IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

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

Plaintiffs,

v.

WILLIAM H. SORRELL, in his official capacity as the Attorney General of Vermont; PETER E. SHUMLIN, in his official capacity as Governor of Vermont; TRACY DOLAN, in her official capacity as Interim Commissioner of the Vermont Department of Health[1]; and JAMES B. REARDON, in his official capacity as Commissioner of the Vermont Department of Finance and Management,

Defendants.

Case No. 5:14-cv-117-cr

PLAINTIFFS' AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

[1] After the Plaintiffs filed their Proposed Amended Complaint, Harry L. Chen resumed his role as Commissioner of the Vermont Department of Health. Mr. Chen should be "automatically substituted" as a Defendant for former Interim Commissioner Tracy Dolan under Fed. R. Civ. P. 25(d).

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Vermont passed Act 120 to require food manufacturers to change the way they label and advertise foods containing ingredients derived from genetically engineered crops. *See* 9 V.S.A. §§ 3041-3048. Plaintiffs represent manufacturers who are subject to the Act, who fundamentally disagree with the message it forces them to convey, and who must now take immediate steps to change their labeling and advertising to comply with the Act's enforcement deadline. Plaintiffs bring this suit to declare invalid and enjoin Act 120 on the ground that it violates the United States Constitution.

Preliminary Statement

1. The world is facing an imminent food shortage. The United Nations' Food and Agricultural Organization predicts that by the year 2050, there will be 9.1 billion people on the planet, and agricultural production will have to increase by 70% to meet their needs. But water and arable land are in short supply. Even in the United States, where severe droughts have become a regular occurrence, farmers must find ways to do more with less. One of those ways is to raise plant varieties that have been genetically modified through biotechnology to be more productive and more easily adaptable to changing conditions.

2. The United States has been at the forefront in developing genetically engineered plant varieties, and in building effective systems of regulatory review around them. The U.S. Food and Drug Administration (FDA), U.S. Environmental Protection Agency (EPA), and U.S. Department of Agriculture (USDA) review genetically engineered plant varieties pursuant to a coordinated process that takes into account health, safety, and environmental concerns. The vast majority of corn, soybeans, sugar beets, and certain other staple crops produced in the U.S. are now derived from genetically engineered plants approved through this process.

3. Since 1994, FDA has confirmed the safety of more than 100 genetically engineered crops for human consumption. FDA has, in the same span of time, repeatedly declined to adopt special labeling rules for foods derived from those crops. The agency does not require manufacturers to separately designate such foods as genetically engineered. FDA's long-standing position is that it is inappropriate to mandate labeling for such foods as a class because genetically engineering the plant does not entail a material difference in the food it produces. In fact, at a congressional hearing on March 27, 2014, the head of FDA reiterated just that point.

4. On May 8, 2014, less than two months later, Vermont enacted Act 120. The Act requires a manufacturer to change the retail label of every covered food to indicate that it is "produced with genetic engineering," or that it "may be" or is "partially" so, and the Act prohibits the manufacturer from using the term "natural" or any "words of similar import" in the labeling, signage, and advertising of that product. The Act is premised on a legislative finding that some consumers want to avoid food derived from genetic engineering because they distrust the FDA's findings or otherwise object to the use or prevalence of biotechnology in agriculture on environmental or religious grounds. The State does not purport to share those views, however, and it has exempted broad categories of foods that contain genetically engineered ingredients from these requirements.

5. The operative provisions of Act 120 take effect July 1, 2016. That is a difficult, if not impossible, deadline for Plaintiffs' members to meet. The Attorney General does not expect to have adopted final rules establishing the size, design, and other requirements for their labels until July 1, 2015. This means, in the span of one year, Plaintiffs' members must revise hundreds of thousands of product packages, from the small to the super-sized. Then, they must establish Vermont-only distribution channels to ensure that the speech Vermont is forcing them

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to say, or not say, is conveyed in that State. And to ensure the correctly labeled products are on the shelf by July 1, 2016, they must put those products into commerce many months before. To comply by the deadline, some companies may have no choice but to revise the labels for all of their products, no matter where they might be sold in the United States.

6. The proscriptions in Act 120 are beyond Vermont's power to enact. The State is compelling manufacturers to convey messages they do not want to convey, and prohibiting manufacturers from describing their products in terms of their choosing, without anything close to a sufficient justification. The State is forcing the costs of this experiment on out-of-state companies and citizens to which it is not politically accountable, and Act 120, alone and in combination with pending legislation in two dozen other states, creates a multi-state patchwork of labeling requirements that is undermining and impeding the federal government's interest in uniform, nationwide standards for food labeling prescribed by duly authorized expert federal agencies.

