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Lactose's Intolerance: The Role of Manufacturers' Rights and Commercial Free Speech in Big Dairy's Fight to Restrict Use of the Term "Milk"

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Lactose's Intolerance

THE ROLE OF MANUFACTURERS' RIGHTS AND COMMERCIAL FREE SPEECH IN BIG DAIRY'S FIGHT TO RESTRICT USE OF THE TERM "MILK"

INTRODUCTION

A young professional idles in line at their favorite café. Morning sunlight spills through the windows, bathing the trendy décor in a bright orange opalescence, as a queue of bleary-eyed patrons advance, single file toward the counter. The young professional reaches the front of the line and approaches the barista to place their daily order. "I'd like a Venti Caffè Latte with soymilk, please." "I'm sorry," the barista responds with feigned enthusiasm, "we no longer carry soymilk, but we have soy beverage and almond milk imitation." Disappointed and unfamiliar with the synthetic sounding alternatives, the young professional reluctantly amends their order to a Caffè Latte with one percent milk. Today, soy, coconut, and almond dairy alternatives allow Americans to exact control over what they consume, but commonplace product names and advertisements may soon become a convenience of the past.[1]

Beginning in the 1970s, the prevalence of non-animal-based substitutes for traditional food products has proliferated due to growing concerns over nutrition, health, and animal welfare.[2] An increase in the number of Americans with dietary restrictions, imposed through voluntary constraint and medical necessity, also contributed to the augmented popularity and pervasiveness of these products.[3] As a result, markets for foods

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[1] Katie Gates Calderon, Elizabeth Fessler, & Lindsey Heinz, *Dairy Vs. Plant-Based 'Milks': A Regulatory Standoff*, LAW360 (Aug. 27, 2017, 10:59 AM EDT), https://www.law360.com/articles/957097/dairy-vs-plant-based-milks-a-regulatory-standoff [http://perma.cc/A7UK-Q4Q5].

[2] *Id.*; *see also* Lauren Sipple, *What's in a Name?: The Use of Dairy Product Names in Labeling of Plant-Based Alternatives*, SCI. MEETS FOOD (Dec. 13, 2018), http://sciencemeetsfood.org/whats-name-use-dairy-product-names-labeling-plant-based-alternatives/ [https://perma.cc/8S4C-XW43] ("Fluid milk consumption in the United States has declined steadily since the 1970s. . . . Meanwhile, non-dairy milk alternative sales have grown by over 60% in the last five years, and the dairy alternatives market is projected to grow to $19.5 billion by 2020." (citations omitted)).

[3] Calderon, et al., *supra* note 1. In addition to allergies, concerns about a possible correlation between dairy products and serious diseases likely contribute to the decline in

derived from animals have been subject to pullback, resulting in decreased sales and reduced net profits.[4] This shift in market power served as the catalyst for a twenty-year battle between the dairy[5] and plant-based alternatives industries over product labeling and misrepresentation.[6]

The fight began in 1997 when the Soyfoods Association of America (SANA)[7] filed a citizen's petition with the United States Food and Drug Administration (FDA).[8] The entreaty requested that the Commissioner of the FDA amend Part 102 of U.S. FDA regulations to include a subsection specifically recognizing soymilk within the section titled "Common or Unusual Name for Nonstandardized Foods."[9] The executive agency issued a response in which it officially acknowledged receipt of the petition but stated that it was unable to address the issue due to its limited budget and because it had other, more pressing priorities.[10] Notably, the FDA neither cautioned manufacturers about possible liability for misrepresentation,[11] nor did it take any steps toward amending

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dairy consumption in the United States. *See, e.g.*, *Health Concerns About Dairy*, PHYSICIANS COMM. FOR RESPONSIBLE MED., https://www.pcrm.org/good-nutrition/nutrition-information/health-concerns-about-dairy [https://perma.cc/N4FW-PRNM] ("Milk and other dairy products are the top source of saturated fat in the American diet, contributing to heart disease, type [two] diabetes, and Alzheimer's disease. Studies have also linked dairy to an increased risk of breast, ovarian, and prostate cancers.").

[4] Lela Nargi, *What's Behind the Crippling Dairy Crisis? Family Farmers Speak Out*, CIV. EATS (Nov. 5, 2018), https://civileats.com/2018/11/05/whats-behind-the-crippling-dairy-crisis-family-farmers-speak-out/ [https://perma.cc/WTX6-8X3S].

[5] In this note, "Dairy" and "Big Dairy" refer to interest groups, large scale dairy producers, and other influential parties that advocate on behalf of animal milk producers. For simplicity, this note concentrates on the National Milk Producers Federation (NMPF) and to a lesser extent, on U.S. Dairy Export Counsel (USDEC), and International Dairy Foods Association (IDFA).

[6] *See* Michael Pellman Rowland, *Got Milk? A Tale of Two Cities*, FORBES (Apr. 11, 2017, 12:17 PM), https://www.forbes.com/sites/michaelpellmanrowland/2017/04/11/milk-industry-controversy/#1c86e0f057e5 [https://perma.cc/J2Q5-5LZW]; *see also* Calderon, et al., *supra* note 1.

[7] The Soyfoods Association of North America (SANA) is an advocacy organization focused on "the health benefits and nutritional advantages of soy consumption." *About Us*, SOYFOODS ASS'N OF NORTH AM., http://www.soyfoods.org/about-us [https://perma.cc/N27Z-FBGG].

[8] FDA-1997-P-0078-0002, Citizen Petition to the FDA from Soyfoods Ass'n of Am. (Feb. 28, 1997), http://www.soyfoods.org/wp-content/uploads/SANA-Citizen-Petition-No.-97P-0078-2-28-97.pdf [http://perma.cc/XML6-YR36] [hereinafter SANA Citizen Petition]. "Citizens petition" refers to a process through which individuals and community organizations request that the FDA, or another administrative agency, begin a rule-making to alter or create rules and regulations. 21 C.F.R. §§ 10.30–10.31 (2018).

[9] Sana Citizen Petition, *supra* note 8, at 1–2.

[10] Interim Response Letter from F. Edward Scarbrough, Dir., Ctr. for Food Safety & Applied Nutrition, U.S. Food & Drug Admin., to Peter Golbitz, Comm. Chair, Soyfoods Ass'n of Am. (Aug. 4, 1997), https://www.regulations.gov/contentStreamer?documentId=FDA-1997-P-0016-0013&attachmentNumber=1&contentType=pdf [https://perma.cc/T96W-SMSZ] [hereinafter 1997 Scarbrough Interim Response Letter].

[11] Upon receipt of the petition, the FDA could have concluded that companies using "milk" in product names and labels were liable for misrepresentation under 21

regulations so as to restrict use of the word "milk."[12] Although seemingly innocuous, the dairy industry quickly viewed the FDA's dismissive response as highly disruptive.[13]

The FDA's failure to give specific instructions opened the proverbial floodgates to further confrontations between interest groups for the dairy industry and their alternative product counterparts. The National Milk Producers Federation (NMPF),[14] SANA, and other interest groups sent letters, taking positions on issues similar to those addressed the original petition, to the FDA.[15] Despite growing interest, the FDA again failed to offer guidance to clarify its position on the matter.[16]

The continued strain between the dairy and plant-based alternative industries, coupled with public backlash from consumers purporting to be misled as to the comparability and health benefits of switching from animal to plant based dairy products, caused industry leaders to look beyond the FDA and

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U.S.C.A § 343(c), which states "[i]f it is an imitation of another food, [the product manufacturer is liable for misrepresentation] unless its label bears . . . the word 'imitation' and, immediately thereafter, the name of the food imitated." 21 U.S.C. § 343(c) (2012). Most alternative milk products do not include the word "imitation" in their title, but rather qualify the term with an alternative food item, followed by the word "milk." *See, e.g.*, *The Many Flavors of Progress. Taste 'em All.*, SILK (2019), https://silk.com/plant-based-products/ [https://perma.cc/J8P7-9XEP].

[12] *See generally* 21 C.F.R. § 131.110 (2018).

[13] Letter from Robert D. Byrne, V.P. of Reg. Affairs, Nat'l Milk Prod. Fed'n, to Joseph A. Levitt, Dir. of the Center for Food Safety and Applied Nutrition, U.S. Food and Drug Administration, 2 (Feb. 14, 2000), https://www.regulations.gov/document?D=FDA-2017-P-1298-0092 [https://perma.cc/Z888-CL8L] [hereinafter 2000 Byrne Letter] (included as Attachment 11 re Comment from National Milk Producers Federation).

[14] NMPF is a special interest organization advocating on behalf of dairy producers and the United States milk industry in Washington D.C. *See* News Release, National Milk Producers Federation, Dairy Organizations Applaud Congressional Letter to the FDA Asking for Stricter Enforcement of Milk Labeling Standards (Dec. 16, 2016), http://www.nmpf.org/latest-news/press-releases/dec-2016/dairy-organizations-applaud-congressional-letter-fda-asking [https://perma.cc/H6F2-MM4V] [hereinafter NMPF News Release].

