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A RECIPE FOR CHAOS AND CONFUSION: CONSUMERS, COMPANIES, AND COURTS HUNGRY FOR IMPROVED U.S. FOOD AND BEVERAGE REGULATIONS

ZOE WOLKOWITZ

I. INTRODUCTION

The Aesop's Fable *The Boy Who Cried Wolf* is a renowned, childhood classic.[1] In this story, a young boy shouts frantically for help, claiming wolves are attacking the sheep.[2] On several occasions, the villagers rush to his aid only to find there are no wolves at all.[3] One day, the wolves actually come and the boy cries for help, but this time no villager comes and the wolves devour all the sheep.[4]

Insufficient U.S. regulations have created a "boy who cries wolf" situation. This childhood story analogizes the current stream of food and beverage labeling litigation making its way through the U.S. courts. In the past few decades, U.S. consumers have become increasingly health conscious.[5] New food trends, such as meatless meat and vegan cheese, stack the shelves too.[6] Consumers rely on labels when they choose which products to buy.[7] In response, manufacturers label products as "natural," and "healthful" to seduce consumers into purchasing their products.[8] Due to insufficient regulations, however, consumers are not protected from these marketing ploys.[9] Instead, consumers are often misled[10] and

1. Aesop, *The Boy Who Cried Wolf*, AESOP'S FABLES (1867) etc.usf.edu/lit2go/35/aesops-fables/375/the-boy-who-cried-wolf [perma.cc/RU94-ABA6] (last visited Sept. 19, 2019).

2. *Id.*

3. *Id.*

4. *Id.*

5. Nicole E. Negowetti, *Food Labeling Litigation: Exposing Gaps in the FDA's Resources and Regulatory Authority*, BROOKINGS GOVERNANCE STUDIES, 6 (June 2014), www.brookings.edu/wp-content/uploads/2016/06/Negowetti_Food-Labeling-Litigation.pdf [perma.cc/7A7M-BET9].

6. *See Plant-based alternatives Driving Industry M&A*, DELOITTE, 3 (2019), www2.deloitte.com/content/dam/Deloitte/uk/Documents/consumer-business/deloitte-uk-plant-based-alternatives.pdf [perma.cc/2VB5-LUVS] (noting that growth within the "plant-based sector has largely been driven by the mainstream emergence of the 'flexitarian' consumer – people who still consume meat and dairy but seek to reduce the levels they consume").

7. *See* THE INT'L FOOD INFO. COUNCIL, 2019 FOOD & HEALTH SURVEY 56 (2019) (measuring the importance of labels when consumers shop for food).

8. *See* Negowetti, *supra* note 5, at 6 (noting that consumers purchase products labeled "organic" or "natural" in belief that these attributes make food healthier, otherwise referred to as the "health halo effect"); *See also,* Diana R.H. Winters, *The Magical Thinking of Food Labeling: The NLEA as a Failed Statute*, 89 TUL. L. REV. 815 (Mar. 2015) (stating that throughout the 90s, consumers became more knowledgeable about how diet affects health).

9. *See e.g.*, Julie Creswell, *Is It "Natural?" Consumers, and Lawyers, Want to Know*, N.Y. TIMES (Feb. 16, 2018), www.nytimes.com/2018/02/16/business/natural-food-

deceived by these labels.[11] This has resulted in a surge of food and beverage litigation.[12] Because of the early success of some claims, litigation continues to swell at an unprecedented rate.[13] Some of these claims deserve merit.[14] Others, however, are frivolous and take advantage of a muddled regulatory and legal system.[15]

U.S. consumers filing frivolous claims can be compared to the "boy who cried wolf," exploiting regulatory gaps to line their pockets with meritless claims.[16] Judges manifest into the villagers left to decide when to affirm, when to be skeptical,[17] and when to completely ignore these claims.[18] Finally, some food and beverage companies are the wolves left to prey upon consumer confusion[19] and feast upon the profits of their misleading labels.[20] Meanwhile, the consumers who allege a truthful

products.html [perma.cc/52MQ-359F] (explaining that manufacturers label unhealthy products as "natural" to entice consumers).

10. *See* Organic Research, Promotion, and Information Order, 82 Fed. Reg. 5746 (proposed Jan. 18, 2017) (acknowledging continued confusion in the marketplace over the meaning of "organic").

11. *See, e.g.,* Rooney v. Cumberland Packing Corp., No. 12-CV-0033-H, 2012 U.S. Dist. LEXIS 58710, at *3 (S.D. Cal. Apr. 16, 2012) (alleging that "Sugar in the Raw" is deceptive because it was actually processed and not natural sugar).

12. *See The Food Court: Trends In Food & Beverage Class Action Litigation*, U.S. CHAMBER INST. FOR LEGAL REFORM, 1 (Feb. 2017) (finding food and beverage label class actions increased from "twenty in 2008 to over 170 new class actions filed in or removed to federal court in 2016").

13. *See id.* at 33 (stating that "lawsuits targeting food and beverage marketing are out of control."). The limited segment of the plaintiffs' bar that brings these suits show no signs of restraint.")

14. *See* Harvey v. Veneman, 396 F.3d 28, 35 (1st Cir. 2005) (suing the USDA for alleged loopholes in the statutory standards that "undermine[] consumer confidence and fail[] to protect producers of true organic products").

15. *See e.g.*, Organic Consumers Ass'n v. Ben & Jerry's Homemade, Inc., No. 2018 CA 004850 B, 2019 D.C. Super. LEXIS 1, at *1 (D.C. Super. Ct. Jan. 7, 2019) (alleging that the ice cream company's cows were not as "happy" as the company purported).

16. *See e.g.*, Hohenberg v. Ferrero U.S.A., Inc., No. 11-CV-205 H, 2011 U.S. Dist. LEXIS 38471, at *2 (S.D. Cal. Nov. 14, 2011) (alleging that Nutella engaged in deceptive marketing practices).

17. *See U.S. Chamber Files Amicus in Chobani Case; Seeks to Prevent 'Shakedown' Food-Label Lawsuits,* U.S. CHAMBER INST. FOR LEGAL REFORM (Nov. 2014), instituteforlegalreform.com/u-s-chamber-files-amicus-in-chobani-case-seeks-to-prevent-shakedown-food-label-lawsuits/ [perma.cc/8DRS-S8U8] (stating that U.S. Chamber filed an amicus brief encouraging the Ninth Circuit to affirm the dismissal "to prevent a return of 'shakedown' lawsuits").

18. Pelayo v. Nestle USA, Inc., 989 F. Supp. 2d 973, 979 (C.D. Cal. 2013) (holding that no reasonable consumer would believe that mass produced, and processed pasta is "All Natural"). The judge condescendingly said, "the reasonable consumer is aware that Buitoni Pastas are not 'springing fully-formed from Ravioli trees and Tortellini bushes." *Id.* at 978.

19. Donna M. Bryne, *Cloned Meat, Voluntary Food Labeling, and Organic Oreos,* 8 PIERCE L. REV. 31, 35-7 (2009) (stating consumers rely on labels in making decisions about what products to put in and on their bodies).

20. *See* Press Release, Organic Trade Ass'n, *U.S. Organic Sales Break Through $50 Billion Mark in 2018* (May 17, 2019) ota.com/news/press-releases/20699#:~:text=The%20U.S.%20organic%20market%20in,by%20the%20Organic%20Trade%20Association [perma.cc/RMM5-P8C2] (stating that "in 2018, U.S.

claim with merit are harmed by mislabeled products and left without anyone to trust their claim.[21]

Although the food and beverage industry is ever-changing, the current state of U.S. labeling regulations proves unsustainable.[22] Most of what Americans eat is regulated by one of two governmental regulatory agencies: The Food and Drug Administration ("FDA") and the United States Department of Agriculture ("USDA").[23] In 1990, both agencies passed groundbreaking food and beverage labeling laws.[24] These laws are the backbone of the corollary discussed in detail below.

This Comment interprets U.S. food and beverage labeling laws and exposes the deception that exists, despite current labeling requirements and prohibitions. This Comment proposes new and improved regulations in order to create sufficient regulatory standards, resulting in a more transparent market.

Section II will introduce existing regulations that govern the food and beverage industry. This section illustrates the inherent contributions these dense regulations have upon the recent rise in food and beverage litigation. This section further explores the different types of claims brought by litigants and the trends expected to continue.

Section III embarks on an in-depth analysis of each regulation and illustrates how the surge of food and beverage litigation is inextricably tied to regulatory shortcomings and insufficiencies. This section further reveals the detrimental effects of these regulations – or, in some instances – a complete lack of regulation. These effects include confusion in the marketplace, regulation by litigation, and a patchwork of U.S. labeling laws.

Finally, the Section IV urges a prompt response from the FDA to create new regulations in order to circumvent deceptive labeling and create a more transparent market. The FDA must regulate undefined buzzwords and update existing definitions. Further, the FDA must disallow deceptive labeling claims that are allowed to exist under

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organic market broke through the $50 billion mark for the first time"). Organic sales have almost quadrupled in the last decade. *Id.*

21. *See e.g.*, Jessani v. Monini N. Am., Inc., 744 F. App'x 18, 19-20 (2d Cir. 2018) (dismissing a class action where a company's truffle oil olive oil contains no actual truffle). The court stated that "it is simply not plausible that a significant portion of the . . . public . . . would conclude that . . . mass produced, modestly-priced olive oil was made with the most expensive food in the world." *Id.* at 19.

22. Andria Cheng, *Beyond Meat, Other Plant-Based Alternatives Still Have Long Growth Runway*, FORBES (June 30 2019), www.forbes.com/sites/andriacheng/2019/06/30/plant-based-meat-alternatives-still-have--long-growth-runway/#33f781b978f2 [perma.cc/6REV-VXYK] (recognizing that "in 2018, meat alternative purchases almost quadrupled, following a 22% increase in 2017"); *see also*, DELOITTE, *supra* note 6, at 13 (noting that by 2025, the North American meat substitutes market is "expected to grow at an eighty-percent increase from 2018").

23. Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990); Organic Foods Production Act of 1990, Pub. L. No. 101-624, 104 Stat. 3935 (1990).

24. *Id.*

current regulations. The USDA must also reevaluate its GMO labeling standard and ensure the future of organics. If both agencies create new regulations and update existing ones, this will provide certainty and uniformity for consumers, companies, and the courts.

II. BACKGROUND

A. FDA Current Regulation

Hungry to protect consumers against false or misleading labels,[25] Congress passed the Federal Food, Drug, and Cosmetic Act ("FDCA") in 1938.[26] The FDCA empowers the FDA to define standards for food quality and food labels.[27] Throughout the 1960's and 1970's, society was evolving and becoming more industrialized.[28] An increasing amount of processed foods soon began to flood the marketplace.[29] At the same time, knowledge regarding the relationship between diet and health became more pervasive throughout American culture.[30] In response to consumer skepticism,[31] manufacturers slapped undefined claims on product labels to reassure consumers.[32] The FDCA soon became ill equipped to protect consumers from deceptive labels.[33]

In response, Congress passed the Nutrition Labeling and Education Act of 1990 ("NLEA").[34] The NLEA aimed to improve the diet of Americans.[35] By creating regulations to adequately inform consumers

25. *See Laws Enforced by FDA*, U.S. FOOD & DRUG ADMIN. (Mar. 19, 2021), www.fda.gov/regulatory-information/laws-enforced-fda [perma.cc/S8SS-6YTS] (explaining that the FDCA was "passed after a legally marketed toxic elixir killed 107 people, including many children").

26. *See* 21 U.S.C. § 393 (b)(2) (2021) (stating that the FDA can (1) protect the public health by ensuring food products sold are properly labeled and (2) issue and enforce regulations pursuant to this authority).

27. *A Food Labeling Guide: Guidance for Industry*, U.S. FOOD & DRUG ADMIN. (Jan. 2013), www.fda.gov/files/food/published/Food-Labeling-Guide-%28PDF%29.pdf [perma.cc/PBW8-G97S].

28. *See* INST. OF MEDICINE, FRONT-OF-PACKAGE NUTRITION RATING SYSTEMS AND SYMBOLS: PHASE I REPORT 19 (Ellen A. Wartella, Alice H. Lichtenstein, and Caitlin S. Boon, eds., 2010) (stating that as "an increasing number of processed foods came into the marketplace, consumers requested information that would help them understand the products they purchased").

29. *Id.*

30. *Id.*

31. *See* COMM. ON THE NUTRITION COMPONENTS OF FOOD LABELING, FOOD AND NUTRITION BD., INST. OF MEDICINE & NAT'L ACAD. OF SCIENCES, NUTRITION LABELING: ISSUES AND DIRECTIONS FOR THE 1990S, 39 (Donna V. Porter and Robert O. Earl, eds., The National Academy Press 1990) (stating that concerns were repeatedly raised about those requirements being "too modest and should have been updated due to both the increasing use of nutrition labeling by manufacturers and growing consumer interest in the nutritional quality of their foods").

32. *See* INST. OF MEDICINE, *supra* note 28, at 20 (stating consumers "attempted to imply something about the special value of the food, such as "extremely low in saturated fat").

33. *Id.*

34. INST. OF MEDICINE, *supra* note 28, at 23.

35. *See id.* (stating that purposes of the NLEA was to "clear up confusion

about products, there was the hope that consumers would choose healthier diets.[36] To effectively carry out this task, the NLEA granted the FDA explicit authority to develop uniform labeling laws.[37] By standardizing food and beverage regulations, the NLEA sought to clear up confusion and deceptive practices surrounding labeling.[38]

The NLEA had a significant effect upon society.[39] To put it into perspective, the NLEA is the reason for the extensive Nutrition Facts Panel seen on the backs of almost every food package today.[40] The NLEA also expressly reserved the right to consistently update labeling requirements, based on society's changing habits and needs.[41] This strict, yet flexible approach chartered many positive changes.[42] For example, after the FDA mandated labels to include trans-fat, subsequent years saw a significant decline in the trans-fatty content of new and existing products.[43] Most recently, in 2016, the FDA updated its Nutrition Facts label requirements.[44]

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surrounding nutrition labeling, aid consumers in choosing healthier diets, and to give food companies an incentive to improve the nutritional qualities of their products").

36. *Id.*

37. *See* 21 U.S.C. § 343-1(a) (2021) (stating explicit preemption provision); INST. OF MEDICINE, *supra* note 28, at 23.

38. INST. OF MEDICINE, *supra* note 28, at 23.

39. 21 U.S.C. § 343(q) (mandating labels to list the serving size, the number of servings, total calories, specific breakdowns of fat, protein, carbs, sugar, cholesterol, sodium, and fiber, and any vitamins and minerals); *see also,* FRED KUCHLER, CATHERINE GREENE, MARIA BOWMAN, KANDICE K. MARSHALL, JOHN BOVAY, LORI LYNCH, U.S. DEPT. OF AGRIC., ERR-239, BEYOND NUTRITION AND ORGANIC LABELS—30 YEARS OF EXPERIENCE WITH INTERVENING IN FOOD LABELS 18 (2017) (stating that "prior to NLEA, companies were only required to list the product's name, net quantity, ingredient list, and manufacturer's name and address on packaged foods"); *see also,* Viggiano v. Hansen Nat. Corp., 944 F. Supp. 2d 877, 888 (C.D. Cal. 2013) (explaining significant effects of the NLEA like expanding "coverage of nutrition labeling requirements; [] chang[ing] the form and substance of ingredient labeling on packages;[] impos[ing] limitations on health claims; [] standardiz[ing] the definitions of all nutrient content claims; and [] requir[ing] more uniform serving sizes").

40. *See* KUCHLER, *supra* note 39, at 18.

41. *See* INST. OF MEDICINE, *supra* note 28, at 23 (stating that the NLEA permits the FDA to "add or delete nutrients based on a determination that changes would help consumers maintain healthy dietary practices").

42. *See e.g.*, U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 25-6 (winning a lawsuit against Krispy Kreme prompted the FDA to require all manufacturers to completely remove trans-fat from food products).

43. *See id.* (noting that in 2006, the FDA-mandated Nutrition Facts labels must include amount of trans fats). Research shows a significant decline in the trans fats content of products from 2005 to 2010, as food manufacturers reformulated many of their products to eliminate or reduce trans fats. *Id.* at 22; *see also* Carmen Filosa, *Trans Fat Bans the Next Regulatory Taking?*, 29 J. LEGAL MED. 99, 102 (2008) (noting that instead of having to label products as containing trans-fat, Frito-Lay eliminated trans-fat from some products).

44. *See Changes to the Nutrition Facts Label*, U.S. FOOD & DRUG ADMIN. (2019), www.fda.gov/food/food-labeling-nutrition/changes-nutrition-facts-label [perma.cc/TH7Y-4NXB] (explaining new requirements for Nutrition Facts Label after learning of new scientific research regarding the link between diet and chronic diseases such as obesity and heart disease). Manufacturers are required to switch to

Today, the FDA continues to make significant changes under the NLEA.[45] For example, in 2016, the NLEA expanded its coverage to include more than just package labels.[46] The NLEA began mandating menu-labeling requirements for restaurants.[47] The FDA now requires restaurants with twenty or more locations [48] to post the number of calories in each item.[49]

The FDA, however, refuses to apply these strict and expansive regulations to front-package label claims.[50] Buzzwords like "natural" are essentially unregulated.[51] In fact, the FDA fails to provide any official definition of what "natural" means.[52] In 1990, the FDA expressly refused to adopt a formal definition.[53] Since then, Congress has attempted to establish a standard definition, but failed in 2013,[54] 2015,[55] and again in 2018.[56] The closest the FDA has come to regulating front-label buzzwords is in its inclusion of "healthy" in the NLEA.[57] However, this

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the new label by January 1, 2020. *Id.* The new addition on the label is "added sugars." *Id.* Other changes are updated daily values and a change in nutrients requirements. *Id.*

45. *See e.g.*, 21 C.F.R. § 101.11 (2021) (mandating menu labeling requirements for restaurants).

46. *Id.*

47. *Id*.

48. *See id.* (stating this regulation applies to "restaurants and similar retail food establishments that are part of a chain with 20 or more locations").

49. 21 C.F.R. § 101.11 (b)(ii)(B)(2) (2021).

50. *See* KUCHLER, *supra* note 39, at 18 (stating that the NLEA allows but regulates some front-of-package health and nutrition claims, such as "high fiber," "reduced calories," and "cholesterol free"); *see also*, 58 Fed. Reg. 2302 at 2407 (Jan. 6, 1993) (promulgating formal regulatory definitions for certain terms such as "free," "low," "lean" and "lite" but not for "natural").

51. *See Use of the Term Natural on Food Labeling*, U.S. FOOD & DRUG ADMIN. (Oct. 22, 2018), www.fda.gov/food/food-labeling-nutrition/use-term-natural-food-labeling [perma.cc/E9H2-L3A3] (emphasizing that "the FDA has not engaged in rulemaking to establish a formal definition for the term 'natural'"). Additionally, the FDA also "did not consider whether the term 'natural' should describe any nutritional or other health benefit." *Id.* Instead, the FDA has an informal "policy" on Natural. *Id.*; *see* 21 C.F.R. §§ 1085(d)-(e), (j) (2021) (stating that the FDA's "informal policy" regarding the definition of "natural" "does not establish a legal requirement").

52. Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 56 Fed. Reg. 2302, 2407 (Jan. 6, 1993).

53. *See id.* (stating that resource limitations preclude the agency from defining natural); *see also,* Holk v. Snapple Bev. Corp., 575 F.3d 329, 341 (3d Cir. 2009) (stating that the FDA declined to promulgate a formal definition of "natural" because of "resource limitations and other agency priorities").

54. Food Labeling Modernization Act of 2013, H.R. 3147, 113th Cong. (2013).

55. *See* Food Labeling Modernization Act of 2015, H.R. 4061, 114th Cong. (as proposed by House, Nov. 18, 2015) (proposing a definition for "natural"); *see also*, Food Labeling Modernization Act of 2015, S. 2301, 114th Cong. (as proposed by Senate, Nov. 18, 2015) (noting passage of this Act would have defined the term "natural").

