

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MIYOKO'S KITCHEN,  
Plaintiff,

v.

KAREN ROSS, et al.,  
Defendants.

Case No. [20-cv-00893-RS](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION FOR  
PRELIMINARY INJUNCTIVE RELIEF**

**I. INTRODUCTION**

In December 2019, plaintiff Miyoko’s Kitchen (“Miyoko’s”) received a letter (“the Letter”) from the California Department of Food and Agriculture (“the Department”). The Letter informed Miyoko’s that a particular label for its “vegan butter” product, as well as certain marketing content on its website, ran afoul of state and federal law, and ordered the company to bring itself into compliance. Miyoko’s responded by bringing this as-applied First Amendment challenge against defendants Karen Ross, in her official capacity as the Secretary of the Department, and Stephen Beam, in his official capacity as Milk and Dairy Food Safety Branch Chief (collectively, “the State”). Having survived the State’s motion to dismiss, Miyoko’s now moves preliminarily to enjoin the State from taking any enforcement action relating to the Letter or its demands. The State opposes, arguing that the speech at issue does not enjoy sufficient First Amendment protection to withstand important regulatory interests. For the reasons explained herein, Miyoko’s motion is granted as regards the phrases “butter,” “lactose free,” and “cruelty free,” and denied as regards the materials on its website and the phrases “hormone free” and

1 “revolutionizing dairy with plants.”

2 **II. BACKGROUND**

3 **A. Miyoko’s Kitchen**

4 Miyoko’s produces and sells a variety of plant-based, vegan products which are designed  
5 to resemble dairy products in appearance and taste. The company markets its foods using names  
6 that reference the products’ more common dairy analogues, such as a “vegan butter” and “vegan  
7 cheese.” These dairy references are always preceded by conspicuous terms such as “vegan” or  
8 “plant-based.” In the company’s view, the labelling of Miyoko’s products leaves no room for  
9 doubt among consumers that these are fundamentally different items than their dairy counterparts,  
10 in that they are not actually dairy.

11 Miyoko’s sells its products in more than 12,000 stores in the U.S. and Canada, enjoying a  
12 presence in established grocery chains such as Safeway, Whole Foods, and Trader Joe’s.  
13 According to the company’s founder, Miyoko Schinner, it is a mission-driven business, dedicated  
14 to “the creation of a humane, healthy, and sustainable food supply” and to “ending animal cruelty  
15 and reducing climate change caused by animal agriculture.” Decl. of Miyoko Schinner, Dkt. 23-1  
16 at 3. To that end, Schinner and her husband also run a non-profit animal sanctuary in Marin  
17 County, California, and an image of a sanctuary volunteer petting a rescued cow features  
18 prominently on Miyoko’s website. *Id.*

19 **B. State and Federal Law as Applied to Miyoko’s Kitchen**

20 California law directs the Department to review food labelling for compliance with federal  
21 law. *See* Cal. Food & Agric. Code § 32912.5 (specifically directing as much “in connection with  
22 advertising and retail sales of milk, . . . dairy products, cheese, and products resembling milk  
23 products”). As pertains here, federal law forbids a retailer from selling “misbranded” food items  
24 (that is, items with “labelling [that] is false or misleading”), food items “offered for sale under the  
25 name of another food,” and food items that, though “purport[ing] to be or . . . represented as a food  
26 for which a definition and standard of identity” exists, do not “conform to such definition and  
27 standard . . . .” 21 U.S.C. § 343. For nearly a century, the standard of identity for butter has

1 required a product “made exclusively from milk or cream, or both . . . and containing not less than  
2 80 per centum by weight of milk fat.” 21 U.S.C. § 321a.

3 On December 9, 2019, Miyoko’s received written notice from the Department’s Milk and  
4 Dairy Foods Safety Branch indicating the label for its “Cultured Vegan Plant Butter” failed to  
5 comply with this regulatory framework. Noting that “the product is not butter” and may not imply  
6 it is “a dairy food without [traditional dairy] characteristics,” the Letter instructed Miyoko’s to  
7 remove five terms from the product’s label: “butter,” “lactose free,” “hormone free,” “cruelty  
8 free,” and “revolutionizing dairy with plants.” The Letter also objected to the display of the animal  
9 sanctuary imagery and the phrase “100% dairy and cruelty free” on Miyoko’s website, stating  
10 “[d]airy images or associating the product with [agricultural] activity cannot be used on the  
11 advertising of products which resemble milk products.” Taken together, these directives present a  
12 meaningful threat to Miyoko’s on two fronts. Financially, obeying the Letter may carry up to two  
13 million dollars in labelling and marketing costs; foundationally, compliance could result—and as  
14 Miyoko’s employees allege, already has resulted—in the chilling of speech around vegan-oriented  
15 causes, the promotion of which the company sees as both its brand and animating purpose.

