

# BEYOND THE BURGER: PROPOSING GUIDANCE FOR ALTERNATIVE DAIRY PRODUCT LABELING

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## ABSTRACT

*Is a hot dog a sandwich? Americans have grappled with a less humorous version of this debate for years. Namely, what qualifies as “milk”? As plant-based food products become more sophisticated, their capacity to closely emulate the taste and appearance of orthodox food is increasingly impressive. In December of 2016, Congress commenced a legislative crusade prohibiting non-dairy beverages from bearing the “milk” label. This campaign has sparked renewed inquiries into*

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*how plant-based manufacturers categorize their products. Developing consistent labeling standards for these foods has met significant obstacles, which are exacerbated by varying interstate perspectives. Overcoming these barriers requires concerted efforts from regulatory bodies and industry stakeholders. In this era of food innovation, this Article explores consumer trends, declining sales and consumption of cow milk, and opportunities for healthy market competition between conventional and dairy alternatives.*

*This Article identifies and assesses these challenges, examining proposed and current state regulations and rationalizing federal intervention. It explores draft federal guidelines issued by the FDA as a temporary solution to bridge existing regulatory gaps. Additionally, this Article critically evaluates the prevalent practice of referencing one food to label another. It delivers an overview of the Canadian regime, seeking insight into how the United States can adopt regulatory frameworks to accommodate the evolving landscape of plant-based products. This Article advocates for implementing the Canadian labeling system until the responsible American agencies can establish new standards of identity for plant-based foods.*

## I. INTRODUCTION

The United Nations' (UN) omission of alternative proteins from its recent climate plan bewildered many experts who found this exclusion "concerning and surprising."<sup>1</sup> Simply reducing carbon dioxide emissions is insufficient to address the climate crisis.<sup>2</sup> We must acknowledge methane's escalating contribution to global warming.<sup>3</sup> This greenhouse gas "has a 'warming potential' more than 80 times that of CO<sub>2</sub>."<sup>4</sup> It originates from various activities, including animal agriculture.<sup>5</sup> Approximately 60% of methane emissions originate from human

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1. Damian Carrington, 'Bewildering' to Omit Meat-Eating Reduction from UN Climate Plan, THE GUARDIAN (Mar. 18, 2024, 6:00 AM), <https://www.theguardian.com/environment/2024/mar/18/bewildering-to-omit-meat-eating-reduction-from-un-climate-plan> [<https://perma.cc/ZK7U-FKMN>].

2. Fiona Harvey, *Reduce Methane or Face Climate Catastrophe, Scientists Warn*, THE GUARDIAN (Aug. 6, 2021, 2:00 PM), <https://www.theguardian.com/environment/2021/aug/06/reduce-methane-or-face-climate-catastrophe-scientists-warn> [<https://perma.cc/55K9-F9KE>].

3. *Id.*

4. *Id.*; V. Ramaswamy et al., *Radiative Forcing of Climate Change*, in CLIMATE CHANGE 2001: THE SCIENTIFIC BASIS 349, 387–88 (J.T. Houghton et al. ed., 2001).

5. *Tropospheric Ozone*, CLIMATE & CLEAN AIR COAL. (Nov. 12, 2024, 5:27 PM), <https://www.ccacoalition.org/short-lived-climate-pollutants/tropospheric-ozone> [<https://perma.cc/M2VJ-6DP7>].

activities, while natural processes contribute the remaining 40%.<sup>6</sup> Perhaps most tangibly, methane exposure yields one million premature deaths from respiratory illness and heat vulnerability annually.<sup>7</sup> According to the UN Environment Programme, methane emissions reached a record high in 2019.<sup>8</sup> This news has left many critics scrutinizing the agricultural sector.<sup>9</sup> It has also renewed the demand for increased availability of plant-based food products.<sup>10</sup>

The retail value of plant-based foods has increased to \$7.4 billion, rising from \$6.9 billion in 2020.<sup>11</sup> According to the University of Oxford, eliminating meat and dairy products from your diet could be the “single biggest way” to slash your environmental impact.<sup>12</sup> Over 25 municipalities have addressed this realization by endorsing a transition to a plant-based diet.<sup>13</sup> The City of Boynton Beach in Palm Beach County, Florida, became the inaugural city to support the Plant Based Treaty, endorsing the treaty just 10 days after its launch on August 31, 2021.<sup>14</sup> Although the probability that the public will fully adopt a plant-based diet is low, this Article examines the potential for localized industrial and regulatory measures addressing these products. As more municipalities consider endorsement, some may encounter challenges in promoting specific products.

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6. *Methane*, NAT'L AERONAUTICS & SPACE ADMIN. (Nov. 12, 2024, 5:32 PM), <https://climate.nasa.gov/vital-signs/methane/> [<https://perma.cc/MHV5-QS3B>].

7. *Tropospheric Ozone*, *supra* note 5.

8. *Emissions Gap Report 2020*, UNITED NATIONS ENV'T PROGRAMME (2020), <https://www.unep.org/interactive/emissions-gap-report/2020/> [<https://perma.cc/X9J8-8ZJB>].

9. Frida Garza, *Food Is a Huge Source of Methane Emissions. Fixing That Is No Easy Feat*, INVESTIGATE MIDWEST (Sept. 30, 2024), <https://investigatamidwest.org/2024/09/30/food-is-a-huge-source-of-methane-emissions-fixing-that-is-no-easy-feat/> [<https://perma.cc/A5NQ-PPYL>].

10. *Id.*

11. EMMA IGNASZEWSKI, GOOD FOOD INST., PLANT-BASED FOODS 3 (2022), [https://gfi.org/wp-content/uploads/2022/03/2021-U.S.-retail-market-insights\\_Plant-based-foods-GFI.pdf](https://gfi.org/wp-content/uploads/2022/03/2021-U.S.-retail-market-insights_Plant-based-foods-GFI.pdf) [<https://perma.cc/H9FA-ZMUU>].

12. Olivia Petter, *Veganism Is 'Single Biggest Way' to Reduce Our Environmental Impact, Study Finds*, INDEP. (Sept. 24, 2020, 2:19 PM), <https://www.independent.co.uk/life-style/health-and-families/veganism-environmental-impact-planet-reduced-plant-based-diet-humans-study-a8378631.html> [<https://perma.cc/6HB9-6L3W>].

13. Cara Buckley, *These Cities Aren't Banning Meat. They Just Want You to Eat More Plants*, N.Y. TIMES (Feb. 28, 2024), <https://www.nytimes.com/2024/02/28/climate/plant-based-treaty-climate.html>.

14. Press Release, Plant Based Treaty, Boynton Beach Is World's First City to Endorse Plant Based Treaty (Sept. 9, 2021), <https://plantbasedtreaty.org/breaking-news-city-of-boynton-beach-first-city-to-endorse-plant-based-treaty/> [<https://perma.cc/3CNP-CUAK>].

This Article examines the FDA's suggested guidance, investigating how further policy formulation could mitigate the recent influx of state laws. It analyzes present tensions through the lens of judicial efficiency, minimizing recurring and repetitive litigation. It next inquires whether plant-based food product labels *must* reference other foods to attract consumers, as is the common practice within the United States. Comparatively, the Canadian framework uses specialized jargon to describe plant-based dairy alternatives (i.e., almond milk becomes an almond beverage).<sup>15</sup> This Article employs a cross-jurisdictional perspective to gauge whether the United States could, or should, adopt the Canadian approach to labeling.

Dairy farmers should be involved in identifying solutions to climate change. In southern Idaho, USDA has begun researching how to assist the dairy industry in meeting its carbon-neutral goal by 2050.<sup>16</sup> For example, farmers may support no-till planting to maintain healthy soil, saving about \$50 per acre.<sup>17</sup> This practice alone may reduce about a quarter of the dairy industry's carbon footprint.<sup>18</sup> Moreover, family farmers across America have prioritized sustainability, becoming "some of our fiercest climate advocates."<sup>19</sup> These families have committed to modernizing their dairy farming practices to meet market trends.<sup>20</sup> The plant-based food industry should aim for compromise by introducing and implementing a new standard of identity (SOI) for its products. By embracing these practices, farming families and plant-based manufacturers can ensure their enterprises' success for generations to come.

This Article considers a multi-faceted analytical approach. Part II evaluates the role of existing federal law in shaping future generations of guidance. In

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15. GOV'T OF CAN., 2019 CANADA'S FOOD GUIDE FOOD CLASSIFICATION SYSTEM: CLASSIFICATION OF FOODS AND BEVERAGES INTO CATEGORIES 2 (2022), <https://www.canada.ca/content/dam/hc-sc/documents/services/publications/food-nutrition/2019-canada-food-guide-food-classification-system-foods-beverages-categories/2019-canada-food-guide-food-classification-system-foods-beverages-categories.pdf> [<https://perma.cc/RZ53-83S2>].

16. Rachel Cohen, *The Dairy Industry Aims to Be Carbon Neutral by 2050. Here's What It Means for Farms*, NPR (Apr. 27, 2022, 5:21 PM), <https://www.npr.org/2022/04/27/1095100351/the-dairy-industry-aims-to-be-carbon-neutral-by-2050-heres-what-it-means-for-far> [<https://perma.cc/NZE4-3NC6>].

17. *Id.*

18. *Id.*

19. Vanguard Renewables, *A Sustainable Moo-vement: How the Dairy Industry Is Fighting Climate Change*, ACCESSWIRE (Mar. 8, 2024, 7:30 AM), <https://www.accesswire.com/840828/a-sustainable-moo-vement-how-the-dairy-industry-is-fighting-climate-change> [<https://perma.cc/48B4-YKH8>].

20. *Id.*

particular, the Article considers whether plant-based dairy alternatives qualify as “imitations.”<sup>21</sup> The United States’ Food, Drug, and Cosmetic Act (FDCA) stipulates that when a food imitates another, it must disclose that fact on its label.<sup>22</sup> Part III explores the relevant state and common law, delineating critical litigation by era. Part IV concludes with insight into the regulatory space, discerning how suggested regulations may impact market trends. This Article urges the FDA and USDA to propose comprehensive guidance, stressing the need for transparent labeling and ensuring proper food consumption. It recommends utilizing the Canadian regulatory framework as a template for change in the United States.

## II. EVALUATING FEDERAL LAW AND ITS IMPACT ON PLANT-BASED DAIRY ALTERNATIVES LABELING UNDER THE FDCA

This Part explores the intersections between the Canadian dairy model, which has excluded plant-based products, and the laissez-faire approach adopted by the United States. It samples the relevant federal legislation as applied by the FDA, which oversees dairy products, and would ideally extend its oversight to plant-based alternatives.<sup>23</sup> Efforts by the FDA to introduce guidance on this issue have failed to meet expectations, eliciting dissatisfaction from all parties.<sup>24</sup> Moreover, this minimalist approach has enabled state legislatures to interfere with interstate commerce by passing comprehensive bills that define “meat” and “dairy” in a way that eliminates competition.<sup>25</sup>

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21. 21 U.S.C. § 343(c); 21 C.F.R. § 101.3(e).

22. 21 U.S.C. § 343(c).

23. See *Food and Drug Administration (FDA)*, INT’L DAIRY FOODS ADMIN. (Nov. 19, 2024, 9:36 PM), <https://www.idfa.org/standards-labeling/food-and-drug-administration-fda> [<https://perma.cc/UZH6-BJJE>].

24. Stephanie Sy & Lena I. Jackson, *New FDA Guidelines on Milk Spark Disagreements Between Farmers and Plant-Based Companies*, PBS NEWS (Mar. 2, 2023, 6:30 PM), <https://www.pbs.org/newshour/show/new-fda-guidelines-on-plant-based-milk-spark-disagreement-among-farmers> [<https://perma.cc/P8JZ-BG7R>].