7. In each of the above respects, the Act exceeds Vermont's authority under the United States Constitution. The Act should be invalidated and enjoined in its entirety, on its face, or in the alternative as applied to Plaintiffs' member companies.

Parties

8. Plaintiffs are trade associations representing food producers and manufacturers. They bring this suit against the Defendants, who are state officials tasked with implementing and enforcing the Act or particular aspects of it.

9. Founded in 1908, Plaintiff Grocery Manufacturers Association (GMA) is an association representing more than 300 food, beverage, and consumer product companies. GMA's member organizations employ more than 2.5 million workers in all 50 States, with U.S.

sales totaling over $460 billion annually. On behalf of its members, GMA leads efforts to increase productivity in the food and beverage industry, and to promote the availability, safety, and security of the U.S. food supply. These efforts include advocating for federal legislation that would impose a uniform federal standard for the labeling of foods that are or contain ingredients derived from genetically engineered crops. Virtually all of GMA's members purchase, process, and sell foods containing ingredients derived from GE plants, and virtually all sell products in Vermont. They will be directly, immediately, and substantially affected by the Act.

10. Plaintiff Snack Food Association (SFA) is the international trade association of the snack food industry representing snack manufacturers and suppliers. Founded in 1937, SFA represents over 400 companies worldwide. SFA business membership includes manufacturers of potato chips, tortilla chips, cereal snacks, pretzels, popcorn, cheese snacks, meat snacks, pork rinds, snack nuts, party mix, and corn snacks, along with various other product categories. SFA's membership includes companies of varying sizes, ranging from multi-category multinational corporations to family-owned and -operated businesses. Virtually all of SFA's members purchase, process, and sell foods containing ingredients derived from GE plants. Many sell products in Vermont and will be directly, immediately, and substantially affected by the Act.

11. Plaintiff International Dairy Foods Association (IDFA) is a trade association representing the nation's dairy processing industry and its suppliers. IDFA has more than 550 member companies, which together represent 85% of the milk, cultured products, cheese, ice cream and frozen desserts produced and marketed in the United States. IDFA engages in legislative and regulatory advocacy on behalf of its members, provides educational and training opportunities, and works to promote the image of the dairy industry and its products. Many

IDFA members sell foods containing ingredients derived from genetically engineered plants and will be directly, immediately, and substantially affected by the Act.

12. Plaintiff National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector, including the food and beverage industry. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. NAM's members in the food manufacturing industry sell foods containing ingredients derived from genetically engineered plants and will be directly, immediately, and substantially affected by the Act.

13. Defendant William H. Sorrell is the Attorney General of Vermont and is sued solely in his official capacity. The Attorney General is authorized to enforce the Act through penalties and civil actions, and to make rules that add to or modify the mandatory labels, or pertain to enforcement actions pursuant to 9 V.S.A. chapter 63, subchapter 1.

14. Defendant Peter E. Shumlin is the Governor of Vermont and is sued solely in his official capacity. The Governor of Vermont appoints and oversees the activities of the Commissioner of the Department of Health and the Commissioner of the Department of Finance and Management, and appoints the members of the interagency committee on administrative rules that will advise the Attorney General with respect to soliciting public input on any proposed rules to implement Act 120. In addition, private donations to Act 120's special fund

that exceed $5,000 (except those for the Department of Forests, Parks, and Recreation) must be reviewed and approved by the Governor pursuant to 32 V.S.A. § 5 and § 585.

15. Defendant Tracy Dolan is substituted for Harry L. Chen as the acting Commissioner of the Vermont Department of Health and is sued solely in her official capacity. The Department of Health is required to advise the Attorney General in making determinations under the Act pertaining to the qualification of independent verifying organizations pursuant to 9 V.S.A. § 3044(6). The speed and substance of that consultation will directly affect the ability of manufacturers to take steps to bring foods into compliance with this exemption.

16. Defendant James B. Reardon is the Commissioner of the Vermont Department of Finance and Management and is sued solely in his official capacity. The Act requires the Department of Finance and Management to advise the Attorney General as to the amount of State funding, if any, that may be used to defend the Act in court. In addition, the Commissioner manages all special funds created pursuant to 32 V.S.A., chapter 7, subchapter 5.

Jurisdiction and Venue

17. This suit alleges violations of the United States Constitution pursuant to 42 U.S.C. § 1983. This Court has federal question jurisdiction under 28 U.S.C. § 1331, and jurisdiction to address deprivations of constitutional rights under 28 U.S.C. § 1343.

