If It Smells Funny, Don't Eat It: An Example of the Controversy Surrounding Genetically Engineered Food Labeling Laws

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If It Smells Funny, Don't Eat It:  
An Example of the Controversy Surrounding  
Genetically Engineered Food Labeling Laws  

Diana Milbourn*  

Many states have made efforts to regulate the production and sale of genetically engineered (GE) foods. This has not only resulted in inconsistency among the states, but has also created controversy as each state approaches the issue without any detailed guidance from the federal government. As such, independent attempts to regulate GE foods may "smell funny"—in other words, they may look good, but are not quite right. This note examines one recent case in Vermont that highlights the struggles with enforceability and constitutionality of a state's attempt to regulate GE foods.

In Vermont, multiple food trade associations sued various government officials, including the state Attorney General, challenging the constitutionality of a newly signed state statute, Act 120. Act 120 requires that certain manufacturers and retailers identify whether raw and processed food sold in Vermont is produced through genetic engineering and prohibits manufacturers from labeling or advertising GE foods as "natural." Defendants moved to dismiss Plaintiffs' claims for failure to state a claim upon which relief may be granted, while Plaintiffs moved for a preliminary injunction to stop enforcement of the newly signed law. The District Court partially granted and partially denied Defendants' motions to dismiss, ultimately summarily dismissed three out of the five claims pled by Plaintiffs. The court's opinion may be considered lengthy, but both the Federal Rules of Civil Procedure and the Plaintiffs' pleading limited its scope. As a result, the opinion fails to

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1. THOMSON REUTERS, Genetically Modified Food, 0070 SURVEYS 1 (2015).
2. See id.
4. § 3043(c).
5. Grocery Mfrs. Ass’n, 102 F. Supp. 3d at 593.
6. Id.
7. Id. at 610.
8. See id. at 598–99.
9. See id. at 599.
explore significant consequences that may lurk beneath the enforcement of statutes such as Act 120.

Act 120 and similar state regulations are especially controversial considering the recent passage of a U.S. House of Representatives proposal (H.R. 1599) that blocks any mandatory labeling of GE foods and will completely preempt Act 120 if it passes the Senate.\textsuperscript{10} H.R. 1599 is called the “Safe and Accurate Food Labeling Act” by its supporters but is known by its opponents under the less-than-subtle name “Deny Americans the Right to Know” or “DARK” Act.\textsuperscript{11} When H.R. 1599 came before the Senate, they read it twice and then referred it to the Committee on Agriculture, Nutrition, and Forestry.\textsuperscript{12} This referral will likely halt the bill’s progress severely since committees are not required to act on measures referred to them.\textsuperscript{13} Either the committee will choose to review H.R. 1599 quickly, or the bill will die from neglect.\textsuperscript{14} If the committee decides not to take any further action in reviewing H.R. 1599, that will “kill” the bill much like a vote against it.\textsuperscript{15} In light of this possibility, and because H.R. 1599 was referred on July 24, 2015,\textsuperscript{16} guidance from the courts is likely the best immediate solution.

I. FACTS

Act 120 was signed on May 8, 2014, and will become enforceable on July 1, 2016.\textsuperscript{17}

It requires that “food [intended for human consumption] offered for sale by a retailer” after the Act’s effective date “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.”\textsuperscript{18}


\textsuperscript{11} \textit{Id.}


\textsuperscript{14} \textit{Id.}

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} H.R. 1599.

\textsuperscript{17} Grocery Mfrs. Ass’n v. Sorrell, 102 F. Supp. 3d 583, 594 (D. Vt. 2015).