25. See Kyle Diamantas & Kelly G. Laudon, *What’s in a Name? Updates on Plant-Based Product Labeling Regulations*, FOOD & DRUG L. INST. (Sept. 2022), <https://www.fdi.org/2022/09/whats-in-a-name-updates-on-plant-based-product-labeling-regulations/> [<https://perma.cc/N7V9-436A>].

*A. Regulatory Ambiguity and the Need for Clear Guidelines Within the Plant-Based Food Industry*

While the federal government has standardized definitions for some food items, it has yet to provide equivalent guidelines for plant-based foods.<sup>26</sup> This disparity has produced regulatory ambiguity. Without explicit guidance, manufacturers must guess how established regulations may or should apply to their products. Given the growing market for plant-based foods, many now clamor for clarity, and the states have responded.<sup>27</sup> At least 13 states have introduced bills restricting “the use of traditional meat and dairy terms . . . on the labels of non-meat products.”<sup>28</sup> These laws focus on products whose label invoke other foods.<sup>29</sup> In the future, it is reasonable to speculate that lawmakers may extend their focus to other plant-based products, such as almond milk.

With the increasing sophistication of plant-based products, certain groups have voiced their disapproval regarding the heightened competition. For example, at the insistence of the state’s farmers union, South Dakota enacted its “truth in labeling” policy.<sup>30</sup> According to *Food Dive*, agriculture is the leading industry in South Dakota, which ranks among the top 15 states for livestock production.<sup>31</sup> One rancher explained, “[W]e don’t want our competition to build their business on our more than a century old, hard-earned reputation for producing a quality and safe product.”<sup>32</sup> His sentiments resonate with other dairy farmers and various commentators. One YouTuber joked, “There’s so much confusion in city folk these days. They are talking about [how] nuts don’t lactate, nuts don’t have nipples.”<sup>33</sup>

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26. Press Release, U.S. Food & Drug Admin., FDA Provides Draft Labeling Recommendations for Plant-Based Milk Alternatives to Inform Consumers (Feb. 22, 2023), <https://www.fda.gov/news-events/press-announcements/fda-provides-draft-labeling-recommendations-plant-based-milk-alternatives-inform-consumers> [<https://perma.cc/685E-GCPF>].

27. See Diamantas & Laudon, *supra* note 25.

28. *Id.*

29. *Id.*

30. Jessi Devenyns, *Mississippi and South Dakota Criminalize Misuse of Term ‘Meat,’* FOOD DIVE (Apr. 4, 2019), <https://www.fooddive.com/news/mississippi-and-south-dakota-criminalize-misuse-of-term-meat/552021/> [<https://perma.cc/H9WE-6DJQ>]; *SD Passes Bill in Support of Truthful Meat Labeling*, TRI-STATE LIVESTOCK NEWS (Mar. 4, 2019), <https://www.tsln.com/news/sd-passes-bill-in-support-of-truthful-meat-labeling/> [<https://perma.cc/9LBC-KUN7>].

31. Devenyns, *supra* note 30.

32. *Legislature Passes Senate Bill 68 in Support of Truthful Labeling & Livestock Industry*, S.D. FARMERS UNION (Mar. 5, 2019), <https://sdfu.org/legislature-passes-senate-bill-68-in-support-of-truthful-labeling-livestock-industry/> [<https://perma.cc/7QSV-Q45L>].

33. Sy & Jackson, *supra* note 24.

This differentiation, though blunt, underscores the core question: what exactly are these products? Are they to be categorized as “milk”? Or do they represent a completely new product, warranting its own SOI?

The plant-based food industry has responded.<sup>34</sup> Most opponents of the state legislation challenge the laws under the First Amendment prohibition of compelled speech, preventing the government from enforcing “the endorsement of ideas that it approves.”<sup>35</sup> That logic has received support from various commentators. Daren Bakst, Senior Research Fellow in Agricultural Policy at the Heritage Foundation, reasoned, “Consumers . . . should be able to decide what products best meet their needs without government intervention.”<sup>36</sup> If the government prevents or restricts consumer freedom of choice, it infringes upon ideals of individual autonomy and reduces market diversity by encouraging monopolistic practices.<sup>37</sup> Perhaps more accurately, Mary Azcuenaga, a former FTC Commissioner, said, “Competition is not always pretty, but ultimately, competition benefits consumers.”<sup>38</sup> Truly, market competition drives innovation, incentivizing companies to invest in development to differentiate themselves from other producers.<sup>39</sup> To facilitate fair competition, the relevant federal agencies should promulgate regulations or issue guidance on addressing plant-based products.

The FDA and USDA hold concurrent jurisdiction over food labeling.<sup>40</sup> Congress has long instructed them to designate “a reasonable definition and [SOI]”

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34. See Petition to Recognize the Use of Well-Established Common and Usual Compound Nomenclatures for Food, Good Food Inst., Docket No. FDA-2017-P-1298 (Mar. 2, 2017) [hereinafter Good Food Inst. Citizen Petition], <https://gfi.org/images/uploads/2017/03/GFIPetitionFinal.pdf> [<https://perma.cc/HVG5-4D7B>].

35. *Knox v. Serv. Emps. Int’l Union*, Loc. 1000, 567 U.S. 298, 309 (2012); see MACKENZIE BATTLE & CYDNEE BENCE, CTR. FOR AGRIC. & FOOD SYS., VT. L. SCH., HOW DOES THE FIRST AMENDMENT APPLY TO FOOD AND SUPPLEMENT LABELS? 1 (2024), <https://labelsunwrapped.org/wp-content/uploads/2021/06/First-Amendment-Food-Labeling-Issue-r5.pdf> [<https://perma.cc/4U4P-LW73>].

36. Daren Bakst, *States Shouldn’t Use Protectionist Schemes to Limit Consumer “Meat” Choices*, HERITAGE FOUND. (Feb. 28, 2019), <https://www.heritage.org/agriculture/commentary/states-shouldnt-use-protectionist-schemes-limit-consumer-meat-choices> [<https://perma.cc/6S5L-DT7F>].

37. Thomas B. Leary, *Freedom as the Core Value of Antitrust in the New Millennium*, FED. TRADE COMM’N (Apr. 6, 2000), <https://www.ftc.gov/news-events/news/speeches/freedom-core-value-antitrust-new-millennium> [<https://perma.cc/EZ4V-RTQW>].

38. Mary L. Azcuenaga, *Address to Boston University School of Law: Recent Issues in Antitrust and Intellectual Property*, 7 B.U. J. SCI. & TECH. L. 1, 4 (2001).

39. *Id.*

40. *Food Labeling – An Overview*, NAT’L AGRIC. L. CTR. (Nov. 13, 2024, 5:54 PM), <https://nationalaglawcenter.org/overview/food-labeling/> [<https://perma.cc/G2Z2-E5XN>].

for “any food, under its common or usual name.”<sup>41</sup> Under this legislative mandate, both agencies should collaborate to establish clear guidelines to guarantee consistency and transparency for conventional food and their alternatives. In March of 2019, the USDA and FDA did reach a formal agreement to jointly oversee cell-cultured human food products.<sup>42</sup> Otherwise, these agencies split their authority.<sup>43</sup> While USDA oversees meat and poultry products, FDA regulates the remaining food supply, including dairy products.<sup>44</sup>

Nevertheless, uncertainty remains regarding which regulatory agency holds primary responsibility for overseeing different plant-based alternatives given their novelty. In 2018, the United States Cattlemen’s Association (USCA) requested that USDA establish explicit and precise regulations for meat product labeling.<sup>45</sup> Specifically, the petition urged USDA to exclude products not originating from animals from its labeling permissions.<sup>46</sup> The USDA found it lacked the authority to regulate the plant-based products.<sup>47</sup> Instead, it advised the USCA to report any concerns to the FDA, which could recommend guidance when “a non-animal product is being labeled as ‘meat’ or ‘beef.’”<sup>48</sup> While this Article addresses plant-based alternatives to dairy, FDA could also engage the FDCA to assert its jurisdiction to regulate alternative meat products.<sup>49</sup>

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41. 21 U.S.C. § 341.

42. News Release, Food & Drug Admin., USDA and FDA Announce a Formal Agreement to Regulate Cell-Cultured Food Prods. from Cell Lines of Livestock and Poultry (Mar. 7, 2019), <https://www.fda.gov/news-events/press-announcements/usda-and-fda-announce-formal-agreement-regulate-cell-cultured-food-products-cell-lines-livestock-and> [<https://perma.cc/2K6D-GSMQ>].

43. Elan Abrell, Senior Regul. Specialist, The Good Food Inst. et al., Panel at the Food and Drug Law Institute’s Food Enforcement and Compliance Conference: Traditional Meat and Dairy Food and Innovative Substitutes: Key Regulatory and Enforcement Issues (Mar. 21, 2019), <https://www.fdli.org/wp-content/uploads/2019/03/11AM-12PM-Traditional-Meat-and-Dairy.pdf> [<https://perma.cc/SBB7-JNEV>].

44. *Id.*

45. *See Petition to Limit the Definition of Beef to Traditional Sources*, FOOD SAFETY & INSPECTION SERV., U.S. DEP’T OF AGRIC. (Feb. 9, 2018), <https://www.fsis.usda.gov/federal-register/petitions/petition-limit-definition-beef-traditional-sources> [<https://perma.cc/YW8Y-ZAG3>].

46. *Id.*

47. Diamantas & Laudon, *supra* note 25.

48. *Id.*

49. *See id.*



*B. Resolving Challenges: Proposing New Standards of Identity to Avoid Misbranding Under the FDCA*

Existing literature investigates the ramifications of misbranding or mislabeling plant-based dairy alternatives under the FDCA.<sup>50</sup> Scant few offer a resolution beyond advocating for regulatory agencies to permit plant-based alternatives to continue using traditional terminology to market its products.<sup>51</sup> This Article diverges from the available literature, proposing that the United States consider the *sui generis* of these products and develop new SOIs befitting their status. To realize this vision, stakeholders must possess a functional understanding of the FDCA.

Congress enacted the FDCA in 1938, following the deaths of 107 individuals from a poorly regulated but “legally marketed toxic elixir.”<sup>52</sup> The Act authorizes the FDA to “regulate[] all foods and food ingredients introduced into or offered for sale in interstate commerce.”<sup>53</sup> Section 343 of the FDCA outlines the criteria for determining when a food is considered “misbranded.”<sup>54</sup>

Manufacturers can avoid disciplinary action by modifying their labels to comply with FDA regulations. For example, a plant-based company might brand its product as a dairy “imitation” to lessen the risk of potential fraud allegations.<sup>55</sup> Per the FDA, an “imitation” is a “substitute for and resembles another food but is nutritionally inferior to that food.”<sup>56</sup> Under the FDCA’s implementing regulations, one product resembles another when they are “organoleptically, physically, and functionally . . . similar.”<sup>57</sup> A “substitute” denotes a product intended to be “used interchangeably with another food.”<sup>58</sup> These interwoven definitions complicate manufacturers’ willingness to embrace the “imitation” label, especially when it implies some modicum of “nutritionally inferiority.”<sup>59</sup>

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50. See, e.g., Clay D. Sapp, *Citizen Surveillance of Misleading Food Labeling*, 126 PENN. STATE L. REV. 389, 399–400, 411 (2022).

51. See, e.g., Katie Justison, *Which Came First: The Chicken or the Chick’n? An FDA Amendment Proposal to Reconcile Conflicting Interests in Plant-Based Meat Labeling*, 64 WM. & MARY L. REV. 1863, 1891–92 (2023).

52. *Laws Enforced by FDA*, U.S. FOOD & DRUG ADMIN. (Apr. 19, 2021), <https://www.fda.gov/regulatory-information/laws-enforced-fda> [<https://perma.cc/7F3N-HDX4>].

53. *Id.*

54. 21 U.S.C. § 343.

