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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MIYOKO'S KITCHEN,

Plaintiff,

v.

KAREN ROSS, in her official capacity as Secretary of the California Department of Food and Agriculture, and STEPHEN BEAM, in his official capacity as Branch Chief of the Milk and Dairy Food Safety Branch,

Defendants.

Case No. 3:20-cv-00893-RS

The Honorable Richard Seeborg

Date: June 25, 2020[1]
Time: 1:30pm
Courtroom: 3

MIYOKO'S KITCHEN'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

[1] This motion was noticed under Northern District of California Local Rule 7-2, with the hearing automatically vacated by Northern District of California General Order 72-3.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Imagine that the California Legislature passes a law tomorrow banning the sale of books advocating a plant-based diet. There would be no question, under longstanding Supreme Court precedent, that any San Francisco bookseller selling such books could bring a First Amendment challenge to the book ban immediately after the law is enacted—even if no booksellers have yet been threatened with prosecution. *See Virginia v. Am. Booksellers Ass'n., Inc.*, 484 U.S. 383 (1988).

Now imagine a slightly different scenario. A particular bookstore receives a letter from the San Francisco Police Department, contending that the bookstore is selling books about plant-based foods in violation of certain federal and state laws (even though the laws don't actually ban the sale of these books). The police demand that the bookstore remove those books from its shelves to come into compliance. And the bookstore knows that if it refuses to acquiesce in the letter's demands, the Police Department will seek to impound the allegedly illegal books. This bookstore should have an even stronger basis for filing a First Amendment challenge—unlike in the first scenario, the government has already taken concrete steps to restrict this bookstore's speech.

In its motion to dismiss, however, the State of California takes the remarkable position that the bookstore in the second scenario is barred by Article III from even bringing a First Amendment claim. The State apparently believes that a person who *might* be targeted under a statute for her speech has suffered cognizable injury-in-fact while a person who *has* actually been threatened by the government on the basis of her speech—like Miyoko's—has not.

The State's topsy-turvy understanding of the Constitution is mistaken. The Ninth Circuit has made clear that, "when the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000). Because of the "sensitive nature of constitutionally protected expression," the Supreme Court "has endorsed what might be called a 'hold your tongue and challenge now' approach" to standing in the First Amendment context, allowing plaintiffs to bring a pre-enforcement challenge even when there is the mere *possibility* that a statute will be invoked against them. *Ariz. Right to Life*

Political Action Comm. v. Bayless, 320 F.3d 1002, 1006 (9th Cir. 2003) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)).

But this is not a pre-enforcement challenge to a statute; it is a challenge to the State's actual enforcement position, by someone who has actually been targeted for enforcement. There can be no doubt that the State specifically targeted Miyoko's for its speech. The State sent Miyoko's a letter demanding that the company remove truthful, accurate speech from its labels and website to comply with the State's interpretation of state and federal law—statements like "100% cruelty and animal free" and images of people hugging cows. And the State admits that its next steps are to seek to "impound the product" and take other "coercive enforcement." ECF 17-1 at 3; ECF 17-2 at 2. The State's threat is not just "possible" or "credible"—it is real.

So are Miyoko's injuries. A plaintiff has standing when she shows "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Here, Miyoko's alleges that it has *already* suffered—and continues to suffer—injury from the State's enforcement action. Following the State's letter, the company has removed branding video from its social media, refrained from making additional truthful claims about its products (like that they are "GMO-free"), and even held back from participating in the current debate over industrial animal agriculture during the coronavirus pandemic—all for fear of further enforcement. Indeed, the State's letter has chilled the speech of *other* California plant-based companies, who are preemptively making changes to avoid similar consequences. And the State's demand that Miyoko's censor itself not only chills the company's speech, but also threatens to impose significant costs (millions of dollars) and burdens on the company. These harms are more than enough to establish both Article III standing and ripeness.

The Court should also reject the State's attempts to escape review through rote invocation of various abstention doctrines. "Abstention from the exercise of federal jurisdiction is the exception rather than the rule." *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989). The State offers no reason why this First Amendment challenge to state enforcement action—a quintessential federal case—falls into that extraordinary exception to federal jurisdiction.