18. This Court also has jurisdiction and may enter a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2202.

19. Venue is proper in this Court under 28 U.S.C. § 1391(e).

Factual Background

20. Genes are heritable units of an organism that are responsible for the traits that organism expresses. When a plant is "genetically engineered," genetic material (DNA) has been inserted into the genome of the plant so that it expresses a desired trait.

21. In some circumstances, genetic engineering allows a plant to express a desired trait that it would not otherwise express. In other circumstances, where the plant has the inherent ability to produce the desired trait, genetic engineering can be used to produce that trait in a more predictable and consistent manner. Varieties of corn, soybeans, and sugar beets, for example, have been genetically engineered for herbicide resistance. This innovation enables farmers to use herbicides to eliminate more of the weeds that compete with their crops for space, light, nutrients, and water. Some corn varieties have been engineered to produce proteins that repel pests. Those same proteins could be sprayed directly on the plants, but with genetically engineered crops, the plant produces them itself.

22. Because of the substantial benefits they offer, genetically engineered (GE) varieties are popular with American farmers. In 2013, 93% of the soybeans and 90% of the corn grown in the U.S. were produced from GE varieties. Cotton, which is used for cottonseed oil, is 88% GE. Roughly 50% of all domestically produced sugar comes from GE sugar beets. Alfalfa, canola, squash, and Hawaiian papayas also have widely used GE varieties. Genetic engineering has been credited with saving Hawaiian papaya farming after the spread of a plant virus that decimated papaya plantations. It has also been credited with dramatic reductions in the use of highly toxic pesticides.

23. If a person lives in the United States for any period of time and does not restrict all of her food purchases to organic food, she is almost certainly consuming ingredients derived

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from GE plants on a daily basis. The corn starch and soybean oil in common grocery items are primarily, if not exclusively, derived from GE crops. Numerous other basic starches and oils are too. The vast majority of foods sold in grocery stores in the United States today contain some amount of at least one ingredient that is connected to a GE plant.

24. The United States Congress has delegated to FDA comprehensive authority over food safety and labeling. After soliciting public comment and conducting hearings in 1992, FDA issued a policy statement announcing it had found no evidence that "foods developed by [genetic engineering] present any different or greater safety concern than foods developed by traditional plant breeding." Nevertheless, FDA has made available a voluntary consultation process for developers of GE plant varieties, through which the agency comprehensively reviews the safety data. The process is used by developers as a matter of course, and through it FDA has reviewed and cleared the GE crops present in the food supply today. As of the filing of this Complaint, FDA has completed consultations on more than 130 GE plants.

25. Over more than two decades of review, FDA has consistently rejected calls to mandate special labeling. In 2001 draft guidance on labeling, the agency stated, just as it had in 1992, that it had found no basis for distinguishing foods derived from GE plants from identical foods derived from non-GE plants. Therefore any labeling based on GE content would continue to be strictly voluntary, subject to requirements set forth in the guidance. In her testimony to Congress in March 2014, FDA Commissioner Margaret Hamburg reiterated that position. And she again confirmed that "credible scientific organizations" "have looked hard at this issue over a long period of time," and the agency "ha[s] not seen evidence" of health risks.

26. The Secretary of Agriculture agrees. In an article published by *The Atlantic* on May 14, 2014, Secretary Tom Vilsack explained that when the federal government "require[s] a

label on something, we're either warning there's a potential safety problem or we're giving nutritional information." Labeling GE foods "doesn't fit," he said, because "[t]here's not a safety issue, and [genetic engineering] doesn't affect nutrition—it's about the process through which food is created."

27. Prominent scientific and medical organizations agree with the FDA Commissioner and the Agriculture Secretary. In 2004, the National Academy of Sciences surveyed the evidence and advised that it would be "scientifically unjustified" to single out GE foods for safety assessments "based exclusively on their method of breeding." In 2012, the American Medical Association announced that "there is no scientific justification for special labeling of bioengineered foods, as a class." In the same year, the American Association for the Advancement of Science, which publishes the journal *Science*, declared it "quite clear" that "crop improvement by the modern molecular techniques of biotechnology is safe." The global scientific community and expert regulatory bodies, including the World Health Organization and the European Commission, have reached the same conclusion.

28. Against the global scientific consensus, opponents of genetic engineering have occasionally published studies with the intent of implying health risks associated with widely grown GE crops. Regulators and other scientific experts have examined these studies and concluded they are either unreliable, irrelevant, or both.

Act 120

29. On April 25, 2014, the Vermont General Assembly passed bill H.112. Two weeks later, Governor Shumlin signed it into law as Act 120. The Act amends Title 9 of the Vermont Statutes to include new chapter 82A, "Labeling of Food Produced with Genetic Engineering." The Act is attached to this Amended Complaint as Exhibit A.

