IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GROCERY MANUFACTURERS ASSOCIATION, SNACK FOOD ASSOCIATION, INTERNATIONAL DAIRY FOODS ASSOCIATION, and NATIONAL ASSOCIATION OF MANUFACTURERS, Plaintiffs, v. WILLIAM H. SORRELL, in his official capacity as the Attorney General of Vermont; PETER E. SHUMLIN, in his official capacity as Governor of Vermont; TRACY DOLAN, in her official capacity as Commissioner of the Vermont Department of Health; and JAMES B. REARDON, in his official capacity as Commissioner of the Vermont Department of Finance and Management, Defendants.	)	Case No. 5:14-cv-117-cr

PLAINTIFFS' [PROPOSED] AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

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

Preliminary Statement

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

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

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

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

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

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

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

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

Parties

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

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

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

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

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

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

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

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

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

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

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

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

Jurisdiction and Venue

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

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

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

Factual Background

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

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

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

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

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

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

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

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

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

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

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

Act 120

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

48. The Act's labeling requirement also fails because it does not directly and materially advance the purely private interests the State has proffered. A consumer can act on a preference against genetic engineering by referring to the voluntary labeling that already exists. Thus, the Act's labeling mandate does not add "materially" to the information that is currently available. The exemptions render the Act constitutionally infirm all on their own. *See IMS Health*, 131 S. Ct. at 2668-71; *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995).

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

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

51. The Act does not even satisfy the most accommodating First Amendment standard, which applies to commercial disclaimers "intended to combat the problem of

inherently misleading commercial advertisements." *Milavetz, Gallop, & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010). Such disclaimers must be "purely factual and uncontroversial," and they may not be "unjustified" or "unduly burdensome." *Zauderer v. Office of Disciplinary Counsel of the S. Ct. of Ohio*, 471 U.S. 626, 651 (1985). Under the Second Circuit's current formulation of this standard, the disclaimer must also bear a "reasonable relationship" to a "sufficient legitimate state interest." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 & n.6 (2d Cir. 2001). The Second Circuit has applied this standard only when the disclaimer requirement directly furthers an interest that qualifies as "substantial" under the *Central Hudson* test. *See id.*; *see also N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 134 (2d Cir. 2009). Not one of the interests cited in Act 120 meets that bar, or is supported by the record before the General Assembly.

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

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

54. Act 120 also fails the basic test of rationality required of all legislation under the Fifth Amendment because it is not rationally related to a legitimate governmental interest. *U.S.*

Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973). It is not rational for a State to ignore the findings of an international consensus of scientists and regulators; to promote irrational, baseless fears as equivalent and even superior to that consensus; and to pass laws based primarily on what they do for the Vermont "brand" instead of what they actually do, in substance, for actual Vermont residents. Further, rationality at least requires a "State" interest to be implicated, which means there must be a harm that warrants governmental intervention. No such harm exists here, and the State's unwillingness to use its own funds to administer and defend Act 120 is express confirmation that Vermont does not have a "state" interest in the survival of this law.

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

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

COUNT TWO

Marketing Restrictions; Violation of the First and Fourteenth Amendments

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

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

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

characterize as being of "similar import" to "natural" and as having a "tendency to mislead" some consumer somewhere. Manufacturers that are not members of the Plaintiff associations, as well as retailers, are also subject to these restrictions.

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

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

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

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

COUNT THREE

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

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

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

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

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

the penalties and private liability could reach hundreds of thousands of dollars for a single violation. ~~The vagueness of the prohibition on the use of "words of similar import" to "natural" opens the door to arbitrary enforcement.~~

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

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

COUNT FOUR
Violation of the Commerce Clause

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

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

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

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

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

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

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

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

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

78. ~~Any one of these burdens outweighs the putative benefit to Vermont consumers, which is effectively zero; they can already avoid GE foods if they wish by buying certified organic or other voluntarily labeled products~~Act 120 is just one manifestation of a nationwide advocacy effort for state-based labeling requirements for foods that are or contain ingredients derived from genetically engineered crops. There are bills and ballot measures pending in more than two dozen states, and they are not all identical to each other. For example, the ballot measures pending in Oregon and Colorado for a vote this November are different from each other, and from Act 120. Among other differences, each has a different definition of "genetically engineered" that expands and contracts the scope of the regulation; the phrasing and format of the disclosure varies; "natural" labeling is banned in Vermont but would not be in Oregon or Colorado. This patchwork of state labeling requirements threatens significant disruptions to the movement of food in interstate commerce, burdening not just manufacturers but all consumers.

