The Nuances of "Tag-Gag" Laws

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This Essay addresses what I have elsewhere called "Tag-Gag" Laws—laws that regulate and restrict how companies can label and advertise plant-based meat products. Plant-based meat is food made entirely from plants that replicates the taste and texture of animal meat. As plant-based meat sales have grown exponentially in recent years, increasing numbers of states have passed Tag-Gag laws; companies selling plant-based meat, in turn, have challenged these laws in court. When covering these lawsuits, the media often (and understandably) lumps them altogether. If a plant-based company wins a preliminary injunction against a state law, it is viewed as a victory for plant-based foods in the labeling wars; if a state survives a preliminary injunction, the media reports the opposite. But not all Tag-Gag laws are created equal, and this Essay draws attention to their important differences. It identifies and categorizes three Tag-Gag variants and discusses how each variant has different legal ramifications. It also proposes specific approaches that companies can follow when challenging the different categories of Tag-Gag laws.

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I. Introduction

Plant-based meat products—products made entirely from plants that replicate the taste and texture of animal meat—are hardly new to the marketplace,[1] but their popularity has surged in recent years. Burger King is selling Impossible Foods' Impossible Burger nationwide, and Starbucks has recently launched an Impossible Breakfast Sandwich.[2] Meanwhile, Beyond Meat—a plant-based meat company best known for its "Beyond Burger" and "Beyond Sausage"—went public in May 2019 and experienced one of the "biggest-popping IPOs" since 2000.[3] In 2020, "[p]lant-based meat had $1.4 billion in sales, growing 45% overall compared to 2019."[4]

With new trends come new regulations. As plant-based meat sales began to rise, a number of states with major animal agriculture industries passed what I have elsewhere called "Tag-Gag" laws.[5] Tag-Gag laws regulate and restrict how companies can label and advertise plant-based meat products. In turn, vegan companies have challenged these statutes as unconstitutional restrictions on free speech.

All Tag-Gag laws build on nearly identical language, which prohibits "misrepresenting a product as meat that is not derived from harvested production livestock or poultry."[6] But with

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[1] *See, e.g.*, *See Our Roots*, TOFURKY, https://tofurky.com/our-story/our-roots/ (last visited June 4, 2021) (noting that the company started in 1980).

[2] *Impossible Whopper*, IMPOSSIBLE, https://impossiblefoods.com/burgerking (last visited June 4, 2021); *Impossible Breakfast Sandwich*, IMPOSSIBLE, https://impossiblefoods.com/starbucks (last visited June 4, 2021).

[3] Mike Murphy, *Beyond Meat Soars 163% in Biggest-Popping U.S. IPO Since 2000*, MARKETWATCH (May 5, 2019, 4:10 PM), https://www.marketwatch.com/story/beyond-meat-soars-163-in-biggest-popping-us-ipo-since-2000-2019-05-02.

[4] Megan Poinski, *Plant-Based Food Worth $7B in 2020, Posting 27% Growth*, FOODDIVE (Apr. 6, 2021), fooddive.com/news/plant-based-food-worth-7b-in-2020-posting-27-growth/597865/#:~:text=A%20total%20of%2057%25%20of,%2C%20up%2075%25%20in%202020.

[5] Jareb A. Gleckel & Sherry F. Colb, *The Meaning of Meat*, 26 ANIMAL L. REV. 75, 108 (2020). The nomenclature "Tag-Gag" is a play on "Ag-Gag," which refers to laws that "seek to 'gag' would-be whistleblowers and undercover activists by punishing them for recording footage of what goes on in animal agriculture." *Ag-Gag Laws,* ANIMAL LEGAL DEF. FUND, https://aldf.org/issue/ag-gag/ (last visited June 4, 2021). "Tag-Gag" laws deter "tagging" products through labeling and advertising.

