15-1504-cv

The United States Court of Appeals
For The Second Circuit

GROCERY MANUFACTURERS ASSOCIATION, SNACK FOOD ASSOCIATION, INTERNATIONAL DAIRY FOODS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS,

Plaintiffs - Appellants,

v.

WILLIAM H. SORRELL, in his official capacity as the Attorney General of Vermont, PETER SHUMLIN, in his official capacity as Governor of Vermont, JAMES B. REARDON, in his official capacity as Commissioner of the Vermont Department of Finance and Management, HARRY L. CHEN, in his official capacity as the Commissioner of the Vermont Department of Health,

Defendants - Appellees.

Appeal From The United States District Court For The District Of Vermont
Civil Case No. 5: 14-cv-117 CR (Honorable Christina Reiss)

BRIEF FOR AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest federation of business organizations and individuals. The Chamber represents more than three million businesses of every size, in every sector, and from every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing amicus briefs in cases involving issues of national concern to American business.[1] The Chamber and its members have an interest in this case because the decision below improperly expands the government's authority to compel business enterprises to disseminate government-dictated messages, including those with implications detrimental to legitimate business interests.

The Chamber believes that the compelled dissemination of government-composed messages is a constitutionally disfavored regulatory tool that must be subjected to heightened judicial scrutiny. Under well-established First Amendment principles, to survive judicial review, the State must demonstrate that the required messaging advances a state objective that is both legitimate and unobtainable through market mechanisms or economic regulation. In addition, the

[1] Pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29.1(b), the amicus states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the amicus, its members, and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this brief. *See* Doc. 43 (filed June 15, 2015).

State must be required to establish that the message it seeks to compel is true and non-controversial. The decision under review stands these fundamental principles on their head. By misreading both this Court's prior decisions and the Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the decision below treats compelled commercial dissemination of purportedly "purely factual and uncontroversial" messages as an ordinary regulatory action that is subject to the most deferential standard of review and thus permissible so long as it has some rational relationship to a state regulatory objective. In the Chamber's view, that decision cannot be allowed to stand.[2]

The Fourteenth Amendment, incorporating the First, guarantees "the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Government "can express [its] view through its own speech," but it cannot infringe others' rights, even in commercial settings, to advance a preferred view or manipulate the marketplace of ideas. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671 (2011); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 7 (1986) (plurality opinion). Here, to placate activist groups,

[2] The Chamber focuses in this brief on the Act's labeling requirement. The District Court rightly concluded that the law's ban on the word "natural" likely is unlawful, JA-94, and the Chamber supports the arguments made by Appellants about the illegality of the restriction, and the irreparability of First Amendment harms flowing from it, *see Brief of Plaintiffs-Appellants* at 50-58, Doc. 44 (filed June 24, 2015).

the State has enacted a law directing consumers away from purchasing foods with genetically engineered ("GE") ingredients, and toward more expensive organic products. *See* 9 V.S.A. § 3043 ("Vermont law" or "Act 120"). That decision lacks scientific foundation and is not supported by any health or safety concerns. Additionally, it directly contravenes the position of Vermont manufacturers, who maintain that GE ingredients are not a significant aspect of their products. The Vermont law thus forces manufacturers "to speak against their will [and] regulates the content of that speech." JA-67.

In justifying this intrusion, the court below ignored the State's responsibility under the First Amendment to demonstrate a substantial interest in disseminating, and an appropriate tailoring of, the compelled message. Sustaining that decision would encourage governments to continue compelling the dissemination of messages aligned with fringe groups—messages without any meaningful scientific support—to the detriment of businesses who want only to use their labels and advertising resources to convey truthful, non-misleading information promoting their lawful products. That is a result the Chamber and its members believe cannot be squared with the constitutional safeguards of a free enterprise, free speech society.

SUMMARY OF THE ARGUMENT

There is no doubt that the Vermont law at issue in this case compels speech and impairs rights guaranteed by the U.S. Constitution. The First Amendment sharply limits the government's power to regulate the content of speech or to compel speech, and its norms demand that the government justify its regulations with a credible, substantial interest beyond satisfying consumer curiosity or forcing one set of sellers to advance the interests of their rivals. It is well-settled that the government has a substantial burden to meet when it seeks to compel speech by any actor, on any topic.