[15] Letter from Nancy Chapman, Exec. Dir., Soyfoods Association of North America, to Joseph A. Levitt, Dir. of the Center for Food Safety and Applied Nutrition, U.S. Food and Drug Administration, at *9–12 (Mar. 9, 2000), http://f.datasrvr.com/fr1/117/64796/soyfoods_2nd_letter.pdf [https://perma.cc/GCQ3-ESVH] [hereinafter 2000 Chapman Letter] (Including Appendix with letters from various organizations, including the Dean Foods Company, Western Quality Food Products, and Cumberland Dairy in opposition to NMPF's proposal); *see also* Good Food Institute, *Tell Congress to Dump the "DAIRY PRIDE Act,"* CHANGE.ORG (2018) https://www.change.org/p/u-s-senate-tell-congress-to-dump-the-dairy-pride-act [https://perma.cc/75YN-Y4LG] [hereinafter GFI Change.org Petition] (detailing GFI's petition to the Senate which allows individual citizens to become involved in opposing the DAIRY PRIDE Act. As of April 26, 2019, 50,571 individuals offered their support.).

[16] Mia De Graff, *War on 'Fake Milk': Dairy Industry Begs FDA to Ban Almond and Soy Alternatives from 'Masquerading as the Real Thing'—but Do We Care?*, DAILY MAIL (Mar. 3, 2017, 3:31 PM EDT), http://www.dailymail.co.uk/health/article-4278160/Mayo-wings-butter-Fake-milk-latest-food-fight.html [https://perma.cc/JJ8C-HHHQ] ("The [NMFP] says it has been trying to get the FDA to enforce the standard since at least 2000, and that the lack of enforcement has led to a proliferation of imitators playing 'fast and loose' with dairy terms.").

to lobby Congress to introduce decisive legislation on the matter.[17] To bring a conclusion to the abiding feud, members of both houses of Congress introduced the "Defending Against Imitations and Replacements of Yogurt, Milk, and Cheese to Promote Regular Intake of Dairy Everyday Act" or the "DAIRY PRIDE Act," in January 2017.[18] As proposed, however, the content-based restriction advanced in the DAIRY PRIDE Act implicates significant questions as to the practicability and constitutionality of the proposed solution.

If passed, the DAIRY PRIDE Act will amend the misbranding section of the Federal Food, Drug, and Cosmetic Act[19] and require the FDA to "issue draft guidance on how enforcement" would be carried out within ninety days of the bill's ratification.[20] In effect, the bill would force milk alternative product manufacturers to remove "milk" and other dairy specific words from product names, packaging, and advertisements or further qualify such terms by adding language like "substitute" or "imitation" to avoid enforcement action.[21] Such a prohibition places a content-based restriction on commercial speech, effectively curbing manufacturers' right to describe and advertise their products, and as such may impose an unconstitutional restriction on their First Amendment right to free speech.[22]

This note examines the relationship between proposed restrictions of commercial speech and manufacturers' First Amendment right to describe products to consumers. This note argues that broad, content-based commercial speech restrictions, like that proposed in the DAIRY PRIDE Act, likely impose unconstitutional limits on manufacturers' First Amendment right to freedom of speech. The note proposes that Congress and the FDA should refrain from passing a statute or promulgating a regulation like the DAIRY PRIDE Act, because

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[17] NMPF News Release, *supra* note 14.

[18] *See* S. 130, 115th Cong. § 1 (2017–2018); H.R. 778, 115th Cong. § 1 (2017–2018). Because the 115th Congress ended in 2018, the DAIRY PRIDE Act was reintroduced in March 2019. *See* S. 792, 116th Cong. (2019–2020); H.R. 1769, 116th Cong. (2019–2020).

[19] S. 130 § 3 ("No food may be introduced or delivered for introduction into interstate commerce using a market name for a dairy product if the food does not meet the criterion set forth for dairy products under paragraph (z)(2) of section 403 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. [§]343) (as added by section 4(a))"); *see also* H.R. 778 § 3.

[20] S. 130 § 4(b)(1); H.R. 778 § 4(b)(1); *see also* DAIRY PRIDE Act One Pager, National Milk Producers Federation, http://www.nmpf.org/files/DAIRY%20PRIDE%20Act%20-%20One%20Pager.pdf [https://perma.cc/XMK6-QFMY].

[21] S. 130 § 4(b)(1); H.R. 778 § 4(b)(1); *see also* 21 U.S.C. § 343(c) (2012).

[22] *See* FDA-2017-P-1298, Citizen Petition from Good Food Inst. to Recognize the Use of Well-Established Common and Usual Compound Nomenclatures for Food, at 35 (Mar. 2, 2017), http://www.gfi.org/images/uploads/2017/03/GFIpetitionFinal.pdf [https://perma.cc/5E29-YPES] [hereinafter GFI Citizen Petition]; *see also* U.S. CONST. amend. I (The First Amendment states "Congress shall make no law . . . abridging the freedom of speech . . . .").

such limitations likely impede on manufacturers' rights, and in practice, would allow the Dairy industry to create a *de facto* monopoly in an increasingly competitive market.[23]

This note proceeds in the following parts. Part I provides a brief history of the conflict between big dairy and plant-based alternative product manufacturers. This Part also explores existing statutes, guidance proffered by regulatory agencies, and their significance to the present conflict. Part II describes the First Amendment's protection of commercial speech in the context of manufacturers' rights and analyzes the restrictions proposed in the DAIRY PRIDE Act under the test for determining whether such restrictions are lawful exercises of legislative power through the four-part test from *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*.[24] Finally, Part III proposes that adding regulations to control the proportions and location of disclaimers on product labels and in advertising would serve the government's stated purpose for advancing the DAIRY PRIDE Act without implicating the level of constitutional scrutiny triggered by content-based speech restrictions.

I. THE TWENTY-YEAR STRUGGLE OVER "MILK"

The conflict between the dairy and plant-based alternative industries over use of the word "milk" in product names and advertisements, began more than twenty years ago. In February 1997, SANA petitioned the FDA to amend their existing "Common or Unusual Name for Nonstandardized Foods" regulation to recognize "soymilk" as the correct name for "the liquid food that is obtained as a result of combining aqueous-extracted whole soybean solids and water, or, as a result of combining other edible-quality soy protein solids, soybean oil, and water."[25] The petition cited the accuracy of the beverage's name,[26] the long-term existence of the product in the United States and abroad,[27] and the prevalence of the term

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[23] It is unclear whether passing the DAIRY PRIDE Act will actually cause an increase in dairy product sales. For example, Canada banned plant-based products from being labeled "milk" in 2009, but purchase of dairy products has continued to decline. Michelle St. Pierre, *Changes in Canadians' Preferences for Milk and Dairy Products, 1960 to 2015*, STATISTICS CANADA (Apr. 12, 2017), http://www.statcan.gc.ca/daily-quotidien/170421/dq170421e-eng.pdf [https://perma.cc/3Q8X-HUTQ].

[24] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

[25] SANA Citizen Petition, *supra* note 8, at 1.

[26] *Id.* at 2.

[27] *Id.* at 3. (citing SOYBEAN BLUE BOOK 72 (Am. Soybean Ass'n 1947); Harry W. Miller & C. Jean Wen, *Experimental Nutrition Studies of Soymilk in Human Nutrition*, 50 CHINESE MED. J. 450–59 (1936)).

"soymilk" in official and industry publications as persuasive evidence for altering the regulation.[28] The FDA issued a response officially acknowledging receipt of the petition but declining to address the issue further.[29] In 2000, NMPF indirectly responded by submitting a trade complaint to the FDA concerning the "rapidly expanding misuse of the name of a standardized food in the labeling of certain food products."[30] NMPF's trade complaint argued that the word "milk" should be read pursuant to 21 C.F.R. § 131.110, which defines the term as the "lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows."[31]

In response, SANA submitted a follow-up letter to NMPF's correspondence; here, SANA admitted that NMPF's interpretation of the word "milk" was not incorrect, but maintained that the statute should be read narrowly.[32] SANA argued that the term soymilk did not violate the FDA's definition of "milk" or its standard of identity, because the language of the regulation limited its scope to the unqualified, or standalone, term. Thus, by referring to the alternative beverage as "soymilk," SANA claimed that their product name fell outside the scope of the FDA regulation.[33] Again, the FDA issued a letter recognizing receipt of the petition, but the agency abstained from taking action or offering guidance in response to either party's requests, apparently due to a lack of sufficient economic resources and the low priority afforded to resolving the conflict.[34] In 2008 and 2012, the FDA issued warning letters to two different soy product manufacturers, but thus far, the FDA has not pursued further enforcement action against either company, even though the conduct at issue appears to be ongoing.[35]

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[28] *Id.* at 3–4.

[29] 1997 Scarbrough Interim Response Letter, *supra* note 10.

[30] 2000 Byrne Letter, *supra* note 13, at 1.

[31] *Id.* at 2 (citing 21 C.F.R. § 131.110 (2000)). Merriam-Webster defines "colostrum" as "milk secreted for a few days after childbirth and characterized by high protein and antibody content." *Colostrum*, MERRIAM-WEBSTER DICTIONARY (2018), https://www.merriam-webster.com/dictionary/colostrum [https://perma.cc/J6EE-TSKV].

[32] 2000 Chapman Letter, *supra* note 15, at 1–2.

[33] *Id.* at 2–3.

[34] *See* Letter from Loretta A. Carey, Div. of Standards & Labeling Regs., U.S. Dep't of Health and Human Servs. to Nancy Chapman, Exec. Dir., Soyfoods Ass'n of N. Am. (July 31, 2000) (on file with Brooklyn Law Review) (acknowledging receipt of letters and agreeing to consider altering their regulations, or in the alternative to reach a decision on how such regulations would be enforced, but conditioned any action on the allocation of sufficient resources for the 2001 fiscal year by the Center for Food Safety and Applied Nutrition). It may be assumed that the Center for Food Safety and Applied Nutrition failed to adequately finance further exploration of the issue for the 2001 fiscal year because the FDA did not pursue this issue further.