30. The Act begins with a list of "findings," which are not codified, and a statement of purpose, which is. The findings allude to the possibility of "unintended consequences" and potential risks that genetic engineering might "potentially pose" to health and safety. The findings do not identify those consequences or risks. What they do identify is public opinion polling showing a *consumer* desire for labeling, and the statement of purpose, described more below, refers to a *consumer* interest in "avoiding" GE ingredients. However, the findings and statement of purpose are both fastidiously ambivalent about the *State's* interest in consumers' avoiding GE ingredients. The findings thus "find" very little of note.

31. The operative part of the Act begins with Section 3043, which requires foods "entirely or partially produced with genetic engineering" to be labeled accordingly. Covered raw agricultural commodities, whether sold in bulk or separately packaged, must be labeled or designated "produced with genetic engineering." Covered processed foods must be labeled as either "partially produced with genetic engineering," "may be produced with genetic engineering," or "produced with genetic engineering."

32. Section 3043 also imposes restrictions prohibiting the manufacturer of a covered food from "label[ing] the product on the package, in signage, or in advertising as 'natural,' 'naturally made,' 'naturally grown,' 'all natural,' or any words of similar import that would have a tendency to mislead a consumer." The Act does not define "natural" or the other listed terms. Nor does it identify words that may be deemed to be "of similar import" for purposes of the Act's prohibitions.

33. The Act exempts broad categories of food products from its requirements and prohibitions. Section 3044 of the Act lists exemptions for food "derived entirely from an animal which has not itself been produced with genetic engineering," such as meat and milk; foods sold

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in restaurants; alcoholic beverages; and processing aids and enzymes. The Act also provides safe harbors for foods with minimal GE ingredient content, and food "that an independent organization has verified has not been knowingly or intentionally produced from or commingled with" GE food or seed.

34. By virtue of these exemptions, many foods that contain GE ingredients will not be required to be designated as such, and processed foods are unjustifiably singled out. By exempting milk and exempting food sold in restaurants, for example, the Act has the effect of exempting two of Vermont's largest domestic industries – dairy and tourism – from the requirements that apply to the largely out-of-state firms engaged in food manufacturing.

35. Food manufacturers to which the Act applies will face stiff penalties for non-compliance with its requirements. Under Section 3048, a manufacturer found to be in violation faces civil penalties of up to $1,000 per day, per product, and potential civil liability. For major food and beverage producers with extensive product lines, this could mean hundreds of thousands of dollars in penalties accruing each day.

36. Except in certain limited circumstances, the Act does not impose liability on retailers. It also does nothing to deter a retailer from purchasing products outside Vermont and reselling those products to Vermont consumers, thereby exposing the manufacturer to potential litigation or investigation by the State for products that may not have been intended for sale in Vermont.

37. Just as the State has shifted the cost of this mandate to out-of-state companies, it also has shifted the cost of implementing and defending it to private individuals and organizations. The Act creates a special fund for that purpose, pursuant to 32 V.S.A. chapter 7, subchapter 5. The fund may accept an unlimited number of private donations, without

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restrictions on who may give, or how much. The Act limits *public* funding of the Attorney General's work to $1.5 million of certain surplus settlement proceeds, if any exist, as well as any additional funds the legislature may appropriate.

38. The Act bars the Attorney General from using public funds to defend the Act unless and until the private funding runs out. Accordingly, implementation and enforcement of the Act depends upon the determinations by the Governor to accept or reject certain donations, and the determinations by the Commissioner with respect to the management and disbursement of the donations in the special fund.

39. Section 3041 of the Act enumerates its four purported "purposes" – *i.e.*, to (1) "[e]stablish a system by which persons may make informed decisions regarding the potential health effects of the food they purchase and consume and by which, if they choose, persons may avoid potential health risks . . . "; (2) "[i]nform the purchasing decisions of consumers who are concerned about the potential environmental effects" of genetic engineering; (3) "[r]educe and prevent consumer confusion and deception" by prohibiting the use of terms like "natural" and "promoting the disclosure of factual information on food labels to allow consumers to make informed decisions"; and (4) "[p]rovide consumers with data from which they may make informed decisions for religious reasons."

40. The Act appears not to recognize that the USDA has established the very system that the Act suggests is missing. Under the USDA's "Certified Organic" program, food that qualifies for the certified organic label cannot be produced using GE plants or GE-derived ingredients. Further, voluntary labeling through programs such as the Non-GMO Project already calls consumer attention to products, organic or not, that meet specified standards for the absence

of GE ingredients. Thus, a consumer can make the "informed" purchasing decisions the Act intends to facilitate, without need for the Act at all.