Vermont's law ostensibly was designed to raise awareness and "inform" consumers about GE foods. It does this by forcing manufacturers to highlight a product attribute which has no scientifically supportable importance in purchasing decisions. Unwilling or unable to regulate GE ingredients directly, Vermont wants to force food manufacturers to display prominently on product labels a statement that particular products are derived from GE ingredients in order to steer consumers away from purchasing those products. That result may serve the interests of organic food producers and some of Vermont's citizens, but it cannot claim to advance a legitimate state interest.[3]

[3] In addition, the record below showed that market mechanisms could satisfy the concerns of those fearing GE ingredients or seeking GE-free products. *See*,

The District Court approved Vermont's departure from constitutional norms by misinterpreting and misapplying longstanding First Amendment jurisprudence. The District Court erred by failing to apply heightened scrutiny once it concluded that the compelled-disclosure requirement at issue was a content-based regulation. *Sorrell*, 131 S. Ct. at 2653. When the Supreme Court applies heightened scrutiny to compelled commercial disclosures, it requires the government to demonstrate a substantial public interest and employs robust fit requirements. Act 120 cannot meet the test the District Court should have applied because its required notice is not linked to any curing of consumer deception, nor is it tailored toward the advancement of any other substantial state interest.

The District Court also decided that Vermont's compelled message did not require manufacturers to espouse any point of view on GE ingredients and thus was entitled to greater constitutional latitude as pure content regulation rather than viewpoint discrimination. That reasoning unrealistically concludes that requiring manufacturers to highlight a product feature that they consider to be of no importance does not express a point of view. And it runs afoul of the recent decision in *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2230 (2015), in which

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e.g., *GMA Mem. Points and Authorities in Support of Prelim. Inj*. at 29, D. Ct. Doc. 33-1 (filed Sept. 11, 2014) (citing third party efforts suitable for State support).

the Supreme Court made clear that a content/viewpoint distinction is not relevant to determining the level of scrutiny required by the First Amendment.

ARGUMENT

I. COMPELLED COMMERCIAL SPEECH MUST BE SUBJECTED TO HEIGHTENED JUDICIAL SCRUTINY.

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). Embedded in this principle is the idea "that freedom of speech prohibits the government from telling people what they must say." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quotation omitted). Nor can the government force private actors to promote messages with which they disagree. *Pacific Gas*, 475 U.S. at 7.

The Supreme Court regularly invalidates regulations compelling persons to affirm or express government-approved views, *Wooley*, 430 U.S. at 714; *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), subsidize or distribute speech they oppose, *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001); *Pacific Gas*, 475 U.S. at 16, or "send a message" with which they disagree, *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000). The basic First Amendment concepts animating these decisions "appl[y] not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 573 (1995); *see also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797–98 (1988) ("These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact' . . . .").

These basic rights, including the right not to speak, protect businesses and individuals alike: "speech does not lose its protection because of the corporate identity of the speaker." *Pacific Gas*, 475 U.S. at 16. "For corporations as for individuals, the choice to speak includes within it the choice of what not to say." *Id.* (*citing Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974)); *Hurley*, 515 U.S. at 574 (holding that the right to tailor one's speech is "enjoyed by business corporations" as well as individuals and the press).

For nearly forty years, the Supreme Court has made clear that the "purely economic" interests of a speaker do not "disqualif[y] him from protection under the First Amendment." *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Protection of economically motivated speech is essential in our "predominantly free enterprise economy." *Id.* at 765; *see also Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). Laws burdening economically motivated speech cannot be treated as "mere commercial regulation." *Sorrell*, 131 S. Ct. at 2664. In commercial

settings, "the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct," so speech regulation "cannot be treated as simply another means that the government may use to achieve its ends." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512 (1996) (rejecting notion that the power to regulate a product "necessarily includes" the "lesser power" to regulate advertising about the product). This is why, "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002). If nothing else, these cases teach that the State's mere desire to disseminate its chosen message is an insufficient interest to support compelling a manufacturer to be the State's messenger.

