


POLICY

FDA Crackdown On Calling Almond Milk 'Milk' Could Violate The First Amendment

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The Food and Drug Administration ended a [public comment period](#) on Monday over whether it should continue to allow plant-based products to use words like “milk” and “cheese” in their labeling. This followed public statements by FDA Commissioner Dr. Scott Gottlieb, who quipped last year that almond milk should not be called milk because “[an almond doesn’t lactate.](#)”

The FDA’s possible change in approach pits the powerful dairy industry against the makers behind up-and-coming alternative milks, like almond, coconut, soy, and [oat](#). Between 2012 and 2017, sales of non-dairy milks grew over 60%, with almond milk taking a 64% market share. During that same period, dairy milk sales dropped by 15%, according to [Mintel](#).

Last week, the Institute for Justice entered the fray and [submitted](#) its own comment, warning that the labeling ban “would confuse consumers, harm small businesses across the country, and raise

serious First Amendment concerns.”



Almond milk with almond on a dark wooden table. GETTY

“If a consumer is confused about the source of a product labeled ‘almond milk,’ then he has bigger problems than being confused about which milk to buy,” said Institute for Justice Senior Attorney Justin Pearson, who authored IJ’s comment to the FDA. “The government does not have the power to change the dictionary.”

In its comment, IJ cited a federal appellate court [decision](#) that vindicated the free speech rights of Mary Lou Wesselhoeft, who runs a [small creamery](#) on her farm in Calhoun County, Florida. For almost three years, Mary Lou sold all-natural skim milk, a byproduct of producing cream. During the skimming process, the skim milk loses almost all of its naturally occurring Vitamin A, which is located in the cream.

Her skim milk had exactly one ingredient: skim milk. So for nearly three years, Mary Lou advertised and sold her skim milk as

skim milk.

Yet her simple, truthful labels earned the ire of Florida regulators. In 2012, the Florida Department of Agriculture and Consumer Services slapped her creamery with two stop orders. Florida law (based on federal regulations) banned the sale of skim milk, unless Vitamin A was added back in. But Mary Lou prides herself on selling only all-natural, additive-free products, a business philosophy that would be undermined if she were forced to artificially inject Vitamin A.

Regulators offered Mary Lou a choice: She could stop selling her additive-free skim milk or she could stop calling it skim milk. Ironically, in its crusade against “misleading” speech, the labels the Department approved would have been wrong or just downright confusing: It would have required Ocheesee Creamery to mislabel the skim milk as either “imitation skim milk,” “imitation milk product,” or “Non-Grade ‘A’ Milk Product, Natural Milk Vitamins Removed.”

Refusing to be cowed into submission, Mary Lou fought back, and with the Institute for Justice, hauled the Department into federal court. In *Ocheesee Creamery LLC v. Putnam*, the Eleventh Circuit U.S. Court of Appeals sided with Mary Lou and ruled that “the Creamery’s use of the words ‘skim milk’ to describe its skim milk is not inherently misleading” and is protected under the First Amendment.

Moreover, the court found that the state’s censorship was “clearly more extensive than necessary to serve its interest in preventing deception and ensuring adequate nutritional standards.” There were “numerous less burdensome alternatives,” the court added, that would have “involved additional disclosure without

banning the term ‘skim milk.’”

That reasoning would also invalidate the very similar rationale
Gottlieb [gave](#) for the proposed crackdown on plant-based milks:

“The FDA has concerns that the labeling of some plant-based products may lead consumers to believe that those products have the same key nutritional attributes as dairy products, even though these products can vary widely in their nutritional content.”



WASHINGTON, DC - OCTOBER 25: Dr. Scott Gottlieb, commissioner of the Food and Drug Administration... [+] GETTY

And as the Institute for Justice pointed out in its comment, “just like in *Ocheesee Creamery*, there is an obvious less-burdensome approach to banning the terms, and it is one already being used: the nutrition facts panel.”

Several federal courts have also rejected the argument that calling non-cow milk “milk” is misleading. As recently as December 2018, the U.S. Ninth Circuit Court of Appeals [dismissed](#) a lawsuit

against Blue Diamond Growers that claimed the company “mislabelled its almond beverages as ‘almond milk’ when they should be labeled ‘imitation milk’ because they substitute for and resemble dairy milk but are nutritionally inferior to it.” In a 5-page, unpublished opinion, the court easily rejected those arguments.

“Notwithstanding any resemblance to dairy milk, almond milk is not a ‘substitute’ for dairy milk,” the court held, “because almond milk does not involve literally substituting inferior ingredients for those in dairy milk.” Moreover, almond milk isn’t “nutritionally inferior” to cow’s milk because “two distinct food products necessarily have different nutritional profiles.”

The Ninth Circuit’s ruling followed a federal court decision in California that blocked a similar lawsuit against the maker of the popular Silk-line of alternative milks. “It is simply implausible that a reasonable consumer would mistake a product like soymilk or almond milk with dairy milk from a cow,” Judge Samuel Conti wrote in his 2013 [opinion](#). “The first words in the products’ names should be obvious enough to even the least discerning of consumers.”

Conti also found that the plaintiffs’ claim of false advertising “stretches the bounds of credulity:” “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.”

Words, of course, can have multiple meanings. While nut milks have soared in popularity recently, there’s nothing new about describing plant liquid as “milk.” The word “[lettuce](#)” shares the same Latin root word as “lactate” due to the plant’s milky juice. In

the 17th Century, Sir Francis Bacon [wrote](#) that “there be plants that have a milk in them when they are cut” and that [pistachios](#) can be “made into a milk of themselves, like unto almond milk.” Two centuries later, when Noah Webster published the first edition of his *American Dictionary of the English Language* in 1828, the word “milk” had a second definition for “[the white juice of certain plants.](#)” And when Charles H. Phillips sought an antacid [patent](#) in 1873, he called his remedy “milk of magnesia,” even though magnesium hydroxide, like almonds, does not lactate.

“Consumers are fully aware that almond, soy, and cashew milk were not made by cows,” Pearson added. “The FDA’s proposed rule not only flies in the face of common sense, but it also violates the First Amendment, which protects food producers’ right to call something what it is.”

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I'm a writer and legislative analyst at the Institute for Justice (IJ), a public interest law firm. As a member of IJ's Communications team, I regularly write opeds and blog about economic liberty, private property rights, the First Amendment and judicial engagement. On the legislative side, I've worked with state and federal lawmakers from both parties to overhaul civil forfeiture and occupational licensing, securing landmark reforms in California, Colorado, the District of Columbia, Nebraska and New Hampshire. My columns at Forbes.com have been cited by several law review journals, the Center for American Progress, the Heritage Foundation, The Economist, SCOTUSblog and the Council of the District of Columbia Committee on the Judiciary and Public Safety. Outside of Forbes, my work has appeared in The Atlantic, The New York Times, The Wall Street Journal, The Washington Post, New York Post, Barron's, The Guardian, Slate, Wired, Reason, and numerous newspapers nationwide. **Read Less**