

EXHIBIT 2

EXCERPTS

Transcript of Hearing Before the House Committee on Judiciary
April 18, 2013, CD No. 13-125

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1 can--I don't have the language right in front of me, but I can
2 find it.

3 Maxine Grad: Questions? Comments?

4 Richard Marek: We're not letting this worry us.

5 Maxine Grad: So, Michael, so your first sentence, I believe,
6 was that you felt it is defensible. Is that correct?

7 Michael O'Grady: I definitely--

8 Maxine Grad: Just sort of [OVERLAY]

9 Michael O'Grady: The line that I have been using is that I
10 think that there is a road to this bill being upheld as
11 constitutional. But there are some issues, some questions,
12 along that road which could derail or be an obstacle to
13 constitutionality. I think it's difficult to predict how a
14 court is going to rule on the multiple issues under the First
15 Amendment analysis and under the commerce analysis. So, unlike
16 Oregon, I don't think I can give you a definitive statement that
17 it is constitutional. I think it's defensible. I think there
18 are very good arguments for its constitutionality, but there
19 will be arguments that it is unconstitutional, and I can't give
20 you a conclusion on that.

21 Maxine Grad: Yeah. That's helpful.

22 Charles "Chip" Conquest: And are there particular places in the
23 bill where you could point to it and say, "This particular
24 provision is a bigger question, and here's another approach?"

25 Michael O'Grady: Well, I'd like to flip that question on its

1 head. I think there's particular provisions that I think are
2 more defensible, such as the prohibition on labeling a product
3 as natural, because I think there is precedent out there that
4 has upheld that. I think that there are some arguments about
5 the commerce clause, about how we're providing a retail
6 exemption and how that might be construed as discriminatory in
7 effect, that this committee might want to address. I think that
8 there are some things that could be addressed just with the
9 labeling itself that could strengthen the--

10 Richard Marek: Look forward to hearing about that.

11 Maxine Grad: Okay. I didn't see--in your definitions, didn't
12 see a definition of natural. Is that something--I know, sure,
13 people talk about it, I know that's kind of hard to define, but
14 is there a definition of natural?

15 Michael O'Grady: There is no definition of natural, and I think
16 that's partly why there is the use of the term so--

17 Maxine Grad: Loosely.

18 Michael O'Grady: Right. There is--

19 Charles "Chip" Conquest: That's a good sign. Don't we have--

20 Michael O'Grady: Not in this bill, there's no definition on
21 natural, but there is a Federal guidance document on it.

22 Charles "Chip" Conquest: We have something--I thought I
23 remembered testimony that we had something in Vermont law that
24 was a reference, that made this--that we thought made this
25 more--that there was more behind it.

1 Michael O'Grady: I'm not recalling that.

2 Charles "Chip" Conquest: I remember from maybe more than a year
3 ago, so maybe I'm just remembering--

4 Michael O'Grady: I'm not recalling that, I'm sorry.

5 Charles "Chip" Conquest: No, not you, I didn't--

6 Maxine Grad: Think of [INDISCERNIBLE 00:02:33 TRACK 3]

7 Richard Marek: I've been thinking about your comment that the
8 ripeness waiver argument might be made. I'm wondering whether
9 you think a possible approach to blocking that as effectively as
10 possible might be to put a [PH 00:02:52 TRACK 3] lighter to any
11 row in the can of worms, providing that someone affected by the
12 application of this bill could petition for delayed
13 implementation of it with respect to their product, which would
14 seem to make ripeness even more remote to them. Might want to
15 think about that.

16 Michael O'Grady: Yeah. So basically a variance process?

17 Richard Marek: Yeah. Yeah. And that would really make it hard
18 to argue with it, you'd need to immediately prepare for it. And
19 get it. It doesn't bind us to write the variance [INDISCERNIBLE
20 00:03:28 TRACK 3]--

21 Michael O'Grady: Right. Right.

22 Richard Marek: But on the merits, it's not warranted.

23 Maxine Grad: Andy?

24 Andrew Donaghy: Has the committee [INDISCERNIBLE 00:03:34 TRACK
25 3] by any potential manufacturers who are going to be

1 potentially suing the state of Vermont?

