

Bridging the Law and Grassroots Efforts as an Effective Tactic for Non-Government Organizations to Regulate the use of Tobacco

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“NATURAL” FOOD LABELING: FALSE ADVERTISING AND THE FIRST AMENDMENT

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Currently, the Food and Drug Administration has not stated a regulated definition for the term “natural,” thus resulting in intentional misuse of the term by companies. It is the author’s position that the most equitable outcome for regulation and limitation of the term natural would be achieved by applying the four-prong test set forth in Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of New York. This ensures advancement in the marketplace for healthy foods to help increase in the health of United States citizens. Further, more accurate conclusions are reached through regulation that considers the unique circumstances of each company’s usage of the term as proposed by the test.

The Central Hudson test proposes that the government has a substantial interest in limiting commercial speech if the following are true: (1) the commercial statement is not misleading, (2) the government has a substantial interest in regulation of the commercial statement, (3) it is possible for the regulation to advance from the government’s interest, and (4) the resulting regulation will not be more extensive than necessary to serve the purpose. In the current context, this would allow the government to insist that the usage of the term natural be limited to products deserving of the title by requiring companies to disclose information about the meaning of the term on their packaging or by prompting the Food and Drug Administration to

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reevaluate and redefine the term to reduce deceiving or misleading claims.

Among other cases, an application of the Ninth Circuit's holding in Ass'n of Nat'l Advertisers v. Lungren, the Sixth Circuit's holding in Int'l Dairy Foods Ass'n v. Boggs, and the Northern District of California's holding in Kane v. Chobani, Inc. illustrate the effectiveness of this test. These cases each involve the usage of the term natural or similar marketing buzzwords to advertise products. Considering that the context of companies' misuse of the term natural falls within the zone of interests protected by the Central Hudson test, the government is granted the ability to suspend companies' First Amendment rights to further their interest in advancing the marketplace of healthy foods and increasing the health of United States citizens. Thus, case law leads to a strong presumption that it would be beneficial for Congress to codify the Central Hudson test, which would essentially require the Food and Drug Administration to redefine and regulate usage of the term natural mandating that companies present their products in such a way that is beneficial and not misleading to consumers.

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INTRODUCTION

In *The Omnivore's Dilemma*, Michael Pollan argues that,

Like the hunter-gatherer picking a novel mushroom off the forest floor and consulting his sense memory to determine its edibility, we pick up the package in the supermarket and, no longer so confident of our senses, scrutinize the label, scratching our heads over the meaning of phrases like "heart healthy," "no trans fats," "cage-free," or "range-fed." What is "natural grill flavor" or TBHQ or xanthan gum? What is all this stuff, anyway, and where in the world did it come from?¹

In his eye-opening explanation of the food Americans eat today, Pollan explains, "[T]he pleasures of eating industrially, which is to say eating in ignorance, are fleeting. Many people today seem perfectly content eating at the end of an industrial food chain, without a thought in the world."²

The price of continuing this way of thinking appears a bargain but fails to account for its true cost "charging it instead to nature, to the public health and purse, and to the future."³ To shift this paradigm, there must be a release of information—an explanation and education of what exactly goes into food products—so as to enhance the markets for truly healthy foods

1. MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA*, 5 (Penguin Books, 1st ed. 2006).

2. *Id.* at 11.

3. *Id.* at 410.

and increase the overall health of Americans. While the change is a bold move, which will ultimately require restrictions on food companies' commercial speech, it is a necessary change that will protect the fundamental right we have, as humans, to choose what we eat.

The term "natural" is one of the most widely misunderstood terms advertised on companies' food packages.⁴ To regulate companies' use of the term natural, Congress should codify an exception for commercial speech regulation under the First Amendment as set forth in *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York*.⁵ Following the *Central Hudson* four-prong test, Congress can restrict companies' use of the term as: (1) prior case law has shown that this type of commercial speech is not misleading; (2) Congress has a substantial interest in regulating the speech; (3) the regulation advances directly from Congress's interest; and (4) the proposed regulation is not more extensive than necessary to serve the interest.⁶

This paper focuses entirely on the use of the term natural when advertising food products. In doing so, this paper will discuss how companies use the freedom allocated by the First Amendment to advertise and market their products using the loosely defined and regulated term to promote sales despite the fact that the majority of a product's ingredients may not be derived from natural ingredients or created using natural processes. This paper asserts that Congress should codify the four-prong *Central Hudson* test thereby requiring the Food and

4. Urvashi Rangan, *TEDxManhattan: From Fables to Labels*, TED, (Feb. 6, 2012), <http://tedxtalks.ted.com/video/TEDxManhattan-Urvashi-Rangan-Fr>.

5. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). The U.S. Supreme Court decided whether the New York Public Service Commission violated the electrical utilities' First Amendment rights when it banned promotional advertising of electricity usage ultimately finding the ban unconstitutional. *Id.* at 571-72.

6. *Id.* at 566; Jonathan S. Kahan & Jeffrey K. Shapiro, *The First Amendment and the Food and Drug Administration's Regulation of Labeling and Advertising: Three Proposed Reforms*, 58 *FOOD & DRUG L.J.* 353, 354 (2003) (discussing the appropriate application of *Central Hudson's* four-prong test to the FDA's regulatory requirements).

Drug Administration (FDA) to redefine and regulate use of the term natural as Congress has a substantial interest in advancing the marketplace for healthy food and the health of all Americans.

I. FOOD LABELING HISTORY

The Wiley Act, passed in 1906, “was considered a substantial reform [in food labeling] because it prohibited the adulteration and misbranding of food sold and distributed in interstate commerce.”⁷ However, while the Wiley Act drastically changed the industry’s labeling schemes, it only offered modest reforms: the government was enabled to go to court but no affirmative requirements for compliance were set.⁸ The FDA’s predecessor, the Bureau of Chemistry, “proposed a ‘false and misleading’ provision that would hold industry accountable for its statements about the “disease fighting” properties of a product (known as ‘disease claims’), which Congress adopted in 1912.”⁹

Recognizing the public’s continued concern for unsafe foods, drugs, and marketing schemes, in 1938, Congress enacted the Federal Food, Drug, and Cosmetic Act (FDCA) to replace the Wiley Act.¹⁰ The FDCA enabled the FDA to “promulgate food definitions and standards of food quality [as well as] set tolerance levels for poisonous substances in food [and could] take enforcement action on adulterated and misbranded foods.”¹¹ The FDCA required that specific nutrition information

7. *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 331 (3d Cir. 2009). See MELVIN J. HINICH & RICHARD STAELIN, CONSUMER PROTECTION LEGISLATION AND THE U.S. FOOD INDUSTRY, 6 (Pergamon Press, ed. 1980) (stating, “The act established the Food and Drug Administration (FDA) and is often called the Wiley act after Dr. H. Wiley, a leading champion of pure and safe foods in the ‘progressive era.’”).

8. *Holk*, 575 F.3d at 331.

9. Claudia L. Andre, *What’s in That Guacamole? How Bates and the Power of Preemption Will Affect Litigation Against the Food Industry*, 15 GEO. MASON L. REV. 227, 229-30 (2007) (citing MARION NESTLE, FOOD POLITICS: HOW THE FOOD INDUSTRY INFLUENCES NUTRITION AND HEALTH, 233 (2002)).

10. Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 75-717, 52 Stat. 1040 (1938); *Holk*, 575 F.3d at 331 (citing *United States v. Bhutani*, 266 F.3d 661 (7th Cir. 2001)).

11. *Holk*, 575 F.3d at 331 (quoting *Fellner v. Tri-Union Seafoods, L.L.C.*, 539

be placed on the informational panel or the principal display panel (PDP).¹² Seemingly a step in the correct direction, the FDCA had its shortcomings: neither the FDA nor the FDCA regulations required all food labels provide detailed nutritional information.¹³ In fact, the FDCA only required nutrition labeling when there was a nutrition claim by the manufacturer, such as low-fat or high in fiber.¹⁴

Following the passage of the FDCA, consumer groups continued to express concerns about unsubstantiated health claims on food and beverages, which prompted Congress and the FDA to consider a national labeling law.¹⁵ In 1966, Congress passed the Fair Packaging and Labeling Act (FPLA), which regulated food products under FDA jurisdiction.¹⁶ However, under this Act companies were still not required to receive FDA approval for product labels advertising food products sold to consumers.¹⁷

Over fifty years after the passage of the FDCA and the FPLA, Congress passed the Nutrition Labeling and Education Act (NLEA).¹⁸ The NLEA introduced a number of substantial reforms. First, coverage of nutrition labeling was expanded to encompass all products under the FDA's authority. Next, both the substance and form of ingredient labels were changed. Third, limitations imposed by the NLEA were enacted regarding health claims and finally, the definitions of all nutrient content

F.3d 237, 251 (3d Cir.2008)).

