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

TURTLE ISLAND FOODS, SPC, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 2:18-CV-04173
	)	
LOCKE THOMPSON, et al.,	)	
	)	
Defendants.	)	

ORDER

Currently pending before the Court is plaintiffs' Motion for Summary Judgment (Doc. # 153) and defendant Chinn and Intervenor State of Missouri's Motion for Summary Judgment (Doc. # 156).

I. BACKGROUND

On August 28, 2018, Mo.Rev.Stat. § 265.494 went into effect. This statute states in part:

> No person advertising, offering for sale or selling all or part of a carcass or food plan shall engage in any misleading or deceptive practices, including, but not limited to, any one or more of the following:
>
> . . .
>
> (7) Misrepresenting the cut, grade, brand or trade name, or weight or measure of any product, or *misrepresenting a product as meat that is not derived from harvested production livestock or poultry.*
>
> Id.(emphasis added).

The statute defines "meat" as: "any edible portion of livestock, poultry, or captive cervid carcass or part thereof." Mo.Rev.Stat. §265.300(7). The term "misrepresent" in the statute is defined as "the use of any untrue, misleading or deceptive oral or written

statement, advertisement, label, display, picture, illustration or sample. Mo.Rev.Stat. § 265.490(6). Pursuant to the statute any person who violates any portion of Mo.Rev.Stat. § 265.494 is guilty of a class A misdemeanor. Mo.Rev.Stat. §265.496. The punishment for a class A misdemeanor is imprisonment for up to one year and a fine up to $2,000 or both. The State did not and still does not have any evidence of consumer confusion about the marketing or labeling of plant-based or cultivated (i.e. cell-cultivated) food products sold as an alternative or substitute for conventional meat from a carcass. On August 30, 2018, two days after the Act went into effect, the Missouri Department of Agriculture ("MDA") issued nonbinding guidance on implementation of the Act. The MDA was tasked with identifying marketing materials and food packaging that it believes violate the Act as a means of assisting prosecutors in the enforcement of the Act. The Memorandum states that the MDA will not refer violations of the Act on product labels if the label includes both 1) a "[p]rominent statement on front of the package, immediately before or immediately after the product name, that the product is 'plant-based,' 'veggie,' 'lab-grown,' 'lab-created,' or a comparable qualifier and 2) a "[p]rominent statement on the package that the product is 'made from plants,' 'grown in a lab,' or a comparable disclosure." The Act applies to plant-based meat products, including Tofurky's products.

Plaintiffs, the Good Food Institute "GFI" (a non-profit advocacy organization) and Tofurky (a plant-based meat producer whose products are marketed and sold in stores in Missouri) in their First Amended Complaint challenge the constitutionality of the Act both facially and as applied and bring four claims for relief: First Amendment (Count I);

Dormant Commerce Clause (Count II); Due Process (Count III) and Declaratory Judgment pursuant to Mo.Rev.Stat. § 527.010 (Count IV).

In their First Amended Complaint, plaintiffs state that "plant-based meats" are foods that approximate the texture, flavor, and appearance of conventional meats produced from livestock. Plant-based meats are typically made from soy, tempeh, wheat, jackfruit, textured vegetable protein and other vegan ingredients. Many plant-based meats are currently available in grocery stores and restaurants. (First Amended Complaint, ¶ 17). Plaintiffs use the term "Clean meats" to refer to meat made of muscle tissue cultured *in vitro* from animal cells. Clean-meat producers add nutrients like salts and sugars to animal cells, which grow into muscle tissue that approximates conventional meat. Clean met is not yet sold in supermarkets or restaurants (First Amended Complaint, ¶ 18).

The labels and marketing materials of Tofurky, as well as the plant-based meat companies that GFI advocates for, all clearly indicate their products are plant based, meatless, vegetarian or vegan. (Complaint, ¶47). Tofurky produces, markets and sells the following products which are clearly labeled as plant based, vegan or vegetarian and using descriptive terms including: "slow-roasted chick'n;" "deli slices" in varieties such as "smoked ham" and "bologna" "veggie burgers;" "hot dogs," "sausages," "grounds in varieties including "DIY chorizo," "DIY breakfast sausage," "DIY Italian sausage," "chorizo" and "ground beef style," and "ham roast." Plaintiffs state that the labels for these products include modifiers like "veggie," "all vegan," and "plant based" that clearly indicate that the products do not contain conventional meat from livestock production animals. (First Amended Complaint ¶ ¶77-79). Tofurky states that because

its labels include terms which are also applied to conventional meat like “kielbasa” “hot dogs” “ham roast” “burgers” and “bologna,” it reasonably fears prosecution under the statute (First Amended Complaint ¶ 82). GFI states that its partners also market products as meat analogues and use meat and meat related terminology in the labeling of their products such as “vegan jerky” “meatless vegan jerky” “seitan” “smart bacon” “veggie bacon strips” “teriyaki chick’n strips” “meat-free” “the ultimate beefless burger” and “beyond meat” “beyond beef crumbles” and “plant-based protein crumbles.” (First Amended Complaint ¶ 86). GFI states that its partners who use these terms on their labels and marketing materials face a credible fear of prosecution for their speech. (First Amended Complaint ¶ 88). Plaintiffs allege that the statute is designed to and will significantly disadvantage Tofurky and the companies the GFI works with because it will restrict how they can market, advertise and sell their products in the marketplace. Plaintiffs allege that the statute prevents marketing products as meat analogues or using meat terminology in truthful and non-misleading ways (Complaint ¶ 95). Tofurky states that compliance with the statute would have a severe detrimental impact on its nationwide marketing and packaging of its products. (Complaint ¶ 97).

Plaintiffs initially named Mark Richardson as the proposed class representative because at the time he was the Cole County Prosecuting Attorney. Locke Thompson has now succeeded Mark Richardson as Cole County Prosecuting Attorney. Thompson is sued in his official capacity only and as a representative of a defendant class of county prosecuting attorneys who enforce the criminal laws of Missouri. Defendant Chris Chinn is the Director of the Missouri Department of Agriculture. The State of Missouri requested and was granted leave to intervene in the action.