56. Food Labeling Modernization Act of 2018, H.R. 5425, 115th Cong. (as proposed by House, Apr. 2, 2018).

57. 21 C.F.R. § 101.65(d)(2) (2019); *see also*, *Use of the Term "Healthy" in the Labeling of Human Food Products: Guidance for Industry*, U.S. FOOD & DRUG ADMIN. 3 (2018), www.fda.gov/regulatory-information/search-fda-guidance-

regulation has proven completely inadequate.[58] Currently, the FDA is reconsidering what it means to label a product as "healthy."[59] Unfortunately, similar to what happened with "natural," the FDA failed to redefine "healthy."[60]

The FDA also selectively enforces some of its back-label requirements.[61] In general, the NLEA requires labels to list all ingredients in the product.[62] However, some ingredients are allowed to be listed collectively – without actually disclosing each one.[63] For example, "artificial flavoring" or "natural flavoring" represents a myriad of ingredients – flavor chemicals, modifiers, and solvents – none of which are required to be individually named.[64] Thus, food manufacturers crouch behind the NLEA's regulatory scheme to sneak in a multitude of synthetic, artificial, and unnatural ingredients without notice.[65] Not surprisingly, "natural flavors"[66] is the fourth most

documents/guidance-industry-use-term-healthy-labeling-human-food-products [perma.cc/AZW5-YU4G] (noting this "should be viewed only as recommendations").

58. *See e.g.,* Press Release, KIND, FDA Reverses Stance Affirms Kind Can Use "Healthy" On Its Labels (May 10, 2016) (explaining that existing regulations allow a product like pop-tarts, but not avocados, to be labeled as healthy).

59. *See* Department of Health and Human Services, Proposed Rule to Update the Definition for the Implied Nutrient Content Claim "Healthy" Under The Federal Food, Drug, and Cosmetic Act of 1938 (2018) (proposing revision to update the existing definition of "Healthy" to be consistent with current FDA dietary guidelines).

60. *See e.g.,* Use of the Term ''Healthy'' in the Labeling of Human Food Products; Request for Information and Comments; Extension of Comment Period, 81 Fed. Reg. 96, 404 (Dec. 30, 2016) (resulting in no updated regulations despite undertaking a comment and rulemaking process).

61. *See e.g.*, 21 C.F.R. § 101.22 (2019) (allowing some flavor added to a food to simply be declared as a "natural flavor" on the label's statement of ingredients).

62. *See Overview of Food Ingredients, Additives & Colors*, U.S. FOOD & DRUG ADMIN. (Feb. 2018), www.fda.gov/food/food-ingredients-packaging/overview-food-ingredients-additives-colors [perma.cc/U3YW-9KNR] (stating that food and beverage "manufacturers are required to list all ingredients in the food on the label"); *see also*, 21 C.F.R § 101.4(a)(1) (2019) (mandating that ingredients be listed by "common or usual name"); *see also, Id.* § 101.4(b) (stating the ingredient "shall be listed by a specific name and not a collective (generic) name").

63. 21 C.F.R. § 101.22 (2020).

64. *See* Nadia Berenstein, *Clean label's dirty little secret***,** THE NEW FOOD ECONOMY (Feb. 1, 2018), www.newfoodeconomy.org/clean-label-dirty-little-secret/ [perma.cc/XPG4-QYF3] (noting that **"**many companies will use additives...when they can disguise them under the benign-sounding catchall 'natural flavors'—even if [consumers] would reject them as individually listed ingredients"); *see also* David Andrews, *Synthetic ingredients in Natural Flavors and Natural Flavors in Artificial flavors***,** ENVIRONMENTAL WORKING GROUP, www.ewg.org/foodscores/content/natural-vs-artificial-flavors [perma.cc/2X4E-3G83] (stating that when the word "flavor" is used on a label, consumers are unaware of what "chemicals, carrier solvents, or preservatives have been added to the food").

65. *See e.g., Lam*, 859 F. Supp. 2d at 1106 (holding that a producer, under existing FDA regulations, can label a product as "natural strawberry flavored," even if that product contained no strawberries). "So long as that product 'contains natural flavor' which is 'derived from' the 'characterizing food ingredient,' it will not run afoul of the regulation." *Id.* at 1103; *see also*, 21 C.F.R. § 101.22(i)(1) (2019) (explaining that a "product can be labeled as 'natural flavor' even if the product contains artificial, non-flavoring ingredients").

commonly listed ingredient after salt, water, and sugar.[67]

B. USDA Current Regulation

1. Regulations Prior to 1990: A State Problem

Consumer confusion within the health food industry is not just a problem of today. Historically, states regulated food and beverage labeling.[68] While the regulatory schemes worked well within each individual state, the requirements of each state differed.[69] Throughout the birth of the organic food industry, the regulations varied so widely, it grew unsustainable.[70] As an example, one state deemed a product organic for containing only twenty-percent organic ingredients, while another state required one-hundred-percent organically grown ingredients for certification.[71] Another example is that some states required "organic milk" to feed dairy cows exclusively with organic feed, while other states had less stringent requirements.[72] These varying standards were problematic for interstate commerce and caused consumer confusion.[73]

2. USDA's Organic Regulations

In response to the desire for uniform labeling standards, Congress passed the Organic Foods Production Act in 1990.[74] This Act created the National Organic Program ("NOP") overseen by the USDA.[75] The NOP is designed to set uniform national standards for the production, handling, and processing of organic products.[76] NOP regulations determine

66. *See generally,* 21 C.F.R. § 101.22(i) (mandating that a product may be labeled as "fruit flavored" or "naturally flavored," even if it does not contain fruit or natural ingredients); *see also, Lam*, 859 F. Supp. 2d at 1102-03 (finding that FDA regulations permit a product to "be labeled as . . . 'naturally flavored,' even if it does not contain fruit or natural ingredients").

67. Andrews, *supra* note 64.

68. *See generally*, Chenglin Liu, *Is "USDA Organic" a Seal of Deceit? The Pitfalls of USDA Certified Organics Produced in the United States, China and Beyond*, 47 STAN. J. INT'L L. 333, 338 (2011) (discussing the organic market "birth" during the 1970's with no regulation).

69. *Id.* at 336-37.

70. *See id.* at 337 (discussing the effects of state-by-state labeling regulation).

71. *Id.*; S. REP. NO. 357, 101st Cong., 2d Sess., at 290-91 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4656, 4943-44.

72. *See* Liu, *supra* note 68, at 337.

73. *Id.* (explaining that a lack of uniformity both burdened interstate commerce and created consumer confusion).

74. 7 U.S.C. §§ 6501-6523 (2021) (stating that the purpose of this act is to (1) establish national standards; (2) assure consumers that organic products meet a consistent standard; and (3) facilitate interstate commerce in organic food); *See also*, Quesada v. Herb Thyme Farms, Inc., 62 Cal. 4th 298, 303 (2015) (noting that "a central purpose behind adopting a clear national definition of organic production was to permit consumers to rely on organic labels and curtail fraud").

75. 7 U.S.C. § 6503 (2021).

76. *Id.*

permissible and prohibited substances in organic production,[77] known as the National List of Allowed and Prohibited Substances ("National List").[78]

The National List is developed by a 15-member volunteer board called the National Organic Standards Board ("NOSB").[79] The makeup of the NOSB includes organic farmers, environmentalists, consumer advocates, scientists, organic retailers, organic-certification agents, and experts in various fields.[80] The diverse make-up of the NOSB is designed to reflect different stakeholders in the organic market.[81] Congressional intent was to balance competing interests and corporate powers through a diverse design.[82] Some tout the NOSB as the "heart of consumer trust in the organic seal."[83] As the organic market continues to surpass sales records each year,[84] a factor of the organic sector's exponential growth is partly attributable to consumer confidence in the integrity of the organic seal.[85]

The NOP additionally sets guidelines for organic foods standards.[86] USDA certified organic products cannot contain genetically modified organisms ("GMOs").[87] Hormones and antibiotics are also prohibited.[88] An organic crop must be produced without "synthetic chemicals and

77. *Id.* at § 6518.

78. *Id.* at § 6517.

79. *Organic Production/Organic Food: Information Access Tools*, U.S. DEPT. OF AGRIC. (Oct. 2018), www.nal.usda.gov/afsic/organic-productionorganic-food-information-access-tools [perma.cc/AK4N-EUY4]; *see also* 7 U.S.C. at § 6518(k)(2) (2021) (explaining that an NOSB responsibility is to develop the National List).

80. 7 U.S.C. § 6518(b)(1)-(7) (2021).

81. *Protect the Nat'l Organic Standards Board*, ORGANIC TRADE ASS'N www.ota.com/sites/default/files/indexed_files/NOSB_Stakeholder_400.pdf [perma.cc/2LPL-PUWP].

82. The Organic Watergate—White Paper Connecting the Dots: Corporate Influence at the USDA's Nat'l Organic Program, CORNUCOPIA INST. 3, www.cornucopia.org/USDA/OrganicWatergateWhitePaper.pdf [perma.cc/CZY5-8ANW].

83. *Over 140 businesses, farmers and organizations call on Senate Agriculture Committee to support the Nat'l Organic Standards Board*, FRIENDS OF THE EARTH (May 24, 2018), www.foe.org/news/140-businesses-farmers-organizations-call-senate-agriculture-committee-support-national-organic-standards-board/ [perma.cc/8LP9-4HE6].

84. *See* Press Release, Organic Trade Ass'n, *supra* note 20 (explaining that the U.S. organic market continues to break sales records every years).

85. *Wins on organic research, import enforcement in 2018 Farm Bill are shadowed by changes to the Nat'l Organic Standards Board*, NAT'L ORGANIC COALITION (Dec. 11, 2018), www.nationalorganiccoalition.org/blog/2018/12/10/wins-on-organic-research-import-enforcement-in-2018-farm-bill-are-shadowed-by-changes-to-the-national-organic-standards-board.

86. *See* KUCHLER, *supra* note 39, at 16 (stating that the "USDA standards encompasses everything from soil health, farm-level biodiversity, and pasture for ruminants to prohibitions on the use of genetic engineering, antibiotics, hormones, and most synthetic pesticides and fertilizers").

87. 7 U.S.C. § 6502(21) (2021).

88. *See id.* at § 6509(c)-(d) (mandating that hormones and antibiotics are prohibited for stimulating growth, and all medications, except vaccines, may be used only to address illness).

pesticides."[89] Yet, some exceptions exist.[90] For example, some non-organic ingredients are allowed in organic foods if they appear on the National List.[91] Simply put, the National List is literally a list of exceptions to the "no synthetics" rule.[92]

The NOP also creates an organic certification system.[93] The NOP uses four categorization variations for labeling certified products.[94] The first two, however, are the only agricultural products that can carry the USDA-Certified seal.[95] These two include: (1) a product that is completely organic may use the USDA organic seal and/or make a "100% organic" claim on its label[96] and (2) a product composed of 95% organic ingredients may use the USDA organic seal if the remaining five percent of non-organic ingredients are on the National List.[97]

The last two categories govern multi-ingredient products – meaning, products made with both organic ingredients and non-organic ingredients.[98] These multi-ingredient products cannot wear the USDA-Certified seal but are permitted to use the monopolized term "organic."[99] The last two tiers include: (3) a product that contains at least 70% organic ingredients can claim "made with organic [X]" on its label[100] and (4) products with fewer than 70% organic ingredients can identify only the organic ingredients as "organic."[101]

In direct contrast to the FDA, the USDA holds a monopoly on label claims.[102] In other words, the NOP dominates the entire field of organic

89. *Id.* at § 6504(1)-(2) (declaring that an organic crop must be produced on land that has been synthetic chemicals free for three preceding years).

90. 7 C.F.R. § 205.605 (2019); *see also* Violet Batcha, *Synthetic Ingredients Allowed In Organic Food?*, ONLY ORGANIC (Oct. 28, 2014), www.onlyorganic.org/synthetic-ingredients-allowed-in-organic-food/ [perma.cc/HQ8T-NUK6] (stating that currently "there are 127 non-organic items that can be added to organic food").

91. 7 C.F.R. §§ 205.600(b), 205.605(b), 205.606 (2021).

92. *See id.* (listing loopholes for nonorganic ingredients and synthetic substances allowed in organic food).

93. 7 U.S.C § 6503(a) (2021).

94. *Id*.

95. *Id*. at § 6505(c).

96. 7 C.F.R. § 205.301(a) (2021).

97. *Id.* at § 205.301(b).

98. *Id.* at § 205.301(c)-(d).

99. *Id.*

100. *See id.* at § 205.301(c) (explaining that a product can carry "made with organic (specified ingredients or food group(s))" if the multi ingredient agricultural product "contains at least 70% organically produced ingredients").

101. *Id.* at § 205.301(d); *see also*, *Id.* at § 205.305(b) (mandating that a product composed of less than 70% organic ingredients may not use the USDA organic seal or use the word organic on the main display panel, but may "identify each organically produced ingredient in the ingredient statement with the word, 'organic'").

102. 7 U.S.C. § 6505(a)(1)(A)-(B) (2021)

> (A) a person may sell or label an agricultural product as organically produced only if such product is produced and handled in accordance with this chapter; and (B) no person may affix a label to, or provide other market information concerning . . . that such product is produced and handled using organic methods, except in accordance with this chapter. *Id.*

marketing.[103] For example, the USDA organic seal,[104] all organic certifiers' seals,[105] "organic,"[106] "100% organic,"[107] "certified organic,"[108] "made with organic,"[109] are labels only allowed through USDA certification. Ultimately, unless certified according to USDA standards, a company is not permitted to use the coveted O-word anywhere on its label.[110]

3. USDA's GMO Labeling Standard

Consumer demand for unorthodox products such as meatless meats,[111] vegan cheese, and plant-based alternatives[112] is ubiquitous within American culture. Many of these products, however, contain GMOs.[113] Whether or not GMO products are harmful is not within the purview of this Comment. However, many consumers are vocal about their disdain toward GMO products and request transparency at the very least.[114] The USDA honored this demand by recently passing a mandatory national labeling law for GMO products.[115] The National Bioengineered Food Disclosure Standard requires a manufacturer to disclose if its product contains GMOs.[116] The Standard gives the manufacturer a choice of four disclosure options:[117] (1) a text

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103. *Id*.

104. 7 C.F.R. § 205.311 (2021).

105. *Id*. at § 205.305(b).

106. *Id*. at § 205.305(b).

107. *Id*. at § 205.301(a).

108. *Id*. at § 205.303(a)(4)-(5).

109. *Id*. at § 205.301(c).

110. 7 U.S.C. § 6505(a)(1)(A)-(B) (2021).

111. *See* Cheng, *supra* note 22 (recognizing that in 2018, "meat alternative purchases" almost quadrupled, "following a 22% increase in 2017"); *see also*, DELOITTE, *supra* note 6, at 13 (noting that by 2025, the North American meat substitutes market is "expected to grow . . . [at] an 80 per cent increase from 2018").

112. Jenny Splitter, *Fake Meat Fight: Can The Plant-Based Movement Get Past The 'Processed Food' Debate?*, FORBES (Sept. 16, 2019), www.forbes.com/sites/jennysplitter/2019/09/16/fake-meat-fight-can-the-plant-based-movement-get-past-the-processed-food-debate/#742401fd7017 [perma.cc/89SZ-8YK6] (stating that the "sales of plant-based foods grew by 11.3% in 2019").

113. 7 C.F.R. § 66.1 (2021) (defining "bioengineered substance").

114. *See Why We Support Mandatory National GMO Labeling*, CAMPBELL SOUP CO. (Jan. 7, 2016), www.campbellsoupcompany.com/newsroom/news/2016/01/07/labeling/ [perma.cc/2GDB-PJAS] (stating that "GMO has evolved to be a top consumer food issue reaching a critical mass of 92% of consumers in favor of putting it on the label").

115. *See* Nat'l Bioengineered Food Disclosure Standard, 7 C.F.R. § 66 (2021) (explaining that the act was signed by Congress in 2016 but will be finalized in 2018). The USDA requires all regulated entities to comply with the NBFDS beginning on January 1, 2022. *Id.*

116. 7 U.S.C. § 1639b(2)(d) (2021) (allowing a manufacturer to choose among different options to disclose bioengineered ingredients).

117. *See* 7 C.F.R. § 66.102 (2019) (stating that a text disclosure must read

disclosure,[118] (2) a symbol disclosure,[119] (3) an electronic link disclosure,[120] or (4) a text message disclosure.[121] The Standard also includes a threshold allowance for trace amounts of GMOs[122] and lists some exemptions.[123] The list of bioengineered foods must be reviewed annually and "is not meant to be exhaustive."[124]

C. Rise in Food and Beverage Litigation

With an ever-increasing number of regulated and non-regulated package labels, consumers no longer enjoy protections from deceptive labeling.[125] Especially because U.S. consumers are now more health conscious than ever.[126] With the hopes of enticing consumers, healthy sounding terms and labels continue to dominate the marketplace.[127]

"bioengineered food" or "contains bioengineered ingredients"); *see id.* at § 66.104 (explaining that when using a symbol disclosure, manufacturers must replicate the form and design of the USDA's symbol and state that the product is "bioengineered"); *see id.* at § 66.106(a) (allowing disclosure using an electronic or digital link (*i.e.:* a QR code, bar code, or SmartLabel)); *see id.* at § 66.108 (explaining that a text message disclosure option must include the statement "Text [command word] to [number] for bioengineered food information").

118. *See* 7 C.F.R. § 66.102 (2021) (mandating that a text disclosure must read "bioengineered food" or "contains bioengineered ingredients").

119. *See id.* at § 66.104 (2019) (stating that when using a symbol disclosure, manufacturers must replicate the form and design of the USDA's symbol and state that the product is "bioengineered").

120. *See id.* at § 66.106(a) (requiring an electronic or digital link (*i.e.:* a QR code, bar code, or SmartLabel) be accompanied by a text statement that reads "Scan here for food information" as well as a telephone number that consumers can call for more information); *see also, id.* at § 66.106(b) (stating that when a smartphone scans the disclosure link, the user's smartphone must be prompted to a website containing the required disclosures).

121. *See id.* at § 66.108 (stating that a text message disclosure option must include the statement "Text [command word] to [number] for bioengineered food information."). The consumer must immediately receive a text message containing the appropriate bioengineered food disclosure. *Id.*

122. *See id.* at § 66.5(c) (establishing an allowable threshold of up to five percent of bioengineered substances).

123. *See generally, id.* at § 66.5 (listing five exemptions); *See id.* at § 66.5(e) (stating exemption from GMO labeling for products certified as organic under the USDA's National Organic Program); *See* 7 U.S.C. § 1639b(b)(2)(A) (exempting foods produced from animals (*e.g.*, meat or eggs) that consumed feed containing GMO ingredients); *see also, Id.* at § 1639b(b)(2)(G) (exempting "small food served in restaurants or similar retail food establishments, including cafeterias, food stands, and bars"). Another exemption is for small food manufacturers whose annual receipts total less than $2.5 million. *Id.*

124. 7 C.F.R. § 66.6 (2021).

125. Creswell, *supra* note 9.

126. Negowetti, *supra* note 5, at 6.

127. *See* Megan Poinski, Christopher Doering & Lillianna Byington, *6 trends to impact the food industry in 2019*, FOOD DIVE (Jan. 7, 2019), www.fooddive.com/news/6-trends-to-impact-the-food-industry-in-2019/544677/ [perma.cc/PP76-A9ED] (stating that "healthy, natural, and better-for-you are terms" that continue to dominate the food industry).

As noted above, these buzzwords are essentially unregulated.[128] Consequently, these products usually do not align with consumer expectations.[129] This confusion enables consumers to seek resolution from the courts.[130] Consumer appetite for litigation continues to grow as they police brands misusing these labeling terms.[131]

Insufficient regulations are felt by companies too, despite the fact some companies do continue to capitalize on the above illustrated "grey area."[132] Companies are often the ones paying the price – literally – for the FDA's deficient regulations.[133] The "grey area" is costing money, and some companies do not enjoy "playing in this sand box" anymore.[134] In some instances, food and beverage manufacturers themselves plead with the FDA to update existing definitions.[135] In the absence of any regulatory shift, however, some companies are proactively making these changes for themselves.[136]

As companies and consumers alike seek resolution from the U.S. court system, the number of labeling class actions has grown 750 percent between 2008 and 2016.[137] California, New York, Illinois, and Florida are dubbed the "food courts."[138] These four states represent over three-quarters of all food and beverage class

128. *See* 56 Fed. Reg. 2302 at 2407 (providing the final rule absent a definition for "natural").

