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—Journal of—
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Volume Twenty

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Michael S. Sinha & Meredith P. Mulhern

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LABELING ENERGY DRINKS: TACKLING A MONSTER OF A PROBLEM

Meredith P. Mulhern,* Michael S. Sinha**

I. INTRODUCTION

Energy drinks first rose to popularity in the 1980s after the creation of Red Bull. Red Bull energy drinks were the first of its kind, opening the door to a new consumer and regulatory landscape.¹ Since Red Bull first launched, multiple companies have released countless new energy drink products. Some energy drinks, like Red Bull, contain less than 100 mg of caffeine per 8 oz can.² However, other energy drinks contain much higher amounts of caffeine. A 12 oz can of Celsius contains 200 mg of caffeine, and up until recently, Celsius offered a product called Celsius Heat, a 12 oz can containing 300 mg of caffeine.³ In addition to high caffeine amounts, energy drinks often contain herbal stimulant additives, vitamin and mineral mixtures, and sugar. There is very little information available on the long-term effects of these stimulant mixtures on the body.

Although many consumers purchase energy drinks because of their caffeine content, many are left in the dark when it comes to labeling transparency and are unaware of their true contents. Energy drinks are classified as dietary supplements, meaning they are not directly regulated by the FDA before hitting store shelves. Instead, energy drink labels follow the Dietary Supplement Health and Education Act (DSHEA) guidelines.⁴ Under DSHEA, energy drinks face lax labeling regulations, which leaves consumers unaware of the dangers of high caffeine contents, stimulative additives, proprietary blends, and excessive sugar. We will discuss the dangers of energy drinks, the current regulatory framework and

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¹ See Red Bull Company Profile, RED BULL, <https://www.redbull.com/us-en/energydrink/company-profile> [hereinafter Red Bull] (last visited Nov. 4, 2024).

² See *Red Bull Energy Drink Ingredients, Facts & Figures*, RED BULL, <https://www.redbull.com/us-en/energydrink/red-bull-energy-drink-ingredients-list> (last visited Nov. 4, 2024).

³ See *Celsius Sparkling Cherry Cola Ingredients*, CELSIUS, <https://www.celsius.com/products/celsius/sparkling-cherry-cola/> (last visited Nov. 4, 2024).

⁴ See 21 C.F.R. § 101.93 (2024).

the problems it causes, why these problems should be corrected, and potential policy changes to fix those problems.

II. ENERGY DRINKS: A NEW FRONTIER

A. *The Rise in Popularity of Energy Drinks*

Energy drinks are a relatively new product in the consumer landscape. Although stimulative beverages existed throughout the 20th century, Red Bull is credited with popularizing energy drinks, spurring an absolute explosion of consumption over the past forty years.⁵ Now, dozens of options fill store aisles, the most popular being Red Bull, Celsius, Monster, and Rockstar, with more and more products being released each year. But what is an “energy drink”? The term “energy drink” is not defined by statute or regulation. The FDA understands “energy drinks” to mean a class of products in liquid form that typically contain caffeine, with or without other added ingredients. Some products of this type are marketed as beverages, which are regulated as conventional foods, but many are marketed as liquid dietary supplements.⁶

For most adults, 400 mg of caffeine per day is considered safe.⁷ Most energy drinks contain 100 to 300 mg of caffeine per serving.⁸ Conversely, a 12 oz can of Coca-Cola contains 34 mg of caffeine.⁹ Despite having lower caffeine content, soda beverages are held to stricter regulatory standards than energy drinks. This is because soda is classified as a “beverage” under the FDA.¹⁰ Most energy drinks are classified as dietary supplements because of their

⁵ Red Bull, *supra* note 1.

⁶ See Letter from Jeanne Ireland, Assistant Comm’r for Legis. of the Food & Drug Admin., to Sen. Richard J. Durbin (Aug. 10, 2012) (on file with Author).

⁷ See *Spilling the Beans: How Much Caffeine is Too Much?*, U.S. FOOD & DRUG ADMIN. (Sept. 7, 2023), <https://www.fda.gov/consumers/consumer-updates/spilling-beans-how-much-caffeine-too-much>.

⁸ See Jamie Pronschinske, *The Buzz on Energy Drinks*, MAYO CLINIC HEALTH SYS. (Aug. 31, 2022), <https://www.mayoclinichealthsystem.org/hometown-health/speaking-of-health/the-buzz-on-energy-drinks>.

⁹ See Caffeine Chart, CENTER FOR SCI. IN THE PUB. INT. (July 2023), <https://www.cspinet.org/caffeine-chart>.

¹⁰ *Product Categories and Products*, FDA (Sept. 4, 2014), <https://www.fda.gov/product-categories-and-products>.

use of herbal additives, meaning they are not directly regulated by the FDA.¹¹

Approximately 90% of Americans and 80% of the global population consumes caffeine every day, making it the most popular stimulant in the world.¹² In the United States, energy drinks are an increasingly popular way to get a daily caffeine fix, becoming the second most common dietary supplement used by young people.¹³ Approximately 30% of young Americans consume energy drinks on a regular basis, with young men comprising the majority of such consumers.¹⁴

This number could continue to grow across all ages and genders due to the current marketing strategies used by the majority of energy drink producers. Most energy drinks have bright, colorful cans or bottles with eye-catching logos, drawing the attention of younger consumers. This is problematic for several reasons. Children and young adults typically do not have high tolerances for caffeine.¹⁵ Because children and adolescents aren't typically as accustomed to caffeine, consuming energy drinks with high caffeine content could result in caffeine overconsumption.¹⁶ Additionally, younger consumers tend to disregard what little information is provided on energy drink labels.¹⁷ In one study, college students were largely unaware of the caffeine content in typical energy beverages.¹⁸ Instead, they were often motivated by price rather than health information when purchasing their desired energy drink products.¹⁹ Caffeine consumption is also linked to risky behavior in young adults.²⁰

In one study, researchers found that among groups of children ranging from ten to fourteen years old, energy drinks were

¹¹ See Chad J. Reissig et al., *Caffeinated Energy Drinks--A Growing Problem*, 99 DRUG & ALCOHOL DEPENDENCE 1, 2 (2009).

¹² See Cyril Willson, *The Clinical Toxicology of Caffeine: A Review and Case Study*, 5 TOXICOLOGY REPS' 1140, 1140 (2018).

¹³ See Ahmed A. Alsunni, *Energy Drink Consumption: Beneficial and Adverse Health Effects*, 9 INT'L J. HEALTH SCIS' 468, 469 (2015).

¹⁴ See *id.*

¹⁵ See *Spilling the Beans*, *supra* note 7.

¹⁶ See *id.*

¹⁷ See Caitlin K. Kelly & J. Roxanne Prichard, *Demographics, Health, and Risk Behaviors of Young Adults Who Drink Energy Drinks and Coffee Beverages*, 6 J. CAFFEINE RSCH. 73, 79 (2016).

¹⁸ See *id.*

¹⁹ *Id.* at 79.

²⁰ *Id.* at 74.

consumed in a variety of public and private places.²¹ Their consumption was generally linked to social activities, sports, and computer gaming.²² The child participants demonstrated strong brand awareness that was linked to preferences to taste and perceived value for money.²³ Key factors included the low price of energy drinks, their widespread availability, and their gendered branding and marketing.²⁴ The outcome of this study demonstrates an urgent need for a more defined regulatory framework. Moreover, the problem seems to be getting worse. With influencers now dipping their toes into the energy drink market, such as YouTuber Logan Paul's PRIME energy drink,²⁵ children are becoming even more exposed to dangerously high levels of caffeine without knowing the true consequences, while parents are being left in the dark.

B. Energy Drinks & Health Risks

Children and young adults are not the only consumers that can be affected by overconsumption. Anyone can experience the negative side effects associated with excessive caffeine intake. Excessive caffeine intake can cause palpitations, tremors, agitation, and gastrointestinal issues.²⁶ In more extreme cases, caffeine overconsumption can cause serious cardiovascular, neurological, psychological, metabolic, renal events, and death.²⁷ For example, atrial fibrillation and myocardial infarction has been reported after high energy drink ingestion in otherwise healthy teenage boys.²⁸ Energy drinks may also contribute to ischemic stroke and lead to seizures.²⁹ Studies also suggest that energy drinks can contribute to obesity and Type 2 diabetes.³⁰

Caffeine sources in energy drinks are commonly derived from guarana, green tea extract, yerba mate, or are synthetically derived, all of which may yield variations in how they are

²¹ Shelina Visram et al., *Children and Young People's Perception of Energy Drinks: A Qualitative Study*, 12 PLOS ONE e0188668, at 1 (2017).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Drink Prime, <https://drinkprime.com/collections/energy> (last visited Nov. 9, 2024).

²⁶ Sara M. Seifert et al., *Health Effects of Energy Drinks on Children, Adolescents and Young Adults*, OFFICIAL J. OF THE AMERICAN ACAD. OF PEDIATRICS 511, 518 (2011).

²⁷ *See id.* at 517.

²⁸ *See* Alsunni, *supra* note 13, at 469.

²⁹ *See* Seifert et al., *supra* note 26 at 519.

³⁰ *Id.*

metabolized within the body.³¹ However, it is unlikely that caffeine content alone is solely responsible for the potential for adverse events or safety concerns.³² In addition to caffeine, a majority of energy drinks also contain B-vitamins, sugar, taurine, ginseng, tyrosine, L-carnitine, and electrolytes.³³ The mixed ingredient combination of vitamins, various herbal extracts, and amino acids—collectively or in combination with caffeine—may be a major contributor to adverse effects associated with energy drink consumption.³⁴ There is minimal research regarding the long-term effects of high amounts of caffeine interacting with herbal stimulants.³⁵

III. FDA REGULATION OF ENERGY DRINKS

A. *The Birth of DSHEA*

In 1994, Congress enacted the Dietary Supplement Health and Education Act (DSHEA).³⁶ At the time of DSHEA's enactment, improving the health status of United States citizens ranked at the top of the Federal government's national priorities, and the use of dietary supplements grew in popularity.³⁷ The benefits of dietary supplements to health promotion and disease prevention were documented increasingly in scientific studies.³⁸ In addition to the growing interest in public health, Congress believed that consumers should be empowered to make choices about their health, and that dietary supplements were a major part of that decision-making process.³⁹

With this background in mind, DSHEA had two primary goals: “to ensure the continued consumer access to a wide variety of dietary supplements and to provide consumers with more information about the intended use of dietary supplements.”⁴⁰ DSHEA defined the term dietary supplement to mean “a product

³¹ See Andrew R. Jagim et al., *Prevalence and Amounts of Common Ingredients Found in Energy Drinks and Shots*, 14 NUTRIENTS Jan. 13, 2022, at 8.

³² See *id.* at 7.

³³ See *id.* at 2.

³⁴ See *id.*

³⁵ See *id.*

³⁶ See 21 U.S.C. §321.

³⁷ See Annette Dickinson, *History and Overview of DSHEA*, 82 FITOTERAPIA 5 (2011); see also Jessie L. Bekker et al., *Re-Regulating Dietary Supplements*, 19 J. FOOD L. & POL'Y 1, 5 (2023).

³⁸ See *id.*

³⁹ *Id.*

⁴⁰ *Id.*

(other than tobacco) intended to supplement the diet that bears or contains one or more of the following dietary supplements: a vitamin, mineral, an herb or other botanical, an amino acid, a dietary substance for use by man to supplement the diet by increasing the total dietary intake, or a concentrate, metabolite, constituent, extract, or combination of any of the aforementioned ingredients.”⁴¹

Before DSHEA and its definition of dietary supplements, there was the 1958 Food Additives Amendment⁴² to the Food, Drugs, and Cosmetics Act.⁴³ In this amendment, Congress aimed to protect consumer health by requiring food additive manufacturers to conduct pre-tests of any potentially unsafe substances that were to be added to food and to advance food technology by permitting food additive use at safe levels.⁴⁴ This amendment reclassified several added ingredients, including caffeine and other common supplement ingredients, as food additives.⁴⁵ “Food additive” is defined by statute as “any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food.”⁴⁶ Companies are required to list these ingredients on product labels. The FDA does not require testing or pre-market approval for foods that do not qualify as food additives; there is a presumption of safety unless the government proves otherwise.⁴⁷ On the other hand, foods that qualify as food additives require FDA approval before entering the market.⁴⁸ This method of classification caused conflict between the FDA and manufacturers until Congress passed DSHEA.

Before the enactment of DSHEA, the FDA frequently contested products with dietary supplement ingredients, deeming them adulterated due to the inclusion of ingredients not authorized

⁴¹ Janet Rehnquist, OFFICE OF INSPECTOR GEN., DEP’T. OF HEALTH & HUMAN SERVS., OEI-01-01-00120, DIETARY SUPPLEMENT LABELS: KEY ELEMENTS, <https://oig.hhs.gov/oei/reports/oei-01-01-00120.pdf>. (2003).

⁴² See Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified throughout 21 U.S.C. §§ 301-399f (2012)).

⁴³ See Food Additives Amendment of 1958, Pub. L. No. 85-929, 72 Stat. 1784 (codified as amended at 21 U.S.C. §§ 321, 331, 342, 346, 348 (2012)). .

⁴⁴ H.R. REP. No. 85-2284, at 1 (1958).

⁴⁵ S. REP. No. 103-410, at 21 (1994).

⁴⁶ 21 U.S.C. § 321 (2022).

⁴⁷ S. REP., *supra* note 45, at 22.

⁴⁸ Joyce A. Generali, *Energy Drinks: Food, Dietary Supplement, or Drug?*, 48 HOSPITAL PHARMACY 5, 5 (2013).

under food additive regulations.⁴⁹The FDA interpreted the food additive provision expansively, indicating that incorporating any food ingredient into another ingredient would subject the product to more stringent regulatory standards for food additives.⁵⁰ Many considered the FDA's interpretation of "food additives" to be too broad, leading to the creation of DSHEA.⁵¹

B. DSHEA & Energy Drink Labels: A Dangerous Lack of Transparency

As a result of Congress' attempt to reduce FDA overreach, DSHEA contains vague requirements for dietary supplement labels. Under DSHEA, labels must contain

"(1) a statement of identity; (2) net quantity of contents (e.g., 60 capsules); (3) nutrition information; (4) net weight of proprietary blend (if it contains a proprietary blend) and a list of ingredients in the blend; (5) the part of the plant used, if an herb or botanical; (6) the name and place of business of the manufacturer, packer, or distributor; (7) a complete list of ingredients by their common or usual names; (8) safety information that is considered "material" to the consequences that may result from the use of the supplement; and (9) a disclaimer that "this statement has not been evaluated by the FDA ..."⁵²

At first glance, these labeling requirements may seem like a valid effort to keep consumers informed. However, DSHEA does not require energy drink labels to contain specific amounts of *each* ingredient, just the net quantity.⁵³ For example, if added caffeine is an ingredient comprising part of a proprietary blend, then the label must indicate only the total amount of the entire blend.⁵⁴ Thus, proprietary blends can have many different ingredients of undisclosed amounts, resulting in wide possibilities of the true

⁴⁹ Trenton David, *Return to Regulation: FDA, Energy Drinks, and Our Youth*, 53 HOUS. L. REV. 1401, 1421 (2016).

⁵⁰ *Id.*; see also *United States v. An Article of Food*, 678 F.2d 735, 738-39 (7th Cir. 1982).

⁵¹ David, *supra* note 49, at 1421.

⁵² Rehnquist, *supra* note 41, at 4; see also 21 U.S.C. §101.36.

⁵³ *Id.*

⁵⁴ *Id.*

number of stimulants within them.⁵⁵ Further, there is no definition on what “material” means in a safety context.⁵⁶ This is concerning because energy drinks can contain dozens of ingredients, all of which can interact with one another. From a consumer standpoint, there is no way to tell how much of each ingredient you are consuming.

Transparent labels are crucial to keeping consumers safe. Labels can play a role in helping consumers to select an appropriate supplement, or in this case, energy drink, by providing information about the purposes of the supplement, the conditions for which the supplement should be taken, and the contents and manufacture of the supplement. When consumers are unknowingly looking at vague or incomplete labels, it negatively affects their ability to choose a product that best fits their needs, which directly conflicts with DSHEA’s stated purpose.⁵⁷

C. Insufficient Solutions: The FDA & the Post-Market Failure

One of the major changes under DSHEA was the exclusion of dietary supplement ingredients from the food additive category and its pre-market approval requirement.⁵⁸ As a result, the FDA does not require dietary supplement manufacturers to establish a product’s safety before entering the market.⁵⁹ The FDA can only intervene after the product is sold to the public, creating a post-market review system.⁶⁰

Manufacturers are responsible for making sure a product is safe before it hits the market. In order to alert the FDA of potentially unsafe products entering the market, DSHEA includes a notification requirement for “new dietary ingredients.”⁶¹ “The market entry date for the ingredient determines the burden the

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 21 U.S.C. §321.

⁵⁸ See Anthony L. Young & I. Scott Bass, *The Dietary Supplement Health and Education Act of 1994*, 50 FOOD & DRUG L.J. 285, 286-290. (1995).

⁵⁹ See *Questions and Answers on Dietary Supplements*, U.S. FOOD & DRUG ADMINISTRATION (2024), <https://www.fda.gov/food/information-consumers-using-dietary-supplements/questions-and-answers-dietary-supplements>.

⁶⁰ See Rachel Harrison, *How a Legal Loophole Allows Unsafe Ingredients in U.S. Foods*, NYU (Aug. 8, 2024), <https://www.nyu.edu/about/news-publications/news/2024/august/legal-loophole-unsafe-ingredients.html>.

⁶¹ 21 U.S.C. § 350b.

manufacturer must satisfy.”⁶² If the ingredient was marketed in the United States before October 15, 1994, the manufacturer is not required to notify the FDA of its use, because it has been classified as an “old ingredient.”⁶³ This framework creates an issue that is unique to energy drinks: because energy drinks often contain a mixture of these “old ingredients,” their manufacturers are technically not required to report them to the FDA.⁶⁴

However, mixing these “old ingredients” is a relatively new practice, and there is very little research on how these ingredients interact with each other, much less their long term effects on the body.⁶⁵ Even if a manufacturer did include “new” ingredients in their products or considered the blends of “old” ingredients as “new” and notified the FDA, it would not make much of a difference in safety efforts because manufacturers are not required to prove that a product is safe or effective.⁶⁶ Additionally, there is no list of what is considered to be an “old ingredient,” so manufacturers face blurred lines when determining what is “new” and what’s not.⁶⁷

If an unsafe product does make its way into the market, the FDA has the burden of proof to show that a supplement presents a significant or unreasonable risk of illness or injury if taken as instructed on the label or is otherwise adulterated.⁶⁸ The FDA also has the burden of proof to show that label information is misleading or untrue.⁶⁹ To establish proof, the FDA conducts field exams, tests supplement ingredients, and reviews label claims.⁷⁰ This is a good effort in theory, but the review process is tedious. Additionally, the FDA typically conducts these post-market reviews only if there have been adverse events, meaning that if a product is under FDA review, somebody has already fallen ill or died from consuming the product.

⁶² David, *supra* note 49.

⁶³ See *Dietary Supplement Health & Education Act (DSHEA)*, COUNCIL FOR RESPONSIBLE NUTRITION, <https://www.crnusa.org/regulation-legislation/fda-ftc-regulations/dietary-supplement-health-education-act-dshea> (last visited Oct. 30, 2024).

⁶⁴ See *id.*

⁶⁵ See 21 U.S.C. § 350b; see also Jagim et al., *supra* note 31.

⁶⁶ See *id.*

⁶⁷ See *Backgrounder: FDA Draft Guidance on New Dietary Ingredients for the Dietary Supplement Industry*, COUNCIL FOR RESPONSIBLE NUTRITION, <https://www.crnusa.org/resources/backgrounder-fda-draft-guidance-new-dietary-ingredients-dietary-supplement-industry> (last visited Oct. 30, 2024).

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ 21 U.S.C. §321.

IV. POTENTIAL SOLUTIONS

A. *Required Labeling of Stimulants*

DSHEA's labeling requirements are extremely vague in comparison to the labeling requirements in other similar industries. One potential solution to this problem is to model energy drink labels after over-the-counter (OTC) stimulant drug labels. OTC drug stimulants have considerably stricter requirements for their labels than energy drinks do. OTC drug stimulants have several requirements, such as a statement of identity, which encompasses not only the name of the product, but identifies the product as an "alertness aid" or a "stimulant."⁷¹ OTC stimulant drugs must also have an "indications" heading.⁷² Under this heading, the product must state, "Helps restore mental alertness or wakefulness when experiencing fatigue or drowsiness. Other truthful and non-misleading statements, describing only the indications for use that have been established and listed... may also be used."⁷³ There must also be a "warnings" heading.⁷⁴ The warnings must include information regarding the caffeine dosage of the product, specifically, "[t]he recommended dose of this product contains as much caffeine as a cup of coffee. Limit the use of caffeine-containing medications, foods, or beverages while taking this product because too much caffeine may cause nervousness, irritability, sleeplessness, and, occasionally, rapid heartbeat."⁷⁵ The warnings must also include that the product is recommended for occasional use only, is not recommended for children under 12 years of age, and directions for consumption.⁷⁶ The recommended dosage for these drugs is "100 to 200 mg, not to be taken more often than every three to four hours."⁷⁷ In contrast, it is not unusual for energy drinks to contain more than 200 mg of caffeine, yet they do not have any of the same required safety information on their labels as OTC stimulants. If energy drink labels were modeled after OTC stimulant labels, consumers would have more information to make informed decisions about the energy drink ingredients and supplements they consume.

⁷¹ 21 U.S.C. §340.50(a).

⁷² 21 U.S.C. § 340.50(b).

⁷³ *Id.*

⁷⁴ 21 U.S.C. § 340.50(b).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 21 U.S.C. §340.50(d).

Another potential solution is to model our framework after other countries. The European Union mandates that energy drinks have a “high caffeine content” label.⁷⁸ Health risks associated with energy drink consumption have caused countries such as Denmark, France, Uruguay, Iceland, Norway, and Turkey to ban high caffeine and taurine drinks altogether.⁷⁹ Given the popularity of energy drinks and other caffeinated beverages in the United States, it is unlikely that they will be banned. Because of this, it is helpful to look to countries like Canada that have limits on what can be added to energy drinks. In 2011, Health Canada (the Canadian equivalent of the FDA) declared its intent to transition caffeinated energy drinks from the natural health products regulatory framework to the food regulatory framework.⁸⁰ This transition was completed in 2012. Following the transition, Health Canada set 180 mg as the maximum amount of caffeine for a single-serving container energy drink.⁸¹

In addition, Health Canada set specific labeling requirements for energy drinks. Health Canada banned energy drink labels from making claims that they be used for hydration or for electrolyte replacement before, during, or after physical activity; they could not contain the words “juice,” “puree” or “pulp” on the label other than as required in the list of ingredients; and manufacturers were completely barred from marketing energy drinks to children.⁸²

The labels are required to contain (1) a declaration of the total caffeine content from all sources; (2) a nutrition facts panel showing details on the amount of calories and other nutrients in the product; (3) a declaration that energy drinks are not recommended for children, pregnant or breastfeeding women, or people who are sensitive to caffeine, and that energy drinks should not be mixed with alcohol; (4) a “high caffeine content” statement; (5) a “maximum number of [container(s)/servings] per day” usage

⁷⁸ Reissig et al., *supra* note 11.

⁷⁹ Kelly & Prichard, *supra* note 17.

⁸⁰ Health Canada, *Category Specific Guidance for Temporary Marketing Authorization – Caffeinated Energy Drinks* (Dec. 2013), <https://www.canada.ca/en/health-canada/services/food-nutrition/legislation-guidelines/guidance-documents/category-specific-guidance-temporary-marketing-authorization-caffeinated-energy-drinks.html#s3.1.2>.

⁸¹ *See id.*

⁸² *Id.*

statement; and (6) any applicable allergen labeling.⁸³ Health Canada also set daily maximum levels for vitamin and nutrient additives in energy drinks.⁸⁴

Meanwhile, in the United States, consumers can purchase Juiced Monster Mango Loco Energy Juice, an energy drink packed in an eye-catching teal and yellow can with sugar skulls, containing mango juice, 55 grams of sugar, herbal stimulative supplements that have a vague indication of daily value but no exact amount, and 150 mg of caffeine from unspecified sources. Modeling our energy drink labeling requirements after Health Canada's framework would help keep consumers informed and help prevent caffeine overconsumption, particularly in children and young adults who have lower tolerances for caffeine.

B. Comparing Caffeine & Tobacco

In 1930, Lucky Strike Cigarettes published an ad claiming, "20,679 Physicians say 'LUCKIES' are less irritating" to the throat.⁸⁵ By the late 1950s, around half of the population of industrialized nations smoked.⁸⁶ By the 1990s, it was evident that smoking cigarettes causes lung cancer and other serious health problems. In 2001, Canada became the first country to put graphic photos and warnings on cigarette packages.⁸⁷ By 2005, less than a quarter of the U.S. population smoked cigarettes. In 2020, the Centers for Disease Control and Prevention (CDC) reported that more than 480,000 deaths annually in the U.S. are caused by smoking cigarettes and secondhand smoke.⁸⁸ Also in 2020, the

⁸³ Canadian Beverage Ass'n, *Energy Drinks in Canada: Know the Facts*, <https://www.canadianbeverage.ca/wp-content/uploads/2014/01/Energy-Drink-Brochure-Layout-English-layout-Sept-23-to-print.pdf> (last visited Nov. 11, 2024).

⁸⁴ Health Canada, *supra* note 81.

⁸⁵ Becky Little, *When Cigarette Companies Used Doctors to Push Smoking*, HISTORY (Mar. 28, 2023), <https://www.history.com/news/cigarette-ads-doctors-smoking-endorsement>.

⁸⁶ See Jason Rodriguez, *When Smoking Was Cool, Cheap, Legal, and Socially Acceptable*, THE GUARDIAN (Mar. 31, 2009), <https://www.theguardian.com/lifeandstyle/2009/apr/01/tobacco-industry-marketing>.

⁸⁷ See Heikki Hiilamo et. al., *The Evolution of Health Warning Labels on Cigarette Packs: The Role of Precedents, and Tobacco Industry Strategies to Block Diffusion*, 23 TOBACCO CONTROL e2 (2014).

⁸⁸ Centers for Disease Control & Prevention, *Tobacco-Related Mortality*, CTR. DISEASE CONTROL, https://archive.cdc.gov/#/details?url=https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/index.htm (last visited Nov. 7, 2024).

FDA finalized the “Required Warnings for Cigarette Packages and Advertisements” rule, establishing eleven new cigarette health warning statements accompanied by color graphics depicting the negative health consequences of smoking cigarettes.⁸⁹

The new warnings include statements like “tobacco smoke can harm your children” and “smoking reduces blood flow to the limbs, which can require amputation,” among other facts about the fatal diseases that cigarettes cause.⁹⁰ The warning must comprise at least the top 50 percent of the front and rear panels of the cigarette package.⁹¹ All eleven required warnings for packages must be randomly displayed over each 12-month period, in as equal a number of times as is possible on each brand of the product and must be randomly distributed in all areas of the United States in which the product is marketed, in accordance with an FDA-approved cigarette plan.⁹² Finally, the required warnings must be indelibly printed on or permanently affixed to the cigarette package.⁹³

Less than 100 years ago, cigarette companies were distributing advertisements touting physician support of their product. Today, federal law requires the same cigarette companies to place labels on their products warning consumers of fatal disease. Millions of people had to die to get these labels on cigarette packages.

We do not know the long-term health effects of proprietary blends and alternative caffeine sources in energy drinks. Although excessive consumption of energy drinks is less likely to lead to fatal diseases such as the ones caused by cigarettes, overconsumption of caffeine has already been proven to be deadly. We do not know what the long-term neurological, cardiovascular, endocrine, or

⁸⁹ See Food and Drug Administration, *Cigarette Labeling and Health Warning Requirements*, FOOD AND DRUG ADMIN. (Aug. 25, 2021), <https://www.fda.gov/tobacco-products/labeling-and-warning-statements-tobacco-products/cigarette-labeling-and-health-warning-requirements>; In 2022, a U.S. District Court in Texas issued an order in the case of *R.J. Reynolds Tobacco Co. et al. v. United States Food and Drug Administration et al.*, vacating the “Required Warnings for Cigarette Packages and Advertisements” rule. However, this does not mean that cigarette packages must do away with warning labels - it applies to the photos that the FDA required under that new rule. The enactment of the new rule was postponed until Nov. 6, 2023.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

metabolic effects will be. In circumstances such as these, it's better to be safe than sorry.

Energy drink labels should discourage caffeine and herbal stimulant overconsumption. They should also describe the dangers and negative health effects that can result from consuming the product. Finally, they should state that energy drinks are unsuitable for children, adolescents, and those with pre-existing health conditions that may be negatively affected by caffeine and other additives. It took the FDA and legislators far too long to regulate cigarette labels. We can still avoid a similar fate with energy drink labels. If the United States can follow Canada's lead with a stricter regulatory framework for cigarette packaging warnings, we should be able to do the same for energy drink labels.

C. Reforming the Post-Market Framework

The post-market review system is ineffective for energy drinks. It primarily relies on the manufacturers themselves reporting serious adverse events to the FDA. A "serious adverse event" occurs when there is an adverse health-related event associated with the use of a dietary supplement that results in death; a life-threatening experience; in-patient hospitalization; a persistent or significant disability or incapacity; or a congenital anomaly or birth defect; or requires medical or surgical intervention to prevent the previously mentioned outcomes.⁹⁴ The FDA does not require "non-serious" events to be reported, but does require reports to be kept for six years.⁹⁵

The problems with this framework are two-fold. First, it only requires that "serious" adverse events are reported to the FDA. This excludes countless data points that could help determine whether a product is effective or not, let alone the potential dangers it could hold. Second, responsibility for reporting falls onto the manufacturer, yet it is in the best interests of the company to not willingly report every serious adverse event that occurs—can consumers trust multi-million-dollar corporations to do the right thing? One recent study found that the FDA receives information regarding "less than one percent of all of the adverse events associated with dietary supplements."⁹⁶ The study determined that

⁹⁴ 21 U.S.C. § 379aa-1(a)(2).

⁹⁵ 21 U.S.C. §379aa(e)(1).

⁹⁶ Office of Inspector Gen., Dep't of Health & Human Servs., *Adverse Event Reporting For Dietary Supplements: An Inadequate Safety Valve*, (2001), <http://oig.hhs.gov/oei/reports/oei-01-00-00180.pdf>.

the current reporting system is “inherently limited,” and “cannot serve as an adequate safety valve until other measures are taken that will allow the FDA” to discover public health concerns.⁹⁷

The primary solution should not be a post-market review system that relies self-policing by the manufacturers of the products that cause serious adverse events. The current framework needs a complete and total overhaul. Instead of manufacturers initially placing products on the market without outside review, the FDA should examine the safety of the product and its ingredients before it reaches consumers. This could be done by doing away with the “old ingredient” versus “new ingredient” framework. If the FDA reviewed *all* ingredients before market release, despite their so-called “newness,” instances of serious adverse events could decline, which may reduce the need for a robust post-market review system to begin with.

Although the current post-market review system is largely ineffective, it is still needed in some capacity. The FDA should continue to be made aware of post-market adverse events even if there was pre-market review. In addition to the above suggestions, manufacturers should not be solely responsible for reporting serious adverse events. A simpler solution may be to let the responsibility fall on distributors and consumers; they have more of an incentive to report serious adverse events because they are the ones who are directly affected by them. A more complex solution would be to create a review system within the FDA that acts as a sort of audit. Although this would require additional funding and resources, the FDA could randomly review energy drink manufacturers, test their products and ingredients, study any reports of adverse events the company may have, and conduct consumer interviews. The randomization of in-depth reviews could encourage safety compliance in manufacturers and compel greater transparency.

D. Other Considerations

Senators Edward Markey (D-MA), Richard Durbin (D-IL), and Richard Blumenthal (D-CT) released a report in 2015 that examined the dangers of energy drinks and offered solutions to improve safety. The solutions included

“(1) all energy drink manufacturers should cease marketing of energy drink products to children

⁹⁷ *Id.*

and teens under the age of 18 and sales of these products in K-12 school settings...; (2) the FDA should develop and release suggestions for daily caffeine consumption limits for children and adolescents, as well as rules requiring the labeling of caffeine content for all products with added caffeine; (3) the FDA should immediately develop and release guidance to industry on the voluntary reporting of adverse events associated with energy drinks and all energy drink companies should commit to providing this information to the FDA; (4) the FDA should define what constitutes an energy drink, a sports drink, or other ‘functional’ beverages; (5) all energy drink manufacturers should cease marketing caffeinated energy drinks as intended to be consumed for hydration or re-hydration following rigorous physical activity...; and (6) federal agencies should look to include restrictions in school-based programs for the sale of energy drinks.”⁹⁸

The Senators’ attempt to form a coalition of energy drink manufacturers is similar to the Canadian Beverage Association (CBA).⁹⁹ The CBA represents Canadian non-alcoholic beverage companies and was created for the industry to take a leadership role in matters concerning the health and well-being of Canadians.¹⁰⁰ The CBA and its members work to encourage companies who produce energy drinks to follow the necessary health regulations and Canada’s Energy Drinks Marketing Code.¹⁰¹ CBA members commit to self-implemented marketing and labeling restrictions that were created with consumer protection in mind.¹⁰²

The Senators’ suggested solutions, despite being sent to various energy drink manufacturers, were never implemented or agreed upon. Adopting these solutions would create a framework

⁹⁸ S.REP., BUZZKILL: A SURVEY OF POPULAR ENERGY DRINKS FINDS THE MAJORITY OF THE MARKET UNWILLING TO MAKE COMMITMENTS TO PROTECT ADOLESCENTS (2015).

⁹⁹ Canadian Beverage Ass’n, *Energy Drinks Marketing Code*, (Mar. 2012), <https://www.canadianbeverage.ca/wp-content/uploads/2016/01/CBA-Energy-drinks-Code-FINAL-English.pdf>.

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² *See id.*

that is similar to Canada's, and would hopefully reduce caffeine overconsumption, increase consumer awareness, and protect American citizens' health.

E. The Ultimate Solution

The best solution to the United States' regulatory problem with energy drink labels is a mixture of all of the above suggestions. Modeling energy drink labels after OTC stimulant labels would result in a similar framework to that of Canada. It would require specific warnings on the label regarding who can safely consume the product, how much caffeine it contains, and the appropriate dosage. The United States should also require specific amounts of all ingredients to be listed and implement a maximum amount of caffeine per energy drink like Canada. The transparency of ingredients and a maximum caffeine amount paired with clear warning labels could help significantly decrease caffeine overconsumption and its associated negative health consequences. Further, a quasi-coalition of energy drink manufacturers that pledge to follow health regulations and guidelines could aid in achieving a stricter framework that would provide more transparent labels. Adopting a framework similar to Canada's is actually quite realistic—the United States already did so by requiring graphic photos on cigarette warning labels, a regulation that Canada implemented over twenty years ago.

Additionally, the post-market review system should be replaced with a pre-market approval system. All ingredients should be reviewed regardless of whether they are “new” or “old.” Large manufacturers should not carry the burden of reporting adverse events to the FDA because they cannot be trusted to do so consistently or accurately. Instead, distributors and consumers should be able to make reports of adverse events of any kind, not just serious ones. To help foster an increased sense of responsibility, the FDA should adopt an audit system that randomly reviews adverse event reports, production and packaging, and specific ingredients within the manufacturing process.

Finally, Congress should grant the FDA the authority to regulate the marketing and sale of energy drinks in schools and other areas that are highly populated by children. There should also be regulations barring manufacturers from packaging energy drinks in bright, colorful containers that are appealing to children and young people.

V. CONCLUSION

Americans will never give up caffeine, that is for certain. Caffeine consumption is deeply intertwined with our economy, our culture, and our lives; but there are limits. Both Congress and the FDA need to take the initiative to regulate what has essentially become a runaway train. Energy drinks, high caffeine contents, and the vague mixtures of exotic additives are a new frontier that cannot go unaddressed. People have died because of the lack of regulations, with more likely to follow.

Labeling energy drinks appropriately can save lives, improving the health of consumers across the country while protecting children from ingesting dangerous ingredients that are harmful to both their short-term and long-term health. Other countries have adopted regulations protecting their citizens, so there is no excuse for the United States not to take similar actions. If consumers become aware of the hidden dangers of energy drinks and overconsumption of caffeine, we can push Congress and the FDA to implement a stronger regulatory regime.

FOOD IDENTITY

Mathilde Cohen*

ABSTRACT

Americans, especially younger generations, are obsessed with eating and cooking. In some ways, it is not surprising given that humans define themselves and others in part by what they eat and do not eat. Food identities are typically ascribed either based on medical or social definitions or chosen by individuals. But they can also be expressive dimensions of other identity traits such as race, ethnicity, religion, national origin, gender, age, body size, disability, and socio-economic status, among others. What role does the law play in supporting or undermining certain food identities? This Article makes two central contributions. First, it highlights that though U.S. law recognizes food identity as an interest to be protected in certain contexts, it does so in an unsystematized way, contributing to systemic deprivation and discrimination in relation

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to foodways. The current legal regime often places the needs of the agri-food industry over those of eaters, especially those who are otherwise marginalized. Second, it reflects on how this inchoate law of food identity could be evaluated and reformed. There are plausible claims that some food identities may be entitled constitutional protections under equality law, freedom of religion, and fundamental rights, but they are unlikely to succeed in the current environment. The Article concludes with a skeptical reflection on the concept of food identity, arguing that in its current legal manifestation as a primarily individual and depoliticized claim for accommodation, it runs the risk of usurping and nullifying social and political claims around food.

INTRODUCTION

“if we are what we eat, who are we?”

—Donna Gabaccia¹

Americans are obsessed with food.² Younger generations, in particular, are said to be continuously thinking about eating and cooking both online and offline.³ On some level, this shift is tied to economic development and abundance, compared to older generations who saw food primarily as necessary sustenance.⁴ On another level, food has long been a central identity trait, which may simply be becoming more salient today.⁵ In 1983, Michel Foucault contrasted the modern fixation with sex with the ancient Greek (and later Christian) preoccupation with food.⁶ Back in Antiquity, he wrote, there was “not much interest in sex. . . . the problem was food, food, food.”⁷ The tide has turned again. People are having less (or thinking less about) sex, but they are paying a lot of attention to food.⁸ Food identity is making a comeback.

A central goal of this Article is to explore whether and how people’s food needs and identities are recognized and regulated by U.S. laws and institutions.⁹ A study released in 2021 by the U.S. Department of Agriculture (USDA) suggested that 61 percent of the

¹ DONNA R. GABACCIA, *WE ARE WHAT WE EAT: ETHNIC FOODS AND THE MAKING OF AMERICANS* 9 (Joyce Seltzer ed., 1998).

² See Margot Pollans, *Abundance and Other Food Obsessions*, 96 U. COLO. L. REV. (forthcoming 2025).

³ See EVE TUROW, *A TASTE OF GENERATION YUM: HOW THE MILLENNIAL GENERATION’S LOVE FOR ORGANIC FARE, CELEBRITY CHEFS, AND MICROBREWS WILL MAKE OR BREAK THE FUTURE OF FOOD* (2015) (exploring millennials’ obsession with food).

⁴ See Pollans, *supra* note 2.

⁵ Alison Hope Alkon et al., *Foodways of the Urban Poor*, 48 GEOFORUM 126, 126 (2013) (finding that cost is the primary barrier to healthy and preferred foods for the low-income); see also TAKING FOOD PUBLIC: REDEFINING FOODWAYS IN A CHANGING WORLD (Psyche Williams-Forsen & Carole Counihan eds., 2013).

⁶ Michel Foucault, *On the Genealogy of Ethics: An Overview of Work in Progress*, in MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 229, 229 (Hubert Dreyfus & Paul Rabinow eds., 1983).

⁷ *Id.*

⁸ Emily Willingham, *People Have Been Having Less Sex—whether They’re Teenagers or 40-Somethings*, SCI. AM. (Jan. 3, 2022), <https://www.scientificamerican.com/article/people-have-been-having-less-sex-whether-theyre-teenagers-or-40-somethings/>.

⁹ This Article does not discuss the Food and Drug Administration’s program for establishing standards of identity for food products, which involves deciding their proper names and ingredients and how to distinguish them. See Federal Food, Drug & Cosmetic Act, 21 U.S.C. § 341 (1938).

people who participated in the Supplemental Nutrition Assistance Program (or “SNAP,” formerly known as food stamps) experienced difficulties accessing healthy food due to its cost.¹⁰ Around the nation, underprivileged Muslim students are at risk of going hungry when their school districts or schools’ lunch programs do not offer halal food options.¹¹ Some vegan and vegetarian students also struggle due to the lack of adequate offerings on their schools’ menus.¹²

These examples suggest that some eaters are systemically disadvantaged or discriminated against in relation to their foodways.¹³ Vulnerable groups, in particular the poor and some minority groups, often lack basic nutrition, let alone favored foods, when privileged Americans have more access to a varied and plentiful food supply than ever before.¹⁴ This discrepancy illustrates the varying valence of food in identity construction and in the law. “Of everything that people have in common, the most common is that they must eat and drink.”¹⁵ Yet, as much as food is something people share and care about across differences, eating also sets them apart as individuals and members of groups.

If growing, purchasing, preparing, and consuming certain foods is a means of affirmative self-expression for the haves and those with privileged identities, it can be a site of “food oppression”

¹⁰ U.S. DEP’T OF AGRIC., BARRIERS THAT CONSTRAIN THE ADEQUACY OF SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) ALLOTMENTS: SURVEY FINDINGS (2021).

¹¹ PAUL FIELDHOUSE, FOOD, FEASTS, AND FAITH: AN ENCYCLOPEDIA OF FOOD CULTURE IN WORLD RELIGIONS 488 (2017); Ahmed Amjad Muslim, *Many Muslim Students Skip Lunch Due to Lack of Diverse Menu in Public School. Get Halal!*, (June 5, 2021), <https://www.change.org/p/elizabeth-warren-many-muslim-students-skip-lunch-due-to-lack-of-diverse-menu-in-public-schools-get-halal> (petition to Massachusetts government).

¹² Ash Mehta, *Students Push to Get More Vegan Meals on the School Menu*, ANTHRO MAG. (Feb. 6 2022), <https://anthromagazine.org/students-push-to-get-more-vegan-meals-on-the-school-menu/>; Melissa Mortazavi, *Consuming Identities: Law, School Lunches, and What It Means to Be American*, 24 CORNELL J. L. & PUB. POL’Y 1, 26 (2014).

¹³ Foodways is a common notion in food studies, which can be defined as the behaviors and beliefs surrounding the production, distribution, and the consumption of food. See, e.g., TAKING FOOD PUBLIC, *supra* note 5.

¹⁴ Andrea Freeman, *The 2014 Farm Bill: Farm Subsidies and Food Oppression*, 38 SEATTLE U. L. REV. 1271, 1276 (2015).

¹⁵ George Simmel, *The Sociology of the Meal?*, in Michael Symons, *Simmel’s Gastronomic Sociology: An Overlooked Essay*, 5 FOOD & FOODWAYS 333, 346 ([1910], 1994).

for the have nots and those with minoritized identities.¹⁶ For the first, a wide range of eating practices are available.¹⁷ For the latter, food choices can be so constrained by availability, cost, and stigma as to result in hunger, malnutrition, and culturally inappropriate diets.¹⁸ Additionally, some foodways may be in harmony with the environment and the protection of future generations' foods, while others cause large-scale environmental degradation and climate change, jeopardizing the feeding of a growing world population.¹⁹ Eating can thus be identity-defining in a positive, self-actualizing way when people enjoy economic security and agency over what foods they produce and consume, but it can be alienating when they are unable to access the foods they need and want and/or discriminated against in relation to their eating.²⁰

Food identity is a widely debated notion in the social sciences, but it is not a well-recognized category in the law and in legal scholarship.²¹ The U.S. legal system neither includes a self-

¹⁶ Freeman, *supra* note 14 (defining food oppression as the study of “how facially neutral food policy and law can physically debilitate members of marginalized and subordinated groups”); see also Catherine Powell, *Color of COVID and Gender of COVID: Essential Workers, Not Disposable People*, 33 YALE J. L. & FEMINISM 1, 1 (2021) (highlighting the labor dimension of the COVID-19 pandemic as women of color were overrepresented among essential food workers and those who lost their employment due to business closures).

¹⁷ See, e.g., SHAMUS KHAN, PRIVILEGE: THE MAKING OF AN ADOLESCENT ELITE AT ST. PAUL'S SCHOOL 151 (2011); Shamus Khan, *Omnivores and Inequality: An Interview with Shamus Khan*, COLUMBIA J. OF LITERARY CRITISIM (2015) (arguing that today's elites define themselves by “their capacity to pick, choose, combine, and consume a wide gamut of the social strata,” including food).

¹⁸ See Alkon et al., *supra* note 5 (finding that cost is the primary barrier to healthy food and preferred food access for the low-income); see also Freeman, *supra* note 14.

¹⁹ See generally The Lancet Commissions, *Food in the Anthropocene: The EAT–Lancet Commission on Healthy Diets from Sustainable Food Systems*, 393 LANCET 447, 447 (2019) (summarizing the best evidence on sustainable food production and estimating the health and environmental effects of different diets). Note that due to space limitations this Article will not discuss in depth the connection between food identities, on the one hand, and animals and the environment, on the other hand, which will be the subject of a distinct project.

²⁰ ANNE BARNHILL & MATTEO BONOTTI, HEALTHY EATING POLICY AND POLITICAL PHILOSOPHY 2 (2022).

²¹ Here are some highlights of the vast social science literature on food and identity: PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE (1984) (using food preferences and choices as an example of the type of practices that mark class differences); E. MELANIE DUPUIS, DANGEROUS DIGESTION: THE POLITICS OF AMERICAN DIETARY ADVICE (2015) (arguing that food choices establish boundaries that define identities and social membership); Melissa Mortazavi, *Tainted Food, Identity, and the Search for Dignitary Redress*, 81 BROOK. L. REV.

standing constitutional or statutory right for all citizens to access sufficient food, let alone a right not to be discriminated on the basis of food. For instance, employers are not explicitly prohibited from dismissing, demoting, or refusing to hire employees based on their eating, nor must they accommodate their dietary requests.²² In his

1463 (2016) (focusing on food identity violations due to exposure to tainted foods); FABIO PARASECOLI, *GASTRONATIVISM. FOOD, IDENTITY, POLITICS* (2022) (developing the notion of gastronativism to denote the use of food in contemporary political and social movements); PARAMA ROY, *ALIMENTARY TRACTS: APPETITES, AVERSIONS, AND THE POSTCOLONIAL* (2010) (linking food and identity to empires), ATSUKO ICHIGO & RONALD RANTA, *FOOD, NATIONAL IDENTITY, AND NATIONALISM* (2016) (addressing the relationship between food and nationalism); KATHERYN C. TWISS, ED., *THE ARCHEOLOGY OF FOOD AND IDENTITY* (2007) (advocating for archeological examinations of food practices to shed light on social identities in the past); ELIZABETH CAPALDI, ED., *WHY WE EAT WHAT WE EAT: THE PSYCHOLOGY OF EATING* (1996) (presenting various facets of the psychology of eating); PETER SCHOLLERS, ED., *FOOD, DRINK AND IDENTITY: COOKING AND DRINKING IN EUROPE SINCE THE MIDDLE AGES* (2001) (exploring the ways in which identities are built through food); DAVID BELL & GILL VALENTINE, *CONSUMING GEOGRAPHIES. WE ARE WHERE WE EAT* (1997) (arguing that food has a bearing on identity formation); RONDA BRULOTTE & MICHAEL DI GIOVINE, EDs., *EDIBLE IDENTITIES: FOOD AS CULTURAL HERITAGE* (2014) (examining the way in which food is used to create identity claims of “cultural heritage”); Thomas M. Wilson, *Food, Drink and Identity in Europe: Consumption and the Construction of Local, National and Cosmopolitan Culture*, 22 *EUROPEAN STUD.* 11, 15 (2006) (pointing out that “food and drink are integral to most if not all definitions of identity”); Elspeth Probyn, *An Ethos with a Bite: Queer Appetites from Sex to Food*, 2 *SEXUALITIES* 421, 422 (1999) (developing the idea of “alimentary subjectivities”). *But see* ALAN WARDE, *CONSUMPTION, FOOD AND TASTE. CULINARY ANTINOMIES AND COMMODITY CULTURE* 199–200 (1997) (voicing skepticism about the idea that food expresses identity). There is a rich literature on various inequities effectuated through food law, but it is not framed in terms of identity. *See, e.g.*, Ernesto Hernández-López, *LA’s Taco Truck War: How Law Cooks Food Culture Contests*, 43 *U. MIAMI INTER-AM. L. REV.* 233 (2011) (reflecting on how food truck litigation represents “culture contests”); Freeman, *supra* note 16; Andrea Freeman, *Unconstitutional Food Inequality*, 55 *HARV. CIV. RTS-CIV. LIB. L. REV.* 840 (2020) (arguing that the Food Distribution Program on Indian Reservations and the National School Lunch Program contribute to food-related health disparities and to the lack of access to healthy food for many Black and Indigenous families); Mortazavi, *supra* notes 12 and 21; Christopher R. Leslie, *Food Deserts, Racism, and Antitrust Law*, 110 *CAL. L. REV.* 1717 (2022) (showing that many “food deserts” result from deliberate choices of supermarkets); Etienne C. Toussaint, *The Abolition of Food Oppression*, 111 *GEO. L.J.* 1043 (2023) (arguing that food insecurity should be addressed under a Thirteenth Amendment dignity framework as a “badge of the antebellum system of chattel slavery”).

²² But courts have considered federal and state anti-discrimination statutes in the context of dietary accommodations. *See, e.g.*, *Kumar v. Gate Gourmet Inc.*, 325 P.3d 193 (Wash. 2014) (finding a prima facie claim of violation of state anti-discrimination law where a caterer did not allow employees to bring their own food to work, refused to provide food that accommodated their religion, and deceived them into eating foods in violation of their religious beliefs). While the Americans

dissent in the 1986 landmark case on sexual orientation discrimination *Romer v. Evans*, late Justice Scalia expressed astonishment for the fact that an applicant to a law school professorship could be rejected for their unappealing food preferences (such as eating snails), but *not* because of their sexual orientation.²³

This Article shows, however, that under disparate areas of the law (including federal, state, and tribal law), specific entitlements to foodways exist for certain groups under certain circumstances, typically defined in terms of culture, religion, and medical need. In other words, a law of food identity is already in place, albeit in an unsystematized—and sometimes incoherent—form. Given that this body of law exists, how should it be evaluated? The Article maps out the meanings of food identity in the law, its existing legal regime, and the protections which might arise in the future, raising two further questions.

The first is whether food identity is, in and of itself, too amorphous a concept to prove useful in the law. One may doubt that any food identities are really “identities,” rather than just idiosyncratic preferences unworthy of legal attention. No established criteria exist to distinguish simple alimentary predilections from foodways interrelated with, or constitutive of, primary forms of identity.

The second is whether food identity can and should be disentangled from identity categories protected under the law as well as other, un- or less protected characteristics. Legally protected characteristics that intersect directly or indirectly with people’s food identities typically include race, ethnicity, nationality, gender and gender identity, sexual orientation, religion, disability, and age, among others. Unprotected interests, such as people’s socioeconomic status, body size, political views, or regional origin

with Disabilities Act, 42 U.S.C. §12112 does not include eating practices as part of its definition of discrimination, the Equal Employment Opportunity Commission (EEOC) guidance on accommodations for employers implicitly touches upon food in the context of “social functions.” See U.S. Equal Emp. Opportunity Comm’n, EEOC-M1A, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT (1992). In a number of cases, diabetic employees alleged that their employers violated the ADA by not allowing them to eat at their desks to regulate their blood sugar levels. See, e.g., *Fraser v. Goodale*, 342 F.3d 1032, 1039–40 (9th Cir. 2003); *Navarro v. DHL Glob. Forwarding*, No. CV15-5510-CAS(Ex), 2017 WL 4442871, at *1 (C.D. Cal. Oct. 4, 2017).

²³ *Romer v. Evans*, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting).

may have a bearing on food identities too. Are oppressions on the basis of food distinct in nature from other forms of subordination, calling for a new civil rights paradigm, or are they a simply one possible manifestation which can be subsumed under existing legal categories?²⁴

The argument proceeds as follows. Part I uses various social science literatures to articulate what food identity is and encompasses. Part II offers a taxonomy of different forms of food discrimination against eaters and food businesses. Part III presents the heterogeneous laws and policies that purport to protect food identities. Part IV argues that in theory, some food identities could be entitled to constitutional protection under equal protection, freedom of religion, and fundamental rights doctrines. To conclude, Part V highlights the limitations of framing food inequities as an identitarian problem.

I. WHAT IS FOOD IDENTITY?

Food and identity are partly co-determined, as what we eat and how we see ourselves are intertwined.²⁵ Anthropologists Claude Lévi-Strauss and Mary Douglas famously argued that societies define themselves according to food choices.²⁶ Psychologist Paul Rozin contends that food is far more than nutrition—it is also a “social vehicle” specific to time and place, serving to connect and separate people while also assuming symbolic and aesthetic

²⁴ See TANYA HERNÁNDEZ, MULTIRACIALS AND CIVIL RIGHTS: MIXED-RACE STORIES OF DISCRIMINATION 6, 94, 111 (2018) (arguing that changing civil rights laws to add a new “multiracial” category is not needed as the discriminatory actions target plaintiffs’ non-Whiteness—usually their Blackness—and that “traditional civil rights law has been properly applied.”); see also Freeman, *supra* note 14 (articulating the concept of food oppression).

²⁵ See Jon D. Holzman, *Food and Memory*, 35 ANN. REV. ANTHROPOLOGY 361, 364 (2006) (arguing that food is a cultural construct); see also Jack Goody, *Cooking, Cuisine and Class: A Study in Comparative Sociology* (Jack Goody & Geoffrey Hawthorn eds., 1982) (showing that cooking and eating contribute to the formation of class, religious and racial/ethnic differences). On identity, see, e.g., Naomi Bell O’Neil, *Social Constructionist Approach to Personal Identity*, in ENCYCLOPEDIA OF IDENTITY 740 (Ronald L. Jackson II ed., 2010).

²⁶ See CLAUDE LÉVI-STRAUSS, THE RAW AND THE COOKED (John Weightman et al. trans., Harper & Row 1969) (1964) (claiming that food preparation and eating are a form of language revealing of a society’s structure); see also MARY DOUGLAS, PURITY AND DANGER (Routledge 2001) (1966) (arguing that societies define themselves according to food choices); see also Mary Douglas, *Deciphering a Meal*, 101 DAEDALUS 61 (1972) (analyzing eating patterns as a form of code and/or versification).

functions.²⁷ This Part offers a framework to think about food identity in the legal realm that builds upon the social science literature on the topic. It points out that food practices not only constitute an active part of identity construction and expression, but also can themselves be the basis of a distinct form of identity—a phenomenon I term *food identitarianism*.

A. *Food as Part of Identity*

Identity is a widely debated concept in the humanities and the social sciences.²⁸ It is often defined as how one sees oneself and is seen by others.²⁹ According to leading social identity theories in psychology, people’s self-concepts have two main dimensions—personal identity and social identity.³⁰ Personal identity refers to the unique ways in which people define themselves as individuals.³¹ Social identity refers to people’s self-categorizations in relation to their group memberships.³² In the sociological tradition, identities are strategic constructions produced in the process of self-presentation.³³ Individuals thus have multiple identities, which encompass different meanings, including cultural, social, and individual dimensions. They can be fluid or stable over time, and some can assume greater importance than others in different contexts.³⁴ Food has been recognized as a way for people to establish

²⁷ Paul Rozin, *The Meaning of Food in Our Lives: A Cross-Cultural Perspective on Eating and Well-Being*, 37 J. NUTR. EDUC. BEHAVIOR S107, S108 (2005).

²⁸ See, e.g., Katja De Vries, *Identity, Profiling Algorithms and a World of Ambient Intelligence*, 12 ETHICS & INFO. TECH. 71, 72 (2010) (noting that “[w]riting about identity is a theoretical minefield”).