12. PATRICIA CURTIS, FOOD LABELING, GUIDE TO FOOD LAWS AND REGULATIONS 86 (1st ed. 2005).

13. *Holk*, 575 F.3d at 331.

14. *Id.* at 331-32.

15. *Id.* at 332 (citing *Andre*, *supra* note 9, at 232).

16. *Curtis*, *supra* note 12, at 86; 15 U.S.C. § 1451 (2012).

17. *Curtis*, *supra* note 12, at 85.

18. Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990) (codified at 21 U.S.C. § 343(q) & (r) *et seq.* (2014)). The regulations assisting the NLEA are located in 21 C.F.R. § 101.9 (2014); *Curtis*, *supra* note 12, at 85 (stating, "All new regulations are published in the *Federal Register* prior to their effective date and compiled annually in Title 21 of the *Code of Federal Regulations*. Summaries of new regulations (proposed regulations and final regulations) are posted on the FDA's Internet website").

claims and serving sizes were standardized.¹⁹ Today, the NELA ensures that nutrition labeling is displayed on all packaged food products allowing companies to make credible advertising and marketing claims, and to educate a consumer on how a food product fits into his or her diet.²⁰ Failure to comply with the NELA standards, ultimately results in the misbranding of a particular food product.²¹

II. THE FDA'S CURRENT DEFINITION OF NATURAL

Previous case law asserts that it is not a violation of the First Amendment for food companies to use the term natural when advertising their products, as no set definition exists regulating the term.²² For example, the Northern District of California in *Astiana v. Hain Celestial Grp., Inc.* determined that without a definitive FDA definition for the term natural, the court was unable to evaluate whether use of the term was false or misleading.²³ Similarly, the Northern District of California in *Janney v. Gen. Mills* confirmed that the court could not rule on the issue, as it required review of the FDA's nonexistent formal definition or regulations for the term natural.²⁴

While the USDA and FDA have created minimum standards for companies purporting to sell organic food, they do not currently regulate companies' use of the term natural.²⁵ Rather, the USDA's current policy statement of natural is:

[M]eat, poultry, and egg products labeled as "natural" must be minimally processed and contain no artificial

19. *Holk*, 575 F.3d at 332; *The Impact of the Nutrition Labeling and Education Act of 1990 on the Food Industry*, 47 ADMIN. L. REV. 605, 606 (1995).

20. *See Curtis*, *supra* note 12, at 96.

21. *Id.*

22. *See Astiana v. Hain Celestial Grp., Inc.*, 905 F. Supp. 2d 1013, 1016 (N.D. Cal. 2012).

23. *Id.* at 1016.

24. *Janney v. Mills*, 944 F. Supp. 2d 806, 812, 814 (N.D. Cal. 2013).

25. *Nat'l Organic Program*, U.S.D.A. AGRIC. MKTG. SERV., <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateC&leftNav=NationalOrganicProgram&page=NOPConsumers&description=Consumers> (last modified Oct. 17, 2012).

ingredients. However, the natural label does not include any standards regarding farm practices and only applies to processing of meat and egg products. There are no standards or regulations for the labeling of natural food products if they do not contain meat or eggs.²⁶

Similarly, the FDA claims that its current policy statement of natural is,

From a food science perspective, it is difficult to define a food product that is "natural" because the food has probably been processed and is no longer the product of the earth. That said, [the] FDA has not developed a definition for use of the term natural or its derivatives. However, the agency has not objected to the use of the term if the food does not contain added color, artificial flavors, or synthetic substances.²⁷

The FDA's definition of added color/color additive is:

[A]ny material, not exempted under section 201(t) of the act, that is a dye, pigment, or other substance made by a process of synthesis or similar artifice, or extracted, isolated, or otherwise derived, with or without intermediate or final change of identity, from a vegetable, animal, mineral, or other source and that, when added or applied to a food, drug, or cosmetic, or to the human body or any part thereof, is capable (alone or through reaction with another substance) of imparting a color thereto.²⁸

The FDA's definition of "artificial flavoring" is:

[A]ny substance, the function of which is to impart flavor, which is not derived from a spice, fruit or fruit

26. *Id.*

27. *What is the Meaning of 'Natural' on the Label of Food?* U.S. FOOD AND DRUG ADMIN., <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm214868.htm> (last updated Apr. 10, 2014).

28. 21 C.F.R. § 70.3 (2014).

juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy products, or fermentation products thereof. Artificial flavor includes the substances listed in §§ 172.515(b) and 182.60 of this chapter except where these are derived from natural sources.²⁹

Further, natural is not defined in the FDCA, and despite “repeated requests, the FDA has expressly declined to define ‘natural’ in any regulation or formal policy statement.”³⁰ In 1991, a year following the passage of the NLEA, “the FDA solicited comments on a potential rule adopting a definition for the term ‘natural,’ noting that the use of ‘natural’ on food labels ‘is of considerable interest to consumers and industry.’”³¹ During that time, the FDA’s informal policy statement of the term natural meant “nothing artificial or synthetic (including colors regardless of source) is included in, or has been added to, the product that would not normally be expected to be there.”³²

29. 21 C.F.R. § 101.22 (2014). The FDA recognizes the following as safe synthetic flavorings:

Synthetic flavoring substances and adjuvants that are generally recognized as safe for their intended use, within the meaning of section 409 of the Act, are as follows: Acetaldehyde (ethanal), Acetoin (acetyl methylcarbinol), Anethole (paraprophenyl anisole), Benzaldehyde (benzoic aldehyde), N-Butyric acid (butanoic acid), d- or l-Carvone (carvol), Cinnamaldehyde (cinnamic aldehyde), Citral (2,6-dimethyloctadien-2,6-al-8, geranial, neral), Decanal (N-decylaldehyde, capraldehyde, capric aldehyde, caprinaldehyde, aldehyde C-10), Ethyl acetate, Ethyl butyrate, 3-Methyl-3-phenyl glycidic acid ethyl ester (ethyl-methyl-phenyl-glycidate, so-called strawberry aldehyde, C-16 aldehyde), Ethyl vanillin, Geraniol (3,7-dimethyl-2,6 and 3,6-octadien-1-ol), Geranyl acetate (geraniol acetate), Limonene (d-, l-, and dl-), Linalool (linalol, 3,7-dimethyl-1,6-octadien-3-ol), Linalyl acetate (bergamol), Methyl anthranilate (methyl-2-aminobenzoate), Piperonal (3,4-methylenedioxy-benzaldehyde, heliotropin), Vanillin.

21 C.F.R. § 182.60 (2014).

30. *Janney v. Mills*, 944 F. Supp. 2d 806, 811-12 (N.D. Cal. 2013).

31. *Id.* at 812 (quoting Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993) [hereinafter Fat Content Rules]).

32. Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 56 Fed. Reg. 60421, 60466 (Nov. 27, 1991) [hereinafter General

In 1993, spurred by the NLEA, the Secretary of the Department of Health and Human Services, and the knowledge that consumers would benefit from creating a definition for the term natural, the FDA sought to address the definition of the term natural.³³ When questioning whether a formal definition and plan for regulation for the term natural was feasible, the agency concluded that the ambiguity surrounding the use of natural has resulted in misleading claims and could be abated if an adequate definition for the term existed.³⁴ Nonetheless, the FDA recognized that there are "many facets of this issue that the agency [would] have to carefully consider if it undert[ook] a rulemaking to define the term 'natural,' [which it refused to do because] of resource limitations and other agency priorities."³⁵

Unfortunately, today "[t]he word 'natural' is often used to convey that a food is composed only of substances that are not manmade and is, therefore, somehow more wholesome."³⁶ Companies use this lack of regulation to advertise their products as natural despite the fact that the majority of the product is not completely composed of natural ingredients or is processed in such a way that no longer deems the product worthy of a natural advertisement.³⁷ However, the FDA has been known to issue warning letters to companies using the term natural in their product labels for foods that contain specific preservatives.³⁸ For example, on August 16, 2001, the FDA sent a warning letter to Oak Tree Farm Dairy, which stated:

The term 'all natural' on the "OAKTREE ALL NATURAL LEMONADE" label is inappropriate because the product contains potassium sorbate. Although FDA has not established a regulatory

Principles]).

33. Fat Content Rules, *supra* note 31, at 2407.

34. *Id.*

35. *Id.*

36. *Holk v. Snapple Bev. Corp.*, 575 F.3d 329, 332 (3d Cir. 2009) (quoting General Principles, *supra* note 32, at 60466.