BACKGROUND

Miyoko's produces and sells a number of different vegan cheeses, cultured vegan butter, and vegan cream cheese. Compl. ¶ 5, 8 (ECF 4). 10. All of these products are prominently labeled as "vegan," "plant-based," and "made from plants." *Id.* ¶¶ 8, 12. Because its target market is people who wish to avoid dairy made from animals, Miyoko's wants its product labels and marketing to make clear to customers that its products are vegan and plant-based. *Id.* ¶¶ 12, 25.

On December 9, 2019, Miyoko's received a letter from the Milk and Dairy Food Safety Branch of the California Department of Food and Agriculture requiring the company to make immediate changes to its product labeling, website, and marketing materials to come into "compliance" with state and federal law. Compl. ¶¶ 19, 27–29; *see* Dept. Ltr. 1 (ECF 4-1). Specifically, the letter contended that the company's Cultured Vegan Butter product "cannot bear the name 'Butter' because the product is not butter," and demanded that Miyoko's "[r]emove the word 'Butter' from the label." *Id.* In addition, the letter required Miyoko's to remove phrases like "lactose free," "hormone free," "cruelty free," and "revolutionizing dairy with plants" from its vegan butter product label. *Id.* at 2. The Department did not dispute the truthfulness of these claims, but claimed that Miyoko's could not express them because "the product is not a dairy product" and "fails to contain [] milk and milk ingredients." *Id.* The Department also demanded that Miyoko's remove "[i]mages of animal agriculture from [its] website," including an image of a "woman hugging a cow with other cows grazing in the background" along with the text "100% dairy and cruelty free." *Id.* at 1–2.

Miyoko's and its leadership understand the Department's letter to threaten adverse action if the company does not make the demanded changes to its product labeling, website, and other marketing materials. Declaration of Miyoko Schinner ¶¶ 11–12; Declaration of Neil Cohen ¶¶ 5–7, 14; Declaration of Jim Allsopp ¶¶ 5–6, 11.[2] The Department has the power to levy significant penalties

[2] In evaluating the State's Rule 12(b)(1) motion to dismiss, the Court can properly "look beyond the complaint" and consider affidavits and other evidence concerning the jurisdictional question. *Savage v. Glendale Union High Sch., Dist. No. 205*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003).

on Miyoko's—including impoundment of its products and even criminal penalties. Schinner Decl. ¶¶ 11–12; Simon Decl. ¶ 12; *see also* Cal. Food & Agr. Code § 32765 (giving Department power to "condemn any product of milk or cream or product resembling a milk product" if "mislabeled"); *id.* § 35281 (providing that any "violation" of statutes concerning milk products is misdemeanor). As the Department itself has explained, "the Department follows a policy of escalating notifications of enforcement." ECF 17-2 at 2. The Department first sends "an initial notice letter"—like the one it sent to Miyoko's—warning "that failure to obtain approval and product registration is a violation of [state law] subject to enforcement by the Department." ECF 17-1 at 3; ECF 17-2 at 2. The Department's next step "before coercive enforcement" is "a second letter that threatens to impound the product." ECF 17-2 at 2; ECF 17-1 at 3. After sending another letter, the Department "will serve impound notices and move forward with impounding products." ECF 17-2 at 3.

Miyoko's is not the only plant-based foods company to have received such a letter from the State. Several other companies have recently received similar enforcement letters from the Milk and Dairy Food Safety Branch, demanding that companies refrain from using clear and non-misleading terms like "almondmilk yogurt" and "vegan cheese." Declaration of Michele Simon ¶ 9. According to the executive director of the Plant Based Foods Association, California plant-based food companies are concerned that the government will revoke their licenses and impose civil penalties, causing them to "to operate with a constant fear of enforcement and in an environment of legal uncertainty." *Id.* ¶ 10. The State's "aggressive enforcement posture" is well known throughout the plant-based foods industry, and "[i]t's no secret" among these companies that the State's enforcement actions came soon "after the National Milk Producers Federation began writing letters complaining to the Branch about animal-based dairy's plant-based competitors." *Id.* ¶ 11. Based on the letter Miyoko's received, even companies who have not received such letters would be "reasonable" to "rethink[] their own marketing and packaging practices" and make changes to their label to comply with the Department's enforcement position. *Id.* ¶ 12.