129. *See* Creswell, *supra* note 9 (explaining that manufacturers label unhealthy products as "natural" to entice consumers).

130. In re ConAgra Foods, Inc., 90 F. Supp. 3d 919 (C.D. Cal. 2015), aff'd by Briseno v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir. 2017) (asking the courts to find a product mislabeled as "natural" when it contains GMOs because the FDA refuses to take a stance).

131. *See e.g.,* Pappas v. Naked Juice Co of Glendora, Inc., No. LA CV11-08276, 2012 U.S. Dist. LEXIS 76067 (C.D. Cal. May 14, 2012) (asking the court to find that Naked Juice mislabeled its juices as "natural" because they contain GMOs).

132. *See* Letter from Andrew C. Briscoe III, The Sugar Ass'n to Docket Mgmt. Branch, Food and Drug Admin. 8-9 (Feb. 28, 2006) (petitioning for an FDA definition of the term "natural" for making claims on foods and beverages); *see also*, Use of the Term "Natural" in the Labeling of Human Food Products; Request for Information and Comments, 80 Fed. Reg. at 69, 907 (discussing the citizen petition received from Sara Lee urging the FDA to define the term "natural").

133. *See e.g.,* *$9M Naked Juice Settlement Gets Judge's Go-Ahead*, LAW 360 (Aug. 8, 2013), www.law360.com/articles/463620 (stating that Naked agreed to pay $9 million to settle this class-action suit).

134. Telephone Interview with Dean Panos, Partner, Jenner & Block LLP (Oct. 10, 2019) (Chicago, IL).

135. *See e.g.,* KIND LLC, Citizen Petition, No. FDA-2015-P-4566 (Dec. 1, 2015) (petitioning the FDA for updated regulations).

136. *See e.g.*, *Coca-Cola to remove controversial drink ingredient,* BBC NEWS (May 6, 2014), www.bbc.com/news/business-27289259 [perma.cc/ATM9-33AE] (noting that name brands like Powerade removed a harmful substance from their sports drinks, although it is FDA approved).

137. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 3.

138. *See id.* at 2 (explaining that each of these states are "preferred venues for litigants" because the state statutes mirror the federal FDCA and NLEA).

actions.[139] A smorgasbord of litigation looms across the federal courts.[140]

1. "Natural" Lawsuits

The corollaries of the FDA's continued silence on defining "natural" are obvious. It is no coincidence that the most common food labeling claim is against products mislabeled as "natural."[141] Consumers believe a product labeled "natural" contains products regulated at a much higher standard than in reality.[142] For example, current research shows that more than fifty-percent of American adults believe the label "natural" is regulated by the government and, further, that it receives heightened regulation.[143] In reality, however, "natural" has no working legal definition and is not regulated.[144] Without a legally enforceable definition, lawsuits continue to rise.[145]

Well-known brands are frequently targeted.[146] For example, consumers sued Dole in the Ninth Circuit for an "All-Natural" label because the packaged fruits contained inherently non-natural synthetic acids.[147] The Northern District of California ordered Jamba Juice to

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139. *Id.*

140. *See Appetite For Litigation: Why Plaintiffs' Lawyers Hunger For Food-Labeling Lawsuits*, MORGAN LEWIS 9-10 (Nov. 16, 2015), www.morganlewis.com/-/media/files/publication/morgan-lewis-title/white-paper/lit-appetite-for-litigation-november-2015.ashx [perma.cc/5B6W-48N7] (stating that suits about the "natural" label have different types of claims). The four most common "natural" claims are when the product contains, "(1) food or drinks containing high-fructose corn syrup; (2) food or drinks containing GMOs; (3) food or drinks containing artificial preservatives; and (4) food or drinks that have been chemically processed or contain unnatural ingredients," like added sugar or artificial colorings. *Id.*

141. *See* U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 2 (naming the most common type of label challenge is products labeled "natural").

142. *See* Letter from Gwendolyn Wyard to Division of Dockets Management, Food and Drug Administration (May 10, 2016) (stating that 71% of respondents think that natural products are grown without pesticides and fertilizers and 70% think those products are produced without GMO's).

143. *See id.* at 6.

144. *Use of the Term Natural on Food Labeling*, *supra* note 51; 21 C.F.R. §§ 1085(d)-(e), (j) (2019) (stating that the FDA's "informal policy" regarding the definition of "natural" "does not establish a legal requirement").

145. *See e.g.*, Elaine Watson, *Court filings indicate resurgence' in 'all-natural' litigation in 2017, but will appropriations bill spur the FDA into action?*, FOOD NAVIGATOR (Aug. 9, 2017), www.foodnavigator-usa.com/Article/2017/08/10/Filings-indicate-resurgence-in-all-natural-litigation-in-2017 [perma.cc/Y4M5-TYXS] (recognizing that the dip in "natural" litigation may end due to the FDA's failure to define the term).

146. *See e.g.*, Johnson v. Tropicana Manufacturing Company Inc., et al., No. 3:19-cv-01164-GPC-KSC (S.D. Cal. June 20, 2019) (alleging that Tropicana orange juice is mislabeled as being "100% pure" because it contains artificial flavoring); *see e.g.*, George v. Blue Diamond Growers, No. 4:15-CV-962 *3 (E.D. Mo. Feb 14, 2017) (alleging the company mislabeled Almond Milk as "All Natural" because the milk contained synthetic ingredients).

147. Brazil v. Dole Packaged Foods, Inc., No. 14-17480, 2016 WL 5539863 (9th Cir. Sept. 30, 2016).

remove it's "all natural" label because the smoothies actually contained synthetic ingredients.[148] Similarly, Missouri consumers sued Blue Diamond, alleging the company mislabeled it's Almond Milk as "All-Natural" because the milk contained synthetic ingredients.[149] In addition, a California court found Nature Valley's granola bars mislabeled as "natural" because the bars contained artificially-produced ingredients.[150] Because there remains no federal regulation or industry standard, litigants continue to play in the grey area.[151]

Some industry experts believe that, even in the absence of a regulatory definition, "natural" lawsuits will begin to wane.[152] This belief is grounded in the fact that some manufacturers have stopped using the term "natural" because it is not worth the risk.[153] Others believe consumers have lost faith in the "natural" label.[154]

Irrespective of which trend prevails, the fact is "natural" labels are frequently targeted by food and beverage litigants.[155] Additionally, "natural" lawsuits have ballooned to encompass a wide variety of claims.[156] The genre of "natural" lawsuits now include natural flavors, GMOs, and synthetically created natural ingredients.[157]

2. Natural Ingredients Synthetically Made Lawsuits

Issues arise when a substance can be found both in nature or synthetically produced in a lab.[158] Under this genre of "natural" lawsuits, plaintiffs claim a product is mislabeled as "natural" when a manufacturer uses a synthetically produced substance instead of its naturally occurring counterpart.[159] The issue is not *what* ingredients are in the product, but *how* these ingredients were produced.[160]

In 2018, there was a significant uptick in plaintiffs challenging the

148. Lilly v. Jamba Juice Co., No. 13-cv-02998-JST, at *3 (N.D. Cal. May 1, 2015) (mandating that Jamba Juice re-label it's "all natural" label because the smoothies actually contained synthetic ingredients).

149. *George*, No. 4:15-CV-962 at *3 (alleging the company mislabeled Almond Milk as "All Natural" because the milk contained synthetic ingredients).

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

151. *Use of the Term Natural on Food Labeling*, *supra* note 51 (emphasizing the FDA's failure to establish a formal definition for the term "natural").

152. *See* Interview with Dean Panos, *supra* note 134 (explaining that some manufacturers have stopped using the "natural" claim).

153. *Id.*

154. *Id.*

155. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 3.

156. *See e.g.*, *Pappas*, No. LA CV11-08276 at *2 (asking the court to find a "natural" label deceptive because the product contains GMOs); *see e.g.*, *George*, No. 4:15-CV-962 at *3 (asking the court to find the Almond Milk mislabeled as "All Natural" because the milk contained synthetic ingredients).

157. *Id.*

158. Telephone Interview with Kirsten Straughan, Director of Nutrition Science Program, The University of Illinois at Chicago (Oct. 4, 2019) (Chicago, IL).

159. Rice v. Nat'l Bev. Corp., No. 18 CV 7151, 2019 U.S. Dist. LEXIS 114961 *12 (N.D. Ill. July 11, 2019).

160. *Id.*

presence of synthetic ingredients in products labeled as natural.[161] California consumers sued Frito Lay when the company used a synthetic ingredient rather than the ingredient's natural form.[162] Most recently, an Illinois consumer accused LaCroix of mislabeling its flavored sparkling waters as "all natural."[163] The suit alleges LaCroix used synthetically created chemicals instead of the naturally occurring versions.[164] LaCroix categorically denied these allegations, maintaining the ingredients are derived from the natural plant.[165] The root of the issue is whether a chemical that occurs in nature, but is instead manmade, can wear the "natural" label.[166] The *LaCroix* court acknowledged that "this seems to be a real dispute" daunting the courts.[167]

3. GMO Lawsuits

Another popular subgroup within the realm of "natural" litigation involves products made with GMOs and labeled "natural."[168] The question of whether GMOs are "natural" is at the core of many recent labeling suits.[169] Currently, the FDA refuses to take a position on whether GMOs constitute "natural" foods or not.[170] Consumers seeking to police the "natural" label believe such a product should not contain GMOs.[171] Subject to these kinds of suits are brand names like Naked Juice,[172] Kashi,[173] Wesson Oil,[174] and Chipotle.[175] Absent any FDA

161. *See* PERKINS COIE, FOOD LITIGATION 2018 YEAR IN REVIEW, 8 (Feb. 2019) www.perkinscoie.com/images/content/2/1/v2/217858/2019-ALL-Food-Litigation-YIR-v2.pdf [perma.cc/BZ82-6QW6] (stating that "2018 saw a significant uptick in cases challenging the presence of synthetic multi-function ingredients . . . in foods labeled 'naturally flavored'"); *see also,* U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 2 (explaining that "natural" litigation has expanded to "include lawsuits targeting claims such as 'nothing artificial' or 'preservative free'").

162. *See* Allred v. Frito-Lay N. Am., Inc., No. 17-CV-1345 JLS, 2018 U.S. Dist. LEXIS 37617 (S.D. Cal. Mar. 7, 2018) (alleging that "no artificial flavors" is misleading when the food contains a synthetic, rather than naturally sourced ingredient). Frito Lay's label stated, "no artificial flavors," but the chips contained synthetic malic acid, rather than naturally sourced malic acid. *Id.* at 14.

163. *Rice*, No. 18 CV 7151 at *13 (stating that the court has "no idea" how do decide a question "not being a biologist").

164. *Id.* at *12.

165. *Id.* at *19.

166. *Id.*

167. *Id.* at *13.

168. *See e.g., Pappas*, No. LA CV11-08276 at *2 (suing Naked Juice for labeling its juices as "natural" despite containing GMOs); *see also, $9M Naked Juice Settlement Gets Judge's Go-Ahead*, *supra* note 133 (stating that Naked agreed to pay $9 million to settle this class-action suit); *see also*, Garcia v. Kashi Co., 43 F. Supp. 3d 1359 (S.D. Fla. 2014) (suing Kashi for the label "nothing artificial" when the products contain genetically modified soy, corn, or other ingredients).

169. Interview with Dean Panos, *supra* note 134.

170. *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d at 1020.

171. *See e.g., Id.* (alleging that an "all natural" label is deceptive because the product contains GMOs).

172. *Pappas*, No. LA CV11-08276 at *1.

173. *Garcia*, 43 F. Supp. 3d at 1367.

guidance, however, food and beverage companies continue to bite the cost of this litigation.[176] A court in the Southern District of Florida, however, has drawn the line when consumers assert products are not "natural" if animals were fed GMO feed.[177] In *Reilly v. Chipotle Mexican Grill, Inc.*, a plaintiff sued Chipotle because Chipotle's advertisements indicated that "all of [its] food is non-GMO," however, its products are sourced from animals raised on GMO-rich feed.[178] The Court denied Chipotle's motion to dismiss on the ground that "Chipotle's 'Non-GMO' claims mislead consumers into paying a premium price . . . for inferior products" because the plaintiff here paid for Chipotle's "food products under the belief that they did not contain GMOs, when in fact they did . . . and [she] otherwise would not have paid had Chipotle not misrepresented the ingredients."[179]

4. Front-Label Claims Do Not Match the Ingredient List Lawsuits

Lawsuits claiming that the front-label does not match the Ingredient List have recently seen the most dramatic growth.[180] Popular brands like Cheez-it,[181] Rx Bar,[182] and Monini olive oil are targeted.[183] Cases under this lawsuit regime expose the deceptive claims permitted under existing regulations.[184]

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174. *In re ConAgra Foods, Inc.*, 90 F. Supp. at 919 (suing the company for a label claiming "100% Natural," because the oils were created using GMOs).

175. Reilly v. Chipotle Mexican Grill, Inc., No. 1:15-CV-23425, 2016 U.S. Dist. LEXIS 193452, at *18 (S.D. Fla. Apr. 20, 2016).

176. *See e.g.,* Trammel v. Barbara's Bakery, Inc., No. 3:12-cv-02664-CRB (N.D. Cal. Nov. 8, 2013) (agreeing to a four million dollar settlement in a mislabeling suit).

177. *See e.g., Reilly*, No. 1:15-CV-23425 at *18 (dismissing complaint against Chipotle for labeling its products non-GMO, when in fact, animals used for its products were fed genetically-modified feed).

178. *Id.* at *2.

179. *Id.* at *16-7.

180. *Food-Labeling Litigation: Trends to Watch in 2019*, MCGUIRE WOODS (Jan. 3, 2019), www.mcguirewoods.com/client-resources/Alerts/2019/1/food-labeling-litigation-trends-2019 [perma.cc/Z6BA-H46H].

181. Mantikas v. Kellogg Co., 910 F.3d 633 (2d Cir. 2018).

182. Complaint, Pizzirusso v. Chicago Bar Co., LLC, No. 1:18-cv-03529 (E.D.N.Y. June 15, 2018) available at www.truthinadvertising.org/wp-content/uploads/2018/06/Pizzirusso-v-Chicago-Bar-Company-complaint.pdf [perma.cc/UL3Y-SFJ6].

183. *Jessani*, 744 F. App'x at 18.

184. August T. Horvath, *Food Fights in the Big Apple: Two Significant New Food Labeling Decisions*, ABA (Mar. 19, 2019) aemdev.americanbar.org/groups/litigation/committees/consumer/articles/2019/winter2019-food-fights-in-the-big-apple-two-significant-new-food-labeling-decisions/ [perma.cc/KW3K-7PNB] (discussing how the Cheez-It case represents the "deceptive" nature of front of package labels regarding "the presence, absence, or amount" of various ingredients); *see also*, Complaint at 6, *Pizzirusso,* No. 1:18-cv-03529 (stating current regulations allow powdered egg whites to be labeled as "egg whites" because they "serve the same function whether they are liquid, fresh or dried").

5. Frivolous Suits

At first, this wave of food and beverage class actions created a significant impact.[185] For example, a lawsuit against Krispy Kreme prompted the FDA to require all manufacturers to completely remove trans-fat from food products.[186] The early success of plaintiffs also caused companies to change their marketing practices and product labels.[187] Although some of these lawsuits are meritorious, there are numerous claims filed that call into question the validity of these lawsuits.[188]

In one example, the District of Columbia Superior Court found Ben & Jerry's labels misleading.[189] The ice cream company suggested its ice cream was made from "happy cows" when, in fact, the cows weren't as "happy" as the company purported.[190] In another lawsuit, the Central District of California held that Krispy Kreme did engage in deceptive practices.[191] Consumers claimed the donut company deprived them of health benefits because the "raspberry-filled" doughnuts contained no actual raspberries.[192]

A three-million-dollar settlement against Nutella is widely believed to be the apex of the frenzy over frivolous lawsuits.[193] A mother claimed

185. *See e.g.,* Final Determination Regarding Partially Hydrogenated Oils, 80 Fed. Reg. 34650, 34669 (June 17, 2015) (requiring manufacturers to eliminate artificial trans-fat from food within three years).

186. *See id.*; U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 25-6 (discussing the concurrency of events like the FDA removal of trans-fat and surge of trans-fat litigation). The FDA's elimination of trans-fat would be a "gift to the litigation industry" and the "class action lawyers have got their forks and knives out." *Id.* at 26.

187. Andrew Levad & Jason Gordon, *Chipped Away: Frito-Lay Removes "All-Natural" Label from Products Containing GMOs,* ADLAW BY REQUEST (Nov. 14, 2017), www.adlawbyrequest.com/2017/11/articles/in-the-courts/chipped-away-frito-lay-removes-all-natural-label-from-products-containing-gmos [perma.cc/LM77-46MV] (stating that "Frito-Lay agreed to remove 'All Natural' label from its products containing genetically modified organisms ('GMOs')").

188. *See e.g.,* Chuang v. Pepper Snapple Grp., Inc., No. CV 17-01875-MWF, 2017 U.S. Dist. LEXIS 163337 (C.D. Cal. Sept. 20, 2017) (dismissing a claim alleging that the company's packaging misled consumers into thinking a fruit snack was healthy by claiming it was "made with Real Fruit"); *see e.g.*, Werbel v. Pepsico, Inc., No. C 09-04456 SBA, 2010 U.S. Dist. LEXIS 76289, at *9 (N.D. Cal. July 1, 2010) (holding that "no reasonable consumer would believe that 'Cap'n Crunch derives any nutritional value from berries").

189. *Organic Consumers Ass'n*, No. 2018 CA 004850 B at *1.

190. *Id.* at *5.

191. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 21.

192. *See id.* (alleging that Krispy Kreme engaged in deceptive practices by selling doughnuts not made with real ingredients while charging premium prices).

193. *See e.g.*, U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 20 (discussing that after Nutella "settled for a handsome amount," the victory spurred more suits challenging labels that allegedly claim "products are healthier than they are, even when the label fully discloses the full ingredients"); *see also,* Ted Burnham, *Nutella Maker May Settle Deceptive Ad Lawsuit For $3 Million*, NAT'L PUB. RADIO (Apr. 26, 2012), www.npr.org/sections/thesalt/2012/04/26/151454929/nutella-maker-

she was "shocked to learn" Nutella's hazelnut spread was not a "healthy" breakfast food, as advertised.[194] Nutella's advertisement highlighted its product's positive attributes.[195] When the mother learned the nutritional value was instead similar to a candy bar, she successfully sued Nutella in the Southern District of California for deceptive marketing practices.[196]

6. Primary Jurisdiction Remedy

When listed as defendants, food and beverage companies frequently invoke the doctrine of primary jurisdiction in an attempt to evade litigation.[197] Primary jurisdiction is a "prudential doctrine" used to stay or dismiss litigation.[198] A court typically invokes primary jurisdiction when it believes a regulatory agency is better equipped to decide the litigated issue.[199] Therefore, food and beverage companies use this tactic with the hope that the courts believe the FDA or USDA should rule on the litigated issue.[200] Federal courts' rulings on these motions, however, are far from uniform.[201] Some stay litigation claims[202] while other courts deny the doctrine.[203] Either way, the effect is a

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may-settle-deceptive-ad-lawsuit-for-3-million [perma.cc/6YPM-7SQY] (questioning how a mother could be surprised that a chocolate spread is unhealthy).

194. *Hohenberg*, No. 11-CV-205 H, at *2 (complaining that plaintiff relied on a Nutella ad of a mother feeding Nutella to her children as part of a healthy breakfast as the reason for feeding her own child Nutella for breakfast).

195. *See* U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 20 (explaining that the Nutella ads focused on the products "quality ingredients," such as hazelnuts and skim milk, but did not mention the sugar and fat content); *see also*, NUTELLA, www.nutella.com/us [perma.cc/P9L4-2M8R] (showing Nutella contains 21 grams of sugar and 11 grams of fat per serving).

196. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 20.

197. *See* Sciortino v. PepsiCo, Inc., 108 F. Supp. 3d 780, 811 (N.D. Cal. 2015) (explaining that the court merely stays or dismisses proceedings to allow the plaintiff to pursue administrative remedies).