37. *See Rangan*, *supra* note 4.

38. *Janney v. Mills*, 944 F. Supp. 2d 806, 812 (N.D. Cal. 2013).

definition for 'natural,' we discussed its use in the preamble to the food labeling final regulations (58 Federal Register 2407, January 6, 1993, copy enclosed). FDA's policy regarding the use of "natural," means nothing artificial or synthetic has been included in, or has been added to, a food that would not normally be expected to be in the food. The same comment applies to use of the terms '100 % NATURAL' and "ALL NATURAL" on the 'OAKTREE REAL BREWED ICED TEA' label because it contains citric acid.³⁹

On August 29, 2001, the agency submitted a similar warning letter to the Hirzel Canning Company, stating that it inappropriately used the term "all natural" to describe its canned tomatoes as calcium chloride and citric acid were listed as added ingredients.⁴⁰ Finally, on November 16, 2011, the FDA sent a warning letter to Alexia Foods, stating that the company's use of the phrase to describe its Roasted Red Potatoes & Baby Portabella Mushrooms misbranded the product as they contained disodium dihydrogen pyrophosphate, a synthetic chemical preservative.⁴¹

The agency concluded each warning letter with a recommendation that each company review its product labels to avoid additional misbranding of its food products.⁴² These warning letters have been viewed as a step in the right direction as they suggest that the FDA is adequately regulating use of the term. In fact, food companies, similar to General Mills, have stated, "these letters show that the FDA routinely makes considered, expert judgments about what products and food labels warrant administrative action for non-compliance [sic]

39. *Id.* (emphasis in original).

40. *Id.* at 812, 814; Fat Content Rules, *supra* note 31, at 2407.

41. *Id.* at 813 (noting that the FDA also claimed the addition of synthetic preservatives "misbranded within the meaning of section 403(a)(1) of the Act [21 U.S.C. 343(a)(1)], which states that a food shall be deemed to be misbranded if its labeling is false or misleading in any particular."

42. *Id.* at 813.

with its informal policy."⁴³ This is a misguided view as the agency has only targeted a small portion of companies misusing the term natural with these warning letters; the same amount of products continue to be sold on a daily basis baring the incorrect use of the label.⁴⁴ Nevertheless, in reaction to numerous lawsuits challenging the use of the term, food companies are just beginning to consider removing the term from their food packaging.⁴⁵

III. WHY THE FDA'S LACK OF DEFINITION HAS PREVIOUSLY PREVENTED COURTS FROM RULING ON THIS ISSUE

A. THE LANHAM ACT AND STANDING TO BRING SUIT

The Lanham Act (the Act), enacted in 1946, authorizes companies or individuals to bring suit in the event that damage results from false or misleading descriptions or representations of products sold by competing companies.⁴⁶

While extremely helpful in preventing companies from misusing terms to advertise or market their products, case law

43. *Id.* at 812.

44. See Mike Esterl, *Some Food Companies Ditch 'Natural' Label*, WALL ST. J., Nov. 6, 2013, <http://online.wsj.com/news/articles/SB10001424052702304470504579163933732367084>.

45. *Id.*

46. 15 U.S.C § 1125(a) (2012). The Act works to prevent false advertising by allowing:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which —

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Id.

warns that the Act may not be used to undermine FDA authority.⁴⁷ Therefore, while the Act aids in the filing of suits against competitor companies misusing the term natural to promote sales, courts are limited in the ability to propose an alternative definition or regulation for the use of the term.⁴⁸

For example, "*PhotoMedex* teaches that the Lanham Act may not be used as a vehicle to usurp, preempt, or undermine FDA authority."⁴⁹ In *PhotoMedex*, the manufacturer of a medical device claimed that its competitor breached the Lanham Act by advertising FDA approval.⁵⁰ Because the FDA previously approved a similar product, the Court barred the claim refusing to usurp the FDA's authority.⁵¹ This case illustrates the limitations of private individuals and companies'.⁵²

PhotoMedex's progeny has applied its holding in similar cases such as the Fourth Circuit's holding in *Mylan Labs., Inc. v. Matkari*, which confirmed that "courts have agreed that the FDCA limits claims under the Lanham Act."⁵³ A plaintiff may not, for example, sue under the Lanham Act to enforce the FDCA or its regulations because allowing such a suit would undermine Congress's decision to limit enforcement of the FDCA to the federal government.⁵⁴

The United States Supreme Court took a direct stance on this issue in *POM Wonderful LLC v. Coca-Cola Co.*⁵⁵ In the lower

47. See *PhotoMedex, Inc. v. Irwin*, 601 F.3d 919, 924 (9th Cir. 2010) ("Because the FDCA forbids private rights of action under the statute, a private action brought under the Lanham Act may not be pursued when, as here, the claim would require litigation of the alleged underlying FDCA violation in a circumstances where the FDA has not yet itself concluded that there was such a violation.").

48. E.g., *PhotoMedex*, 601 F.3d at 924; *POM Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170, 1175-1176 (9th Cir. 2012). This article later discusses the Supreme Court's decision to overturn the ninth circuit's holding in *POM Wonderful*.

49. *Id.*

50. *PhotoMedex*, 601 F.3d at 923.

51. *Id.* at 930-31.

52. See *PhotoMedex*, 601 F.3d at 924.

53. *POM Wonderful*, 679 F.3d at 1175-6; See, e.g., *Mylan Labs., Inc. v. Matkari*, 7 F.3d at 1139.

54. *POM Wonderful*, 679 F.3d at 1175-6.

55. *POM Wonderful LLC v. Coca-Cola Co.*, No. 12-761, slip op. (S. Ct. June 12, 2014).

court, POM Wonderful argued that Coca-Cola violated the Lanham Act's false-advertising provision by misnaming, mislabeling, and falsely advertising and marketing a juice product.⁵⁶ That case affirmed the Ninth Circuit's holding in *PhotoMedex* by "resolv[ing] not 'to usurp the FDA's prerogative'" when questioning whether a competitor juice company's advertisements violated the Lanham Act.⁵⁷ While POM Wonderful did not challenge Coca-Cola's use of the term natural, as no such claim was made on the product packaging, it did argue against similar name and labeling claims.⁵⁸

At the circuit level, POM Wonderful further contended that Coca-Cola's use of misleading labels permitted "(1) Coca-Cola [to] give its product a name that refers to juices that provide the characterizing flavor, and [that] (2) those juices need not be predominant by volume if Coca-Cola states that those juices are not predominant."⁵⁹ As a progeny of *PhotoMedex*, the Ninth Circuit found that ruling on POM Wonderful's challenge to Coca-Cola's juice named "POMegranate Blueberry Flavored Blend of 5 Juices" would require the court to undermine the FCDA's regulations and authority.⁶⁰ In response, the Ninth Circuit held "that the FDCA and its regulations bar pursuit of both the name and labeling aspects of POM [Wonderful]'s Lanham Act claim."⁶¹

In doing so, the Ninth Circuit essentially established the FDA's controlling authority in determining the amount of regulation necessary to prevent deception from a company's packaging explaining that "under [the court's] precedent, for a court to act when the FDA has not . . . would risk undercutting

56. *POM Wonderful*, 679 F.3d at 1174.

57. *Id.* at 1176 (citing *PhotoMedex*, 601 F.3d at 928).

58. *Id.* at 1172.

59. *Id.* at 1177.

60. *Id.*

61. *Id.* at 1176. Accordingly, the Court in *Pom Wonderful* ultimately affirmed the lower court's award of summary judgment, which barred Pom Wonderful's Lanham Act claim against Coca-Cola Company's use of misleading terminology to market a juice product. *Id.* at 1179.

the FDA's expert judgments and authority."⁶² In other words, if the FDA considered regulation of a term necessary, to ensure that it could be understood by the ordinary individual.⁶³

Surprisingly, the United States Supreme Court's review of the case held that "the FDCA and the Lanham Act complement each other in the federal regulation of misleading labels [as] Congress did not intend the FDCA to preclude [the] Lanham Act suits like POM's."⁶⁴ Justice Kennedy clarified this opinion stating that the FDCA "does not preclude Lanham Act suits. In consequence, food and beverage labels regulated by the FDCA are not, under the terms of either statute, off limits to Lanham Act claims."⁶⁵ Justice Kennedy explained that the FDA and the Lanham Act "complement each other," and that "it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other."⁶⁶

Indicating that while the two statutes are to work in unison, the opinion also illustrated that each statute "has its own scope and purpose" explaining that "the Lanham Act protects commercial interests against unfair competition, while the FDCA protects public health and safety."⁶⁷ As the two statutes have distinct purposes, "if Lanham Act claims were to be precluded then commercial interests—and indirectly the public at large—could be left with less effective protection in the food and beverage labeling realm than in many other, less regulated industries."⁶⁸

Highlighting that "[i]t is unlikely that Congress intended the FDCA's protection of health and safety to result in less

62. *Id.* at 1177.