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

COUNT FIVE
Violation of the Supremacy Clause; Preemption

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

81. Article VI, Clause 2 of the United States Constitution provides that the laws of the United States are "the supreme law of the land." When a state law is expressly or implicitly

preempted by federal law, or when it would be impossible to comply with both the state and federal law, the state law must yield.

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

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

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

85. ~~Act 120 is expressly preempted or conflict-preempted by each of the above federal enactments.~~ It is also conflict-preempted by the congressional delegations of authority to FDA, USDA, and EPA pursuant to the federal statutes that regulate the safety and labeling of plant and food products, including, in addition to the above, the Plant Protection Act, 7 U.S.C. § 7701 *et seq.* and the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136. The coordinated, product-focused framework these agencies use to evaluate genetically engineered crops is part of a comprehensive federal policy, and Congress has never abrogated it. Instead, Congress has chosen voluntary labeling by enacting the Organic Foods Production Act, 7 U.S.C.

§ 6501, *et seq*. By adding new, additional layers of regulation, and imposing unjustified burdens on innovative technologies that offer substantial benefits to the American public and should be encouraged, Act 120 stands as an obstacle to the achievement and execution of Congress's objectives in its regulation of new agricultural technologies.

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

PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully seeks the following relief:

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

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

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

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

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

DATE: ~~June 12~~September 11, 2014

Respectfully submitted,

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Added to Amended Complaint

Exhibit A

Act 120

No. 120. An act relating to the labeling of food produced with genetic engineering.

(H.112)

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. FINDINGS

The General Assembly finds and declares that:

(1) Federal law does not provide for the labeling of food that is produced with genetic engineering, as evidenced by the following:

(A) Federal labeling and food and drug laws do not require manufacturers of food produced with genetic engineering to label such food as genetically engineered.

(B) As indicated by the testimony of a U.S. Food and Drug Administration (FDA) Supervisory Consumer Safety Officer, the FDA has statutory authority to require labeling of food products, but does not consider genetically engineered foods to be materially different from their traditional counterparts to require such labeling.

(C) No formal FDA policy on the labeling of genetically engineered foods has been adopted. Currently, the FDA only provides nonbinding guidance on the labeling of genetically engineered foods, including a 1992 draft guidance regarding labeling of food produced from genetic engineering and a 2001 draft guidance for industry regarding voluntary labeling of food produced from genetic engineering.

(2) Federal law does not require independent testing of the safety of food produced with genetic engineering, as evidenced by the following:

(A) In its regulation of food, the FDA does not distinguish genetically engineered foods from foods developed by traditional plant breeding.

(B) Under its regulatory framework, the FDA does not independently test the safety of genetically engineered foods. Instead, manufacturers submit safety research and studies, the majority of which the manufacturers finance or conduct. The FDA reviews the manufacturers' research and reports through a voluntary safety consultation, and issues a letter to the manufacturer acknowledging the manufacturer's conclusion regarding the safety of the genetically engineered food product being tested.

(C) The FDA does not use meta-studies or other forms of statistical analysis to verify that the studies it reviews are not biased by financial or professional conflicts of interest.

(D) There is a lack of consensus regarding the validity of the research and science surrounding the safety of genetically engineered foods, as indicated by the fact that there are peer-reviewed studies published in international scientific literature showing negative, neutral, and positive health results.

(E) There have been no long-term or epidemiologic studies in the United States that examine the safety of human consumption of genetically engineered foods.

(F) Independent scientists may be limited from conducting safety and risk-assessment research of genetically engineered materials used in food products due to industry restrictions or patent restrictions on the use for research of those genetically engineered materials used in food products.