COUNT ONE
Labeling Mandate; Violation of the First and Fourteenth Amendments

41. Plaintiffs reassert and incorporate by reference each of the above paragraphs.

42. The First Amendment to the United States Constitution, as incorporated against the States by the Fourteenth Amendment, protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). That protection extends to expressions of both opinion and fact. *Riley v. Nat'l Fed. for the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988).

43. Act 120 compels manufacturers to use labels that do not accurately describe their products, that could confuse consumers rather than inform them, and that could frighten consumers from purchasing safe, nutritious, affordable foods that are no different from counterpart organic, "Non-GMO" certified, or otherwise exempted foods. At bottom, Act 120 requires manufacturers to use their labels to convey an opinion with which they disagree, and that the State does not purport to endorse: namely, that consumers should assign significance to the fact that a product contains an ingredient derived from a genetically engineered plant.

44. The Act requires the disclosure of the presence of GE ingredients but does not require the disclosure of their absence. Nor does the Act mandate speech from the many firms and individuals selling products that are statutorily exempt, despite the presence of ingredients derived from GE plants in some of their products. Under other exemptions, individuals selling products that potentially contain such ingredients can avoid the labeling requirement by certifying that they not made "knowing or intentional use," regardless of actual use.

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45. The Act's labeling requirement thus imposes a burden on protected speech based upon its content, and the identity and viewpoint of the speaker. As such, "heightened judicial scrutiny is warranted." *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011).

46. Defendants bear the burden of demonstrating Act 120 satisfies constitutional scrutiny. That means they must demonstrate a sufficiently strong governmental interest justifying the intrusion on protected speech. Here, that interest must be "compelling" because Act 120 requires Plaintiffs' members "to associate with speech with which [they] may disagree." *Pac. Gas & Elec. Co. v. Public Utilities Comm'n*, 475 U.S. 1, 15 (1986) (plurality). Even under the somewhat less rigorous standard that courts sometimes apply to commercial-speech restrictions, Defendants "must show at least that the statute directly advances a *substantial governmental interest* and that the measure is drawn to achieve that interest," with a "fit between the legislature's means and ends." *IMS Health*, 131 S. Ct. at 2667-68 (emphasis added; internal quotation marks and citation omitted). *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

47. The Act's labeling requirement does not withstand this scrutiny because the State's interest in this mandate is not "a *governmental* interest," *IMS Health*, 131 S. Ct. at 2667 (emphasis added). In adopting Act 120, the State acted as a pass-through for advocates of controversial views that the State did not purport to endorse, and that are based on conjecture about "unintended consequences" that the State did not bother to substantiate, or independently investigate. As the State is aware, "mere consumer concern" is not enough to justify compelled speech. *See Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 73 & n.1 (2d Cir. 1996).

48. The Act's labeling requirement also fails because it does not directly and materially advance the purely private interests the State has proffered. A consumer can act on a

preference against genetic engineering by referring to the voluntary labeling that already exists. Thus, the Act's labeling mandate does not add "materially" to the information that is currently available. The exemptions render the Act constitutionally infirm all on their own. *See IMS Health*, 131 S. Ct. at 2668-71; *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995).

49. The Act's labeling requirement also lacks a reasonable fit with the State's purported interest. When regulating speech, a State must employ "a means narrowly tailored to achieve the desired objective." *Bd. of Trustees of SUNY v. Fox*, 492 U.S. 469, 480 (1989). The Act does not satisfy this requirement because the State did not "carefully calculate[ ] the costs and benefits associated with the burden on speech [it has] imposed." *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993) (internal quotation marks and citation omitted).

50. Nor did Vermont consider alternatives less burdensome than regulating speech. Here, those alternatives are many. For example, if Vermont believes consumers should look for certified organic or other voluntary labeling, "[t]he State can express that view through its own speech." *IMS Health*, 131 S. Ct. at 2671. Or it could direct consumers to the many informative web sites that exist on these topics. These are just two examples, and it is not Plaintiffs' burden to list them all. "If the First Amendment means anything, it means that regulating speech must be a last – not first – resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002). Because compelling speech "seems to have been the first strategy [Vermont] thought to try," *id.*, Act 120's labeling requirement does not survive scrutiny.

