15-1504-cv

IN THE

United States Court of Appeals for the Second Circuit

GROCERY MANUFACTURERS ASSOCIATION, SNACK FOOD ASSOCIATION, INTERNATIONAL DAIRY FOODS ASSOCIATION, and 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; and HARRY L. CHEN, in his official capacity as the Commissioner of the Vermont Department of Health,

Defendants-Appellees.

On Appeal from the
United States District Court for the District of Vermont
Case No. 5:14-cv-117-cr (Hon. Christina Reiss)

BRIEF FOR PLAINTIFFS-APPELLANTS

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June 24, 2015

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants Grocery Manufacturers Association, Snack Food Association, International Dairy Foods Association, and National Association of Manufacturers (the Associations) hereby disclose that each is a nongovernmental trade association, none is owned in whole or in part by a parent corporation or a publicly traded company, and none issues stock.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331. It denied the Associations' preliminary-injunction motion on April 27, 2015. The Associations timely appealed from that order on May 6, 2015. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

INTRODUCTION

This is a First Amendment appeal involving the current social and political controversy over genetic engineering. Genetic engineering (sometimes called "GE") is the modern-day equivalent of age-old agricultural breeding techniques. The vast majority of certain common crops grown in the United States, like corn and soy, are now genetically engineered. The benefits of genetic engineering are many: we can now make foods less likely to cause allergic reactions in sensitive people, or make plants resistant to disease. And the Nation's foremost scientific and medical organizations, both public and private, repeatedly have confirmed that commercially available GE crops are safe for human consumption.

As with virtually any new technology, however, there are those who oppose it. Notwithstanding study after authoritative study, those consumers seek to avoid GE ingredients. The market in turn has responded to their preferences: Tens of thousands of products boast a "seal of approval" created by the independent Non-GMO Project. Many also bear the USDA Organic label (which does not permit the use of GE ingredients), or make a similar claim. And some companies have committed to using ingredients derived only from non-GE sources, or to informing consumers which of their products contain GE ingredients.

The State of Vermont, however, concluded that all those voluntary, market-driven options were not enough. It elected to wade into the GE debate by passing

Act 120, a first-of-its-kind law regulating the labeling of foods containing GE ingredients. Act 120 requires food manufacturers to include on certain products with GE ingredients a label warning consumers that the products are or may be "produced with genetic engineering." 9 V.S.A. § 3043(b). It also prohibits manufacturers from using the word "natural" (or "words of similar import") to describe those products. *Id.* § 3043(c). The state legislature explained that the law assists consumers in making "informed decisions" about the potential health or environmental effects of the food they purchase, or in acting "for religious reasons." *Id.* § 3041.

Therein lies the First Amendment problem. This Court has already instructed Vermont that it cannot trammel manufacturers' free-speech rights to appease "consumer curiosity." *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996). So in Act 120—and in the inevitable litigation challenging the law as violating the First Amendment—the State offered a mash-up of justifications, commingling its consumer-curiosity rationale with vague assertions of unspecified "risks." The legislature was careful, however, not to promote *Vermont's own* health, safety, or environmental agenda, given the overwhelming scientific and medical consensus—not to mention that Vermont allows products with GE ingredients to be sold. (Nor, of course, could the legislature purport to be advancing *Vermont's own* religious agenda, given the Establishment Clause.) The

resulting law thus is just the constitutionally deficient *Amestoy* law with a fresh coat of paint.

The District Court, however, distinguished Act 120 from the virtually identical law rejected in *Amestoy* by gesturing toward some purported "scientific debate" that might in turn motivate consumers' curiosity. JA78. That was wrong; a state's invocation of a lopsided "debate" cannot remotely suffice to establish a substantial state interest. And despite invoking that "debate" as justification for the law, the court simultaneously deemed the disclosure mandate "uncontroversial," JA73-76, leading it to apply a uniquely low level of First Amendment scrutiny that has no place in the current heated social and political discussion about genetic engineering.

As for Act 120's speech prohibition, the District Court held that Vermont's ban on the use of the word "natural" to describe foods containing GE ingredients was likely unconstitutional: The State had been unable to justify its speech ban by pointing to any universal meaning of the word "natural" or by proving how using "natural" to describe GE-derived foods was misleading. The District Court failed, however, to issue a preliminary injunction, concluding that the Associations had not adequately shown irreparable harm. That was wrong, too. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Act 120 deals two blows to the First Amendment—a compelled disclosure on the one hand, and a ban on speech on the other. Because the Associations are likely to succeed in their First Amendment challenges to both prongs of the law, Act 120 should have been preliminarily enjoined.

STATEMENT OF THE ISSUE

Whether the District Court erred in denying the Associations' motion for a preliminary injunction against enforcement of Act 120.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend I.

Vermont's Act 120 is reproduced in the Joint Appendix at JA144-161.

STATEMENT OF THE CASE

This case involves a constitutional challenge to Vermont's Act 120. In the decision on appeal, Chief Judge Christina Reiss of the U.S. District Court for the District of Vermont denied the Associations' motion for a preliminary injunction. *Grocery Mfrs. Ass'n v. Sorrell*, No. 5:14-cv-117-cr, -- F. Supp. 3d --, 2015 WL 1931142 (D. Vt. Apr. 27, 2015).

I. FACTUAL BACKGROUND

A. Genetically Engineered Crops

1. Over 150 years ago, a monk named Gregor Mendel conducted a series of experiments on pea plants. As generations of schoolchildren remember, Mendel hybridized plants with different traits—seed shape, length of stem, flower color, and the like—by selectively cross-pollinating those plants by hand with other varieties, and then recording the dominant and recessive traits that resulted. *See* Edward Edelson, *Gregor Mendel and the Roots of Genetics* (1999).

Genetic engineering is modern-day Mendel: rather than hand-pollinating pea plants, genetic engineering of crops involves transferring genes from one plant into the genome of another to encourage a desired trait. McHughen Decl. ¶¶ 27-31 (Dist. Ct. Dkt. 33-2); *see also* Steven Savage, *Why Would the USDA Get Involved in a 15th Century Method of Labeling?*, Forbes, May 28, 2015, http://goo.gl/lfzcLx (noting that "virtually all crops have been 'genetically modified' in many ways for centuries"). Scientists for many years have used genetic engineering to create hardier varieties of popular staple crops. McHughen Decl. ¶¶ 34-40. Last year, at least ninety percent of the corn, soybeans, and cotton planted in the United States (and in Vermont) were from GE varieties. *See* USDA, *Genetically Engineered Varieties of Corn, Upland Cotton, and Soybeans, by State and for the United States*

2000-2014, http://goo.gl/WqqSde; Vt. Agency of Agric., Food & Mkts., *Reported Genetically Engineered Seed Sales in Vermont 2002-2012*, http://goo.gl/LSxymv.

GE varieties of basic crops are prevalent for good reason. Genetic engineering can produce crops that are more resistant to drought, or are more productive food sources. *See, e.g.*, Ted D. Sheely, *Genetic Engineering Helps Plants Survive in Drought*, Sacramento Bee, June 6, 2015, http://goo.gl/Irnoou ("The future of drought-tolerant plants and crops due to genetic engineering show[s] vast promise for California farmers and our state."); Pamela Ronald, *The Case for Engineering Our Food* (Mar. 2015), Ted Talk Tr. (posted May 2015), https://goo.gl/FYvLJf ("genetic engineering can be used to fight pests and disease," "to reduce the amount of insecticides," and "to reduce malnutrition").

GE crops enter the food supply just as other crops do. The plant creates a food—say, an ear of corn—which can be sold at retail as a raw commodity or processed further into food ingredients like starches and oils. The ingredients may be sold as they are, or manufactured into multi-ingredient foods. *See* Blasgen Decl. ¶¶ 7-9 (Dist. Ct. Dkt. 33-3).

2. The federal government regulates United States agricultural crops through several interlocking statutory and regulatory schemes. Three federal agencies share principal authority over food crops: the USDA's Animal Plant and Health Inspection Service regulates to prevent the spread of plant pests and

diseases; the EPA regulates associated pesticide use; and the FDA regulates food safety and labeling. In addition, the USDA's Food Safety and Inspection Service regulates the safety and labeling of meat and poultry products, including those with plant-based ingredients. *See* McHughen Decl. ¶¶ 55-68.

The agencies coordinate and sequence review at each stage, so that "[b]y the time a genetically engineered product is ready for commercialization, it will have undergone substantial review and testing during the research phase, and thus, information regarding its safety should be available." White House Office of Science and Technology Policy, *Coordinated Framework for Regulation of Biotechnology*, 51 Fed. Reg. 23302, 23304 (June 26, 1986). Foods produced from GE plant varieties, as a class, do not occupy any special regulatory status, because there is no evidence that they vary in their objective characteristics "in any meaningful or uniform way." FDA, *Statement of Policy: Foods Derived from New Plant Varieties*, 57 Fed. Reg. 22984, 22991 (May 29, 1992).

