Where's the Beef? The Fifth Circuit's Attempt to Clarify Plant-Based Food Labeling Laws in Turtle Island Foods S.P.C. v. Strain

Andrew J. Kash

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WHERE’S THE BEEF? THE FIFTH CIRCUIT'S ATTEMPT TO CLARIFY PLANT-BASED FOOD LABELING LAWS IN TURTLE ISLAND FOODS S.P.C. V. STRAIN

I. THE RISE OF PLANT-BASED FOOD ALTERNATIVES IN U.S. MARKETS AND ENACTMENT OF CONSUMER PROTECTION LAWS

Within the last decade, plant-based food alternatives have become increasingly popular in U.S. households. In 2010, approximately twenty percent of households regularly purchased plant-based milk alternatives and by 2016, roughly one-third of households consistently bought alternatives. Plant-based milk, which had roughly a fifteen percent market share of total retail milk sales in 2022, has seen faster market adoption compared to plant-based meat. Moreover, in 2022, plant-based meat alternatives held roughly one percent of total retail meat sold within the United States. Given the increased innovations and consumer interest plant-based products have experienced in recent years, manufacturers have created several alternatives to traditionally frozen plant-based food products. As a result, refrigerated plant-based, meat-like products have increased marketability, which has allowed them to be sold alongside traditional animal-based meats, creating greater consumer visibility in stores.

Consumers’ switch from meat to plant-based alternatives has substantially reduced overall greenhouse gas levels. According to proponents of plant-based alternatives, despite the fact that animal


2. See id. (noting statistics of increasing plant-based alternative food purchases).


4. See id. (describing retail market share of plant-based meat).

5. See id. (identifying innovation-led product changes).

6. See id. (relating innovation results with plant-based manufacturers).

agriculture utilizes seventy-seven percent of Earth’s agricultural land, it contributes only seventeen percent to the global food supply. Due to this inefficiency in land usage, economists and environmentalists alike have begun studying “food loss” to determine the negative and quantifiable effects that animal products create compared to plant-based alternatives. In terms of inefficiency, producing four grams of beef protein requires the same amount of land that can create one hundred grams of plant-based protein. Thus, the choice to produce beef over plant alternatives results in inefficient land usage and a drastic opportunity loss for agricultural forces to deliver protein-rich foods to consumers worldwide.

Concerned with setting standards for a growing variety of food and drink items in 1973, the Food and Drug Administration (FDA) established a standard for the description of milk. Soon after, the FDA regulated the misbranding of food in part to protect against false labeling of items such as “milk” or “meat.” As plant-based milk and meat alternatives have grown in popularity within the last decade, fifteen states passed laws further limiting the usage of popular descriptive food terms.

Turtle Island Foods (Tofurky) — a plant-based food company that originally introduced a holiday meatless roast to the market in 1995 — has challenged the constitutionality of laws passed in states with alternative meat labeling restrictions. Tofurky has succeeded in many of its claims, primarily because courts have not declared the company’s labeling of terms such as “plant-based” or “vegan” as

8. See id. (analyzing animal agricultural land usage efficiency); see also Team GFI, GOOD FOOD INST., https://gfi.org/our-team/ (last visited Dec. 28, 2023) (detailing makeup of institute team).


10. See id. (finding inefficiencies when Americans choose to eat animal products over plant alternatives that are more efficient with land usage).

11. See id. (concluding present opportunity food loss when producing animal-based protein).

12. See LABELING OF PLANT-BASED MILK ALTERNATIVES AND VOLUNTARY NUTRIENT STATEMENTS: GUIDANCE FOR INDUSTRY, infra note 1 (recounting creation of standard and necessary requirements for calling products “milk”).


misleading or misbranding to consumers. Moreover, since courts have not found Tofurky’s labeling to be misleading or misbranding, the company has continued to market its products with plant-based related terms in emerging markets. Despite courts’ decisions favoring Tofurky, the company has filed several amended complaints, attacking the plain language of several state statutes by claiming they are vague and contradictory to promoting consumer clarity with food labels.

Tofurky’s vagueness and First Amendment violation claims against states have seen more mixed results. As seen in Oklahoma’s labeling law, Tofurky successfully challenged the law under First Amendment violations but did not receive a judgment on how the law was too vague to apply to Tofurky or other companies seeking to use alternative labels. While a district court decision in Louisiana led to a declaration of the state law as unconstitutional, the Fifth Circuit has recently reversed, leaving Tofurky on a negative note with its most recent court decision. Though future litigation is likely to continue, Tofurky can continue to rely upon several court decisions as persuasive authority in hopes of permitting less stringent labeling laws against a growing alternative food commercial company.

This Note examines the significance of the Fifth Circuit’s ruling in Turtle Island Foods S.P.C. v. Strain by exploring both Tofurky’s advances and its setbacks with state labeling laws. In addition, this Note addresses the potential marketing and environmental impacts of various state determinations, particularly in the Fifth Circuit. Part II of this Note provides a historical and factual framework for

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16. See generally Turtle Island Foods, SPC v. Thompson, 992 F.3d 694, 701-02 (8th Cir. 2021) (explaining claims brought by Tofurky).
17. See id. (portraying implications of court determinations).
22. See Caracciolo, supra note 18 (elucidating potential positive outlook for Tofurky in future litigation).
23. See 65 F.4th 211, 212 (5th Cir. 2023) (introducing Note’s substance).
24. For a discussion of the Fifth Circuit’s ruling and its potential impact on individual state labeling laws, see infra notes 144-60 and accompanying text.
25. For a summary of the arguments in Turtle Island Foods, see infra notes 31-47 and accompanying text.
understanding Louisiana’s labeling laws.26 A development of state interest in labeling laws for plant-based foods – including challenges brought in several states – follows in Part III.27 Part IV includes an explanation and summary of the legal justifications for the court’s holding.28 Next, Part V provides a critical analysis of the court’s reasoning, contending that a narrow interpretation of the Louisiana labeling law’s text is proper but does not address the main question regarding the case’s applicability and overall purpose for the state of Louisiana and beyond.29 Lastly, Part VI outlines the case’s potential impacts on both Louisiana and broader food marketing and future plans for plant-based alternatives.30