63. 21 U.S.C. § 343(f) (2012).

64. *POM Wonderful LLC v. Coca-Cola Co.*, No. 12-761, slip op. at 17 (S. Ct. June 12, 2014).

65. *Id.* at *9.

66. *Id.* at *11 (citing *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001) (stating "we can plainly regard each statute as effective because of its different requirements and protections")).

67. *Id.*

68. *Id.* at *12.

policing of misleading food and beverage labels," that case ultimately transforms older precedent, by granting lower courts the ability to acknowledge instances where companies have purposely attempted to mislead consumers.⁶⁹ While the Supreme Court's holding in *POM Wonderful LLC v. Coca-Cola Co.* may grant lower courts the ability to limit a company's use of the term natural in a misleading manner, it does not directly grant the courts the ability to propose a manageable definition that will regulate all food companies' use of the term indefinitely.⁷⁰

Similarly, additional precedent shows that individuals have standing to bring these types of claims.⁷¹ In *Astiana v. Ben & Jerry's Homemade, Inc.*, consumers sued Ben & Jerry's Homemade, Inc. [hereinafter Ben & Jerry's] after buying products advertised as all natural when in fact they contained processed ingredients.⁷² The consumers argued that Ben & Jerry's alkalized cocoa was processed with potassium carbonate, synthetic, man-made ingredient and not natural.⁷³

The consumers claimed that they consciously pay a premium for all natural foods and consistently abstain from purchasing foods not derived from natural ingredients or processes; ultimately they relied on the representation that the ice cream was all natural.⁷⁴ Ben & Jerry's refuted these arguments by insisting that the terms all natural and natural are terms of art.⁷⁵ Ben & Jerry's further argued that in order for a consumer to be deceived by the labeling on its packaging, the consumer would need to be familiar with the policy statement of the term natural set forth by the FDA; recognize that the term all natural was used on the package; consider that the use of this

69. *Id.*

70. *See Id.*

71. 15 U.S.C. § 1125(a) (2012).

72. *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387, 2011 U.S. Dist. WL at *2. (describing additional fraud and false advertising claims brought by consumers).

73. *Id.*

74. *Id.* at *8.

75. *Id.*

term indicated that Ben & Jerry's use of alkali in the Dutch cocoa ingredient was natural; and finally, rely on the claim, all natural, when choosing to purchase the product.⁷⁶

The court disagreed with this proposed four-prong test, which ultimately evaluates two elements: (1) whether average consumers are prone to deception, and (2) if a reasonable consumer "would assume the words 'all natural' on the label meant 'alkalized with sodium carbonate and not potassium carbonate.'" ⁷⁷ While the court refused to analyze whether the all-natural claim on the packaging was fraud under FDA regulation, it did find that the consumers alleged enough facts to maintain a 12(b)(6) motion of fraud thereby confirming that individuals have standing to bring these types of claims.⁷⁸

B. PRIMARY JURISDICTION

Similar to the Ninth Circuit's holding in the Lanham Act lawsuits, primary jurisdiction restricts courts from usurping the FDA's authority when evaluating whether the use of the term natural is misleading to consumers.⁷⁹ Primary jurisdiction, which does not involve jurisdiction at all, is predicated on judicial restraint.⁸⁰ The Supreme Court recognized "in the development of administrative agencies that coordination between traditional judicial machinery and these agencies was necessary if consistent and coherent policy were to emerge."⁸¹ This Court has "redefined the doctrine of primary jurisdiction" to specifically apply "to a claim properly cognizable in court— i.e. a claim over which a court has subject-matter jurisdiction— where the claim, or some portion of it, lies within the

76. *Id.* at **8-9.

77. *Id.* at *9.

78. *Id.* at *18.

79. *See* *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970) (citing *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 441 (1907)).

80. James W. Hilliard, *Tapping Agency Expertise: The Doctrine of Primary Jurisdiction*, 96 ILL. B.J. 256, 257 (2008).

81. *Port of Boston Marine Terminal Ass'n*, 400 U.S. 62 at 68.

competence of an administrative agency."⁸² If primary jurisdiction applies, referral of the issue to the agency stays "further proceedings, and provides the parties a reasonable opportunity to seek an administrative ruling."⁸³

In the realm of food labeling, primary jurisdiction was a central issue in *Astiana v. Hain Celestial Grp.*⁸⁴ In that case, the court evaluated whether Hain Celestial's use of the terms "all natural," "pure natural," and "pure, natural & organic" on cosmetic product labels were false or misleading due to the artificial and/or synthetic materials contained in all of the products.⁸⁵ Since the court found no definitive FDA definition for the term natural, it refused to decide whether use of the term was false or misleading; it would risk undercutting the FDA's expert authority and judgments.⁸⁶

Similarly, in *Janney v. Gen. Mills*, the Northern District of California evaluated whether Janney's claim that advertisements and packaging of Nature Valley products, primarily granola bars, sold and manufactured by General Mills were misleading or deceptive as the granola bars were labeled as natural even though they contained "high fructose corn syrup (HFCS), high maltose corn syrup (HMCS), and/or maltodextrin and rice maltodextrin (Maltodextrin)."⁸⁷ Janney argued that each ingredient was highly processed and use of the term was deceptive and confusing to consumers and should be reserved for products that are minimally processed and do not contain synthetic or artificial ingredients.⁸⁸

Janney also contended that the name, Nature Valley, as well as the images of nature posted on the company's website and

82. Hilliard, *supra* note 80, at 257.

83. *Id.*

84. *Astiana v. Hain Celestial Grp. Inc.*, 905 F. Supp. 2d 1013, 1016-17 (N.D. Cal. 2012).

85. *Id.* at 1014.

86. *Id.* at 1016.

87. *Janney v. Mills*, 944 F. Supp. 2d 806, 809 (N.D. Cal. 2013).

88. *Id.*

accompanying social media, reinforced the idea of naturalness.⁸⁹ By asserting, Janney argued that General Mills sought to “capitalize on consumers’ preference for all-natural foods and the association between such foods and a wholesome way of life.”⁹⁰ Janney supported this argument by stating that she was originally driven to purchase the granola bars in an attempt to “consume all-natural foods for reasons of health, safety, and environmental preservation,” because she believed that “all-natural foods contain only ingredients that occur in nature or are minimally processed, and they would not include HFCS, HMCS, and Maltodextrin among such ingredients.”⁹¹

General Mills argued food products labeled as natural was under the FDA’s regulatory authority and as such dismissal was proper when applying the four-prong test of primary jurisdiction.⁹² The doctrine applied when “(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration.”⁹³

General Mills supported this argument by asserting that Janney’s claim required the court to determine: (1) whether the term natural on the Nature Valley packaging was misleading or false; (2) that food labeling is an issue that Congress has placed within the primary jurisdiction of the FDA; (3) that labels are unquestionably “subject to comprehensive regulatory authority by the FDA (and that under that authority, the FDA has adopted a ‘policy’ for the use of ‘natural,’ which it enforces through

89. *Id.*

90. *Id.*

91. *Id.* at 809-10.

92. *Id.* at 811.

93. *Id.* (citing *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114-15 (9th Cir. 2008); *see also*, *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002)) (“relevant factors are whether agency determination lies at the heart of task assigned to agency by Congress; whether agency expertise is required to unravel intricate technical facts; whether the agency determination would materially aid the court”).

administrative action); and that the FDA's enforcement of its 'natural' policy for food labeling is an issue that requires the agency's expertise and uniformity in administration."⁹⁴

General Mills also claimed that the FDA's warning letters to companies in violation of use of terms of art, illustrate the FDA's enforcement of its policy, and that any action on behalf of the court to "usurp the agency's role and decide for itself whether any such action is appropriate 'would risk undercutting the FDA's expert judgments and authority.'"⁹⁵ Janney responded that since the case only challenged whether the food labels were misleading, a question not answered solely by FDA expertise, she was not requesting the court to define the term natural, but rather to rule on a question of state law: if the marketing General Mills used to advertise its Nature Valley products misled reasonable consumers.⁹⁶

The court determined that the question of whether ingredients in foods advertised as natural involves referencing the FDA's regulation, which ultimately requires the FDA's expertise and uniformity in administration.⁹⁷ Therefore, the court relied on the Ninth Circuit's holding in *POM Wonderful* and *Hain Celestial* to justify the denial of Janney's motion, based on primary jurisdiction grounds, asserting that the court was not entitled to rule on an issue dealing with the FDA's expertise; "dismissal in deference to that agency is the proper result—even if no formal regulation has been adopted."⁹⁸

Similarly in *Brazil v. Dole Food Co.*, Dole Food urged the court "to let the FDA do its job," and to stay or dismiss the case instead of creating 'a patchwork of court-made labeling law in an attempt to combat Brazil's assertion that its food labels were deceptive to consumers.⁹⁹ Nonetheless, the court found Brazil's

94. *Janney*, 944 F. Supp. 2d at 811.