3. The federal government has consistently and uniformly concluded that foods derived from GE crops are as safe as those derived from non-GE crops. *See, e.g.*, *id.* ("FDA is not aware of any information showing that * * * foods developed by the new techniques present any different or greater safety concern than foods developed by traditional plant breeding."); *Agric., Rural Dev., FDA, and Related Agencies Appropriations for 2015: Hearing Before the Subcomm. on Agric., Rural*

Dev., FDA, and Related Agencies of the H. Comm. on Appropriations, 113th Cong. 936 (2015) (statement of Dr. Margaret Hamburg, Comm'r, FDA) ("very credible scientific organizations * * * have looked hard at this issue over a long period of time," and FDA "ha[s] not seen evidence of safety risks associated with genetically modified foods"); Press Release, *USDA Secretary Vilsack Addresses American Farm Bureau Convention*, Jan. 13, 2014, http://goo.gl/rveVzl ("There are no studies that reflect that there is any safety concern" with GE crops); U.S. Trade Rep., *Executive Summary of the First U.S. Submission, EC—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS 291, 292 and 293, at 2 ¶ 11 (Apr. 30, 2004), https://goo.gl/AaYwhP ("[T]he safety of biotech products has been confirmed by scientific reports under the auspices of renowned international institutions * * * , as well as independent scientists in the United States, Africa and Europe."). The federal government's consistent conclusion also comports with the conclusion of every other authoritative United States medical and scientific entity: "The science is quite clear" that GE crops are no less safe than comparable non-GE crops. Am. Ass'n for the Adv. of Science, *Statement of the Board of Directors on the Labeling of Genetically Modified Foods* (Oct. 20, 2012), http://goo.gl/xiGTMu. Thousands of studies and decades of close regulatory scrutiny confirm as much. *See* McHughen Decl. ¶¶ 69-74, 93-101 (and sources cited therein, including the

National Academy of Sciences, the American Medical Association, and the European Commission).

B. The Labeling Controversy

1. Every credible scientific and medical entity agrees with the federal regulators' uniform conclusion that GE ingredients are safe. Some consumers nevertheless disagree.[1] This is not the first time, nor will it be the last, that science and medicine counsel in one direction, yet some subset of popular belief maintains the opposite. Other examples of the phenomenon are not difficult to come by—from the belief that vaccines cause autism to the belief that fluoridated water causes cancer. *See* Joel Achenbach, *Why Do So Many Reasonable People Doubt Science?*, Nat'l Geographic, Mar. 2015, http://goo.gl/93sX3t. In any event, the

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[1] *See* Madeline Ostrander, *Can GMOs Help Feed a Hungry World?*, The Nation, Sept. 1, 2014, http://goo.gl/4kgDg2 (noting the "supercharged" "political fight over GMOs"); *see also* Brandon R. McFadden & Jayson L. Lusk, *Cognitive Biases in the Assimilation of Scientific Information on Global Warming and Genetically Modified Food*, 54 Food Policy 35 (July 2015), http://goo.gl/c9zB6W (free draft available at http://goo.gl/1odCLr) (finding that even when consumers are presented with uncontroverted research showing the safety of GE-derived foods, some still maintain that such foods are unsafe); James E. McWilliams, *The Price of Your Right to Know*, Slate, May 20, 2014, http://goo.gl/SB5sXL ("The overwhelming scientific consensus is that GMOs are safe to eat. That hasn't prevented the disingenuous association of genetic modification with maladies ranging from cancer, autism, impotence, allergies, and infertility to farmer suicides in India."); Ronald, *The Case for Engineering Our Food*, *supra* ("What scares me most about the loud arguments and misinformation about plant genetics is that the poorest people who most need the technology may be denied access because of the vague fears and prejudices of those who have enough to eat.").

market has responded to consumers who maintain that GE ingredients are suspect. To name just a few examples, stores like Whole Foods publish shopping guides for customers who want to avoid purchasing foods with GE ingredients.[2] Independent organizations like the Non-GMO Project provide comprehensive lists of non-GE products, restaurants, and retailers, and supply food producers with a "seal of approval" they can place on labeling for food made with only non-GE ingredients.[3] The USDA allows qualifying food products without GE ingredients to bear a "USDA Organic" label, and it has recently announced that it has verified a private company's "Non-GMO" process under its Process Verified Program. *See* Stephanie Strom, *U.S. Approves SunOpta System for Detecting Genetically Modified Crops*, N.Y. Times, May 15, 2015, http://goo.gl/HO35t1. Information for those who wish to avoid GE ingredients in their foods is thus readily available.

2. Some companies, such as Ben & Jerry's,[4] Clif Bars,[5] and Chipotle,[6] have committed to using only ingredients from non-GE sources. Other companies view GE ingredients as no different from any other kind of ingredients. Many of those

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[2] http://goo.gl/Hn4omD (last visited June 24, 2015).

[3] *See, e.g.*, http://goo.gl/vag1Uh (last visited June 24, 2015) (Non-GMO Project); http://goo.gl/GI6jZO (last visited June 24, 2015) (Non-GMO Shopping Guide).

[4] http://goo.gl/ncUwpr (last visited June 24, 2015).

[5] http://goo.gl/UKYA5n (last visited June 24, 2015) ("Do Clif Bars contain GMOs or bioengineered ingredients?").

[6] https://goo.gl/mUt7Kj (last visited June 24, 2015).

companies are members of the Associations. *See, e.g.*, Adams Decl. ¶ 32 (Dist. Ct. Dkt. 33-6); Hermansky Decl. ¶ 34 (Dist. Ct. Dkt. 33-9); Morgan Decl. ¶¶ 29-30 (Dist. Ct. Dkt. 33-10). These companies sell food products that contain corn, soy, and other ingredients derived from GE plants. *E.g.*, Blasgen Decl. ¶ 18; Adams Decl. ¶ 12; Morgan Decl. ¶ 16. They also sometimes use the word "natural" on their labels when they advertise their products. *E.g.*, Morgan Decl. ¶ 18; *see* Hermansky Decl. ¶ 18 (Dist. Ct. Dkt. 33-9). These food manufacturers convey their commercial message to consumers through their labeling decisions. Adams Decl. ¶ 10; Baxter Decl. ¶ 7 (Dist. Ct. Dkt. 33-7); Bradley Decl. ¶ 9 (Dist. Ct. Dkt. 33-8); Hermansky Decl. ¶ 10; Morgan Decl. ¶ 8.

C. Vermont's GE Labeling Laws

Vermont has entered the GE-labeling fray before. In 1994, for example, it passed a law requiring special labeling for milk produced from cows treated with recombinant bovine somatotrophin (rBST), a genetically engineered hormone. 6 V.S.A. § 2754 (terminated) (rBST law). Although the FDA had rejected mandatory rBST labels—rBST is identical to BST naturally produced by cows—some objectors insisted that there was room for debate about the safety of milk from rBST-treated cows. *See Amestoy*, 92 F.3d at 76-77 & n.3 (Leval, J., dissenting). The State thus decided to require labels in light of "consumer concern" about the safety of rBST and some consumers' "philosophical

opposition" to rBST. Br. of Defs.-Appellees, *Int'l Dairy Foods Ass'n v. Amestoy*, No. 95-7819, 1995 WL 17049818, at *13 (2d Cir. Oct. 19, 1995). This Court nevertheless found the rBST law unconstitutional, explaining that consumer interest is insufficient justification for compelling speech. *Amestoy*, 92 F.3d at 74.

Two decades and several other failed labeling attempts later,[7] the General Assembly passed Act 120. When the bill was first introduced in the House, Governor Shumlin observed that it "resembled" the rBST law, which had been "called unconstitutional for some very good reasons." Gordon Dritschilo, *Shumlin: GMO Labeling Good, Bill Bad*, Rutland Herald, Mar. 5, 2013, http://goo.gl/BrNf08. The Attorney General, for his part, warned that "there's going to be a [legal] fight" over the law. Dan D'Ambrosio, *The Battle Over GMOs*, Burlington Free Press, June 7, 2013, http://goo.gl/iXrK2p.

Nevertheless, the bill passed both Houses. In May 2014, Governor Shumlin signed Act 120 into law.

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[7] *See* 6 V.S.A. § 644(a)(4) (requiring labeling of GE seed; never enforced); 2006 Vt. Bills & Resolutions S.18 (making manufacturers of GE seed liable for crop "drift"; vetoed); 2012 Vt. Bills & Resolutions H.772 (declaring food misbranded if it did not identify that it had been "produced with genetic engineering"; did not make it to a vote).

D. "An Act to Regulate the Labeling of Genetically Engineered Foods"

Act 120 requires a "food offered for sale by a retailer after July 1, 2016" to be labeled as "produced entirely or in part from genetic engineering if it is * * * entirely or partially produced with genetic engineering." 9 V.S.A. § 3043(a). The Act prescribes the text of the labels. *Id.* § 3043(b). Raw GE commodities must be designated as "produced with genetic engineering," while processed foods containing GE ingredients may be designated as either "produced," "may be produced," or "partially produced" with genetic engineering. *Id.* The Attorney General, through rulemaking, may require alternate wording "in a manner consistent with requirements in other jurisdictions," or may require a "disclaimer" that the FDA "does not consider foods produced from genetic engineering to be materially different from other foods." Act 120, § 3. The Act further provides that "a manufacturer of a food produced entirely or in part from genetic engineering shall not label 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." 9 V.S.A. § 3043(c).

The General Assembly's several stated purposes for enacting Act 120 are informational: The Act proclaims the State's intent to promote "informed" consumer decisions based on "potential health risks," "potential environmental effects of the production of food from genetic engineering," or "religious reasons,"

with those decisions made free from "decept[ive]" assertions that foods tied in some way to genetic engineering are "natural." *Id.* § 3041.

But the State wishes to inform its consumers only some of the time. The Act exempts processed food sold for immediate consumption and food sold at restaurants, regardless of content. *Id.* § 3044(7). It exempts food produced "without the knowing or intentional use" of GE plant varieties, regardless of content. *Id.* § 3044(2), (6). It exempts products derived from an animal, even if the animal consumed feed from GE crops. *Id.* § 3044(1). And it exempts a number of other categories in addition. *See id.* § 3044(3) (processing aids and enzymes); *id.* § 3044(4) (alcohol); *id.* § 3044(5) ("genetically engineered materials" no more than 0.9% by weight); *id.* § 3044(8) (medical food).

