



## MANDATED LABELING FOR GENETICALLY ENGINEERED FOODS: VERMONT'S LEGISLATION IMPLICATES THE FIRST AMENDMENT

by Robert Hahn and John Dillard

Vermont has become the first state to require labeling of genetically engineered foods.<sup>1</sup> On April 23, 2014, Vermont's legislature approved a bill (H.112) that would require raw agricultural commodities and processed foods offered for sale in Vermont retail stores, with certain exceptions, to bear special labeling if they are entirely or partially produced with genetic engineering.<sup>2</sup> Governor Peter Shumlin signed the bill into law on May 8, 2014, and the labeling requirement will become effective on July 1, 2016. Vermont is now at the tip of the spear in the movement to require labeling on foods containing ingredients that are commonly referred to as "genetically modified organisms" or "GMOs."<sup>3</sup>

Although this legislation apparently enjoys broad popular support in a state known for embracing organic farming techniques and the local food movement, it is vulnerable to a constitutional challenge under the First Amendment.<sup>4</sup> While the U.S. Court of Appeals for the Second Circuit is a particularly hospitable court for Vermont to make its case, it is not clear that even the Second Circuit would uphold this law if challenged. Moreover, even if the law is upheld by the Second Circuit, there is a good chance that the U.S. Supreme Court would grant *certiorari* to an appeal, given the existence of a pronounced split among the circuit courts on the proper standard to be applied in First Amendment review of this type of labeling law.

Freedom of speech is one of America's most fundamental rights. The right to free speech encompasses both the right to speak as well as the right to refrain from speech. Commercial speech, in the form of labeling or advertising, is also protected by the First Amendment but has been accorded less protection

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<sup>1</sup> Both Maine and Connecticut have passed similar labeling laws; however, the Maine and Connecticut laws do not go into effect until a critical mass of neighboring states enact similar legislation. *See, e.g.*, Public Act No. 13-183, amending Connecticut General Statutes 21a-92, 21a-99, and 21a-102.

<sup>2</sup> For raw agricultural commodities (*e.g.*, an ear of corn), the mandated label would state "produced with genetic engineering." For processed foods, the mandated label would state "partially produced with genetic engineering," "may be produced with genetic engineering," or "produced with genetic engineering." H.112 also prohibits "natural," "all natural," and similar claims in labeling or advertising for foods produced entirely or partially from genetic engineering. However, this article focuses on the mandatory labeling provision of the law.

<sup>3</sup> Although the Food and Drug Administration (FDA) has stated that use of the terms "genetically modified organism" and "GMO" to refer to genetically engineered foods are potentially misleading (*i.e.*, since nearly all foods have been genetically modified in some manner and since very few foods contain organisms) (*Draft Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Biotechnology* (Jan. 2001)), these terms have, unfortunately, become the commonly used terms in the trade.

<sup>4</sup> The legislation may be vulnerable to other legal challenges, including claims that it is subject to federal preemption (especially to the extent it applies to meat and poultry products) and that it violates the dormant Commerce Clause, but this article will focus on the First Amendment.

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from government regulation than other forms of constitutionally guaranteed expression. In general, the U.S. Supreme Court has created two exceptions from the general rule that content-based speech regulation is subject to strict scrutiny. First, restrictions on commercial speech are subject to intermediate review under *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*<sup>5</sup> Under *Central Hudson*, restrictions on truthful, nonmisleading commercial speech are permissible, provided that: (1) the government asserts a “substantial interest”; (2) the restriction on speech directly advances the government interest; and (3) the restriction is not more burdensome than is necessary to advance the government interest. Second, purely factual and uncontroversial disclosure requirements deemed necessary to prevent consumer deception are subject to an even more relaxed standard of review. Under *Zauderer v. Office of Disciplinary Counsel*, such disclosure requirements are permissible if reasonably related to the government interest in preventing consumer deception.<sup>6</sup>

There appears to be a split among the Circuit Courts of Appeals regarding the proper standard for review of compelled commercial speech. In other circuits, *Zauderer* is viewed as a narrow exception that only applies “in order to dissipate the possibility of consumer confusion or deception.”<sup>7</sup> However, the Second Circuit has taken a different position by giving the Supreme Court’s decision in *Zauderer* much broader application. In *National Elec. Manuf’s Assoc. v. Sorrell*, the Second Circuit held that *Central Hudson* should only apply to instances where commercial speech is prohibited or otherwise restricted, not in cases of compelled commercial speech. Furthermore, the Second Circuit held that *Zauderer* is not limited to compelled commercial speech that is designed to prevent consumer deception. Instead, the *Sorrell* court held that a government may compel an accurate factual and uncontroversial disclosure so long as the compelled disclosure is “reasonably related” to a legitimate state interest.<sup>8</sup>

Thus, the Second Circuit applies a “rational basis” review to laws requiring “purely factual and uncontroversial” commercial speech. Such laws are permissible if the disclosure requirement is reasonably related to a legitimate government interest. In *Sorrell*, the court found that a Vermont statute mandating warning labels on mercury-containing light bulbs, thereby encouraging consumers to properly dispose of the bulbs, was reasonably related to the state’s legitimate interest in reducing the amount of mercury released into the environment. In *New York State Restaurant Association v. New York City Board of Health*, the Second Circuit held that a New York City ordinance requiring calorie information on menus and menu boards in chain restaurants was reasonably related to the city’s legitimate interest in reducing obesity rates.<sup>9</sup>

It is true that the Second Circuit in *IDFA v. Amestoy* struck down a Vermont statute mandating labeling of milk from cows treated with recombinant bovine somatotropin (rbST).<sup>10</sup> In that decision, the court held that the public’s “right to know” about production methods is not a substantial government interest. However, that case applied the *Central Hudson* standard, not *Zauderer*, and the Second Circuit has gradually narrowed its holding so that it is now “expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of ‘consumer curiosity.’”<sup>11</sup>

<sup>5</sup> *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 562-63 (1980).