[6] MO. REV. STAT. § 265.494(7) (2018), *amended by* 2018 Mo. Legis. Serv. 627 & 925 (West). *See also* OKLA. STAT. ANN. tit. 63, § 316 (West 2020) ("misrepresenting a product as meat that is not derived from harvested production livestock"); ARK. CODE ANN. § 2-1-305(6) (2019) ("[r]epresenting the agricultural product as meat or a meat product when the agricultural product is not derived from harvested livestock, poultry, or cervids"); LA. STAT. ANN. §

increasing numbers of states passing labeling and advertising regulations for plant-based products, there is also an increasing number of regulatory variants. Statements in the media, such as "[t]he plant-based industry has had mixed success challenging [Tag-Gag] laws,"[7] can be misleading because they fail to recognize the differences among statutes; different permutations have different practical, as well as legal, implications.

This Article has two main goals. First, it sheds light on the nuances of Tag-Gag statutes. It delineates three main categories, which I refer to, respectively, as "suppression" statutes, "disclosure" statutes, and "ambiguous" statutes. Second, it analyzes the constitutional footing of each respective variant and proposes different approaches that companies can follow when challenging these laws.

II. Suppression Statutes

"Suppression" statutes are those that prohibit companies from using specific language on plant-based meat labels and advertisements. Arkansas, for example, prohibits "[u]tilizing 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."[8] Louisiana, in nearly identical language, prohibits "[u]tilizing a term that is the same as or deceptively similar to a term that has been used or defined historically in reference to a specific agricultural product."[9] In states with suppression statutes, companies cannot use words like "meat" or "beef" on labels or advertisements that describe plant-based meat products because "meat" and "beef" historically refer to animal products.

3.4744(4) (2019) ("[r]epresenting a food product as meat or a meat product when the food product is not derived from a harvested beef, pork, poultry, alligator, farm-raised deer, turtle, domestic rabbit, crawfish, or shrimp carcass").

[7] Elaine Watson, '*Highly Disingenuous . . . ' Plant-Based Labeling Battle Heats Up as More States Challenge Use of Meat, Dairy Terms*, FOOD NAVIGATOR USA, https://www.foodnavigator-usa.com/Article/2021/02/03/Highly-disingenuous-Plant-based-labeling-battle-heats-up-as-more-states-challenge-use-of-meat-dairy-terms (last updated Feb. 11, 2021, 12:40 AM).

[8] ARK. CODE ANN. § 2-1-305(10) (2019).

[9] LA. REV. STAT. § 4744(9) (2019).

Suppression statutes blatantly run afoul of the First Amendment. The First Amendment, which is applicable to states through the Fourteenth Amendment, "prohibits laws that abridge the freedom of speech."[10] To determine whether a law unconstitutionally burdens commercial speech, such as speech on labels or advertisements, courts apply an intermediate-scrutiny test from *Central Hudson Gas & Electric Corporation v. Public Services Commission*.[11] Under *Central Hudson*, as long as commercial speech concerns lawful activity and is not inherently misleading, the government can only regulate the speech if (1) the governmental interest is substantial, (2) the challenged regulation directly advances the government's asserted interest, and (3) the regulation is no more extensive than necessary to further the government's interest.[12]

Certainly, the government has a substantial interest in preventing consumer confusion, which states proffer as their justification for Tag-Gag laws. But under an intermediate scrutiny framework, the burden is on the government to demonstrate that its regulations directly advance that government interest and that the regulations are no more extensive than necessary to further the interest.[13] And state governments cannot meet their burden of showing that Tag-Gag laws directly advance their interests in preventing consumer confusion; there is no evidence to support the position that the presence of words like "meat" on plant-based product labels confuses consumers and that proscribing their use prevents confusion. To the contrary, empirical research demonstrates that:

> (1) consumers are no more likely to think that plant-based products come from an animal if the product's name incorporates words traditionally associated with animal products than if it does not[; and] (2) [o]mitting words that are traditionally associated with animal products from the names of plant-based products actually

[10] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S.Ct. 2361, 2371 (2018).
[11] Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm'n, 447 U.S. 557, 565 (1980).
[12] *Id.* at 566.
[13] *See* Ibanez v. Fla. Dep't of Bus. & Prof'l Regul., 512 U.S. 136, 146 (1994).