(3) Genetically engineered foods are increasingly available for human consumption, as evidenced by the fact that:

(A) it is estimated that up to 80 percent of the processed foods sold in the United States are at least partially produced from genetic engineering; and

(B) according to the U.S. Department of Agriculture, in 2012, genetically engineered soybeans accounted for 93 percent of U.S. soybean acreage, and genetically engineered corn accounted for 88 percent of U.S. corn acreage.

(4) Genetically engineered foods potentially pose risks to health, safety, agriculture, and the environment, as evidenced by the following:

(A) There are conflicting studies assessing the health consequences of food produced from genetic engineering.

(B) The genetic engineering of plants and animals may cause unintended consequences.

(C) The use of genetically engineered crops is increasing in commodity agricultural production practices, which contribute to genetic homogeneity, loss of biodiversity, and increased vulnerability of crops to pests, diseases, and variable climate conditions.

(D) Cross-pollination of or cross-contamination by genetically engineered crops may contaminate organic crops and, consequently, affect marketability of those crops.

(E) Cross-pollination from genetically engineered crops may have an adverse effect on native flora and fauna. The transfer of unnatural deoxyribonucleic acid to wild relatives can lead to displacement of those native plants, and in turn, displacement of the native fauna dependent on those wild varieties.

(5) For multiple health, personal, religious, and environmental reasons, the State of Vermont finds that food produced from genetic engineering should be labeled as such, as evidenced by the following:

(A) Public opinion polls conducted by the Center for Rural Studies at the University of Vermont indicate that a large majority of Vermonters want foods produced with genetic engineering to be labeled as such.

(B) Polling by the New York Times indicated that many consumers are under an incorrect assumption about whether the food they purchase is produced from genetic engineering, and labeling food as produced from genetic engineering will reduce consumer confusion or deception regarding the food they purchase.

(C) Because genetic engineering, as regulated by this act, involves the direct injection of genes into cells, the fusion of cells, or the hybridization of genes that does not occur in nature, labeling foods produced with genetic

engineering as "natural," "naturally made," "naturally grown," "all natural," or other similar descriptors is inherently misleading, poses a risk of confusing or deceiving consumers, and conflicts with the general perception that "natural" foods are not genetically engineered.

(D) Persons with certain religious beliefs object to producing foods using genetic engineering because of objections to tampering with the genetic makeup of life forms and the rapid introduction and proliferation of genetically engineered organisms and, therefore, need food to be labeled as genetically engineered in order to conform to religious beliefs and comply with dietary restrictions.

(E) Labeling gives consumers information they can use to make decisions about what products they would prefer to purchase.

(6) Because both the FDA and the U.S. Congress do not require the labeling of food produced with genetic engineering, the State should require food produced with genetic engineering to be labeled as such in order to serve the interests of the State, notwithstanding limited exceptions, to prevent inadvertent consumer deception, prevent potential risks to human health, protect religious practices, and protect the environment.

Sec. 2. 9 V.S.A. chapter 82A is added to read:

CHAPTER 82A. LABELING OF FOOD PRODUCED WITH GENETIC ENGINEERING

§ 3041. PURPOSE

It is the purpose of this chapter to:

(1) Public health and food safety. Establish a system by which persons may make informed decisions regarding the potential health effects of the food they purchase and consume and by which, if they choose, persons may avoid potential health risks of food produced from genetic engineering.

(2) Environmental impacts. Inform the purchasing decisions of consumers who are concerned about the potential environmental effects of the production of food from genetic engineering.

(3) Consumer confusion and deception. Reduce and prevent consumer confusion and deception by prohibiting the labeling of products produced from genetic engineering as "natural" and by promoting the disclosure of factual information on food labels to allow consumers to make informed decisions.

(4) Protecting religious practices. Provide consumers with data from which they may make informed decisions for religious reasons.

§ 3042. DEFINITIONS

As used in this chapter:

(1) "Consumer" shall have the same meaning as in subsection 2451a(a) of this title.

(2) "Enzyme" means a protein that catalyzes chemical reactions of other substances without itself being destroyed or altered upon completion of the reactions.

(3) "Food" means food intended for human consumption.

