IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Turtle Island Foods, SPC, doing business as The Tofurky Company; and The Good Food Institute, Inc., Plaintiffs, v. Mark Richardson, in his official capacity as Cole County Prosecuting Attorney and on behalf of all Missouri Prosecuting Attorneys, Defendants.	)	No. 2:18-cv-4173 FJG

Suggestions in Support of
Plaintiffs' Motion for Preliminary Injunction

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I. Background

On August 28, 2018, a Missouri statute criminalizing truthful speech went into effect. Amendments to Mo. Rev. Stat. § 265.494(7) make "misrepresenting a product as meat that is not derived from harvested production livestock or poultry" a Class A misdemeanor, punishable by incarceration up to one year and a fine up to $1,000. *See* Mo. Rev. Stat. § 265.496 (penalty provision). Through the Statute, the Missouri legislature intended to—and did—criminalize the use of the word "meat" and meat-related terminology in the marketing and packaging of plant-based meat products.

Plaintiffs include the advocacy organization The Good Food Institute (GFI) and Tofurky, a plant-based meat producer whose products are marketed and sold in Missouri. *See* Declaration of Bruce Friedrich, GFI Executive Director (Oct. 12, 2018) ¶¶ 1, 6, **attached hereto as Plaintiffs' Exhibit 1**; Declaration of Jaime Athos, Tofurky President and CEO (Oct. 29, 2018) ¶ 3, **attached hereto as Plaintiffs' Exhibit 2**. Some of Tofurky's products are labeled variously as "veggie burgers," "chorizo style sausage," "slow roasted chick'n," "plant-based jumbo hot dogs," and "vegetarian ham roast." Ex. 2 ¶¶ 4, 5 and Attachment. The Statute could be interpreted by Missouri's prosecutors[1] to outlaw those and other similar descriptors, by casting them as "misrepresent[ations]."

There is no evidence that these product terms and descriptors are misleading to consumers. Indeed, the Statute was intended *not* to protect consumers but instead to protect the state's cattle, pork, and chicken industries.[2] That interest cannot justify a law that impinges upon

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[1] *See* Mo. Rev. Stat. § 265.220 ("Prosecutions under this chapter shall be begun and carried on in the same manner as other prosecutions for misdemeanors in this state."); Mo. Rev. Stat. § 56.060 ("Each prosecuting attorney shall commence and prosecute all civil and criminal actions in the prosecuting attorney's county . . . .").

[2] *See, e.g.*, *Third Reading of Senate Bills in House* (May 17, 2018) (Rep. Knight: "all we're trying to do is basically just protect our meat industry"; Rep. Razer: "We have to protect our cattle industry, our hog farmers, our chicken industry."), http://mohouse.granicus.com/MediaPlayer.php?view_id=1&clip_id=742 (embedded video),

Plaintiffs' First Amendment speech rights. Because enforcement of the Statute will cause Plaintiffs irreparable harm, they seek a preliminary injunction and request that this motion be set for a hearing.

II. Argument

A. Eighth Circuit standard for preliminary injunction

In deciding whether to issue a preliminary injunction, courts in the Eighth Circuit consider the four factors articulated by the *Dataphase* court: (1) the probability that Plaintiffs will prevail on the merits, (2) whether Plaintiffs face a threat of irreparable harm absent the injunction, (3) the balance between the harm Plaintiffs face and the injury that the injunction's issuance would inflict upon Defendants, and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc); *accord Amos v. Higgins*, 996 F. Supp. 2d 810, 812 (W.D. Mo. 2014).

When a plaintiff demonstrates likely success on a First Amendment free-speech claim, the remaining factors are generally deemed to be satisfied. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) (en banc). In this case, all four *Dataphase* elements weigh strongly in favor of a preliminary injunction.

B. Plaintiffs will succeed on the merits of their First Amendment claim.

In order for the first factor to weigh in the movant's favor, the movant must be "substantially likely" to prevail on the merits of its claim. *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 731–32 (8th Cir. 2008). Plaintiffs are substantially likely to prevail

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Declaration transcribing remarks attached hereto as Plaintiffs' Exhibit 3; S. Brown, *How Missouri Began to Tackle Fake Meat: Missouri Sen. Sandy Crawford*, DROVERS (May 31, 2018) (video of Sen. Crawford stating that the beef industry trade group approached her "with an idea for a bill . . . we dubbed the fake meat bill" and "we want to protect our cattlemen in Missouri and protect our beef brand"), https://www.drovers.com/article/how-missouri-began-tackle-fake-meat-missouri-sen-sandy-crawford (embedded video), **PDF of written DROVERS text reflecting some content of video attached hereto as Plaintiffs' Exhibit 4.**

on their First Amendment claim here because they wish to engage in truthful, nonmisleading speech that is prohibited by the Statute, and the government cannot carry its burden to demonstrate that the Statute directly and materially advances a substantial government interest without being more extensive than necessary.

1. Plaintiffs' speech is protected by the First Amendment.

Plaintiff Tofurky markets and packages commercial products that are sold in Missouri. Ex. 2 ¶ 3. The marketing and packaging of commercial products contain speech. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495–99 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995) (noting that parties agreed that information on beer labels constituted commercial speech); *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 653 (8th Cir. 2003) (noting that parties agreed that fax advertisements constituted commercial speech).