2 Michael O'Grady: Any that would be potentially suing--

3 Andrew Donaghy: I'm not saying that [INDISCERNIBLE 00:03:45

4 TRACK 3]

5 Michael O'Grady: I don't think they heard specifically from

6 Monsanto this time. They heard from Val Giddings from the--oh,

7 I can't remember.

8 Maxine Grad: Biotechnology Industry Organization.

9 Michael O'Grady: Biotechnology Industry Organization. I never

10 can remember what the acronym stands for. Although it's pretty

11 simple. And then last year they also heard from the

12 Biotechnology Industry Organization. Which is a consortium of

13 companies that would--so in that association we'll likely--

14 Richard Marek: They laid out their position about--

15 Michael O'Grady: Yep. I think their position is effectively

16 laid out in that memo, that they would argue First Amendment and

17 commerce clause claims, that it's excessively burdensome, and

18 that the state interests aren't substantial and directly related

19 to the labeling requirement.

20 Richard Marek: So they'd say the likelihood is that if we pass

21 this--this bill becomes law, that we will be probably talking

22 with a civil lawsuit?

23 Michael O'Grady: I think that that is very likely. [Commotion]

24 Thank you.

25 Maxine Grad: Thank you. Thank you. Welcome to [INDISCERNIBLE

1 00:00:29 TRACK 4].

2 Bridget Asay: Thank you. Good morning.

3 [INDISCERNIBLE 00:00:32 TRACK 4]

4 Bridget Asay: My name's Bridget Asay, I'm with the Attorney
5 General's office. I appreciate being asked here this morning,
6 and I'm happy to talk about the bill that passed in-house Ag,
7 and some of the legal issues that could be raised. I think that
8 Mike has really covered the ground, so I'll probably be shorter
9 and happy to take questions. I walked in as he was talking
10 about the commerce clause, so I missed his discussion of the
11 First Amendment. If I'm saying things you've already heard and
12 you just want to give me the stop sign, go ahead. I just want
13 to start by making it very clear that I'm not here--or my office
14 is not here--to raise policy concerns. In general, we support
15 efforts to get more information to consumers, and we certainly
16 understand that many Vermonters want more and better information
17 about genetically engineered food. But I do have to raise some
18 legal concerns with the bill. The proposal to require labels on
19 genetically engineered food, if enacted, does carry very real
20 risk. It seems little doubt at this point that if it were
21 passed it would be challenged by the industry, and we do think
22 there's a real risk that the courts would not uphold it. I am
23 not saying the bill is not defensible; it is defensible. As
24 Mike has said, there are good arguments; there is a path to it
25 being upheld. Defensible is not the same as prevailing, and

1 that's what we want to make sure is clear as the legislature's
2 debating this issue. The opponents of this bill can bring two
3 challenges: First Amendment and commerce clause--and I think
4 they may have identified those challenges that carry--we call
5 them fee challenges, fee-bearing challenges. So they would be
6 entitled, if they prevail on those challenges, to have the state
7 pay their attorney's fees at the end of the day. It's not an
8 easy thing to estimate how much those fees could be; I can tell
9 you that we have a submission from Entergy in the Vermont-Yankee
10 litigation that puts their expenses just the trial court at over
11 \$4 million. We haven't litigated that, the court hasn't
12 awarded, so that's not set in stone by any means, but that does
13 give you a sense of the kinds of numbers that can come in. And
14 the further a case gets litigated through the appellate system,
15 the bills go up. Another thing about this case that I should
16 flag is to defend--I shouldn't say "this case," this bill, if
17 challenged, this would be a case that would involve--it could
18 involve--a pretty protracted litigation. And I think that's why
19 we wanted to flag the fee issue in particular. This is not
20 going to be a paper case that would get through the court system
21 very quickly. The science is kind of at the heart of the case;
22 there's going to be experts, there's going to be discovery,
23 there's going to be a trial, I would expect. So that's the kind
24 of thing that feeds into wanting to give fair warning about what
25 the cost could be. And that would include the Attorney

1 General's own costs in putting on a defense, as well as any
2 liabilities should we lose.

3 Charles "Chip" Conquest: Can I just ask for clarification--

4 Bridget Asay: Yeah.

5 Charles "Chip" Conquest: So, in a case like this, if you
6 prevail, you know, harshly--I'm just trying to figure out
7 whether--is prevailing in any part, you get the fees, you can
8 ask for the fees for the entire case? Or is that prorated in
9 any way?

10 Bridget Asay: It really depends on what exactly the outcome is.

11 So, if you have a case where a plaintiff challenges one
12 statute, say, on three different grounds, and they win a
13 judgment that it was unconstitutional on one ground and the law
14 is knocked out, the ability to sort of prorate the fees is less.