95. *Id.* at 813.

96. *Id.* at 814.

97. *Id.*

98. *Id.* (citing *POM Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170, 1177 (9th Cir. 2012)).

99. *Id.*

claim could be resolved on the FDA's existing definitions.¹⁰⁰ Therefore, the court retained jurisdiction and permitted the case to advance based on the fact that no FDA regulations would be created or overruled, as they would merely be evaluated.¹⁰¹

Brazil v. Dole Food Co. essentially illustrates that it is possible for courts to compare the commercial speech in question to the FDA definitions and regulations. Presumably anything beyond mere comparison of speech to the FDA definitions and regulations, such a development of an applicable definition, would not be permitted, as these types of evaluations would require courts to override the FDA's expertise and authority which primary jurisdiction seemingly restricts.

C. PREEMPTION

Preemption is a doctrine that identifies certain issues of national character as so important that federal law preempts over state or local law.¹⁰² Preemption occurs in three situations: (1) federal law expressly preempts a specific provision; (2) courts conclude that Congress intended total preemption; or (3) a federal and state law conflict.¹⁰³ Prior case law suggests that mere comparison of the use of the term natural to the FDA's policy statement is not preempted, thereby allowing courts to rule on its use.¹⁰⁴ Additionally, "Given that (1) regulating the proper marketing of food has traditionally been within states' historic police powers, and (2) there is no clear indication from Congress that, in the process of attempting to strengthen and unify nutrition food labeling, it intended to preclude states from affording state consumers protection from misbranded food products."¹⁰⁵

100. *Id.* at 960.

101. *Id.*

102. *Andre, supra* note 9, at 234. Under this doctrine, neither a state nor local authority may pass a law inconsistent with federal law. *Id.*

103. *Id.*

104. *See Holk v. Snapple Bev. Corp.*, 575 F.3d 329, 342 (3d Cir. 2009); *see also, Brazil v. Dole Food Co.*, 935 F. Supp. 2d 947, 959 (N.D. Cal. 2013).

105. *Brazil*, 935 F. Supp. 2d at 958.

This is visible most notoriously in *Holk v. Snapple Beverage Corp.*, where the Third Circuit evaluated whether an individual's claim that Snapple Beverage's use of the term all natural on its product-packaging label was preempted and found that the FDA's authority does not have the ability to preempt conflicting state law.¹⁰⁶ In that case, the Third Circuit neglected to evaluate the issue of primary jurisdiction merely concluding that Holk's claim was not preempted.

Holk sued Snapple Beverage, a manufacturer of juice and tea beverages, alleging several claims: Snapple products contained HFCS and therefore were not "All Natural." In addition, the beverages were not "Made from the Best Stuff on Earth" and some beverages were falsely labeled, for example, the Acai Blackberry Juice, despite the absence of acai berry juice or blackberry juice.¹⁰⁷ The case was subsequently removed to federal court.¹⁰⁸

Snapple Beverage argued that preemption applied to Holk's claim because it stood as an obstacle to federal law; the FDA had a policy statement for the term natural and that the policy would be challenged by Holk's suit that involved evaluating conditions of the term not yet determined by the FDA.¹⁰⁹ Snapple Beverage supported this argument, claiming that state law was required to yield to any federal authority that generates constant standards—the FDA in this case.¹¹⁰ Holk countered that Snapple Beverage waived its right to express preemption as it did not introduce the claim in District Court.¹¹¹ Additionally, the state causes are not "an obstacle to federal objectives because there are no federal requirements in place regarding the term

106. *Holk*, 575 F.3d at 332, 342.

107. *Id.* at 332-33. Holk's claims were based on the New Jersey Consumer Fraud Act, breach of express warranty, breach of the implied warranty of merchantability, and unjust enrichment and common law restitution *Id.*

108. *Id.* at 331.

109. *Id.* at 339 (addressing the absence of a definition for the term "natural" provided by the FDA).

110. *Id.* at 339-40.

111. *Id.* at 335.

natural.”¹¹² Moreover, her claim did not “conflict with federal law because, even if she obtained a favorable verdict, Snapple Beverage would not be required to undertake a specific corrective action.”¹¹³

After careful evaluation, the Third Circuit determined FDA’s policy statement on use of the term natural did not have a preemptive effect because the FDA knew that a relevant and applicable definition was “of considerable interest to consumers and industry,” and refused to generate such a definition.¹¹⁴ The court further stated that, “[a]s a result, there is no conflict in this case because there is no FDA policy with which state law could conflict.”¹¹⁵ The court supported this conclusion by stating that, “a search of the *Federal Register* results in neither earlier references to this policy nor other requests for comments [from concerned citizens] on the use of the term ‘natural,’” and because “the FDA did not appear to consider all the comments received,” “the record demonstrates that the FDA arrived at its policy without the benefit of public input.”¹¹⁶ The court also stated, “that if the term ‘natural’ [was] adequately defined, the ambiguity surrounding use of this term that results in misleading claims could be abated.”¹¹⁷ Nonetheless, since the FDA has declined to define the term, there is continued lack of

112. *Id.* 339-40 (internal quotations omitted).

113. *Id.* at 340.

114. *Id.* (citing Fat Content Rules, *supra* note 31 at 2397). “Because the District Court found that *Holk*’s claims were preempted, it did not address Snapple’s primary jurisdiction argument . . .” *Id.* at 342 n.2. Because *Holk v. Snapple* remains an outlier among precedence, it is highly presumable that had the Third Circuit directly questioned the issue of primary jurisdiction, it would not have permitted the claim to advance based on the fact that the court would have had to rule on *Holk*’s challenge which involved the interpretation of the term “natural.” See *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) (stating “[b]ecause of resource limitations and other agency priorities, FDA is not undertaking rulemaking to establish a definition for ‘natural’ at this time”).

115. *Holk*, 575 F.3d at 342.

116. *Id.* at 341. Most importantly, the court noted that an important comment ignored by the FDA “questioned whether restrictions on the use of ‘natural’ could raise First Amendment concerns,” and the “FDA did not respond to this comment, as it declared it moot in light of its decision not to proceed with a definition.” *Id.* (citing Fat Content Rules, *supra* note 31 at 2397).

117. *Id.*

support for a preemption argument.

Therefore, as prior case law shows, claims against companies' use of the term natural are not preempted based on the fact that states have the right to regulate the use of the term within the FDA's current policy statement. Further, the holdings in *Holk* and *POM Wonderful* both propose an excellent avenue to circumvent the primary jurisdiction bar for courts by stating that when a government agency fails to address issues of material importance to the general public, the courts may address the issue.¹¹⁸ Since the FDA has declined to define the term natural, and because a definition is of considerable interest to both consumers and the food production industry, this lack of regulation may allow courts to restrict the use of the term beyond the FDA's current policy statement. Nevertheless, it remains imperative that Congress takes action to redefine the term to ensure that all claims are successfully regulated in court.¹¹⁹

IV. PRIOR CASE LAW REGULATING COMMERCIAL SPEECH UNDER THE FIRST AMENDMENT

Primary jurisdiction and preemption usually prevent courts from usurping the FDA's authority when comparing whether use of the term is misleading beyond the current policy statement of the term. To circumvent this issue, an analysis of the United States Supreme Court's holding in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York* clarifies that Congress has a substantial interest in regulating commercial speech.¹²⁰ In doing so, the Court adopted a four-prong test

118. *Id.* at 342; *see generally*, *POM Wonderful LLC v. Coca-Cola Co.*, No. 12-761, slip op. at 17 (S. Ct. June 12, 2014).

119. Glen G. Lammi, *Class Actions Challenging Use of 'Natural' on Food Labels Begin to Founder*, FORBES, (NOV. 4, 2013), <http://www.forbes.com/sites/wlf/2013/11/04/class-actions-challenging-use-of-natural-on-food-labels-begin-to-founder> (describing how preemption arguments would fail as the FDA has no regulated definition).

120. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-562 (1980); *see Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 636 (6th Cir. 2010) (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 374-375 (1977))

which analyzes whether the government has the ability to restrict commercial speech under the First Amendment, finding that: "(1) it must concern lawful activity and not be misleading; (2) the government's interest must be substantial; (3) the regulation must directly advance the government's interest; and (4) it must not be more extensive than necessary to serve the interest."¹²¹ In the current context, this would allow Congress to insist that use of the term natural be limited to products deserving of the current policy statement. This would require companies to disclose information about the meaning of the term on a product's packaging or by prompting the FDA to reevaluate and redefine the term to reduce deceiving or misleading claims.

Appropriately, when commercial speech is distinctively misleading, it is traditionally not granted the protections offered by the First Amendment.¹²² For example, in *Int'l Dairy Foods Ass'n v. Boggs*, the Sixth Circuit noted that the lower court correctly:

[C]oncluded that the composition claims were misleading and therefore not entitled to any First Amendment protection. "Misleading advertising may be prohibited entirely," including where the speech is "inherently likely to deceive or where the records indicates that a particular form or method of advertising has in fact been deceptive."¹²³

(addressing application of the *Central Hudson* test and claiming that in these circumstances the "preferred remedy is more disclosure, rather than less" as "it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision").

121. Kahan & Shapiro, *supra* note 6, at 354. (citing *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566).

122. See Sorrell v. IMS Health Inc., 131 S.Ct. 2653, 2674 (2011) (citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996)(opinion of Steven, J.); *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-2 (1976) (describing cases in which misleading or deceptive speech is not protected under the First Amendment).

123. *Boggs*, 622 F.3d at 636 (citing *In re R.M.J.*, 455 U.S. 191, 202-03 (1982)).

In that case, the court upheld Congress's ability to "prevent the dissemination of commercial speech that is false, deceptive, or misleading," based on the fact that if testing would detect the presence of substances proclaimed to be missing in the product, then the claims on the packaging would be inherently false, deceptive, and misleading.¹²⁴

Likewise, in *Williams v. Gerber Prods. Co.*, the Ninth Circuit directly questioned whether the First Amendment protected Gerber's commercial speech, specifically advertising its fruit snacks for children, which claimed that the snacks were made "with fruit juice and other all natural ingredients" on the packaging.¹²⁵ In that case, the consumers brought two deception claims: (1) Gerber deceived its customers with its product packaging, which used the words "fruit juice" and pictures of fruits, including peaches, strawberries, cherries, and oranges when the fruit snacks did not contain fruit juice from the fruits featured; and (2) the packaging described the snack as made "with real fruit juice and other all natural ingredients" even though the first two ingredients listed on the nutrition label were corn syrup and sugar.¹²⁶

In weighing this issue, the court evaluated whether a reasonable consumer would look past the misleading claims on the front of the packaging to determine whether the small print ingredient label on the side of the box matched the advertisement claims.¹²⁷ While the court found that the ingredient list complied with FDA regulations, it also concluded that the FDA's intent in requiring an ingredient list was not to permit companies from correcting or shielding themselves from liability of the false or misleading claims purported on front of the box.¹²⁸

As the court found that a reasonable consumer would

124. *Id.* at 636, 638 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985)).

125. *Williams v. Gerber Products Co.*, 552 F.3d 934, 936 (9th Cir. 2008).

126. *Id.*

127. *Id.*

128. *Id.* at 939.

presume that an ingredient list would merely confirm the representations made on the front of the packaging, the court held that a reasonable consumer could be deceived by the advertisements.¹²⁹ This holding is furthered by the results of studies illustrating that consumers would have to read data safety sheets filed with the United States government to know exactly which ingredients are in a particular food product.¹³⁰

V. ANALYSIS OF THE *CENTRAL HUDSON* APPROACH

As previously argued, since primary jurisdiction has prevented courts from usurping the FDA's authority by evaluating the term's definition beyond the scope of the current policy statement, Congress should codify the *Central Hudson* four-prong test to regulate commercial speech when using the term natural in advertising their products. Congress may do so as (1) courts have previously held that use of the term may not be misleading to consumers because the FDA has not defined the term; (2) Congress has a substantial interest in regulating the term; (3) regulation will advance directly from this interest; and (4) regulation will not be more excessive than necessary to serve Congress's interest.

A. PRONG ONE: THE SPEECH IN QUESTION MUST NOT BE MISLEADING

Prong one for the test requires that the speech in question is lawful and not misleading.¹³¹ While courts have previously held that the term natural could be misleading, a majority of courts find use of the term not to be misleading; the issue may be preempted if the courts are required to question whether a

129. *Id.* at 939-40.

130. Stephanie Strom, *Lawyers From Suits Against Big Tobacco Target Food Makers*, N.Y. TIMES, Aug. 18, 2012, available at http://www.nytimes.com/2012/08/19/business/lawyers-of-big-tobacco-lawsuits-take-aim-at-food-industry.html?pagewanted=all&_r=0.

131. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

specific product is outside the realm of the FDA's current policy statement.¹³²

In *Int'l Dairy Foods Ass'n v. Boggs*, the Sixth Circuit reversed the lower court's decision holding the composition claims about the ingredients in milk as inherently misleading because it implied a compositional difference between conventional milk and milk manufactured with rbST, thereby violating the FDA's finding that no measurable difference existed between the two.¹³³ The court's reasoned that a compositional claim for conventional milk, milk produced with rbST, does not exist because conventional milk has been found to contain levels of IGF-1, insulin-like growth factor-1 and may be of poorer quality of nonconventional milk.¹³⁴ Further, the court insisted that labeling milk as "rbST free" creates "a meaningful distinction between conventional . . . milk and at worst potentially misleads [consumers] into believing that a compositionally distinct milk adversely affects their health."¹³⁵ Therefore, the court found that based on those circumstances, the compositional claim "rbST free" was "not inherently misleading."¹³⁶

In *Kane v. Chobani, Inc.*, consumers claimed Chobani's

132. See *POM Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170 (9th Cir. 2012).

133. 622 F.3d at 636.

134. *Id.*; see also, *The Surgeon General, Bone Health and Osteoporosis: A Report of the Surgeon General, Chapter Two: Key Messages*, 1, 29, DEP'T. OF HEALTH AND HUMAN SERVS., http://www.dsls.usra.edu/meetings/bonehealth_2005/SG_full_report.pdf

It acts by stimulating the production of another hormone called insulin-like growth factor-1 (IGF-1), which is produced in large amounts in the liver and released into circulation. IGF-1 is also produced locally in other tissues, particularly in bone, also under the control of growth hormone. The growth hormone may also directly affect the bone—that is, not through IGF-1. Growth hormone is essential for growth and it accelerates skeletal growth at puberty. Decreased production of growth hormone and IGF-1 with age may be responsible for the inability of older individuals to form bone rapidly or to replace bone lost by resorption. The growth hormone/IGF-1 system stimulates both the bone-resorbing and bone-forming cells, but the dominant effect is on bone formation, thus resulting in an increase in bone mass.

Id.

135. *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 637 (6th Cir. 2010).

136. *Id.* (*but c.f.* *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 73 (2d Cir. 1996) (describing how rBST does not cause harm to consumers thereby illustrating the circuit split).

products, specifically “Chobani Greek Yogurt” were mislabeled and falsely advertised as “all natural” with “no sugar added” even though evaporated cane juice (ECJ), fruit and vegetable juice, and turmeric were listed on the ingredient list.¹³⁷ The court organized the consumers’ claim into two separate allegations: (1) “ECJ Allegations” and (2) “All Natural Claims”.¹³⁸

The consumers argued the following: (1) before purchasing Chobani’s yogurt products, the consumers believed the yogurt only contained natural sugars from milk and fruit not added syrup or sugar ingredients; (2) they read the ingredient list prior to their purchase; and (3) they would not have bought Chobani’s products if they were made aware of the ECJ or other unnatural ingredients contained within the yogurt.¹³⁹ The court reasoned that because the consumers admitted to reading the products’ labels, which “disclosed the presence of fruit or vegetable juice concentrate” reasonable consumer plausibly could be aware of the added ingredients, thereby dismissing the all natural claim.¹⁴⁰

The court’s holding in *Chobani, Inc.* essentially indicates that companies’ use of the term natural is not misleading as there is no statute or strict FDA definition because the current policy definition is not inherently misleading.¹⁴¹ This allows companies to make compositional claims based on the ingredients in their products if they clearly state the actual ingredients contained in a product on a package’s ingredient list. Therefore, due to this relevant case law, prong one of the *Central Hudson* test is met in cases addressing the use of the term natural on food products.