The First Amendment value supporting the "free flow of accurate information" is occasionally mistaken as a justification for mandatory warnings and disclosures.[4] But, properly analyzed, that principle is a reason to be *skeptical of restrictions* on commercial speech, not an affirmative *license to compel* private parties to disseminate information on the State's behalf. At its core, "[t]he First

[4] *See, e.g.*, JA-78; *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113–14 (2d. Cir. 2001) ("*NEMA*") ("Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal.").

Amendment is a limitation on government, not a grant of power." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in judgment). Allowing the government to regulate the marketplace of ideas by forcing private parties to convey government messages detracts from, rather than advances, the specially protected role of free speech in the marketplace. A "free flow" principle could justify compelling virtually any disclosure of interest to any group. There would be "no end to the information that states could require manufacturers to disclose," resulting in a complete (and improper) abrogation of manufacturers' First Amendment rights. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996).

Recognition of the need for meaningful First Amendment scrutiny need not jeopardize "thousands of routine commercial disclosure requirements."[5] While unjustifiable regulations have been and should be struck down,[6] courts have

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[5] *Vermont Opp'n Br.* at 17, D. Ct. Doc. 63 (filed Nov. 14, 2014).

[6] *See, e.g.*, *United Foods*, 533 U.S. at 411 (invalidating regulation because it compelled corporate entity to "subsidize speech with which [it] disagree[d]"); *Amestoy*, 92 F.3d at 73 (invalidating disclosure requirement lacking a substantial interest); *CTIA v. City and Cnty. of San Francisco*, 494 F. App'x 752 (9th Cir. 2012) (invalidating disclosure requirement that was not purely factual and uncontroversial); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 651 (7th Cir. 2006) (holding that video game labels were subject to strict scrutiny because they were not purely factual and uncontroversial); *Ficker v. Curran*, 119 F.3d 1150, 1152 (4th Cir. 1997) (striking down state ban on an attorney's targeted mailings because restriction failed intermediate scrutiny review).

sustained other traditionally required disclosures. *See, e.g.*, *Zauderer*, 471 U.S. at 650–51. Speech regulations can survive First Amendment scrutiny only if the government meets its burden to show an actionable government interest by "demonstrat[ing] that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993). Thus, the application of heightened scrutiny to compelled speech is reconcilable with the advancement of the public interest in a well-functioning commercial marketplace.

The First Amendment demands rigorous scrutiny of Vermont's speech compulsion.

II. VERMONT'S DISCLOSURE REQUIREMENT COMPELS MANUFACTURERS TO PROMOTE ONE SIDE OF A PUBLIC POLICY DEBATE.

A small group of activists have adopted a political agenda condemning genetic engineering of food products as detrimental to consumer health and the environment. Food manufacturers vehemently disagree and point to what they describe as "the overwhelming scientific and medical consensus" "that commercially available GE crops are safe for human consumption." *Brief of Plaintiffs-Appellants* at 2–3. The Chamber and its members do not seek to constrain this political debate or to stop anti-GE advocates' efforts to persuade consumers, through their own speech, to avoid purchasing GE foods. We do,

however, support food manufacturers' efforts to reject Vermont's attempt to compel them to advance a political cause with which they disagree by labeling their products in a way that conveys that they, or the State of Vermont, or both, consider the presence of GE ingredients to be a significant factor that should bear upon a consumer's purchasing decision.

Act 120 requires any food "entirely or partially produced with genetic engineering" offered for sale by a retailer in Vermont to bear a label on the package declaring that the food is "produced with genetic engineering." 9 V.S.A. § 3043(a). For unpackaged agricultural products like fruits and vegetables, the label must be posted "on the retail store shelf or bin in which the commodity is displayed." *Id.* § 3043(b). As the District Court acknowledged, "it is beyond dispute" that this rule "regulates the content of . . . speech," "identifies the class of speakers who must make it," and forces the identified class "to speak against their will." JA-67.

Act 120 did not "merely" "emerge[] from a contested legislative debate about the safety of GE foods." JA-68. It is the centerpiece of a nationwide campaign[7] to draw attention to a production method that a vocal minority thinks is

[7] *See, e.g.*, Right to Know GMO – A Coalition of States, *Our Mission*, http://www.righttoknow-gmo.org/mission (last visited June 30, 2015); Just Label It, http://www.justlabelit.org/ (last visited June 30, 2015); Label GMOs,

detrimental to the public health and the environment, despite the scientific consensus to the contrary.