[35] Letter from Barbara J. Cassen, Dist. Dir., Pub. Health Serv., U.S. Food and Drug Administration, to Yan Hui Fang, CEO, Fong Kee Tofu Co., Inc. (Mar. 7, 2012),

After decades of litigation and numerous appeals to the FDA,[36] the Good Food Institute (GFI) submitted a new petition to the FDA in March 2017, with a request similar to the SANA's 1997 citizen's petition.[37] Several additional organizations, including the New York Bar City Association, also sent correspondence in opposition to the DAIRY PRIDE Act to the FDA.[38] In a letter, the FDA acknowledged receipt of the petition, but further action remains to be seen.[39] While continuing to pursue FDA guidance, dissatisfaction with the present ambiguity led leaders in the dairy industry to seek alternative solutions, including pursuing litigation to strengthen and enforce FDA regulations in their favor.

Despite strong opposition to restricting use of the term "milk,"[40] members of Congress have begun to rally together around the dairy industry by introducing the DAIRY PRIDE Act.[41] Apparently advanced to counter the FDA's silence, the

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https://www.fdalabelcompliance.com/letters/ucm295239 [https://perma.cc/8SER-5GWB]; Letter from Alonza E. Cruise, Dist. Dir., Pub. Health Serv., U.S. Food and Drug Administration, to Long H. Lai, Lifesoy, Inc. (Aug. 8, 2008), https://www.fdalabelcompliance.com/letters/ucm1048184 [https://perma.cc/V2GA-FVPM]; *see also* GFI Citizen Petition, *supra* note 22, at 26 n.69 (recognizing that the FDA had issued two warning letters to Fong Kee Tofu Co. and Lifesoy, in 2012 and 2008, respectively).

[36] Notably, NMPF submitted a comment in the "Point of Purchase Nutrition Information (Front-of Pack and Shelf Tag Nutrition Symbols), Docket No. FDA-2010-N-0210" rulemaking, asking "the FDA to significantly increase enforcement efforts to prevent misbranding of certain food items that are imitations of standardized dairy products," in July of 2010. Nat'l Milk Prod. Fed'n, Comment Letter on Point of Purchase Nutrition Information (Front-of Pack and Shelf Tag Nutrition Symbols), Docket No. FDA-2010-N-0210 (July 28, 2010), http://law-bites.com/wp-content/uploads/2014/05/NMPFcomment2010.pdf [https://perma.cc/G8FD-776J].

[37] GFI Citizen Petition, *supra* note 22, at 1.

[38] LORI A. BARRETT & CARLA A. LATTY, ASS'N OF THE BAR OF THE CITY OF N.Y., REPORT ON LEGISLATION BY THE ANIMAL LAW COMMITTEE AND THE CONSUMER AFFAIRS COMMITTEE (2017), http://s3.amazonaws.com/documents.nycbar.org/files/201782-DairyPrideAct_FINAL_3.1.17.pdf [https://perma.cc/37Q9-XXE5].

[39] Interim Response Letter from Douglas A. Balentine, Dir., Ctr. for Food Safety & Applied Nutrition, to Nigel Barrella, Good Food Inst. (Aug. 29, 2017), https://www.regulations.gov/contentStreamer?documentId=FDA-2017-P-1298-0091&attachmentNumber=1&contentType=pdf [https://perma.cc/NEY4-C7FF].

[40] *See, e.g.*, Michele Simon, *Plant Based Coalition Lobbies Congress to Oppose Dairy Pride Act*, PRWEB (Nov. 1, 2017), http://www.prweb.com/pdfdownload/14866415.pdf [https://perma.cc/P6ZA-MG4P] ("[A]dvocates and organizations representing manufacturers of plant-based foods, including the Soyfoods Association of North America, the Good Food Institute, Blue Diamond, and Campbell Soup Company, have come together to oppose the Dairy Pride Act."); *see also* GFI Change.org Petition, *supra* note 15; Eric M. Erba & Andrew M. Novakovic, *The Evolution of Milk Pricing and Government Intervention in Dairy Markets*, CORNELL PROGRAM ON DAIRY MARKETS AND PRICING 6–16 (Feb. 1995), https://dairymarkets.org/pubPod/pubs/EB9505.pdf [https://perma.cc/UFL6-S5BT] (demonstrating that Congress has taken an active role subsidizing the dairy industry since it passed the Agriculture Adjustment Act in 1933).

[41] *DAIRY PRIDE Act Supporters Keep Grassroots Pressure on Congress*, NAT'L MILK PROD. FED'N (2018), http://www.nmpf.org/latest-news/articles/dairy-pride-act-supporters-keep-grassroots-pressure-congress [https://perma.cc/ZJ45-J7XA] (stating that support for the DAIRY PRIDE Act continues to grow through grassroot efforts and

DAIRY PRIDE Act, as proposed, would alter section 403 of the Federal Drug and Cosmetic Act[42] to include "[n]o food may be introduced or delivered into interstate commerce using a market name for a dairy product" unless it "contains as a primary ingredient, or is derived from a lateral secretion, particularly free from colostrum, obtained by the complete milking of one or more hooved animals."[43] The bill defines the phrase "market name for a dairy product" as meeting definitions set forth for milk, heavy cream, sour cream, yogurt, various cheeses derived from milk, ice cream derived from cow's milk, goat's milk, and cow milk sherbet, as well as additional definitions set forth in "any successor regulations or any other term for which the Secretary has promulgated a standard of identity with respect to a food that is formulated with a dairy product . . . as the primary ingredient."[44] In practice, the DAIRY PRIDE Act prohibits manufacturers of alternative dairy foods from using "milk," "ice cream," "yogurt," and "cheese" in their product names and advertisements.[45] Interestingly, in September of 2018, the FDA followed suit and opened a non-rulemaking notice and comment period titled, "Use of the Names of Dairy Foods in the Labeling of Plant-Based Products,"[46] and extended the comment period through January 2019.[47] In January 2019, NMPF submitted a new citizen petition to the FDA, and in response, the agency again initiated a non-rulemaking notice and comment period, here extending from February 2019 to August 2019.[48] As of May 2019, no further action has been taken with regard to this initiative. However, the former Commissioner of the FDA, Scott Gottlieb, apparently indicated that producing an FDA guidance document on use of the term

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congressional backing from Senators King, Baldwin, Stabenow, Risch, and Crapo and Representatives Welch, Simpson, Duffy, Courtney, Valadao, DelBene, Peterson, Gallagher, Grothman, Kind, Rooney, Sensenbrenner, Nolan, Stefanik, and Comer).

[42] Federal Food, Drug and Cosmetic Act, ch. 675, § 403, 52 Stat. 1040, 1047 (1938) (codified as amended at 21 U.S.C. § 343 (2012)). 21 U.S.C. § 343 (2012). Section 403 of the Food, Drug, and Cosmetic Act regulates misbranded food, nutritional labeling, and disclosures.

[43] S. 130, 115th Cong. §§ 3, 4(a)(2) (2017).

[44] S. 130. § 4(a)(3) (internal parenthesis omitted).

[45] *See* S. 130 § 3.

[46] Use of the Names of Dairy Foods in the Labeling of Plant-Based products, Notice, Request for Comments, 83 Fed. Reg. 49,103 (Sept. 28, 2018). The FDA requested comments on "how consumers use these plant-based products . . . . [and] whether consumers are aware of and understand the basic nature, essential characteristics, characterizing ingredients, and nutritional differences between plant-based products and dairy foods." *Id.*

[47] Use of the Names of Dairy Foods in the Labeling of Plant-Based products, Notice, Extension of Comment Period, 83 Fed. Reg. 58,775 (Nov. 21, 2018).

[48] *See generally* FDA-2019-p-0777-0001, Citizen Petition Submitted on Behalf of the National Milk Producers Federation (Feb. 21, 2019), https://www.regulations.gov/document?D=FDA-2019-P-0777-0001 [https://perma.cc/PZS3-QFB2] [hereinafter NMPF Citizen Petition].

"milk," would take "close to a year," possibly indicating that the agency is currently pursuing action on the topic.[49]

II. THE CONSTITUTIONALITY OF COMMERCIAL SPEECH RESTRICTIONS PROPOSED IN THE DAIRY PRIDE ACT

A. Commercial Speech Jurisprudence

The First Amendment states, *inter alia*, "Congress shall make no law . . . abridging the freedom of speech."[50] Although significantly more limited than individuals' rights, non-natural persons, like corporations, possess a constitutionally protected right to free speech.[51] There is no explicit discussion of or reference to commercial speech in the Constitution that would distinguish it from non-commercial expression.[52] In fact, the Supreme Court did not recognize commercial speech as protected by the Constitution until the latter half of the twentieth century.[53] The Court first addressed and dismissed the concept of protected commercial speech in *Valentine v. Chrestensen*.[54] Following *Valentine*,[55] however, the Court revisited questions regarding commercial speech and incrementally accepted commercial expression as a protected right.[56]

The Supreme Court recognized commercial speech as protected under the First Amendment in 1976 through *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[57] The Court imposed limits on government regulation of

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[49] Edward Hale, *Got Soy Beverage?*, REG. REV. (Mar. 10, 2019), https://www.theregreview.org/2019/03/20/hale-got-soy/ [https://perma.cc/LP9L-VD3Q] (internal quotations omitted).