²⁹ See Akeel Bilgrami, *Notes Toward the Definition of “Identity,”* 135 DAEDALUS 4, 5 (2006); see also D. Abrams, *Social Identity, Self as Structure and Self as Process*, in SOCIAL GROUPS AND IDENTITIES: DEVELOPING THE LEGACY OF HENRI TAJFEL 143 (WP Robinson, ed., 1996); see also Dan P. McAdams, *Personality, Modernity, and the Storied Self: A Contemporary Framework for Studying Persons*, 7 PSYCHOL. INQUIRY 295 (1996).

³⁰ See, e.g., John C. Turner & Katherine J. Reynolds, *Self-Categorization Theory*, in HANDBOOK OF THEORIES OF SOCIAL PSYCHOLOGY (Paul A. M. Van Lange et al., eds., 2012).

³¹ See *id.*

³² See *id.*

³³ See, e.g., ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959); see also GEORGE HERBERT MEAD, *MIND, SELF, AND SOCIETY* (1934) (both Goffman and Mead emphasize the role of interaction between individuals in negotiating the meaning of the self).

³⁴ See, e.g., Miles Hewstone et al., *Intergroup Bias*, 53 ANN. REV. PSYCH. 575 (2002).

or maintain a personal as well as a social identity throughout these variations.³⁵

Individuals define themselves in relation to others and the world by what they put into their bodies.³⁶ Groups are also demarcated by what their members eat or are imagined to eat.³⁷ As sociologist Claude Fischler writes, “not only does the eater incorporate the properties of food, but, symmetrically, it can be said that the absorption of a food incorporates the eater into a culinary system and therefore into the group which practices it, unless it irremediably excludes him.”³⁸ Food shapes human relationships with natural and social environments, connecting our physical bodies to social, emotional, and cultural meanings.³⁹ Nutritional anthropology shows that food is also communication: procurement, preparation, provisioning, as well as consumption, sharing, and rejection of foods can all carry messages about roles and statuses.⁴⁰

Food identity is typically ascribed either based on medical or social definitions or chosen by individuals.⁴¹ Eating practices can be chosen or inherited, free or constrained.⁴² They can overlap or intersect with other identities such as nationality, race, ethnicity, religion, sexual orientation, gender, disability status, parental status, age, body size, and religion, among others.⁴³ There is a range from food preferences to robust food identities. At one end of the spectrum, mere preferences may be characterized by the desire for

³⁵ See Claude Fischler, *Food, Self, and Identity*, 27 SOC. SCI. INFO. 275 (1988); see also STEPHEN MENNELL ET AL., *THE SOCIOLOGY OF FOOD: EATING, DIET AND CULTURE* (1992); see also *FOOD, HEALTH, AND IDENTITY* (Pat Caplan ed., 1st ed. 1997); see also Sydney W. Mintz & Christine M. Du Bois, *The Anthropology of Food and Eating*, 31 ANN. REV. ANTHROPOLOGY 99, 109-110 (2002); see also Carole A. Bisogni et al., *Who We Are and How We Eat: A Qualitative Study of Identities in Food Choice*, 34 J. NUTRITION EDUC. & BEHAV. 129 (2002).

³⁶ See Fischler, *supra* note 35, at 279-80.

³⁷ Michael Herzfeld, *Culinary Stereotypes: The Gustatory Politics of Gastro-Essentialism*, in *THE HANDBOOK OF FOOD & ANTHROPOLOGY* 31, 31 (2016); see also Gabaccia, *supra* note 1, at 8.

³⁸ See Fischler, *supra* note 35, at 280-81.

³⁹ Meredith E. Abarca, *Foreword*, in *FOOD IDENTITIES AT HOME AND ON THE MOVE. EXPLORATIONS AT THE INTERSECTION OF FOOD, BELONGING AND DWELLING* xii, xii (Raul Matta et al. eds., 2020).

⁴⁰ See generally WILLA ZHEN, *FOOD STUDIES: A HANDS-ON GUIDE* (2019) (exploring the various meanings and messages conveyed by food).

⁴¹ See Suzannah Gerber & Sara C. Folta, *You Are What You Eat ... But Do You Eat What You Are? The Role of Identity in Eating Behaviors—A Scoping Review*, 14 NUTRIENTS 3456 (Aug. 23, 2023).

⁴² See *id.*

⁴³ See *id.*

certain foods and aversion for others, such as “having a sweet tooth,” disliking greens, or favoring the cuisine one grew up eating.⁴⁴ Eaters may (or may not) consider these attitudes as distinguishing them personally or socially in a meaningful and consequential way. At the other end of the spectrum, some forms of eating (such a “being” halal, kosher, Ital, vegan, or vegetarian) may represent non-negotiable aspects of who individuals and groups take themselves to be and how they present themselves to others.⁴⁵ These practices may thus be expressive dimensions of other identities, integrated in other identities, or amount to identities of their own. In between these two poles, there may be a gradation of relationships to food, some chosen and others not, such as being a supertaster, committing to eating local, organic, paleo, keto, and/or raw foods, having food sensitivities or allergies, and following a medically prescribed diet, among others. These relationships to food may or may not become identities for eaters, which creates challenges for regulation considering law’s aspiration to draw bright lines and offer unequivocal concepts.

Food is part of the presentation of self in everyday life.⁴⁶ Much as one “performs” one’s racial, ethnic, gender, religious, national, or class identity⁴⁷ by speaking, moving, or dressing in certain ways, eating is often predetermined by who we think we are and how we want to project to others.⁴⁸ Food identity also arguably intersects with how we and others perceive our bodies and thus can be related to fatness or thinness, which are often unprotected characteristics under equality law despite evidence of pervasive body size stigma.⁴⁹ There are culturally expected ways to eat for different

⁴⁴ *See id.*

⁴⁵ *See id.*

⁴⁶ *See* GOFFMAN, *supra* note 33 (showing that social interactions can be likened to a theater in which people are similar to actors on a stage playing a variety of roles).

⁴⁷ *See* Judith Butler, *Gender as Performance: An Interview with Judith Butler*, 67 RADICAL PHIL.: J. SOCIALIST & FEMINIST PHIL. 32 (1994) (arguing that gender is socially constructed through performative acts such as speech and nonverbal communication); *see also* DEVON CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN “POST-RACIAL” AMERICA (2013) (on how racial identities are performed and policed through performance).

⁴⁸ *See* KYLA W. TOMPKINS, RACIAL INDIGESTION: EATING BODIES IN THE NINETEENTH CENTURY 7 (2012) (arguing that eating is a primary way in which people perform their racial and gender identities and read others’ bodies).

⁴⁹ *See* Rebecca M. Puhl & Chelsea A. Heuer, *Obesity Stigma: Important Considerations for Public Health*, 100 AM. J. PUB. HEALTH 1019, 1019 (2010). But things are changing as states and municipalities have banned or are in the process of banning discrimination on the basis of body type. *See* Matt Gonzales, *Laws, Policies Can Counter Weight Discrimination at Work*, SHRM (May 9, 2023), <https://www.shrm.org/resourcesandtools/hr-topics/behavioral->

racial and ethnic groups, genders, socioeconomic groups, fat and -thin people, and generations, among other distinctions.⁵⁰ Social science and popular culture document some of these food scripts.⁵¹ Certain periods of life or events can bring greater salience to food in identity construction and performance, for example, entering into new relationships, becoming a parent, having an illness, or being at risk for health problems.⁵² For people who have migrated growing foods, cooking, and eating can create a feeling of home and belonging.⁵³ These practices can also function as tools of resistance to acculturation and transmission of cultural affiliation intergenerationally.⁵⁴ Strategic disidentification with one's ascribed food identity to fit in is a well-documented phenomenon—from Muslims and Jews consuming pork publicly to Black Americans making a point of not eating certain foods in the presence of Whites.⁵⁵ So is the reclaiming of food practices that have historically been demeaned by dominant groups.⁵⁶

In addition to the role of food in shaping personal and social identities, eating can influence national identities, as I have shown in the French context.⁵⁷ Governments and organizations often put forward as common national characteristics certain essential foods, drinks, and/or cuisines through which citizens can imagine belonging to a single, cohesive people.⁵⁸ Sociologist Michaela

competencies/global-and-cultural-effectiveness/pages/laws-policies-can-counter-weight-discrimination-at-work.aspx.

⁵⁰ See e.g., BOURDIEU, *supra* note 21, at 190–191.

⁵¹ See Herzfeld, *supra* note 37, at 31.

⁵² Bisogni et al., *supra* note 35, at 132–133.

⁵³ See Abarca, *supra* note 39; see also GABACCIA, *supra* note 1, at 8.

⁵⁴ Daniel L. Weller & David Turkon, *Contextualizing the Immigrant Experience: The Role of Food and Foodways in Identity Maintenance and Formation for First- and Second-generation Latinos in Ithaca, New York*, 54 *ECOLOGY FOOD & NUTRITION* 57, 61 (2014).

⁵⁵ See, e.g., JESSICA B. HARRIS, *HIGH ON THE HOG: A CULINARY JOURNEY FROM AFRICA TO AMERICA* 17 (2011) (writing that watermelon has been used in “some of the most virulently racist images of African Americans,” becoming viewed as so “stereotypically African American” that it figured in a comedy routine about “an upwardly mobile black man trying to bring home a watermelon without being seen by the neighbors in his upscale white community.” Harris notes fried chicken’s similar associations).

⁵⁶ See, e.g., SUZAN-LORI PARKS, *THE DEATH OF THE LAST BLACK MAN IN THE WHOLE ENTIRE WORLD* (1990) (play exploring and reclaiming archetypes of Black America, including foods such as watermelon and character names such as “Greens Black-Eyed Peas Cornbread” or “Lots of Grease and Lots of Pork.”).

⁵⁷ See Mathilde Cohen, *The Whiteness of French Food. Law, Race, and Eating Culture in France*, 39 *FRENCH POL., CULTURE, & SOC’Y* 26, 29 (2021).

⁵⁸ Michaela DeSoucey, *Gastronomicalism: Food Traditions and Authenticity Politics in the European Union*, 75 *ANN. SOC. REV.* 432, 433 (2012); see also Arjun

DeSoucey has proposed the term “gastronationalism” to describe “the use of food production, distribution, and consumption to create and sustain the emotive power of national attachment, as well as the use of nationalist sentiments to produce and market food.”⁵⁹ In her construction, gastronationalism is not just a cultural phenomenon, but also fundamentally a juridical and political one, as it relies on legal tools to promote and protect certain agricultural and eating practices.⁶⁰ The contours and operations of gastronationalism may be different in the United States from other countries, where it is a response to a perceived tension between globalization’s push toward standardization (and the spread of the American diet) and local identity politics. By contrast, “the culinary landscape of the . . . [United States] is the result of ongoing adaptations, hybridizations, and creolization, as well as hegemonic attempts at whitening and making the cuisine more proper.”⁶¹ Historian Paul Freedman argues that one of the defining features of food in the United States is variety rather than a single identifiable cuisine.⁶² Similarly, cultural anthropologist Christy Shields suggests that for Americans, food “is most strongly associated with the notion of choice” and the “idea of having an abundant number and variety of food products from which to choose,”⁶³ including “an array of distinct ‘foreign’ foods and cuisines.”⁶⁴ The American version of gastronationalism is thus buttressed by the farm bill and agricultural subsidies that foster an a profusion of industrially produced foods of all sorts and the impression of consumer choice.⁶⁵ The nation’s internal diversity of cuisines does not make food identity less fraught and contentious, however. In the United States as well as elsewhere, eating serves “as a dominant site of economic, cultural, and political struggle.”⁶⁶

Appadurai, *Gastro-Politics in Hindu South Asia*, 8 AM. ETHNOLOGIST 494, 494 (1981) (offering the concept of gastro-politics to define situations in which food is a medium or message of conflict).

⁵⁹ See *id.*

⁶⁰ See Atsuko Ichijo, *Food and Nationalism: Gastronationalism Revisited*, 48 NATIONALITIES PAPERS 215, 215–216 (2020).

⁶¹ See PARASECOLI, *supra* note 21, at 123.

⁶² PAUL FREEDMAN, *AMERICAN CUISINE: AND HOW IT GOT THIS WAY* 1 (2019).

⁶³ Christy Shields Argèles, *Imagining Self and the Other: Food and Identity in France and the United States*, 7 FOOD, CULTURE & SOC’Y 14, 20 (2004).

⁶⁴ *Id.* at 21.

⁶⁵ See Pollans, *supra* note 2.

⁶⁶ WENYING XU, *EATING IDENTITIES. READING FOOD IN ASIAN AMERICAN LITERATURE* 14 (2007).

B. Food as a Primary Identity

Food can be a primary form of identity for some people, whom I might call “food identitarians,” rather than just an element of it. The salience of food as its own source of identity varies depending on groups and individuals and periods in their lives. It can turn around the types of food people want to obtain, those they want to avoid, or both. Some people have long distinguished themselves through foodways, be it by restricting their eating to certain times, quantities, and food types, or by growing and cooking particular foods. For them, eating can have the dual function of determining their connection to the world and effectuating their relationship to a group. Asceticism, feasting and fasting, and other versions of alimentary excess or abstinence (including those diagnosed and categorized as eating disorders) are marks of self-control and willpower in many cultures, but also may function as influential forms of political action.⁶⁷ One’s diet can express one’s identity as someone who cares for the environment and animals for example. Eaters may embrace veganism as a way of “eating for the environment” while others are motivated by the goal of avoiding all forms of exploitation of and cruelty to animals as far as possible.⁶⁸ For some, “vegan identity includes social values and norms, and should thereby be seen as more than a dietary choice,” but rather a primary form of identity.⁶⁹

For food identitarians, eating practices are best conceived as a separate identity, rather than just a pattern of food choices or diet. This is particularly true when their foodways are not mainstream, and/or have less social and legal support, or are stigmatized, requiring a considerable investment in time, energy, interpersonal negotiation, and/or money to be sustained.⁷⁰ For example, “being” or becoming Ital, vegan, vegetarian, pescatarian, paleo, committed to

⁶⁷ See, e.g., ROY, *supra* note 21; see also Melanie DuPuis, *Not in My Body: rBGH and the Rise of Organic Milk*, 17 AG. & HUM. VALUES 285, 285 (2000) (dubbing some forms of alimentary conscientious objections “‘Not-in-my-Body’ or ‘NIMB’ politics of refusal); see also Amanda Machin, *Hunger Power: The Embodied Protest of the Political Hunger Strike*, 8 INTERFACE 157 (2016) (recounting examples of political activism in the form of hunger strikes).

⁶⁸ *A Vegan Diet: Eating for the Environment*, PHYSICIANS COMMITTEE FOR RESPONSIBLE MEDICINE, <https://www.pcrm.org/good-nutrition/vegan-diet-environment> (last visited Sept. 1, 2024).

⁶⁹ Sara Vestergren & Mete Sefa Uysal, *Beyond the Choice of What You Put in Your Mouth: A Systematic Mapping Review of Veganism and Vegan Identity*, 13 FRONTIERS PYSCH. 1, 2 (2022).

⁷⁰ Bisogni et al., *supra* note 35, at 135.

organic, local, macrobiotic, raw foods can be central dimensions of how some individuals and groups understand and present themselves.⁷¹ These ways of eating can ground identities at the individual level, (re)defining how eaters see themselves or at the collective level, as they may force exit from (or allow entry into) a community of eaters.⁷² Emerging research on vegans and vegetarians, for instance, suggests that despite within-group heterogeneity, some categorize themselves as part of a distinct social group.⁷³ Certain food-based identities are negatively reinforced due their devaluation in law and culture.⁷⁴ Living with food allergies or food-related diseases such as Celiac is not an identity that people choose, but it can become central to one's sense of self and relationships with others.⁷⁵

To conclude, there is a continuum from food preferences to food identities. At one extreme, some eating practices may reflect cravings for certain foods, which eaters do not treat as distinguishing them personally or socially in a consequential way. At the other extreme, eating practices may represent non-negotiable aspects of who individuals and groups take themselves to be and how they present themselves to others. The next Part develops the notion of “food discrimination” to conceptualize the multi-faceted instances in

⁷¹ See *id.* at 131.

⁷² See, e.g., Jennifer Jabs et al., *Managing Vegetarianism: Identities, Norms and Interactions*, 39 *ECOLOGY FOOD & NUTRITION* 375, 382 (2000) (study of self-identified vegetarians finding that “the practice of not eating meat or other animal-derived food encompassed more than just a physical behavior; it often became an identity for themselves”); see also Daniel L. Rosenfeld & Anthony L. Burrow, *The Unified Model of Vegetarian Identity: A Conceptual Framework for Understanding Plant-Based Food Choices*, 112 *APPETITE* 78, 78–79 (2017).

⁷³ See Daniel L. Rosenfeld & Janet A. Tomiyama, *When Vegetarians Eat Meat: Why Vegetarians Violate Their Diets and How They Feel About Doing So*, 143 *APPETITE* 1, 2 (2019); see also Lori Gruen & Robert C. Jones, *Veganism as an Aspiration*, in *THE MORAL COMPLEXITIES OF EATING MEAT* 153, 156 (Ben Bramble & Bob Fisher eds., 2015) (arguing that some versions of veganism can be thought of as an identity).

⁷⁴ See, e.g., Rosenfeld & Tomiyama, *supra* note 73, at 7 (writing that vegetarians carry the “feeling of stigma” and of “possessing a devalued social identity,” as they expect that their diet will “be met with social disapproval and/or alienation,” leading some to “distancing themselves from this group membership and passing.”).

⁷⁵ See Sarah Nettleton et al., *Experiencing Food Allergy and Food Intolerance: An Analysis of Lay Accounts*, 44 *SOCIO.* 289, 298 (2010) (writing that the “the food allergic identity is relatively stable and is rooted in dominant medical discourse”); see also Sandra VanderKaay, *Mothers of Children with Food Allergy: A Discourse Analysis of Occupational Identities*, 23 *J. OCCUPATIONAL SCI.* 217, 224, 225 (2016) (suggesting that food allergies can inform the identities of people close to the allergic person, in particular mothers of children with a food allergy).

which people are discriminated against through food, especially when they and/or their foodways do not conform with dominant norms and identities.

II. FOOD DISCRIMINATION

Law differentiates people, things, and situations all the time, but only socially damaging distinctions are generally deemed unlawful.⁷⁶ *Food discrimination* can be defined as unfair differentiation and treatment based on the foods people eat (as well as how they are produced, prepared, and marketed). What makes it unfair? Food identities may be a valid basis for decision-making and treatment. But when weaponized to differentiate and disfavor certain groups of eaters, there may be an argument for legal recourse. In the examples discussed here, the discriminatory practices target already-recognized protected categories, such as race, national origin, disability, or age, but are effectuated through actions or words directed at food. While this Part uses the vocabulary and concepts of U.S. anti-discrimination law, the goal is not to articulate a new, anti-discrimination-based protected category for food identity, but rather to expand our understanding of what can count as discrimination.

Current federal and state discrimination statutes (with the exception, perhaps, of Minnesota's work law) offer little protection against food discrimination.⁷⁷ The standard antidiscrimination distinction between disparate treatment and impact is ill suited to grapple with this form of discrimination, which often presents both aspects at the same time.⁷⁸ At one level, the entire food system and its regulation have a disparate impact on food identities that depart from the standard American diet and often intersect with other forms of disadvantage.⁷⁹ A combination of subsidies, laws, regulations, and cultural norms make this diet the most affordable, widely accessible,

⁷⁶ Stephen D. Sugarman, "*Lifestyle*" *Discrimination in Employment*, 24 BERKELEY J. EMP. & LAB. L. 377, 392 (2003).

⁷⁷ *But see* MINN. STAT. § 181.938(2) (2023) (prohibiting employment discrimination on the ground that an "applicant or employee engages . . . in the use or enjoyment of lawful consumable products," which are defined as including "*food*, alcoholic or nonalcoholic *beverages*, and tobacco." (emphasis added)). Some states have antidiscrimination statutes that do not directly address food but prohibit employment discrimination for activities or products used outside the workplace, which could be interpreted as protecting food identities. *See, e.g.*, N.C. GEN. STAT. ANN. § 95-28.2(b) (West 1992).

⁷⁸ *See* Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 313–314 (2018) (highlighting the limits of anti-discrimination law and doctrine as applied to race discrimination).

⁷⁹ *See infra* note 232 and accompanying text for a definition of the Standard American Diet.

and accepted as normal and desirable.⁸⁰ As a result, non-normative foodways can prove more expensive, harder to procure, and stigmatized, despite the Centers for Disease Control and Prevention (CDC)’s recommendation that governments, health care facilities, schools, and employers, among others, offer “culturally preferred foods” that “meet the diverse tastes and needs of customers based on their cultural identity.”⁸¹ At another level, specific policies and actions by public and private entities (as well as by individual conduct) may adversely affect eaters whose food identities are at odds with the mainstream.

In what follows, I present several dimensions of food discrimination. Beginning by mapping out how food can be instrumentalized to demean and subordinate eaters, I then turn to laws made and applied in ways that negatively impact minoritized food businesses.

A. Eaters

Eaters may be discriminated against for their eating practices alone or based on how their foodways intersect with other identity axes. To elucidate the concept food discrimination, this section outlines a range of feelings and rationalizations that lead to unfair distinctions or actions based on foodways—cost reduction, stereotype, stigma, disgust, and pretext. It lingers on the specific case of discrimination against vegans or vegetarians, given that their diets need not be associated with specific identity traits and thus provide examples of discrimination based on food.

i. Discriminatory Attitudes and Rationales

At least five varieties of rationales and negative attitudes can be identified in food discrimination patterns emerging from the case law. I illustrate each category with examples cutting across legal domains, including employment discrimination, fair housing, disability law, public accommodations, and elder law.

⁸⁰ See, e.g., Jonah Gelbach et al., *Passive Discrimination: When Does It Make Sense to Pay Too Little?*, 76 U. CHI. L. REV. 797, 799–800 (2009).

⁸¹ Centers for Disease Control and Prevention, *Cultural Food Preferences in Food Service* (Jul. 7, 2022), <https://www.cdc.gov/nutrition/food-service-guidelines/strategize-and-act/cultural-food-preferences.html>.

1. Cost Reduction

When the government and (public or private) institutions such as schools, employers, or public accommodations provide food, pay for food, or allow people to consume food on their premises, they may be concerned that non-normative food identities will impose extra costs. These could be economic. Correctional departments and courts regularly point out that accommodating imprisoned people's dietary requests is expensive.⁸² In the employment context, costs come in the form of reimbursement for meals when workers travel for business purposes, ordering special items for catered meetings or events, or allowing workers to take more frequent (or longer) breaks to procure and eat food, leading to putative productivity loss.⁸³ For instance, in a 2002 case, a plaintiff of Indian descent pointed out in her national origin discrimination allegations that her employer, who had mocked her vegetarianism and Indian foodways, refused to reimburse her for vegetarian meal expenses while away from home at a professional conference.⁸⁴

Costs could be social or reputational. During the hiring process, employers might develop the belief that people whose foodways depart from the mainstream will be harder to socialize with. They may also wish to promote a particular business image within or outside the organization and consider that allowing their employees (or customers) to eat certain foods in certain locales would interfere. For example, in a 2014 case, to substantiate her charge of employment discrimination and retaliation based on race, color, and disability, a plaintiff described episodes of harassment related to her eating and body. A team leader told her at a potluck that "she was 'too fat and black' to eat with other employees" and that "she had 'too much food on her plate' and she should eat less so she could lose weight." The same coworker took away food from her, stating that she "did not need any more snacks because of her weight."⁸⁵

⁸² See, e.g., Tate McCotter, *Alarming National Spike in Religious Diets*, 66 SHERIFF 29, 29 (2014) (discussing the impact of kosher food demand across the U.S. on prison budgets).

⁸³ See *Alkhalwaldeh v. Dow Chem. Co.*, 851 F.3d 422, 428-429 (5th Cir. 2017).

⁸⁴ *Nair v. Columbus State Cmty. Coll.*, No. 2:02-CV-595, 2008 WL 483333, 36-37, 40 (S.D. Ohio Feb. 19, 2008).

⁸⁵ *Wellington v. Texas Guaranteed*, No. A-13-CA-077-SS, 2014 WL 2114832, at *6 (W.D. Tex. May 20, 2014) 19-20, 24; see also *Marchmon v. Securitas Sec. Servs.*, 994 F. Supp. 2d 742, 745-46 (W.D.N.C.).

Food allergies, diseases, and sensitivities have spurred litigation that implicate all of these costs. For example, in 2019, a U.S. Court of Appeals ruled that a twelve-year-old with a severe gluten intolerance may have a disability.⁸⁶ The court explained that a jury could have found it reasonable for the child to ask that a historical tavern in colonial Williamsburg allow him to bring and eat his own gluten-free meal on premises rather than risking to consume the restaurant's gluten-free offering.⁸⁷ The tavern objected that a policy allowing patrons to consume home-prepared foods without notice would be "disruptive to the restaurant's operations, and that the modification would present safety and liability risks."⁸⁸ According to the restaurant (as well as a dissenting judge), a mix of economic, safety, and reputational motivations justified not accommodating the eater's request.⁸⁹

2. Stereotype

As Elizabeth Emens has written in the context of discrimination, "[p]eople use stereotypes all the time. In the absence of perfect information, or in the absence of time and energy to process all the available information, people rely on proxies and generalizations."⁹⁰ As she points out, stereotyping often involves subscribing to myths about a group, which can carry negative symbolic effect or stigma, in addition to affecting everyone because it constrains identities.⁹¹ Food stereotyping can be particularly harmful when it overlaps with vulnerable identities. Stereotypes associated with cuisines and people who have historically been discriminated against raise concerns as they can perpetuate oppressions. For example, in the 2002 employment discrimination case mentioned above, the plaintiff of Indian descent alleged that her employer "made derogatory remarks about Indians eating with their hands."⁹² Similarly, in 2005, a Chinese software engineer filed a case under New York City's and the state's Human Rights Laws, claiming that she was discriminated against at work based upon her national origin, gender, pregnancy, and disability. She reported having

⁸⁶ *J.D. By Doherty v. Colonial Williamsburg Found.*, 925 F.3d 663 (4th Cir. 2019).

⁸⁷ *See id.*

⁸⁸ *Id.*, at 674.

⁸⁹ *Id.* at 679 (Wilkinson, J., dissenting) (arguing that granting the accommodation would deny the restaurant "much-needed revenue" and alter its character as an establishment that aims at offering an eighteenth-century atmosphere).

⁹⁰ Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L. J. 399, 414 (2006).

⁹¹ *See id.* at 416.

⁹² *Nair v. Columbus State Comm.*, Docket No. 2:02-cv-00595 (S.D. Ohio Jun 14, 2002), 36-37, 40.

frequently been the subject of derogatory remarks at the hand of her supervisor, including mockeries of Chinese culture, such as, “Chinese foods are greasy and cheap.”⁹³

3. *Stigma*

Erving Goffman famously conceptualized stigma as “the situation of the individual who is disqualified from full social acceptance.”⁹⁴ The concept was later broadened, elaborated, and critiqued, but stigma is generally understood to exist when dominant cultural beliefs link groups of people to undesirable characteristics, leading them to experience status loss and discrimination.⁹⁵ Stigma thus includes an element of stereotyping.⁹⁶ Institutions and people may view those who eat differently than the mainstream as having a devalued social status.⁹⁷ Moreover, stigmatized traits seen as controllable trigger stronger reactions,⁹⁸ and eating is generally considered to be within a person’s control. Groups defined by race, ethnicity, and/or nationality have historically been (and continue to be) derided for their real or imaginary foodways.⁹⁹ This is illustrated in the employment context in a 2013 Texas case in which an employee of Indian descent alleged that his supervisor “made fun of his food, and spoke of steakhouses and meat packing plants knowing that ‘cows’ were sacred to Indians” to support a claim of race and national origin discrimination.¹⁰⁰ Food-based stigma arises early on in eaters’ lives, as even school children appear to understand eating as status defining.¹⁰¹ In some educational environments, students are teased and bullied for packing non-conforming lunches such as foods associated with minority culinary cultures.¹⁰² People who have food

⁹³ *Wenping Tu v. Loan Pricing Corp.*, 21 Misc. 3d 1104(A), 873 N.Y.S.2d 238 (Sup. Ct. 2008).

⁹⁴ ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

⁹⁵ Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363, 366–75 (2001).

⁹⁶ *See id.* at 367.

⁹⁷ *Id.*

⁹⁸ Brenda Major, *Stigma*, in ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY 944, 945 (Roy F. Baumeister & Kathleen D. Vohs eds., 2007).

⁹⁹ *See infra* note 95 and accompanying text.

¹⁰⁰ *Gaspari v. FMC Techs., Inc.*, Civil Action No. H-13-2353 (S.D. Tex. Feb. 4, 2016), at 12.

¹⁰¹ Anna Ludvigsen & Sara S. Scott, *Real Kids Don’t Eat Quiche*, 12 FOOD, CULTURE & SOC’Y 417, 420 (2009).

¹⁰² *See How Bringing Culturally-Specific Lunches to School Can Leave Kids*

Feeling Ashamed and Different, CBC RADIO (May 26, 2017),

<https://www.google.com/search?client=safari&rls=en&q=How+bringing+culturall>

addictions or food-related allergies or intolerance also experience stigma.¹⁰³

4. *Disgust*

Psychologists Paul Rozin and April Fallon “approach disgust as a food-related emotion and define it as revulsion at the prospect of oral incorporation of offensive objects.”¹⁰⁴ They argue that disgust is an adaptive response that has protected humans from potentially harmful foods in their environment. Disgust is culturally determined and intersects with stigma, but it is profoundly embodied, as it implicates emotions and the senses. Particular groups of people may become associated with specific cuisines others find repulsive, with the effect that eaters themselves become the object of disgust. Rozin and Fallon explain that humans sometimes develop the “‘belief’ that people take on the properties of the foods they eat” and thus see them as contaminated and disgusting.¹⁰⁵ The emotion of disgust has been shown to be at the heart of prejudice that translates into a negative response to out-groups.¹⁰⁶ Philosopher Martha Nussbaum has analyzed how the disgust people may feel toward others and conducts they disapprove fuels discriminatory and exclusionary government decision-making.¹⁰⁷ This explains, according to her, that the Supreme Court’s animus jurisprudence rests on the principle that laws cannot legitimately rely on a view that certain groups are “disgusting.”¹⁰⁸

Segregated eating exemplifies the connection between disgust and eating—where the disgust is not so much about the food itself than about who eats it, where, and with whom. In various cultures, the dominant group has historically refused to eat with subordinated others because eating together contributes to forging

yspecific+lunches+to+school+can+leave+kids+feeling+ashamed+and+different&i
e=UTF-8&oe=UTF-8.

¹⁰³ See generally D’Andra Millsap Shu, *Food Allergy Bullying as Disability Harassment: Holding Schools Accountable*, 92 U. COLO. L. REV. 1, 4-5 (2021) (discussing the phenomenon of food allergy bullying in school).

¹⁰⁴ Paul Rozin & April E. Fallon, *A Perspective on Disgust*, 94 PSYCH. REV. 23, 23 (1987).

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., Michael Bang Petersen, *How and Why Disgust Responses Underlie Prejudice. Evidence from the Field*, 38 POL. & LIFE SCI. 62, 62 (2019).

¹⁰⁷ MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 12–17 (2010).

¹⁰⁸ *Id.*, at 150–151.

social bonds and shared identities.¹⁰⁹ In her analysis of “racist restaurants” in the United States, Naa Oyo Kwate writes, “eating establishments were one of the most contested public spaces undergoing desegregation. White people were disgusted at having to eat with Black neighbors; although Black people were fit to prepare the food, dining with them was intolerable.”¹¹⁰ With the passage of the 1964 Civil Rights Act and state public accommodation laws, restaurants and other food businesses can no longer discriminate based on race, color, religion, sex, or national origin.¹¹¹ But racially segregated eating persists, illustrated by restaurants located in overwhelmingly White neighborhoods that function as “white space[s]” excluding non-Whites, in particular Blacks, by subtle (and less subtle) means such as their location, décor, profiling of patrons, and other methods.¹¹²

Disgust-motivated food discrimination is also manifested by sensory disputes involving the sight, smell, and sound of food. In the housing context, plaintiffs have raised the question whether “the Fair Housing Act is violated if a landlord comments on or takes disciplinary action against a tenant of differing ethnicity for emitting smells from their dwelling unit caused by cooking food associated with other national origins (curry, cumin, ginger, etc.)”¹¹³ While unsuccessful in some cases,¹¹⁴ in at least one instance in 2010, the U.S. Department of Housing and Urban Development (HUD) issued a charge of discrimination against a landlord based on national origin, family status, and race discrimination that included food-related actions.¹¹⁵ Among the violations cited were the White property manager’s instruction to her two assistant managers “not to show certain units . . . to black or Indian families because . . . she did not want to smell their cooking.”¹¹⁶ In the elder law context, charges

¹⁰⁹See COMMENSALITY: FROM EVERYDAY FOOD TO FEAST 2 (Susanne Kerner et al. eds., 2015) (framing “commensality,” the practice of eating and drinking together, as one of the most important forms of human sociality).

¹¹⁰ Naa Oyo A. Kwate, BURGERS IN BLACKFACE: ANTI-BLACK RESTAURANTS THEN AND NOW 83 (2019).

¹¹¹ Some states may protect different categories.

¹¹² See Elijah Anderson, “*The White Space*,” 1 SOCIO. RACE & ETHNICITY 10, 13 (2015).

¹¹³ Marley J. Hochendoner, *Cooking Odors and National Origin. Can You Pass the Smell Test for Fair Housing Discrimination?*, <https://www.fhcci.org/wp-content/uploads/2011/12/Cooking-Smells-FH.pdf> (last visited Sept. 2, 2024).

¹¹⁴ See, e.g., *Clark v. Oakhill Condo. Assoc., Inc.*, US Dist. Court for The N. Dist. Of IN, S. Bend Div., 2008.

¹¹⁵ *U.S. Department of Housing and Urban Development v. Rita Lovejoy* (2010), FHEO No.: 10-08-0323-8.

¹¹⁶ *Id.*, at 6.

of discrimination have been raised by (or on behalf of) nursing facility residents who were refused access to common dining halls on account of their unappetizing way of eating. They were ostracized because they drool, make sounds when dining, and/or otherwise eat in a manner considered messy even though they may have no control over their table manners due to age, disability, and/or medical condition.¹¹⁷ The disgust, here, does not originate from the type of food eaten (except perhaps in the case of special medical diets such as liquid diets), but from the manner in which it is eaten.

5. *Pretext*

Sometimes food can be a pretext for discriminators to express their animus. In this scenario, the discrimination is not about the victims' eating. Rather, the cultural associations between food and identity are weaponized to demean. For instance, in a 2021 Indiana case, a Black woman brought hostile work environment claims against her employer based on sex and race. One of her exhibits was a White coworker's asking her whether she "had ever had "chocolate-covered n** toes."¹¹⁸ The plaintiff testified discovering that the term was a pejorative slang for Brazilian nuts, deducing that the coworker was "trying to find a clever way of saying 'n**' in front of [her] and it upset [her]."¹¹⁹ Despite the long list of foods used as racial and ethnic metaphors to humiliate and undermine people,¹²⁰ the court minimized the impact of this language on the ground that it was primarily about food, not about people, stating that the defendant's "use of an epithet was referring to a food item, rather than a person or a group. Although these circumstances do not make the use of the n-word acceptable, they do lessen the abusive impact for purposes of the hostile work environment analysis."¹²¹ This statement manifests the legal system's lack of

¹¹⁷ See, e.g., Paula Span, *Tables Reserved for the Healthiest*, N.Y. TIMES (Feb. 9, 2012), <https://archive.nytimes.com/newoldage.blogs.nytimes.com/2012/02/09/tables-reserved-for-the-healthiest/>.

¹¹⁸ *Paschall v. Tube Processing Corp.*, No. 1:19-cv-04488-JMS-MG, WL 1390350 at *4 (S.D. Ind. Apr. 13, 2021).

¹¹⁹ See *id.*

¹²⁰ See, e.g., Kat Chow & Gene Demby, *Overthinking It: Using Food as a Racial Metaphor* (Sept. 14, 2014), <https://www.npr.org/sections/codeswitch/2014/09/12/348008432/overthinking-it-using-food-as-a-racial-metaphor>.

¹²¹ *Paschall v. Tube Processing Corp.*, No. 1:19-cv-04488-JMS-MG, WL 1390350 at *4 (S.D. Ind. Apr. 13, 2021); see also *Marchmon v. Securitas Sec. Servs.*, 994 F. Supp. 2d 742, 745-46 (W.D.N.C.) (plaintiff citing as evidence of discriminatory motive her supervisor's commenting "on what [the plaintiff] was eating, saying:

recognition of food discrimination as a genuine form of discrimination.

In sum, a number of negative attitudes, feelings, and arguments toward food may animate the way in which governments, institutions, and other people treat people. The next section focuses on the special case of discrimination against vegans and/or vegetarians. This category of eaters is useful to analyze separately as it encompasses people who embrace these foodways for a variety of reasons beyond culture, religion, and medical need and therefore may not have any ground for redress under current law. It also includes individuals who inhabit privileged identities as well as people who are marginalized, raising the question whether food identity protections should attach to all, regardless of their stature in society.

ii. Discrimination Against Vegans and Vegetarians

Vegans and vegetarians offer both a current and old example of eaters who have been discriminated against, either purely because of their foodways or because of the intersection between their eating and other forms of subordination.¹²² The 1882 Chinese Exclusion Act, which banned Chinese laborers' immigration into the United States, offers a historical example of race-based discrimination motivated in part by its targets' (real or imaginary) food identities. In the debates leading up to the passage of the statute, then secretary of state James Blaine argued in favor of excluding the Chinese because, among other reasons, they were assumed to be willing to work for lower wages as their foodways were more frugal and less reliant on meat.¹²³ He distinguished the "Chinese" and "white race" by contrasting the "man who can live on rice" and the "man who must have beef and bread."¹²⁴

Today, there is evidence that vegetarians and vegans experience discrimination, though empirical data lacks to ascertain whether vegetarians and vegans of color and/or of foreign origin

'That's why most black women are overweight because of what you are eating.'" The court agreed that the comment was "insensitive," but was not persuaded that it had a connection with her termination).

¹²² See KAREN IACOBBO & MICHAEL IACOBBO, *VEGETARIAN AMERICA: A HISTORY* (2004) (recounting the history of vegetarianism in the United States including how its proponents were mocked and cast out).

¹²³ See AMERICAN FEDERATION OF LABOR, *SOME REASONS FOR CHINESE EXCLUSION: MEAT VS. RICE, AMERICAN MANHOOD AGAINST ASIATIC COOLEISM. WHICH SHALL SURVIVE?* 16-17 (1902).

¹²⁴ See *id.* at 31.

experience discrimination at higher rates compared to White, native-born Americans.¹²⁵ Veganism and vegetarianism are examples of “positive deviance,” that is, behaviors many view as “superior,” even while rejecting them.¹²⁶ Elizabeth Emens argues that people who transition to vegetarianism might be stigmatized for the shift, as it makes others uncomfortable even when viewed as admirable.¹²⁷ In U.S. culture, vegans often occupy a “killjoy” position, “assigned to a category of difficulty” and troubling “the prevailing happiness order.”¹²⁸ The studies that report bias are mostly based on narratives and self-reports from people who are vegetarian or vegan,¹²⁹ but also on omnivores’ self-declared feelings towards vegetarians and vegans.¹³⁰ In U.K. newspapers, dominant media discourse around vegetarians and vegans has been found derogatory, pointing to the existence of “veganphobia.”¹³¹ Bias may also exist in nutrition research as the literature has been charged with overstating the risks of vegetarian and vegan diets.¹³² Psychologists Cara MacInnis and Gordon Hodson claim that anti-vegetarian bias is a result of

¹²⁵ See, e.g., Oscar Horta, *Discrimination Against Vegans*, 24 RES PUBLICA 359, 361, 372 (2018) (cataloguing different ways in which vegans are being discriminated against).

¹²⁶ Joe Boyle, *Vegetarianism and Fruitarianism as Deviance*, in THE ROUTLEDGE HANDBOOK OF DEVIANT BEHAVIOR 268 (Clifton D. Bryant ed., 2011).

¹²⁷ See Elizabeth Emens, *Conversion Discrimination* (Nov. 23, 2016) (draft paper on file with author).

¹²⁸ Richard Twine, *Vegan Killjoys at the Table—Contesting Happiness and Negotiating Relationships with Food Practices*, 4 SOCIETIES 623, 626 (2014).

¹²⁹ See generally Lynsey Kluever Romo & Erin Donovan-Kicken, “*Actually, I Don’t Eat Meat*”: A Multiple-Goals Perspective of Communication About Vegetarianism, 63 COMM’N STUD. 405 (2012) (suggesting that vegetarians have unique “self-presentational” challenges); see also Christopher A. Hirschler, “*What Pushed Me Over The Edge Was A Deer Hunter*”: Being Vegan In North America, 19 SOC’Y & ANIMALS 156 (2011) (reporting that some vegan interviewees experienced hardship due to their diet).

¹³⁰ See generally Kristof Dhont & Gordon Hodson, *Why Do Right-Wing Adherents Engage in More Animal Exploitation and Meat Consumption?*, 64 PERSONALITY & INDIVIDUAL DIFFERENCES 12 (2014) (finding that social dominance orientation and right-wing authoritarianism translate into negative attitudes toward animal advocates such as vegetarians.); see also Mary Bresnahan et al., *Why Is the Vegan Line in the Dining Hall Always the Shortest? Understanding Vegan Stigma*, 1 STIGMA & HEALTH 3, 3 (2016) (exploring why people stigmatize vegans/vegetarians).

¹³¹ See generally Matthew Cole & Karen Morgan, *Vegaphobia: Derogatory Discourses of Veganism and the Reproduction of Speciesism in UK National Newspapers*, 62 BRIT. J. SOCIO. 134 (2011).

¹³² See generally Gary E. Varner, *In Defense of the Vegan Ideal: Rhetoric and Bias in the Nutrition Literature*, 7 J. AGRIC. & ENV’T ETHICS 29, 30-31 (1994).

“symbolic threat.”¹³³ Vegetarian or vegan values and practices would represent a menace to dominant cultural norms, in particular to the belief in human supremacy over other species.¹³⁴ People may thus discriminate against vegetarians and vegans because these eaters embody a challenge to the anthropocentric worldview.¹³⁵

The bias against vegans and vegetarians, when unsupported by other grounds for unlawful discrimination, has barely been addressed by U.S. law. By contrast, in the United Kingdom, a White cisman claimed in 2018 that he was fired after disclosing to coworkers that their employer invested “pension funds in firms involved in animal testing.”¹³⁶ The employee sued, maintaining that his dismissal was due to his “ethical veganism.”¹³⁷ He won an out-of-court settlement after a U.K. employment tribunal found that ethical veganism is a protected philosophical belief under U.K. law.¹³⁸ Scholars have commented on similar cases of U.S. workers alleging employment discrimination for being vegan and vegetarian with more or less success.¹³⁹ Additionally, Lisa Johnson offers examples of discrimination against ethical vegans beyond the work context such as at public accommodations and facilities as well as in the form of crimes against persons and property.¹⁴⁰

There is controversy as to whether vegan or vegetarian identity is a stigmatized identity, a privileged, even elitist identity, or a combination of both.¹⁴¹ According to a 2018 Gallup poll, 5 percent of U.S. adults consider themselves to be vegetarians, but non-White

¹³³ Cara C. MacInnis & Gordon Hodson, *It Ain't Easy Eating Greens: Evidence of Bias Toward Vegetarians and Vegans from Both Source and Target*, 20 GRP. PROCESSES & INTERGROUP RELS. 721, 722 (2015).

¹³⁴ See Dhont & Hodson, *supra* note 130, at 13.

¹³⁵ See Cole & Morgan, *supra* note 131, at 149.

¹³⁶ Jamie Doward, *Worker Could Make History in a Crucial Case for Ethical Vegans*, THE GUARDIAN (Dec. 29, 2019), theguardian.com/lifeandstyle/2019/dec/29/ethical-vegan-jordi-casamitjana-protected-status-court-tribunal.

¹³⁷ *Id.*; see also Jessica Greenebaum, *Veganism, Identity, and the Quest for Authenticity*, 15 FOOD, CULTURE, & SOC'Y 129, 130 (2012); see also Lisa Johnson, *Veganism as a Legally Protected Religion*, in THE ROUTLEDGE HANDBOOK OF RELIGION AND ANIMAL ETHICS 307, 307 (Andrew Linzey & Clair Linzey eds., 2018).

¹³⁸ See Skater + Gordon Lawyers, *Ethical Veganism as a Protected Philosophical Belief* (Dec. 20, 2019), slatergordon.co.uk/newsroom/ethical-veganism/.

¹³⁹ See Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287, 292 (2011).

¹⁴⁰ Lisa Johnson, *The Religion of Ethical Veganism*, 5 J. ANIMAL ETHICS 31, 38–40 (2015).

¹⁴¹ See Jessica Greenebaum, *Questioning the Concept of Vegan Privilege: A Commentary*, 41 HUMAN. & SOC'Y 355 (2017).

Americans (9 percent) are three times as likely as White Americans (3 percent) to describe themselves as vegetarian.¹⁴² Veganism and vegetarianism are most widely spread among Black Americans, 8 percent of whom declare that they are strict vegans or vegetarians.¹⁴³ The concept of “vegan privilege” has been disputed, with some scholars and activists “debat[ing] whether veganism requires affluence, whether it assumes whiteness, first world privilege, and cultural insensitivity” while others reject the concept as “[i]t approaches veganism as a monolithic movement and lacks contextualization.”¹⁴⁴ A. Breeze Harper, for instance, critiques the mainstream vegan movement for centering affluent White vegans rather than being inclusive and supportive of vegans of color and those struggling economically.¹⁴⁵ Grounded in an intersectional lens, Jessica Greenebaum pushes back against the idea of vegan privilege, focusing instead on criticizing omnivores by highlighting the “privileges of mindless eating” they have and vegans do not.¹⁴⁶ This debate is important because if vegetarianism and veganism are indeed expressions of alimentary privilege, there may be less justification for affording their practitioners legal protections.¹⁴⁷ By contrast, if they are stigmatized food identities, which are also instrumentalized to oppress already minoritized groups, there would be grounds to lend them legal protection. Yet another perspective has been to propose veganism as an alimentary version of the “universal design” concept in disability studies and advocacy, that is, the process of designing an environment welcoming of all people.¹⁴⁸ According to Chloë Taylor and Kelly Struthers, “[s]erving vegan food as a default, especially with nut-free and gluten-free options, maximizes the number of people who can eat, while the more animal products one serves, the more likely one is to exclude certain human

¹⁴² See *What Percentage of Americans Are Vegetarian?*, GALLUP (Sept. 27, 2019), <https://news.gallup.com/poll/267074/percentage-americans-vegetarian.aspx>.

¹⁴³ See *Why Black Americans Are More Likely to Be Vegan*, BBC (Sept. 11, 2020), [bbc.com/news/world-us-canada-53787329](https://www.bbc.com/news/world-us-canada-53787329).

¹⁴⁴ See Greenebaum, *supra* note 141, at 356.

¹⁴⁵ See, e.g., A. Breeze Harper, *Going Beyond the Normative White “Post-Racial” Vegan Epistemology*, in *TAKING FOOD PUBLIC: REDEFINING FOODWAYS IN A CHANGING WORLD* 155 (Psyche Williams-Forsen & Carole M. Counihan, eds., 2012); see also APH KO & SYL KO, *APHRO-ISM: ESSAYS ON POP CULTURE, FEMINISM, AND BLACK VEGANISM FROM TWO SISTERS* (2017).

¹⁴⁶ See Greenebaum, *supra* note 141, at 360.

¹⁴⁷ See *infra*, Part IV.

¹⁴⁸ Chloë Taylor & Kelly Struthers Montford, *Veganism as universal design, Accommodation and inclusion in law and social justice praxis*, in *DISABILITY AND ANIMALITY: CRIP PERSPECTIVES IN CRITICAL ANIMAL STUDIES* 129, 129 (Stephanie Jenkins et al., eds., 2020).

eaters.”¹⁴⁹ In this view, veganism becomes the ultimate accessible sustenance for all rather than and an identitarian foodway.

In practice, the issue that has animated news headlines in the past decade in the United States has tended *not* to be whether vegans or vegetarians are discriminated against, but whether meat-eaters are the object of discrimination. The question was raised in the following scenarios—would it be discriminatory for public schools, employers, or landlords to go all vegetarian or vegan?¹⁵⁰ Yet, historically, in the United States, it is vegetarians who have been ostracized and meat-eaters, valorized, as the consumption of animal flesh was often linked to higher social status.¹⁵¹ Today, it continues to be easy and normative for meat-eaters to consume animal flesh and secretions—carnism is embedded in our social structures.¹⁵² These policies may have attracted so much attention precisely because of the social tensions around veganism and vegetarianism as identities that can be simultaneously or alternatively vilified and elevated and thus challenging dominant food identities.

Individuals face food-related discrimination in various contexts. As the next section discusses, food businesses, in particular restaurants, may also experience differential treatment depending on the cuisine they offer and the identities of their owners and/or workers.

B. Food Businesses

The first federal food safety laws passed in 1906 were responsive to the widely unsanitary practices of the food industry.¹⁵³

¹⁴⁹ See *id.* at 137.

¹⁵⁰ See Ben Chapman & Corinne Lestch, *School 244 in Flushing, Queens, Becomes First Public School in Nation to Serve Only Vegetarian Meals*, N.Y. DAILY NEWS (Apr. 30, 2013), nydailynews.com/new-york/queens/queens-school-serves-all-vegetarian-fare-article-1.1331690; see also David Gelles, *Memo from the Boss: You're a Vegetarian Now*, N.Y. TIMES (July 20, 2018), nytimes.com/2018/07/20/business/wework-vegetarian.html; see also Andy Newman, *This \$5,750-a-Month Brooklyn Apartment Has a Smell Test*, N.Y. TIMES (June 18, 2023), nytimes.com/2023/06/18/nyregion/vegan-tenants-landlord-ny.html?smid=nytcore-ios-share&referringSource=articleShare.

¹⁵¹ See DUPUIS, *supra* note 21; see also DAVID J. McCLEMENTS, *FUTURE FOODS: HOW MODERN SCIENCE IS TRANSFORMING THE WAY WE EAT* 323, 335 (2019).

¹⁵² See generally MELANIE JOY, *WHY WE LOVE DOGS, EAT PIGS, AND WEAR COWS: AN INTRODUCTION TO CARNISM* (2020) (coining the term “carnism” to label the equivalent of veganism for people who eat meat and the belief that it is natural and necessary to eat animals).

¹⁵³ See MICHAEL T. ROBERTS, *FOOD LAW IN THE UNITED STATES* (2016) (describing the early history of laws prohibiting adulteration).

As with many public health initiatives, they were also entangled with racial anxieties and tensions around immigration and urbanization, which often manifest themselves in the form of fear and disgust for the foods of the others.¹⁵⁴ In the contemporary area, federal, state, and local health and safety laws continue to have a disparate impact on low-income as well as immigrant and/or minority communities' ability to start and maintain food businesses.¹⁵⁵ First, access to a commercial kitchen meeting regulatory standards may be a non-starter for these groups disproportionately lacking access to capital.¹⁵⁶ Second, the objective of ensuring food safety continues to enable discriminatory enforcement practices.¹⁵⁷ The result is not only harm to low-income and minority entrepreneurs, but also to eaters for whom access to the foods sold by these vendors may be integral to their identities.

The most significant barrier for independent restaurants associated with immigrants and non-White American cuisine for staying in business once they have obtained a license is passing food safety inspections.¹⁵⁸ This Article does not use the phrase "ethnic" food or restaurant because in this context the adjective ethnic is often employed as a pejorative to designate virtually any food identified as non-White and/or immigrant and/or unrefined.¹⁵⁹ As sociologist Krishnendu Ray notes, "[a]n ethnic is a proximate but subordinate other, too close to be foreign, too different to be the self."¹⁶⁰ Ray

¹⁵⁴ See generally KANT PATEL & MARK E RUSHEFSKY, *THE POLITICS OF PUBLIC HEALTH IN THE UNITED STATES* (2005) (presenting the politics often underlying public health campaigns and law-making); see also KC Councilor, *Feeding the Body Politic: Metaphors of Digestion in Progressive Era US Immigration Discourse*, 14 COMMUN & CRITICAL/CULTURAL STUD. 139, 143 (2017) (arguing that in the era between the 1882 Chinese Exclusion Act and the Immigration Act of 1924, nativists commonly invoked metaphors of eating and digestion to support their cause).

¹⁵⁵ See, e.g., Phoebe Godfrey, *Reflexive Food Truck Justice: A Case Study in CLiCK, Inc., a Nonprofit, Shared-Use Commercial Kitchen*, in *FOOD TRUCKS, CULTURAL IDENTITY, AND SOCIAL JUSTICE: FROM LONCHERAS TO LOBSTA LOVE* 149 (Julian Agyeman et al., eds., 2017) (presenting a non-profit shared-used commercial kitchen that primarily serves immigrant and minority food entrepreneurs who might not otherwise be able to start a business to financial and regulatory costs).

¹⁵⁶ See *id.*

¹⁵⁷ Bernd van der Meulen et al., *Food Safety Regulations Applied to Traditional and Ethnic Foods*, in *REGULATING SAFETY OF TRADITIONAL AND ETHNIC FOODS* 441, 443 (2016).

¹⁵⁸ See Kimberly J. Harris, *Culture and Theory: Considerations for the Ethnic Restaurant and Food Safety Culture*, 3 ATHENS J. OF TOURISM 263 (2016).

¹⁵⁹ Suvir Saran, *Racism in Food? US, North European Cuisines Enjoy a Privileged Status, While Others Are Named "Ethnic,"* THE ECONOMIC TIMES (Sept. 15, 2019), <https://economictimes.indiatimes.com/magazines/panache/food-drinks/why-is-our-food-called-ethnic/articleshow/71130768.cms?from=mdr>.

¹⁶⁰ KRISHNENDU RAY, *THE ETHNIC RESTAURANTEUR* 1 (2016).

observes that in the United States, some foreign cuisines escape the label “ethnic” when their producers participate in the social field of the dominant.¹⁶¹ French cuisine is the paradigmatic example of a foreign cooking not categorized as ethnic due to its elite status.¹⁶² Other cuisines gradually evaded the label as their makers gentrified, for example, Italian, Spanish, and Japanese fare.¹⁶³

The regulation of food businesses can prove racist and xenophobic even when it is facially neutral.¹⁶⁴ In the early 1900s, public health officials blamed food-borne diseases on Eastern Europeans, Mexicans, and other immigrants.¹⁶⁵ Gabriel Chin and John Ormonde documented the national movement in the late nineteenth and early twentieth centuries to eliminate Chinese restaurants in particular through “racial regulation.”¹⁶⁶ Legal tactics such as zoning and licensing laws were used by various cities and municipalities to stifle Chinese restaurants as well as food vendors based on racist beliefs that they threatened American jobs and the “virtue” of White women.¹⁶⁷ This persecution proceeded even as Chinese people were often compelled to enter the food business due to laws and policies excluding them from other occupations.¹⁶⁸ More recently, the deportation and incarceration of Japanese Americans during World War II was legally justified by a national security rationale, when historians have shown that one of the real motivations, in addition to racism, was to seize their farmland.¹⁶⁹

Racial inequities persist in the inspection and licensing of food establishments. A study conducted in Louisiana based on 2011 data found that independent restaurants which the researchers

¹⁶¹ See *id.* at 11.

¹⁶² See Cohen, *supra* note 57 (arguing that the elite status of so-called French food is indissociable from its racialization as White).

¹⁶³ See RAY, *supra* note 160, at 11.

¹⁶⁴ See Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147, 2147 (2019) (theorizing discriminatory legislative motivations masked by facially neutral government action).

¹⁶⁵ See Howard Markel & Alexandria M. Stern, *The Foreignness of Germs: The Persistent Association of Immigrants and Disease in American Society*, 80 MILBANK Q. 757, 757 (2002); see also Nancy Tomes, *The Making of a Germ Panic, Then and Now*, 90 AM. J. OF PUB. HEALTH 191, 191 (2000).