II. STANDARD

A moving party is entitled to summary judgment on a claim only if there is a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). If the moving party meets this requirement, the burden shifts to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. 242, 248 (1986). In Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), the Court emphasized that the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts" in order to establish a genuine issue of fact sufficient to warrant trial. In reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence. Matsushia, 475 U.S. 574, 588; Tyler v. Harper, 744 F.2d 653, 655 (8th Cir. 1984).

III. DISCUSSION

A. Plaintiff's Motion for Summary Judgment

1. Count I – Violation of the First Amendment

In Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed2d 341 (1980), the Court noted "[t]he First

Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwanted governmental regulation. . . . Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." Id. at 561-562. Plaintiffs state that to survive, any government restriction on non-misleading commercial speech must meet the three-prong test set forth in Central Hudson. In that case, the Supreme Court stated:

> Nevertheless, our decisions have recognized the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. . . .The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. . . .The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation. The First Amendment's concern for commercial speech is based on the informational function of advertising . . .Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about unlawful activity. The government may ban forms of communication more likely to deceive the public than to inform it or commercial speech related to illegal activity.

Id. at 562-64 (internal citations and quotations omitted). The Count in Central Hudson stated:

> a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

a. Plaintiffs Argue the Missouri Statute is Unconstitutional Because it Restricts Truthful Commercial Speech

The parties agree that Tofurky's plant-based meat labels are not inherently misleading[1] and thus are protected by the First Amendment. Plaintiffs recognize that in ruling on the Motion for a Preliminary Injunction, this Court made a preliminary finding that Tofurky's labels are not inherently misleading and the Missouri Statute does not apply to Tofurky's labels. Plaintiffs urge the Court to reassess the scope of the Statute and its application to Tofurky. Plaintiffs state that the Statute sweeps more broadly and applies to speech that the State disfavors and therefore characterizes as "misleading" despite it not being inherently misleading. Plaintiffs state that the Statute makes it illegal to "misrepresent[ ] a product as meat that is not derived from harvested production livestock or poultry." Mo.Rev.Stat. §265.494(7), but the Statute also declares that terms like "meat" refer exclusively to products "derived from harvested production stock or poultry" regardless of whether these terms have broader meaning. Thus, plaintiffs argue that the Statute applies to speech that is *not* inherently misleading. Plaintiffs argue that where "truthful and nonmisleading expression will be snared along with fraudulent or deceptive commercial speech, the State must satisfy the remainder of the Central Hudson test by demonstrating that its restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end." Edenfield v. Fane, 507 U.S. 761, 768-69, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993).

The State argues in opposition that under the plain language of the statute, it is clear that the General Assembly intended to prohibit the use of advertising that falsely

[1] Plaintiffs state that "inherently misleading" speech is speech that "inevitably will be misleading" to consumers.

labels plant-based or lab-grown products as conventional meat or misleads consumers about the product, not to prohibit the use of the word "meat" in advertising. The State argues that plaintiffs' labels do not violate the statue because they describe their products as plant based or lab grown. The State argues that the Statute requires producers of plant-based or lab-grown meat to disclose that they are plant-based or lab-grown so as not to mislead consumers. The State notes that nothing in the Statute prevents plaintiffs from using meat-related terms on their labels, but the labels must accurately describe their products. Because the statute regulates commercial speech that is false or inherently misleading, the State argues that the Central Hudson analysis ends at the threshold inquiry and the law is constitutional.

As the Court previously explained in the Order denying the Motion for Preliminary Injunction, the Court does not find that the Statute restricts truthful commercial speech. Plaintiffs state that they want to continue to use meat terms on their plant-based products because they believe this helps consumers understand what they are purchasing. Because plaintiffs have a vested interest in making sure that consumers understand what they are purchasing, their labels will indicate that their products are plant-based or lab-created. Plaintiffs are concerned that the use of other words typically used to describe meat, like "sausage", "roast", "links", "patties" would violate the Statute. But, the Statute only prohibits misrepresenting a product as "any edible portion of livestock, poultry, or captive cervid carcass" that is not derived from harvested production livestock or poultry. As the Eighth Circuit noted in its decision affirming this Court's Order denying the Motion for Preliminary Injunction, "[p]laintiffs allege they are not in the business of misrepresenting their products as meat. In fact, Tofurky alleges its

products are labeled in such a way as to 'clearly indicate that the products do not contain meat from slaughtered animals' and are otherwise 'clearly labeled as plant based, vegan or vegetarian.' For the sake of Plaintiff's arguments on appeal, these allegations prove too much. And further, Plaintiff's as-applied challenge is impeded by the fact that there is a significant doubt surrounding whether the Statute would ever, or could ever, be applied to their speech." In Turtle Island Foods, S.P.C. v. Strain, 65 F.4th 211 (5th Cir. 2023), the Fifth Circuit considered a challenge to a similar Louisiana law that prohibited representing a food product as meat or a meat product when the food product is not derived from various animals. The district court in that case found the Act unconstitutional and invalidated the entire statute. On appeal, the Fifth Circuit reversed the district court finding that the Act applied only to *actually* misleading speech and thus fell outside of the First Amendment's protection of commercial free speech. Id. at 220. In that case, the Fifth Circuit stated:

> "In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449-50, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008).The Supreme Court has also empowered us to "shun an interpretation that raises serious constitutional doubts and instead . . .adopt an alternative that avoids those problems." Jennings, 138 S.Ct. at 836; see also Washing. State Grange, 552 U.S. at 450-51, 128 S.Ct. 1184 . . .So, courts are required "to accept a narrowing construction of a state law in order to preserve its constitutionality." Voting for Am., 732 F.3d at 396.

Id. at 220. The Fifth Circuit found that the district court erred by failing to give any weight to the State's interpretation and instead substituting its own Central Hudson analysis of the statute. Tofurky advanced the same arguments in the Strain case that it makes in the instant action, arguing that the language of the statute could encompass words like

"plant-based sausage" or "ham-style roast" and that it could potentially be held liable for making a plant-based product and labeling it as such, but consumers could be confused. The Fifth Circuit noted:

> [a]lthough this is a way to read the Act, it is far from the *only* way to read the Act. Nothing in the statute's language requires the State to enforce its punitive provisions on a company that sells its products in a way that just so happens to confuse a consumer. . . .The State's construction limits the Act's scope to representations by companies that *actually intend* consumers to be misled about whether a product is an "agricultural product" when it is not. This interpretation is not contradictory to the Act, and we thus accept it for the present purposes of evaluating Tofurky's facial challenge. . . .Consequently, we conclude that the Act, when narrowly construed, does not violate the First Amendment's protection of commercial free speech.