55. See 21 C.F.R. § 101.3(e) (2024).

56. *Id.* § 101.3(e)(1).

57. *Id.* § 101.13(d).

58. *Id.*

59. *Id.* § 101.3(e)(4).

Many plant-based food manufacturers interpret the “imitation foods’ provision [to be] based on the cheapening and counterfeiting of products.”<sup>60</sup> Their distaste hinges on the fact that plant-based products boast varying nutritional profiles.<sup>61</sup> For example, soy milk contains increased iron, whereas cow milk contains more potassium.<sup>62</sup> However, the “imitation” classification signals a “reduction in the content of an essential nutrient that is present in a measurable amount.”<sup>63</sup> This interpretation highlights the complexity of categorizing these products. This is not a one size fits all approach.

For many, their argument pivots on whether plant-based products qualify as “imitations,” and if they do, the implications for competition within the traditional industry.<sup>64</sup> However, this Article proposes an interim solution—applying section 343(i).<sup>65</sup> Section 343(i) of the FDCA lays out how to label a product with no definition and SOI.<sup>66</sup> However, adopting this framework assumes those products forego the opportunity to declare themselves as dairy items. So, what next?

One pathway for FDA involvement includes establishing a standard definition for plant-based products.<sup>67</sup> Beginning in 1939, FDA has approved an SOI for over 250 food items.<sup>68</sup> These SOIs insulate consumers from economically motivated adulteration, manifesting as food fraud.<sup>69</sup> For example, from 2008 to 2012, cases of “pine mouth” arose when certain manufacturers replaced edible nut species with a non-food variety.<sup>70</sup> This condition left a “bitter metallic taste” in consumers’ mouths, which lasted for weeks.<sup>71</sup> The FDA penalizes manufacturers for misbranding their products and selling adulterated items.<sup>72</sup> By establishing a

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60. Nigel Barrella, *Are Plant-Based Milks “Imitations”? No Whey!*, GOOD FOOD INST. (Mar. 23, 2021), <https://gfi.org/blog/plant-based-milk-fda-comment/> [<https://perma.cc/UTE8-QYZJ>].

61. *Id.*

62. *Id.*

63. 21 C.F.R. § 101.3(e)(4)(i).

64. See Barrella, *supra* note 60.

65. 21 U.S.C. § 343(i).

66. *Id.*

67. See *Standards of Identity for Food*, U.S. FOOD & DRUG ADMIN. (Mar. 14, 2024), <https://www.fda.gov/food/food-labeling-nutrition/standards-identity-food> [<https://perma.cc/BU53-LFZQ>].

68. *Id.*

69. See *Economically Motivated Adulteration (Food Fraud)*, U.S. FOOD & DRUG ADMIN. (Apr. 18, 2024), <https://www.fda.gov/food/compliance-enforcement-food/economically-motivated-adulteration-food-fraud> [<https://perma.cc/4CN2-YA7E>].

70. *Id.*

71. *Id.*

72. *Id.*

clear definition for plant-based dairy alternatives, the FDA can curtail deceptive practices such as misrepresenting ingredients or perpetuating misleading labeling claims.

There might be pushback from the dairy industry regarding the differing nutritional content of cow milk versus plant-based alternatives. At times, the FDA has permitted certain foods to have a “nutrient content claim and a standardized term,” even if those label components did not align with the SOI.<sup>73</sup> Responding to public demand, Congress has amended the FDCA by mandating labeling disclosures for prevalent allergens.<sup>74</sup> Afterward, manufacturers began offering alternatives to conventional foods—like cookie butter, to replace peanut butter.<sup>75</sup> This amendment has also permitted product labels to promote reduced nutrient levels.<sup>76</sup> As a result, products bearing designations like “low-fat” or “reduced calorie” emerged.<sup>77</sup> These products preserve consumer freedom of choice by easing avoidance of common allergens and facilitating diet curation through low fat and reduced calorie options. While this framework has not yet integrated plant-based foods, it does not render the idea implausible.<sup>78</sup> Thus, while challenges persist, there remains a potential for managing the present regulatory landscape to accommodate plant-based dairy alternatives.

The FDA may also solicit stakeholder input for establishing new SOIs for products.<sup>79</sup> In 1997, the Soyfoods Association of America (SANA) requested the agency recognize “soymilk” as “the established common or usual name to be used in labels . . . to identify a beverage of this nature.”<sup>80</sup> The first documented use of the word “soymilk” occurred in 1936, and its usage has steadily increased in popularity.<sup>81</sup> To support its petition, SANA referenced a March 1984 memorandum from the Government of Canada.<sup>82</sup> That memorandum indicated that “soymilk” is a “well established” term within the industry, “thus barring any

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73. Good Food Inst. Citizen Petition, *supra* note 34, at 4.

74. *Id.* at 5; 21 U.S.C. §§ 343(w), 321(qq).

75. *See* Good Food Inst. Citizen Petition, *supra* note 34, at 5.

76. *Id.* at 4.

77. *Id.*

78. *See id.* at 6.

79. Jacqui Fatka, *FDA Asks for Input on Plant-Based Dairy Products*, FEEDSTUFFS (Sept. 28, 2018), <https://www.feedstuffs.com/livestock-and-poultry-market-news/fda-asks-for-input-on-plant-based-dairy-product-labels> [<https://perma.cc/4XMV-3D5N>].

80. Citizen Petition, Soyfoods Ass’n of Am., Docket No. FDA-1997-P-0078 (Feb. 28, 1997) [hereinafter SANA Citizen Petition], [<https://perma.cc/W55Y-MLFK>].

81. *Id.* at 2–3.

82. *Id.* at 4.

objection from the dairy industry.”<sup>83</sup> However, as plant-based alternatives grew in popularity and sophistication, this opinion changed.<sup>84</sup> In 2009, Canada banned plant-based dairy alternatives from being labeled “milk.”<sup>85</sup> This sudden shift in attitude offers minimal room for maneuvering or adapting to consumer preferences or market dynamics. However, it is worth noting, as this Article discusses below, that the Canadian dairy market is less volatile than its American counterpart.<sup>86</sup> Nevertheless, this international precedent serves as a compelling example, reinforcing the need for compromise amidst industry innovation.

Here, federal intervention is necessary and justified. A “regulatory gray area” has developed from inaction by the FDA in managing the novel products emerging within the dairy market.<sup>87</sup> Moreover, state-level courts encounter challenges in determining jurisdiction over this matter, often perceiving the FDCA as preempting their authority.<sup>88</sup> In the case of *Ang v. Whitewave Foods Co.*, the United States District Court for the Northern District of California dismissed allegations that soy, almond, and coconut products were mislabeled as “milk.”<sup>89</sup> The court reasoned that section 343-1(a) “prohibits states . . . from imposing any requirements regarding [SOI] that is not identical to the federal requirements.”<sup>90</sup> The court reasoned that absent an SOI, the plant-based manufacturers should rely upon the “common or usual name of the food.”<sup>91</sup> The court elaborated that a product’s “common or usual name” is a “name commonly used by the public for such food.”<sup>92</sup> Simply put, this classification must “accurately identify or describe . . . the basic nature of the food or its characterizing properties or ingredients.”<sup>93</sup> Herein lies another point of contention.

The current “common or usual name” for plant-based foods usually derives from its closest conventional relative.<sup>94</sup> Although these alternatives resemble cow

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83. *Id.*

84. Sabrina Tremblay-Huet, *The Law and Politics of Plant-Based “Milk” Products*, CANADIAN ASS’N FOR FOOD L. & POL’Y (Oct. 2, 2017), <http://foodlaw.ca/blog/2017/10/2/the-law-and-politics-of-plant-based-milk-products> [<https://perma.cc/2WDF-ALYF>].

85. *Id.*

86. See discussion *infra* Section II.E.

87. Katie Gates Calderon et al., *Dairy vs. Plant-Based ‘Milks’: A Regulatory Standoff*, LAW360 (Aug. 24, 2017, 10:59 AM), <https://www.law360.com/articles/957097>.

88. *Id.*

89. No. 13-CV-1953, 2013 WL 6492353, at \*1 (N.D. Cal. Dec. 10, 2013).

90. *Id.* at \*3; 21 U.S.C. § 343-1(a).

91. *Whitewave*, 2013 WL 6492353, at \*3.

92. *Id.*

93. *Id.* at \*4 (quoting 21 C.F.R. § 102.5(a) (2024)).

94. See Calderon et al., *supra* note 87.

milk in appearance, they contain differing nutritional components.<sup>95</sup> Furthermore, federal regulations stipulate that a name “may not be confusingly similar to the name of any other food.”<sup>96</sup> For decades, the dairy industry has taken issue with the use of “milk” on plant-based product labels.<sup>97</sup> It has raised numerous legal challenges, criticizing plant-based manufacturers for misleading consumers.<sup>98</sup> While parties may struggle to prove that product names like “cashew milk” deceive consumers, the government should not stave off litigation without proposing a long-term solution.<sup>99</sup> Therefore, this Article invites the FDA to exercise its regulatory muscle and propose a new SOI for plant-based dairy alternatives.

A new SOI could specify unique identifiers for each alternative “in a way that distinguishes it from different foods.”<sup>100</sup> For example, with the acceptance of the SANA petition, “soy milk” would have become “the liquid food” derived from “combining aqueous-extracted whole soybean solids and water.”<sup>101</sup> However, while the FDA acknowledged receipt, it refrained from responding, citing budget constraints.<sup>102</sup> This seemingly benign refusal has “opened the proverbial floodgates . . . between . . . the dairy industry and their alternative product counterparts.”<sup>103</sup> Over the years, the FDA has continuously neglected to offer guidance to elucidate its position.<sup>104</sup> This failure has enabled both Congress and the states to speculate on how to regulate certain products.

*C. Debating the DAIRY PRIDE Act: Navigating Market Competition for Plant-Based Alternatives*

Americans consume less milk today than four and a half decades ago.<sup>105</sup> Over the years, Congress has often deliberated on the proposed “Defending Against Imitations and Replacements of Yogurt, Milk, and Cheese to Promote Regular

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95. *Id.*

96. 21 C.F.R. § 102.5(a).

97. Calderon et al., *supra* note 87.

98. Kathleen Justis, *Lactose’s Intolerance: The Role of Manufacturers’ Rights and Commercial Free Speech in Big Dairy’s Fight to Restrict Use of the Term “Milk,”* 84 BROOK. L. REV. 999, 1011, 1017 (2019).

99. *See id.* at 1011–12.

100. 21 C.F.R. § 102.5(a).

101. SANA Citizen Petition, *supra* note 80, at 1.

102. Justis, *supra* note 98, at 1000.

103. *Id.* at 1001.

104. *Id.* at 1000–01.

105. Anahad O’Connor, *Got Almond Milk? Dairy Farms Protest Milk Label on Nondairy Drinks*, N.Y. TIMES (Feb. 13, 2017), <https://www.nytimes.com/2017/02/13/well/eat/got-almond-milk-dairy-farms-protest-milk-label-on-nondairy-drinks.html>.

