcement of a village ordinance.[157] This ordinance required that businesses obtain a license if they sell "items that are designed and marketed for use with illegal cannabis or drugs."[158] Every violation of this ordinance carried with it a fine between $10 and $500.[159] Every day that a business remained in violation of the ordinance was treated as a separate offense and fined accordingly.[160] The respondent storeowner sold in his store ("Flipside") merchandise including "phonographic records, smoking accessories, and novelty devices."[161] The respondent sued the Village asserting that the ordinance was unconstitutionally vague and overbroad.[162] The Village ordinance was upheld at the District Court level and reversed at the Circuit.[163] The Supreme Court subsequently overturned the Circuit Court ruling in favor of the respondent and holding that the ordinance was not overbroad nor unconstitutionally vague on its face as it was applied to the respondent.[164] More specifically, the court determined that the village's ordinance was not unduly vague because the contested language in the ordinance "designed or marketed for use" was "sufficiently clear as it applied to Flipside."[165]

The Constitution prohibits vague laws because they pose the potential of "trapping" innocent citizens without giving a fair warning of what constitutes lawful or unlawful conduct.[166] In *Village of Hoffman Estates*, the court cited *Grayned v. City of Rockford* in laying out the standards for evaluating vagueness in statutes, stating

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissible delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.[167]

Courts understand that citizens can presumably operate between "lawful and unlawful" conduct and thus it is important that the laws give a person of "ordinary intelligence a

[157] *Id.* at 493.
[158] *Id.* at 492.
[159] *Id.*
[160] *Id.*
[161] *Id.* at 491.
[162] *Id.*
[163] *Id*.
[164] *See id.* at 500.
[165] *Id*.
[166] *Id.* at 498.
[167] *Id*.

reasonable opportunity to know what is prohibited and act accordingly."[168] The court further noted that these standards were not to be mechanically applied and that extent of vagueness is to be determined by the manner of the law's enactment.[169] Therefore, regulation of economic activity is "subject to a less strict vagueness test" (due to its application in what is often more narrow subject matters) and because businesses that are subject to the laws have the ability to consult the relevant legislature prior to taking action(s).[170] The court also acknowledged that, as a matter of public policy, it expresses more tolerance of civil laws over criminal because the consequences are less damaging.[171]

Finally, the court noted that the most important factor impacting vagueness is whether the law hinders the ability to practice constitutionally protected rights such as free speech *inter alia.*[172] The court found that the respondent's facial challenge failed because the law clearly stated that it requires the respondent to obtain a license if it sold the aforementioned items, which the respondent does not contest.[173]

The court found that "designed for use" and "marketed for use" were sufficiently clear for the respondent to understand.[174] It found that a "businessperson of ordinary intelligence" could ascertain that "designed for use" refers to the way a manufacturer intended for its product to be utilized by a consumer.[175] The court also reasoned that the language "marketed for use" is sufficiently clear as referring to the manner in which a retailer would display and market his product(s).[176] In this case, the respondent deliberately displayed his pipes, colored rolling papers, and other paraphernalia physically near magazines titled "High Times" and "Marijuana Grower's Guide" which is a manner unambiguously that "appeals to or encourages illegal drug use."[177]

Here, Act 501 is a civil law that warrants a less strict vagueness analysis under Supreme Court precedent.[178] Any ambiguities under the law with respect to phrases like "deli slices" and "chick'n" can be clearly interpreted and understood by a businessperson (or entity) of ordinary intelligence. The terms "slices" and "chick'n" are the same or similar in their historical use defining a term referring to a specific agricultural product. Therefore, it is likely that a court would find that Act 501 does not meet the

[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.* at 499.
[173] *Id.* at 500.
[174] *Id.* at 500-03.
[175] *Id.* at 501.
[176] *Id.* at 502-03.
[177] *Id.*
[178] *See id.* at 498 (explaining that civil laws are subject to a less stringent vagueness review than criminal).

unconstitutional vagueness standard outlined in *Village of Hoffman Estates* and find that the law is sufficiently clear.