Id. at 221.

This Court agrees with this analysis and finds that the Missouri Statute does not prohibit plaintiffs' commercial speech and thus does not violate the First Amendment.

2. Count II – Dormant Commerce Clause

In Assn. to Preserve and Protect Local Livelihoods v. Town of Bar Harbor, No. 1:22-CV-00416-LEW, 2024 WL 952418 (D. Me. Mar. 1, 2024), the Court stated:

> Among the powers the Constitution vests in Congress is the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art I, § 8. The conferral upon Congress of the power to regulate commerce clearly authorizes Congress to override competing regulations adopted by the states, but it also acts as a bulwark against state and local regulations that would, if permitted to stand, either discriminate against foreign and interstate commerce for local protectionist purposes or produce a Balkanized system in which commerce among the states and with other nations is overburdened by a need to satisfy multifarious regulations imposed by different states on the very same commercial activity. Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 571, 576–77 (1997) (concerning discriminatory regulation); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 523–530 (1959) (concerning regulation inimical to the orderly movement of good[s] across state lines). The bulwark against pernicious regulation is varyingly described as the "dormant" Commerce Clause or

the "negative command" of the Commerce Clause. Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 368 (2023).

Id. at *18.

In Eddie's Truck Ctr., Inc. v. Daimler Vans USA LLC, No. 5:21-CV-05081-VLD, 2023 WL 3388503 (D.S.D. May 11, 2023), the Court explained:

> "The dormant Commerce Clause is the negative implication of the Commerce Clause: states may not enact laws that discriminate against or unduly burden interstate commerce." S.D. Farm Bureau, Inc. v. Hazeltine, 340 F.3d 583, 592 (8th Cir. 2003). "A state law that is challenged on dormant Commerce Clause grounds is subject to a two-tiered analysis. First, the court considers whether the challenged law discriminates against interstate commerce." Id. at 593 (citing Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 99 (1994)). "If the law is not discriminatory, the second analytical tier provides that the law will be struck down only if the burden it imposes on interstate commerce 'is clearly excessive in relation to its putative local benefits.' " Id. (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

Id. at *8.

i. Scope of the Dormant Commerce Clause

In Restaurant Law Center v. City of New York, 90 F.4th 101 (2d Cir. 2024), the Court observed "the dormant Commerce Clause's scope is not absolute. . . States retain broad power to regulate their own affairs, even if they bear adversely upon interstate commerce. . . . And courts are not to wield the dormant Commerce Clause as a roving license . . . to decide what activities are appropriate for state and local governments to undertake." Id. at 118 (internal citations and quotations omitted).

In a recent decision, the Supreme Court clarified the scope of the dormant Commerce Clause. In National Pork Producers Council v. Ross, 598 U.S. 356, 143 S.Ct. 1142, 215 L.Ed.2d 336 (2023), California adopted a law banning the in-state sale of certain pork products derived from breeding pigs confined in stalls so small that they

cannot lie down, stand up or turn around. Two groups of out-of-sate pork producers filed suit arguing that the law unconstitutionally interfered with their preferred way of doing business in violation of the dormant Commerce Clause. The Supreme Court outlined the history of the Commerce Clause and observed:

> state laws offend the Commerce Clause when they seek to build up . . .domestic commerce through burdens upon the industry and business of other States, regardless of whether Congress has spoken. . . .At the same time, though, the Court reiterated that, absent discrimination, a State may exclude from its territory, or prohibit the sale therein of any articles, which, in its judgment, fairly exercised, are prejudicial to the interests of its citizens. Today, this antidiscrimination principle lies at the very core of our dormant Commerce Clause jurisprudence. . . .In its "modern" cases, this Court has said that the Commerce Clause prohibits the enforcement of state laws driven by . . . economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.

Id. at 369 (internal citations and quotation omitted). In National Pork, petitioners argued that the "extraterritoriality doctrine" is an "almost *per se"* rule forbidding the enforcement of state laws which have the practical effect of controlling commerce outside of the State even when the laws do not purposely discriminate against out-of-state economic interests. The pork producers argued that the California law offends the extraterritoriality doctrine because it would impose substantial new costs on out-of-state pork producers. Id. at 370-71. The Court rejected the petitioners' arguments stating:

> In our interconnected national marketplace, many (maybe most) state laws have the "practical effect of controlling" extraterritorial behavior. State income tax laws lead some individuals and companies to relocate to other jurisdictions. See, e.g., Banner v. United States, 428 F.3d 303, 310 (C.A. DC 2005) (*per curiam*). Environmental laws often prove decisive when businesses choose where to manufacture their goods. See American Beverage Assn., 735 F.3d at 379 (Sutton, J., concurring). Add to the extraterritorial-effects list all manner of "libel laws, securities requirements, charitable registration requirements, franchise laws, tort laws," and plenty else besides. J. Goldsmith *375 & A. Sykes, The Internet and the Dormant Commerce Clause, 110 Yale L. J. 785, 804 (2001). Nor, as we have seen,

> is this a recent development. Since the founding, States have enacted an "immense mass" of "[i]nspection laws, quarantine laws, [and] health laws of every description" that have a "considerable" influence on commerce outside their borders. Gibbons, 9 Wheat. at 203; see also Cooley, 12 How. at 317–321. Petitioners' "almost *per se*" rule against laws that have the "practical effect" of "controlling" extraterritorial commerce would cast a shadow over laws long understood to represent valid exercises of the States' constitutionally reserved powers. It would provide neither courts nor litigants with meaningful guidance in how to resolve disputes over them. Instead, it would invite endless litigation and inconsistent results.

Id. at 374-75.