Intake of Dairy Everyday” Act (DAIRY PRIDE Act).<sup>106</sup> The Act targeted plant-based alternatives, stipulating that any food “introduced or delivered . . . into interstate commerce” under a dairy product label must adhere to specific criteria.<sup>107</sup> Those ultra-selective criteria have prompted discussions about the necessity for a more inclusive yet definitive standard for plant-based dairy alternatives.<sup>108</sup>

In 1977, the FDA defined “milk” as the “lacteal secretion . . . of one or more healthy cows.”<sup>109</sup> Notably, this SOI excludes more than just plant-based dairy alternatives.<sup>110</sup> It also omits non-cattle sources, like goats.<sup>111</sup> When the plaintiffs presented this definition in *Ang v. Whitewave Foods Co.*, the court dismissed it, arguing that it “pertains to what milk is, rather than what it is not, and makes no mention of non-dairy alternatives.”<sup>112</sup> This dismissal underscores the need for clearer regulatory guidance from the FDA. Such a narrow definition, if wholly enforced, limits the market significantly. The Good Food Institute condemned the Act as an anti-competitive measure, favoring conventional dairy over plant-based alternatives.<sup>113</sup> Meanwhile, the Act’s authors leveraged health concerns and preventing deceptive or misleading labeling in support of the Act.<sup>114</sup>

Over 60% of buyers cite nutritional considerations as a significant factor in driving purchases of dairy products.<sup>115</sup> The DAIRY PRIDE Act posits, “to obtain the amount of calcium contained in one cup of non-fat fluid milk from a plant-based milk alternative, the portion size and calorie intake must be greater.”<sup>116</sup> Consequently, recent government dietary guidelines exclude plant-based milk

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106. DAIRY PRIDE Act, H.R. 1769, 116th Cong. § 1 (2020).

107. *Id.* § 3.

108. See, e.g., Paul Shapiro, *Plant-Based ‘Dairy’ Products Aren’t New. Neither Is the U.S. Dairy Industry’s Hostility*, WASH. POST (Oct. 19, 2018, 5:28 PM), [https://www.washingtonpost.com/opinions/plant-based-dairy-products-arent-new-neither-is-the-us-dairy-industrys-hostility/2018/10/19/7341108e-b36e-11e8-9a6a-565d92a3585d\\_story.html](https://www.washingtonpost.com/opinions/plant-based-dairy-products-arent-new-neither-is-the-us-dairy-industrys-hostility/2018/10/19/7341108e-b36e-11e8-9a6a-565d92a3585d_story.html); Tiffany Dowell Lashmet, *What Is the Dairy Pride Act and What Legal Issues Could It Face?*, TEX. A&M AGRILIFE EXTENSION (June 5, 2017), <https://agrilife.org/texasaglaw/2017/06/05/dairy-pride-act-legal-issues-face/> [<https://perma.cc/73PV-PYCW>].

109. 21 C.F.R. § 131.110(a) (2024).

110. See *id.*

111. See *id.*

112. No. 13-CV-1953, 2013 WL 6492353, at \*3 (N.D. Cal. Dec. 10, 2013).

113. Chuck Quirnbach, *Wis. Lawmakers Reintroduce Bill Preventing Non-Dairy Products Being Labeled as Milk*, NPR (Mar. 31, 2023, 5:10 AM), <https://www.npr.org/2023/03/31/1167297116/wis-lawmakers-reintroduce-bill-preventing-non-dairy-products-being-labeled-as-mi> [<https://perma.cc/QQ5X-MHFW>].

114. DAIRY PRIDE Act, H.R. 1769, 116th Cong. § 2 (2020).

115. Abrell, *supra* note 43, at 37.

116. H.R. 1769, § 2(4).

alternatives from the dairy group.<sup>117</sup> Only enriched, fortified soy beverages, which closely resemble milk, qualified for inclusion in that group.<sup>118</sup> However, the dairy industry maintains that plant-based alternatives profit from using dairy-related terminology and imagery, leading to misconceptions about these products.<sup>119</sup> In 2023, FDA authored draft guidance that suggested including a voluntary nutrient statement on the labels of non-dairy products.<sup>120</sup> Should plant-based manufacturers decide against applying the “imitation” label, they may propose a comparable statement instead.<sup>121</sup>

In February of 2023, FDA released a Consumer Update on deciphering the nutrition facts label on milk and plant-based milk alternatives.<sup>122</sup> This resource discourages small children from consuming the latter as substitutes for “human milk or infant formula.”<sup>123</sup> Case reports, highlighted by former FDA Commissioner, Scott Gottlieb, identified some public health risks associated with young children ingesting plant-based alternatives inappropriately.<sup>124</sup> As an illustration, a toddler developed rickets when their parents replaced cow milk with a soy-based alternative.<sup>125</sup> Additionally, overconsumption of rice-based beverages may result in the onset of kwashiorkor, a severe form of protein malnutrition.<sup>126</sup> Nonetheless, this Article encourages conscientious consumption of plant-based dairy alternatives. It assumes consumers are individuals with dietary preferences or ethical considerations regarding the treatment of farmed animals and animal agriculture’s contributions to climate change.

Despite these warnings, the Good Food Institute reported that households with children spend more on items from this category than households with no

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117. U.S. DEP’T OF AGRIC. & U.S. DEP’T OF HEALTH & HUM. SERV., DIETARY GUIDELINES FOR AMERICANS 2020-2025, at 33 (9th ed. 2020), [https://www.dietaryguidelines.gov/sites/default/files/2021-03/Dietary\\_Guidelines\\_for\\_Americans-2020-2025.pdf](https://www.dietaryguidelines.gov/sites/default/files/2021-03/Dietary_Guidelines_for_Americans-2020-2025.pdf) [<https://perma.cc/HFC4-PTTY>].

118. *Id.*

119. Calderon et al., *supra* note 87.

120. U.S. FOOD & DRUG ADMIN., U.S. DEP’T OF HEALTH & HUM. SERVS., LABELING OF PLANT-BASED MILK ALTERNATIVES AND VOLUNTARY NUTRIENT STATEMENTS: GUIDANCE FOR INDUSTRY 15 (2023), <https://www.fda.gov/media/165420/download> [<https://perma.cc/6267-JTE8>].

121. *Id.* at 13–15.

122. *Milk and Plant-Based Milk Alternatives: Know the Nutrient Difference*, U.S. FOOD & DRUG ADMIN. (Feb. 22, 2023), <https://www.fda.gov/consumers/consumer-updates/milk-and-plant-based-milk-alternatives-know-nutrient-difference> [<https://perma.cc/UP2G-4VXR>].

123. *Id.*

124. Abrell, *supra* note 43, at 41.

125. *Id.*

126. *Id.*

children.<sup>127</sup> This discrepancy may arise from parents seeking to appease picky eaters or introduce dietary variety into their children’s palate. Likewise, it is unrealistic to rely upon consumer discretion and expect haggard parents to scan the nutrition facts label according to FDA specifications on every purchase.

*D. 2023 FDA Draft Guidance: Navigating the Future of the Dairy Industry*

In 2023, FDA unveiled draft guidance regarding labeling of plant-based milk products.<sup>128</sup> Invoking previous Consumer Updates, FDA urged the alternative manufacturers to “include a statement explaining how the product compares with dairy milk.”<sup>129</sup> It is unreasonable and unrealistic to expect the average consumer to decode the extensive information provided on the typical nutrition facts label. Yet, straightforward disclaimers like “soy milk—tastes just like cow’s milk” are bound to provoke the dairy industry’s ire.

This guidance has also rehashed old inquiries. Why must plant-based dairy alternatives measure themselves against cow milk?<sup>130</sup> Dr. Walter Willett, a professor at Harvard Medical School, opined as to why “the guidance ‘assumes that cow milk is the superior standard. Might human milk not be a better standard?’”<sup>131</sup> From a young age, we internalize the cultural perceptions associated with dairy consumption.<sup>132</sup> In 1993, the ubiquitous “Got Milk?” slogan appeared on television screens across the nation.<sup>133</sup> This campaign, “which most often featured celebrities with milk mustaches,” was meant to revamp the industry following a decline in sales.<sup>134</sup> Soon, the tagline was everywhere.<sup>135</sup> Even Barbie bought into it.<sup>136</sup>

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127. Emma Ignaszewski & Ben Pierce, *U.S. Retail Market Insights for the Plant-Based Industry*, GOOD FOOD INST. (Sept. 18, 2024, 11:10 AM), <https://gfi.org/marketresearch/#milk-market> [<https://perma.cc/936B-63BF>].

128. Jacqueline Howard & Sandee LaMotte, *FDA Releases Draft Guidance on How Plant-Based Milk Items Should be Labeled*, CNN HEALTH (Feb. 22, 2023, 8:05 PM), <https://www.cnn.com/2023/02/22/health/fda-plant-milk-guidance-wellness/index.html> [<https://perma.cc/43BL-3SK9>].

129. *Id.*

130. *Id.*

131. *Id.* Although the author acknowledges that humans are unique in their consumption of milk from another mammal, she thought it best to conclude this line of inquiry here.

132. *Id.*

133. Kirk Kardashian, *The End of Got Milk?*, NEW YORKER (Feb. 28, 2014), <https://www.newyorker.com/business/currency/the-end-of-got-milk>.

134. *Id.*

135. *Id.*

136. *Id.*



Yet even a partnership with Mattel was insufficient to revive dairy consumption.<sup>137</sup> Per *The New Yorker*, “People have more drink options than ever [before]: sodas, juices, waters, non-dairy milks, energy drinks.”<sup>138</sup> In 2014, “Milk Life” replaced “Got Milk?”<sup>139</sup> This “more specific sales pitch” focused on milk’s lesser-known ingredient—protein.<sup>140</sup> According to Jessica Ziehm, the executive director of the New York Animal Agriculture Coalition, “People know milk and calcium go hand in hand . . . People also need to know milk has a lot of protein.”<sup>141</sup> This strategic adjustment illustrates how industries should react to competition.

While prioritizing action on the climate crisis, we risk destabilizing dairy farmers’ livelihoods. Globally, about 150 million farmers rely on the dairy industry.<sup>142</sup> Neglecting their input would constitute a critical error. *The McGill Business Review* has projected that “the dairy industry’s survival relies on extensive government intervention.”<sup>143</sup> However, the 2023 FDA draft guidance certainly falls short. Per Stephanie Sy, a *PBS News Hour* affiliate, “The only thing the sides of the great milk debate seem to agree on is moo-tual dissatisfaction with the FDA’s draft guidance.”<sup>144</sup>

First, accurate guidance would reflect the realities of the situation. During the coronavirus pandemic, the federal government allocated \$16 billion to support dairy farmers, directing the funds primarily to large-scale operations rather than smallholders.<sup>145</sup> This decision forced many farmers to reevaluate and restructure their businesses.<sup>146</sup> For example, some farms avoided bankruptcy by transitioning to A2 milk, a beverage lacking the protein that causes lactose intolerance, hoping they could reclaim consumers attracted by dairy alternatives.<sup>147</sup> To stabilize the industry, the government should curtail consolidation and monopolization of those large-scale farms while assisting smallholder transitions.<sup>148</sup>

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137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Daniela Garabito, *Milking It for All It’s Worth: The Fall of the Dairy Industry*, MCGILL BUS. REV. (Sept. 17, 2020), <https://mcgillbusinessreview.com/articles/milking-it-for-all-its-worth-the-fall-of-the-dairy-industry> [<https://perma.cc/2AEQ-8LTY>].