Here, the vagueness of 501 has the potential of permitting discriminatory enforcement of the law against companies like Tofurky and the other named defendants.[179] The Arkansas' executive branch is given discretion to interpret what constitutes a product labeled as meat or a "similarly descriptive" word.[180] As previously mentioned, "plant-based deli slices" might be arguably be permitted but "plant-based chick'n" would not, even though both phrases would accurately communicate to the consumer that the product is not derived from animal meat and that it is (as the name suggests) plant-based.[181]

IV. Dormant Commerce Clause

A. Purpose

The Dormant Commerce Clause prohibits states from passing laws that discriminate against and burden interstate commerce.[182] Here, the Arkansas law (Act 501) affects the regulation of interstate commerce, or commercial activity that crosses state lines.[183] Arkansas would require manufacturers to create different labeling to meet the standards of Act 501.[184] The food products made by Tofurky and similarly situated companies are produced and sold across state lines.[185] This commercial activity is regulated by the federal government, and Act 501's attempt at state regulation of food products conflicts with Congress' desire for promoting and protecting interstate commerce.[186]

The Dormant Commerce Clause is "implicit" in the Commerce Clause and prohibits states from enacting legislation that "discriminates against or excessively burdens interstate commerce."[187] In *Granholm v. Heald*, the Supreme Court held that a Michigan statute regulating the sale of wine from out of state wineries to consumers in Michigan was unconstitutional because it violated the Commerce Clause.[188] Michigan was requiring out-of-state alcohol sales to go through a rigorous three-tier system to obtain a license to sell directly to consumers in Michigan.[189] Michigan did not mandate this requirement for producers already within its state.[190] The court held that the "differential

[179] Memorandum, *supra* note 4, at 14.
[180] *See id.* at 14.
[181] *See id.* at 13-14.
[182] *Commerce Clause*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/commerce_clause (last visited Jan. 19, 2020).
[183] Complaint, *supra* note 2, at 15-16.
[184] *Id.*
[185] *See id.*
[186] *See id.*
[187] *See* CORNELL LEGAL INFO. INST., *supra* note 182.
[188] Granholm v. Heald, 544 U.S. 460, 466 (2005).
[189] *Id.* at 468-70.
[190] *Id*.

treatment between in-state and out-of-state wineries constituted explicit discrimination against interstate commerce.[191]

Similarly, here, a court could find that Act 501 discriminates against plant-based companies by limiting their ability to market and sell within Arkansas.[192] Prohibiting companies like Tofurky from labeling and advertising its product the same way it does nationwide would most likely excessively burden the company's ability to engage in interstate commerce within Arkansas.[193] Thus, a court may find that Act 501 implicates the Dormant Commerce Clause and is unconstitutional.[194]

Furthermore, Act 501 states in part that it prohibits "Representing an agricultural product as meat or a meat product when the agricultural product is not derived from harvested livestock, poultry, or cervids" or " Utilizing a term that is the same as or similar to a term that has been used or defined historically in reference to a specific agriculture product" amongst many other restrictive provisions.[195] By enacting a law that has the impact of limiting the marketability of certain products, Arkansas has, at a minimum, interfered, if not effectively restricted, the interstate commerce of food products in and out of the state.[196] Thus, the court should find that Act 501 does in fact facially discriminate against and restrict interstate commerce.

B. Burdening of Interstate Commerce

The plaintiffs alleged that the Arkansas law was passed for the improper purpose of burdening interstate commerce.[197] The restrictions the Act places on what food can be marketed and sold in the state "impedes the flow of interstate commerce in food, which the public has a strong interest in keeping affordable and accessible."[198] The law regulates the packing and marketing of these products by any person or entity doing business in Arkansas, regardless of whether or not the activities were directed at consumers in the state.[199]

Here, it would cost Tofurky about $1,000,000 to change its marketing and labeling practices at a nationwide level to be in compliance with Act 501.[200] It would also be "logistically and financially impractical to create separate products to be sold within

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[191] *Id*. at 467.
[192] *See* Complaint, *supra* note 2, at 15-16.
[193] *Id.*
[194] *See id.*
[195] *Id.* at 7-8.
[196] *See id.* at 15-16.
[197] *Id.*
[198] *Id*. at 16.
[199] *Id.* at 15.
[200] Linda Satter, *Federal Judge Halts Arkansas Law on Plant-Based Food Labeling*, ARK. DEMOCRAT GAZETTE (Dec. 12, 2019, 7:07 AM), https://www.arkansasonline.com/news/2019/dec/12/federal-judge-halts-arkansas-law-on-pla-1.