Plaintiff GFI, which advocates for clean meat (animal meat grown directly from cells) and plant-based alternatives to conventional meat products, engages in advocacy with the public, and expends resources to educate and support plant-based and clean meat companies that do business in Missouri. Ex. 1 ¶¶ 2, 3, 12–15. Commercial speech and advocacy are both types of expression protected by the First Amendment. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980) (both applying First Amendment analysis to commercial speech); *Fed. Election Comm'n v. Wisc. Right To Life, Inc.*, 551 U.S. 449, 455–57 (2007) (applying First Amendment analysis to issue advocacy).

2. The Statute is subject to at least intermediate scrutiny.

A content-based law is one that cannot be "justified without reference to the content of the regulated speech" or one that was "adopted by the government because of disagreement with

the message the speech conveys." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (internal quotation markets and brackets omitted). The Statute at issue here is content based on its face because it prohibits speech (or not) based on what it says. *Id.*

Content-based statutes that create criminal penalties for the exercise of constitutionally protected freedoms—including the right to engage in commercial speech—are indisputably subject to heightened scrutiny. *City of Houston v. Hill*, 482 U.S. 451, 459 (1987); *see also Sorrell*, 564 U.S. at 566. Until recently, when confronted with a challenge to a law that burdened commercial speech, courts uniformly applied the four-part test set out by the United States Supreme Court in *Central Hudson*, which is a variety of "intermediate scrutiny." *See, e.g., Passions Video, Inc. v. Nixon*, 458 F.3d 837, 841 (8th Cir. 2006). But the Supreme Court's 2011 decision in *Sorrell* muddied the waters.

In that case, the Supreme Court implied that laws burdening commercial speech should be evaluated under a standard even more rigorous than *Central Hudson* intermediate scrutiny. 564 U.S. at 564–71 (applying noncommercial precedents to commercial-speech case). The *Sorrell* Court suggested that a content-based law burdening commercial speech should be subjected to strict scrutiny, just like a content-based law burdening noncommercial speech. *Id.* at 571 ("In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory. . . . however, the outcome is the same [in this case] whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied"); *see also Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 298 n.4 (4th Cir. 2013) (noting that "the question of whether *Sorrell*'s 'heightened scrutiny' is, in fact, strict scrutiny remains unanswered" but concluding that the challenged law could not withstand intermediate scrutiny so it would "not attempt to answer that question"); *see also Reed*, 135 S. Ct. at 2226 (holding that,

under strict scrutiny, content-based laws are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests").

If Plaintiffs are substantially likely to prevail under *Central Hudson* intermediate scrutiny, they also necessarily satisfy *Sorrell* strict scrutiny. Because Plaintiffs are substantially likely to prevail under either level of scrutiny, the Court need only analyze the Statute under the less-exacting *Central Hudson* test.

a. ***Central Hudson* threshold question: The government cannot meet its burden of demonstrating that Plaintiffs' speech is false or inherently misleading.**

Central Hudson comprises four parts: a threshold question and a three-prong test. "With respect to both the threshold question and the three-prong test, the burden is on the government to produce evidence to support its restriction." *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1236 (11th Cir. 2017) (citing *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)). That burden is "not slight" and will not be satisfied by "[m]ere speculation or conjecture." *Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136, 143 (1994).

As a threshold matter, the court considers whether the speech at issue is "protected by the First Amendment." *Id.* at 566. Although commercial speech is unprotected if it "concerns unlawful activity" or is "false or inherently misleading," *see, e.g., 1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1056 (8th Cir. 2014), the Supreme Court has confirmed that even "potentially misleading" commercial speech is protected by the First Amendment. *See Ibanez*, 512 U.S. at 146 ("we cannot allow rote invocation of the words 'potentially misleading' to supplant the [government's] burden to 'demonstrate that the harms it recites are real and that

its restriction will in fact alleviate them to a material degree'") (quoting *Edenfield*, 507 U.S. at 771); *Peel v. Att'y Reg. & Disciplinary Comm'n*, 496 U.S. 91, 106–08 (1990).

Unlike inherently misleading speech, *potentially* misleading speech may be regulated only if that regulation passes muster under the remaining three *Central Hudson* prongs. *Peel*, 496 U.S. at 109 ("Even if we assume [the regulated speech] may be potentially misleading to some consumers, that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public.").

Speech is "inherently" misleading only if it is "**inevitably** . . . misleading to consumers." *1-800-411-Pain*, 744 F.3d at 1056 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 372 (1977)) (emphasis added). This is a high bar. For example, in *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999), the D.C. Circuit Court rejected as "almost frivolous" the government's argument that placing health claims that lacked "significant scientific agreement" on dietary supplements would be inherently misleading to consumers. *See id.* at 655 (characterizing the government's contention that the claims would have "such an awesome impact" as to make it "virtually impossible" for consumers to exercise judgment as nothing more than "paternalistic assumption"). And in *Bloom v. O'Brien*, the District of Minnesota rebuffed the state's argument that a statute prohibiting itemization of "gross revenue tax" on health care bills was directed at inherently misleading speech. The court granted a preliminary injunction in favor of the health care providers who had challenged the statute, rejecting the argument that consumers would inevitably confuse *permissible* revenue tax with *impermissible* sales tax. 841 F. Supp. 277, 281–82 (D. Minn. 1993) (commenting that "a bill which accurately states the amount and the nature of the charge is not inherently misleading").