II. A PACKAGE DEAL: STANDING AND SPEECH REGULATION IN THE FACTUAL ANALYSIS OF TURTLE ISLAND FOODS

In its complaint, Tofurky argued that the state of Louisiana’s Truth in Labeling of Food Products Act (the Act) was an unconstitutional restriction on Tofurky’s right to free speech.31 Tofurky primarily argued that its labeling and marketing of plant-based foods should not be deemed a violation of the Act.32 Under the Act, commercial producers cannot misbrand or misrepresent any food product as an agricultural product.33 Additionally, the law prohibits companies from representing a food product as meat when the product was not derived from any animal listed within the Act.34 After the Act took effect on October 1, 2020, Tofurky elected to refrain from using certain words and images in its marketing materials and removed videos from its website and social media as a precautionary measure before any state enforcement.35

26. For a discussion of Turtle Island Foods and the Tofurky’s ongoing battle with labeling laws, see infra notes 31-47 and accompanying text.
27. For an overview of Turtle Island Foods, its historical background, and its facts, see infra notes 51-63 and accompanying text.
28. For a discussion of Turtle Island Foods and its legal basis and reasoning, see infra notes 144-60 and accompanying text.
29. For a critical analysis of the Fifth Circuit’s holding in Turtle Island Foods, see infra notes 161-75 and accompanying text.
30. For a discussion of Turtle Island Foods and its potential impacts, see infra notes 176-96 and accompanying text.
32. See Turtle Island Foods at 214 (citing LA. STAT. ANN. §§3:4741-4746) (providing basis for Tofurky’s claim).
33. LA. STAT. ANN. § 3:4744(B) (explaining restrictions on commercial labeling).
34. See id. (noting additional restrictions on ability to misrepresent non-meat products).
Prior to arguing the merits of its claim, Tofurky had to establish it had standing to challenge the Act, as Louisiana had not imposed any penalty against Tofurky and no enforcement actions had previously occurred.\textsuperscript{36} Since the defendants argued that Tofurky's labels were not misleading, never claimed that the labels Tofurky removed were a violation of the Act, and Louisiana did not direct Tofurky to remove any labels or marketing materials, the defendants contended no actual injury had occurred.\textsuperscript{37} Because of the alleged lack of enforcement actions taken and absence of actual injury to the plaintiffs, the defendants argued jurisdiction was improper.\textsuperscript{38} Nevertheless, the district court concluded Tofurky had standing and could bring a pre-enforcement claim against the defendant state.\textsuperscript{39}

The district court also went further and sought to decide whether the state government had the power to regulate the specified commercial speech in accordance with the First Amendment.\textsuperscript{40} Since the district court found that the plaintiffs had standing, the court determined the burden was on the defendant state to justify the restriction on commercial speech.\textsuperscript{41} By shifting the burden to the defendant to produce evidence that consumers were confused by Tofurky's labeling, the court held that the Act was unconstitutional as there was no evidence presented by the defendants that consumers were ever confused.\textsuperscript{42} In addition, the court concluded that the Act was unconstitutional because it was an excessive measure to further Louisiana's interest in reducing or eliminating consumer confusion.\textsuperscript{43} Thus, the court's grant of summary judgment for Tofurky and its determination that the law was unconstitutional led the Louisiana Commissioner of Agriculture and Forestry to appeal the decision to the Fifth Circuit.\textsuperscript{44}

Ultimately, the Fifth Circuit found that the Act only applied to companies that purposely misled consumers into thinking products

\textsuperscript{36} See id. at 696 (describing court's requirement for valid standing). For a further discussion of standing requirement, see infra notes 124-31 and accompanying text.
\textsuperscript{37} See Strain, 594 F. Supp. 3d at 695 (listing Louisiana's argument that it had not actually or imminently threatened enforcement).
\textsuperscript{38} See id. at 697-700 (finding Tofurky had standing).
\textsuperscript{39} See id. at 701 (summarizing district court's determinations).
\textsuperscript{40} Id. at 696 (explaining district court's path to find Act violated First Amendment).
\textsuperscript{41} See id. at 702 (analyzing lack of consumer confusion).
\textsuperscript{42} See Strain, 594 F. Supp. 3d at 696-703 (displaying reasoning to find Act unconstitutional in district court).
\textsuperscript{43} See id. at 703 (describing reasoning for district court finding of unconstitutional restriction of commercial speech).
\textsuperscript{44} See Turtle Island Foods S.P.C. v. Strain, 65 F.4th 211, 215 (5th Cir. 2023) (showing history of district court decision leading to defendant appeal).
were animal-based when they were not. The Fifth Circuit concluded that the lower court implemented its own interpretation and went beyond the limits of binding precedent. Consequently, the Fifth Circuit reversed the lower court’s decision and vacated the injunction that ceased implementation of the Act.

III. The Meat of the Problem: An Overview of Plant-Based Alternatives and Food Labeling Laws

Given greater consumer interest in plant-based alternatives, Tofurky’s mission involves raising awareness about the environmental impacts of animal-based consumption. In providing consumers with plant-based alternatives that lower environmental costs of production, Tofurky has faced state restrictions in its attempts to market these products. To understand the court’s review in Turtle Island Foods, it is important to contextualize plant-based alternatives, Louisiana’s food labeling statute, and labeling laws’ interaction with First Amendment rights.

A. The Meat Industry and the Rise of Plant-Based Alternatives

State labeling laws have continuously evolved with growing consumer interest in plant-based alternatives. While the consumption of meat and meat products has been on the rise since the 1960s, it is evident that livestock production has a profound negative impact on greenhouse gas emissions as well as on overall water pollution and water scarcity levels. Meat production alone accounts for fifty-seven

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45. See id. at 221 (providing decision to reverse lower court decision).
46. See id. at 220-21 (finding errors in district court’s decision to implement its own interpretation of Act).
47. See id. at 221 (giving order to reverse district court judgment and vacate injunction).
49. See Joan Sabaté, Kittí Sranacharoenpong, Helen Harwatt, Michelle Wien & Samuel Soret, The Environmental Cost of Protein Food Choices, 18 PUB. HEALTH NUTRITION 2067, 2067 (2014) (calculating impacts of meat production on environmental factors by considering impact of producing one kilogram of plant-based or animal-based protein).
50. For a discussion on the Fifth Circuit’s review, see infra notes 144-60 and accompanying text.
51. For a discussion on the impacts of several state labeling laws, see infra notes 80-115 and accompanying text.
percent of the greenhouse gas emissions of the entire food production industry.\textsuperscript{53} This impact also results in deforestation and a loss of biodiversity, which can significantly contribute to changes in the environment.\textsuperscript{54} Moreover, roughly sixty percent of biodiversity loss has been attributed to meat consumption.\textsuperscript{55} These changes limit the ability of ecosystems to regulate themselves through the changes seen in soil degradation, water loss, and greenhouse gas emission levels.\textsuperscript{56}