Arkansas alone."[201] Tofurky would also be liable for any advertising to that inadvertently spilled into Arkansas from neighboring states.[202] The implementation of these options would be very expensive, significantly burdensome, and would create a competitive disadvantage for Tofurky in the marketplace.[203] Additionally, having to take these measures would most likely force Tofurky to stop selling their products in the entire Arkansas region.[204]

The Supreme Court has previously upheld decisions from lower courts prohibiting the enforcement of labeling-like laws that interfered with interstate commerce.[205] In *Hunt v. Washington State,* a Washington state agency brought suit seeking declaratory and injunctive relief in response to a North Carolina statute concerning the packaging and sale of apples in North Carolina.[206] The statute required that "all closed containers of apples sold, offered for sale, or shipped into the State to bear no grade other than the applicable U.S. grade or standard."[207] At the time, the production of apples and other produce was federally regulated by the United States Department of Agriculture (USDA).[208] However, as a matter of public policy, Washington State sought to enhance the reputation of its apples on the national market by implementing a rigorous, mandatory inspection program.[209] This program was successful in marketing and had substantial acceptance in the industry, being equal to or greater than the standards required by the USDA.[210] This program noted this greater level of quality control by marking the outside of the closed containers of apples with a Washington State grade.[211] These apples were subsequently shipped nationwide.[212] Seemingly in response, the North Carolina Board of Agriculture adopted a regulation that required all closed containers of apples sold in the state to "display either the applicable USDA grade or a notice indicating no classification."[213] The regulation also expressly prohibited the marking of state grades.[214]

The court held that North Carolina's regulation was unconstitutional on a few grounds.[215] The most notable being that the regulation had "practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them."[216]

[201] Turtle Island Foods v. Soman, 424 F. Supp. 3d 552, 563 (E.D. Ark. 2019).
[202] *Id.* at 564.
[203] *Id.*
[204] *See id.*
[205] *See* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 348-354 (1977).
[206] *Id.* at 335.
[207] *Id.* (internal quotations omitted).
[208] *See id.* at 336-338.
[209] *Id.* at 336.
[210] *Id.* at 336.
[211] *See id.* at 336.
[212] *See id.*
[213] *Id.* at 337.
[214] *Id.*
[215] *Id.* at 350-53.
[216] *Id.* at 350.

To begin with, the court reasoned that the North Carolina statute would impose increased costs on the Washington apples and would effectively "shield" North Carolina producers from the competition from Washington and other states which had their own respective grade markings.[217] Next, the court noted that enforcing the statute would "strip" Washington of the competitive advantage it gained as a result of the expensive and stringent quality assurance practice it had adopted.[218] The court recognized that Washington's apples were recognized industry-wide for their good quality, which allowed its growers to market and sell their product at a premium.[219] In fact, the court further recognized the existence of "numerous affidavits from apple brokers and dealers located both inside and outside of North Carolina acknowledged their customers preference for Washington apples precisely because of their superior quality.[220] This superiority was identified and confirmed by the grading system and appearance of the apples.[221]

Finally, prohibiting the use of Washington's distinctive grading and marking system would level the playing field with local North Carolina growers who had "no similar impact" due to their lack of a similar quality assurance system.[222] Washington apple producers would normally benefit from the sales that have a superior quality product that is easily identifiable to consumers.[223] However, in *Hunt*, to sell apples in North Carolina, Washington growers would be forced to downgrade their product to put it on par with the inferior USDA grade.[224] This effectively eliminated the expansive competitive advantage that Washington producers previously obtained.[225]

The court further asserted that when discrimination against a form of commerce is found via the laws of a state, the burden falls on the state to justify the discrimination.[226] This requires the state to demonstrate a justification in terms of "the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[227] It was the state government's position that the regulations were necessary to protect their residents from confusion and deception.[228] However, the court found that this argument failed because the statute permitted the use of not using grade markings entirely on the closed containers of

