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 Acting 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

DEFENDANTS' SUR-REPLY BRIEF
IN SUPPORT OF THEIR MOTION TO DISMISS

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Defendants submit this sur-reply in response to Plaintiffs' Reply in Support of their Motion for a Preliminary Injunction ("Pls. Reply") (Doc. 75) pursuant to the Scheduling Order issued by the Court on October 6, 2014 (Doc. 51). The State will reserve until the January 7, 2015, hearing its response to most of Plaintiffs' reply arguments. Two of Plaintiffs' arguments, however, warrant a brief sur-reply. First, Plaintiffs argue for the first time that this Court cannot consider the Attorney General's draft implementing rule when evaluating Plaintiffs' constitutional challenges. Second, Plaintiffs repeatedly suggest – quite misleadingly – that Defendants merely "assert" certain points, rather than argue those points with supporting case law and record materials. Plaintiffs are wrong in both respects.

I. This Court Can – And Should – Consider The Draft Rule Released By The Office Of The Attorney General.

The Attorney General's Draft Rule forecloses several of Plaintiffs' challenges to Act 120. Not surprisingly, then, Plaintiffs ask this Court not to consider the Draft Rule in evaluating their facial challenge to the statute. Pls. Reply 18. They are wrong. "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.5 (1982); *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (same).

Plaintiffs ask this Court to disregard that fundamental principle of constitutional law on the ground that the Attorney General purportedly exceeded the scope of his authority in promulgating it. Pls. Reply 25. That too is wrong. The Draft Rule falls squarely within the broad authority granted by the Legislature to the Attorney General to implement the provisions of Act 120, including the authority to require that GE labeling is done "in a manner consistent with requirements in other jurisdictions." Act 120, Sec. 3(2). Act 120 contemplated that the

Attorney General would clarify certain aspects of the statute, and he has done just that – in fact narrowing, not expanding, the range of the statute in many ways. Thus, the Draft Rule represents neither an "*ultra vires* amendment" nor an "impermissibl[e] alter[ation]" of Act 120. Pls. Reply 22, 25. The separation-of-powers concerns underlying the cases cited by Plaintiffs (at Pls. Reply 25) are not implicated here.

Plaintiffs' back-door challenge to the Attorney General's rulemaking authority, moreover, cannot be raised in this Court or at this juncture. First, this Court would lack jurisdiction to consider such a challenge. *Allen v. Cuomo*, 100 F.3d 253, 260 (2d Cir. 1996) (explaining that the "scope of authority of a state agency is a question of state law and not within the jurisdiction of federal courts") (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984)). Second, Plaintiffs would lack standing to challenge a rule that would *benefit* rather than harm their members by clarifying and limiting the scope of Act 120. *See, e.g.*, *Brod v. Agency of Natural Res.*, 2007 VT 87, ¶¶ 6, 13, 182 Vt. 234, 238, 240, 936 A.2d 1286, 1289, 1291 (2007) (dismissing plaintiffs' claim that administrative rule exceeded agency's statutory authority where plaintiffs did not "suffer any harm from its existence"; a party "must be directly affected by a government action, rule or law in order to have standing to challenge it" (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992)). And third, such a challenge would be premature, as the statutory rulemaking process – which will include consideration of whether the proposed rule is within the scope of the Attorney General's authority, *see* 3 V.S.A § 842 – has not yet run its course.

Finally, Plaintiffs ask this Court to disregard the Draft Rule because it is not yet final. Pls. Reply 24-25. But the Draft Rule is well along in the implementation process, and is on track

to be finalized by July 1, 2015, or earlier.[1] On its face, the Draft Rule obviates many of Plaintiffs' concerns. And if the lack of absolute finality matters at all, it cuts *against*, not in favor of, Plaintiffs' position. To avoid "premature constitutional adjudication," federal courts should not address constitutional issues that "may be materially altered by the determination of an uncertain issue of state law." *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 511-12 (1972); *see, e.g.*, *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941) (federal courts should abstain from unnecessary constitutional adjudication if state law could be interpreted in such a way that "the constitutional issue does not arise"); MTD 21-22 (citing cases). Plaintiffs ask this Court to do precisely the opposite – to ignore the Draft Rule and declare Act 120 unconstitutional, even though Plaintiffs do not dispute that the very concerns underlying their constitutional claims will disappear within months once the Draft Rule is finalized.