\textsuperscript{18} \textit{Id.}
Act 120 has many components, each of which is essential to understanding the court’s rationale in this case. Two provisions are particularly critical in the court’s opinion.19

The first critical provision in Act 120 is the “disclosure requirement,”20 which dictates “packaged raw agricultural commodity[ies]” be labeled by GE manufacturers “with the clear and conspicuous words ‘produced with genetic engineering.’”21 The second critical provision of Act 120 prohibits GE food manufacturers from using labeling, advertising, or signage indicating that a GE food product is “‘natural,’ ‘naturally made,’ ‘naturally grown,’ ‘all natural,’ or any words of similar import that would have a tendency to mislead a consumer.”22 These definitions are known as the Act’s “‘natural’ restriction,”23 although Act 120 does not define the term “natural” or the phrase “any words of similar import.”24 Plaintiff trade associations attack both of these provisions, as well as the enforcement of the statute in its entirety, based on free speech, preemption, and Commerce Clause theories.25

II. DESCRIPTION OF PLAINTIFF’S CLAIMS

The court addressed each of the Plaintiffs’ claims in turn, partially in light of a document the Attorney General filed during the pendency of this case, “The Final Rule.”26 The Final Rule purports to clarify the scope of Act 120 and includes many definitions the original Act does not.27 In particular, the Final Rule ostensibly narrows the Act’s “natural” restriction by stating that the phrase “[n]atural or any words of similar import” means the words nature, natural, or naturally.”28 Plaintiffs objected to the Final Rule’s retroactive “clarification” because they contended, such amendments are unlawful.29 Plaintiffs assert that only the Vermont General Assembly may correct Act 120’s constitutional deficiencies.30 The court acknowledged, but did not resolve, the disputed admissibility of this “clarification” of Act 120; it permitted

19. Id.
20. Id. at 595.
21. Id.
22. Id. at 596.
24. Id.
25. Id. at 594.
26. Id. at 602.
27. Id.
28. Id. at 602.
29. See Grocery Mfrs. Ass’n, 102 F. Supp. 3d at 603.
30. Id.
the parties to submit supplemental briefings on the issue but does not address
the Rule’s validity.31

Plaintiffs filed five constitutional claims against Act 120:32

• Count One (1) challenged the “disclosure requirement” under the
  First Amendment because it compels manufacturers to use labels
  that do not accurately describe their products, resulting in consumer
  confusion and fear;33

• Count Two (2) raised a First Amendment challenge for the “‘natu-
  ral’ restriction” because labeling GE foods as “natural” is not mis-
  leading and prohibiting manufacturers from using these words is
  unconstitutional;34

• Count Three (3) asserted that the Act’s “‘natural’ restriction” is im-
  permissibly vague in violation of the First and Fifth Amendments
  because Act 120 does not define “any words of similar import;”35

• Count Four (4) challenged the Act as violating the Commerce
  Clause;36 and

• Count Five (5) asserts that Act 120 is preempted by numerous fed-
  eral statutes.37

Although there are numerous areas of discussion in the court’s opinion,
this note primarily addresses the court’s general rationale regarding the two
most critical provisions of Act 120.38 Additionally, because Count (5) is
likely moot in light of H.R. 1599,39 this note only examines Counts (1)
through (4).

III. PROCEDURAL AND SUBSTANTIVE HISTORY

The District Court held that some of Plaintiffs’ claims were sufficient to
establish plausible constitutional violations but dismissed the rest.40 The
court also held the Plaintiffs would not suffer irreparable harm absent entry
of a preliminary injunction against the enforcement of Act 120.41 Additionally,
because the Plaintiffs failed to request an evidentiary hearing or a con-

31. Id.
32. Id. at 595.
33. Id. at 621.
34. Id. at 636.
36. Id. at 648.
37. Id. at 610.
38. The disclosure requirement and the natural restriction. Id. at 594.
40. Grocery Mfrs. Ass’n, 102 F. Supp. 3d at 647.
41. Id.
solidation with the merits, the opinion did not provide the guidance that Plaintiffs likely sought, as the court was confined solely to the factual and procedural background presented by the parties. The most significant consequence of this procedural obstacle was the court’s inability to answer the question underlying all GE controversies: that “genetically engineered foods potentially pose risks to health, safety, agriculture, and the environment.” The gravity of this unanswered question is significant. Had the court been able to give an answer, the issue central to the GE controversy would be moot.

