Legal Opinion Letter

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BIOTECH FOOD LABELING PROPOSAL RAISES FIRST AMENDMENT CONCERNS

by
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With Californians set to vote on Proposition 37—the California Right to Know Genetically Engineered Food Act ("the Act")—and a host of other states considering similar proposals, the debate on compelled labeling for foods derived from plant varieties developed with the use of recombinant DNA and related technologies ("food biotechnology") is in full force. Often lost in these debates, however, is whether such initiatives would pass muster under First Amendment principles for compelled speech requirements.

It is well-established that the First Amendment protects the freedom of expression and encompasses both the right to speak and the right to refrain from speaking, including in the context of product labeling. Government regulations that prescribe the content of product labeling are subject to exacting scrutiny and subject to *de novo* judicial review. Under the First Amendment, the government has the burden of establishing that any content restriction directly advances a substantial government interest and is no more extensive than necessary to achieve its purpose. Compelled labeling requirements are subject to particularly rigorous review when the prescribed labeling requires the speaker to convey a subjective point of view that the speaker finds objectionable, such as speech disparaging a lawful product the speaker wishes to market.

Proposition 37 is a California ballot initiative that will be put to a vote on November 6 and would make California the first and only state to compel labeling of foods derived from plant varieties developed using food biotechnology. The Act would broadly require labeling of food products unless the manufacturer affirmatively establishes that food biotechnology was not used in the development of any ingredient, or demonstrate the applicability of one of the exemptions. Specifically, Proposition 37 would require food offered for retail sale in California to include language disclosing the presence of, or possible presence of, genetic engineering "if it is or *may have been entirely or partially* produced with genetic engineering."[1]

Raw agricultural commodities would be required to display on the front of the package, or on a retail shelf or bin if not separately packaged, the statement "Genetically Engineered" in "clear and conspicuous words." Processed foods would be required to display either the statement, "Partially Produced with Genetic Engineering," or "May be Partially Produced with Genetic Engineering." The Act would also prohibit certain foods from being characterized as natural.

Because it both bans and compels speech, the Act would be vulnerable to challenge under the First Amendment, which demands that "regulating speech must be a last – not first – resort."[2] The Supreme Court has long held that the government must justify restrictions on commercial speech by demonstrating that "the restriction directly and materially advances a substantial State interest."[3] Statutes that compel speech in order to satisfy consumer curiosity cannot withstand First Amendment scrutiny because "consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement in a commercial context."[4] Compelled disclosure requirements involving more subjective information must pass heightened scrutiny, and have consistently been struck down as violative of the First Amendment.

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"Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech," and is therefore considered a "content-based regulation of speech [that] is subject to exacting First Amendment scrutiny."[5]

For instance, the Supreme Court struck down a New Hampshire law requiring drivers to display the state motto, "Live Free or Die," on license plates because the First Amendment protects the right "to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."[6] Similarly, the Seventh Circuit invalidated an Illinois law that would have required video game manufacturers to display an "18" sticker on a video game if it was determined based on "contemporary community standards" to warrant labeling.[7]

Evaluating the subjectivity of the information compelled necessarily requires a consideration of the larger context in which the information is conveyed. For instance, in a recent unpublished opinion involving a San Francisco ordinance requiring cell phone retailers to provide customers with information relating to radiofrequency energy emissions, the Ninth Circuit explained that the required statements "could prove to be interpreted by consumers as expressing [an] opinion that us[e] is dangerous . . . [because] there is a debate in the scientific community about the health effects of cell phones."[8] Disclosure requirements compelling a speaker to espouse a subjective position have consistently been struck down. Along these lines, the D.C. Circuit recently invalidated an FDA rule that would have compelled labeling on cigarette packages because the labeling would have "convey[ed] the state's subjective—and perhaps even ideological—view that consumers should reject this otherwise legal, but disfavored, product."[9]

The sheer breadth of the labeling requirement imposed by Proposition 37 raises questions as to whether the Act compels speech subject to heightened scrutiny under the First Amendment. The Vermont law struck down by the Second Circuit in *IDFA v. Amestoy* would have provided for "shelf-labeling of milk derived from rBST-treated cows through the use of blue shelf labels, blue stickers, or explanatory signs placed in retail establishments."[10] The explanatory signs would state "that rBST has been or may have been used" in production of labeled products and also explain that "[t]he United States Food and Drug Administration has determined that there is no significant difference between milk from treated and untreated cows." Notwithstanding those options, Vermont's compelled speech requirement could not survive First Amendment scrutiny because it "requir[ed] a product's manufacturers to publish the functional equivalent of a warning about a production method that had no discernible impact on a final product."[11]

Proposition 37 would pose comparable concerns by compelling similar, and potentially more provocative, statements on a wide array of lawful food product labeling. In view of the substantial body of case law invalidating compelled speech requirements, particularly those that endorse a value-laden position or stigmatize a lawful product, Proposition 37 would be vulnerable to challenge under the First Amendment both for its compelled labeling requirement and its speech ban.

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[1] The California Right to Know Genetically Engineered Food Act § 110809(a) (emphasis added).
[2] *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).
[3] *Ibanez v. Fla. Bd. of Accountancy*, 512 U.S. 136, 142 (1994).
[4] *IDFA v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996).
[5] *Riley v. Nat'l Fed'n Of Blind*, 487 U.S. 781, 795-99 (1988).
[6] *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).
[7] *See Entm't Software Assoc. v. Blagojevich*, 469 F.3d 641, 650-52 (7th Cir. 2006).
[8] *CTIA v. San Francisco*, 2012 WL 3900689, at *1 (9th Cir. Sept. 10, 2012).
[9] *R.J. Reynolds Tobacco Co. v. FDA*, 2012 WL 3632003, at *4 (D.C. Cir. Aug. 24, 2012).
[10] *IDFA v. Amestoy*, 898 F. Supp. 246, 249 (D. Vt. 1995).
[11] *IDFA v. Amestoy*, 92 F.3d 67, 73 (2d Cir. 1996).

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