16 Approximately two months after receiving the Letter, Miyoko’s brought suit  
17 under the First Amendment, seeking declaratory and injunctive relief from the State’s  
18 legal interpretation as applied to Miyoko’s vegan butter. Whereas the State has  
19 determined the product’s marketing and labelling to be false and misleading, Miyoko’s  
20 insists its references to butter are qualified by conspicuous language making clear to  
21 consumers that the product is *not*, in fact, regular dairy-based butter. Miyoko’s thus  
22 contends that the State’s enforcement posture, as captured in the Letter, violates the  
23 company’s constitutionally secured right to engage in truthful commercial speech.

24 Miyoko’s now seeks a preliminary injunction prohibiting the State from taking  
25 any enforcement action based on the Letter. The State’s rebuttal emphasizes two  
26 propositions. First, that the contested commercial speech is misleading, and therefore  
27 beyond the First Amendment’s protective scope; and second, that any protection the

1 speech might enjoy must yield to the State’s interest in regulating food sales and  
2 safeguarding consumers.

### 3 III. LEGAL STANDARD

4 To obtain preliminary injunctive relief, the moving party bears the heavy burden  
5 of demonstrating that “he is likely to succeed on the merits, that he is likely to suffer  
6 irreparable harm in the absence of preliminary relief, that the balance of equities tips in  
7 his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def.*  
8 *Council*, 555 U.S. 7, 20 (2008). Alternatively, if the moving party can demonstrate the  
9 requisite likelihood of irreparable harm and show that an injunction is in the public  
10 interest, a preliminary injunction may issue so long as there are “serious questions going  
11 to the merits and the balance of hardships tips sharply in the moving party’s favor.”  
12 *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.2011) (internal  
13 quotation marks and citations omitted).

### 14 IV. DISCUSSION

15 Because a plaintiff’s likelihood of success on the merits “is a threshold inquiry,”  
16 when a plaintiff fails to show that likelihood a court “need not consider the remaining  
17 *Winter* elements.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (internal  
18 quotation marks and citations omitted). While it is Miyoko’s burden to prove that  
19 likelihood at this fledgling stage of the controversy, both parties agree that the merits of  
20 Miyoko’s as-applied constitutional challenge ultimately turn upon the four-part test for  
21 analyzing restrictions on commercial speech set out by the Supreme Court in *Central*  
22 *Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557  
23 (1980).

24 Under that test—often (and accurately) characterized as a form of intermediate  
25 constitutional scrutiny—a court must first decide if the contested commercial speech  
26 even enjoys First Amendment protection, which does not attach unless “the  
27 communication is neither misleading nor related to unlawful activity.” *Id.* at 564.

1 Assuming the speech is protected, any governmental restriction on it survives only if “(2)  
2 the State . . . assert[s] a substantial interest to be achieved by [the] restriction; (3) the  
3 restriction . . . directly advance[s] the state interest involved; and (4) [the restriction] . . .  
4 is not more extensive than is necessary to serve that interest.” *Metro Lights, LLC v. City*  
5 *of Los Angeles*, 551 F.3d 898, 903 (9th Cir. 2009) (citing *Central Hudson*, 447 U.S. at  
6 564-66) (internal quotation marks omitted).

7 The disputed speech on the label<sup>1</sup> of Miyoko’s vegan butter product falls into  
8 three categories: the term “hormone free,” the word “butter,” and a trio of phrases  
9 highlighting the distinction between the product and its dairy counterpart—“lactose free,”  
10 “cruelty free,” and “revolutionizing dairy with plants.” While the State does not defend to  
11 a satisfactory degree its power to regulate “butter,” “lactose free,” and “cruelty free,”  
12 Miyoko’s comes up short of proving its use of “hormone free” and “revolutionizing dairy  
13 with plants” is subject to constitutional protection in the first place. Each category is  
14 addressed in turn.

