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COURT LOSS SHOULD DETER SPEECH RESTRICTIONS ON PLANT-BASED PRODUCT NAMES

by Marc Robertson

In a decision you may have missed during this past holiday season, commercial speech and common sense prevailed when the U.S. District Court for the Eastern District of Arkansas held in [Turtle Island Foods SPC d/b/a Tofurky Co. v. Soman](#) that the State could not impose what it thought was the best way to name plant-based meat substitutes. An Arkansas statute would prohibit plant-based-product companies' use of words on their labels that are "traditionally associated with animal-based meat"—think, "burger," "chorizo style sausage," or "deli slices." Judge Kristine Baker issued a preliminary injunction after determining that the plaintiff, Tofurky, is likely to prevail on the merits of its First Amendment claim.

Tofurky is, as the court put it, a "social purpose corporation" that produces plant-based, vegan or vegetarian meals, often in the form of traditional meat dishes. It labels its products using meat-based terms like "Veggie Burger," "Slow Roasted Chick'n," and "Polish-style wheat gluten and tofu sausages." Each label clearly identified the product as vegan or vegetarian and features the letter "V," which is widely understood to mean the product is vegan or vegetarian. The Arkansas legislature concluded that such labels mislead consumers, and passed Act 501 to clear up the supposed confusion. It 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." Ark. Code. Ann. § 2-1-305.

Tofurky filed a motion for declaratory and injunctive relief, arguing that Act 501's labeling provisions infringe upon its First Amendment right to share truthful and non-misleading information about its products and would actually create more consumer confusion than alleviate it.

The District Court considered, among other factors, the likelihood that Tofurky would succeed on the merits of its First Amendment challenge. It applied the Supreme Court's four-part *Central Hudson* test. Under *Central Hudson*, courts consider whether: (1) the commercial speech at issue concerns unlawful activity or is misleading; (2) the government has a substantial interest in regulating the speech; (3) the regulation directly and materially advances the government's substantial interest; and (4) the regulation is not "more extensive than is necessary to serve" the asserted interest. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

The District Court began its analysis by "considering the label as a whole" and determining whether "'an ordinary consumer would [] be deceived' as to the nature of the product." [Turtle](#)

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[*Island Foods SPC d/b/a Tofurky Co. v. Soman*](#), No. 4:19-cv-00514-KGB, 2019 WL 7546141, at *12 (E.D. Ark. Dec. 11, 2019). It stated that, under the first prong of *Central Hudson*, unless the speech is “inherently misleading” or related to “unlawful activity,” the government has limited power to restrict the speech and the court should conduct a full *Central Hudson* analysis. Arkansas argued that terms like “Veggie Burger” were inherently misleading and thus deserved no constitutional protection. The court disagreed, concluding that “the simple use of a word frequently used in relation to animal-based meats does not make use of that word in a different context inherently misleading.” *Id.* at *11.

On the second prong, the court assumed without deciding that the State does have a substantial interest in “protect[ing] consumers from being misled or confused by false or misleading labeling of agricultural products that are edible by humans.”

The third prong requires the regulation to directly advance that interest. Because the court determined that Tofurky’s labels are neither false nor misleading, the Act does not actually alleviate consumer deception and misinformation. The Act also failed the fourth prong as its “blanket restriction is far more extensive than necessary.” *Id.* at *13. The court noted that Tofurky pointed to several federal and state laws that already prohibit deceptive labeling and marketing of food products, but the State failed to demonstrate why those laws are inadequate. And the court found that less restrictive alternatives did exist, such as requiring “more prominent disclosures of the vegan nature of plant-based products.” *Id.*

Judge Baker’s decision is just the first step in Tofurky’s legal challenge, but it positively highlights the strength of plant-based-product producers’ constitutional arguments against such labeling restrictions. Unfortunately, one federal court’s preliminary ruling is unlikely to deter other States from attempting to save reasonable consumers from themselves. For instance, a Washington legislator has [introduced a bill](#) aimed at “Veggie Burger” and other meat-alternative terms he finds objectionable and misleading.

And paternalistic legislators, often egged on by industry competitors, aren’t stopping at meat alternatives. Plant-based milk alternatives, which prominently use descriptive adjectives such as “almond,” “soy,” and “hemp” in front of the word “milk,” have come under fire. In Oklahoma, a state representative introduced legislation that would limit the use of the word “milk” to only that which is “produced by mammals with hooves.” [Our View: Milk-label Bill Better Suited for Compost Bin than Legislative Committee](#), Muskogee Phoenix (Jan. 19, 2020). A Kentucky State Senator introduced a similar bill, Senate Bill 81, which would also restrict the use of the word “milk” to only refer to that which comes from a hooved animal. See John Cheves, [Don’t Call It ‘milk’ If it Doesn’t Come from a Hooved Mammal, KY Senator Says](#), Lexington Herald Leader (Jan. 16, 2020). These are examples of at least eleven states that have enacted similar laws in recent years targeting plant-based alternatives to meat and dairy. *Id.* Even a group of federal legislators have joined the chorus, signing a letter to FDA’s Commissioner that urges the agency to “ensure that dairy terms may only be used to describe products that include dairy.” Sylvan Lane, [Senators Ask FDA to Crack Down on Non-Dairy Milks, Cheeses](#), The Hill, Jan. 24, 2020.

Legislators and regulators have the authority to combat speech that is truly misleading, though we’d prefer that unclear labeling be remedied through *more* speech, not less. And they certainly shouldn’t be embracing cures that are worse than the alleged disease—laws that create confusion where reasonable consumers wouldn’t be confused in the first place. Thankfully we have the First Amendment, and its faithful application by judges like Judge Baker, to help remind our elected officials and unelected regulators of those basic principles of lawmaking and regulation.