143. *Id.*

144. Sy & Jackson, *supra* note 24.

145. Garabito, *supra* note 142.

146. *See id.*

147. *Id.*

148. *Id.*

In Wisconsin, birthplace of the DAIRY PRIDE Act, the state Department of Agriculture offers programs to help farmers transform their businesses into “farm-to-table restaurants, petting zoos, or bed and breakfasts.”<sup>149</sup> These land use conversions limit the environmental harms associated with large farms such as climate change and water quality impacts.<sup>150</sup> Like this Article, the *McGill Business Review* also suggests that the United States “would do well” to emulate Canada’s approach to dairy farming.<sup>151</sup> The Canadian labeling approach may mitigate competing claims between the dairy industry and manufacturers of plant-based alternatives. Moreover, Canada’s quotas might reduce the amount of dairy and, subsequently, methane circulating the marketplace.<sup>152</sup>

*E. The Canadian Dairy Commission: Lessons for United States Plant-Based Dairy Alternative Labeling*

In July of 2022, Canada invested over \$1.4 million in plant-based food production in one province.<sup>153</sup> The Honorable Carla Qualtrough, Minister of Employment, Workforce Development and Disability Inclusion, praised the decision, noting, “Innovative agriculture is the way of the future.”<sup>154</sup> Like most Americans, Canadians have consumed less milk over recent decades.<sup>155</sup> Canada boasts over 10,300 dairy farms—all regulated by the Canadian Dairy Commission (CDC).<sup>156</sup> Established in 1966, the CDC oversees a meticulous supply management system founded on “three pillars—import control, producer pricing and production discipline.”<sup>157</sup> A Canadian “dairy year” revolves around the CDC setting milk prices, managing production quotas, and regulating imports and exports.<sup>158</sup> The Canadian monthly dairy quota is a supply management strategy

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149. *Id.*

150. *Id.*

151. *Id.*

152. *See id.*

153. News Release, Agric. & Agri-Food Can., Gov’t of Can. Invs. Over \$1.4 Million in Plant-Based Food Prod. in British Columbia (Jul. 7, 2022), <https://www.canada.ca/en/agriculture-agri-food/news/2022/07/government-of-canada-invests-over-14-million-in-plant-based-food-production-in-british-columbia.html> [<https://perma.cc/59ZC-GMBP>].

154. *Id.*

155. EXP. ACTION GLOB., ARE CANADIAN CONSUMERS AND FARMERS BETTER OFF WITH THE CANADIAN MODEL? 11–13 (2018), [https://www.nfu.ca/wp-content/uploads/2018/05/Dairy-Systems-Around-The-World\\_Export-Action-Global\\_April-2018.pdf](https://www.nfu.ca/wp-content/uploads/2018/05/Dairy-Systems-Around-The-World_Export-Action-Global_April-2018.pdf) [<https://perma.cc/CLG6-2WA3>].

156. *About the Canadian Dairy Commission: Fact Sheets*, GOV’T OF CAN. (Feb. 15, 2023), <https://www.cdc-ccl.ca/en/node/888> [<https://perma.cc/6VX4-SFZE>].

157. *Id.*; EXP. ACTION GLOB., *supra* note 155, at 5.

158. *About the Canadian Dairy Commission*, *supra* note 156.

that limits domestic dairy production to ensure stable incomes for farmers and protect them from high tariffs and other import competition.<sup>159</sup> This quota operates as a ceiling for domestic milk production.<sup>160</sup> Subsequently, farmers purchase a share of the production quota, similar to a “license” to produce milk.<sup>161</sup> Farmers are guaranteed a minimum price, which is negotiated through provincial marketing boards.<sup>162</sup> The CDC ensures these quotas by imposing high tariffs on foreign dairy products to safeguard the domestic market share.<sup>163</sup> Comparatively, the United States has a less regulated system facilitated by multiple subsidy programs.<sup>164</sup> Although their regulatory structures may vary, the United States can still glean valuable lessons from the Canadian approach to dairy regulation.

In Canada, the Food and Drug Regulations (FDR) Section B.08.003, defines “milk” as “the normal lacteal secretion obtained from the mammary gland of the cow.”<sup>165</sup> Nevertheless, the Canadian National Dairy Code has expanded that definition to include a “dairy animal” including “goats and sheep and other such species, as may be kept for the purposes of milking.”<sup>166</sup> This amendment demonstrates a positive trend toward increased industry adaptation, especially when facing diversifying product lines.

The Canadian system benefits from increased marketing regulations for “[t]he alternatives market.”<sup>167</sup> Per Leslie Ewing, executive director of Plant-Based Foods of Canada, Canada restricts manufacturers from using common names,

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159. David Lawder, *U.S. Agriculture Trade Chief Demands Canada Broaden Dairy Quota Access*, REUTERS (Feb. 10, 2023, 11:34 AM), <https://www.reuters.com/markets/commodities/us-agriculture-trade-chief-demands-canada-broaden-dairy-quota-access-2023-02-10/> [<https://perma.cc/RZR2-7FDY>].

160. *See id.*

161. Jimmy Beltran et al., *Recommendations for Canada’s Dairy Supply Management*, MCGILL (Jul. 28, 2023), <https://www.mcgill.ca/maxbellschool/policy-lab-2023/dairy> [<https://perma.cc/XMY7-5EKD>].

162. *Id.*

163. *Id.*

164. EXP. ACTION GLOB., *supra* note 155, at 6.

165. *Guidelines for the Acceptable Use of “100% Canadian Milk” Claims on Dairy Products*, GOV’T OF CAN. (July 6, 2022), <https://inspection.canada.ca/en/food-labels/labelling/industry/dairy/100-canadian-milk> [<https://perma.cc/Z4YJ-XVEU>].

166. *National Dairy Code – Part I (Revised November 2021)*, GOV’T OF CAN. (June 23, 2021), <https://agriculture.canada.ca/en/sector/animal-industry/canadian-dairy-information-centre/acts-regulations-codes-and-standards/national-dairy-code-part-i> [<https://perma.cc/EU3B-9RRT>].

167. Treena Hein, *Labelling Plant-Based Products*, FOOD IN CAN. (Sept. 2, 2021), <https://www.foodincanada.com/features/labelling-plant-based-products/> [<https://perma.cc/TS9G-UHFA>].

including “milk” to identify plant-based foods.<sup>168</sup> For example, in Canada, Silk promotes its various “plant-based beverages” as being “*like* dairy milk.”<sup>169</sup> Alternatively, within the United States, those items are called “almond milk” and “cashew milk.”<sup>170</sup> This difference does not impact the success of those products within Canada, where over half of the population wants to integrate plant-based foods into their diet.<sup>171</sup>

The Canadian Food Inspection Agency (CFIA) is the regulatory entity responsible for ensuring food safety and consumer protection in Canada.<sup>172</sup> In October of 2010, the CFIA evaluated consumer perceptions regarding the labeling claim “100% Canadian milk.”<sup>173</sup> Generally, consumers associate the claim with the ingredient’s origin, perceiving it to match the FDR definition.<sup>174</sup> Understanding consumer perceptions of labeling claims can substantiate regulations for conventional and plant-based dairy alternatives.

However, if the United States enforced such a distinction, it could raise constitutional challenges. Under the First Amendment, for example, “a producer can’t be forced to carry its competitor’s message disparaging the producer’s own product.”<sup>175</sup> One potential labeling mechanism would involve devising a specific label for these plant-based foods. Such a designation respects the *sui generis* of plant-based food products, preventing administrative agencies from passing the buck regarding regulation. Yet, this solution raises another crucial question—if they are not “milk,” then what are these products? In the United States, many courts have struggled to devise an answer, resulting in differing jurisdictional approaches.

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168. *Id.*

169. *Plant-Based Beverages: Dairy-Free Goodness*, SILK CAN. (Nov. 30, 2024, 8:15 AM), <https://www.silkcanada.ca/products/plant-based-beverage/almond-cashew-unsweetened-vanilla/> [<https://perma.cc/MN4Q-EHNT>].

170. *Products–Beverages*, SILK (Oct. 20, 2024, 3:53 PM), <https://silk.com/plant-based-products/beverages/> [<https://perma.cc/JV7U-HMHC>].

171. *Plant-Based Foods of Canada: “Canada Is in a Position of Strength in Plant Based Foods,”* PLANT-BASED FOODS OF CAN. (June 7, 2024), <https://www.plantbasedfoodscanada.ca/news/2024/6/7/plant-based-foods-of-canada-canada-is-in-a-position-of-strength-in-plant-based-foods> [<https://perma.cc/V467-3U5S>].

172. *Canadian Food Inspection Agency*, GOV’T OF CAN. (Oct. 24, 2024), <https://inspection.canada.ca/eng/1297964599443/1297965645317> [<https://perma.cc/R4QC-267T>].

173. *Guidelines for the Acceptable Use of “100% Canadian Milk” Claims on Dairy Products*, *supra* note 165.

174. *Id.*

175. Barrella, *supra* note 60.

### III. ANALYSIS OF STATE AND COMMON LAW: KEY LITIGATION TRENDS OVER TIME

While the Canadian system offers insights into the potential operation and structure of a federal dairy model, analyzing domestic court decisions provides an opportunity to refine and filter intricacies within the United States' framework. In the United States, federal inaction has generated ongoing uncertainty regarding the labeling of plant-based products.<sup>176</sup> To fill this void, the judiciary has assumed the role of interpreting regulatory fragments and guiding principles.<sup>177</sup> This Part presents a concise summary of five case series spanning multiple states. It considers the implications of these rulings on the dairy industry, particularly its plant-based sector. These cases span many years, illustrating the longevity of this issue and emphasizing the urgency for prompt federal intervention to prevent further prolongation.

#### *A. Coffee-Rich*

The conception of mainstream plant-based alternatives in the mid-twentieth century generated litigation regarding labels for non-dairy derivatives.<sup>178</sup> These suits, which this Article refers to as the “Coffee-Rich Cases,” determined whether “a vegetable product” was an “imitation.”<sup>179</sup> Notably, the manufacturers of Coffee-Rich invested significant financial resources into promotional efforts aimed at educating “the potential consumer as to the nature of the product.”<sup>180</sup> This programming “enable[d] the consumer who read[] . . . the label of the container to differentiate between ‘Coffee-Rich’ and dairy products.”<sup>181</sup> During the 1960s, the Coffee-Rich packaging included the “brand name” and the statement, “a vegetable product contains no milk or milk fat.”<sup>182</sup> Below this text was “a simple drawing of a small pitcher pouring a liquid into a cup.”<sup>183</sup> Similar imagery has become common for dairy alternatives.<sup>184</sup>

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176. Calderon et al., *supra* note 87.

177. *Id.*

178. *See* Coffee-Rich, Inc. v. Kan. State Bd. of Health, 388 P.2d 582, 583–84 (Kan. 1964).

179. *Id.* at 584–85; Coffee-Rich, Inc. v. Comm’r of Pub. Health, 204 N.E.2d 281, 284–85 (Mass. 1965).

180. Coffee-Rich, Inc. v. Comm’r of Pub. Health, 204 N.E.2d at 283.

181. *Id.*

182. *Id.* at 283–84.

183. *Id.* at 284.

184. *See generally* Abrell, *supra* note 43.

This Article recognizes the nascency of the plant-based sector and does not expect all manufacturers to have allocated substantial resources to similar promotional programs. In California, a court recognized that “when [Coffee-Rich] products are sold in the original labeled package . . . [it does] not bear resemblance to any milk product nor could they be mistaken for any milk product.”<sup>185</sup> Likewise, neither “milk” nor “milk fat” was mentioned on the label.<sup>186</sup> In spite of this, the Coffee-Rich Cases arose because the California legislature worried that “when [Coffee-Rich] products are served to the consumer . . . not in labeled containers . . . each of said products, taken as a whole, could be mistaken for milk products.”<sup>187</sup> These concerns regarding consumers inadvertently encountering non-dairy alternatives “in a ‘restaurant context’” prompted court action.<sup>188</sup>

At trial, the Coffee-Rich counsel assured the court that consumers would not be deceived because the “public doesn’t really care as long as this type of product is satisfactory for the specific need or use to which they are putting them.”<sup>189</sup> The court countered that it was unreasonable to expect milk regulations to only extend to packaging “and that any substandard milk could be sold, as long as it was in a proper container.”<sup>190</sup> As the court indicated, this relieves regulatory oversight of its responsibility to uphold food production and labeling standards. However, plant-based alternatives are not just “substandard milk.”<sup>191</sup> Interestingly, other cases from this series concentrated on whether Coffee-Rich constituted a new and distinct product with unique characteristics.<sup>192</sup> This rationale reinforces the decades-long argument perpetuated by plant-based manufacturers, shifting the burden onto the agency to devise and establish a suitable SOI for these products.<sup>193</sup> However, it’s important to recognize the need for a new SOI altogether, not simply modification of an existing one.