#### 15 A. “Hormone Free”

16 The parties do not seriously disagree about the truthfulness of Miyoko’s  
17 “hormone free” claim: because plants contain naturally-occurring hormones, and because

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19 <sup>1</sup> Since this suit was filed, the State has withdrawn its objections to the image of a woman petting  
20 a cow and the phrase “100% dairy and cruelty free” on Miyoko’s website. This withdrawal  
21 followed the State’s determination that the objections had been erroneous as a matter of California  
22 law, in that the Department’s authority to regulate that specific speech (i) requires the  
23 promulgation of an attendant regulation, and (ii) only applies to physical packaging. *Compare*  
24 *Withdrawal of Position*, Dkt. 37, with Cal. Food & Agric. Code § 38955 (providing that “[o]n the  
25 *labels* of imitation milk products the use of pictures and symbols depicting dairy or agricultural  
26 activities . . . and [the] use of dairy or agricultural terms or words . . . shall be subject to restriction  
27 or prohibition by the director *by regulation*”) (emphases added).

24 Proceeding on the understanding that the Department’s conclusion as to its lack of authority under  
25 “the relevant statute” was not just artful wording—but rather, a good faith concession that it was  
26 genuinely unaware of *any* statute conferring such authority—the Letter’s rescinded demands no  
27 longer confront Miyoko’s with the sort of “immediate threatened injury” that is “a prerequisite to  
28 preliminary injunctive relief.” *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th  
Cir. 1988). The portion of Miyoko’s motion trained on enjoining the State from action related to  
those demands is accordingly denied.

1 Miyoko’s vegan butter is made of plants, it necessarily contains hormones as well. That  
 2 the claim is literally false places it beyond the bounds of protected commercial speech,  
 3 fatally undermining Miyoko’s right to use it without fear of reprisal. *See, e.g. Zauderer v.*  
 4 *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (observing  
 5 the “well-settled” rule that “false” commercial speech fails the first step of *Central*  
 6 *Hudson*).

7 Miyoko’s struggles to escape this result by reference to its prototypical consumer,  
 8 who allegedly “understands that the phrase . . . in context with other phrases [on the  
 9 label] . . . mean[s] that the company’s vegan butter does not contain the artificial  
 10 hormones that are sometimes added to animal-based dairy products.” Pl.’s Reply, Dkt. 43  
 11 at 7. While there is something to be said for the connection a brand forges with its  
 12 customers, this reasoning takes that concept a step too far. *Central Hudson* insists, at the  
 13 threshold, that commercial speech be true, and provides no exception for falsities made  
 14 true by the target consumer’s supposed contextual awareness. Indeed, as the State  
 15 persuasively points out, no court has ever repudiated a regulator’s authority to demand  
 16 that products claiming to lack hormones actually lack hormones. *See, e.g. Int’l Dairy*  
 17 *Foods Ass’n v. Boggs*, WL 937045, at \*8 (S.D. Ohio Apr. 2, 2009), *aff’d in relevant*  
 18 *part*, 622 F.3d 628 (6th Cir. 2010). Against this backdrop, Miyoko’s insistence that it  
 19 would be “illogical for any consumer to believe” that a product labelled “hormone free”  
 20 does not contain hormones falls decidedly flat. Pl.’s Reply, Dkt. 43 at 7-8. Neither, for  
 21 that matter, is Miyoko’s aided by its curious attempt to distinguish the regulation of  
 22 hormone claims in milk from hormone claims in butter, an argument squarely  
 23 contradicting the one advanced by the company for every other phrase at issue in this  
 24 action. Because its plant-based butter is not “hormone free,” there is no merit to  
 25 Miyoko’s request for license to label it with that term.