After rejecting petitioner's extraterritoriality argument, the Court addressed plaintiff's argument that the California statute was unconstitutional under Pike v. Bruce Church Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). Petitioners in that case argued that under Pike, a court must at least assess the burdens imposed on interstate commerce by a challenged law and prevent its enforcement if the law's burdens are clearly excessive in relation to the putative local benefits." The Court however rejected petitioners' invitation for a more expansive reading of Pike. The Court stated:

> [Petitioners] urge us to read Pike as authorizing judges to strike down duly enacted state laws regulating the in-state sale of ordinary consumer goods (like pork) based on nothing more than their own assessment of the relevant law's "costs" and "benefits." That we can hardly do. Whatever other judicial authorities the Commerce Clause may imply, that kind of freewheeling power is not among them. Petitioners point to nothing in the Constitution's text or history that supports such a project. And our cases have expressly cautioned against judges using the dormant Commerce Clause as "a roving license for federal courts to decide what activities are appropriate for state and local governments to undertake." United Haulers, 550 U.S., at 343, 127 S.Ct. 1786. . . .Not only is the task petitioners propose one the Commerce Clause does not authorize judges to undertake. This Court has also recognized that judges often are "not institutionally suited to draw reliable conclusions of the kind that would be necessary . . .to satisfy [the] Pike" test as petitioners conceive it.

Id. at 380. In National Pork, the Court held that farmers and vertically integrated processors could provide all their pigs the space the California law requires; they may

segregate their operations to ensure pork products entering California meet its standards; or they may withdraw from that State's market. Id. at 384-85. The Court found that the law presents a choice primarily - but not exclusively - for out-of-state businesses, finding that there were some pork producers located in California. The Court found that California market share previously enjoyed by one group of out-of-state businesses (farmers who confine their pigs in small spaces and processors who decline to segregate their products) will be replaced by another group (those who raise and trace pork which complies with the law). Id. at 385. The Court noted "some may question the 'wisdom' of a law that threatens to disrupt the existing practices of some industry participants and may lead to higher consumer prices. . . .But the dormant Commerce Clause does not protect a particular structure or metho[d] of operation." Id. The Court concluded that petitioners had only alleged harm to some producers' favored "methods of operation" and a "substantial harm to interstate commerce remains nothing more than a speculative possibility." Id. at 386-87.

ii. Does the Missouri Statute Discriminate Against Interstate Commerce?

a. Does the law discriminate on its face?

"'Discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later." Oregon Waste Systems, Inc. v. Dep't of Enviro. Quality of Oregon, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). In Truesdell v. Friedlander, 80 F.4th 762 (6th Cir. 2023), the Court explained that where West Virginia imposed a tax on interstate transactions but not intrastate transactions, the law was discriminatory. However, where a law treats interstate and intrastate commerce the same, the law does not discriminate simply

because it affects more out-of-state businesses than in-state ones. The Missouri statute states in part: “No person advertising, offering for sale or selling all or part of a carcass or food plan shall engage in any misleading or deceptive practices, including any one or more of the following: Misrepresenting the cut, grade brand or trade name, or weight or measure of any product, or *misrepresenting a product as meat that is not derived from harvested production livestock or poultry.*” On its face, the statute does not discriminate against out-of-state producers. Thus, the Court finds that on its face, the law is neutral.

b. Does the law have a discriminatory effect on interstate commerce?

In Truesdell, the Court explained, “a facially neutral law has a discriminatory effect if it gives in-state entities a ‘competitive advantage’ that will lead consumers to shift market share to those entities.” Id. at 771. Plaintiffs argue that the Missouri Statute regulates extraterritorially in its effect by creating requirements that preclude nationwide distribution of plant-based meat products. Plaintiffs argue that separate label requirements on a state-by-state basis would force retailers and distributors to cease carrying plant-based meat products at all if they could not sell them uniformly on a nationwide basis. However, as was discussed above, the Supreme Court has rejected this extraterritoriality argument. As noted by the Court in New Jersey Staffing Alliance v. Fais, No. 1:23-cv-02494, 2023 WL 4760464 (D.N.J. July 26, 2023), “the National Pork Court has rendered the “extraterritoriality doctrine” a dead letter: extraterritorial effects alone are no longer sufficient to show a violation of the Commerce Clause. . . .Instead, plaintiffs now must demonstrate that a law amounts to purposeful discrimination against out-of-state businesses.” Id. at *9 (internal citations and quotations omitted). In the instant case, the Court finds that plaintiffs have failed to show that the Missouri Statute

discriminates in its effect. "[A] law is only clearly discriminatory in its effect where it 'confer[s] a competitive advantage upon local business vis-á-vis out-of-state competitors.'" Restaurant Law Center, 90 F.4th at 120 (quoting Town of Southold v. Town of E. Hampton, 477 F.3d 38, 49 (2d Cir. 2007)). In the instant case, the Missouri Statute does not confer any advantage on Missouri producers of lab grown or cultivated meat vs. out-of-state producers of lab grown or cultivated meat. The law prohibits *any* person advertising, offering for sale or selling all or a part of a carcass from representing a product as meat that is not derived from harvested production livestock or poultry, regardless of whether they are located in Missouri or outside of the state. Thus, the Court finds that plaintiffs have failed to show that the Missouri Statute has a discriminatory effect.

c. Did the Legislature Pass the Law to Achieve a Discriminatory Purpose?

In Truesdell, the Court noted "the Commerce Clause concerns itself with protectionist 'effects, not motives,' and thus does not require courts to investigate the subjective mindsets of the legislators who passed the law." Id. 80 F.4th at 772-73 (quoting Comptroller of the Treasury of Md. v. Wynne, 575 U.S. 542, 561, n.4, 135 S.Ct. 1787, 191 L.Ed.2d 813 (2015)). Plaintiffs point to statements by some Missouri legislators stating, "all we're trying to do is basically just protect our meat industry" and "we're just trying to protect our product." "We have to protect our cattle industry, our hog farmers, our chicken industry." "We wanted to protect our cattlemen in Missouri and protect our beef brand." (Plaintiffs' Statement of Uncontroverted Facts, ¶¶ 71-73). However, the Court does not find that these statements show a discriminatory purpose, these statements simply show the reason the law was enacted – to reduce consumer

confusion and ensure that consumers know what type of product they are purchasing. In Assoc. to Preserve and Protect, 2024 WL 952418, a group of Bar Harbor businesses sought to preserve commercial relationships with cruise lines and their passengers challenged a Bar Harbor ordinance that capped the number of cruise ship passengers who could visit the town per day. Plaintiffs argued that the ordinance was facially and per se discriminatory and protectionist because it impacted only travelers who were arriving by sea, without attempting to regulate the congestive impact of land-based travelers. Id. at * 21. The Court found that the Bar Harbor ordinance did not discriminate based on the interstate or international character of the individuals visiting the town. The ordinance was instead imposed because too many people visiting the town hampered the experience for the local residents. Plaintiffs however argued that the Ordinance was discriminatory and protectionist because it had the effect of favoring hotels and other land-based overnight accommodations, explaining that cruise lines are in competition with land-based accommodations because they are competing for the patronage of travelers seeking to visit a particular destination. However, the Court rejected this argument finding that the Ordinance was not directed to favor local hoteliers and the Court did not find that the Ordinance produced such a result. The Court stated:

