



March 5, 2020

The Honorable Ralph Northam
Governor of Virginia
Patrick Henry Building
1111 East Broad Street
Richmond, VA 23219

Re: Veto Request: HB 119

Dear Governor Northam,

On behalf of the Plant Based Foods Association (PBFA) I am writing to respectfully request your veto of HB 119, relating to the labeling of milk.

PBFA was founded in 2016 to represent the interests of companies producing plant based meat and dairy alternatives. Today the association has grown to over 180 member companies, ranging from small start-up food companies to established brands to ingredient suppliers. Many of our members make and sell dairy alternatives, including plant-based milk, cheese, yogurt and ice cream using American grown agricultural commodities.

We believe that HB 119 is unnecessary, will only create confusion and is likely unconstitutional. Please consider:

- **HB 119 is a solution in search of a problem.** Our member companies selling milk alternatives already use qualifiers such as “non-dairy”, “dairy-free”, “plant-based”, and/or “vegan” to make their labels clear to consumers.

In addition, PBFA has established industry guidance for the labeling of plant-based milks and other dairy alternatives. These include recommendations that labels clearly identify the main ingredient as part of the word “milk” or be labeled as a “plant-based milk,” along with an easy to read disclosure of the main ingredient. We also recommend that the principal display panel contain the words “dairy-free” or “non-dairy,” as these are the phrases that are the most meaningful to consumers to connote that these products do not contain animal milk.

The US Food & Drug Administration is completing a formal review as to whether plant based milks are causing consumer confusion.

We support this FDA process because we believe that the issue is best determined on the federal level, with input from all concerned parties, rather than chaotically on a state-by state basis.

- **HB 119 will confound shoppers and retailers.** Plant based milk alternatives have been on store shelves for decades. Consumers are not confused about what they are buying, and many are choosing these products for a variety of reasons. If enacted into law, HB 119 would have the effect of setting Virginia apart from the rest of the United States when it comes to how these products are presented to consumers while placing Virginia grocers at a disadvantage.
- **HB 119 raises legal issues.** Our members are in full compliance with current FDA requirements. Therefore, attempts to impose new restrictions such as these run afoul of First Amendment protections allowing companies to label their foods with clear, non-misleading terms. Because the First Amendment prevents the government from restricting the free flow information to consumers except in extremely narrow circumstances, laws such as proposed in HB 119 are unlikely to withstand constitutional scrutiny.

For example, an Ohio law that precluded use of word “butter” in labeling or advertising any product that was made in imitation of or substitute for butter, without regard to whether such use was misleading, was ruled unconstitutional. *Lever Bros. Co. v. Maurer*, 712 F. Supp. 645 (S.D. Ohio 1989).

Likewise, a Washington law prohibiting use of dairy terms in advertising margarine was deemed per se violative of the First Amendment. *Anderson, Clayton & Co. v. Washington State Dep't of Agric.*, 402 F. Supp. 1253 (W.D. Wash. 1975). In recent years, the Supreme Court has affirmed and re-affirmed that these types of restrictions are unconstitutional.

As such, each recent instance of such speech-restrictive legislation has been subject to legal challenge by a coalition of plaintiffs including some combination of PBFA, PBFA company members, the American Civil Liberties Union, the Institute for Justice, and the Good Food Institute.

Use of the term “milk” by plant-based food companies is not meant to diminish the value of cow’s milk produced by Virginia dairies. Rather, these terms have been understood and accepted in the marketplace as the common and usual names for more than 30 years and are clearly understood by consumers.

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We believe there is room in the market for everyone and that government should not be in the position of picking winners and losers.

For these reasons above and others, we urge you to reject HB 119. Should you or your staff have any questions, please feel free to contact me at (510) 465-0322.

Sincerely,

Michele Simon, JD, MPH
Executive Director, Plant Based Foods Association