## 26 **B. “Butter”**

### 27 **1. Miyoko’s Likelihood of Satisfying the First *Central Hudson* Factor**

1           Beginning, as is appropriate when a word’s significance is up for debate, with the  
2 dictionary, “butter” is defined as (1) “a solid emulsion of fat globules, air, and water  
3 *made by churning milk or cream* and used as food,” and (2) “a buttery substance,”  
4 including (a) “any of various fatty oils remaining nearly solid at ordinary temperatures”  
5 or (b) “*a creamy food spread*[,] especially [] one made of roasted nuts . . . .” *Butter*,  
6 Merriam-Webster Online, <https://www.merriam-webster.com/dictionary/butter>  
7 (emphases added). Predictably, Miyoko’s stresses this secondary definition, and  
8 reinforces its position with the long, uncontroversial history of common usage for phrases  
9 like “peanut butter” and “apple butter.” The government parries with a history of its own:  
10 since 1923, the Food, Drug & Cosmetic Act has mandated that “‘butter’ shall be  
11 understood to mean the food product usually known as butter, which is made exclusively  
12 from milk or cream . . . [and] contain[s] not less than 80 per centum by weight of milk fat  
13 . . . .” 21 U.S.C. § 321a.

14           Setting aside, for the moment, the circular logic of the State’s position, neither  
15 party’s definitional approach proves dispositive. The question thus remains: is Miyoko’s  
16 use of the word “butter,” in immediate or close proximity to terms like “vegan,” “made  
17 from plants,” “cashew cream fermented with live cultures,” and “cashew & coconut oil  
18 spread,”<sup>2</sup> misleading commercial speech? For three reasons, the State—which, as “the  
19 party seeking to uphold a restriction on commercial speech,” bears the final “burden of  
20 justifying [the restriction]”—does not overcome Miyoko’s contention that it is not.

21 *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

22           *First*, courts querying the product names of other plant-based “alternative” foods  
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24 <sup>2</sup> Aside from the brand name, “butter” is the most prominent word on the front of the label for  
25 Miyoko’s vegan butter product. It is directly preceded by “European style cultured vegan” and  
26 directly followed by “made from plants” (each in smaller text), producing the phrase “European  
27 style cultured vegan butter made from plants” on the label’s upper-right quadrant. “Cashew cream  
28 fermented with live cultures” appears in even smaller text on the middle of the label’s bottom-left  
quadrant, and the font size of “cashew & coconut oil spread,” on the very bottom-left corner, is  
tinier still.

1 generally have not found those names misleading. In damages suits brought by individual  
 2 consumers under the California Unfair Competition Law, for instance, trial judges of this  
 3 district have held “it is simply implausible that a reasonable consumer would mistake a  
 4 product like soymilk or almond milk with dairy milk from a cow,” and that “even the  
 5 least sophisticated consumer[] does not think soymilk comes from a cow.” *Ang v.*  
 6 *Whitewave Foods Co.*, 2013 WL 6492353, at \*4 (N.D. Cal. Dec. 10, 2013) (“agree[ing]  
 7 with Defendants that the names ‘soymilk,’ ‘almond milk,’ and ‘coconut milk’ accurately  
 8 describe Defendants’ products”); *Gitson v. Trader Joe’s Company*, 2015 WL 9121232, at  
 9 \*1 (N.D. Cal. Dec. 1, 2015) (declining any suggestion that “the word ‘soymilk’ is  
 10 misleading” in that “it implies the product has a similar nutritional content to cow’s milk”  
 11 because the same unsophisticated consumer “would not assume that two distinct products  
 12 have the same nutritional content; if the consumer cared about the nutritional content, she  
 13 would consult the label”). The Ninth Circuit has affirmed this reasoning. *Painter v. Blue*  
 14 *Diamond Growers*, 757 F. App’x 517, 519 (9th Cir. 2018). Likewise, and in the more  
 15 pertinent First Amendment setting, an Arkansas district court recently rejected that state’s  
 16 framing of commercial speech as misleading where the label of plant-based “meat”  
 17 products “include[d] ample terminology to indicate [their] vegan or vegetarian nature . . .  
 18 .” *Turtle Island Foods SPC v. Foman*, 424 F. Supp. 3d 552, 574 (E.D. Ark. 2019).