> The same comparison might be drawn between two non-Californian producers of pork products seeking to place their products in California stores, where one complies with California law and the other does not. Or we might compare a non-Californian producer of pork products with a Californian producer of beef products. In either example, the producers compete for dollars directed toward meat consumption, yet that obvious point did not inform the Supreme Court's evaluation of the merits in National Pork Producers Council. I can see no reason why it should control here. Reducing the constitutional inquiry so that discrimination is found and heightened standards are imposed whenever one product or service is impacted by a regulation but a competing product or service is

> not is a recipe for widescale elimination of state and local regulations impacting the provision of goods and services.

Id. at *22. The same is true in this case - simply because lab created or cultivated meat producers may be impacted by the Missouri Statute, but producers of harvested production livestock or poultry are not impacted, does not show that the Missouri Statue had a discriminatory purpose or make the Statute unconstitutional.

iii. Is the Burden on Interstate Commerce Clearly Excessive in Relation to the Putative Local Benefits? (Pike Balancing Test)

Determining that the Statute is not discriminatory does not end the analysis regarding the Dormant Commerce Clause. The Court must still analyze whether the burden imposed by the Statute is excessive compared to the benefits. In Association to Preserve and Protect, the Court stated:

> [u]nder this standard, "the extent of the burden that will be tolerated will ... depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." Id. But even so, "[p]reventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of 'extreme delicacy,' something courts should do only 'where the infraction is clear.'" Nat'l Pork Producers Council, 598 U.S. at 390 (quoting Conway v. Taylor's Executor, 66 U.S. (1 Black) 603 (1862)).

Id. at *25. Plaintiffs argue that the purported aims of the Statute are already accomplished by existing State and federal laws that prohibit misbranding or mislabeling food. Plaintiffs state that there is no local benefit if a challenged law is redundant with existing state or federal laws. Additionally, plaintiffs argue that any interest in preventing consumer confusion can be accomplished with alternative means that do not restrict interstate commerce. Plaintiffs argue that in 1990 Congress enacted the FDCA to establish a uniform food labeling scheme. Thus, the Act's restrictions on plant-based and cultivated meat labels directly contradicts Congress' intent to regulate food labeling

in a uniform manner. The State argues that the Court need not conduct the Pike balancing test because the Statute does not regulate activity outside of Missouri. However, the State argues that if the Court were to conduct the Pike balancing test, the local interests allow Missourians to know with certainty what they are purchasing and consuming.

In the interest of complete analysis of the issue, the Court will conduct the Pike balancing test. In looking at the burdens imposed by the Statute, plaintiffs allege that complying with the law will require them to make marketing and packaging changes that could potentially cost them millions of dollars. Tofurky's CEO stated in her Declaration that "[t]rying to change our packaging alone would cost an estimated $1 million and would involve a deep dive into how to rebrand and redesign the package, to order the actual packaging for dozens of SKUs." Ex. L, ¶ 14. Ms. Athos also stated that "[c]ompliance with the law would cause tangible market disadvantages and potentially disrupt Tofurky's distribution and retail partnerships in regions beyond Missouri, making it impossible to market and sell our products nationwide." Ms. Athos stated, "certain chains that operate in Missouri along with other states who would likely stop carrying Tofurky's products nationwide if they could not also carry those products in Missouri. Several of our suppliers, partners, and retail distributors have brought up their concerns about the Missouri Act and whether it threatens our—and subsequently their—business model." Id. at ¶ 16.

In Assoc. to Preserve and Protect, the Court considered the impact of the Ordinance limiting the number of cruise ship passengers who were allowed to disembark in Bar Harbor. The Court in that case found that the Ordinance would have

some effect on commerce since almost 80% of the cruise ships that visit Bar Harbor have a capacity in excess of 1,000. But, the Court found that it was impossible to predict the Ordinance's precise consequences because the law still permits passengers in large numbers to disembark and visit Bar Harbor. The Court found that "[i]nsofar as the Ordinance causes visitors to travel to Bar Harbor through other means, like smaller cruise ships, the Ordinance is best described as burdening the cruise line industry's business model, rather than interstate commerce." Id. at *25. The Court found that the "Commerce Clause does not protect the cruise line industry's 'particular structure [and] methods of operation.'" Id. (quoting Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978)). The Court ultimately concluded that although the Ordinance would cause visitation to Bar Harbor to decrease, it was impossible to quantify this number, thus the impact of the Ordinance on interstate commerce was uncertain. In considering the benefits of the Ordinance, the Court found that reducing the number of visitors commensurably advanced Bar Harbor's local interest in lessening congestion at the waterfront. The Court found that the noneconomic benefit was reasonably well calibrated to ameliorate the effects of cruise tourism and how it affected the waterfront. Weighing the two interests, the Court found that considering the nature of the local interest in Bar Harbor's decision to limit the number of visitors, the Court "cannot say that the Ordinance imposes a burden on commerce that 'is clearly excessive in relation to the putative local benefits.'" Id. at 26 (quoting Pike, 397 U.S. at 142)). Similarly, in Truesdell, 80 F.4th 762, the Court observed:

> just as a State faces a nearly impossible task in proving the validity of a discriminatory law, so too a challenger faces a similarly tall order in

> proving the invalidity of a seemingly neutral law. . . .To put things in perspective, the Supreme Court has not invalidated a law under Pike in more than 30 years. . . .This cautious approach follows from the difficult nature of the task. An unconstrained balancing test asking judges to weigh a law's benefits against its costs requires them to make subjective policy judgments far outside their area of expertise in neutrally interpreting legal texts. . . .These difficulties suggest that judges should hesitate to second-guess the judgments of lawmakers concerning the utility of legislation.

