INSTITUTE FOR JUSTICE

April 24, 2023

VIA THE FEDERAL eRULEMAKING PORTAL

Dockets Management Staff (HFA-305)
Food and Drug Administration
5630 Fishers Lane, Room 1061
Rockville, MD 20852

Re: Docket No. FDA-2023-D-0451
Labeling of Plant-Based Milk Alternatives and Voluntary Nutrient Statements: Guidance for Industry

Dear Commissioner Califf:

The Institute for Justice ("IJ") respectfully submits the following comments in response to the U.S. Food and Drug Administration's (the "FDA's") draft guidance on the labeling of plant-based milk alternatives and voluntary nutrient statements.

IJ is a nonprofit, public interest law center dedicated to, among other things, defending free speech. In doing so, IJ defends the rights of business owners to use clear, plain language to describe their products to customers. Due to our principled approach, IJ has had the unique experience of representing both dairy milk sellers and plant-based food sellers in First Amendment challenges to food labeling regulations. *Compare Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228 (11th Cir. 2017) (representing dairy milk sellers), *and S. Mountain Creamery, LLC v. FDA*, No. 1:18-CV-00738-YK, 2019 WL 1393317 (M.D. Pa. Mar. 31, 2019) (same)*, with Upton's Naturals Co. v. Bryant*, No. 3:19-cv-00462-HTW-LRA (S.D. Miss.) (representing plant-based food sellers), *and Upton's Naturals Co. v. Stitt*, No. 20-cv-938, 2020 WL 6808784 (W.D. Okla. Nov. 19, 2020) (same). As a result of these firsthand experiences, the undersigned is also the author of a published law journal article on the precise subject of the present draft guidance. *See* Justin Pearson, *Censorship and Sensibility: Does the First Amendment Allow the FDA to Change the Meanings of Words?*, 17 Geo. J.L. & Pub. Pol'y 521 (2019).

Like the draft guidance, these comments have two parts. First, we commend the FDA for rejecting the dairy industry's push to ban plant-based milk terms and for recognizing that the dairy industry's proposed approach would raise "First Amendment Considerations." *See* Draft Guidance at 8. Second, we caution the FDA against the draft guidance's alternative approach of creating "voluntary nutrient statements" for plant-based foods. Although a truly "voluntary" approach would not violate the First Amendment, this particular approach would be poor policy and could run the risk of eventually devolving into a First Amendment violation.

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The Dairy Industry's Proposed Ban on Terms Like "Coconut Milk" and "Almond Milk" Would Violate the First Amendment.

The FDA should be commended for rejecting the dairy industry's self-interested overtures to impose a ban on commonly understood terms like "coconut milk" and "almond milk." If adopted, the industry's proposed ban would have violated the First Amendment by banning terms that are not misleading when used in context.

Federal courts have repeatedly recognized that a regulation's failure to take context into account is counterproductive to consumers and violates the First Amendment. *See Express Oil Change, L.L.C. v. Miss. Bd. of Licensure for Prof'l Eng'rs & Surveyors*, 916 F.3d 483, 488–93 (5th Cir. 2019) (holding that ban of term "engineers" in context of "tire engineers" at automotive service centers violated the First Amendment); *Ocheesee Creamery*, 851 F.3d at 1240 (holding that ban on use of term "skim milk" to describe additive-free skim milk violated the First Amendment because potential confusion could be addressed by other language on the label); *Painter v. Blue Diamond Growers*, 2017 WL 4766510, at *2 (C.D. Cal. May 24, 2017), *aff'd*, 757 F. App'x 517 (9th Cir. 2018) (holding that reasonable consumers were not confused by use of term "milk" in context of almond milk labels); *Ang v. Whitewave Foods Co.*, 2013 WL 6492353, at *4 (N.D. Cal. Dec. 10, 2013) (holding that reasonable consumers were not confused by use of term "milk" in context of soymilk, coconut milk, and almond milk labels); *Gitson v. Trader Joe's Co.*, 2013 WL 5513711, at *7 (N.D. Cal. Oct. 4, 2013) (holding that reasonable consumers were not confused by use of term "milk" in context of soymilk labels).

Express Oil Change is instructive, as it discussed this point at length while addressing a commercial speech challenge. There, Mississippi banned the use of the term "engineer" by anyone who did not meet the characteristics listed in the relevant regulations. 916 F.3d at 486. When an automotive service center brought a First Amendment challenge regarding its use of the term "tire engineers," the state attempted to show that the tire center's speech was misleading by relying on surveys where consumers were confused by the term "tire engineers." *Id.* at 490–91. The U.S. Court of Appeals for the Fifth Circuit expressly rejected the state's argument because the survey ignored the relevant context. *Id.* In other words, it did not matter what consumers thought when they heard the term in the abstract while taking the survey. What mattered was whether consumers understood the term when they heard it in context at the tire service centers. *Id.* At most, the survey could support an argument that the speech in question was potentially misleading, but potentially misleading speech typically may not be banned. *Id.* at 491–93; *see also Ibanez v. Fla. Dep't of Bus. & Prof. Reg.*, 512 U.S. 136, 144–46 (1994).

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This is especially true of food labels, where sellers are often able to resolve potential confusion by adding just a word or two. As observed by a federal judge in dismissing a putative class action over the use of the term "milk":

> [I]t is simply implausible that a reasonable consumer would mistake a product like soymilk or almond milk with dairy milk from a cow. The first words in the products' names should be obvious enough to even the least discerning of consumers.
> . . . .
> Under Plaintiffs' logic, a reasonable consumer might also believe that veggie bacon contains pork, that flourless chocolate cake contains flour, or that e-books are made out of paper.