(4) "Genetic engineering" is a process by which a food is produced from an organism or organisms in which the genetic material has been changed through the application of:

(A) in vitro nucleic acid techniques, including recombinant deoxyribonucleic acid (DNA) techniques and the direct injection of nucleic acid into cells or organelles; or

(B) fusion of cells (including protoplast fusion) or hybridization techniques that overcome natural physiological, reproductive, or recombination barriers, where the donor cells or protoplasts do not fall within the same taxonomic group, in a way that does not occur by natural multiplication or natural recombination.

(5) "In vitro nucleic acid techniques" means techniques, including recombinant DNA or ribonucleic acid techniques, that use vector systems and techniques involving the direct introduction into the organisms of hereditary materials prepared outside the organisms such as micro-injection, chemoporation, electroporation, micro-encapsulation, and liposome fusion.

(6) "Manufacturer" means a person who:

(A) produces a processed food or raw agricultural commodity under its own brand or label for sale in or into the State;

(B) sells in or into the State under its own brand or label a processed food or raw agricultural commodity produced by another supplier;

(C) owns a brand that it licenses or licensed to another person for use on a processed food or raw commodity sold in or into the State;

(D) sells in, sells into, or distributes in the State a processed food or raw agricultural commodity that it packaged under a brand or label owned by another person;

(E) imports into the United States for sale in or into the State a processed food or raw agricultural commodity produced by a person without a presence in the United States; or

(F) produces a processed food or raw agricultural commodity for sale in or into the State without affixing a brand name.

(7) "Organism" means any biological entity capable of replication, reproduction, or transferring of genetic material.

(8) "Processed food" means any food other than a raw agricultural commodity and includes any food produced from a raw agricultural commodity that has been subjected to processing such as canning, smoking, pressing, cooking, freezing, dehydration, fermentation, or milling.

(9) "Processing aid" means:

(A) a substance that is added to a food during the processing of the food but that is removed in some manner from the food before the food is packaged in its finished form;

(B) a substance that is added to a food during processing, is converted into constituents normally present in the food, and does not significantly increase the amount of the constituents naturally found in the food; or

(C) a substance that is added to a food for its technical or functional effect in the processing but is present in the finished food at levels that do not have any technical or functional effect in that finished food.

(10) "Raw agricultural commodity" means any food in its raw or natural state, including any fruit or vegetable that is washed, colored, or otherwise treated in its unpeeled natural form prior to marketing.

§ 3043. LABELING OF FOOD PRODUCED WITH GENETIC ENGINEERING

(a) Except as set forth in section 3044 of this title, food offered for sale by a retailer after July 1, 2016 shall be labeled as produced entirely or in part from genetic engineering if it is a product:

(1) offered for retail sale in Vermont; and

(2) entirely or partially produced with genetic engineering.

(b) If a food is required to be labeled under subsection (a) of this section, it shall be labeled as follows:

(1) in the case of a packaged raw agricultural commodity, the manufacturer shall label the package offered for retail sale, with the clear and conspicuous words "produced with genetic engineering";

(2) in the case of any raw agricultural commodity that is not separately packaged, the retailer shall post a label appearing on the retail store shelf or bin in which the commodity is displayed for sale with the clear and conspicuous words "produced with genetic engineering"; or

(3) in the case of any processed food that contains a product or products of genetic engineering, the manufacturer shall label the package in which the processed food is offered for sale with the words: "partially produced with genetic engineering"; "may be produced with genetic engineering"; or "produced with genetic engineering."

(c) Except as set forth under section 3044 of this title, 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.

(d) This section and the requirements of this chapter shall not be construed to require:

(1) the listing or identification of any ingredient or ingredients that were genetically engineered; or

(2) the placement of the term "genetically engineered" immediately preceding any common name or primary product descriptor of a food.

§ 3044. EXEMPTIONS

The following foods shall not be subject to the labeling requirements of section 3043 of this title:

(1) Food consisting entirely of or derived entirely from an animal which has not itself been produced with genetic engineering, regardless of whether the animal has been fed or injected with any food, drug, or other substance produced with genetic engineering.