Id. at 773-74 (internal citations and quotations omitted). In Truesdell, the Court explained that the plurality in National Pork Producers imposed limits on the Pike test holding that courts "should not even attempt to quantify a state law's local 'benefits' or compare those benefits to the law's costs unless a challenger has first shown that the law inflicts 'substantial burdens' on interstate commerce." Truesdell, 80 F.4th at 774 (internal citations and quotations omitted). The Court also noted that "the 'costs' side of the Pike balance does not consider *all* burdens that a state law might impose; it only considers *interstate-commerce* burdens. . . .This limit means that the costs incurred by specific interstate *businesses* – in contrast to interstate *commerce* generally – do not matter." Id. The Court noted that in National Pork Producers, the law would likely "'shift market share' from out-of-state producers wedded to noncompliant production methods to other producers willing to change. . . .But this effect on some businesses did not plausibly allege a substantial harm to interstate commerce." Id.

In the instant case, the Court finds that plaintiffs have not shown that Missouri's statute imposes significant burdens on interstate commerce. At most, plaintiffs have alleged that they would be forced to incur extra costs to rebrand and redesign their packages and the Act threatens Tofurky's business model if certain chain stores who operate in Missouri as well as other states are not able to carry Tofurky's products nationwide. In National Pork Producers, the Court observed that farmers and vertically

integrated pork processors have a choice, they can provide pigs all the space the law requires, they can segregate their operations to ensure pork products entering California meet its standards or they could withdraw from the State's market. Id. at 384. The Court recognized that the law "threatens to disrupt the existing practices of some industry participants and may lead to higher consumer prices . . . But the dormant Commerce Clause does not protect a 'particular structure or metho[d] of operation.'" Id. at 385. Similarly, in the instant case, the Missouri Statute may impose additional costs on plant based meat producers, some producers may view these costs as excessive and leave the Missouri marketplace, but these effects alone are insufficient to show that the law impermissibly burdens interstate commerce. As in Association to Preserve and Protect, the Court "cannot say that the Ordinance imposes a burden on commerce that 'is clearly excessive in relation to the putative local benefits.'" Id. 2024 WL 952418 at *26. Thus, the Court finds that the Missouri Statute does not violate the dormant Commerce Clause.

3. Count III – Due Process Clause

Plaintiffs allege that the Missouri Statute violates the Due Process Clause because the text is vague and ambiguous and because it encourages discriminatory enforcement. Plaintiffs state that the Statute is too vague and ambiguous to provide adequate notice because it fails to define key terms. The Statute prohibits "misrepresenting a product as meat" if it does not come from a harvested animal. Mo.Rev. Stat. § 265.494(7). The Statute defines "misrepresent" as any "misleading . . .oral or written statement, advertisement, label, display, picture, illustration or sample." Mo.Rev.Stat. § 265.490(6). Plaintiffs argue that a person of ordinary intelligence could

not, by looking the plain text of the Statute determine whether a plant-based or cultivated meat label that uses terms such as “chicken” or “sausage” along with a qualifier like “plant-based” would violate the Statute. The Statute also applies to pictures and illustrations. Plaintiffs argue that there is no objective way to measure whether a picture or illustration is inherently misleading and the Statute provides no guidance for the ordinary person attempting to determine if a picture or illustration violates the Statute. Plaintiffs also argue that the Statute encourages arbitrary and discriminatory enforcement because it fails to define key terms and is ambiguous. Plaintiffs state that the Statute fails to provide prosecutors with clear instructions regarding: 1) whether plant-based and cultivated meat products that use terms such as “meat” “sausage” or “chicken” on their labels along with qualifying language violates the Statute; 2) what types of images and illustrations “misrepresent” a product as meat or 3) whether persons advertising, offering or selling these products who do not also advertise, offer or sell carcasses or food plans are subject to the Statute. Plaintiffs state that prosecutors would only need to determine that the use of any word, image, advertisement, label or even a product’s location in a store was misrepresenting the product as meat. Plaintiffs also allege that the Statute chills non-misleading commercial speech. Plaintiffs state that a law is unconstitutionally vague if it has a capacity “to chill constitutionally protected conduct, especially conduct protected by the First Amendment.” Serv. Emps. Int’l Union, Loc. 5 v. City of Houston, 595 F.3d 588, 597 (5th Cir. 2010). Tofurky states that the Statute has already chilled its commercial speech and it has avoided saying anything new because it fears enforcement and has refrained from using certain words or images on marketing materials or packages.

In opposition, defendants state that the correct test is whether a statute "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "authorizes or even encourages arbitrary and discriminatory enforcement." Hill v. Colorado, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). Defendants state that since the Statute was enacted in 2018, there has been no enforcement and no one has pointed to a label that violates the Statute.

> The void-for-vagueness doctrine, which is embodied in the Fifth and Fourteenth Amendments, Postscript Enters., Inc. v. Whaley, 658 F.2d 1249, 1254 (8th Cir. 1981), "addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way," FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253, 132 S.Ct. 2307, 183 L.Ed.2d 234 (2012). "To defeat a vagueness challenge, a penal statute must pass a two-part test: The statute must first provide adequate notice of the proscribed conduct, and second, not lend itself to arbitrary enforcement." United States v. Barraza, 576 F.3d 798, 806 (8th Cir. 2009) (citation omitted). We are mindful, of course, that the Due Process Clause does not require "perfect clarity and precise guidance." Hegwood v. City of Eau Claire, 676 F.3d 600, 603 (7th Cir. 2012) (citation omitted). Moreover, "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Nygard v. City of Orono, 39 F.4th 514, 519 (8th Cir. 2022) (quoting Parker v. Levy, 417 U.S. 733, 756, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974)).