51. The Act does not even satisfy the most accommodating First Amendment standard, which applies to commercial disclaimers "intended to combat the problem of inherently misleading commercial advertisements." *Milavetz, Gallop, & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010). Such disclaimers must be "purely factual and

uncontroversial," and they may not be "unjustified" or "unduly burdensome." *Zauderer v. Office of Disciplinary Counsel of the S. Ct. of Ohio*, 471 U.S. 626, 651 (1985). Under the Second Circuit's current formulation of this standard, the disclaimer must also bear a "reasonable relationship" to a "sufficient legitimate state interest." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 & n.6 (2d Cir. 2001). The Second Circuit has applied this standard only when the disclaimer requirement directly furthers an interest that qualifies as "substantial" under the *Central Hudson* test. *See id.*; *see also N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 134 (2d Cir. 2009). Not one of the interests cited in Act 120 meets that bar, or is supported by the record before the General Assembly.

52. Act 120 is not subject to the *Zauderer* standard because it compels disclosures that are controversial. *See Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 245 n.6, 249 (2d Cir. 2014). The Act acknowledges that the disclosures are not supported by scientific consensus, and the primary environmental concern it identifies is actually a broader concern about "commodity agricultural production practices" – not genetic engineering itself. And there can be no dispute that State endorsement of particular religious beliefs is controversial as well as a violation of the Establishment Clause.

53. Act 120's disclosures would fail under *Zauderer* in any event because they are both unjustified and unduly burdensome and do not serve a sufficient legitimate state interest—that is, an interest that is substantial.

54. Act 120 also fails the basic test of rationality required of all legislation under the Fifth Amendment because it is not rationally related to a legitimate governmental interest. *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973). It is not rational for a State to ignore the findings of an international consensus of scientists and regulators; to promote irrational, baseless

fears as equivalent and even superior to that consensus; and to pass laws based primarily on what they do for the Vermont "brand" instead of what they actually do, in substance, for actual Vermont residents. Further, rationality at least requires a "State" interest to be implicated, which means there must be a harm that warrants governmental intervention. No such harm exists here, and the State's unwillingness to use its own funds to administer and defend Act 120 is express confirmation that Vermont does not have a "state" interest in the survival of this law.

55. Act 120 thus fails under any standard of First Amendment scrutiny.

56. Accordingly, Section 3043(b) of Act 120 should be declared invalid and enjoined, on its face and/or as applied to Plaintiffs' members.

COUNT TWO

Marketing Restrictions; Violation of the First and Fourteenth Amendments

57. Plaintiffs reassert and incorporate by reference each of the above paragraphs.

58. The First Amendment prohibits a State from restricting commercial speech unless the restriction directly and materially advances a substantial governmental interest and is no more extensive than necessary. *IMS Health*, 131 S. Ct. at 2667-68.

59. Section 3043(c) of Act 120 prohibits manufacturers from using certain "natural" terminology or "words of similar import that have a tendency to mislead a consumer" in the advertising, labeling, and signage of covered foods. Plaintiffs' members include companies that have used, currently use, and intend to continue to use the "natural" terms specifically identified in Act 120 with respect to products that contain ingredients derived from GE crops. Further, Plaintiffs' member companies engage in a diverse range of marketing activities across all forms of media, in which they may use terms that an ambitious plaintiff or state attorney could characterize as being of "similar import" to "natural" and as having a "tendency to mislead"

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some consumer somewhere. Manufacturers that are not members of the Plaintiff associations, as well as retailers, are also subject to these restrictions.

60. The Act's legislative findings state that labeling foods using "natural" or "similar descriptors" is "inherently misleading." That purported finding is belied by the fact that the Act exempts numerous foods containing ingredients derived from GE crops from this restriction. Under Act 120, a can of sauce containing corn starch derived from GE corn cannot be labeled "all natural" when it is sold at a supermarket, but the same sauce can be advertised as "all natural" when it is used at a restaurant. At the supermarket, a granola bar containing proteins derived from GE soy may not be labeled "naturally made," but it may bear that labeling if it is sold in a vending machine for immediate consumption.

61. Even if the State had shown these terms were just potentially misleading, and it has not, the Act's prohibition does not satisfy heightened scrutiny because it does not have anything close to a reasonable fit with the State's asserted interests. It is a complete ban on speech that does not take into account narrower restrictions. The ban also extends to "signage" and "advertising" in addition to labeling and thus covers all manner of media, and video and audio communications as well as print. Nothing limits it from reaching registered trademarks and copyrights belonging to Plaintiffs' members and other entities subject to the ban. And the vague prohibition of "words of similar import" with "a tendency to mislead a consumer" has potentially infinite reach. No findings in the Act or the record justify that broad sweep.

62. Nor has the State shown that it could not achieve its interest in preventing deception through other means, including the State's existing consumer protection laws. The Act cannot be sustained in the absence of such a showing.