(2) A raw agricultural commodity or processed food derived from it that has been grown, raised, or produced without the knowing or intentional use of food or seed produced with genetic engineering. Food will be deemed to be as described in this subdivision only if the person otherwise responsible for complying with the requirements of subsection 3043(a) of this title with respect to a raw agricultural commodity or processed food obtains, from whomever sold the raw agricultural commodity or processed food to that person, a sworn statement that the raw agricultural commodity or processed food has not been knowingly or intentionally produced with genetic engineering and has been segregated from and has not been knowingly or intentionally commingled with food that may have been produced with genetic

engineering at any time. In providing such a sworn statement, any person may rely on a sworn statement from his or her own supplier that contains the affirmation set forth in this subdivision.

(3) Any processed food which would be subject to subsection 3043(a) of this title solely because it includes one or more processing aids or enzymes produced with genetic engineering.

(4) Any beverage that is subject to the provisions of Title 7.

(5) Any processed food that would be subject to subsection 3043(a) of this title solely because it includes one or more materials that have been produced with genetic engineering, provided that the genetically engineered materials in the aggregate do not account for more than 0.9 percent of the total weight of the processed food.

(6) Food that an independent organization has verified has not been knowingly or intentionally produced from or commingled with food or seed produced with genetic engineering. The Office of the Attorney General, after consultation with the Department of Health, shall approve by procedure the independent organizations from which verification shall be acceptable under this subdivision (6).

(7) Food that is not packaged for retail sale and that is:

(A) a processed food prepared and intended for immediate human consumption; or

(B) served, sold, or otherwise provided in any restaurant or other food establishment, as defined in 18 V.S.A. § 4301, that is primarily engaged in the sale of food prepared and intended for immediate human consumption.

(8) Medical food, as that term is defined in 21 U.S.C. § 360ee(b)(3).

§ 3045. RETAILER LIABILITY

(a) A retailer shall not be liable for the failure to label a processed food as required by section 3043 of this title, unless the retailer is the producer or manufacturer of the processed food.

(b) A retailer shall not be held liable for failure to label a raw agricultural commodity as required by section 3043 of this title, provided that the retailer, within 30 days of any proposed enforcement action or notice of violation, obtains a sworn statement in accordance with subdivision 3044(2) of this title.

§ 3046. SEVERABILITY

If any provision of this chapter or its application to any person or circumstance is held invalid or in violation of the Constitution or laws of the United States or in violation of the Constitution or laws of Vermont, the invalidity or the violation shall not affect other provisions of this section which can be given effect without the invalid provision or application, and to this end, the provisions of this chapter are severable.

§ 3047. FALSE CERTIFICATION

It shall be a violation of this chapter for a person knowingly to provide a false statement under subdivision 3044(2) of this title that a raw agricultural

commodity or processed food has not been knowingly or intentionally produced with genetic engineering and has been segregated from and has not been knowingly or intentionally commingled with food that may have been produced with genetic engineering at any time.

§ 3048. PENALTIES; ENFORCEMENT

(a) Any person who violates the requirements of this chapter shall be liable for a civil penalty of not more than $1,000.00 per day, per product. Calculation of the civil penalty shall not be made or multiplied by the number of individual packages of the same product displayed or offered for retail sale. Civil penalties assessed under this section shall accrue and be assessed per each uniquely named, designated, or marketed product.

(b) The Attorney General shall have the same authority to make rules, conduct civil investigations, enter into assurances of discontinuance, and bring civil actions as provided under subchapter 1 of chapter 63 of this title. Consumers shall have the same rights and remedies as provided under subchapter 1 of chapter 63 of this title.

Sec. 3. ATTORNEY GENERAL RULEMAKING; LABELING OF FOOD PRODUCED WITH GENETIC ENGINEERING

The Attorney General may adopt by rule requirements for the implementation of 9 V.S.A. chapter 82A, including:

(1) a requirement that the label required for food produced from genetic engineering include a disclaimer that the Food and Drug Administration does

not consider foods produced from genetic engineering to be materially different from other foods; and

(2) notwithstanding the labeling language required by 9 V.S.A. § 3043(b), a requirement that a label required under 9 V.S.A. chapter 82A identify food produced entirely or in part from genetic engineering in a manner consistent with requirements in other jurisdictions for the labeling of food, including the labeling of food produced with genetic engineering.