B. PRONG TWO: CONGRESS’S INTEREST MUST BE SUBSTANTIAL

Congress has a substantial interest in restricting the

137. Kane v. Chobani, Inc., 973 F. Supp. 2d 1120, 1123-24 (N.D. Cal. 2014).

138. *Id.* at 1124.

139. *Id.*

140. *Id.* at 1137-38.

141. *Id.*

commercial speech of companies using the term natural in the advertising or marketing of their food or personal care products for two reasons: (1) to advance the marketplace of healthy food, and (2) to increase the health of its citizens.

1. ADVANCING THE MARKETPLACE OF HEALTHY FOOD

It is well known that "consumers will pay more for labels that they think add value, and consumers are also misled to believe that some labels are meaningful, and that deludes consumer demand and it deludes moving the marketplace forward."¹⁴² Additionally, food products advertised as healthy are often more expensive; consumers are overcharged when misguided into buying foods that are not actually natural.¹⁴³ Therefore, as Congress has a "substantial interest" in advancing a fair marketplace for natural food products, cases addressing products purporting to be natural should also meet prong two of the *Central Hudson* test.¹⁴⁴

2. INCREASING THE HEALTH OF UNITED STATES CITIZENS

The burden of increasing the health of United States citizens lies directly on Congress's substantial interest in increasing the health of its citizens. Currently, "obesity related conditions include heart disease, stroke, type 2 diabetes, and certain types

142. *Id.* at 1136-37.

143. Andrea Carlson & Elizabeth Frazao, *Are Healthy Foods Really More Expensive? It Depends on How you Measure the Price*, *Economic Information Bulletin No. (EIB-96) May 2012*, 1, 30 available at <http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib96.aspx> (stating that, "Cheap food that provides few nutrients may actually be 'expensive' for the consumer from a nutritional economy perspective, whereas a food with a higher retail price that provides large amounts of nutrients may actually be quite cheap."); see Jean Lyons & Martha Rumore, *Food Labeling-Then and Now*, 2 *J. PHARMACY & L.* 171, 180 (1994) (discussing the history of food law and how, for example, "The grocery store has become the tower of Babel, and consumers need to be linguists, scientists, and mind readers to understand many of the labels they see.). The goal of the NLEA, initiated in 1990, was to help the public make informed healthy choices, clear up confusion on labeling and encourage innovative products. *Id.* at 181.

144. *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

of cancer, some of the leading causes of death.”¹⁴⁵ While each may be directly related to an individual’s diet, obesity is the most prominent shared factor. There are approximately 400,000 deaths in the United States each year attributed to this disease, which ultimately results in government spending in excess of \$122.9 billion a year.¹⁴⁶ In fact, in 2008 “[t]he estimated annual medical cost of obesity in the [United States] was \$147 billion.”¹⁴⁷ This accounted to medical bills that were \$1,429 higher for people who were obese versus those of an average weight.¹⁴⁸ With a rate this high and continuously increasing, it is necessary for Congress to intervene and help combat the crisis.

The United States Surgeon General identified that an increased level of consumption of calories attributed to fat and added sugar, such as sodas, sugary drinks, or fast food, is directly correlated to obesity because these foods are generally higher in calories than in nutrients.¹⁴⁹ The Surgeon General stated that one effective method for reducing the risk of obesity and its associated risks is to limit one’s consumption of high calorie and low nutrient foods while simultaneously adding vegetables, whole grains, fruits, and lean proteins.¹⁵⁰ This proposal for reduction of obesity rates in America is to, “Ensure that more food options that are low in fat and calories, as well as fruits, vegetables, whole grains, and low-fat or non-fat dairy products, are available” to every American consumer.¹⁵¹

By increasing the transparency of food labels, fewer

145. *Adult Obesity Facts*, CTRS. FOR DISEASE CONTROL AND PREVENTION, September 9, 2014, available at <http://www.cdc.gov/obesity/data/adult.html>. [hereinafter *Adult Obesity Facts*].

146. Melissa M. Card, *America, You Are Digging Your Grave with Your Spoon—Should the FDA Tell You That on Food Labels?*, 68 *FOOD & DRUG L.J.* 309, 309 (2013).

147. *Adult Obesity Facts*, *supra* note 145.

148. *Id.*

149. *The Surgeon General’s Vision for a Healthy and Fit Nation*, U.S. DEP’T. OF HEALTH AND HUMAN SERVS. (2010), <http://archive.hhs.gov/news/press/2001press/20011213.html>.

150. *Id.*

151. Damon Thompson, U.S. Department of Health and Human Services, *Overweight and Obesity Threaten U.S. Health Gains, Communities Can Help Address the Problem, Surgeon General Says*, Dec. 13, 2001 available at <http://archive.hhs.gov/news/press/2001pres/20011213.html>.

consumers would be deceived into buying foods that increase their health risks rather than reduce them. An example of this argument is directly visible in the Second Circuit's holding in *New York State Rest. Ass'n v. New York City Bd. of Health*.¹⁵² In this case, the New York State Restaurant Association (NYSRA), a non-profit organization compiled of over 7,000 restaurants in the city limits, challenged the constitutionality of § 81.50 of the New York City Health Code, which required roughly 10% of all New York City restaurants, including major fast food chains such as Kentucky Fried Chicken, McDonald's, and Burger King, to post the calorie content of each menu item.¹⁵³

The Second Circuit noted that § 81.50 was originally passed to: "(1) reduce consumer confusion and deception; and (2) to promote informed consumer decision-making so as to reduce obesity and the diseases associated with it."¹⁵⁴ Section 81.50's notice of adoption directly identified seven major findings associated with obesity in New York City: (1) obesity is an epidemic; (2) "it is mainly a result of excess calorie consumption from meals eaten outside the home;" (3) food from fast food restaurants "is associated with weight gain and excess calorie consumption;" (4) the distorted perception of calorie content "'led consumers to unhealthy food choices;" (5) consumers would make informed and healthier decisions if provided caloric information, similar to the NLEA's Nutrition Fact panel; (6) restaurants' voluntary activities were woefully inadequate and were unsuccessful at informing the majority of consumers; and (7) it is recommended by leading health authorities that calorie content information should be posted at the point of purchase."¹⁵⁵

As a result of the overwhelming factual support for labeling, the Second Circuit held that although the Constitution

152. See generally *New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009).

153. *Id.* at 117.

154. *Id.* at 134.

155. *Id.* at 134-35.

protects restaurants “when they engage in commercial speech, the First Amendment [was] not violated [in this case because] the law in question mandates a simple factual disclosure of caloric information and is reasonably related to New York City’s goals of combating obesity.”¹⁵⁶ In finding so, the Second Circuit acknowledged its duty to increase the health of New York City residents by requiring restaurants to post information about their products — essentially an alternative form of restricting or regulating commercial speech.¹⁵⁷

Observed in legal precedent and in leading health studies, it is evident that Congress has a substantial interest in regulating companies’ use of the term natural, as required by prong two of the *Central Hudson* test, due to the negative alternative, which includes failing to advance the marketplace of healthy food or refusing to increase the health of its citizens.

C. PRONG THREE: REGULATION MUST DIRECTLY ADVANCE FROM CONGRESS’S INTEREST

Due to Congress’s compelling interest in advancing the marketplace and protecting the health of its citizens, Congress will regulate companies’ use of the term natural to advertise products that are not in fact derived from natural ingredients or that are not processed in a natural way. Legal precedent demonstrates that the burden “is not satisfied by mere speculation or conjecture;” rather, to restrain commercial speech, Congress must be able to prove that damages the marketplace or individuals experience are true and that restraint on this speech will relieve those harms.¹⁵⁸

1. HOW THE REGULATION ADVANCES THE MARKETPLACE OF HEALTHY FOOD

The Ninth Circuit’s holding in *Ass’n of Nat’l Advertisers, Inc.*

156. *Id.* at 118.

157. *Id.* at 117-18.

158. *Id.* at 135.

v. Lungren illustrates Congress's interest in protecting a fair and competitive marketplace for companies truthfully advertising their products as environmentally friendly.¹⁵⁹ In that case, the Ninth Circuit analyzed whether regulation of companies' commercial speech involving the use of common environmental marketing buzzwords would progress from its interest of advancing the marketplace of environmental protection products.¹⁶⁰

The court first weighed its environmental protection interests and found the statute set reasonably satisfied standards while simultaneously creating incentive for companies with noncomplying products to improve their environmental qualities in order to receive the benefits of green labeling.¹⁶¹ The court acknowledged that the statute advanced California's interest in increasing natural resource preservation while decreasing the impact on the state's landfills.¹⁶²

The court also correctly determined that § 17508.5 of the California Business and Professions Code was intended to dissuade environmentally unfriendly companies from free riding off of environmental advertisements in order to charge consumers higher prices for what were marketed as "green" products.¹⁶³ Further, the court noted that the statute attempted to protect ecologically conscious companies from unjust price competition by ensuring that non-environmental competitors could not prevent green companies from losing their marketability by abusing commonly used environmental terms.¹⁶⁴ Accordingly, the court held that § 17508.5 adequately

159. *Ass'n of Nat'l Advertisers, Inc. v. Lungren*, 44 F.3d 726 (9th Cir. 1994).