Vermont's mandatory message is far from anodyne. The statement "produced with genetic engineering" is not a simple identification of what is in the package. It highlights and characterizes one aspect of a product and suggests that this information should be important to the consumer because GE foods are purportedly different from and inferior to non-genetically engineered foods. Requiring display of this message at the point-of-purchase strongly signals—despite Vermont's denial, *see* 9 V.S.A. § 3041—that this information ought to inform (and dissuade) the purchase of GE products.

Even if this point-of-sale disclosure were important to those few consumers who independently wish to eschew genetically engineered products, those consumers have readily available means of obtaining the same information. Several advocacy and for-profit organizations already identify and promote foods without GE ingredients, and help consumers identify those foods.[8] These entities

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http://www.labelgmos.org/ (last visited June 30, 2015); Non-GMO Project, http://www.nongmoproject.org/ (last visited June 30, 2015).

[8] *See, e.g.*, Non-GMO Project, *Verified Products*, http://www.nongmoproject.org/find-non-gmo/search-participating-products/ (last visited June 30, 2015) (browseable database of foods "verified as compliant with the Non-GMO Project Standard"); Non-GMO Shopping Guide, *Tips for Avoiding GMOs*, http://www.nongmoshoppingguide.com/tips-for-avoiding-gmos.html (last

use "political consumerism" to encourage food companies to adjust their GE practices.[9] If Vermont were concerned that these resources were insufficient, the State could fund its own advocacy campaign to promote GE awareness. Instead, Vermont has compelled dissenting businesses to signal to previously uninterested consumers that the vocal minority is right and that its opinion should be heeded in purchasing decisions. Requiring these businesses—against their will—to bear the expense and burden of this messaging only adds injury to insult.

III. THE VERMONT LAW CANNOT SURVIVE HEIGHTENED SCRUTINY.

"Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment." *Sorrell*, 131 S. Ct. at 2667. As a threshold matter, "the State must show at least that the statute directly

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visited June 30, 2015); Whole Foods, *How to Shop if You're Avoiding GMOs*, http://www.wholefoodsmarket.com/how-shop-if-youre-avoiding-gmos (last visited June 30, 2015).

[9] *See, e.g.*, Carmen Bain & Tamera Dandachi, *Governing GMOs: The (Counter) Movement for Mandatory and Voluntary Non-GMO Labels*, 6 Sustainability 9456, 9457 (2014), *available at* www.mdpi.com/journal/sustainability (observing "[p]revious social movement efforts to ban GMO crops, and ongoing attempts to introduce federal legislation that would require GMO labels, have remained largely unsuccessful" but "contemporary efforts by the non-GMO movement to mobilize political consumers" are more promising); *see also* Chipotle, *When it Comes to Our Food, Genetically Modified Ingredients Don't Make the Cut*, https://chipotle.com/gmo (last visited June 30, 2015); David Pierson, *General Mills drops GMOs from Cheerios*, L.A. Times, Jan. 3, 2014, http://www.latimes.com/business/la-fi-cheerios-gmo-20140104-story.html.

advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Id.* at 2667–68 (citing *Central Hudson*, 447 U.S. at 566).

"Since its decision in *Central Hudson*, the Supreme Court has not stated that something less than a 'substantial' governmental interest would justify either a restriction on commercial speech or a compelled commercial disclosure." *Am. Meat Inst. v. USDA*, 760 F.3d 18, 31 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment). Nor has this Court accepted anything less to justify compelled commercial speech. *Compare Amestoy*, 92 F.3d at 73 ("Vermont has failed to establish the second prong of the *Central Hudson* test, namely that its interest is substantial.") *with N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 134 (2d Cir. 2009) ("*NYSRA*") ("New York City has a substantial interest in passing Regulation 81.50."); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 n.6 (2d Cir. 2001) ("*NEMA*") ("The disclosure statute . . . is based on Vermont's substantial interest in protecting human health and the environment from mercury poisoning.").