198. *Id.*

199. *Id.*

200. *See* PERKINS COIE, *supra* note 161, at 6 (noting "several courts extended primary jurisdiction stays in deference to the FDA's open docket on defining 'natural' in food labeling"); *see also,* U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 33 (noting that other courts have "followed by example" to stay litigation pending an FDA ruling).

201. *Compare* Forsher v. J.M. Smucker Co., CV 2015-7180, 2016 WL 5678567, at *1 (E.D.N.Y. Sept. 30, 2016) (invoking primary jurisdiction because the FDA could best address the technical and policy issues raised by labeling a GMO product as "natural"), *with* Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111, 1124 (N.D. Cal. 2010) (rejecting application of primary jurisdiction because "courts are well-equipped to handle" such challenges in the food labeling arena).

202. *See* Coyle v. Hornell Brewing Co., No. 08-cv-02797, 2010 WL 2539386, at *4 (D.N.J. June 15, 2010) (deciding that whether high-fructose corn syrup is "natural" or artificial is a task for the regulatory agency and not the courts).

203. *See e.g., In re ConAgra Food, Inc.* 90 F. Supp. at *5 (refusing to stay litigation because it was highly speculative of when, if ever, the FDA would define "natural"); *see e.g.*, Astiana v. Hain Celestial Grp., Inc., 783 F.3d 753, 761 (9th Cir. 2015) (stating that "common sense tells us that even when agency expertise would be helpful, a court should not invoke primary jurisdiction when the agency is aware of but has

patchwork of state labeling laws.[204]

III. ANALYSIS

Section III begins by illustrating how each category of food and beverage litigation is inextricably tied to regulatory shortcomings. This section reveals the patchwork of labeling laws throughout the country caused by the surplus of labeling litigation. This section further explores specific regulations of non-organic conventional products. Finally, this section ends with a side-by-side comparison of "organic" products versus conventional ones.

Over the last twenty-plus years, U.S. food and beverage labeling regulations have played out in the marketplace in an unsustainable manner.[205] Confusion is inherent in the FDA's statutory and regulatory schemes.[206] This is evident by the fact that judges, companies, and consumers alike urge the FDA to create new regulations and to update existing ones.[207] The FDA fails to realize that the food and beverage industry has undoubtedly changed since Congress enacted the NLEA in 1990.[208] As one example, the NLEA was written in a time where food additives were simple ingredients such as salt and vinegar.[209] Now, food additives exist in forms such as Olestra, a chemical created by the food giant Procter & Gamble.[210] The FDA's continued failure to update existing regulations and to promulgate new ones feeds the surplus of litigation.[211]

The surge of food and beverage litigation is inextricably tied to regulatory shortcomings.[212] However, consumers and companies

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expressed no interest in the subject matter of the litigation").

204. *Compare, Trammel*, No. 3:12-cv-02664-CRB (finding that "natural" labels cannot contain GMOs), *with* Randolph v. J.M. Smucker Co., 303 F.R.D. 679, 692 (S.D. Fla. 2014) (denying class certification on the basis that consumers would not think that "all natural" meant non-GMO).

205. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 3.

206. *See e.g.*, 21 C.F.R. § 101.22 (2021) (allowing a manufacturer to label a product as "naturally strawberry flavored," even if that product contains no actual strawberries).

207. *See e.g.*, *Pappas*, No. LA CV11-08276 at *2 (asking the court to find a "natural" label deceptive because the product contains GMOs); *see also, In re ConAgra Foods, Inc.*, 90 F. Supp. 3d at 1020 (noting that the FDA has not mandated whether GMOs constitute "natural" foods or not).

208. Peter Lehner, *FDA Allows Secret, Untested Chemicals into Our Food*, HUFFPOST (June 1, 2017), www.huffpost.com/entry/fda-allows-secret-untested-chemicals-into-our-food_b_59306534e4b042ffa289e859 [perma.cc/3SBC-6FRT] (recognizing that the NLEA was written in a time where food additives were simple ingredients).

209. *Id.*

210. *See e.g.,* Melissa Kravitz, *6 foods that are legal in the US but banned in other countries*, BUS. INSIDER (Mar. 1, 2017), www.businessinsider.com/foods-illegal-outside-us-2017-3 [perma.cc/LVC6-CKT2] (explaining the bad health effects of Olestra, a synthetically created food additive).

211. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 3.

212. *See e.g.*, *Rice*, No. 18 CV 7151 at *3 (suing LaCroix over an ingredient that can be both found in nature or synthetically produced in a lab).

seeking judicial resolution inadvertently create more problems – a patchwork of labeling laws.[213] The irony is that Congress passed the NLEA to create uniform labeling standards.[214] Yet today, in the absence of sufficient regulations, Congress's original intention is swallowed up by an inadequate regulatory scheme.[215]

A. Regulatory Shortcomings Fuel the Surge in Food and Beverage Litigation

1. Manipulating the Ingredient List Lawsuits

Some manufacturers pervert existing regulations.[216] One of the NLEA's most significant changes was requiring a manufacturer to list all ingredients by their specific name on the Ingredient List.[217] Such ingredients must also be listed by quantity in descending order.[218] A common practice is for manufacturers to advantageously use these regulations to mask the total amount of sugar in a product.[219]

First, companies masquerade sugar under a variety of guises.[220] Because an ingredient must be listed by its "specific name,"[221] sugar can be listed by over sixty different names.[222] Common names include sucrose and high-fructose corn syrup.[223] Dextrose, trehalose, and rice syrup, however, are less common names for sugar.[224] Consequently,

213. *Compare, Jessani*, 744 F. App'x at 18 (finding that a consumer is expected to read the ingredient list), *with Mantikas*, 910 F.3d at 635 (concluding that consumers are not expected to read the ingredient list).

214. 7 U.S.C. § 6501 (2021).

215. 21 C.F.R, §§100-190 (2021).

216. *See e.g.*, Class Action Complaint at 54, Milan v. Clif Bar & Co., No. 18-cv-02354-JD, 2019 U.S. Dist. LEXIS 141403 (N.D. Cal. Aug. 20, 2019) (noting the existence of thirteen different types of added sugars found in one single protein bar).

217. *See Overview of Food Ingredients, Additives & Colors, supra* note 62 (stating that food and beverage "manufacturers are required to list all ingredients in the food on the label"); *see also*, 21 C.F.R § 101.4(a)(1) (2021) (mandating that ingredients be listed by "common or usual name"); *see also, Id.* § 101.4(b) (stating the ingredient "shall be listed by a specific name and not a collective (generic) name").

218. 21 C.F.R § 101.4 (2021).

219. *See e.g.*, *Milan*, No. 18-cv-02354-JD at *2 (noting the existence of thirteen different types of added sugars found in one single protein bar).

220. Food Labeling: Revision of the Nutrition and Supplement Facts Labels, 81 Fed. Reg. 33742, 33813 (May 27, 2016) (noting that many consumers do not recognize the names of some types of sugars to be a sugar); *see* Negowetti, *supra* note 5, at 6 (noting that more than 50 lawsuits have been filed since 2012 against food producers for "failing to list 'sugar' . . . but instead, referring to the ingredient as 'evaporated cane juice'").

221. 21 C.F.R § 101.4(a)(1) (2021) (mandating that ingredients be listed by "common or usual name"); *see also, Id.* § 101.4(b) (stating the ingredient "shall be listed by a specific name and not a collective (generic) name").

222. 81 Fed. Reg. at 33833 (listing names for added sugars: "brown sugar, corn sweetener, corn syrup, dextrose, fructose, fruit juice concentrates, glucose, high-fructose corn syrup, honey, invert sugar, lactose, maltose, malt sugar, molasses, raw sugar, turbinado, sugar, trehalose, and sucrose").

223. *Id.*

224. *Id.*

consumers do not always recognize the names of some types of sugar as sugar.[225] By opting for unfamiliar sugar names, companies effectively deceive consumers about the amount of sugar in a product.[226]

Second, manufacturers use several types of sugar in a single product so the product appears healthier.[227] Instead of using just one type of sugar, manufacturers will disseminate the total amount of sugar by using multiple different sugar types.[228] Effectively, these companies can drop sugar further down the product's Ingredient List.[229] This is because, under the NLEA, the lesser the ingredient's weight, the lower it ranks on the list.[230] Thus, this practice allows a manufacturer to list healthier ingredients at the top.[231] Sugar synonyms, meanwhile, appear at the bottom of the Ingredient List, thereby portraying the product as having minimal sugar.[232] A seemingly "healthy" product can actually be loaded with sugar.[233]

It is no surprise consumers turn to the U.S. court system for protection against these deceptive practices.[234] In one case, plaintiffs sued Clif Bar & Company ("Clif") for misleading labels due to "excessive" amounts of sugar in their bars.[235] The company markets the bars as "healthy," yet some bars contain up to twenty-two grams of added sugar[236] – 88 percent of the daily recommended value.[237] Further, as many as thirteen different types of added sugars can be found in one single bar.[238] Currently, this litigation is pending.[239] The fact that the plaintiffs made it past summary judgment, however, indicates an impending verdict against the company.[240]

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225. *Id.* at 33813 (recognizing that consumers do not recognize names of some types of sugars, like trehalose, to indicate that is sugar).

226. 81 Fed. Reg. at 33813 (explaining that consumers do not recognize the names of some types of sugars to be a sugar or unable to determine the amount of sugar that is added); *see also Id.* at 33827 (noting that some consumers were unable to determine the "total amount of sugars," even when only "sugars" was listed on the label).

227. *See e.g., Milan*, No. 18-cv-02354-JD at *2 (explaining that Clif bar uses as many as 13 types of added sugar in its Classic Bars).

228. *See e.g.*, *id.* (noting the existence of thirteen different types of added sugars found in one single protein bar).

229. *Overview of Food Ingredients, Additives & Colors, supra* note 62.

230. 21 C.F.R § 101.4 (2021).

231. *Id.*

232. *Id.*

233. *See e.g.*, Class Action Complaint, *Milan*, No. 18-cv-02354-JD at 54 (discussing how Clif Bar markets its bars as "healthy," yet some bars contain up to 22 grams of added sugar).

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 55.

238. *See id.* at 54 (explaining that "the primary ingredient in every Classic Bar is added sugar from Brown Rice Syrup, but Clif uses as many as 13 types if added sugar in its Classic Bars").

239. *Id*.

240. *Id.*

The purpose of the Nutrition Facts Panel is to provide consumers with information needed to maintain healthy dietary practices.[241] When sugars are hidden unrecognizably on labels, however, consumers are unable to make healthy choices.[242] Consumers tend to think added sugar is mainly found in junk foods like cookies and cake.[243] In reality, added sugars hide in seventy-four percent of all packaged foods.[244] Thus, the aforementioned manufacturing practices are not just deceptive, but also harmful to American health.[245]

2. "Natural Flavor" Lawsuits

To create a more transparent market, the FDA mandated food and beverage companies to name every single ingredient.[246] However, the NLEA allows for a major loophole.[247] This author refers to this section of the NLEA as the "Willy-Wonka" section.

Unlike the term "natural," the FDA has a legally-binding definition for "natural flavors."[248] As discussed in Section II, the FDA does not require manufacturers to list which ingredients makeup the "flavor."[249] Flavors are "complex mixtures."[250] Often times, these mixtures are comprised of more than 100 chemicals.[251] Yet, these chemical cocktails are shielded behind the NLEA's regulatory scheme.[252]

The FDA enables companies to hide ingredients consumers may not recognize or want.[253] In fact, companies are never required to fully disclose the ingredients that create the "flavor" in their products.[254] This

241. 81 Fed. Reg. 33742 at 33754 (stating that the "objective of the Nutrition Facts label is to provide nutrition information about products to help consumers in maintaining healthy dietary practices").

242. *Id.* at 33823 (justifying adding "Added Sugars" to better enable consumers in constructing healthy dietary practices).

243. Tara Duggan, *Sneaky sugar: Where added sugar lurks in your diet*, SAN FRANCISCO CHRON. (Jan. 20, 2016), www.sfchronicle.com/recipes/article/Sneaky-sugar-Where-added-sugar-lurks-in-your-diet-6772809.php [perma.cc/5XDC-37AN].

244. *Id.*

245. 81 Fed. Reg. 33742 at 33814 (listing the negative health benefits of added sugar like cardiovascular disease and weight gain).

246. 21 C.F.R. § 101.4(a)(1) (2021) (mandating that every ingredient be listed by name).

247. *Id.* at § 101.22 (2019).

248. *Id.* § 101.22(a)(3).

249. *Id.* § 101.22(h)(1).

250. Andrews, *supra* note 64.

251. *Id.*

252. *See* 21 C.F.R. § 101.22 (2021) (allowing multiple ingredients to be collectively listed as "flavor").

253. Lisa Lefferts, *Clean Labels: Public Relations or Public Health?*, CTR. FOR SCI. IN THE PUB. INTEREST (2017), www.cspinet.org/sites/default/files/attachment/Clean%20Label%20report%20%281%29.pdf [perma.cc/PB7S-PXMT].

254. *See e.g.,* NATURE'S BAKERY, www.naturesbakery.com/faqs [perma.cc/6B78-A9DE] (last visited May 1, 2021) (refusing to disclosure the ingredients that make the "natural flavors" by calling it "proprietary information").

is an especially critical loophole for manufacturers using a proprietary mixture of ingredients collectively labeled as "flavors."[255] By allowing this exemption, the FDA recognizes companies should not have to forfeit their trade secrets.[256] There is a strong correlation with the fact that the flavor industry grosses around $24 billion in sales annually.[257]

As the fourth most commonly listed ingredient on the Nutrition Facts labels, "natural flavors" is deceptive for several reasons.[258] First, the difference between "artificial" and "natural" flavors is arbitrary. "Natural flavor," like artificial flavoring, is an unspecified group of ingredients that displace real, nutritious ingredients.[259] Both artificial and natural flavors are created by flavorists in a laboratory.[260] Yet, the FDA makes the following distinction: natural flavors must be derived from plant or animal material,[261] but artificial flavors are synthesized in the laboratory.[262] Put simply, a natural flavor is still made in a lab, but originally sourced from something grown in nature.[263] The only difference is the source of the flavor chemicals.[264] The chemical structures and health effects are indistinguishable.[265] The NLEA makes an unfounded distinction between "natural" and "artificial" flavors.[266] Because consumers typically equate the term "natural" with positive health benefits,[267] the NLEA effectively deceives consumers into believing a "natural flavor" is healthier – even though this is not the case.[268] "Natural" only means the ingredient started out in nature.[269] Ironically, artificial flavors can sometimes be healthier than their "natural" counterparts.[270]

Second, "natural flavors" are anything but natural. A "natural flavor" is an additive to a product.[271] Natural flavors are highly

255. *Id.*

256. *See e.g.*, 21 C.F.R § 101.22(i)(4)(v) (2021) (protecting companies "flavor" formula from public access).

257. Andrews, *supra* note 64.

258. *Id.*

259. Lefferts, *supra* note 253.

260. Andrews, *supra* note 64.

261. *See* 21 C.F.R. § 101.22(i)(1) (2021) (stating that natural flavor can derive their aroma or flavor from "spice[s], fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, fish, poultry, eggs, dairy products" or products fermented or otherwise manipulated in a lab).

262. Andrews, *supra* note 64.

263. 21 C.F.R. § 101.22 (2021).

264. Interview with Kirsten Straughan, *supra* note 158.

265. Andrews, *supra* note 64.

266. 21 C.F.R. § 101.22 (2021).

267. *See* Negowetti, *supra* note 5, at 6 (noting that consumers purchase "natural" products in belief that these attributes make food healthier).

268. *See* Lefferts, *supra* note 253, at 16 (stating "[p]aradoxically, both natural and artificial flavorings products contain a wide range of synthetic non-flavoring ingredients, such as artificial preservatives, artificial colorings, and emulsifiers.")

269. 21 C.F.R. § 101.22(a)(3) (2021).

270. *See* Lefferts, *supra* note 253, at 16 (explaining that "natural" cured meats can potentially have 10 times as much nitrite as meats cured with synthetic nitrites).

271. *See* Franziska Spritzler, *Natural Flavors: Should You Eat Them?*, HEALTHLINE

processed and contain many chemical additives.[272] In its definition of "natural flavor," the NLEA fails to account for the naturally-occurring source that is being highly processed during the manufacturing process.[273] In fact, the NLEA expressly permits a product to be labeled as a "natural flavor," even if the product contains artificial, non-flavoring ingredients.[274] Essentially, the only requirement is that the "natural flavor" mimics that of a real food.[275] This regulation is deceptive because the products' flavors – not their ingredients – are natural.[276] Consumers believe a product labeled "natural" makes a food healthy.[277] Thus, by allowing manufacturers to hide hundreds of chemicals, preservatives, and additives behind a vague term like "natural flavor," the NLEA actually perpetuates this deception.

Finally, the NLEA defines "natural flavor" in a vague manner. According to the FDA, a "natural flavor" can be derived from *any* source found in nature.[278] The only condition is that the ingredients must simulate and provide the "characterizing" flavor of that product.[279] Accordingly, existing regulations allow a manufacturer to label a product as "naturally strawberry flavored," even if that product contains no actual strawberries.[280] In fact, manufacturers commonly use an amalgamation of substances to simulate the flavor of a real strawberry, without use of any actual strawberries.[281] Under the same regulatory scheme, a label can use illustrations of fruit to indicate that product's "natural flavor," even though the product contains no ingredients derived from the depicted fruit.[282]

Besides deception and an utter lack of transparency, this scheme poses other significant problems.[283] For example, the NLEA states a

(Dec. 16, 2016), www.healthline.com/nutrition/natural-flavors [perma.cc/S72C-TR8S] (stating that "natural flavors are extracted from plants and animals for the purpose of creating flavor enhancers to be used in processed foods").

272. *Id.*

273. Andrews, *supra* note 64.

274. 21 C.F.R. § 101.22(i)(1) (2021).

275. *Id.*

276. *Id.*

277. *See* Negowetti, *supra* note 5, at 6 (noting that consumers purchase "natural" products in belief that these attributes make food healthier).

278. 21 C.F.R. § 101.22 (2021).

279. *See id.* at § 101.22(i) (stating that the label may contain words or vignettes (including depictions of the fruit) describing the product's flavor even if none of the natural flavor used in the food is derived from the product whose flavor is simulated).

280. *Lam*, at 859 F. Supp. 2d at 1102.

281. *Id.*

282. *See e.g.,* McKinniss v. Kellogg USA, No. CV 07-2611 ABC (RCx), 2007 U.S. Dist. LEXIS 96106 at *12 (C.D. Cal. Sept. 19, 2007) (finding "FDA regulations permit illustrations of fruit on [a] product label to indicate that product's 'characterizing flavor,' even where the product contains no ingredients derived from the depicted fruit").

283. *See e.g.*, Sydney Ross Singer, *Attention, Allergy Sufferers: Beware of Natural Flavors*, FOOD SAFETY NEWS (Dec. 2, 2015), www.foodsafetynews.com/2015/12/attention-allergy-sufferers-beware-of-natural-

natural flavor can derive its flavoring from meat – a naturally occurring source.[284] So, a vegan might consume a product labeled "naturally flavored," not knowing the flavor was derived from animal products because the manufacturer is not required to reveal this.[285] Another risk is posed to people with food allergies.[286] Multiple ingredients are exempt from being named in the ingredient list under the elusive "flavor" label.[287] If an exempt ingredient is derived from one of the eight foods the FDA cites as commonly causing allergies, manufacturers must list its presence somewhere on the label.[288] However, if someone is allergic to a less common allergen, that person might not know what is in their food.[289] An example of this occurrence is in wine.[290] Wine is made by filtering through "fining agents."[291] Popular "fining agents" are animal derived,[292] which includes bone marrow, milk, gelatin, and isinglass – the bladder of a fish.[293] Under the NLEA, because each of these agents are animal derived, each agent constitutes a "natural flavor."[294] Therefore, each agent does not need to be individually named.[295]

This regulation has a chilling effect. Foods labeled with a certain flavoring might not involve that food at all.[296] In addition, seemingly vegan foods can include animal derived ingredients.[297] It is no surprise litigation in this area is expected to continue to rise.[298] For people who want to know exactly what they are eating, this NLEA loophole provides

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flavors/ [perma.cc/FHN8-3YKW] (stating that "the "natural flavor loophole" can contain potentially hazardous ingredients to people with allergies).

284. 21 C.F.R. § 101.22 (2021).