Plaintiff Tofurky's packaging and advertisements—which accurately convey the nature and contents of its products, *see, e.g.* Ex. 2 ¶¶ 4–8, Attachment—are not inherently misleading. To the contrary, they are objectively true. *See Ocheesee*, 851 F.3d at 1239 ("statements of objective fact . . . are not inherently misleading absent exceptional circumstances") (citing *Peel*, 496 U.S. at 101–02). Tofurky clearly and prominently identifies its products variously as "all vegan," "plant based," "vegetarian," "veggie," and "made with pasture raised plants" on the front of its products' packages. *See* Ex. 2 ¶¶ 4–8, Attachment; *see also Ang v. Whitewave Foods Co.*, 2013 WL 6492353, at *4 (N.D. Cal. Dec. 10, 2013) (dismissing false-advertising suit against plant-based milk producer that labeled its products "soymilk," "almond milk," and "coconut milk" for implausibility, among other reasons, and finding that plaintiff's argument that any reasonable consumer would "assume the beverages came from cows" because the packages used the term "milk" to "stretch[] the bounds of credulity").

When it enacted the Statute, the government did not rely on any evidence that Plaintiff Tofurky's advertisements and labels—or any plant-based meat producer's marketing materials—are even *potentially* misleading. *See, e.g.*, State's Proposed Answer ¶ 33, ECF No. 20-1; *Edenfield*, 507 U.S. at 771 (striking down ban on certain CPA advertising practices where the government had "present[ed] no studies" or "any anecdotal evidence" that ban directly served government interest). On the other hand, at least one study shows that consumers are *not* confused by plant-based meats' marketing and packaging. *See* Declaration of Keri Szejda (Oct. 29, 2018), GFI Senior Consumer Research Scientist, at ¶ 8, **attached hereto as Plaintiffs' Exhibit 5.**

But *even if* these labels and advertisements were potentially misleading, the government would still bear the burden of demonstrating that the Statute meets all three of the *Central*

Hudson prongs. *Peel*, 496 U.S. at 109 ("Even if we assume [the speech at issue] may be potentially misleading to some consumers, that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public."). That is a burden it cannot satisfy.

b. **First prong of *Central Hudson*: The government cannot meet its burden of demonstrating that it has a substantial interest in suppressing Plaintiffs' speech.**

Once the threshold question is addressed, courts consider whether the state has "assert[ed] a substantial interest to be achieved" by the regulation of commercial speech. 447 U.S. at 564. Here, the legislative sponsors and supporters of the Statute acknowledged publicly—including on the floor of the Missouri House of Representatives—that their interest in enacting the Statute was to protect the animal agriculture industries from competition by plant-based meat producers. *See* Exs. 3 & 4.

The suppression of disfavored speech—or the amplification of favored speech—is not a substantial government interest that can justify a criminal law. *Sorrell*, 564 U.S. at 566. As such, the government has not asserted that the Statute is supported by any substantial government interest sufficient to meet its burden under the first *Central Hudson* prong.

c. **Second prong of *Central Hudson*: The government cannot meet its burden of demonstrating that the Statute directly and materially advances any substantial interest.**

The government also must prove that the statute "directly and materially" advances a legitimate and substantial interest. *Passions Video, Inc. v. Nixon*, 458 F.3d 837, 842 (8th Cir. 2006) (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001)). Assuming that the government argues that it has a substantial interest in protecting consumers from misleading commercial speech, it must show that the Statute directly and materially advances that interest.

A regulation on commercial speech "may not be sustained if it provides only ineffective or remote support for the government's purpose." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 486 (1996) (quoting *Central Hudson*, 447 U.S. at 564) (internal quotation marks omitted)). Instead, the government must demonstrate that the harms it seeks to alleviate are real and that the statutory restriction will alleviate those alleged harms to a material degree. *Edenfield*, 507 U.S. at 762. It cannot justify the Statute based on mere "speculation or conjecture;" instead, it must point to tangible evidence that supports the idea that the restriction will further the state's interest. *Id.* at 770–71.

In *Bolger v. Youngs Drug Products Corp.*, a federal statute prohibited the unsolicited mailing of contraceptive advertisements. 463 U.S. 60, 60 (1983). Arguing that the statute passed muster under the First Amendment, the United States asserted that the law encouraged parents to choose how they wish to talk about sensitive topics like birth control with their children by prohibiting children access to mailings about sensitive topics like birth control. *Id.* at 71. Nonetheless, the Court found that the statute provided "only the most limited incremental support for the interested asserted" because parents typically already have control of what information flows into their mailbox in the first place. *Id.* at 73. Accordingly, the statute did not "directly and materially" advance the government's interest. *Id.* at 73.