The District Court here avoided analyzing the constitutionally required interest issue by misreading the Supreme Court's decision in *Zauderer*, 471 U.S. 626. That decision focused on the propriety of a remedial disclosure intended to avoid consumers being misled into retaining counsel on the assumption that litigation would be risk free when they would, in fact, be liable for costs. In that

situation, the Court upheld the required disclosure as "reasonably related to the state's interest." *Id.* at 651. That test, however, is supplemental to—not a replacement for—substantial interest review. *See, e.g., Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *Edenfield*, 507 U.S. at 790 (independently assessing tailoring of remedy where substantial interest is established). To read that "reasonable fit" requirement otherwise as a replacement for substantial interest review would go far beyond the facts of *Zauderer* and depart radically from longstanding commercial speech principles. Thus, unlike the District Court, this Court must consider whether Vermont has established any substantial state interest that would justify the statements it seeks to compel. As we show below, Vermont fails to meet that requirement.

A. Vermont Has Not Identified Any Interest Sufficient To Require Businesses To Become Government Messengers.

The government must justify infringements on free speech rights by first showing that the interest it seeks to advance is "substantial." *Sorrell*, 131 S. Ct. at 2667. This standard "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770–71; *see also Ibanez v. Fla. Dep't of Bus. & Prof'l Reg., Bd. of Accountancy*, 512 U.S. 136, 143 (1994).

This robust requirement was not bypassed in *Zauderer*. There, the Supreme Court applied heightened scrutiny to Ohio's regulations of attorney advertising that attempted both to compel and restrict speech so as to prevent consumer deception. The Court began its analysis by describing its commercial speech cases in detail, and then stated: "we must apply the teachings of these cases to three separate forms of regulation," including "disclosure requirements." *Zauderer*, 471 U.S. at 638. When it reached those disclosure requirements, the Court first identified a "substantial government interest" in "preventing deception." *Id.* at 650. But the Court did not stop there. It next scrutinized the asserted harm, determined that the advertisements at issue were in fact "deceptive," and concluded that it was "self-evident" and "hardly . . . speculative" that the public would be harmed absent the disclosures. *Id.* at 652–53.

That is not the approach the District Court took here. Rather than scrutinize for itself whether Vermont's proffered interests were "substantial," the District Court asserted that it was "required to view the[] legislative findings with deference." JA-78, 82. This was error. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989) (quoting *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)); *see also FCC v. League of Women Voters*

of Cal., 468 U.S. 364, 387 n.18 (1984) (rejecting legislative findings in context of intermediate scrutiny).

Instead of deferring to the Vermont legislature, the District Court should have itself reviewed the legislative record and determined whether the asserted interests were "substantial" enough to justify the compelled speech. The Supreme Court has recognized governments have an interest in preserving market integrity by preventing deception. *See Va. State Bd. of Pharm.*, 425 U.S. at 771–72 ("The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely."). As in *Zauderer*, under special circumstances the State may prescribe disclosure to cure possible deception without foreclosing speakers from addressing what they believe is a matter of market importance. Governments also may require disclosures necessary to protect consumer safety or health. *See, e.g.*, *United States v. Sullivan*, 332 U.S. 689, 693 (1948) (upholding federal law requiring labels on "harmful foods, drugs and cosmetics"). And, courts have held that governments may require disclosure of product-related information like weight, volume, and contents that are recognized as critical to purchasing decisions. *See, e.g.*, *Armour & Co. v. State of N. Dakota*, 240 U.S. 510, 515 (1916) (upholding State packaging and labeling requirements that protect "honest weights"). Absent one of these well-established

interests, however, First Amendment rights preclude compelling manufacturers to act as government billboards.

Vermont's asserted interests do not rise to this level of substantiality. The State does not claim to be addressing otherwise deceptive labeling, nor does it claim to have made a legislative judgment that identifying genetically engineered foods is necessary to safeguard consumer health or safety. Similarly, the State has not shown that the method in which food ingredients are produced is critical to purchasing decisions. Thus, this case is fundamentally different from *Zauderer*, *NYSRA*,[10] and *NEMA*,[11] where courts found those governmental interests were legitimate and present.

The best that Vermont can muster in defending its GE disclosure requirement is reliance on "potential health consequences" identified by discredited scientific speculation; "unintended" possible environmental consequences from GE cultivation; consumer rights to additional information; and assistance to those whose religious beliefs and practices involve avoiding GE

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[10] In *NYSRA*, New York City presented extensive and undisputed evidence that excess caloric consumption created a public health obesity problem. 556 F.3d at 135.