[50] U.S. CONST. amend. I.

[51] *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976) ("[T]he speech whose content deprives it of protection cannot simply be speech on a commercial subject.").

[52] U.S. CONST. amend I. The failure of the Constitution to distinguish between types of speech does not, in itself, mean that commercial expression automatically falls within a protected category, but rather indicates that arguments must be based on additional sources. Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 631 (1990). For example, "[T]he Constitution doesn't mention child pornography either, and we know it receives no protection at all." *Id.* (citing New York v. Ferber, 458 U.S. 747 (1982)).

[53] *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) ("[T]he Constitution imposes no . . . restraint on government as respects purely commercial advertising.").

[54] *Id.*

[55] *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 384 (1973); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265–66 (1964).

[56] *See, e.g.*, Bigelow v. Virginia., 421 U.S. 809, 826 (1975) ("Advertising is not . . . stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.").

[57] Va. State Bd of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761–62 (1976). In *Virginia State Bd. of Pharmacy*, the Supreme Court determined

commercial speech, but chose not to define the type of content that would fall outside of the protected category.[58] In subsequent decisions, the Supreme Court articulated two variances between protected commercial and individual speech.[59] First, commercial speech is more objective than noncommercial expression because the accuracy of statements can be verified more easily.[60] Second, commercial speech is more durable than its noncommercial counterpart because it "is engaged in for profit," and as such, is less likely to be "chilled by proper regulation."[61]

Although the Court provided some guidance, commercial speech still occupies a "position at the blurry crossroads of expressive and economic activity."[62] Protections of commercial speech represent an "attempt to reconcile heightened protection for free speech with legitimate deference to economic regulation [which] has generated strain and untidiness in commercial speech doctrine."[63]

At its core, "the doctrine of commercial speech rests on a clean distinction between the market for ideas and the market for goods and services."[64] The First Amendment creates strict safeguards to protect persons from government regulation of ideas, while majoritarian politics generally control in the

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restricting commercial enterprises from advertising to be unconstitutional based on the First Amendment, even if a party's interest proves to be wholly economic. *Id.* at 761–62. The Court rejected the idea that expression with no purpose beyond proposing one or more commercial transactions was "so removed from any 'exposition of ideas,' and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' that it lacks all protection." *Id.* at 762 (citations omitted) (first quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942), then quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

[58] *Id.* at 761 ("If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject.").

[59] *Id.* at 771–72 n.24 (1976); *see also e.g.*, Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 481 (1989); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 n.6 (1980); Freedman v. Rogers, 440 U.S. 1, 10 (1979); Bates v. State Bar of Ariz., 433 U.S. 350, 381 (1977).

[60] Kozinski & Banner, *supra* note 52, at 634.

[61] *Id.*

[62] Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 146 (1999). The Court articulated the accepted definition of commercial speech in *Pittsburg Press Co. v. Pittsburg Comm'n on Human Relations*, wherein it was described as speech that only "propose[s] a commercial transaction." 413 U.S. 376, 385 (1973). Dicta in *Virginia State Bd. of Pharmacy* somewhat clarified the doctrine by giving examples of speech falling outside of the scope of commercial expression. 425 U.S. 748, 761 (1976). The Court excluded expression projected by or made to solicit money, speech about commercial topics, and factual expression on a commercial subject from the scope of commercial speech. *See* Kozinski & Banner, *supra* note 52, at 638; *see also* Buckley v. Valeo, 424 U.S. 1, 29 (1976); *Va. State Bd. of Pharmacy*, 425 U.S. at 761; N.Y. Times v. Sullivan, 376 U.S. 254, 265–66 (1964); NAACP v. Button, 371 U.S. 415, 431 (1963).

[63] Stern, *supra* note 62, at 146 (footnotes omitted).

[64] Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 2 (1979).

economic sphere.[65] As such, commercial speech is "subject to numerous restrictions that would be unconstitutional if applied to [noncommercial speech]."[66] Courts have applied different tests and methods of analysis to resolve questions of whether a particular type of speech is commercial, and if it is, whether a regulation withstands constitutional scrutiny.[67] A court's determination of whether a particular form of expression constitutes commercial speech, "represents a categorical approach that affords scope for the individualized adjustments associated with balancing tests."[68] The "combination of coherence and flexibility offers a constructive framework for dealing with an intrinsically untidy area."[69] The Court established the main test for commercial speech in *Central Hudson Gas & Electric Corp. v. Public Services Commission*.[70]

Content-based restrictions of commercial speech trigger a level of evaluation comparable to intermediate scrutiny.[71] To survive an intermediate scrutiny analysis, statutes must further an important government interest and the means employed must be substantially related to that interest.[72] Likewise, the four-part test used to evaluate whether restrictions on commercial expression impose unconstitutional restraints on such speech[73] requires that the government interest be substantial and that the restriction reasonably advance that interest.[74] Moreover, in the context of a *Central Hudson* analysis, the government's interest for restricting commercial speech cannot be exemplary of naked

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[65] *Id.* ("[I]n the economic sphere . . . the majoritarian political process controls.") Natural persons enjoy additional safeguards not extended to business associations or non-natural persons; one example of these safeguards is the overbreadth doctrine, which allows a party to challenge a law restricting free speech on the ground that it may curtail another individual's First Amendment rights, despite otherwise lacking sufficient standing to challenge the law. *See* Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496–97 (1982); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 844–45 (1970).("[T]he overbreadth doctrine does not [extend] to commercial speech.").

[66] Jackson & Jeffries, *supra* note 64, at 2.

[67] Michael Mazur, *Commercial Speech and the First Amendment in the 21st Century Does the Nike Test Help Keep Corporations Honest?*, 5 U.C. DAVIS BUS. L.J. 999, 999–1000 (2005).

[68] Stern, *supra* note 62, at 142.

[69] *Id.*

[70] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

[71] *Commercial Speech Restrictions*, AM. BAR ASS'N 1 (May 2016) (on file with Brooklyn Law Review). At first blush, the *Central Hudson* test appears more akin to a strict scrutiny analysis, but the Court declined to extend such an analysis to commercial speech in *Lorillard Tobacco Co. v. Reilly*. 533 U.S. 525, 554–55 (2001).

[72] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1972).

[73] *See* discussion *infra* Section II.B.

[74] *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

paternalism.[75] The court will likely analyze challenges to the DAIRY PRIDE Act by applying the *Central Hudson* test.[76]

B. Application of the Central Hudson *Test to the Non-Dairy Product's "Milk" Label*

After determining that a form of speech is commercial, most modern courts utilize the four-part test articulated in *Central Hudson*.[77] Due to the nature of the restriction in the DAIRY PRIDE Act, it appears clear that the bill seeks to regulate commercial speech through a content-based restriction and without imposing a limitation on individual speech. This constraint, if enacted, would regulate the names of products sold to consumers, but would not place any real restriction on individual speech.

After establishing that the statute would impose a restriction to commercial speech, courts will likely move to analyze the proposed restrictions under the four-part *Central Hudson* test. Under this test, a reviewing court first asks,

> 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, [a court] ask[s] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [the reviewing court] 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.[78]

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[75] *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 374–76 (2002).

[76] In its most recent citizen petition, NMPF attempts to supplement the *Central Hudson* analysis with the standard articulated in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*. NMPF Citizen Petition, *supra* note 48, at 44–65. In *Zauderer*, the Court declined to follow *Central Hudson*'s four-part test, reasoning that disclosure requirements are fundamentally different from prohibitions, and as such, determined that the government need only demonstrate that "disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio., 741 U.S. 626, 651 (1985). It should be noted that *Zauderer* and its progeny apply when the government seeks to compel disclosure of factual and uncontroversial information, whereas *Central Hudson* applies when the government wishes to impose a restriction on commercial speech. *See, e.g.*, Am. Meat Inst. v. USDA, 760 F.3d 18, 29 (D.C. Cir. 2014) (en banc) ("[T]he Supreme Court's analysis of the disclosure requirement in *Zauderer* does not reformulate the *Central Hudson* standard but rather establishes a different standard based on the 'material differences between disclosure requirements and outright prohibitions on speech.'" (quoting *Zauderer*, 471 U.S. at 650)); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 113–14 (2d Cir. 2001) ("Commercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests."). The DAIRY PRIDE Act, if enacted, would prohibit non-dairy product manufacturers from using words like "milk" in product names and advertisements, and as such should be analyzed under the *Central Hudson* framework.

[77] *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

[78] *Id.*

To adequately apply *Central Hudson*'s four-part test, courts consider the commercial expression at issue and its context; all four factors must be satisfied to uphold a restriction on commercial speech.[79] Although the reasons for regulating speech espoused in the DAIRY PRIDE Act demonstrate a substantial governmental interest, the speech at issue is not inherently deceptive, the means of regulation may not advance the government's stated goal, and the restriction is not a reasonable fit for advancing the government's interest. As such, the DAIRY PRIDE Act will likely fail to withstand a *Central Hudson* analysis.