285. *See id.* at § 101.22(a)(3) (allowing an ingredient derived from meat or poultry to be collectively listed as "natural flavor").

286. Singer, *supra* note 283.

287. 21 C.F.R. § 101.22 (2021).

288. Food Allergen Labeling and Consumer Protection Act of 2004, Pub. L. No. 108-282, (codified in scattered sections of 21 U.S.C.); 21 U.S.C. §§ 202(2)(A), 203(a) (stating that eight common allergens are milk, eggs, fish, crustacean shellfish, tree nuts, peanuts, wheat and soybeans); *Food Allergen Labeling and Consumer Protection Act of 2004*, U.S. FOOD & DRUG ADMIN. (July 16, 2018), www.fda.gov/food/food-allergensgluten-free-guidance-documents-regulatory-information/food-allergen-labeling-and-consumer-protection-act-2004-falcpa [perma.cc/3W2Z-FRFM].

289. Singer, *supra* note 283.

290. *See* IS WINE VEGAN?, PETA, www.peta.org/about-peta/faq/is-wine-vegan/ (stating that "[p]opular animal-derived fining agents used in the production of wine include blood and bone marrow, casein (milk protein), chitin (fiber from crustacean shells), egg albumen (derived from egg whites), fish oil, gelatin (protein from boiling animal parts), and isinglass (gelatin from fish bladder membranes)").

291. *Id.*

292. *Id*.

293. *Id.*

294. 21 C.F.R. § 101.22(a)(3) (2021).

295. *See id.* (allowing flavor derived from animals to be collectively listed).

296. *See* Henny v. Harvey, No. 7:08-cv-00399, 2009 U.S. Dist. LEXIS 25977 at *10 (W.D. Va. Mar. 27, 2009) (explaining that pork "flavor" was not made from any pork).

297. *See e.g.*, 21 C.F.R. § 101.22(a)(3) (allowing an ingredient derived from meat or poultry to be collectively listed as "natural flavor").

298. Interview with Dean Panos, *supra* note 134.

no clarity.

3. Natural Ingredients Produced Synthetically Lawsuits

The Illinois lawsuit against LaCroix is yet another example of the insanity over the artificial vs. natural debate.[299] Yet, the issue in the *LaCroix* lawsuit illustrates confusion surrounding an ingredient or chemical that can be found both in nature or synthetically produced in a lab.[300] Unfortunately, the ambiguity surrounding how the FDA distinguishes natural chemicals from synthetic ones is of little help in resolving this ongoing dispute.[301] As previously explained, under the NLEA, when a chemical is extracted from an actual plant, it is "natural."[302] When the *same* chemical is made in a laboratory setting, the chemical is deemed synthetic and labeled "artificial."[303] This distinction is arbitrary.

Take, for example, an ingredient at issue in *LaCroix*.[304] LaCroix uses the chemical Linalool as a citrus flavoring agent.[305] The lawsuit claims Linalool is not "natural" because the FDA lists Linalool as a synthetic ingredient.[306] However, this allegation is an erroneous reading of the regulation. It is true Linalool appears on the FDA's approved lists of synthetic flavorings,[307] but that is just because it can *also* be synthesized in a lab.[308] Linalool is a chemical that naturally occurs in over 200 plants and fruits, including herbs, leaves, flowers, and wood.[309] Nonetheless, the NLEA makes the following distinction: if Linalool is extracted from a natural plant in a lab, as LaCroix maintains, then the false labeling claim has no basis.[310] However, if Linalool was engineered in a lab, as Plaintiff maintains, LaCroix must remove "natural" from its label.[311] The two chemicals are the same;[312] the only difference is how they are

299. *Rice*, No. 18 CV 7151 at *3.

300. Interview with Kirsten Straughan, *supra* note 158.

301. *See* 21 C.F.R. § 101.22 (2021) (explaining that when compounds are extracted from actual real sources, they are natural, but when they are synthesized in a lab, they are synthetic and labeled "artificial"); *see also*, *Overview of Food Ingredients, Additives & Colors*, *supra* note 62 (explaining that some ingredients found in nature can be manufactured artificially and produced more economically, with greater purity and more consistent quality, than their natural counterparts).

302. 21 C.F.R. § 101.22(a)(3) (2021).

303. *Id.* at § 101.22(a)(1).

304. *Rice*, No. 18 CV 7151 at *3.

305. *Id.*

306. *Id.* at *11.

307. 21 C.F.R §182.60 (2019).

308. Technical Res. Int'l, *Summary of Data For Chemical Selection: Linalool*, U.S. DEP'T OF HEALTH AND HUMAN SERV. & NAT'L TOXICOLOGY PROGRAM 8 (Sept. 1997), www.ntp.niehs.nih.gov/ntp/htdocs/chem_background/exsumpdf/linalool_508.pdf [perma.cc/F9KU-QH2H].

309. *Id.*

310. 21 C.F.R. § 101.22(a)(3) (2021).

311. *Id.* at § 101.22(a)(1).

312. Interview with Kirsten Straughan, *supra* note 158.

sourced.[313] This distinction is meaningless, and, from a scientific standpoint, the two are exactly the same.[314]

The lawsuit against LaCroix highlights the disjunction between how a manufacturer understands "natural" and the consumer's belief regarding the term "natural."[315] On the one hand, consumers – like the plaintiff in *LaCroix* – believe manmade chemicals can never be considered "natural."[316] At the other end of the spectrum, manufacturers and industry experts recognize that both forms of the chemical are identical, regardless of the source.[317] According to scientists, recognizing one form as natural and the other as synthetic is a distinction without merit.[318] Some courts have even offered another interpretation – stating the degree of processing and the fact that the ingredient was not derived from a plant is what distinguishes a synthetic one from a natural substance.[319] With multiple interpretations, it is no wonder these labeling lawsuits continue to proliferate.[320]

Ambiguities in FDA regulations are fueling this litigation. The NLEA deceives consumers into believing a "natural" chemical is healthier than its synthetically created counterpart.[321] Yet, the real "issue" with synthetics is when the chemicals are used to create a new substance,[322] or used in toxically high concentrations.[323] In the suit against LaCroix, however, the synthetic substance is simply an exact replication of the natural substance – natural product synthesis.[324]

In reality, the major difference is cost.[325] It costs more to derive a chemical from plants than to create it in a lab.[326] The "natural" chemical

313. 21 C.F.R. § 101.22(a) (2021).

314. Interview with Kirsten Straughan, *supra* note 158; *see also,* Gary Reineccius, *What is the difference between artificial and natural flavors?*, SCIENTIFIC AMERICAN (July 29, 2002), www.scientificamerican.com/article/what-is-the-difference-be-2002-07-29/ [perma.cc/ZVM7-AAY2] (recognizing that "natural" flavors are "in fact no better in quality, nor are they safer, than their cost-effective artificial counterparts").

315. *See* Interview with Kirsten Straughan, *supra* note 158 (explaining that consumers believe words like "synthetic" are "scary" and must mean that the product is bad, but they don't actually know what it means or what the health effects are – if any).

316. *Rice*, No. 18 CV 7151 at *3.

317. Interview with Kirsten Straughan, *supra* note 158.

318. *See id.* (explaining that the real issue with synthetically created natural ingredients is when the substances are used to create a new substance or used in toxically high concentrations).

319. Rojas v. Gen. Mills, Inc., 2014 U.S. Dist. LEXIS 41315, 2014 WL 1248017, at *1 (N.D. Cal. March 26, 2014).

320. PERKINS COIE, *supra* note 161, at 8.

321. 21 C.F.R. § 101.22 (2021).

322. *See e.g.,* Kravitz, *supra* note 210 (explaining the negative health effects of Olestra, a synthetically created food additive).

323. Interview with Kirsten Straughan, *supra* note 158.

324. K. C. Nicolaou, *Organic Synthesis: The Art and Science of Replicating the Molecules of Living Nature and Creating Others Like Them in the Laboratory*, 470 PROC. R. SOC. A 19, 21 (2013).

325. Reineccius, *supra* note 314.

326. *Id.*

route is simply too expensive on a practical or commercial scale.[327] The FDA understands this concept.[328] The FDA explicitly states "ingredients found in nature can be manufactured artificially and produced more economically, with greater purity and more consistent quality, than their natural counterparts."[329] Yet, in direct contradiction to itself, the FDA makes a senseless distinction between natural and synthetic in the NLEA.[330]

4. Front-Label Claims Do Not Match the Ingredient List Lawsuits

The dramatic increase in lawsuits against companies whose front-label claims differ from that product's ingredient list stems from NLEA insufficiencies.[331] Take the grain issue in the Cheez-It lawsuit, for example.[332] In *Mantikas v. Kellogg Company*, consumers sued Cheez-It for deceptive labeling based on marketing its crackers as "whole grain."[333] The Second Circuit Court of Appeals found the label deceptive because the crackers were made predominantly from "enriched white flour," not whole grains.[334] Although deceptive, no regulation mandates how much grain is needed in order to claim a product is "whole grain."[335] The FDA is radio silent on any measurements specifying the grain content of label claims.[336] The only types of claims with existing regulations are specifically identified flours, like "whole wheat flour,"[337] or the exact percentage of the ingredient as in "100% whole grain."[338] The clear lack of regulations provides no hope for courts, consumers, or companies involved in these types of claims.

On the other hand, existing yet insufficient regulations create problems too. Although the NLEA mandates all foods to be listed on the Ingredient List by its common or usual name,[339] some exceptions exist.[340] The class action against Rx bar highlights this unnerving

327. *Id.*

328. *Overview of Food Ingredients, Additives & Colors, supra* note 62.

329. *Id*.

330. 21 C.F.R. § 101.22 (2021).

331. *Food-Labeling Litigation: Trends to Watch in 2019*, MCGUIRE WOODS (Jan. 3, 2019), www.mcguirewoods.com/client-resources/Alerts/2019/1/food-labeling-litigation-trends-2019 [perma.cc/54GM-G44V].

332. *Mantikas*, 910 F.3d at 635.

333. *Id.* at 634.

334. *Id.*

335. *Guidance for Industry and FDA Staff: Whole Grain Label Statements*, U.S. FOOD AND DRUG ADMIN. & U.S. DEPT. OF HEALTH AND HUMAN SERV., 5-6 (Feb. 2006), www.wholegrainscouncil.org/sites/default/files/atoms/files/FDAdraftguidance.pdf [perma.cc/WX9W-Q9PC] (noting that instead of adding regulations, the FDA released a non-binding guide that carries no regulatory force).

336. *Id.*

337. 21 C.F.R. § 137.200 (2021).

338. *Id.* § 102.5(b).

339. 21 C.F.R. § 101.4(a) (2021).

340. *Id.* at § 101.4(b)(11) (2021).

regulatory exemption.[341] Consumers filed suit after realizing the bars purported "egg whites" were actually grounded up egg white protein powder, and not real eggs.[342] The NLEA expressly allows this practice.[343] This loophole allows companies to manipulate their Ingredient Lists in order to entice consumers. Rx Bar's motto is "no B.S." and prides itself on a minimalist label approach.[344] The complete ingredient list is simple: dates, egg whites, almonds, and cashews.[345] Rx Bar marketed its product as containing "egg whites," because consumers would be less enticed to buy a product boldly labeled as "egg white protein powder."[346] Clearly, Rx bar was right, because consumers filed suit when they found out the bar's "real" ingredients were not so real.[347] Such a regulatory scheme is misleading because it effectively deceives consumers and fails to reveal the basic nature of the product.[348] Undoubtedly, these lawsuits are expected to continue to rise.[349]

While over seventy-seven percent of Americans actually read ingredient lists, existing regulations still enable consumer deception.[350] When the FDA finally decided to crack down on companies for deceptive Ingredient Lists, it targeted a granola bar for listing "Love" as an ingredient.[351] FDA regulations, and a lack thereof, continue to cause marketplace confusion and enable deceptive practices.[352]

5. "Healthy" Lawsuits

The twenty-year-old NLEA is in need of a reboot. Regulation of the term "healthy" has proven insufficient.[353] It is no surprise that food and beverage litigation increasingly targets products advertised as "healthy."[354] A class action filed against KIND Bar in the Southern District of New York illustrates the FDA's failure to create an adequate definition.[355]

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341. Complaint at 3, *Pizzirusso*, No. 1:18-cv-03529.

342. *Id.* at 7.

343. 21 C.F.R. § 101.4(b)(11) (2021).

344. Complaint at 1, 3, *Pizzirusso*, No. 1:18-cv-03529.

345. *Id.* at 2.

346. *Id.* at 8.

347. *Id.* at 11.

348. *Id.*

349. Interview with Dean Panos, *supra* note 134.

350. Zoya Gervis, *Most people think food labels are misleading*, N.Y. POST (June 7, 2018), www.nypost.com/2018/06/07/most-people-think-food-labels-are-misleading/ [perma.cc/H45K-Y2JZ].

351. Bruce Y. Lee, *FDA Tells Bakery That 'Love' Is Not an Ingredient*, FORBES (Oct. 4, 2017) www.forbes.com/sites/brucelee/2017/10/04/fda-tells-bakery-that-love-is-not-an-ingredient/#f5af0e375fb2 [perma.cc/URD6-3DCW].

352. *See* Complaint at 3, *Pizzirusso*, No. 1:18-cv-03529 (alleging that defendant intentionally misled consumers by stating that the product contained egg white powder instead of real egg whites as listed).

353. *See e.g.,* Press Release, KIND, *supra* note 58 (explaining that existing regulations allow a product like pop-tarts, but not avocados, to be labeled as healthy).

354. U.S CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 2.

355. In re KIND LLC Healthy & Nat. Litig., 209 F. Supp. 3d 689 (S.D.N.Y. 2016).

After consumers alleged KIND mislabeled its fruit and grain bars as "healthy," the FDA requested removal of the word from KIND products.[356] In response, KIND filed a citizen petition urging the FDA to update its definition of "healthy."[357] KIND explained current regulations disallow foods like nuts, salmon, and avocados to be labeled as healthy, yet items like fat-free pudding and low-fat toaster pastries can carry such designation.[358] The NLEA states snack foods labeled as "healthy" cannot contain more than three grams of total fat per serving.[359] Nuts are nutritious; yet, they contain fat content exceeding the amount allowed by the NLEA.[360] Nuts are a primary ingredient in KIND bars.[361] KIND bars, therefore, exceeded the NLEA's "healthy" threshold allowance.[362] Following KIND's petition, the FDA soon reversed its position and allowed KIND to reinstate its "healthy" label.[363]

Subsequently, the FDA admitted it must update its regulations to align with modern science and dietary guidance.[364] In the wake of this chaos and confusion, the FDA recently looked to redefine "healthy."[365] Unfortunately, the FDA's guarantee to redefine "healthy" came up empty-handed.[366]

Without a change to current FDA regulations, companies and consumers will continue to be harmed. To start, consumers are misled when existing regulations allow unhealthy products to claim they are "healthy."[367] On the flip side, consumers continue to dish out lawsuits based on outdated regulations.[368] As evinced by the lawsuit against KIND, companies with products that are actually healthy are then sued for using the term "healthy" because their products do not conform to the NLEA's obsolete regulations.[369] The FDA's empty promises to

356. Press Release, KIND, *supra* note 58.

357. *See* KIND LLC, Citizen Petition, No. FDA-2015-P-4566 (calling for "updated regulations emphasizing the importance of real foods and nutrient-dense ingredients within a healthy diet").

358. Press Release, KIND, *supra* note 58.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. Dep't. of Health and Human Services, Proposed Rule to Update the Definition for the Implied Nutrient Content Claim "Healthy" Under The Federal Food, Drug, and Cosmetic Act of 1938 (2018), www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=0910-AI13 [perma.cc/VE4B-SYQU] (proposing revision to update the existing definition of "healthy," under 21 C.F.R. § 101.65, to be consistent with current FDA dietary guidelines).

365. Use of the Term ''Healthy'' in the Labeling of Human Food Products, 81 Fed. Reg. at 404.

366. *See id.* (resulting in no updated regulations despite undertaking a comment and rulemaking process).

367. See Press Release, KIND, *supra* note 58 (explaining that unhealthy products such as fat-free pudding can be labeled "healthy" under existing regulations).

368. U.S CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 2.

369. KIND LLC, Citizen Petition, No. FDA-2015-P-4566 (calling for "updated

undertake rulemaking processes do not provide manufacturers with a beacon of hope.[370]

These regulations established twenty-plus years ago are inconsistent with current nutrition science and modern dietary guidelines.[371] Yet, in another failed attempt to correct regulations, the FDA has left consumers, companies, and courts in a state of disarray.[372]

6. GMO Lawsuits

The question of whether GMOs are "natural" is at the core of many recent labeling suits.[373] In an attempt to alleviate some marketplace confusion, the USDA did pass a mandatory national labeling law for GMO products.[374] As Section II outlined, the National Bioengineered Food Disclosure Standard ("the Standard") now requires manufacturers to disclose the presence of GMOs.[375] This labeling regime will not come into full effect until January 2022.[376] However, the Standard is structured in a way that raises concern over the potential for more deception and litigation.[377]

The Standard creates a misleading, ineffective, and ultimately unworkable regulation that does not satisfy the consumers' right to know if a product contains a GMO. First, the USDA Standard misses the mark in providing transparency for consumers. The Standard offers companies the choice of four disclosure options.[378] The options are: (1) a text disclosure,[379] (2) a symbol disclosure,[380] (3) an electronic link disclosure,[381] or (4) a text message disclosure.[382] By allowing multiple

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regulations emphasizing the importance of real foods and nutrient-dense ingredients within a healthy diet").

370. *Se e.g.,* Use of the Term ''Healthy'' in the Labeling of Human Food Products; Request for Information and Comments; Extension of Comment Period, 81 Fed. Reg. 96, 404 (Dec. 30, 2016) (resulting in no updated regulations despite undertaking a comment and rulemaking process).

371. *Id.*

372. *Id.*

373. *See e.g., In re ConAgra Foods, Inc.*, 90 F. Supp. at 919 (alleging that an "all natural" label is deceptive because the product contains GMOs); Interview with Dean Panos, *supra* note 134.

374. 7 C.F.R. § 66 (2021).

375. *Id.*

376. *See id.* (compelling all regulated entities to comply with the NBFDS beginning on January 1, 2022).

377. *Id.*

378. 7 U.S.C. § 1639b(2)(d) (2021) (allowing a food manufacturer to choose among different options to disclose bioengineered ingredients).

379. *See* 7 C.F.R. § 66.102 (2021) (mandating that a text disclosure must read "bioengineered food" or "contains bioengineered ingredients").

380. *See id.* at § 66.104 (2021) (stating that when using a symbol disclosure, manufacturers must replicate the form and design of the USDA's symbol and state that the product is "bioengineered").

381. *See id.* at § 66.106(a) (requiring an electronic or digital link (*ie:* a QR code, bar code, or SmartLabel) be accompanied by a text statement that reads "Scan here for food information" as well as a telephone number that consumers can call for more

distinct disclosure options, rather than insisting on one uniform disclosure method, consumers will likely be deceived once the regulation comes into effect in early 2022.

The option for electronic disclosures raises the gravest concern.[383] Consumers are unaware that a QR code, for example, will mean a product contains GMOs.[384] A QR code allows consumers with smartphones to scan a barcode on the package to see if the product contains GMOs or not.[385] Similarly, a statement reading, "Scan here for food information" fails to put a consumer on notice that the product contains GMOs.[386] Further, technology disclosure options alienate the elderly, disabled, and others who do not know how to scan or use such technology. For example, older adults are just thirteen percent as likely to have used QR codes as younger adults.[387] The Standard essentially decreases the availability and accuracy of information provided to consumers.

Second, the different disclosure options will likely mislead consumers into thinking they are purchasing non-GMO products, when in fact they are. Opting for the non-GMO option, a consumer might avoid the product with a symbol disclosure[388] – the most obvious disclosure method. That same consumer will then choose a product without a symbol, believing he or she is choosing a non-GMO product. An average consumer would not know a digital or electronic code means the product contains GMOs. Further, multiple products already carry existing electronic codes on their label for other reasons.[389] The different disclosure options are just not comparable. The Standard fails to require a clear, simple disclosure of GMOs. Four different options are confusing enough; but, by allowing companies to disclose in such a way that does not properly warn consumers enables deception.