The Department's enforcement position has caused Miyoko's significant, ongoing harm. As a result, the company now "operates under a cloud" and "a constant fear of enforcement action."

Schinner Decl. ¶ 1. And these fears are not limited to Miyoko's vegan-butter product; the company is "concerned that the State's enforcement position affects not only the specific labeling identified in the letter, but all of [its] 100% plant-based products, and therefore threatens [its] ability to convey [its] message across the board." *Id.* ¶ 14.

Miyoko's does not want to change its packaging and creative materials to remove images of Miyoko hugging her cow or truthful phrases like "cultured vegan butter," Cohen Decl. ¶ 13, and has no intention of discontinuing the use of words such as "butter" and "cheese" preceded by unequivocal qualifiers, Schinner Decl. ¶ 13. Nevertheless, as a result of the State's letter, Miyoko's has had to censor and limit its speech. Already, Miyoko's had to edit and remove portions of a brand video from social media out of "fear of being further targeted by the Milk and Dairy Food Safety Branch." Cohen Decl. ¶ 8. And the company has been unable to make innovations, implement changes to its packages, or take any steps forward as to branding for fear that it will "'pok[e] the bear' and spur further enforcement action." Allsopp Decl. ¶¶ 6, 8; Cohen Decl. ¶¶ 7–8 . For example, because the letter said Miyoko's could not use the truthful phrase "lactose free" to describe its lactose-free plant-based dairy products, the company has refrained from making any (similarly truthful) claims that its products are "GMO-free" in its branding. Cohen Decl. ¶ 8.

The company has even shied away from its public advocacy because of the Department's letter, which is especially harmful to the company because Miyoko's is "unique" in that its founder and CEO is an "outspoken advocate." Cohen Decl. ¶ 13. For example, the coronavirus pandemic has "dramatically increased the public consciousness" about the problems in "industrial animal agriculture" and has spurred demand for plant-based alternatives—but Miyoko's has "been forced to proceed cautiously and not fully join this public conversation" because it is afraid that its speech on these issues could lead to additional enforcement or negative consequences. *Id.* ¶ 11.

Miyoko's has also had to expend significant resources to come into "compliance" with the State's enforcement position. It will either have to create specialized labels and marketing for the products it sells in California, or it will to change all of its labels and marketing nationwide. Schinner Decl. ¶ 16. This will not only be incredibly expensive for Miyoko's—it would cost around

$2 million—but it will also require significant rebranding and design efforts by the company's small team. *Id.*; Cohen Decl. ¶ 5. The leadership team has already spent over 100 hours to deal with the letter's fallout. *Id.* Complying with the Department's demands would also force the company to discard thousands of dollars of packaging, thereby imposing an environmental burden directly contrary to the company's mission. Schinner Decl. ¶ 16.

Of paramount concern to Miyoko's is that compliance with the Department's directive will prevent the company from accurately communicating to consumers the nature and contents of its products, as well as "what they stand for." Schinner Decl. ¶ 1. Plant-based foods like those produced by Miyoko's rely on their ability to differentiate themselves from animal-based products to ensure that consumers get what they expect when purchasing these foods. *See* Schinner Decl. ¶ 6. Shifting to the "new messaging and nomenclature" mandated by the state will likely cause "confusion among consumers." *Id.* ¶ 16. Miyoko's cannot accurately and effectively describe its products without comparison to the conventional dairy products they are designed to replace. *See* Cohen Decl. ¶¶ 3–4; Allsopp Decl. ¶¶ 3–4. Not being able to describe the company's products with words like "cultured vegan butter," "cultured vegan mozz," and "plant-based dairy" would in fact leave its customers "baffled as to [the] product's taste and function." *Id.* ¶ 3. "Without these phrases and images," one of Miyoko's executives explains, "we can't truly express who we are as a company." Cohen Decl. ¶ 3.

The state's position has also "had a chilling effect on [the company's] plans for future labeling and advertising." Schinner Decl. ¶ 19. As Ms. Schinner explains, "For each new label, we now have to ask ourselves: Is the State going to consider this 100% truthful message about our 100%-plant-based products illegal and order us to alter our message? And, if so, is it worth the risk to us? Should we censor ourselves in advance? Or should we continue to tell our customers the truth about our products?" *Id.* ¶ 15. Miyoko's "believes in [its] core mission" and doesn't "want to change [its] message." *Id.* ¶ 19. Not being able to communicate its mission to its loyal customers would be "unspeakably detrimental" to the company and its future. Cohen Decl. ¶ 2.