Say, for example, the FDA established that the SOI for a particular soy beverage was “soy milk.” That could provoke opposition from the dairy industry. It is easy to contend that the accepted definition of “milk” does not encompass plant-based sources within its scope.<sup>194</sup> To remedy this constraint, the FDA would

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185. *Coffee-Rich, Inc. v. Fielder*, 27 Cal. App. 3d 792, 801 (Cal. Ct. App. 1972).

186. *Coffee-Rich, Inc. v. Kan. State Bd. of Health*, 388 P.2d 582, 587 (Kan. 1964).

187. *Coffee-Rich, Inc. v. Fielder*, 27 Cal. App. 3d at 801.

188. *Id.* at 802.

189. *Id.* at 803.

190. *Id.* at 803–04.

191. *See id.*

192. *Coffee-Rich, Inc. v. Kan. State Bd. of Health*, 388 P.2d 582, 587 (Kan. 1964).

193. *See generally* SANA Citizen Petition, *supra* note 80.

194. *See* 21 C.F.R. § 131.110(a) (2024).

have to modify its definition through a proposed rulemaking—a daunting and laborious undertaking.<sup>195</sup> Furthermore, such a standard may imply false nutritional equivalence between cow milk and the soy beverage.<sup>196</sup> Returning to the Coffee-Rich Cases, the Kansas Supreme Court reasoned, “Coffee-Rich is no more an imitation of . . . [a] dairy product than nylon is an imitation of silk.”<sup>197</sup> If we concede that comparison, could plant-based manufacturers counter the dairy industry’s argument against them? Indeed, while these products may resemble milk, their distinct differences warrant them a separate identity altogether.<sup>198</sup>

This Article proposes adopting the Canadian labeling system temporarily, giving FDA the opportunity to assess its applicability to the United States marketplace and develop new SOIs for plant-based dairy alternatives. Drawing upon the many precedential Coffee-Rich Cases, the plant-based sector can bolster that argument. In Kansas, the court determined that “to place on the labels . . . the word ‘imitation’ followed by the words ‘milk,’ ‘cream’ or ‘half and half’ would mislead and deceive the purchasing public.”<sup>199</sup> Meanwhile, a Michigan court ruled the product did not qualify as an “imitation of cream, half and half or milk” because it was unique and distinctive to conventional dairy.<sup>200</sup>

The inherent uniqueness of Coffee-Rich and other plant-based foods makes it challenging to view them as anything other than novel products designed to cater to a specific niche market. What is the alternative? While consumers have grown accustomed to qualifiers, it is not advantageous to clutter labels with phrases like: “organic, low-fat, reduced fat, fat-free, reduced calorie, low-carb, gluten-free, wheat-free, dairy-free, soy-free, no artificial colors, non-GMO, grown without pesticides, raised without antibiotics, no added sugars.”<sup>201</sup> Well, you get the idea.

Ideally, regulatory agencies would evaluate each product on its merits. However, such formalized adjudications are time-consuming and often contentious. Therefore, the United States should consider implementing a comprehensive framework reminiscent of the Canadian labeling regime.<sup>202</sup> Currently, the United States is unprepared for what lies ahead. For instance, France

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195. *See generally* Use of the Names of Dairy Foods in the Labeling of Plant-Based Products, 83 Fed. Reg. 49103 (Sept. 28, 2018).

196. Calderon et al., *supra* note 87.

197. *Coffee-Rich, Inc. v. Kan. State Bd. of Health*, 388 P.2d at 587.

198. *Id.*

199. *Id.* at 584.

200. *Coffee-Rich, Inc. v. Mich. Dep’t of Agric.*, 135 N.W.2d 594, 595 (Mich. Ct. App. 1965).

201. Calderon et al., *supra* note 87.

202. *See generally* Beltran et al., *supra* note 161.

developed a “new dairy category . . . a blend of 50% cow’s milk and 50% plant-based ingredients.”<sup>203</sup> How would we even begin labeling that product?

Given the vast number of choices available, consumers require clear labeling, especially when differentiating between conventional dairy and plant-based alternatives. This task requires cooperation between regulatory agencies, dairy farmers, and plant-based product producers. Presently, the Coffee-Rich example retains its relevance. The original packaging could serve as a model for other plant-based dairy derivatives. However, stakeholders must remain vigilant and monitor states enacting laws aimed at limiting labeling choices, as seen in the “Tofurky Cases.”<sup>204</sup>

### B. Tofurky

Nearly half of Americans favor vegetarian meals over meat, with one out of every two individuals choosing plant-based options.<sup>205</sup> Some jurisdictions have been receptive to embracing this dietary transition.<sup>206</sup> Numerous states have enacted legislation regulating the terminology permissible to denote alternative protein products.<sup>207</sup> This influx of state legislation (and the ensuing litigation) has reignited public interest.<sup>208</sup> Challenges to these laws have slowed the introduction of comparable legislation in other states.<sup>209</sup> As such, this Article will only consider two examples, both involving the manufacturer Tofurky.

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203. Flora Southey, *New Milk Category Blends Dairy and Plant-Based for the Mainstream*, FOOD NAVIGATOR EUR. (Nov. 16, 2021, 3:58 PM), <https://www.foodnavigator.com/Article/2021/11/16/new-milk-category-blends-dairy-and-plant-based-for-the-mainstream-it-s-a-source-of-calcium-and-protein-with-less-sugar-than-cow-s-milk> [https://perma.cc/UPU5-KUJG].

204. See *Challenging Louisiana’s Meat-Labeling Censorship Law*, ANIMAL LEGAL DEF. FUND (Mar. 28, 2022), <https://aldf.org/case/challenging-louisianas-meat-labeling-censorship-law/> [https://perma.cc/RKB8-ZJG8].

205. Press Release, Sprouts Farmers Mkt., *Surv. by Sprouts Looks into New Year Eating Habits, Reveals Young Ams. Are Likely to Shift Away from Meat* (Jan. 18, 2021), <https://about.sprouts.com/press-release/survey-by-sprouts-looks-into-new-year-eating-habits-reveals-young-americans-are-likely-to-shift-away-from-meat/> [https://perma.cc/67AZ-H4VZ].

206. See, e.g., *Truth in Labeling of Food Products Act*, LA. STAT. ANN. §§ 3:4741–46 (2024).

207. *Truth in Labeling Lawsuits* – Update, NAT’L AGRIC. L. CTR. (Dec. 10, 2020), <https://nationalaglawcenter.org/truth-in-labeling-lawsuits-update/> [https://perma.cc/NB9U-S9EJ].

208. *Id.*

209. *Id.*



Turtle Island Foods (Tofurky) began as a tempeh startup in Oregon, promoting a mission of “respect for people, animals and the planet.”<sup>210</sup> Tofurky’s website offers “food for plant-eaters, meat-eaters and people who resist labels.”<sup>211</sup> And, as advertised, Tofurky has opposed state efforts to regulate the labeling of its products.<sup>212</sup> Missouri became the inaugural state to enact an alternative protein labeling law, which Tofurky challenged within the same year.<sup>213</sup> In that case, *Turtle Island Foods, SPC v. Richardson*, Tofurky sought a preliminary and permanent injunction, asserting the Missouri statute was unconstitutional.<sup>214</sup>

The Missouri statute restricts the definition of “meat” to “any edible portion of livestock, poultry, or captive cervid carcass or part thereof.”<sup>215</sup> It also provides that “misleading or deceptive practices” includes “misrepresenting a product as meat that is not derived from harvested production livestock or poultry.”<sup>216</sup> Although Tofurky explicitly discloses that its products are plant-based and meatless, its labels also incorporate terms associated with traditional meat, such as “burgers.”<sup>217</sup> This narrative parallels the debate over labeling practices within the dairy sector. Much like Tofurky, plant-based companies use “milk,” “cheese,” and “yogurt” to attract consumers familiar with traditional jargon.<sup>218</sup> In Missouri, the court rejected Tofurky’s plea, determining that none of the company’s labels violated the statute because of the “disclaimers such as ‘plant-based’ . . . [which] were not likely to mislead consumers.”<sup>219</sup> Fortunate for this analysis, Tofurky’s legal quandaries persisted beyond the Ozarks.<sup>220</sup>

In 2019, Louisiana passed a law regulating meat substitute labels under the mandate of consumer protection, penalizing parties for misbranding or

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210. *Friendliest Food on the Plate*, TOFURKY (Nov. 5, 2024, 4:15 PM), <https://tofurky.com/our-story/our-roots> [<https://perma.cc/6FGG-B44E>]; *Truth in Labeling Laws(uits) – Update*, *supra* note 207.

211. *Friendliest Food on the Plate*, *supra* note 210.

212. *Truth in Labeling Laws(uits) – Update*, *supra* note 207.

213. Jana Caracciolo, *Truth in Labeling Laws(uits) – Update on Arkansas*, NAT’L AGRIC. L. CTR. (Oct. 25, 2020), <https://nationalaglawcenter.org/truth-in-labeling-lawsuits-update-on-arkansas/> [<https://perma.cc/AJ3B-MXJ6>].

214. 425 F. Supp. 3d 1131, 1135 (W.D. Mo. 2019).

215. MO. REV. STAT. § 265.300(7) (2024).

216. *Id.* § 265.494(7) (2024).

217. Turtle Island Foods, *SPC v. Richardson*, 425 F. Supp. 3d at 1135.

218. *See Products*, SILK (Nov. 18, 2024, 9:02 AM), <https://silk.com/plant-based-products/> [<https://perma.cc/VQ22-ZGR9>].

219. Caracciolo, *supra* note 213.

220. *See id.*

misrepresenting a food product.<sup>221</sup> This legislation exemplifies how states have endeavored to fill the regulatory void resulting from the FDA's inaction. These laws hold relevance for the dairy industry, which may lobby state legislatures to enact similar legislation, propelling their matter to court where state regulations substantiate inconsistent judgments.<sup>222</sup>

Indeed, the agriculture industry considers these legislative maneuvers to be advantageous.<sup>223</sup> Representative Francis Thompson acknowledged crafting the Louisiana Act to shield the animal agriculture industry from “growing competition from plant-based meat.”<sup>224</sup> Jessica Almy, Director of Policy at The Good Food Institute, criticized the law, saying “Consumers are no more likely to believe that ‘veggie burgers’ contain cow meat than Girl Scout cookies contain Girl Scouts.”<sup>225</sup>

Under the Act, unlawful labeling practices include portraying a product “as meat or a meat product” when said item does not derive from animals.<sup>226</sup> Many plant-based companies use familiar terminology to engage with mainstream customers, using “meat-esque words” to denote serving suggestions and flavor profiles.<sup>227</sup> Tofurky also challenged this Act in *Turtle Island Foods, S.P.C. v. Strain*, a pre-enforcement action for violating the First Amendment.<sup>228</sup>

The case hinged on intent, specifically, whether Tofurky *intended* to mislead customers into confusing plant-based foods with meat.<sup>229</sup> The Louisiana Act proposed penalties, including \$500 in fines, for each “advertisement or sale of plant-based meat products” containing misleading terms.<sup>230</sup> The United States Court of Appeals for the Fifth Circuit interpreted the Act as prohibiting companies from deceiving customers by claiming that a product contains meat when it does not.<sup>231</sup> That analysis might appear straightforward, yet the Louisiana Act lacked legislative precision.

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221. Truth in Labeling of Food Products Act, LA. STAT. ANN. §§ 3:4742, 4744(B) (2024).

222. See Megan Poinski, *Tofurky Sues Louisiana Over Plant-Based Meat Labeling Law*, FOOD DIVE (Oct. 12, 2020), <https://www.fooddive.com/news/tofurky-sues-louisiana-over-plant-based-meat-labeling-law/586785/> [<https://perma.cc/G3E3-Q533>].