<sup>6</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

<sup>7</sup> *Zauderer*, 471 U.S. at 651. See, e.g., *Borgner v. Brooks*, 284 F.3d 1204, 1214 (11th Cir. 2002), *Spirit Airlines, Inc. v. U.S. Dept. of Transp.*, 687 F.3d 403, 414-15 (D.C. Cir. 2012); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1213 (D.C. Cir. 2012) (“The Supreme Court has never applied *Zauderer* to disclosure requirements not designed to correct misleading commercial speech”). The D.C. Circuit is currently reviewing this issue *en banc* in *American Meat Institute v. USDA*, No. 13-5281.

<sup>8</sup> *National Elec. Manuf’s Assoc. v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001).

<sup>9</sup> *New York State Restaurant Association v. New York City Board of Health*, 556 F.3d 114 (2d Cir. 2009).

<sup>10</sup> *International Dairy Foods Association v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).

<sup>11</sup> *Sorrell*, 272 F.3d at 115, n. 6.

Despite these Vermont-friendly precedents, there is a strong argument that H.112 violates the First Amendment even under the relaxed Second Circuit standard of review. It is not clear that mandatory labeling of genetically engineered foods, as required by Vermont’s H.112, can be framed as a “purely factual and uncontroversial” disclosure requirement. While Vermont has characterized the law as a neutral labeling requirement that proponents of genetic engineering should be happy to comply with, the very fact that government would require a label disclosure on genetically engineered foods likely carries an implied message that such foods may be less desirable. This implied message is highly controversial.<sup>12</sup>

Even assuming the Second Circuit determines that Vermont’s labeling requirement is purely factual and uncontroversial and therefore subject to review under the forgiving “rational basis” standard of *Sorrell*, it is uncertain whether the law can pass muster. First, the court must find a legitimate government interest underlying the legislation. H.112’s legislative findings explain the state legislature’s concerns about genetically engineered foods, which can be summarized as follows: (1) there is “a lack of consensus regarding the validity of the research and science surrounding the safety” of such foods;<sup>13</sup> (2) planting of genetically engineered crops contributes to loss of biodiversity and displacement of wild relatives; (3) genetically engineered crops may “contaminate” organic crops, reducing their marketability; and (4) some consumers have religious objections to “tampering with the genetic makeup of life forms.” It concludes that consumers should be able to choose not to purchase genetically engineered foods for “multiple health, personal, religious, and environmental reasons.”<sup>14</sup>

Thus, the government interest justifying H.112 is to provide a mechanism whereby Vermont consumers who wish to avoid genetically engineered foods for health or environmental reasons may do so. Is this a legitimate government interest? The Vermont legislature offers no scientific evidence to support its allegations that genetically engineered foods may be harmful to human health or the environment, and it frankly acknowledges that the FDA does not share its concerns. While this is more than “mere consumer concern” or “consumer curiosity,” which was held not to be a substantial government interest in *IDFA v. Amestoy*, can Vermont simply assert a potential risk to human health and the environment, and would the Second Circuit accept that at face value? Could Vermont require a label warning for a food additive that had been approved by the FDA simply by asserting that it might be unsafe?

The court must also find that H.112 is reasonably related to the asserted government interest. There must be a reasonable fit between the ends (*i.e.*, facilitating consumer identification and avoidance of genetically engineered foods) and the means chosen (*i.e.*, mandatory labeling of such foods). Here, H.112 may be on even shakier ground. As Vermont observes, roughly 80% of processed foods in the U.S. contain genetically engineered ingredients, and the use of genetic engineering is increasing. In these circumstances, it would appear to make more sense to facilitate labeling of foods that do *not* contain genetically engineered ingredients than to mandate labeling of those that do. In fact, “non-GMO” label statements and certifications are increasingly common.

In addition, there is another simple way for consumers who wish to avoid genetically engineered foods to do so—purchasing certified organic foods. Under the Organic Foods Production Act and U.S. Department of Agriculture regulations, foods labeled “organic” may not be produced using genetic engineering. While organic foods may unintentionally contain trace amounts of genetically engineered crops, the Vermont law

<sup>12</sup> See *IMS Health Inc. v. Sorrell*, 630 F.3d 263 (2<sup>nd</sup> Cir. 2010), *affirmed*, 131 S. Ct. 2653 (2011), striking down a Vermont law restricting the use of pharmacy records revealing physician prescribing practices (“...the legislative findings are explicit that Vermont here aims to do exactly that which has been so highly disfavored—namely, put the state’s thumb on the scales of the marketplace of ideas in order to influence conduct”).

<sup>13</sup> H.112, Section 1(2)(D).

<sup>14</sup> H.112, Section 1(5).

would offer consumers no more protection from the ingestion of minor amounts of genetically engineered foods. It exempts from labeling foods that unknowingly or unintentionally contain genetically engineered content, as well as processed foods with genetically engineered content of not more than 0.9% of the total weight. If Vermont nevertheless wishes to make it easier for its consumers to avoid genetically engineered foods, a more rational approach would be to mandate “non-GMO” labeling of foods that are not genetically engineered or partially genetically engineered.

It is unclear whether Vermont’s legislation will ultimately survive a legal challenge. In recognition that a legal challenge is likely, the legislature appropriated \$1.5 million to defend the law and created a fund for private donors, primarily organic food interests, to assist in defending the law upon its passage. Given the substantial circuit split regarding the standard of review to be applied to this type of labeling law, the Supreme Court may ultimately need to provide guidance on the parameters of compelled commercial speech.