In addition to providing individuals with healthier outcomes and a decreased risk of cardiovascular disease, experts have associated plant-based diets with reducing the negative impacts on freshwater and land usage.\textsuperscript{57} In recent years, consumers have expressed a strong willingness to alter their preferences if a new product addresses their primary desires of nutrition, taste, and safety.\textsuperscript{58} As plant-based companies shift away from more unhealthy products containing refined grains and added sugars to more natural whole grains and real fruits and vegetables, experts believe that consumers favoring plant-based diets will double from thirteen percent to twenty-seven percent.\textsuperscript{59} Experts also project that the number of people who would mix plant-based foods into a diet of traditional animal products would increase by one third.\textsuperscript{60}

While worldwide markets have more thoroughly established procedures for new plant-based products, plant-based producers also face limitations in establishing sustainable suppliers and dedicated consumer adoption.\textsuperscript{61} In addition to these challenges, state

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\textsuperscript{53} See id. (showing statistics for resulting greenhouse gas emissions).

\textsuperscript{54} See id. (implying broader climate changes to overall environment).


\textsuperscript{56} See id. (listing effects of meat production on environment).

\textsuperscript{57} See Aviva A. Musicus, Dong D. Wang, Marie Janiszewski, Gidon Eshel, Stacy A. Blondin, Walter Willett & Meir J. Stampfer, Health and Environmental Impacts of Plant-Rich Dietary Patterns: A US Prospective Cohort Study, 6 LANCET PLANET HEALTH 892, 892 (2022) (characterizing environmental impacts of various diets and associated health risks).


\textsuperscript{59} See Musicus et al., supra note 57, at 892 (distinguishing variances in plant-based diets and predicting future consumer trends).

\textsuperscript{60} See id. (predicting future consumer eating habits).

\textsuperscript{61} See Morach et al., supra note 58, at 12 (illustrating plant-based producer challenges in adopting greater market-share).
regulation has made marketing plant-based products more difficult, particularly regarding the usage of various terms related to traditional meat products. Ultimately, continuing to build market acceptance has remained a challenge for Tofurky though the company remains dedicated to bringing greater awareness to consumers in hopes of lowering overall environmental impacts from food production.

B. Louisiana’s Truth in Labeling of Food Products Act

The desire for states to pass laws barring alternative food companies from using words such as “meat” and “burger” dates back to 2018, when Missouri became the first state to pass an alternative protein labeling law. By late 2019, eleven other states had followed and passed similar labeling laws. In many of the laws, only food products made from animals could contain traditional labels such as “burger,” “bacon,” or “hot dog.” Along with other states nearby, such as Mississippi and Arkansas, Louisiana passed the Truth in Labeling of Food Products Act in 2019 to “protect consumers from misleading and false labeling of food products that are edible by humans.”

The Act aims to prevent companies from misleading, misbranding, or misrepresenting any food product as an agricultural product. In addition, the Act only permits products derived from various animals to bear protected terms on their labels. The Act’s enforcement measures impose a maximum penalty of five hundred


63. See Morach et al., supra note 58, at 20-22 (arguing for fair levels of policy and regulation between conventional and alternative proteins).

64. Caracciolo, supra note 18 (noting timeline of state implementation of labeling laws since 2018 and pending litigation across United States).


66. See id. (highlighting specific labels exclusive to products made from animals).


68. Id. (listing purpose of Louisiana statute).

69. See id. (citing LA. STAT. ANN. § 3:4744(B)(4)) (underscoring intentional protections in labeling practices by Louisiana Act).
dollars for each violation, assessed by Louisiana’s Commissioner of Agriculture and Forestry through an adjudicatory hearing.\(^{70}\)

C. Food Labeling Laws and the First Amendment: Commercial Speech

First Amendment protections over commercial speech have seen greater developments in the last forty years since the United States Supreme Court provided more flexibility for businesses to interact with consumers.\(^{71}\) The Court has generally provided less protection for commercial speech compared to traditional forms of protected speech, which usually involve political or artistic expression.\(^{72}\) As attitudes toward state bans on commercial speech shift and a trend toward overturning restrictions grows, the Supreme Court has increasingly moved towards granting commercial speech a degree of limited protection.\(^{73}\) Additionally, the Supreme Court has employed varying definitions in its attempts to define commercial speech.\(^{74}\) Following the language used in the turning-point case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,\(^{75}\) the Supreme Court has defined commercial speech as speech that “no more than propose[s] a commercial transaction.”\(^{76}\) This limited definition suggests that one opposing a commercial transaction has complete First Amendment protections when communicating.\(^{77}\) Likewise, the definition seems to favor speech that opposes product sales while


\(^{72}\) See *id.* (demonstrating differences in treatment between various protected speech types); *see also* Vincent A. Blasi, *The Pathological Perspective and the First Amendment*, 85 *Columbia L. Rev.* 449, 449 (1985) (questioning First Amendment’s application to commercial free speech).

\(^{73}\) See Redish, *supra* note 71 (highlighting change in Supreme Court’s perspective to strongly recognize First Amendment protections for commercial speech); *see also* Valentine v. Chrestensen, 316 U.S. 52, 55 (1942) (following lack of commercial free speech protections).


\(^{75}\) 425 U.S. 748, 762 (1976) (favoring limited commercial speech protections under First Amendment).

\(^{76}\) *Id.* (defining commercial speech with limited applicability); *see also* Thomas H. Jackson & John C. Jeffries Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 Va. L. Rev. 1, 41 (1979) (discussing impacts to traditional areas of speech expression when commercial speech protections are altered).