Similarly, here the Statute at best "provides only the most limited incremental support" to advance an interest in protecting consumers from confusion about whether plant-based meats are made from animals. Tofurky and other plant-based meat producers *already* distinguish their products from animal meats. *See* Ex. 2 ¶¶ 4–8 and Attachment; Ex. 1 ¶ 4. In addition to listing ingredients and nutritional content, Tofurky prominently identifies its products variously as "all vegan," "plant based," "vegetarian," "veggie," and "made with pasture raised plants." Ex. 2

¶¶ 4–5 and Attachment. In other words, Plaintiff Tofurky is not trying to deceive consumers into believing its plant-based meats are animal products; to the contrary, it wants to make clear that its products are *not* made from animals. Ex. 2 ¶ 7. *Compare Gitson v. Trader Joe's Co.*, 2015 WL 9121232, at *1 (N.D. Cal. Dec. 1, 2015) ("The reasonable consumer (indeed even the least sophisticated consumer) does not think soymilk comes from a cow. To the contrary, people drink soymilk in lieu of cow's milk."); *see also Painter v. Blue Diamond Growers*, 2017 WL 4766510 (C.D. Cal. May 24, 2017), at *2 (dismissing misleading-advertising claim against almond milk producer and commenting that "[n]o reasonable consumer could be misled by Defendant's unambiguous labeling or factually accurate nutritional statements"); *Pearson*, 164 F.3d at 655 (commenting that to accept the state's argument that inclusion of dubious health claims alongside a disclaimer on dietary-supplement labels was "inherently misleading" would be akin to finding that "consumers were asked to buy something while hypnotized").

Other evidence, including the dearth of consumer complaints about the labels and marketing of plant-based meats and the fact that the Statute is the only one of its kind nationwide (*see* Ex. 4; Ex. 2 ¶¶ 10, 11), also demonstrates that the Statute fails to directly and materially advance a government interest in preventing consumer confusion. *See Ang*, 2013 WL 6492353, at *4 (commenting that it would be "highly improbable" for a reasonable consumer to "believe that veggie bacon contains pork"); *Edenfield*, 507 U.S. at 771 (highlighting the fact that the majority of states had no ban similar to challenged ban and commenting that "[n]ot even [challenger's] own conduct suggest[ed] the government's concerns [were] justified").

In short, consumers are not confused by the marketing and packaging of plant-based meats, and the Statute cannot "directly and materially" solve a problem that does not exist. *Assoc. of Nat'l Advertisers, Inc. v. Lungren*, 809 F. Supp. 747, 756 (N.D. Cal. 1992) ("If First

Amendment scrutiny in the commercial speech arena is to have any bite at all, a legislative body cannot justify its restrictions on commercial speech simply by declaring that marketing claims are misleading"); *accord Ibanez*, 512 U.S. at 146.

d. **Third prong of *Central Hudson*: The government cannot meet its burden of demonstrating that the Statute is no more extensive than necessary.**

Even if the Court finds that the Statute materially and directly advances some substantial interest, the government also must demonstrate that the Statute is "not more extensive than necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. The Statute must be "reasonable" and "narrowly tailored to achieve the desired objective," and it "cannot curtail substantially more speech than is necessary to accomplish its purpose." *See Lorillard Tobacco*, 533 U.S. at 556; *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1222 (8th Cir. 1998). More specifically, if there are "alternatives to the regulations that directly advance the asserted interest in a manner less intrusive to plaintiffs' First Amendment rights," the government has failed to carry its burden. *Mo. Broadcasters Ass'n v. Lacy*, 846 F.3d 295, 302 (8th Cir. 2017).

Assuming the government has a substantial interest in alerting consumers that plant-based meats come from plants, Missouri could have required all plant-based meat producers to label their products as plant based or vegetarian. *See Central Hudson*, 447 U.S. at 571 (suggesting that having a company print more detailed information on its advertisements is a legitimate and less restrictive alternative to a ban); *Pearson*, 164 F.3d at 657 (holding that disclosure is "constitutionally preferable to outright suppression"). Of course, in addition to listing ingredients and nutritional content, most—if not all—plant-based meat producers *already* identify their products as alternatives to animal meats. To illustrate, Tofurky already conspicuously labels its products as "vegan" and "plant-based." Ex. 2 ¶ 5 and Attachment.

Far from being "not more extensive than necessary," *Central Hudson*, 447 U.S. at 566, the Statute is a broad and blunt instrument that uses the force of the criminal law to reserve common food terms for exclusive use by the government's preferred industries. It is not tailored sufficiently to withstand even *Central Hudson* intermediate scrutiny.

C. The loss of speech rights is an irreparable harm, and Plaintiffs also satisfy the remaining *Dataphase* factors.

Because the state cannot meet its burdens under *Central Hudson* intermediate scrutiny—let alone *Sorrell* heightened scrutiny—in order to justify the criminalization of Plaintiffs' truthful speech, Plaintiffs are likely to succeed on their First Amendment free-speech claim. When a movant is substantially likely to succeed on its First Amendment claim, the remaining preliminary injunction *Dataphase* factors are generally deemed satisfied. *Swanson*, 692 F.3d at 870. However, the other factors also weigh in Plaintiffs' favor.