Sanimax USA, LLC v. City of S. St. Paul, No. 23-1579, 2024 WL 878914, at *13 (8th Cir. Mar. 1, 2024). In Clary v. City of Cape Girardeau, 165 F.Supp.3d 808 (E.D.Mo. 2016), the Court noted, "[t]he Due Process Clause's proscription against vague regulations is stronger still when the regulation in question implicates the First Amendment. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech. . . .That is so because [s]peech is an activity particularly susceptible to being chilled, and regulations that do not provide citizens with fair notice of what constitutes a violation

disproportionately hurt those who espouse unpopular or controversial beliefs." Id. at 816 (internal citations and quotations omitted).

Plaintiffs argue that the Missouri Statute is vague because it fails to define the word "misleading." The statute states in part:

"No person advertising, offering for sale or selling all or part of a carcass or food plan shall engage in any *misleading* or deceptive practices, including, but not limited to, any one or more of the following:

(7) Misrepresenting the cut, grade, brand or trade name, or weight or measure of any product, or misrepresenting a product as meat that is not derived from harvested production livestock or poultry.

Plaintiffs state than a person of ordinary intelligence could not by simply looking at the plain text of the Statute determine whether a plant-based or cultivated meat label that uses terms such as "chicken" or "sausage" along with a qualifier like "plant-based" would violate the Act. The Court disagrees. The Merriam Wester Dictionary defines the word "mislead" to mean "to lead in a wrong direction or into a mistaken action or belief often by deliberate deceit." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/disctionary/mislead (Accessed Mar. 19, 2024). A person of ordinary intelligence could readily determine that a plant-based or cultivated meat product label that used the word "sausage" or "chicken" along with a qualifying word like "plant-based" was not leading consumers into a mistaken belief that they were in fact purchasing chicken or sausage. Plaintiffs also complain that misleading "pictures and illustrations" are outlawed and argue there is no objective way to measure whether these are inherently misleading and there is no guidance to prosecutors as to what violates the law. Again, the Court finds that a person of ordinary intelligence would be able to determine by looking at the label that it was plant based if the appropriate

qualifying words (i.e. plant-based, lab grown, vegan) were used in conjunction with words that are traditionally used to describe meat products (roast, ham, burger, sausages, patties etc.).

Plaintiffs also argue that the Missouri Statute encourages arbitrary and discriminatory enforcement because it fails to establish standards for prosecutors and the public as to 1) whether plant-based and cultivated meat products that use meat terms along with qualifying language violate the Act; 2) what types of images and illustrations "misrepresent" a product as meat or 3) whether persons advertising, offering or selling these products who do not advertise, offer or sell carcasses or food plans are subject to the Act. As discussed above, the Court finds that the Act provides sufficient guidance that it only applies to "person[s] advertising, offering for sale or selling all or part of a carcass or food plan." Additionally, the Act states that it prohibits misleading or deceptive practices which include representing a product as meat that is not derived from harvested production livestock or poultry. The terms "livestock", "meat" and "poultry" are all defined in the Statute. Thus, the Court finds that the Statute provides sufficiently specific guidance to both the public and prosecutors as to what actions are prohibited by the Statute. Accordingly, the Court finds that the Statute does not violate the Due Process Clause as it is not vague.

4. Count IV – Declaratory Judgment

In Count IV, plaintiffs request that the Court declare the Statute unconstitutional on its face, as applied to plaintiffs or both and enter a declaratory judgment that the Statute does not apply to plaintiffs or others who do not advertise, offer for sale or sell any part of a carcass or food plan. Plaintiffs state that declaratory judgment is available where a

party demonstrates facts showing "'a justiciable controversy that presents a real, substantial, presently-existing controversy admitting of specific relief, as distinguished from an advisory decree upon a purely hypothetical situation; . . .a [party] with a legally protectable interest at stake, . . .a controversy ripe for judicial determination; and . . .an inadequate remedy at law." Mo. State Conf. of Nat'l Ass'n for Advancement of Colored People v. State, 601 S.W.3d 241, 246 (Mo.banc 2020)(quoting Mo. Soybean Assn'n v. Mo. Clean Water Comm'n, 102 S.W.3d 10, 25 (Mo. Banc 2003)). Plaintiffs state that their reasonable belief that they must choose between conforming their speech to the Statute's dictates or risk prosecution is an injury-in-fact that presents a justiciable controversy for purposes of Missouri's declaratory judgment statute. Plaintiff's state that a "future injury may suffice if the threatened injury is 'certainly impending' or there is a 'substantial risk' that the harm will occur." Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014).

In opposition defendants state that the Missouri Declaratory Judgment Act provides a procedural remedy rather than a substantive right and federal courts have held that it is improper to invoke the Missouri Declaratory Judgment Act as opposed to the Federal Declaratory Judgment Act in federal court. Additionally, defendants argue that even if plaintiffs could bring their claim, they have not presented a ripe controversy and any fears of prosecution are speculative and lack evidentiary support.

1. Does the Court have jurisdiction to consider plaintiff's Missouri Declaratory Judgment claim?

In their First Amended Complaint, plaintiffs assert a Claim for Declaratory Judgment pursuant to Mo.Rev.Stat. § 527.010. In Hooper v. Advance America, Cash Advance Centers of Missouri, Inc., No. 08-4045-CV-C-NKL, 2008 WL 2787727,

(W.D.Mo. July 15, 2008), the Court found that it lacked jurisdiction over plaintiff's claim for declaratory judgment pursuant to the Missouri Declaratory Judgment Act because the Missouri Act "gives Missouri circuit courts exclusive jurisdiction over Missouri Declaratory Judgment Act claims." Id. at *3. Additionally, in Dye v. Kinkade, No. 2:15-cv-4021-MDH, 2015 WL 7313424 (W.D.Mo. Nov. 19, 2015), the Court stated "[t]he Missouri Declaratory Judgment Act provides a procedural remedy rather than a substantive right and federal courts have held that it is improper to invoke the Missouri Declaratory Judgment Act, as opposed to the Federal Declaratory Judgment Act, in federal court." Id. at *7. The Court agrees and finds that it cannot grant relief under the Missouri Declaratory Judgment Act. However, as plaintiffs note, the Court can consider their claim under the Federal Declaratory Judgment Act. In Maschio-Gaspardo North America, Inc. v. High Plains Apaches Sales & Serv., No. 3:14-cv-00132-SMR-HCA, 2016 WL 7487915 (S.D.Iowa Feb. 11. 2016), the Court noted that both parties had initially sought declaratory judgment under the Iowa statute, but upon removal, the federal Declaratory Judgment Act took control. See also G.S. Robins & Co. v. Alexander Chem Corp., No. 4:10CV2245SNLJ, 2011 WL 1431324 at *1, n.1 (E.D.Mo. Apr. 14, 2011)("Although plaintiff brought this action under Missouri's declaratory judgment act, § 527.010 et. seq., upon removal, this action became governed by the federal Declaratory Judgment Act, 28 U.S.C. § 2201"); GG/MG, Inc. v. Midwest Regional Bank, No. 4:22-cv-00850-SRC, 2022 WL 16960979, *2 (E.D.Mo. Nov. 16, 2022)("The Federal Declaratory Judgment Act applies in a removed case because the Act 'is procedural only.'").