\(^{77}\) See Redish, *supra* note 71 (suggesting viewpoints opposing commercial speech possess greater First Amendment protections).
discriminating against speech promoting such sales.78 Facing limited power in challenging state prohibitions on its commercial speech, Tofurky relied on a framework that alleged violations of both the First and Fourteenth Amendments against each state.79

1. The Central Hudson Test

In 2019, Tofurky challenged the Missouri statute prohibiting misrepresentations or misleading food labels through a misdemeanor punishment of imprisonment and a fine up to $1,000.80 Among others similarly situated, Tofurky filed a complaint regarding the statute’s constitutionality under the First Amendment.81 The district court denied the preliminary injunction, finding the plaintiffs unlikely to succeed on a First Amendment claim because the Missouri statute only prohibited misleading speech — a permissible government restriction.82

Following the reasoning from Central Hudson Gas and Electric Corporation v. Public Service Commission of New York,83 the district court declined to issue a preliminary injunction.84 The Central Hudson analysis provides that First Amendment commercial free speech protections only apply to communications that are not misleading or unlawful.85 Additionally, the district court followed the Supreme Court’s holding that the government could ban communication forms that are more likely to deceive than inform.86

In Central Hudson, the Supreme Court created a four-part test to determine whether speech or text is protected by the First Amendment.87 Commercial speech must first concern lawful activity and

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78. See id. (noting discrepancy in Supreme Court interpretation).
79. See Turtle Island Foods, S.P.C. v. Strain, 65 F.4th 211, 221 (5th Cir. 2023) (alleging claims under both First and Fourteenth Amendment).
81. See Turtle Island Foods, SPC v. Richardson (Richardson), 425 F. Supp. 3d 1131, 1135 (W.D. Mo. 2019) (introducing background of plaintiff class and reason for complaint against state of Missouri).
82. Id. at 1141 (announcing court reasoning for denying plaintiff’s motion for preliminary injunction).
86. Id. (noting additional powers of government to rule on commercial communication).
87. See id. (explaining creation of four-part test).
not be deemed misleading. Second, the governmental or state interest must be substantial. If the speech is neither misleading nor unlawful and advances a substantial governmental interest, the law at issue must then directly support the governmental interest asserted. Fourth, the law may not be more extensive than necessary to accomplish the governmental interest.

In the test provided in *Central Hudson*, the Supreme Court emphasized that the First Amendment does not protect misleading commercial statements. In the 2019 case, the Missouri statute only intended to regulate false or inherently misleading commercial speech. Although the plaintiffs appealed and believed their labels were truthful and non-misleading, the U.S. Court of Appeals for the Eighth Circuit affirmed and concluded the plaintiffs failed to show irreparable harm through the statute. Though denied on appeal, the plaintiffs received a seemingly positive outcome: the district court found the statute did not apply to the plaintiffs' speech or labeling actions.

2. Tofurky’s Challenges to Commercial Free Speech Protection

In 2022, Tofurky challenged the constitutionality of a similar Arkansas statute through the First Amendment’s Free Speech Clause and the Fourteenth Amendment’s Due Process Clause. Because Tofurky had not been penalized by Arkansas, had not taken steps to remove products from stores, and had not changed marketing practices or altered product labeling, the state claimed Tofurky lacked standing to challenge the Act. In addressing the injury in fact requirement and whether Tofurky had a claim that could soon

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88. See id. (listing first consideration of lawful activity).
89. See id. (listing second factor regarding state or governmental interest).
90. See *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564 (summarizing first three factors of initial consideration).
91. See id. (explaining fourth factor requiring direct advancement of government interest).
92. See id. (emphasizing limited protections of First Amendment on misleading commercial speech).
93. See id. (questioning connection between commercial speech and First Amendment); see also *Turtle Island Foods, SPC v. Richardson*, 425 F. Supp. 3d 1131, 1140 (W.D. Mo. 2019) (describing purpose of Missouri statute).
94. See *Turtle Island Foods, SPC v. Thompson*, 992 F.3d 694, 701-02 (8th Cir. 2021) (concluding district court did not abuse discretion and no reason exists for changing district court ruling).
95. See id. at 698 (noting district court decision rendered positive outcome for plaintiffs because court found statute did not apply to plaintiffs’ speech).
97. See id. at 925 (noting lack of actions taken by plaintiff Tofurky to establish standing).
result in actual or imminent harm, the district court concluded that Tofurky had valid standing to pursue both injunctive and declaratory relief.98 Accordingly, the court found that Tofurky’s labeling was lawful and not inherently misleading, thus permitting First Amendment protection.99 The court also permanently enjoined the relevant Arkansas Code from being enforced statewide and declared the statute facially unconstitutional and unenforceable against Tofurky.100

In early 2022, Tofurky challenged the Louisiana Truth in Labeling of Food Products Act, claiming a restriction on commercial speech.101 The company had already refrained from using certain phrases and images and removed videos from its company website and social media out of fear of future enforcement.102 Finding a present pre-enforcement case with Tofurky under the Barilla v. City of Houston103 holding to confer standing, the district court determined that the plaintiff’s self-censorship had been chilled by the Act.104 Because the court noted Tofurky’s self-censorship, the plaintiffs demonstrated serious intent to engage in the Act’s proscribed conduct, thus possessing standing to challenge the Act.105 The Fifth Circuit’s reasoning based on Express Oil Change, L.L.C. v. Mississippi Board of Licensure for Professional Engineers and Surveyors106 recognized an alternative method for the defendant to create a less-restrictive disclaimer to prevent consumer confusion.107 Rather than a complete statutory bar on commercial speech through a statute, the court found an alternate method to support its analysis.108 The state’s

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98. See id. (showing Tofurky’s conclusions at district court level).
99. See id. at 937 (describing district court’s conclusion that plaintiff’s claims had valid standing).
100. See id. at 948 (noting additional declarations by court).
102. See id. at 699 (describing differences between Tofurky’s conduct in Louisiana versus Arkansas).
103. See Barilla v. City of Houston, 13 F.4th 427, 433 (5th Cir. 2021) (introducing test to find pre-enforcement validity to confer standing onto plaintiff).
104. See Strain, 594 F. Supp. 3d at 698 (explaining method used to determine whether plaintiff has standing turns on whether threat of future enforcement of act is substantial).
105. See id. at 700 (concluding Tofurky’s self-censorship existence).
106. See Express Oil Change, L.L.C. v. Miss. Bd. of Licensure for Pro. Eng’rs & Surveyors, 916 F.3d 483, 493 (5th Cir. 2019) (addressing alternative methods to prevent consumer confusion in markets); see also Voting for Am., Inc. v. Steen, 732 F.3d 382, 398 (5th Cir. 2013) (providing reasons for using narrow interpretation of state statutes).
107. See Strain, 594 F. Supp. 3d at 703 (noting methods states may impose in place of total ban on commercial speech).
108. See id. (explaining additional methods of imposing free-speech restrictions); see also Express Oil Change, 916 F.3d at 495 (addressing alternative “regulatory safeguards” states may impose).
primary argument contended that the Act didn’t restrict Tofurky’s speech but rather targeted other forms of commercial speech that might be considered deceptive. Consequently, the district court determined that the state failed to demonstrate a connection between the regulation and the constitutionally protected speech. As a result, the district court found the Act unconstitutionally vague and restricted Louisiana from enforcing the provisions of the state statute.