II. Plaintiffs' Reply Brief Mischaracterizes Defendants' Arguments And The Record.

Time and again, Plaintiffs complain that Defendants merely assert key arguments but never support them. To avoid the confusion that Plaintiffs have introduced, the following chart juxtaposes Plaintiffs' assertions with the location of those supposedly missing arguments in Defendants' Motion to Dismiss the Complaint ("MTD") and Defendants' Reply Brief in Support of their Motion to Dismiss and Opposition to Plaintiffs' Motion for a Preliminary Injunction ("Defs. Reply").

[1] Since the release of the preliminary draft rule for informal public input by the Office of the Attorney General in October 2014, the Draft Rule has moved further along in the administrative rulemaking process. On November 25, the Draft Rule was prefiled with the interagency committee on administrative rules ("ICAR"), pursuant to 3 V.S.A. § 837. ICAR approved the Draft Rule on December 8. Then, on December 12, 2014, the Attorney General formally filed the proposed rule with the Office of the Secretary of State, as required under 3 V.S.A. § 838.

Plaintiffs' Contentions	**Defendants' Actual Argument**
"Defendants opposition brief never offers any reason why *Central Hudson*'s intermediate-scrutiny test should not apply." Pls. Reply 5.	Defs. Reply 14-20 (explaining why *Zauderer* – not the *Central Hudson* test or strict scrutiny – applies to Act 120's disclosure requirement); MTD 9-14 (same).
"Defendants' affirmative argument on direct advancement is that it exists because they say so." Pls. Reply 9.	Defs. Reply 26 (explaining why an informational disclosure "directly advances" the goal of facilitating informed purchasing decisions, citing *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981) and *Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014)).
"Defendants offer only the naked assertion that 'certainly Vermonters can understand what it means that a product was "partially" or "may" have been produced with genetic engineering" in response to the argument that "[d]escribing the *product* as 'genetically engineered' does little to convey to the lay consumer the true process of genetic engineering: genetic engineering applies to the *plant*, which then grows food just like every other plant does." Pls. Reply 9.	Defs. Reply 27. "[T]here is nothing wrong or misleading about Act 120's definition: A food made from plants produced with genetic engineering is itself produced, at least in part, with genetic engineering. And the very FDA policy statement that Plaintiffs repeatedly cite authorizes labels stating that a food was 'produced using biotechnology.'. . . [C]ertainly Vermonters can understand what it means that a product was 'partially' or 'may' have been produced with genetic engineering, much the same way that consumers with peanut allergies can understand what it means that a product 'may' have been produced with peanuts."
"Defendants' affirmative argument is that there is a reasonable fit because the fit is reasonable." Pls. Reply 10.	Defs. Reply 26 (explaining why *Central Hudson*'s "reasonable fit" prong is satisfied by a mandate that, like Act 120, does not burden more commercial speech than necessary, and noting that the Supreme Court has deemed disclosure requirements "less restrictive" than alternatives such as the suppression of speech).
"In response to Plaintiffs' listing of [alternatives to required labeling], Defendants offer only that the State 'had reasons for rejecting them.'" Pls. Reply 10.	Defs. Reply 28-29 (citing evidence in legislative history that explains *why* the State rejected the alternatives that Plaintiffs insist it should have chosen, and explaining why deference is owed the State's reasonable judgment based on that evidence).
"Defendants are left with nothing to substantiate their claim that consumers are unable to find out whether a particular food contains GE-derived materials." Pls. Reply 11.	Defs. Reply 9-10 (pointing to evidence before the Legislature showing that Americans are unaware that many of the products sold in supermarkets today have been genetically engineered); *id.* at 29 (explaining that only manufacturers know for certain whether a particular product contains GE material, and citing *Evergreen Ass'n v. City of New York*, 740

