



# KANSAS JUSTICE INSTITUTE

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## Testimony to the House Agriculture Committee

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HB 2530: “AN ACT concerning agriculture; relating to the labeling of certain foods; prohibiting the use of identifiable meat terms on labels of meat analogs without use of proper qualifying language; amending K.S.A. 65-656 and 65-665 and repealing the existing sections.”

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Chairman Rahjes and Members of the Committee:

House Bill Number 2530 implicates the free speech clauses of the First Amendment to the United States Constitution, Section 11 of the Kansas Constitution Bill of Rights, and the dormant Commerce Clause, among other constitutional provisions not discussed here.

Kansas Justice Institute<sup>1</sup> submits this written testimony to provide the Committee with an overview regarding some of the constitutional issues implicated by this government mandated speech. KJI opposes HB 2530 on constitutional grounds.

First, Kansas already prohibits misleading speech. The bill is therefore unnecessary.

### 1. This Compelled-Disclaimer Requirement Raises Serious Free Speech Issues

Next, this bill prohibits the use of the perfectly understandable—and completely accurate—phrases “Soy Burger,” “Bean Burger,” “Plant-Based Burger,” or “Soy Burger Made from Plants,” when describing a burger made from soybeans, other beans, or other plants.<sup>2</sup>

It also prohibits the phrase “Soy Patty,” “Bean Patty,” “Plant-Based Patty,” or “Patty Made from Plants,” when accurately describing a patty made from soybeans, other beans, or other plants.<sup>3</sup>

And it prohibits a label that uses two different fonts or sizes to identify the meatless product even if both fonts are clearly visible, explanatory, and not misleading. So, the following example is prohibited:

**Meatless** Soy Burger.<sup>4</sup>

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<sup>1</sup> KJI is a non-profit, public-interest litigation firm committed to protecting individual liberty and the constitutional rights of all Kansans. It is a part of Kansas Policy Institute.

<sup>2</sup> Using an “identifiable meat term” such as “burger” (Sec. 1, (ff)), requires one of the following: “(A) ‘This product does not contain meat’; (B) ‘meatless’; (C) ‘meat-free’; (D) ‘vegan’; (E) ‘veggie’; (F) ‘vegetarian’; or (G) ‘vegetable’” (Sec. 2, (m)).

<sup>3</sup> That is because “identifiable meat term” uses the phrase “includes, but is not limited to[.]”

<sup>4</sup> “Meatless” in bold, 14-point font, “Soy Burger” in normal, 12-point font.

These are the types of problems that exist when the government mandates speech. As a practical matter, it cannot be done well. As a *constitutional* matter, it cannot be done at all.

The First Amendment and Section 11 of the Kansas Constitutional Bill of Rights protect against these types of government regulations on speech.

In our view, to the extent the bill requires certain words to be used—words chosen from a list, for example—it is a content-based regulation of speech. “Strict scrutiny” should apply, the most stringent review possible, and which virtually no law can survive. But this law would likely fail even under the lesser standard of review outlined in *Central Hudson*.<sup>5</sup> See, e.g., *Miyoko's Kitchen v. Ross*, No. 20-CV-00893-RS, 2021 WL 4497867 (N.D. Cal. Aug. 10, 2021). Other states that have imposed similar mandated speech triggered constitutional litigation.

## 2. This Bill Raises Dormant Commerce Clause Issues

Congress has the power to “regulate commerce ... among the several States.” U.S. Const. art. I, § 8. The Commerce Clause’s offshoot—the dormant Commerce Clause—prohibits states from discriminating or placing excessive burdens on interstate commerce. Braden H. Boucek, *That’s Why I Hang My Hat in Tennessee: Alcohol and The Commerce Clause*, 2018-2019 Cato Sup. Ct. Rev. 119, 124 (2019); see, e.g., *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019).

In our view, this bill impacts the dormant Commerce Clause because it will force out-of-state plant-based businesses to re-design their packaging to address unproven claims regarding consumer confusion. And to the extent there is *some* confusion, this bill imposes an unreasonable and excessive burden in relation to such minimal confusion.

## 3. Conclusion

KJI opposes HB 2530. Government compelled labeling, disclaimers, and speech raise serious constitutional issues. KJI respectfully asks this Committee to carefully consider the issues raised above.

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<sup>5</sup> 447 U.S. 557 (1980).