For those manufacturers who do not fall within an exemption, penalties for non-compliance can add up quickly: $1,000 per day, per product. *Id.* § 3048(a). The Attorney General is authorized to investigate potential violations of Act 120 and to bring enforcement suits. *Id.* § 3048(b). The law does not clearly indicate whether consumers have a private right of action as well. *See id.* ("Consumers shall have the same rights and remedies as provided under [Vermont's Consumer Protection Act].").[8]

[8] Act 120 (§ 3) also authorizes the Attorney General to adopt implementing regulations. The Attorney General issued a final rule in April 2015. *See* Vt.

II. PROCEDURAL HISTORY

A. The Associations' Suit

As Attorney General Sorrell predicted, *see supra* at 13, Vermont soon found itself in court. The four appellant Associations brought suit against the State a few weeks after the Act was signed into law, articulating a number of constitutional claims and seeking declaratory and injunctive relief against enforcement of Act 120. They argued that the law was preempted by several federal laws that prohibit misbranded food and dictate a variety of food labeling practices, including the Federal Food, Drug, and Cosmetic Act (FDCA); the Nutrition Labeling and Education Act (NLEA); the Federal Meat Inspection Act (FMIA); and the Poultry Products Inspection Act (PPIA). The Associations also raised a Commerce Clause claim based on Act 120's regulation of out-of-state business, disproportionate burden on out-of-state entities, and disruption of the movement of food in interstate commerce. They also brought a Due Process vagueness challenge to the opaque ban on "words of similar import" to the word "natural."

Consumer Protection Rule (CP) 121.01-.06. Among other things, the rule creates a presumption of uncertain import. Specifically, any non-compliant "packaged, processed food" offered for sale before January 1, 2017 "is presumed to have been packaged and distributed prior to July 1, 2016 * * * unless there is evidence that the food was distributed on or after July 1, 2016." CP 121.04(d)(i). The statute, of course, applies to any "food offered for sale by a retailer after July 1, 2016," 9 V.S.A. § 3043(a), so the effect of this rule is unclear.

Most importantly for this appeal, the Associations raised two First Amendment challenges. First, they explained that the GE labeling mandate cannot survive the First Amendment scrutiny applicable to commercial speech under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Among other flaws, Vermont had failed to assert a substantial state interest in light of *Amestoy*'s holding that "consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement * * * in a commercial context." 92 F.3d at 74. Second, the Associations argued that the "natural" ban failed under *Central Hudson* as well.

The State moved to dismiss. According to Vermont, the GE labeling mandate compels a purely factual disclosure and is therefore subject to a lesser First Amendment standard. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650-651 (1985). Under that lesser standard, Vermont claimed that the labeling requirement is "reasonably related," *id.* at 651, to its interest in increasing consumer awareness of potential health and environmental risks. As for the "natural" ban, Vermont asserted that the term "natural" is inherently misleading when applied to foods with GE ingredients, meaning that the First Amendment did not protect the manufacturers' speech.

After negotiations with the State over the effective date of the Act proved unsuccessful, the Associations in September 2014 moved for a preliminary injunction against implementation or enforcement of the Act.

B. The District Court's Ruling

The District Court heard argument in early January 2015. In late April, it granted in part and denied in part the State's motion to dismiss, and denied the Associations' motion for a preliminary injunction.

On preemption, the court found neither express nor conflict preemption under the FDCA or the NLEA, meaning that multiple States may adopt different labeling requirements despite federal agencies' general regulatory authority over the contents of labels. JA48-57. It held that the FMIA and PPIA would in fact preempt the application of Act 120 to meat and poultry products, but that there was insufficient evidence the Associations' members "actually manufacture GE food products that are non-exempt under 120 and subject to the FMIA or PPIA." JA62. The court also dismissed the Commerce Clause claim to the extent it relied on disproportionate costs for out-of-state entities and burdensome effects on interstate commerce. JA42-45. It refused to dismiss, however, the portion of the Commerce Clause claim alleging that Vermont had attempted to regulate out-of-state advertising and signage. JA42. And the court sided with the Associations on their void-for-vagueness challenge as well. JA94-99.

As for GMA's First Amendment claims: Although twice acknowledging that the legal question of what level of scrutiny applied to Act 120's labeling mandate was "subject to reasonable debate," JA79; *see also* JA84, the District Court concluded that the Associations were not likely to succeed on the merits of their First Amendment challenge to Act 120's compelled-speech provision. The court rested that ruling—however tentatively offered, given the acknowledged close legal question—on three basic conclusions.

First, the court recognized that the Associations' "characterization of the GE disclosure requirement as mandating a 'controversial' disclosure appears unassailable." JA73. That in turn would have rendered the *Zauderer* standard inapplicable to the State's speech mandate; *Zauderer*'s more accommodating standard applies only to "purely factual *and* uncontroversial" disclosures. 471 U.S. at 651 (emphasis added). But the District Court nevertheless concluded that "[b]ecause Act 120's GE disclosure requirement mandates the disclosure of only factual information—whether a food product contains GE ingredients—in conjunction with a purely commercial transaction, it does not require the disclosure of 'controversial' information." JA76.

Second, the court deemed *Amestoy* inapplicable, reducing its reach to those cases where the State "*concede[s]* that its only purpose in enacting the disclosure requirement was to satisfy consumer curiosity." JA77 (emphasis added). With

that limitation, it was enough for the court that the State had "emphasize[d] that it is *not making* the concessions it made in [*Amestoy*]," JA78 (emphasis in original), and that the State had presented some minimal evidence supporting its purported additional interests. Notably, the court did not require the State to expressly *affirm* the additional interests it mentioned; it was sufficient that they had been raised somewhere, by someone, in the legislative record. *See id.* The court admitted that "some of the State's interests arguably border on the appeasement of consumer curiosity." *Id.*

Third and finally, the District Court held that the State had met its low burden under *Zauderer*, 471 U.S. at 651, to demonstrate the constitutionality of the labeling mandate by showing a reasonable relationship between its supposed substantial interest and the compelled speech. Even though the court took no issue with the Associations' evidence showing that "the studies on which the State relies" to legitimatize consumer concern that GE-derived foods might present health, safety, and environmental risks are " 'outdated, retracted, or debunked,' " the court concluded that those studies were nevertheless "real"—and being "real," therefore sufficed to support the labeling mandate. JA82.

As for the Act's prohibition of the use of the word "natural" and similar terminology on GE-derived foods, however, the court *agreed with the Associations* that their First Amendment challenge was likely to succeed: the State had not

shown that the use of "natural" on labeling was inherently or actually misleading, and the prohibition did not withstand *Central Hudson* scrutiny. JA86-94.

It is a fundamental constitutional principle that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. But the District Court did not enjoin Act 120 (or any part of it). Instead, it concluded that the Associations had not sufficiently supported the contention that their members' "use of the 'natural' terminology * * * will be chilled prior to trial," or that their members "must make material changes in the way they conduct business" in advance of the enforcement deadline. JA101. The court therefore denied the Associations' request for injunctive relief.

The Associations appealed. *See* JA171-172.

STANDARD OF REVIEW

This Court "review[s] a district court's denial of a motion for a preliminary injunction for abuse of discretion," but it "review[s] the district court's legal conclusions de novo." *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 261 (2d Cir. 2014). In addition, because this is a First Amendment case, the "appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* (quotation marks omitted).

SUMMARY OF ARGUMENT

Both of Act 120's speech-regulating elements—the labeling mandate and the "natural" ban—are unconstitutional and should be enjoined.

The Labeling Mandate. The District Court erred in concluding that Act 120's labeling mandate was likely constitutional under *Zauderer*. *Zauderer* applies only to "purely factual and uncontroversial" disclosures. 471 U.S. at 651. A label warning customers that a product may be "produced with genetic engineering" may be factual at some level of objective abstraction; but it is certainly not "uncontroversial." Requiring manufacturers to highlight the presence (or possible presence) of GE ingredients conveys that there is something to be noted about that particular attribute of the product—put another way, that GE-derived foods are different from other foods. Some people fervently believe as much. Others (along with every single reputable United States government, medical, and scientific organization) believe otherwise. The disclosure mandate thus thrusts manufacturers into a heated social and political debate, if a one-sided scientific one. It requires the precise type of *factual* disclosure that this Court has explained is nevertheless *controversial*, and therefore falls outside of *Zauderer*'s purview. *See Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233 (2d Cir. 2014).

Under either *Central Hudson* or *Zauderer*, moreover, the labeling mandate fails because it does not serve a substantial state interest. This Court explained in

Amestoy that "consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement." 92 F.3d at 74. Yet the State offers nothing more than the same consumer-curiosity interest rejected in *Amestoy*, gussied up with the thinnest of justifications: Instead of relying on general "consumer curiosity," the State simply lists the reasons *why* a consumer might be curious about GE-derived food—including public health, food safety, and environmental impact—without actually adopting any of those concerns. *See* 9 V.S.A. § 3041. The State cannot surmount *Amestoy* by pointing to its citizens' purported interest in speculative health and safety or environmental risks; that is just a more sharply drawn invocation of consumer curiosity, and an impermissibly derivative reference to *someone else's* potential interest in health, safety, and the environment.

The labeling mandate fares no better under the other *Central Hudson* prongs. It does not directly advance any real government interests because it is vague, misleading, and riddled with exceptions. Nor is there a reasonable fit between the First Amendment burden Act 120 imposes and the State's tenuous objectives.