On appeal, the court found Tofurky satisfied the injury in fact requirement for a pre-enforcement free speech challenge; however, it determined that the Louisiana Act did not violate the First Amendment’s protection of commercial free speech. The Fifth Circuit reversed the decision by following the state’s narrow construction of the Act’s text that explicitly applied to companies from intentionally misleading consumers by claiming a product was animal-based when it was not. In overturning the decision, the Fifth Circuit held that the Act was limited in scope to counter company representations that mislead consumers about non-agricultural products. Ultimately, the court favored viewing the Act as a limited means of protecting consumers from companies that mislead.

IV. Printing a New Label: A Narrative Analysis of the Fifth Circuit’s New and Narrow Construction

On appeal, the Fifth Circuit reviewed whether the State of Louisiana had a sufficient claim against the district court’s granting of Tofurky’s summary judgment. In determining whether a sufficient claim existed, the Fifth Circuit focused on whether Tofurky had valid standing and whether the Act had violated the First Amendment. Tofurky argued that a narrow construction of the statute would

109. See Strain, 594 F. Supp. 3d at 703 (noting state’s inability to show relation between regulation and protected speech).
110. See id. (showing district court determinations).
111. See id. (determining unconstitutionality of Louisiana Act and noting resulting orders to state).
112. See Turtle Island Foods, S.P.C. v. Strain, 65 F.4th 211, 221 (5th Cir. 2023) (noting conclusions of Fifth Circuit on Tofurky’s First Amendment claims).
113. See id. (explaining narrow construction of Act and limited application of intentionally misleading consumers).
114. See id. (describing Fifth Circuit’s process of following narrow interpretation of Act’s text).
115. For a further discussion of the background of the narrow construction of the Act, see supra notes 47-114 and accompanying text.
116. See Turtle Island Foods, 65 F.4th at 221 (summarizing review of Tofurky’s Fifth Circuit claims).
117. For a discussion on the Fifth Circuit’s reasoning, see infra notes 144-60 and accompanying text.
lead to potential future claims brought against the company.\textsuperscript{118} Tofurky feared that even when its labeling unintentionally confuses a consumer into thinking a plant-based product is an agricultural, animal-based product specified under the Act, it could nevertheless still be held liable.\textsuperscript{119} If a labeling term were deemed deceptive in the future, or even defined historically to reference an agricultural product, Tofurky worried the Act could apply to the company’s conduct.\textsuperscript{120} Thinking the state could enforce a future claim, Tofurky argued in favor of the \textit{Central Hudson} test.\textsuperscript{121} More specifically, Tofurky sought First Amendment protections in its pre-enforcement claims.\textsuperscript{122} The Fifth Circuit disagreed with Tofurky, reasoning that because nothing in the statute’s terms expressly required the state to enforce the provisions, making potential future determinations against Tofurky was left up to the commissioner discretion.\textsuperscript{123}

A. Valid Standing for Tofurky

Tofurky first had to establish standing to challenge the Louisiana Act and claim that the statute was an unconstitutional restriction on free speech.\textsuperscript{124} In order to establish standing, Tofurky had to demonstrate (1) an “injury in fact” that was “concrete and particularized” and “actual or imminent,” (2) that it was fairly traceable to the defendant’s actions, and (3) that it was likely to be redressed by a favorable decision.\textsuperscript{125} Because the State of Louisiana had not acted yet, Tofurky challenged in a pre-enforcement manner to permit a finding of an injury in fact if the court was able to find chilled speech or self-censorship.\textsuperscript{126} Per the Fifth Circuit, all Tofurky had to show to establish an injury in fact was that it (1) intended to engage in a course of conduct affected with a constitutional interest, (2) that

\begin{itemize}
  \item \textsuperscript{118} See \textit{Turtle Island Foods}, 65 F.4th at 221 (explaining Tofurky’s argument on appeal).
  \item \textsuperscript{119} See id. (noting Tofurky’s fear of future enforcement).
  \item \textsuperscript{120} See id. (summarizing Act’s ability to apply retroactively to Tofurky’s conduct).
  \item \textsuperscript{121} See id. (providing Tofurky’s general basis for argument).
  \item \textsuperscript{123} See \textit{Turtle Island Foods}, S.P.C. v. Strain, 65 F.4th 211, 221 (5th Cir. 2023) (explaining Fifth Circuit’s disagreement with Tofurky’s claim to use alternate First Amendment violation test).
  \item \textsuperscript{124} See id. (noting initial challenge for Tofurky).
  \item \textsuperscript{125} See id. (citing \textit{Lujan v. Defs. of Wildlife}, 504 U.S. 555, 560-61 (1992)) (describing test to establish plaintiff standing).
  \item \textsuperscript{126} See id. (citing \textit{Barilla v. City of Houston}, 13 F.4th 427, 431 (5th Cir. 2021)) (describing pre-enforcement free speech challenge requirements).
\end{itemize}
the course of action was arguably proscribed by statute, and (3) that there existed a credible threat of prosecution under the statute.127

As the Fifth Circuit determined that Tofurky intended to engage in conduct that was arguably affected by a constitutional interest, the court stated the labels and marketing were the precise kinds of commercial activity the First Amendment sought to protect.128 Moreover, Tofurky’s intended actions were proscribed by the Act as it restricts from misbranding or misrepresenting any food product as an agricultural one.129 The Fifth Circuit also disagreed with the State of Louisiana as it chose not to apply the test in Barilla and instead looked only to whether Tofurky actually intended to mislead.130 Since the parties had agreed that Tofurky had not intended to mislead or misbrand, and that Tofurky’s intention was not at issue even at the district court level, all parties determined that Tofurky had not misled any consumers.131