ARGUMENT

I. Miyoko's has Article III standing and its First Amendment claim is ripe.

Although the State raises objections to both Article III standing and ripeness, it admits (at 4–5) that "the analysis is the same" here. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc); *see Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010). The question is whether Miyoko's has established Article III injury-in-fact. And it is a simple question: Has Miyoko's "asserted an injury that is real and concrete rather than speculative and hypothetical"? *Thomas*, 220 F.3d at 1139 (quotation marks omitted); *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

1. Here, based on the complaint's allegations and the record, there can be no dispute that Miyoko's has sufficiently demonstrated injury-in-fact. The company's speech has already been chilled in numerous respects: It has edited and removed social-media branding videos out of fear of further enforcement, it has refrained from using other truthful phrases like "GMO-free" on its product labels, and it has had to reconsider its new brand theme for its entire product line—a picture of Miyoko hugging a rescued cow. *See* Allsopp Decl. ¶¶ 5–8; Cohen Decl. ¶¶ 4–5, 7–9. The company and its founder have refrained from fully weighing in on the growing public debate over animal agriculture in the coronavirus pandemic, because they are worried about saying something that could cause them to be further targeted by the State. Cohen Decl. ¶ 11. Indeed, *other* plant-based food companies are likely chilling their own speech—refraining from using certain phrases or even preemptively changing their own labels—after seeing what the State demanded of Miyoko's. *See* Simon Decl. ¶¶ 12–14; Cohen Decl. ¶ 13. The company has already experienced difficulty working with some partners who expressed "some nervousness . . . after they became aware of the Branch's enforcement letter." Allsopp Decl. ¶ 9.

What's more, as a result of the State's letter, Miyoko's has had to consider changing its labeling and marketing materials for its entire line of products—a task that will cost millions of dollars and require substantial time and effort. *See* Compl. ¶¶ 25, 46–47; Schinner Decl. ¶¶ 1, 14, 16; Cohen Decl. ¶¶ 5–6; Allsopp Decl. ¶¶ 5–8. These demanded changes will make it more difficult for

Miyoko's to accurately and truthfully convey the nature of its products and its mission to consumers, potentially causing Miyoko's to lose customer goodwill and even market share. *See* Compl. ¶¶ 25–26, 45, 47–48; Schinner Decl. ¶¶ 1, 16, 18; Cohen Decl. ¶¶ 3, 5, 7, 11–14; Allsopp Decl. ¶¶ 4–5, 7, 10. And, absent a court order declaring the State's enforcement unconstitutional, Miyoko's will have to either censor its own speech or risk significant penalties. *See* Compl. ¶¶ 43–44; Schinner Decl. ¶¶ 1, 11, 15, 16–19.

Yet, somehow, the State argues that "Miyoko's has not been harmed" by its enforcement action, and that the Court therefore lacks Article III jurisdiction over this "hypothetical situation[]. ECF 17-1 at 1–2, 9. This argument is based on a deeply flawed reading of the relevant precedent. The State acknowledges that the standing inquiry is significantly relaxed when First Amendment violations are at issue. *See* ECF 17-1 at 5; *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003) ("[I]n the First Amendment-protected speech context, the Supreme Court has dispensed with rigid standing requirements."). But it claims (at 5) that this applies only where the plaintiff challenges "the constitutionality of statutes." Miyoko's is subject to a more demanding standard, the State goes on to say, because the company is challenging the enforcement position reflected in the Department's December 9, 2019 letter—an actual threat of enforcement—rather than a statute that could conceivably be enforced against it. Recall the bookstore hypotheticals at the outset of this brief: The upshot of the State's position is that the bookstore that has actually been threatened with censorship lacks standing to challenge that censorship.

