

Wiley Rein *Amicus* for U.S. Chamber Raises First Amendment Challenge to Vermont GMO Labeling Law

July 7, 2015

On July 1, 2015, Wiley Rein LLP submitted an *amicus* brief on behalf of the U.S. Chamber of Commerce, arguing that a recent federal court ruling in Vermont improperly sustained Vermont's requirement that businesses disseminate government-dictated messages regarding the use of genetically modified organisms (GMOs) in food production. The closely watched case, *Grocery Manufacturers Association et al. v. Sorrell et al.*, has far-reaching implications for consumers and the food industry. Vermont is the first state in the country to pass a law requiring mandatory GMO labeling, following failed attempts to pass similar laws in other states. A few other states have passed labeling laws, but they do not take effect unless other states successfully mandate labeling. GMA's lawsuit raises important First Amendment issues about the power of government to compel private actors to communicate controversial information the state wants consumers to have.

The Wiley Rein team that authored the brief includes partners Bert W. Rein and Megan L. Brown and associate Jeremy J. Broggi. The brief argues: "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."

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Vermont's law requires that certain foods sold at retail stores in Vermont bear mandatory labeling if they are produced with genetic engineering. The law, passed by the state legislature in April 2014, is scheduled to take effect in July 2016. The Grocery Manufacturers Association (GMA) and other food trade groups filed a federal lawsuit challenging the law in June 2014, arguing that it interferes with businesses' free speech rights and regulates interstate commerce. The state moved to dismiss the case in August 2014; the plaintiffs subsequently sought a preliminary injunction halting implementation of the Act while the court decides whether to issue a permanent injunction invalidating the law.

On April 27, 2015, Chief Judge Christina Reiss of the U.S. District Court for the District of Vermont issued an opinion denying the food industry groups' request for a preliminary injunction. However, the judge also denied the Vermont Attorney General's motion to dismiss many of the lawsuit's claims, including claims that the First Amendment prohibits the law's disclosure requirement—as the state does not have sufficient scientific evidence of harm to consumers to compel this type of commercial speech. Notably she also concluded that GMA was likely to succeed on its claim that the First Amendment also bars the new law's restrictions on labeling GMOs as "natural," since there is not sufficient evidence that the term is misleading.

The case is currently on appeal before the U.S. Court of Appeals for the Second Circuit.

Mr. Rein has previously authored pieces about the viability of Vermont's proposed GMO food labeling law in *FDLI's Food and Drug Policy Forum* (June 2015) and in *Food Safety Magazine's eDigest* (May 2014).

Ms. Brown has authored several articles on the First Amendment and compelled speech, and regularly litigates and files briefs on the First Amendment implications of varied government regulatory efforts.

Wiley Rein's Litigation Team has extensive experience vindicating the speech rights of the firm's clients both in defensive litigation and in proactive constitutional challenges. The firm's lawyers have experience spanning the spectrum of First Amendment litigation, from strict scrutiny to commercial speech to rational basis review. Wiley Rein has argued these issues in procedural settings ranging from preliminary relief and fee disputes to emergency appeals and Supreme Court practice.

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