B. First Amendment Protections

Tofurky plaintiffs were also required to establish that no set of valid circumstances of applicability could exist under the Act or that the Act lacked any “plainly legitimate sweep.”132 To win the preliminary injunction on appeal, Tofurky needed to persuade the court that the statute was not valid under any circumstances.133 Additionally, Tofurky had to convince the court that First Amendment protections should apply to its conduct to protect plaintiffs from future enforcement actions.134 In the Fifth Circuit, Tofurky shifted to a claim of vagueness, arguing that since their conduct was not deemed misleading, the Act should still change as it was unconstitutionally vague.135

128. See Turtle Island Foods, 65 F.4th at 216 (explaining qualified First Amendment protections).
129. See id. (noting how Tofurky’s actions were proscribed by Act).
130. See id. at 221 (summarizing Fifth Circuit’s alternate method to aid in establishing standing); see also Barilla, 13 F.4th at 433 (establishing test to find pre-enforcement validity to confer valid standing onto plaintiff).
131. See Turtle Island Foods, 65 F.4th at 221 (explaining absence of Tofurky’s intentions to mislead).
132. See id. at 220 (citing United States v. Stevens, 559 U.S. 460, 472 (2010)) (noting requirements for Tofurky to challenge First Amendment violation).
133. See id. at 221 (listing necessary elements for Tofurky to win preliminary injunction).
134. See id. (describing additional considerations to win preliminary injunction and convince court).
135. See id. at 220 (explaining Tofurky’s change of stance in Fifth Circuit).
The Fifth Circuit responded by countering the district court’s broad interpretation of the Act, choosing to provide its own interpretation.136 In its reasoning, the court relied on the state’s argument that the Act only applies to misleading speech.137 Since the Act is only in place to safeguard against speech that actually misleads, and the parties agreed Tofurky did not use misleading labeling, the Fifth Circuit held that the Act only applies to companies that intend to mislead consumers by claiming a product is agricultural when it is not.138 As a result, the Fifth Circuit followed a narrow interpretation of the Act and found that the state did not violate Tofurky’s First Amendment protections of commercial free speech.139

The court also limited when the state could enforce the Act’s punitive provisions.140 Specifically, the Fifth Circuit stated the Act could only apply to “companies that actually intend consumers to be misled about whether a product is an ‘agricultural product’ when it is not.”141 The court also considered whether its own interpretation contradicted the Act when evaluating Tofurky’s own understanding.142 Once the court determined that it could apply a narrower interpretation to analyze the state statute, the Fifth Circuit found the district court erred by implementing its own interpretation of the state Act.143

C. Application of the Central Hudson Test

On appeal in the Fifth Circuit, Tofurky argued that the plain meaning of the Act extended beyond simply misleading speech or labeling.144 With this reasoning, Tofurky believed it could bring forward a First Amendment challenge, even though the district court

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137. See id. at 220 (agreeing with Louisiana state argument).

138. See id. at 221 (describing Fifth Circuit’s conclusions about Act’s language).

139. See id. (considering implications and Fifth Circuit conclusions).

140. See id. (limiting scope of application and enforcement).

141. See Turtle Island Foods, 65 F.4th at 221 (capturing Fifth Circuit’s interpretation of Act for evaluating Tofurky’s argument on appeal); see also Voting for Am., Inc. v. Steen, 732 F.3d 382, 398 (5th Cir. 2013) (providing narrow interpretation did not contradict state statute); see also Express Oil Change, L.L.C. v. Miss. Bd. of Licensure for Pro. Eng’rs & Surveyors, 916 F.3d 483, 488 (5th Cir. 2019) (supporting narrow interpretation of state statute).

142. See Turtle Island Foods, 65 F.4th at 221 (noting Fifth Circuit’s additional considerations).

143. See id. (providing final decision to reject Tofurky’s claims).

144. See id. (describing Tofurky’s argument in favor of expansive Act interpretation).
did not find Tofurky’s labeling misleading. Arguing on appeal, Tofurky claimed that the district court correctly applied the factors listed in *Central Hudson*.

On a fundamental level, Louisiana argued that the Act only applies to actually misleading speech. Louisiana reasoned that because of its limited application, the Act could not be included under First Amendment protections of commercial free speech for Tofurky. In convincing the Fifth Circuit, Louisiana challenged the district court’s order with two distinct lines of reasoning: (1) the Act only applies to those who intentionally misbrand or misrepresent food products as agricultural ones, (2) if the *Central Hudson* four-part test applies, the district court erred in its application. As both sides agreed that Tofurky did not intentionally misbrand or misrepresent, the Fifth Circuit focused on Louisiana’s second claim against the district court’s determinations regarding the application of the four-part test. Ultimately, the state did not provide extensive reasoning behind its rejection of the *Central Hudson* factors because it argued that the Act’s “misbrand or misrepresent” requirement ensured there was a direct advancement of governmental interest. In essence, Louisiana argued that the state has a valid interest in protecting consumers against misleading speech. Due to the Act’s limited application, Louisiana argued that the Act went no further than necessary to advance the state’s interests.

The Fifth Circuit agreed with Louisiana’s reasoning and decided to forego the *Central Hudson* factors in its analysis. The court followed precedent and opted for a narrower interpretation of the Act’s text to uphold its constitutionality.