Sec. 4. GENETICALLY ENGINEERED FOOD LABELING SPECIAL FUND

(a) There is established a Genetically Engineered Food Labeling Special Fund, pursuant to 32 V.S.A. chapter 7, subchapter 5 to pay costs or liabilities incurred by the Attorney General or the State in implementation and administration, including rulemaking, of the requirements under 9 V.S.A. chapter 82A for the labeling of food produced from genetic engineering.

(b) The Fund shall consist of:

(1) private gifts, bequests, grants, or donations of any amount made to the State from any public or private source for the purposes for which the Fund was established;

(2) except for those recoveries that by law are appropriated for other uses, up to $1,500,000.00 of settlement monies collected by the Office of the Attorney General that, as determined by the Office of the Attorney General after consultation with the Joint Fiscal Office and the Department of Finance

and Management, exceed the estimated amounts of settlement proceeds in the July 2014 official revenue forecast issued under 32 V.S.A. § 305a for fiscal year 2015; and

(3) such sums as may be appropriated or transferred by the General Assembly.

(c) Monies in the Fund from settlement monies collected by the Office of the Attorney General or from funds appropriated or transferred by the General Assembly shall be disbursed only if monies in the Fund from private gifts, bequests, grants, or donations are insufficient to the Attorney General to pay the costs or liabilities of the Attorney General or the State incurred in implementation and administration of the requirements of 9 V.S.A. chapter 82A.

(d) On or after July 1, 2018, if the Attorney General is not involved in ongoing litigation regarding the requirements of 9 V.S.A. chapter 82A and monies in the Fund exceed the costs or liabilities of the Attorney General or the State:

(1) unexpended monies in the Fund received from private or public sources shall be appropriated by the General Assembly, after review by the Senate and House Committees on Appropriations, the Senate Committee on Agriculture, and the House Committee on Agriculture and Forest Products, for the support of agricultural activities or agricultural purposes in the State,

including promotion of value-added products, compliance with water quality requirements, and marketing assistance and development; and

(2) unexpended State monies in the Fund shall revert to the General Fund.

Sec. 5. ATTORNEY GENERAL FISCAL YEAR BUDGET

If, in fiscal year 2015, $1,500,000.00 in monies is not collected in the Genetically Engineered Food Labeling Special Fund established under Sec. 4 of this act, the Attorney General shall request in the fiscal year 2016 budget proposal for the Office of the Attorney General the monies necessary to implement and administer the requirements established by 9 V.S.A. chapter 82A for the labeling of food produced from genetic engineering.

Sec. 6. ATTORNEY GENERAL REPORT ON LABELING OF MILK

(a) On or before January 15, 2015, the Office of the Attorney General, after consultation with the Agency of Agriculture, Food and Markets, shall submit to the Senate and House Committees on the Judiciary, the Senate Committee on Agriculture, and the House Committee on Agriculture and Forest Products a report regarding whether milk and milk products should be subject to the labeling requirements of 9 V.S.A. chapter 82A for food produced with genetic engineering. The report shall include:

(1) a recommendation as to whether milk or milk products should be subject to the requirements of 9 V.S.A. chapter 82A; and

(2) the legal basis for the recommendation under subdivision (1) of this subsection.

(b) In exercise of the Attorney General's authority to defend the interests of the State, the Attorney General, in his or her discretion, may notify the General Assembly that it is not in the best interest of the State to submit the report required under subsection (a) of this section on or before January 15, 2015. Any notice submitted under this subsection shall estimate the date when the report shall be submitted to the General Assembly.

Sec. 7. EFFECTIVE DATES

(a) This section and Secs. 3 (Attorney General rulemaking), 4 (genetically engineered food labeling special fund), 5 (Attorney General budget fiscal year 2016), 6 (Attorney General report; milk) shall take effect on passage.

(b) Secs. 1 (findings) and 2 (labeling of food produced with genetic engineering) shall take effect on July 1, 2016.

Date Governor signed bill: May 8, 2014