> causes consumers to be significantly *more* confused about the taste and uses of these products.[14]

With respect to plant-based meat, in particular, the study found that participants were no more likely to think that a product called "Next Generation Meat: Plant-Based Beef Burger" came from a cow than they were to think that "Next Generation Vegetables: Plant-Based Veggie Patty" did.[15] However, significantly fewer participants thought that eating "Next-Generation Meat: Plant-Based Beef Burger" would taste like eating vegetables than eating "Next Generation Vegetables: Plant-Based Veggie Patty."[16] Since omitting terms creates rather than prevents confusion, legislation prohibiting companies from using words like "meat" or "beef" on plant-based meat labels does not advance the government's interest in preventing consumer confusion.

Empirics aside, common sense dictates that to accurately describe products that replicate the taste, texture, and function of animal products, companies must use words traditionally associated with those animal products. Perhaps the clearest example is a vegan product that replicates tuna fish. While a company *could* call a veggie burger a veggie patty, what option is there for vegan tuna?[17] The word "tuna" is necessary to convey the message that there are plant-based alternatives to killing fish and destroying ocean ecosystems.

As of June 2021, the only court to analyze a suppression statute agreed with the above analysis; a federal court in Arkansas granted Tofurky, a plant-based meat company, a preliminary injunction prohibiting the state from enforcing its suppression statute against the plaintiff.[18] In reaching this holding, the court found that Tofurky was likely to win the merits of its First

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[14] Jareb A. Gleckel, *Are Consumers Really Confused by Plant-Based Food Labels? An Empirical Study*, 12 J. ANIMAL & ENV. L. 1 (2021).
[15] *Id.* at 13.
[16] *Id.*
[17] Please email the author if you can think of one!
[18] Turtle Island Foods, SPC v. Soman, 424 F. Supp. 3d 552, 571 (E.D. Ark. 2019).

Amendment challenge under *Central Hudson*.[19] Courts across the nation should find the same when analyzing suppression statutes.

III. Disclosure Statutes

"Disclosure" statutes fall at the opposite extreme of the spectrum as suppression statutes. They require that, if companies use words like "meat" or "beef" on plant-based products, they must also make clear that the product is vegan. Oklahoma's Tag-Gag law, for example, provides that "product packaging for plant-based items shall not be considered [to misrepresent the products as meat] . . . so long as the packaging displays that the product is derived from plant-based sources in type that is uniform in size and prominence to the name of the product."[20]

Disclosure statutes stand on stronger constitutional footing than suppression statutes because there is a "constitutional presumption favoring disclosure over concealment."[21] In fact, suppression statutes should fail the *Central Hudson* test merely because disclosure statutes are a "less extensive" alternative.[22]

The one federal court to analyze a disclosure statute denied the plant-based company's motion for a preliminary injunction to prevent enforcement of the law.[23] In examining the likelihood that the plaintiffs would succeed on the merits of a First Amendment challenge, the court wrote, "[T]he Supreme Court has recognized that it has 'applied a lower level of scrutiny to laws that compel disclosures in certain contexts,' including cases analyzing the disclosure of 'factual, noncontroversial information in . . . 'commercial speech.'"[24] The court then proceeded to

[19] Assessing the likelihood of a plaintiff's success on the merits is one step a court takes in determining whether to issue a preliminary injunction. *See* Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008).
[20] OKLA. STAT. ANN. tit. 63, § 316 (West 2020).
[21] Peel v. Att'y Registration & Disciplinary Comm'n, 496 U.S. 91, 111 (1990).
[22] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 565 (1980) (holding that the third part of the test is whether the regulation is more extensive than necessary to further the government's interest).
[23] Upton's Nats. Co. v. Stitt, No. CIV-20-938-F, 2020 WL 6808784, at *5 (W.D. Okla. Nov. 19, 2020).
[24] *Id.* at *2 (citing Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S.Ct. 2361, 2371 (2018)).