[11] In *NEMA*, the state demonstrated that identifying mercury in consumer products was necessary to prevent environmental harm as they were disposed. 272 F.3d at 115, 115 n.6.

foods. JA-82; *see also* 9 V.S.A. § 3041 ("Purpose"). All of these asserted interests are either unsubstantiated or constitutionally insufficient.

A health interest cannot be supported by "mere speculation or conjecture"; a state must demonstrate that the "harms it recites are real." *Edenfield*, 507 U.S. at 770–71. But Plaintiffs show there is no scientifically recognized health threat from GE foods. *See Brief of Plaintiffs-Appellants* at 7–10. "[T]he science is quite clear crop improvement by the modern molecules techniques of biotechnology is safe." Am. Ass'n for the Advancement of Science, *Statement by the AAAS Board of Directors on Labeling of Genetically Modified Foods* (Oct. 20, 2012), *available at* http://www.aaas.org/sites/default/files/AAAS_GM_statement.pdf. The District Court relied on Vermont's assertion that "there are studies supporting both 'sides' of the GE debate," JA-82, but the Vermont legislature itself was unwilling to find such contrarian speculation persuasive, and no "objective observer" could adopt the argument that GE foods pose a health risk against the great weight of scientific evidence, *Amestoy*, 92 F.3d at 73.

Vermont's remaining assertions are little more than an effort to gratify "'consumer curiosity,'" an interest that has been explicitly deemed to be constitutionally insufficient. *NEMA*, 272 F.3d at 115 n.6 (quoting *Amestoy*, 92 F.3d at 73). The per se inadequacy of consumer curiosity is a logical complement to the Supreme Court's "harms are real" standard. It requires Vermont to proffer

persuasive evidence that its disclosure requirement "bears on" a legitimate problem. *Amestoy*, 92 F.3d at 74; *cf. Ibanez*, 512 U.S. at 143 ("[W]e cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden . . . ."). If it cannot do so, that is an indication that nothing more than gratifying consumer curiosity is at stake.

Thus, in *Amestoy*, this Court held that dairy product manufacturers could not be required to disclose that their products contain milk from recombinant Bovine Somatotropin ("rBST") treated herds because there was "no scientific evidence from which an objective observer could conclude that rBST has any impact at all on dairy products," and therefore no "indication that this information bears on a reasonable concern for human health or safety." 92 F.3d at 73–74. "[C]onsumers interested in such information should exercise the power of their purses by buying products from manufacturers who voluntarily reveal it." *Id.* at 74.

Finally, Vermont's asserted interest in assisting some unidentified consumers with religious reservations about consuming GE foods is simply too vague to be substantial. And even if it were better defined, Vermont has not explained why the normal practice of relying on market incentives to generate affirmative, voluntary disclosures by those whose products meet particular religious needs—*e.g.*, marketing to those keeping Kosher or Halal—is insufficient

here. Again, the power of the purse is enough to empower interested consumers. *Id.* at 74.

B. Vermont's Compelled Speech Requirements Are Not Reasonably Tailored To The Interests It Has Identified.

In addition to demonstrating an important and substantial state interest, the State must also demonstrate that its regulations are properly "drawn to achieve that interest." *Sorrell*, 131 S. Ct. at 2668. This means that the law must "directly advance" the substantial interest in a manner that is "not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. Where disclosure is appropriate, the disclosure must be at least "reasonably related to the State's interest," *Zauderer*, 471 U.S. at 651—a standard the Supreme Court has never found satisfied outside the limited circumstance of remediating deception, *see Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010).

The "reasonably related" requirement should not be confused with the need for a substantial state interest at the threshold, despite some *dicta* in this circuit to the contrary. *See, e.g.*, *NYSRA*, 556 F.3d at 135 n.23 (erroneously quoting from Equal Protection Clause rational-basis case when discussing *Zauderer*). "[T]he reasonable fit" required under *Zauderer* is "far different, of course, from the 'rational basis' test used for Fourteenth Amendment equal protection analysis." *Fox*, 492 U.S. at 480; *see also Am. Meat Inst.*, 760 F.3d at 33 (Kavanaugh, J., concurring in the judgment) ("[T]hose *Zauderer* fit requirements are far more

stringent than mere rational basis review."). *Zauderer* held that the mandated disclosures at issue in that case were "reasonably related to the State's interest in preventing deception of consumers" because they were "purely factual," "uncontroversial," and not "unjustified or unduly burdensome." 471 U.S. at 651. That goes well beyond rational basis review.