IV. COURT OF APPEAL HOLDING

Plaintiffs have appealed this case to the Second Circuit. However, considering the pendency of the Safe and Accurate Food Labeling Act (or DARK Act, depending on whom you ask), this issue may become moot, as H.R. 1599 will preempt Act 120 if it passes the Senate. Assuming, arguendo, that the pending bill does not pass, however, the case will proceed to the Second Circuit. This court primarily consists of Democratic appointees, and as most Democrats emphatically support mandatory labeling of GE food, the future of this case may be predictable even without the passage of H.R. 1599.

V. COURT’S RATIONALE

The Vermont District Court’s opinion ultimately approved of the Act’s “disclosure requirement” but was less favorable to its “‘natural’ restriction.” The court did not explicitly state why the first provision is preferable to the second, but it is likely due to the inherently different action each requires. The “disclosure requirement” compels GE manufacturers to provide

42. Id. at 599.
43. Id.
44. Id. (internal quotation marks omitted).
46. Gillam, supra note 10.
information to consumers, whereas the "‘natural’ restriction" explicitly prohibits speech.

A. Count (1): Whether Act 120’s “Disclosure Requirement” violates the First Amendment

Plaintiffs claim that “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." The court does not address the substance of this claim; instead, it reasons that forced speech is preferable to forbidden speech. The court bases its rationale on the Supreme Court’s holding that “there are material differences between disclosure requirements and outright prohibitions on speech.” The court also noted “First Amendment protection for commercial speech is justified in large part by the information’s value to consumers.” Accordingly, the “constitutionally protected interest in not providing . . . factual information is ‘minimal.’” Despite the fact that the court’s rationale presupposes the “opinion” with which the Plaintiffs “disagree,” the court adamantly endorses the disclosure of GE-related information to consumers.

B. Count (2): Whether Act 120’s “‘Natural’ Restriction” violates the First Amendment

The court was much less favorable towards Act 120’s “‘natural’ restriction.” This provision prohibits GE food manufacturers “from labeling or advertising GE foods as ‘natural,’ ‘naturally made,’ ‘naturally grown,’ ‘all natural,’ or ‘any words of similar import.’” The court found the enforce-

50. Id. at 621–22.
51. Id. at 636.
52. Id. at 621–22 (emphasis added).
53. See id. at 639.
54. Id. at 621 (quoting Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 650 (1985)).
56. Id.
57. Id. at 621.
58. Id. at 632 (referencing 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (plurality opinion)).
59. Id. at 642.
60. Id. at 594.
ment of Act 120's "'natural' restriction" turns on how "natural" is defined.61 It assumed, arguendo, that the word "natural" in conjunction with GE foods is misleading62 but ultimately found that the "'natural' restriction" was not directly related to, or likely to advance, any state interest.63

C. Count (3): Whether Act 120's "'Natural' Restriction" is Impermissibly Vague

The Plaintiffs' claim is that Act 120 does not define what "words of similar import" are and is not permissible on product packaging.64 The court warns that this definitional deficiency will "permit arbitrary and irrational enforcement as it provides no meaningful standard for determining which words will trigger liability."65 Thus, the court explained, the "'natural' restriction" will inconsistently penalize GE food manufacturers that use advertising terms that are "susceptible to more than one interpretation."66 Additionally, the court noted that neither Act 120 nor the Final Rule defines "'natural,' 'naturally made,' 'naturally grown,' [or] 'all natural.'"67 Accordingly, the court observed that the State faces an uphill battle in arguing that a GE food manufacturer's use of "'natural' terminology is actually or inherently misleading because the alleged deception cannot be measured against a statutory, or even a regulatory, definition of the restricted terms."68 The court ultimately concluded that the "'natural restriction' [ ] subjects GE manufacturers to a standardless restriction that virtually no food manufacturer could satisfy."69

D. Count (4): Whether Act 120 violates the Commerce Clause

Plaintiffs also claim that Act 120 violates the Commerce Clause.70 The court notes three possible ways a law may violate the Commerce Clause by discriminating against interstate commerce: "(1) by discriminating against interstate commerce on its face; (2) by harboring a discriminatory purpose; or