19           Against this, the State offers one alternative-mayonnaise case.<sup>3</sup> In *Duran v.*  
 20 *Hampton Creek*, the court ruled a consumer fraud plaintiff’s complaint sufficiently  
 21 plausible based principally on the labelling of an eggless mayonnaise. 2016 WL 1191685,  
 22 at \*1 (N.D. Cal. Mar. 28, 2016). Yet—and as the State neglects to mention—crucial to

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 24 <sup>3</sup> The State summons this case on the heels of articulating why butter is *sui generis*, because  
 25 “[n]either milk nor meat has a plant-based analog as well-known as margarine.” Defs.’ Opp’n,  
 26 Dkt. 38 at 11. This premise is difficult to believe in light of the current prevalence of products like  
 27 “soymilk,” “almond milk,” and “coconut milk,” *see e.g. Ang*, 2013 WL 6492353, at \*3 (noting the  
 U.S. Food & Drug Administration’s regular use of the word “soymilk” in official statements), and  
 the absence of any authority to support it severely undercuts the State’s theory that mayonnaise-  
 related cases are somehow more instructive than those involving milk, or meat.

1 that ruling was the uniquely unrepresentative label of the product in question, which  
 2 consisted almost entirely of the phrase “Just Mayo” and the picture of an egg, without  
 3 any accompanying qualifiers such as “vegan” or “made from plants.” *Duran*, 2016 WL  
 4 1191685, at \*2. No like facts are alleged here.

5         *Second*, the State’s showing of broad marketplace confusion around plant-based  
 6 dairy alternatives<sup>4</sup> is empirically underwhelming. To bolster its claim that a given  
 7 business practice is deceptive, a regulatory body is, of course, invited to present academic  
 8 studies to that effect. *Edenfield*, 507 U.S. at 771. The State’s efforts to that end, however,  
 9 do not suggest that any such research exists. The briefing for this motion only engages a  
 10 single academic report, introduced by Miyoko’s in support of the idea that plant-based  
 11 dairy replacements do not, as a general matter, misdirect or confuse the average  
 12 consumer. *See Feltz Study*, Dtk. 24-6, at 50. That study indicates, in relevant part, that the  
 13 public “accurately identifie[s] the source of animal-based milk products 84% of the time,  
 14 plant-based milk-products 88% of the time, animal-based cheese products 81% of the  
 15 time, and plant-based cheese products 74% of the time.” *Id.* Hoping to turn this data  
 16 against its proponent, the State makes hay of the 74% figure—or, more accurately, of the  
 17 26% consumer-confusion rate it necessarily describes. This is, to put it mildly, a  
 18 blinkered interpretation. Adopting the State’s preferred metric, 26% of the study’s  
 19 participants were indeed confused by plant-based cheeses—but a full 19% were *also*  
 20 confused by animal-based cheeses. Conversely, while 12% of respondents misidentified  
 21 plant-based milks, 16% misidentified animal-based milks. Taken as a whole, this research  
 22 merely signals the following: that consumers are perhaps a bit better at identifying  
 23 traditional cheeses than vegan cheeses, and perhaps a (roughly equivalent) bit better at  
 24 identifying vegan milks than traditional milks. For the purposes of First Amendment  
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26  
 27 <sup>4</sup> As distinct from any as-applied evidence the State might put forward regarding how Miyoko’s  
 28 vegan butter particularly confuses California shoppers. *See* Discussion Part B.2, *infra*.

1 scrutiny, this modest takeaway hardly cuts in favor of finding Miyoko’s use of “butter”  
2 inherently misleading.

3 *Finally*, justifying governmental speech regulation using the government-issued  
4 dictionary is troublingly self-fulfilling. As the Eleventh Circuit has forcefully observed,  
5 though “[i]t is undoubtedly true that a state can propose a definition for a given term . . .  
6 it does not follow that once a state has done so, any use of the term inconsistent with the  
7 state’s preferred definition is inherently misleading. Such a per se rule would eviscerate  
8 *Central Hudson* . . . .” *Ocheesee Creamery v. Putnam*, 851 F.3d 1228, 1238 (11<sup>th</sup> Cir.  
9 2017). While non-determinative, this consideration does occasion a more searching  
10 review of the State’s reliance on distinctions of its own creation. In the State’s central  
11 thesis, Miyoko’s product does not meet the federal standard for “butter” (which it cannot  
12 be called without dairy and an 80% fat content), barely evades being “margarine” (which  
13 it would have to be called if it was slightly fattier), and ought to be sold as a “spread”  
14 (non-enforcement around peanut-and-fruit-based “butter” notwithstanding).