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63. Act 120's categorical prohibition of particular terms without regard to context or common sense is overbroad. It will directly punish and indirectly chill Plaintiffs' members' truthful and non-misleading speech, as well as the truthful and non-misleading speech of third-party manufacturers and retailers that are not members of the Plaintiff associations. The ban cannot withstand First Amendment scrutiny and should be declared invalid and enjoined on its face and/or as-applied to Plaintiffs' members.

COUNT THREE
Marketing Restrictions; Violation of Fifth, First, and Fourteenth Amendments

64. Plaintiffs reassert and incorporate by reference each of the above paragraphs.

65. The Due Process Clause of the Fifth Amendment of the United States Constitution, as incorporated by the Fourteenth Amendment, requires that state laws define prohibited conduct with sufficient specificity. Regulated entities should be afforded reasonable notice and may not be subjected to arbitrary enforcement of the laws.

66. Act 120's ban on the use of "words of similar import" to "natural" in the advertising, labeling, and signage of covered foods does not give Plaintiffs' members reasonable notice of the advertising and labeling claims that are prohibited by the law. The qualification that the prohibited "words of similar import" are those that "have a tendency to mislead a consumer" does nothing to clarify the scope of the prohibition and will necessarily chill speech protected by the First Amendment.

67. The ban on words "of similar import" provides companies with no guidance as to the types of terms that could trigger liability, and gives the Attorney General, courts, and juries limitless discretion to impose liability for arbitrary reasons, or no good reason at all. This risk of arbitrary enforcement is especially problematic in the context of a law restricting speech, where

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the penalties and private liability could reach hundreds of thousands of dollars for a single violation.

68. The Attorney General cannot make rules to clarify this requirement without violating the terms of the statute because the Act itself does not define "natural" or the other listed terms, and the ban extends to words of "similar import" to these undefined words. To the extent the Attorney General promulgates rules purporting to limit the scope of the ban, and those rules are deemed to be consistent with the statute, the rules will nevertheless be too little, too late, given the compressed compliance timetable.

69. Section 3043(c)'s prohibition is therefore void for vagueness under the Fifth, First, and Fourteenth Amendments, and should be declared invalid and enjoined.

COUNT FOUR
Violation of the Commerce Clause

70. Plaintiffs reassert and incorporate by reference each of the above paragraphs.

71. Article I, Section 8 of the United States Constitution grants the Congress exclusive authority to regulate interstate commerce and thus prohibits a State from doing so.

72. Act 120 requires manufacturers of covered foods to include specific language on the labels of products destined for sale in Vermont. It also prohibits manufacturers from advertising or labeling food in particular ways in Vermont.

73. The vast majority of Plaintiffs' members are manufacturers located outside the State of Vermont. There are no major food manufacturers based in Vermont, and Vermont's restaurant and dairy industries, as well as its organic industry, are all exempted from the Act's requirements. Consequently, the cost of implementing the regulation falls largely, if not entirely, on out-of-state companies.

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Burlington, Vermont 05402-0369
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74. Plaintiffs' members sell food in interstate commerce through nationwide and regional distribution chains. In order to comply with the Act, they would need to establish Vermont-specific distribution channels where those channels do not currently exist. However, there is no commercially reasonable way to do so, and it may be impossible to establish such a system before the Act's effective date. Therefore, to avoid liability under Act 120, manufacturers who do not or cannot establish Vermont-specific distribution would have to revise their labeling on a regional or even nationwide basis, no matter where in the country their products may ultimately be sold.

75. Similarly, manufacturers promote their food through regional and national advertising that reaches Vermont consumers through print, television, radio, and the Internet. Manufacturers therefore cannot achieve compliance with the advertising restrictions in the Act without changing their nationwide and regional advertising, as well as their Internet advertising and web sites.

76. Substituting non-GE ingredients only for Vermont-bound products is not feasible for Plaintiffs' member companies. The current supply of non-GE ingredients could not meet the need of any major food manufacturer in the United States. The prices are prohibitively high because of that low supply, and any increased demand resulting from the Act would send prices higher. Even if the supply of such ingredients were to increase in the future, or prices were to drop dramatically, manufacturers would face significant challenges changing their product formulations just for Vermont.

77. Act 120 imposes monumental costs that fall on out-of-state entities and employees who have no political representation in the State. It alters and impedes the flow of interstate commerce in food, which the public has a strong interest in keeping affordable and

accessible throughout the year. It has the effect of regulating products, conduct, and commerce occurring outside Vermont's borders, and on the Internet. Any one of these burdens outweighs the putative benefit to Vermont consumers, which is effectively zero; they can already avoid GE foods if they wish by buying certified organic or other voluntarily labeled products.