Finally, even under *Zauderer*, the labeling mandate cannot survive. *Zauderer* requires that the State's choices be reasonable. It is decidedly *un*reasonable to compel speech contrary to the conclusion of every professionally

recognized scientific and medical organization, and to do so while at the same time *disclaiming* any type of warning message.

The Natural Ban and the Lack of Injunction. The District Court correctly concluded that the "natural" ban violates the First Amendment. And it is settled law that such "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. But the court nevertheless stopped short of granting an injunction, concluding that the Associations' members would not suffer irreparable harm because there was insufficient proof that they have labels implicated by the ban on labeling foods containing GE ingredients as "natural." That finding overlooks a number of declarations demonstrating otherwise. The Associations' members who use the term "natural" on their labels will find their First Amendment rights chilled absent a preliminary injunction.

In addition to suffering *per se* First Amendment harms, the Associations' members will be obligated to fundamentally change their business operations in anticipation of Act 120's taking effect. To comply with both the labeling mandate and the "natural" ban, the Associations' members will make and are making vast structural changes to their inventory, production, and distribution systems. Those major costs will not be recouped if they ultimately prevail on the merits. Nor will the Associations' members have any way to remedy the reputational harms they

will suffer from warning customers in Vermont—on their own labels, no less—that their products are somehow different from their products in other states and from other, non-labeled products.

This Court should conclude that the Associations' First Amendment challenges to both the labeling mandate and the "natural" ban are likely to succeed on the merits. And without a preliminary injunction, both the labeling mandate and the "natural" ban will cause irreparable harm. Finally, the remaining preliminary-injunction factors also favor relief. The District Court's denial of a preliminary injunction should be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE ASSOCIATIONS' FIRST AMENDMENT CHALLENGE TO VERMONT'S GE LABELING MANDATE IS NOT LIKELY TO SUCCEED ON THE MERITS.

The District Court observed that "whether intermediate scrutiny applies to Act 120's GE disclosure requirement presents a question of law" that "is subject to reasonable debate." JA79; *see also* JA84 (observing that "the appropriate level of scrutiny is a contested question of law"). It ultimately sided with Vermont, however, concluding that intermediate scrutiny was "not warranted" in this case. JA79.

The District Court was correct that the appropriate standard of scrutiny is a legal question. It just answered the question wrong.

A. *Central Hudson* Scrutiny Applies To The GE Labeling Mandate.

1. The Compelled Speech Is Controversial.

Zauderer made clear that its uniquely low standard of First Amendment scrutiny was appropriate because the compelled disclosure at issue—a benign disclaimer stating that contingency-fee clients could owe costs—involved "purely factual and uncontroversial information." 471 U.S. at 651. Act 120 is not "uncontroversial" like the disclosure in *Zauderer*. *Zauderer*'s relaxed reasonable-relationship test thus does not apply; *Central Hudson* does.

It is difficult to point to a current topic *more* hotly debated in many circles than genetic engineering of crops: Hundreds of thousands of news articles and blog entries and Facebook posts and Twitter tweets and Marches On Monsanto collectively attest to the intensity of the current controversy. Proponents of GE-derived foods note the lack of any documentation about ill effects. Opponents maintain that there nevertheless may be risks that have gone unidentified by everyone, often because regulators are supposedly beholden to industry groups. The social debate continues, at a fast clip, and at high decibel levels. That hot debate presumably is why the District Court observed at the January motions hearing that it was "unpersuaded at this point that all that Act 120 requires is uncontroversial factual * * * disclosures because I don't think this is an area in

which there is no controversy." Jan. 17, 2015 Motions Hr'g Tr. 21:10-14 (Dist. Ct. Dkt. 87). Quite right.

But when late April came around, the court changed its mind. In denying the Associations' preliminary-injunction motion, the court concluded that it could assess Act 120's labeling mandate under *Zauderer*, because the mandate supposedly compels only "purely factual and uncontroversial information." 471 U.S. at 651. *See* JA76. Not so. The court's analysis erroneously conflates "factual" with "uncontroversial," and it contradicts the very precedent on which the court purported to rely.

The District Court concluded that "[b]ecause Act 120's GE disclosure requirement mandates the disclosure of only factual information—whether a food product contains GE ingredients—in conjunction with a purely commercial transaction, it does not require the disclosure of 'controversial' information." *Id.* It thus held as a matter of law that all *facts* compelled in the commercial-speech context are *un*controversial. But that is not how it works. *Zauderer* is limited to those circumstances where a state "require[s] the dissemination of 'purely factual *and* uncontroversial information.' " *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (emphasis added) (quoting *Zauderer*, 471 U.S. at 651). If factual information were *per se* uncontroversial, *Hurley* could have ended the sentence after the word "factual." It did not. The Court instead

made clear that its use of the conjunctive was intentional: "[i]ndeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, *but equally to statements of fact the speaker would rather avoid*." *Id.* (emphasis added).

Compelled factual statements can and often do convey an implicit controversial message, "compel[ling] affirmance of a belief with which the speaker disagrees." *See id.*; *cf. Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 797 (1988) (recognizing that "compelled statements of opinion" cannot neatly be distinguished from "compelled statements of 'fact' "). *Zauderer*'s "uncontroversial" requirement thus ensures that a disclosure will not be subject to a uniquely low level of scrutiny when it may convey an implicit message. *See Evergreen*, 740 F.3d at 245 n.6 (noting that compelled disclosure about abortion would require pregnancy centers "to mention controversial services that some pregnancy service centers, such as Plaintiffs in this case, oppose").

The District Court did not follow those consistent teachings. Instead, citing several of this Court's (and other courts of appeals') precedents, the court distinguished compelled commercial *opinions* from compelled commercial *facts*. *See* JA75 (concluding that "compelled commercial information must also be 'opinion-based' before it can be said to convey a 'controversial' governmental

message"). The case law does no such thing: Facts, like opinions, may be controversial, depending on the context in which they are stated.

Take, for example, the first case the District Court cites on this topic, *Evergreen*, 740 F.3d 233. *See* JA74. *Evergreen* held that a state could constitutionally require pregnancy-services centers to disclose whether they had a licensed medical provider on staff—what this Court described as a "brief, bland, and non-pejorative disclosure" that conveyed a "neutral message." 740 F.3d at 249, 250. The District Court focused on that holding. *See* JA74-75. It failed to account, however, for *Evergreen*'s opposite conclusion concerning the requirement that the centers "disclose whether or not they provide or provide referrals for abortion, emergency contraception, or prenatal care." 740 F.3d at 249. The *Evergreen* Court explained that this latter disclosure—*although factual and accurate*—was controversial because it "requires centers to mention controversial services that some pregnancy services centers, such as Plaintiffs in this case, oppose." *Id.* at 245 n.6. Stated differently, the factual disclosure had the effect of "mandat[ing] discussion of controversial political topics." *Id.* at 250.

CTIA-Wireless Ass'n v. City & County of San Francisco, 494 F. App'x 752 (9th Cir. 2012), which the District Court also cited, applies the same principle. There, the Ninth Circuit affirmed a preliminary injunction barring enforcement of a San Francisco ordinance that required cell-phone companies to make disclosures

about radio-frequency emissions. *See id.* at 754. Similar to *Evergreen*, the *CTIA* court recognized that even "factual statements" that are "accurate and not misleading" can convey "more than just facts." *Id.* at 753. And the language compelled by the city's ordinance—recommending "what consumers should do if they want to reduce exposure to radiofrequency energy emissions"—"could prove to be interpreted by consumers as expressing San Francisco's opinion that using cell phones is dangerous." *Id.* The implicit message was a warning, and one that was controversial given the "debate in the scientific community about the health effects of cell phones." *Id.* at 753-754 (quotation marks omitted).[9]

Vermont's GE labeling mandate fits neatly in line with these cases. Just as in *Evergreen*, the law "mandate[s] the discussion of controversial political topics," 740 F.3d at 250; namely, the bona fides of genetic engineering. And just as in *CTIA*, the law conveys "more than just facts," 494 F. App'x at 753. At best, it suggests that manufacturers attach relevance to information that is scientifically irrelevant; at worst, it constitutes a politically motivated warning.

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[9] *See also, e.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 371 (D.C. Cir. 2014) ("conflict free" label "conveys moral responsibility for the Congo war"), *overruled in part on other grounds by Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 653 (7th Cir. 2006) (signs explaining video game ratings were controversial because they "communicate that any video games in the store can be properly judged pursuant to" such ratings).

Act 120's requirement that manufacturers label their covered products as being "produced with genetic engineering," *see* 9 V.S.A. § 3043(b), tells consumers that the labeled products are distinctive for that reason. Labeling a product as having been (or possibly having been) produced with genetic engineering suggests the difference matters, and it "stigmatizes those products." Henry I. Miller & Jeff Stier, *Mandatory Labeling of Genetically Engineered Foods Deserves A Warning Label Of Its Own*, Forbes, Oct. 9, 2013, http://goo.gl/GTRnZl.[10] Vermont's labeling mandate turns a can of soda, a gum wrapper, or a bag of chips into a forced host for the controversial message that genetic engineering is different.

The District Court waved away this issue, reasoning that the food manufacturers could counteract any negative implications from the State's mandated label by *also* including their own positive message on the food label. JA76. But that is precisely the problem: the food manufacturers do not wish to be drawn into that debate *on their labels*, and the First Amendment protects them from that prospect. *See Evergreen*, 740 F.3d at 250. Act 120 effectively forces companies to further engage with a political topic of the State's choice, and on the

[10] To see why, consider a factual statement less subject to controversy: "Contains raw or undercooked ingredients." Noting the presence of raw ingredients conveys to the consumer that the product poses a greater health risk than products with fully cooked ingredients.