62. Id.
63. Id.; see Safelite Grp., Inc. v. Jepsen, 764 F.3d 258, 264 (2d Cir. 2014); Alexander v. Cahill, 598 F.3d 79, 90 (2d Cir. 2010).
65. Id. at 644.
66. Id. at 640 (quoting Alexander, 598 F.3d at 90).
67. Id. at 637.
68. Id.
69. Id. at 638.
(3) by discriminating in its effect." The court found that, although the law did not discriminate in either of the first two ways, the third way was plausible because Act 120’s "natural restriction" was "without limitation and for no stated purpose." The court reached this conclusion in large part because, under Act 120, GE food manufacturers are prohibited from using certain signage and advertising "regardless of where or how those activities take place." Thus, the court found that Plaintiffs’ allegations were "sufficient to state a plausible per se violation of the Commerce Clause based upon its discriminatory effects."

VI. CRITIQUE OF THE COURT’S APPROACH

Although the court acknowledges the limited scope of its opinion, it nonetheless misses potential opportunities to provide much-needed guidance on such controversial issues. For instance, the court summarily concludes that Act 120 does not violate the Commerce Clause, "even though interstate commerce may be affected." The court does not explain this conclusion, however, and thus provides no standard by which to determine how much interstate commerce is "enough" to bring the Commerce Clause into effect. The court also notes that courts are "particularly hesitant to interfere with the [state’s consumer protection] efforts," because that area of the law is traditionally under state control. Instead of merely warning against judicial activism, the court could have specified the limits of the doctrines. Without such guidance, Act 120 may "permit arbitrary and irrational enforcement."

Another deficiency in the court’s analysis is its statement on (or rather mention of) the risk of a “patchwork of state labeling requirements.” Plaintiffs raised the possibility of adverse effects on the competitive market caused by the likelihood of inconsistent food-labeling laws among the states. The court dismisses this concern as merely “potential” instead of

71. Id. at 604 (quoting Town of Southold v. Town of E. Hampton, 477 F.3d 38, 48 (2d Cir. 2007)).
72. Id. at 607.
73. Id.
74. Id.
75. Id. at 599 ("[T]he court is . . . confined to the factual and procedural background set forth herein . . . .")
77. Id. at 604.
78. Id. (quoting SPGGC, LLC v. Blumenthal, 505 F.3d 183, 194 (2d Cir. 2007)).
79. Id. at 644.
80. Id. at 609.
81. Id.
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proactively addressing the issue. It seems the court would rather wait until disparate state food labeling laws are passed before it considers how to resolve this disparity. In an area in which the country clearly needs guidance, judicial resolution of such issues is vitally important. Even if such guidance were mere dicta, the benefit of any direction (albeit implicit) to others who face issues with state food labeling laws would be invaluable. As the controversy surrounding GE foods continues, and as H.R. 1599 currently awaits Senate review, any guidance could make a difference.

Furthermore, for a court opinion that so drastically impacts commerce, both in Vermont and out-of-state, it is woefully silent on the topic of commerce itself. The court did not discuss any potential deterrent effect that mandatory labeling laws may have on out-of-state manufacturers who may be reluctant to do business in Vermont as a result of Act 120, nor did the court address concerns that such laws may impact manufacturers’ livelihoods, the pursuit of which is recognized as a constitutional right. Furthermore, the court did not address the fact that this law impacts not only manufacturers, but retailers of food products as well. The court did not seem to consider any possible effects this law may have on regional, or possibly national, grocery store chains. Act 120 requires retailers in Vermont to label shelves on which genetically modified food will sit. This will presumably affect consumer choices and may affect sales in the Vermont locations. The only recourse in such a situation is raising prices of the food itself, which may cause potential price regulation difficulties chain-wide.