The second *Dataphase* factor involves the likelihood of irreparable injury absent an injunction. 640 F.2d at 112. A restriction on a plaintiff's First Amendment rights "unquestionably" constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Phelps-Roper v. Nixon*, 509 F.3d 480, 485 (8th Cir. 2007), *modified on reh'g*, 545 F.3d 685 (8th Cir. 2008) ("If [appellant] can establish a substantial likelihood of success on the merits of her First Amendment claim, she will also have established irreparable harm as the result of deprivation."). Plaintiffs face the untenable choice of either risking criminal prosecution or upending their advocacy, marketing, advertising, and packaging practices to comply with the Statute. Ex. 1 ¶¶ 8–12; Ex. 2 ¶¶ 12–14, 17. Either way, they face irreparable harm absent an injunction. *Elrod*, 472 U.S. at 373–74; *see also Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016) (discussing types of First Amendment injuries-in-fact that give rise to standing).

"The third Dataphase factor requires a district court to consider the balance between the harm to the movant and the injury that granting the injunction will inflict on other interested parties." *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 489 (8th Cir. 1993) (citing *Dataphase*, 640 F.2d at 114). The harms caused to Plaintiffs by the Statute significantly outweigh the burden an injunction would place on Defendants or the public. Compliance with the Statute would have a severe detrimental impact on Plaintiffs. Ex. 1 ¶ 15; Ex. 2 ¶¶ 15–19. The Statute has caused and continues to cause GFI to divert resources it would otherwise have to invest in other advocacy. Ex. 1 ¶¶ 14–15. Likewise, Tofurky has invested significant time and resources in developing its products and marketing and packaging those products in truthful and non-deceptive ways. Ex. 2 ¶¶ 9, 15, 19. Now the Statute requires that Plaintiff Tofurky either (1) risk criminal prosecution, along with all of the harms that result from being prosecuted, by continuing its current marketing and packaging practices; (2) create specialized marketing and packaging practices just for the state of Missouri, including attempting to police spillover from marketing in nearby states; (3) change its marketing and packaging practices nationwide; or (4) refrain from marketing or selling its products in Missouri at all. Ex. 2 ¶ 14; *see also* Ex. 2 ¶¶ 15–20. Each of these options—some of which may be impossible as a practical matter—significantly burdens Tofurky's commercial speech rights for no legitimate reason.

In addition to this constitutional harm, Plaintiffs face tangible market disadvantages as a result of the Statute. For instance, if Tofurky attempts to comply with the Statute but continues to advertise and market its plant-based meats in other states, it may nonetheless be criminally liable for advertising that spills into Missouri markets. Ex. 2 ¶¶ 16, 17. In addition, retail chains that operate both in Missouri and other states are less likely to carry Tofurky's products if they

cannot do so in all of their stores, which may create bad will, as customers may be frustrated with the unavailability of its products in Missouri or puzzled about why its products are called different names and packaged differently. Ex. 2 ¶¶ 18, 19. Given that consumers are not confused by the marketing or packaging of Tofurky's—or others'—plant-based meat products, there is no discernable harm to weigh against the injunction. Thus, the harm to Plaintiffs absent an injunction clearly outweighs the harm to Defendants if an injunction were granted.

Finally, the fourth *Dataphase* factor considers the public interest. Violations of constitutional rights are irreparable injuries, and it is always in the public interest to protect those rights. *Nixon*, 509 F.3d at 485; *accord Rounds*, 530 F.3d at 752. *See also Child Evangelism Fellowship of Minn. V. Minn. Special Sch. Dist. No. 1*, 690 F.3d 996, 1000, 1004 (reversing denial of preliminary injunction and holding that where plaintiff showed "high likelihood of success on the merits of its First Amendment claim," that was "likely enough, standing alone, to establish irreparable harm" and "[t]he likely First Amendment violation further mean[t] that the public interest and the balance of harms (including irreparable harm to [plaintiff]) favor[ed] granting the injunction").

III. Conclusion

For the foregoing reasons, Plaintiffs respectfully request the Court enter a preliminary injunction and enjoin the enforcement of the Statute, Mo. Rev. Stat. § 265.494(7), during the pendency of this action.

Plaintiffs request that this motion be set for an evidentiary hearing so that they may present additional evidence.

Respectfully submitted,

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on October 30, 2018, I filed a copy of the foregoing electronically with the Court using the CM/ECF system, which sent notification to counsel.

/s/ Anthony E. Rothert

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Turtle Island Foods, SPC, doing business as The Tofurky Company; and The Good Food Institute, Inc., Plaintiffs, v. Mark Richardson, in his official capacity as Cole County Prosecuting Attorney and on behalf of all Missouri Prosecuting Attorneys, Defendants.	)	Case No.18-4173-W-FJG **DECLARATION OF BRUCE FRIEDRICH IN SUPPORT OF COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

DECLARATION OF BRUCE FRIEDRICH

I, Bruce Friedrich, declare as follows:

1. I am an adult resident of the District of Columbia, where I work as Executive Director of The Good Food Institute (GFI), a nonprofit corporation created and operating under the laws of Washington, D.C. that helps create and support companies that produce plant-based and clean meats, including through advocacy.

2. GFI advocates for clean meat (meat grown from animal cells outside of an animal) and plant-based meat. GFI expends resources to educate and support plant-based and clean meat companies that do business in Missouri (among other states) and advocates for these companies. These companies are in various states of maturity. Some are in early stages: GFI helps these companies form and launch their products. Others are more mature and rely on GFI for information on markets and marketing, policy, connections to entrepreneurs and others,

Plaintiffs' Exhibit 1

communications, and more. Among other things, GFI's Corporate Engagement department works as a trusted partner with restaurants, grocery stores, and food service on decisions about which products they should stock and related matters, and advocates on behalf of increased marketing of plant-based meats.