Ang, 2013 WL 6492353, at *4.

The FDA is obviously aware of this precedent, as the agency discussed it in the draft guidance. *See* Draft Guidance at 8–9. Yet, even armed with the knowledge that the dairy industry's proposal would have been unconstitutional, standing up to such a powerful special interest group is no small feat, and the FDA should be applauded for doing so. We therefore encourage the FDA to finalize this aspect of the draft guidance.

The Government-Recommended "Voluntary Nutrient Statements" for Plant-Based Foods Would Be Bad Policy and Could Eventually Lead to Constitutional Violations.

IJ asks the agency to reconsider the second part of its draft guidance, wherein the FDA recommends "voluntary nutrient statements" for plant-based food labels. It should be noted that this is a lesser problem than the ban proposed by the dairy industry discussed above. Therefore, if the FDA were forced to choose between imposing a ban or rejecting the ban while recommending voluntary nutrient statements, then the FDA made the right choice. However, it does not appear that such a choice was required, and the better approach would be neither to impose a ban nor to recommend voluntary nutrient statements.

The problems with the voluntary nutrient statements are twofold. First, they are bad policy, as government-created statements have a history of increasing consumer confusion rather than decreasing it. Second, although truly voluntary policies are not unconstitutional, there is a risk that these voluntary statements could eventually devolve into either explicitly or implicitly mandated requirements, in which case the First Amendment might be violated.

First, the recommendations are bad policy because they are based on a misguided, dairy-centric view. Plant-based milks are healthier than dairy milks in some ways and less healthy in others. And, of course, the converse is also true. Yet, the recommended statements only look at one side of the equation by asking plant-based sellers to disclaim

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the specific ways in which they are less healthy without asking dairy-milk sellers to disclaim the specific aspects in which dairy milk is less healthy. To be clear, the better approach would be to recommend statements for neither plant-based milks nor dairy milks, but if the FDA is determined to pursue such an approach, then it should do so in an evenhanded manner.

Consumers understand that there are many different types of milks, and this has always been true. As observed in the undersigned's law journal article on this subject:

> A review of the cases and related materials from this period [pre-Founding through the start of the Progressive Movement] reveals another interesting fact: the concept of vegetable milk was well-understood. For example, in an 1873 business dispute, the contract in question referenced, among other things, "[m]ilk and other juices of the corn," and there does not appear to have been anything unusual in its doing so. After all, as far back as the 15th century, recipes called for the ingredient "almondes mylk." In 1626, Francis Bacon noted that "there be plants, that have a Milk in them when they are Cut." And the 18th-century Encyclopaedia Britannica stated that "the emulsive liquors of vegetables may be called vegetable milks." In fact, consumers so appreciated the idea that the term "milk" did not necessarily mean cow's milk that when American inventor John Callen patented his new antacid in 1818, he named it Milk of Magnesia. None of this appears to have confused anyone.

See Pearson, *supra*, at 529 (internal citations omitted).

Basing disclaimers on a logically flawed approach would only exacerbate the inherent risk that the disclaimers could increase consumer confusion rather than decrease it. *See* Brief of Amicus Curiae Professor of Marketing J. Scott Armstrong in Support of Neither Party at 9–14, *Cigar Ass'n of Am. v. FDA*, 964 F.3d 56 (D.C. Cir. 2019) (No. 18-5195), 2019 WL 1044102, at *9–14 (examining research showing that "many government-mandated disclaimers are counterproductive"). As this is obviously not the FDA's goal, IJ asks the FDA to reconsider the agency's proposed recommendation of "voluntary nutrient statements" for plant-based food labels.

Second, government-proposed "voluntary" approaches run the risk of devolving into requirements viewed by sellers as being either implicitly or explicitly mandatory. If this were to happen here, then this approach would run the risk of violating the First Amendment.

Although compelled speech is sometimes analyzed differently for First Amendment purposes than bans on commercial speech, this does not mean that the First Amendment does not apply. For example, when the U.S. Supreme Court reviewed a First Amendment challenge to restrictions on the use of the term "certified financial planner,"

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the Court did not merely rule the ban unconstitutional but also expressly rejected the Florida government's alternative argument that if it could not ban the speech, then it could impose a compelled disclaimer. *See Ibanez*, 512 U.S. at 144–46.

This is even truer today than it was when the Court issued its ruling in *Ibanez*. Five years ago, the Court clarified that the *Zauderer* test that sometimes applies to compelled commercial speech imposes meaningful burdens on the government. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2377–78 (2018) (holding that the compelled speech at issue in that case failed the test announced in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). It is unlikely that the government could meet these burdens if the "voluntary nutrient statements" were ever viewed as being more than just voluntary.

In conclusion, IJ wants to again commend the FDA for choosing to follow the First Amendment rather than the demands of self-interested dairy industry groups. IJ therefore encourages the FDA to finalize the portion of the draft guidance rejecting the dairy industry's calls for a ban on plant-based milk terms. However, IJ suggests that the FDA reconsider its approach of recommending "voluntary nutrient statements," as these are bad policy in that they run a high risk of being counterproductive to consumers, while also suffering from the risk that this approach could eventually lead to constitutional violations if it were ever to be viewed as mandatory instead of voluntary.

Respectfully,

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