1. Whether the Commercial Speech Is Unlawful or May Mislead Consumers

Determining whether speech is deceptive or unlawful, under the first part of the *Central Hudson* test, does not require extensive constitutional analyses. Rather, only intrinsically misleading speech categorically falls outside of First Amendment protections and, as such, outside the scope of analysis under *Central Hudson*.[80] The Court couches potentially misleading speech within the scope of protected expression and analyzes it under a heightened level of scrutiny.[81] Thus, any government restriction must be narrowly tailored to a substantial state interest.[82] The government carries the burden of demonstrating that its interest in curtailing deception is substantial and directly and narrowly tailored.[83]

The government likely will not be able to demonstrate that product names like soymilk and almond milk inherently mislead consumers,[84] even though proponents of the DAIRY PRIDE Act often refer to the names of products like "soymilk" or "almond milk" as "misleading" in rhetoric.[85] Alternative dairy products have used names like soymilk, almond milk, and coconut milk for decades;[86] such names, which include the name of the traditional product with an additional qualifying word or phrase accompanying the product name, appear pervasively throughout

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[79] *Id.*

[80] *See* Pearson v. Shalala, 164 F.3d 650, 655 (D.C. Cir. 1999) (citing, *inter alia*, *In re* R.M.J., 455 U.S. 191, 203 (1982)).

[81] *Id.* at 655–56.

[82] *Id.*

[83] Edenfield v. Fane, 507 U.S. 761, 770–71 (1993).

[84] *See Pearson*, 164 F.3d at 655 (D.C. Cir. 1999) (describing the "inherently misleading" standard as having an "awesome impact," bound to mislead consumers).

[85] *See, e.g.*, S. 130, 115th Cong. § 2(6) (2017).

[86] SANA Citizen Petition, *supra* note 8, at 2–3 (citing Harry W. Miller & C. Jean Wen, *Experimental Nutrition Studies of Soymilk in Human Nutrition*, 50 CHINESE MED. J., 450, 450–59 (1936)).

the market, without confusing consumers.[87] Courts have considered the issue on numerous occasions and determined that no reasonable consumer would be deceived by qualified product names.[88] It must be conceded that products bearing names commonly associated with another product may have the potential to deceive consumers, but courts have determined that consumers generally understand and are not confused by products bearing qualified dairy product names.[89]

2. Whether the Government Possesses a Substantial Interest in Restricting Commercial Speech

The government possesses a legitimate and substantial interest in ensuring that product names and other information presented to consumers accurately represent the product being sold, and in increasing national health.[90] The findings advanced as justifications for the enactment of the DAIRY PRIDE Act, particularly claims relating to national health, demonstrate the existence of a legitimate government interest. These findings include: (1) the majority of individuals in the United States, including both adults and children, fail to meet their recommended dairy intake, as set forth in the 2015–2020 Dietary Guidelines for Americans, a publication by the Department for Health and Human Services and Department of Agriculture,[91] potentially leading to serious or deadly diseases;[92]

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[87] *See* Letter from Nancy Chapman, Exec. Dir., Soyfoods Ass'n of N. Am., to Stephen Ostroff, Acting Comm'r, U.S. Food & Drug Admin., and Susan T. Mayne, Dir., Ctr. for Food Safety & Applied Nutrition 3 (Feb. 2, 2017), http://www.soyfoods.org/wp-content/uploads/FDA_Letter_from-SANA-2.2.17.pdf [https://perma.cc/Y6SC-KN67] [hereinafter 2017 Chapman Letter]. In 2006, a member of SANA commissioned a professional market research organization, Market Tools, to perform a study to gauge customer perception and understanding of "soymilk." *Id.* The firm surveyed 814 people and found that only three percent of people surveyed believed the product contained cow's milk. *Id.*

[88] *See, e.g.*, Gitson v. Trader Joe's Co., No. 1:17-cv-00117, 2015 WL 9121232, at *2 (N.D. Cal. Dec. 1, 2015) ("Soymilk . . . does not 'purport [ ] to be' from a cow within the meaning of section 343(g)." (alteration in original) (quoting 21 U.S.C. § 343(g) (2012))); Ang v. Whitewave Foods Co., No. 13-CV-1953, 2013 WL 6492353, at *4 (N.D. Cal. Dec. 10, 2013).

[89] *Gitson*, 2015 WL 9121232, at *2; *Ang*, 2013 WL 6492353, at *4.

[90] *What Does FDA Regulate?*, U.S. FOOD & DRUG ADMIN. (Dec. 19, 2017), https://www.fda.gov/AboutFDA/Transparency/Basics/ucm194879.htm [https://perma.cc/VTD6-PJYP].

[91] *See* U.S. DEP'T OF HEALTH & HUMAN SERV. & U.S. DEP'T OF AGRIC., 2015–2020 DIETARY GUIDELINES FOR AMERICANS 23, 49 (8th ed. 2015), https://health.gov/dietaryguidelines/2015/resources/2015-2020_Dietary_Guidelines.pdf [https://perma.cc/B7ME-6P89] [hereinafter DIETARY GUIDELINES]. Notably, the "[a]verage dairy intake for most young children ages [one] to [three] years meets recommended amounts, but all other age groups have average intakes that are below recommendations." *Id.* at 49. Further, the 2015–2020 Dietary Guidelines for Americans includes soymilk as part of the recommended dairy products. *Id.* at 23, 49.

[92] S. 130, 115th Cong. § 2(1) (2017).

(2) dairy foods provide key nutrients, including vitamin D, calcium, potassium and magnesium;[93] (3) women are less likely to receive the recommended amount of calcium compared to their male counterparts;[94] (4) plant-based milk alternative products do not possess the same amount of vitamin D and potassium as cow's milk;[95] (5) imitation products do not provide the same nutritional value as products made from dairy cows;[96] (7) the FDA defines milk narrowly, excluding plant-based alternatives;[97] and (6/8) enforcement should be improved because the proliferation of milk imitation products in the marketplace puts consumers at risk of being deceived.[98]

While some of the justifications articulated in the bill rely on incomplete or disproven information, other considerations, especially those relating to health and consumer protection, should be considered as legitimate government interests. Thus, Congress possesses a legitimate interest in promoting accuracy in the information presented to the public, especially as it appears on consumable products.[99]

3. Whether the Proposed Regulation Directly Advances the Government's Expressed Interest

Under the *Central Hudson* test, a regulation must directly advance a substantial government interest.[100] Although less exacting than a strict scrutiny analysis, to satisfy this part of the test the government must demonstrate that the DAIRY PRIDE Act directly advances consumer health and financial protection.[101]

The DAIRY PRIDE Act professes to protect consumers from misconceptions and deception caused by the product names and labels of dairy alternative goods. Although the FDA has been largely silent on the deceptiveness of non-dairy labels, the federal judiciary recently offered an interpretation of the present regulatory and legislative framework. The courts, however,

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[93] *Id.* § 2(2).

[94] *Id.* § 2(3).

[95] *Id.* § 2(4).

[96] *Id.* § 2(5).

[97] *Id.* § 2(7).

[98] *Id.* §§ 2(6), 2(8). Despite being parroted about as one of the most common reasons for enacting the DAIRY PRIDE Act, statistical evidence and judicial decisions disprove the theory that customers are misled by the plant-based alternative products. *See, e.g.*, 2017 Chapman Letter, *supra* note 87, at 2–3; *see also* Ang v. Whitewave Foods Co., No. 13-CV-1953, 2013 WL 6492353, at *4 (N.D. Cal. Dec. 10, 2013).

[99] *What Does FDA Regulate?*, *supra* note 90.

[100] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566, 569 (1980).

[101] *Id.* at 566.

reached the opposite conclusion to that asserted by the drafters of the DAIRY PRIDE Act.[102]

Federal courts recently deemed it inconceivable that a reasonable consumer[103] would be misled into thinking products bearing the names like soymilk or almond milk actually contain cow's milk. In *Ang v. WhiteWave Foods Co.*, the court rejected the plaintiff's claim that the defendant misbranded products by using titles like "almond milk" in the names of their foods.[104] The plaintiff argued that 21 C.F.R. § 131.110 defines milk as coming from a cow, and stated that products bearing names using the same term, like almond milk, coconut milk, and soymilk create an identical belief in consumers.[105] The court dismissed the plaintiff's claims, stating "[i]t is simply implausible that a reasonable consumer would mistake a product like soymilk or almond milk with dairy milk from a cow. The first words in the products' names should be obvious enough to even the least discerning of consumers."[106]

Likewise, in *Gitson v. Trader Joe's Co.*, a federal district court determined use of the word "soymilk" in Trader Joe's products did not violate the Federal Food, Drug, and Cosmetic Act.[107] The court held that "[t]he reasonable consumer (indeed, even the least sophisticated consumer) does not think soymilk comes from a cow. To the contrary, people drink soymilk in lieu of cow's milk."[108]

Moreover, the FDA already requires manufacturers to use qualifying language to aid consumers in distinguishing milk products from non-dairy substitutes, further limiting the ability of the legislation like the DAIRY PRIDE Act to meet its stated goals. To avoid consumer deception, the FDA utilizes standards of identity, codified in section 403(g) of the Food, Drug, and Cosmetic Act,[109] to evaluate whether a product that incorporates the name of a standardized food unlawfully misleads consumers. The Act states, *inter alia*, that products using the name of statutorily defined foods are misbranded if they

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[102] *Compare Ang*, 2013 WL 6492353, at *4 *with* S. 130, 115th Cong. § 2 (2017).

[103] *Ang* at *4 ("False advertising claims under the [California state law] are governed by the reasonable consumer standard, whereby a plaintiff must show that members of the public are likely to be deceived." (citing Williams v. Gerber Products Co., 552 F.3d 934, 938 (9th Cir.2008))).

[104] *Id.* at *4.

[105] *Id.* at *3.