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145. *See id.* (explaining Tofurky’s justification to bring First Amendment violation claim).
146. *See id.* (summarizing Tofurky’s argument to follow district court interpretation).
147. *Turtle Island Foods*, 65 F.4th at 220 (noting defendant’s argument that Act only applies to actually misleading speech).
148. *See id.* (describing results of limited Act application to Tofurky’s labeling).
149. *See id.* at 219 (listing defendant’s arguments for Fifth Circuit to overturn district court’s determinations).
150. *See id.* (noting Fifth Circuit’s determination to closely consider district court’s application of four-part test).
151. *See id.* (explaining Louisiana’s choice to briefly explain direct advancement of state interest).
153. *See id.* (showing how state interpreted Act in limited way to advance interests of protecting consumers).
154. *See id.* at 220 (agreeing with defendant state to apply narrow interpretation of Act).
precedent, the Act’s narrower construction allowed the Fifth Circuit to view the statute as only applying to actually misleading representations that would evidently fall outside of explicitly protecting First Amendment free speech.\textsuperscript{156}

Ultimately, in choosing to reject the *Central Hudson* analysis, the Fifth Circuit did not have to make a determination on the purposes of the Act.\textsuperscript{157} By choosing not to apply the *Central Hudson* analysis, the Fifth Circuit did not have to conclude whether the Act directly advanced any state asserted interest.\textsuperscript{158} The Fifth Circuit also did not have to determine whether the commercial speech concerned unlawful or misleading activity.\textsuperscript{159} Rejecting the district court analysis, the Fifth Circuit furthered its narrow stance by explaining that the district court erred when it thought the Act covered more speech than was necessary to advance a state’s interest.\textsuperscript{160}

V. EXPIRED LABELS: A CRITICAL ANALYSIS OF THE FACTORS CONSIDERED IN THE *TURTLE ISLAND FOODS* DECISION

The Fifth Circuit decided *Turtle Island Foods* by foregoing the factors provided by the Supreme Court in *Central Hudson* to determine when First Amendment commercial free speech protections apply.\textsuperscript{161} In doing so, the Fifth Circuit missed the opportunity to uphold the existing Supreme Court precedent that authorizes the government to ban forms of communication that are more likely to deceive the public than to inform.\textsuperscript{162} As a result of the Fifth Circuit’s ruling, Louisiana’s commissioner can enforce the state statute against Tofurky only if the company’s labeling is found to mislead consumers in the future.\textsuperscript{163} This limited application advances a unique and particular

\textsuperscript{156} See id. at 220 (showing implications of narrower construction of Act’s text).

\textsuperscript{157} See *Turtle Island Foods*, 65 F.4th at 220-21 (explaining how Fifth Circuit was able to avoid determining whether Act advanced state interest).

\textsuperscript{158} See id. (describing Fifth Circuit’s lack of necessary conclusions).

\textsuperscript{159} See id. (furthering explanation of Fifth Circuit decision to avoid making additional conclusions).

\textsuperscript{160} See id. (noting district court’s mistake of providing overly broad interpretation).

\textsuperscript{161} For a discussion of the Fifth Circuit’s findings and decision to overturn the district court, see *supra* notes 116-31 and accompanying text.


state interest in First Amendment protections for Tofurky’s commercial free speech.\textsuperscript{164}

Though the Fifth Circuit ultimately disagreed with the district court that the Act was not more extensive than necessary to advance a state interest, it considered Tofurky’s pre-enforcement claims, bringing attention to an alternative and less restrictive means of enforcement.\textsuperscript{165} Tofurky suggested that instead of only using a disclaimer when marketing products, the state could protect consumers in an alternative fashion and remove any possible confusion in the market.\textsuperscript{166} By having the state provide a disclaimer, the court explained that this could be as simple as “more prominent disclosures of the vegan nature of plant-based products.”\textsuperscript{167} A disclaimer could also be as unobtrusive as a symbol or statement that the products do not contain meat.\textsuperscript{168}

The district court also recognized additional approaches the state could take and sought to justify alternative methods of enforcement by looking to \textit{Express Oil Change}.\textsuperscript{169} In that case, the state’s use of regulatory safeguards or disclaimers instead of statements that explicitly ban actually misleading speech resulted in the state enforcing only as much as necessary to regulate the commercial environment.\textsuperscript{170}

Ultimately, the Fifth Circuit’s decision to forego the \textit{Central Hudson} analysis in favor of a narrower reading of the Louisiana state statute leaves an unanswered question regarding Tofurky’s speech rights.\textsuperscript{171} Within the last \textit{Central Hudson} factor, the law must not be more extensive than necessary to accomplish the government’s

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\item \textsuperscript{164} See \textit{id.} (advocating for Tofurky’s ability to receive protection for commercial speech).
\item \textsuperscript{165} See Turtle Island Foods SPC v. Strain, 594 F. Supp. 3d 692, 701-02 (M.D. La. 2022) (bringing attention to Tofurky’s argument that Act was more extensive than necessary to advance state interest).
\item \textsuperscript{166} See \textit{id.} (noting Tofurky’s suggestion with alternative method for state to reduce consumer confusion).
\item \textsuperscript{167} See \textit{id.} (providing examples for Tofurky to market products without consumer confusion).
\item \textsuperscript{168} See \textit{id.} (listing additional examples for Tofurky to reduce any possible confusion in marketing products).
\item \textsuperscript{169} See \textit{id.} at 703 (describing alternative methods of enforcement); see also \textit{Express Oil Change}, L.L.C. v. Miss. Bd. of Licensure for Pro. Eng’rs & Surveyors, 916 F.3d 483, 487 (5th Cir. 2019) (shifting burden to defendant to justify instant restriction on commercially protected free speech).
\item \textsuperscript{170} See \textit{Express Oil Change}, 916 F.3d at 487 (showing implications of alternative methods of enforcement).
\item \textsuperscript{171} See Turtle Island Foods SPC v. Strain, 594 F. Supp. 3d 692, 703 (M.D. La. 2022) (finding defendant state did not address why less-restrictive disclaimer would prevent consumer confusion); see also \textit{Plant-Based Meat Labeling Standards Released, PLAN\textsuperscript{BASED} FOODS ASS’N} (Dec. 9, 2019), https://www.plantbasedfoods.org/ plant-based-meat-labeling-standards-released/#:~:text=PBFA%27s%20meat%20alternative%20stand%20allow,is%20plant%2Dbased%20or%20vegetarian (illustrating challenges for plant-based label marketing).
\end{itemize}
objective. The Fifth Circuit did not discuss the lower court’s consideration of a disclaimer and only noted the court’s skepticism about whether the statute advanced a state interest. Courts using Turtle Island Foods as precedent in the future should consider that as pre-enforcement claims arise, defendant states have a motive to bring penalties at any time following the court determination. With the Fifth Circuit’s elimination of the Central Hudson factor questioning a substantial state interest, Tofurky remains open to further state enforcement on labeling that was once deemed by both parties not to be misleading or misbranding.