¹⁶⁶ Gabriel J. Chin & John Ormonde, *The War Against Chinese Restaurants*, 67 DUKE L.J. 681 (2018).

¹⁶⁷ See, e.g., NATALIA MOLINA, *FIT TO BE CITIZENS?: PUBLIC HEALTH AND RACE IN LOS ANGELES 1879–1939* (Univ. of Cal. Press 2006).

¹⁶⁸ Samantha Barbas, “I’ll Take Chop Suey”: *Restaurants as Agents of Culinary and Cultural Change*, 36 J. POPULAR CULTURE 669, 674–75 (2003).

¹⁶⁹ Keith Aoki, *No Right to Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment*, 40 B.C. L. REV. 37, 64 (1998).

categorize as ethnic experienced more safety violations than those classified as nonethnic or chain restaurants.¹⁷⁰ Inequities in food safety inspections may be due both to a misunderstanding on the part of consumers and food safety inspectors about how certain foods are traditionally prepared and to a comparative lack of resources for some minority-owned restaurants to implement practices that match regulations.¹⁷¹ It has also been suggested that language and cultural barriers are responsible for the difficulty of small, independent restaurants to comply with food safety standards.¹⁷² Health and safety inspections would thus be unfairly biased against food establishments perceived to be non-White, non-American, and non-elite, “docking points for traditional cooking and presentation practices” that do not actually impact the safety of the meals.¹⁷³ An earlier study in the San Francisco Bay area evaluated the factors consumers use to determine whether they think a restaurant is vulnerable to outbreaks of foodborne illnesses.¹⁷⁴ Authors found that fine-dining establishments and buffets scored comparably well, with fine-dining scoring the highest, reflecting, perhaps, that they have more resources to allocate to compliance. The results “varied widely depending on ethnicity French, Italian, and Japanese restaurants were among the highest median performers while Chinese, Mexican, and especially Vietnamese were among the lowest.”¹⁷⁵

In conclusion, a range of attitudes and rationales ground discrimination against and inequities toward eaters and food businesses. The next Part explores what, if anything, current laws and doctrines say about food identities and food-based discrimination.

¹⁷⁰ See Pei Liu & Yee Ming Lee, *An Investigation of Restaurant Food Safety Performance: A Comparison Between Ethnic and Nonethnic and Chain and Independent Restaurants in Louisiana*, 20 J. FOODSERVICE BUS. RSCH. 204, 204 (2017).

¹⁷¹ See *id.*; see also Justin Goss, *A Melting Pot of Cuisines: Examining the Relationship Between Restaurant Ethnicities and Food Safety Inspection Scores* (Apr. 17, 2017) (Master’s Thesis, Georgetown University) (ProQuest).

¹⁷² See Kimberly J. Harris et al., *Food Safety Inspections Results: A Comparison of Ethnic-Operated Restaurants to Non-Ethnic-Operated Restaurants*, 46 INT’L J. HOSP. MGMT. 190, 190 (2015).

¹⁷³ See Andrew Simmons, *Gastronomic Bigotry*, SLATE (Jun. 6, 2014, 8:36 AM), <https://slate.com/human-interest/2014/06/ethnic-restaurants-and-food-poisoning-the-subtle-racism-of-saying-chinese-food-caused-your-stomachache.html>.

¹⁷⁴ See Yumi E. Satow et al., *Factors Used by Restaurant Customers to Predict Sanitation Levels*, 12 J. FOODSERVICE BUS. RSCH. 170, 170 (2009).

¹⁷⁵ See *id.* at 174.

III. THE CURRENT REGULATION OF FOOD IDENTITY

Federal, tribal, state, and local law regulate some aspects of food identity, especially those associated with culture, religion, and medical need, even if it is in a haphazard, unexplicit way. This is particularly true for people who are dependent on the government for their nutrition, be it because they are poor, incarcerated, institutionalized, or receive a portion (or all) of their meals from the government (or government-funded and regulated institutions such as schools).¹⁷⁶ This Part offers a roadmap of some of the laws and policies purporting to support food identities as well as their limitations. It starts by examining the federal government's dietary guidelines, which simultaneously inform and are informed by agricultural priorities, before turning to food assistance programs, prison food, and initiatives to support Indigenous foodways.

A. Dietary Guidelines

According to Melanie DuPuis, "Americans have talked about diet since the founding of the nation," asking the questions "What to eat?" and "How to govern?" in tandem.¹⁷⁷ As this section shows, government dietary advice has not only been tied to agricultural policies and economic interests, but also to politics of exclusion and inclusion. The federal government has offered dietary advice for over a century in various forms.¹⁷⁸ DuPuis' historical research suggests that it has "followed racial, ethnic, and sectional politics that sacralized the cream-based New England diet and treated other peoples' eating as degenerate and less civilized."¹⁷⁹ The very notion that scientifically identified nutrients in food determine the value of people's diets, in other words, was associated with the idea that everyone should eat what White Anglo-Saxons ate.

In the 1990s, federal law imposed a legal obligation on the Secretary of Agriculture and the Secretary of Health and Human Services to create Dietary Guidelines for the U.S. population at

¹⁷⁶ Time and space permitting, other categories of people who are dependent for their nutrition on the state or state-funded and regulated institutions could have been included in this Article such as the hospitalized, members of armed forces living on military bases, children in foster care, migrant farm workers, and people living in transitional housing programs either due to domestic violence or experiencing homelessness or both, among others.

¹⁷⁷ See DUPUIS, *supra* note 21, at 3–4.

¹⁷⁸ See *History of Dietary Guidelines*, DIETARY GUIDELINES FOR AMERICANS, <https://www.dietaryguidelines.gov/about-dietary-guidelines/history-dietary-guidelines> (last visited Sept. 23, 2024).

¹⁷⁹ *Id.* at 67, 92.

large.¹⁸⁰ Issued every five years, they form the basis of federal nutrition policy and programs, guide local, state, and national initiatives, as well as inform various organizations and industries.¹⁸¹ While the USDA does not consider the environmental impact of its Guidelines, it does take into account particular “identified population subgroups”—the phrase includes, but is not limited to groups based on factors such as age, sex, or race.¹⁸² For example, the 2020-2025 guidelines included the following recommendation:

Incorporate Cultural Traditions. Cultural background can have significant influence on food and beverage choices. Customizing the Dietary Guidelines framework to reflect specific cultures and traditions is an important strategy to help communities across the country eat and enjoy a healthy dietary pattern. . . Relying on the expertise of professionals in nutrition and in specific cultural foodways can help people prepare foods healthfully while retaining heritage.¹⁸³

The 2020-2025 Guidelines also aim to provide a “framework intended to be customized to individual needs and preferences, as well as the *foodways of the diverse cultures* in the United States.”¹⁸⁴ Despite these inclusive objectives, a number of non-governmental organizations have faulted the Guidelines for “racial bias,” in particular because of their continued promotion of dairy products and meat and their disparate impact on non-White people.¹⁸⁵ The Food 4

¹⁸⁰ See 7 U.S.C. § 5341(a)(1); see also *Purpose of the Dietary Guidelines*, DIETARY GUIDELINES FOR AMERICANS., <https://www.dietaryguidelines.gov/about-dietary-guidelines/purpose-dietary-guidelines> (last visited Sept. 1, 2024).

¹⁸¹ *Id.*

¹⁸² 7 USCA §5341(b)(1) & (4).

¹⁸³ U.S. Dep’t of Agric. & U.S. Dep’t of Health and Hum. Servs., *Dietary Guidelines for Americans, 2020-2025*, DIETARY GUIDELINES FOR AMERICANS, Dec. 2020, at 1, 27. For other examples of efforts to take into consideration food identities in federal guidelines, see e.g., U.S. Dep’t of Agric., U.S. Dep’t of Health and Hum. Servs. & Indian Health Serv., *My Native Plate*, U.S. DEP’T OF AGRIC. SNAP-ED CONNECTION (2016), <https://snaped.fns.usda.gov/library/materials/my-native-plate> (a nutrition education tool devised by the Indian Health Service to represent dietary guidelines based on traditional Indigenous foods).

¹⁸⁴ U.S. Dep’t of Agric. & U.S. Dep’t of Health and Hum. Servs., *Executive Summary*, DIETARY GUIDELINES FOR AMERICANS, 2020-2025, 2020 at 1, 3 (emphasis added).

¹⁸⁵ See Michael Keevican, *Physicians Committee Faults New Dietary Guidelines for Racial Bias, Calls for Guidelines To Be Redrafted*, PHYSICIANS COMM’N. FOR RESPONSIBLE MED. (Dec. 29, 2020), <https://www.pcrm.org/news/news-releases/physicians-committee-faults-new-dietary-guidelines-racial-bias-calls-guidelines>; see also Gosia Wozniacka, *Should the Dietary Guidelines Help Fight Systemic Racism?*, CIV. EATS (Jul. 28, 2020), <https://civileats.com/2020/07/28/should-the-dietary-guidelines-help-fight>

Health Alliance, an organization working to ensure that the Guidelines are based on science and reflect the needs of underrepresented and disadvantaged communities, found that over 90% of the systematic reviews in the 2020 Scientific Report for the Guidelines did not account for race, ethnicity, and/or socio-economic status.¹⁸⁶ This figure is of particular concern considering that “[m]inorities and all people of low socio-economic status . . . are more likely to consume meals funded by the USDA Feeding Assistance Programs, whose contents are largely determined by” the guidelines.¹⁸⁷ At an even deeper level, as Priya Fielding-Singh has argued, the underlying issue, beyond the Guidelines themselves, is that racism shapes our perception of what foods are healthy or not.¹⁸⁸ For instance, mainstream dietary advice privileges foods coded as White and Western (such as the so-called Mediterranean diet, promoted by the USDA Guidelines, nutritionists, and the popular press, among others), which are culturally constructed as healthier than other foods and cuisines.¹⁸⁹ Yet, they may not be healthier than numerous other foodways such as, for example, the Jamaican diet centered around the fruit ackee, the cassava flatbread bammy, and the leafy green callaloo.¹⁹⁰

Taking into account minority groups’ foodways for law and policymaking purposes is not without precedent. There is mounting evidence that in fact there is no one “best” diet from a health perspective.¹⁹¹ However, American reform projects have embraced

systemic-racism/ (arguing that the latest guidelines “don’t reflect the nation’s growing diversity, or the particular health and dietary risks that communities of color face.”).

¹⁸⁶ *Limitations of the Evidence on Race, Ethnicity, and Socio-economic Status in the Report by the 2020 Dietary Guidelines Advisory Committee*, FOOD4HEALTH ALL. (Aug. 2020), <https://food4health.org/wp-content/uploads/2020/08/F4H-report-113p.pdf>.

¹⁸⁷ *Id.*

¹⁸⁸ See generally PRIYA FIELDING-SINGH, *HOW THE OTHER HALF EATS: THE UNTOLD STORY OF FOOD AND INEQUALITY IN AMERICA* (2021) (arguing that the media and public discourse promote a narrow version of a healthy diet based in part on cultural and racial associations).

¹⁸⁹ See, e.g., Kate Gardner Burt, *The Whiteness of the Mediterranean Diet: A Historical, Sociopolitical, and Dietary Analysis Using Critical Race Theory*, 5 J. CRITICAL DIETETICS 41, 41 (2021); see also DUPUIS, *supra* note 19, at 104–105 (pointing out that the Mediterranean diet is praised for the very features—plant-based and unprocessed—that have been historically vilified in the United States in cuisines from Asian countries, Southern/Soul traditions, and Mexico).

¹⁹⁰ See Janice Goldschmidt et al., *Advancing Cultural Competencies: Applying the Dietary Exchange List System to Jamaican Foods*, 12 HEALTH SCI. J. 1, 7 (May 10, 2018).

¹⁹¹ See Peilu Wang et al., *Optimal Dietary Patterns for Prevention of Chronic Disease*, 29 NATURE MED. 719, 726–727 (2023).

research about people's food identities as part of an effort to "purify" food and society based on the notion that there is one "right" diet."¹⁹² In the late 1920s, industrialist Henry Ford, also known for his racist views, opined that "right eating" should be part of "religious teaching" and that if people learned "to eat the things they should eat, there would be no need for hospitals" and "[j]ails and prison would have less to do."¹⁹³ At the same time, it was recognized that people's food identities could be so ingrained as to making it difficult for dietary change to occur. For example, in 1933, Alberta Childs, the nutrition supervisor of the Infant Welfare Society of Chicago, reported that her organization undertook to find out "what food supplies the Italian, Mexican, Negro, and Polish housewives bought for their families."¹⁹⁴ The motivation was primarily to avoid waste in the city's food relief program, as the Society realized that people "could not be brought to adopt new food habits over night" and that "many racial food habits are economical and otherwise desirable."¹⁹⁵ Soon the federal government itself would turn to the study of food identities.

Historian Rebecca Spang has shown that during the Second World War—and its accompanying food shortages and rationing—the federal government set up a "Committee on Food Habits" (CFH).¹⁹⁶ Its goal was to gain knowledge into people's foodways so as to change them, or more precisely, to "get people to wish what they need" as defined by the Food and Nutrition Board, another committee established at the time.¹⁹⁷ The CFH, which included prominent social scientists such as anthropologist Margaret Mead, was supposed to determine what people need to eat through objective physical requirements for nutrients.¹⁹⁸ The first food habit research was conducted on isolated or minority communities such as immigrant populations in Chicago and New York as well as patients in government psychiatric hospitals because they were perceived as a departure from the norm.¹⁹⁹ The very phrase "food habits" was popularized by the Committee and implicitly connected to racial,

¹⁹² DUPUIS, *supra* note 21, at 11.

¹⁹³ N.Y. State Med. Ass'n & Med. Soc'y State N.Y., *Diet and Morals*, 29 DAILY PRESS 635, 635 (1929).

¹⁹⁴ Alberta B. Childs, *Some Dietary Studies of Poles, Mexicans, Italians, and Negroes*, 9 CHILD HEALTH BULL. 84, 85 (1933).

¹⁹⁵ *Id.* at 85.

¹⁹⁶ Rebecca L. Spang, *The Cultural Habits of a Food Committee*, 2 FOOD & FOODWAYS 359, 360 (1988).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 361.

¹⁹⁹ *Id.* at 364.

ethnic, national, cultural, and disability identities.²⁰⁰ Yet, as Spang writes, a central impetus for the research was to cater to agricultural interests, “the CFH’s purpose was, in fact, to find consumers for surplus soybeans and cabbages.”²⁰¹ Federal nutrition advice was thus keyed to food identities, on the one hand, and agricultural interests, on the other hand. One way to sum up this relationship is that Americans were (and still are, to large extents) advised to eat what the government encourages farmers to produce via its laws and subsidies. This connection explains in part why agricultural surpluses have been used to feed the poor and other groups who rely on government nutrition programs, such as students.²⁰²

B. Government Nutrition Programs

Federal food assistance programs are tasked with increasing food security and reducing hunger by providing low-income people access to food and nutrition education.²⁰³ The USDA delivers nutritional assistance to one in four Americans.²⁰⁴ According to the agency, as of 2023, 13.5% of households were food insecure, and another 13.5% experienced low or very low food security.²⁰⁵ This means that 47.4 million people lived in food insecure households.²⁰⁶ Their numbers increased with the COVID-19 pandemic²⁰⁷ and households with Black members disproportionately suffer from food insecurity.²⁰⁸

²⁰⁰ See *id.* at 378; see also Margaret Mead, *The Problem of Changing Food Habits: Report of the Committee on Food Habits 1941-1943*, 108 BULL. NAT’L RSCH. COUNCIL 1 (1943) (defining food habits as the “culturally standardized set of behaviors in regard to food manifested by individuals who have been reared within a given cultural tradition”).

²⁰¹ Spang, *supra* note 196, at 371.

²⁰² See Kenneth Schlossberg, *Nutrition and Government Policy in the U.S.*, 1978 NUTRITION & NAT’L POL’Y 326, 343 (noting that the permanent school lunch program was established by a 1946 Act of Congress which called it “a measure of national security to safeguard the health and well-being of the Nation’s children and to encourage the domestic consumption of nutritious agricultural commodities.”).

²⁰³ See *id.*

²⁰⁴ See U.S. Dep’t of Agric., *FNS Nutrition Programs*, USDA FOOD & NUTRITION SERV. (Feb. 15, 2024), <https://www.fns.usda.gov/programs>.

²⁰⁵ See U.S. Dep’t of Agric., *Key Statistics & Graphics*, USDA ECON. RSCH. SERV., <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-u-s/key-statistics-graphics/> (last visited Sept. 4, 2024) (defining food insecurity as the uncertainty of having or being able to acquire enough food to meet members’ needs).

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ *Food Security in the U.S.: Measurement*, U.S. DEP’T OF AGRIC., <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-u-s/measurement> (last visited Sept. 16, 2024).

The USDA administers a wide range of food programs, including the School Meals Programs, the Supplemental Nutrition Assistance Program (SNAP), and the Food Distribution Program on Indian Reservations (FDPIR).²⁰⁹ In recent years, the USDA has endeavored to bring some of its programs “into alignment with current federal nutrition guidance policy.”²¹⁰ It does not generally commit to honoring participants’ food identities, but does express an interest in supporting them to some extent. For example, during the pandemic, the Emergency Food Assistance Program (TEFAP), which supplies low-income people with emergency food assistance at no cost, begun to “consider a participant’s perspective on cultural and religious practices around foods” and thus to include some halal and kosher options.²¹¹ Another example is found in the Child Nutrition Programs, for which the USDA “may approve variations in the food components of meals served . . . where . . . necessary to meet ethnic, religious, economic or physical needs.”²¹² Federal law also states that “[s]chools should consider ethnic and religious preferences when planning and preparing meals.”²¹³ But the National School Lunch Program does not make such considerations mandatory and culturally diverse menu options are often few and far between.²¹⁴ Notably, the National School Lunch and School Breakfast Programs require that schools serve cow’s milk to obtain federal subsidies for their meals.²¹⁵ In 2022, a group of 28

²⁰⁹ See U.S. DEP’T OF AGRIC., *Food Assistance Programs*, <https://www.nutrition.gov/topics/food-security-and-access/food-assistance-programs> (last visited Sept. 27, 2024).

²¹⁰ Ann L. Yaktine & Suzanne P. Murphy, *Aligning Nutrition Assistance Programs with the Dietary Guidelines for Americans*, 71 NUTRITION REVIEWS 662, 663 (2013).

²¹¹ See U.S. Dep’t of Agric., *Halal Foods in TEFAP* (July 31, 2024), <https://www.fns.usda.gov/tefap/halal>; see also U.S. Dep’t of Agric., *Kosher Foods in TEFAP* (July 31, 2024), <https://www.fns.usda.gov/tefap/kosher>; see also Kirsten Gillibrand, *Gillibrand Presses USDA On Purchase And Distribution Of Kosher And Halal Food In Farmers To Families Food Box Program* (Feb. 4, 2021), <https://www.gillibrand.senate.gov/news/press/release/gillibrand-presses-usda-on-purchase-and-distribution-of-kosher-and-halal-food-in-farmers-to-families-food-box-program> (suggesting that the program did not include these options before).

²¹² *Variations in Meal Requirements for Religious Reasons: Jewish Schools, Institutions and Sponsor*, U.S. DEP’T OF AGRIC (Mar. 27, 2013), <https://www.fns.usda.gov/cn/variations-in-meal-requirements-for-religious-reasons>.

²¹³ 7 CFR § 210.10(m)(3).

²¹⁴ See, e.g., Mortazavi, *supra* note 12, at 26.

²¹⁵ See 42 U.S.C. §1758(a)(2)(A) (proving that school lunches include cow’s milk and allowing for substitutes if students provide a “written statement from a licensed physician that identifies the disability that restricts the student’s diet and that

organizations submitted a complaint letter to the USDA criticizing the policy as “discriminatory” given the large proportion of lactose intolerant children of color.²¹⁶ The federal and state governments can also further and hinder food identities at the production stage by subsidizing or failing to subsidize the growing of crops central to certain groups’ food identities.²¹⁷

Some programs endeavor to include participants’ food identities in their core design. For instance, the foods available for purchase through the Special Supplemental Nutrition Program for Women, Infants, and Children (aka the “WIC Program”) are determined and reviewed every decade for adequacy with “nutritional science, public health concerns, and cultural eating patterns.”²¹⁸ WIC offers supplemental nutrition and education to pregnant, postpartum, and breastfeeding women, infants, and children up to age five.²¹⁹ The USDA typically provides a “food package” to eligible WIC participants via the use of vouchers, coupons, checks, and electronic benefits transfer cards.²²⁰ Only certain foods are approved for inclusion in the packages, but the list of items and allowed substitutions has widened to better match participants’ dietary needs and preferences.²²¹ Since 2007, the USDA allows whole-grain bread to be substituted with whole-grain tortillas, pasta, rice, or other grains; milk and cheese can now be replaced with

specifies the substitute for fluid milk,” which can be extremely burdensome for underprivileged families with limited healthcare access.).

²¹⁶ Dr. Jewel Bronaugh, *USDA Equity Commission Letter* (July 26, 2022), <https://docs.google.com/document/d/1O-iy0zmVcKzmQe83ztv5LohNnNQSOWX4gGtiSHkmpck/edit>.

²¹⁷ U.S. Dep’t of Agric., *Specialty Crop Block Program*, <https://www.ams.usda.gov/services/grants/scbpgp>; *Ethnic Produce Final Report*, CEI MAINE (2016), <https://www.ceimaine.org/wp-content/uploads/2017/01/Ethnic-Produce-Final-Report.pdf> (state departments of agriculture can apply for federal grants to enhance the competitiveness of specialty crops or set up their own programs, as illustrated by this Maine project to support crops primarily grown and eaten by minority and/or immigrant populations, such as fava beans, amaranth, molokhia, or mustard greens).

²¹⁸ 42 U.S.C 1786 (b) (14) & (f) (11) (C) (ii).

²¹⁹ *Id.*

²²⁰ See Aditi Vasan et al., *Association of WIC Participation and Electronic Benefits Transfer Implementation*, 175 JAMA PEDIATR. 609 (2021).

²²¹ See U.S. Dep’t of Agric., *Food and Nutrition Service, Special Supplemental Nutrition Program for Women, Infants, and Children (WIC): Revisions in the WIC Food Packages*, 87 Federal Register 71090, 71091 (2022), <https://www.govinfo.gov/content/pkg/FR-2022-11-21/pdf/2022-24705.pdf> (proposing to revise WIC regulations to provide inter alia state agencies with greater flexibility to tailor food packages to accommodate participants’ special dietary needs and “personal and cultural preferences” as well as more equitable access.).

soymilk or tofu.²²² The program recently expanded its choice of plant milks beyond soymilk and allow plant-based yogurt.²²³ Whole grain items commonly consumed in minority communities such as sorghum, wheat berries, teff, buckwheat, pita, and naan, among others, also became eligible.²²⁴ These developments testify to the agency's explicit recognition "that culturally preferred foods vary and are unique to individual cultural identity."²²⁵ State and local agencies have substantial authority in the implementation of federal food programs such as nutrition assistance and school lunches.²²⁶ Some have proven to be especially sensitive to food identities and barriers in food access. For instance, New York introduced a bill that would require public schools to offer plant-based, kosher, and halal menu items in the cafeteria.²²⁷

At the same time, nutrition assistance programs have been criticized for failing to provide healthy and culturally appropriate foods to participants and depriving them of control over their eating.²²⁸ Even when participants are allowed to select their own foods with few formal constraints, choices are often overdetermined by price and accessibility. For instance, SNAP participants can use their benefits to purchase their preferred items at stores authorized by the government. For stores to be eligible to participate in SNAP they must stock "staple foods," defined as vegetables or fruits, dairy

²²² See U.S. Dep't of Agric., *USDA Finalizes Changes to the WIC Program, Expanding Access to Healthy Fruits and Vegetables, Whole Grains, and Low-Fat Dairy for Women, Infants, and Children*, USDA-FNS, 2014, <https://www.fns.usda.gov/pressrelease/2014/003114>. See also Food Research & Action Center, *Impact of the Revised WIC Food Packages 2* (May 2019), https://frac.org/wp-content/uploads/frac_brief_revised_wic_food_package_impact_nutrition_retail.pdf

²²³ See U.S. Dep't of Agric., 2024 final rule on *Special Supplemental Nutrition Program for Women, Infants, and Children (WIC): Revisions in the WIC Food Packages* submitted to the Office of the Federal Register (OFR) at 29.

²²⁴ *Id.*, at 74.

²²⁵ *Id.*, at 75.

²²⁶ See U.S. Dep't of Agric., *State/Local Agency* (Dec. 12, 2022), <https://www.fns.usda.gov/snap/state>.

²²⁷ See NY Senate, *NY Making Equitable and Alternative Lunches (MEAL) Act*, <https://www.nysenate.gov/legislation/bills/2021/A10102>.

²²⁸ See, e.g., Andrea Freeman, "First Food" Justice: Racial Disparities in Infant Feeding as Food Oppression, 83 *FORDHAM L. REV.* 3053 (2015) (criticizing the WIC program for its failure to support participants to breastfeed); Mortazavi, *supra* note 12, at 1 (arguing that the National School Lunch Program teaches a "discriminatory account of what it means to eat and be American"); Freeman, *Unconstitutional Food Inequality*, *supra* note 21.

products, meat, poultry, or fish, and breads or cereals.²²⁹ The SNAP regulations do not include in their definition of “staple food items” requirements of cultural or health appropriateness.²³⁰ Participants may thus live in areas in which authorized retailers do not carry, for instance, “ethnically assorted food staple items aimed at serving the Bangladeshi community and the Muslim community, including halal meat and Bangladeshi specialty items,” as was raised in litigation.²³¹ Food choice is also constrained, regardless of location, by cost. The cheapest and most ubiquitous foods tend to be those subsidized by the government and typical of what nutritionists call the Standard American Diet (“SAD”).²³² This is a high-fat, high-sugar, and high-meat way of eating that relies heavily on processed foods.²³³ It is also low in fresh fruits and vegetables and known for its negative health, animal welfare, and environmental impacts.²³⁴ In other words, even when participants can in theory purchase their foods of choice, in reality options may be so constrained that they cannot express their food identities.²³⁵

As the next section illustrates, federal law also plays an important role in defining the foods consumed by institutionalized persons in ways that relates to their food identities.

C. Institutionalized Persons

Institutionalized persons are defined as those receiving mental health treatment in state-owned, and/or regulated facilities, people who are incarcerated, and others who reside in facilities

²²⁹ 7 C.F.R. § 271.2. (defining “staple food” as “those food items intended for home preparation and consumption in each of the following food categories: meat, poultry, or fish; bread or cereals; vegetables or fruits; and dairy products.”).

²³⁰ *Id.*

²³¹ *Kawran Bazar Inc. v. United States*, No. 15-CV-6109 (NGG) (JO), 2016 U.S. Dist. LEXIS 172240 (E.D.N.Y. Dec. 12, 2016):

<https://plus.lexis.com/api/permalink/d0460eca-a298-47ea-947f-a25ece3ee71a/?context=1530671>. But note that some states have adopted rules for the authorization of stores that are more protective of participants’ food identities. *See, e.g.*, 28 PA. CODE § 1103.7.

²³² *See* DuPuis, *supra* note 21, at 3, 99; *but see* MICHAEL CAROLAN, *THE REAL COST OF CHEAP FOOD* (1st ed. 2011) (attacking the myth of cheap food by showing that the cheapest foods are extremely expensive when their social, health, environmental, and other costs are internalized).

²³³ *See* David Grotto & Elisa Zied, *The Standard American Diet and Its Relationship to the Health Status of Americans*, 25 NUTRITION IN CLINICAL PRAC. 603, 603 (2010).

²³⁴ *See id.*

²³⁵ *See* Andrea Freeman, *Fast Food: Oppression Through Poor Nutrition*, 95 CAL. L. REV. 2221, 2222 (2007) (labeling this predicament as food oppression).

owned and/or regulated by the government. People who meet the definition of “institutionalized persons” typically lack agency with respect to their eating. Most or all of the meals are provided by the institution that houses them, in quantities and at times decided by administrators and staff members. Institutions such as hospitals, nursing homes, and carceral facilities often serve more or less the same mass-produced food.²³⁶

Nursing facility residents appear to be the most extensively protected institutionalized persons under the law.²³⁷ Not only must facilities “provide each resident with a nourishing, palatable, well-balanced diet,” but also they are required to take “into consideration the preferences of each resident” regardless of whether those are based on religion, culture, ethnicity, or idiosyncrasy.²³⁸ Notably, the food and drink they receive must be “palatable” and “attractive.”²³⁹ This is an unusual mandate in U.S. law and culture, which often approach food through a nutritionist lens, that is, from the perspective of a meal’s nutritional components and calories, rather than a yearning for taste and pleasure.²⁴⁰ The unusual requirement might be explained by the cultural valorization of the elderly, even if the United States is not generally known for its high-quality elder care (and in practice anecdotal evidence suggests that the food served in nursing facilities fails to meet the mandate).²⁴¹ By contrast, other institutionalized populations are usually stigmatized, most prominently the mentally ill or disabled and the incarcerated.

Prison food has received significant attention from scholars, advocates, and courts due to incarcerated people’s unique

²³⁶ See, e.g., Frederick J. Demicco & John A. Williams, *A Current Perspective on Institutional/Contract Foodservice Management: The Once Lost and Found “I” in HR&IM*, 8 HOSP. & TOURISM EDUCATOR 15, 15 (1996) (emphasizing the breadth of institutional foodservice). Though individuals may resist this control by obtaining foods from other sources, such as prison commissaries, hospital stores, vending machines, visitors, or from other institutionalized persons.

²³⁷ 42 C.F.R § 483.60; see also 42 C.F.R § 483.60(c)(4).

²³⁸ *Id.*

²³⁹ 42 C.F.R § 483.60 (d)(2).

²⁴⁰ See generally GYORGY SCRINIS, *NUTRITIONISM: THE SCIENCE AND POLITICS OF DIETARY ADVICE* (2013) (arguing that the prevailing nutritional paradigm is reductionist, myopically focusing on the health effects of individual nutrients in food in isolation).

²⁴¹ See Catherine Virginia, *Nursing home kitchens in ‘horrible’ condition endanger the elderly, advocates say*, NBC NEWS (Oct. 3, 2019), <https://www.nbcnews.com/news/us-news/nursing-home-kitchens-horrible-condition-endanger-elderly-advocates-say-n1061216>

vulnerability and dependency.²⁴² Sociologist Rebecca Godderis argues that eating is a central locus of identity and expression in the carceral context.²⁴³ The power of food is intensified in this environment, she notes, because of the lack of control imprisoned people have over themselves and their bodies.²⁴⁴ According to the Maryland Food & Prison Abolition Project, “[o]ne difference about the carceral context is that there is a free-standing right to food there.”²⁴⁵ This right has been established by the case law, which requires, among basic minima, that three meals be offered daily that have a sufficient calorie count to “maintain normal health.”²⁴⁶ Courts have interpreted the Eighth Amendment to protect incarcerated individuals from the deprivation of “life’s necessities” such as food.²⁴⁷ But the use of “special disciplinary diets is not uncommon in prison,” for instance in the form of unappetizing, but nutritionally adequate, loaves containing a mixture of ingredients, which have been upheld by courts except when “so revolting that prisoners simply would not eat it.”²⁴⁸

The Maryland Food & Prison Abolition Project observes that food is routinely used as a form of violence and punishment.²⁴⁹ Imprisoned people may be served inadequate or insufficient food and prevented from controlling what, when, and how they eat.²⁵⁰ Plaintiffs have thus claimed that they were denied vegan diets,²⁵¹ Ital

²⁴² See LESLIE SOBLE ET. AL., *EATING BEHIND BARS: ENDING THE HIDDEN PUNISHMENT OF FOOD IN PRISON* (2020); see also SALVADOR JIMENEZ MURGÍA, *FOOD AS A MECHANISM OF CONTROL AND RESISTANCE IN JAILS AND PRISONS: DIETS OF DISREPUTE* (2020); see also ERIKA CAMPLIN, *PRISON FOOD IN AMERICA* (2017).

²⁴³ See Rebecca Godderis, *Food for Thought: An Analysis of Power and Identity in Prison Food Narratives*, 50 *BERKELEY J. SOCIO.* 61, 61–62 (2006).

²⁴⁴ See *id.* at 73.

²⁴⁵ MARYLAND FOOD & PRISON ABOLITION PROJECT, *I REFUSE TO LET THEM KILL ME: FOOD, VIOLENCE, AND THE MARYLAND CORRECTIONAL FOOD SYSTEM* 49 (2021).

²⁴⁶ See, e.g., *Cunningham v. Jones*, 567 F.2d 653 (6th Cir. 1977); see also AMERICAN BAR ASSOCIATION, *ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS* 82 (3d ed. 2011).

²⁴⁷ See, e.g., *Landman v. Royster*, 333 F. Supp. 621, 647 (E.D. Va. 1971) (class action enjoining punishment consisting of a bread and water diet).

²⁴⁸ AMERICAN BAR ASSOCIATION, *ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS* 83 (3d ed. 2011).

²⁴⁹ MARYLAND FOOD & PRISON ABOLITION PROJECT, *supra* note 245, at 17.

²⁵⁰ See *id.* at 13.

²⁵¹ See *Vinning-El v. Evans*, 657 F.3d 591 (7th Cir. 2011).

diets,²⁵² medically necessary gluten-free diets,²⁵³ raw-food diets,²⁵⁴ non-vegetarian halal diets,²⁵⁵ kosher diets,²⁵⁶ or the opportunity to eat game meat as part of the Navajo Tribe’s harvest celebration.²⁵⁷ A 2019 report on state prisons from the civil-rights organization Muslim Advocates stated that the “most common accommodation problem identified by Muslim prisoners in their federal lawsuits was difficulty receiving a diet accommodation.”²⁵⁸

In theory, incarcerated persons who require special foods on religious grounds are protected by federal and state law—the First and Eighth Amendments, the 1993 Religious Freedom Restoration Act (RFRA)²⁵⁹ (for those in federal facilities), the 2000 Religious Land Use and Institutionalized Person Act (RLUIPA)²⁶⁰ (for those in state and local facilities), and the Federal Bureau of Prisons and states’ laws and policies, among others. RFRA and RLUIPA define “religious exercise” broadly to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”²⁶¹ The Department of Justice’s Civil Rights Division specifies that its RLUIPA work includes bringing suits on behalf of people discriminated against on the basis of diet.²⁶² While incarcerated persons following specific diets based on religious beliefs or medical needs usually prevail, there is no requirement to accommodate those who observe a “diet based on ‘purely secular’ concerns such as health or animal suffering” and personal or cultural preferences.²⁶³

²⁵² See *Daley v. Lappin*, 555 F. App’x 161 (3d Cir. 2014).

²⁵³ See *Jamison v. Clarke*, No. 7:18-CV-00504, 2020 WL 618838 (W.D. Va. Feb. 10, 2020).

²⁵⁴ See *Africa v. Pennsylvania*, 662 F.2d 1025, 1036–37 (3d Cir. 1981).

²⁵⁵ *Jones v. Carter*, 915 F.3d 1147 (7th Cir. 2019).

²⁵⁶ *Greer v. Dowling*, No. CIV-14-708-M, 2017 WL 8222640 (W.D. Okla. June 22, 2017), report and recommendation adopted, No. CIV-14-708-M, 2018 WL 1322050 (W.D. Okla. Mar. 14, 2018), *aff’d in part, rev’d in part and remanded*, 947 F.3d 1297 (10th Cir. 2020).

²⁵⁷ *Schlemm v. Wall*, 784 F.3d 362, 363 (7th Cir. 2015).

²⁵⁸ MUSLIM ADVOCATES, FULFILLING THE PROMISE OF FREE EXERCISE FOR ALL: MUSLIM PRISONERS ACCOMMODATION IN STATE PRISONS 17 (2019).

²⁵⁹ 42 US § 2000bb, *et. Sq.* (1993).

²⁶⁰ *Id.*

²⁶¹ *Id.* at § 2000cc-5(7)(A).

²⁶² *Religious Land Use and Institutionalized Persons Act*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/religious-land-use-and-institutionalized-persons-act-0> (last visited Sept. 15, 2024).

²⁶³ See, e.g., Tim Phillips, *Veganism and the U.S. Legal System*, in THE ROUTLEDGE HANDBOOK OF VEGAN STUDIES 134, 141 (Laura Wright ed., 2021).

Despite the lack of legal mandate to accommodate non-religious and non-medical diets, some state department of corrections as well as federal facilities have policies professing to offer alternative meals, including vegan and/or vegetarian options, regardless of eaters' motivations.²⁶⁴ Assuming this is true in practice, the carceral context offers a four-fold matrix: 1) situations in which there is a legal right to certain diets, which is honored, e.g., when religious food accommodations are successfully provided; 2) situations in which there is a legal right to certain diets, which is violated, e.g., when religious food accommodations are inadequate or absent, as in the example of halal mentioned above; 3) situations in which there is no legal right to receive a certain diet, but institutions accommodate people's requests anyways, even if

²⁶⁴ See, e.g., State of Alaska Department of Correction, *Food Service Standards*, <https://doc.alaska.gov/pnp/pdf/805.01.pdf?051716> (offering vegetarian diets in addition to religious and therapeutic diets); Georgia Department of Corrections, *Alternative Entrée Program*, <https://public.powerdms.com/GADOC/documents/105540> (including vegan meals); Idaho Department of Correction, *Food Services*, <https://www.idoc.idaho.gov/content/prisons/resident-services/food-services> (“including vegetarian menus and a ‘healthy choice’ option, to meet individual dietary needs.”); Indiana Department of Correction, *The Development and Delivery of Foodservices*, <https://www.in.gov/idoc/files/04-01-301-FoodService-9-1-2022.pdf> (providing “special diets to incarcerated individuals who cannot eat the regular, scheduled meals due to religious, moral, or medical conditions” including diabetic, renal, Kosher, and vegan diets); Kansas Department of Corrections, *Programs and Services: Medical and Religious Diets and Vegetarian Alternative Diet 3*, <https://www.doc.ks.gov/kdoc-policies/AdultIMPP/chapter-10/10-119/view> (offering a “vegetarian alternative diet,” which must be requested to the chaplain or another designated staff based on “the offender’s declaration that he/she wishes to eat the vegetarian alternative diet.”); Minnesota Department of Corrections, *Menus and Nutrition*, <https://mn.gov/doc/about/menus-and-nutrition/> (offering “ovo-lacto vegetarian-based meals”); New York State Corrections and Community Supervision, *Food Service Operation Manual 24* (2018), <https://doccs.ny.gov/system/files/documents/2019/08/Food%20Service%20Operations%20Manual.pdf> (serving “an alternative entrée in a manner that will accommodate . . . various religious and personal dietary practices”); North Carolina Department of Public Safety, *Prisons Food and Nutrition Management Policies and Procedures 1* (2020), <https://www.ncdps.gov/documents/files/food-and-nutrition-management-polices-procedures/open> (offering vegetarian entrées for those who request a non-meat entrée); South Carolina Department of Correction, *Food Services Operations*, <https://www.doc.sc.gov/policy/ADM-16-05.htm.pdf> (“Vegetarians may choose to eat the meat-free, animal-free, ‘Alternate Entrée Diet.’”). See also Julia Martinier & Geoff Horsfield, *Federal Facilities Should Offer More Plant-Based or Vegetarian Options* (Aug. 30, 2022), <https://www.ewg.org/news-insights/news/2022/08/federal-facilities-should-offer-more-plant-based-or-vegetarian-options> (reporting that nearly “half of federal facilities surveyed routinely offer a plant-based or vegetarian entree option”).

imperfectly; and 4) situations in which there is no legal right to obtain a certain diet and no efforts are made to accommodate eaters.

To summarize, when people are most dependent on the federal and state government for their food needs, laws and doctrines explicitly support some food identities, most prominently those defined in religious and medical terms. But concrete practices do not appear to generally live up to these commitments even if some institutions strive to meet their residents' food identities, whatever they are. The next section focuses on the special case of Indigenous foodways, which are increasingly revived and reclaimed via legal means.

D. Indigenous Foodways

Food and identity are frequently connected in tribal laws.²⁶⁵ Dozens of tribal Constitutions and statutes protect tribal members' hunting, trapping, fishing, and plant gathering rights, highlighting the relationship between food procurement and identity.²⁶⁶ A few

²⁶⁵ The federal government itself recognizes and encourages this connection. *See* 25 U.S.C.A. § 4354 (West 2021) (requiring the “head of each agency” to “take actions that help empower Indian tribes, tribal organizations, and Native Hawaiian organizations to showcase the heritage, foods, traditions, history, and continuing vitality of Native American communities.”). *See also* Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555 (2021) (arguing that tribal law is too often excluded from the “mainstream conception of ‘American law’”).

²⁶⁶ *See, e.g.*, Kenaitze Indian Tribal Code (Alaska), Tribal Council Ordinance 1999-02 Hunting, Fishing and Gathering (Amended and Restated 2017.11.17) (“The Hunting, Fishing, Gathering Commission is hereby authorized by the Tribal Council to carry out hunting, fishing, gathering, activities.”); Hopi Laws (Arizona) (Constitution Article IV (right to hunt for eagles in traditional territories); Ordinance 48, Section 7.25 (right to fish and hunt small game or migratory birds); White Mountain Apache (Arizona), White Mountain Apache Code, Section 5.7 (right to hunt big and small game); Mohegan Tribe (Connecticut), Mohegan Tribe Code of Laws, Section 8-107(a) (finishing permitted in certain areas); Nez Perce (Idaho), Nez Perce Tribal Code, Section 3-1-45 (allowing tribal members to fish “for ceremonial purposes” and certain hunting); Pokagon Band of Potawatomi (Indiana), Pokagon Band of Potawatomi Codes, Section 4.01(c) and Section 4.01(d) (right to fish and gather wide plants); Grand Traverse Band of Ottawa and Chippewa Indians Tribe (Michigan), Constitution Article X, Section 2 (“It shall be the Tribal Policy ... to protect treaty rights to ‘fish, hunt, trap and gather food’”); Little River Band of Ottawa Indians (Michigan), Little River Band of Ottawa Indians Tribal Code, Natural Resource Regulations Chapter 1 Section 4 (“Members “may exercise Inland Article 13 Rights, including hunting, fishing, trapping and gathering”); Pokagon Band of Potawatomi (Michigan), Pokagon Band of Potawatomi Tribal Code Hunting and Gathering Code (“Article I, Section 2 of the Constitution reserves to Citizens the right to engage in certain Natural Resource Activities for Permitted

Uses”); Sault Ste. Marie Tribe (Michigan); Sault Ste. Marie Tribal Code Chapter 21, Subchapter II 22.201 (“Tribal members may engage in hunting, fishing, trapping and gathering activities on lands and inland waters within the outer boundaries of the-Ceded Territory”); Lower Sioux (Minnesota), Lower Sioux Tribal Laws, Constitution Article X Section 1 (“any and all treaties assuring the rights and privileges of people of Indian blood the right to hunt and fish are not affected by anything in this Constitution.”); Minnesota Chippewa Tribe (Minnesota), Minnesota Chippewa Tribe Ordinances, Ordinance #8 Natural Resources Protection, Section 300 (“This Ordinance is enacted ... so that the hunting, fishing, trapping, wild rice, and all other natural resources of the reservations’ and Tribe’s may be preserved and protected”); Mississippi Band of Choctaw Indians (Mississippi), Mississippi Band of Choctaw Indians Tribal Code Title X Hunting and Fishing Code, Chapter 4 Section 10-4-1(1) (“Indians, whether members of this Tribe or not, may take any kind of wildlife protected by the Tribal Code and located within the exterior boundaries of the Choctaw Reservation for the Choctaw community or family consumption purposes, but not for commercial purposes, without obtaining any Tribal or state license or permit to so do”); Fort Peck Tribes (Montana), Fort Peck Tribes Comprehensive Code of Justice, Title 19 Game and Fish Management, Section 201 (“Members of the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation shall be allowed to hunt and fish on the Reservation with special free permits”); Winnebago (Nebraska), Winnebago Tribal Code, Title 8, § 8-149(1) (“The Wildlife and Parks Commission shall, at its discretion, and upon application of any member or members of the Tribe of Winnebago Indians, have the right to grant a special permit to take or kill a big game in the off-season.”); Mescalero Apache (New Mexico), Mescalero Apache Tribal Code Chapter 15, Section 15-4-2 (“Tribal members need not obtain a permit to take small game”); Sisseton Wahpeton Oyate (North Dakota), Sisseton Wahpeton Oyate Judicial Codes (“Only enrolled members of the Tribe may hunt, trap or fish during any season designated a Tribal season.”); Standing Rock Sioux Tribe (North Carolina), Standing Rock Sioux Tribe Titles, Section 9-905 (“Members of the tribe and their non-member Indian spouses shall be issued a member game, fish and wildlife license”); Confederated Tribes of the Grand Ronde Community of Oregon (Oregon), Confederated Tribes of the Grand Ronde Community of Oregon Ordinances and Resolutions, Chapter 801(a) (“The exercise of hunting and fishing are “of critical importance to the culture, subsistence, and health and welfare of the Tribe”); Confederated Tribes of Warm Springs (Oregon), Confederated Tribes of Warm Springs Tribal Code, Chapter 350, § 350.010 (The tribe is provided the “exclusive right to hunt on the reservation” and is guaranteed “the right to hunt on unclaimed land in common with the citizens of the United States”) and § 350.220 (non-members are not allowed to pursue, shoot or kill wild animals/birds within the reservation except within “the McQuinn Strip” under the agreement); Chehalis (Washington), Chehalis Tribal Code, § 10.25.020 (The Tribe has exercise over hunting rights to “provide for the subsistence and ceremonial needs” of the tribe), §10.30.010 (only members can hunt); Colville (Washington), Colville Tribal Law and Order Code, § 4-1-70 (members are eligible to fish and hunt); Hoh Tribe (Washington), Hoh Tribe Law and Order Code, Section 4 (“Only members can fish for “commercial, subsistence and ceremonial purposes” except that married spouses of members may do so); Jamestown S’Klallam Tribe (Washington), Jamestown S’Klallam Tribe Tribal Code, § Section 6.04.01 (specifying who is eligible to fish); Nisqually (Washington), Nisqually Tribal Code (Enrolled members are authorized to fish for ceremonial and subsistence, but need

include in addition an explicit recognition of a right to culturally appropriate foods. For instance, the Constitution of the Tlingit & Haida Indian Tribes of Alaska protects “the access to native foods and traditional practices through our inherent rights to traditional and customary hunting, fishing and gathering.”²⁶⁷ Tribal statutes and Codes sometimes include similar provision.²⁶⁸ This legal recognition of traditional food practices can be read as a reaction to centuries of colonization and violence that disrupted Indigenous communities’ control of their own land and food systems, as Devon Mihesuah and Elizabeth Hoover have highlighted.²⁶⁹ Indigenous peoples disproportionately suffer from diet-related diseases compared to other Americans.²⁷⁰ For instance, the Comanches “traditionally

a valid fisherman identification card); Port Gamble S’Klallam Tribe (Washington), Port Gamble S’Klallam Tribe Law and Order Code, § 17.02.01 (specifying fishing rights), § 18.01.10 (specifying hunting rights); Puyallup (Washington), Puyallup Tribal Codes, § 12.08.140 (hunting rules and eligibility); Shoalwater Bay (Washington), Shoalwater Bay Code of Laws, § 24A-05-00 (Designated hunters can be appointed for hardship and ceremonial permits) & § 24A-11-00 (It would be unlawful for a hunter to kill more than 1 deer and 1 elk in a hunting season unless special provisions were made); Skokomish (Washington), Skokomish Codes and Ordinances, § 7.02.040 (Enrolled members are eligible to exercise fishing rights), § 7.03.009 (Members are eligible to exercise hunting rights); Snoqualmie (Washington), Snoqualmie Tribal Codes §.6.4 (hunting eligibility); Spokane Tribe (Washington), Spokane Tribe of Indians Law and Order Code, § 17-11.02 (Enrolled members are allowed to hunt, fish and trap unless prohibited, and no fishing/hunting licenses are required of members unless required by the Council); Suquamish (Washington), Suquamish Tribal Code §14.1.14-§14.3.9 (fishing, hunting, and trapping rules and eligibility); Swinomish (Washington), Swinomish Tribal Code, § (18-03.010 – 18-04.030 (fishing, hunting, and gathering rules and eligibility); Tulalip (Washington), Tulalip Tribal Codes §8.05.050-§8.10.100 fishing and hunting rules and eligibility); Stockbridge-Munsee (Wisconsin), Stockbridge-Munsee Ordinances, Section 21.8(A) (“Members do not need a hunting permit when “hunting, possessing, or transporting any game lawfully taken within the boundaries” as long as: 1. the member has a valid tribal identification; and 2. the member is at least 12 years old and completed an “approved hunter safety course and possesses a certificate”).

²⁶⁷ Central Council of Tlingit & Haida Indian Tribes of Alaska Statutes (Alaska), CONST. ART. XII.2, <http://www.ccthita.org/government/legislative/>; *see also* the Grand Traverse Band of Ottawa and Chippewa Indians Tribes CONST. ART X.2: (“It shall be the Tribal Policy ... to protect treaty rights to ‘fish, hunt, trap and gather food’”), <https://ecode360.com/GR1800/document/698380155.pdf>

²⁶⁸ *See supra* note 266.

²⁶⁹ DEVON A. MIHESUAH & ELIZABETH HOOVER, *INDIGENOUS FOOD SOVEREIGNTY IN THE UNITED STATES: RESTORING CULTURAL KNOWLEDGE, PROTECTING ENVIRONMENTS, AND REGAINING HEALTH* (2019); *see also* Freeman, *supra* note 18, at 154.

²⁷⁰ *See* U.S. Dep’t of Health and Human Services Office of Minority Health, *Obesity and American Indians/Alaska Natives*,

hunted wild game . . . , traded and raided for agricultural foods, gathered wild plants, and, by necessity, were physically active.”²⁷¹ When they were forced into reservations in the 1870s and deprived of their traditional foodways they began to suffer from diet-related diseases.²⁷²

The concept of food sovereignty acquired an official definition in 1996 when La Vía Campesina, an international peasant movement, described it as “the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems.”²⁷³ It is widely used by Indigenous Peoples, Nations, and organizations to characterize their efforts to transform and reclaim food systems.²⁷⁴ Part of this work is directed at reforming federal nutrition assistance programs, that is, at undoing some of the harmful aspects of federal food law. Some of the people living on reservations may be reliant on federal rations from the FDPIR, the program for income-eligible tribal households, for a majority of their nutritional needs. This dependency is the direct result of land dispossession, environmental degradation, and the undermining of Indigenous cultures.²⁷⁵ In recent years, some tribal governments successfully reclaimed control over the program. For instance, the

<https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=40> (last visited Sept. 15, 2024) (reporting that as of 2018, 48.1% of American Indians/Alaska Natives aged 18 and over were “obese” compared to 30% non-Hispanic Whites); *see also* U.S. Dep’t of Health and Human Services Office of Minority Health, *Diabetes and American Indians/Alaska Natives*,

<https://www.minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlID=33> (last visited Sept. 15, 2024) (reporting that 23.5% of American Indians/Alaska Natives aged 18 and over had diabetes in 2018 compared to 8% non-Hispanic Whites).

²⁷¹ Devon Mihesuah, *Comanche Traditional Foodways and the Decline of Health*, in *INDIGENOUS FOOD SOVEREIGNTY IN THE UNITED STATES: RESTORING CULTURAL KNOWLEDGE, PROTECTING ENVIRONMENTS, AND REGAINING HEALTH* 223, 223 (Devon A. Mihesuah & Elizabeth Hoover eds., 2019).

²⁷² *See id.*

²⁷³ Declaration of Nyéléni, *LA VÍA CAMPESINA* (Feb. 27, 2007),

<https://viacampesina.org/en/declaration-of-nyi>; *but see* Devon G. Pena, *Autonomia and Food Sovereignty: Decolonization Across the Food Chain*, in *MEXICAN-ORIGIN FOODS, FOODWAYS, AND SOCIAL MOVEMENTS: DECOLONIAL PERSPECTIVES* 5, 10–13 (Devon G. Pena, Luz Calvo, Pancho McFarland & Gabriel R. Valle eds., 2017) (questioning La Vía Campesina’s adherence to Western concepts of human rights and its anthropocentric prioritization of human interests over other beings).

²⁷⁴ *See, e.g.*, First Nations Development Institute, *About Food Sovereignty*, <https://www.nativefoodsystems.org> (last visited Sept. 16, 2024).

²⁷⁵ Steph Tai, *In Fairness to Future Generations of Eaters*, 32 *GEO. ENV’T L. REV.* 515, 516 (2020); *see also* Kathy Lynn, *The Impacts of Climate Change on Tribal Traditional Foods*, 120 *CLIMATE CHANGE* 545, 548–49 (2013).

FDPIR Self-Determination Demonstration Project launched pilot initiatives in tribal nations including the Mississippi Band of Choctaw, the Chickasaw Nation of Oklahoma, and the Lummi Nation from Washington state.²⁷⁶ The Project “allows these selected tribes to buy food directly from commercial vendors—many of them from within their own tribes and from their neighbors—instead of providing a standardized set of options typical of the FDPIR or ‘commodity foods’ program.”²⁷⁷ Other initiatives include the “Decolonizing the Diet Project” at Northern Michigan University led by Dr. Martin Reinhardt, an Anishinaabe Ojibway citizen of the Sault Ste. Marie Tribe of Chippewa Indians from Michigan.²⁷⁸ It aims at reconnecting “humans with foods that are Indigenous to the Great Lakes Region and that were part of Indigenous peoples’ diets prior to colonization.”²⁷⁹

These initiatives go well beyond the measures identified above in other federal programs such as WIC, as they aim at structurally changing the ways in which communities grow, distribute, and consume food. Conjoined with tribal Constitutions and statutes’ strong recognition of food-related rights, they cast tribal law as unique in its acknowledgment of food identity as a central legal interest. State laws have also been a source of recognition and protection of Indigenous foodways. In 2011, Hawai‘i passed a statute to exempt traditional producers of the staple poi from standard food preparation requirements such as using a certified food-processing establishment or obtaining a permit from the department of health.²⁸⁰ As Hi‘ilei Julia Kawehipuaakahaopulani Hobart argues, this change resulted from a movement to “indigenize the law” prompted by the 2009 arrest of a kalo farmer and activist for making poi by hand following traditional methods.²⁸¹ Some of the food safety rules on the books until then dated back to the 1910s, when the pre-statehood Hawai‘i Board of Health had targeted poi on the ground that it was implicated in a cholera outbreak, leveraging an “eliminary logics

²⁷⁶ See Kalen Goodluck, *This Program Is Supporting Tribal Food Sovereignty with Federal Dollars* (July 5, 2022), <https://civileats.com/2022/07/05/indigenous-foodways-tribal-food-sovereignty-fdpiir-usda-commodity-foods-health-nutrition-access/>.

²⁷⁷ *Id.*

²⁷⁸ See Martin Reinhardt, *Spirit Food. A Multi-Dimensional Overview of the Decolonizing Diet Project*, in *INDIGENOUS INNOVATIONS* 81, 81 (Elizabeth Sumida Huaman & Barath Sriraman eds., 2015).

²⁷⁹ *Id.* at 82.

²⁸⁰ H.I. Rev. Stat. §321-4.7 (2019).

²⁸¹ HI‘ILEI JULIA KAWEHIPUAAKAHAOPULANI HOBART, *COOLING THE TROPICS, ICE, INDIGENEITY, AND HAWAIIAN REFRESHMENT* 91 (2022).

of assimilation . . . through discourses of ‘safety.’”²⁸² The 2011 statute can thus be seen as an example of successful legal protection of Kānaka Maoli’s food identities and undoing of enduring forms of food discrimination.

This Part has shown that a law of food identity already exists in the United States, which alternatively protects and undermines people’s foodways, often placing the needs of the agri-food industry over eaters’. Even rights-holders face substantial challenges in accessing healthy and culturally appropriate foods. The next Part examines how conventional constitutional law frameworks treat food identities.