223. *Challenging Louisiana's Meat-Labeling Censorship Law*, *supra* note 204.

224. *Id.*

225. Poinski, *supra* note 222.

226. LA. STAT. ANN. § 3:4744(B)(4).

227. See *Turtle Island Foods, S.P.C. v. Strain*, 65 F.4th 211, 217 (5th Cir. 2013).

228. *Id.* at 215.

229. *Id.* at 217.

230. *Challenging Louisiana's Meat-Labeling Censorship Law*, *supra* note 204.

231. *Turtle Island Foods, S.P.C. v. Strain*, 65 F.4th at 220–21.

Tofurky objected to the perceived “laundry list of speech” prohibited by the Act, arguing that it infringed upon protections for truthful commercial speech.<sup>232</sup> Current literature often follows this logic, focusing primarily on the ramifications of the potential infringement on commercial speech.<sup>233</sup> This Article reframes the discussion by inviting the FDA to integrate the Canadian labeling regime, developing a blank slate for applying new SOIs.<sup>234</sup>

Typically, bills of this nature will establish a definition for “meat,” distinguishing traditional animal-derived products from those created from plants or cell cultivation.<sup>235</sup> For example, the Louisiana Act restricts “meat” to just “a portion of a beef, pork, poultry, alligator, farm-raised deer, turtle, domestic rabbit, crawfish, or shrimp carcass.”<sup>236</sup> Interestingly, this definition omits various game meats such as venison and fish—both common sources of protein in many diets.<sup>237</sup> Likewise, while the Act offers certain definitions, others remain ambiguous or insufficient.<sup>238</sup> For example, the term “synthetic product” is broad and lacking precision, encompassing everything “derived from a plant, insect, or other source.”<sup>239</sup> According to the Plant-Based Foods Association, a plant-based food will “contain no animal-derived ingredients.”<sup>240</sup> Although the Act authorizes Louisiana’s Commissioner of Agriculture to enforce its provisions, it provides limited guidance for identifying offenders.<sup>241</sup>

Similarly, the Louisiana Act does not define “represent,” generating confusion on how a company might *misrepresent* its products.<sup>242</sup> Thus, Tofurky worried the State may impose an expansive interpretation to capture its use of “meat-esque words.”<sup>243</sup> A definition of this breadth could reshape the landscape of plant-based food advertising in Louisiana and other states with similar censorship legislation. While Tofurky sells items marketed as plant-based meat alternatives,

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232. *Id.* at 221.

233. *See, e.g.*, Justis, *supra* note 98, at 1002.

234. *See* discussion *supra* Section II.E.

235. *See, e.g.*, LA. STAT. ANN. § 3:4743(10) (2024).

236. *Id.*

237. *See id.*

238. *See generally id.*

239. *Id.* § 3:4743(10)(a).

240. *The Benefits of a Whole-Food, Plant-Based Diet*, SHARP (Apr. 18, 2024), <https://www.sharp.com/health-news/the-benefits-of-a-whole-food-plant-based-diet> [<https://perma.cc/8RYM-KJ7Y>].

241. LA. STAT. ANN. § 3:4745(A) (2024); *Turtle Island Foods, S.P.C. v. Strain*, 65 F.4th 211, 214 (5th Cir. 2023).

242. *Turtle Island Foods, S.P.C. v. Strain*, 65 F.4th at 217.

243. *Id.* at 215.

the Louisiana Act does not explicitly preclude those labels.<sup>244</sup> The company maintains, and the court agreed, that Louisiana could argue the lack of intent to deceive customers is not be a prerequisite for enforcement.<sup>245</sup>

Moreover, the court observed no “explicit safe harbor” in the Louisiana Act for plant-based products comparable to statutes from other states.<sup>246</sup> Changing its national marketing scheme would cost Tofurky an estimated \$1,000,000.<sup>247</sup> Tofurky lacks the means to create labels exclusive to Louisiana, and the company cannot guarantee that it could remove its other products from the state.<sup>248</sup> Taking such measures would effectively remove Tofurky from the competitive market in Louisiana.<sup>249</sup> Alternatively, the Oklahoma Meat Consumer Protection Act exempts “product packaging for plant-based items” from its advertising sanctions.<sup>250</sup> This exemption applies to all products, provided the packaging indicates the item derives from a plant-based source “in type that is uniform in size and prominence.”<sup>251</sup> Without equivalent safeguards, Tofurky violates the Louisiana Act simply because its products are plant-based, and its packaging contains words associated with meat.<sup>252</sup> This Article contends that prompt federal intervention would rectify these inconsistencies, eliminating commercial barriers and fostering market competition.

Additionally, Louisiana did not produce evidence to support its claim that terms on plant-based products cause customer confusion.<sup>253</sup> This evidentiary issue resembles *Miyoko’s Kitchen v. Ross*, which involved the California Food and Agricultural Code.<sup>254</sup> The California Code empowers the Department of Food and Agriculture to oversee the “advertising and retail sales of milk, frozen and cultured dairy products, cheese, and products resembling milk products.”<sup>255</sup> In 2021, the United States District Court for the Northern District of California prevented the State from requiring Miyoko’s Kitchen to eliminate the term “butter” from its vegan product labels.<sup>256</sup> The court maintained that California lacked the authority

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244. *Id.* at 217.

245. *Id.*

246. *Id.* at 218.

247. *Id.* at 215.

248. *Id.*

249. *Id.*

250. OKLA. STAT. tit. 2, § 5–107(C)(1) (2024).

251. *Id.*

252. Turtle Island Foods, S.P.C. v. Strain, 65 F.4th at 217.

253. *Challenging Louisiana’s Meat-Labeling Censorship Law*, *supra* note 204.

254. See No. 20-cv-00893, 2020 WL 8361994, at \*1, \*3 (N.D. Cal. Aug. 21, 2020).

255. CAL. FOOD & AGRIC. CODE § 32912.5(a) (West 2024).

256. See *Miyoko’s Kitchen*, 2020 WL 8361994, \*1.

to enforce its order, as the State could not demonstrate that it would contribute to consumer confusion prevention.<sup>257</sup> In particular, the State failed to declare its interest in avoiding consumer confusion “to a material degree.”<sup>258</sup> This ambiguous metric provides little clarity on gauging confusion resulting from the deceptive application of standardized definitions to food products. Ultimately, the court upheld the Louisiana Act, finding it does not violate the First Amendment.<sup>259</sup>

### C. “Krab” Mix and “Fruit” Snacks

This Article applies the “reasonable consumer” standard when assessing the potential deception of labels, wherein a company endeavors to “forge definitions for words that no reasonable consumer would recognize.”<sup>260</sup> In *Kang v. P.F. Chang’s China Bistro, Inc.*, the plaintiff purchased sushi rolls containing “krab mix” only to discover “the horrible truth that ‘krab’ wasn’t crab.”<sup>261</sup> He subsequently brought a claim under several California statutes, including the state’s Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumer Legal Remedies Act (CLRA).<sup>262</sup> California’s UCL broadly condemns “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.”<sup>263</sup> Frequently, the UCL appears alongside the state’s FAL.<sup>264</sup> Triggering the UCL occurs whenever there is “[a]ny violation of the false advertising law.”<sup>265</sup> Finally, California’s CLRA serves as a catch-all for civil remedies, prohibiting “unfair methods of competition and unfair or deceptive acts or practices.”<sup>266</sup> This amalgamation of consumer protections is comprehensive, reflecting California’s status at the forefront of food regulations.<sup>267</sup>

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257. *Id.* at \*5.

258. *Id.*

259. *Turtle Island Foods, S.P.C. v. Strain*, 65 F.4th 211, 221 (5th Cir. 2023).

260. Andrew Jacobs, *Lawsuits Over ‘Misleading’ Food Labels Surge as Groups Cite Lax U.S. Oversight*, N.Y. TIMES (Sept. 15, 2021), <https://www.nytimes.com/2021/09/07/science/food-labels-lawsuits.html>.

261. 844 F. App’x 969, 972 (9th Cir. 2021) (Bennett, J., dissenting).

262. *Id.* at 970 (majority opinion).

263. CAL. BUS. & PROF. CODE § 17200 (West 2024).

264. *Id.* §§ 17200, 17500.

265. *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (citing *Kasky v. Nike, Inc.*, 45 P.3d 243, 250 (Cal. 2002)).

266. CAL. CIV. CODE § 1770(a) (West 2024).

267. Jessica Fu, *California May Ban Some Food Dyes in School Meals. Will Other States Follow?*, THE GUARDIAN (Mar. 17, 2024, 9:00 AM), <https://www.theguardian.com/us-news/2024/mar/17/california-food-dye-ban-school-meals?ref=upstract.com> [<https://perma.cc/DE79-9NAR>].

In *Kang*, the district court found the plaintiff's claims improbable, concluding that "no reasonable consumer would view the words 'krab mix' to mean real crab."<sup>268</sup> On appeal, the court reversed, asserting that reasonable consumers could interpret the term "krab mix" as a blend of imitation and real crab meat.<sup>269</sup> This ruling suggests that minor variations in label wording could confuse reasonable consumers, fueling future disputes, possibly spanning various sectors.<sup>270</sup>

In the dairy sector, for example, the industry may argue that the term "plant milk" misleads consumers, who expect the beverage to only come from cows (or another hooved mammal). The long-term solution requires the FDA to supersede state guesswork and propose a SOI for each product.<sup>271</sup> In the interim, the United States should adopt the Canadian practice of labeling plant-based food products.<sup>272</sup> For example, one oat-derived, dairy alternative called "Malk," parodies the conventional term "milk," invoking the connotation of "tofurky" or "krab."<sup>273</sup>

Other intricacies may involve streamlining or simplifying current dairy labels, such as Ben & Jerry's discontinuing its "happy cows" campaign.<sup>274</sup> In 2020, a class action lawsuit compelled the company to reevaluate this claim on its ice cream labels after being accused of misleading consumers.<sup>275</sup> This decision upholds authenticity, thwarting conventional dairy if it should employ misinformation on its labels, especially regarding ingredient sourcing under specific "animal welfare and environmental standards."<sup>276</sup> Moreover, this artificial system of checks and balances maintains equilibrium between traditional and plant-based dairy. Allowing one aspect of an industry to become excessively regulated at the expense of another undermines the principles of fair market

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268. *Kang v. P.F. Chang's China Bistro, Inc.*, No. CV 19-02252, 2020 WL 2027596, \*4 (C.D. Cal. Jan. 9, 2020).

269. *Kang v. P.F. Chang's China Bistro, Inc.*, 844 F. App'x 969, 971 (9th Cir. 2021).

270. *See id.*

271. *See* discussion *supra* Section II.B.

272. *See* discussion *supra* Section II.E.

273. *See Home*, MALK (Nov. 5, 2024, 4:27 PM), <https://malkorganics.com> [<https://perma.cc/SE87-P9PD>].

274. Jacobs, *supra* note 260.

275. Sam Danley, *Ben and Jerry's Drops 'Happy Cows' Claim*, FOOD BUS. NEWS (Jan. 17, 2020), <https://www.foodbusinessnews.net/articles/15234-ben-and-jerrys-drops-happy-cows-claim> [<https://perma.cc/HZ84-2QPG>].

276. *Id.*

competition.<sup>277</sup> Nevertheless, these decisions only address one element of product labeling. This Article delves deeper by posing the question: how does the judiciary influence the images found on food packaging labels?