The State's position is groundless. The Ninth Circuit has long held that "when the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." *Stroh*, 205 F.3d 1155 (9th Cir. 2000). And the Ninth Circuit has consistently "applied the requirements of ripeness and standing less stringently in the context of First Amendment claims." *Wolfson*, 616 F.3d at 1058; *see, e.g.*, *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1006 (9th Cir. 2003); *Stroh*, 205 F.3d at 1154–55. Nowhere in these cases does the Ninth Circuit ever limit this relaxed standard to claims solely challenging the constitutionality of statutes.

Nor would such a limitation make any sense. The Supreme Court has made clear that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Blanchette v. Conn. Gen. Insurance Corps.*, 419 U.S. 102, 143 (1974). Rather, it is "sufficient for standing purposes that the plaintiff intends to engage in 'a course of conduct arguably affected with a constitutional interest' and that there is a credible threat that the challenged provision will be invoked against the plaintiff." *Stroh*, 205 F.3d at 1154–55. In the First Amendment context, "the Supreme Court has endorsed what might be called a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences." *Bayless*, 320 F.3d at 1006 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)). In other words, the Supreme Court and the Ninth Circuit have repeatedly held that a plaintiff has standing to bring a First Amendment challenge so long as there is a "credible threat" a statute may be invoked against the plaintiff in a manner that implicates speech. Why would the standing question be more stringent for a plaintiff, like Miyoko's, that the government has *actually threatened* with enforcement?

The answer is: It's not. All a plaintiff must do to demonstrate injury-in-fact in a First Amendment case is "allege that [it has] been 'threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible.'" *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 618 (9th Cir. 1999). "Here, there has clearly been a specific threat of prosecution." *Id.* The Department's letter is "precise and exact"—the company must remove the offending speech from its product labels, website, and marketing, or it will suffer severe, adverse consequences. *Id.* That is enough to conclude that Miyoko's has standing.

Indeed, courts routinely find informal oral warnings, as well as more formal threats like the one that Miyoko's received, to be sufficient to show injury. *See San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996) ("A specific warning of an intent to prosecute under a criminal statute may suffice to show imminent injury and confer standing."); *see, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (plaintiff warned twice by police to stop handbilling); *Ripplinger*, 868 F.2d at 1047 (9th Cir. 1989) (plaintiff warned by county attorney to stop distributing pornography). That includes

letters from regulatory agencies, like the one at issue here, that instruct the plaintiff to stop engaging in certain speech. *See*, *e.g.*, *Cooksey v. Futrell*, 721 F.3d 226, 236 (4th Cir. 2013) (State Board of Dietetics and Nutrition's letter requesting that the plaintiff make specific "necessary changes" to the content of his diet-advice website and "going forward, align your practices with the guidance provided," reasonably chilled his speech); *Holistic Candlers & Consumers Ass'n. v. Food & Drug Admin.*, 664 F.3d 940, 943 (D.C. Cir. 2012) (where FDA's letter notified manufacturers of ear candles that the agency considered their products to be misbranded and advised them to "take prompt action to correct [the identified] deviations" from the Food, Drug, and Cosmetic Act, "there is no doubt that the appellants that manufacture such devices have suffered the requisite injury in fact"); *Berry v. Schmitt*, 688 F.3d 290, 297-98 (6th Cir. 2012) ("Berry had sufficient reason to fear future discipline, as the warning letter unequivocally stated that Berry had violated the rule and essentially cautioned him not to let it happen again."); *Ocheesee Creamery, LLC v. Putnam*, 2015 WL 10906062, at *1 (N.D. Fla. 2015) (where "[t]he Creamery sold what it labeled as 'skim milk' until agents with the Florida Department of Agriculture and Consumer Services" ordered it to stop doing so, "[t]he Creamery has standing to maintain this suit").

2. The State nevertheless claims that this Court should apply the Ninth Circuit's "three-prong test for ripeness and standing" in pre-enforcement challenges, which asks "[1] whether the plaintiffs have articulated a 'concrete plan' to violate the law in question, [2] whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and [3] the history of past prosecution or enforcement under the challenged statute." ECF 17-1 at 4–5 (quoting *Thomas*, 220 F.3d at 1139). But that test is used to evaluate whether a "genuine threat of imminent prosecution" exists in cases "involve[ing] a pre-enforcement challenge to a statute." *NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers Union, Local 433*, 891 F.3d 1182, 1188 (9th Cir. 2018); *see Thomas*, 220 F.3d at 1139.