[106] *Id.* at *4.

[107] Gitson v. Trader Joe's Co., No. 13-cv-01333-VC, 2015 WL 9121232, at *6–7 (N.D. Cal. Oct. 4, 2015); *see also* 21 U.S.C. § 331(a) (2012 & Supp. V. 2018) (setting out the prohibition against misbranding in the FDCA); *id.* § 343.

[108] *Gitson*, 2015 WL 9121232, at *1.

[109] Food, Drug, & Cosmetic Act, ch. 675, § 403, 52 Stat. 1047 (codified as amended at 21 U.S.C. § 343(g)).

> purport [] to be or [are] represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 341 of this title, *unless*. . . [they] conform [] to such definition and standard, and [their] label bears the name of the food specified in the definition and standard.[110]

Notably, the Court interprets the words "purport" and "represent" to suggest "the idea of counterfeit."[111] In *Gitson*, the court determined that

> the fact that the FDA has standardized milk does not categorically preclude a company from giving any food product a name that includes the word "milk." Rather as the language of section 343(g) indicates, the standardization of "milk" simply means a company cannot pass off a product as milk if it does not meet the regulatory definition of "milk."[112]

The court went on to determine that Trader Joe's soymilk never attempted to pass itself off as milk, as evidenced by use of "soy" in the product label.[113]

The drafters of the DAIRY PRIDE Act, however, reached an opposite interpretation, explicitly stating "[p]lant-based products labeled as milk are misleading to consumers," among the legislative findings necessitating the enactment of the bill, but without including any corroborating evidence supporting the assertion.[114] Further, it appears the drafters of the Act failed to acknowledge another FDA regulation, which asserts that the presence of a standard of identity "does not necessarily preclude the use of the standardized name in connection with the name of a nonstandarized food, and 'in some cases it may be necessary to . . . provide the consumer with accurate, descriptive, and fully informative labeling.'"[115] Based on these contrary judicial findings and FDA regulations inconsistent with the consumer protection rationale expressed in the DAIRY PRIDE Act, the Act's content-based restriction on speech will likely not advance the government's interest.[116]

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[110] *Id.* (emphasis added).

[111] 62 Cases of Jam v. United States, 340 U.S. 593, 600 (1951); *see also* GFI Citizen Petition, *supra* note 22, at 17–18.

[112] *Gitson*, 2015 WL 9121232, at *2 (citing 21 U.S.C. § 343(g)).

[113] *Id.*

[114] S. 130, 115th Cong. § 2(6) (2017).

[115] Nonfat Dry Milk, low-fat Dry Milk, Dry Whole Milk, and Dry Cream; Standards of Identity; Confirmation of Effective Date and a Further Amendment, 44 Fed. Reg. 3964, 3965 (Jan. 19, 1979) (quoting Imitation Foods; Application of the Term "Imitation," 38 Fed. Reg. 20702, 20703 (Aug. 2, 1973)).

[116] *See* BARRETT & LATTY, *supra* note 38, at 2–5 (arguing that the government's interest in consumer protection will not be advanced by the DAIRY PRIDE Act because the underlying problem, that consumers are being misled by the term "milk" in names and advertisements of non-dairy substitute products, does not exist).

In addition to consumer protection, the DAIRY PRIDE Act claims to advance consumer health, but these legislative findings misrepresent recommendations in the Dietary Guidelines published by the U.S. Department of Health and Human Services and the United States Department of Agriculture. The legislative findings relevant here claim that dairy products play an important role in individual health for adults and children, that most Americans are not meeting their recommended dairy intake, and that dairy products provide consumers with nutrients under consumed by most Americans.[117] The aforementioned legislative findings rely on dietary guidelines published by the Department of Health and Human Services and the Department of Agriculture, but they fail to disclose one critical piece of information:[118] Fortified soymilk is included under "Dairy" in the Dietary Guidelines for 2015–2020.[119] As such, all of the health findings articulated in the legislative justifications apply to at least one plant-based milk alternative product.[120] Moreover, the Dietary Guidelines recommend that the American populous increase consumption of certain foods in the dairy group, including fortified soymilk.[121] Similar to the government's consumer protection motive, the Act's content-based speech restriction will likely not advance the government's interest to promote individual health.[122]

4. Whether the Restraint Imposes Limitations More Extensive Than Necessary to Satisfy a Substantial Government Interest

Even if a court determines that the DAIRY PRIDE Act advances the government's expressed interests, the government will, nevertheless, fail to satisfy the final element of the *Central Hudson* analysis. Unlike the other parts of the test, which remain largely unaltered from those set forth in the initial decision, the Court has revised, and ultimately watered down, the final analysis prong.[123] In *Board of Trustees of SUNY v. Fox*,

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[117] S.130, 115th Cong. §§ 2(1)–(3) (2017).

[118] BARRETT & LATTY, *supra* note 38, at 5 ("Astonishingly, the legislative findings fail to disclose a crucial fact: The Dietary Guidelines include fortified soymilk in the dairy group.").

[119] DIETARY GUIDELINES, *supra* note 91, at 23.

[120] *Id.*; *see also* S. 130, 115th Cong. §§ 2(1), 2(2), 2(4) (2017).

[121] *Id.* at 49.

[122] *See* BARRETT & LATTY, *supra* note 38, at 5.

[123] This is not to say the Court never altered the other prongs of the *Central Hudson* test. In *Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 343–44 (1986), the Court diluted the scrutiny afforded by *Central Hudson* to rational basis review. *See also id.* at 353 n.3 (Brennan, J., dissenting) ("In rejecting appellant's equal

the Supreme Court modified the original least-restrictive-means test, which required statutes restricting commercial speech be the least restrictive means to advance a substantial interest.[124] Now, however, restrictions on commercial speech need only be a "reasonable fit" for advancing a substantial government interest to satisfy *Central Hudson*.[125] Even analyzed under this lower standard, it remains unlikely that the restrictions set forth in the DAIRY PRIDE Act provide a reasonable fit to accomplish the government's stated goals.

The governmental interests advanced in the DAIRY PRIDE Act, which asserts to increase national health and assuage consumer confusion, are incompatible with the means set forth for achieving them, and thus, do not provide a reasonable solution for accomplishing the Act's purpose. First, there is a lack of credible research suggesting that a reasonable consumer is unable to distinguish almond, coconut, or other non-dairy milk alternatives from traditional dairy milk, with the products' current labels.[126] Further, although attempted class action lawsuits have raised questions regarding products liability and misrepresentation on the part of plant-based milk alternatives, such cases have largely been dismissed on summary judgment or during the pleading stage of litigation.[127]

Manufacturers of plant-based dairy products already differentiate their products from more traditional commodities

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protection claim, the Court erroneously uses a 'rational basis' analysis, thereby ignoring the important First Amendment interests implicated by this case." (citing Police Dept. of Chicago v. Mosley, 408 U. S. 92 (1972)). The Court reversed this change in the late 1990s. *See* Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 182–86 (1999); 44 Liquormart Inc. v. R.I., 517 U.S. 484, 509–13 (1996).

[124] Bd. of Tr. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480–81 (1989) (the Court "declin[ed] to impose [the] least-restrictive-means requirement," and instead stated that "since the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." (citations omitted)); *see also* Matthew Passalacqua, Note, *There's Something Brewing Within the Commercial Speech Doctrine*, 46 VAL. U. L. REV. 607, 618–19 (2011).

[125] *Fox*, 492 U.S. at 480–81.

[126] *See* 2017 Chapman Letter, *supra* note 87, at 3 (In a survey of 814 individuals, only three percent of participants believed the product contained cow's milk and only five percent stated they mistakenly purchased soymilk in lieu of cow's milk.).

[127] *See, e.g.*, Nat'l Milk Producers Fed'n. v. Harris, 653 F.2d 339, 340 (8th Cir. 1981) (wherein NMPF "alleged the invalidity of a FDA regulation that authorizes qualifying food products to bear a label describing these products as 'substitute[s]' rather than as 'imitation[s],'" and that "the FDA had unlawfully approved the marketing of food products as cheese substitutes and had unlawfully refused to enforce the regulation against such products" (alteration in original)); *see also* Ang v. Whitewave Foods Co., No. 13-CV-1953, 2013 WL 6492353, at *4 (N.D. Cal. Dec. 10, 2013) ("[I]t is simply implausible that a reasonable consumer would mistake a product like soymilk or almond milk with dairy milk from a cow. The first words in the products' names should be obvious enough even to the least discerning of consumers."); Gitson v. Trader Joe's Co., No. 1:17-cv-00117-VC, 2015 WL 9121232, at *2 (N.D. Cal. Dec. 1, 2015) ("Soymilk. . . does not 'purport [ ] to be' from a cow within the meaning of section 343(g)." (alteration in original)).

by qualifying the word "milk" on their product labels and advertisements.[128] The DAIRY PRIDE Act would require manufacturers to add an additional term, such as imitation, into their titles, or drop the word milk altogether and replace it with more generic language, like beverage.[129] Rather than furthering the needs of the public, such a requirement primarily acts as a means of insulating the dairy industry from free-market competition, which some critics of the bill believe to be the main purpose for advancing the DAIRY PRIDE Act.[130]

Despite offering seemingly altruistic justifications for supporting the DAIRY PRIDE Act, more nefarious explanations may be motivating NMPF and other interested groups in their pursuit of such drastic legislative action. In SANA's response to NMPF's 2000 letter asking the FDA to enforce 21 U.S.C. § 131.110 to prevent labeling products as "soymilk," the organization advanced the theory that "[t]he NMPF letter [was] a barely-disguised effort to try to get the FDA to expend its resources to protect dairy milk producers from honest free-market competition by a nutritious and truthfully-described product."[131]

Although this argument lacked substantial merit when first advanced, evidence today may provide comparatively strong support for this assertion. Today, fifty-eight percent of consumers drink non-dairy milk and thirty-six percent consume plant-based meat alternatives.[132] Sales of plant-based products designed to replace meat, dairy, and egg items rose to $3.1 billion, with an 8.1% growth rate.[133] Likewise, sales of plant-based milk products rose at a rate of 3.1% as sales of traditional milk fell by five percent, and sales of other alternative dairy products rose by twenty percent.[134] Further, non-dairy yogurt sales rose by a staggering fifty-six percent.[135] It follows that the dairy industry might seek drastic action, including usurping the FDA by directly pursuing decisive legislation, to try to retain their foothold within the market.[136]

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[128] *See, e.g.*, 44 Fed. Reg. 3964, 3965 (Jan. 19, 1979) (quoting 38 Fed. Reg. 20702, 20703 (Aug. 2, 1973)).