15 You know, I wouldn't want to say it's not gonna happen; there
16 are arguments you can make. But if they have substantially
17 prevailed on their claim and the claims they brought were
18 closely related enough to the common core of issues, it's much
19 harder to prorate the fees. If they bring a challenge to three
20 different statutes and they only win on one, that's a clearer
21 example of where fees can be prorated, because they didn't
22 really prevail on everything they argued. So--

23 Charles "Chip" Conquest: And that's how they define
24 substantially prevailing, is whether you prevail on the majority
25 of the claims that you're making? Or--I'm asking 'cause I

1 really want to know, so--

2 Bridget Asay: Yeah. Sure, yeah, yeah. And I wish I--I don't
3 have the precise language of the standard at hand, but it
4 will--how much, what the plaintiff was looking for. So kind of
5 forget about what their legal theories were, and think about
6 what were they looking for, what outcome were they getting, and
7 how much of that outcome did they achieve, I think, in non-legal
8 terms, which is a fair part of the inquiry.

9 Maxine Grad: [INDISCERNIBLE 00:00:37 TRACK 5]

10 Richard Marek: In terms of issue and processes, is there any
11 way that you could take a swinging wild cast at how long the
12 process of litigation might take?

13 Bridget Asay: Yeah. I should be able--let me--give me a second
14 to think back through this. So, I would say--you know, probably
15 9 to--partly this would depend on how close the effective date
16 was and therefore whether there was some effort by the trial
17 court to speed things up. But I think a fair estimate might be
18 somewhere from 9 12 months in the trial court; maybe to a year
19 and a half if the effective date was really far out and the
20 court wasn't rushed, and then about a year for one appeal to the
21 2nd Circuit, and then if it went to the Supreme Court, that
22 would add another year. None of that's written in stone, but
23 that's a--

24 Richard Marek: So it could take three years.

25 Bridget Asay: Yes. It could take three years.

1 Maxine Grad: Suzy? And then--

2 Susan Wizowaty: I realize I never have thought about this. If
3 we lost 2nd Circuit and decide to appeal, so we would pay the
4 expenses in 2nd Circuit. But if we won on appeal to the Supreme
5 Court, would all of the costs then revert to Monsanto, say?

6 Bridget Asay: Absolutely.

7 Susan Wizowaty: The whole package, all the way down?

8 Bridget Asay: The whole package, all the way down. Whoever
9 wins at the end wins. Yes.

10 Maxine Grad: That's interesting.

11 Richard Marek: Yeah. I just--I know you've already
12 [INDISCERNIBLE 00:02:07 TRACK 5] at hand, but it would be
13 interesting to represent a conference question, because I
14 think--I'm not sure if you were in the room when counsel was
15 speaking to it, but he indicated there were portions of the bill
16 which has that ability, obviously. And that there are portions
17 of it that we could prevail on. So it's possible we could have
18 a bifurcated judgment where the law is held unconstitutional in
19 part and constitutional in part, and parts of it charge forward.

20

21 Bridget Asay: Right.

22 Richard Marek: And so it'd be interesting to--do you have an
23 opinion on the [PH 00:02:39 TRACK 5] mall by state point that I
24 raised and the possibility of consolidation and shared fees? I
25 think--

1 Bridget Asay: I can--

2 Richard Marek: --first of all, I respect you're not trying to
3 predict as counsel whether we'd win. Anyway, who tries to
4 predict the outcome in a case with this complexity is not
5 somebody you want as a lawyer.

6 Bridget Asay: [INDISCERNIBLE 00:02:58 TRACK 5]

7 Richard Marek: Frankly speaking. But in terms of the notion
8 that--in my judgment at least, any law in this area that's
9 effective would obviously be challenged. I think it's silly to
10 pretend it wouldn't be. And if there's a loss at any stage, at
11 the primary stage, at least, then there's some fees probably
12 that are going to be awarded against you. But I think it's
13 extremely hard to quantify that. I respect your timeline, and I
14 think you're right, and I think your ballpark numbers are
15 probably right. Whether we'd end up paying it all if we were to
16 lose, or whether it might be shared among other states, I think
17 is more of an open question.