State's terms. *See Nat'l Framework for the Review and Labeling of Biotech. in Food: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 113th Cong. 9 (2015) (written testimony of Todd Daloz, Vt. Assistant Att'y Gen.) (suggesting that manufacturers in their labeling can offer their "views on the safety and importance of GE food to the national and global food system") ("Daloz Testimony"). It takes precious few words to imply that there is something wrong with a product; it takes many more to explain why that implication is false.

The District Court also maintained that Act 120 conveys no particular government opinion or message about food products "produced with genetic engineering." *See* JA74-75. That is divorced from reality. The label is a warning. The press and the public have confirmed as much. *See, e.g.*, Will Coggin, *Federal Standard Needed for GMOs*, The Hill, May 7, 2014, http://goo.gl/L5Ea00 ("Recently, Vermont became the first state to mandate de facto warning labels on genetically improved foods (GIFs), also referred to as GMOs."); *GMO Labeling Law in Vermont Could Be Thwarted by Federal Judge*, Inquisitr, Jan. 9, 2015, http://goo.gl/kLdm8F (describing Act 120 as requiring "consumer warning labels"); Joanna Rothkopf, *Vermont Now Requires GMO Labels, and the Change Is Tougher than It Sounds*, Bustle, Apr. 25, 2014, http://goo.gl/tmmMJT ("the language of the bill indicates that GMOs are implicitly dangerous"); *Vermont Passes Bill to Require Warning Labels for Genetically Modified Foods*, Guardian,

Apr. 24, 2014, http://goo.gl/LvzpCw; *see also* Cass R. Sunstein, *Don't Mandate Labeling for Gene-Altered Foods*, BloombergView, May 12, 2013, http://goo.gl/3eoknu (explaining that mandatory GE labels "inevitably lead many consumers to suspect that public officials, including scientists, believe that something is wrong with G[E] foods—and perhaps that they pose a health risk").

The list goes on and on. And understandably so: the historical and intended effect of mandating GE labels is to warn consumers away from purchasing GE-derived foods. For confirmation, look at what happened in Europe: The European Union "made [GE] labels compulsory in 1997; consumers were spooked and G[E] food is now rare in Europe." *Warning Labels for Safe Stuff*, Economist, Nov. 2, 2013, http://goo.gl/Ab0oaz; *accord* Sunstein, *Don't Mandate Labeling for Gene-Altered Foods*, *supra*. This fully comports with what the Secretary of Agriculture has recognized: "When you label something you are essentially conveying the message that there may be something that you need to know about with reference to this product that may be harmful to you." *Vilsack Pokes at Major EU TTIP Red Lines at GMOs, Hormone Beef*, Inside U.S. Trade, June 19, 2014, http://goo.gl/wGONqN. Just as a product labeled "containing peanuts" is understood as a warning that the product contains a common allergen, peanuts, a product labeled "produced with genetic engineering" is understood as a warning that the product contains something that is different and potentially harmful.

Vermont's own counsel made this point at the motions hearing, albeit in a different context: "If you have a kid with a peanut allergy, and somebody puts on the package 'may contain peanuts,' you are not going to buy that product." Jan. 17, 2015 Motions Hr'g Tr. 132:8-10.[11]

2. *Zauderer* Applies Only To Potentially Deceptive Speech.

Zauderer assessed a regulation requiring attorneys who advertised contingency-fee arrangements to disclose that their clients could owe costs. 471 U.S. at 653. In upholding the regulation, the Supreme Court explained that "because disclosure requirements trench more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warnings or disclaimers might be appropriately required in order to dissipate the possibility of consumer confusion or deception.'" *Id.* at 651 (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982) (alterations omitted)). Put another way, the disclosure requirement at issue was

[11] Act 120 is controversial for the additional reason that it involves the State in religious matters, which *Zauderer* itself recognized is controversial. *See* 471 U.S. at 651 (distinguishing disclosure in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)). Here, the General Assembly enacted Act 120 with religion in mind. *See* 9 V.S.A. § 3041(4). And in defending the law, the State has continued to plumb the religious and philosophical debate. *Compare* Brunk Decl. ¶ 16 (Dist. Ct. Dkt. 63-18) ("In certain theistic religious traditions this 'unnaturalness' may be viewed as a violation of God's creation or a form of prideful 'playing God.'"), *with Transgenic Plants for Food Security in the Context of Development*, PAS Study Week, Vatican City, 15-19 May 2009, at 4, http://goo.gl/eIt2QF ("Thus new human forms of intervention in the natural world should not be seen as contrary to the natural law that God has given to the Creation.").

constitutionally permissible because it was a narrower alternative to other means of preventing consumer deception, such as barring the potentially misleading advertisements altogether. *See id.* at 650 (contrasting the disclosure requirement with an attempt "to prevent attorneys from conveying information to the public"); *id.* at 651 n.14 (describing "disclosure requirements as one of the acceptable less restrictive alternatives to actual suppression of speech"). A State could therefore require the disclosure of "purely factual and uncontroversial information," so long as the disclosure requirement was "reasonably related to the State's interest in preventing deception of consumers." *Id.* at 650-651.

This Court in the past has viewed *Zauderer* more expansively. *See N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 133 (2d Cir. 2009) ("*NYSRA*"); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) ("*NEMA*") (both concluding that the Supreme Court had not clearly limited *Zauderer* to compelled disclosures designed to prevent consumer deception). But the Supreme Court has more recently clarified that *Zauderer* applies only where a government-compelled disclosure is "intended to combat the problem of inherently misleading commercial advertisements." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) (describing this as an "essential feature[]" of *Zauderer*); *see also id.* at 257 (Thomas, J., concurring) (emphasizing that the Court applies *Zauderer* "only where 'the particular advertising is *inherently likely*

to deceive or where the record indicates that a particular form or method of advertising has *in fact* been deceptive' " (quoting *R.M.J.*, 455 U.S. at 202)). This "intervening Supreme Court decision" thus "casts doubt on"—or, put more strongly still, rejects—"the prior ruling[s]" to the contrary in *NEMA* and *NYSRA*. *Finkel v. Stratton Corp.*, 962 F.2d 169, 175 (2d Cir. 1992).

Once *Zauderer* is given its proper scope, there is no real argument that it applies here. The State cannot plausibly assert that the GE labeling mandate is designed to prevent consumer deception. Among other problems, the mandate is not linked to any voluntary advertising claims that might deceive a consumer; it applies even to a product that would otherwise be sold with a blank label. Indeed, Act 120 states only that the labeling mandate "allow[s] consumers to make informed decisions." 9 V.S.A. § 3041(3). And the District Court never suggested that the disclosure requirement related in any way to Vermont's purported interest in preventing consumer deception. For this reason, too, the GE labeling mandate falls outside *Zauderer*'s limited purview, and *Central Hudson* scrutiny applies.

B. The GE Labeling Mandate Fails *Central Hudson* Scrutiny.

Act 120's GE labeling mandate fails every single step of *Central Hudson*. It does not serve a substantial governmental interest because it is geared toward consumer curiosity alone; it does not directly advance the governmental interests

that the State identifies; and there is no reasonable fit between the onerous disclosure requirement and any such interests.

1. The Law Does Not Serve A Substantial Governmental Interest.

Central Hudson first asks "whether the asserted governmental interest is substantial." 447 U.S. at 566. That inquiry begins and ends with *Amestoy*, 92 F.3d 67. Because Act 120's labeling mandate does nothing more than satisfy consumer curiosity, it cannot pass constitutional muster. *Id.* at 74.

Just like here, *Amestoy* involved a Vermont GE labeling mandate—the rBST labeling law. Just like here, the FDA had rejected mandatory labeling for GE-derived products after finding that there was no significant difference between those products and non-GE-derived products. *Id.* at 70. Just like here, Vermont nevertheless thought it necessary to compel labeling in order "to help consumers make informed shopping decisions." *Id.* Just like here, the law was challenged on First Amendment grounds. Just like here, the State supported its labeling mandate with expert testimony suggesting the risk of health effects of rBST, in the face of regulators', scientists', and doctors' consistent conclusions to the contrary. *See id.* at 76-77 & n.3 (Leval, J., dissenting). And just like here, the district court denied the Associations' motion for a preliminary injunction.

This Court reversed. As it explained, the rBST law violated the First Amendment because "consumer curiosity alone is not a strong enough state

interest to sustain the compulsion of even an accurate, factual statement." *Id.* at 74 (majority op.). Rather, the government must show—at a minimum—that the compelled disclosure "bears on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern." *Id.* Vermont failed to make that showing in *Amestoy*, and it failed to make that showing again in Act 120.

The District Court, however, concluded that *NEMA* and *NYSRA* effectively reduced *Amestoy*'s reach to situations in which the government *concedes* that there is no interest other than consumer curiosity (essentially rendering *Amestoy* a class of one). JA77-78. Because the State did not overtly concede below that consumer curiosity was its only interest, and because the legislative record included speculative references to the potential health and environmental effects of GE crops, the court concluded that the GE labeling mandate was supported by interests other than consumer curiosity. JA78-79. The paper support for the labeling law might be outdated, refuted, and debunked, the District Court acknowledged; but the papers were "real," and therefore sufficient. JA82.

The District Court's analysis is wrong, for at least two reasons. *First*, neither *NEMA* nor *NYSRA* altered *Amestoy*'s rule that satisfying consumer curiosity is not a substantial state interest. If anything, *NEMA* and *NYSRA* reaffirm *Amestoy*'s continued vitality by taking pains to distinguish the substantial

government justifications offered in those cases from mere consumer curiosity. *See NEMA*, 272 F.3d at 115 n.6 (explaining that, unlike in *Amestoy*, the disclosure was "based on Vermont's substantial interest in protecting human health and the environment from mercury poisoning"); *NYSRA*, 556 F.3d at 134 (pointing to "New York's interest in preventing obesity" and plaintiffs' related concession "that New York City has a substantial interest").