[129] S. 130, 115th Cong. § 4 (2017).

[130] *See, e.g.*, GFI Citizen Petition, *supra* note 22, at 14–15.

[131] 2000 Chapman Letter, *supra* note 15, at 5.

[132] Becky Schilling, *The Future of Plant-Based Foods*, SUPERMARKET NEWS (Sept. 21, 2017), http://www.supermarketnews.com/consumer-trends/future-plant-based-foods [https://perma.cc/6AY5-RWHW].

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *See* Letter from Peter Welch, Member of Cong., et al., to Robert M. Califf, Comm'r, U.S. Food & Drug Admin. (Dec. 16, 2016), https://www.nmpf.org/wp-content/uploads//Welch-Simpson%20Letter.pdf [https://perma.cc/WV6G-DWQL].

The New York City Bar Association explicitly referenced these tactics in a letter issued in support of the 2017 GFI Citizen Petition, stating that "[w]hile the Petition's proposed regulation is not limited in scope to the names of plant-based products, given the recent effort of politicians to limit the product names of plant-based products . . . [GFI's] Petition would limit the effect of such anti-competitive efforts."[137]

Even without the underlying, anti-competitive motivation however, the DAIRY PRIDE Act cannot withstand constitutional scrutiny. Although the government possesses a substantial interest in promoting the consumer health and preventing deception, the content-based restriction on commercial speech in the DAIRY PRIDE Act applies to speech that is neither inherently unlawful nor deceitful. Further, the proposed regulation of "milk" is unlikely to play any substantive role in advancing the government's objectives, and as such, fails to provide a solution reasonably tailored to suit the government interest. It is unlikely, given the parameters, that the DAIRY PRIDE Act would withstand constitutional scrutiny, if challenged.

III. MOVING FORWARD WITH AN EYE TOWARD COMPROMISE

During the dispute over use of the term "milk," the dairy and plant-based alternative industries have proposed potential modifications to the existing regulatory structure, generally requiring strict enforcement of existing regulations or modifications thereto. SANA's first proposal, from its 1997 citizen petition, served as the catalyst of the present debate.[138] At that time, SANA requested that the FDA commissioner amend Part 102 of the FDA regulations "to recognize 'soymilk' as the established common or usual name to be used in labels and other labeling to identify a beverage of this nature."[139] NMPF fired back, asking that the FDA rigidly enforce their existing regulatory scheme and prohibit dairy substitutes from using "milk" in their products' names.[140] The administrative agency chose not to amend their regulations, while also functionally declining to follow a strict enforcement policy, essentially suspending SANA's proposal in a state of regulatory

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[137] Letter from Lori Barrett-Peterson, Animal Law Comm. Chair, Ass'n of the Bar of N.Y. City, to Div. of Dockets Mgmt., U.S. Food & Drug Administration, at 4 (Aug. 23, 2017), http://documents.nycbar.org/files/FDA_Petition_Milk_Labeling_ANIMAL_8_23_17.pdf [https://perma.cc/AD7C-6RZZ].

[138] Calderon, et al., *supra* note 1.

[139] SANA Citizen Petition, *supra* note 8, at 1.

[140] 2000 Byrne Letter, *supra* note 13, at 2–3 (citing 21 C.F.R. § 131.110).

limbo.[141] Even after the passage of approximately twenty years, the same pattern persists.[142]

In 2017, GFI drafted a new citizen petition. Like the original petition from SANA, the current proposal requests a change to existing FDA regulations. Specifically, GFI requested that the

> FDA amend 21 CFR § 102.5, to add the following language after part (d):
>
> (e) The common or usual name of food may be—
>
> (1) the common or usual name of another food preceded by a qualifying word or phrase that identifies (i) an alternative plant or animal source that replaces the main characterizing ingredient(s) or component(s) of such other food, or (ii) the absence of a primary characterizing plant or animal source, or of a nutrient, allergen, or other well-known characterizing substance, that is ordinarily present in such other food; or
>
> (2) any other word or phrase comprised of two or more terms, which may be separated by hyphens or spaces; but if such name includes the common or usual name of any other food, it must effectively notify consumers that the product is distinct from such other food.[143]

The GFI petition asserts that its proposed regulatory alteration would not violate Section 403 of the Food, Drug, and Cosmetic Act,[144] as long as it would not cause a reasonable consumer to be misled or deceived.[145] The FDA sent a response letter to GFI in which it acknowledged receipt of the petition.[146] Here, in contrast to its previous non-involvement policy, the FDA's reply stated that the agency had been inundated with "competing priorities," and claimed that it would "complete [its] review of the [Good Food Institute petition] and consider any amendments to [FDA] regulations as warranted in the contest of other programs within the Center," rather than issuing an outright refusal to act.[147] The reply from the FDA does not, however, promise to address the solutions proposed in GFI's

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[141] Calderon, et al., *supra* note 1.

[142] Linda A. Goldstein & Theodore J. Kobus III, *Decades-Long Milk War Froths on*, LEXOLOGY (Sept. 12, 2017), https://www.lexology.com/library/detail.aspx?g=1ea058a8-1b4d-4f85-9b97-1581f9bbda43 [https://perma.cc/RJ5E-4762].

[143] GFI Citizen Petition, *supra* note 22, at 2.

[144] Federal Food, Drug and Cosmetic Act, ch. 675, § 403, 52 Stat. 1040, 1047 (1938) (codified as amended at 21 U.S.C. § 343 (2012)). Section 403 of the Food, Drug, and Cosmetic Act regulates misbranded food, nutritional labeling, and disclosures. *Id.*

[145] GFI Citizen Petition, *supra* note 22, at 2.

[146] Dynna Bigby, Supervisor Admin. Proceedings Specialist, U.S. Federal Food and Drug Administration Division of Dockets Management, to Nigel Barrella, Good Food Inst. (Mar. 2, 2017) (on file with *Brooklyn Law Review*).

[147] Interim Response Letter from Douglas A. Balentine, Dir., Ctr. for Food Safety & Applied Nutrition to Nigel Barrella, Good Food Inst. (Aug. 29, 2017), https://www.regulations.gov/document?D=FDA-2017-P-1298-0091 [https://perma.cc/5DSD-USLK].

petition.[148] Interestingly, approximately one year after receipt of the GFI petition, the FDA requested comments regarding a regulation that might be substantively similar to the DAIRY PRIDE Act.[149] Although this mitigates the likelihood that the FDA will abstain from taking concrete action absent congressional mandate, it does not ensure that such action will be taken or necessarily indicate what avenue, if any, the agency will pursue to accomplish its goals.

Thus far, all solutions proffered by SANA, NMPF, GFI and others, to end the abiding debate over use of the term milk, have proven unsuccessful.–In spite of regulatory uncertainty, new foods, manufactured with substitute ingredients, proliferated throughout the market over the past twenty years.[150] Regardless of whether the proposed restrictions are codified through the DAIRY PRIDE Act or an agency promulgated regulation, the broad commercial speech restrictions encompassed in the bill will likely impose an unconstitutional restraint on manufacturers' First Amendment right to free speech.[151] Still, the longevity and impassioned nature of debate over use of "milk" necessitates that some action should be taken to resolve the conflict.

Rather than pursuing solutions proposed by GFI, NMPF, or SANA, the FDA should add regulations to control the size and location of disclaimers on product labels and in advertising, but expressly allow dairy substitute products to use "milk" and other dairy specific terms in product names and advertisements. While not completely satisfying the demands of any of the interested parties, this solution occupies a middle ground, and serves the governmental interests articulated in the DAIRY PRIDE Act, namely, to promote consumer health and protect against deception, without implicating the level of judicial scrutiny triggered by content-based speech restrictions.[152]

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[148] Keller & Heckman LLP, *FDA Delays Decision on Plant-Based Milk Labeling Petition*, NAT'L L. REV. (Sept. 5, 2017), https://www.natlawreview.com/article/fda-delays-decision-plant-based-milk-labeling-petition [https://perma.cc/RYW7-4YD6].

[149] *See* Use of the Names of Dairy Foods in the Labeling of Plant-Based products, Notice, Extension of Comment Period, 83 Fed. Reg. 58,775 (Nov. 21, 2018); Use of the Names of Dairy Foods in the Labeling of Plant-Based products, Notice, Request for Comments, 83 Fed. Reg. 49,103 (Sept. 28, 2018); *see also* NMPF Citizen Petition, *supra* note 48.