[217] *Id.* at 351.
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.* at 352.
[224] *See id.*
[225] *See id.*
[226] *Id.* at 353.
[227] *Id*.
[228] *Id*. at 349.

apples.[229] The court reasoned that permitting the use of no markings did not stifle confusion or deception as it prevented consumers from having all the information needed to assess the quality of the apples in the containers.[230]

Similarly, the Arkansas statute discriminates against plant-based companies, hinders the expansive competitive advantage gained by research and development, and burdens interstate commerce in and out of the state of Arkansas.[231] Act 501 may be found to discriminate against plant-based companies because it prohibits them from uniquely marketing their products to consumers that contributes to the sales and name recognition within their respective industry.[232]

Act 501 also strips plant-based companies of the competitive advantage they have earned within the industry by investing in research and development to create a product that resonates with consumers and consumer trends with respect to the alternative consumption of animal proteins.[233] Plant-based companies like Tofurky, Beyond Meat, and Impossible Foods have invested in development to create a product that mimics the texture, flavor, and appearance of animal protein to create and alternative product for consumers.[234] These products are not targeted at traditionally vegetarian or vegan consumers and are instead intended for consumers of animal proteins seeking to consume less meat or reduce their carbon footprint.[235] That target consumer has created a unique place in the market for plant-based "meat" companies.[236] By limiting their ability to properly market and sell their products, Arkansas has effectively "shielded" its local producers of animal proteins from the competition that these out of state plant-based companies would impose with no corresponding detriment for the animal protein producers.[237]

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[229] *See id.* at 353.
[230] *Id.* at 353-54.
[231] *See id.* at 348-354.
[232] *See id.*
[233] *See generally* Katy Askew, *We Are Trying to Push the Boundaries of What is Possible: The Meatless Farm R&D Chief Talks Innovation in the Plant-Based Category* (Jan. 28, 2020, 3:38 PM), https://www.foodnavigator.com/Article/2020/01/27/The-Meatless-Farm-R-D-chief-on-the-future-of-plant-based-innovation.
[234] David Yaffe-Bellamy, *The New Makers of Plant-Based Meat? Big Meat Companies*, N.Y. TIMES (Oct. 14, 2019), https://www.nytimes.com/2019/10/14/business/the-new-makers-of-plant-based-meat-big-meat-companies.html.
[235] *See* Rina Raphael, *Meatless Burgers vs. Beef: How Beyond Meat's Environmental Impact Stacks Up*, FAST COMPANY (Sept. 26, 2018), https://www.fastcompany.com/90241836/meatless-burgers-vs-beef-how-beyond-meats-environmental-impact-stacks-up; https://www.bbc.com/news/science-environment-49238749.
[236] *See* Raphael, *supra* note 235.
[237] *See id.*; Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 351 (1977).

Finally, Act 501 similarly burdens interstate commerce.[238] It imposes costs on companies to redevelop their marketing and work out new logistical ways for continuing to sell the product under a different name in states that have passed similar legislation.[239] If companies decide to discontinue the sale of their product in Arkansas, they would then be tasked with attempting to develop ways of continuing the market and sell their products outside of Arkansas without inadvertently having a product or an advertisement cross state lines.[240]

Moreover, after a suit is filed, the burden will shift to Arkansas to establish that they had a substantial government interest in banning the use of this type of labeling and marketing and that the law directly.[241] Thus, a court may find that Act 501 is unconstitutional because it interferes substantially with interstate commerce.[242]

C. Regulation of Packaging & Marketing of Food Products

Act 501 has the practical effect of prohibiting companies from marketing their products on the Internet.[243] Because the Internet is accessible to consumers in Arkansas, the Act could have the unintended (or perhaps intended) effect of forcing companies to somehow arrange for their online products to not be marketed on the Internet within the geographical area of the state.[244] Failure to comply with the law by accidental "spill over" might subject these companies to fines for each product marketed.[245] The law also does not explicitly state how Internet forms of advertising are supposed to be regulated.[246] This creates a situation where producers are left exposed to arbitrary enforcement of the law.[247]