3. GFI distributes educational information to the public and offers its services to plant-based and clean meat companies free of charge because these companies contribute to the creation of a humane, healthy, and sustainable food supply.

4. Plant-based meat companies currently use meat and meat-related terminology in the labeling and marketing of their products, including: "vegan jerky," "meatless vegan jerky: seitan," "smart bacon: veggie bacon strips," "teriyaki chick'n strips: meat-free," "the ultimate beefless burger," and "beyond meat: beyond beef crumbles, plant-based protein crumbles."

5. GFI believes that these labels are permissible under the FDCA and the First Amendment and vigorously advocates for this position, including, for example, by disseminating publicly available analysis such as "Producers' First Amendment Right to Use Clear Labels on Food," available at https://www.gfi.org/images/uploads/2018/05/FirstAmendmentFactsGFI.pdf.

6. The Statute criminalizes the protected speech of any plant-based meat or clean meat company that does business in Missouri, many of which work closely with GFI. Companies that market and label products in a way that could be construed as "misrepresenting a product as meat that is not derived from harvested production livestock or poultry" may be criminally prosecuted under the Statute and their executives imprisoned for up to a year.

7. GFI's partner plant-based and clean meat companies cannot accurately and effectively describe their products without comparison to the conventional meat products they are designed to replace.

8. GFI's partner companies have invested significant time and expense in developing their products and marketing and packaging those products in truthful and non-deceptive ways.

Yet, because of the Statute, GFI's partners must now: (1) choose to continue to have their products sold in the State of Missouri as packaged, at a substantial risk of criminal prosecution; (2) design, produce, and distribute different, specialized marketing and packaging for their products when they will be sold in the state of Missouri, creating a logistical nightmare in distribution channels that service neighboring states; or (3) change the entirety of their marketing and packaging nationwide because of the Statute, at considerable expense and causing confusion to consumers.

9. GFI believes that plant-based meat and clean meat companies who use these common-sense terms on their labels and marketing materials in Missouri now face a credible threat of prosecution for their speech. In advising these companies, GFI faces uncertainty about whether they may use common-sense labels that consumers understand in order to convey information about the characteristics their products share with conventional meat.

10. Similarly, in advising retailers that sell plant-based meat in Missouri, GFI faces uncertainty about whether these retailers may sell such products without the threat of prosecution if the products continue to bear such common-sense labels that consumers understand.

11. The Statute has required GFI's Policy Department and Executive Director to divert resources, including time spent by GFI employees on analysis of the Statute; consulting with outside counsel to determine how the Statute interacts with federal labeling law; and responding to inquiries about the effects of the Statute. GFI undertook these activities in response to, and to counteract, the effects of the Statute. For example, on August 31, 2018, GFI received a phone call from the owner of a health food store located in southeastern Missouri, who expressed surprise about the law going into effect and dismay about the Missouri Department of Agriculture's apparent ignorance of the law. Consistent with its mission and priorities, GFI's staff had to spend time discussing with the owner the status of guidance from the Department of Agriculture on the law, GFI's concerns about its potential enforcement, and the lack of clarity as to the scope and effect of the Statute.

12. As a result, the Statute has forced GFI to divert resources from other activities central to its mission and priorities. For example, this year, the U.S. Food and Drug Administration and the U.S. Department of Agriculture are considering how clean meat should be regulated, including holding public meetings on the regulation of clean meat. GFI has participated in these proceedings, but in a diminished capacity because of the harms caused by this Statute, which have resulted in GFI diverting time and resources that could have otherwise been used to develop additional materials for those meetings or convene additional meetings among affected stakeholders to coordinate their approach. Indeed, because GFI's resources are so strained, in part due to the Statute's constraint on the commercial speech of plant-based and clean meat companies, GFI has been forced to hire additional staff members in its Policy Department since the Statute was adopted.

13. GFI also advocates for policies to ensure that plant-based and clean meat companies can compete on a level playing field with the products of conventional animal agriculture.

14. Prior to the introduction of the Statute, GFI focused on federal policy. The Statute has forced GFI to divert resources in order to advise its partners how to navigate state-level censorship.

15. In sum, the Statute has already caused and continues to cause GFI to divert staff time and resources away from other activities in order to investigate and attempt to counteract the pernicious effects of the Statute, which has impaired GFI's ability to carry out its mission and fund its other organizational priorities to the same extent it would have in the absence of the Statute. If not for the Statute's criminalization of truthful and non-deceptive labeling practices, GFI would have directed its resources to other activities. Moreover, GFI may not simply ignore the Statute's effects on plant-based and clean meat companies because that would cause harm to GFI's reputation, credibility, and financial support.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on October 12, 2018 /s/ Bruce Friedrich
Bruce Friedrich

Plaintiffs' Exhibit 1

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Turtle Island Foods, SPC, doing business as The Tofurky Company; and The Good Food Institute, Inc.,	)	
Plaintiffs,	)	
v.	)	No. 18-cv-4173
Mark Richardson, in his official capacity as Cole County Prosecuting Attorney and on behalf of all Missouri Prosecuting Attorneys,	)	
Defendants.	)	

DECLARATION OF JAIME ATHOS

I, Jaime Athos, declare as follows:

1. I am the president and CEO of Turtle Island Foods, SPC (Tofurky), which is a plaintiff in the case captioned above. I am over the age of 18. I offer this declaration in support of Plaintiffs' motion for a preliminary injunction. I have personal knowledge of the facts set forth in this declaration and could and would testify competently to those facts if called as a witness.