apply "the lower level of scrutiny" from *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,[25] rather than applying the *Central Hudson* test as the plaintiffs had urged.[26] Under *Zauderer*, a statute requiring disclosure is likely to be upheld if the disclosure is (1) factual, (2) noncontroversial, (3) reasonably related to the state's interest in preventing deception of consumers, and (4) not unduly burdensome.[27]

Of course, merely because courts apply a lower level of scrutiny to disclosures does not mean that all disclosure statutes are constitutional. Even under *Zauderer*, the burden is on the defendant to prove that the disclosure requirement is neither unjustified nor unduly burdensome.[28] The more that regulations control labeling practices by requiring companies to use specific words, fonts, sizes, and placements on packaging, the more likely these statutes are to unduly burden companies.[29]

Not only may disclosure statutes fail *Zauderer* scrutiny, but *Zauderer* does not necessarily provide the appropriate standard for courts to follow when analyzing all disclosure laws. A plaintiff could argue, for example, that Tag-Gag disclosure statutes discriminate based on viewpoint and should therefore be subject to strict scrutiny review.[30] As I have argued elsewhere, veganism is a political ideology, and regulations that specifically target veganism and vegan products therefore target a political viewpoint.[31] Many Tag-Gag statutes, including Oklahoma's, are one-directional. They do not prevent companies that use eggs in their products from advertising and labeling their products as "plant-based," nor do they require that such companies add "with eggs" in the same

[25] Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).
[26] *Upton's Nats. Co.*, 2020 WL 6808784, at *3.
[27] *Id.* at *4 (citing *Zauderer*, 471 U.S. at 651 (1985)).
[28] Ibanez v. Fla. Dep't of Bus. & Prof'l Regul., 512 U.S. 136, 146 (1994).
[29] This also raises issues under the Dormant Commerce Clause as discussed *infra* note 35 and accompanying text.
[30] Wooley v. Maynard, 430 U.S. 705 (1977) (subjecting laws that censor speech based on viewpoint to strict scrutiny).
[31] Gleckel, *supra* note 5, at 108–20.

size and font as the product name—even though the term "plant-based" suggests to consumers that a product is made exclusively from plants.[32]

Additionally, disclosure statutes may be unconstitutional for reasons apart from violating the First Amendment. State laws violate the Dormant Commerce Clause ("DCC")[33] if they purposefully discriminate against out of state commerce[34] or if they impose a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits."[35] Senator Crawford, a drafter of Missouri's law, stated, "we wanted to protect our cattlemen in Missouri and protect our beef brand,"[36] which is the kind of evidence that implicates a discriminatory purpose. And if vegan companies must adjust labels and advertisements for each state, it unduly burdens their ability to market their products nationally.

But to the extent disclosure statutes are unconstitutional, it is because of *how* they require disclosure, not because it is inherently problematic for states to demand more information for consumers. In general, more information is better than less. Therefore, if courts rule against plant-based companies that challenge disclosure statutes, like the district court did in Oklahoma, it is not a "loss" for plant-based companies the way it would be if a court were to uphold a suppression statute.

IV. Ambiguous Statutes

[32] Green Slice foods is one example of a product that labels itself "plant-based" despite using eggs. *Meatless Foods Powered by Organic Goodness*, GREEN SLICE, https://greenslicefoods.com/ (last visited June 4, 2021).

[33] The Dormant Commerce Clause is an unwritten corollary to the Commerce Cause. The Commerce Clause grants Congress affirmative power over interstate commerce, and by implication, the Supreme Court has found that states lack power to regulate even absent federal legislation. C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994).

[34] S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 594 (8th Cir. 2003) (holding a South Dakota referendum had a discriminatory purpose where a drafter wrote that "[d]esperately needed profits [would] be skimmed out of local economies and into the pockets of distant corporations" without the proposed amendment).