Here, however, we challenge the State's actual enforcement position: the Department's demand that Miyoko's must censor its speech by changing its labels and marketing to comply with state and federal law. *See* Compl. ¶¶ 48, 51–52. And there can be no dispute that the State's threat of

enforcement was genuine. Indeed, the State *itself* admits that the next steps are product impoundment and "coercive enforcement." ECF 17-1 at 3; ECF 17-2 at 2. Thus, the Court need not even apply the State's three-step framework; all it must do is determine whether Miyoko's has shown a "real and concrete" injury. *Thomas*, 220 F.3d at 1139. As explained above, it has.

In any event, even if it applied, the three-prong inquiry would only confirm that Miyoko's has demonstrated injury-in-fact. *First*, Miyoko's has made clear that it has a "concrete plan" to violate the law, as interpreted and enforced by the Department. *Thomas*, 220 F.3d at 1139. As Miyoko's founder explains, the company "ha[s] no intention of discontinuing the use of words such as 'butter' and 'cheese,' preceded by unequivocal qualifiers," despite the Department's demands that it do so. Schinner Decl. ¶ 13. Indeed, Miyoko's continues to sell products with the labeling that the Department deems unlawful. *See id.*; *see also Merrifield v. Lockyer*, 2005 WL 1662135, at *5 (N.D. Cal. 2005) (holding this requirement satisfied where plaintiffs' intended speech "would violate the terms of the 'warning letter'" sent by state authorities).

That Miyoko's believes the Department's interpretation of these laws is erroneous is irrelevant to the Article III inquiry, *see* ECF 17-1 at 5–6, because the company's injury is caused by its plan to violate the State's enforcement position *based* on those laws. Put differently, Miyoko's has not alleged a "hypothetical" intent to violate the law at some unknown date in the future; according to the State itself, Miyoko's is *currently* violating the law. The State cannot escape an otherwise live constitutional challenge because, like the San Francisco bookstore in our second hypothetical, its speech-restrictive enforcement policy rests on dubious, aggressive interpretations of state and federal law. "Courts must be willing to entertain the possibility that content-neutral enactments are enforced in a content-discriminatory manner. If they were not, the First Amendment's guarantees would risk becoming an empty formality, as government could enact regulations on speech written in a content-neutral manner so as to withstand judicial scrutiny, but then proceed to ignore the regulations' content-neutral terms by adopting a content-discriminatory enforcement policy." *Hoye v. City of Oakland*, 653 F.3d 835, 854 (9th Cir. 2011).

Second, the State's letter to Miyoko's is indisputably a "specific warning or threat to initiate proceedings." *Thomas*, 220 F.3d at 1139. In its motion, the State tries to characterize the letter as merely its "view of [the] law, absent any threat of enforcement"—as simply an "invitation" to discuss "concerns." ECF 17-1 at 2, 6, 8. The Court should reject this sleight of hand. The letter specifically demands that Miyoko's "make necessary changes" to its product labels and marketing—such as "[r]emoving the word 'Butter' from the label" along with "[i]mages of animal agriculture"—and "resubmit it for review" to come into "compliance" with state and federal law. Dept. Ltr. 1–2. Given the Department's enforcement authority, Miyoko's reasonably understood the letter as threatening further enforcement action if it did not comply. Schinner Decl. ¶¶ 11–13. Indeed, the State has since confirmed how reasonable this belief is—in its motion, the State makes clear that the very next step in the process would be a threat to impound Miyoko's products. ECF 17-1 at 3; ECF 17-2 at 2. Thus, the situation here is far different from the two cases that the State cites for support, both of which involved letters from government agencies merely stating the agency's general authority to enforce certain laws, as opposed to specific demands. *See* ECF 17-1 at 6 (citing *Rincon Band of Mission Indians v. San Diego Cty.*, 495 F.2d 1, 4 (9th Cir. 1974); *Rancheria v. Bonham*, 872 F. Supp. 2d 964, 973 (N.D. Cal. 2012)).[3]