Second, the State in a First Amendment case bears the burden of justifying its speech regulation by setting forth the substantial interest achieved by the regulation. *See Sorrell v. IMS Health*, 131 S. Ct. 2653, 2667 (2011). The State does not carry that burden merely by refusing to concede an impermissible interest. Nor does it carry that burden merely by citing minimal evidence of a lack of consensus on a particular issue. *See* JA77. The State instead must engage in an exercise of legislative judgment and adopt a specific rationale for its mandated disclosure that "bears on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern." *Amestoy*, 92 F.3d at 74. This Court's precedents affirm as much. In *NEMA*, for example, the Court upheld a Vermont law imposing disclosure requirements on mercury-containing products, pointing to Vermont's stated health and environmental interest in "reducing mercury contamination." 272 F.3d at 115. And in *NYSRA*, this Court relied on a specific chain of medical and scientific evidence linking the disclosure requirement

to the City's stated interest in "reduc[ing] obesity and the diseases associated with it." 556 F.3d at 134-135. In both cases, then, the mandatory disclosure furthered the State's interest in its citizens' healthy and safe behavior—an interest well within the State's *parens patriae* role.

That is the critical piece missing from Act 120. The State's litigation papers are occasionally coy about it, but the justification for the law boils down to a single thing: informing consumers of "potential risks"—meaning the risk of a risk. Act 120, §1(6). Vermont never goes so far as to affirmatively adopt any of the rationales listed in the Act: (1) "Public health and food safety," (2) "Environmental impacts," (3) "Consumer confusion and deception," and (4) "Protecting religious practices." 9 V.S.A. § 3041. Rather, Vermont offers these as different ways of describing the *reasons for consumer curiosity*, not *Vermont's governmental interests*. The State's purported public health interest is in establishing "a system by which *persons* may make informed decisions regarding the potential health effects of the food they purchase." *Id.* § 3041(1) (emphasis added). Its purported environmental interest is in informing "the purchasing decisions of *consumers* who are concerned about the potential environmental effects." *Id.* § 3041(2) (emphasis added). Its purported consumer deception interest is in "promoting the disclosure of factual information on food labels to allow *consumers* to make informed decisions." *Id.* § 3041(3) (emphasis added). And its purported religious interest is

in providing "*consumers* with data from which they may make informed decisions for religious reasons." *Id.* § 3041(4) (emphasis added).[12]

Vermont has superficially reworked the impermissible *Amestoy* consumer-curiosity interest to articulate several reasons why a consumer *might* be curious. But *Vermont itself* does not assert that GE-derived products are unsafe or bad for the environment. The best it could muster in enacting Act 120 is a claim that *some* consumers *might* believe they are—and that the State therefore has a sufficient interest in compelling disclosure even if it remains agnostic as to whether those consumers are right or wrong, and even if consumers' beliefs are contradicted by scientific and medical evidence. Since Act 120's enactment, the State has readily admitted that "[a]t its core, Act 120 endeavors to provide consumers with accurate

[12] An aside on religion: There may be a governmental interest in accommodating religious interests, but there is *no* cognizable governmental interest in forcing private parties to facilitate other private parties' religious compliance. *See Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (a "statute's principal or primary effect must be one that neither advances nor inhibits religion"); *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985) ("The First Amendment * * * gives no one the right to insist that, in pursuit of their own interests, others must conform their conduct to his own religious necessities." (ellipsis in original)). Moreover, if religious facilitation were truly a substantial governmental interest, it would have been equally sufficient to support Vermont's compelled disclosure of rBST in *Amestoy*. It is hard to fathom where that justification would end; states could cite religion to compel disclosures on almost any topic—controversial or not. A State could, for example, claim religious interests in requiring canned tuna labels to disclose the length of the fish used. *See Rastafari Worship and Customs*, BBC, http://goo.gl/bCr7up (last visited June 24, 2015) (Rastafarians will not eat fish more than 12 inches long).

factual information" in light of "consumers' right to know." Daloz Testimony 3, 13. That interest is identical in substance to the one rejected in *Amestoy*, where Vermont "itself ha[d] not adopted the concerns of the consumers; it ha[d] only adopted that the consumers are concerned." 92 F.3d at 73 n.1; *see also id.* at 73 (describing Vermont's claims about "strong consumer interest and the public's 'right to know' "). It should be rejected again here.

2. The Law Does Not Directly Advance Vermont's Asserted Interests.

Even assuming that Act 120 was enacted to promote real, non-speculative interests in protecting public health or the environment, the law does not directly advance those interests.

First, and most fundamentally, Act 120 is littered with tentative language about hypothetical harms—so much so that the statutory findings hardly amount to "findings" in the traditional sense. Among other things, the "findings" accompanying Act 120 state that genetically engineered foods "potentially pose risks," Act 120 § 1(4), and that regulation could "prevent potential risks," *id.* § 1(6). If the direct-advancement prong means anything, however, it means that a State cannot pass a law regulating speech where there is only a *risk* that regulated behavior *could pose a risk*. As the Supreme Court explained in *Edenfield v. Fane*, 507 U.S. 761, 770 (1993), the direct-advancement prong "is not satisfied by mere speculation or conjecture"; the State must "demonstrate that the harms it recites are

real." *See also Central Hudson*, 447 U.S. at 569 (state cannot rely on "conditional and remote eventualities" to justify a speech restriction).

Second, even if the State *had* taken sides and asserted that genetic engineering harms public health and the environment—and even if that conclusion had actual scientific support—Act 120 would not forestall those harms. The law ultimately requires manufacturers to label products with vague descriptions, including that a food "*may be* produced with genetic engineering." 9 V.S.A. § 3043(b)(3) (emphasis added). A label that says a product "may" contain GE material does little to identify those supposedly harmful products that Vermont might wish to discourage. The GE labeling mandate cannot directly advance health and environmental interests if, at the end of the day, it permits the many products that incorporate hard-to-trace ingredients to fall back on an opaque disclaimer.

Third, and relatedly, Act 120 is so riddled with exemptions that it is devoid of real meaning or impact. Food sold at restaurants, food sold for immediate consumption, and animal products all are exempt from the labeling mandate. *See* 9 V.S.A. § 3044(1), (7)(A), (7)(B). The Attorney General's regulations include an additional exemption for all products that contain meat or poultry. *See* CP 121.03(a)(ii). That means, for example, that a package of hamburger buns sold at the grocery store must be labeled; hamburgers sold at McDonald's need not be. A

granola bar sold in bulk at a warehouse club must be labeled; the same granola bar sold individually in a vending machine need not be. A can of vegetable soup must be labeled; a can of beef-and-vegetable soup need not be. Because a vast array of food products containing GE ingredients will remain unlabeled, the State cannot plausibly assert that the law materially advances the informational interests it proffers. *See, e.g.*, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190 (1999) (rejecting a law that "is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it"); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-489 (1995) (concluding that "exemptions and inconsistencies bring into question the purpose of the labeling ban"); *Safelite*, 764 F.3d at 266 (finding law was "underinclusive" such that "customers * * * would not get the information" that the state "contends is necessary to protect consumer choice").

3. There Is No Reasonable Fit Between The Law And Vermont's Asserted Interests.

The last prong of *Central Hudson* asks whether a speech regulation "is no more extensive than necessary to further the State's interest." 447 U.S. at 570-571. Although it need not meet a least-restrictive-means standard, a law must be narrowly tailored to the State's substantial interest. *See Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 477-478 (1989). At bottom, the reasonable-fit inquiry asks whether government regulation of speech is really necessary. For "[i]f

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).

And there were so many other things to which Vermont could have resorted. It could have published its own list of common products containing GE ingredients. It could have certified products that do not contain GE ingredients. *See, e.g.*, *Riley*, 487 U.S. at 800; *Entm't Software*, 469 F.3d at 652 (both suggesting government publication as an alternative to compelled speech). The State could even have waged its own advertising campaign on behalf of organic foods, or on behalf of manufacturers that voluntarily label their products. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) (government speech promoting beef products exempt from First Amendment scrutiny).

Or, given the market focus on the issue, Vermont could simply have allowed market forces to do their work. Consumers currently rely on a multitude of GE-related sources to inform their purchasing choices. Shopping guides point consumers to GE and non-GE foods. Many websites verify products as organic or "GMO-free." Multiple cell phone apps scan barcodes and assess ingredient lists for the presence or potential presence of GE ingredients. And, of course, manufacturers of foods that do not contain GE ingredients, and who think they will profit from advertising that fact, advertise it. *See* Dempsey Decl. ¶ 12 (Dist. Ct.

Dkt. 33-4). That is precisely the solution this Court blessed in *Amestoy*: "consumers interested in such information should exercise the power of their purses by buying products from manufacturers who voluntarily reveal it." 92 F.3d at 74.

C. The GE Labeling Mandate Fails Even *Zauderer*'s Reasonable-Relationship Test.

As explained, the District Court was wrong to apply *Zauderer* rather than *Central Hudson*. For one, Act 120's labeling mandate compels disclosure on a controversial issue. For another, the law is not designed to prevent consumer deception, as the Supreme Court has repeatedly instructed. Either characteristic is reason enough to apply *Central Hudson*. And the labeling mandate, in turn, fails every prong of *Central Hudson*. Even putting all of that to the side, though, the District Court was wrong to deny a preliminary injunction. Act 120's glaring flaws mean that it cannot survive review under *Zauderer* in any event.