78. Act 120 is just one manifestation of a nationwide advocacy effort for state-based labeling requirements for foods that are or contain ingredients derived from genetically engineered crops. There are bills and ballot measures pending in more than two dozen states, and they are not all identical to each other. For example, the ballot measures pending in Oregon and Colorado for a vote this November are different from each other, and from Act 120. Among other differences, each has a different definition of "genetically engineered" that expands and contracts the scope of the regulation; the phrasing and format of the disclosure varies; "natural" labeling is banned in Vermont but would not be in Oregon or Colorado. This patchwork of state labeling requirements threatens significant disruptions to the movement of food in interstate commerce, burdening not just manufacturers but all consumers.

79. Act 120 violates the Commerce Clause. It should be declared invalid and enjoined in its entirety.

COUNT FIVE
Violation of the Supremacy Clause; Preemption

80. Plaintiffs reassert and incorporate by reference each of the above paragraphs.

81. Article VI, Clause 2 of the United States Constitution provides that the laws of the United States are "the supreme law of the land." When a state law is expressly or implicitly preempted by federal law, or when it would be impossible to comply with both the state and federal law, the state law must yield.

82. The Federal Food, Drug, and Cosmetic Act (FDCA) provides that a food shall be deemed misbranded when its labeling "is false or misleading in any particular." 21 U.S.C. § 343(a)(1). The FDCA also directly regulates claims about the nutritional content or composition of foods sold for human consumption, *see* 21 U.S.C. § 343, *et seq.*, and the FDCA does not require special labeling for GE ingredients as a class.

83. The Nutrition Labeling and Education Act, 21 U.S.C. § 343-1(a), *et seq.*, provides that any state law imposing any labeling requirement that is not identical to those prescribed in certain provisions of the FDCA is expressly preempted and null and void.

84. The Federal Meat Inspection Act, 21 U.S.C. § 601, *et seq.*, and the Poultry Products Inspection Act, 21 U.S.C. § 451, *et seq.*, expressly preempt all state regulation of labeling of meat and poultry products, including products Act 120 does not exempt. The USDA, which administers these statutes, does not require special labeling for products containing GE ingredients, and it does not prohibit the use of the term "natural" on those products.

85. It is also conflict-preempted by the congressional delegations of authority to FDA, USDA, and EPA pursuant to the federal statutes that regulate the safety and labeling of plant and food products, including, in addition to the above, the Plant Protection Act, 7 U.S.C. § 7701 *et seq.* and the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136. The coordinated, product-focused framework these agencies use to evaluate genetically engineered crops is part of a comprehensive federal policy, and Congress has never abrogated it. Instead, Congress has chosen voluntary labeling by enacting the Organic Foods Production Act, 7 U.S.C. § 6501, *et seq.* By adding new, additional layers of regulation, and imposing unjustified burdens on innovative technologies that offer substantial benefits to the American public and should be

encouraged, Act 120 stands as an obstacle to the achievement and execution of Congress's objectives in its regulation of new agricultural technologies.

86. Accordingly, Act 120 is expressly preempted or conflict-preempted, in whole or in part, by each of the above federal enactments, separately or together. This flawed legislation should be declared invalid and enjoined in each preempted respect, and in its entirety.

gravel & shea
76 St. Paul Street
Post Office Box 369
Burlington, Vermont 05402-0369

PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully seeks the following relief:

A. A declaration that the Act is invalid and unenforceable, in its entirety or in part, on its face or as applied;

B. A permanent injunction barring Defendants from enforcing or otherwise implementing any aspect of the Act, including but not limited to the acceptance and disbursement of funds for these purposes;

C. Preliminary and temporary injunctive relief as the Court deems appropriate;

D. An order awarding attorneys' fees and costs, including pursuant to 42 U.S.C. § 1988; and

E. Any other relief the Court deems just and proper.

Dated: Burlington, Vermont
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Matthew B. Byrne, Esq.
Gravel & Shea PC
76 St. Paul Street, 7th Floor, P. O. Box 369
Burlington, VT 05402-0369
(802) 658-0220
mbyrne@gravelshea.com
For Plaintiffs

Of Counsel:

Catherine E. Stetson (pro hac vice)
E. Desmond Hogan (pro hac vice)
Mary Helen Wimberly (pro hac vice)
Hogan Lovells US LLP
555 Thirteenth Street NW
(202) 637-5600
cate.stetson@hoganlovells.com
desmond.hogan@hoganlovells.com
mary.wimberly@hoganlovells.com