Tellingly, despite repeatedly stressing the "absence of any type of threat of enforcement" here, ECF 17-1 at 7, the State "has not argued to this Court that plaintiffs will not be prosecuted" if Miyoko's does not make the changes demanded in that letter. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010) (citations omitted). And courts "consider[] the Government's failure to disavow application of the challenged provision as a factor in favor of a finding of standing." *Stroh*, 205 F.3d at 1155; *see Peachlum v. City of York, Pennsylvania*, 333 F.3d 429, 435 (3d Cir. 2003) ("In cases involving

[3] Indeed, in *Rincon*, a Native American tribe "*requested* a written statement of county policy as to the county's jurisdiction to enforce its gambling ordinance." 495 F.2d 1, 4 (9th Cir. 1974) (emphasis added). Likewise, in *Rancheria*, the state agency "simply indicated that [it] had the authority to enforce the fishing regulations against the" plaintiffs, and the Court found that this statement did "not constitute a specific warning or threat to initiate proceedings." 872 F. Supp. 2d at 972–73. Notably, the agency statement in *Rancheria* also followed a tribe's request for the agency to articulate the extent of its authority over tribal activities. *See id.* at 967.

fundamental rights, even the remotest threat of prosecution, such as the absence of a promise not to prosecute, has supported a holding of ripeness."). Even if the State were to belatedly attempt to disavow its position or withdraw its threat in response to this lawsuit, there would be nothing to stop the State from changing its mind and deciding to move forward with enforcement against Miyoko's in the future.

Third, and finally, the State's letter to Miyoko's is not an anomaly. Adopting an "aggressive enforcement posture" towards plant-based dairy companies, the Department has recently sent letters "prohibiting these companies from using clear and non-misleading terms like 'almondmilk yogurt,' 'vegan cheese' and the like"—and these letters appear to be escalating in number in the time since the National Milk Producers Federation complained to state regulators about plant-based dairy products. Simon Decl. ¶¶ 9, 11; Allsopp Dec. ¶ 7. These plant-based companies, like Miyoko's, "have been forced to operate with a constant fear of enforcement and in an environment of legal uncertainty," faced with the untenable position of losing their business license or being fined for continuing to engage in truthful speech. *See* Simon Decl. ¶¶ 10, 12–15. In one case, the Department demanded that The Cultured Kitchen (TCK), a plant-based foods company, remove any mention of the word "cheese" from its labels for its cashew-cheese products—though the Department refused to put any specific demands "in writing." *See* Taimie L. Bryant, *Social Psychology and the Value of Vegan Business Representation for Animal Law Reform*, 2015 Mich. St. L. Rev. 1521, 1537–42 (2015). At first, TKC tried to "resist[] the labeling changes"—"they want[ed] to be able to use the word 'cheese'" "for customer recognition and self-presentation reasons," the labels were not confusing, and compliance would have been exceedingly burdensome—but "the CDFA stuck to its stringent reading of the statutes, forcing TCK to change its labeling or sue." *Id.* at 1538, 1541. "TCK had been unable to operate for a substantial period of time due to CDFA delays in response, could not afford to litigate, and changed its label." *Id.*

The State again tries to distract the Court by claiming that there is "no history of either criminal or civil enforcement for this type of labeling violation." ECF 17-1 at 8. But the State itself admits that it has sent "letters containing specific warnings of possible enforcement" to other plant-

based producers. *Id.* That the companies in those cases may have chosen to acquiesce in the Department's demands rather than contest their constitutionality does not erase the Department's history of enforcement.

In sum, the State and Miyoko's "remain philosophically on a collision course." *Canatella v. State of California*, 304 F.3d 843, 853 (9th Cir. 2002). The State's threat of prosecution is not "merely hypothetical and conjectural, but actual," and it has "continuing, present adverse effects" on the company—especially given that Miyoko's intends to continue engaging in the proscribed speech. *Canatella*, 304 F.3d at 853. Accordingly, the Court should conclude that Miyoko's has satisfied Article III's standing and ripeness requirements.