Finally, the Standard fails to require disclosure by using clear terms

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information); *See also, id.* at § 66.106(b) (stating that when a smartphone scans the disclosure link, the user's smartphone must be prompted to a website containing the required disclosures).

382. *See id.* at § 66.108 (stating that a text message disclosure option must include the statement "Text [command word] to [number] for bioengineered food information.") The consumer must immediately receive a text message containing the appropriate bioengineered food disclosure. *Id.*

383. *See id.* at § 66.106(a) (allowing electronic disclosures).

384. *See id.* (allowing a QR code to be a form of disclosure).

385. *Id.*

386. *See id.* (stating that an electronic disclosure must be accompanied by a text statement that reads "Scan here for food information").

387. Jonathan Mendelson & Jennifer C. Romano Bergstrom, *Age Differences in the Knowledge and Usage of QR Codes*, 8010 Lecture Notes on Computer Science 156-161 (July 2013), doi.org/10.1007/978-3-642-39191-0_18 [perma.cc/89HE-4FC5].

388. 7 C.F.R. § 66.104 (2021).

389. Lynn Petrak, *Food companies, consumers benefiting from smart labels*, BANKING BUSINESS (July 12, 2018), www.bakingbusiness.com/articles/46608-food-companies-consumers-benefiting-from-smart-labels [perma.cc/FW7K-WH2T] (increasing SmartLabel from 4,000 products in early 2017 to nearly 28,000 food, beverage, personal care and household products in 2018).

that consumers can understand. The Standard mandates exclusive use of the term "bioengineered," instead of GMO.[390] "Bioengineered" is an unfamiliar term to consumers and will likely confuse them.[391] Ironically, the USDA made this decision on the basis that using any other term would cause marketplace confusion.[392] Yet, the USDA's justification is erroneous and misguided for several reasons.[393] The USDA admittedly utilized a public comment period and received more than 14,000 comments during its rulemaking process.[394] A comment period is a specified amount of time the public has to submit input before an agency makes a final decision on a proposed rule.[395] Multiple organizations, companies, and citizens all expressed their contempt of using "bioengineered" in lieu of GMO.[396] Even food giants argued for the use of GMO terminology because it is a familiar and preferred term for consumers.[397] Another reason for the USDA's flawed justification is that the "bioengineered" term is inconsistent with other government programs and regulations.[398] As one example, USDA organics uses terms like "GMO" and "genetic modification."[399] Ultimately, the Standard can only fulfill its mission if consumers understand the disclosure. The Standard, however, falls short in providing consumers with transparent information in a way they can digest.

Prior to enactment of the Standard, products were voluntarily certified as GMO-free by a non-profit.[400] These certified non-GMO

390. 7 U.S.C. § 1639b(2)(d) (2019) (mandating that all disclosure options require the label to use only the term "bioengineered," not GMO).

391. Letter from Gwendolyn Wyard to The Honorable Sonny Perdue, Secretary of Agric., U.S. Dep't of Agric. (July 3, 2018).

392. Greg Jaffe, *The Final Nat'l Bioengineered Food Disclosure Standard*, CTR. FOR SCI. IN THE PUB. INTEREST (Apr. 8, 2019), www.cspinet.org/news/biotech-blog-final-national-bioengineered-food-disclosure-standard [perma.cc/6LS6-K65J].

393. *See e.g.*, Michael Levitin, *Food giants back US consumers in battle for meaningful food labelling*, ETHICAL CORP. (Sept. 4, 2018), www.productstewardship.us/resource/resmgr/psi_in_the_news/2018_9_3_Food_giants_back_US.pdf (highlighting multiple organizations, companies, and citizens expressing their contempt of using "bioengineered" in lieu of "GMO"); *see e.g.*, *Organic 101: Can GMOs Be Used in Organic Products*, U.S. DEP'T OF AGRIC. (Feb. 21, 2017), www.usda.gov/media/blog/2013/05/17/organic-101-can-gmos-be-used-organic-products [perma.cc/39HU-6M9A] (explaining how organic farmers avoid enforcement actions by implementing an "organic system plan").

394. Press Release, U.S. Dep't of Agric., Establishing the Nat'l Bioengineered Food Disclosure Standard (Dec. 20, 2018).

395. *How to Participate in the Rulemaking Process*, DEP'T OF HEALTH AND HUMAN SERVICES 7, www.hhs.gov/sites/default/files/regulations/rulemaking-tool-kit.pdf [perma.cc/F8T3-EMUA].

396. *Levitin*, *supra* note 393.

397. *See e.g.*, *See Why We Support Mandatory Nat'l Gmo Labeling*, *supra* note 114 (stating that "GMO" is the most familiar and preferred term for consumers).

398. *Organic 101: Can GMOs Be Used in Organic Products*, *supra* note 393 (referring to genetically engineered substances with terms like "GMO" and "genetic modification).

399. *Id.*

400. Levitin, *supra* note 393.

products saw a massive sales increase of twenty-three billion dollars in just five years.[401] Evidently, consumers place high importance on buying non-GMO products.[402] A rise in litigation will naturally follow because the Standard's labeling scheme is deceptive and many consumers place importance on non-GMO products.[403] Between FDA silence on defining "natural"[404] and faulty USDA regulations, it is no surprise that GMO labeling suits are expected to increase.[405]

B. Effects of Food and Beverage Labeling Litigation

Confusion is not just daunting consumers and companies. Insufficient regulations have caused pandemonium amongst the federal courts.[406] When the FDA fails to regulate, courts are tasked with promulgating rulings, even though they are not industry experts.[407] When courts are forced to interpret vague and insufficient regulations, a wide variety of decisions are invariably disseminated across the country.[408] Federal courts either seek to interpret existing, but insufficient regulations,[409] or attempt to regulate where the FDA has failed to.[410] By attempting to grapple with the surge of food and beverage litigation, courts inadvertently create more confusion.[411] Federal courts are generating different rulings in different jurisdictions, thereby creating a patchwork of labeling laws.[412]

401. *See id.* (noting a sales increase from $3 billion in 2013 to $26 billion in 2018).

402. *Id.*

403. *Id.*

404. *See e.g.*, *Pappas*, No. LA CV11-08276 at *2 (asking the court to find a "natural" label deceptive because the product contains GMOs); *see also, In re ConAgra Foods, Inc.*, 90 F. Supp. 3d at 1020 (noting that the FDA has not mandated whether GMOs constitute "natural" foods or not).

405. Interview with Dean Panos, *supra* note 134 (stating that GMO suits are expected to continue rising).

406. *Compare*, *Chacanaca*, 752 F. Supp. 2d at 1124 (stating that "courts are well-equipped to handle" such challenges in the food labeling arena*, with Rice*, No. 18 CV 7151 at *2 (conceding that the court is ill-equipped to decide these scientific issues).

407. *See e.g., Rice*, No. 18 CV 7151 at *13 (diminishing the courts capability to decide scientific disputes).

408. *Compare, Jessani*, 744 F. App'x at 18 (finding that a consumer is expected to read the ingredient list), *with Mantikas*, 910 F.3d at 635 (concluding that consumers are not expected to read the ingredient list).

409. *See e.g., Lam*, at 859 F. Supp. 2d at 1106 (interpreting existing regulations to mean that a food manufacturer can label a product as "natural strawberry flavored," even if that product contained no strawberries).

410. *See e.g., Bohac*, No. 12-CV-05280-WHO at *3 (ruling on the term "natural" because it is "within the court's competence" absent FDA rules or regulations).

411. *See* Interview with Dean Panos, *supra* note 134 (recognizing existing patchwork of all different rulings from different jurisdictions).

412. *Id.*

1. Regulation by Litigation

The FDA has promised on countless occasions to promulgate new regulations, but always fails to follow through.[413] Similarly, the FDA promises to update existing regulations, but fails to do so every time.[414] Consumers, however, refuse to settle for a "Hobson's Choice" – a choice of taking what is available or nothing at all.[415] As a result, consumers flock to the courts to police labeling terms that are vague or even unregulated.[416]

In the U.S., consumers and companies are now turning to the courts for labeling regulations instead of Congress or regulatory agencies.[417] This trend is known as "regulation by litigation."[418] As an example, consumers asked a California court to rule that a product is mislabeled as "natural" when it contains GMOs because the FDA refuses to take a stance.[419] Consumers try to define amorphous labeling terms and the courts attempt to provide clarity to consumers.[420] Handing regulatory authority over to the federal courts, however, only exacerbates the confusion due to inconsistent rulings.[421]

2. Primary Jurisdiction

Courts are perplexed over how to handle this glut of litigation.[422] In the food and beverage labeling arena, federal courts are unsure if they are the proper authority to decide these industry specific issues.[423] The courts are therefore left to decide whether or not to invoke

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413. *See* Food Labeling Modernization Act of 2018, H.R. 5425, 115th Cong. (as proposed by House, Apr. 2, 2018) (failing to define natural).

414. *See e.g., FDA to Redefine "Healthy" Claim for Food Labeling*, U.S. FOOD & DRUG ADMIN. (Dec. 29, 2017), www.fda.gov/food/cfsan-constituent-updates/fda-redefine-healthy-claim-food-labeling [perma.cc/J2QZ-3GSE] (announcing a public process to redefine healthy, but failing to do so).

415. HOBSONS CHOICE, MERRIAM-WEBSTER DICTIONARY (11th ed. 2014).

416. *See Appetite For Litigation: Why Plaintiffs' Lawyers Hunger For Food-Labeling Lawsuits*, *supra* note 140, at 2 (seeking to fill the regulatory void using litigation in the absence of FDA definition of "natural").

417. *See e.g.,* KIND LLC, Citizen Petition, No. FDA-2015-P-4566 (petitioning the FDA for updated regulations); *see e.g.*, *Pappas*, No. LA CV11-08276 at *2 (asking the court to find a "natural" label deceptive because the product contains GMOs).

418. *See e.g.,* KIND LLC, Citizen Petition, No. FDA-2015-P-4566 (petitioning the FDA for updated regulations); *see e.g.*, *Pappas*, No. LA CV11-08276 at *2 (asking the court to find a "natural" label deceptive because the product contains GMOs).

419. *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d at 919.

420. *See e.g.*, *Pappas*, No. LA CV11-08276 at *2 (asking the court to find a "natural" label deceptive because the product contains GMOs).

421. *Compare, Trammel*, No. 3:12-cv-02664-CRB (finding that "natural" labels cannot contain GMOs), *with Randolph*, 303 F.R.D. at 692 (denying class certification on the basis that consumers would not think that "all natural" meant non-GMO).

422. *See e.g., Rice*, No. 18 CV 7151 at *2 (conceding that the court is ill-equipped to decide these scientific issues).

423. *See id.* at *13 (stating that the court has "no idea" how do decide a question "not being a biologist").

primary jurisdiction, due to possible agency action.[424]

At first, federal courts often invoked primary jurisdiction in the belief that the FDA was undertaking a rulemaking process.[425] In 2016, the Ninth Circuit stayed litigation under primary jurisdiction because the FDA requested public comments showing interest in defining "natural."[426] This decision sparked movement in food and beverage litigation, as federal district courts in New York, California, Missouri, and New Jersey followed the trend and stayed litigation.[427] Unfortunately, the FDA's 2016 comment process ended with no definition or guidance for "natural."[428]

The FDA's continued reluctance to define the much-maligned term seems to have sparked a new trend – courts that initially stayed litigation based on primary jurisdiction are now lifting stays.[429] Federal courts across the country are highly speculative of whether or not the FDA will *ever* regulate "natural."[430] Uncertainty was deemed significant enough that three federal judges, two from the Northern District of California and one from New Jersey, wrote a letter to the FDA pleading for guidance on a proper definition of "natural."[431] The FDA declined to provide any definition.[432] In response, the three judges lifted their stays.[433] Federal courts now recognize the "glacial pace" of the FDA in

424. *Sciortino*, 108 F. Supp. 3d at 811.

425. *See* PERKINS COIE, *supra* note 161, at 6 (noting "several courts extended stays under primary jurisdiction in deference to the FDA's open docket on defining 'natural' in food labeling"); *see also,* U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 33 (noting that other courts have "followed by example" to stay litigation pending an FDA ruling).

426. *See e.g.*, Kane v. Chobani, LLC, 645 F. App'x 593, 594 (9th Cir. 2016) (staying litigation under primary jurisdiction because the FDA requested comments in defining "natural").

427. *See* U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 33 (noting that other courts followed *Kane* and stayed litigation pending an FDA rule); *See e.g.*, *George*, No. 4:15-cv-962 at *3 (staying litigation based on primary jurisdiction because the FDA has the appropriate authority and expertise to determine the question).

428. *Use of the Term Natural on Food Labeling*, *supra* note 51.

429. *See e.g.*, *In re KIND LLC "Healthy & All Nat." Litig.*, 287 F. Supp. 3d at 469 (lifting stay based on primary jurisdiction because of the FDA's failure to promulgate definitions); *see* Watson, *supra* note 145 (recognizing the "natural" litigation dip in 2016); *see e.g.,* Madrigal v. Hint, Inc., No. CV 17-02095-VAP, 2017 U.S. Dist. LEXIS 221802 at *7 (C.D. Cal. June 23, 2017) (noting that primary jurisdiction is improper without any sense as to when, or even if, the FDA will follow up on its request for public comment and issue formal guidelines regarding the use of "natural" in food labeling); *see e.g.,* In re Hain Celestial Seasonings Prod. Consumer Litig., 108 B.R. 36 (C.D. Cal. 2016) (lifting a stay after six months of no indication that the FDA had taken any rulemaking or informal guidance action).

430. *See e.g., In re ConAgra Food, Inc.* 90 F. Supp. at *5 (refusing to stay litigation because it was highly speculative of if the FDA would ever define "natural").

431. *See* Amy P. Lally, Livia M. Kiser, & Rachel Goldberg, *FDA Seeks Public Input on "Natural Food" Labeling Use*, CLASS ACTION REPORTER (Mar. 9, 2016) (pleading the FDA to issue guidance for a definition of "natural").

432. *Id.*

433. *Id.*

defining such terms.[434] The Ninth Circuit expressly criticized the FDA stating "common sense tells us that even when agency expertise would be helpful, a court should not invoke primary jurisdiction when the agency is aware of, but has expressed no interest in, the subject matter of the litigation."[435]

Some question the federal courts' ability to rule on such technical and policy issues.[436] A federal court in the Northern District of Illinois conceded it was ill-equipped to resolve the issue as the court is "not a biologist and has no expert assistance."[437] Nonetheless, the court proceeded to rule on the issue because existing regulations provide no basis for resolution and FDA rulemaking was highly unlikely.[438] Federal courts are now taking it upon themselves to fill in the regulatory gaps in the wake of silence from the FDA.[439]

The bottom line is that courts are ill-suited to decide these industry specific issues.[440] Consumers and companies turning to the federal court system for resolution, however, leaves the courts with no choice but to regulate through litigation.[441] Because courts inherently interpret issues differently, a patchwork of labeling laws is not just imminent, but prevalent.[442]

3. A Patchwork of Labeling Laws

Federal courts attempting to regulate where the FDA has failed to has inadvertently created a patchwork of labeling laws with inconsistent rulings.[443] A series of GMO labeling suits illustrate this repercussion.[444]

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434. *See e.g.*, *In re KIND LLC "Healthy & All Nat." Litig.*, 287 F. Supp. 3d at 469 (recognizing the "glacial pace" of the FDA in defining the term "natural" and lifting stays).

435. *Astiana*, 783 F.3d at 753.

436. *Forsher*, CV 2015-7180 at *1 (invoking primary jurisdiction because the FDA is best to answer the technical and policy issues raised by labeling a GMO product as "natural").

437. *Rice*, No. 18 CV 7151 at *13 (stating that the court has "no idea" how do decide a question "not being a biologist").

438. *Id.* at *11 (explaining that existing regulations are confusing because a naturally occurring chemical is also listed as a synthetic chemical).

439. *See e.g., Chacanaca*, 752 F. Supp. 2d at 1124 (stating that "courts are well-equipped to handle" such challenges in the food labeling arena).

440. *See e.g., Rice*, No. 18 CV 7151 at *2 (conceding that the court is ill-equipped to decide these scientific issues).

441. *See e.g.*, *Pappas*, No. LA CV11-08276 at *2 (asking the court to find a "natural" label deceptive because the product contains GMOs); *see e.g.*, *George*, No. 4:15-CV-962 at *3 (asking the court to find the Almond Milk was mislabeled as "All Natural" because the milk contained synthetic ingredients).

442. *Compare Trammel*, No. 3:12-cv-02664-CRB (finding that "natural" labels cannot contain GMOs), *with Randolph*, 303 F.R.D. at 692 (denying class certification on the basis that consumers would not think that "all natural" meant non-GMO).

443. *Compare Trammel*, No. 3:12-cv-02664-CRB (finding that "natural" labels cannot contain GMOs), *with Randolph*, 303 F.R.D. at 692 (denying class certification on the basis that consumers would not think that "all natural" meant non-GMO).

444. *See Trammel*, No. 3:12-cv-02664-CRB (finding that "natural" labels cannot

For example, a court in the Northern District of California ruled a product labeled "all natural" cannot contain GMOs.[445] Meanwhile, across the country, a court in the Southern District of Florida refused to accept that same proposition as true.[446] The effect of patchwork labeling inherently causes problems for interstate commerce.[447] Further, different laws in different jurisdictions cause confusion for consumers in purchasing, for companies in their labeling practices, and for courts in their application.[448]

Federal courts attempting to interpret existing insufficient regulations similarly lead to inconsistent rulings.[449] Two cases brought in the U.S. Court of Appeals for the Second Circuit illustrates the lack of uniformity in the courts.[450] As explained earlier, the court in Mantikas found the "whole grain" Cheez-It label deceptive.[451] Bluntly, the court noted, that a box of Cheez-Its labeled "whole grain" is expected to be predominantly whole grain.[452] The court further concluded "reasonable consumers should not be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box."[453]

In a strikingly different decision in *Jessani v. Monini North American Inc.*, the court was unreceptive to a similar claim.[454] In *Jessani*, consumers sued a company whose truffle olive oil contained no actual truffle.[455] The label not only stated "White Truffle" in large font, but also pictured a sliced truffle.[456] Truffle, however, was not listed as an ingredient on the back of the label.[457] Putting much emphasis on the fact the product's ingredient list contained no reference to truffles, the *Jessani* court dismissed the suit.[458] *Jessani* holds that a consumer is expected to read the ingredient list, while in stark contrast, *Mantikas*

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contain GMOs), *and Randolph*, 303 F.R.D. at 692 (denying class certification on the basis that consumers would not think that "all natural" meant non-GMO).

445. *Trammel*, No. 3:12-cv-02664-CRB (finding that "natural" labels cannot contain GMOs).

446. *Randolph*, 303 F.R.D. at 692 (denying class certification because "all natural" does not mean non-GMO).

447. Liu, *supra* note 68, at 337.

448. *Id.*

449. *Compare Jessani*, 744 F. App'x at 18 (finding that a consumer is expected to read the ingredient list), *with Mantikas*, 910 F.3d at 635 (concluding that consumers are not expected to read the ingredient list).

450. *Mantikas*, 910 F.3d at 635; *Jessani*, 744 F. App'x at 18.

451. *Mantikas*, 910 F.3d at 635.

452. *Id.* at 637 (stating that "consumers expect that the ingredient list contains more detailed information about the product that confirms other representations on the packaging").

453. *Id.*

454. *Jessani*, 744 F. App'x at 18.

455. *Id.*

456. *Id.* at 33.

457. *Id.* at 20.

458. *See id.* (stating that no reasonable consumer would think that a "mass produced, modestly-priced olive oil was made with the most expensive food in the world").

holds the opposite conclusion.

Both *Jessani* and *Mantikas* were tried in the same district during the same year.[459] The cases yielded opposite conclusions.[460] Such results strongly indicate a trend of patchwork labeling laws, even in the same geographical areas. Although both cases ultimately came down to different interpretations by the courts, the simple fact is that the problem stems from NLEA insufficiencies. If the FDA continues to avoid updating existing regulations, patchwork labeling will spread throughout the U.S. court system much like it already has within the Second Circuit.[461] Ultimately, the FDA's failure to sufficiently regulate the marketplace is contrary to the NLEA's purpose of establishing uniform food labeling laws.[462]

C. Organic v. "Natural"

Consumers often believe products labeled as "natural" have the same characteristics of products labeled as "organic."[463] Unbeknownst to those consumers, "natural" products are actually regulated in the same way as any conventional, non-organic product.[464] Although the USDA's regulation of organic foods is far from perfect,[465] it is regulated much better than the FDA's "natural" products. A side-by-side analysis illustrates the superiority of organic products to "natural" ones.

