



October 1, 2019

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Director of the Bureau of Regulatory Services  
Mississippi Department of Agriculture & Commerce  
P.O. Box 1609  
Jackson, MS 39215

SUBMITTED ELECTRONICALLY TO ADAM@MDAC.MS.GOV

RE: Proposed Labeling Requirements for Cell-Cultured Foods, MSOS System Number 24404

Dear Mr. Choate,

The Good Food Institute (“GFI”), a 501(c)(3) nonprofit organization, appreciates the opportunity to submit these comments to the Mississippi Department of Agriculture & Commerce (“MDAC”) regarding the labeling of cultivated meat and meat food products.

GFI’s team of scientists, entrepreneurs, and policy experts work to create a healthy, sustainable, and just food system by advocating for and supporting research into plant-based and cultivated (or “cell-cultured”) meat. GFI encourages innovation in plant-based and cultivated foods and supports the availability of plant-based foods to meet increasing consumer demand.

GFI welcomes the proposed labeling requirements for plant-based foods,<sup>1</sup> but has significant concerns about the constitutionality of the proposed labeling requirements for cultivated meat<sup>2</sup> (also known as “cell-based meat,” and referred to in the proposed regulation as “cell-cultured food”). While the MDAC is tasked with encouraging “the proper development of agriculture, horticulture and kindred industries,”<sup>3</sup> it must not overstep its regulatory authority nor violate producers’ First Amendment rights. Congress has granted USDA exclusive authority to regulate meat and poultry labels, and state regulation of such labels is preempted by federal law. In addition, prohibiting producers from accurately labeling cultivated meat as what it is — animal

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<sup>1</sup> Miss. Dep’t of Agric. & Commerce, Proposed Rule on Labeling of Plant-Based Foods, MSOS Sys. No. 24402 (Sept. 5, 2019), <https://bit.ly/2nA01QZ>.

<sup>2</sup> Miss. Dep’t of Agric. & Commerce, Proposed Rule on Labeling of Cell-Cultured Foods, MSOS Sys. No. 24404 (Sept. 5, 2019) [hereinafter “Proposed Rule 24404”], <https://bit.ly/2mFgOBK>.

<sup>3</sup> Miss. Code Ann. § 69-1-13(a).

meat — would result in false and misleading labels, and would put consumers with meat allergies at potentially fatal risk. Qualifiers like “lab-grown,” “lab-created,” or “grown in a lab” are particularly misleading, as cultivated meat will not be grown in laboratories any more than any food sold for commercial sale is. As a result, and as discussed in more detail below, the proposed regulation would be an unconstitutional restriction on commercial speech.

## **I. The proposed labeling requirements for cultivated meat are preempted by federal law.**

The U.S. Department of Agriculture (USDA) regulates meat and poultry labeling under the Federal Meat Inspection Act<sup>4</sup> (FMIA) and the Poultry Products Inspection Act<sup>5</sup> (“PPIA”), respectively. Under the FMIA and PPIA, USDA has broad authority to regulate the “material required to be incorporated in [meat] labeling.”<sup>6</sup> Congress has preserved this authority by enacting broad express preemption provisions in each Act.<sup>7</sup> Accordingly, Mississippi may not make or enforce “labeling requirements” with respect to USDA-inspected meat products that are “in addition to, or different than” those imposed by USDA.<sup>8</sup>

Preemption under the FMIA “sweeps widely,” and forbids state labeling requirements that differ from federal law, even where such requirements do not conflict with federal law.<sup>9</sup> USDA will regulate cultivated meat products under the FMIA and PPIA: as announced recently in a Formal Agreement between USDA and the U.S. Food and Drug Administration (FDA), all cultivated meat products will be subject to USDA inspection and their labels will require USDA pre-approval.<sup>10</sup> USDA has also promulgated extensive regulations governing the labeling of meat food products, none of which require “lab-grown” or other comparable qualifiers contemplated by the proposed labeling requirements for cultivated meat. The proposed regulation therefore, on its face, imposes a requirement in addition to and different than federal law, and is preempted.<sup>11</sup>

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<sup>4</sup> 21 U.S.C. § 601 et seq.

<sup>5</sup> 21 U.S.C. § 451 et seq.

<sup>6</sup> 21 U.S.C. § 607(c); *id.* § 457(b).

<sup>7</sup> 21 U.S.C. § 678; *id.* § 467(e).

<sup>8</sup> 21 U.S.C. § 678; *id.* § 467(e).

<sup>9</sup> *Nat’l Meat Ass’n v. Harris*, 565 U.S. 452, 459-60 (2012).