1. *Zauderer* Preserved The Substantial Interest Requirement.

Zauderer governs "the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases." *NEMA*, 272 F.3d at 115. In other words, it loosens *Central Hudson*'s "fit" requirement; it applies a "reasonable-relationship" standard in place of a "direct-advancement" standard when reviewing a compelled disclosure's fit. *See id.* at 114-115. But *Zauderer* goes no further. Neither this Court nor the Supreme Court has ever

suggested that *Zauderer* eliminates the need for a *substantial state interest*.[13] To the contrary, this Court has regularly applied the usual substantial-state-interest standard in conjunction with *Zauderer*'s reasonable-relationship test. *See NYSRA*, 556 F.3d at 134 (relying on concession that City had a "substantial interest" in "preventing obesity"); *NEMA*, 272 F.3d at 115 n.6 (noting the State's "substantial interest in protecting human health and the environment from mercury poisoning"); *see also Conn. Bar Ass'n v. United States*, 620 F.3d 81, 96 (2d Cir. 2010) (relying on the government's substantial interest in preventing deception).

The District Court nonetheless opined that "it is not clear whether *Zauderer* requires a state to identify a 'substantial' governmental interest before it may require a factual, non-controversial commercial disclosure." JA80-81.[14] But neither the District Court nor the State has cited any case holding that some lesser

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[13] Indeed, because the Supreme Court applies *Zauderer* only to speech regulations aimed at preventing consumer deception, *see supra* at 34-36, its *Zauderer* cases necessarily involve a substantial state interest. It should be no surprise, then, that the Supreme Court has not more explicitly addressed the question whether a lesser interest could suffice.

[14] The origin of the District Court's confusion appears to lie in its misreading of *Zauderer*. The court stated that *Zauderer* had "rejected an argument that Ohio had to demonstrate 'its disclosure requirement serves some substantial governmental interest.' " JA81 n.36. *Zauderer* did no such thing. The remainder of the passage explains that what *Zauderer* actually rejected was the challenger's argument "that the State must establish * * * that the disclosure requirement serves some substantial governmental interest *other than preventing deception*." *Zauderer*, 471 U.S. at 650 (emphasis added).

interest could suffice, and the most recent decision to have addressed the issue reserved the question. *See Am. Meat Inst. v. USDA*, 760 F.3d 18, 23 (D.C. Cir. 2014). An out-of-circuit reservation provides no basis to depart from in-circuit precedent. The State must establish a substantial governmental interest even under *Zauderer*, and it has failed to do so here. *See supra* at 37-42.

2. There Is No Reasonable Relationship Between The GE Labeling Mandate And Vermont's Asserted Interests.

Zauderer may have loosened *Central Hudson*'s "fit" requirement—but even applying a looser standard of fit, there *still* is no reasonable relationship between those interests and the GE labeling mandate. Put starkly: Vermont has no credible basis for determining that foods containing genetic engineering pose health or environmental risks. As a result, the compelled disclosure is "unjustified" under *Zauderer*. 471 U.S. at 651.

The District Court held otherwise, concluding that the State satisfied *Zauderer* by pointing to "studies" suggesting that genetic engineering is harmful. It did not matter to the court that the Associations had pointed out that those studies were "outdated, retracted, or debunked." JA82. Rather, it was enough that the studies were "real." *Id.*

That was error. This Court requires more. The State must show that the compelled disclosure "bears on a reasonable concern for human health or safety or some other sufficiently substantial governmental concern." *Amestoy*, 92 F.3d at

74. It cannot do so simply by introducing a lengthy compilation of documents and affidavits hypothesizing possible risks, as it did in *Amestoy*. Rather, the State must present scientific evidence sufficient for "an objective observer" to conclude that genetic engineering is harmful. *Id.* at 73. *See also Edenfield*, 507 U.S. at 771 (State must demonstrate *harms* are "real").

Imagine the consequences if the threshold of proof were as low as the District Court envisions it, such that a "study" penned or posted by somebody somewhere would satisfy the reasonable-relationship test. Pluck any pseudo-scientific paper off the Internet (for one of the latest, google "chemtrails") and—voila!—a State can demonstrate a reasonable relationship between a compelled disclosure and public health. Even *Zauderer*'s looser reasonable-relationship test has more force than that; it requires, after all, some measure of *reason*. *See NEMA*, 272 F.3d at 115-116 (finding the State had shown a plausible chain of causation between the mercury disclosure and its asserted interest of encouraging proper disposal of mercury-containing lamps); *NYSRA*, 556 F.3d at 134-135 (same for New York's calorie-count disclosure).

The State has not shown any similarly plausible chain of causation here connecting the labeling mandate to any legitimate public health or safety interest. It can identify no credible, professionally recognized entity that has found evidence that federally approved GE-derived foods are unsafe—none. It can point to no

environmental harms from GE crops, other than distinct alleged harms from pesticides or farming techniques that it has not attempted to directly regulate. And it cannot permissibly point to religion as a catch-all interest where other justifications fail. The law therefore does not satisfy the reasonable-relationship test.

Whether under *Central Hudson* or under *Zauderer*, then, the GE labeling mandate cannot survive First Amendment scrutiny.

II. THE ASSOCIATIONS' MEMBERS ARE BEING IRREPARABLY HARMED IN THE ABSENCE OF A PRELIMINARY INJUNCTION.

A. The Loss Of The Associations' Members' Free Speech Rights Is *Per Se* Irreparable Harm.

The District Court next turned to the ban on the term "natural" (or "words of similar import") and correctly applied *Central Hudson*. JA90-94. It held that the speech restriction failed *Central Hudson* several times over. It did not further a substantial state interest, and it failed the direct-advancement and reasonable-fit requirements. JA91-92. As the District Court explained, "the potential benefits of prohibiting the use of undefined terms by only some food manufacturers and the likelihood those benefits will be achieved remains remote, contingent, and speculative." JA93-94. The Associations' First Amendment challenge was thus likely to succeed on the merits. JA94.

The " 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.' " *Amestoy*, 92 F.3d at 71 (quoting *Elrod*, 427 U.S. at 373). The loss of the Associations' members' First Amendment freedoms is close at hand: as the District Court acknowledged, some manufacturers "will have to begin distribution by at least July 1, 2015 to comply with Act 120's GE disclosure requirement." JA13.[15] As of that date, they will be forced to speak (the GE labeling mandate) and be prohibited from speaking (the ban on "natural") to comply with Vermont's law. The time for preliminary injunctive relief therefore is *now* because "speakers may self-censor rather than risk" an enforcement action. *Ashcroft v. ACLU*, 542 U.S. 656, 670-671 (2004).

The District Court recognized this fact for the GE labeling mandate. *See* JA100 (the Associations' declarants had detailed "the expense, time, and resources they will expend to achieve compliance" with the labeling mandate). But the court held differently with respect to the State's ban on "natural" because, according to the court, the Associations had not sufficiently shown that their members (i) have "natural" labels that (ii) are implicated by the "natural" ban. *Id.*

The record below belies that conclusion. The Associations' Complaint specifically stated that their "members include companies that have used, currently

[15] *See* Adams Decl. ¶¶ 21-22; Baxter Decl. ¶¶ 24-25; Bradley Decl. ¶ 22; Hermansky Decl. ¶ 31; Morgan Decl. ¶¶ 32-33; *see also* Blasgen Decl. ¶¶ 39-44; Dempsey Decl. ¶¶ 32-35.

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." JA121. And the company declarations supporting that statement could not have been clearer: "*Both* aspects of Act 120—its compelled statements about genetic engineering *and its ban on "natural"*—introduce new requirements that *would necessitate changes* to the labels of thousands of General Mills' products sold in Vermont." Bradley Decl. ¶ 11 (emphases added); *see also* Hermansky Decl. ¶ 15 (same for ConAgra). The District Court appears to have overlooked these declarations in concluding that the Associations had not provided evidence that any member company used the word "natural" on GE-derived products. *See* JA100.

Even without the direct record evidence that the Associations' member companies use "natural" to describe products with GE ingredients, that conclusion easily follows by necessary implication. As the State has explained, "the vast majority of foods sold in grocery stores in the United States contain some amount of at least one ingredient that is connected to a genetically engineered plant." JA133-134 ¶ 23. The member-company declarants are manufacturers of GE-derived foods as defined by the State. *See* Adams Decl. ¶ 12; Baxter Decl. ¶ 15; Bradley Decl. ¶ 12; Hermansky Decl. ¶ 16; Morgan Decl. ¶ 16. For at least some declarants, *most* of their products contain ingredients derived from GE plants. *See* Blasgen Decl. ¶ 18; Adams Decl ¶ 12; Morgan Decl. ¶ 16. And as Kraft's

declaration stated expressly, the Associations' member companies use the word "natural" on their products. Morgan Decl. ¶ 18; *see also* Hermansky Decl. ¶ 18 ("ConAgra Foods does not currently prohibit use of the word 'natural' for products[']labels whose ingredients may have been made with crops grown from seeds developed using genetic engineering"). The Associations' members thus use the word "natural" to describe food products containing GE ingredients.

Indeed, this Court can take judicial notice that the Associations' members use the word "natural" to advertise products that include ingredients derived from GE plants, given the number of the Associations' members currently embroiled in litigation for *just that practice*. *See, e.g.*, *Briseno v. ConAgra Foods Inc.*, No. 2:11-cv-5379 (C.D. Cal.); *Gengo v. Frito-Lay N. Am., Inc.*, No. 1:12-cv-854 (E.D.N.Y.); *Nelson v. Campbell Soup Co.*, No. 3:14-cv-2647 (S.D. Cal.); *see also Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006) (judicial-notice rule).