[35] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[36] Complaint for Declaratory and Injunctive Relief, Turtle Island Foods v. Richardson, No. 18-CV-4173 (W.D. Mo. Aug. 27, 2018).

Ambiguous Tag-Gag statutes merely provide a blanket prohibition against "misrepresenting a product as meat that is not derived from harvested production livestock or poultry."[37] Facially, it is impossible to know whether such statutes are suppression or disclosure statutes.

The Eighth Circuit Court of Appeals, the only appellate court to have ruled on a Tag-Gag statute as of June 2021, affirmed the district court's denial of Tofurky's demand for a preliminary injunction against Missouri's ambiguous statute.[38] In reaching this holding, however, the court interpreted the statute as a disclosure statute, relying on "the Department[] [of Agriculture's] currently-expressed view [that] products containing . . . disclosures 'do not misrepresent themselves as meat' and therefore do not violate section 265.494(7)."[39] Therefore, the court held that the statute did not apply to Tofurky's products and found that Tofurky was safe against the possibility of an enforcement action.[40]

As is evident from the Eighth Circuit's ruling, a court's decision to side with a state regarding an ambiguous Tag-Gag statute is not, by definition, an unfavorable outcome for a vegan-company plaintiff—namely if the court interprets the statute as a disclosure statute. Nonetheless, I argue that ambiguous Tag-Gag statutes should be unconstitutional unless a *state* (as opposed to a court) explicitly interprets it as a disclosure statute.[41] Ambiguous statutes are perhaps the most dangerous to plant-based companies because, without downright suppressing speech, they chill

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[37] MO. ANN. STAT. § 265.494(7) (2018), *amended by* 2018 MO. LEGIS. SERV. 627 & 925 (West).
[38] Turtle Island Foods, SPC v. Thompson, 992 F.3d 694 (8th Cir. 2021).
[39] *Id.* at 698.
[40] *Id.* at 699–700.
[41] I have argued elsewhere that statements by Missouri's Department of Agriculture should not have influenced the court's interpretation of Missouri's Tag-Gag statute. Missouri's statute carries criminal penalties and is therefore enforceable by over 100 individual prosecutors, whom the Department of Agriculture has no capacity to bind. Sherry Colb & Jareb Gleckel, *Dear Big Ag: We Don't Trust Your Motives*, DORF ON LAW (June 14, 2019), http://www.dorfonlaw.org/2019/06/dear-big-ag-we-dont-trust-your-motives.html.

companies' use of words like "meat" as descriptors of plant-based products. They are, therefore, *de facto* suppression statutes.

I propose that due process vagueness claims are the key to defeating ambiguous statutes like Missouri's. A statute is unconstitutionally vague if it fails to "give people 'of common intelligence' fair notice of what the law demands of them."[42] Ambiguous Tag-Gag statutes are vague precisely because a company cannot know if the statute requires disclosure or suppression of speech. By challenging a Tag-Gag statute as vague, a plaintiff can either cause a court to strike the statute down outright or force the state to clarify the statute. If a state adopts the position that the statute requires disclosure, this should not pose a threat to companies' marketing since companies brand their plant-based meat products as vegan or plant-based regardless. If a state adopts the position that a statute prohibits plant-based companies from using key words like "meat" and "burger" on labels and advertisements, then the First Amendment claim stands on firm ground.

V. Conclusion

With the rise of plant-based meat products, corresponding state regulations, and legal challenges to the regulations, it is important for vegan companies, legal scholars and the media to accurately track the shifting landscape. While it is easy to describe a general war between plant-based companies and agriculture-heavy states over vegan labeling and marketing, the nuances are equally important. This Article has attempted to provide clarity about these nuances by delineating three categories of state Tag-Gag laws. By analyzing the legal implications of each variant, it aims to help vegan companies challenge Tag-Gag statutes so that their products can be optimally competitive in a national marketplace.

[42] United States v. Davis, 139 S. Ct. 2319, 2325 (2019).