<sup>10</sup> *See* FDA & USDA, Formal Agreement Between FDA & USDA Regarding Oversight of Human Food Produced Using Animal Cell Technology Derived From Cell Lines of USDA-Amenable Species (Mar. 7, 2019), <https://bit.ly/2onsdqf>.

<sup>11</sup> Courts have determined that the FMIA preempts similar state laws. *See, e.g., Armour & Co. v. Ball*, 468 F.2d 76 (6th Cir. 1972) (invalidating Michigan law because it was preempted by the marking, labeling, and ingredient requirements of the FMIA); *see also Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 620 (D. Vt. 2015) (holding that state law requiring certain foods be designated as produced with genetic engineering “mandates a ... disclosure that is clearly in addition to and different than [federal requirements]”).

## II. The proposed labeling requirements for cultivated meat would violate First Amendment protections for commercial speech.

Section 114.01(2) of the proposed regulation provides that cultivated meat may not be labeled as a “meat” or “meat food product” (as defined by *Miss. Code Ann.* §§75-33-3(1)(b) and 75-35-3(g)) unless the label also prominently and conspicuously displays the phrase “lab-grown” or a comparable qualifier. The proposed regulation thus would give cultivated meat producers the false choice of labeling their products either without using accurate and necessary meat terms, or by using meat terms paired with inaccurate and misleading modifiers such as “lab-grown.”

Forgoing meat terms altogether would put consumers at risk and expose sellers to liability. Cultivated meat is animal meat, down to its DNA. This means that consumers with meat allergies may experience potentially fatal allergic reactions to cultivated meat.<sup>12</sup> Eliminating meat terms from cultivated meat labels would withhold from these consumers the information necessary to protect their health. Avoiding terms like “beef” or “pork” thus is not a real option for producers.<sup>13</sup> In effect, therefore, the regulation would compel producers to call their meats “lab-grown” or similar disparaging terms. Because this requirement is not a permissible health and safety warning, the appropriate standard of review is unclear, but under either First Amendment test — *Central Hudson* or *Zauderer* — the regulation is clearly unconstitutional.

In *National Institute of Family & Life Advocates v. Becerra*, the U.S. Supreme Court established that government-compelled speech is a content-based regulation of speech, and provided a framework for analyzing First Amendment challenges to such compelled speech: if a compelled speech regulation does not qualify for the *Zauderer* exception, it must survive heightened scrutiny under the *Central Hudson* test to avoid violating the First Amendment.<sup>14</sup> To determine whether the *Zauderer* exception applies, a court must consider whether the compelled speech governs only “commercial advertising” and requires the disclosure of purely factual and uncontroversial information.

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<sup>12</sup> Reported incidences of meat allergies have been increasing over the last several years. Am. Coll. of Allergy, Asthma & Immunology, *Meat Allergy*, <https://bit.ly/2kEkwa7> (last updated May 8, 2019). Red meat allergies in particular are on the rise in the southern, eastern, and central United States due to the increasing population of Lone Star ticks, whose bite can result in an allergy to red meat, potentially causing life-threatening anaphylaxis. See generally *Red meat allergy transmitted by lone star ticks on the rise*, CBS News (July 5, 2018), <https://cbsn.ws/2X2eeCw>; see also Steinke et al., *The alpha gal story: Lessons learned from connecting the dots*, 135 J. Allergy & Clinical Immunology 589 (Mar. 2015), <https://bit.ly/2rBlpCm>.

<sup>13</sup> It would also violate federal law: both the Federal Meat Inspection Act, 21 U.S.C. § 607(d), and the Poultry Products Inspection Act, 21 U.S.C. § 457(c), prohibit “labeling which is false or misleading.”

<sup>14</sup> *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018).

Under *Zauderer*, the government may compel commercial speech only if the speech in question is (1) purely factual, (2) uncontroversial, and (3) not unjustified or unduly burdensome. A compelled disclosure accompanying a related product or service must meet all three criteria to be constitutional.<sup>15</sup> The proposed regulation fails the first prong of this test, because the “lab-grown” requirement is not “purely factual.” Terms like “lab-grown” or “lab-created” are not factual: they are inaccurate and misleading. At commercial scale, cultivated meat will be made in a food production facility similar to a beer brewery, not in a lab. Many new foods are developed in test labs, but ultimately produced in other settings before reaching the market. Just as it would be inaccurate and fundamentally misleading to label such products as “lab-grown” when commercial-scale production does not take place in a lab, it would be inaccurate and misleading to require cultivated meat producers to label their products as “lab-grown.” Nor can such modifiers be described as “uncontroversial”: they are not only misleading but frankly pejorative, apparently designed to be unappealing to consumers. Finally, the regulation is both unjustified and unduly burdensome: a requirement to use false and misleading language on labels cannot be justified, and is clearly not the least burdensome means of alerting consumers to the production process of cell-based meat. The proposed regulation thus is unconstitutional under *Zauderer*.