160. *Id.* at 734.

161. *Id.* at 733.

162. *Id.* at 735 (stating, "If producers of ecologically substandard products achieve the statute's minimum thresholds, these improvements translate directly into less waste being dumped and dumped waste decomposing more rapidly.").

163. *Id.*

164. *Id.* at 734-35 (stating, "Rivals will no longer be able to negate such firms' green marketing edge by representing as 'recycled' products consisting of dross recaptured from the factory floor rather than-in keeping with the more common understanding of the term-a significant (i.e., ten percent or more) portion of costlier reprocessed post-consumer waste.").

complied with the third prong of the *Central Hudson* test for purpose of advancing the marketplace.¹⁶⁵

While *Lungren* addressed the use of environmental marketing buzzwords on non-food products, the case directly speaks to the application of the term natural to food products. *Lungren* analyzed advertisement terms in conjunction with an applicable statute; however, the court's holding may still be applied despite the lack of an applicable FDA definition. Therefore, it is evident that any future regulation of companies' commercial speech concerning the natural label will advance directly from Congress's interest in advancing the marketplace of healthy food by maintaining a fair and competitive marketplace for companies correctly using the term.

2. HOW THE REGULATION INCREASES THE HEALTH OF UNITED STATES CITIZENS

Congress's substantial interest in regulating the term natural is partially attributed to its interest in increasing the health of its citizens. Prior case law has previously recognized that "the governmental interest and the legislative means chosen to promote it 'need not be perfect, but simply reasonable.'"¹⁶⁶ Therefore, it is reasonable that both the third prong of the *Central Hudson* test and the First Amendment only require that the restriction of the commercial speech in question produce "more than 'ineffective or remote support' for a legitimate governmental policy goal."¹⁶⁷

In *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, the United States Supreme Court clarified that a company's First Amendment rights are protected if restrictions on its commercial speech are adequately related to the state's interest in reducing consumer deception and is not unjustified or unduly

165. *Id.* at 735.

166. *Lungren*, 44 F.3d at 732 (quoting *Ass'n of Nat. Advertisers, Inc. v. Lungren*, 809 F. Supp. 747, 757 (N.D. Cal. 1992)).

167. *Id.* (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980)).

burdensome.¹⁶⁸ *Lungren* reiterates this claim by asserting that since the purpose of § 17508.5 of the California Business and Professions Code was to increase the exchange of information from companies to consumers in the marketplace, meaning that the state had a substantial interest in regulating environmental companies' commercial speech due to its interest in consumer protection.¹⁶⁹ Further, the Ninth Circuit in *Lungren* recognized that regulation of these companies' commercial speech was not unjustified or unduly burdensome as the restriction directly promoted the state's "consumer protection" goals,¹⁷⁰ and as green marketing drastically increases consumer demand for environmentally friendly products.¹⁷¹ Therefore, as the Ninth Circuit illustrates, maintaining consumer protection is of the upmost importance.

Based on the extensive health reasons, Congress has a substantial interest in regulating companies' use of the term natural. Congress's restriction on this commercial speech will advance directly from this interest, as doing so will increase the exchange of information from food companies to consumers. As it is well determined that information about a product can affect a consumer's decision to purchase that item, Congress's substantial interest in advancing the health of its citizens thereby prompts its ability to restrict companies' commercial speech that improperly uses the term natural on food labels.

D. PRONG FOUR: REGULATION MUST NOT BE MORE EXTENSIVE THAN NECESSARY TO SERVE CONGRESS'S INTEREST

Congress's imposed regulation will not be more extensive than necessary to serve the purpose of protecting its interest in

168. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

169. *Lungren*, 44 F.3d at 733-34 (citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976)) (stating, "The First Amendment...does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely").

170. *Id.* at 732. (quoting *Lungren*, 809 F.Supp. at 757).

171. *Id.* at 733.

advancing the marketplace for healthy food and increasing the health of its citizens. Regulation of companies' use of the term natural on food labels is not intended to punish companies abusing the term, rather, it is intended to provide the information consumers need to make educated decisions when purchasing products. It is also intended to simultaneously allow companies correctly using the term to enjoy the benefits of healthy food labeling.

The United States Supreme Court previously acknowledged that the "least restrictive means" test does not apply to questions based on restriction of the First Amendment for commercial speech.¹⁷² Instead, the Supreme Court insisted that there must be:

"[A] 'fit' between the legislature's ends and the means chosen to accomplish those ends," a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.¹⁷³

Essentially, the regulation must not unduly prohibit a company to ensure room is left for editing and commentary.¹⁷⁴

To meet this standard in regards to the issue at hand, Congress must acknowledge that due to the incompetency of the FDA's current policy statement, food companies take advantage of the flexible definition of the term by applying it to products that do not necessarily meet the definition most consumers imply for the term natural. Although Congress "has more leeway to regulate potentially misleading commercial speech

172. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995). The "least restrictive means" test questions whether the least restrictive means are being used to achieve the desired result.

173. *Id.* (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

174. *Lungren*, 44 F.3d at 736-37.

than it does in the context of truthful and non-misleading [sic] commercial speech, it 'may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive.'"¹⁷⁵ In other words, "If the First Amendment means anything, it means that regulating speech must be a last—not first—resort."¹⁷⁶

Therefore, to reduce the confusion of the term, it is Congress's duty, via the FDA, to codify the four-prong *Central Hudson* test and to define the term natural. This regulation of the restriction of companies' speech is not more extensive than necessary to serve Congress's interests of advancing the marketplace of healthy food and increasing the health of United States citizens.

CONCLUSION

For generations families sat down for dinner and did not need to question what went into their food.¹⁷⁷ Today, the fear is rampant. Food companies abuse the First Amendment's allocation of free commercial speech by improperly using the loosely defined and regulated term natural to promote sales to consumers attempting to purchase healthy foods.

While the Lanham Act, primary jurisdiction, and preemption may hinder a successful suit, individuals are permitted to sue companies misusing the term natural in the advertisement of their products, so long as the court compares the use of the term to the current FDA policy statement and nothing further. By limiting any evaluation of specific use of the term beyond the policy statement, these courts are essentially

175. *Disc. Tobacco City & Lottery, Inc. v. U.S.*, 674 F.3d 509, 524 (6th Cir. 2012) *cert. denied*, 133 S.Ct. 1996 (U.S. 2013) (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

176. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371-73 (2002) (describing the Supreme Court's application of the four-prong *Central Hudson* test to a proposed restriction to an FDA regulation finding the level of commercial speech restriction more extensive than necessary to serve the government's interest; there were numerous non-restrictive solutions that would satisfy the government).

177. *POLLAN*, *supra* note 1, at 411.

recognizing Congress's ability to intervene and codify the four-prong *Central Hudson* test into a statutory law.

As the number of individuals bringing suits continues to sharply increase, a number of companies are beginning to voluntarily remove the term natural from their labels regardless of FDA mandate.¹⁷⁸ In fact, some companies are not only removing the label but also reformulating their products to comply with what consumers envision the term to mean.¹⁷⁹

Congress has the ability to codify *Central Hudson* based on the fact that: (1) prior case law has deemed that use of the term natural is not misleading; (2) Congress has a substantial interest in regulating companies' speech because it has an interest in advancing the marketplace for natural food and increasing the health of its citizens; (3) Congressional regulation would advance directly from these interests; and (4) regulation would not be more extensive than necessary to serve the purpose. In doing so, Congress would essentially require the FDA to redefine and regulate use of the term, thereby allowing companies to present their products in such a way that is beneficial to consumers.

To be deceived or puzzled by companies' natural food advertisements breaks all sense of security we deserve from the food industry and the government. As Michael Pollan concluded in *The Omnivore's Dilemma*, "[W]e eat by the grace of nature, not industry, and what we're eating is never anything more or less than the body of the world."¹⁸⁰ Therefore, it is our fundamental right to ask Congress to create and regulate understandable definitions for food packaging, for it is one of our most precious freedoms to know what is in our food and ultimately in our bodies.

178. Esterl, *supra* note 44.

179. *Id.*

180. POLLAN, *supra* note 1, at 411.