18 Bridget Asay: So, to try to respond to that a little bit, I
19 think there's two different issues about the involvement of
20 other states. And one is the process; so if the bill didn't
21 take effect until other states laws also took effect, would
22 somehow the processes be joined? I think that's not terribly
23 likely. It would probably depend which states there were, how
24 many there were. You know, joining cases that are filed in
25 different states is not that common unless you really fall under

1 the multidistrict litigation rules, which is more about mass
2 torts and that sort of thing. So I'd have to think about that,
3 but I wouldn't really expect, if California passed a law and
4 Vermont passed a law, that we would have a single trial, given
5 the geographic distance of the--

6 Richard Marek: Assuming they were both challenged.

7 Bridget Asay: Assuming they were both challenged. That can
8 proceed on two different fronts. I do think substantively that
9 having laws in place in multiple states while the laws are being
10 challenged will help all of the states defend them. I think
11 that's helpful to--I mean, the core of the issue, both in the
12 First Amendment issue and the commerce clause, the core of the
13 issue is, how strong is the state's interest here? So having
14 more states having come to the table and said, "This is
15 important and this matters," to me that has an impact. It's not
16 a quantifiable impact, but it would have an impact. So, also,
17 things could get consolidated on appeal. But that would have to
18 be in the same circuit. So if it were Connecticut and Vermont,
19 that's a possibility. And that's the Supreme Court too. Yeah.

20

21 Maxine Grad: [INDISCERNIBLE 00:00:24 TRACK 6].

22 Susan Wizowaty: And a recourse being the Federal government
23 getting stronger in support of Monsanto, would that trickle
24 through the courts and then we're up against that
25 representative, the David and Goliath scenario, that the

1 Goliath's getting stronger? Are you weighing that in the
2 equation?

3 Bridget Asay: I'm sorry, I guess I--I wasn't here from the
4 beginning, so I'm not sure about the Federal government
5 supporting Monsanto?

6 Susan Wizowaty: Well, I don't know if I'm wrong, but I hear the
7 President's supporting Monsanto. Just things that you hear,
8 bits and pieces on the news, you know what I mean? And I'm just
9 thinking of the atmosphere in general from that level. Whereas
10 the public is somewhat outcrying, obviously, but you hear things
11 from the Federal coming down.

12 Bridget Asay: You know, that's harder to say.

13 Susan Wizowaty: And it's a likelihood that it would be harder
14 for states, even, who are coming together to defend it.

15 Bridget Asay: Yeah, I don't know where the Federal
16 government--I'm not familiar with the statements that you're
17 referring to. I do think it's important to remember that in the
18 dairy labeling case--so, did Mike talk about the dairy labeling
19 case? So, we had this case some years ago involving the
20 requirement to label for rBGH that was struck down by the 2nd
21 Circuit, which is one of the cases that's of concern for the
22 future of this case. And it was an issue for the court in that
23 case that the FDA had said that there was no difference between
24 the milk from cows that had been treated and milk from cows that
25 had not been treated. So here we do have similar statements

1 from the FDA. Now, I absolutely agree with Mike, the fact that
2 they are draft is very helpful. So, they've been out for years
3 but they've never been adopted by rule. But you do still have a
4 statement from the Federal agency that regulates food safety
5 saying that they don't see a difference. So that did matter in
6 the dairy labeling case; it could matter again in this case. We
7 would certainly argue that a draft is a draft and it's not--it
8 doesn't stand for anything more than that.

9 Susan Wizowaty: And just by way of statement, I need to mention
10 for the record that the head of the Food Division at the FDA is
11 a former Monsanto executive. And--you know, it just--

12 Richard Marek: Can't hear you.

13 Susan Wizowaty: Just that the head of the Food Division of the
14 FDA is a former Monsanto executive. And the revolving door is
15 just.

16 Andrew Donaghy: It appears the issue, by contrast to mercury,
17 which is a known danger to--we've seen a lot [INDISCERNIBLE
18 00:03:02 TRACK 6] and now a bill here has the potential for--it
19 may cause--it hasn't ever really been proven to be a danger to
20 our products that are genetically engineered. And I think--is
21 that part of what--in contrast to mercury, for example. We
22 don't have any proof that it's really a danger.

23 Bridget Asay: I'm not a scientist, and I'm definitely not a
24 legislator. But the question of how strong the science is and
25 how much the concern is is the question for the committee and

