THE CONSTITUTIONALITY OF GMO DISCLOSURE REQUIREMENTS

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I. BACKGROUND

A lack of consensus exists among members of the public and in the scientific community regarding "the safety of genetically engineered foods."[1] The peer-reviewed "scientific literature [contains] negative, neutral, and positive health results."[2] Few long-term randomized double blind placebo controlled clinical trials exist to validate the long-term safety of genetically engineered foods, and it remains possible that one or more of these foods may result in injury to consumers.[3]

Public disagreement over the safety of genetically engineered foods has led interest groups on both sides of the debate to seek legislative solutions. Several state legislatures have considered bills to mandate labeling disclosures for genetically modified foods; such a bill has passed in Vermont, Maine and Connecticut.[4] Supporters of these mandatory labeling disclosures argue that they objectively inform the public of the contents of various foods, and that this provides individuals the necessary information to make informed purchasing decisions.[5]

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1. H.B. 112, 72d Leg., Biennial Sess. (Vt. 2014).
2. *Id.*
3. *See id.*
4. *See* ME. REV. STAT. ANN. tit. 22, § 2591 (2014); VT. STAT. ANN. tit. 9, § 3043 (West 2016); CONN. GEN. STAT. ANN. § 21a-92c (West 2015).
5. James E. McWilliams, *The Price of Your Right to Know*, SLATE (May 20, 2014),

Those who oppose mandatory genetically modified organism ("GMO") labeling laws argue that they are unconstitutional because there is no credible scientific support for the contention that genetic modification of foodstuffs is dangerous and that mandatory labeling carries an implicit implication to the contrary.[6] Opponents of mandatory GMO labeling laws have submitted a federal bill to prohibit such disclosures.[7] That bill was passed in the House of Representatives on July 23, 2015, and at the time of this writing awaits consideration by the Senate.[8] Given the strongly held views on both sides of this question, it is important to consider the constitutionality of laws that compel the disclosure of genetically engineered ingredients.

II. STATE GMO LABELING LAWS

In 2014 alone, 25 states proposed 67 pieces of legislation that relate to GMO labeling.[9] As of July 2015, three states have enacted mandatory GMO labeling laws: Maine, Vermont, and Connecticut.[10] Those laws require conspicuous statements identifying the presence of genetically engineered ingredients on packaging and labels of foods sold at retail. The laws in Maine and Vermont also prohibit the use of the term "natural" on foods that contain genetically engineered ingredients.[11] These laws are intended to protect consumers' "right to know" what is in their food. The "right to know" furthers a number of legitimate state interests, including reducing consumer confusion and inadvertent deception.[12]

The Vermont GMO labeling law, Act 120, signed into law on May 8, 2014, will go into effect on July 1, 2016.[13] Act 120 imposes two primary requirements concerning genetically engineered foods sold in Vermont: (1) certain manufacturers and retailers must identify raw and processed food sold in Vermont that was produced (either wholly or partly) with genetic engineering, and (2) manu-

http://www.slate.com/articles/health_and_science/science/2014/05/gmo_food_labels_would_label_laws_in_vermont_maine_connecticut_increase_food.html.

6. It has also been suggested that state laws mandating GMO labeling violate World Trade Organization (WTO) Agreements, but such a challenge would face a high burden of proof and likely would be unsuccessful. *See generally* Michele M. Compton, *Applying World Trade Organization Rules to the Labeling of Genetically Modified Foods*, 15 PACE INT'L L. REV. 359 (2003).

7. *See generally* Safe and Accurate Food Labeling Act of 2015, H.R. 1599, 114th Cong.

8. *Id.* § 304.

9. McWilliams, *supra* note 5, at 2.

10. *Id.*

11. ME. REV. STAT. ANN. tit. 22, § 2593(2) (2014); VT. STAT. ANN. tit. 9, § 3043(c) (2016).

12. ME. REV. STAT. ANN. tit. 22, § 2591(3).

13. *See* H.B.112, 72d Leg., Biennial Sess. (Vt. 2014).