As explained in *Zauderer*, the factual and uncontroversial tailoring requirement was appropriate there because the corrective disclosure mandate was a "less restrictive alternative[]" to Ohio's arguable right to ban the deceptive speech altogether. *Id.* at 651 n.14; *accord Ibanez*, 512 U.S. at 142 ("[F]alse, deceptive, or misleading commercial speech may be banned."). Consistent with this justification, the Supreme Court employs the *Zauderer* fit requirements solely to evaluate the disclosures designed to prevent consumer deception. *See Milavetz*, 559 U.S. at 229 ("inten[t] to combat the problem of inherently misleading commercial" speech is one of "the essential features of the rule at issue in *Zauderer*"). A majority of the circuit courts appear to follow the same approach. *See Pub. Citizen, Inc. v. La. Att'y Disciplinary Bd.*, 632 F.3d 212, 228 (5th Cir. 2011) (attorney advertising); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 640–41 (6th Cir. 2010) (milk labels); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 966 (9th Cir. 2009), *aff'd sub nom. Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (video game labels); *Entm't Software Ass'n v. Blagojevich*,

469 F.3d 641, 651 (7th Cir. 2006) (video game labels); *United States v. Bell*, 414 F.3d 474, 484 (3d Cir. 2005) (tax advice); *Borgner v. Brooks*, 284 F.3d 1204, 1214 (11th Cir. 2002) (dental advertisements); *Ficker v. Curran*, 119 F.3d 1150, 1152 (4th Cir. 1997) (attorney mailings). Where disclosure is justified by an independent state information interest other than the prevention of deception, a more extensive fit analysis is required. *See Central Hudson*, 447 U.S. at 566.

The District Court found Vermont's GE disclosure requirement to be reasonably related to the goal of changing consumer behavior—a goal Vermont did not specifically espouse—because "[t]he Second Circuit has held that a state's interest in 'encouraging . . . changes in consumer behavior' through compelled disclosure is 'rationally related' to a disclosure requirement even if the disclosure is not the best means of furthering that goal." JA-83 (quoting *NEMA*, 272 F.3d at 115). But that analysis ignores the predicate finding in *NYSRA* and *NEMA*, namely that the behavioral changes being pursued through compelled disclosure were found to be important to furthering the public health and protecting the environment. By contrast, the behavior change sought by GE labeling has not been shown to further any such interest and can only be analogized to the fear-driven behavioral change pursued in *Amestoy*.

In fact, Vermont has tiptoed around any interest in actively changing behavior, seeking shelter in potentialities that may not require proof, and invoking

a vague interest in "informing" consumers. *See* 9 V.S.A. § 3041(1) (reciting purpose to assist persons in avoiding "potential health risks" "*if they choose*") (emphasis added); *id.* § 3041(2) (reciting purpose to "[i]nform the purchasing decisions *of consumers who are concerned* about the potential environmental effects") (emphasis added); *id.* § 3041(4) (reciting purpose to facilitate "informed decisions for religious reasons"). This is plainly insufficient. If the State is unable to establish a public benefit through behavioral changes, there is no compelling need to inform consumers of anything, and mandatory disclosure is not a reasonably tailored requirement.

Even if the "factual and uncontroversial" standard of *Zauderer* were to be applied in isolation, the Vermont disclosure requirement could not survive. Vermont's insistence that the GE disclosure be prominently displayed on the package or directly above unpackaged produce signals that GE presence should be a salient purchasing consideration. Moreover, it suggests that the disclosure is somehow equally or more important than nutritional facts. That message is far from uncontroversial. The State itself argues that manufacturers are free to counteract any negative effect of the GE disclosure by accompanying it with their own statement of mainstream science. But no matter how valid, a counterstatement would only further emphasize the importance of a product characteristic that manufacturers believe has no importance whatsoever.