	F.3d 233 (2d Cir. 2014), in support of argument that alternative advertising campaign would thus not be an effective alternative).
"[O]ne would expect Defendants' opposition brief to devote substantial ink to answering why Act 120's labeling mandate is factual and noncontroversial. Instead, Defendants devote half a page to the topic." Pls. Reply 12.	MTD 9-14 (arguing at length that *Zauderer* applies to Act 120's factual and uncontroversial labeling mandate).
"In sum, Defendants offer no authorities that actually support their conclusory contention that the labeling mandate compels only factual, noncontroversial speech." Pls. Reply 13.	*See*, e.g., MTD 9 (citing *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001)); MTD 10 (citing *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009), *Am. Meat Inst. v. U.S. Dep't of Agric.*, No. 13-5281, 2014 WL 3732697 (D.C. Cir. July 29, 2014)); MTD 12 (citing *Safelite Grp., Inc. v. Jepsen*, 988 F. Supp. 2d 199 (D. Conn. 2013), *rev'd on other grounds*, 764 F.3d 258 (2d Cir. 2014), *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012)); MTD 13 n.3 (citing *Envtl. Def. Ctr. Inc. v EPA*, 344 F.3d 832 (9th Cir. 2003)); Defs. Reply 17 (citing *Conn. Bar Ass'n v. United States*, 620 F.3d 81 (2d Cir. 2010), *Beeman v. Anthem Prescription Mgmt., LLC*, 315 P.3d 71 (Cal. 2013), *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294 (1st Cir. 2005)); Defs. Reply 21 n.26 (citing *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014)).
"Defendants wisely do not cite *NEMA* or *NYSRA* to support their argument that the labeling mandate compels factual, noncontroversial speech." Pls. Reply 13 n.7.	Defs. Reply 20 ("'In resolving disputes, [courts] should follow the case which directly controls.' *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 108 (2d Cir. 2012). Here, those cases are *Zauderer*, *NEMA*, and *NYSRA*.")
"Defendants also have no ready answer to *CTIA-Wireless Ass'n v. City & Cnty. of San Francisco.*" Pls. Reply 14.	Defs. Reply 19 n.23 (distinguishing *CTIA*).

"[*N*]*o* professionally recognized scientific group has concluded there was doubt as to the health safety, or environmental risks of GE." Pls. Reply 15.	Defs. Reply 10 & n.10; Antoniou Decl. ¶ 35 (quoting numerous scientific groups that have concluded that there is doubt as to the health, safety, or environmental risks of GE, including the British Medical Association, which has stated that "[m]any unanswered questions remain, particularly with regard to the potential long-term impact of GM foods on human health and on the environment," and the American Public Health Organization, which has stated that there are "concerns related to human exposure to and consumption of these [GE] plant proteins.").
"The record fails to contain substantial evidence supporting Defendants' theories of GE's supposed risks." Pls. Reply 16.	*See generally* Defs. Reply Ex. J (collecting 60 studies, papers, and surveys considered by the Vermont Legislature).
"The State offers no substantive answer to [the] contention" that "there is no reasonable relationship between the Act's mandate and the State's alleged interests." Pls. Reply 16.	MTD 14-16 (Heading I(B): "The disclosure requirement is entirely rational and therefore constitutional under *Zauderer*").
"Defendants argue that 'natural' as applied to GE-derived food products is inherently misleading – because it is inherently misleading." Pls. Reply 17.	MTD 18-19 (explaining that Act 120 will "inevitably be misleading to consumers" because GE techniques are, by definition, not brought about by nature); Defs. Reply 29-30 (explaining why Act 120's exemptions do nothing to change the "inherently misleading" nature of "natural" advertising on GE foods).
"Defendants have failed to show that 'natural' advertising is *actually* misleading." Pls. Reply 17.	Defs. Reply 11 ("[T]he Legislature considered a summary of a 2010 survey conducted by The Hartman Group that showed that 61% of consumers believed that 'natural' suggests the absence of genetically engineered food. Ex. J at 804; Ex. E, Kolodinsky Decl. ¶ 9; *see also id.* ¶ 26 (results from 2013 Vermonter Poll 'confirm that "natural" labels on genetically engineered foods would be misleading to Vermont citizens in particular')"); Defs. Reply 30-31 (summarizing evidence in legislative record on "actually misleading" point).
"Defendants do not stir themselves to defend [the text of the statute against Plaintiffs' vagueness challenge]." Pls. Reply 18.	MTD 19-21 (explaining that Act 120, on its face, is not vague because it is clear what the ordinance as a whole prohibits); Defs. Reply 32 (same).

CONCLUSION

The Court should dismiss the Amended Complaint with prejudice. The Court should also deny Plaintiffs' Motion for a Preliminary Injunction.

DATED at Montpelier, Vermont this 15th day of December, 2014

STATE OF VERMONT

WILLIAM H. SORRELL
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By: /s/ *Megan J. Shafritz*

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