VI. Public Policy

The United States is moving towards energy sustainability and renewability.[248] As a matter of public policy, it is important that the United States adopts a policy of promoting industries and practices that reduce the harmful effects of greenhouse gas emissions and

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[238] *See Hunt*, 432 U.S. at 350.
[239] *See* Complaint, *supra* note 2.
[240] *Id.*
[241] *See Hunt*, 432 U.S. at 353. The burden would fall on Arkansas to justify local benefits from Act 501 and a lack of nondiscriminatory alternatives adequate to preserve the local interest at stake. *Id.*
[242] *See id.* at 348-353.
[243] *See* Complaint, *supra* note 2 (explaining the practical effect Act 501 has on companies in the state).
[244] *See id.*
[245] *See* ARK. CODE ANN. § 2-1-305 (2020) ("'labeling' means the act identifying, describing, or advertising an agricultural product that is edible by humans by means of the label or through other means.").
[246] *See id.*
[247] *See* Complaint, *supra* note 2, at 14.
[248] *See* John Podesta, *A 100 Percent Clean Future,* CTR. FOR AM. PROGRESS (October 10, 2019), https://www.americanprogress.orhartg/issues/green/reports/2019/10/10/475605/100-percent-clean-future/.

what will promote the positive growth of the economy.[249] Failing to repeal laws such as Act 501 hinders the ability of businesses to be innovative in ways that would benefit both the economy and the push for more environmental and health friendly practices.[250]

The government promoting more balanced and plant-based diets may also improve the health of the general public.[251] Some public health advocates believe the government should play more of a role in mitigating and preventing conditions such as heart disease and Type II diabetes.[252] In 2015, the Dietary Guidelines Advisory Committee submitted a report to the United States Departments of Agriculture and Health and Human Services (USDA & HHS).[253] The committee had recommended that people eat more plant-based foods.[254] Furthermore, numerous studies have shown that switching to a more plant-based diet or reducing meat consumption has a significant positive impact on an individual's "carbon footprint" and climate change.[255] The United States government should have an interest in ensuring the health of its citizens and its environment. Adopting and interpreting laws that are consistent with that policy interest will benefit the country as a whole and its citizens.[256] Laws such as Act 501 may, in part, reduce the ability of the government to attain that general initiative.[257]

CONCLUSION

In conclusion, the Federal Court should strike down Arkansas' Act 501 "Freedom in Labeling Law" as unconstitutional as it violates the First Amendment's freedom of speech protections and the Fourteenth Amendment's protections against vague statutes.[258] The law also interferes with interstate commerce and implicates the Dormant Commerce Clause.[259] Thus, the court should find the Act 501 is unconstitutional under the First and Fourteenth Amendments and conflicts with United States public policy.[260]

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[249] *Id.*
[250] Complaint, *supra* note 2, at 12 (explaining Act 501 prevents businesses from using innovative ways to push industries and initiatives into a sustainable future).
[251] *See Vegan Diet Can Benefit Both Health and the Environment*, HARV. T.H. CHAN SCH. OF PUB. HEALTH, https://www.hsph.harvard.edu/news/hsph-in-the-news/vegan-diet-health-environment/.
[252] *Id.*
[253] *Scientific Report of the 2015 Dietary Guidelines Advisory Committee*, U.S. DEP'T OF AGRIC. (Feb. 2015), https://health.gov/sites/default/files/2019-09/Scientific-Report-of-the-2015-Dietary-Guidelines-Advisory-Committee.pdf.
[254] Kimberly Leonard, *The Great Government Takeover*, U.S. NEWS (June 5, 2015, 6:00 AM), https://www.usnews.com/news/the-report/articles/2015/06/05/the-great-government-takeover-of-food.
[255] Harrabin, *supra* note 235.
[256] *See id.*
[257] *See id.*; Complaint, *supra* note 2, at 12.
[258] *See* Complaint, supra note 2.
[259] *See id.* (explaining how Act 501 facially discriminates and interferes with interstate commerce).
[260] *See id.*