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459. *Mantikas*, 910 F.3d at 635; *Jessani*, 744 F. App'x at 18.

460. *Compare Jessani*, 744 F. App'x at 18 (finding that a consumer is expected to read the ingredient list) *with Mantikas*, 910 F.3d at 635 (concluding that consumers are not expected to read the ingredient list in order to verify misleading representations on the front of the box).

461. *See Jessani*, 744 F. App'x at 18 (finding that a consumer is expected to read the ingredient list) *and Mantikas*, 910 F.3d at 635 (concluding that consumers are not expected to read the ingredient list in order to verify misleading representations on the front of the box).

462. 7 U.S.C. § 6501 (2019) (stating that a central purpose of the NLEA is in response to the desire for uniform labeling standards).

463. Letter from Gwendolyn Wyard to Division of Dockets Management, *supra* note 142, at 4 (explaining that nearly three-fourths of consumers believe that "natural" products are made without GMOs, pesticides, and synthetics).

464. 21 C.F.R. §§ 1085(d)-(e), (j) (2021).

465. *See e.g.*, *Nat'l Organic Standards Board Former Members*, U.S. DEP'T OF AGRIC., www.ams.usda.gov/rules-regulations/organic/nosb/former-members [perma.cc/CFC5-NY6T] (showing that General Mills occupied a scientist seat, Smucker's and Campbell Soup Company each occupied a handler seat, Driscoll's occupied a producer seat, and Dean Foods occupied a farmer seat on the NOSB); *see e.g.*, The Cornucopia Inst. v. U.S. Dep't of Agric., 260 F. Supp. 3d 1061 (W.D. Wis. 2017) (alleging that the USDA acted in direct opposition to the NOP by appointing non-farmers to NOSB positions reserved for organic farmers); *see e.g.*, Notification of Sunset Process, 78 Fed. Reg. 56811, 56813 (Sept. 16, 2013) (amending the Sunset Review Process from a majority vote for *renewal* to now requiring a majority vote to *remove* a non-organic substance); *Harvey*, 396 F.3d at 28 (circumventing the NOSB to approve synthetic ingredients for the national list without NOSB review).

1. Pesticides

Although organic produce allows for the use of some pesticides, the difference between organic and conventional produce is vast. There is a considerable difference in the amount of pesticides ingested when eating one over the other.[466] Currently, organic farmers have restricted access to twenty-five synthetic pesticides.[467] While "natural" and other non-organic produce have over 900 registered for use.[468] It goes without saying then that people who eat organic produce consume far fewer pesticides.[469] For example, one sample of non-organic kale contained the residue of seventeen different pesticides.[470] And, seventeen different pesticides on one piece of kale still did not exceed the established threshold tolerance for non-organic produce.[471] More shocking is the most frequently-detected pesticide was DCPA.[472] DCPA is currently classified by the Environmental Protection Agency as a possible human carcinogen and has been prohibited in Europe since 2009.[473] It is safe to say DCPA is banned in organic certified products.[474]

2. Processed Foods

American diets consist of more than sixty percent highly processed foods.[475] While organic junk food is still considered junk food, organic processed foods reign supreme to "natural" processed foods.[476]

For starters, organic foods are minimally processed without

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466. Compare, *Nat'l List of Allowed and Prohibited Substances*, ORGANIC TRADE ASS'N (2019), www.ota.com/advocacy/organic-standards/national-list-allowed-and-prohibited-substances [perma.cc/A2P4-JH86] (allowing non-organic produce to use over 900 pesticides), *with* Organic Research, Promotion, and Information Order, 82 Fed. Reg. 5746 (proposed Jan. 18, 2017) (restricting organic produce to 25 pesticides).

467. 82 Fed. Reg. 5746.

468. *Nat'l List of Allowed and Prohibited Substances*, *supra* note 466.

469. *EWG's 2019 Shopper's Guide to Pesticides in Produce™*, ENVIRONMENTAL WORKING GROUP (Mar. 17, 2021), www.ewg.org/foodnews/summary.php [perma.cc/U9XX-QEU6].

470. U.S. DEP'T OF AGRIC., AGRIC. MARKETING SERV. & SCI. AND TECH. PROGRAM, PESTICIDE DATA PROGRAM ANNUAL SUMMARY, 20 (Dec. 2018) (noting 30 different pesticides found on all kale samples tested).

471. *Id.* at 20.

472. *See id.* (finding DCPA on nearly sixty percent of kale samples).

473. *EWG's 2019 Shopper's Guide to Pesticides in Produce™*, *supra* note 469.

474. 7 C.F.R. § 205.605 (2021).

475. Jennifer M Poti, Michelle A Mendez, Shu Wen Ng, & Barry M Popkin, *Is the degree of food processing and convenience linked with the nutritional quality of foods purchased by US households?*, 101 AM. J. CLIN. NUTR. 6, 1251 (June 2015), www.ncbi.nlm.nih.gov/pmc/articles/PMC4441809/pdf/ajcn100925.pdf [perma.cc/TA3E-UTTQ].

476. *Nat'l List of Allowed and Prohibited Substances, supra* note 466 (comparing the sixty-seven non-organic items that can be added to organic packaged products to the 3,000 allowable ingredients in "natural" packaged products).

artificial ingredients or synthetic preservatives.[477] By definition, organic ingredients must be free from artificial colors, flavors, preservatives, MSG, GMOs, and high fructose corn syrup.[478] In stark contrast, products labeled "natural" are permitted to contain all of the above.[479]

As outlined in Section II, the NOP has a loophole which allows some non-organic ingredients in organic products.[480] However, the non-organic ingredients in a certified organic product may not exceed five percent of the total product.[481] Additionally, any non-organic substance is cautiously approved by the NOSB and appears on the National List.[482] In the last decade, six substances have been added, while a staggering seventy-seven have been removed.[483] Usually non-organic ingredients will be added to the National List only when there is no commercially available organic substitute.[484] Currently, there are only sixty-seven non-organic items that can be added to organic food[485] while "natural" packaged foods bulge with over 3,000 allowable ingredients.[486]

Accordingly, most substances approved by the FDA and used in "natural" products, are prohibited in organic products and banned in other countries.[487] For example, Olestra is typically seen in diet versions of products and foods labeled "fat free."[488] Procter & Gamble's creation, Olestra, is banned in the UK and Canada.[489] Yet, in 2003, the FDA went so far as to remove its warning label requirement for companies using Olestra in their products.[490] Also banned in places like Europe and Japan, BHA and BHT are preservatives approved by the FDA.[491] BHT and BHA are often found in non-organic cereal, nut mixes, gum, and beer.[492] The two are known in the industry as potential human carcinogens, or

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477. *How is organic food processed?,* ORGANIC TRADE ASS'N, www.ota.com/organic-101/how-organic-food-processed [perma.cc/SSP4-ZDJA].

478. *Id.*

479. *Nat'l List of Allowed and Prohibited Substances, supra* note 466.

480. 7 C.F.R. § 205.605 (2021).

481. *Id.* § 205.301(b).

482. *Id.* § 205.600.

483. *Nat'l List of Allowed and Prohibited Substances, supra* note 466.

484. 7 C.F.R. § 205.606 (2021).

485. *Nat'l List of Allowed and Prohibited Substances, supra* note 466.

486. *Id.*

487. *See e.g.*, Kravitz, *supra* note 210 (explaining that Olestra is banned in the UK and Canada but created and allowed in the U.S.).

488. *Id.*

489. *Id.*

490. 21 C.F.R § 172 (2003) (lifting requirement that forced manufacturers using Olestra in their products to include a warning label regarding health consequences of consumption).

491. *Why these food additives are banned in Europe—but not in the United States*, ADVISORY BOARD (Jan. 3, 2019), www.advisory.com/daily-briefing/2019/01/03/banned-foods [perma.cc/5K7X-V3H9].

492. Troy Farah, *Banned bread: why does the US allow additives that Europe says are unsafe?*, THE GUARDIAN (May 28, 2019), www.theguardian.com/us-news/2019/may/28/bread-additives-chemicals-us-toxic-america [perma.cc/8EHG-9LDL].

cancer-causing agents.[493] Another example is brominated vegetable oil.[494] Approved by the FDA, brominated vegetable oil is typically used in sports drinks and citrus-flavored sodas.[495] This flavor emulsifier is banned in all European Union countries, as well as India and Japan.[496]

Despite the FDA's "approval," manufacturers recently began to disallow these aforementioned substances in their products.[497] Name brands like Powerade and Gatorade removed brominated vegetable oil from their sports drinks.[498] Similarly, the food giant, General Mills, removed BHT from its cereals.[499] Yet, all of these substances are still acceptable in "natural" products.[500] These aforementioned substances have been described as "one of the worst inventions ever"[501] and as a "poison"[502] and should never be allowed in a product labeled "natural." Unfortunately, they are. Furthermore, the fact some food giants are making proactive changes, even before the FDA requires them to do so, speaks volumes to the FDA's ill-designed regulations.[503]

IV. PROPOSAL

The food and beverage industry is ever-changing.[504] Unfortunately, the FDA fails to adapt accordingly. The NLEA is no longer compatible with modern society. Without regulatory action, the detrimental effects of confusion in the marketplace, regulation by litigation, and a patchwork of state labeling laws

493. *Id.*

494. Kravitz, *supra* note 210.

495. *Id.*

496. *Id.*

497. *See e.g.*, *Coca-Cola to remove controversial ingredient from Powerade drink*, *supra* note 136 (recognizing that Powerade and Gatorade removed brominated vegetable oil from their sports drinks).

498. *Id.*

499. Melody Bomgardner, *General Mills to Remove Antioxidant BHT from Its Cereals*, SCIENTIFIC AMERICAN (Feb. 25, 2015), www.scientificamerican.com/article/general-mills-to-remove-antioxidant-bht-from-its-cereals/ [perma.cc/P9X5-WWPJ].

500. Farah, *supra* note 492.

501. Chris Gentilviso, *The 50 Worst Inventions*, TIME (May 27, 2010), content.time.com/time/specials/packages/article/0,28804,1991915_1991909_1991785,00.html [perma.cc/7VL4-T9RT].

502. Bre Gajewski, *Why Is Our Country Trying To Poison Us?*, ODYSSEY (Nov. 28, 2016), www.theodysseyonline.com/https-wwwtheodysseyonlinecom-chemicals-in-food [perma.cc/9C4L-R6DM]; *see also*, Chris Carrington, *Why Does The FDA Allow Additives in Our Food That Are Banned in Other Countries?,* D.C. CLOTHESLINE (Feb. 7, 2015), www.dcclothesline.com/2015/02/07/fda-allow-additives-food-banned-countries/ [perma.cc/S5KQ-F9JQ] (dubbing multiple ingredients allowed in U.S. food as "poison").

503. *See e.g., Coca-Cola to remove controversial ingredient from Powerade drink*, *supra* note 136 (noting that sports drink companies voluntarily removed harmful substances due to consumer worry); *see also*, Levitin, *supra* note 393 (explaining that Food Giants began disclosing GMO on its packaging to create transparency).

504. DELOITTE, *supra* note 6, at 3.

will continue to harm consumers, companies, and courts. The FDA and USDA must immediately update existing regulations and promulgate new ones to curb such damaging realities.

This section begins by proposing a definition for the unregulated term "natural" and proposing criteria the FDA should implement in its regulation of other misleading terms such as "healthy." This approach will mitigate consumer confusion, curtail misleading label claims, reduce lawsuits, and prevent a patchwork of state labeling laws. Second, this section proposes changes to deceptive NLEA regulations that currently regulate "flavor," the Ingredient List, and front-label claims. Next, this section illustrates a two-fold approach to revising the USDA's GMO Disclosure Standard that will better enable the Standard to achieve its original purpose – to provide consumers with transparency. This section concludes by providing consumers with guidance on how to protect themselves from deceptive labeling and ways in which to make educated healthier choices, until the FDA and existing regulations can ensure such transparency and certainty.

A. The FDA Must Define Misleading Terms to Achieve Uniformity and Consistency For Consumers, Companies, And Courts

Amid the maelstrom of insufficient regulations, a surge of food and beverage litigation has resulted.[505] The FDA must tackle, not avoid, the litany of NLEA controversies exposed by these labeling lawsuits. By providing hard and fast regulations for undefined terms like "natural," courts will finally be able to implement consistent rulings and companies will no longer be forced to play in the "grey area." Revising existing definitions of words like "healthy" will alleviate confusion inherent in outdated definitions.

1. The FDA Must Define "Natural" Based on Consumer Perceptions

The FDA must define the buzzword "natural." The parsimonious attitude towards defining the term is no longer acceptable. As illustrated throughout this Comment, absent a regulatory definition, confusion is rampant. Promulgating a definition will create an industry with much more certainty. Other benefits to providing a uniform standard will curtail misleading label claims, reduce lawsuits, and prevent a patchwork of state labeling laws throughout the U.S..

A principal purpose of labeling is to inform consumers about the product.[506] Therefore, it is important that the words on labels accurately

505. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 12, at 3.
506. Bryne, *supra* note 19, at 35-6.

represent what consumers believe them to mean. Yet, consumers still believe that a product labeled "natural" is regulated at a much higher standard than it is in reality.[507] These consumers believe "natural" foods contain ingredients grown without toxic pesticides, fertilizers, or GMOs.[508] Additionally, many consumers believe "natural" products are minimally processed without artificial ingredients or synthetic preservatives.[509] These traits, however, align much more closely with organic standards.[510]

"Natural" must be regulated in a similar fashion as the heightened regulations organic foods and beverages receive. Consumers place importance upon "natural" products;[511] therefore, a definition in line with consumer belief is necessary to avoid deception. Because consumers perceive "natural" to be regulated like organic,[512] "natural" should be defined accordingly and regulated based on such consumer perceptions.

In regulating "natural" similar to organic, the FDA should implement definitions found in USDA organic regulations. Some definitions include approved processing techniques and production methods.[513] In this same regard, the FDA must take a stance on whether GMO products can be labeled "natural."[514]

Further, the FDA should create a list of permitted and prohibited substances, similar to the National List in organics.[515] However, acknowledging the fact that many companies desire to create healthy foods that do not meet the stringent organic standards, "natural" should not have such an exhaustive list as organic does. Current practice of allowing over 3,000 ingredients in a food labeled as "natural," however, is unacceptable,[516] especially when some of those ingredients are created by food giants[517] or considered carcinogenic.[518] A list of allowed and prohibited substances will ensure consumers "natural" products

507. Letter from Gwendolyn Wyard to Division of Dockets Management, *supra* note 142, at 2.

508. *See id.* at 4 (explaining that about three-fourths of consumers believe that "natural" products are made without GMOs, pesticides, and synthetics).

509. *Id.* at 5-7.

510. *See How is organic food processed?*, *supra* note 477 (stating that organic ingredients must be free from ingredients such as artificial colors, flavors, preservatives, and GMOs).

511. *See* Negowetti, *supra* note 5, at 6 (noting that consumers purchase products labeled "organic" or "natural" in belief that these attributes make food healthier).

512. Letter from Gwendolyn Wyard to Division of Dockets Management, *supra* note 142, at 2.

513. *See* 7 U.S.C. § 6504 (2019) (listing standards for organic production).

514. *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d at 1020 (noting that the FDA has not mandated whether GMOs constitute "natural" foods or not).

515. 7 U.S.C. § 6517 (2019).

516. *Nat'l List of Allowed and Prohibited Substances, supra* note 466.

517. *See e.g.,* Kravitz, *supra* note 210 (explaining that food giant Procter & Gamble created Olestra).

518. Farah, *supra* note 492.

live up to their name. Also, a "friendlier" list, aside from the organics list, will allow commercial businesses to still flourish.

Finally, "natural" products should be labeled in a similar way as organics. As the Section II outlined, organic producers certify products according to a four-tier labeling scheme.[519] Accordingly, "natural" products should do the same: 100% natural, 95% natural, partially natural, and contains natural [insert ingredient]. This method will offer a flexible approach for companies, as well as provide a clear label for consumers.

2. The FDA Must Update Existing Definitions to Align with Modern Science, Dietary Trends, and Manufacturing Practices

In the face of changing tastes and fast-moving trends, labeling must be vigilant. Accordingly, food and drink labeling must be based on current scientific evidence and dietary trends. Yet, current labeling regulations are based on outdated thinking. Since its enactment over twenty years ago, labeling rules have not been revisited, even though our understanding of healthy eating habits has changed considerably.[520] As KIND pointed out, existing regulations prevent healthy foods – like nuts, avocados, and salmon – from bearing the label "healthy."[521] A product like pop-tarts, however, is in the clear.[522] The FDA must update the NLEA to reflect modern scientific research and today's health trends.

The NLEA expressly reserved the right to update labeling requirements based on society's changing habits and needs.[523] The FDA utilizes this flexible approach in governing the Nutrition Facts Panel (NFP).[524] The FDA continuously amends the NFP, according to current science, dietary trends, and manufacturing practices.[525] The most recent NFP changes of 2016 illustrate this laudable approach.

One notable change was a revision of required nutrients.[526] The FDA no longer requires Vitamins A and C to be listed on the NFP, since deficiencies of those vitamins are rare today.[527] In contrast, Vitamin D and potassium must now be listed because recent dietary trends show

519. 7 C.F.R. § 205.301 (2021).

520. *See e.g.,* 80 Fed. Reg. at 34669 (requiring manufacturers to eliminate artificial trans-fat, a practice allowed prior to enactment of this regulation).

521. Press Release, KIND, *supra* note 58.

522. *Id.*

523. *See* INST. OF MEDICINE, *supra* note 28, at 23 (stating that the NLEA permits the FDA to "add or delete nutrients based on a determination that changes would help consumers maintain healthy dietary practices").

524. *The New and Improved Nutrition Facts Label – Key Changes*, U.S. FOOD & DRUG ADMIN. (2019), www.fda.gov/media/99331/download [perma.cc/S756-RL7W]; *see also, Changes to the Nutrition Facts Label*, *supra* note 44 (explaining new requirements for Nutrition Facts Label after learning of new scientific research regarding the link between diet and chronic diseases such as obesity and heart disease).

525. *Id.*

526. *Id*.

527. *Id.*

Americans suffer from lack of consumption of the recommended amounts.[528]

Another NFP change requires "Added Sugars" to be listed.[529] This change is, in part, created to combat the deceitful manufacturing practices discussed in the analysis section.[530] By requiring the NFP to list "Added Sugars," there is a blatant distinction between naturally occurring sugars and those added to a product.[531] As such, the FDA would ensure that a consumer is truly informed of the amount of sugar in a product, despite a manipulated Ingredient List.[532] Just like the subsequent decline seen after the FDA mandated labels to include trans-fat,[533] hopefully the addition of "Added Sugars" on the NFP would spur on similar changes.

The FDA also removed "Calories from Fat" from the NFP.[534] According to the FDA, this change reflects current research that shows the *type* of fat consumed is more important than the *amount*.[535]

The FDA justified the 2016 NFP changes as an attempt to prevent misleading labeling and providing consumers with information to allow them to maintain healthy dietary practices.[536] As illustrated by these changes, the FDA amends the NFP according to modern science, recent dietary trends, and current manufacturing practices.[537] Just as the FDA amends the NFP according to current scientific information, dietary trends, and manufacturing practices, the FDA should govern other labeling regulations and definitions similarly. Unfortunately, the FDA fails to utilize this flexible approach with other labeling requirements.

As one example, the FDA still bases its "healthy" definition on

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528. *Id.*

529. *Id.*

530. 81 Fed. Reg. at 33813 (explaining that consumers may not recognize the names of some types of sugars to be a sugar).

531. *Id.* at 33813 (declaring the amount of "Added Sugars" provides consumers with specific quantitative information, that is not currently available on the label, about the amount of all added sugars found in a product).

532. *Id.* at 33799 (concluding that declaring "Added Sugars" is necessary to assist consumers to maintain healthy dietary practices); *see also id.* at 33760 (stating that "consumers need to have information on the label so that they can consider the amount of added sugars in foods").