In *Williams v. Gerber Products Co.*, several parents sued Gerber, claiming the company engaged in deceptive marketing of fruit snacks designed for toddlers.<sup>278</sup> Like the “krab mix” example, the plaintiffs based their allegations on California’s UCL.<sup>279</sup> The case involved five distinct allegations, all challenging identical packaging samples.<sup>280</sup> Only the first two allegations are relevant here.<sup>281</sup> The other three allegations are product-specific and do not analogize well to the dairy industry.<sup>282</sup>

First, the parents demonstrated that Gerber advertises “Fruit Juice” in its product, supplementing the container with images of various fruits.<sup>283</sup> However, this combination was misleading as the product did not contain any juice from the depicted fruits.<sup>284</sup> In the dairy industry, similar confusion may arise when companies use depictions reminiscent of the original Coffee-Rich packaging, such as white liquid being poured into a glass.<sup>285</sup> This resemblance between conventional dairy and plant-based products is unavoidable yet intentional.<sup>286</sup> Per Steven Demos, former CEO of WhiteWave, “Dairy milk is a staple food that we consider a fundamental part of the scenery in a supermarket. Why not position fresh soymilk to be as close as possible?”<sup>287</sup> Strategically positioning dairy alternatives caters to the changing needs and preferences of consumers. However, should a company incorporate cows into the packaging of soymilk, it might surpass the boundaries of permissibility and “non-actionable puffery.”<sup>288</sup> To remedy this precarious overlap, the advertisements for plant-based dairy alternatives should steer away from explicitly conventional imagery.

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277. See Alden Abbott & Andrew Mercado, *Reining in Market-Distorting Federal Regulation*, MERCATUS CTR., GEO. MASON UNIV. (Jan. 4, 2022), <https://www.mercatus.org/research/policy-briefs/reining-market-distorting-federal-regulation> [<https://perma.cc/C8P6-V3FB>].

278. 552 F.3d 934, 936 (9th Cir. 2008).

279. *Id.*; Kang v. P.F. Chang’s China Bistro, Inc., 844 F. App’x 969, 970 (9th Cir. 2021).

280. *Gerber Prods. Co.*, 552 F.3d at 936.

281. *Id.*

282. *See id.*

283. *Id.* at 939.

284. *Id.*

285. *Coffee-Rich, Inc. v. Comm’r of Pub. Health*, 204 N.E.2d 281, 283–84 (Mass. 1965).

286. Abrell, *supra* note 43, at 40.

287. *Id.*

288. *Gerber Prods. Co.*, 552 F.3d at 937.

Second, the parents critiqued Gerber's promise that its product was derived from "real fruit juice and other all natural ingredients."<sup>289</sup> Just beneath that statement, on the nutrition facts label, Geber revealed that the two primary ingredients were, in fact, "corn syrup and sugar."<sup>290</sup> On appeal, the court revived the "reasonable consumer" standard, disagreeing with the district court about the implications of that statement.<sup>291</sup> A consumer should not have to "look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box."<sup>292</sup> Moreover, an ingredient list does not permit manufacturers to "mislead consumers and then rely on the ingredient list to correct those misinterpretations."<sup>293</sup> These rulings lend credence to the enforcement of explicit labeling to inform consumers and dissuade manufacturers from employing confusing labeling tactics.

This issue might emerge in plant-based food labeling if a company markets its product as containing specific ingredients like almonds, yet the primary components are water and other additives.<sup>294</sup> However, despite these moving parts, there is potential for reaching a middle ground between the FDA and its regulated parties.

#### *D. Mayo Wars*

Imagine this scenario: you prepare for lunch with a refreshing glass of milk (whichever variety you prefer) and get ready to enjoy your banana and mayonnaise sandwich. Upon taking your first bite, you notice that the mayo portion of your sandwich is lacking, prompting you to reach for the container to add another dollop. But wait! It is not actually mayonnaise. Instead, it is a "mayonnaise imposter hiding under a deceptive label."<sup>295</sup> This interesting tale drove one

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289. *Id.* at 936.

290. *Id.*

291. *Id.* at 939–40.

292. *Id.* at 939.

293. *Id.* at 939–40.

294. See Delaney Nothhaft, *Almond Milk Is Healthy and Simple to Make. Here's How*, USA TODAY (Mar. 1, 2024, 11:48 AM), <https://www.usatoday.com/story/life/health-wellness/2023/09/12/how-is-almond-milk-made/70697210007/> [<https://perma.cc/65W6-CKNW>].

295. Sydney Brownstone, *Unilever Is Suing Silicon Valley's Favorite Eggless Mayo Over Whether It Can Call Itself Mayo*, FAST CO. (Nov. 10, 2014), <https://www.fastcompany.com/3038313/unilever-is-suing-silicon-valleys-favorite-eggless-mayo-over-whether-it-can-call-itself-mayo> [<https://perma.cc/B2FB-DJ2S>].



company to file suit, hoping to protect their unwitting consumers from receiving a serving of vegetables instead of chicken eggs.<sup>296</sup>

In 2014, Unilever, a traditional condiment giant, sued Hampton Creek for misbranding its product, “Just Mayo,” and disregarding the SOI for mayonnaise.<sup>297</sup> The lawsuit admonished Hampton Creek for substituting conventional ingredients, like chicken eggs, with alternative proteins.<sup>298</sup> Unilever, a company valued at \$60 billion, also complained about “losing share to Just Mayo.”<sup>299</sup> Curiously, Unilever manufactures a well-known alternative called “I Can’t Believe It’s Not Butter”—a possible example of how the Canadian approach to labeling might appear in the United States.<sup>300</sup> This overlap positions Unilever squarely on both sides of the debate over plant-based labeling.

Unilever has experimented with egg replacements, culminating in the creation of a subsidiary called “Alleggra.”<sup>301</sup> Before the lawsuit, Hampton Creek’s CEO, Josh Tetrick, even floated the idea of partnering with Unilever, receiving support from Unilever’s senior vice president of marketing.<sup>302</sup> However, the competition posed by Hampton Creek proved overwhelming.<sup>303</sup> That said, it is unclear why Unilever exclusively targeted Just Mayo. Another eggless product called Vegenaïse somehow avoided the condiment giant’s wrath.<sup>304</sup> Likewise, when the FDA issued a warning letter to Hampton Creek, it declined to send a similar reprimand to Vegenaïse, presumably because its clever title enabled the latter to evade reprimand.<sup>305</sup> Tetrick hesitated to market his premier product, Just Mayo, as “vegan,” fearing it would alienate mainstream consumers.<sup>306</sup> Yet,

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296. *Id.*

297. *Id.*

298. *Id.*

299. Beth Kowitt, *Peace in the Mayo Wars: Unilever Drops Suit Against Startup Hampton Creek*, FORTUNE (Dec. 18, 2014, 9:20 PM), <https://fortune.com/2014/12/18/peace-in-the-mayo-wars/>.

300. Brownstone, *supra* note 295.

301. *Id.*

302. *Id.*

303. *Id.*

304. *See id.*

305. *See id.*; Carolyn Theis, *FDA Warning Letter Says Vegan Mayonnaise Can’t Be Labeled Mayo*, ARMSTRONG TEASDALE LLP (Sept. 11, 2015), <https://casetext.com/analysis/fda-warning-letter-says-vegan-mayonnaise-cant-be-labeled-mayo> [<https://perma.cc/EW5G-8P5W>].

306. *See What It’s Like to Lead a Food Startup Under Fire by the FDA*, WBUR (Sept. 4, 2015), <https://www.wbur.org/hereandnow/2015/09/04/just-mayo-hampton-creek-ceo> [<https://perma.cc/Y39Q-9B8M>].

Tetrick's labeling choice could mislead consumers who expect it to contain *just* conventional egg-based mayonnaise.

Responding to the FDA, Hampton Creek adjusted its label to satisfy the parameters delineated by the agency.<sup>307</sup> This alteration enabled the company to incorporate traditional imagery in exchange for more prominent disclaimers, resonating with consumers while promoting its plant-based mission.<sup>308</sup> In December of 2014, Unilever withdrew its case, choosing to “address its label directly with industry groups and regulatory authorities.”<sup>309</sup> This precedent for compromise may influence or inspire the dairy industry to work with plant-based alternatives until the latter can develop labels with new SOIs.

#### IV. PETITIONING FOR CLARITY: A CALL FOR ENFORCEMENT OF LABELING REQUIREMENTS

American consumers have also entered an era of experimentation, with 20% reporting “trying new things” as a post-pandemic priority.<sup>310</sup> During the pandemic, the dairy industry became accustomed to “operating at reduced capacity,” limiting their retail portfolio to “core dairy products” (i.e., milk and butter).<sup>311</sup> In 2019, the National Milk Producers Federation (NMPF) appealed to the FDA, petitioning to enforce existing labeling requirements for “imitations.”<sup>312</sup> This petition acknowledged that “nutritionally inferior substitute[s]” were exempt from “imitation” labeling in two circumstances.<sup>313</sup> First, if manufacturers do not portray non-dairy alternatives as standardized dairy foods.<sup>314</sup> Second, if the labeling reveals other essential facts outlining the distinctions between the “reference[d]

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307. Jessica Leber, *Hampton Creek Wins the Mayo Wars, With a Few Caveats*, FAST CO. (Dec. 17, 2015), <https://www.fastcompany.com/3054801/hampton-creek-wins-the-mayo-wars-with-a-few-caveats> [<https://perma.cc/Z39Y-SR95>].

308. Brownstone, *supra* note 295.

309. The Associated Press, *Hellman's Maker Unilever Drops Suit Over Eggless Mayo*, N.Y. TIMES (Dec. 18, 2014), <https://www.nytimes.com/2014/12/19/business/hellmans-maker-unilever-drops-suit-over-eggless-mayo.html>.

310. Christina Adams et al., *What's Ahead for the Dairy Industry*, MCKINSEY & CO. (May 11, 2021), <https://www.mckinsey.com/industries/agriculture/our-insights/whats-ahead-for-the-dairy-industry> [<https://perma.cc/BD9M-3RWJ>].

311. *Id.*

312. Citizen Petition at 4, Nat'l Milk Producers Fed'n, Docket No. FDA-2019-P-0777 (Feb. 21, 2019) [hereinafter NMPF Citizen Petition], <https://www.nmpf.org/wp-content/uploads/2019/03/National-Milk-Producers-Federation-Citizen-Petition-and-Attachments.pdf> [<https://perma.cc/JC59-LMKG>].

313. *Id.* at 41.

314. *Id.*; Abrell, *supra* note 43, at 52.

standardized food and [its] substitute.”<sup>315</sup> These restrictions would afford manufacturers three labeling options: (1) almond beverage, (2) almond milk – imitation milk, or (3) almond milk – milk substitute (with material distinctions).<sup>316</sup> While not ideal, these choices represent a potential compromise between traditional producers and plant-based companies. Ultimately, we can escape the labeling stalemate through compromise, offering options to encourage experimentation while supporting the dairy industry’s continued adaptation and integrity.

## V. CONCLUSION

This Article recognizes that plant-based companies must use language that resonates with public understanding, relying on familiar terminology to market novel products. Any alternative approach would result in unappetizing labels, such as substituting “‘veggie pucks’ instead of ‘veggie burger’ and ‘vegan tubes’ instead of ‘vegan hot dogs.’”<sup>317</sup> Such a determination could diminish the attractiveness of plant-based products and impede market competition.<sup>318</sup>

The FDA must facilitate the dialogue between traditional dairy and plant-based companies, foregoing its historic apathy toward the issue of plant-based product labeling. By implementing a temporary framework like the Canadian dairy model, the United States can maintain a neutral ground while having a clean slate to reconcile the desires of both parties. We must no longer overlook this facet of the climate crisis. It is imperative that the United States promptly and tactfully correct this element of the American food system.

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315. Abrell, *supra* note 43, at 52; NMPF Citizen Petition, *supra* note 312, at 41.

316. Abrell, *supra* note 43, at 53; NMPF Citizen Petition, *supra* note 312, at 66.

317. *Challenging Louisiana’s Meat-Labeling Censorship Law*, *supra* note 204.

318. *Id.*