II. There is no reason for this Court to abstain from deciding Miyoko's First Amendment claim.

"Abstention from the exercise of federal jurisdiction is the exception rather than the rule." *Ripplinger*, 868 F.2d at 1048. That is even more so for the three doctrines on which the State relies. *See, e.g.*, *Sprint Commc'ns v. Jacobs*, 571 U.S. 69, 73 (2013) (describing *Younger* as "exceptional"); *Courthouse News Serv. v. Planet*, 750 F.3d 776, 783 (9th Cir. 2014) (calling *Pullman* "extraordinary and narrow"); *Tucson v. U.S. W. Commc'ns*, 284 F.3d 1128, 1133 (9th Cir. 2002) (calling *Burford* "extraordinary and narrow"). And abstention is particularly disfavored in First Amendment cases because "the delay that comes from abstention may itself chill the First Amendment rights at issue." *Porter v. Jones*, 319 F.3d 483, 492–93 (9th Cir. 2003); *see also Houston v. Hill*, 482 U.S. 451, 467 & n.17 (1987) (stressing the Court's "particular[] reluctan[ce] to abstain" in free-speech cases). Abstention is at war with the principle that plaintiffs in free-speech cases "have a special interest in obtaining a prompt adjudication of their rights." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563 (2011). The State's grab-bag request for abstention should therefore be rejected.

1. *Pullman* abstention. The State's invocation of *Pullman* (at 9–10) flouts binding precedent. "*Pullman* abstention 'is generally inappropriate when First Amendment rights are at stake.'" *Courthouse News*, 750 F.3d at 784. And the Ninth Circuit has "held that the first requirement for *Pullman* abstention is 'almost never' satisfied in First Amendment cases 'because the guarantee of

free expression is always an area of particular federal concern.'" *Id.* So too here: Whether Miyoko's First Amendment rights have been violated by the State's demands that the company censor its speech is a question that "the federal courts are particularly well-suited to hear." *Porter*, 319 F.3d at 492–93. Nor can state courts moot the First Amendment question by resolving issues of state law. The Department's letter relied largely on *federal* regulations, over which state courts have no authority. *See* Dept. Ltr. 1–2.

2. *Younger* abstention. The State's request for *Younger* abstention is even more confounding. ECF 17-1 at 10–12. *Younger* applies only where "there is an ongoing state judicial proceeding." *Page v. King*, 932 F.3d 898, 901–02 (9th Cir. 2019). It thus applies to "state administrative proceedings" only when they are "judicial in nature." *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 627 (1986); *see also Agriesti v. MGM Grand Hotels*, 53 F.3d 1000, 1002 (9th Cir. 1995) ("*Younger* abstention is permissible only in deference to state proceedings that are judicial in nature."). And purely "executive" acts—like the State's demand letter to Miyoko's—cannot implicate *Younger*, because such acts "do not mark the commencement of judicial proceedings." *Id.* at 1002; *see, e.g.*, *CFNR Operating Co. v. City of Am. Canyon*, 282 F. Supp. 2d 1114, 1117 (N.D. Cal. 2003) ("Mere issuance of the citations was not a judicial act and there is no pending proceeding that is adjudicative in nature relating to the citations.").

3. *Burford* abstention. The State's final attempt to persuade this Court to decline jurisdiction fares the worst. *Burford* abstention is appropriate only where the case concerns "an essentially local issue" that "aris[es] out of a complicated state regulatory scheme." *United States v. Morros*, 268 F.3d 695, 705 (9th Cir. 2001). Whether the State of California has unconstitutionally sought to censor Miyoko's speech is not a local issue—it is a question about *federal* constitutional rights. Further, the State misrepresents the law when it says that *Burford* is appropriate when "challenges are concentrated in a court *or agency*." ECF 17-1 at 12 (emphasis added). As the State's own case says, the Ninth Circuit allows *Burford* abstention only when the state "ha[s] concentrated suits involving the local issue in a particular court." *Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290, 296 (9th Cir. 1996), *as amended* (Aug. 5, 1996); *see Friends of Oceano Dunes v. Ainsworth*, 785 F. App'x

394, 395 (9th Cir. 2019) (holding *Burford* inapplicable because California had not "concentrated suits attacking [the agency's actions] in a particular court"). What's more, "federal review" here won't "disrupt state efforts to establish a coherent policy." *Morros*, 268 F.3d at 705. To the contrary, this Court's review likely will clarify to the Department what the First Amendment requires—an enforcement policy that does not pick and choose among companies based on the content and viewpoint of their speech.

CONCLUSION

The motion to dismiss should be denied.

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Respectfully submitted,

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