1 for the legislature to decide. How strong that is will be
2 relevant to litigation. I mean, that's clear. If you think
3 about the difference between the outcome in the dairy labeling
4 case and the outcome in the mercury labeling case--you know, the
5 court was persuaded in the mercury labeling case, this clearly
6 toxic, harmful to human health and the environment, there's a
7 clear reason that the state can articulate. If you put the
8 label on mercury products, it tells consumers not to put them in
9 the trash, and it keeps it out of the waste stream. So that is
10 what swayed the court in the mercury case. So that issue, I'd
11 agree that's the heart of the issue. But the weighing of it is
12 not for me, that's for you. But I think that is just--to spend
13 a couple minutes on the First Amendment issue, from my
14 perspective, to me that is the way--thinking about those two
15 cases and the difference between those two cases and where this
16 issue falls in that realm in terms of the certainty of the
17 science and the purpose, you know, the identifiable purpose of
18 the labeling. There's another case from New York recently that
19 upheld the calorie counts on restaurant menus. And again, the
20 New York City's defense there was, "If people know how many
21 calories are in their food, it'll affect their eating habits,
22 and we're interested in obesity." Sort of drawing that line,
23 and that was persuasive to the court. So the evaluation is, you
24 know, "Is this closer to the dairy labeling case where the court
25 said this was just about consumer curiosity, and that's not

1 enough to infringe on commercial speech, or is this serving
2 another interest, a health or safety interest?

3 Susan Wizowaty: Thank you. Michael, do you know of that New
4 York case?

5 Michael O'Grady: I do.

6 Susan Wizowaty: Okay, great.

7 Richard Marek: I guess, to put this in sort of legal terms,
8 which you are qualified to speak to, this strikes me as
9 being--going to the court with three verdicts: guilty, not
10 guilty, or the Scottish verdict, not proven. And we're kind of
11 in the not proven area in terms of the challenge. We're saying
12 that the court read--we're basically asking the court to say is
13 it constitutional to add a labeling requirement for something
14 which has been introduced into the food stream but has not been
15 proven to be harmful, hasn't been proven to be [INDISCERNIBLE
16 00:01:11 TRACK 7]. And that's the conundrum.

17 Bridget Asay: I mean, depending on the findings and how the
18 bill comes out, if that's where the legislature is, then that
19 would be one of the arguments that the state would make, that
20 that's--

21 Richard Marek: That's a legitimate interest.

22 Bridget Asay: --a legitimate interest. Then the courts would
23 decide. I did want to mention that I do agree with Mike, again,
24 that the natural labeling point is more defensible. And the
25 difference there is that that is an effort to prevent deception

1 of consumers. I did say across the hall, and I would say again
2 here after talking to my colleagues who do a lot of consumer
3 protection work, we do think it would be helpful on the natural
4 labeling point if there were a modest appropriation to do some
5 research. The way these things can be proven are through
6 consumer studies that try to determine what consumers perceive
7 when they see certain words on a label, and show that they would
8 associate that with genetic engineering or whatever the label
9 is. But, because that's in the category of preventing
10 deception, that's an easier category to defend.

11 Richard Marek: It's also easier not to label something as
12 natural than it is to label something as containing GMO.

13 Bridget Asay: So, for example, if you were looking at a
14 commerce clause issue, if the label has to be on the product,
15 that gets you into the commerce clause issue that Mike was
16 talking about, and the weighing--well, having standards for
17 taking a label off is not the same, would not be the same
18 burden. They don't have any obligation to put it on there at
19 all. Yeah.

20 Charles "Chip" Conquest: So the research that you're talking
21 about is to get a sense for consumer perception of what natural
22 means to them?

23 Bridget Asay: Right. Right.

24 Maxine Grad: And did you want to say anything more about the
25 commerce clause?

1 Bridget Asay: So, in some ways the issues are related, because
2 the commerce clause test is a balancing test that involves the
3 state interests. And so you get back to this question of how
4 strong--what interests is the state asserting, and how strong is
5 it? The mercury labeling case is a really good commerce clause
6 for the state. I mean, the manufacturers made these arguments
7 about how they wouldn't sell the product in the state because
8 the label would be too expensive, and the court said, "Well, you
9 don't have to sell the product in the state if you don't want
10 to, but you're not being discriminated against because your
11 products are made out of state. Vermont businesses aren't being
12 treated differently." So it is a very good precedent, but the
13 range of arguments that could be made here because of the scope
14 of the labeling requirement, the scope of the market, the
15 sourcing requirements; there would be a different set of
16 arguments. And so I wouldn't attempt to predict the outcome of
17 that. I don't have anything else. Any other questions?

18 Richard Marek: Off to Boston.

19 Bridget Asay: Have any other questions?

20 Maxine Grad: Have a safe trip.

21 Susan Wizowaty: Yes.

22 Bridget Asay: Thank you. Thank you, I appreciate that.

23 Susan Wizowaty: Yes. Thank you.

24 Bridget Asay: It's nice to see you all. Take care.

25 Susan Wizowaty: Yeah. Take care.