[150] Calderon et al., *supra* note 1.

[151] *See supra* Part II.

[152] Requiring that alternative dairy product manufacturers alter product labels and advertisements so as to clearly communicate an item's contents to consumers would impose a compelled disclosure requirement, and as such, would not act as an outright prohibition on manufacturers' freedom of speech. As such, a court would likely evaluate the restriction under the test articulated in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, instead of applying the C*entral Hudson* analysis. In *Zauderer*, the Court declined to follow *Central Hudson*'s four-part test, reasoning that disclosure requirements are fundamentally different from prohibitions, and as such,

The FDA employed a similar regulation strategy, though admittedly on a much smaller scale, when it settled a conflict over use of the term "mayonnaise."[153] The dispute over regulation of "mayonnaise," aptly referred to as the "Mayo Wars" by the media, revolved around a single product, Just Mayo, an egg-free, vegan mayonnaise substitute.[154] The conflict arose because the mayonnaise standard of identity requires products bearing the mayonnaise or mayo nomenclature to include eggs as an ingredient.[155] In August 2015, the FDA issued a letter, accusing the Just Mayo manufacturer, Hampton Creek, of misbranding the product pursuant to section 403(r)(1)(A) of the Federal Food, Drug, and Cosmetic Act.[156] The letter also alleged that that the company's Siracha sauce was similarly misbranded and that the statements on the company's website misled consumers into believing insufficiently substantiated health claims.[157] Rather than forcing Hampton Creek to rename Just Mayo, the FDA accepted a compromise solution wherein the company would change its packaging by making phrases like "Egg-Free" more visible to consumers.[158] Although applying a similar solution in the war on milk would require the regulations be applied on a much larger scale, the FDA should afford manufacturers of dairy substitute products the same deference it gave to Hampton Creek.

The FDA should require manufacturers of plant-based alternative products to alter a product's packaging if the agency determines such action is necessary to accurately communicate the composition of the item to consumers. These modifications should be limited, in all but the most egregious cases, to changing the size and placement of disclaimers that differentiate such substitute products from their more commonplace counterparts. Moreover, unless a product is clearly misbranded, pursuant to Part 403 of the Food, Drug, and Cosmetic Act,[159] the FDA should expressly permit the use of

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determined that the government need only demonstrate that "disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

153 *See* Beth Kowitt, *The Mayo Wars Just Ended*, FORTUNE (Dec. 17, 2015), http://fortune.com/2015/12/17/hampton-creek-just-mayo-fda/ [https://perma.cc/5DY8-8ZZS].

154 *Id.*

155 21 C.F.R. § 169.140 (2018).

156 Warning Letter from William A. Correll, Jr., Dir., Ctr. for Food Safety & Applied Nutrition, to Joshua Tetrick, Founder & C.E.O., Hampton Creek Foods, Inc., at 1–3 (Aug. 12, 2015), https://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm458824.htm [https://perma.cc/28E3-T4TZ].

157 *Id.*

158 *See* Kowitt, *supra* note 153.

159 Federal Food, Drug and Cosmetic Act, ch. 675, § 403, 52 Stat. 1040, 1047 (1938) (codified as amended at 21 U.S.C. § 343 (2012 & Supp. V 2018)); 21 U.S.C. § 343 (2012 & Supp. V 2018).

"milk" and other dairy specific terms in names, labels, and advertisements for substitute products. Additionally, to prevent manufacturers of dairy substitute products from misusing "milk," the FDA should encourage consumers and regulated parties to take an active role in product regulation. To participate, consumers should be able to file lawsuits against infringing parties and bring complaints to the FDA directly, as is the case in the current regulatory scheme.

Big dairy and its supporters will likely argue that consumers' lawsuits have historically proven to be ineffective and that a solution based primarily at regulating packaging and labels is an insufficient means of protecting consumers.[160] This argument, however, lacks merit and should not dissuade the FDA from pursuing the proposed regulatory agenda. The failure of previous lawsuits likely does not indicate a fundamental problem with this system, but rather demonstrates that alternative milk product names and labels are sufficiently clear so as not to mislead a reasonable consumer, or in the words of one federal judge "even the least discerning of consumers."[161]

It must be conceded that no alteration to the current regulatory landscape, or even the perpetuation thereof, exists without added costs. Before the FDA reaches a final ruling on important final or proposed regulations, it conducts an economic analysis, which includes "an assessment of the costs, benefits, and cost-effectiveness of the action, as well as assessments of the costs, benefits and cost-effectiveness of the most promising alternative actions."[162] Thus, the FDA must expend time and financial resources to create, examine, and ultimately reach a conclusion on how and whether a regulation should proceed.[163] Further, the dispute over use of "milk" impacts a multitude of interest groups, manufacturers, and products, making the requisite analysis much broader than that which was required in the context of the "Mayo Wars."[164] The possible market impact will probably meet the standard of importance to trigger an economic analysis, and as

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[160] *See e.g.*, Ang v. WhiteWave Foods Co., No. 13-CV-1953, 2013 WL 6492353, at *1, 4 (N.D. Cal. Dec. 10, 2013).

[161] *Id.* at *4.

[162] *Economic Impact Analyses of FDA Regulations*, U.S. FOOD AND DRUG ADMIN. (Dec. 22, 2017), https://www.fda.gov/AboutFDA/ReportsManualsForms/Reports/EconomicAnalyses/ [https://perma.cc/S847-USL4]; *see also* Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 30, 2017); Exec. Order No. 13,563, 14 Fed. Reg. 3821 (Jan. 18, 2011); Exec. Order No. 12,866, 3 C.F.R. § 638 (1993), *reprinted in* 5 U.S.C. § 601 (1994).

[163] *See Economic Impact Analyses of FDA Regulations*, *supra* note 162.

[164] *The Dairy & Dairy Alternatives Market*, PACKAGED FACTS (2018), https://www.packagedfacts.com/Content/Featured-Markets/Dairy-and-Dairy-Alternatives [https://perma.cc/XQA4-LGPR] (demonstrating the extensiveness of the dairy and plant-based alternatives industries).

such, will likely require that the FDA invest substantial resources before it can bring a conclusion to the abiding conflict.[165]

While the cost of completing an economic analysis will likely be substantial, this initial expenditure should not dissuade the agency from issuing guidance and bringing the conflict over use of the term "milk" to an end.[166] If the FDA fails to act, the present dispute may linger indefinitely, which could lead to continued uncertainty and increased costs for producers, manufacturers, and consumers.[167]

CONCLUSION

The decreasing demand for dairy products and proliferation of substitute items created an atmosphere in which a war over the use of the word "milk" has persisted across decades. The twenty-year debate between the dairy and plant-based alternative industries may, however, be heading toward an apparent end. If the DAIRY PRIDE Act passes Congress, it is unlikely it will withstand judicial scrutiny under the four-part test articulated in *Central Hudson*.

There are less restrictive and constitutionally viable means the FDA could use to regulate "milk." One such example would be to enact a solution similar to that which the regulatory agency used when resolving the "mayo wars" conflict—requiring more conspicuous labeling.[168] Yet, a question remains: Is any of this regulation really necessary? Consumers today can bring action against manufacturers for misleading labels. The lack of

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[165] It does not appear that the FDA conducted an economic analysis in reaching its decision on the dispute over use of the term mayonnaise, likely because it did not center around an important proposed or final FDA regulation. The requirement that regulators conduct a cost-benefit analysis extends exclusively to regulations, and as such would not have been considered in the "mayo wars" because that case ended in settlement. *See* Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017); Exec. Order No. 12,866, 3 C.F.R. § 638 (1993), *reprinted in* 5 U.S.C. § 601 (1994).

[166] While the FDA's policy of inaction may be the result of a general apathy toward the issue, there may be other explanations for the executive agency's seemingly dismissive behavior. For example, since the passage of the Prescription Drug User Fee Act in 1992, a significant portion of FDA funding comes directly from pharmaceutical companies, which in all likelihood has an effect on the alignment of the agency's priorities. Prescription Drug User Fee Act of 1992, Pub. L. No. 102-571, 106 Stat. 4491 (codified as amended at 21 U.S.C. § 379g); *see also Prescription Drug User Fee Amendments (PDUFA)*, U.S. FOOD AND DRUG ADMINISTRATION (Dec. 22, 2017), https://www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/default.htm [https://perma.cc/93Y6-R29Y].

[167] *See, e.g.*, AC Shilton, *The Battle Over the Word 'Milk*,' OUTSIDE (Feb. 6, 2017), https://www.outsideonline.com/2152336/should-nut-milk-be-considered-milk [https://perma.cc/BZ7R-ZVV6] (explaining the consequences "banning [ ] use [of the term 'milk'] from nondairy products could severely impact plant-based products"). *But see* St. Pierre, *supra* note 23 (Canada banned plant-based products from using "milk" in product names in 2009, but purchase of dairy products has continued to decline.).

[168] *See, e.g.*, Kowitt, *supra* note 153.

success of suits challenging use of "milk" to date likely does not indicate a fundamental problem with this system, but rather shows that alternative milk product names and labels are sufficiently clear so as not to mislead a reasonable consumer.[169]

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[169] *See e.g.*, Ang v. WhiteWave Foods Co., No. 13-CV-1953, 2013 WL 6492353, at *4 (N.D. Cal. Dec. 10, 2013).

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