In short, Vermont had many other options at its disposal to address the concerns of individuals interested in learning more about GE. It could have deferred to the market to respond if appropriate to any consumer desire to obtain the information at issue. It could have acted against any manufacturer that falsely labels its products as *not* containing GE ingredients. It could have regulated conduct, or promoted information about GE itself, which might have satisfied the requirements of the First Amendment. It took none of these more modest approaches. Vermont's unjustified and burdensome regime—which impermissibly enlists private businesses as mouthpieces of the State—must be invalidated.

IV. THE VERMONT LAW ALSO FAILS HEIGHTENED SCRUTINY AS A VIEWPOINT AND CONTENT-BASED REGULATION OF SPEECH.

Although Act 120 fails under a traditional commercial speech inquiry, the law in fact merits even more searching scrutiny. The District Court decided that Vermont's compelled message did not require manufacturers to espouse any point of view and, thus, gave it greater constitutional latitude as pure content regulation of speech rather than viewpoint discrimination. The District Court erred on both points. The Vermont law does advance a viewpoint, and in any event, "mere" content regulation remains subject to the most stringent scrutiny.

First, Act 120 is undeniably advancing a point of view. With its enactment, Vermont has taken the position that the use of GE should be an important factor in

consumer decision-making and has forced businesses to promote this view, despite scientific consensus that foods with GE ingredients are not meaningfully different than their non-GE counterparts. The State's assertion that it is not advancing a point of view resembles the artifice it constructed in *Sorrell*. There, Vermont claimed that its law regulating speech in the pharmaceutical marketing sector was a "mere commercial regulation" subject only to rational basis review. *Sorrell*, 131 S. Ct. at 2663–64. The Supreme Court looked behind Vermont's professed rationale and determined that its content-based regulation was also "aimed at a particular viewpoint" because it was designed to disfavor branded marketers as a class, reflecting Vermont's non-neutral value judgment about the relative value of speech and speakers. *Id.* at 2664.

A similar tactic is being used here to obscure Vermont's interest in favoring a viewpoint on GE ingredients and promoting the interests of one group by compelling the speech of another. By mandating that the words "produced with genetic engineering" appear clearly and conspicuously on the package, Vermont imbues that information with importance and signals to consumers that it should be considered. Additionally, because the State is forcing manufacturers of GE foods to distribute this speech, it not only "regulates the content of . . . speech" but "identifies the class of speakers who must make it." JA-67. Vermont's regime is decidedly not viewpoint neutral; it should be subject to stringent review.

Second, even if Act 120 were not viewpoint discrimination, it still must be subject to heightened scrutiny as a content-based regulation. The District Court concluded otherwise, specifically rejecting the analogy to *Sorrell*, because it thought that "requirements regulat[ing] content" are subject to lesser scrutiny than "impermissible viewpoint discrimination." JA-67; JA-68 n.30. Again, the District Court erred.

Just weeks ago the Supreme Court clarified that a distinction between content and viewpoint regulation is not relevant to determining the level of scrutiny required by the First Amendment. Any "law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 135 S. Ct. at 2228. Like the District Court here, in *Reed*, the Ninth Circuit had declined to apply heightened scrutiny to the regulation under review because it did "not mention any idea or viewpoint." *Id.* at 2229. The Supreme Court reversed, holding that although viewpoint discrimination "is a 'more blatant' and 'egregious form of content discrimination,'" all "content-based restrictions on speech" must "survive strict scrutiny." *Id.* at 2230, 2231. This rule extends to at least some product disclosures. As Justice Breyer observed, product disclosure regulations—including "energy conservation labeling-practices . . . labels of certain consumer electronics . . . and so on"—"inevitably involve content

discrimination." *Id.* at 2234 (Breyer, J., concurring); *see also Riley*, 487 U.S. at 795.

Vermont has engaged in viewpoint discrimination, and its law should be subject to stringent review. But, even if Act 120 involved only content regulation, *Reed* makes clear that content regulation suffices to trigger the highest degree of scrutiny. Vermont's regime should be subject to searching review, and the District Court should be reversed.

CONCLUSION

For the forgoing reasons, the District Court should be reversed.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Circuit Rule 32.1 because this brief contains 6,314 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2010 version of Microsoft Word in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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