2. All of Tofurky's products are vegetarian.

3. Tofurky markets and packages plant-based meats that are sold in Missouri.

4. The attachment to this declaration fairly and accurately depicts the primary display panel of some of Tofurky's plant-based meat products.

5. Tofurky uses terms like "chorizo," "ham roast," and "hot dogs," alongside qualifiers like "all vegan," "plant based," "vegetarian," and "veggie," to show that our products are plant-based meats that can be served and consumed just like any other meats.

6. Tofurky distinguishes its products from animal-based meat products through its marketing and packaging.

7. Tofurky does not want to deceive consumers into believing our plant-based meats are made from animals; to the contrary, Tofurky includes prominent qualifiers and descriptors in order to show that our products are *not* made from animals.

8. Tofurky also includes a list of ingredients and nutritional information on every product package.

9. Tofurky products are marketed and sold nationwide.

10. I am not aware of a single consumer communication sent to Tofurky or to any government agency complaining that a consumer mistakenly believed Tofurky's plant-based meat products were, or contained meat, from slaughtered animals.

11. Besides the Missouri statute at issue in this case, Mo. Rev. Stat. § 265.494(7), I'm not aware of any other law in a jurisdiction where Tofurky products are marketed or sold that attempts to prohibit plant-based meats from using the word "meat" and related terminology.

12. Because the Missouri statute at issue is a criminal law, I reasonably fear that a Missouri prosecutor could use it to criminally prosecute Tofurky or me.

13. Because the statute provides no exception for plant-based meat producers that use descriptors and qualifiers to identify their products as being vegetarian, vegan, or made from plaints, I reasonably fear that a Missouri prosecutor could criminally prosecute Tofurky or me for Tofurky's current packaging and marketing materials—including the packaging shown in Exhibit 3.

14. Tofurky faces the untenable choice of: (1) risking criminal prosecution, along with all of the harms that result from being prosecuted, by continuing our current marketing and packaging practices; (2) creating specialized marketing and packaging practices just for the state of Missouri, including attempting to police spillover from marketing in nearby states; (3)

changing our marketing and packaging practices nationwide; or (4) refraining from marketing or selling our products in Missouri at all. That said, it is likely impossible to ensure that no nationwide marketing enters Missouri, and logistically and financially impractical to create separate products to be sold within Missouri alone.

15. Any of these options would be a significant burden, cost a considerable amount of money, and cause tangible market disadvantages.

16. For instance, I believe retail chains that operate in Missouri along with other states may be less likely to carry Tofurky's products if they cannot do so in all of their stores.

17. In addition, Tofurky and I may be liable for our media advertising in other states that spills over into Missouri markets (including regional and national advertising that reaches Missouri consumers through print, television, radio, and the internet).

18. Moreover, I believe that compliance with the Missouri statute may also create bad will for Tofurky, as customers may be frustrated with the unavailability of our products in Missouri or puzzled about why our products are called different names and packaged differently in Missouri.

19. I believe that the loss of goodwill from our customers would be a significant burden for Tofurky. Although all corporations work to sustain their reputations, I believe that Tofurky does more than most: We have invested considerably to become a socially responsible corporation, including becoming a Certified B Corporation, using mostly Forest Stewardship Council-certified paperboard, and seeking out vendors who are committed to environmental sustainability and fair trade.

20. I believe that Tofurky's current packaging and marketing materials accurately convey the nature and contents of its products.

21. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of October 2018.

By: _/s/ Jaime Athos
Jaime Athos


Tofurky
new!
Veggie
BURGER
White Quinoa
PROTEIN
GLUTEN FREE
NO CHOLESTEROL


Tofurky
Deli
SLICES
Smoked Ham Style
PROTEIN
SLOW-SMOKED
TENDER
PLANT-BASED
NON-GMO INGREDIENTS


Tofurky
new!
DIY
MADE WITH PASTURE RAISED PLANTS
CHORIZO STYLE
SAUSAGE


Tofurky
PROTEIN
SLOW ROASTED
CHICK'N
Thai Basil
BRIGHT & VIBRANT
SWEET
PLANT-BASED
NON-GMO INGREDIENTS

Plaintiffs' Ex. 2

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Turtle Island Foods, SPC, doing business as The Tofurky Company; and The Good Food Institute, Inc.,	)	
Plaintiffs,	)	
v.	)	No. 18-cv-4173
Mark Richardson, in his official capacity as Cole County Prosecuting Attorney and on behalf of all Missouri Prosecuting Attorneys,	)	
Defendants.	)	

DECLARATION OF JESSIE STEFFAN

I, Jessie Steffan, declare as follows:

1. I am over the age of 18 and could and would competently testify to the following if called to do so. I offer this declaration in support of Plaintiffs' motion for preliminary injunction.
2. The Missouri House of Representatives uploads audio from some of its legislative proceedings on Granicus.com, a digital platform marketed to governments.
3. On October 30, 2018, I visited http://mohouse.granicus.com/MediaPlayer.php?view_id=1&clip_id=742, where the Missouri House has uploaded video from the May 17, 2018 floor discussion following the Third Reading of Senate Bills 627 and 925 in the House of Representatives, and I reviewed parts of that video.
4. At or around 1:27:49, Rep. Jeff Knight is depicted on that video and states, among other things, "all we're trying to do is basically just protect our meat industry" and "we're just trying to protect our product."