15 To the degree this arrangement reflects identifiable linguistic norms, it embodies a  
16 substantially credible assertion of regulatory power over commercial speech; but without  
17 that indicia, the government’s opinion of what words mean is not, by itself, especially  
18 compelling. Because, as discussed above, the State’s view of “butter” stands largely by  
19 itself—unanchored by precedent, empirical research, or any other form of independently  
20 authoritative ballast—it does not disturb the weight of evidence tending to show that  
21 Miyoko’s use of that word is likely not misleading. In this early phase of the litigation, it  
22 therefore appears Miyoko’s decision to label its product as “butter” is entitled to First  
23 Amendment protection.

## 24 **2. Miyoko’s Likelihood of Satisfying the Remaining *Central Hudson***

### 25 **Factors**

26 Miyoko’s succeeds under factors two through four of *Central Hudson*. True, the  
27 State asserts, in the abstract, “a substantial interest to be achieved by . . . restriction[s]”

1 aimed against customer confusion. *Central Hudson*, 447 U.S. at 564. Nor, for argument’s  
2 sake, is it immediately clear that the choice to reserve certain terms for foods of a certain  
3 compositional makeup is, in the abstract, “more extensive than is necessary to serve that  
4 interest.” *Id.* at 566. The problem is with how “the restriction . . . directly advance[s] the  
5 state interest involved.” *Metro Lights*, 551 F.3d at 903.

6 To sustain its “butter” ban in this action, the State eventually “must demonstrate  
7 that the harms it recites are real and that its restrictions will in fact alleviate them to a  
8 material degree.” *Edenfield*, 507 U.S. at 771 (citations omitted). In the narrow context of  
9 an as-applied constitutional challenge, the State might satisfy this requirement with a  
10 moderate showing of the ban’s tendency to redress harms caused by Miyoko’s vegan  
11 butter in particular, if not the dairy-alternative market writ large. There is, on this record,  
12 no such showing to be found. Nowhere, for instance, does the State present testimony  
13 from a shopper tricked by Miyoko’s vegan butter, or otherwise make the case for why  
14 Miyoko’s substitute spread is uniquely threatening to the public weal. This omission  
15 makes it exceedingly difficult to ascertain the *advancement* of a legitimate governmental  
16 interest, to *any* degree, resulting from a proscription of Miyoko’s practice of labelling its  
17 spread “butter.”<sup>5</sup> It is consequently likely the company will prevail on this score by  
18 operation of the remainder of *Central Hudson*.

19 **C. “Lactose Free,” “Cruelty Free,” and “Revolutionizing Dairy with Plants”**

20 Turning to “lactose free” and “cruelty free,” the parties apparently agree that both  
21 claims are literally true:<sup>6</sup> but that alone does not trigger First Amendment protection. To

22 \_\_\_\_\_  
23 <sup>5</sup> Strumming this chord to decidedly more dramatic effect, Miyoko’s dedicates appreciable time  
24 and energy to the State’s purported role in a dairy-sponsored conspiracy against vegan food  
25 producers. Though the hearsay comprising much of this narrative may, as the State points out, be  
26 taken into account for the purposes of a preliminary injunction, it need not be given weight where,  
27 as here, it does not seem particularly reliable. *See* Order Denying Mot. to Dismiss, Dkt. 33 at 2  
28 n.1. In any event, this “conspiracy” story—whatever its weighting—does not bear on the outcome  
of this order.

<sup>6</sup> The moving papers are silent on any “cruelty” implicated in the manufacture and sale of  
Miyoko’s vegan butter.