533. KUCHLER, *supra* note 39, at 19.

534. *The New and Improved Nutrition Facts Label – Key Changes*, *supra* note 524.

535. 79 Fed. Reg. at 11881 (concluding "current science supports a view that the type of fat is more relevant than overall total fat intake in increased risk of chronic diseases").

536. 81 Fed. Reg. at 33760 (stating that requiring a declaration of added sugars is reasonably related to the government's interest of "promoting the public health, preventing misleading labeling, and providing information to consumers to assist them in maintaining healthy dietary practices").

537. *See e.g.*, 79 Fed. Reg. at 11881 (amending regulations based on "current science"); *see e.g.*, 80 Fed. Reg. at 34669 (requiring manufacturers to eliminate artificial trans-fat based on manufacturing practices and new scientific information).

a food's nutrient and fat content – a definition created over twenty years ago.[538] The irony is in its latest NFP change, the FDA diminished the importance of the amount of fat.[539] By its own admission, the FDA stated "now is an opportune time to reevaluate regulations concerning nutrient content claims . . . including the term 'healthy.'"[540] If the FDA does not update its regulations and definitions accordingly, lawsuits based upon these outdated regulations will only continue to increase. Further, consumers, companies, and courts will continue to be harmed.

B. The FDA Must Change Existing Deceptive NLEA Regulations

Consumers deserve to know what is in their food and current regulations do not provide adequate transparency. Certain regulations and statutory exceptions ultimately undermine the original intention of the NLEA.[541] Proposed changes to the NLEA's most deceptive sections are discussed below.

1. Flavor

As extensively discussed in the analysis section, the NLEA's "flavor" exception enables deception. The FDA does not require companies to list the combination of ingredients that create the "flavor" in a product[542] – which can number in the hundreds.[543] The NLEA was established primarily to enable consumers to make informed, healthy choices.[544] This loophole, however, creates the antithesis of that intention.

Striking the balance between consumer right-to-know and the protection of commercial business can be difficult. Consumers deserve to know what tongue-twisting chemicals exist in their food, but companies deserve protection for their proprietary mixtures that give products their unique flavor.[545] The FDA has ultimately failed to find a middle ground between transparency and over-regulation.

This proposal attempts to tackle such a complex problem by

538. 21 C.F.R. § 101.65(d)(2) (2021).

539. *See* 79 Fed. Reg. 11880, 11881 (changing the NFP "fat" section to reflect current science stating that the type of fat is more relevant than overall total fat intake).

540. *Statement on FDA's Actions on Labeling of KIND Products*, U.S. FOOD & DRUG ADMIN. (Dec. 14, 2017), www.fda.gov/food/food-labeling-nutrition/statement-fdas-actions-labeling-kind-products [perma.cc/QZ97-VHJC].

541. INST. OF MEDICINE, *supra* note 28 (stating that purposes of the NLEA was to "clear up confusion surrounding nutrition labeling, aid consumers in choosing healthier diets," and help consumers "identify and select foods based on nutrients most strongly linked to public health concerns for Americans").

542. 21 C.F.R. § 101.22 (2021).

543. Andrews, *supra* note 64.

544. *See* INST. OF MEDICINE, *supra* note 28 (a purpose of the NLEA was to "aid consumers in choosing healthier diets").

545. *See e.g.,* NATURE'S BAKERY, *supra* note 254 (refusing to disclose "natural flavors" based on proprietary information).

balancing these conflicting interests.

First, companies should only use the word "flavors." Currently, the NLEA makes a distinction between "natural flavors" and "artificial flavors."[546] This approach, however, is deceptive for a multitude of reasons previously discussed. Most notably, because consumers typically equate the term "natural" with positive health benefits,[547] the NLEA effectively deceives consumers into believing a "natural flavor" is healthier. In reality, flavors – whether artificial or "natural" – are not healthy.[548] By removing the word "natural" or "artificial," consumers will no longer give credence to one over the other. This requirement would diminish the inherent deception of inadvertently tricking consumers into picking a "healthier" product that is not actually healthier.

Second, if a product's flavor is derived without the purported ingredient, the company must disclose the absence of such ingredient.[549] Acknowledging the practicality of producing foods on a commercial scale, this Comment does not attempt to entirely forbid this practice. Using flavoring, instead of the real ingredient, is more economical and reliable for manufacturers.[550] The proposed requirement, however, stipulates a supplemental mandatory disclosure stating the absence of such an ingredient. For example, if the product is labeled as "strawberry flavored" and contains no actual strawberries, the label must state "made with no actual strawberries." This disclosure must be conspicuously placed on the *front* of the label and in a font no less than two sizes below the "flavor" claim. This requirement would inform consumers that they will not actually be consuming the marketed ingredient, while still allowing companies to market products as desired. By notifying the absence of an ingredient, consumers will be better informed about the genuine health benefits derived from that product. This allows consumers to make more informed, healthy choices, which is consistent with the initial intention of the NLEA.[551]

Third, if an ingredient used to create the product's "flavor" is sourced from a substance inconsistent with the product itself, the company must disclose the presence of that source. As an example, some bagel and bread products contain flavor derived from meat.[552] The same

546. 21 C.F.R. § 101.22 (2021).

547. *See* Negowetti, *supra* note 5, at 6 (noting that consumers purchase "natural" products in belief that these attributes make food healthier).

548. *See generally* Lefferts, *supra* note 253, at 16 (explaining that both natural and artificial flavorings combine multiple chemicals, preservatives, artificial colorings and are highly processed).

549. *Lam*, 859 F. Supp. 2d at 1102 (existing regulations allow a manufacturer to label a product "strawberry flavored," even if that product contains no actual strawberries).

550. *Overview of Food Ingredients, Additives & Colors, supra* note 62.

551. *See* INST. OF MEDICINE, *supra* note 28 (stating that a purpose of the NLEA was to "aid consumers in choosing healthier diets").

552. Laura Moss, *14 surprising foods that contain animal products*, MOTHER

is true with potato chips.[553] An average consumer would never expect an animal by-product to be used in a seemingly vegetarian product. Under this proposal, a company using flavor derived from meat in a product inconsistent with meat, like bread and potato chips, must state on the front of the label "some flavor sourced from meat." Basically, if an ingredient used in the "flavor" is sourced from a substance inconsistent with the end product, the label must conspicuously state on the front "some flavor sourced from [X]" – "X" being the source of the ingredient that contributes to the "flavor" in the product.

To aid manufacturers in implementing this third proposed rule, the FDA should create a general, non-exhaustive list. Although this rule is self-evident, some guidance is still necessary to establish consistency and certainty. As a threshold matter, any ingredients derived from animals and used as a "flavor" in a product that seems ordinarily "vegan" – like a bagel – must disclose the presence of an animal-derived source. These products include, but are not limited to: bagels, chips, wine, orange juice, salad dressings, and nuts.[554] Reading this list, most people would be surprised to learn many of these products contain flavor derived from animals.[555] This emphasizes the importance of this necessary disclosure. The proposed mandatory disclosure will create a more transparent and safer marketplace. The fact that existing regulations unintentionally allow a vegan to consume an unknowingly meat-flavored product is unacceptable. The same goes for consumers with food allergies. A vegan, for example, should not have to scour every package to make sure it is vegan-certified to know that no animal was used in the product. Instead, existing regulations should provide such certainty. It is not too much to ask that a product is what it is purported to be.

These proposed changes strike a healthy balance between consumers and companies. These requirements should not disrupt a twenty-four billion dollar flavor industry[556] or hamper manufacturers from using practical and economic methods.[557] Cloaking ingredients in such vague terms, however, does not provide adequate transparency. These three changes appropriately burden manufacturers by diminishing the reach that many of the NLEA practices deceptively afford.

NATURE NETWORK (July 21, 2014), www.mnn.com/food/healthy-eating/stories/14-surprising-foods-that-contain-animal-products [perma.cc/B9U2-YNRS].

553. *Id.*

554. ETNT Editors, *20 Vegetarian Foods That Surprisingly Aren't*, EAT THIS, NOT THAT! (Sept. 20, 2016), www.eatthis.com/vegetarian-foods-that-arent [perma.cc/V6EL-JDMX].

555. Moss, *supra* note 552.

556. Andrews, *supra* note 64.

557. Reineccius, *supra* note 314; *Overview of Food Ingredients, Additives & Colors, supra* note 62.

2. Ingredient List

The NLEA's default rule – all foods must be named on the Ingredient List[558] – should not allow for any exceptions. As Rx Bar illustrated,[559] existing regulations allow a company to label an ingredient as "egg whites," when the actual ingredient is instead grounded up egg white protein powder.[560] Another allowable practice is to list an ingredient as "milk" instead of "reconstituted milk" – "milk" created by adding water to skim milk powder.[561] The NLEA was, in part, designed to aid consumers in choosing products to maintain healthier diets.[562] This exception, however, defeats this purpose and fosters deception.

The proposal is simple – *all* foods listed on the Ingredient List must be named for what it is. No exceptions should exist. This only requires the NLEA to do what it already promises to do.[563] Because Americans place a high importance on reading ingredients lists,[564] the NLEA must create regulations that enable consumers to make educated choices. Further, an outright ban on the exceptions as proposed, will create a more transparent marketplace and fulfill the intended purpose of the NLEA.[565]

3. Front Label Claims

Sufficient regulations should assure consumers that they are not expected to scour ingredient labels to ensure prominent representations on the front of packages are true. Yet, the NLEA allows this practice to continue in many situations.[566]

The NLEA must prohibit a company from advertising an ingredient on a label if the ingredient is absent from the product. The only exception is for "flavors," as mentioned above. A company should not be able to use illustrations of a food on the front of the label if that product contains no ingredients derived from the depicted food.[567] Similarly, a product should not be allowed to

558. 21 C.F.R. § 101.4 (2021).

559. *See* Complaint at 3, *Pizzirusso*, No. 1:18-cv-03529 (alleging that the product contained egg white powder instead of real egg whites as listed).

560. 21 C.F.R. § 101.4(b)(11) (2021).

561. *Id.* § 101.4(b)(4).

562. *See* INST. OF MEDICINE, *supra* note 28 (stating that a purpose of the NLEA was to help consumers "identify and select foods based on nutrients most strongly linked to public health concerns for Americans").

563. 21 C.F.R. § 101.4 (2021).

564. Gervis, *supra* note 350; THE INT'L FOOD INFO. COUNCIL, *supra* note 7, at 13 (finding ingredient recognition has a significant impact on purchases).

565. *See* INST. OF MEDICINE, *supra* note 28 (stating that a purpose of the NLEA was to "clear up confusion surrounding nutrition labeling").

566. *See e.g.*, *McKinniss*, 2007 U.S. Dist. LEXIS 96106, *4 (allowing illustrations of fruit on the label, "even where the product contains no ingredients derived from the depicted fruit").

567. *Id.*

claim on the front that the product is, for example, "white truffle," when in fact truffle is contained nowhere in the product.[568] The above reasoning sounds elementary, however, existing NLEA regulations allows for these practices.[569] The aforementioned practices legitimately express what "deceptive" means. The fact that the NLEA was intended to minimize deception, but allows for such practices, is wholly inconceivable. A hard and fast rule, as proposed, will create transparency and alleviate deception.

C. The USDA Must Revise its GMO Disclosure Standard

This Comment analyzed the inherent flaws in the USDA's mandatory national labeling law for GMO products.[570] The Standard is structured in a way that raises concern for more deception and litigation. Most notably, unfamiliar terms and multiple disclosure options fail to eradicate deceptiveness. To rectify the USDA's shortcomings, the proposal is two-fold. First, the Standard must use one symbol signifying an item is indeed a GMO. Second, the Standard must use the term "GMO."

First, the Standard must use one agency-approved symbol. By insisting on one uniform disclosure method, instead of four,[571] consumers will easily recognize if a product is genetically modified. By using one uniform symbol, consumers will become familiar with the symbol's connotation, thereby dispelling any confusion or deception. In fact, a one label disclosure standard has already proven successful. Prior to enactment of the Standard, certified GMO-free products wore one uniform symbol stating "Non-GMO."[572] Under this regime, GMO products subsequently saw an exponential increase in sales with no claims of deception.[573]

Second, the Standard must use "GMO" terminology. Familiar terminology alleviates marketplace confusion. Using terms such as "GMO," "Non-GMO," or "GM," appropriately discloses that a product contains GMOs because consumers are highly familiar with these terms.[574] "Bioengineering," however, is an unfamiliar consumer term.[575]

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568. *See e.g., Jessani*, 744 F. App'x at 18 (allowing a company to claim "White Truffle" on the font, but truffle was not listed in the Ingredient List or even an ingredient in the product).

569. *See id.* (existing regulations allow a company to claim "White Truffle" on the font, but truffle is not an ingredient in the product).

570. 7 C.F.R. § 66 (2021).

571. 7 U.S.C. § 1639b(2)(d) (2021) (allowing a food manufacturer to choose among different options to disclose bioengineered ingredients).

572. NON-GMO PROJECT, www.nongmoproject.org [perma.cc/3XNC-UNH2] (last visited May 1, 2021).

573. *See* Levitin, *supra* note 393 (noting sales increased from three billion dollars in 2013 to twenty-six billion dollars in 2018).

574. *See* Letter from Gwendolyn Wyard to The Honorable Sonny Perdue, *supra* note 391, at 7 (stating that consumers are familiar with genetically modified terms and acronyms like "GMO," "GM" and "GE").

Using "GMO" language will also ensure consistency among governmental agencies.[576]

D. What Consumers Can Do in the Meantime

After reading this Comment, consumers might wish to know what they can do in the meantime to protect themselves from deceptive labeling and how to gain assurance they are buying the best quality food. This section explains how to decode food packages, so consumers can differentiate between mislabeled junk and truly healthy products.

1. Avoid Purchasing Foods Based on Buzzwords

When purchasing products, do not rely on buzzwords like "natural" and "healthy." As previously explained, "natural" is completely unregulated and "healthy" is based upon outdated science. Manufacturers use these words as marketing ploys to entice health-conscious consumers.[577] Neither word, however, ensures a product is healthy.

2. Ignore Front Package Claims or Pictures; Read the Ingredient List

Similar to the use of buzzwords, front package claims aim to sell products, not inform consumers of what is actually in their products. The most important way for consumers to ensure they are eating products they intend is to read the Ingredient List. Although the NLEA Ingredient List exception poses problems, this regulation generally supports a consumer's right to know what is inside packages.

There are certain ways consumers can properly decode an Ingredient List. Remember the following as the "Rules of Threes." First, a good rule of thumb is to skim the first three ingredients. These ingredients make up the largest percentage of the product because ingredients must be listed by descending order.[578] If the first three ingredients are whole foods, it is safe to assume the product is a healthy choice. If, however, the first ingredients are sugars, hydrogenated oils, or refined grains, consumers should assume the product is unhealthy, no matter what the product label states. Additionally, consumers should check that the claimed food product is one of the first ingredients listed. If the product is strawberry yogurt, for example, consumers should scan the label to ensure strawberries are one of the first ingredients listed.

Second, consumers should avoid purchasing a product with more than three unfamiliar tongue-twisting ingredients. Butylated

575. *Id.*

576. *See e.g., id.* (explaining the USDA organics uses terms like "GMO").

577. Creswell, *supra* note 9 (discussing the importance companies put on using marketing buzzwords).

578. 21 C.F.R § 101.4 (2021).

hydroxyanisole (BHA) and butylated hydroxytoluene (BHT) are examples. These tongue-twisting ingredients are preservatives known in the industry as potential human carcinogens.[579]

Third, be skeptical of a product if its Ingredient List is longer than two or three lines. A long Ingredient List suggests the product is highly processed. Another reason for this rule is because manufacturers split ingredients, so the healthier ingredients appear at the top. As previously noted, this practice is commonly seen with sugars. In so doing, manufacturers disguise sugar under multiple names so the quantity per sugar type is less, thereby appearing at the bottom of the Ingredient List. Such a practice stresses the importance of questioning a long Ingredient List. To conclude, consumers should always read the Ingredient List and distrust a purportedly "healthy" product, if the list is long and the ingredients are unfamiliar.

3. Junk Foods

Contrary to the rules discussed above regarding "healthy" packaged foods, junk food requires a different set of rules. Long Ingredient Lists and unfamiliar names are inherent with junk food products.[580] A consumer can still, however, make healthier choices when buying junk food. If a consumer is going to buy "junk" foods, buying organic is best.[581] Organic foods, receive heightened regulations that ensure quality ingredients and disallow a majority of those harmful ingredients.[582] On the contrary, a non-organic packaged product may contain thousands of allowable ingredients that are bad for consumers.[583] Next time, instead of grabbing a box of Cheez-Its, for example, opt for the organic alternative.[584]

4. Find Trustworthy Brands

For consumers who do not have the time or desire to inspect every product's packaging, finding a trustworthy brand is another useful practice to avoid deceptive labeling practices. A company's website typically informs consumers how the food is produced, what ingredients are prohibited and allowed, from where the food is sourced, and by what processes or technologies the food is created.[585] These broad categories

579. *Overview of Food Ingredients, Additives & Colors, supra* note 62.

580. *See* Amy Smith, *How do processed foods affect your health?*, MEDICAL NEWS TODAY (May 14, 2020), www.medicalnewstoday.com/articles/318630 [perma.cc/DLW9-BP8Z] (explaining that ultra-processed foods like junk foods have several additives, chemicals, and artificial ingredients added into the products).

581. *Nat'l List of Allowed and Prohibited Substances, supra* note 466.

582. *See id.* (explaining that 67 non-organic items can be added to organic food).

583. *Id*.

584. *See e.g.,* ANNIE'S, www.annies.com/faq/ [perma.cc/KST9-JLXY] (last visited May 1, 2021) (certifying all products as either organic or "Made with Organic").

585. *See e.g.*, Whole Foods Market, 365 BY WHOLE FOODS MARKET, www.wholefoodsmarket.com/departments/365-products [perma.cc/A48R-F9Z5]

include information about whether the product and its ingredients are organic, non-GMO, locally and sustainably sourced, pesticide free, contain hormones, antibiotics or flavors, or disregard animal welfare.[586] By researching company practices and choosing brands that align with personal values, consumers are less likely to be deceived. Further, this awareness and knowledge will make shopping much easier and faster.

In conclusion, the obvious way to avoid deceptive products is to buy fresh whole foods. However, when purchasing packaged foods, it is important to know what labels to avoid and how to decode packages so consumers are making educated, healthful choices – like the NLEA intended. Until existing regulations can ensure such transparency and certainty, consumers must take necessary steps to avoid deception.

V. CONCLUSION

In *The Boy Who Cried Wolf*, everyone lost. The villagers had no more sheep, the boy was eaten, and the wolves were left with nothing more to feast upon.[587] If regulatory agencies continue to skirt their responsibility for promulgating sufficient regulations, the fable's tragic ending will be the U.S. food & beverage industry's reality.

As was evident prior to enacting the NLEA and NOP, without clear and uniform regulations, the marketplace becomes unsustainable.[588] A variation of standards is problematic for interstate commerce and causes chaos and confusion for consumers, companies, and courts alike.[589] Today, the shortcomings of the NLEA are profound, causing deception and confusion – the very things the NLEA was designed to protect against. The irony is that in 1990, Congress created the NLEA in response to the desire for uniform labeling standards.[590] Yet today, in the absence of sufficient regulatory standards, a patchwork of labeling laws has ensued. The problems of the past have become our glimpse into the future. Regulatory agencies and Congress need to make immediate changes in order to protect consumers, prevent a detrimental patchwork of state labeling laws, and to create uniformity for companies and courts.

(last visited May 1, 2021) (listing the standards that its food is sourced and made from).

586. *Id.* The brand "365" by Whole Foods is a brand this author personally trusts because its products are non-GMO, locally and sustainably sourced, place an emphasis on animal welfare, are pesticide free, hormone-free, antibiotic-free, and disallow over 100+ ingredients like high-fructose corn syrup. *Id.*

587. Aesop, *supra* note 1.

588. *See* Liu, *supra* note 68, at 337 (stating that a lack of uniformity both burdened interstate commerce and created consumer confusion).

589. *Id.*

590. 7 U.S.C. § 6501 (2020).