5. At or around 1:52:08, Rep. Greg Razer is depicted on that video and states, among other things, “We have to protect our cattle industry, our hog farmers, our chicken industry.”
6. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of October 2018.

By: _/s/ Jessie Steffan
Jessie Steffan

How Missouri Began To Tackle Fake Meat: Missouri Sen. Sandy Crawford

by:- Sara Brown

Missouri might be the first state to enact legislation that requires labeling of plant-based and lab-grown meat to be clear when compared to meat from livestock. But why and how did this legislative effort begin?

Missouri State Sen. Sandy Crawford said the idea began with conversations with the Missouri Cattlemen's Association and other aligned agriculture commodity groups and restaurants. She shares the process it takes to get farm legislation moved through the state government in this interview with Jared Wareham, Drovers' New Generation columnist and manager of Top Dollar Angus.

“We wanted to protect our cattlemen in Missouri and protect our beef brand,” Crawford said. With a growing number of companies creating meat in a laboratory or selling products that aren’t beef, she said they started looking for ways to protect the integrity of the meat production chain in Missouri.

Meat currently has definition in the statute and that hasn’t changed, Crawford said. What they “added teeth to” was the portions that talked about how products are labeled—“you can’t misrepresent products that don’t meet the definition of meat that is already in the statute,” she says.

Five other states are looking to model similar legislation off the Missouri bill.

Beef cattle represent $2 billion of an $88 billion agriculture industry in Missouri, she added. “That’s just the cattle themselves…so it is huge for the state of Missouri.”

Listen to AgriTalk visit with Missouri Cattlemen’s Association Executive Vice President, Mike Deering here:

For more on these topics listen to Kester’s interview with AgriTalk below:

See other coverage of this issue:

AgriTalk: Trade, Fake Meat Top of Mind for Cattlemen

'Fake Meat' Labeling Bill Passes in Missouri

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

Turtle Island Foods, SPC, doing business as The Tofurky Company; and The Good Food Institute, Inc., Plaintiffs, v. Mark Richardson, in his official capacity as Cole County Prosecuting Attorney and on behalf of all Missouri Prosecuting Attorneys, Defendants.	)	No. 18-cv-4173

DECLARATION OF KERI SZEJDA

I, Keri Szejda, declare as follows:

1. I am over the age of 18. I offer this declaration in support of Plaintiffs' motion for a preliminary injunction. I have personal knowledge of the facts set forth in this declaration and could and would testify competently to those facts if called as a witness.

2. I am a senior consumer research scientist at The Good Food Institute, a plaintiff in the above-captioned case.

3. I received a Bachelor of Arts in Interdisciplinary Studies from the University of Cincinnati in 2004, a Master of Arts in Communication from the University of Hawai‘i at Mānoa in 2010 (as well as a graduate certificate in conflict management), and a Ph.D in Communication from Arizona State University in 2015.

4. Among other professional experience, I previously held research positions at Quest Associates (1995-2004), Community Research (now CTI Clinical Research Center) (2005-2006), and the Johns Hopkins Center for a Livable Future (2012-2013).

5. After I completed my Ph.D in 2015, I remained at Arizona State University until 2017, doing postdoctoral research at the Risk Innovation Lab at the School for the Future of Innovation in Society and teaching communication courses. In 2017, I taught courses on quantitative research methods and advanced research methods in communication.

6. I have expertise in the field of consumer communication. My own research in the field of communication focuses on the design and evaluation of messaging to consumers relating to the nutrition and sustainability of foods.

7. For example, I was lead author on the following papers published in peer-reviewed journals: "Consumer Information-Seeking Preferences at a University Farmers' Market," JOURNAL OF HUNGER & ENVIRONMENTAL NUTRITION (Jan. 2012); "Future directions in neutrality research: Symmetry and transparency," INTERNATIONAL JOURNAL OF CONFLICT MANAGEMENT (July 2014); and "A critical examination of the available data sources for estimating meat and protein consumption in the USA," PUBLIC HEALTH NUTRITION (Nov. 2015).

8. I have reviewed the available peer-reviewed literature on consumer perceptions of, knowledge about, and categorization of plant-based meats. Nothing in that literature shows that consumers mistake plant-based meats for meats from slaughtered animals. For example, I reviewed A.C. Hoek et al., "Identification of new food alternatives: How do consumers categorize meat and meat substitutes?" 22 FOOD QUALITY & PREFERENCE

271–383 (June 2011), in which participants did a sorting task involving animal and plant-based meats. In my opinion as an expert in the field of methods of communication to consumers, the study is methodologically sound. None of the participants expressed or demonstrated a belief that the plant-based meats came from animal sources.

9. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 29, 2018. /s/ Keri Szejda
Keri Szejda