VI. THE FIFTH CIRCUIT’S SUPER-SIZED IMPACT ON THE FUTURE OF PLANT-BASED CONSUMER FOODS

As a result of the Fifth Circuit’s narrow interpretation of the Louisiana statute, Tofurky and producers of plant-based meat alternatives are left open to future enforcement claims in the states in which they operate. The growing popularity of plant-based alternatives and recent court decisions affecting the alternative meat market may restrict future profits for companies like Tofurky. In addition to the significant environmental costs of beef production, agricultural interests influencing state governments to restrict plant-based marketing and stifle competition may hinder future consumers from incorporating alternative meats into their diets. Due to decreased demand for plant-based meats in commercial markets, environmental degradation may aggregate the impacts of climate change over time.


173. See id. (discussing lower court’s conclusion that Act was more extensive than necessary).


176. See Turtle Island Foods, 65 F.4th at 218 (providing commissioner planned to begin enforcement against Tofurky once Fifth Circuit finalized decision).


178. See id. (discussing impact on overall consumer tastes due to restriction on marketability of plant-based foods).

179. See id. (predicting larger impacts of climate change due to higher real meat production).
On a broader level, some political representatives advocate for state regulations that prevent plant-based companies from intentionally misleading consumers based on notions of fairness. In particular, Arkansas Representative David Hillman claimed that the Arkansas labeling law aimed to protect consumers fairly but intentionally left room for alternative motives. Alternative motives in both Arkansas and Louisiana, however, appear to advance agricultural and real meat products by implementing state legislation restricting market competition. By punishing certain food products for mislabeling, state legislators hinder consumers’ access to meat alternatives that are less impactful to the environment.

By adopting a narrow interpretation of the Louisiana statute, the Fifth Circuit disregarded Supreme Court precedent, enabling the court to utilize the state statute to rule against plant-based products. Because the Fifth Circuit permitted the Louisiana labeling law to withstand a First Amendment challenge, Tofurky is left rather desperate in its ability to continue marketing. Due to the court’s decision, Tofurky will likely encounter future difficulty in creating and marketing plant-based products.

By overturning the district court’s decision, the Fifth Circuit’s holding preserves agricultural and traditional meat companies’

181. See id. (describing Representative David Hillman’s remarks and support of “baldly protectionist” Arkansas labeling law).
182. See id. (questioning intent of state labeling laws and possible presence of agricultural industry influence).
183. See id. (concluding negative impact to environment based on lack of change to consumer preferences).
184. See Turtle Island Foods, S.P.C. v. Strain, 65 F.4th 211, 218 (5th Cir. 2023) (noting commissioner or future holder of same office has discretion to decide Tofurky’s labels suddenly violate statute); see also Turtle Island Foods SPC v. Soman, 632 F. Supp. 3d 909, 927 (E.D. Ark. 2022) (describing possibility for state to retroactively enforce monetary penalties against Tofurky).
185. See Soman, 632 F. Supp. 3d at 927 (providing Tofurky would incur costs verging on one million dollars if required to change marketing and packaging practices nationwide); see also Nicole Negowetti, Taking (Animal-Based) Meat and Ethics off the Table: Food Labeling and the Role of Consumers as Agents of Food Systems Change, 99 Ok. L. Rev. 91, 104 (2020) (contextualizing market-based strategy to change production and widespread availability of plant-based food options for consumers in effort to shift preferences away from animal-based meat).
186. See Turtle Island Foods, S.P.C. v. Strain, 65 F.4th 211, 221 (5th Cir. 2023) (finding Louisiana state statute did not violate First Amendment protections of commercial free speech).
power to restrict competition against newer plant-based alternatives.\(^{187}\) The decision also imposes a future of limited competition in the overall animal and plant-based food market.\(^{188}\) As consumers generally have a limited ability to change food preferences, this also reduces the opportunity to decrease environmental emissions.\(^{189}\)

The Fifth Circuit should have strongly considered the district court’s idea of a less restrictive disclaimer to prevent consumer confusion.\(^{190}\) A disclaimer would have allowed Louisiana defendants to enact safeguards on commercial speech without imposing an absolute ban.\(^{191}\) Providing an alternative option to restrict speech would enable Louisiana to prevent general consumer confusion without imposing instant restrictions on all of Tofurky’s labeling.\(^{192}\)

The question remains: what speech is the Act intended to encompass?\(^{193}\) More importantly, though Tofurky is not covered under the Act, the company must proceed with caution as a result of the Fifth Circuit’s determinations.\(^{194}\) By failing to provide an adequate reason for limiting Tofurky’s First Amendment ability to market to consumers, the Fifth Circuit negatively impacted the growing plant-based market.\(^{195}\) This decision has ultimately affected the future of market preferences, created confusion across jurisdictions,

\(^{187}\) See Holmes, supra note 177 (listing possible implications of future restricted competition).

\(^{188}\) See id. (providing additional restraints on competition to consumer markets).

\(^{189}\) See id. (showing possible results of restrictive court decisions on plant-based companies).


\(^{191}\) See id. (describing effects of disclaimer); see also Turtle Island Foods SPC v. Strain, 594 F. Supp. 3d 692, 702-03 (M.D. La. 2022) (providing benefits of disclaimer instead of complete ban).

\(^{192}\) See id. (describing positive results of disclaimer for plant-based labeling).

\(^{193}\) See Silverman, supra note 190 (arguing for federal government clarification to properly resolve ongoing questions with state labeling laws).

\(^{194}\) See id. (describing ongoing labeling controversy); see also Strain, 594 F. Supp. 3d at 702-03 (arguing in favor of disclaimer and less restrictive ban on plant-based food marketing).

\(^{195}\) See id. (noting negative effects on ability for plant-based companies to grow in market).
and adversely contributed to climate change effects that plant-based companies have sought to lessen.196

Andrew J. Kash*


* J.D./M.B.A. Candidate, May 2025, Villanova University Charles Widger School of Law and Villanova School of Business; B.A., Economics, December 2020, University of Minnesota – Twin Cities. To each family member that took time to assist me throughout writing, thank you for your support and continued encouragement. Thank you to my colleagues at the Villanova Environmental Law Journal for your ongoing assistance throughout the publication process. I dedicate my efforts on this Note to my feline friend Loki, who passed away while I wrote these words.