IV. THE POTENTIAL CONSTITUTIONAL LAW OF FOOD IDENTITY

At first sight, the U.S. legal system appears to be a good candidate to protect food identities. American law has endorsed identity-based claims in several areas, particularly in constitutional doctrine, influenced by the identity-based social movements of the twentieth and twenty-first centuries.²⁸³ Additionally, the United States is uncommon among other nation-states in that it does not tie its national identity to a specific cuisine or set of iconic dishes, but rather distinguishes its foodways by the fact that they are multiple and diverse.²⁸⁴ Taken together, these two facets of American law and culture could have led to the legal recognition and support of a wide range of food identities. This Part reflects on why this is not the case, conducting an analysis of how food identity claims would fare under forms of constitutional analysis traditionally applicable—equality law, freedom of religion, and fundamental rights. The Article does not advocate that food identity be recognized under any of these frameworks, but rather explores what it would take to do so.

A. Equality Law

To entrench food identities, an obvious place to start is equality law (broadly defined as encompassing equal protection and antidiscrimination law) given that this field developed around a

²⁸² *Id.* at 92.

²⁸³ See William N. Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2065 (2002).

²⁸⁴ See *supra* notes 57-62 and accompanying text.

grounds-based system of protected characteristics or identities.²⁸⁵ A protected (or “suspect”) class or group is an identity-based category of people protected against discrimination.²⁸⁶ The list of protected groups differs depending on whether the relevant law derives from the federal or the state government and the type of law at stake (Constitution, statutes, or regulations). There is no universally agreed upon definition of a protected class, though groups labeled by race, religion, national origin, or citizenship are typically protected.²⁸⁷ Under federal constitutional law, the criteria elaborated over the years by the Supreme Court to demarcate groups that receive protection, include the immutability of a given characteristic or trait (or the fact that a trait is considered too important for anyone to be asked to change);²⁸⁸ a history of discrimination on the basis of the trait(s) in question; and the lack of political power of those sharing the trait(s).²⁸⁹ Courts apply these indicia somewhat inconsistently, making it hard to predict how food identity would fare. In what follows, each criterion is examined in turn to suggest that food identity is most likely to get traction under the doctrine where an already protected group is at stake.

Immutability/Importance. According to equal protection doctrine, a trait is immutable if it is beyond the power of an individual to change or central to their personal identity.²⁹⁰ It is debatable whether eating practices are immutable and/or too important for eaters to be asked to change. Some people’s diets are inflexible, be it because of their ethical, cultural, or religious underpinnings, or because of health needs such as allergies and intolerances.²⁹¹ Others’ may be variable and changing.²⁹² The immutability criterion has

²⁸⁵ See generally MARTHA MINOW, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND LAW* (1999) (examining the connection between identity politics and law).

²⁸⁶ See *United States v. Carolene Products Co.*, 304 U.S. 144, 155 (1938) (offering the leading formulation in declaring that legal distinctions affecting “discrete and insular minorities” should be subject to heightened scrutiny).

²⁸⁷ See ELIE MYSTAL, *ALLOW ME TO RETORT: A BLACK GUY’S GUIDE TO THE CONSTITUTION* 157 (2022).

²⁸⁸ See Jessica A Clarke, *Against Immutability*, 125 *YALE L.J.* (2015) (critically examining the evolution of the concept of immutability into that of traits individuals cannot change as treating characteristics people are arguably accountable for, such as pregnancy, fatness, or criminal record, as an appropriate basis for discrimination).

²⁸⁹ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); see also Marcy Strauss, *Reevaluating Suspect Classifications*, 35 *SEATTLE U. L. REV.* 135, 138–139 (2011).

²⁹⁰ See Clarke, *supra* note 288, at 5.

²⁹¹ See, e.g., Sachi Edwards, *Living in a Minority Food Culture: A Phenomenological Investigation of Being Vegetarian/Vegan*, 7 *PHENOMENOLOGY & PRAC.* 111, 119–120 (2013).

²⁹² See Emens, *supra* note 127.

expanded to include “not just those traits an individual cannot change, but also those considered too important for anyone to be asked to change.”²⁹³ This means that even for people whose diet is in principle mutable, eating could be construed as a core dimension of identity that they should not be required to compromise.

History of Discrimination. There is a long history of demeaning people based on their foodways, as evidenced by language itself.²⁹⁴ Donna Gabaccia points out that “in the United States we have labeled Germans as ‘krauts,’ Italians as ‘spaghetti-benders,’ Frenchmen as ‘frogs,’ and the British as ‘limeys.’”²⁹⁵ These stereotypes can have serious consequences, as Linda Gordon documented in her research on child welfare agencies in the late nineteenth and early twentieth centuries.²⁹⁶ Some of their “exclusively WASP agents” singled out households for child abuse based on their foodways.²⁹⁷ They particularly “hated the garlic and olive-oil smells of Italian cooking, and considered this food unhealthy, overstimulating, aphrodisiac.”²⁹⁸ In the 1920s, the powerful “Americanization” movement that endeavored to make immigrants less “indigestible” into society proceeded in part by crusading against “foreign vegetables,” such as cabbage, and teaching immigrant women to cook “American” food.²⁹⁹ Similarly, certain states and localities had laws on the books targeting unpopular food practices.³⁰⁰ An ordinance in Gary, Indiana forbade riding of street cars or going to the theater within four hours after eating garlic, a food long associated with immigrant cuisines.³⁰¹ Harassment and discrimination typically target members of marginalized groups defined in terms of protected classes including race, ethnicity, and national origin. But characteristics that are unprotected by the law can also expose food discrimination. Poor students may be mocked for bringing non-brand-names foods to school³⁰² or made subject to “lunch shaming” for unpaid lunch

²⁹³ Clarke, *supra* note 288, at 2.

²⁹⁴ See Harris, *supra* note 55.

²⁹⁵ Gabaccia, *supra* note 1, at 8; Fischler, *supra* note 35, at 280 (adding to this list “Macaronis,” for Italians and “Roastbeefs” for the British).

²⁹⁶ See Linda Gordon, *Child Abuse, Gender, and the Myth of Family Independence: Thoughts on the History of Family Violence and its Social Control 1880-1920*, 12 NYU REV. L. & SOC. CHANGE 523, 526 (1985).

²⁹⁷ See *id.*

²⁹⁸ *Id.*

²⁹⁹ See John F. McClymer, *Gender and the “American Way of Life”: Women in the Americanization Movement*, 10 J. AM. ETHNIC HIST. 3, 4, 12 (1991).

³⁰⁰ See MICHAEL ALBERTSON & ELLEN ALBERTSON, TEMPTATIONS: IGNITING THE PLEASURE AND POWER OF APHRODISIACS 202 (2002).

³⁰¹ See *id.*

³⁰² See CBC Radio, *supra* note 102.

debt.³⁰³ Fat people may be humiliated and excluded based on their eating, thus ascribed with a “discredited and deviant identity.”³⁰⁴

Political Powerlessness. Margot Pollans argues that all American eaters are “powerless by design” given the law’s “homogenizing” effect on the food supply and the fact that it “paralyz[es] consumers through information control, and polariz[es] various food system constituents.”³⁰⁵ But some groups of eaters may be more or less politically powerful. To the best of my knowledge, no data exists on the food identities of elected and non-elected public officials nationally. One might conjecture that omnivores consuming a standard American diet are more widely represented than other types of eaters in those positions.³⁰⁶ Additionally, the food industry lobby is extremely powerful “at every level of government,” “litigating any law that is likely to be effective in curbing unhealthy eating,” thus reinforcing the dominance of the standard American diet.³⁰⁷

Food identity may thus satisfy all three criteria for protected characteristics, even if in practice no statute or precedent treats it as such. However, realistically, food identity is unlikely to become protected under equal protection given the “pluralism anxiety” characterizing the doctrine.³⁰⁸ Coined by Kenji Yoshino, the expression describes the Supreme Court’s refusal to extend constitutional protection to new groups, the curtailment of protection for already covered groups, and the limitation of Congress’ capacity to protect groups through legislation.³⁰⁹ This development explains why in most contexts discrimination on the basis of food, when unsupported by another cognizable claim, is not prohibited.

³⁰³ See, e.g., Alexandra Cox & Kristen Harper, *What School Lunch “Shaming” Says About Our Approach to Student Health* (Jun. 23, 2017), <https://www.childtrends.org/blog/school-lunch-shaming-says-approach-student-health>.

³⁰⁴ Andrea E. Bombak, *Everybody Watches and Everybody Comments*, 18 FOOD, CULTURE & SOC’Y 681, 691(2015).

³⁰⁵ See Margot J. Pollans, *Eaters, Powerless by Design*, 120 MICH. L. REV. 643, 643 (2022).

³⁰⁶ See, e.g., Max Broad, *The Newest Vegan, and Other Veg Interests in Congress’ 2021 Freshmen Class* (Jan. 14, 2021), <https://dcvfa.com/the-newest-vegan-and-other-veg-interests-in-congress-2021-freshmen-class/> (pointing out the handful of vegan or vegetarian congresspeople).

³⁰⁷ Lawrence O. Gostin, “*Big Food*” *Is Making America Sick*, 94 MILBANK Q. 480, 480 (2016).

³⁰⁸ Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 747–748 (2011).

³⁰⁹ See *id.*

That said, it is not inconceivable for equality law to evolve and expand. The movement to ban hair discrimination is a case in point. It shows that lawmakers and judges can accept a social constructionist understanding of race when a particular cultural practice is used as a proxy for racial identity, and thus, a pretext to discriminate. To survive and thrive people need access to sufficient, healthy, culturally appropriate foods as well as to economic opportunities, typically in the form of jobs that support their basic (and other) needs. Hairstyles have historically been used to discriminate, particularly against Black women in the employment context.³¹⁰ Similar to foodways, hairstyles may inform people's personal and social identities.³¹¹ Black American communities, in particular, have a rich history of using hair styling as part of personal expression, group affiliation, and symbolic communication and have been oppressed on these practices.³¹² Grooming policies and preferences often perpetuate "Eurocentric standards" that harm racial and ethnic minorities.³¹³ Yet, until recently, hair styling was considered a personal choice that did not amount to an "immutable" characteristic deserving of legal protection. Wendy Greene as well as other scholars and advocates successfully changed this perception by critiquing the immutability doctrine as a legal fiction "curtailing the efficacy of our federal civil rights law."³¹⁴ As a result, starting with California in 2019, a growing number of states enacted "C.R.O.W.N. Acts" (Creating a Respectful and Open Workplace/World for Natural Hair Acts) or similar civil rights legislation that prohibit race-based hair discrimination.³¹⁵ Typically, these statutes restrict the claim for hair discrimination to the context of racial discrimination, even if some states extend it to religion and national origin discrimination. The underlying impetus for this set-up is that marginalized groups are the victims of hair

³¹⁰ D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1394 (2008).

³¹¹ See generally EMMA TARLO, *ENTANGLEMENT: THE SECRET LIVES OF HAIR* (2016) (offering a cross-country anthropological exploration of hair and its social meanings).

³¹² See Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079, 1100 (2010).

³¹³ See Grayson Moronta, *Why Do You Care About My Hair?*, 43 CARDOZO L. REV. 1715, 1716 (2022).

³¹⁴ Wendy Greene, 527 F. Supp. 229 *United States District Court, S.D. New York Renee ROGERS, et al., Plaintiff v. AMERICAN AIRLINES, INC., et al. No. 81 Civ. 4474 Dec. 1, 1981*, in *CRITICAL RACE JUDGMENTS: REWRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW* 159, 176 (Bennett Capers et al., 2022).

³¹⁵ *Id.* at 1732. A federal Crown Act passed the House in 2020 and was reintroduced in the 117 Congress in March 2022.

discrimination, therefore the law should focus on guaranteeing remedies to them.

Similarly, it food identities could become protected by civil rights law when they intersect with eaters' other disadvantaged identities. The list of relevant identities could be broader than race, national origin, and religion, including traits that often intersect overlap eating, in particular gender (broadly understood to include sexual orientation and gender identity), disability, body size, and socio-economic status.

B. Freedom of Religion

Given the breadth of U.S. law's definition of religion and the extent of its protection, food identity could arguably be protected as a sub-category. In fact, conceptualizing food identity as a form of free exercise is not unprecedented. In 2021, Judge Lamberth of the U.S. District Court for the District of Columbia "ordered corrections authorities to provide organic food to an Arizona man accused of participating in the insurrection at the U.S. Capitol while sporting face paint, no shirt and a furry hat with horns."³¹⁶ According to news report, the incarcerated plaintiff, a White cisman who goes by "QAnon Shaman," considers eating organic food to be part of his "shamanic belief system and way of life."³¹⁷ Judge Lamberth found this religious liberty argument valid given that "there is no doubt that Shamanism is a religion" and "defendant's willingness to go without food for more than a week is strong evidence of his sincerity in his religious beliefs."³¹⁸ Considering that prison food has long been denounced for being unappetizing and unhealthy, Reverend Al Sharpton commented, "[t]he fact that this man is given this kind of preference shows the double standard in the criminal justice system."³¹⁹ But the case could serve to argue for more robust food rights for all. To fall more squarely under First Amendment protection, food identity could be reframed as a form of expressive

³¹⁶ Jacques Billeaud, *Man Who Wore Horns at US Capitol to Get Organic Food in Jail*, AP NEWS (Feb. 3, 2021), <https://apnews.com/article/capitol-riot-man-gets-organic-food-jail-198eccc02b8173f4e5071ca342250518>.

³¹⁷ *Id.*

³¹⁸ *United States v. Chansley*, Case No. 21-cr-3 (RCL), 2021 WL 4133655, at 8 (D.C. Cir. 2021).

³¹⁹ Nicole Chavez & Christina Carrega, *'QAnon Shaman' Rioter Will Eat Organic Food, While Most Prisons and Jails Have Reputation for Serving Food That Is Unhealthy* (Feb. 9, 2021), <https://www.cnn.com/2021/02/08/us/prison-meals-qanon-shaman-organic-food/index.html>.

conduct, that is, behavior that has a communicative component.³²⁰ This move would be facilitated by two contemporaneous phenomena—the cultural expansion of what counts as religious practice in American society and the Roberts Court’s interest in expanding free exercise jurisprudence.³²¹

Federal law defines “religious exercise” broadly to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”³²² This description could be read as encompassing food and dietary choices. A majority of sitting Justices seems inclined toward a more expansive view of free exercise than previously. In *Employment Division v. Smith* (1990), the Court had restricted the free exercise framework, making it generally easier for governments to justify and impose burdens on religious practice.³²³ More recent decisions signal an openness to returning to a more favorable position to religious claimants.³²⁴ The QAnon Shaman case illustrates a similar trend in the lower courts.

According to Tara Isabella Burton, the category of what counts as religious has widened in American culture. Even people not formally affiliated religiously often call themselves “spiritual.”³²⁵ They tend to engage in daily practices around “wellness,” such as committing to certain ways of eating, exercising, and shopping.³²⁶ They see these actions as animated by a “philosophy of life,” which is “rooted in both ethical notions about the self and metaphysical notions about energy.”³²⁷ How would they fare under the law? To receive First Amendment protection under the free exercise clause, a petitioner must not only demonstrate that their belief is sincerely

³²⁰ See, e.g., *Spence v. Washington*, 418 U.S. 405 (1974) (holding that non-verbal actions such as burning a flag can be protected free speech).

³²¹ See generally TARA ISABELLA BURTON, *STRANGE RITES: NEW RELIGIONS FOR A GODLESS WORLD* (2020) (arguing that Americans are redefining religion and embracing a kaleidoscopic panoply of spiritual traditions, rituals, and subcultures); see also Christopher C. Lund, *Second-Best Free Exercise*, 91 *FORDHAM L. REV.* 843 (2022) (arguing that the Roberts Court is undertaking a “revolution” by granting unprecedented religious exemptions and reaching results that very protective of religious claimants).

³²² 42 USC §2000cc-5(7)(A).

³²³ See generally *Emp. Div. v. Smith*, 494 U.S. 872 (1990) (limiting the standard set in *Sherbert v. Verner*, 374 U.S. 398 (1963), according to which the free exercise clause requires the government to justify even incidental burdens upon religious practice under strict scrutiny).

³²⁴ See Lund, *supra* note 321.

³²⁵ See BURTON, *supra* note 321, at 18.

³²⁶ See *id.* at 94.

³²⁷ *Id.*

held, but also that it is a religious one.³²⁸ Courts understand religion relatively broadly, including idiosyncratic beliefs, but a purely secular belief or an insincerely held belief would not count. Trying to fit every food identity under a free exercise paradigm would stretch the doctrine past its current limits. But ethical veganism or vegetarianism would probably make the cut. For instance, Lisa Johnson argues that based on her survey of “self-identified adult ethical vegans and/or ethical vegetarians,” their beliefs “meet the definition of religion according to U.S. federal law,”³²⁹ as they “occupy a place of importance . . . parallel to that of a traditionally recognized religion.”³³⁰ By contrast, David Rosengard, an attorney with the Animal Legal Defense Fund, hypothesizes that a non-religious, imprisoned vegan seeking a vegan diet “for purely pragmatic . . . , political . . . , or secularly ethical reasons” would not fit the criteria.³³¹

Many eaters make food choices based on belief systems, which are not themselves recognized religions, such as the drive to eat organic food for environmental reasons, raw foods for personal health, or foods that depart from the standard American diet for cultural reasons and/or personal preference. The key to a free exercise regime to protect food identity would be the recognition that cultural, spiritual, philosophical, and political motives to grow, acquire, and consume certain foods are akin religious practices. Without this shift, legal fictions and labored (and potentially insincere) arguments would have to be made to adjust secular eating food identities within a religious frame. Current First Amendment doctrine seems to allow for this evolution, as the Court previously held that the “test of religious belief . . . is whether it is a sincere and meaningful belief occupying in the life of its possessor a place parallel to that filled by the God.”³³² The belief, thus, would not have to be about God, so long as it holds a “parallel place.”³³³ But the Court later distinguished between religious faith and modes of life,

³²⁸ See generally *United States v. Seeger*, 380 U.S. 163 (1965) (holding in the context of a federal statute authorizing conscientious objections to military service when based on religious belief that the main inquiry is whether the nature of a belief is religious).

³²⁹ See Johnson, *supra* note 137, at 31.

³³⁰ See *id.* at 34.

³³¹ David B. Rosengard, *Three Hots and a Cot and a Lot of Talk: Discussing Federal Rights-Based Avenues for Prisoners Access to Vegan Meals*, 23 ANIMAL L. REV. 355, 369 (2017).

³³² *Seeger*, 380 U.S. at 166.

³³³ *Id.*

stating that a way of life “based on purely secular considerations” is not protected under the First Amendment.³³⁴

In 2018, the Court directly addressed the question of food in the context of the First Amendment in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.³³⁵ The case involved Jack Phillips, a devout Christian cakeshop owner, who objected on religious grounds to baking a wedding cake for a same-sex couple.³³⁶ Phillips claimed that baking involved “his artistic skills to make an expressive statement, a wedding endorsement in his voice and of his own creation.”³³⁷ In its 7-2 decision in favor of Phillips, the Court did not settle whether professional baking is a form of protected speech and free exercise given that the case was decided on different grounds.³³⁸ But the majority and concurring opinions appeared sympathetic to the idea.³³⁹ The *303 Creative v. Elenis* holding in 2023 according to which businesses cannot be forced to create expressive designs speaking messages with which they disagree adds further doctrinal support to this perspective.³⁴⁰ If refusing to create and bake a cake for a certain occasion can be framed as protected expressive conduct, other dimensions of foodways could also qualify, from growing and selling foods to preparing and eating them. An 11th Circuit decision from 2018 illustrates this possibility. Analogizing flag burning and sharing meals, the appellate court found that a non-profit association’s food sharing events in a public park organized to spread the message that food is a human right constituted expressive conduct.³⁴¹ Should other courts follow suit by recognizing that a wider range food-related practices convey messages about oneself, others, and the world, food identity could become constitutionally protected under the First Amendment.

C. Fundamental Rights

A third constitutional path to protecting food identity would treat it as a fundamental or human right. There is no federally

³³⁴ *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

³³⁵ *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 584 U.S. 617, 624–25 (2018).

³³⁶ *See id.* at 626.

³³⁷ *Id.* at 632-33.

³³⁸ *See id.*

³³⁹ *See id.* at 656, 658 (Thomas, J., concurring) (claiming that “the Constitution looks beyond written or spoken words as mediums of expression” before concluding that “creating and designing custom wedding cakes—is expressive”).

³⁴⁰ *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 603 (2023).

³⁴¹ *See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1238 (11th Cir. 2018).

recognized constitutional right to food in the United States.³⁴² But a few states have shown interest in protecting the right to food, with the state of Maine becoming in 2021 the first in the nation to enshrine it in its Constitution.³⁴³

i. No Federal Right to Food

The right to food is a relative newcomer onto the legal scene, but an increasing number of foreign and international jurisdictions embrace it.³⁴⁴ It is typically conceived as a second-generation social and economic right that translates into entitlements for its holders and obligations for governments (and at times for private entities as well).³⁴⁵ It is also viewed as a third-generation right providing collective and even inter-generational rights—under this group reading, one individual’s eating cannot be isolated from others given the interrelatedness of foodways and the impact of food choice on human health, animals, and the environment.³⁴⁶ The actual content of the right varies depending on the jurisdiction, but it generally requires governments to secure access to a minimum level of nutritious and culturally appropriate foods for all people, rather than just negative rights against harmful actions.³⁴⁷ Some jurisdictions go further by advocating for a right to food sovereignty safeguarding individuals and communities’ agency over what foods to grow, how to harvest and distribute them, and what ultimately comes into their bodies.³⁴⁸

Legal scholars have written about the implausibility of the recognition of a federal constitutional right to food in the United States.³⁴⁹ Under current Supreme Court jurisprudence, the most straightforward way to treat the right to food as fundamental would

³⁴² See Amy Cohen & Mathilde Cohen, *The “Second Amendment of Food”: A Reflection on American Liberalism*, 52 *FORDHAM URBAN LAW J.* (forthcoming, 2024) (offering a critical analysis of the movement to constitutionalize the right to food at the state and federal levels as a mostly negative right against regulation rather than a positive entitlement to food redistribution and a commitment to reforming the food system toward more justice and sustainability).

³⁴³ *Id.*

³⁴⁴ See generally Mathilde Cohen, *The Right to Food*, *MAX PLANCK ENCYCLOPEDIA OF COMPAR. CONST. L.* 9 (2016) (retracing the history of the right to food from an international and comparative law perspective).

³⁴⁵ See *id.*

³⁴⁶ See *id.*

³⁴⁷ See *id.*

³⁴⁸ See PRISCILLA CLAEYS, *HUMAN RIGHTS AND FOOD SOVEREIGNTY MOVEMENT: RECLAIMING CONTROL* 12–13 (2015).

³⁴⁹ See, e.g., David J. Berg, *Food Choice is a Fundamental Liberty Right*, 9 *J. FOOD L. & POL’Y* 173, 177, 179 (2013).

be through judicial interpretation of the due process clause. But in the past half century, the Court signaled its reluctance to expand the list of fundamental rights under due process, particularly in the socio-economic domain. Most famously, in its 1972 *San Antonio Independent District v Rodriguez* decision, a majority of Justices refused to recognize a constitutional right to education, listing among their justifications the fear of a slippery slope that could lead to the acknowledgment of a right to food and housing.³⁵⁰ In other words, the Court rejected the idea that concrete entitlements such as eating, housing, and education are essential to fully exercise established constitutional rights. The right to food is seen as neither necessary to secure people's life nor their liberty under the due process clause. Federal courts have more or less held to this line of reasoning in the decades since.³⁵¹

However, in 2024, Republican Congressman Thomas Massie proposed a "right to food" amendment to the U.S. Constitution that would state, "The right of the people to grow food and to purchase food from the source of their choice shall not be infringed and Congress shall make no law regulating the production and distribution of food products which do not cross state lines."³⁵² For Massie, "everyone should be able to sign a food declaration of independence" as he does not want "the government to tell me what I can and can't buy."³⁵³ This libertarian understanding of the right would curtail the federal government's ability to regulate food, rather than promoting a positive interpretation of the right that would protect food identities by guaranteeing, for instance, non-discriminatory means of production and access to sufficient healthful, affordable, and culturally adequate foods. This proposed amendment simultaneously departs from and builds upon previous and ongoing state initiatives to constitutionalize the right to food, in particular in Maine, as discussed in the next section.

³⁵⁰ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (Marshall, J., dissenting).

³⁵¹ See, e.g., *Sibley v. United States*, No. 03-3540, 2004 U.S. Dist. LEXIS 5458, at *2 (E.D. La. Mar. 31, 2004) (imprisoned man claiming that as one of God's children he has the right to food, clothing and shelter, in addition to voting).

³⁵² See, e.g., Pete Kennedy, *Right to Food: Massie Proposes Constitutional Amendment* (Apr. 11, 2024), <https://www.foodfreedomfoundation.org/blog/right-to-food-massie-proposes-constitutional-amendment>.

³⁵³ Thomas Massie on One America News: "We Need a Food Declaration of Independence" 4/11/2024, <https://www.youtube.com/watch?v=cnveGN3j0vU>.

ii. Maine's Right to Food

State constitutionalism has been more active in this area, in part because state Constitutions rely on direct popular consent and control and are thus more responsive to the citizenry and, thus, Americans' preoccupation with food.³⁵⁴ In November of 2021, the state of Maine became the first in the nation to codify a right to food via constitutional amendment.³⁵⁵ The new provision states that individuals have a

natural, inherent and unalienable right to food, including the right to save and exchange seeds and the right to grow, raise, harvest, produce and consume food of their own choosing for their own nourishment, sustenance, bodily health and well-being, as long as an individual does not commit trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the harvesting, production or acquisition of food.³⁵⁶

This amendment resulted from a bipartisan coalition supported by legislators, small-scale food producers, and advocates (such as the Miami Law School clinic) who pushed for the recognition of rights to food and food sovereignty at municipal and state levels for over a decade.³⁵⁷ It illustrates how food law issues can cut across political divisions, leading conservative lawmakers to coopt some of the concepts and language originally developed by progressive human rights lawyers internationally when they can serve libertarian and/or business interests. Tellingly, Republican state representative Billy Bob Faulkingham, who sponsored the amendment, dubbed it the "Second Amendment of food."³⁵⁸ His support was motivated by "the dangers our farming, hunting, and fishing rights face" posed by the government (in particular the Food and Drug Administration) and animal rights' organizations such as PETA or the Humane Society.³⁵⁹

³⁵⁴ See John Kincaid, *State Constitutions in the Federal System*, 496 ANNALS AAPSS 12, 12 (1988).

³⁵⁵ See Taylor Telford, *Maine Just Voted to Become the Nation's First 'Right to Food' State. What Does That Mean?* WASH. POST (Nov. 3, 2021), <https://www.washingtonpost.com/business/2021/11/03/maine-right-to-food/>.

³⁵⁶ MAINE CONST. ART. I, §25.

³⁵⁷ See Telford, *supra* note 317 (highlighting the role of Heather Retberg, a livestock farmer and advocate who opposes the concentration of the food supply in the hands of a few global companies and that of republican lawmakers).

³⁵⁸ *Id.*

³⁵⁹ Billy Bob Faulkingham, Opinion, *Rep. Billy Bob Faulkingham: Mainers Can Protect Their Food Freedom by Supporting 'Right to Food'*, SUN J. (Oct. 17,

It remains to be seen whether other states will follow Maine and how the Maine branches of government will interpret it. The right could be broadly implemented to ensure that vulnerable eaters be secured access to affordable, healthy, and culturally appropriate foods.³⁶⁰ However, it is unlikely that it will translate into positive entitlements, given that no appropriation was voted to implement it.³⁶¹ In fact, the language and history of the Article suggest that it will likely, at least initially, be read narrowly as an individual right to be free from regulation.³⁶² It is telling that the first lawsuits filed on the ground of the new “inalienable constitutional right to harvest food” contended that Maine should allow for Sunday hunting or unlicensed home kitchen businesses, rather than, say, improving the food quantity, quality, and cultural appropriateness of state-controlled food assistance programs.³⁶³

Maine’s food amendment exposes the inherent tensions in the idea of a fundamental right to food, which can be simultaneously framed to reinforce or challenge the dominant allocation of resources and power. It highlights the limits of a right to food construed on the traditional, absolutist model of individual rights, which are not balanced against one another, rather than on a group-based model, which would include the consideration of other interests such as racial and social justice, animal rights, and environmental protection, among others.

In closing, several features of U.S. constitutional law may explain why food identity lacks a consistent and explicit legal regime, which are particularly visible in the doctrines examined in this Part. First, as Cass Sunstein puts it, “[t]he constitutions of most nations create social and economic rights . . . [b]ut the American

2021), <https://www.sunjournal.com/2021/10/17/rep-billy-bob-faulkingham-mainers-can-protect-their-food-freedom-by-supporting-right-to-food/>.

³⁶⁰ See Wendy Heipt, *The Right to Food Comes to America*, 17 J. FOOD L. & POL’Y 111, 124–125 (2021).

³⁶¹ See Shenna Bellows, *Maine Citizen’s Guide to the Referendum Election*, (Nov. 1, 2021), <https://www.maine.gov/sos/cec/elec/upcoming/pdf/11-21citizensguide.pdf>.

³⁶² See MAINE CONST., *supra* note 356. ART. I, §25.

³⁶³ See *Parker v. Dep’t of Inland Fisheries & Wildlife*, 314 A.3d 208, 216–17 (Me. 2024); Suzanne Sisk, *Fighting for Food Freedom in Maine: FTCLDF Lawsuit Asserts the State of Maine Has Violated the Food Sovereignty Act*, FARM-TO-CONSUMER LEGAL DEF. FUND (Apr. 27, 2023), <https://www.farmtoconsumer.org/blog/2023/04/27/fighting-for-food-freedom-in-maine-ftcldf-lawsuit-asserts-the-state-of-maine-has-violated-the-food-sovereignty-act/>.

Constitution does nothing of the kind.”³⁶⁴ Second, as Jamal Greene has argued, “US courts recognize relatively few rights, but strongly. They should instead recognize more rights, but weakly.”³⁶⁵ Assuming these points are correct, there is little constitutional space for food issues, which are social and economic and require balancing with other potential rights. This position explains the weakness and dispersion of statutory and regulatory protections of food identity in the absence of a strong political will to prioritize healthy and culturally adequate eating.

V. THE LIMITS OF FOOD IDENTITY

This final Part raises three challenges for thinking about food identity in the law. The first centers around the question of whether food discrimination is ever discrimination based solely on alimentary practices instead of discrimination based on eaters’ other marginalized traits. The second turns to the promises and limits of state obligations to provide adequate food. Finally, the third reflects on the normative implications of the food identity frame.

A. *The Limits of Anti-Discrimination Law*

One lens to think about food identity comes from anti-discrimination law. In earlier sections, this framework was used not to suggest that a new, food-based identity category be explicitly protected, but rather to flesh out some of the harms people experience in relation to their foodways.³⁶⁶ This section raises the question whether “discrimination on the basis of food identity” is a new category of discrimination that should be legally acknowledged or whether it is simply discrimination on the basis of an already-recognized protected category such as race, religion, or disability.

One view is that there is no need to identify a new type of discrimination, “discrimination on the basis of food identity.” Instead, our understanding of what counts as racial discrimination (such as discriminating against people for eating Chinese or Indian food), religion-based discrimination (such as discriminating against people for eating halal food), or disability-based discrimination (such as discriminating people who have food allergies) should be

³⁶⁴ Cass Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 90, 92 (Michael Ignatieff ed., 2005).

³⁶⁵ JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* xx (2021).

³⁶⁶ See Cohen, *supra* Part III and Part IV.A.

expanded. The example of race-based hair discrimination would support this understanding—hair discrimination is just racial discrimination, but it was an important legal innovation to count it as such and the argument is that we should do the same for food.

Another view is that we need the radical idea that “food identities” are identities that deserve self-standing protection under the law given that some people see their eating practices as non-negotiable aspects of how they understand and present themselves. The problem to solve, in this perspective, is that some of these food identities are not motivated by cultural, medical, or religious reasons and, therefore, unprotected under existing law. One illustration discussed earlier was the case of vegans and vegetarians, where their diets are neither grounded on religion nor a traditional cultural diet nor medical need. For these eaters, a new legal category of “food identity” would make a major difference, for instance, by establishing some protection against workplace harassment. At the same time, an alternative account would say that eating practices such as ethical veganism/vegetarianism are not so much about identity as about conscience and moral belief. As noted earlier, it has been argued that strongly held beliefs should be treated as religious beliefs even if they are not religious, leading to the possibility of protecting vegans and vegetarians and other similarly situated eaters without having to say anything about “identity.”³⁶⁷

Yet another approach would be to treat people’s food identities as an element of their protected bodily and moral autonomy rather than a matter of anti-discrimination. The idea underlying anti-discrimination law is typically that one should not face discrimination for something that one cannot change (or something that is so important that one should not be expected to change). When an eating practice fits into the first category due to, for example, allergies or cultural norms, it fits the anti-discrimination paradigm. The harder scenario is when it fits into the second category (i.e., a behavior thought to be changeable and/or not central to how people see themselves). Treating foodways under an autonomy paradigm, rather than an anti-discrimination one might offer a solution if the goal is to protect all these categories of eaters. The theory here would be that people have the right to decide what to incorporate into their bodies (as well as when and how), period, along the lines of what some scholars have dubbed as “food freedom.”³⁶⁸ But this

³⁶⁷ See Cohen, *supra* Part IV.B.

³⁶⁸ See, e.g., BAYLEN LINNEKIN & MICHAEL BACHMAN, THE ATTACK ON FOOD FREEDOM 2 (2014), <https://ij.org/wp-content/uploads/2015/03/perspectives-food-freedom-1.pdf>.

perspective tends to leave aside concerns about systemic inequalities in the food system.

In sum, while this Article uses the vocabulary and concepts of anti-discrimination law, it does not commit to treating food identity as a matter of anti-discrimination. The next section turns to the weaknesses of another conceptual framing that emphasizes the government's obligations to protect food identities through positive entitlements.

B. The Limits of State Obligations

In the legal realm, food identity could be conceived as an entitlement to food rights and benefits rather than a ground for protection from discrimination. Hannah Arendt famously called citizenship “a right to have rights.”³⁶⁹ But in some respects, the right to food might be even more primary. It makes enjoyment of all specific rights possible. For people to meaningfully exercise civil, political, or social, economic, and cultural rights, they must be adequately nourished. Arguably, the shortest Constitution in the world could be drafted as follows: “People shall have the right to food.” All other fundamental rights would follow. In reality, it is a fairly well-established point in primary and secondary international and domestic law sources that at a bare minimum a state has the obligation to guarantee a sufficient quantity of food to its people.³⁷⁰ But food security understood as minimum caloric intake has been proven inadequate.³⁷¹ It does not address the inequitable distribution of food resources, the quality and healthfulness of the food available, and its palatability in terms of personal and cultural preferences. Part of the problem, as shown earlier through examples drawn from federal, state, local, and tribal laws, is that in fulfilling its obligations to provide food, a state may promote certain food identities and denigrate others.³⁷²

³⁶⁹ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296 (1951).

³⁷⁰ See Committee on Economic Social and Cultural Rights. General comment 12. The right to adequate food (Art. 11) (20th session, 1999); see also Molly D. Anderson, *Beyond Food Security to Realizing Food Rights in the US*, 29 J. RURAL STUD. 113 (2012) (describing how the United States legal system addresses food insecurity in the absence of an enshrined right to food).

³⁷¹ See, e.g., *An Introduction to the Basic Concepts of Food Security*, FSN NETWORK (2008), <https://fsnnetwork.org/resource/introduction-basic-concepts-food-security> (including “economic and physical access to food” as one of four “dimensions of food security”).

³⁷² See Cohen, *supra* Part II.

What kind of food claims should individuals or groups be allowed to make on the government and in what context(s)? The strength of a state's obligation to guarantee or facilitate access to certain foods may depend on context, calling for a taxonomy of food identity claims and state obligations. Presumably, the more dependent the eaters on the government for their nutrition, the stronger its duty to honor their food identities. At the most dependent end of the spectrum, such as when people are institutionalized, food identities should be understood broadly to include alimentary preferences and aversions. In less restrictive settings, such as schools and food assistance programs, the onus on the state could be eased to protecting food identities construed in the strong sense, that is, those constitutive of other core identities or of identities of their own. Thus, from a state-centered perspective, there may be no fundamental tension between "mere" food preferences and robust food identities. The operative distinction would be instead an eaters' degree of autonomy and access in food provisioning.

The next and last section critically examines the very framing of the Article. It questions the notion of food identity as a construct that could distract from the urgency of pushing for the political, economic, and social change necessary for people to have equal access to the foods they need and desire.

C. The Limits of Identity

This final section is inspired by Sarah Bak-Geller Corona.³⁷³ It does not mean to invalidate the concept of food identity, which the Article has strived to flesh out, but rather to call attention to some of its conceptual problems, connecting it to important debates on food and power asymmetries. It proceeds by highlighting three points.

First, for decades, constructivist social science approaches have raised skepticism toward any homogeneous, apparently harmonious, primordial, and rooted reality presumed to exist behind the idea of "identity."³⁷⁴ As theorized by Fredrick Barth, identity should be understood as a process of creating limits, rather than a

³⁷³ See Sarah Bak-Geller Corona, Personal Communication (on file with author); see also Sarah Bak-Geller Corona, *Wheat versus Maize: Civilizing Dietary Strategies and Early Mexican Republicanism*, 4 J. INTERDISC. HIST. IDEAS, no. 8, 2015 at 1, 1 (exploring Mexican debates about efforts to create a diet that could make bodies more economically productive and create modern citizens).

³⁷⁴ See, e.g., Stuart Hall, *Deconstructing Identities: The Politics of Anti-Essentialism*, in 2 ESSENTIAL ESSAYS 55 (2018).

stable material contained by limits.³⁷⁵ It makes sense, in this view, that the relationship between food and identity should be flexible, ambiguous, and often contradictory. For example, the social tensions that result from treating veganism and vegetarianism as food identities, which some assume are stigmatized while others see as privileged, are not exceptional, but central to the category of identity.³⁷⁶ From this perspective, the essential question facing food justice advocates, lawmakers, regulators, and legal scholars is how to preserve (rather than resist) the instability and ambivalence typical of identity processes in the concept of food identity. Traditionally, law has not fared well with shifting and variable categories, as it is constructed around rules and binary distinctions, frequently demanding “yes” or “no” answers.³⁷⁷ But its evolution toward “smoother jurisprudence” and the push toward balancing or “proportional” approaches, as advocated by Jamal Greene, might vindicate a constructivist vision of food identity.³⁷⁸

Second, as voices of southern and decolonial epistemologies have emphasized, “neoliberal identity politics” and its exacerbation of cultural pluralism can be seen as a depoliticized means of managing cultural diversity, which may usurp and nullify the social and political claims of marginalized groups.³⁷⁹ In the U.S. context, the concept of food identity may be particularly suspect due to its genealogy in government-sponsored research on “food habits” for the purpose of furthering agricultural economic interests.³⁸⁰ By failing to center the distribution of resources and political representation for marginalized groups, an identity focus could turn into an aesthetic and symbolic recognition that covers up inequalities and generates new colonial relations.³⁸¹ The contemporary politics of recognition of diversity, inspired by the principles of liberal

³⁷⁵ See Fredrik Barth, *Introduction, Pathan Identity and Its Maintenance in ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURE DIFFERENCE* 9-38, 117-34 (Fredrik Barth ed., 1969).

³⁷⁶ See Cohen, *supra* Part III.A.2.

³⁷⁷ See, e.g., LEO KATZ, *WHY THE LAW IS SO PERVERSE* 139-81 (2011) (discussing the all-or-nothing nature of the law)

³⁷⁸ Adam Kolber, *Smooth and Bumpy Laws*, 102 CAL. L. REV. 655, 658 (2014); GREENE, *supra* note 365, at xxi-xxv.

³⁷⁹ See, e.g., Jorge Juan Rodríguez V, *The Neoliberal Co-Optation of Identity Politics: Geo-Political Situatedness as a Decolonial Discussion Partner*, 5 HORIZONTES DECOLONIALES [DECOLONIAL HORIZONS] 101, 101 (2019) (criticizing the “neoliberal co-optation of identity politics”).

³⁸⁰ See Spang, *supra* note 196.

³⁸¹ See Aisha M. Beliso-De Jesús, *Confounded Identities: A Meditation on Race, Feminism, and Religious Studies in Time of White Supremacy*, 86 J. OF THE AM. ACAD. OF RELIGION 307, 307 (2018) (critiquing academic identity-thinking that maintains white privilege and naturalizes white supremacy).

philosophy, have arguably neutralized and depoliticized social movements by “culturalizing” the social, economic, and political demands of minority and vulnerable populations. Thus, a purely identity-based approach runs the risk of essentializing and canceling the political agenda of actors who fight for food rights.³⁸² In this light, the way forward for people to have access to healthy and culturally appropriate foods does not lie in making identities and cultural diversity visible and respected, but in challenging the structural socio-economic inequalities and the symbolic domination of which the oppressed groups are victims.

Finally, as Sarah Bak-Geller Corona emphasizes, in some communities, food identities are contested by social movements whose political goal consists in building spaces of autonomy to ensure food rights.³⁸³ These actors tend to overlook identity claims, concentrating instead on the definition of what constitutes the common good. Alternative food and farmers of color networks, communal governments, and queer and feminist organizations, among others, do not bet on the state or the market as guarantors of food rights, but rather on their own capacities to build and reproduce the common.³⁸⁴ These interlocutors of public food policies aspire to new forms of democracy that can emerge from collective action at the local level.

VI. CONCLUSION

This Article has identified a concept at work in multiple areas of U.S. law without being explicated as such—food identity. Food identity refers to the central role food may play in individuals and groups’ self-understanding and self-presentation. The legal system exhibits concern for some people’s food identities in certain contexts, but the way in which these instances relate as a pattern has not been observed despite its role in alternatively facilitating or undermining access and equity within the food system. The Article thus helps expose and classify instances of what it calls food discrimination, which were not recognized as such thus far. It

³⁸² See, e.g., LEAH PENNIMAN FARMING WHILE BLACK: SOUL FIRE FARM’S PRACTICAL GUIDE TO LIBERATION ON THE LAND (2018); BLACK FOOD MATTERS: RACIAL JUSTICE IN THE WAKE OF FOOD JUSTICE 1, 1 (Hanna Garth & Ashante M. Reese eds., 2020).

³⁸³ See Bak-Geller Corona, *supra* note 373.

³⁸⁴ See, e.g., *About Us*, NATIONAL BLACK FOOD AND JUSTICE ALLIANCE, <https://blackfoodjustice.org/about-us-1> (last visited Sept. 15, 2024); see also, *About Us*, NATIVE AMERICAN FOOD SOVEREIGNTY ALLIANCE, <https://nativefoodalliance.org/our-work-2/about-us/> (last visited Sept. 15, 2024).

contributes to the growing literature on the various forms of “food oppression” that erodes people’s health, happiness, sense of belonging and community as well as their ability to attain certain educational and job opportunities, among others.³⁸⁵ Remedying these problems entail rethinking multiple areas of law given the complexity of the food system, including not only agricultural and food law, but also public assistance programs, property law, work law, taxation, environmental law, animal law, health law, and more.³⁸⁶ There are risks, however, involved in centering identity in food law. The concept has a history of being coopted and depoliticized by institutions, leaving untouched dominant allocation of resources and power. This is the reason why if food identities became more systematically entrenched in the law, one of the leading considerations in deciding which alimentary practices to protect should be the extent to which they are interrelated to other disadvantaged identities.

³⁸⁵ See Freeman, *supra* note 14; Toussaint, *supra* note 21.

³⁸⁶ See Steph Tai, *Food Systems Law from Farm to Fork and Beyond*, 45 SETON HALL L. REV. 109, 110 (2015).

**FORCED TO WEATHER THE STORM:
REFORMING THE LIVESTOCK INDEMNITY PROGRAM TO
IMPROVE FARM ANIMAL WELFARE**

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ABSTRACT

Each year, extreme weather events put the lives and well-being of millions of farm animals at risk. These events can lead to injury, suffering, acute and chronic stress, decreased productivity, and loss of life. As storms increase in frequency and intensity, efforts should be made to ensure livestock are protected. This paper proposes modifications to the Livestock Indemnity Program (LIP), a federally run disaster assistance program that compensates livestock owners and growers for animal deaths and reduced value caused by eligible conditions, including extreme weather. Surprisingly, the program does not require producers to show proof and use of a disaster mitigation plan before drawing down indemnity payments. Some believe this is a missed opportunity to better safeguard animal welfare and compromises the fiscal integrity of the program. The value of emergency planning is recognized by federal agencies, lawmakers, advocates, researchers, and many sectors of the livestock industry as an important (or essential) aspect of ensuring animal welfare. Furthermore, an analysis of publicly available data shows that LIP payments have been made to some of the same

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counties 15 out of 15 years. Repeat payments demonstrate a reliance on the program and proof that animal suffering and death is occurring extensively in some parts of the country. This paper argues that tying disaster planning to the LIP, whether through incentives or a mandate, is a prudent and overdue policy change to the program. The impact of extreme weather on livestock is reviewed, including methods of assessing welfare. The LIP is detailed, including the program's purpose, participation criteria, and payment data. Past and current congressional and advocate efforts to reform the LIP are presented. New approaches to federal reforms are proposed, as well as a review of private sector engagement opportunities to advance farm animal protections during weather disasters. As extreme weather increases so will the impact on farm animals and cost of compensating ranchers through the LIP. Congressional oversight and reforms of the LIP are urgently needed to better protect farm animals and taxpayer funding of the program.

I. INTRODUCTION

Each year, extreme weather puts the lives and well-being of millions of farm animals at risk. These events lead to suffering, acute and chronic stress, decreased productivity, and loss of life. Reporting by *The New York Times* about a winter storm in West Texas in 2016 that killed more than 35,000 dairy cows describes what some animals face during extreme weather:

The wind blew mercilessly for 48 hours, leaving snow drifts as high as 14 feet. . . . [A]s the blizzard raged on, cows that had sought shelter behind windbreakers were buried alive by drifting snow. Others froze to death on open fields. Calves that had been nestled inside hutches went hungry because no one could reach them.¹

As storms increase in frequency and intensity, efforts should be made to better protect livestock. This paper proposes modifications to the Livestock Indemnity Program (LIP) in order to improve safeguards for farm animals impacted by extreme weather. The LIP is a federally run disaster assistance program that compensates livestock owners and growers for animal deaths and reduced value caused by eligible conditions, including extreme weather.² Currently, the program does not require producers to show proof of a disaster mitigation plan to draw down indemnity payments.³ In order to better protect farm animals and ensure the fiscal integrity of the program, the LIP should be amended.

Part II of this paper highlights why extreme weather is a cause for concern. Part III reviews how philosophies, models, science, and ethics are used to define and assess animal welfare. Part IV explores how farm animal welfare is compromised during extreme weather and the importance of disaster planning. Part V explains the LIP, including its creation by Congress, purpose, participation criteria, payment formulas, and animal welfare related shortcomings. Part VI provides an analysis of LIP spending data,

¹ See Lucinda Holt & Fernanda Santos, *Blizzard Buried Some Dairy Cows in the Snow; 35,000 Die*, N. Y. TIMES (Jan. 5, 2016), <https://www.nytimes.com/2016/01/06/us/in-west-texas-hundreds-of-dairy-cows-killed-by-blizzard.html>.

² See *Disaster Assistance Livestock Indemnity Program*, U.S. DEP'T OF AGRIC. SERV. AGENCY (Aug. 2023), https://www.fsa.usda.gov/Assets/USDA-FSA_Public/usdfiles/FactSheets/2023/FSA_LIP_LivestockIndemnityProgram_Factsheet_2023.pdf [hereinafter *LIP Fact Sheet*].

³ See *id.*

including geographic trends and a case study of two extreme weather events that impacted Texas and Nebraska. Current and past congressional and advocate efforts to reform the LIP will be reviewed in Part VII. Alternative federal and private sector approaches to advance farm animal welfare during weather disasters will be proposed in Part VIII, followed by concluding thoughts in Part IX.

II. EXTREME WEATHER: A CAUSE FOR CONCERN

Extreme weather is having a catastrophic impact on livestock and the environment. Horrific stories of animals drowning during hurricanes and floods, freezing to death and/or being buried alive under snow during winter storms, and being subjected to other acutely stressful situations have been reported during recent years.⁴ While exact numbers are difficult to track, the Animal Welfare Institute (AWI) reported that more than 5 million pigs and poultry died during Hurricanes Florence and Michael in 2018, more than 37,000 cattle died in Montana during a winter storm in 2018, more than 100,000 poultry died during Hurricane Laura in 2020, and more than 100,000 farm animals died during a deep freeze in Texas in 2021.⁵

In geographic regions where factory farms are prevalent, extreme weather can also have disastrous environmental impacts. Flooding and runoff can cause untreated waste to spill into waterways, putting humans, other animals, and the environment at risk. In concentrated animal feeding operations, or CAFOs, urine and feces typically fall through slats on the floor and are washed into “lagoons” where they are “digested” anaerobically by bacteria.⁶ Some large farms can produce more raw waste than the population of some U.S. cities.⁷ An analysis by the Government Accountability

⁴ See Holt & Santos, *supra* note 1; see also Kelsey Piper, *How 3.4 million chickens drowned in Hurricane Florence*, VOX (Sept. 24, 2018, 6:30AM), <https://www.vox.com/science-and-health/2018/9/24/17897216/chickens-died-hurricane-florence-factory-farms>; see also Li Cohen, *Cows are starving to death amid California's winter weather rampage. Emergency helicopter hay drops could save them*, CBS NEWS (Mar. 10, 2023), <https://www.cbsnews.com/news/cows-starving-california-winter-weather-emergency-hay-drops/>.

⁵ See *Emergency and Disaster Preparedness for Farm Animals Act*, ANIMAL WELFARE INST., <https://awionline.org/legislation/emergency-and-disaster-preparedness-farm-animals-act> (last visited Sept. 28, 2024).

⁶ See CARRIE HRIBAR, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES, 3, 7 (Mark Schlutz ed., Nat'l Ass'n of Loc. Bds. of Health, 2010).

⁷ See U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-944, CONCENTRATED ANIMAL FEEDING OPERATIONS 1, 1 (2008).

Office (GAO) that used data from the Environmental Protection Agency (EPA) and United States Department of Agriculture (USDA) found that “a very large hog farm, with as many as 800,000 hogs, generates more than 1.6 million tons of manure annually—more than one and a half times the sanitary waste (urine and feces only) produced by the about 1.5 million residents of Philadelphia, Pennsylvania in 1 year.”⁸ A similar comparison was drawn in the report for a CAFO with beef cattle: “Approximately 140,000 head of cattle could produce over 1.6 million tons of manure annually, more than the almost 1.4 million tons of sanitary waste generated by the more than 2 million residents of Houston, Texas.”⁹

After Hurricane Florence in 2018, at least 110 waste lagoons in North Carolina released (or were at risk of releasing) pig waste into waterways.¹⁰ The headline of one article claimed, “Hurricane Florence is turning North Carolina into a toxic stew of pig poop, sewage and coal ash.”¹¹ Animals and humans are, obviously, at a high risk of infection and illness in these conditions. This is just one example of how extreme weather is threatening the interconnected and collective well-being of humans, animals, and the environment, a concept recognized as “One Health.”¹²

While many mitigation efforts are made during hurricane season to reduce events (such as lagoon flooding) that impact animals, humans, and the environment, are these efforts sufficient as storms intensify and become more unpredictable?¹³ Recently, Hurricane Otis progressed from a tropical storm to a category five hurricane in less than 12 hours, catching the public off guard and

⁸ See *id* at 5.

⁹ See *id* at 20.

¹⁰ See Kendra Pierre Louis, *Lagoons of Pig Waste Are Overflowing After Florence. Yes, That's As Nasty As It Sounds*, N.Y. TIMES (Sept. 19, 2018), <https://www.nytimes.com/2018/09/19/climate/florence-hog-farms.html>.

¹¹ See Sarah Sax, *Hurricane Florence Is Turning North Carolina Into a Toxic Stew of Pig Poop, Sewage, and Coal Ash*, VICE (Sept. 18, 2018, 6:08 PM), <https://www.vice.com/en/article/7xjb4d/hurricane-florence-is-turning-north-carolina-into-a-toxic-stew-of-pig-poop-sewage-and-coal-ash>.

¹² See *About One Health*, CTR. FOR DISEASE CONTROL AND PREVENTION (July 17, 2024), <https://www.cdc.gov/one-health/about/index.html>.

¹³ See Wynne Davis, *Overflowing Hog Lagoons Raise Environmental Concerns In North Carolina*, NPR (Sept. 22, 2018, 7:54 AM), <https://www.npr.org/2018/09/22/650698240/hurricane-s-aftermath-floods-hog-lagoons-in-north-carolina>.

putting animals at risk.¹⁴ In states that bring-in billions of dollars from the food animal industry, is enough being done to protect animals, humans and the environment given the high risk of extreme weather?

III. ASSESSING ANIMAL WELFARE

While it may be obvious that extreme weather events compromise the welfare of farm animals, it is important to apply an understanding of philosophies, science, ethics, and models to determine how and why.

A. *Philosophies, Definitions, Science and Ethics*

For more than a century, philosophers, researchers, organizations, governmental entities, and others have created models, standards, metrics, and definitions of “animal welfare.” The topic is complex, multi-faceted, and heavily debated. Science, ethics, culture, and religion are just a few of the dimensions that impact how we view animal welfare. In historical debates about whether animals should have moral consideration, the perspective of Western philosopher Jeremy Bentham is often cited from the late 18th century: “[T]he question is not, Can they *reason?* nor, Can they *talk?* but, Can they *suffer?*”¹⁵ Bentham reasoned animals are worthy of moral consideration because they can suffer.¹⁶ William Youatt, an English veterinarian and author, argued in the 19th century that animals are sentient beings, capable of senses, emotions, consciousnesses, and other states similar to humans. He wrote, “We are endeavoring to shew that the difference [between humans and animals] in one of the most essential of all points, is in degree and not in kind.”¹⁷

¹⁴ See *Hurricane Otis Causes Catastrophic Damage in Acapulco, Mexico*, NAT’L ENV’T SATELLITE, DATA, AND INFO. SERV., NAT’L OCEANIC & ATMOSPHERIC ADMIN. DEPT OF COM., (Nov. 2, 2023),

<https://www.nesdis.noaa.gov/news/hurricane-otis-causes-catastrophic-damage-acapulco-mexico>; see also Rachel Ramirez, *Hurricane Otis’ Explosive Intensification As A Symptom of Climate Crisis, Scientists Say*, (Oct. 25, 2023, 1:09 PM) CNN WEATHER, <https://www.cnn.com/2023/10/25/weather/hurricane-otis-rapid-intensification-climate/index.html>.

¹⁵ See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 325, 325 (1823).

¹⁶ *Id.*

¹⁷ WILLIAM YOUATT, THE OBLIGATION AND EXTENT OF HUMANITY TO BRUTES, PRINCIPALLY CONSIDERED WITH REFERENCE TO THE DOMESTICATED ANIMALS 43 (Longman et al. 1839).

Governmental and private sector organizations have also contributed to discussions about animal welfare. For example, the World Organization for Animal Health, founded as OIE, currently defines animal welfare as “the physical and mental state of an animal in relation to the condition in which it lives and dies.”¹⁸ More specifically, “An animal experiences good welfare if the animal is healthy, comfortable, well nourished, safe, is not suffering from unpleasant states such as pain, fear and distress, and is able to express behaviours that are important for its physical and mental state.”¹⁹

In addition to philosophies and definitions, animal welfare science guides our understanding of what animals need and want. Scientific research, although sometimes inconclusive, helps us to identify “what is.”²⁰ For example, animal preferences and the strength of those preferences can be assessed through a process of operant conditioning (punishments and rewards).²¹ Animals have been shown to work for what they want and take action to seek one set of circumstances and avoid others.²² Additionally, scientists at the Research Institute for Farm Animal Biology are trying to better understand the minds of farm animals.²³ In an attempt to gain insight into their emotional state, one scientific study is aiming to see whether pigs would voluntarily exercise on a treadmill to make themselves feel better.²⁴ They have learned over the last decade and countless experiments that “pigs show signs of empathy and goats rival dogs in some tests of social intelligence.”²⁵

Combining science with ethics takes us from “what is,” to “what ought to be.”²⁶ Animal welfare science is shaped by both these mindsets; the field is driven by ethical concerns over the

¹⁸ World Organization for Animal Health, *Section 7 Animal Welfare*, TERRESTRIAL ANIMAL HEALTH CODE 1 (2019), https://www.woah.org/fileadmin/Home/eng/Health_standards/tahc/2023/chapitre_aw_introduction.pdf.

¹⁹ *Id.*

²⁰ Meghann K. Pierdon, DVM, Assistant Professor, Lecture at Univ. of Pa. Sch. of Veterinary Med.: Animal Welfare Science & Ethics (Aug. 28, 2022).

²¹ *Id.*

²² See MARIAN S. DAWKINS, *WHY ANIMALS MATTER: ANIMAL CONSCIOUSNESS, ANIMAL WELFARE, AND HUMAN WELL-BEING* 165-69 (2012).

²³ See David Grimm, *What are Farm Animals Thinking?*, 382 *SCI.* 1103, 1104 (2023).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Pierdon, *supra* note 20.

treatment of animals *and* relies on science to understand whether an animal's physical and physiological needs are being met.²⁷

B. *The Five Freedoms/Five Domains Frameworks*

The Five Freedoms, based on recommendations by Roger Brambell in 1965, has served as a catalyst for discussions about animal welfare and continues to be recognized globally when setting husbandry standards and laws.²⁸ Brambell argued that animals should have²⁹:

- **Freedom from Hunger and Thirst:** by ready access to fresh water and a diet to maintain full health and vigor.
- **Freedom from Discomfort:** by providing an appropriate environment including shelter and a comfortable resting area.
- **Freedom from Pain, Injury or Disease:** by prevention or rapid diagnosis and treatment.
- **Freedom to Express Normal Behavior:** by providing sufficient space, proper facilities and company of the animal's own kind.
- **Freedom from Fear and Distress:** by ensuring conditions and treatment which avoid mental suffering.

Some have passionately argued we should move beyond the Five Freedoms framework to the Five Domains Model, which incorporates more contemporary evidence-based thinking that can be used for animal welfare assessment.³⁰ Central to the model is a belief that to ensure animals have a "life worth living," it is critical to minimize their negative experiences and provide opportunities for them to have positive experiences.³¹ The Five Domains³² and examples of each are as follows:

²⁷ *Id.*

²⁸ See FARM ANIMAL WELFARE COUNCIL, FARM ANIMAL WELFARE IN GREAT BRITAIN: PAST, PRESENT AND FUTURE 2, 6 (2009); *see also* F.W. ROGERS BRAMBELL, REPORT OF THE TECHNICAL COMMITTEE TO ENQUIRE INTO THE WELFARE OF ANIMALS KEPT UNDER INTENSIVE LIVESTOCK HUSBANDRY SYSTEMS 1, 9-15 (London, Her Majesty's Stationery Office 1965).

²⁹ *See id.*

³⁰ See David J. Mellor et al., *The 2020 Five Domains Model: Including Human-Animal Interactions in Assessments of Animal Welfare*, ANIMALS, Oct. 2020, at 1, 2.

³¹ *Id.* at 5

³² *See id.* at 2.

- **Nutrition:** nutritional opportunities/inadequacies; water and food intake/deprivation
- **Physical Environment:** thermal extremes, confinement, overcrowding, effective shelter and shade, conditions conducive to rest and sleep
- **Health:** injury, disease, functional impairment, poor physical fitness
- **Behavioural Interactions:** including those with the environment, other animals, and humans
- **Mental State:** including those that are negative (e.g., boredom, loneliness, frustration, anxiety, fear, panic) and those that are positive (e.g., calm, playful, affectionate, comfortable)

An animal's state in the first four domains give rise to positive and negative experiences that impact their mental well-being in the fifth domain.³³ Specifically, biological functioning (affected by nutrition, the physical environment, and health) coupled with an animal's ability to "freely express agency" through behavioral interactions directly impacts whether they have a positive or negative mental state.³⁴

IV. FARM ANIMAL WELFARE DURING EXTREME WEATHER AND THE IMPORTANCE OF DISASTER PLANNING

Farm animal welfare can be compromised during extreme weather in myriad ways. When animals are not able to do the things they want and biologically need to do, their welfare can suffer.³⁵ In 2012, author and animal welfare scientist, Marian Dawkins, wrote, "[A]n animal with unmet wants is inefficient and unhealthy, if for no other reason than that it is spending a great deal of energy 'trying' to get what it wants and possibly damaging itself in the process."³⁶

A. *The Impact of Extreme Weather on Farm Animals*

Based on the Five Domains framework, extreme weather can have a widespread impact on livestock welfare. Limited or no

³³ *Id.*

³⁴ *See id.*

³⁵ DAWKINS, *supra* note 22, at 136-42.

³⁶ *Id.* at 171.

access to adequate food and water (nutrition), extreme temperatures and lack of shelter (environment), restricted expression of behaviors (behavior), injuries that impair mobility and cause pain (health) can all lead to anxiety, fear, and panic (mental state) on an acute and chronic basis.

The Animal Welfare Committee, an advisory committee for the UK Department for Environment, Food and Rural Affairs and Welsh and Scottish governments, published an opinion about disasters and emergencies and categorized the welfare impact of extreme weather into three categories:

- As a *direct result* of the event (e.g., contamination of feed and water; prolonged exposure to extreme temperatures/flooding that can cause hypothermia and pneumonia);
- As a result of the way in which the animals are *managed* (e.g., disrupted milking routines for dairy cows that can result in discomfort and mastitis; inadequate housing ventilation from loss of power that can result in respiratory illness and distress); and,
- Through *the effect on* farm workers (e.g., workers cannot access facilities; barn stalls cannot be cleaned; injuries/illnesses cannot be addressed; feed and clean water cannot be provided).³⁷

Additionally, during an emergency, all (or most) of the attention can shift to the bare necessities.³⁸ The focus becomes on preventing death; worker capacity is limited and only the most critical situations are often addressed. Physical and mental suffering by animals that doesn't rise to the level of risking life may be neglected. If any number of the Five Freedoms/Domains can be compromised during a flood, severe heat, blizzard, or other extreme weather event, society (including policymakers) has a moral and ethical responsibility to mitigate these consequences.

³⁷ Farm Animal Welfare Comm., *Op. on Contingency Plan. for Farm Animal Welfare in Disasters and Emergencies* (Mar. 2012), http://assets.publishing.service.gov.uk/media/5a7dfb5640f0b62305b8007d/FAWC_opinion_on_contingency_planning_for_farm_animal_welfare_in_disasters_and_emergencies.pdf.

³⁸ Telephone Interview with Abigale Zoltick, DVM, Veterinary Resident in Animal Welfare, Univ. of Pa. Sch. of Veterinary Med. (Jan. 28, 2024).

B. Disaster Planning

While it seems reasonable to assume that disaster planning can reduce suffering and loss of animal life, how can we know for sure that it achieves the intended result? Direct scientific studies comparing outcomes on farms of those who planned and those who did not are lacking, but reasonable inferences can be made about the importance of planning on welfare and mortality based on anecdotal stories and a basic understanding of animal welfare concepts.

The North Carolina Pork Council touted the benefits of planning in the aftermath of Hurricane Florence in 2018.³⁹ They reported that, “[P]ig farmers were well prepared for the storm and came together in its wake to provide feed and fuel to those farms in need immediately following the storm....Farmers moved more than 20,000 pigs to higher ground before the storm and this coordinated effort across the industry unquestionably reduced animal mortality in our industry.”⁴⁰

An interview with Weldon Warren, owner of Holy Cow Beef in West Texas, revealed how emergency planning in advance of the historic winter storm, Goliath, in 2015 saved his livestock.⁴¹ Warren raises his cows on pasture and does not have large barns for housing.⁴² Ahead of freezing temperatures and a forecast of several feet of snow, he knew that providing a feed source was essential to survival.⁴³ Warren converted cotton trailers into feed wagons that could hold hay and parked them near the cattle pens.⁴⁴ Troughs of grain were also set up.⁴⁵ Not only did this provide nutrition, but it also kept the cows centrally located and away from the fence lines, where they would be at an increased risk of dying. Warren said, “Cattle will try to escape the storm, and they start walking until they hit a fence....[w]e wanted to prevent the cows from

³⁹ N.C. Pork Council, *Hurricane Florence's Impact on NC Hog Farms* (Oct. 10, 2018),

<https://ncpork.org/florenceimpact/#:~:text=Hurricane%20Florence%20resulted%20in%20the,than%20the%20state%20of%20Massachussets>.

⁴⁰ *See id.*

⁴¹ Telephone Interview with Weldon Warren, Owner, Holy Cow Beef (Mar. 26, 2024).

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ *See id.*

walking.”⁴⁶ Snow drifts that accumulate along the fences can bury cattle and cause them to die by asphyxiation or by freezing to death.

The federal government recognizes the importance of disaster planning and provides a range of resources for producers. A fact sheet titled “Do You Have a Plan for Your Livestock Should Disaster Strike” was published in October 2016 and is available online.⁴⁷ This document cites specific procedures from the American Veterinary Medical Association (AVMA) and recommends having a livestock evacuation kit and emergency plan in place.⁴⁸ The importance of strong shelter, adequate food and water, warm bedding, cooling options for animals, and overall farm safety is also noted.⁴⁹ The document stresses, “The steps we take and don’t take will directly impact their [the animals’] well-being.”⁵⁰

After a survey in 2011 showed a lack of emergency planning by feedlots, the USDA published targeted resources. The survey of large (8,000+ cattle) and small (1,000 – 7,999 cattle) feedlots across 12 states showed that only 34 percent had a written emergency-procedure plan in place.⁵¹ The Animal and Plant Health Inspection Service (APHIS), a branch of the USDA, published an info sheet in July 2012 on emergency preparedness for feedlot operations, specifically, and emphasized the benefits of a written plan, well-trained employees, and strong relationships with local officials.⁵²

It is true, in some cases, no amount of planning and good intentions may prevent some negative impacts to animals in emergencies. Although we cannot anticipate the outcome of all events, calls to reform the LIP pull from the science that exists about animal welfare, studies on how environmental conditions can compromise the physical and emotional state of animals, societal

⁴⁶ *See id.*

⁴⁷ U.S. Dep’t of Agric., *Do YOU Have a Plan for Your Livestock Should Disaster Strike? USDA Preparedness Fact Sheet* (Oct. 2016), <http://www.usda.gov/sites/default/files/documents/usda-livestock-preparedness-fact-sheet.pdf>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Animal and Plant Health Inspection Serv., *Emergency Preparedness and Mgmt. on U.S. Feedlots*, U.S. Dep’t of Agric. (July 2012), https://www.aphis.usda.gov/animal_health/nahms/feedlot/downloads/feedlot2011/Feed11_is_EmergMgmt.pdf.

⁵² *Id.*

recognition that planning for emergencies (in many cases) helps reduce negative consequences, and an ethical obligation to reduce animal suffering and protect life.

V. THE LIVESTOCK INDEMNITY PROGRAM

A variety of federal disaster assistance programs are related specifically to livestock: the Livestock Indemnity Program, the Emergency Assistance for Livestock, Honeybees and Farm-Raised Fish Program (ELAP), the Livestock Forage Disaster Program (LFP) and the Emergency Livestock Relief Program (ELRP) are a few.⁵³ These programs collectively provide compensation for diverse categories of losses ranging from livestock death and injury to feed supplies and access to grazing acreage, to the inspection and treatment of animals for specific diseases.⁵⁴ This paper focuses on much needed reforms to the Livestock Indemnity Program, specifically. Before those changes are proposed, it is important to understand more about the program, including why it was created.

A. Congressional Establishment

For decades, the United States has provided compensation to farmers and ranchers for unexpected losses.⁵⁵ Disaster relief, whether through ad hoc payments or standing programs, helps mitigate risk and incentivize participation in the country's food production industry.⁵⁶ The federal government has been apt to step in when "low-probability, high consequence" events are likely to cause financial devastation.⁵⁷

The amount of funding through assistance programs is substantial. A report by the Congressional Research Service (CRS) noted that from FY 2016 through FY 2021, more than \$3.8 billion was distributed through agricultural disaster assistance programs,

⁵³ Farm Serv. Agency, *Disaster Assistance Programs*, U.S. DEP'T OF AGRIC. (Sep. 28, 2024), <https://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/index> [hereinafter *Disaster Assistance*].

⁵⁴ *Id.*

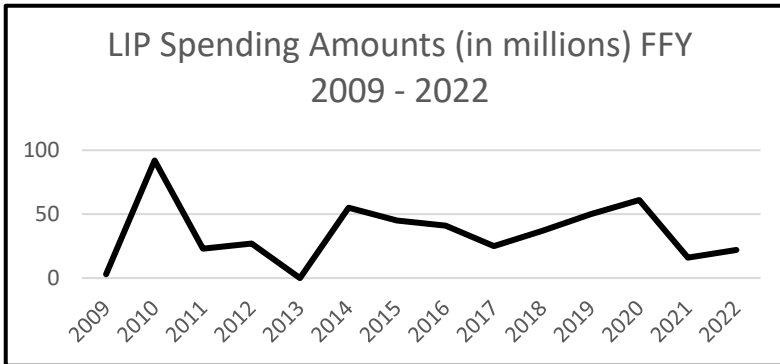
⁵⁵ David A. Moss, *Courting Disaster? The Transformation of Federal Disaster Policy Since 1803*, in *THE FINANCING OF CATASTROPHE RISK* 307, 307 (Kenneth Froot ed., 1999).

⁵⁶ Barry K. Goodwin & Ligia A. Vado, *Public Responses to Agricultural Disasters: Rethinking the Role of Government*, 4 *CANADIAN J. OF AGRIC. ECON./REVUE CANADIENNE D'AGROECONOMIE* 55, 399-417 (2007).

⁵⁷ See Moss, *supra* note 55.

not including federal crop insurance.⁵⁸ Whether this federal safety net has led to higher risk behaviors (or alternatively, behaviors that fail to responsibly mitigate risk) is debatable.⁵⁹ As weather related disasters increase in frequency and severity, rethinking the role of government and any unintended consequences of federal assistance is warranted.⁶⁰

The Livestock Indemnity Program was created by Congress through the 1997 Emergency Supplemental Appropriations Act.⁶¹ The program is administered by the USDA Farm Service Agency (FSA) and distributes millions of dollars each year in relief payments.⁶² According to USDA budget reports, spending under the program from 2009 to 2022 has fluctuated significantly as seen in the chart below.⁶³ The cumulative total over fourteen years has been approximately \$497 million.⁶⁴



B. Purpose

The Livestock Indemnity Program was created for two purposes. The first is to compensate “eligible producers or contract growers for livestock deaths in excess of normal mortality caused by eligible loss conditions.”⁶⁵ “Contract growers” are eligible for

⁵⁸ See MEGAN STUBBS, CONG. RSCH. SERV., IF12101, FARM BILL PRIMER: DISASTER ASSISTANCE (2024).

⁵⁹ See Goodwin & Vado, *supra* note 56.

⁶⁰ See *id.*

⁶¹ 1997 Emergency Supplemental Appropriations Act of Recovery from Natural Disasters, and for Overseas Peacekeeping Efforts, including those in Bosnia, Pub. L. 105-18, 111 Stat. 160.

⁶² *LIP Fact Sheet*, *supra* note 2.

⁶³ U.S. Dep’t of Agric., Budget Summary, 2012 – 2025, <https://www.usda.gov/our-agency/about-usda/budget>.

⁶⁴ *Id.*

⁶⁵ *LIP Fact Sheet*, *supra* note 2.

payment only if they are raising swine or poultry, have “possession and control” of the livestock, and have a written agreement with the livestock owner setting forth terms and conditions for their care.⁶⁶ The “normal” mortality rate is determined by the USDA FSA.⁶⁷ An eligible loss condition includes eligible adverse weather, eligible disease, and attacks by animals reintroduced into the wild by the federal government or protected by federal law.⁶⁸ Eligible adverse weather events are defined as “extreme or abnormal damaging weather that is not expected to occur during the loss period for which it occurred, which directly results in livestock losses.”⁶⁹ Examples include, but are not limited to, hurricanes, floods, blizzards, extreme heat, extreme cold, freezing rain or sleet, and winter storms lasting for at least three consecutive days and accompanied by high winds.⁷⁰ Interestingly, drought is not an eligible adverse weather event except when associated with anthrax.⁷¹ Congress has periodically provided financial relief for livestock losses solely related to drought through other supplemental appropriations.⁷²

The second purpose of the LIP is to compensate “eligible livestock owners that must sell livestock at a reduced price because of an injury from an eligible loss condition.”⁷³ To summarize, LIP is focused on livestock deaths and injuries that result in a reduced sales price. The livestock impacted must have been held for commercial use and includes beef and dairy cows, buffalo/bison, chickens, ducks, geese, turkeys, pigs, goats, sheep, and several other species.⁷⁴

C. *Payment*

Payment through the LIP is based on a formula and contingent upon submission of required documentation.⁷⁵ For livestock deaths in excess of normal mortality, payment is calculated by multiplying the national payment rate for the livestock category (75% of the average fair market value) by the

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *LIP Fact Sheet, supra note 2.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Extending Government Funding and Delivering Emergency Assistance Act, H.R. 5305, 117th Cong. (2021).

⁷³ *LIP Fact Sheet, supra note 2.*

⁷⁴ *Id.*

⁷⁵ *Id.*

number of eligible livestock times the producer's share.⁷⁶ For context, the payment rates in 2023 for livestock *owners* ranged from \$1,163.23 for an adult beef cow and \$1,198.13 for an adult dairy cow to \$233.35 for an ewe sheep, \$266.90 for a sow, and \$11.99 for an egg laying chicken.⁷⁷ By comparison, rates for swine and poultry *contract* growers were significantly less: \$109.68 for a sow and \$.72 for an egg laying chicken.⁷⁸

To demonstrate how payment might be made, we can walk through a simple calculation.⁷⁹ Suppose a beef producer had full ownership of 500 cows and lost 30 of them during an extreme winter storm in North Dakota. If FSA's "normal" loss rate on cows during that event was 3%, then normal mortality would equate to approximately 15 cows. As a result, the producer might be eligible for LIP payment on the remaining 15 cows that died. Because the producer owned the cows, and assuming they were all full-grown adults, that would equate to a LIP payment of \$17,448.45 (15 x \$1,163.23), using 2023 rates.

For injured livestock sold at a reduced price, LIP payments for *owners* are calculated by multiplying the national payment rate for the livestock category minus the amount that the owner received for the livestock times the owner's share.⁸⁰ If injured livestock are sold for more than the national payment rate, no payment is provided to the owner.⁸¹ Livestock owners and contract growers must keep and submit records of eligible losses including animal deaths, injuries, and sales receipts.⁸²

D. Eligibility Limitations

The LIP has several additional limitations. Beginning in 2017 and for the years following, Congress removed the per person and per legal entity yearly program payment cap.⁸³ There is no limit to the amount the LIP will pay an individual or entity for losses; however, if the individual or entity has an average adjusted gross income that exceeds \$900,000, they are ineligible for payment

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *LIP Fact Sheet*, *supra* note 2.

⁷⁹ See Kenny Burdine, *USDA-FSA's Livestock Indemnity Program*, 22 *ECON. & POL'Y UPDATE* 1 (2022).

⁸⁰ *LIP Fact Sheet*, *supra* note 2.

⁸¹ *Id.*

⁸² *Id.*

⁸³ See The Bipartisan Budget Act of 2018, H.R. 1892, 115th Cong. (2018).

under the program.⁸⁴

Deadlines for when a loss may be claimed are also specified.⁸⁵ A livestock owner or contract grower must submit notice of loss within 30 calendar days of when the loss is first apparent.⁸⁶ An application for payment must be made within 60 calendar days after the end of the calendar year in which the eligible loss condition occurred.⁸⁷

E. Animal Welfare Shortcomings

Despite the prescriptive eligibility conditions for LIP payments, surprisingly, there is no requirement for producers to have a disaster preparedness plan in place to mitigate losses.⁸⁸ Additionally, there is no limit to the number of times producers can seek compensation through the program.⁸⁹

Consequently, in areas where extreme weather events have historically occurred (e.g., flooding in the southeast, winter storms in the north, etc.), the federal government is available to *repeatedly* indemnify losses if eligibility and documentation requirements are met.⁹⁰ Some might consider this a “federal handout.”

No federal incentive or requirement to mitigate the loss or injury of farm animals during extreme weather is tied to the program. As a result, the LIP may be creating an incentive to leave animals behind when disaster strikes, surely an unintended consequence of its current structure. If farmers are considering relocating or rescuing animals, cost is likely to be a significant factor. Knowing that federal assistance, or other insurance support, is available may influence how the animals are managed and, in turn, their welfare.

⁸⁴ See *LIP Fact Sheet*, *supra* note 2. However, bi-partisan efforts in Congress are occurring to remove the gross income cap so that producers at all income levels (even large CAFOs) will be newly eligible for LIP payments; see also Fair Access to Agriculture Disaster Programs Act, H.R. 4127, 118th Cong. § 2 (2023).

⁸⁵ *LIP Fact Sheet*, *supra* note 2.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

VI. DISTRIBUTION OF LIP FUNDS AND GEOGRAPHIC TRENDS

A review of LIP payments to producers across the country over more than a decade reveals several noteworthy findings and patterns; however, important caveats to the data presented must be declared. Keep in mind that the LIP compensates for animal loss and injury from “eligible loss conditions” which includes not just adverse weather but also disease and certain predator attacks.⁹¹ The publicly available data does not distinguish between these different conditions but only shows that a payment was made.

In this paper, an assumption is being made that payment numbers to counties and states, in the aggregate, are being mostly attributed to adverse weather, although it is possible that a portion of those totals includes loss related to disease and predator attacks. Other advocates analyzing the program, including elected officials and non-profit organizations, have also represented the data in a similar fashion. The high-level points made about state and county reliance on the program are still valid given this assumption that payments are largely attributed to adverse weather

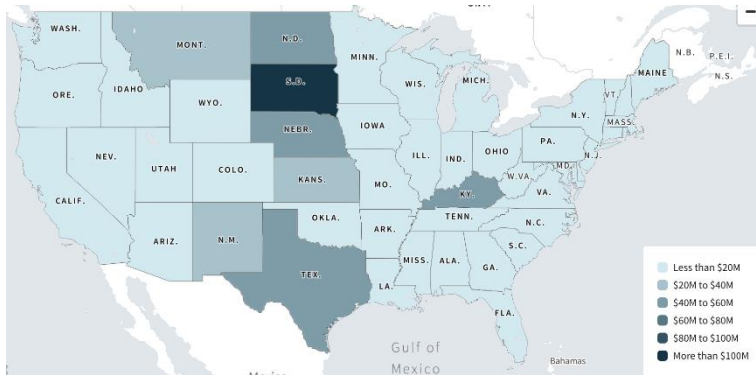
A. State and County Highlights

From October 2009 – March 2024, producers in the following five states had the highest total payouts from the LIP: South Dakota (\$119.7M), Nebraska (\$50.4M), North Dakota (\$49.1M), Texas (\$42.4M) and Kentucky (\$40.5M).⁹²

⁹¹ *LIP Fact Sheet*, *supra* note 2.

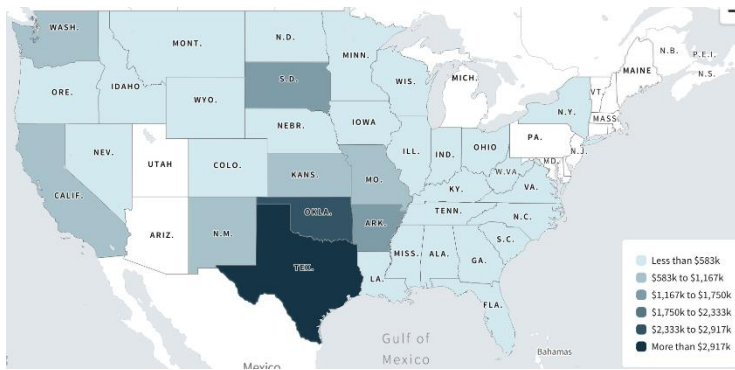
⁹² USAspending.gov. U.S. Dep’t of Agric., Farm Serv. Agency. *Livestock Indemnity Program* (2008-2024), https://files.usaspending.gov/generated_downloads/PrimeAwardSummariesAndSubawards_2024-03-23_H19M49S27435227.zip.

Federal Fiscal Year 2009 – March 2024



While these five states are often the top recipients of funding from the program, substantial variations among the five can exist from year to year. In Federal Fiscal Year (FFY) 2021, for example, Texas far surpassed South Dakota by almost three times (\$3.2M vs. \$1.2M), the result of a historic and unusual winter storm.⁹³ Oklahoma was also impacted by the storm and received \$2.7M from the LIP, ranking it as #2 for that year.⁹⁴

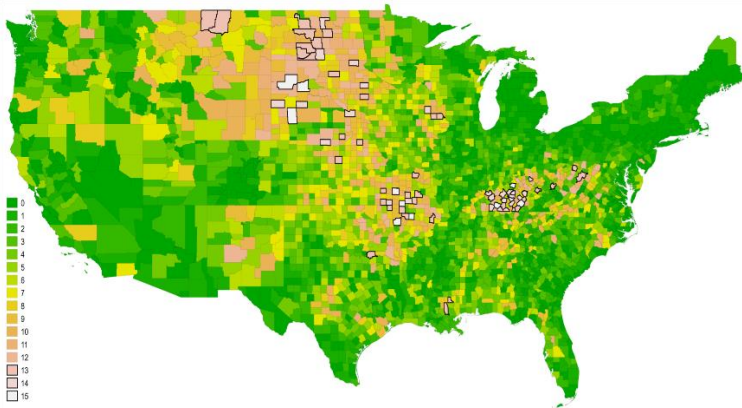
Federal Fiscal Year 2021



⁹³ *Id.*

⁹⁴ *Id.*

Some counties were also found to be *highly* reliant on the program. From October 2009 – March 2024, millions of dollars were distributed in the same counties year after year.⁹⁵ For example, producers in eleven counties received LIP payments 15 out of 15 years. For Meade County in South Dakota, the cumulative total of these payments exceeded \$14 million.⁹⁶ Twenty-five counties across the country received payments 14 out of 15 years, and another thirty-eight counties received payments 13 out of 15 years.⁹⁷ While this may be a small percentage of counties across the country, the cumulative payment data is substantial.⁹⁸ Additional details from this subset of counties and visualization of the clustering are provided below:



of Years out of 15 (2009 – 2023) that LIP Payments Were Made
in a County⁹⁹

⁹⁵ USAspending.gov, *supra* note 92.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ There are 76 Federal Information Processing Standard (FIPS) (3.07%) with more than one county name associated with it. Approximately half of these are simply spelling differences, but some are distinctly different counties. In all cases, the FIPS with the most recent county name (and state) associated with it is used.

State	County	# of Years Out of 15 Received LIP Payment	# of Payments	Total Awarded
South Dakota	Meade	15	217	14,395,427
South Dakota	Haakon	15	289	4,435,641
Kentucky	Pulaski	15	327	2,862,273
Nebraska	Sheridan	15	201	1,955,709
Kentucky	Taylor	15	635	1,498,496
Kentucky	Warren	15	85	489,562
Arkansas	Washington	15	63	412,399
Missouri	Lawrence	15	89	373,752
Kentucky	Shelby	15	58	294,466
Arkansas	Boone	15	86	277,480
Missouri	Vernon	15	64	222,117
South Dakota	Bennett	14	323	6,691,406
North Dakota	Emmons	14	146	2,527,957
Kentucky	Adair	14	297	2,379,848
Kentucky	Marion	14	268	1,660,496
South Dakota	Fall River	14	205	1,623,783
Nebraska	Dawson	14	212	1,586,255
Kentucky	Logan	14	148	1,337,278
Nebraska	Knox	14	234	1,235,942
Kentucky	Hart	14	248	1,071,347
South Dakota	Brookings	14	92	986,718
Kentucky	Lincoln	14	266	927,231
South Dakota	Marshall	14	97	891,256
Kentucky	Allen	14	208	767,697
Kentucky	Madison	14	79	729,919
Kentucky	Nelson	14	116	654,473
Kentucky	Washington	14	189	640,240
North Dakota	Pierce	14	56	549,719
Kentucky	Monroe	14	90	512,553
Kentucky	Hardin	14	115	413,628
Kentucky	Davies	14	62	333,973
Kentucky	Mason	14	90	290,192
Iowa	Fayette	14	45	271,026
Kentucky	Ohio	14	61	232,585
Kansas	Cherokee	14	85	134,578
Missouri	Greene	14	41	134,506
Iowa	Dubuque	13	238	5,024,557
North Dakota	Sioux	13	126	4,016,702
North Dakota	Morton	13	152	3,245,717
Montana	Blaine	13	298	3,181,240
North Dakota	Grant	13	107	3,068,408
North Dakota	Burleigh	13	118	2,592,577
Montana	Phillips	13	169	2,280,636
Nebraska	Howard	13	152	1,123,551
South Dakota	Faulk	13	145	1,065,124
North Dakota	Wells	13	63	972,255
Kentucky	Barren	13	178	944,384
North Dakota	McLean	13	70	881,445
North Dakota	Ward	13	61	632,173
Nebraska	Seward	13	91	558,463
South Dakota	Minnehaha	13	60	513,573
Iowa	Delaware	13	37	507,732
Kentucky	Wayne	13	76	482,285
Kentucky	Rockcastle	13	72	469,718
Louisiana	Tangipahoa	13	50	466,593
Arkansas	Sharp	13	62	390,803
Missouri	Cooper	13	75	380,378
Kentucky	Clinton	13	125	378,048
Arkansas	Carrroll	13	68	337,911
Kentucky	Morgan	13	108	334,962
Missouri	Barry	13	62	330,541
Kansas	Smith	13	85	306,207
West Virginia	Harrison	13	80	295,226
Oklahoma	Bryan	13	83	264,664
Oklahoma	Ottawa	13	36	195,057
Missouri	Webster	13	48	185,113
Kansas	Allen	13	68	164,497
Kansas	Labette	13	61	151,566
Missouri	Polk	13	58	125,565
Missouri	Laclede	13	25	97,995
West Virginia	Randolph	13	50	94,233
Mississippi	Walthall	13	33	89,719
West Virginia	Lincoln	13	69	65,883

B. Repeat Recipients

Just as trends at the county level exist, trends among individual recipients are also present. Repeat payments to the same producers, especially across different years, raises alarms about the frequency of disaster events that are resulting in the loss or reduced value of livestock.¹⁰⁰

A few examples of repeat payments to a single producer across multiple years are provided from USDA data below:¹⁰¹

	Tim Graber Farms, Inc. (Washington, IA)	D.L. Robey Farms Partnership (Logan, KY)	Gordon Cattle Co (Blaine, MT)	Brooks Ranch (Slope, ND)	Blue Ridge Farm Inc. (Nelson, KY)	Gary Buckley Ranch (Bowman, ND)
2009						\$27,743
2010		\$116,672	\$26,262	\$46,603	\$16,645	\$27,743
2011	\$62,030	\$18,699	\$26,707		\$25,809	
2012	\$86,218	\$9,722	\$30,245	\$37,490	\$11,286	
2013						
2014	\$131,948	\$47,372	\$41,857	\$22,584		
2015		\$21,772			\$25,489	\$20,687
2016	\$14,744					\$473
Total	\$294,940	\$214,237	\$125,071	\$106,677	\$79,229	\$76,646

Based on payout formulas previously reviewed, the size of an award in a single year should give some indication of livestock impact. For example, a payment of \$100,000 could mean reimbursement for approximately 85 deceased cows or 1,000 deceased sows. These numbers should be considered in the context of animals who lost their life and/or were injured, as well as the hundreds (possibly thousands) more that endured extreme stress and were not part of a claim for payment.

Publicly available data from the USDA has widespread redactions that make it difficult to track repeat payments to recipients.¹⁰² Out of more than 41,000 payments made publicly available and analyzed, “individual recipient” was listed 4,663

¹⁰⁰ USAspending.gov, *supra* note 92.

¹⁰¹ 76 FIPS, *supra* note 99.

¹⁰² USAspending.gov, *supra* note 92.

times (8%), “multiple recipients” was listed 14,379 times (26%), and “redacted due to PII” was listed 32,574 times (58%).¹⁰³ In total, more than 93 percent of awards did not publicly disclose the name of the recipient.¹⁰⁴ However, county and state data is listed even if the recipient name is not.

Repeat payments to unnamed producers contribute to concerns about transparency. For example, more than \$950,000 was distributed to an “individual recipient” located at 2925 SW 6th Ave. in Ontario, Oregon in 2017 and 2018 across 42 separate payments.¹⁰⁵ Additionally, millions of dollars in LIP payments have been sent to USDA FSA offices across the United States and were then presumably distributed to producers. The only address listed in the publicly available data for those payments is the USDA FSA office, not the final recipient. For example, more than \$1.1 million was distributed in 2017 and 2018 across 73 separate payments to the USDA FSA office at 210 Bierman Road in Dubuque, Iowa.¹⁰⁶ In 2018, 82 separate payments totaling more than \$2 million went to the USDA FSA office in Arecibo, Puerto Rico.¹⁰⁷ Who those payments were subsequently distributed to is not noted.

Limitations in the public data make it difficult for stakeholders to analyze, spot trends, conduct oversight and help ensure the fiscal integrity of the program. While audits by the USDA Office of Inspector General have not identified the LIP as a “high-risk program” for fraud, other disaster assistance programs have been flagged.¹⁰⁸ LIP spending data *without* name redactions can potentially be obtained through a Freedom of Information Act (FOIA) request to the USDA. Due to time constraints, a FOIA request of comprehensive LIP data was not possible prior to submission of this paper; however, a more thorough analysis of program payments may be achievable if such a request is made.

¹⁰³ *Id.* “PII” means personally identifiable information.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ USAspending.gov, *supra* note 92.

¹⁰⁸ Off. of the Inspector Gen., U.S. Dep’t of Agric., *USDA’s Compliance With Improper Payment Requirements for Fiscal Year 2022* (2023), <https://usdaoig.oversight.gov/reports/audit/usdas-compliance-improper-payment-requirements-fiscal-year-2022>; “In FY2021, the Noninsured Crop Disaster Assistance Program (NAP) and Wildfires and Hurricanes Indemnity Program (WHIP) were found by the OIG to have an improper payment rate greater than 10%, likely caused by administrative errors.” Stubbs, *supra* note 58.

C. Geographic Trends

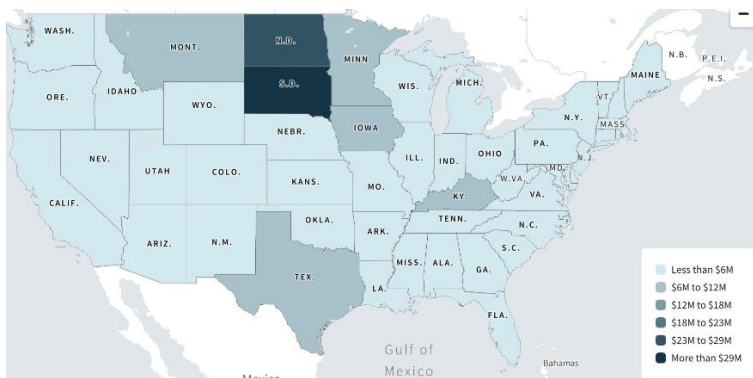
Variations in state level LIP distributions may be an indication of changing weather patterns. Some noteworthy findings are revealed when aggregate data across fifteen years are split into three time blocks:

- Data Block 1: FFY 2009 – 2013
- Data Block 2: FFY 2014 – 2018
- Data Block 3: FFY 2019 – 2023

For example, South Dakota is consistently a top recipient (shaded darkest), and several states in the Great Plains/Midwest are having an increased reliance on the program. Spending in Kansas grew from \$4.4M to \$9.2M to \$13.2M across the three time blocks shown below.¹⁰⁹ Nebraska jumped from \$5.4M to \$13.1M to \$31.9M.¹¹⁰

In contrast to steady growth in some states, others have a yo-yo pattern. For example, in Data Block 1, Kentucky received \$8.9M, but their allocation significantly increased in Data Block 2 to \$28.2M.¹¹¹ Then it dropped considerably in the third block to \$3.3M.¹¹²

LIP Spending - Data Block 1 Federal Fiscal Year 2009 – 2013



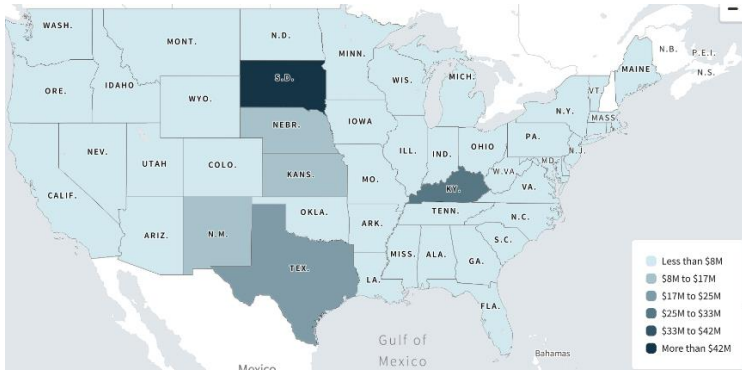
¹⁰⁹ USAspending.gov, *supra* note 92.

¹¹⁰ *Id.*

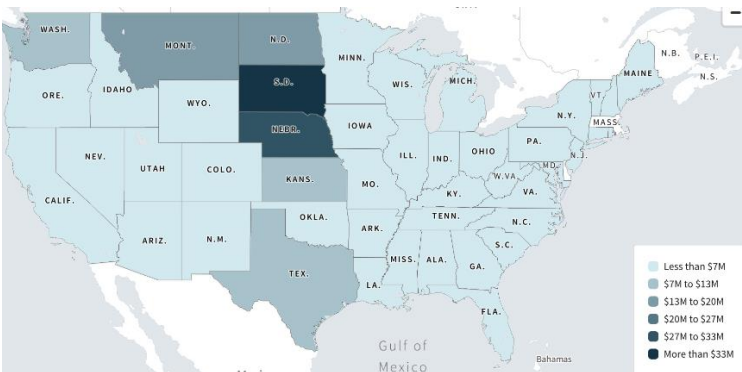
¹¹¹ *Id.*

¹¹² *Id.*

LIP Spending - Data Block 2 Federal Fiscal Year 2014 – 2018



LIP Spending - Data Block 3 Federal Fiscal Year 2019 – 2023



What conclusion about weather patterns can be drawn from this data? State level back-and-forth spending, as seen in Kentucky, make assumptions about climate change debatable. However, in the case of South Dakota, it can safely be concluded that animal death/injury consistently caused by extreme weather has occurred and continues to be frequent. The majority of states have a low reliance on the program, which could mean that weather patterns are staying largely the same or the changes are not having a significant impact on livestock.

However, some states, like Nebraska and Kansas, fall between these two categories. There, a shift can be seen occurring across the years and increased use of indemnity payments. This could be a sign of more frequent and/or intense weather events, a

greater reliance on the program (i.e., producers have larger farming operations and are filing larger claims), or a greater awareness about the program by producers (i.e., more producers are participating). The National Climate Assessment, which is led by hundreds of private sector experts and a 60-member Federal Advisory Committee, reported the following about the Great Plains region (which includes Nebraska and Kansas):

Changing extremes in precipitation are projected across all seasons, including higher likelihoods of both increasing heavy rain and snow events and more intense droughts. Winter and spring precipitation and heavy downpours are both projected to increase in the north, leading to increased runoff and flooding that will reduce water quality and erode soils.¹¹³

Given the likelihood of more extreme weather and growing reliance on the LIP in this region, disaster planning should be an essential component of farming operations (if it has not been already) to better protect livestock.

D. Case Studies – Weather Events

To grasp the severity of extreme weather events that lead to LIP payments, two case studies are presented.

i. Winter Storm Uri – Texas

In February 2021, Texas experienced an extreme winter event.¹¹⁴ Snow, sleet, and freezing rain occurred throughout the state followed by six to nine days of consecutive freezing temperatures that broke historical records.¹¹⁵ At one point, nearly 10 million people were without power and the ability to stay

¹¹³ *Great Plains, Climate Change Impacts in the United States: The Third National Climate Assessment*, U.S. GLOBAL CHANGE RESEARCH PROGRAM, <https://nca2014.globalchange.gov/highlights/regions/great-plains> (last visited Sept. 28, 2024).

¹¹⁴ *The Great Texas Freeze: Feb. 11 – 20, 2021*, Nat'l Ctr. for Env't Info. (Feb. 24, 2023), <https://www.ncei.noaa.gov/news/great-texas-freeze-february-2021>.

¹¹⁵ Jess Donald, *Winter Storm Uri 2021*, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, <https://comptroller.texas.gov/economy/fiscal-notes/2021/oct/winter-storm-impact.php> (last visited Sept. 28, 2024); *The Great Texas Freeze: Feb. 11 – 20, 2021*, NAT'L CTR. FOR ENV'T INFO. (Feb. 24, 2023), <https://www.ncei.noaa.gov/news/great-texas-freeze-february-2021>.

warm.¹¹⁶ A resident said in an interview, “It looked like the end of the world.”¹¹⁷

The impact on livestock was catastrophic. The Texas A & M AgriLife Extension Service estimated the statewide loss to livestock producers to be “at least \$228 million.”¹¹⁸ These losses included the death and injury to cattle, sheep, goats, and poultry, as well as operational losses (e.g., feed, milk production).¹¹⁹ The storm hit during the start of the birthing season, resulting in the loss of many calves, lambs, and kids.¹²⁰

The total payout to producers in Texas in FFY 2021 exceeded \$3.2 million.¹²¹ The largest single payment was \$115,533 to a producer in Waco.¹²² For comparison, total payouts to the state in FFY 2020 were \$930,219 and in FFY 2019 were \$518,874, significantly lower than what was seen in FFY 2021.¹²³ However, as previously stated, extreme weather can cause dramatic swings in allocations to individual states. Another significant increase in payments to Texas occurred in FFY 2018. The state received a staggering \$6.7 million from the LIP, a possible result of Hurricane Harvey, with significant funding going to counties along the Texas coast.¹²⁴

ii. Bomb Cyclone – Nebraska

Nebraska is prone to rapidly changing weather events ranging from widespread flooding to blizzards and tornados.¹²⁵ And despite the likelihood of volatile weather, more than 90 percent of

¹¹⁶ Donald, *supra* note 115; see *The Great Texas Freeze*, *supra* note 114.

¹¹⁷ Jacob Ohara et al., “It looked like the end of the world”: Listen to the Stories of Texans Who Lived Through 2021’s Historic Winter Storm, THE TEXAS TRIBUNE (Feb. 17, 2022), <https://www.texastribune.org/2022/02/17/texas-winter-storm-2021-stories/>.

¹¹⁸ Paul Schattenberg, *Initial Texas agricultural loss estimates from URI exceed \$600 million*, AGRILIFE TODAY (Mar. 3, 2021), <https://agrifiletoday.tamu.edu/2021/03/02/initial-ag-losses-from-uri-exceed-600-million/>.

¹¹⁹ *Id.*

¹²⁰ Donald, *supra* note 115.

¹²¹ USAspending.gov, *supra* note 92.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See Lauren Taylor, *Nebraska Devastated by Multiple Extreme Weather Events*, ENVIRONMENTAL AND ENERGY STUDY INSTITUTE (May 7, 2019), <https://www.eesi.org/articles/view/nebraska-devastated-by-multiple-extreme-weather-events>.

the state is comprised of farms and ranches.¹²⁶

Across the country, Nebraska received the second highest funding total from the LIP (\$50 million) over a 15-year period (FFY 2009-2024).¹²⁷ However, total state payouts in Nebraska can fluctuate between the years to a surprising degree. Compare the distributions to Nebraska producers in FFY 2017 (\$839,204) and FFY 2018 (\$901,672) to FFY 2019 (\$6,608,675) and FFY 2020 (\$20,070,078).¹²⁸

In March 2019, a “bomb cyclone” swept through the Midwest and caused unprecedented flooding.¹²⁹ A bomb cyclone is a rapidly developing storm that is created when warm air collides with cool air, triggering a sudden drop in barometric pressure over a 24-hour window.¹³⁰ In cooler climates, this can result in a blizzard; in warmer climates, the storm can take on hurricane-like characteristics above land.¹³¹ The bomb cyclone that impacted the Midwest in March 2019 resulted in widespread destruction to the agriculture industry, among others, and flooding lingered for months.¹³² In addition to the loss of life and injury of livestock, the flooding wiped out roads and made areas inaccessible by workers and veterinarians that were needed to render aid and care.¹³³ Reporting by *The Washington Post* provided this account:

Anthony Ruzicka, a fifth-generation Nebraska rancher, got the call at 6 a.m. The nearby 90-year-old Spencer Dam was failing under pressure of a river swollen with snowmelt and rain. He got out with moments to spare — but the wall of water swallowed up many calves and all his bulls, along with his farmhouse, outbuildings, feed bins, and the original log cabin built when his family came

¹²⁶ *See id.*

¹²⁷ USAspending.gov, *supra* note 92.

¹²⁸ USAspending.gov, *supra* note 92.

¹²⁹ Taylor, *supra* note 125.

¹³⁰ *See* Nat'l Ocean Serv., Nat'l Oceanic & Atmospheric Admin., *What Is Bombogenesis?* (Jan. 20, 2023), <https://oceanservice.noaa.gov/facts/bombogenesis.html>.

¹³¹ *Id.*

¹³² Joey Garrison, *Nebraska Slammed by Worst Flooding in 50 Years After Massive “Bomb Cyclone,”* USA TODAY (Mar. 16, 2019), <https://www.usatoday.com/story/news/nation/2019/03/16/nebraska-flooding-worst-50-years-following-bomb-cyclone-storm/3184806002/>.

¹³³ *See id.*

from Czechoslovakia to homestead in the 1860s.¹³⁴

The article also noted the degree of contamination in the water. John Hansen, president of the Nebraska Farmers Union said, “The water is chock-full of stuff. This is a toxic brew that is going down the river — the water took out gas stations and farm shops and fuel barrels.”¹³⁵

VII. REFORMING THE LIVESTOCK INDEMNITY PROGRAM: CURRENT AND PAST EFFORTS

Policymakers and animal welfare advocates have identified a need to modify the Livestock Indemnity Program and have called on Congress and the USDA to act.¹³⁶ Their goals are to reduce animal suffering/death and/or protect taxpayer dollars used in the program.¹³⁷ While many recognize a role for the federal government to play in risk mitigation, they also argue in favor of additional oversight and accountability in the program.¹³⁸

Over the last several years, the Animal Welfare Institute, the Humane Farming Association, members of Congress, and other stakeholders have tried to advance reforms to the LIP through regulatory and legislative pathways.¹³⁹ Even the American Bar Association, which many would consider an unlikely advocate on this issue, took the unusual step of passing a resolution in February 2023 calling on:

Congress and the United States Department of Agriculture to incentivize the safeguarding of the environment, human health, food safety, animal welfare, and farmers by providing natural disaster preparedness training and guidance to farmers and other animal producers who seek federal government payments including, but not

¹³⁴ Laura Reiley, “*Maybe It’s a Sign from God.*” *Midwest Floods Devastate Nebraska Farmers*, WASH. POST, Mar. 19, 2019.

¹³⁵ *Id.*

¹³⁶ Telephone Interview with Allie Granger, Senior Pol’y Assoc., Animal Welfare Inst. (July 26, 2023). [hereinafter *Granger*]

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See id.*; *see also* *Emergency and Disaster Preparedness for Farm Animals Act*, *supra* note 5; *see also* Humane Farming Association - <https://hfa.org/livestock-indemnity-program-language.html> (last visited Oct. 26, 2024).

limited to, those through the Livestock Indemnity Program.¹⁴⁰

Although the federal government has guidance materials that emphasize the importance of disaster planning, many have argued planning efforts should be made mandatory if federal indemnity payments are sought.¹⁴¹

A. *Legislative Reforms*

Repeated efforts have been made to pass legislation that would encourage or require the USDA to reform the LIP.¹⁴²

i. Agriculture Appropriations Bills

Advocates and policymakers have focused on the yearly appropriations process as a pathway to reform the LIP.¹⁴³ Beginning in 2018 and for years afterward, members of Congress have asked for language to be included in the House Agriculture Appropriations Bill that would advance disaster planning.¹⁴⁴ The efforts have had mixed success. The proposed language was not included in the FFY 2018 and FFY 2019 bills.¹⁴⁵ However, the FFY 2020 Agriculture Appropriations Bill passed by Congress included the following report language: “The agreement recognizes the importance of disaster planning and directs the Department to work

¹⁴⁰ American Bar Association, *Resolution*, ABA (Feb. 6, 2023), <https://www.americanbar.org/content/dam/aba/administrative/tips/animal-law/res-509.pdf>.

¹⁴¹ See U.S. Dep’t Agric., *Disaster Planning With Animals*, <https://www.nal.usda.gov/animal-health-and-welfare/disaster-planning-animals> (last visited Sept. 28, 2024).

¹⁴² See Telephone Interview with Allie Granger, *supra* note 136.

¹⁴³ See *id.*

¹⁴⁴ Letter from Ro Khanna et al., U.S. Rep., to Sanford Bishop, U.S. Rep., and Jeff Fortenberry, U.S. Rep., House Appropriations Comm. (Apr. 26, 2021) (on file with author) [hereinafter *Khanna Letter 2021*]; Letter from Ro Khanna et al., U.S. Rep., to Sanford Bishop, U.S. Rep., and Andy Harris, U.S. Rep., House Appropriations Comm. (Apr. 26, 2022) (on file with author) [hereinafter *Khanna Letter 2022*]; Letter from Ro Khanna et al., U.S. Rep., to Sanford Bishop, U.S. Rep., and Andy Harris, U.S. Rep., House Appropriations Comm. (Mar. 24, 2023) (on file with author) [hereinafter *Khanna Letter 2023*].

¹⁴⁵ See Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2018, H.R. 3268, 115th Cong. (2017); see also Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2019, H.R. 5961, 115th Cong. (2018).

with producers that want to *voluntarily* develop disaster plans to prevent livestock deaths and injuries.”¹⁴⁶ (emphasis added)

Marginally more prescriptive report language was included in the FFY 2021, FFY 2022 and FFY 2023 Agriculture Appropriations Bills passed by Congress:

Livestock Indemnity Payments for Adverse Weather. —The Committee is aware that millions of farmed animals die each year due to the effects of adverse weather. Extreme weather events are occurring at increased frequency, putting additional livestock at risk. The Committee recognizes the importance of disaster planning and directs the Department to work with producers that want to voluntarily develop disaster plans to prevent livestock deaths and injuries.¹⁴⁷

Unfortunately, the FFY 2024 spending bill does not include the language above, breaking several years of precedent.¹⁴⁸ The reason for the change is not entirely clear, but some speculate the language was not a priority for leadership on the committee after Republicans gained control of the House in 2023.¹⁴⁹

Policy changes often happen incrementally, and while the report language above is a step in the right direction, it is merely a suggestion from Congress to the USDA to advance disaster planning. No law or regulation *requiring* the USDA or producers to act currently exists.

Further, it is unclear what actions the USDA has taken in response to the report language passed by Congress in previous years. In April 2023, the Animal Welfare Institute (AWI) sent a letter to the Farm Service Agency, the agency within the USDA

¹⁴⁶ Further Consolidated Appropriations Act, Pub. L. No. 116-94, 133 Stat. 2534 (2020) (citing the Explanatory Statement at H11165).

¹⁴⁷ Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182 (2020) (citing H. Rep. 116-446 at 47) [hereinafter *Appropriations FY 2021*]; Consolidated Appropriations Act, Pub. L. No. 117-103, 136 Stat. 49 (2022) (citing H. Rep. 117-82 at 49) [hereinafter *Appropriations FY 2022*]; Consolidated Appropriations Act, Pub. L. No. 117-328, 136 Stat. 4459 (2022) (citing H. Rep. 117-392 at 46).

¹⁴⁸ Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2024, H.R. 4368, 118th Cong. (2023).

¹⁴⁹ Telephone Interview with Kevin Fox, Legis. Dir., Congressman Ro Khanna (Jan. 12, 2024).

tasked with administering the LIP, seeking information about their efforts to advance disaster planning.¹⁵⁰ The following questions were asked:

1. Does FSA, or the USDA more generally, have the necessary expertise and resources (both in terms of funding and personnel) to carry out this directive?
2. Since 2019 when this directive was first issued, has the agency seen an increase in interest from producers in developing disaster preparedness plans?
3. What actions are being taken to proactively notify and demonstrate to livestock and poultry producers that FSA personnel serve as a resource and can provide technical assistance in developing a site-specific, comprehensive disaster preparedness plan?
4. What actions are being taken, or what tools are being utilized, to identify high-risk or particularly vulnerable operations or geographic areas where extreme weather is likely to cause high livestock and poultry mortality? Is routine, proactive outreach being conducted to high-risk operations prior to extreme weather events?¹⁵¹

At the time this paper was completed, AWI was still awaiting a response from the FSA.¹⁵²

For the past several years, Congressional leaders have also pushed for the passage of stronger LIP reform language in funding bills that would mandate disaster planning. In 2021 and each year since, more than 50 Democratic lawmakers in the House have called on committee leadership to include the following in the yearly agriculture appropriations bills:¹⁵³

Provision, Agriculture Appropriations Bill
Livestock Indemnity Payments for Adverse
Weather. For expenses involved in making

¹⁵⁰ Letter from Dena Jones, Dir., Farm Animal Program, Animal Welfare Inst., to Marcus Graham, Deputy Dir. for Field Operations, U.S. Dep't of Agric. Farm Service Agency (Apr. 6, 2023).

¹⁵¹ *See id.*

¹⁵² Granger, *supra* note 136.

¹⁵³ *Khanna Letter 2021*, *supra* note 144; *Khanna Letter 2022*, *supra* note 144; *Khanna Letter 2023*, *supra* note 144.

indemnity payments to eligible livestock owners or contract growers, such sums as may be necessary: Provided, That the Secretary shall ensure that no funds are used for issuing payments under the program, unless the applicant offers 1) a disaster preparedness plan that is specific to the species of animal(s) and region of the country, and 2) a description of how the plan was executed to prevent livestock injuries or deaths.

Report Language, Agriculture Appropriations Bill

Disaster Preparedness. – The Committee recognizes that millions of farmed animals die each year due to the effects of adverse weather, and extreme weather events are occurring at increase frequency, putting additional livestock at risk of injury and death. The committee also is cognizant that veterinary and agricultural trade associations recognize the importance of disaster planning in preventing the extent of livestock deaths. Therefore, the Committee encourages USDA to require written disaster preparedness plans for the issuance of payments under the Livestock Indemnity Program.

This engagement campaign has been led by Rep. Ro Khanna, a Democratic member representing the 17th District in California (Silicon Valley).¹⁵⁴ Rep. Khanna has circulated several Congressional sign-on letters that argue disaster plans should be required for LIP payments to “safeguard animal welfare, promote transparency, and ultimately save taxpayer dollars.”¹⁵⁵ To date, this language has not been included in any yearly funding bills.

ii. The Emergency and Disaster Preparedness for Farm Animals Act

In addition to the advocacy efforts focused on appropriations bills, standalone legislation to reform the LIP has been recently introduced. The Emergency and Disaster Preparedness for Farm Animals Act (H.R. 243) was introduced on

¹⁵⁴ *Khanna Letter 2021, supra* note 144.

¹⁵⁵ *Id.*

Jan. 20, 2023, by Rep. Steve Cohen, a Democrat representing the 9th district in Tennessee (Memphis) and member of the Congressional Animal Protection Caucus. The bill is co-sponsored by an additional 20 members, all Democrats, from 15 different states.¹⁵⁶

If passed, the Emergency and Disaster Preparedness for Farm Animals Act would amend federal law and stipulate that an eligible producer could only receive LIP payment after an adverse weather event *if* the producer had submitted to the USDA an emergency preparedness plan at least 180 days before the claim for payment is made.¹⁵⁷ If more than two years have passed since submission of the plan, the producer must have submitted a renewal.¹⁵⁸ Additionally, the producer must provide “a description of how the most recently submitted disaster preparedness plan was implemented on the farm to attempt to prevent such loss” not more than 30 days after the livestock loss occurred.¹⁵⁹ Specific components of the preparedness plan are also required.¹⁶⁰ Under the proposed bill, the plan must account for each potential type of adverse weather event in the area, the size of the farm, and each type of livestock.¹⁶¹

In a press release announcing the bill, Rep. Cohen made the following statement:

Millions of farm animals die each year during extreme weather events and natural disasters, costing taxpayers millions in indemnity payments to producers for their losses. Our bill simply requires producers to have plans in place to mitigate those disasters and the effects they have on their livestock. It is a prudent remedy to a solvable problem, and ultimately will save animal lives. An ounce of prevention is worth a pound of cure.¹⁶²

¹⁵⁶ Emergency and Disaster Preparedness for Farm Animals Act, H.R. 243, 118th Cong. §3 (2023). [hereinafter *Farm Animals Act*].

¹⁵⁷ *See id.*

¹⁵⁸ *See id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See id.*

¹⁶¹ *See id.*

¹⁶² *The Honorable Steve Cohen, Congressman Cohen Introduces the Emergency and Disaster Preparedness for Farm Animals Act*, COHEN HOUSE (Jan. 19, 2023), <https://cohen.house.gov/media-center/press-releases/congressman-cohen-introduces-emergency-and-disaster-preparedness-farm>.

Rep. Lloyd Doggett, a Democrat representing the 37th district (Austin) in Texas, is an original co-sponsor of the bill and provided the following statement to me about his advocacy for reforms:

With the dangers of the climate crisis and extreme weather steadily growing, farm animals must not be forgotten. USDA's Livestock Indemnity and Emergency Loan Programs should require disaster preparedness plans for farmers and ranchers receiving federal assistance. In the 2021 Winter Storm Uri alone, we saw devastating losses statewide--\$228 million in livestock loss among numerous dead cattle, sheep, and goats. Ensuring farmers and ranchers take necessary precautions before and during natural disasters is imperative to protect animal wellness as we face more extreme and more frequent disasters.

I joined my colleague Representative Steve Cohen as an original cosponsor of the Emergency and Disaster Preparedness for Farm Animals Act to protect farm animals and taxpayers against these threats. Unless more adequate measures are developed to protect livestock, taxpayers will be paying much more than the millions already being spent to compensate farmers and ranchers for avoidable losses. Our proposed bill offers needed reforms to protect both animal life and taxpayer dollars.¹⁶³

As of the writing of this paper, the Emergency and Disaster Preparedness for Farm Animals Act has been referred to the House Committee on Agriculture but has not been scheduled for a hearing, an important first step of the legislative process.¹⁶⁴ Currently, only Democrats support the bill, and because Republicans currently control the House, the lack of bi-partisan engagement may limit (or eliminate) its prospects for movement. There have been efforts by AWI and other stakeholders to have the language from H.R. 243 included in the farm bill reauthorization, but the same challenging

¹⁶³ Email from Jillian Smith, Legislative Assistant, Office of U.S. Rep. Lloyd Doggett (Jan. 24, 2023, 03:03 CST) (on file with author).

¹⁶⁴ *Farm Animals Act*, *supra* note 156.

political dynamics are likely to still be an issue.¹⁶⁵ A Senate companion to the House bill would be helpful in showing bicameral support for the reforms, but at this time, one has not been introduced.

In trying to understand why a bill, which appears to implement common sense reforms to a federal program, would stall in Congress, Allie Granger, Senior Policy Associate at AWI, said: “Anyone you ask, no matter what part of the political spectrum they fall on, will say disaster planning is not a bad thing, but the challenge lies in the mandate. The bill is viewed as punitive by industry and elected officials.”¹⁶⁶

Even though a plethora of governmental and private sector resources exist to help producers craft a preparedness plan, a mandate of any kind will always be scrutinized. Even the National Alliance of State Animal and Agricultural Emergency Programs (NASAAEP), which is dedicated to planning for and responding to disasters involving animals, declined to endorse the bill.¹⁶⁷ In response, Granger said, “For whatever reason, there is so much resistance to requiring anything that might be considered a burden for producers.”¹⁶⁸

iii. The Farm Bill

Every five years, Congress considers the “Farm Bill,” comprehensive legislation that reauthorizes and sets funding levels, and amends dozens of agricultural related programs including those impacting farming, nutrition, conservation, trade, rural development, research, and energy.¹⁶⁹ The farm bill provides a legislative vehicle for agricultural-related reforms to pass Congress.

According to a report from the Congressional Research Service (CRS), the non-partisan public policy research institute for Congress, “Interest in agricultural disaster assistance has increased since 2018, primarily due to the funding for ad hoc disaster assistance and *questions about the effectiveness of the permanent disaster assistance programs.*”¹⁷⁰ (emphasis added) The report goes

¹⁶⁵ Granger, *supra* note 136.

¹⁶⁶ Granger, *supra* note 136.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See RENEE JOHNSON & JIM MONKE, CONG. RSCH. SERV, IF12047, FARM BILL PRIMER: WHAT IS THE FARM BILL? (2024).

¹⁷⁰ Stubbs, *supra* note 58.

on to state that a farm bill provides an opportunity for Congress “to debate the federal government’s role in responding to natural disaster-related losses for an industry that is acutely influenced by natural disasters and fluctuations in weather.”¹⁷¹

In 2018, advocates considered, but did not pursue, an amendment to the farm bill that would have advanced livestock disaster planning.¹⁷² Since another five years have passed, the farm bill was up for review by Congress in 2023. However, challenging political dynamics resulted in a one-year extension of the 2018 passed bill rather than a full reauthorization through new legislation. Committee work on a five-year reauthorization has continued in 2024 but another short-term extension could occur pending the outcome of the November elections.¹⁷³ Some advocates have pushed for The Emergency and Disaster Preparedness for Farm Animals Act to be tacked onto the farm bill, rather than trying to advance it as standalone legislation, but those efforts have been unsuccessful to date.¹⁷⁴

B. Regulatory Reforms

Legislative reforms by Congress can get bogged down in political dynamics and processes so, at times, stakeholders seek policy change by directly engaging federal agencies. Federal agencies are tasked with implementing programs created and funded by Congress. This process involves an interpretation of legislative language and rulemaking. If a federal agency has been granted authority to oversee and manage a program, that often affords them discretion to make changes to the program, so long as those changes do not violate the legal statute or run afoul of Congressional intent.

In 2018, seven members of Congress sent a letter to the USDA urging them to modify the LIP.¹⁷⁵ These members, all

¹⁷¹ *Id.*

¹⁷² Granger, *supra* note 136.

¹⁷³ See Saul Elbein, *Republicans press Johnson for farm bill vote, warning of looming ‘crisis’*, THE HILL (Sept., 26, 2024), <https://thehill.com/policy/energy-environment/4901163-house-republicans-urge-vote-farm-bill/>.

¹⁷⁴ See Animal Welfare Inst., *AWI Seeks Animal Welfare Measures in 2023 Farm Bill*, 72 AWI Q. 22 (2023), <https://awionline.org/awi-quarterly/spring-2023/awi-seeks-animal-welfare-measures-2023-farm-bill>.

¹⁷⁵ Letter from U.S. Rep. Alcee Hastings et al., to Sonny Purdue III, Sec’y of Agric., U.S. Dep’t of Agric. (Dec 4., 2018), https://mma.prnewswire.com/media/795536/Humane_Farming_Association_Letter_to_the_USDA.pdf?p=pdf.

Democrats and from six different states, asked the agency to “implement common sense changes to the information collected from farmers prior to providing reimbursement for animals that have died as a result of adverse weather events.”¹⁷⁶ More specifically, the members argued that producers should be required to provide details regarding “precautionary measures” that they took to avoid death of livestock.¹⁷⁷ The letter states that only producers that answer the following list of questions, in addition to other program requirements, should be eligible for payment:¹⁷⁸

- What was the producer’s disaster management plan in the case of an adverse weather event?
- What steps were taken by the producer to keep animals from suffering or dying as a result of exposure to heat, cold, or other elements?
- What type of shelter did the producer provide to animals prior to the eligible adverse weather event?
- What percentage of a producer’s animals did that shelter accommodate?
- Were transport vehicles available to evacuate the animals out of harm’s way?
- Were emergency flood/water supplies available to accommodate animals that did not have access to normal food/water sources?
- Was veterinary assistance available to treat or humanely euthanize animals?

The Congressional letter stressed that a lack of oversight removes the incentive for producers to mitigate losses and suffering.¹⁷⁹ “Without this compensation, we believe many producers would no doubt make an effort to provide for their animals. Instead, we believe massive numbers of neglected livestock are dying painfully and needlessly while taxpayers’ foot the bill.”¹⁸⁰ Despite this engagement from lawmakers, the USDA declined to require the suggested questions for payment. One reason for the inaction may have been the partisan nature of the request; at the time, it was a Democratic letter sent to a Republican led administration.

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

¹⁷⁸ *See id.*

¹⁷⁹ *See id.*

¹⁸⁰ *See id.*

VIII. ADDITIONAL APPROACHES TO ADVANCE DISASTER PLANNING

Current federal approaches to reform the Livestock Indemnity Program have moved slowly (or stalled altogether). While the goal should, unquestionably be, the protection of all farm animals during extreme weather, policy reforms and federal changes often happen incrementally. This section proposes other ways to advance disaster planning.

A. Proposed Programmatic Reforms

As previously detailed, the Emergency and Disaster Preparedness for Farm Animals Act would require all producers to have a disaster preparedness plan in place to be eligible for LIP payments. The broad mandate makes this approach politically challenging. Kevin Fox, Legislative Director for Rep. Ro Khanna, said in an interview that currently proposed legislation (H.R. 243) may need to be “scaled back a bit, from the mandate” to get broad bi-partisan and industry support.¹⁸¹

The House Agriculture Appropriations Committee has also expressed concern in the past that some aspects of the application for LIP reimbursement are too “burdensome” for producers.¹⁸² In 2021, they directed the USDA to “streamline, simplify, and improve the application process for producers.”¹⁸³ In 2022, the Committee expressed a desire for disaster payments to be made “expeditiously” to producers so that they can “recover and maintain operations.”¹⁸⁴ Any proposed reforms to the LIP should keep these

¹⁸¹ Telephone Interview with Kevin Fox, *supra* note 149.

¹⁸² H.R. REP. NO. 116-446, at 46 (2020) (“The Committee is concerned the current process for producers to apply for reimbursement due to attacks by animals under the Livestock Indemnity Program is burdensome and does not fully compensate producers for their loss. The Committee directs the Secretary to provide a report to the Committee within 180 days of enactment on factors contributing to producers’ challenges in the application process for the Livestock Indemnity Program. The report shall examine ways to streamline, simplify, and improve the application process for producers, and make recommendations on possible methods to fully and fairly compensate producers for direct and indirect costs of eligible attacks”).

¹⁸³ *Id.*

¹⁸⁴ 168 CONG. REC. H1712 (daily ed. Mar. 9 2022) (statement of Rep. DeLauro) (“The agreement notes that the Extending Government Funding and Delivering Emergency Assistance Act (Public Law 117-42) provided \$10,000,000,000 for disaster assistance to aid producers who suffered losses due to droughts, hurricanes, wildfires, floods and other qualifying disasters in calendar years 2020 and 2021. The funding included \$750,000,000 for livestock producers for losses

preferences expressed by the Committee in mind.

i. A “One-Strike” Approach

An alternative legislative approach to reforming the program could be to tailor the mandate for disaster planning to high-risk geographic areas, instead of requiring all producers seeking payment from the LIP to have one in place. Data presented in Part VI of this paper showed that some producers have sought payment *repeatedly* over a series of years, demonstrating that extreme weather events in their region are likely. Additionally, payments to specific counties have occurred consistently, year after year, which is proof that the area is prone to livestock loss, injury, and distress.¹⁸⁵

A “one strike” policy would require an emergency plan from producers who seek LIP payment after one weather event. Specifically, the first time a producer seeks LIP payments, proof of a preparedness plan would not be required (although would certainly be encouraged) by the USDA. Any request for payments after the first event must be coupled with documentation about the plan and its effectiveness in averting loss of life and/or the reduced value of livestock.

After one claim for indemnity, producers should be planning more intentionally for an emergency. If lawmakers still feel that a “one strike” policy is too stringent, perhaps a “two strikes” policy can be a compromise. This policy, whether one or two strikes, should encourage ranchers to think about and prepare for (if they haven’t already) a similar event or other weather emergency occurring.

Members of Congress who have been leery of a broad mandate may be more receptive to a more targeted policy, such as this approach. If extreme weather has been shown to *repeatedly* occur in their area, requiring producers to plan for such events is an important way to safeguard taxpayer dollars that fund the LIP.

incurred during 2021 due to drought or wildfire. The agreement remains concerned about the impacts of these natural disasters and directs the Department to *expeditiously* distribute the assistance to help our producers and ranchers recover and maintain their operations” (emphasis added).

¹⁸⁵ USAspending.gov, *supra* note 92.

ii. A “Carrot” Approach

Some policymakers prefer a “carrot,” not a “stick,” approach when it comes to changing behavior. Under this dynamic, a reward (carrot) is used to incentivize intended behavior rather than rendering punishment (stick) for an undesirable behavior. In the context of reforming the LIP, rather than requiring all producers to provide a disaster plan, an incentive could be offered for those who do. More specifically, producers who show proof *and* use of a disaster preparedness plan alongside their claim for indemnity payment could be eligible to receive a slightly higher rate of reimbursement for animal loss or reduced value.

As previously detailed, the LIP payment is set as a percentage (75%) of fair market value of the livestock. A pure “carrot” approach would entail increasing the percentage for those with a plan to, say, 78 percent. (A survey could help identify a percentage that provided an adequate incentive.) Of course, increasing the percentage may lead to more spending through the program. If federal budget concerns arise, the carrot could be coupled with a stick as an offset. More specifically, the new payment policy could be 78 percent for those *with* a plan and 72 percent (a decrease of 3 percentage points from the current rate) for those *without* a plan. Even though the percentage payout is higher, the expectation is that disaster planning will reduce the number of animals impacted, and thus, spending under the program.

B. Welfare Certification Entities

A complementary approach to pursuing federal reforms to protect farm animals during extreme weather lies in working with welfare certification entities. Several third-party welfare certification entities require disaster planning for farm animals in their certification programs: American Humane Certified, A Greener World, Global Animal Partnership, and Certified Humane are a few. Most requirements give producers broad discretion to create a plan that is tailored to their facilities and geographic location.

A Greener World (AGW), a non-profit organization focused on “promoting agriculture systems that have a positive impact on the environment, society and animals,” offers

certification in 10 countries.¹⁸⁶ In 2023, they worked with more than 6,000 farmers managing more than 3 million acres.¹⁸⁷ AGW offers certification in five areas, including animal welfare.¹⁸⁸ Disaster planning is required for “Animal Welfare Approved” farms. More specifically, “A plan to care for or house animals in emergency situations must be prepared and be understood by all of those working on the farm.”¹⁸⁹ The AGW further stipulates:

11.1.1.2 The plan must ensure welfare of the animals is maintained in any potential climatic extreme such as floods, snowstorms, or drought.

11.1.1.3 The plan must ensure welfare of the animals is maintained during any potential disruption of services or mechanical breakdown, such as water supply cutoff and breakdown of feeding or ventilation machinery.

11.1.2 *Recommended* All plans for animal management should be reviewed at least annually or whenever changes to farm management practices occur, whichever is most frequent.

Note: Plans should take into account climatic trends where extraordinary events have become more frequent.

Tim Holmes, Director of Compliance at AGW, said emergency planning is critical to their standards.¹⁹⁰ “There is such a positive welfare benefit from having [a plan] in place. You cannot run a welfare program without addressing emergency planning.”¹⁹¹ AGW provides planning templates that prompt producers to think through different scenarios before they occur.¹⁹² Holmes said,

¹⁸⁶ A GREENER WORLD, 2022 IN REVIEW (2022), <https://agreenerworld.org/wp-content/uploads/2022/11/AGW-2022-in-Review-SPREADS.pdf>.

¹⁸⁷ *See id.*

¹⁸⁸ *See Certified Animal Welfare Approved by AGW*, A GREENER WORLD (2023), <https://agreenerworld.org/certifications/animal-welfare-approved/>.

¹⁸⁹ *Dairy Cattle Standards*, A GREENER WORLD, <https://agreenerworld.org/certifications/animal-welfare-approved/standards/dairy-cattle-and-calves-standards/> (last visited Sept. 18, 2024).

¹⁹⁰ Telephone Interview with Tim Holmes, Dir. of Compliance, A Greener World (Nov. 16, 2023) [hereinafter Holmes].

¹⁹¹ *See id.*

¹⁹² *See Farm Templates & Plans*, A GREENER WORLD <https://agreenerworld.org/certifications/farm-templates-plans/> (last visited Sept. 18, 2024).

“When you are dealing with a highly stressful situation, you don’t think logically. My father used to say, ‘You don’t make rational decisions when you are under pressure and irrational.’”¹⁹³ Holmes also said that farmers usually don’t see the value of having a plan unless they have had an issue in the past. “With all the other daily challenges, emergency planning is usually not high on the list of ‘What I need to do to make a farm run successfully.’”¹⁹⁴

AGW audits producers every 15 months, and the plan is a required component of the welfare certification program.¹⁹⁵ If a producer does not have a disaster plan in place, they are deemed “non-compliant” and are required to submit a corrective action plan.¹⁹⁶ If they do not have a disaster plan in place for the second audit, they are deemed “critically non-compliant” and will not be re-certified in the program until the disaster plan is completed.¹⁹⁷

Holmes said that initial reluctance to building a plan often leads to appreciation: “We’ve had farms that won’t initially want to fill out the plan and believe it’s a waste of time. And then three years later, [the plan] really came in handy.”¹⁹⁸ Holmes stressed that producers have been appreciative after an event caused them to use it.¹⁹⁹

The Global Animal Partnership is another multi-species farm animal certification organization focused on advancing welfare.²⁰⁰ Included in their certification standards for all species is a requirement for emergency planning related to weather events.²⁰¹ The standards stipulate that “All animals must be protected from heat or cold stress and from extreme weather.” For some species, specific guidance for producers is as follows: “The producer must be able to demonstrate protocols for protecting animals from heat and cold stress and extreme weather.”²⁰²

¹⁹³ Holmes, *supra* note 190.

¹⁹⁴ Holmes, *supra* note 190.

¹⁹⁵ See *Global Animal Partnership 5-Step Animal Welfare Standards for Beef Cattle*, GLOB. ANIMAL P’SHP (Apr. 7, 2022), <https://globalanimalpartnership.org/wp-content/uploads/2022/04/Global-Animal-Partnership-Animal-Welfare-Standards-for-Beef-Cattle-v1.2-20220407.pdf>.

¹⁹⁶ Holmes, *supra* note 190.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See *PILOT G.A.P. Policy Manual*, GLOB. ANIMAL P’SHP (Apr. 28, 2020), <https://globalanimalpartnership.org/wp-content/uploads/2020/05/Pilot-G.A.P.-Policy-Manual-v1.1-April-28-2020.pdf>.

²⁰¹ See *id.*

²⁰² *Global Animal Partnership*, *supra* note 195.

These welfare certification entities and others are uniquely positioned in the private sector to advance protections for farm animals during extreme weather; however, strong standards and consistent audit oversight are key. As a convener of like-minded producers committed to animal welfare, they can also facilitate sharing of best practices. Additionally, these entities (and their certified producers) may be allies in seeking change at the federal level.

C. Trade Associations

Industry trade associations also have a role to play in incentivizing and advancing disaster planning. These organizations are typically species specific, and several require such plans for certification: National Chicken Council, National Dairy Farm Program, National Turkey Federation, National Pork Board, and the United Egg Producers.

The National Chicken Council (NCC) represents “vertically integrated broiler producer-processors.”²⁰³ For certification by NCC, hatcheries must have “a written plan for disaster response and recovery, including, but not limited to, SOPs addressing structural damage with potential to impact bird welfare, loss of power, and water outages.”²⁰⁴ Growout operations must have a similar plan including procedures for depopulation.²⁰⁵

The National Dairy Farmers Assuring Responsible Management (FARM) Program is a voluntary program created by the National Milk Producers Federation and is focused on five areas, including animal care.²⁰⁶ To participate in the FARM Animal Care program, producers must agree to meet specific standards set by the organization.²⁰⁷ Under the program, a facility must have “a written emergency action/crisis plan to effectively manage

²⁰³ *National Chicken Council Animal Welfare Guidelines and Audit Checklist for Broilers*, NAT’L CHICKEN COUNCIL (2019), <https://www.nationalchickencouncil.org/wp-content/uploads/2020/03/NCC-Animal-Welfare-GuidelinesBroilersDec2019.pdf>.

²⁰⁴ *Id.*

²⁰⁵ *See id.*

²⁰⁶ *See* FARM Animal Care, NAT’L DAIRY FARM <https://nationaldairyfarm.com/dairy-farm-standards/animal-care/> (last visited Sept. 18, 2024).

²⁰⁷ *See id.*

emergencies or crises that may occur.”²⁰⁸ A facility must also have “names, telephone numbers and the site address posted in a prominent location, in the languages understood by family and non-family employees with animal care responsibilities, for emergency preparedness.”²⁰⁹

While these requirements are a step in the right direction, the trade association language often lacks specificity and guidance on how to protect animal welfare during an emergency. Ensuring producers have educational resources to do robust and thorough planning, taking into consideration the myriad ways extreme weather might impact their operation and the animals, is essential. Oversight and timely auditing for those that require planning for certification is also an important aspect of compliance.

Industry buy-in and support is important, possibly key, to advancing disaster planning – whether it be voluntary or mandatory. Trade groups can be a gateway to producers and, ideally, an ally in efforts to protect farm animal welfare during extreme weather. Disaster planning policies required for certification (or merely recommended by an association) provide an acknowledgement of their importance. Trade associations should be called upon by their members and the public to participate in policy making that aligns with their commitment to protect farm animal welfare, whether that be supporting the reforms to the LIP outlined above or elsewhere. Engaging in advocacy efforts to advance federal policies that will better protect farm animal welfare during extreme weather should be viewed as action in furtherance of their mission.

D. Academia/Animal Science Researchers

Those in academia and/or conducting animal science research can also help legitimize the importance of, and assist in the implementation of, disaster plans on farms. Evidence-based research can help expand the knowledge base of how animals

²⁰⁸ *Animal Care Reference Manual*, NAT’L DAIRY FARM (2020), <https://nationaldairyfarm.com/wp-content/uploads/2020/02/Animal-Care-V4-Manual-Print-Friendly.pdf>.

²⁰⁹ *Id.* at 22; Nat’l Milk Producers Fed’n, *Comprehensive Emergency Action Plan Guidance*, <https://nationaldairyfarm.com/wp-content/uploads/2020/01/Comprehensive-Emergency-Action-Plan-Guidance.pdf> (last visited Sept. 29, 2024).

suffer, mentally and physically, during acute and chronic stress caused by extreme weather events. The scientific community should be called upon to help educate policymakers, producers, veterinarians, and the public.

Researchers and academics should be seen as partners in disaster planning efforts and educational hubs for those seeking resources. Penn State Extension, run by The Pennsylvania State University College of Agricultural Sciences, published a guide in January 2023 detailing the components of an emergency response plan for producers.²¹⁰ They claim that “whether you raise pigs, sheep, goats, or cattle, having an emergency plan for their care is critical for animal welfare and business continuity.”²¹¹ Elizabeth Hines, the author of the guide and a swine extension specialist, stresses the importance of having emergency contacts, a plan for how to achieve daily animal care, and a labor management plan.²¹²

Colorado State University Extension provides a set of resources detailing care for livestock before,²¹³ during,²¹⁴ and after²¹⁵ a disaster, such as flooding, blizzards, ice storms, wildfires, and tornados. The guidance documents astutely recognize that the needs of animals, physically and mentally, can be different at different stages of a disastrous event.²¹⁶ They note that “livestock can sense some impending disasters before humans recognize a threat,” causing behavioral changes and stress, and tout the benefit of a “disaster box” that includes materials essential for livestock care and management.²¹⁷ During a disaster event, they appropriately note that “adrenalin, panic and confusion affect humans *and*

²¹⁰ Elizabeth Hines & Tara Felix, *Building An Emergency Response Plan for Producers*, PENNSTATE EXTENSION (2023), <https://extension.psu.edu/building-an-emergency-response-plan-for-livestock-producers>.

²¹¹ *Id.* at 1.

²¹² *See id.*

²¹³ S. Cotton & T. McBride, *Caring for Livestock Before Disaster*, COLO. STATE EXTENSION CTR. (2010), <https://extension.colostate.edu/docs/pubs/livestk/01814.pdf>.

²¹⁴ S. Cotton & T. McBride, *Caring for Livestock During Disaster*, COLO. STATE EXTENSION CTR. (2013), <https://extension.colostate.edu/docs/pubs/livestk/01815.pdf>.

²¹⁵ S. Cotton & T. McBride, *Caring for Livestock After Disaster*, COLO. STATE EXTENSION CTR. (2010), <https://extension.colostate.edu/wp-content/uploads/2023/05/Caring-for-Livestock-After-Disaster-Final.pdf>.

²¹⁶ Cotton & McBride, *supra* note 213.

²¹⁷ *Id.* at 1.

animals” (emphasis added) and survival instincts can impact animal behavior and, subsequently, handling.²¹⁸ After a disaster event, they note the heightened sensitivity of livestock and importance of creating an environment that is “familiar, quiet, and protected from additional stimuli.”²¹⁹

These resources are excellent examples of how academics and researchers can be seen as a credible advisor on disaster planning and help advance farm animal welfare. Just as welfare certification entities and trade associations can be helpful to broaden reform efforts, so too can this community.

VIII. CONCLUSION

Animals impact humans in a myriad of ways. “Their health affects our own health, our food, the medicines we have, and the ones we need, as well as making the earth a good place to live,” wrote Marian Dawkins.²²⁰

While most recognize the importance of animals for one reason or another, failure to adopt the proposed reforms to the Livestock Indemnity Program perpetuates societal and governmental views that livestock enjoy a lower moral status than other animals. For example, in December 2021, the Animal and Plant Health Inspection Service of the USDA issued a final rule that reinstated a requirement for emergency plans for animals included in the Animal Welfare Act.²²¹ The rule states, “Following the events experienced during the 2005 hurricane season, AC [Deputy Administrator for APHIS’ Animal Care program] concluded that entities responsible for animals covered by the AWA could better safeguard the health and welfare of their animals by developing contingency plans for possible emergencies or disasters.”²²²

²¹⁸ Cotton & McBride, *supra* note 213.

²¹⁹ Cotton & McBride, *supra* note 214.

²²⁰ Dawkins, *supra* note 22, at 124 (citing Montira Pongsiri, *Sustaining Life: How Human Health Depends on Biodiversity*, (Eric Chivian & Aaron Bernstein eds.), 50 *Integrative & Comparative Biology* 1 (2010)).

²²¹ Handling of Animals, Contingency Plans, 86 Fed. Reg. 68533 (Dec. 3, 2021) (to be codified at 9 C.F.R. pt. 200) (the Animal Welfare Act is a federal law that regulates the treatment of animals used in research, teaching, testing, exhibition, transport, and by dealers); U.S. Dep’t of Agric., Animal and Plant Health Inspection Services, *Animal Welfare Act*, (Jan. 12, 2022), https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/SA_AWA. [hereinafter *Animal Welfare Act*]

²²² Handling of Animals, *supra* note 221.

However, only animals used for research and other specific purposes are governed by the Animal Welfare Act; livestock solely used for food, fiber or production are excluded.²²³

All animals, not just those involved in research or those who provide endless hours of companionship, are deserving of reasonable efforts to protect them from avoidable suffering and death. While these efforts may not always be perfect, the federal government should ensure those who care for livestock are, at a minimum, trying to mitigate the harmful impact of extreme weather.

As reviewed in this paper, the value of emergency planning is recognized by federal agencies, lawmakers, advocates, researchers, and many sectors of the livestock industry as an important (or essential) aspect of ensuring animal welfare. Tying this activity to the LIP, whether through incentives or a mandate, is a prudent and overdue policy change to the program. Increased accountability and oversight are urgently needed by Congress.

The repeated reliance on LIP payments by producers operating in certain counties, as shown by the data, is demonstrating the high risk of injury or death to livestock in specific areas of the country. And as climate disasters increase, so will the impact on farm animals and cost of compensating ranchers.

An ethical obligation is held by those who are involved in animal agriculture to safeguard livestock during extreme weather, and admittedly many producers do take important steps to protect welfare. The burden of providing evidence to the USDA that efforts were made to mitigate animal loss and suffering is reasonable considering the millions of federal dollars paid out through the LIP each year. Whether the goal is to protect taxpayer funds, improve farm animal welfare, or both, commonsense reforms proposed in this paper should be pursued by policymakers.

²²³ *Animal Welfare Act*, *supra* note 221.

**UDDER CONFUSION:
AN ALMOND MILK CASE STUDY TO EXAMINE THE
COMPLEX INTERPLAY OF CONSUMER FOOD CHOICES,
SOCIAL MEDIA, AND REGULATION**

Madeline McCulloch

*“What in the f*ck is almond milk? . . . Show me the tit on an
almond!”*

The Ranch, Season 1, episode 8: “Til It’s Gone”¹

I. INTRODUCTION

The preference for plant-based diet options has steadily increased for the American public.² The New York Times reported, “In the United States, plant-based products grew into an eight billion industry in 2022, with a growth rate of seven percent since the year before.”³ Moreover, those numbers are only predicted to grow, with the plant-based market projected to potentially swell to as much as a \$162 billion industry by 2030.⁴ This is all particularly true for alternative milks.

By the end of 2020, plant-based milk alternatives (“**PBMA**”)⁵ accounted for approximately fifteen percent of the total milk market and thirty-five percent of the overall plant-based market, making alternative milks, particularly almond, one of the most popular ways for people to dabble in a plant-based diet.⁶ And not only is the demand for PBMA present, so too is the supply

¹ *The Ranch: Til It’s Gone* (Netflix broadcast Apr. 1, 2016).

² See Victoria Petersen, *There’s No Shortage of Plants to Milks*, N.Y. TIMES, March 2, 2022 at § D, at 1.

³ See Melisa Clark, *What’s a Plant-Based Diet? Here’s What You Need to Know to Eat Less Meat*, N.Y. TIMES (July 27, 2023),

<https://www.nytimes.com/article/plant-based-diet.html>; see also Karine Lacroix, et al., *Understanding Differences in American’s Motivations for Eating Plant-Rich Foods*, YALE PROGRAM ON CLIMATE CHANGE COMM’N (Apr. 7, 2022),

<https://climatecommunication.yale.edu/publications/understanding-differences-in-americans-motivations-for-eating-plant-rich-foods/>; Emma Ignaszewski & Ben Pierce, *U.S. Retail Market Insights for the Plant-Based Industry*, GOOD FOOD INST., <https://gfi.org/marketresearch/> (last visited Oct. 17, 2024).

⁴ See *Plant-based Food Market to Hit \$162 Billion in Next Decade, Projects Bloomberg Intelligence*, BLOOMBERG (Aug. 11, 2021), <https://www.bloomberg.com/company/press/plant-based-foods-market-to-hit-162-billion-in-next-decade-projects-bloomberg-intelligence/>.

⁵ *Plant-Based Milk Alternatives (PBMA)*, FDA, <https://www.fda.gov/food/food-labeling-nutrition/plant-based-milk-alternatives-pbma> (last visited Oct. 17, 2024).

⁶ See Peterson, *supra* note 2.

(*capitalism never disappoints in that way*). According to University of California Davis’ research, the top six PBMA companies are, in order of sales, Blue Diamond Breeze, Califia Farms, Oatly, Planet Oat, Ripple, and Silk.⁷ Blue Diamond Breeze—ranked first with its brand Almond Breeze—alone comes in at a whopping estimated annual U.S. revenue of \$618 million.⁸ The demand for these companies’ products are further demonstrated by the higher-price tag shoppers are willing to pay for their products.⁹ “Plant-based milks retail at prices nearly twice that of traditional dairy.”¹⁰ Customer rationale in justifying and accepting these prices is a query to be explored further.

Almond milk holds the gold in the U.S. plant-based milk market.¹¹ While there has been a slight decline in PBMA sales in recent reports, almond milk still strongly leads the pack, with oat milk coming in second.¹² Almond milk usurped soy for this top-slot as it became a social favorite, advertised as a lower-calorie option than both soy and dairy milk.¹³ What is undeniable is that the early-2000s rise of plant-based milks, very much including almond milk,

⁷ See Antoine Abrieux et al., *The Evolving Mkt. for Plant-Based Milk: Alfalfa and other Potential Sources*, UC DAVIS INNOVATION INST. FOR FOOD AND HEALTH (Apr. 2022), at 7, <https://foodandhealth.ucdavis.edu/wp-content/uploads/2022/09/IIFH-GSM-Plant-Based-Milk-Market-Report.pdf>.

⁸ See *id.*

⁹ See *id.*; see also Janet Nguyen, *Why Does Oat Milk Cost More Than Dairy Milk?*, MARKETPLACE (Nov. 17, 2023), <https://www.marketplace.org/2023/11/17/why-does-oat-milk-cost-more-than-dairy-milk/>; Aliya Uteuova, *Paying Extra for Milk Alternatives: Unfair, Illogical, and a Little Bit Racist?*, THE GUARDIAN (Mar. 3, 2022), <https://www.theguardian.com/us-news/2022/mar/03/coffee-milk-extra-cost-charge-starbucks>.

¹⁰ See Abrieux et al., *supra* note 7, at 8.

¹¹ See Nils-Gerrit Wunsch, *Sales Value of Milk Substitutes in the U.S. in Mid 2021, by Category*, STATISTA (Aug. 8, 2024), <https://www.statista.com/statistics/932707/sales-milk-dairy-free-alternatives-us/#:~:text=Almond%20milk%20substitutes%20were%20the,dollars%20during%20that%20time%20frame>.

¹² See Elaine Watson, *US Retail Sales of Oat Milk Decline in Latest Quarter After Years of Explosive Growth*, AFIN (Aug. 15, 2023), <https://agfundernews.com/us-retail-sales-of-oat-milk-decline-in-latest-quarter-after-years-of-explosive-growth>.

¹³ See Chenab Khakh, *An Exploration of Alternative Dairy—The Environmental and Economic Impacts of Oat, Almond and Soy Milks*, THE CORNELL DAILY SUN (Dec. 9, 2019), <https://cornellsun.com/2019/12/09/an-exploration-of-alternative-dairy-the-environmental-and-economic-impacts-of-oat-almond-and-soy-milks/>; see also John McCarthy, *Blue Diamond Almond Breeze Looks to Snatch Milk-Drinkers Low Calorie TV Ad Message*, THE DRUM (Dec. 22, 2014), <https://www.thedrum.com/news/2014/12/22/blue-diamond-almond-breeze-looks-snatch-milk-drinkers-low-calorie-tv-ad-message>; Richard Ford, *Blue Diamond Kicks Off Calorie-Centric Almond Milk Campaign*, THE GROCER (Feb. 1, 2013), <https://www.thegrocer.co.uk/dairy/blue-diamond-kicks-off-calorie-centric-almond-milk-campaign/236134.article>.

runs parallel to the advent of social media, with media applications like Instagram and TikTok being introduced in 2010 and 2018, respectively.¹⁴ And it is for these reasons that almond milk—as a strong example of a newer, trendy food choice—makes an ideal case study to explore the confusing interplay of consumer choice, social media, and the regulation of food claims.

It is, first, essential to examine the comprehensive context surrounding almond milks' status on grocery shelves. This writing will attempt to do so by, one, asking why shoppers put almond-milk in their grocery cart, in lieu of the presumptive dairy choice, in the first place. Second, the writing will put those consumer responses under a microscope, examining whether any truth backs the peoples' choice and rationale. Third, the article will explore the current regulatory schemes put forth by the Food and Drug Administration (“**FDA**”) and the Federal Trade Commission (“**FTC**”) in guaranteeing that those rationales are justified, specifically looking at the holes in the current regulatory schemes and guidelines that fail to address the changing landscape of marketing that is social media. Finally, the article will culminate with a return to focus on almond milk as an example of the current gaps in regulation addressing social media's influence on consumer choice regarding food. What we buy and choose to consume is at the center of our understandings of nutrition and maintaining healthy lifestyles. Thus, how it is successfully and neglectfully regulated is vital. Throughout each segment of this writing, almond milk will serve as a case study, but it is not the only food product that would have satisfied this exercise. Other trendy or divisive foods—such as beef, protein powder, or another milk alterative, for that matter—could also have underscored the confusion-generator that is regulation meets social media. Almond milk though, for purposes of this writing, serves as an ideal microcosmic exploration of the growing hurdles facing the FDA and FTC.

¹⁴ See Alison Eldridge, *Instagram*, BRITANNICA MONEY, <https://www.britannica.com/money/Instagram> (last visited Oct. 23, 2024); *TikTok*, BRITANNICA, <https://www.britannica.com/topic/TikTok> (last visited Oct. 25, 2024).

II. THE ALMOND MILK CRAZE

“Now move out of the way, I got to get me some of that almond milk.”

Suits, Season 8, episode 5: “Good Mudding.”¹⁵

A. Why Consumers Choose the Alternative

With a grasp of almond milk’s recent-found success, the next question is: what makes consumers drawn to this nutty alternative? “According to the National Consumer Panel, forty-one percent of U.S. households purchased plant-based milk in 2022, with a repeat purchase rate of seventy-six percent.”¹⁶ Almond milk absolutely dominates this alternative milk market, accounting for annual sales of over a billion dollars, nearly doubling the runner-up, oat milk’s, sales.¹⁷ Even when other alternative milks see a rise in sales—as oat and pea have seen in recent years—they still do not even begin to touch the status of almond.¹⁸ And even though dairy milk sales are still, of course, *far* higher in comparison, the climb and growing ubiquity of almond milk is noteworthy nonetheless. You would be pressed to find a coffee shop that does not offer the alternative now (for instance, almond milk has been an available option in Starbucks nationwide since 2016).¹⁹ In short, there is a demand for the beverage.²⁰

There are a variety of reasons that consumers point to in explaining their rationale for opting for PBMA.s.²¹ Of course, many

¹⁵ *Suits: Good Mudding* (USA Network broadcast Aug. 15, 2018).

¹⁶ See Grace Garwood, *Deep Dive: The State of Alternative Milk*, THE FOOD INST. (May 9, 2023), <https://foodinstitute.com/focus/deep-dive-the-state-of-alternative-milk/>.

¹⁷ See Katharina Buchholz, *Almond Domiantes U.S. Milk Substitute Market*, STATISTA (Aug. 22, 2023), <https://www.statista.com/chart/17981/sales-of-alternative-to-dairy-products/>; see also Elaine Watson, *Plant-based milk by numbers, US retail: Oat Milk and Pea Milk Up Double Digits, Almond Milk and Soy Milk Flat*, FOOD NAVIGATOR USA (July 26, 2022), <https://www.foodnavigator-usa.com/Article/2022/07/25/Plant-based-milk-by-numbers-US-retail-Oat-milk-and-pea-milk-up-double-digits-almond-milk-and-soy-milk-flat>.

¹⁸ See Buchholz, *supra* note 17.

¹⁹ See *Starbucks Almond Milk is Now Available Nationwide*, STARBUCKS (Sept. 29, 2016), <https://stories.starbucks.com/stories/2016/starbucks-almondmilk-available-nationwide/>.

²⁰ See, e.g., Straits Research, *Almond Milk Market Size, Share & Risks by 2031*, STRAITS RESEARCH (Dec. 25, 2022), <https://straitsresearch.com/report/almond-milk-market>.

²¹ An outside the scope of this writing but notable reason consumers preference PMBAs is viewing it an eco-alternative. Many people point to an ever-growing environmental awareness for their shopping choice as fears of climate change

consumers who elect for dairy-free choices do so because of health or dietary reasons—be it lactose malabsorption (i.e., an inability to digest dairy) or choosing to lead a vegan lifestyle.²² However, the more fascinating and enlightening inquiry is when potential dairy-consumers are also alternative-milk consumers, i.e., when their choice is not rooted in limitation but rather preference and/or perceived benefit.

i. Perceptions of Nutritional Value

Many consumers point to the perceived nutritional benefits with almond milk, over that gained by drinking cow's milk. In a 2018 Consumer Reports study, over half of Americans surveyed said that plant-based milks have more or the same amount of “protein, calcium, vitamin A, and potassium,” with only twenty-six percent polled saying they were sure it had less.²³ Fifty-eight percent of those surveyed cited “healthier than cow's milk” as their main reason for purchasing plant-based milk.²⁴ The internet is brimming with blogs

surge and the perception that PBMA's alleged reduced carbon footprint.²¹ Plant-based milks have become “popular replacements for traditional dairy products . . . often because they are seen as more environmentally friendly and ethical options.”²¹ But this line of thinking does not generally start with the replacement. People do not usually switch products if they are satisfied with the one they have, so the inspiration to purchase a PBMA is likely finding something dissatisfactory with the dairy original. Society had to find out that gas-guzzling cars were bad for the environment before the industry had incentive to begin creating hybrids and electric vehicle replacements. Similarly, the alternative-based switch has to begin with the discovery of a perceived environmental villain: dairy. *See* Meike Rombach, “Got Milk Alternatives?” *Understanding Key Factors Determining U.S. Consumers' Willingness to Pay for Plant-Based Milk Alternatives*, 12, 1277 *FOODS* 1, 1 (2023) (“Milk is a popular product in U.S. consumer markets. However, consumer awareness and lifestyle changes toward climate-conscious consumption have increased over the past decade.”); *see also id.* at 11 (“Reasons to pay more for plant-based milk alternatives are animal welfare concerns and the green and clean image of the product, suggesting, environmental friendliness and sustainability.”).

²² *See id.* at 1; *see also Definition & Facts for Lactose Intolerance*, NAT'L INST. OF DIABETES AND DIGESTIVE AND KIDNEY DISEASE, <https://www.niddk.nih.gov/health-information/digestive-diseases/lactose-intolerance/definition-facts#:~:text=Lactose%20intolerance%20is%20a%20condition,like%20cheese%20or%20ice%20cream> (last visited Oct. 25, 2024) (“In the United States, about 36 percent of people have lactose malabsorption.”); *Adapting Dietary Guidelines for Vegetarians, Vegans*, U.S. DEP'T OF AG., <https://tellus.ars.usda.gov/stories/articles/more-menu> (last visited Oct. 25, 2024) (“Approximately 6% of Americans prefer a vegetarian diet, while another 3% identify as vegan.”).

²³ *See Plant-Based Milk Survey*, CONSUMER REPORTS 1, 2 (Oct. 31, 2018), <https://advocacy.consumerreports.org/wp-content/uploads/2019/02/2018-Plant-Based-Milk-Survey-Public-Report-1.pdf>.

²⁴ *See id.*

making health claims for almond and other alternative milks. Nutritional claims array from almond milk carrying a lower calorie count than cow's milk, that it is richer in vitamins like Vitamin E and D and calcium, that it does not raise blood sugar, that it is low in carbs, and that it can even lower one's risk of heart disease.²⁵ Though these beverages, including almond, can, of course, have some nutritional benefits, perceptions of the nutritional value are typically not considerate of the additives and additional ingredients most major producers of almond milk and other like PBMA's added (a concept to be explored further later in the article).

Nutrition (*among other things, such as environmentalism*) is often a central point made in promoting PBMA's, and it helps create a market primed for increasing almond milk sales. "[T]he relationship among consumer perception of sustainability and consumer perception of other related attributes, such as whether a product is natural, healthy, ethical, or trustworthy, is critical knowledge for effective consumer messaging."²⁶ This is the strategy that almond milk and other PBMA producers have been successfully implementing (and the strategy that pro-dairy researchers suggest the dairy industry do to combat the rising threat of the PBMA's).²⁷ In short, when consumers think they can make a nutritionally, personally-beneficial choice by picking almond milk, it is no wonder the sales have continued to grow. Almond milk and fellow alternative milk sales, though, can also heavily attribute their success to the prevalence of social media campaigns.

²⁵ See Atli Arnarson, *7 benefits of almond milk*, MED. NEWS TODAY (Sept. 4, 2024), <https://www.medicalnewstoday.com/articles/318612#summary>; see also Cynthia Sass, *Health Benefits of Almond Milk*, HEALTH (Apr. 21, 2024), <https://www.health.com/nutrition/is-almond-milk-healthy#:~:text=Almond%20milk%20may%20help%20you,a%20wide%20range%20of%20recipes>; Kathleen M. Zelman, *Health Benefits of Almond Milk*, WebMD (Dec. 21, 2022), <https://www.webmd.com/diet/health-benefits-almond-milk>.

²⁶ See A. N. Schiano et al., *Consumer perception of sustainability of dairy products and plant-based alternatives*, 103 JOURNAL OF DAIRY SCI., 11228, 11228 (Dec. 2020), <https://www.sciencedirect.com/science/article/pii/S0022030220308225>.

²⁷ See *id.*

III. SPOILER ALERT - CONSUMERS MIGHT BE MISINFORMED

“So, we’re in the bad place, and I know why. Almond milk. I knew it was bad for the environment, but I loved the way it coated my tongue with a weird film.”

The Good Place, Season 2, episode 1, “Everything is Great! Part 2.”²⁸

Through these explored consumer perceptions nutritional value and other arguable benefits, married with the persuasive nature of social media platforms, it is more understandable why consumers put the almond milk in the cart and leave the cow’s milk carton behind, particularly given the price difference. Consumers, of course, always have to balance the pros and cons of their purchase decisions. It is just that when it comes to decisions rooted in either environmental or nutritional perceptions, there are tangible consequences to misbalancing the information (or the misinformation), whether communities experience them states away or down the line in one’s doctor’s office. Thus, now the question is whether these shoppers’ rationales and perpetuated social media narratives are bred from truth.

A. *The Nutritional Value*

The story of almond milk’s nutritional value is a complicated one because there is the matter of almond milk’s benefits on their own, and then discussion of what the wide variety of additives, sweeteners, and varying other ingredients used in different company’s products. Furthermore, as previously discussed, any plant-based milk will always have dairy milk as a comparator. “Dairy milk is a ubiquitous nutrient-dense beverage and ingredient, especially in Western diets.”²⁹ Cow’s milk is rich in protein, calcium, potassium, and multiple vitamins, and though some PBMA’s are enriched with parallel nutrients, there is no guarantee of their presence.³⁰ While dairy alternatives are incredibly valuable for those

²⁸ *The Good Place: Everything is Great!* (NBC broadcast Sept. 20, 2017); see also Genevieve Valentine, “*On the Backs of Tortoises’ Challenges Us to Consider How Much of Life is Intertwined*,” NAT’L PUBLIC RADIO (Nov. 1, 2019), <https://www.npr.org/2019/11/01/774366961/on-the-backs-of-tortoises-challenges-us-to-consider-how-much-of-life-is-intertwi>.

²⁹ See Andrew J. Berady et al., *A Scoping Review of the Environmental Impacts and Nutrient Composition of Plant-Based Milks*, 13 *ADVANCES IN NUTRITION* 2559, 2559 (2022).

³⁰ See Dawn MacKeen, *Do You really Want to Milk a Plant?*, N.Y. TIMES, May 20, 2021, at §D, at 3.

with allergies or intolerances to dairy, “[u]sually, these beverages do not include all of the necessary nutrients needed to replace dairy foods,” wrote the “deputy administrator for the U.S. Department of Agriculture’s Center for Nutrition Policy and Promotion.”³¹ Almond milk also does not hold a candle to the protein that cow’s milk can provide, offering just one gram to the eight grams in a glass of whole milk.³² Additionally, sometimes it is thought that because it is a nut based milk, almond milk will carry over with it the benefits of eating raw almonds, but this is not generally the case. The processing methods of almond milk “can result in the loss of certain nutritional properties and bioactive compounds. Fiber is also removed during processing, which creates a less satiating product.”³³

And then, of course, there is also the matter that, many PBMA, including almond milk, do not “meet a child’s recommended dairy needs.”³⁴ The Center for Disease Control (“CDC”) makes particular note about the added sugars common in dairy alternatives as a detriment to children’s health—though the added sugars should be taken note of by all consumers.³⁵

A wide array of nutritional differences can depend on the PBMA brand.³⁶ While unsweetened almond milk contains no added sugar, a large swath of the almond milk products on the shelves are in fact sweetened or flavored, with as many as twenty-plus added grams of sugar.³⁷ Some of these “sweetened versions [of PBMA] can contain more sugar than a doughnut.”³⁸ By having added sugars or syrups, sweetened PBMA can be “higher in high glycemic index carbohydrates, which can increase blood glucose levels more

³¹ See *id.*

³² See *id.*

³³ See Homa Warren, *Cow milk vs. alternative milk: what’s the best?*, BAYLOR COLL. OF MED. (Oct. 4, 2023), <https://www.bcm.edu/news/cow-milk-vs-alternative-milk-whats-the-best>.

³⁴ *Cow’s Milk and Milk Alternatives*, CENTER FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nutrition/infantandtoddlernutrition/foods-and-drinks/cows-milk-and-milk-alternatives.html#:~:text=Milk%20alternatives%20should%20not%20be,does%20not%20need%20added%20sugars> (last visited Oct. 27, 2024).

³⁵ See *id.*

³⁶ See Liza Torborg, *Mayo Clinic Q and A: Dairy milk, soy milk, almond milk—which is the healthiest choice for you?*, MAYO CLINIC (Apr. 9, 2019), <https://newsnetwork.mayoclinic.org/discussion/mayo-clinic-q-and-a-dairy-milk-soy-milk-almond-milk-which-is-the-healthiest-choice-for-you/#:~:text=Unflavored%20white%20dairy%20milk%20and,sweetened%20E2%80%94%20or%20flavored%20E2%80%94%20beverage>.

³⁷ See *id.*

³⁸ See MacKeen, *supra* note 31.

than lactose [found in dairy].”³⁹ Thus, even when almond milk or other comparable alternatives are fortified with nutrients, there is still a high likelihood that the product will contain other added ingredients that can decrease the nutritional value of the product—at least as it compares to the dairy option it is likely replacing for the shopper.⁴⁰ Almond milk is a prime example of a product where consumers should be particularly eager to read the nutritional label, looking for those added sugars or fortified nutrients.⁴¹ Otherwise, a product marketed as a dairy alternative could bring nutritional negatives the buyer was not anticipating, having equated the PBMA with the cow’s milk they have grown up with.⁴²

IV. SOCIAL MEDIA: *LIKE THIS ARTICLE FOR MORE ALMOND MILK*

Participating in social media, through platforms like Facebook, Twitter, Instagram, and TikTok has become a ubiquitous part of most people’s lives.⁴³ As of 2021, the Pew Research Center reported that over seventy percent of Americans use some type of social media.⁴⁴ Lives and experiences are shared both in the real world and the digital, and this ubiquity has undoubtedly influenced food consumption and grocery shopping trends.⁴⁵

Marketers can use social media platforms to trigger food curiosity for plant-based milk alternatives. Social media platforms allow customers to share their experiences, and food is one of the topics that users like to comment on or even share user-

³⁹ See Ben Knight, *Why plant-based ‘milks’ are rising to the top*, UNSW SYDNEY NEWSROOM (July 28, 2022), <https://www.unsw.edu.au/newsroom/news/2022/07/why-plant-based--milks--are-rising-to-the-top>.

⁴⁰ See *id.*; MacKeen, *supra* note 31.

⁴¹ See Mandy Oaklander, *Almond Milk: Should You Drink It?*, TIME (Aug. 20, 2018), <https://time.com/3677300/almond-milk-nutrition/>.

⁴² See *id.*

⁴³ See Jordan Zimmerman & Sarah Brown-Schmidt, *#foodie: Implications of interacting with social media for memory*, 16 COGN. RES. PRINC. IMPLIC., 1, 1 (2020).

⁴⁴ See *Social Media Fact Sheet*, PEW RSCH. CENTER, <https://www.pewresearch.org/internet/fact-sheet/social-media/> (last visited Oct. 27, 2024).

⁴⁵ See Anuraag Nallapati, *How The Combination Of Social Media And Online Delivery Is Shaping The Future Of Food*, FORBES (Oct. 6, 2022), <https://www.forbes.com/sites/forbestechcouncil/2022/10/06/how-the-combination-of-social-media-and-online-delivery-is-shaping-the-future-of-food/?sh=5bc3ed917848>.

generated content about, such as photos and videos. Studies have found that engagement through the combination of image and commentary extends the user experience beyond the moment of interaction and allows them to recognize the content and product later on.⁴⁶

Unsurprisingly, this is truer for younger generations that have grown up with social media as a pillar of their day-to-day lives.⁴⁷ For instance, a consumer report, cross-sectioning U.K. and U.S. citizens between the ages of fourteen and thirty-four, found that, “53% of Gen Z respondents said they find inspiration for new food through TikTok.”⁴⁸ Further, the “research notes the rise of food influences on TikTok, as well as brands introducing produce lines directly based on movements spurred by the app.”⁴⁹ So, there appears to be a relationship between the newfound requirement of engagement on social media and food choices; the influencing flows both ways. Consumers may make shopping decisions based on the images and narratives received from social media, and the companies may reshape their advertising tactics and alter their products themselves in response to the consumer interaction and interest on social media.

Having social media accounts to promote food products is almost a necessity for brands to be “trendy,” helping to score younger generation shoppers, and, at least according to the earlier referenced study, TikTok seems to be one of the most influential of the media apps.⁵⁰ As stated earlier, the top six PBMA companies, in order by sales, are Blue Diamond Breeze, Califia Farms, Oatly, Planet Oat, Ripple, and Silk, and nearly all of these leading companies, unsurprisingly, have TikTok accounts.⁵¹ As of the writing of this article, Almond Breeze has 21.7 thousand followers;⁵² Califia Farms

⁴⁶ See Rombach, *supra* note 21, at 11.

⁴⁷ See Emily Crowe, *How Gen Z and TikTok Are Shaping Food Trends*, PROGRESSIVE GROCER (June 3, 2022), <https://progressivegrocer.com/how-gen-z-and-tiktok-are-shaping-food-trends>.

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See Abrieux, *supra* note 7, at 7.

⁵² Almond Breeze (@almondbreeze), TIKTOK, <https://www.tiktok.com/@almondbreeze?lang=en> (last visited Oct. 25, 2024).

has 49.7 thousand followers;⁵³ Oatly has 658.6 thousand followers;⁵⁴ Planet Oat has 2,010 followers; and Silk has 27.5 thousand followers.⁵⁵ Some of these videos are akin to traditional food marketing schemes, such as promoting Almond Breeze as the perfect addition to one's morning coffee⁵⁶ or showing recipes that include almond milk as the central ingredient.⁵⁷

The brands begin to deviate from traditional advertising norms when they engage in social media trends, the same trends that content creators and other non-corporate accounts participate in. As flitting as social media trends and TikTok sounds can be, they are difficult to articulate in writing. But when Califia posts pictures with dancing *The Office*⁵⁸ characters⁵⁹ or when Almond Breeze assigns different flavored almond milks to the different astrological signs,⁶⁰ it is evident that traditional marketing techniques have taken a backseat to social media algorithm cooperation.

Further, in addition to traditional commercial style content and trend-engaging posts, PBMA brands are also keen partakers in brand collaboration and corporate partnership videos. "Branded content is content for which the creator has been compensated, either with money or something else of value, by a brand or business partner. This may include when products and services have been given for free."⁶¹ Aspiring content creators, looking to increase their views and also pay their bills, partner with corporations to essentially make advertisements for the corporation's products, services, or general brand.⁶² Every one of the aforementioned companies engages

⁵³ See Califia Farms (@califiafarms), TIKTOK, <https://www.tiktok.com/@califiafarms?lang=en> (last visited Oct. 25, 2024).

⁵⁴ See Oatly (@oatly), TIKTOK, <https://www.tiktok.com/@oatly?lang=en> (last visited Oct. 25, 2024).

⁵⁵ See Silk (@lovemysilk), TIKTOK, <https://www.tiktok.com/@lovemysilk?lang=en> (last visited Oct. 25, 2024).

⁵⁶ See Almond Breeze, TIKTOK (Nov. 21, 2023), <https://www.tiktok.com/@almondbreeze/video/7304058779371375918?lang=en>.

⁵⁷ See Almond Breeze, TIKTOK (Dec. 5, 2023), <https://www.tiktok.com/@almondbreeze/video/7309224510069230890?lang=en>.

⁵⁸ *The Office* (NBC Television Broadcast 2005-2013).

⁵⁹ See Califia Farms, TIKTOK (Nov. 2, 2023), <https://www.tiktok.com/@califiafarms/video/7297069177716690218?lang=en>.

⁶⁰ See Almond Breeze, TIKTOK (Nov. 3, 2023), <https://www.tiktok.com/@almondbreeze/video/7026497379369061679?lang=en>.

⁶¹ See *Partnership ads on Facebook and Instagram*, INSTAGRAM, <https://help.instagram.com/116947042301556> (last visited Oct. 27, 2024).

⁶² See *id.*; *Your brand in the spotlight: The power of content partnerships with TikTok*, TIKTOK (Nov. 9, 2022), <https://www.tiktok.com/business/en-AU/blog/content-partnerships-with-tiktok?redirected=1>.

in this type of content, paying content creators to create sponsored content with their products. It is customary, and sometimes even required, that when engaging in brand deals, there must be tags, linking either the content creator's video to the corporation's page, or the corporation linking their page to the creator responsible for the post.⁶³

What is particularly interesting, is that from a cursory glance, it appears that the videos that get the most views on these corporations' pages are sponsored content created by individuals outside of, say, the Blue Diamond corporation. As of the date of this writing, of Blue Diamond Almond Breeze's six most recent posts, five have over a million views, with one reaching four million. The common denominator is that each video ends with an at sign (@), indicating the paid creator that actually made the post.⁶⁴ To use one video with over four million as a case study, @almondbreeze on TikTok posted on November 11, 2023, a video in partnership with @cass.spinelli.⁶⁵ While Almond Breeze only has 21.7 thousand followers, @cass.spinelli has over three-hundred thousand followers and over thirty-four million likes on her TikTok page alone. Her content production schedule is far more intensive than the almond milk brand, and her content takes on a general lifestyle, daily blog style.⁶⁶ In addition to the four million views the video she made for Almond Breeze made on their page, it garnered another, approximate, 270,000 views on her channel.⁶⁷ Interestingly, when posted on her individual account, it has a #ad and says "paid partnership."⁶⁸ These minimal details do not distract from the overall video but are present nonetheless.⁶⁹ This is a prime example of a company taking advantage of the fact that social media influencers

⁶³ See *Partnership ads*, *supra* note 61.

⁶⁴ See Almond Breeze, TIKTOK (Nov. 27, 2023), <https://www.tiktok.com/@almondbreeze/video/7306201821754838318?lang=en>; Almond Breeze, TIKTOK (Dec. 12, 2023); Almond Breeze, TIKTOK (Dec. 7, 2023), <https://www.tiktok.com/@almondbreeze/video/7309912868097379626?lang=en>; Almond Breeze, TIKTOK (Dec. 5, 2023), <https://www.tiktok.com/@almondbreeze/video/7309224510069230890?lang=en>; Almond Milk, TIKTOK (Nov. 21, 2023).

⁶⁵ See Almond Breeze, TIKTOK (Nov. 27, 2023), <https://www.tiktok.com/@almondbreeze/video/7306201821754838318?lang=en>; see also Cass Spinelli (@cass.spinelli), TIKTOK, <https://www.tiktok.com/@cass.spinelli?lang=en> (last visited Oct. 27, 2024).

⁶⁶ See *id.*

⁶⁷ See Cass Spinelli (@cass.spinelli), TIKTOK (Nov. 27, 2023), <https://www.tiktok.com/@cass.spinelli/video/7306187791975648542?lang=en>.

⁶⁸ See *id.*

⁶⁹ See *id.*

are the ones that control the electronic word of mouth, “which substantially affects customer purchase decisions . . . The [electronic word of mouth] created by [social media influencers] is considered more powerful and convincing” than the word the company.⁷⁰

Social media has created an entire new means of advertising products, and its influence on the purchases of the more digitally native generations of Millennials and Gen Z is undeniable.⁷¹ As is evident from the microcosmic exploration with Almond Breeze’s branded and partnered content, this new form of marketing brings new narrators and voices to be associated with the product and the general perception of PBMA’s. Like so many other corporations, these alternative milk companies are taking advantage of the parasocial relationships forged online.

Parasocial relationships are “nonreciprocal socio-emotional connections with media figures such as celebrities or influencers.”⁷² Companies can take advantage of social media’s ability to incite parasocial relationships between app users and content creators, reshaping the public’s perceptions of their products by associating the product with the individuals whom so many have created these relationships.⁷³ The product is good or cool because the person you follow is good or cool.

Subsequently, brands connect and interact more effectively with customers, shaping their overall image and influencing purchase intention. Furthermore, [social media influencers, “SMI”] assists the brand in developing trust and making their followers loyal by sharing content on their

⁷⁰ See Asty Almaid et al., *Parasocial Relationship, Customer Equity, and Purchase Intention*, 24 J. OF MGMT. INFO. AND DECISION SCI. 1, 4 (2021).

⁷¹ See D. Tighe, *Share of shoppers that purchased a product after seeing it on social media in the U.S. in 2nd quarter 2023, by generational cohort*, STATISTA (Dec. 4, 2023), <https://www.statista.com/statistics/1260868/social-media-influence-on-shopping-by-generation-us/>.

⁷² See Cynthia A. Hoffner & Bradley J. Bond, *Parasocial relationships, social media, & well-being*, 45 CURRENT OP. IN PSYCHOLOGY 101306 (June 2022), <https://www.sciencedirect.com/science/article/abs/pii/S2352250X22000082>; see also Cody Mell-Klein, *Taylor Swift is not your BFF. What are parasocial relationships and are they healthy for us?*, NORTHEASTERN GLOBAL NEWS (Oct. 26, 2023), <https://news.northeastern.edu/2023/10/26/parasocial-relationships-taylor-swift/>.

⁷³ See Delia Cristina Balaban et al., *Parasocial relation. and social media influencers' persuasive power. Exploring the moderating role of product involvement*, 230 ACTA PSYCHOLOGIA 103731 (2022).

social media platforms. Kay, et al., (2020) stated that SMI posts on social media improve their followers' purchasing intention and boost their product awareness or attractiveness.⁷⁴

In sum, consumers can be persuaded to buy PBMA's like almond milk because they are more easily persuaded by the social media influencers they follow and perhaps have a parasocial relationship with. Not only do alternative milk producers benefit from social media, but they also benefit from it as another platform of communication. They also intensely benefit from the branded content network that allows narratives about products to be shaped by factors beyond science, price, nutrition, and other objective factors. Instead, perceptions of brand image can be shaped by them with the most followers.

V. #REGULATION

Before diving into the intricate web that regulates *the* web, one must first understand the regulatory scheme for advertising food products in general. It becomes immediately apparent that this is a multi-agency-focused inquiry, as the marketing and advertising of food is of the concern of the FDA, sometimes the USDA, and the FTC. For example, while the nutrition panels plastered on all processed foods fall under the purview of the FDA,⁷⁵ the "FTC regulates food advertising under its statutory authority to prohibit deceptive acts or practices under Section 5 of the FTC Act."⁷⁶

A. *The Food and Drug Administration*

First, there is the role of the FDA. The FDA gained the authority to establish standards for foods, including label and branding requirements under the Federal Food, Drug, and Cosmetic

⁷⁴ See Almaid, *supra* note 71.

⁷⁵ See *Food Labeling & Nutrition*, FOOD AND DRUG ADMIN., <https://www.fda.gov/food/food-labeling-nutrition> (last visited Apr. 19, 2024) ("Food labeling is required for most prepared foods, such as breads, cereals, canned and frozen foods, snacks, desserts, drinks, etc. Nutrition labeling for raw produce (fruits and vegetables) and fish is voluntary. We refer to these products as "conventional" foods.").

⁷⁶ See *Enforcement Policy Statement on Food Advert.*, FED. TRADE COMM'N (May 13, 1994), <https://www.ftc.gov/legal-library/browse/enforcement-policy-statement-food-advertising#Introduction>.

Act.⁷⁷ The FDA promulgates extensive requirements for how food products need to be regulated, from the font sizes of product names, to listed allergens, to what can and cannot be called a juice or a dairy product.⁷⁸ The most well-known and recognized requirement is likely the nutrition facts panel that is required to be on the side or back of any processed food product.⁷⁹ The panel exemplifies a regulatory informational disclosure requirement, educating the public on calories, total sugars, daily value calculations, ingredients, etc.⁸⁰ This information disclosure, whether or not utilized by consumers, is part of the FDA's larger strategic initiative to educate in efforts to improve public health.

In addition to regulating the packaging and nutrition labels, the FDA regulates nutritional and health claims made by food manufacturers. "Authorized health claims in food labeling are claims that have been reviewed by FDA and are allowed on food products . . . to show that a food or food component may reduce the risk of a disease or a health-related condition."⁸¹ The public is supposed to find assurance in that these reviewed by the FDA claims are supported by scientific evidence.⁸² Authority for this regulation and review process stems from the Nutrition Labeling and Education Act of 1990.⁸³

The FDA acts sparingly in authorizing health claims, having only done so twelve times since the Act passed in 1990.⁸⁴ "To be approved by the FDA as an authorized health claim, there must be significant scientific agreement . . . among qualified experts that the

⁷⁷ See *80 Years of the Fed. Food, Drug, and Cosmetic Act*, FOOD AND DRUG ADMIN., <https://www.fda.gov/about-fda/fda-history-exhibits/80-years-federal-food-drug-and-cosmetic-act> (last visited Oct. 17, 2024).

⁷⁸ See *Food Labeling Guide*, FOOD AND DRUG ADMIN., <https://www.fda.gov/media/81606/download> (last visited Oct. 19, 2024).

⁷⁹ See *The Nutrition Facts Label*, FOOD AND DRUG ADMIN., <https://www.fda.gov/food/nutrition-education-resources-materials/nutrition-facts-label> (last visited Oct. 19, 2024).

⁸⁰ See *id.*

⁸¹ See *Authorized Health Claims That Meet the Significant Sci. Agreement (SSA) Standard*, FOOD AND DRUG ADMIN., <https://www.fda.gov/food/food-labeling-nutrition/authorized-health-claims-meet-significant-scientific-agreement-ssa-standard> (last visited Oct. 19, 2024).

⁸² See *id.*

⁸³ See *id.*

⁸⁴ See *Questions and Answers on Health Claims in Food Labeling*, FOOD AND DRUG ADMIN., <https://www.fda.gov/food/nutrition-food-labeling-and-critical-foods/questions-and-answers-health-claims-food-labeling> (last visited Oct. 19, 2024).

claim is supported by the totality of publicly available scientific evidence for a substance/disease relationship.”⁸⁵ The currently approved health claims are very narrow, with examples of model health claims looking like “low fat diets rich in fruits and vegetables . . . *may* reduce the risk of some types of cancer,”⁸⁶ or “While many factors affect heart disease, diets low in saturated fat and cholesterol *may* reduce the risk of this disease” (emphasis added).⁸⁷ Prevalent among model health claims are wiggle words like “may”—the kind of words regulatory agencies thrive on. The leeway implemented in the few authorized health claims out there underscores that, even after being supported by significant scientific agreement, the FDA exhibits intensive hesitancy in allowing food manufacturers to assert that their food product may serve some health or disease-fighting usage (that is a job for drugs).

A notorious example of the FDA exercising this hesitancy occurred in 2009 with General Mills and Cheerios.⁸⁸ The FDA issued a warning letter when the box of cereal read that “you can lower your cholesterol 4 percent in 6 weeks.” This kind of claim waded dangerously near asserting that the food product was a drug. This marketing scheme proved to be a violation of the Food and Drug Cosmetic Act, and it serves as a keen example of the exact type of claim and marketing strategy that the FDA is hawk-eyed for.⁸⁹ Now, while the FDA looks at the food’s carton as it sits on the shelf or is presented in commercials, a question still arises concerning the internet. In this ever-changing advertising landscape, does the FDA know to look at social media and branded content? Moreover, is it even equipped to do so effectively?

⁸⁵ See *Authorized Health Claims*, *supra* note 81.

⁸⁶ See 21 CFR 101.78 (1977).

⁸⁷ See 21 CFR 101.74 (1977).

⁸⁸ See Tiffany Hsu, *FDA warns General Mills over Cheerios cholesterol claims*, L.A. TIMES (May 12, 2009), <https://www.latimes.com/archives/blogs/money-company/story/2009-05-12/fda-warns-general-mills-over-cheerios-cholesterol-claims>; *FDA sinks Cheerios health claims; calls cereal an ‘unapproved drug,’* CONSUMER REPORTS (May 13, 2009), <https://www.consumerreports.org/cro/news/2009/05/fda-sinks-cheerios-health-claims-calls-cereal-an-unapproved-drug/index.htm>.

⁸⁹ See *FDA: Don’t Advertise Cheerios as a Drug*, ABC NEWS (May 13, 2009), <https://abcnews.go.com/Business/Cholesterol/story?id=7574156&page=1#:~:text=The%20FDA%20said%20ads%20promoting,prevent%20or%20treat%20heart%20disease>.

B. *The Federal Trade Commission*

The FDA is not the only player in regulating food products' marketing and claims; the Federal Trade Commission is also on the scene. The basic mission of the FTC is to protect "the public from deceptive or unfair business practices and from unfair methods of competition through law enforcement, advocacy, research, and education."⁹⁰ There is, understandably, a good deal of overlap between this mission and the FDA's role in public health and America's food supply.⁹¹

Perhaps the most infamous example of the FTC stepping in against the marketing of a food product is with POM Wonderful, a pomegranate blended drink whose marketing campaign made causal claims regarding their product and conditions like heart disease, prostate cancer, and erectile dysfunction.⁹² Both the FTC and the US Court of Appeals for the District of Columbia ultimately found that POM Wonderful violated the Federal Trade Commission Act "by making false, misleading and unsubstantiated health claims about their products."⁹³ The court and FTC commissioner emphasized essentially a lack of proper studies and a lack of a qualifier (or, as put earlier, "wiggle words").⁹⁴ In short, the incident with POM Wonderful demonstrates tangible consequences to the claims food producers make about their products, particularly those that are misleading and potentially dangerous to public

⁹⁰ See *About the FTC*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc> (last visited Oct. 19, 2024).

⁹¹ See *What We Do*, FOOD AND DRUG ADMIN., <https://www.fda.gov/about-fda/what-we-do> (last visited Oct. 19, 2024).

⁹² See POM Wonderful LLC, et al., FED. TRADE COMM'N, <https://www.ftc.gov/legal-library/browse/cases-proceedings/pom-wonderful-llc-et-al> (last visited Apr. 19, 2024); Chloe Sorvino, *The Verdict: POM Wonderful Misled Its Customers, A Blow To Its Billionaire Owners*, FORBES (May 2, 2016), <https://www.forbes.com/sites/chloesorvino/2016/05/02/the-verdict-pom-wonderful-misled-its-customers-a-blow-to-its-billionaire-owners/?sh=279389514b94>;

see also Practical Law Com., *DC Circuit: POM Wonderful's Health Claims Were Deceptive*, THOMAS REUTERS (May 3, 2016),

[https://1.next.westlaw.com/Document/I45be5d5aabc811e498db8b09b4f043e0/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&isplc=true&firstPage=true&bhcp=1](https://1.next.westlaw.com/Document/I45be5d5aabc811e498db8b09b4f043e0/View/FullText.html?transitionType=Default&contextData=(sc.Default)&isplc=true&firstPage=true&bhcp=1); POM Wonderful LLC v. FTC, 777 F.3d 478, 484 (U.S. App. D.C. 2015).

⁹³ See Practical Law Com., *supra* note 92.

⁹⁴ See *POM Wonderful LLC*, 777 F.3d at 484.

understanding of health and food safety.

In addition to outward, misleading claims, like those made by POM Wonderful, the FTC is also heavily concerned with transparent disclosures in endorsement deals.⁹⁵ Here, the governing and relevant statute is Part 255 of the Federal Trade Commission Act, Section 255.5 Disclosure of material connections.⁹⁶ It reads: “When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement, and that connection is not reasonably expected by the audience, such connection must be disclosed clearly and conspicuously.”⁹⁷ This is incredibly relevant when the manufacturer is paying an influencer to endorse.⁹⁸ However, it fails to address when influencers choose to make health or product-related conduct on their own accord. Nonetheless, the FTC plays a vital role in regulating what is said about products and by whom.

C. Social Media Regulation (and a Lack Thereof)

The FDA and FTC’s roles in protecting the public from misleading and potentially dangerous marketing claims have only become more difficult with the advent and exponential growth of social media. Increasingly, the FTC has had to monitor and issue warnings regarding health and safety claims made over social media.⁹⁹ Baseless health claims—be it for food, drink, drugs, or medical products—have become far more accessible to perpetuate through social media endorsements with influencers and other third-parties.¹⁰⁰ Prescription drugs, such as Ozempic, and vaping products serve as strong examples of how quickly rhetoric and advertising that the FDA and/or FTC would have highly regulated can get muddled in the echo chamber of social media.¹⁰¹ They shine a light on the

⁹⁵ See *FTC’s Endorsement Guides: What People Are Asking*, FED. TRADE COMM’N, <https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking> (last visited Oct. 19, 2024).

⁹⁶ See 16 CFR §255.2 (2023); Fed. Trade Comm’n Act of 1920, 15 U.S.C. § 41.

⁹⁷ See *id.*

⁹⁸ See *Endorsements, Influencers, and Reviews*, FED. TRADE COMM’N, <https://www.ftc.gov/business-guidance/advertising-marketing/endorsements-influencers-reviews> (last visited Oct. 19, 2024).

⁹⁹ See e.g., *FTC and FDA Send Warning Letters to Cos. Selling Flavored E-liquids About Social Media Endorsements without Health*, FED. TRADE COMM’N (June 7, 2019), <https://www.ftc.gov/news-events/news/press-releases/2019/06/ftc-fda-send-warning-letters-companies-selling-flavored-e-liquids-about-social-media-endorsements>.

¹⁰⁰ See *id.*

¹⁰¹ See *id.*

holes in regulation regarding marketing on social media. For example, the FTC had highlighted material connections between endorsers and advertisers when it came to selling e-liquids for vapes.¹⁰² Bloomberg Law aptly points out the lack in readdressing regulatory guidelines to account for social media's influence, reporting, "TikTok, the social media platform that has 150 million active users a month in the US, . . . didn't exist when the FDA's most recent guidelines [for prescription drugs] were written."¹⁰³

A mirror has already been held to the FDA's lack of addressing misleading drug claims.¹⁰⁴ And the same holes in the FDA's regulation of drug-related claims on social media are present for food and beverage-based claims too. For example, in November of 2023, the FTC "issued warnings to two food and beverage industry groups, as well as a dozen online influencers, for failing to adequately disclose paid social media posts that promoted a sweetener and sugary products."¹⁰⁵ Here, the American Beverage Association and The Canadian Sugar Institute, allegedly, failed to "adequately disclose [in their content] that the influencers were apparently hired to promote the safety of aspartame or the consumption of sugar-containing products."¹⁰⁶ This is the proverbial tip of the regulation iceberg when it comes to the FTC monitoring the relationship between producers and influencers.

¹⁰² See *FTC and FDA Send Warning Letters*, *supra* note 99.

¹⁰³ See Celine Castronuovo, *TikTokers Put Consumers at Risk as Drug Ads Go Unchecked by FDA*, BLOOMBERG LAW (Dec. 14, 2023), <https://news.bloomberglaw.com/health-law-and-business/tiktokers-put-consumers-at-risk-as-drug-ads-go-unchecked-by-fda>.

¹⁰⁴ See *id.*

¹⁰⁵ See *FTC warns food industry trade groups and influencers about disclosures on paid social media posts*, ASSOCIATED PRESS (Nov. 15, 2023), <https://apnews.com/article/influencers-ftc-paid-sponsored-ads-social-45bac44d3cf5ff57629c3bf31a100fd0>; *FTC Warns Two Trade Associations and a Dozen Influencers About Social Media Posts Promoting Consumption Of Aspartame or Sugar*, FED. TRADE COMM'N (Nov. 15, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/11/ftc-warns-two-trade-associations-dozen-influencers-about-social-media-posts-promoting-consumption>; Ivana Saric, *Food influencers warned by FTC over paid social media posts*, AXIOS (Nov. 18, 2023); Thomas Gremillion, *The Truth Behind Your Feed: FTC Targets Deceptive Food Mktg. Online*, CONSUMER FED'N OF AM. (Nov. 17, 2023), <https://consumerfed.org/the-truth-behind-your-feed-ftc-targets-deceptive-food-marketing-online/>.

¹⁰⁶ See *FTC Warns Two Trade Assocs.*, *supra* note 105.

Both the FDA and the FTC have addressed influencers in some capacity.¹⁰⁷ The FDA's materials are namely focused on how to define and train influencers for public health messages, such as "say no to drugs" and "mental health matters" campaigns.¹⁰⁸ Conversely, the FTC speaks specifically to compliance for influencers in disclosing their relationships with a given brand.¹⁰⁹ This is what the November 2023 aspartame debacle spoke to: failure to disclose payments from industry groups. Nevertheless, this is only a side of the coin. Flip the coin over to see that, in addition to worries about a lack of transparency between producer and influencer, there is the worry about influencers perpetuating misunderstandings about food and, perhaps in sponsored content, instructed or otherwise, making misleading claims.

In conjunction with the FDA, the FTC needs to expand on its November 2023 aspartame actions and create the regulatory infrastructure to respond to non-disclosures by social media influencers who are making false or misleading nutritional claims. The civil penalties threatened for failures of disclosure of the connections between influencers and trade groups is a start,¹¹⁰ but there also needs to be forward-looking steps in addition to FTC reactions. Furthermore, disclosing endorsements—a namely FTC concern—cannot be the sole concern regarding social media. The FDA needs to step in, too, by updating guidelines and regulations on health claims and marketing, specifically through third-party influencers. In fact, no regime currently exists to force a third-party influencer not paid by a manufacturer who provides misleading information to their followers.

i. Almond Milk Regulation Exercise

Returning to the star of this writing—almond milk—can serve as a fruitful exercise in understanding what all the FDA might consider when regulating the product's packaging. First, as alluded

¹⁰⁷ See Center for Tobacco Prods., *Influencers 101: Best Practices and Practical Approaches for Public Health Campaigns*, FOOD AND DRUG ADMIN., <https://www.fda.gov/media/165158/download> (last visited Apr. 19, 2024); see also *Disclosures 101 for Social Media Influencers*, FED. TRADE COMM'N (Nov. 2019), <https://www.ftc.gov/business-guidance/resources/disclosures-101-social-media-influencers>.

¹⁰⁸ See Center for Tobacco Prods., *supra* note 107.

¹⁰⁹ See *Disclosures 101*, *supra* note 107; see also 16 CFR §255 (2023).

¹¹⁰ See mwb124, *FTC Cracks Down on Non-disclosure by Influencers on Social Media Discussing Nutrition Claims*, PENN STATE COLL. OF AG. SCIS. (Nov. 20, 2023), <https://pennstatefoodsafety.blogspot.com/2023/11/ftc-cracks-down-on-non-disclosure-by.html>.

to before, there would be concern regarding the product's title: "almond milk."

In the spring of 2023, the FDA released a "Draft Guidance for Industry: Labeling of Plant-Based Milk Alternatives and Voluntary Nutrient Statements."¹¹¹ The guidance said plant-based milk . . . could be called 'milk' if its plant origin was clearly identified," (for example, "almond milk") in accordance with the Federal Food, Drug, and Cosmetic Act.¹¹² This guidance was viewed as the agency's official recommendation, not carrying any force of law.¹¹³ But nonetheless, this guidance clearly paved a path for PBMA's to continue their marketing schemes, allowed to further present as a full-fledged alternative to cow's milk. Assuming that after a further comment period, the FDA does not alter their guidance substantially, this does mean that the FDA has, arguably, attempted to close the door to potential litigation on the grounds of misbranding PMDA's as "milk," as the courts have typically shown a great deal of deference to FDA's recommendations and decisions.¹¹⁴

Moving forward, the label "milk" does not seem to be in question, but what about the claims the product makes or gets associated with—namely claims comparing the nutritional value of almond milk to its dairy and other alternative counterparts. This writing has already highlighted that there is a vast disparity in understanding regarding the nutritional benefits of almond milk, and social media is abundant with influencers who are making health claims and suggestions to viewers, oftentimes under the guise of

¹¹¹ In Apr. of 2023, the FDA reopened the comment period for this draft guidance "in response to requests from stakeholders to allow additional time for interested persons to develop and submit comments." See *Draft Guidance for Indus.: Labeling of Plant-Based Milk Alts. and Voluntary Nutrient Statements*, FOOD AND DRUG ADMIN. (Feb. 2023), <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/draft-guidance-industry-labeling-plant-based-milk-alternatives-and-voluntary-nutrient-statements>; *FDA Reopens Comment Period for the Draft Guidance on Labeling of Plant-Based Milk Alts.*, FOOD AND DRUG ADMIN. (Apr. 2023), <https://www.fda.gov/food/cfsan-constituent-updates/fda-reopens-comment-period-draft-guidance-labeling-plant-based-milk-alternatives>.

¹¹² See Andrew Jacobs, *Mixed Reaction as F.D.A. Proposes That Soy, Oat and Almond Drinks Can Be Called Milk*, N.Y. TIMES (Feb. 24, 2023), § B, at 4; see also Yasmin Tayag, *Milk Has Lost All Meaning*, THE ATLANTIC (Mar. 7, 2023), at 1; see also *Draft Guidance for Indus.*, *supra* note 111.

¹¹³ See Jacobs, *supra* note 112 ("[I]n concession to the nation's traditional milk producers, the FDA also recommended that the packaging for plant-based drinks make clear the key nutritional differences between their product's and cow's milk.").

¹¹⁴ See Liam Bendiksen et al., *FDA and Chevron Deference: A Case Review*, 78 FOOD AND DRUG LAW JOURNAL, 372, 372 (2023).

proclaiming themselves some sort of nutritionist or obtaining some other expertise that should encourage viewer engagement and trust.

There is the British “Holistic Nutritionist” with over a hundred-thousand followers who makes claims about glucose spikes and recommends almond milk to help regulate those numbers.¹¹⁵ There is the young woman whose 10,000 follower and 2.4 million liked page is solely dedicated to the products she likes that claims that almond milk helps you lose weight, improves vision, and promotes skin and heart health.¹¹⁶ And for the fellas, there is the bodybuilder who advertises that organic, non-GMO almond milk will help get you ripped and build lean muscle mass.¹¹⁷ And this goes both ways!¹¹⁸ Some influencers might be doing too much fear-mongering around divisive food products like almond milk, like the self-identified “Crunchy mom” with 185.2k followers on TikTok.¹¹⁹ She asserts that most almond milks are heavily sprayed with pesticides, include too many added gums, and likely hurt your gut health.¹²⁰

¹¹⁵ See Steph Robinson (@stephrobinson), TIKTOK (Sept. 28, 2023), https://www.tiktok.com/@stephrobinson/video/7284046336545115397?_r=1&_t=8ILVNExxAmE.

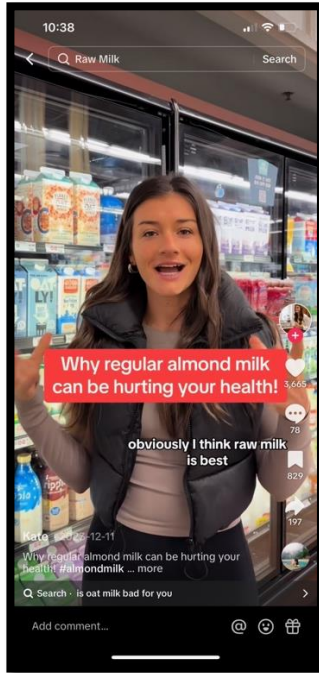
¹¹⁶ See BeaFindss (@beatiu5), TIKTOK (Oct. 10, 2023), https://www.tiktok.com/@beatiu5/video/7288252893767929094?_r=1&_t=8ILWk9w2rMJ.

¹¹⁷ See Korin Sutton (@korinsutton), TIKTOK (July 15, 2023), https://www.tiktok.com/@korinsutton/video/7256075991628385579?_r=1&_t=8LXAggiX4.

¹¹⁸ See Anna North, *The “You’re doing it wrong”-ification of TikTok*, VOX (March 24, 2023), <https://www.vox.com/culture/23648715/tiktok-instagram-advice-mistakes-howto-tutorial>.

¹¹⁹ See Kate (@thatcrunchymomkate), TIKTOK, https://www.tiktok.com/@thatcrunchymomkate?_t=8ILVkaA9kKb5&_r=1 (last visited Oct. 20, 2024).

¹²⁰ See Kate (@thatcrunchymomkate), TIKTOK (Dec. 11, 2023), https://www.tiktok.com/@thatcrunchymomkate/video/7311502237929393450?_r=1&_t=8ILVnnqZQrb.



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¹²¹ See Kate (thatcrunchymomkate), TikTok (Dec. 11, 2023), https://www.tiktok.com/@thatcrunchymomkate/video/7311502237929393450?_r=1&_t=8ILVnnqZQrb; BeaFindss (@beatu5), TikTok (Oct. 10, 2023),

This is where there needs to be proactive regulatory steps from the FDA. The realm of social media is creating new regulatory threats for misleading claims for food products, and almond milk is a prime example. Terms like “gut health,” “glycemic index,” and “microbiome” are common to populate with the simple search of “almond milk, health” on social media, and these are the exact types of terms that would typically flag the FDA of a potentially unauthorized health claim. But, because smaller influencers are making them, it would seem that the “supported by scientific evidence” standard the FDA maintains for authorized health claims is failing to be properly implemented.¹²²

Brands could easily take advantage of using nano-, micro-, and mid-sized influencers (all under 500k followers) to slip under the FDA and FTC’s radar more easily.¹²³ “Influencers, particularly ‘micro-influencers’ with followers of 1,000 to 100,000, wield more power than one may realize. The smaller scale of their audience enables micro-influencers to foster a closer connection with their following . . . The trust bestowed upon influencers can be dangerous, particularly in the context of potential health misinformation and disinformation.”¹²⁴ This problem has already been pointed out in the drug-context, and it shows that the threat of influencers and misinformation extends into the food realm, too.¹²⁵

Between the parasocial relationships and the self-proclaimed nutritionists dominating the almond milk content feed, the mouthpieces of unchecked health claims are numerous. As the almond milk though-experiment demonstrates, this balancing act of regulatory authority, coupled with the ever-changing nature of advertising in light of the internet and social media, has left some gaps. Where there were once demands of scientific certainty and regulatory accountability, now there are ‘likes’ and ‘shares.’

https://www.tiktok.com/@beatius5/video/7288252893767929094?_r=1&_t=8ILWk9w2rMJ; Korin Sutton (@korinsutton), TIKTOK (July 15, 2023), https://www.tiktok.com/@korinsutton/video/7256075991628385579?_r=1&_t=81LXAggziX4.

¹²² See *Authorized Health Claims*, *supra* note 81.

¹²³ See *Influencers 101*, *supra* note 107, at 9.

¹²⁴ See Sneha Dave et al., *The FDA and FTC need to crack down on TikTok and Instagram influencers pitching prescription drugs*, STAT (Jan. 22, 2024), <https://www.statnews.com/2024/01/22/fda-ftc-tiktok-instagram-influencers-advertising-prescription-drugs/>.

¹²⁵ See *id.*

VII. NUT-THING LEFT TO DO BUT ACT

In the end, this writing is not meant to vilify anyone's personal preference for their morning coffee. Rather, almond milk serves as an exemplary food product to highlight an unfolding new truth about how and why consumers make the food choices they do, the confusion and misunderstanding that can surround a new popular food item, and how the regulation framework is and is not equipped to address the information and marketing source that is social media. This writing has established that not only does food and beverage marketing thrive on social media, particularly with the assistance of influencers and other posters, but that there is a gaping hole in the regulatory framework.

Almond milk, as a trendy and not traditionally conventional food product, served as a strong case study example of the extent of confusion that can follow one food product from production to marketing, to consumption. This writing could have easily focused on a low-sugar option that uses a scientifically-uncertain artificial sweetener, or even just commonplace beef—a protein debated for its health and environmental benefits and harms routinely. But nonetheless, almond milk, as the highest-selling plant-based milk, serves as an example of how fast the food marketing landscape is changing with social media, and how the FDA and the FTC are just not equipped to wield the same level of regulatory enforcement they have in the past, such as with Cheerios or POM Wonderful, with products discussed on social media. While Cheerios was unable to claim their circular cereal would lower her cholesterol, and POM Wonderful could not promise that pomegranate juice would fix his erectile dysfunction, what is to stop @RemyfromArkansas (a hypothetical influencer with, say, fifty thousand followers) from saying that Almond Milk makes her menstrual cramps go away or is better for her heart health, whether her intention be because she was paid to promote the product by the manufacturer or because simply because she thinks sharing nutritional insights will gain her own following (which will, in turn, increase her ability to profit from producing content online). As a nano-, micro-, or mid-sized influencer, health claims can easily fly under the regulatory radar, go unchecked, and still lead to an internet chain reaction. Consumers, either aimlessly scrolling or intentionally looking for food product-specific content, will, in turn, hear misleading and potentially false assertions of nutritional benefits and/or detriments. The FDA has stringent scientific guidelines for authorized health claims, but they may not stand strong enough in the shadow of Instagram, Facebook, and TikTok.

In response to the changing landscape, the FDA and FTC will need to revisit their food and beverage marketing guidelines and accompanying health claims.¹²⁶ The clarity they attempt to ensure in current statutes fails to address the threats of internet misinformation and influencer sway. As previously examined, there is already considerable confusion about almond milk's health benefits and other realities, just as there might be confusion about other current or future trendy products. That confusion will always exist, but without proper regulation of the rhetoric and claims made online, it could have the potential of growing to scales that, inevitably, completely defeat the purposes of in-place regulatory schemes—schemes made in an era in which the reach and effect of apps like TikTok was inconceivable. While the threat of harm tied to choosing to switch out half-and-half for almond milk in your morning coffee is low, dietary and food safety misinformation is a serious matter, nonetheless. Gone unchecked, and decades of efforts at regulation, information disclosure, transparency, and scientific certification of health claims could quickly be overshadowed by social media influencers with just the right number of followers.

As this author sees it, the best next step would be for the FDA to issue a draft guidance addressing social media companies on how they flag health and nutritional claim videos. While draft guidances “do not create or confer any rights for or on any person and do not operate to bind FDA or the public,” they still reflect the current thinking of the regulatory body and can carry an accompanying, influential weight.¹²⁷ They are a central vehicle of communication between regulator and regulated, and companies should be eager to comply. By directing a draft guidance at the social media companies, the FDA can put a spotlight on the growing hole in the regulatory system: content and health claims made either independently by thought-leaders online or indirectly by the manufacturers via micro-influencer branded content that could more likely go-unchecked.

The draft guidance would, ideally, suggest a model parallel to what happened to address misinformation during the COVID-19 pandemic. During the public health emergency, the World Health

¹²⁶ Though broader than the scope of this article, here too could be expansion from the regulatory agencies in addressing misleading environmental claims. That, however, unlike food related health claims, lacks any true regulatory framework to build upon.

¹²⁷ See *Guidances*, FOOD AND DRUG ADMIN., <https://www.fda.gov/industry/fda-basics-industry/guidances> (last visited Oct. 17, 2024).

Organization “teamed up with over 40 tech companies to help disseminate facts, minimize the spread of false information and remove misleading posts.”¹²⁸ This was part of, essentially, a call for social media companies to self-regulate the “fake news” and disinformation themselves.¹²⁹ The latest iteration of this desire for social media platforms to self-regulate came in the form of badges across relevant posts, in addition to taking down particularly charged or dangerous posts.¹³⁰ For example, on TikTok that reads “Learn more about COVID-19 vaccines” and then hyperlinks the user to a page on TikTok’s website filled with statements of the platform’s dedication to community support and information regarding the virus.¹³¹ Particularly noteworthy is the subheading on this page that reads, “Combating medical misinformation,” further linking the user to TikTok’s Community Guidelines.¹³² Instagram follows a similar structure, adding links to “health organization on content you’ve posted or see in your feed if the post mentions COVID-19 or vaccines.”¹³³ The links on Instagram will either go to the CDC.gov, WHO.int, or a local health ministries.¹³⁴

¹²⁸ See Malaka Gharib, *WHO is Fishing False COVID Info On Social Media. How’s That Going?*, NAT’L PUB. RADIO (Feb. 9, 2021), <https://www.npr.org/sections/goatsandsoda/2021/02/09/963973675/who-is-fighting-false-covid-info-on-social-media-hows-that-going>.

¹²⁹ See *Social media firms fail to act on Covid-19 fake news*, BBC (June 3, 2020), <https://www.bbc.com/news/technology-52903680>; Sheera Frenkel, et al., *Misinformation Surge on Coronavirus Stumps Facebook and Twitter*, N.Y. TIMES, § A, at 8 (March 9, 2020).

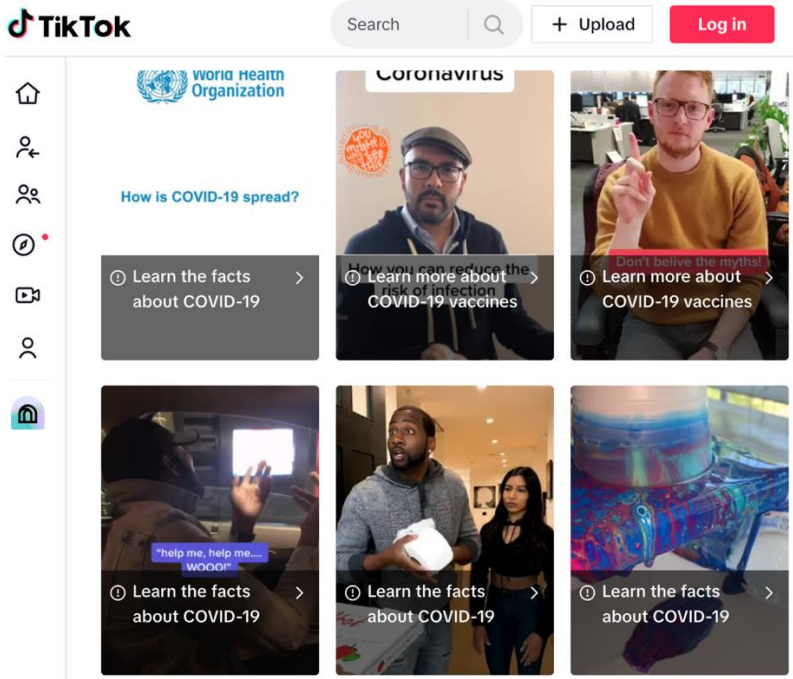
¹³⁰ See Tiffany Hsu, *As Covid-19 Continues to Spread, So Does Misinformation About It*, N.Y. TIMES (Dec. 28, 2022), <https://www.nytimes.com/2022/12/28/technology/covid-misinformation-online.html>

¹³¹ See Theo Bertram, *Supporting our community through COVID-19*, TIKTOK, <https://newsroom.tiktok.com/en-gb/supporting-our-community-through-covid-19> (last visited Oct. 14, 2024).

¹³² See *id.*; see also *Community Guidelines*, TIKTOK, <https://www.tiktok.com/community-guidelines/en/> (last visited Oct. 14, 2024).

¹³³ *Why Instagram Add Links to Some Posts in Your Feed*, INSTAGRAM, <https://help.instagram.com/234606571236360> (last visited Oct. 14, 2024).

¹³⁴ See *id.*



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Some have argued that this response from social media is an example of coercive pressure from the federal government overstepping their bounds.¹³⁶ The criticism has gained traction as the Supreme Court was set to decide in June of 2024 a lower, Louisiana court’s decision that would have “curbed the Biden administration’s ability to community with social media companies about contentious content,” including matters concerning COVID-19 (though the Court ultimately held that the parties lacked standing, meaning the substantive questions still exist).¹³⁷ This Louisiana injunction ran

¹³⁵ See #coronavirus, TIKTOK, <https://www.tiktok.com/tag/coronavirus?lang=en> (last visited Oct. 14, 2024).

¹³⁶ See Jenin Younes & Aaron Kheriaty, *The White House Covid Censorship Machine*, WALL STREET J. (Jan. 8, 2023), <https://www.wsj.com/articles/white-house-covid-censorship-machine-social-media-facebook-meta-executive-rob-flaherty-free-speech-google-11673203704>.

¹³⁷ See Lawrence Hurley, *Supreme Court blocks restrictions on Biden admin. Efforts to get platforms to remove social media posts*, NBC News (Oct. 20, 2023), <https://www.nbcnews.com/politics/supreme-court/supreme-court-blocks-biden-social-media-curbs-rcna105785> (“GOP attorney generals in Louisiana and Missouri, along with five social media users, filed the underlying lawsuit, alleging the U.S. government officials went too far in what they characterize as coercion of social media companies to address posts, especially those related to Covid-19.”);

contradictory to Senator Amy Klobuchar's 2021 attempts to introduce "a bill that would remove Section 230 protections during a public-health emergency for 'health information' that platforms algorithmically promote. The obvious question is: What counts as 'health misinformation?'"¹³⁸ It is clear that government interaction with social media is a divisive and ever-unfolding matter, with many questions yet to be answered.

The effects of disinformation during a global crisis like the pandemic is, of course, in no substantial way comparable to concerns surrounding consumer perceptions of PBMA's. However, the schema that was put in place in the crisis mode of the pandemic may prove to be a beneficial form for other agencies, like the FDA, to follow in tackling disinformation on an array of matters moving forward. There should be room made for the FDA to issue draft guidances that target social media platforms in particular about content on their platforms that makes nutritional claims about food. Without such action, unsubstantiated health claims made to smaller but susceptible audiences online will continue to go unchecked and unregulated.

In sum, social media is slowly chipping away at FDA and FTC regulation, and doing *nut*-thing about it cannot be the right response.

see also Vivek H. Murthy, Surgeon General, et al., v. Missouri, et al., 601 U.S. 1, 4 (2023).

¹³⁸ *See* Jeff Kosseff, *America's Free Favorite Flimsy Pretext for Limiting Free Speech*, THE ATLANTIC (Jan. 4, 2022), <https://www.theatlantic.com/ideas/archive/2022/01/shouting-fire-crowded-theater-speech-regulation/621151/>; *see also* Alexandra S. Levine, *Klobuchar targets vaccinemisinformation with Section 230 bill*, POLITICO (July 22, 2021), <https://www.politico.com/news/2021/07/22/klobuchar-vaccine-misinformation-section-230-bill-500554>.

LEGAL CHEFS' APPETIZING TAGLINES TO ENGAGE CONSUMERS IN THE AGE OF SOCIAL MEDIA: THE STRUGGLE AGAINST TRADEMARK GENERICIDE

Emily McDonald

"Food is our common ground, a universal experience."

- James Beard¹

I. INTRODUCTION

To play off the words of Mark Kurlansky, "Food is a central activity of mankind and one of the single most significant trademarks of a culture."² Many have heard the phrases "raisin bran," "escalator," "nylon," and "aspirin," all of which are "old" trademarks that have undergone genericide. Genericide occurs when a trademark has become common from the customer's perspective concerning specific goods or services rather than associated with the source, which is usually the company that registered the trademark.³ In short, businesses are no longer able to use the trademark exclusively. Another common trademark phrase that became generic was "Taco Tuesday." The foody phrase appeared as a key component of the plot in the film, "The Lego Movie,"⁴ in 2019 with LeBron James utilizing the phrase on social media and other outlets, and again when Taco Bell sued Taco John's for cancelation of the mark in the summer of 2023.⁵

¹ *James Beard Quotes*, ALLGREATQUOTES, <https://www.allgreatquotes.com/quote-229960/> (last accessed Oct. 21, 2024).

² AZ Quotes, <https://www.azquotes.com/quote/576584> (last visited Oct. 20, 2024)

³ See Mead Gruver, *A taco chain trademarked 'Taco Tuesday' 30 years ago: Should they still be able to use it?*, (Aug. 13, 2019, 4:48 PM), <https://www.usatoday.com/story/money/2019/08/13/taco-tuesday-taco-johns-trademarking-tiff-wyoming-brewery/2001466001/> [hereinafter Gruver]; see also *E.I. DuPont de Nemours & Co. v. Yoshida Int'l, Inc.*, 393 F. Supp. 502 (E.D.N.Y. 371975); see *American Thermos Prods. Co. v. Aladdin Indus., Inc.*, 207 F. Supp. 9 (D. Conn. 1962).

⁴ See *The LEGO Movie/Transcript*, FANDOM, https://thelegomovie.fandom.com/wiki/The_LEGO_Movie/Transcript (last visited Oct. 14, 2024).

⁵ See Andriy Lytvyn, *LeBron's Shot to Register TACO TUESDAY is Blocked*, SMITH AND HOPEN (May 19, 2020), <https://smithhopen.com/2020/05/19/lebrons-shot-to-register-taco-tuesday-is-blocked/> [hereinafter Andriy]; Also, there currently are trademarks for "Sunday Funday" and "Margarita Mondays." See Craig Hlavaty, *The Term 'Taco Tuesday' is Trademarked by The Taco John's Chain From Wyoming*, CHRON (Apr. 18, 2018), <https://www.chron.com/business/article/The-term-Taco-Tuesday-is-copyrighted->

In light of the prolific use of social media today, recent data and statistics show that “food” has become a predominant category and trend on social networking sites. Moreover, social media is impacting users' lifestyles and brain anatomy and physiology. Studies are revealing that brain scans of heavy social media users are similar to the brain scans of gamblers and drug-addicted individuals. Additionally, businesses are facing difficulties in maximizing the marketing potential of their well-crafted trademarks while fighting to maintain distinctiveness in the slipstream of social media. Thus, businesses must proactively regulate and protect their trademarks, despite the current difficulties existing on social networking sites.

II. BACKGROUND

With this premise, consider the account of how the trademark phrase “Taco Tuesday” began with the creativity of a business owner to a well-known foody phrase today, which demonstrates not only the power of a well-crafted trademark phrase but also the difficulty in navigating the legal and social landscape.

A. Taco Tuesday's Inception Proved to be a Lucrative Marketing Tactic

The trademark phrase “Taco Tuesday” has been around for nearly a century, with an “advertisement for a Tuesday taco special [found] in the classified section of the October 16, 1933, edition of the El Paso Herald-Post.”⁶ Gregory’s Restaurant & Bar, based in New Jersey, began using the phrase on February 6, 1979.⁷ About that time, a “Taco John’s franchisee in Minnesota came up with ‘Taco Twosday’ to promote two tacos for 99 cents on [their] slow day of the week.”⁸ Tuesday seemed to be a similarly uncommon

by-a-Taco-11014084.php. The parent company of Taco John’s is Spicy Seasonings.

⁶ See Gustavo Arellano, *The Crazy Contentious History of Taco Tuesday*, THRILLIST (Sept. 3, 2018), <https://www.thrillist.com/eat/nation/history-of-taco-tuesday-when-did-it-start>; Ananya Bhattacharya, *Taco Bell has squeezed out its last big challenger to the Taco Tuesday trademark*, QUARTZ (Oct. 25, 2023), <https://qz.com/taco-bell-has-squeezed-out-its-last-big-challenger-to-t-1850956701#:~:text=Feb.,Tuesday%20trademark%20for%20restaurant%20services>.

⁷ *Id.*

⁸ Mead Gruver, *Taco Bell says ‘Taco Tuesday’ belongs to everyone as it asks U.S. regulators to force competitor to drop trademark claim*, FORTUNE (May 17, 2023, 3:54 AM), <https://fortune.com/2023/05/17/taco-bell-taco-tuesday-belongs->

day of the week for restaurants, so owners, such as Steve and Ellen Levinson who own Tortilla Flats, acquired a state trademark of the phrase “Taco Tuesday” in 1984,⁹ and turned their “slowest night of the week [to their] biggest night of the week.”¹⁰ Additionally, Canada’s MTY Food Group’s TacoTime, acquired their own “Taco Tuesday” trademark in 1997, while Australia’s Salsa’s Fresh Mex Grill did the same in 2011.¹¹

In 1981, Gregory’s Restaurant & Bar (“Gregory’s”) applied for federal registration of the phrase “Taco Tuesday” for their food services.¹² However, nearly ten years later, Gregory’s missed the deadline to submit evidence of their continued use of the trademark, as required under trademark law, resulting in the United States Patent Trademark Office (USPTO) canceling their registered trademark phrase.¹³ Taking the opportunity, Taco John’s federally trademarked the phrase “Taco Tuesday” in 1989.¹⁴ Despite efforts to register the mark again, Gregory’s was unable to reclaim the trademark.¹⁵ The remaining option was to petition for cancellation of Taco John’s phrase, which Gregory’s subsequently did.¹⁶

The proceeding that resulted from the petition lasted for over three years.¹⁷ Although Gregory’s alleged that its use significantly predated Taco John’s federal trademark application, Taco John’s acquired the nationwide rights.¹⁸ Notwithstanding this, Gregory’s retained the legal right of ‘trademarks by geographic region,’ which allows the use of a trademark by businesses in a

everyone-asks-us-regulators-force-competitor-johns-drop-trademark-claim/
Hlavaty, *supra* note 5. The parent company of Taco John’s is Spicy Seasonings.

⁹ See Bhattacharya, *supra* note 6.

¹⁰ E. Scott Reckard, ‘Taco Tuesday’ Trademark Issue, LA TIMES (July 23, 1997), <https://www.latimes.com/archives/la-xpm-1997-jul-23-fi-15401-story.html>.

¹¹ See Bhattacharya, *supra* note 6.

¹² See Reckard, *supra* note 10.

¹³ See Andrey Lytvyn, *Who owns Taco Tuesday? PART I*, SMITH & HOPEN (May 13, 2020), <https://smithhopen.com/2020/05/13/who-owns-taco-tuesday-part-i/> [hereinafter Lytvyn].

¹⁴ See Mister Retrops, *Taco Tuesday is now for everyone after Taco Bell triumphs in lawsuit against Taco John’s over trademark phrase*, NOT THE BEE (Aug. 16, 2023), <https://notthebee.com/article/taco-tuesday-is-now-for-everyone-after-taco-bell-wins-lawsuit-with-taco-johns-over-trademark>; *Celebrate Taco Tuesday Every Tuesday with Taco John’s*, TACO JOHN’S, <https://tacojohns.com/taco-tuesday/> (last visited Oct. 14, 2024).

¹⁵ See Lytvyn, *supra* note 13.

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.*

certain geographic area; here, the area was New Jersey.¹⁹ Despite this, Gregory's again failed to complete its renewal and submit the necessary information to the USPTO in 2006.²⁰ This mistake resulted in the canceled registration of their New Jersey trademark phrase "Taco Tuesday" and cost thousands of dollars, with the process of resecuring the trademark taking over two years.²¹ Taco John's acquired the trademark nationally in every state but New Jersey.

The foody phrase gained popularity in non-restaurant settings as well. Around thirty years later, LeBron James formed LBJ Trademarks, LLC to acquire and trademark the phrase "Taco Tuesday" for use in his online entertainment services, advertisements on social media, and other audiovisual content.²² The USPTO rejected James' trademark application on grounds of likelihood of confusion, meaning a consumer mistakenly confuses two trademarks as coming from the same source.²³ Interestingly, the application was also rejected on grounds that the trademark phrase was a "commonplace message."²⁴

B. Despite Exercising Trademark Ownership Rights Over The Popular Phrase "Taco Tuesday," Efforts Were Insufficient In The Digital Age Leading To The Trademark's Demise

Many companies have attempted to use Taco John's trademark phrase "Taco Tuesday".²⁵ Taco John's attempted to exercise its ownership rights under the trademark hundreds of times, by sending cease-and-desist letters to Old Fashioned Tavern and Restaurant in Wisconsin,²⁶ Iguana Mexican Grill in Oklahoma

¹⁹ See *id.*

²⁰ See *id.*

²¹ See Lytvyn, *supra* note 13.

²² See Andriy, *supra* note 5; see also Ayana Archie, *Taco John's has given up its 'Taco Tuesday' trademark after a battle with Taco Bell*, NPR, (July 19, 2023, 5:09PM), <https://www.npr.org/taco-tuesday-trademark-taco-johns-taco-bell>.

²³ See Andriy, *supra* note 5.

²⁴ *Id.* Examples of uses of "Taco Tuesday" were given as evidence in support of his rejection. James abandoned this trademark enterprise. *Id.*

²⁵ See Alex Mayyasi, *The Trademarking of "Taco Tuesday,"* PRICEONOMICS (Sept. 23, 2016), <https://priceonomics.com/the-trademarking-of-taco-tuesday/>.

²⁶ See *id.*

City,²⁷ and Freedom’s Edge Brewing Company for La Barata taco truck.²⁸

In an attempt to make its trademark known and protected, Taco John’s utilized radio advertisements for decades.²⁹ However, with the digital age in media progressing, unauthorized trademark use became prolific, which seemed nearly inevitable considering that over three million hits came up on a search for the phrase in 2016 and how “Taco Tuesday” commonly appears on many other platforms such as Facebook, Instagram, and X.³⁰ The foody phrase even made an appearance in the 2014 film, “The Lego Movie.”³¹ The full trademark phrase “Taco Tuesday” is mentioned at least nine times throughout The LEGO Movie and is a key component in the film’s plot.³²

The controversy surrounding the trademark phrase “Taco Tuesday” came to a head in 2023.³³ On May 6, 2023, Taco Bell filed a Petition for Cancellation with the USPTO regarding Taco John’s and Gregory’s trademark phrase “Taco Tuesday,” arguing genericide, among other things.³⁴ Initially, Taco John’s filed an Answer to Petition for Cancellation in an attempt to defend and save their trademark. However, just two months later, Taco John’s filed a notice of abandonment of registration, effectively abandoning its mark “Taco Tuesday.” Taco Bell’s petition was granted just one month following Taco John’s abandonment. Gregory’s followed

²⁷ See Rusty Surette, *Trademark Forces Iguana Mexican Grill to Change 'Taco Tuesday'*, NEWS 9 (Aug. 3, 2010, 2:50PM), <https://www.news9.com/story/5e35b43483eff40362beec6a/trademark-forces-iguana-mexican-grill-to-change-taco-tuesday>.

²⁸ See Gruver, *supra* note 3.

²⁹ See TEDX Talks, *Taco Tuesday®: How we claimed the best day of the week*, Billie Jo Waara, TEDxCheyenne, YOUTUBE (June 29, 2016), https://www.youtube.com/watch?v=ICDUAXLxIXg&ab_channel=TEDxTalks.

³⁰ See *id.*

³¹ See Gruver, *supra* note 3.

³² See *The LEGO Movie/Transcript*, *supra* note 4. “Taco Tuesday” is the disguised name for the ‘end of the world,’ where all of the film’s character would be put into a frozen and immobilized state; see also *supra* text accompanying note 4.

³³ See Bhattacharya, *supra* note 6.

³⁴ See *Taco Bell IP Holder, LLC v. Gregory Hotel, Inc.*, No. YUMB2162 (May 16, 2023) (Electronic System for Trademark Trials and Appeals), <https://ttabvue.uspto.gov/ttabvue/v?pno=92082327&pty=CAN&eno=1>; *Taco Bell IP Holder, LLC v. Spicy Seasonings, LLC*, No. YUMB2161 (May 16, 2023) (Electronic System for Trademark Trials and Appeals), <https://ttabvue.uspto.gov/ttabvue/v?pno=92082333&pty=CAN&eno=1>.

suit a few months following Taco John's and relinquished its trademark in New Jersey.³⁵

Notably, the CEO of Taco John's, Jim Creel stated, "We've always prided ourselves on being the home of Taco Tuesday, but paying millions of dollars to lawyers to defend our mark just doesn't feel like the right thing to do."³⁶

C. Despite Exercising Trademark Ownership Rights Over The Popular Phrase "Taco Tuesday," Efforts Were Insufficient In The Digital Age Leading To The Trademark's Demise

This taco controversy reveals the varying attitudes and perceptions of both the consumer and those in the business world regarding trademarks. Some people have equated 'owning' the trademark "Taco Tuesday" as owning "'happy hour' or 'Sunday brunch.'"³⁷ Before relinquishing the trademark, Billie Jo Waara, the marketing executive of Taco Johns, even stated, "[w]e recognize that the unauthorized use [of Taco Tuesday] is prolific, and we do our best to communicate ownership."³⁸ Conversely, Michael Atkins, an attorney in Seattle stated, "It's kind of asinine to me to think that one particular taco seller, or taco maker, would have monopoly rights over 'Taco Tuesday.'"³⁹ Going back decades to an interview in 1997, an employee of La Siesta Mexican Food stated, "Give me a break[;] everybody has Taco Tuesdays."⁴⁰

Interestingly, some unauthorized users say they understand wanting to protect a trademark and don't hold it against businesses protecting their trademark,⁴¹ yet some news outlets describe protecting one's mark as 'trademark bullying' with others calling for boycotts.⁴² Iguana Grill was described as a "mom-and-pop

³⁵ See Bhattacharya, *supra* note 6.

³⁶ Mayyasi, *supra* note 25.

³⁷ Jordan Valinsky, *The Strange History of Taco Tuesday*, CNN (July 4, 2023), <https://www.cnn.com/2023/07/04/business/taco-tuesday-history/index.html>.

³⁸ *Id.*

³⁹ Gruver, *supra* note 3.

⁴⁰ Reckard, *supra* note 10.

⁴¹ See Gruver, *supra* note 3.

⁴² See Timothy Geigner, *Taco John's Continues To Wage A Long-Lost Trademark War To Keep 'Taco Tuesday' From Becoming Generic*, TECHDIRT (Oct. 3, 2016, 11:07 PM), <https://www.techdirt.com/2016/10/03/taco-johns-continues-to-wage-long-lost-trademark-war-to-keep-taco-tuesday-becoming-generic/> (defending "Taco Tuesday" was described as "silly"); see Ross Yoder, *"It's A Risk We're Willing To Take": David Chang Finally Addressed Momofuku's Cease-And-Desist*

establishment . . . [that] relented rather than pay lawyers, so this isn't a novel concept for the corporate chain."⁴³ In exercising its ownership rights, Taco John's was described as "prolific" and "silly."⁴⁴ Taylor Montgomery, Taco Bell's Chief Marketing Officer in the U.S., stated, "Taco Tuesday belongs to all who make, sell, eat and celebrate tacos, and this Free-For-All will not only thank taco fans who supported the cause but will also spotlight local restaurants and vendors who can now embrace Taco Tuesdays without fear of legal action."⁴⁵ This "Taco Tuesday" trademark controversy demonstrated the power of a well-crafted trademark phrase and how media and consumer perceptions make navigating the legal and social landscape more difficult. To fully understand this impact, consider the foundational aspects of trademark distinctiveness and the legal framework involved.

III. FUNDAMENTAL ASPECTS OF TRADEMARK LAW: PART I

There is more to trademarks than what the average person may think. The description of a "trademark" is laid out in 15 United States Code § 1127, which states the following:

The term "trademark" includes any word, name, symbol, or device, or any combination thereof—

PR Crisis That Had People Calling For A Boycott, BUZZFEED (Apr. 16, 2024), <https://www.buzzfeed.com/rossyoder/david-chang-chili-crunch-trademark-apology?origin=web-hf>; see Megan Schaltegger, *David Chang Apologizes For Being A 'Trademark Bully' To Other Chili Crunch Brands*, AOL (Apr. 16, 2024), <https://www.aol.com/david-chang-called-trademark-bully-183900812.html>; see e.g., Stephanie Sy and Karina Cuevas, *Celebrity chef's 'chili crunch' trademark sparks debate over food and culture*, PBS (Apr. 11, 2024), <https://www.pbs.org/newshour/show/celebrity-chefs-chili-crunch-trademark-sparks-debate-over-food-and-culture>.

⁴³ Joe Patrice, *'Taco Tuesday' Trademark Terminated Thanks To Taco Bell*, ABOVE THE LAW (July 19, 2023, 1:13 PM), <https://abovethelaw.com/2023/07/taco-tuesday-trademark-terminated-thanks-to-taco-bell/#:~:text=In%202010%2C%20it%20threatened%20to,concept%20for%20the%20corporate%20chain.>

⁴⁴ See Geigner, *supra* note 42.

⁴⁵ Rayan Jeltema, *Taco Bell offers first free Taco Tuesday after trademark battle*, ABC12 (Aug. 15, 2023), https://www.abc12.com/news/business/taco-bell-offers-first-free-taco-tuesday-after-trademark-battle/article_957ff324-3b7f-11ee-87a3-738c1474311d.html. Montgomery's statements may be taken with a grain of salt, as stating as much is for his own best interest and that of the company he works for – Taco Bell, who sued to cancel Taco John's mark. *Id.*

- (1) used by a person, or
- (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.⁴⁶

The United States Patent and Trademark Office (“USPTO”) similarly says that a trademark functionally “identifies the source of your goods or services,” “provides legal protection for your brand,” and “helps you guard against counterfeiting and fraud.”⁴⁷ However, not just any “word, name, symbol, or device”⁴⁸ may receive trademark protection.⁴⁹ To receive protection, a mark must “identify and distinguish . . . goods, including . . . from those manufactured or sold by others and to indicate the source of the goods,” i.e., source-identifying or distinctive.⁵⁰ There are several different categories or so-called classes for the degree of protection that a mark may receive: fanciful or arbitrary, suggestive, descriptive, and generic.⁵¹

Fanciful or arbitrary marks are comprised of “words invented solely for their use as trademarks.”⁵² Such marks seem ‘arbitrary’ or “unrelated to the goods they adorn,” and thus receive automatic trademark protection as such marks are inherently distinctive.⁵³ Similar to fanciful marks, suggestive marks receive automatic trademark protection as they are inherently distinctive, “requir[ing] imagination, thought, and perception to reach a conclusion as to the nature of the goods.”⁵⁴

⁴⁶ 15 U.S.C. § 1127.

⁴⁷ USPTO, *What is a Trademark?*, <https://www.uspto.gov/trademarks/basics/what-trademark> (last visited Oct. 13, 2024).

⁴⁸ 15 U.S.C. § 1127.

⁴⁹ Laverne Berry, Esq., *The Abercrombie Formulation: Generic, Descriptive, Suggestive, Arbitrary and Fanciful Marks*, (May 2, 2011), <https://berrylaw.com/the-abc-formulation-generic-descriptive-suggestive-arbitrary-and-fanciful-marks/>.

⁵⁰ 15 U.S.C. § 1127; Berry, *supra* note 49.

⁵¹ *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9, 1976 U.S. App. LEXIS 13312, *8.

⁵² *Id.* at 11.

⁵³ Berry, *supra* note 49.

⁵⁴ *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1249, 2012 U.S. App. LEXIS 17009, *1; *see also* Berry, *supra* note 49 (stating that “a

Unlike fanciful or suggestive marks, descriptive marks “forthwith convey an immediate idea of the ingredients, qualities or characteristics of the goods,” and are not inherently distinctive.⁵⁵ A mark that is generic is “one that refers, or has come to be understood as referring to the genus of which the particular product is a species;” and, under common law, “neither those terms which were generic nor those which were merely descriptive could become valid trademarks.”⁵⁶ Black’s Law Dictionary defines genericide as:

The loss or cancellation of a trademark that no longer distinguishes the owner’s product from others’ products. Genericide occurs when a trademark becomes such a household name that the consuming public begins to think of the mark not as a brand name but as a synonym for the product itself. Examples of trademarks that have been “killed” by genericide include *aspirin* and *escalator*.⁵⁷

A descriptive mark may be protected if the mark acquires secondary meaning. The United States Supreme Court has stated that secondary meaning may be acquired, when “in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.”⁵⁸ “Creamy” for yogurt is an example of this.⁵⁹ Generic marks can never acquire secondary meaning like descriptive marks, which means such marks can never receive trademark protection.⁶⁰

Ultimately, trademarks provide a vehicle that can create an association between a business’s goods or services and the trademark owner which helps a business become more

suggestive mark will tend to connote a characteristic of a product, and thereby enable a consumer to infer something about the product from the mark”).

⁵⁵ *Stix Prods. v. United Merchs. & Mfrs.*, 295 F. Supp. 479, 488, 1968 U.S. Dist. LEXIS 12333, *24; Berry, *supra* note 49.

⁵⁶ *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9, 1976 U.S. App. LEXIS 13312, *9; *see also Delaware & Hudson Canal Co. v. Clark*, 80 U.S. (13 Wall.) 311, 323, 20 L. Ed. 581 (1872) (“Nor can a generic name, or a name merely descriptive of an article or its qualities, ingredients, or characteristics, be employed as a trademark and the exclusive use of it be entitled to legal protection.”); *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U.S. 446, 55 L. Ed. 536, 31 S. Ct. 456 (1911).

⁵⁷ BLACKS LAW DICTIONARY (8th ed. 2004).

⁵⁸ *Inwood Labs. v. Ives Labs.*, 456 U.S. 844, 851, 102 S. Ct. 2182, 2187.

⁵⁹ USPTO, *Strong Trademarks*, <https://www.uspto.gov/trademarks/basics/strong-trademarks> (last visited Oct. 13, 2024).

⁶⁰ Berry, *supra* note 49.

distinguishable from others.⁶¹ As “trademarks gain value from actual use,” it is necessary for trademark owners to assert ownership and police their trademarks to avoid improper utilization, tarnishment,⁶² or infringement.⁶³ It is important to police them or the trademark is at risk of no longer being able to accomplish its function, such as with genericide.⁶⁴ Alienation of the customers is an existing danger.⁶⁵

IV. SOCIAL MEDIA: SHAPING PERCEPTIONS IN THE DIGITAL AGE

To optimally utilize the power of trademarks and mitigate against losing trademark distinctiveness, businesses must grasp the profound impact social media is having on human physiology and how “food” is dominating content across various platforms. Understanding this impact enables trademark owners to leverage the reach that social networking sites offer and to proactively regulate and protect their trademarks.

A. Social Media Use Is Pervasive

Louie Andre summarily stated, “Social media has become so ingrained in people’s lives that it’s hard to imagine a world without it.”⁶⁶ It’s reported that “more than half (50.64%) of the global population now uses social media, and 83.36% of the four and a half billion internet users are active users.”⁶⁷ The estimated number of worldwide social media users is projected to “increase to

⁶¹ Tom Kulik, *Policing Trademarks In A Social Media World*, ABOVE THE LAW (Oct. 16, 2017), <https://abovethelaw.com/2017/10/policing-trademarks-in-a-social-media-world/>.

⁶² *See id.*

⁶³ *See* John Patzakis, *Social Media Evidence Proves Essential in Recent High-Stakes Trademark Infringement Matters*, (Apr. 18, 2023), <https://www.x1.com/social-media-evidence-proves-essential-in-recent-high-stakes-trademark-infringement-matters/> (“Recent court decisions reflect how social media evidence can play an important role in establishing actual confusion in a trademark infringement lawsuit,” when properly authenticated social media evidence.); *see generally* S10 Ent. & Media LLC v. Samsung Elecs. Co., No. 221CV02443CASJPRX, 2023 WL 2090703 (C.D. Cal. Feb. 14, 2023); *see also* Great W. Air, LLC v. Cirrus Design Corp., 649 F. Supp. 3d 965 (D. Nev. 2023).

⁶⁴ Kulik, *supra* note 61.

⁶⁵ *Id.*

⁶⁶ Louie Andre, *68 Social Media Usage Statistics for 2023: Time Spent & Impact on Health*, FINANCESONLINE, <https://financesonline.com/social-media-usage-statistics/> (last visited Oct. 16, 2024) (hereinafter Louie).

⁶⁷ *Id.*

almost six billion in 2027.”⁶⁸ Another study found that 92.3 percent of parents and 82.3 percent of their kids increased technology use to connect with others in 2020 during the pandemic.⁶⁹

A U.K. study revealed that from 2010 to 2019, there was an increase in individuals who had created at least one social media account, with males increasing from 51% to 78% and females from 56% to 86%.⁷⁰ According to 2023 statistics, the U.S. has seen a similar increase in social media usage, with Americans spending an average of 2.08 hours per day on social media.⁷¹ In 2020, “time spent on TikTok by US users grew 375% year-over-year in 2020[,] and among children under 15, daily usage increased to 82 minutes from 38 minutes between May 2019 and February 2020.”⁷²

The average time spent on social media by internet users in 2020 was around two hours and forty-one minutes, which, in more tangible terms, equates to nearly forty-one days of non-stop use in a year.⁷³ Likewise, if someone slept for seven hours per day and utilized the remaining seventeen hours of the day entirely for social media use, it would take nearly fifty-eight days to equal the amount of time he or she spent on social media in one year.⁷⁴ However, to make this value more relatable, consider the Harry Potter series,⁷⁵ which takes approximately sixty hours and thirteen minutes to read.⁷⁶ With the average amount of social media consumed by a

⁶⁸ Stacy Jo Dixon, *Number of social media users worldwide from 2017 to 2027*, <https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/> (last visited Oct. 13, 2024). “In 2022, over 4.59 billion people were using social media worldwide, a number projected to increase to almost six billion in 2027.” *Id.*

⁶⁹ See Michelle Drouin et al., *How Parents and Their Children Used Social Media and Technology at the Beginning of the COVID-19 Pandemic and Associations with Anxiety*, 23 *CYBERPSYCHOLOGY, BEHAVIOR, AND SOCIAL NETWORKING* 11, (2020).

⁷⁰ Cathrine Hile, *How Much of Your Time Is Screen Time?*, USWITCH, <https://www.uswitch.com/mobiles/screen-time-report/> (last visited Oct. 13, 2024).

⁷¹ See Louie, *supra* note 66.

⁷² *Id.*

⁷³ See *id.*

⁷⁴ See generally *id.*

⁷⁵ See Counter: Every Word Counts, *How Many Words Are There in the Harry Potter Book Series?*, (Nov. 23, 2015), [https://wordcounter.net/blog/2015/11/23/10922_how-many-words-harry-potter.html#:~:text=Only%20one%20book%20\(Order%20of,Potter%20books%20contain%201%2C084%2C170%20words.](https://wordcounter.net/blog/2015/11/23/10922_how-many-words-harry-potter.html#:~:text=Only%20one%20book%20(Order%20of,Potter%20books%20contain%201%2C084%2C170%20words.)

⁷⁶ See Dianna Dilworth, *How Long Does It Take to Read Popular Books?: INFOGRAPHIC*, (Sept. 11, 2014), <https://www.adweek.com/galleycat/how-long-does-it-take-to-read-popular-books->

single individual in 2020, someone could read the series over sixteen times. Similarly, it takes approximately three days to travel to the moon, which means six days to go there and back.⁷⁷ Someone could make seven trips to the moon and back in the same amount of time the average person spends on social media in one year.⁷⁸

This matters, as businesses are looking for ways to expand customer reach and create brand awareness. Social media sites are providing just that – a place where prospective customers ‘congregate’ and are easily accessible. Businesses are exposing their brands on a more immediate, consistent, and pervasive basis owing to the considerable amount of time people devote to social media. Businesses are leveraging this pervasive presence to shape potential customers' perceptions through the strategic use of trademarks on these platforms, which will be discussed more fully later.

B. Social Media Use Is Impacting Brain Anatomy And Physiology

With further developments in technology and the data available from the increased use of social media, the biological effects of social networking sites are more observable and evident given the increased number of users. The human brain’s ability to change is referred to as neuroplasticity.⁷⁹ This is relevant, as recent research has found that heavy social media use leads to “poorer cognitive performance ... [and] shrinks parts of the brain associated with maintaining attention.”⁸⁰ Another study explained that “social

infographic/91254#:~:text=Personal%20Creations%20has%20created%20an,Harry%20Potter%20series%20of%20books.

⁷⁷ See Toby Saunders, *How long does it take to get to the Moon?*, Science Focus (June 13, 2023), <https://www.sciencefocus.com/space/how-long-does-it-take-to-get-to-the-moon>.

⁷⁸ See generally *id.*

⁷⁹ See Majid Fotuhi, *What Social Media Does to Your Brain*, NEUROGROW (Sept. 21, 2020), <https://neurogrow.com/what-social-media-does-to-your-brain/>.

⁸⁰ *Id.*; Diana I. Tamir et al., *Media Usage Diminishes Memory for Experiences*, 76 J. OF EXPERIMENTAL SOC. PSYCH. 161 (2018) (noting that “[a]cross three studies, participants without media consistently remembered their experience more precisely than participants who used media”); see Joseph Firth et al., *The “online brain”: how the Internet may be changing our cognition*, 18 WORLD PSYCHIATRY: OFF. J. OF THE WORLD PSYCHIATRIC ASS’N 119 (2019) (noting that “heavy social media use is linked with memory deficits, especially in your transactive memory” and that “the first longitudinal studies on this topic have found that adverse attentional effects of digital multi-tasking are particularly pronounced in early adolescence (even compared to older teens), and that higher frequency of Internet

network site [. . .] addiction is associated with a presumably more efficient impulsive brain system, manifested through reduced grey matter volumes in the amygdala bilaterally.”⁸¹

Unlike newspapers, which have a start and a distinct ending point, for example, social media platforms, by encouraging and providing endless scrolling, are addictive by design.⁸² “Social media makes you addicted to your screens . . . [by providing] immediate rewards in the form of a dopamine release (the happy hormone) every time you post or get a notification from the app.”⁸³ These “constant barrage[s] of shallow rewards rewire[. . .] your brain to want more of what caused that dopamine release, which leads to social media addiction.”⁸⁴ This research further revealed that “the brain scans of heavy social media users look very similar to those addicted to drugs or gambling.”⁸⁵ The brain's neuroplasticity has demonstrated how social media physically impacts its users. This background of social media use and its influence on individuals' lives and the physiology of their brains provides the context and framework necessary to understand how the food culture dominating social media is transforming

use over 3 years in children is linked with decreased verbal intelligence at follow-up, along with impeded maturation of both grey and white matter regions”) Further, the frequency of internet use was found to be associated with a decrease in verbal intelligence. See Hikaru Takeuchi et al., *Impact of frequency of internet use on development of brain structures and verbal intelligence: Longitudinal analyses*, 39 HUM. BRAIN MAPPING 4471 (2018) (the changes in regional gray and white matter volume are related to language processing, attention and executive functions, emotion, and reward).

⁸¹ Qinghua He et al., *Brain anatomy alterations associated with Social Networking Site (SNS) addiction*, 7:45064 SCI. REP. (2017) (hereinafter Qinghua) (the study goes on to state: “We also show that in contrast to other addictions in which the anterior-/mid-cingulate cortex is impaired and fails to support the needed inhibition, which manifests through reduced grey matter volumes, this region is presumed to be healthy in our sample and its grey matter volume is positively correlated with one's level of SNS addiction. These findings portray an anatomical morphology model of SNS addiction and point to brain morphology similarities and differences between technology addictions and substance and gambling addictions”).

⁸² Dana Rose Garfin, *Technology as a coping tool during the coronavirus disease 2019 (COVID-19) pandemic: Implications and recommendations*, 36 STRESS AND HEALTH: J. OF THE INT'L SOC'Y FOR THE INVESTIGATION OF STRESS 555 (2020).

⁸³ See Majid, *supra* note 79.

⁸⁴ *Id.*

⁸⁵ See *id.*; see also Qinghua, *supra* note 81 (stating that social network site addiction “is similar in terms of brain anatomy alterations to other (substance, gambling etc.) addictions”).

individuals' preferences, specifically regarding food-related businesses and products.

C. Social Media Users Are Being Inundated with Food-related Content

In recent years, there has been a surge of food-related content on social media.⁸⁶ These new platforms have opened the way for regular citizens and not just experts, chefs, and celebrities to give their say about food.⁸⁷ “Food” has become one of the “most popular types of social media accounts” rising to fifty-one percent as of 2021.⁸⁸ Statista reported that “four out of five adults from Generation Z enjoyed watching or interacting with food content on social media in 2021.”⁸⁹

Since 2015, food blogs have increased by twelve percent, with around thirty-two million food bloggers creating content in the U.S.⁹⁰ “Around 42% of food bloggers depend on social media ads for their income,” with others relying on sponsored posts and affiliates for income.⁹¹ Nearly a third of food bloggers merely blog to participate with others.⁹² Considering X (formerly Twitter), food traveling-related blogs make up 4.64%, with 34.92% centered on healthy food lifestyles and 18.94% focused on fast food.⁹³

On Instagram, “39% of . . . users explore food content, with 27% of them sharing food-related videos and photos.”⁹⁴ Per month, “#food” is used over two hundred and fifty million times on Instagram.⁹⁵ Forty percent of participants in a study of two

⁸⁶ See Profiletree, *100 Ways Social Media Has Shaped the Food Industry With Interesting Statistics*, (Sept. 13, 2023), <https://profiletree.com/ways-social-media-shaped-food-industry-statistics/#:~:text=39%25%20of%20Instagram%20users%20explore,times%20on%20a%20monthly%20basis.>

⁸⁷ See *id.*

⁸⁸ Daniel Gillespie, *More than half of people have tried a recipe they saw on social media*, (Oct. 4, 2021), <https://swnsdigital.com/us/2021/08/more-than-half-of-people-have-tried-a-recipe-they-saw-on-social-media/>.

⁸⁹ Koen Van Gelder, *Social media food behavior of Generation Z 2021*, (Feb. 10, 2023), <https://www.statista.com/statistics/1312232/social-media-food-behavior/>.

⁹⁰ See Profiletree, *supra* note 86.

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *id.*

⁹⁴ *Id.*

⁹⁵ See *id.*; see also SocialMediaToday, *The Psychology of Foodstagramming*, (Nov. 9, 2016), <https://www.socialmediatoday.com/social-networks/psychology-foodstagramming.>

thousand people admitted to posting images of drinks or food that they didn't even consume themselves, with "19% confessing that they'd never intended to eat it in the first place."⁹⁶ In another study, over a third of participants stated that they ordered the food merely to post on social media and did not eat what they ordered.⁹⁷ Users were also avid to try recipes, with over fifty percent of respondents being "inspired to try a recipe after seeing it on their feed or timeline."⁹⁸ As people are drawn to social media and more food-based content, businesses are having to adjust.

D. Social Media Is Influencing How People Are Choosing And Selecting Restaurants And Other Food-related Business

Social media has altered the way customers interact, having a transformative effect on food-related businesses and restaurants.⁹⁹ With such a surge, it's not surprising that eighty-eight percent of social media users "rely on online reviews in choosing [restaurants] rather than personal recommendations."¹⁰⁰ In the last decade, "ordering through social media has grown by almost 300%," with seventy-five percent of "Facebook users [choosing] restaurants based on reviews and comments from other consumers."¹⁰¹ With the increasing use of TikTok, around fifty-five percent of its users visit restaurants after searching and viewing them on the platform.¹⁰² While ninety percent of "restaurant visitors look up the restaurant on social media," before going to eat "92% of food consumers" are restoring to online reviews.¹⁰³

In 2018, "Influencer marketing was a 4.6 billion dollar industry," with that figure increasing.¹⁰⁴ It was estimated that in

⁹⁶ Gillespie, *supra* note 88.

⁹⁷ *See id.*; see also Chris Melore, *Instagram insanity: Third of social media users order food just to take pictures — but don't eat it!*, (Aug. 2, 2021), <https://studyfinds.org/social-media-influencer-food-pictures/>.

⁹⁸ Gillespie, *supra* note 88; see also Viktoriya Trifonova, *Trends #Foodporn: how to say bon appetit on social media*, (Jan. 18, 2022), <https://blog.gwi.com/trends/food-trends-on-social-media/>.

⁹⁹ *See* Profiletree, *supra* note 86.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See id.*

¹⁰³ *Id.*

¹⁰⁴ Yara Qutteina et al., *What Do Adolescents See on Social Media? A Diary Study of Food Marketing Images on Social Media* (Oct. 11, 2024),

<https://www.frontiersin.org/articles/10.3389/fpsyg.2019.02637/full>. An Influencer is "an individual or a group of individuals who built their own audience through social media platforms' ... [including] anyone who influences the attitudes and

2019, adolescents, including twelve to eighteen-year-olds, “see over 9000 food marketing posts on social media every year.”¹⁰⁵

Interestingly, “82% of American restaurants” utilize social media “as their leading marketing and advertising platform,” which is unsurprising considering that twenty-two percent of customers visit “a food store based on its presence on social media.”¹⁰⁶ Not only is social media influencing particular food stores or businesses to frequent, but the dietary choices as well.¹⁰⁷ In a survey of two thousand participants, “Twenty-seven percent of respondents also said their desire to post better-looking food photos online has led to a change in their diet over the years.”¹⁰⁸ Simply put: businesses do “not have the luxury of ignoring social media.”¹⁰⁹

*E. Social Media Allowed For Greater Brand Awareness,
But Created New Trademark Management Challenges
for Businesses And Owners*

Social media has created a new landscape that gives businesses greater capability and customer reach allowing for brand interaction.¹¹⁰ The drawback is that social networking sites are a

behaviors of other individuals through social media . . . [which] have an influence on food preferences and behaviors.” *Id.* In the United States, the Federal Trade Commission requires and provides disclosure guidelines for influencer marketing for promoting on social media. *Id.*; see also Adam J. Kucharczuk, *The Perceived Influence of Food and Beverage Posts on Social Media during the COVID-19 Pandemic: An Exploratory Study with U.S. Adolescents and Their Parents*, (July 11, 2022), <https://www.mdpi.com/2673-7051/2/3/31>.

¹⁰⁵ Qutteina, *supra* note 104.

¹⁰⁶ Profiletree, *supra* note 86.

¹⁰⁷ See *id.* Both positive and negative effects are observable: “69% of teenage girls with eating disorders admitted that polished images of models and celebrities contributed to their food habits;” “41% adopted plant-based diets due to social media pressure;” and “54% of online users resorted to locally sourced food to follow a sustainable diet.” *Id.*

¹⁰⁸ Gillespie, *supra* note 88; see also Yilang Peng, *Dominating over junk food on social media*, (Apr. 10, 2023), <https://www.fcs.uga.edu/news/story/dominating-over-junk-food-on-social-media>.

¹⁰⁹ *Social Media And Trademark Law In The 21st Century: Presenting Opportunities And Problems*, *Veritas Business Law*, (Oct. 11, 2024), <https://veritasbusinesslaw.com/social-media-and-trademark-law-in-the-21st-century-presenting-opportunities-and-problems/#> (hereinafter *Veritas*).

¹¹⁰ Kulik, *supra* note 61; *Veritas*, *supra* note 109; Patzakis, *supra* note 63; Erica Klein & Anna Robinson, *Combating Online Infringement: Real-World Solutions for an Evolving Digital World*, *LANDSLIDE* (Apr. 1, 2020) https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2019-20/march-april/combating-online-infringement-real-world-solutions-evolving-digital-world/.

source of trademark infringement¹¹¹ where fraudulent sellers “pass off” their counterfeit goods using this same channel as the real goods.¹¹²

Considering how food-related businesses and restaurants utilize their trademarks on these dynamic platforms where customer perceptions and behaviors are shifting, it has been becoming increasingly difficult for smaller establishments to keep up.¹¹³ In a written testimony for a hearing on “Online Platforms and Market

¹¹¹ Ignor Demcak, *Social media regulations for brand infringement monitoring*, (Jan. 2023) <https://www.tramatm.com/blog/category/media/social-media-regulations-for-brand-infringement-monitoring>. Social media has provided several advantages in helping business to: “attract customers, get customer feedback and build customer loyalty,” “increase market reach, including international markets,” “do market research and reduce marketing costs,” “increase revenue by building customer networks and advertising,” “exchange ideas to improve business model,” “increase traffic to website and improve its search engine ranking,” and “keep an eye on competitors.” *See id.*

¹¹² Kulik, *supra* note 61; Klein, *supra* note 110.

¹¹³ *See* American Economic Liberties Project, *The Truth About Google, Facebook, and Small Businesses*, (May 3, 2021), <https://www.economicliberties.us/our-work/the-truth-about-google-facebook-and-small-businesses/> (hereinafter AELP); *see e.g.*, Sahil Dhanwani, *Rise of Social Media: Potential Risks of Trademark Infringement*, IIPR (Jan. 6, 2023) <https://www.iiprd.com/rise-of-social-media-potential-risks-of-trademark-infringement/> (“The evolution and development of trademark law protect the right of manufacturers or sellers but the advancement of technology and the emergence of social media has bound lawmakers and interpreters to make a continuous intervention and take a comprehensive vigil over the various new issues related to trademark infringement. The upsurge of social media apps and their intervention in our lives have completely changed the marketing game for every business organization. Today, social networking and social media are becoming significant and considerable factors to make business strategies, particularly for marketing for all enterprises. . . the risk of trademark infringement has increased to a large extent . . . Undoubtedly, social media has transformed our lives. Since the way of our life has changed, business organizations are bound to change their strategies accordingly. New ways of promotion and selling have brought new challenges and potential risks to the Intellectual property rights and therefore, persistent efforts to safeguard the laws in new market culture is need of the hour”); *see generally* Rana Chowdhury, *Branding in Social Media and the Impact of Social Media on Brand Image*, NORD UNIV. (Feb. 12, 2019), https://www.academia.edu/86556942/Branding_in_Social_Media_and_the_Impact_of_Social_Media_on_Brand_Image?email_work_card=view-paper; Robert Moore, *From Genericide to Viral Marketing: On “Band”*, 23 *Univ. Chi.* 331-357 (2003); Charmian Lim, *The Fame Monster: The Influence of Social Media on Trademark Genericide*, TILBURG UNIV. (2013) <https://arno.uvt.nl/show.cgi?fid=132816>; Laura Rienda-Garcia, et al, *Analysing Trademark And Social Media In The Fashion Industry: Tools That Impact Performance And Internationalization For SMEs*, Global Fashion Management Conference (2019) http://gfmconference.net/html/sub3_01.html?code=372405.

Power,” the small business co-owner and co-founder of 37signals, David Heinemeier Hansson, stated, “For years, we’ve been dealing with the problem that Google allows competitors to purchase ads on our trademark, blocking and misdirecting consumers from reaching our site.”¹¹⁴ This requires owners like Hansson to expend additional funds to run their advertisements using the trademark for customers “who were already searching for that specific business.”¹¹⁵ Due to large network sizes, such as Google, “policing false and fraudulent listings that harm those businesses” is increasingly difficult.¹¹⁶ Not only has ordinary use but also the licensing of trademarks become more difficult to keep up with on social media.¹¹⁷

V. FUNDAMENTAL ASPECTS OF TRADEMARK LAW: PART II

The Lanham Act states that genetic terms not only can’t be registered but such marks can be canceled, as with the case of “Taco Tuesday.”¹¹⁸ “Taco Tuesday” is an example of a suggestive trademark that was canceled and became generic, meaning it was no longer distinctive.¹¹⁹

Trademark distinctiveness can be illustrated in two parts: (a) “relevant class of goods [and/or] services,” and (b) “primary significance.”¹²⁰ Trademark terms, when used in connection with relevant goods or services, must name a “particular feature or

¹¹⁴ *Id.* (citing “Written Testimony of David Heinemeier Hansson, CTO & Co-founder, Basecamp, before the Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, Hearing on: Online Platforms and Market Power, Part 5: Competitors in the Digital Economy, January 17.”)

¹¹⁵ *Id.*

¹¹⁶ *Id.* (citing Garofalo, Pat, “Close to Home: How the Power of Facebook and Google Affects Local Communities,” American Economic Liberties Project, August 30, 2020, <https://economicliberties.us/our-work/close-to-home-how-the-power-of-facebook-and-google-affects-local-communities/>).

¹¹⁷ See *License & Protection of trademarks on social media*, COSMOVICI IP, (Apr. 1, 2018), <https://cosmovici-ip.com/news/license-protection-trademarks-social-media/> (noting that “[t]rademark licensors are struggling to keep pace with the use of social media as a business advertising tool but, as technologies advance, the provisions of the license agreements are also changing”).

¹¹⁸ See Lanham Act § 14(3), 15 U.S.C. § 1064(3); see also *Trademark and Unfair Competition in a Nutshell*, WEST ACADEMIC, <https://subscription-westacademic-com.eu1.proxy.openathens.net/Book/Detail?id=25548> (last visited Oct. 21, 2024) (hereinafter *Nutshell*).

¹¹⁹ See Mayyasi, *supra* note 25; *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9 (2d Cir. 1976).

¹²⁰ See *Nutshell*, *supra* note 118, at 31.

exemplification of the class” to not be considered generic.¹²¹ Simply restated: “The Federal Circuit has adopted a two-part test to assess genericness . . . [first,] one must specify the genus of the products at issue . . . [second], one asks whether the mark’s ‘primary significance’ to the relevant public is as a reference to that genus.”¹²² Lanham Act § 14(3) specifically states that it’s not the “purchase motivation” that’s the test for genericness, rather it’s the significance to the public.¹²³ This was a point that Taco Bell strongly argued in their Petition for Cancellation: the public’s perception and significance was that “Taco Tuesday” was no longer linked to Taco John’s.¹²⁴ However, being a fact-bound inquiry, the analysis is on a case-by-case basis; of which, the analysis may be difficult at times.¹²⁵

Even if there is a distinguishing characteristic of a new product, it may still be deemed generic if the characteristic itself merely labels or describes a ‘new product category.’¹²⁶ Similarly, a term is considered generic when, in having a unique characteristic that distinguishes it from other products, that characteristic, when used as the product name, is labeled with common descriptive terms.¹²⁷ Relatedly, if the public perceives the term to merely be a group subcategory of goods or services, the mark is generic.¹²⁸

Concerning primary significance, the first step is determining the relevant purchaser.¹²⁹ Then one can look at the

¹²¹ *See id.*; U.S. Patent & Trademark Office v. Booking.com B.V., 140 S.Ct. 2298, 2304 (2020) (“names a ‘class’ or goods or services, rather than any particular feature or exemplification of the class”). “The inquiry focuses on consumer perception.” *Id.* Lanham Act § 14(3), 15 U.S.C. § 1064(3) (“primary significance” to consumers).

¹²² Nutshell, *supra* note 118, at 31; Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc., 786 F.3d 960, 965 (Fed. Cir. 2015).

¹²³ *See* Lanham Act § 14(3).

¹²⁴ Spicy Seasoning, *supra* note 34.

¹²⁵ *See* Lanham Act § 14(3); *see also* Nutshell, *supra* note 118, at 31-32.

¹²⁶ *See* Genesee Brewing Company, Inc. v. Stroh Brewing Co., 124 F.3d 137 (2d Cir. 1997).

¹²⁷ *See* A.J. Canfield Co. v. Honickman, 808 F.2d 291 (3d Cir. 1986) (holding that ‘diet chocolate fudge soda’ was generic).

¹²⁸ *See* Royal Crown Co. v. Coca-Cola Co., 892 F.3d 1358, 1368 (Fed. Cir. 2018) (finding that “whether the relevant consuming public would consider the term ZERO to be generic for a subcategory of the claimed genus of beverages—i.e., the subcategory of the claimed beverages encompassing the specialty beverage categories drinks with few or no calories or few or no carbohydrates” should have been considered).

¹²⁹ *See generally* Mil-Mar Shoe Co., Inc. v. Shonac Corp., 75 F.3d 1153 (7th Cir. 1996); *see also* Nutshell, *supra* note 118, at 35.

varying types of evidence for primary significance such as dictionary definitions.¹³⁰ Adjectives are more likely source-identifying than nouns or verbs.¹³¹ It's important to look at how third parties regularly use the mark in reference to the characteristics of their goods¹³² and how the trademark owner uses their own trademark.¹³³

The timing of adopting a mark matters, as time allows a mark to develop secondary meaning.¹³⁴ The reverse is also true and arguably more common, where a mark has original distinctiveness but becomes generic over time, which, as outlined previously, is referred to as genericide.¹³⁵ For example, a mark may become generic if it is so strongly associated with the underlying goods by the public that the mark becomes associated with the whole category of goods.¹³⁶

When genericness is litigated, courts often consider the time the infringer entered the market rather than when the mark was established or adopted, but whether a mark may become distinctive again still remains uncertain.¹³⁷ Interestingly, courts may offer certain remedies, such as an injunction against infringers, even when a mark is considered generic.¹³⁸ Due to the often fact-specific nature of such cases, there may be evidence of “residual source-indicating significance” where the mark is generic to one portion of

¹³⁰ *See id.*

¹³¹ *See generally* Elliot v. Google, Inc., 860 F.3d 1151 (9th Cir. 2017); Nutshell, *supra* note 118, at 35.

¹³² *See generally* Filipino Yellow Pages, Inc. v. Asian Journal Pubs., Inc., 198 F.3d 1143 (9th Cir. 1999).

¹³³ *See generally* Haughton Elevator Co. v. Seeberger, 85 U.S.P.Q. 80 (Comm'r Pat. 1950).

¹³⁴ *See, e.g.*, Bayer Co. v. United Drug Co., 272 F. 505, 511-512 (N.Y. S.D. 1921); A. C. A. § 4-71-209 (stating, “The Secretary of State shall cancel from the register, in whole or in part: (1) Any registration concerning which the Secretary of State shall receive a voluntary request for cancellation from the registrant or the assignee of record; . . . (3) Any registration concerning which a court of competent jurisdiction shall find that: . . . (E) The mark is or has become the generic name for the goods or services, or a portion thereof, for which it has been registered”).

¹³⁵ *Id.*

¹³⁶ *See* Bayer Co. v. United Drug Co., 272 F. 505, 511-512 (N.Y. S.D. 1921).

¹³⁷ *See* Nutshell, *supra* note 118, at 37; *see generally, e.g.*, Nora Beverages, Inc. v. Perrier Grp. of Am., Inc., 164 F.3d 736 (2d Cir. 1998); *see generally* Harley-Davidson v. Grottanelli, 164 F.3d 806 (2d Cir. 1999); *but cf.* Schwan's IP, LLC v. Kraft Pizza Co., 460 F.3d 971 (8th Cir. 2006).

¹³⁸ *See* Nutshell, *supra* note 118, at 41.

the public but “remains source-indicating” to another portion of the public that allows for remedies under the Lanham Act.¹³⁹

Recall that an owner’s promotion efforts may succeed “so thoroughly over time that consumers . . . have come . . . [to] equate the mark with the underlying goods or services,” resulting in genericide of their mark.¹⁴⁰ For these reasons, courts may allow injunctive relief despite the generic nature of the mark under the assertion of unfair competition, particularly what is called passing off.¹⁴¹ However, “case law pertaining to trademark infringement on social networking sites is slim,” with parties commonly settling or resolving via alternative dispute resolutions.¹⁴²

VI. SEVERAL LESSONS FROM “TACO TUESDAY” TO PROTECT ONE’S MARK

Reflecting on “Taco Tuesday,” businesses should be attentive to the procedural aspects of maintaining a trademark phrase, particularly regarding USPTO deadlines. As seen in the two occasions relating to Gregory’s case, these can be particularly unforgiving.¹⁴³ Due to such an increase in personal use and business use, companies are thinking of different ways to increase their brand awareness, including simple steps such as profile customization.¹⁴⁴ Additionally, communication is key, and utilizing a trademark can be treated similarly to developing and implementing a typical marketing strategy.¹⁴⁵ Communication helps the customer understand “the value and quality behind the brand,” which empowers customers “to discern between genuine goods and counterfeit[s].”¹⁴⁶

As seen with the varying perceptions in response to Taco John’s acting to protect its (now former) trademark phrase, it is

¹³⁹ See *id.*; Bayer Co. v. United Drug Co., 272 F. 505, 511-512 (N.Y. S.D. 1921).

¹⁴⁰ See Nutshell, *supra* note 118, at 41-42.

¹⁴¹ See Lanham 15 U.S.C. § 1125(a); Nutshell, *supra* note 118 at 41-42; Murphy Door Bed Co. v. Interior Sleep Sys., Inc., 874 F.2d 95 (2d Cir. 1989); see, e.g., Blinded Veterans Ass’n v. Blinded Am. Veterans Found., 872 F.2d 1035 (D.C. Cir. 1989); King-Seeley Thermos Co. v. Aladdin Indus., Inc., 321 F.2d 577 (2d Cir. 1963).

¹⁴² *How To Claim a Trademark on the Top Six Social Media Platforms*, COSEARCH, (Oct. 29, 2021), <https://corsearch.com/content-library/blog/how-to-claim-a-trademark-on-the-top-six-social-media-platforms/> (hereinafter Six Social).

¹⁴³ See Lytvyn, *supra* note 13.

¹⁴⁴ Six Social, *supra* note 142.

¹⁴⁵ Kulik, *supra* note 61.

¹⁴⁶ *Id.*

critical to be able to discern differences “between free expression and infringing uses.”¹⁴⁷ This is important because not only should the customer’s perceptions be accounted for, but also because of serious implications regarding individuals’ First Amendment rights.¹⁴⁸

When a trademark owner exercises the legal ability to send a cease and desist letter, the owner should consider who the recipient is, how will they understand the context, and how will they react – meaning owners should simply consider the risk of such letters.¹⁴⁹ This is particularly true, as such letters can spread beyond the recipients this occurred several times Taco John’s sent such letters.¹⁵⁰ However, “recent court decisions reflect how social media evidence can play an important role in establishing actual confusion in a trademark infringement lawsuit.”¹⁵¹ But how does this further play out within social media platforms?

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (noting that “Brand owners need to work very closely with qualified IP counsel to properly draw the line between legitimate fair use/parody and actionable trademark infringement, as the intersection of trademark law and First Amendment expression is a complex one and requires a deft legal hand”); see e.g., Ilya Somin, *Social Media, Freedom of Speech, and Common Carriers: Response to Adam Candeub*, REASON (Apr. 10, 2024), <https://reason.com/volokh/2024/04/10/social-media-freedom-of-speech-and-common-carriers-response-to-adam-candeub/>; Ethan Wham, *Moody & Paxton Oral Arguments: What Others Are Saying*, DISRUPTIVE COMPETITION PROJECT (Mar. 1, 2024), <https://www.project-disco.org/competition/moody-paxton-oral-arguments-what-others-are-saying/>.

¹⁴⁹ Kulik, *supra* note 61; see e.g., Associated Press, *Small Business Outcry Halts Momofuku's Bid to Defend its 'Chile Crunch' Trademark*, INC. (Apr. 15, 2024), <https://www.inc.com/associated-press/small-business-outcry-halts-momofuku-bid-to-defend-its-chile-crunch-trademark.html>; Mae Anderson and Associated Press, *Momofuku backs down from 'chile crunch' trademark after pushback from small brands founded by Asian Americans: 'This situation has created a painful divide'*, FORTUNE (Apr. 15, 2024), <https://fortune.com/2024/04/15/momofuku-chile-crunch-trademark-pushback-small-brands-asian-americans/>.

¹⁵⁰ See *id.*; Mayyasi, *supra* note 25; Surette, *supra* note 25; Gruver, *supra* note 3.

¹⁵¹ See Patzakis, *supra* note 63 (“Recent court decisions reflect how social media evidence can play an important role in establishing actual confusion in a trademark infringement lawsuit,” when properly authenticated social media evidence.); see generally *S10 Ent. & Media LLC v. Samsung Elec. Co. Ltd.*, (C.D. Cal. Feb. 14, 2023); *Great W. Air LLC v. Cirrus Design Corp.*, (D. Nev. Jan. 6, 2023).

VII. PROTECTING ONE'S MARK ON SOCIAL MEDIA THROUGH THE PLATFORMS' TRADEMARK COMPLAINT PROCESSING

These “mammoth size” problems need a swift response towards trademark infringement on social platforms.¹⁵² To understand the difficulty a business may have in dealing with trademark infringement on social media, consider how such social networking sites operate regarding copyright infringement. In 1998, the Digital Millennium Copyright Act (“DMCA”) was passed, with the “main purpose . . . to protect Internet service providers from copyright infringement claims,” with its ‘notice-and-takedown’ regime.¹⁵³ Social networking sites, by acting per 17 U.S.C. § 512, can avoid liability.¹⁵⁴ When an individual submits a copyright infringement form or complaint falling under section 512(c)(3), the platform should “respond[...] expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”¹⁵⁵ In addition to individual takedown notices, social networking platforms have systems that automatically run copyright infringement scans, such as YouTube’s “Content ID” detection system that “automatically scans uploaded videos to compare them to its massive database of files submitted by content owners.”¹⁵⁶ Copyright infringement is often easier to identify on social networking sites due to the very nature of copyright infringement as it may be cross-referenced with existing data.¹⁵⁷ DMCA copyright notice purportedly allows “small copyright holders [to receive] the equivalent of urgent and permanent injunctive relief against infringing content;” however,

¹⁵² Frederick Mostert and Martin Schwimmer, *Notice and Takedown for Trademarks*, 101 TRADEMARK REPORTER 249, 254 (2011) (“Justice necessitates swift removal of infringing trademark use on the Internet [as] the sheer volume of online trademark fraud mandates a pragmatic approach to a worldwide problem . . . prompt removal of infringing trademark use is essential, if simply to keep up on a daily basis with the mammoth size of the problem”).

¹⁵³ Zach Wolfe, *Takedown: How To Protect Your Intellectual Property From Infringement on Social Media*, FIVE MINUTE LAW (Feb. 10, 2020), <https://fiveminutelaw.com/2020/02/10/takedown-how-to-protect-your-intellectual-property-from-infringement-on-social-media/>.

¹⁵⁴ 17 U.S.C. § 7512(c).

¹⁵⁵ 17 U.S.C. § 7512(c).

¹⁵⁶ Wolfe, *supra* note 153.

¹⁵⁷ *See id.*

some consider these take-down notices as overreaching and quelling speech.¹⁵⁸

The DMCA provides a legal framework for copyrights but not for trademarks – as the DMCA does not apply to trademark infringement.¹⁵⁹ Given this absence and that infringement must be by a person¹⁶⁰ the increasing influence of social media centered around food, restaurants, and other food-related businesses need to be vigilant in safeguarding their trademarks. Broadly speaking, a business can protect its trademark on social media by registering its trademark, policing its trademark, and enforcing its trademark rights.¹⁶¹

Trademark monitoring, or policing, “is the process of searching websites, social media, and online marketplaces for unauthorized” uses or users.¹⁶² This works to proactively protect the brand and save finances that might have otherwise been spent in court.¹⁶³ This affirmative duty may be accomplished through private monitoring services or individuals, such as lawyers, firms, or the trademark owners themselves, along with software.¹⁶⁴ The costs for private monitoring and watching services vary significantly.¹⁶⁵ Trademark monitoring software or utilizing tools

¹⁵⁸ Mostert, *supra* note 152, at 257.

¹⁵⁹ See *id.*; Bennett Kuhar, *Dealing with Copyright and Trademark Infringement on the Internet and Social Media*, TUCKER ELLIS LLP (Apr. 21, 2023), <https://www.tuckerellis.com/ip-tip-of-the-month-blog/dealing-with-copyright-and-trademark-infringement-on-the-internet-and-social-media/>.

¹⁶⁰ Klein, *supra* note 110.

¹⁶¹ See Igor Demcak, *Trademark protection on social media: 3-Step Process*, TRAMA TM (Oct. 2022), <https://www.tramatm.com/blog/category/legal/trademark-protection-on-social-media-3-step-process>.

¹⁶² Lukas Bleidorn, *Trademark Monitoring: Everything You Need to Know*, RED POINTS (Nov. 27, 2023) [hereinafter Red Points], [https://www.redpoints.com/blog/trademark-monitoring/#:~:text=Google%20Alerts%3A%20Google%20Alerts%20streamlines,your%20search%20term%20appears%20online.](https://www.redpoints.com/blog/trademark-monitoring/#:~:text=Google%20Alerts%3A%20Google%20Alerts%20streamlines,your%20search%20term%20appears%20online.;); see also Demcak, *supra* note 111 (“with ongoing trademark monitoring, brand owners can: discover trademark infringements before opposition window ends; avoid losing rights due to delays or a lack of response; limit risk and gain peace of mind; strengthen & enforce your competitive position; track trademark activities of your competitors; [and] deter others from filing similar trademarks.”).

¹⁶³ See Red Points, *supra* note 162.

¹⁶⁴ Demcak, *supra* note 111; Red Points, *supra* note 162; Klein, *supra* note 110.

¹⁶⁵ See *Trademark Watch Services*, THE BROWNE FIRM, <https://www.thebrownefirm.com/intellectual-property-lawyer/trademark-watch-services/> (last visited Oct. 17, 2024); see also Daren Harris, *Trademark Monitoring*, NORTHWEST REGISTERED AGENT (Aug. 22, 2023), <https://www.northwestregisteredagent.com/trademark-service/how-to->

such as Google Alerts are generally more affordable and time-efficient options.¹⁶⁶ When improper use is discovered, social media platforms provide ways via online forms to report trademark infringement, as with the copyright forms, while also encouraging parties to attempt to resolve issues directly with the suspected trademark infringer.¹⁶⁷ For example, YouTube Help’s copyright page does not include this same ‘encourage’ language that appears on the trademark page.¹⁶⁸

Due to the nature of trademarks, social networking sites have a harder time determining infringement in such a non-physical environment.¹⁶⁹ This also hinges on how the use of the mark or a similar mark “creates a likelihood of confusion regarding the source of goods or services,” rather than merely “copying someone’s

protect/monitoring#:~:text=The%20average%20cost%20of%20a,is%20around%200%24200%20per%20year.; see also *Secure Your Brand With Real-Time Trademark Monitoring*, TRADEMARKIA, <https://www.trademarkia.com/brand-monitoring>.; see also *Trademark Watch / Trademark Monitor*, BAIT LEGAL LLP, <https://www.baitlegal.com/trademark-watch> (last visited Oct. 17, 2024) (noting that the cost depends on multiple factors).

¹⁶⁶ Red Points, *supra* note 162 (“because trademark monitoring software can track various sites all across the globe nonstop, it is far more effective and efficient (both on time and cost) than hiring employees to scan for these infringements.”)

¹⁶⁷ See Six Social, *supra* note 142; see generally *Help With Intellectual Property Issues*, K, <https://help.twitter.com/en/forms/ipi/trademark> (last visited Oct. 3, 2024); *Help Center*, FACEBOOK, <https://www.facebook.com/help/contact/634636770043106> (last visited Oct. 3, 2024); *Trademark Infringement Notification*, PINTEREST, <https://www.pinterest.com/about/trademark/> (last visited Oct. 3, 2024); *Reporting a Trademark Infringement Form*, LINKEDIN, <https://www.linkedin.com/help/linkedin/ask/TS-NTMI> (last visited Oct. 3, 2024); *Help Center: Trademark Complaint*, YOUTUBE HELP, https://support.google.com/youtube/contact/trademark_complaint (last visited Oct. 3, 2024); *Help Center: Trademark*, INSTAGRAM, <https://help.instagram.com/222826637847963> (last visited Oct. 3, 2024); *About Trademark Infringement on Snapchat*, SNAPCHAT, <https://help.snapchat.com/hc/en-us/articles/7012343429652-About-Trademark-Infringement-on-Snapchat> (last visited Oct. 3, 2024).

¹⁶⁸ See *What is Copyright?*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797466> (last visited Oct. 3, 2024); *Trademark*, YOUTUBE HELP, <https://support.google.com/youtube/answer/6154218> (last visited Oct 3, 2024) (“If you think your trademark is being infringed, keep in mind that YouTube doesn’t mediate trademark disputes between creators and trademark owners. As a result, we strongly encourage trademark owners to speak directly with the creator who posted the content in question. Contacting the uploader may fix the problem faster in a way that benefits everyone. Some creators list ways they can be contacted in their channel.”).

¹⁶⁹ Wolfe, *supra* note 153; Klein, *supra* note 110.

trademark” or what’s considered non-infringing use.¹⁷⁰ Additional considerations include classical or nominative fair use, which varies from fair use in copyright.¹⁷¹

In 15 U.S.C. § 1057, “registration of a mark . . . [is] prima facie evidence of the validity of the registered mark and . . . of the owner’s ownership of the mark, and of the owner’s exclusive right to use the registered mark.”¹⁷² Not only is this advantageous position, but some social networking sites require the trademark owner or an authorized representative to provide the trademark registration number when submitting a complaint form.¹⁷³ Registration, although not legally required for ownership, builds on the use of a trademark in establishing trademark rights that existed under common law.¹⁷⁴ Although some have suggested the implementation of something similar to arbitration or sanction for bad faith notice, smaller establishments need something adapted to this ever-changing social media landscape.¹⁷⁵

Two cases are before the United States Supreme Court: *NetChoice v. Paxton*¹⁷⁶ and *Moody v. NetChoice*,¹⁷⁷ both of which are expected to have a ruling by June 2024.¹⁷⁸ These Texas and Florida cases, respectively, concern laws that “restrict how social media companies moderate content on their platforms.”¹⁷⁹ These laws have the potential, depending on implementation, to “improve outcomes for trademark owners when they enforce their rights . . . [implementing and requiring a] 48-hour response time [from social

¹⁷⁰ *See id.*

¹⁷¹ Wolfe, *supra* note 153.

¹⁷² 15 U.S.C. § 1057(b).

¹⁷³ *See, e.g., Help With Intellectual Property Issues, X*, <https://help.twitter.com/en/forms/ipi/trademark/trademark-owner> (last visited Oct. 3, 2024).

¹⁷⁴ *See* Lanham Trademark Act (Lanham Act) § 14(3), 15 U.S.C.A. § 1064(3); Wolfe, *supra* note 153; *Social Media and Trademarks: Understanding Your Rights in a Digital Age*, PSED L., <https://www.psedlaw.com/learn/more/social-media-and-trademarks-understanding-your-rights> (last visited Oct. 3, 2024).

¹⁷⁵ *See generally* Mostert, *supra* note 152.

¹⁷⁶ *See NetChoice v. Paxton Oral Argument*, (Feb. 26, 2024), <https://www.c-span.org/video/?533619-1/netchoice-v-paxton-oral-argument>.

¹⁷⁷ *See Moody v. NetChoice Oral Argument*, (Feb. 26, 2024), <https://www.c-span.org/video/?533618-1/moody-v-netchoice-oral-argument#>.

¹⁷⁸ *See id.*

¹⁷⁹ *Id.*

media platforms].”¹⁸⁰ Although this presents social media platforms with feasibility issues and introduces First Amendment concerns before the Court, such a model has trademark complaint processing implications—namely “being able to potentially close out a trademark enforcement matter[s] within a matter of days.”¹⁸¹

VIII. CONCLUSION

“Taco Tuesday,” despite the efforts of its trademark owner, was canceled. The taco controversy demonstrated the varied customers’ and businesses’ reactions, revealing the challenges trademark owners must navigate in the digital age. These challenges are compounded by the pervasive use of social media, social media’s impact on the human brain, and the inundation of food-related content on those platforms. Understanding this will allow trademark owners to implement tailored and proactive steps to regulate and safeguard their trademarks’ distinctiveness while leveraging the advantageous reach of social media platforms.

“Taco Tuesday” demonstrated how businesses must maintain a balance in asserting trademark ownership rights to successfully navigate the legal and social landscape. Moreover, the current standard for processing trademark complaints on social media platforms may be on the verge of change. This change could enable businesses to enforce their trademark rights more quickly, saving time, money, and resources, while maintaining their customers’ positive perceptions and distinctiveness of their trademark.

¹⁸⁰ Kristin Hardy, *UPDATED: Texas Social Media Bill May Speed Resolution of Trademark Complaints*, TAFT (Oct. 4, 2022), <https://www.taftlaw.com/news-events/law-bulletins/updated-texas-social-media-bill-may-speed-resolution-of-trademark-complaints/>.

¹⁸¹ *Id.*