facturers may not label GMO foods as "'natural,' 'naturally made,' 'naturally grown,' 'all natural,'" or containing the term nature.[14] Genetically engineered foods must be labeled with a conspicuous disclaimer that says "produced with genetic engineering" or "genetically engineered."[15] The act does not consider a change of genetic material through traditional breeding techniques, conjugation, fermentation, traditional hybridization, in vitro fertilization, or tissue culture to be genetic engineering. Act 120 also imposes a mandatory disclaimer which factually discloses the FDA's position on genetically modified foods.[16]

The Grocery Manufacturers Association, Snack Food Association, International Dairy Foods Association, and National Association of Manufacturers challenged Act 120 in the United States District Court for the District of Vermont in 2014 claiming, among other things, that the Act is invalid under the First Amendment and Commerce Clause of the U.S. Constitution, and is preempted by federal law under its Supremacy Clause.[17] Upon a motion to dismiss on behalf of the State of Vermont and a cross-motion for preliminary injunction on behalf of plaintiffs, the court declined to issue a preliminary injunction and held that: (1) Act 120 is not expressly preempted by the FDCA, (2) not conflict preempted by the FDCA; (3) the disclosure requirements of Act 120 did not reflect viewpoint discrimination in violation of the First Amendment, (4) plaintiffs had stated a claim that the statute's use of "natural" terminology violated the First Amendment; (5) and plaintiffs had stated a claim for vagueness as to the phrase "words of similar import."[18] The court in finding no express preemption held that the plaintiffs failed to show that "Act 120's GE disclosure requirement is 'not identical' to any mandatory labeling requirement of the FDCA" and Act 120 properly exempted those producers whose products are regulated by the PPIA and FMIA.[19] The court dismissed plaintiffs' conflict preemption claims on the grounds that Congress has consistently tolerated state regulation of food and beverages, and Act 120's GE requirement can clearly coexist with federal regulations.[20] The court also determined that the Act's GE disclosure did not require manufacturers or retailers to take the government's side on the issue of GE safety, but instead to merely convey facts about food content.[21] The ruling has been appealed to the United States Court of Appeals for the Second Circuit.[22]

14. *See* VT. STAT. ANN. tit. 9, § 3043(c).
15. *See id.* tit. 9, § 3043(b)(1).
16. *See* H.B. 112.
17. *See* Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 594 (D. Vt. 2015).
18. *Id.* at 583-84.
19. *Id.* at 613.
20. *Id.* at 617.
21. *Id.* at 625.
22. Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583 (D. Vt. 2015), *appeal docketed*,

Maine's law, like Act 120, mandates that foods produced wholly or in part by genetic engineering must bear the conspicuous disclosure statement "Produced with Genetic Engineering."[23] Maine's law also prohibits the use of the term "natural" on foods that qualify as genetically engineered. [24] Maine's law contains a contingent effective date which delayed the implementation of the law until similar legislation passed in either five other states or state(s) with a total population exceeding twenty million.[25] Connecticut passed the first mandatory GMO labeling law in 2013. The Connecticut law is substantially similar to both Maine and Vermont's law. The law defines genetic engineering using a nearly identical definition to Vermont's law.[26] Like Maine's law, Connecticut's law has yet to take effect because it has a contingent effective date which requires that four other states pass similar laws before its law will take effect.[27]

III. CONSTITUTIONAL CONSIDERATIONS

State laws which compel commercial speech are generally subject to attack on three grounds: (1) the laws violate the First Amendment to the United States Constitution; (2) federal law preempts the state laws; or (3) the laws violate the Dormant Commerce Clause. The existing state laws that mandate labeling of genetically modified foods likely survive all three of these considerations for the reasons explained below.

A. First Amendment

The right to speak and the right not to speak are "complementary components of the broader concept of 'individual freedom of the mind'" protected by the First Amendment.[28] Generally, government regulation of speech based on content is subject to the highest level of judicial review, strict scrutiny.[29] However, where the speech "propos[es] a commercial transaction," it receives lesser protection than other forms of speech.[30] Where such commercial speech is *compelled* by the state, the level of review depends on the nature of the speech mandate.

No. 15-1504 (2d Cir. May 6, 2015).

23. ME. REV. STAT. tit. 22 § 2593(1) (2014).

24. *Id.* § 2593(2).

25. *See id.*

26. *See* H.B. 6527, 183d Sess. (Conn. 2013).

27. *See id.*

28. Wooley v. Maynard, 430 U.S. 705, 714 (1977) (citations omitted).

29. *See* Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 642 (1994).

30. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980).

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York and its progeny held that when the state censors or restricts protected commercial speech, or when the state compels the speaker to adopt a specific viewpoint or state-sanctioned orthodoxy, intermediate scrutiny is applied.[31] Under the *Central Hudson* test, a four part inquiry is applied to the law.[32] First, the speech must be lawful and non-misleading.[33] Second, the asserted government interest must be substantial.[34] Third, the regulation must directly advance the government interest.[35] Fourth, the regulation must not be more extensive than necessary to serve the government interest.[36]

An exception to the *Central Hudson* intermediate scrutiny test was first articulated in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*.[37] Where the state compels the disclosure of purely factual information, the disclosure need only be reasonably related to a legitimate state interest.[38] In *Zauderer*, the Court appeared to limit its holding to disclosures that are intended to prevent consumer deception.[39] However, the Second Circuit and recently the D.C. Circuit have held that the *Zauderer* exception applies whenever the state compels purely factual information, regardless of the governmental interest furthered.[40] The D.C. Circuit overruled its prior holding in *R.J. Reynolds Tobacco v. Food & Drug Administration* which limited *Zauderer's* applicability to circumstances where the state interest is the prevention of deception.[41] In *American Meat Institute v. USDA*, the D.C. Circuit explained that "*Zauderer's* characterization of the speaker's interest in opposing forced disclosure of such information as 'minimal' seems inherently applicable beyond the problem of deception, as other circuits have found."[42]

In *National Electrical Manufacturers Ass'n v. Sorrell*, the Second Circuit assessed the constitutionality of a Vermont statute requiring manufacturers of

31. *See id.* at 573; R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205, 1217 (D.C. Cir. 2012), *overruled by* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014).

32. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *See* Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

38. *Id.*

39. *Id.*

40. *See* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014); N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 133 (2d Cir. 2009).

41. *Am. Meat Inst.*, 760 F.3d at 22; *N.Y. State Rest. Ass'n*, 556 F.3d at 133.

42. *Am. Meat Inst.*, 760 F.3d at 22; *N.Y. State Rest. Ass'n*, 556 F.3d at 134.

mercury-containing products to label their products and packaging to inform consumers that the products contain mercury.[43] The Court upheld the mandatory disclosure, and explained:

> [W]ithin the class of regulations affecting commercial speech, there are "material differences between [purely factual and uncontroversial] disclosure requirements and outright prohibitions on speech." Regulations that compel 'purely factual and uncontroversial' commercial speech are subject to more lenient review than regulations that restrict accurate commercial speech and will be sustained if they are 'reasonably related to the State's interest in preventing deception of consumers.'[44]

The Vermont statute at issue in *Sorrell* did not revolve around consumer deception, but the Second Circuit still applied *Zauderer* because "Vermont's interest in protecting human health and the environment from mercury poisoning is a legitimate and significant public goal."[45] Put simply,

> [t]he law was not intended to combat consumer deception, 'but rather to better inform consumers about the products they purchase' with the hope that newly informed consumers would properly dispose of mercury-containing products and thereby protect 'human health and the environment from mercury poisoning.'[46]

In *New York State Restaurant Ass'n v. New York City Board of Health*, the Court rejected a First Amendment challenge to a city regulation requiring restaurants to post calorie content information on their menus.[47] The court upheld the calorie statement because the disclosure was indisputably factual, and it furthered the State's interest in mitigating obesity and, thus, protecting consumer health.[48]

Thus, the clear trend among the circuits is to apply a broad *Zauderer* exception, under which the central inquiry is whether the disclosure at issue is a "purely factual disclosure." If so, the law is subjected to rational basis review.[49]

Statutes go beyond the *Zauderer* exemption when they compel speech that expresses a specific viewpoint or opinion. For example, the Seventh Circuit struck down a law that required video game retailers to label "sexually explicit"

43. Nat'l Elec. Mfgs. Ass'n v. Sorrell, 272 F.3d 104, 107 (2d Cir. 2001).

44. *Id.* at 113; *Zauderer*, 471 U.S. at 650-51.

45. *Sorrell*, 272 F.3d at 115 (explaining that the law would increase consumer awareness of the need to properly dispose of mercury-containing products).