Under the test of *Central Hudson Gas & Electric Corp. v. Public Service Commission* as well, truthful commercial speech, including words and images on labels, is protected by the First Amendment.<sup>16</sup> Courts make four inquiries when assessing whether a state’s restriction on commercial speech passes the *Central Hudson* test: (1) whether the speech is truthful, (2) whether the state has a substantial interest in regulating the speech, (3) whether the regulation materially advances that interest, and (4) whether the regulation is narrowly tailored. If the government wishes to restrict truthful commercial speech, it may only do so to directly advance a substantial government interest and, even then, it cannot restrict speech in a manner that is more extensive than necessary to further that interest.<sup>17</sup> Because preventing cultivated meat producers from labeling their products using accurate meat descriptors would not directly advance a substantial government interest in a narrowly tailored manner, the proposed labeling requirements violate the *Central Hudson* test.

For a regulation to warrant heightened scrutiny under *Central Hudson*, first, it must seek to restrict commercial speech that “is neither misleading nor related to unlawful activity.”<sup>18</sup> The speech that the proposed rule seeks to prohibit — truthful labels using accurate meat terms — meets this condition.<sup>19</sup> Cultivated beef is indeed “beef,” just as cultivated chicken is “chicken,”

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<sup>15</sup> *Nat’l Inst. of Family & Life Advocates*, 138 S.Ct. at 2372.

<sup>16</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 564.

<sup>19</sup> Proposed Rule 24404, § 114.01.

and so forth. As noted, being alerted to this fact by truthful labels is particularly critical to consumers with meat allergies, whose life may depend on accurate labeling of cultivated meat products.

Addressing the remaining prongs of the *Central Hudson* test, if the government wishes to restrict truthful commercial speech, it may do so only to directly advance a substantial government interest and, even then, it cannot restrict speech in a manner that is more extensive than necessary to further that interest.<sup>20</sup> Banning the use of meat terms on cultivated meat labels does not advance any substantial state interest. Nor does requiring inaccurate and pejorative modifiers that would mislead consumers as to the nature of the production process. Industry protectionism is not a legitimate state interest<sup>21</sup>: consumers, not the government, should decide who wins and loses in the marketplace. Nor would the proposed regulation advance any state interest in informing consumers about the foods they purchase and consume; rather, it would create consumer confusion by obfuscating the nature and properties of the product.

Finally, if the regulation aims to advance a state interest in consumer understanding, barring cultivated meat producers from using meat terms on their labels is not narrowly tailored to serve that interest. Labels for cultivated meat can convey its unique production process without excluding meat terms altogether or inaccurately describing that process as taking place in a laboratory.

For these reasons, the proposed requirements would be an unconstitutional restraint on commercial speech.<sup>22</sup>

### **III. Conclusion.**

We urge the MDAC to reconsider Proposed Rule 24404. First, it is preempted by federal law: the USDA has the exclusive authority to regulate meat labels under the broad express preemption provisions of the FMIA and PPIA. Moreover, its requirements would violate First Amendment protections for commercial speech. GFI encourages MDAC to engage with the cultivated meat industry to understand how best to communicate accurate and descriptive information to

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<sup>20</sup> *Cent. Hudson*, 447 U.S. at 557, 561.

<sup>21</sup> For example, Mississippi Farm Bureau Federation President Mike McCormick was quoted as saying “This bill will protect our cattle farmers from having to compete with products not harvested from an animal.” Alex Lowery, *Fake meat bill passes House, heads to Senate*, Farm Bureau, Jan. 25, 2019, <https://bit.ly/2nr8Dto>; see also Complaint at 8, *Upton’s Naturals Co. v. Bryant*, No. 3:19-cv-00462-HTW-LRA (S.D. Miss. July 1, 2019), <https://bit.ly/2mEvVeG>.

<sup>22</sup> See, e.g., Suggestions in Support of Plaintiffs’ Motion for Preliminary Injunction, *Turtle Island Foods v. Richardson*, No. 2:18-cv-4173 FJG (C.D. Mo. Oct. 30, 2018), <https://bit.ly/2Lill8E>.

consumers about cultivated meat products rather than seeking to enact unconstitutional labeling restrictions.

Again, GFI thanks MDAC for the opportunity to submit these comments. Please feel free to contact us if you have any questions.

Sincerely,



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