82. Grocery Mfrs. Ass’n, 102 F. Supp. 3d at 609.
83. See id.
84. See Genetically Modified Food, supra note 1.
85. H.R. 1599.
87. See id.
90. Grocery Mfrs. Ass’n, 102 F. Supp. 3d at 595.
The most troublesome, and unfortunately most ambiguous, issue in this court's opinion is that the "disclosure requirement" compels speech that presumes the truth of Defendants' claims: that there is a measurable difference between GE and "natural" foods.\footnote{Grocery Mfrs. Ass'n, 102 F. Supp. 3d at 595.} As declared by the Vermont General Assembly, Act 120's purpose is, in part, to "[e]stablish a system by which . . . persons may avoid potential health risks of food produced from genetic engineering."\footnote{Id. at 598.} This claim has been neither proven nor negated, but the requirement of different labeling rules arguably presumes that it has been proven.\footnote{See Carole Bartolotto, Genetically-Modified Organisms (GMOs) Have NOT Been Proven Safe, HUFFINGTON POST (Jul. 24, 2014, 5:21 PM), http://www.huffingtonpost.com/carole-bartolotto/ have-genetically-modified_b_5597751.html.}

Although the court recognizes that there are "material differences between disclosure requirements and outright prohibitions on speech"\footnote{Grocery Mfrs. Ass'n, 102 F. Supp. 3d at 621 (quoting Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 650 (1985)).} and that forcing speech that is \emph{only factual} does not violate the First Amendment,\footnote{Id. at 626.} it misses a step in its analysis. The statement that a food product is genetically engineered may itself sound like a "fact," but if the statement is based on something that has \textit{not been proven}, is it factual? The court does not address this question and merely dismisses the claim because food-labeling does not neatly fit within the definition of an "opinion."\footnote{Id. at 629.} Moreover, the court concludes that the compelled speech is not controversial enough to violate the First Amendment.\footnote{Id. at 630.}

This case ensures that state laws regarding food-labeling will remain inconsistent (unless, of course, H.R. 1599 is passed) and that consumers will still not know whether GE food poses health risks.\footnote{See id. at 600.} Given that the scientific conclusions about GE food are widely varied and hotly contested,\footnote{See Genetically Modified Food, supra note 1, at 1.} perhaps the courts should step in and provide guidance. This court's holding may be moot if H.R. 1599 becomes law\footnote{Gillam, supra note 10.}—but otherwise, consumers, manufacturers, and retailers will remain unsure of how to proceed.

\footnotesize{92. Grocery Mfrs. Ass'n, 102 F. Supp. 3d at 595.  
93. Id. at 598.  
96. Id. at 626.  
97. Id. at 629.  
98. Id. at 630.  
99. See id. at 600.  
100. See Genetically Modified Food, supra note 1, at 1.  
101. Gillam, supra note 10.}
VII. OVERVIEW OF THE CRITIQUE

This case addresses a law that requires special labels for genetically modified food but, unfortunately, leaves many questions unanswered.\(^{102}\) Laws like Act 120 are controversial in many states because of disputed safety and commercial claims.\(^{103}\) Thus, laws such as these will continue to raise many concerns, including discrimination, free speech, preemption issues, and whether the law is designed to protect the health and safety of the public at large, as opposed to an improper purpose.\(^{104}\) Moreover, even if these laws do pursue a proper purpose, significant concerns exist about whether the requirements of these laws are reasonably related to their purported legislative purpose.\(^{105}\)

This case clearly reflects the fact that GE foods have not been conclusively proven dangerous to public health.\(^{106}\) However, this case illustrates that there is both a need (however disputed) and a resistance to regulate genetically modified food. Ironically, the Plaintiffs’ pleading in this case deprived the court of a crucial opportunity to provide some much-needed direction on these issues. We can only hope that next time plaintiffs will ask for the guidance that the public needs and deserves.

102. § 3043.
103. *Genetically Modified Food*, supra note 1, at 1.
104. See *Grocery Mfrs. Ass’n*, 102 F. Supp. 3d at 639.
105. See id. at 635 (quoting Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 650).
106. See Bartolotto, supra note 94.