46. *Id.* at 115-16; Safelite Grp., Inc. v. Jepsen, 988 F. Supp. 2d 199, 205 (D. Conn. 2013).

47. *N.Y. State Rest. Ass'n*, 556 F.3d at 136.

48. *Id.* at 134.

49. *See id.*

video games.[50] The court held that the compelled speech violated the First Amendment because the compulsion did not involve a "purely factual disclosure," but, instead, forced retailers to communicate "a subjective and highly controversial message—that the games content is sexually explicit."[51] The definition of "sexually explicit" was inherently subjective and, so, labeling the product as "sexually explicit" was an adoption of the State's opinion.[52] Moreover, the term "explicit" is pejorative, thus conveying the view that the nudity was offensive. The Seventh Circuit explained that the "State's definition of this term is far more opinion-based than the question of whether a particular chemical is within any given product."[53]

Applying the principles explained above, state mandated GMO laws do not violate the First Amendment. The first inquiry is whether to apply *Central Hudson* or *Zauderer*. As the Seventh Circuit noted in *Entertainment Software Ass'n v. Blagojevich*, whether a particular chemical is within any given product is a purely factual inquiry.[54] Like calorie content and mercury content, GMO disclosures are factual statements about the contents of food. Each of the three GMO disclosure bills that have been passed by state legislatures clearly define the types of products considered "genetically engineered." For example, the Vermont law defines "genetic engineering" as 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 . . . in vitro nucleic acid techniques . . . [or] fusion of cells. . . or hybridization techniques."[55] This is a scientific and factual definition sufficiently articulated to put all regulated entities on notice of the specific conduct regulated.

Opponents of a mandatory GMO disclosure law would likely argue that there is an implied negative connotation, like "sexually explicit," associated with the disclosure. Such a connotation would remove the law from *Zauderer's* "purely factual" exception. Vermont's law undermines that argument because it includes a mandatory disclaimer that accurately and truthfully sets forth the FDA's position on genetically modified foods.[56] The disclaimer states that "the Food and Drug Administration does not consider foods produced from genetic engineering to be materially different from other foods."[57] State laws modeled after Vermont's nullify any potential negative connotation associated with the

50. Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 643 (7th Cir. 2006).
51. *See id.* at 652.
52. *Id.*
53. *Id.*
54. *See id.*
55. *See* VT. STAT. ANN tit. 9 § 3042(4) (West 2016).
56. *See generally* H.B. 112, 72d Leg., Biennial Sess. (Vt. 2014).
57. *Id.*

mandated disclosure.

Since mandated GMO disclosures convey viewpoint neutral, factual information, under the modern trend of *Zauderer* they are constitutional so long as a legitimate state interest exists for the disclosure. A legitimate interest need only establish a "rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose."[58] The State has no obligation to produce evidence, or empirical data to sustain rationality.[59] Under rational basis review a statute comes with a "strong presumption of validity" and those challenging the law must bear the burden to "negate every conceivable basis which might support it."[60] "[B]ecause [courts] never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."[61] Thus, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."[62]

Maine's law lists five reasonable state interests to which a GMO labeling law could be rationally related: (1) promotion of public health and safety, (2) limitation of environmental impacts, (3) prevention of consumer confusion, (4) promoting economic development, and (5) protecting religious and cultural practices.[63] Courts have held that these are all legitimate state interests. However, of most importance is the state interest in preventing consumer confusion or deception. The law is clear that if the state action is rationally related to the prevention of consumer deception or confusion, *Zauderer* would apply in any jurisdiction. A purely factual disclosure that informs consumers about food content and manufacturing reduces the potential for consumer confusion.

B. Preemption

State laws relating to labeling of foods must also pass a preemption analysis. Under the Supremacy Clause of the United States Constitution, the "Constitution, and the Laws of the United States . . . shall be the Supreme Law of the Land."[64] "[S]tate laws that conflict with federal law are without effect" and are

58. Nat'l Elec. Mfgs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001).

59. F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

60. *Id.* at 314-15; Lenhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973).

61. *Beach Commc'ns, Inc.*, 508 U.S. at 315; U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980).

62. *Beach Commc'ns, Inc.*, 508 U.S. at 315.

63. ME. REV. STAT. tit. 22, § 2591 (2014); *Sorrell*, 272 F.3d at 115 (noting states have a substantial interest in protecting human health and the environment.).

64. U.S. CONST. art. VI, cl. 2.

preempted.[65] However, "[h]ealth and safety issues have traditionally fallen within the province of state regulation. This is true of the regulation of food and beverage labeling and branding."[66] Therefore, states may regulate in the area of food and beverage labeling and branding so long as those regulations are not preempted by federal law. In *Cippllone v. Liggett Group, Inc.*, the U.S. Supreme Court described the relevant test for determining whether Congress intended for a federal statute to preempt state law:

> Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.[67]

Unless Congress clearly intends to supersede state law, the Courts apply a presumption against preemption.[68] "In areas of traditional state regulation, [the court] assume[s] that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest."[69] Under the Supremacy Clause, a state law may be preempted by federal law in three ways: express preemption, field preemption, and conflict preemption.[70] Courts are "guided by the rule that '[t]he purpose of Congress is the ultimate touchstone in every preemption case.'"[71] It is generally accepted that federal law does not occupy the entire field of food and beverage regulation, and thus field preemption does not apply.[72] Therefore, the relevant analysis is whether state laws which mandate

65. N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 123 (2d Cir. 2009).

66. Holk v. Snapple Beverage Corp., 575 F.3d 329, 334 (3d Cir. 2009).

67. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (citations omitted).

68. *See, e.g.*, *id.* ("Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by [the] Federal Act unless that [is] the clear and manifest purpose of Congress.'"); Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

69. Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) (citations omitted).

70. *See* Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985).

71. Altria Grp., Inc. v. Good, 555. U.S. 70, 76 (2008); *Medtronic*, 518 U.S. at 485.

72. *See* United States v. Locke, 529 U.S. 89, 111 (2000); *see also* Holk v. Snapple Beverage Corp., 575 F.3d 329, 337 (3d Cir. 2009) ("It does not appear that Congress has regulated so comprehensively in either the food and beverage or juice fields that there is no role for the states."); Fellner v. Tri–Union Seafoods, L.L.C., 539 F.3d 237, 243 n.3 (3d Cir. 2008) (citing *Hillsborough Cty.*, 471 U.S. at 717) (noting defendants could not assert a field preemption claim in case involving labeling requirements because "[c]ourts rarely find field preemption,

GMO labeling statements are either expressly preempted or conflict preempted.

1. USDA Labeling Laws

The USDA's Food Safety and Inspection Service ("FSIS") is primarily responsible for the regulation of food labeling for meat, poultry, and egg products shipped in interstate commerce under the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 601 *et seq*., the Poultry Products Inspection Act ("PPIA"), 21 U.S.C. § 451 *et seq*., the Egg Products Inspection Act ("EPIA"), 21 U.S.C. § 1031 *et seq*., and their implementing regulations, 9 C.F.R. § 317 *et seq*. These statutes provide the USDA the authority to regulate marketing, labeling, or packaging of meat, poultry, or processed parts.[73] The USDA applies the FMIA and the PPIA to product labels and materials that accompany a product but are not attached to it, such as point-of purchase materials.[74] Both the FMIA and PPIA contain express preemption language which prohibits states from "[m]arking, labeling, packaging, or [adding] ingredient requirements in addition to, or different than, [those] mandated by federal law."[75] The EPIA also contains express preemption language which prohibits labeling requirements with respect to egg products processed at an official plant in accordance with the requirements of the EPIA that are in addition to or different from those required under the EPIA, the FDCA, or the Fair Packaging and Labeling Act.[76]

The express preemption provisions of the FMIA and PPIA have been upheld by numerous courts.[77] Therefore, any state law requiring the disclosure of "genetically engineered" foods may not apply such requirements to products that fall within the jurisdiction of FSIS. While this authority does apply to the majority of meat, egg and poultry products, a limited list of animal products are not subject to FSIS jurisdiction.[78]

especially in areas traditionally regulated by the states, unless the structure of a regulatory program leaves little doubt that Congress intended federal law to be exclusive in a particular field").

73. *See generally* Federal Meat Inspection Act, 21 U.S.C. §§ 601-95 (2012); Poultry Products Inspection Act, 21 U.S.C. §§ 451-72 (2012); Egg Products Inspection Act, 21 U.S.C. §§ 1031-56 (2012); 9 C.F.R. §§ 317.1-.400 (2016).

74. 21 U.S.C. §§ 457, 607; USDA GUIDE TO FEDERAL FOOD LABELING REQUIREMENTS FOR MEAT, POULTRY, AND EGG PRODUCTS 4-5 (R. Post et al. eds., 2007).

75. 21 U.S.C. § 678.

76. 21 U.S.C. § 1052(b).

77. *See* Am. Meat Inst. v. Leeman, 180 Cal. App. 4th 728, 761 (2009); *see also* Nat'l Broiler Council v. Voss, 44 F.3d 740, 745 (9th Cir. 1994).

78. *See* USDA, FOOD STANDARDS AND LABELING POLICY BOOK 10 (2005) (exempting products with small amounts of meat if the meat used was already inspected according to USDA standards).

2. FDCA and NLEA

Two federal laws address the labeling of foods beyond the scope of the USDA: the Federal Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301–399f, and the Nutrition Labeling and Education Act ("NLEA"), 21 U.S.C. §§ 343–1-343–3. "The FDCA prohibits the misbranding of food and drink and its 'statutory regime is designed primarily to protect the health and safety of the public at large.'"[79] The FDCA does not contain any express preemption language, it does not, itself, provide a basis for express preemption of mandatory GMO labeling laws.[80]

The NLEA was intended "to clarify and to strengthen the Food and Drug Administration's legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about nutrients in foods."[81] Unlike the FDCA, the NLEA contains an express preemption provision.[82] This provision prohibits states from enacting laws or regulations that are "not identical to the requirement[s]" of the NLEA's labeling provisions concerning: food sold under another name; imitation food; misleading containers; food in package form; prominence of information; standard of identity; standards of quality and fill of container; unidentified foods (foods without a definition and standard of identity); artificial flavoring, artificial coloring, and chemical preservatives; nutrition information; nutrition levels and health related claims; major food allergens; and non-major food allergens.[83] This provision, however, is to be construed narrowly.[84] Furthermore, the NLEA clearly exempts "any requirement respecting a statement in the labeling of food that provides for a warning concerning the safety of the food or *component of the food*."[85]

State laws that mandate "genetically engineered" statements on labels are not implicated by the provisions described above. Foods that have established federal standards of identity can bear "genetically engineered" on their label and still comply with the federal standard.[86] The NLEA preemption clause regarding

79. POM Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228, 2234 (2014); Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 611 (D. Vt. 2015).

80. *POM Wonderful*, 134 S. Ct. at 2234; Grocery Mfrs. of Am., Inc. v. Gerace, 755 F.2d 993, 997 (2d Cir.), *aff'd*, 474 U.S. 801 (1985).

81. H.R. Rep. No. 101–538, at 7 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 3336, 3337.

82. *See* 21 U.S.C. § 343-1(a)(5).

83. *See generally* 21 U.S.C. § 343-1(a)(2).

84. *See* Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353, § 6(c)(2) (emphasis added).

85. *Id.* (stating the FDCA "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under [21 U.S.C. § 343-1] of the Federal Food, Drug, and Cosmetic Act.") (emphasis added).

86. *See generally, e.g.*, 21 C.F.R. § 130.8 (2016).

nutrition labeling does not expressly preempt genetically engineered statements either.[87] While such a statement does concern a component of the food, it does not concern the nutritional content of the food.[88] These statements are not implicated by the NLEA's preemption of health-related or nutrition level claims.[89] The term genetically engineered, and similar statements, do not expressly or implicitly characterize the level of a nutrient in a food, or characterize the relationship between a nutrient in a food and a disease or health-related condition.[90] Thus, the only potentially applicable preemption clauses do not prohibit state mandated labeling of genetically engineered foods and express preemption cannot be said to apply.[91]

Although the FDCA and NLEA do not expressly preempt GMO labeling laws, the House of Representatives has recently passed the Safe and Accurate Food Labeling Act, H.R. 1599.[92] That bill, which passed by a vote of 275 to 150, expressly preempts state regulation of the labeling of a food by virtue of its having been developed using bioengineering, including any requirements for claims that a food is or contains an ingredient that was developed using bioengineering.[93] Because the legislative intent of this bill is to expressly preempt state GMO labeling laws, the enactment of this legislation would moot the previous analysis

87. *See* 21 U.S.C. § 343-1(a)(5).

88. *See* 21 U.S.C. § 343(q) (requiring food labels to bear nutrition information about serving size, servings per container, calories, fat, cholesterol, sodium, carbohydrates, sugars, fiber, protein, vitamins, and minerals).

89. *See* 21 U.S.C. § 343-1(a)(5).

90. *See* 21 C.F.R. § 101.13(b) (2016); *see also* 21 C.F.R. § 101.14(a)(1).

91. *See* Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 615 (D. Vt. 2015).

92. *See* Safe and Accurate Food Labeling Act of 2015, H.R. 1599, 114th Cong. H.R. 1599 may be susceptible to a constitutional challenge on First Amendment grounds. The bill would place a pre-market approval burden on voluntary "non-GMO" disclosures by requiring certification through the FDA. This commercial speech is truthful and non-misleading and thus afforded protection under the First Amendment. Therefore, for the FDA pre-market certification requirement of H.R. 1599 to withstand constitutional scrutiny, the government would need to assert a substantial government interest, the regulation would need to *directly* advance that interest and the regulation would need to be narrowly tailored to achieve that interest. Because H.R. 1599 expressly states that there is no material difference between GE and non-GE food products, in H.R. 1599, section 424(b)(1) and section 291B(a)(3)), the government could not assert an interest in protecting consumer health. Because the speech is truthful and non-misleading, the government would struggle to establish that the law prevents or mitigates potential deception. Even if prevention of deception was accepted as the interest, there are clearly less restrictive means of enforcing accurate labeling, e.g. regulation through enforcement. The FDA enforces nearly every labeling law without a pre-market approval process, thus, such a method would clearly be appropriate and less restrictive. Therefore, this provision of H.R. 1599 is likely unconstitutional. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

93. H.R. 1599.

and result in the preemption of state laws mandating GMO disclosure statements.

"Conflict preemption exists (1) where it is impossible for a private party to comply with both state and federal requirements, or (2) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[94] The first prong requires "no inquiry into congressional design" but turns solely on whether "compliance with both federal and state regulations is a physical impossibility."[95] Whether a state law is an obstacle to Congressional purpose is "'informed by examining the federal statute as a whole and identifying its purpose and intended effects.'"[96] A state law must pose such an obstacle to Congressional purpose that "the [federal] act cannot otherwise be accomplished . . . and its provisions be refused their natural effect."[97]

Under this analysis, state mandatory GMO labeling laws are not conflict preempted. First, the NLEA prohibits courts from implying preemption based upon any of its provisions.[98] However, the NLEA does not purport to prevent a court from concluding that a state law is impliedly preempted by another federal law or regulation.[99] Thus, for a court to find that H.112 is impliedly preempted, it must do so on provisions of federal law other than the NLEA.[100] Second, neither the FDCA, nor its subsequent regulations address or concern the use of the term "genetically engineered."[101] Although the FDA has published draft guidance regarding *voluntary* labeling of foods produced through genetic engineering, these recommendations are non-binding and thus cannot preempt state law.[102] Thus, there is no potential conflict between existing federal food and beverage labeling laws, and state laws mandating the disclosure of "genetically engineered" foods.

94. *Grocery Mfrs. Ass'n*, 102 F. Supp. 3d at 615 (internal quotations omitted); *see also* Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995).

95. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963); *see also* Wyeth v. Levine, 555 U.S. 555, 572 (2009) ("Impossibility pre-emption is a demanding defense.").

96. *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 725 F.3d 65, 101 (2d Cir. 2013); Mary Jo C. v. N.Y. State & Local Ret. Sys., 707 F.3d 144, 162 (2d Cir. 2013).

97. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000).

98. *See* Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353, § 6(c)(1) (stating that the NLEA "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under [21 U.S.C. § 343-1] of the Federal Food, Drug, and Cosmetic Act").

99. *Id.* § 6(c)(3).

100. *See* Holk v. Snapple Beverage Corp., 575 F.3d 329, 336 (3d Cir. 2009).

101. *See* U.S.C. § 343-1 (2012).

102. *See Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Derived from Genetically Engineered Plants*, FDA, http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/labelingnutrition/ucm059098.htm (last visited Apr. 27, 2016).

C. Dormant Commerce Clause

The Commerce Clause authorizes Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indians Tribes."[103] While the Commerce Clause does not "expressly restrain 'the several States' in any way," the U.S. Supreme Court has interpreted a negative implication within the Clause, "called the dormant Commerce Clause."[104] However, "the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected."[105] Under the Dormant Commerce Clause, when federal law is silent on a matter, state action may nonetheless be restrained if it burdens interstate commerce.[106] The purpose of the Dormant Commerce Clause is to "prevent[] a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear."[107] "A law may clearly discriminat[e] against interstate commerce in three ways: (1) by discriminating against interstate commerce on its face; (2) by harboring a discriminatory purpose; or (3) by discriminating in its effect."[108]

The state GMO labeling laws that have been enacted do not discriminate on their face against interstate commerce in favor of intrastate commerce.[109] The labeling regulations apply equally to in-state and out-of-state manufacturers. Neither do these laws harbor a discriminatory purpose.[110] Thus, state GMO labeling laws may only be unconstitutional if they fail the "Pike balancing test," which assesses discriminatory effect.[111] Under *Pike v. Bruce Church, Inc.*, a law will be struck down where it burdens interstate commerce disproportionately to the local benefits derived.[112] State specific labeling laws likely impose some burdens on interstate commerce, e.g., increased business costs and revenue reduction. However, a nondiscriminatory regulation significantly burdens interstate

103. U.S. CONST. art. I, § 8, cl. 3.

104. Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337 (2008).

105. Maine v. Taylor, 477 U.S. 131, 138 (1986); *see also* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36 (1980).

106. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 326 (1979).

107. Oklahoma Tax Comm'n. v. Jefferson Lines, Inc., 514 U.S. 175, 179-80 (1995).

108. Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 604 (D. Vt. 2015) (citations omitted); *see also* Town of Southold v. Town of E. Hampton, 477 F.3d 38, 48 (2d Cir. 2007).

109. *Grocery Mfrs. Ass'n*, 102 F. Supp. 3d at 648 (finding that Act 120 was not, and could not, be challenged facially).

110. *Id.* at 605 (noting that the plaintiffs did not allege a discriminatory purpose nor point to any facts to support same).

111. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 141-42 (1970).

112. *See id.* at 142.

commerce where it impairs the interstate flow of goods.[113] It is unlikely that a local labeling regulation would impair the interstate flow of goods.[114] The local benefits of "right to know" labeling laws are numerous and likely outweigh the slight burden imposed on interstate commerce. As the "Purpose" section of Maine's law indicates, at least five legitimate state interests are furthered by these laws.[115] For these reasons, it is unlikely that a court would strike down a state GMO labeling law on dormant Commerce Clause grounds.

IV. CONCLUSION

Under the present legal framework, state laws which mandate GMO labeling disclosures are likely constitutional under the First Amendment, Supremacy Clause, and Commerce Clause. Because courts tend to apply the more lenient standard enumerated in *Zauderer* to state mandated speech that is factual and non-misleading, mandatory factual disclosures like GMO labeling need only survive rational basis review.[116] Furthermore, where states expressly limit their GMO labeling laws to non FSIS regulated food products, these laws will not be subject to express or implied preemption. However, if H.R. 1599 is signed into law, state laws mandating GMO disclosures would be expressly preempted, but H.R. 1599 may contain unconstitutional provisions under the First Amendment.[117]

113. *See* Yakima Valley Mem'l Hosp. v. Wash. State Dept. of Health, 731 F.3d 843, 847 (9th Cir. 2013).

114. *See* Minnesota. v. Clover Leaf Creamery Co., 449 U.S. 456, 472 (1981) ("[T]he inconvenience of having to conform to different packaging requirements in Minnesota and the surrounding States should be slight."); *see also* Exxon Corp. v. Governor of Maryland., 437 U.S. 117, 118-21 (1978) (although law prohibiting refinery owners from also operating filling stations within Maryland would cause some refiners to withdraw from the Maryland market, the effect on interstate commerce was minimal because other out-of-state companies could still operate within the state).

115. *See* ME. REV. STAT. ANN., tit. 22, § 2591 (2015).

116. *See* Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

117. *See* McWilliams, *supra* note 5; s*ee also* VT. STAT. ANN. tit. 9, § 3043(e) (West 2016).