1 pass muster under the first prong of *Central Hudson*, these terms, printed in quasi-close  
 2 proximity<sup>7</sup> to “vegan butter,” must additionally be cleared of any role in the creation or  
 3 maintenance of a deceptive inference. *See Sears, Roebuck & Co v. F.T.C.*, 676 F.2d 385,  
 4 395 (9th Cir. 1982) (bringing “inference and pragmatic judgment” to bear on the  
 5 application of *Central Hudson*) (internal quotation marks and citation omitted). For its  
 6 part, Miyoko’s endeavors to show no such inference exists by highlighting the numerous  
 7 phrases on its label that point in an unmistakably non-dairy direction: “vegan,” “made  
 8 from plants,” “cashew cream fermented with live cultures,” and “cashew & coconut oil  
 9 spread.” The State—as with “butter”—produces little by way of rebuttal, resorting once  
 10 more to the Feltz study to justify its restrictions of “dairy-related descriptions” at not only  
 11 the constitutional threshold, but also “the third/fourth steps of the *Central Hudson* test.”  
 12 Defs.’ Opp’n, Dkt. 38 at 13. As with “butter,” this strategy asks more of “26%” than the  
 13 figure can bear. Without more to suggest that using “lactose free” and “cruelty free” as  
 14 Miyoko’s does is facially deceptive—or that the Department forestalls some specific  
 15 harm by barring this specific instance of that usage—Miyoko’s appears poised to win its  
 16 fight to retain those terms on its label.

17 Not so for “revolutionizing dairy with plants.” Returning to the dictionary, to  
 18 “revolutionize” an industry requires “chang[ing] it fundamentally or completely.”  
 19 *Revolutionize*, Merriam-Webster Online, [https://www.merriam-webster.com](https://www.merriam-webster.com/dictionary/butter)  
 20 /dictionary/butter. “Revolutionizing dairy” thus denotes direct interaction with animal-  
 21 based milk products in a way that leaves them “fundamentally” different than they were  
 22 before. Put simply, this is not at the core of what Miyoko’s—a maker of dairy  
 23 *replacements*—does or seeks to do. Just like the statement that a vegan clothier’s  
 24 motorcycle jackets “revolutionize leather with cotton,” or that a maker of non-alcoholic  
 25

26 \_\_\_\_\_  
 27 <sup>7</sup> These phrases appear on the side of the product’s label. “Revolutionizing dairy with plants”  
 28 appears on the back.

1 beverages “revolutionizes whiskey with seltzer,” this claim of Miyoko’s is plainly  
 2 misleading.<sup>8</sup> The State should not be enjoined from responding to its presence in the  
 3 marketplace with appropriate regulatory action.

4 **D. Irreparable Harm, the Balance of Equities, and the Public Interest**

5 Although likelihood of success on the merits is the first hurdle on the path to  
 6 preliminary injunctive relief, Miyoko’s still must demonstrate that the governmental  
 7 action it seeks to avoid threatens irreparable harm, and that both the balance of hardships  
 8 and public interest counsel for relief. Helpfully, binding First Amendment precedent  
 9 makes quick work of these issues.

10 With respect to irreparable harm, “[a] party seeking preliminary injunctive relief  
 11 in a First Amendment context can establish irreparable injury . . . by demonstrating the  
 12 existence of a colorable First Amendment claim,” *CTIA – The Wireless Association v.*  
 13 *City of Berkeley*, 928 F.3d 832, 851 (9th Cir. 2019) (internal quotation marks and  
 14 citations omitted); with respect to the weight of equities, “the fact that” a Plaintiff has  
 15 “raised serious First Amendment questions compels a finding that . . . the balance of  
 16 hardships tips sharply in Plaintiff[’s] favor,” *American Beverage Association v. City &*  
 17 *County of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (internal bracketing,  
 18 quotation marks, and citation omitted); and with respect to social good, “it is always in  
 19 the public interest to prevent the violation of a party’s constitutional rights,” *id.* (internal  
 20 quotation marks omitted). Concerning “butter,” “lactose free,” and “cruelty free,”  
 21 Miyoko’s is accordingly entitled to preliminary injunctive relief.

22 **V. CONCLUSION**

23 Consistent with the foregoing, the State is preliminary enjoined from any  
 24 enforcement action relating to the Letter or its demands insofar as they implicate the  
 25 word “butter” and the phrases “lactose free” and “cruelty free.” Miyoko’s petitions  
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27 <sup>8</sup> Tellingly, Miyoko’s does not try to rebut the State’s definitional critique.

1 regarding the terms “hormone free” and “revolutionizing dairy with plants” are denied.  
2 After consultation with the parties and as is appropriate on the facts of the case, no  
3 security shall be required of Miyoko’s in conjunction with this relief.

4 **IT IS SO ORDERED.**

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6 Dated: August 21, 2020

7   
8 RICHARD SEEBORG  
9 United States District Judge

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United States District Court  
Northern District of California