2. Is there a justiciable controversy?

> The Federal Declaratory Judgment Act provides that [i]n a case of *actual controversy* within its jurisdiction, . . .any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. 28 U.S.C. § 2201(a)(emphasis added). . . .The Eighth Circuit has held that, to qualify as a justiciable controversy, [t]here must be [1] a *concrete dispute* between parties having adverse legal interests, and [2] the declaratory judgment plaintiff must seek *specific relief* through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

GG/MG, Inc. v. Midwest Regional Bank, 2022 WL 16960979, at *2 (internal citations and quotations omitted). "An 'actual controversy' justifying declaratory judgment requires the plaintiff to satisfy the traditional three elements for Article III standing: injury in fact, causal connection, and redressability. See McGowen, Hurst, Clark & Smith, P.C. v. Com. Bank, 11 F.4th 702, 709 (8th Cir. 2021)." Markel Corp. v. Pennsylvania Ins. Co., No. 8:22-CV-241, 2023 WL 6051038, at *3 (D. Neb. Jan. 6, 2023).

Plaintiffs argue that this case involves a pre-enforcement challenge to a law that imposes criminal sanctions on anyone who misrepresents a product as meat in violation of the Act's terms. With pre-enforcement challenges plaintiffs state "an actual arrest, prosecution or other enforcement action is not a prerequisite to challenging the law." Susan B. Anthony List, 573 U.S. at 158. In Susan B. Anthony, the Supreme Court stated, "we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" Id. at 159 (quoting Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979)). Plaintiffs argue that they satisfy the injury-in-fact requirement where they allege an intent to engage in a course

of conduct that could be seen as violating the Missouri statute. But, as this Court noted when it ruled on plaintiff's Motion for Preliminary Injunction:

> Plaintiffs state that they are likely to succeed on their First Amendment claim because they wish to engage in truthful, non-misleading speech that is prohibited by the statute. This however is precisely the reason the Court finds that plaintiffs are not likely to succeed – *because the statute does not prohibit their speech*.

(Doc. # 66, p. 12). Similarly, the Eighth Circuit noted in its opinion affirming the denial of plaintiff's Motion for a Preliminary Injunction:

> Here, the State does not argue Plaintiffs "misrepresent" their products as meat. And, Plaintiffs allege they are not in the business of misrepresenting their products as meat. In fact, Tofurky alleges its products are labeled in such as way as to "clearly indicate that the products do not contain meat from slaughtered animals" and are otherwise "clearly labeled as plant based, vegan or vegetarian." For the sake of Plaintiff's arguments on appeal, these allegations prove too much. And further, Plaintiff's as-applied challenge is impeded by the fact that there is a significant doubt surrounding whether the Statute would ever, or could ever, be applied to their speech.

Turtle Island Foods SPC, 992 F.3d 694, 701. Defendants argue that "[n]either the Department [of Agriculture] nor a prosecutor has tried to enforce the statue in the way that the plaintiffs fear, or even given any indication that they plan to do so. No member of the defendant class of prosecutors has taken [action] or threatened to act. No defendant-class member intends to charge, has charged, or has convicted anyone of the statute at issue. The only prosecutor named as a representative of the class has disavowed any enforcement action. And it has been almost five years since the statute went into effect." (Defendants' Suggestions in Support, p. 25). Defendants argue that any declaration that Court would issue would be purely advisory and thus improper. Plaintiffs argue that they have demonstrated "an actual and well-founded fear that the law will be enforced against them." The Court does not agree.

Plaintiffs have not shown that either their conduct or speech is proscribed by the statute. The Statute applies to persons advertising, offering for sale or selling all or part of a carcass or food plan from "misrepresenting a product as meat that is not derived from harvested production livestock or poultry." Mo.Rev.Stat. § 265.494(7). However, as noted by Tofurky's President, "all of Tofurky's products are vegan. . . . Tofurky's products include plant-based sausages, pockets, tempeh, roasts, burgers, deli slices, and chick'n. . . . Tofurky clearly and carefully distinguishes its products from animal-based meat products in its marketing and packaging through words like "plant-based," use of the "certified plant based" seal created by the PBFA, and the FDA-regulated ingredients list on every product's information panel. Tofurky does not want to deceive consumers into believing our plant-based meats are made from animals—this is why Tofurky includes prominent qualifiers and descriptors in order to show that our products are not made from animals." (Doc. 159-14, ¶¶ 7-8). Tofurky does not misrepresent that their products are meat when they do not come from harvested production livestock because that is not their business model or stated purpose. Tofurky's plant-based meat products were intended to serve as alternatives or substitutes for products that contain meat from slaughtered animals. Id. at ¶ 9. Thus, the Court finds that plaintiffs have not shown that their words or actions are proscribed by the statute. Plaintiffs have also not shown that there is any credible threat of prosecution against them. As defendants note, neither the Missouri Department of Agriculture nor any prosecutor in the five years since the statute's enactment has tried to enforce the statute in the way plaintiffs fear or given any indication that they plan to do so. Thus, the Court finds that plaintiffs' have failed to

show that they have suffered an injury in fact and there is no "actual controversy" on which the Court could issue a declaratory judgment.

IV. CONCLUSION

Accordingly, for the reasons stated above, the court hereby **DENIES** plaintiffs' Motion for Summary Judgment on all counts (Doc. # 153) and **GRANTS** defendant Chinn and Intervenor State of Missouri's Motion for Summary Judgment on all counts (Doc. # 156).

Date: March 26, 2024
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge