IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UPTON'S NATURALS CO.; and
THE PLANT BASED FOODS
ASSOCIATION,

Plaintiffs,

vs. Civil Action No. 5:20-cv-00938

KEVIN STITT, in his official
capacity as Oklahoma Governor; and
BLAYNE ARTHUR, in her official
capacity as Oklahoma Commissioner
of Agriculture,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

At the meat lobby's request, the Oklahoma Legislature has agreed to harm its competition. The state's new law forces vegan food sellers change their labels from how they appear everywhere else. Many, like Plaintiff Upton's Naturals, cannot practically do so and will stop selling their legal, healthy food in Oklahoma. Worse, the new law does not help consumers, as it merely requires food sellers to repeat things consumers already know. Under the Tenth Circuit's controlling commercial-speech precedent, this law is unconstitutional. And the Court should enter a preliminary injunction allowing Plaintiffs to continue their clear, honest communications with customers during this case.

The Plaintiff plant-based food sellers proudly tell their customers that their products lack meat. For example, Upton's clearly labels its products, like seitan "bacon," as "vegan." Other members of the Plaintiff Plant Based Food Association ("PBFA") also clearly label their products, like veggie burgers, using similar terms like "meatless." In fact, customers buy their products specifically because they do not come from animals, so it is crucial to Plaintiffs' businesses that this point is clear. And they make sure that it is.

Despite this honesty, Oklahoma is requiring Upton's (and PBFA's other members) to rewrite their labels with oversized disclaimers, as if veggie burgers were cigarettes. Under Oklahoma's new law, these labels must have disclaimers as big and prominent as their product names. But Upton's product names are their labels' biggest text, just like the product names on "Coke" cans, "Cheerios" boxes, and other safe products.

Oklahoma's compelled-disclaimer requirement violates the First Amendment, which protects Upton's chosen speech. To pass any level of First Amendment scrutiny,

the government must show that this requirement solves a real problem without burdening more speech than necessary. The government cannot meet this burden: any reasonable consumer already knows that Upton's products are meatless, and the government has better, less-onerous tools for ensuring that labels are honest.

To prevent an imminent violation of their rights, Upton's and PBFA's other members need expedited relief. Oklahoma's compelled-disclaimer requirement will go into effect on November 1. By then, vegan food sellers must either create special labels for Oklahoma or withdraw their products from the state (as Upton's would have to do). To avert this fate, Upton's and PBFA ask this Court to enter a preliminary injunction.

STATEMENT OF FACTS

The facts are clear—though Plaintiffs' speech is perfectly truthful, Oklahoma is forcing them to alter the content of that speech. First, this section provides background on Plaintiffs—Upton's Naturals and PFBA—and their speech. Next, this section describes Oklahoma's recent law—written by meat industry lobbyists and passed at the industry's request—burdening that speech. Finally, this section discusses the harm Plaintiffs will suffer without a preliminary injunction.

I. PLAINTIFFS COMMUNICATE HONESTLY WITH CONSUMERS.

Plaintiff Upton's Naturals is a small, Chicago-based natural foods company founded on vegan values. Decl. Daniel Staackmann Supp. Pls.' Mot. Prelim. Inj. ¶¶ 4, 6, attached as Exhibit A. The company's president and founder—Dan Staackmann—is an animal-rights advocate and has been vegan for more than 25 years. *Id*. ¶¶ 2–3, 5, 7. Consistent with his founding vision, Upton's Naturals sells entirely plant-based and fruit-

based foods. *Id*. ¶ 8. For example, its "bacon," "chorizo," and "hot dog" products are made of wheat-based seitan, its "bar-b-que" is made of jackfruit, and it will soon begin selling "jerky bites" made of tarragon, tamarind, peppercorn, and wheat. *Id*. ¶¶ 12, 14, 16. Upton's uses these terms because doing so improves consumer understanding by explaining the meats for which these products serve as alternatives. *Id*. ¶ 18.

While using these meat terms, Upton's proudly labels all its products as vegan. *Id*. ¶ 20. For example, on the front of Upton's "ch'eesy bacon mac" label, there is a conspicuous disclaimer that the product is "100% Vegan":

Ex. A ¶ 21, Ex. 1-1. Likewise, on the front of Upton's Naturals' "Updog" vegan hot dog label, there is a conspicuous disclaimer that the product is a "vegan hot dog."

Ex. A ¶ 23, Ex. 1-3. Similarly, on the front of Upton's Naturals' labels for its upcoming "jerky bites" product, there is a conspicuous disclaimer that the product is "vegan."


NEW
VEGAN
UPTON'S
NATURALS
JERKY BITES
Tamarind Pepperoni
SOY-FREE
GOOD SOURCE OF
PROTEIN
NT WT
2 OZ (56.7 g)

Ex. A ¶ 24, Ex. 1-4. Though the product name is the biggest text on each of these labels—just like on most other companies' labels—each label clearly tells consumers that Upton's Naturals' products are plant-based.

The backs of many Upton's Naturals' labels provide more notice that Upton's does not sell meat. Ex. A ¶ 25. For example, they say, "Try All Our Great Vegan Products" and "Vegan For A Reason." *Id*. they also say:

> *At Upton's Naturals, veganism is a way of life, and every meal is an opportunity to show compassion for animals. Thank you for supporting our mission to make delicious vegan foods that anyone can enjoy.*

Id.

Like Upton's, other PBFA members proudly tell consumers the truth about their products using the plain language that consumers understand best. PBFA has over 170 plant-based members selling several tasty treats, including plant-based "beef," "hot dogs," "burgers," "bacon," "meatballs," "jerky," and "steaks." Decl. Michele Simon Supp. Pls.' Mot. Prelim. Inj. ¶¶ 6–7, attached as Exhibit B. While PBFA members use these meat terms in their product names (which are typically the largest text on their labels), their labels conspicuously explain that these products are "vegan," "meatless," or "plant-based." *Id*. ¶ 10. Their labels also proudly provide other information discussing the businesses' vegan practices. *Id*. ¶ 12.

As the labels show, it is vital to Upton's Naturals and PBFA's other members that consumers know their products are vegan. Ex. A ¶ 26; Ex. B ¶ 13. After all, they market their foods to vegans and other customers looking for meat alternatives. Ex. A ¶ 26; Ex.

B ¶ 13. Accordingly, it would be disaster for their businesses if the public thought they had started selling meat. Ex. A ¶ 26.

II. UNDER PRESSURE FROM THE MEAT INDUSTRY, OKLAHOMA IMPOSES A COMPELLED-DISCLAIMER REQUIREMENT ON PLAINTIFFS' SPEECH.

The Oklahoma Legislature enacted its new compelled-disclaimer law, House Bill 3806, for one reason. A trade association asked the government to harm its competition. So that is what the government did.

Consumer groups did not ask for Oklahoma's new law. Like every other state in the union, Oklahoma already had laws prohibiting misleading labels. *See* Okla. Stat. Ann. tit. 63, § 1-1110(a). Moreover, a 2019 predecessor to Oklahoma's new law already required that a plant-based meat alternative's "packaging display[] that the product is derived from plant-based sources," though the prior law did not require this information to be the largest text on the label. *Id*. § 317(7) (2019). Plaintiffs had no problems complying with those laws, and Plaintiffs are not challenging them. Ex. A ¶¶ 26–27; Ex. B ¶¶ 10–11. Indeed, even if those laws had not already existed, Plaintiffs would still be proudly explaining that their foods do not come from animals. Ex. A ¶ 26; Ex. B ¶ 11. Their entire business model depends on it. Ex. A ¶ 26; Ex. B ¶ 13.

But this honesty did not stop powerful interest groups from trying to use government power to hurt their competitors. In fact, they did not even try to hide their role in passing House Bill 3806. A beef industry group—the Oklahoma Cattlemen's Association—publicly boasted that it "brought" the bill to the Oklahoma Legislature and worked "closely" with a pork industry group—the Oklahoma Pork Council—and the

Oklahoma Department of Agriculture, Food and Forestry to pass the legislation.[1] The association even tapped one of its own members—Representative Toni Hasenbeck—to be the bill's lead sponsor in the Oklahoma House of Representatives.[2] For her efforts shepherding the bill through the Oklahoma Legislature, the association recognized Representative Hasenbeck with its "Legislative Appreciation Award."[3]

When this legislation goes in effect on November 1 as the "Meat Consumer Protection Act" ("Act"), vegan food sellers will no longer be able to use any meat-related terms on their labels unless they also include a disclaimer as big and conspicuous as their product names. The Act prohibits advertising "a product as meat that is not derived from harvested production livestock," while defining "meat" broadly and providing that:

> [P]roduct packaging for plant-based items shall not be considered in violation of [the Act] so long as the packaging displays that the product is derived from plant-based sources in type that is uniform in size and prominence to the name of the product.

2020 Okla. Sess. Laws 53, § 1(C)(1).[4] In other words, a qualifying label's explanation that food is vegan must be "in type that is uniform in size and prominence to the name of the product" (the "Compelled-Disclaimer Requirement").

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[1] Press Release, Okla. Cattlemen's Ass'n, Cattlemen Applaud Governor Stitt's Signature on the Oklahoma Meat Consumer Protection Act (May 19, 2020), https://www.okcattlemen.org/assets/docs/PressReleases/2020/05_19_Governor%20signs%20HB3806.pdf

[2] *Id*.

[3] Press Release, Okla. Cattlemen's Ass'n, Representative Toni Hasenbeck Honored by the Oklahoma Cattlemen's Association (Jul. 27, 2020), https://www.okcattlemen.org/assets/docs/PressReleases/2020/07_27_Legistlative_Hasenback.pdf.

[4] Under the Act, this provision will be codified as Section 5-107(1)(C)(1) of Title 2 of the Oklahoma Statutes.

But this requirement would force vegan food sellers to change their labels or stop selling in Oklahoma. Sadly, Upton's Naturals and other members of the PBFA would be forced to do the latter.

III. PLAINTIFFS FACE AN IMMINENT INJURY THAT THIS COURT CAN PREVENT.

With the Act going into effect on November 1, 2020, Upton's Naturals and PBFA both face an imminent injury in Oklahoma, where Upton's Naturals and PBFA's members currently sell their products. Ex. A ¶ 33; Ex. B ¶ 7. Their labels have product names containing meat terms like "beef," "hot dogs," "burgers," "bacon," "meatballs," "jerky," and "steaks." Ex. A ¶¶ 12, 16; Ex. B ¶ 7. While Plaintiffs clearly label all these products as vegan, they also follow the standard practice of having product names as the biggest text on their labels. Ex. A ¶ 19; Ex. B ¶¶ 14, 16. Thus, these labels will soon be illegal in Oklahoma, exposing Plaintiffs to fines of up to $10,000 or even jail time of up to one year per violation.[5]

Plaintiffs would like to retain these labels, and not just because they are the same labels Plaintiffs use everywhere else. Ex. A ¶¶ 29–30; Ex. B ¶ 16. The labels honestly communicate Plaintiffs' product features, images, and brand names to consumers using the plain language that consumers understand best. Ex. A ¶¶ 30–31; Ex. B ¶¶ 16–17. And revising these labels to have unusual disclaimers the size of product names would be

[5] Okla. Stat. Ann. tit. 2, § 2-18(A) (authorizing fines up to $10,000 for Agricultural Code offenses); *id.* § 2-18(C) (providing that Code offenses are misdemeanors); Okla. Stat. Ann. tit. 21, § 10 (authorizing up to year imprisonment for misdemeanors).

expensive and would crowd out speech that Plaintiffs prefer, like photographs of their foods. Ex. A ¶¶ 29–32; Ex. B ¶ 16.

For companies that could bear neither this burden nor the risk of criminal prosecution, the Act would chill speech. Ex. A ¶¶ 34–35; Ex. B ¶ 17. For example, because Upton's Naturals cannot afford to comply with the Compelled-Disclaimer Requirement, it would withdraw its "Ch'eesy Bacon Mac," "Updog" and "Jerky Bites" labels from Oklahoma if the Act went into effect. Ex. A ¶ 35.

A preliminary injunction would prevent this injury. If this Court preliminarily enjoins the Compelled-Disclaimer Requirement, Upton's and other PBFA members would keep speaking in Oklahoma just as they are now doing. Ex. A ¶ 36; Ex. B ¶ 17.

ARGUMENT

Oklahoma's new compelled-disclaimer law will not tell reasonable consumers anything that they do not already know. After all, Plaintiffs' labels already honestly, clearly, and proudly explain that their products are vegan. But Oklahoma is nonetheless forcing Plaintiffs to rewrite these labels through its Compelled-Disclaimer Requirement.

This requirement violates the First Amendment. It regulates non-misleading commercial speech about a lawful activity, which is constitutionally protected. Under binding Tenth Circuit precedent, the Compelled-Disclaimer Requirement is thus subject to at least intermediate scrutiny. Also, because the requirement forces vegan food sellers to alter the content of their speech, it triggers strict scrutiny under more recent Supreme Court precedent. The requirement fails either level of scrutiny, as both tests require the government to prove that the requirement furthers a legitimate end where less-restrictive

means would not suffice. Because reasonable consumers know that vegan products do not come from animals, the requirement does not advance a legitimate interest. And since Oklahoma already has consumer-protection tools it could use, the requirement burdens far more speech that necessary. Thus, the requirement is unconstitutional.

In fact, even if lesser scrutiny applied—and it does not—the requirement would still be unconstitutional. At times, federal courts have applied the Supreme Court's test from *Zauderer v. Office of Disciplinary Council of the Supreme Court of Ohio*, 471 U.S. 626 (1985), to certain disclaimer requirements. But the test applies only where disclaimers correct inherently misleading speech. Because Plaintiffs' speech is not inherently misleading, the test is inapplicable here. And even where the test does apply, the government bears the burden to prove that a compelled disclaimer remedies an actual harm without extending broader than necessary. Because the government cannot meet that burden here, it would also fail *Zauderer*.

As discussed below, Plaintiffs satisfy the four requirements of a preliminary injunction: (1) likelihood of success on the merits; (2) irreparable harm; (3) balance of equities; and (4) benefit to the public. *Verlo v. Martinez*, 820 F.3d 1113, 1126 (10th Cir. 2016). Plaintiffs therefore are entitled to a preliminary injunction allowing them to keep using their current food labels during this litigation. Finally, because there is no risk of any harm at all to Defendants, Plaintiffs request that this Court either waive the bond requirement of Rule 65(c) or set it in a nominal amount.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR FIRST AMENDMENT CLAIM.

Plaintiffs are likely to prevail on the merits under any level of First Amendment scrutiny. First, under the relevant Tenth Circuit precedent, Plaintiffs prevail under intermediate scrutiny. Second, even if that were not true (although it is), under the relevant Supreme Court precedent, Plaintiffs prevail under strict scrutiny. Finally, even if *Zauderer* applied (which it does not), Plaintiffs would also prevail, as the government cannot meet its burdens there either.

A. Under Binding Tenth Circuit Precedent, the Compelled-Disclaimer Requirement Fails First Amendment Scrutiny.

Tenth Circuit precedent mandates that Plaintiffs should prevail. This precedent explains that the Compelled-Disclaimer Requirement triggers (at least) intermediate scrutiny. Because Defendants cannot overcome their intermediate-scrutiny burdens, the requirement is unconstitutional.

1. *Under Binding Tenth Circuit Precedent, the Compelled-Disclaimer Requirement Triggers (At Least) Intermediate Scrutiny.*

At minimum,[6] the Compelled-Disclaimer Requirement is subject to intermediate scrutiny. This (or an even higher standard under strict scrutiny) applies to any government regulation of commercial speech unless that speech is "misleading" or "related to unlawful activity." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980). Here, *Central Hudson's* intermediate-scrutiny test (or

[6] As Plaintiffs discuss in Section I(B)(1), the Supreme Court has recently clarified that strict scrutiny is the default review for content-based speech restrictions. Accordingly, content-based restrictions on protected commercial speech also trigger strict scrutiny.

else strict scrutiny) must apply because: (1) the labels at issue are "commercial speech" and the government cannot meet its burden to show that (2) they are misleading or (3) related to unlawful activity.

First, product labels are commercial speech.[7] *See, e.g.*, *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 (10th Cir. 1991) (applying *Central Hudson* to law regulating alcohol labels because "[a]dvertising" and "[p]roduct labels" are "commercial speech"); *see also Adolph Coors Co. v. Bentsen*, 2 F.3d 355, 357 n.3 (10th Cir. 1993) (same). And in the Tenth Circuit, disclaimer requirements imposed on commercial speech must survive *Central Hudson*. For example, in *United States v. Wenger*, the court applied *Central Hudson* to disclosures required in securities advertisements. 427 F.3d 840, 849 (10th Cir. 2005). Just like the laws challenged in *Brady*, *Bentsen*, and *Wenger*, the Compelled-Disclaimer Requirement regulates Plaintiffs' labels and advertising, which are commercial speech.

Second, Plaintiffs' speech is not misleading. The Tenth Circuit has held that commercial speech is unprotected as "inherently misleading" where it is "incapable of being presented in a way that is not deceptive." *Revo v. Disciplinary Bd. of the of the S. Ct. for the State of New Mexico*, 106 F.3d 929, 933 (10th Cir. 1997). Plaintiffs can and do present their labels in non-deceptive ways every day. Ex. A ¶¶ 20–26; Ex. B ¶ 10.

[7] *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 776 (1976) (defining "commercial speech" as speech that "does no more than propose a commercial transaction"); *see also Rubin v. Coors, Inc.*, 514 U.S. 476, 483 (1995) (holding that beverage-label regulation failed *Central Hudson* test).

A recent federal court decision concerning plant-based food labels is instructive. In *Turtle Island Foods SPC v. Soman*, the plaintiff, "Tofurky," challenged an Arkansas law prohibiting it from using meat terms like "beef," "chorizo," and "sausage" for plant-based foods as a First Amendment violation. 424 F. Supp. 3d 552, 563 (E.D. Ark. 2019). In granting Tofurky's motion for a preliminary injunction, the court found that Tofurky's labels were not "inherently misleading" given their context:

> [T]hese labels use some words traditionally associated with animal-based meat. However, the simple use of a word frequently used in relation to animal-based meats does not make use of that word in a different context inherently misleading. This understanding rings particularly true since the labels also make disclosures to inform consumers as to the plant-based nature of the products contained therein.

Id. at 573.[8]

For the same reason, Plaintiffs' speech is not inherently misleading. Plaintiffs proudly make numerous "disclosures to inform consumers as to the plant-based nature of the[ir] products." For example, on the fronts of Upton's Naturals' labels, there are conspicuous statements that their products are "Vegan" and made from ingredients like "seitan" and "jackfruit." Ex. A ¶¶ 20–25. And, on the back, there are more disclosures, like "Try All Our Great Vegan Products," "Vegan For A Reason," and the following:

> *At Upton's Naturals, veganism is a way of life, and every meal is an opportunity to show compassion for animals. Thank you for supporting our mission to make delicious vegan foods that anyone can enjoy.*

[8] Recently, a different federal district court similarly held that a plant-based "butter" label was not misleading in context. *See* Order Granting In Part & Denying In Part Motion for Preliminary Injunctive Relief, *Miyoko's Kitchen v. Karen Ross, et al.*, Case No. 20-cv-00893-RS (N.D. Cal. Aug. 21, 2020), ECF No. 46.

Id. ¶ 25. Given this context, the government cannot meet its burden to prove that Plaintiffs' labels are inherently misleading.

Third, there can be no reasonable dispute that Plaintiffs' speech concerns lawful activity—sales of plant-based food. Thus, intermediate scrutiny applies to the Compelled-Disclaimer Requirement under controlling Tenth Circuit precedent applying the *Central Hudson* test to restrictions on commercial speech, including compelled disclaimers.

2. *Defendants Cannot Satisfy Intermediate Scrutiny*.

The Compelled-Disclaimer Requirement fails intermediate scrutiny under *Central Hudson*. To meet this standard, the government must prove that: (1) the government's interest is "substantial"; (2) the restriction at issue "directly and materially advances" that interest; and (3) the restriction is not "more extensive than necessary" to serve that interest. *See Ibanez v. Fla. Dep't of Bus. & Prof. Reg.*, 512 U.S. 136, 143 (1994) (citing *Central Hudson*, 447 U.S. at 566). "This burden is not satisfied by mere speculation or conjecture." *Edenfield v. Fane*, 570 U.S. 761, 770 (1993). Rather, the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id*. at 771. The government cannot do so here. In fact, the Compelled-Disclaimer Requirement fails for two independent reasons.

First, although consumer protection is a "substantial" government interest, Defendants fail *Central Hudson*'s second prong because the Compelled-Disclaimer Requirement does not "directly and materially" further the interest. *See Turtle Island Foods*, 424 F. Supp. 3d at 563 (ruling that ban on Tofurky's use of meat terms did not "directly and materially" advance consumer protection where Tofurky's speech was not

"false" or "misleading" in context). Given that Plaintiffs already proudly label their products as vegan, provide lengthy information about their vegan processes, and market to customers who are specifically seeking out vegan foods for that very reason, the Compelled-Disclaimer Requirement would not inform reasonable consumers of anything they do not already know. Ex. A ¶¶ 20–26; Ex. B ¶¶ 10–13. Thus, the government cannot meet its burden to prove that it does.

Second, while that failure alone would render the law unconstitutional, the government also fails *Central Hudson's* third prong. For this prong, the government bears the burden of showing why less-restrictive alternatives are somehow insufficient. *See, e.g.*, *Revo*, 106 F.3d at 935 (holding that ban on attorney solicitation violated the First Amendment where there were "numerous and obvious less-burdensome alternatives"). Defendants cannot do so here. After all, Oklahoma already has laws that ban misleading labels. *See, e.g.*, Okla. Stat. Ann. tit. 63, § 1-1110(a). And even before the Compelled-Disclaimer Requirement, Oklahoma required Plaintiffs to disclose that their products were plant-based.[9] *Id*. § 317(7) (2019). But, unlike the Compelled-Disclaimer Requirement, this earlier requirement did not take the unusual approach—normally reserved for risky products like cigarettes or alcohol[10]—of requiring the disclaimer to be oversized. Given the availability of these alternatives that restrict less speech than the

[9] Plaintiffs do not object to this requirement so long as Plaintiffs remain free to choose *how* to disclose that their products are plant-based.

[10] Until this year, cigarette labels had to print warnings that comprised at least 30 percent of their "principal display panels." 21 C.F.R. § 1143.3 (2016). Meanwhile, while alcohol labels must have government warnings of a minimum size, their product names can be larger than this warning. 27 C.F.R. § 16.22.

Compelled-Disclaimer Requirement, the government cannot meet its burden under *Central Hudson's* third prong either. Thus, the requirement is unconstitutional.

B. Under Supreme Court Precedent, the Compelled-Disclaimer Requirement Fails First Amendment Scrutiny.

While the Tenth Circuit has historically applied intermediate scrutiny to commercial-speech regulations, including compelled-disclaimer requirements like the one here,[11] the Supreme Court recently clarified that content-based speech restrictions are generally subject to strict scrutiny. *See Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (applying strict scrutiny to sign code because it imposed content-based restriction on speech); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (applying "heightened" scrutiny," rather than the *Central Hudson* test, to content-based restriction on commercial speech). Also, the Court's recent decision in *National Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361, 2371 (2018), clarified that government-scripted disclaimers are content-based restrictions. Under this precedent, the Compelled-Disclaimer Requirement is content-based and subject to strict scrutiny, which Defendants cannot satisfy.

1. *Under Supreme Court Precedent, the Compelled-Disclaimer Requirement Triggers Strict Scrutiny.*

In *NIFLA*, the Supreme Court held that government-scripted disclaimers are inherently content-based.[12] 138 S. Ct. at 2371. There, the plaintiffs challenged

[11] *See, e.g.*, *Wenger*, 427 F.3d at 848.

[12] *NIFLA* held that there were two exceptions to this general rule, neither of which applies here. First, there are certain "health and safety warnings long considered

California's requirement that licensed crisis pregnancy centers give clients notice of services the state provided.[13] *Id*. at 2368–70. According to the Court, because this notice required individuals to "speak a particular message," it "alter[ed] the content" of their speech. *Id*. at 2371. As a result, the notice requirement was content based. *Id*.

Likewise here, the Compelled-Disclaimer Requirement is content-based and thus subject to strict scrutiny. It does not merely require Plaintiffs to provide truthful information in any reasonable manner Plaintiffs see fit, in which case intermediate scrutiny would apply. Instead, it chooses their message right down to the specific font size of their words. And it forces Plaintiffs to reduce the size of their product names, product images, and other messages to which they allocate limited label space to attract consumers. Ex. A ¶¶ 30–31; Ex. B ¶ 16. Thus, the requirement forces them to "alter the content" of their speech in multiple ways and is content-based under *NIFLA*. Because content-based restrictions on speech trigger strict scrutiny, so does the Compelled-Disclaimer Requirement. *See, e.g.*, *Barr v. Am. Ass'n of Political Consultants, Inc*., 140 S. Ct. 2335, 2346 (2020) ("Content-based laws are subject to strict scrutiny.").

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permissible." 138 S. Ct. at 2376. The Compelled-Disclaimer Requirement is not one of these—it does not warn consumers of any "health and safety" risks. Second, there are cases when the Supreme Court's *Zauderer* test applies. *Id*. As discussed in Section I(C)(1), this is not one of those cases; and *NIFLA* disclaims that it is not altering when *Zauderer* applies. *Id*. at 2377 (noting that the Court "need not decide whether the *Zauderer* standard applie[d]" to one of the challenged requirements).

[13] The plaintiffs in *NIFLA* also challenged a separate notice requirement imposed on unlicensed clinics. As discussed in Section I(C)(2), because this requirement failed even the *Zauderer* test, the Supreme Court did not address whether strict scrutiny applied to it.

2. *Defendants Cannot Satisfy Strict Scrutiny*.

Not surprisingly, the government cannot satisfy strict scrutiny. It is a "demanding standard" under which restrictions on speech are presumptively invalid. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011). In the rare cases where the government meets this test, the government must prove that the requirement is narrowly drawn to serve a compelling interest. *Id*. Those extremely unusual cases where the government meets this burden involve weighty issues such as preventing terrorism or preserving the integrity of the judicial system. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010); *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015).

This is not such a case. "It is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000). Here, the government cannot meet this standard.

C. *Zauderer* Does Not Apply Here, But The Government Would Fail It Regardless.

Even if intermediate or strict scrutiny did not apply to the Compelled-Disclaimer Requirement (and they do), Plaintiffs would still be likely to prevail on their First Amendment claim. Under the Supreme Court's *Zauderer* test, compelled corrections of inherently misleading speech are subject to a different test. 471 U.S. at 650–53 (holding that a compelled correction of inherently misleading speech was constitutional if the government could show that it only included "factual and uncontroversial" language, was "reasonably related" to correcting the inherently misleading speech, and was not "unduly

burdensome"). But this test does not apply in this case; and, even if did, the Compelled-Disclaimer Requirement would still violate the First Amendment.

1. *The* Zauderer *Test Is Inapplicable Here*.

As the Supreme Court's cases show, the *Zauderer* test is limited to corrections of inherently misleading speech. There, the plaintiff was an attorney with an inherently misleading advertisement: he promised clients that they would owe "no legal fees" if their lawsuits were unsuccessful, but failed to explain that "legal fees" did not include "significant litigation costs" for which they could still be liable. 471 U.S. at 631, 650. In upholding a mandated correction to this advertisement, the Court explained that, when it came to speech that was inherently misleading, the government need not satisfy *Central Hudson*. *Id*. at 651. In later opinions, the Supreme Court has repeatedly explained that *Zauderer*'s test applies only to compelled corrections of "inherently misleading speech." *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) (applying *Zauderer* because, as "in that case, [the] required disclosures are intended to combat the problem of inherently misleading commercial advertisements"); *Ibanez*, 512 at 146–49 (applying intermediate scrutiny to compelled disclaimer directed at non-misleading speech).[14]

[14] *See also Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., joined by Ginsburg, J., dissenting from denial of certiorari and explaining that even though the Eleventh Circuit was correct to apply *Central Hudson* to compelled disclaimer directed at non-misleading speech, the Justices would have granted certiorari because the Eleventh Circuit was not strict enough on the government).

Because Plaintiffs' speech is not inherently misleading, the *Zauderer* test is inapplicable here. As discussed above, their labels are not inherently misleading because they already clearly mark their products as plant-based. *See supra* 3–6. The Compelled-Disclaimer Requirement is thus subject to intermediate or strict scrutiny rather than the *Zauderer* test.

2. *Even If The* Zauderer *Test Applied, the Compelled-Disclaimer Requirement Would Still Be Unconstitutional*.

Even if the *Zauderer* test applied to the Compelled-Disclaimer Requirement, though, the requirement would still be unconstitutional. That is because, under *Zauderer*, the government still bears the burden of showing that the requirement remedies an actual problem without burdening more speech than necessary.

A similar disclaimer requirement in *NIFLA* is illustrative. *NIFLA*'s second half addressed a requirement that unlicensed facilities provide customers a government-drafted notice stating they were unlicensed. 138 S. Ct. at 2369–70. This latter notice had to be posted "conspicuously," written in 48-point type, at least as big as surrounding text or "otherwise set off [to] draw[] attention to it," and in several languages. *Id*.

The Supreme Court declined to address whether *Zauderer* or heightened scrutiny applied because the government could not meet its *Zauderer* burdens regardless. According to the Court, the disclaimer requirement in *NIFLA* failed *Zauderer* for two reasons. First, the government failed its burden to show that the notice "remed[ied] a harm" that was "'potentially real not purely hypothetical[.]'" *Id*. at 2377 (citing *Ibanez*, 512 U.S. at 146). Because California did not show that consumers were unaware that

unlicensed facilities were unlicensed, its justification for the notice was "purely hypothetical." *Id*. Second, the government failed to meet its burden to show that the notice did not extend "broader than reasonably necessary," rendering it "unduly burdensome." *Id*. Since an unlicensed facility had to (among other things) "call attention to the notice, instead of its own message, by some method such as larger text," the notice was "broader than reasonably necessary" and therefore "unduly burdensome" under the test. *Id*. at 2378.

Just like this requirement in *NIFLA*, the Compelled-Disclaimer Requirement fails *Zauderer* on two counts. First, the government cannot show that any of its alleged consumer-confusion concerns here are more than "hypothetical." *Supra* § I(A)(2). Second, even if Defendants' concerns about Plaintiffs' speech were valid (and they are not), the requirement extends "broader than reasonably necessary." Like the unlicensed notice requirement in *NIFLA*, the Compelled-Disclaimer Requirement mandates the specific content of the text (and even its size). It also unnecessarily crowds out Plaintiffs' other speech. Thus, the Compelled-Disclaimer Requirement would fail *Zauderer* too.

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The government would fail its burdens under any First Amendment standard. As a result, Plaintiffs are likely to prevail on the merits.

II. PLAINTIFFS SATISFY THE REMAINING ELEMENTS FOR A PRELIMINARY INJUNCTION.

The remaining three elements of the preliminary-injunction analysis are also easily met: (1) the suppression of speech is always an irreparable harm; (2) the balance of

equities favors Plaintiffs because Defendants will suffer no harm if Plaintiffs can keep speaking freely during this case; and (3) the public interest favors Plaintiffs because the public has no interest in the suppression of their speech.

As to the irreparable-harm requirement, it is well established in this Circuit that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Verlo*, 820 F.3d at 1126 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Indeed, "when an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012) (citation omitted). Here, because Plaintiffs have shown that they are likely to prevail on their First Amendment claim, Plaintiffs have satisfied the requirement of establishing irreparable harm.

The balance of equities also tips in Plaintiffs' favor. Defendants have no legitimate interest in the continued enforcement of an unconstitutional law. *See Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999); *Doe I v. Parish*, No. 06-CV-0457-CVE-FHM, 2006 WL 8457272, at *5 (N.D. Okla. Sept. 14, 2006) ("The Tenth Circuit has held that the government is not harmed when it is enjoined from enforcing an unconstitutional statute."). Even if the government had an interest in the continued enforcement of the law, the Supreme Court has explained that courts must "give the benefit of any doubt to protecting rather than stifling speech." *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 469 (2007); *see also id.* at 474 ("Where the First Amendment is implicated, the tie goes to the speaker, not the censor.").

Finally, an injunction will serve the public interest because "it is always in the public interest to prevent the violation of a party's constitutional rights." *Verlo*, 820 F.3d at 1126 (quoting *Awad*, 670 F.3d at 1132); *see also Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005) ("Vindicating First Amendment freedoms is clearly in the public interest."). Like Defendants, "the public, when the state is a party asserting harm, has no interest in enforcing an unconstitutional law." *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010). If this Court enjoins Defendants, Plaintiffs could continue to speak freely to potential customers and, as a result, benefit the public.

III. THIS COURT SHOULD SET A BOND AT EITHER ZERO DOLLARS OR A NOMINAL AMOUNT.

Under Federal Rule of Civil Procedure 65(c), this Court may issue a preliminary injunction only if the applicant provides a bond in an amount determined by the Court. This Court, however, may set the bond in whatever amount it finds proper, and the Court may even set the bond at zero dollars if there is no risk of financial harm to the enjoined party. *See Coquina Oil Corp. v. Transwestern Pipeline Co*., 825 F.2d 1461, 1462 (10th Cir. 1987). Here there is no danger Defendants will suffer any financial damage or incur any unrecoverable costs if Plaintiffs continue communicating freely during this case. For these reasons, Plaintiffs request that, if their motion for preliminary injunction is granted, this Court set the bond at either zero dollars or in a nominal amount.

CONCLUSION

For all these reasons, the Court should grant Plaintiffs' motion for preliminary injunction and enjoin the enforcement of Oklahoma's Compelled-Disclaimer

Requirement against Plaintiffs during this litigation. Plaintiffs also request that the Court waive the bond requirement under Federal Rule of Civil Procedure 65(c).

Dated this 16th day of September, 2020

Respectfully submitted,

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**Pro Hac Vice Application To Be Filed*

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, a true and correct copy of the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION** was dispatched to a third-party process server for service to the following Defendants:

Kevin Stitt, in his official capacity as Oklahoma Governor
Office of the Governor
Oklahoma State Capitol
2300 N. Lincoln Blvd.
Oklahoma City, OK 73105

Blayne Arthur, in her official capacity as Oklahoma Commissioner of Agriculture
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