If the record displays any uncertainty as to the precise number of such products affected, moreover, the fault for that lies at the feet of the State. Act 120 prohibits not only use of the word "natural" on what the State defines as GE products, but also "any words of similar import." 9 V.S.A. § 3043(c). One of the challenges that the Associations make to the law—and one for which the District Court found they had a substantial likelihood of success—is that it is void for

vagueness because the Associations' members cannot reasonably predict what falls within the ban. The Associations' declarants made that point time and again. *See, e.g.*, Adams Decl. ¶ 17 (the words-of-similar-import "standard is so vague and ambiguous that [Coca Cola] has no way to predict the full scope of the terms that could be considered prohibited"); Baxter Decl. ¶ 16 (PepsiCo "does not know which specific terms the State of Vermont considers to be of 'similar import' to 'natural' and is unclear about how it can ensure compliance with this aspect of the law"); Morgan Decl. ¶ 19 ("Kraft has no way to know which words may be considered 'words of similar import' prohibited by the Act," it "may have to over-estimate the scope of this part of the ban to protect itself," and "it is impossible to known in advance how many of Kraft's products or trademarks contain 'words of similar import' ").[16] The State should not benefit from the Associations' supposedly imprecise evidence of the degree of harm when that is *part of the problem with the challenged statute*.

[16] *After* the Associations submitted their company declarations and briefing was concluded, the State purported to limit the phrase "natural or any words of similar import" to mean "nature, natural, or naturally." CP 121.01(14). But the Attorney General has refused to clarify that the regulations govern private actions to the extent they may be brought to enforce the requirements and prohibitions of Act 120, rendering the regulations a "dead letter." GMA Comments on Draft Preliminary Regulations to Implement Act 120, at 12 (Nov. 14, 2014), http://goo.gl/10CalC.

As in *Amestoy*, "appellants have amply demonstrated that the First Amendment is sufficiently implicated to cause irreparable harm." 92 F.3d at 72. They have done so for both the GE labeling mandate and the "natural" ban, and the District Court erred in holding otherwise.

B. Act 120 Requires The Associations' Members To Change Their Business Practices *Now* To Comply With The Act.

A preliminary injunction is also necessary to avoid the structural, business-practice changes the Associations' members will have to incur (and are incurring) to bring their speech into compliance with the State's requirements. If Act 120 is struck down, their efforts will all be for naught, and the harm done to their businesses cannot be repaired.

Irreparable harm is measured by "the injury the plaintiff will suffer if he or she loses on the preliminary injunction but ultimately prevails on the merits, paying particular attention to whether the remedies available at law, such as monetary damages, are inadequate to compensate for that injury." *Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010) (quotation marks omitted). The Associations' member companies easily meet that standard. There is no adequate remedy at law for the fundamental structural changes that the Associations' member companies must make to their business practices to comply with *both* aspects of Act 120: the labeling mandate and the prohibition on "natural." These changes go well beyond the type of "ordinary compliance costs" that "are typically

insufficient to constitute irreparable harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005). Rather, the Associations' member companies are being required to "fundamentally change the nature of their operations." *Id.*

The District Court itself said as much:

> In addition to the impacts of designing new packages and/or labels for Vermont-bound products, Plaintiffs' GE manufacturers assert they will need to expend resources for dual-inventory, production, and distribution systems for Vermont-bound products, which will require additional plant and storage space for producing and handling separate inventories of Vermont-specific labels and products. JA31.

Quite so. The Associations' declarants explained again and again that they will have to restructure their supply and distribution chains—segregating Vermont-bound products at each level—to comply with Act 120 (again, both aspects of the law) because, at least for now, they continue to have the First Amendment freedom in other states not to convey Vermont's compelled message or to limit their speech as Vermont commands. *See* Adams Decl. ¶ 26 (Coca-Cola's "supply chain network does not currently allow it to limit the distribution of products labeled in compliance with the Vermont statute to Vermont alone"); Baxter Decl. ¶¶ 17, 23 ("In order to comply with Act 120's labeling requirements, [PepsiCo] must develop Vermont-specific labels," and "we do not have distribution systems that are dedicated exclusively to Vermont due to economic and logistical barriers."); Bradley Decl. ¶ 17 ("General Mills' supply chain network does not currently enable it to limit the distribution of products labeled in compliance with Act 120 to

Vermont alone, or alternatively to prevent products with non-compliant labels from reaching Vermont."); Hermansky Decl. ¶ 26 ("there is currently no available method [for ConAgra] to ensure that products in the distribution system are eliminated from sale into Vermont"); Morgan Decl. ¶ 37 ("In order to implement a separate label scheme for Vermont, therefore, Kraft will have to work with all of its varying distributors to create separate product streams and quality-control measures to ensure that * * * no non-compliant labels get into Vermont."); *see also* Blasgen Decl. ¶ 45 ("If a manufacturer rationally responds to these changes by exiting the Vermont market, or by raising prices, it would necessarily suffer a loss of sales revenue, not to mention a substantial decline in its goodwill with customers."); Michaud Decl. ¶¶ 6, 10 (Dist. Ct. Dkt. 33-5) ("I expect at least some brands to cease distribution to Vermont," and "[t]he loss of even a single brand can change the financial model that sustains the company.").[17]

Money damages (even if they were available from the State) could not compensate the Associations' members for these efforts. *See Am. Frozen Food Inst. v. United States*, 855 F. Supp. 388, 394 (CIT 1994) (packager would be irreparably injured by labeling rule requiring it to "re-engineer its inventory

[17] One of the State's purported experts opines that the Associations' members can simply withdraw from the Vermont market to avoid these business-practice changes. *See* Dyke Decl. ¶ 5 (Dist. Ct. Dkt. 63-22). Of course that would be precisely the chilling effect that the First Amendment contemplates. The harm to speech and the harm to business practices are intertwined.

management process to track the source of the vegetables from delivery to packaging to ensure that the various labels will correctly reflect the countries of origin for the vegetables"); *see also Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 423 (2d Cir. 2013) (finding irreparable harm where the plaintiff "would be unable to recover monetary damages from Vermont because of the Eleventh Amendment"). The losses of employee time and energy, and the diversion of staff and resources to compliance issues instead of new business opportunities, are also severe irreparable harms to the Associations' members. *See Nordic Windpower USA, Inc. v. Jacksonville Energy Park, LLC*, No. 5:12-cv-5, 2012 WL 1388357, at *13 (D. Vt. Apr. 19, 2012) (recognizing "lost opportunities" as irreparable harm because "[i]rreparable harm may be found where damages are difficult to quantify"). The member companies would not recover these costs with a favorable decision on the merits: "The significant costs, operational changes, lost revenues, and lost business opportunities I have described above, if companies incur them during this litigation, or go out of business because of them, would not be remedied if Act 120 is later declared invalid." Dempsey Decl. ¶ 35. And that is to say nothing of the reputational harm that the member companies would suffer from pulling their products from the shelves in Vermont, marketing their products differently in Vermont than they do in other states, or from labeling their products

with the mandated warning label. *See, e.g.*, Blasgen Decl. ¶ 45; Adams Decl. ¶ 34; Morgan Decl. ¶ 46. This is the very definition of irreparable harm.

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Once labels are printed and the products bearing them are in circulation, the Associations' member companies cannot effectively claw them back. And given the long shelf life of some of their products, the member companies must put compliantly labeled food products into circulation in a matter of weeks. By failing to preliminarily enjoin the Act, the District Court has left the Associations' members with a lose-lose choice: self-censor now to avoid potential liability later, or defy the law now and risk enforcement later. First Amendment preliminary injunctions are supposed to protect against just that dilemma. The District Court erred as a matter law in holding otherwise.

III. THE OTHER PRELIMINARY-INJUNCTION FACTORS FAVOR RELIEF.

The District Court already found that the Associations are likely to prevail on their First Amendment challenge to Act 120's speech ban. And for all of the reasons explained above, the Associations are also likely to prevail on their First Amendment challenge to Act 120's speech mandate. Irreparable harm follows inexorably from either conclusion, rendering the remaining two factors of the preliminary injunction something of an afterthought. *See, e.g.*, *Safelite*, 764 F.3d at 266 & n.4 (directing entry of injunction after assessing plaintiffs' likelihood of

success, and relegating other factors to a footnote); *Amestoy*, 92 F.3d at 74 (directing entry of injunction after assessing plaintiffs' irreparable harm and likelihood of success).

But in any event, the other preliminary injunction factors favor relief as well. The balancing-of-hardships and public-interest factors merge into one because the government is the party opposing relief. *Nken v. Holder*, 556 U.S. 418, 435 (2009). These combined factors weigh in favor of a preliminary injunction because the State "does not have an interest in the enforcement of an unconstitutional law." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (quotation marks omitted). That is particularly so here where, as here, consumers may suffer due to rising costs of food caused by the law (not to mention the confusing labels the law compels). *See* Dempsey Decl. ¶ 35.

The Associations' members' loss of First Amendment freedoms and other irreparable injuries also easily outweigh the costs to the State of an injunction. Indeed, an injunction would *save* some costs, because it would preclude the State from spending money to implement or enforce an unconstitutional law. Act 120's main benefit to the State is its symbolic value. That symbolic value is not affected by a preliminary injunction. A preliminary injunction would preserve the status quo, and under the status quo, consumer interests are amply served by existing labeling.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the Brief contains 13,929 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the Brief has been has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2015, I caused the foregoing to be filed through this Court's CM/ECF appellate filer system, which will send a notice of electronic filing to all registered users including the following lead counsel of record for Defendants-Appellees:

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