15-1504

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GROCERY MANUFACTURERS ASSOCIATION, SNACK FOOD ASSOCIATION, INTERNATIONAL DAIRY FOODS ASSOCIATION, and NATIONAL ASSOCIATION OF MANUFACTURERS,
Plaintiff-Appellants
v.

WILLIAM H. SORRELL, in his official capacity as the Attorney General of Vermont; PETER SHUMLIN, in his official capacity as Governor of Vermont; JAMES B. REARDON, in his official capacity as Commissioner of the Vermont Department of Finance and Management; and HARRY L. CHEN, in his official capacity as the Commissioner of the Vermont Department of Health,
Defendant-Appellees

On Appeal From The United States District Court For The District Of Vermont

Brief of *Amici Curiae* Public Good Law Center, Free Speech For People, Inc., and Consumer Action In Support Of Defendant-Appellees and Affirmance

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CORPORATE DISCLOSURE STATEMENT

No party to this filing has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any party to this filing.

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INTEREST OF *AMICI CURIAE*

Amici curiae are organizations concerned about attempts to divert the First Amendment from its intended purposes and organizations dedicated to protecting consumers.[1]

Free Speech For People (FSFP) is a national non-partisan, non-profit organization that works to restore republican democracy through education, citizen organizing, and legal advocacy. FSFP has filed *amicus* briefs in the Supreme Courts of the United States and Montana, arguing in defense of public laws against corporate First Amendment challenges.

Consumer Action is a non-profit consumer education organization that empowers low- and moderate-income and limited-English-speaking consumers to prosper. Every day Consumer Action sees that greater business transparency allows consumers to make better choices, and that consumers – especially those who can least afford it – suffer significant harms from deceptive marketing.

The Public Good Law Center is a public interest law firm focused on consumer protection and First Amendment law. Public Good has submitted *amicus* briefs in the United States Supreme Court, in various Courts of

[1] The parties have consented to the filing of this brief. No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel, or any other person – other than *amici* – contributed any money to fund the preparation or submission of this brief.

Appeals, and in the Supreme Court of California in First Amendment cases and in cases involving debt collection, credit reporting, and other contexts in which disclosure regimes protect vulnerable citizens.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). Other – perhaps even more fundamental – interests protected by the First Amendment elsewhere, such as self-government or self-realization, are only minimally implicated. Accordingly, "[f]or the state to mandate disclosures designed more fully and completely to convey information is … to advance, rather than to contradict, pertinent constitutional values." Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. Rev. 1, 28 (2000).

For that reason this Court should be wary of Appellant Food Companies' efforts to ratchet up the "reasonably related" standard announced for factual commercial disclosures in *Zauderer*, whether by manufacturing a requirement that the state's interest be "substantial" (though such a requirement would be easily met in this case) or by asking the court to extend *Int'l Dairy Foods Ass'n v. Amestoy* [*IDFA*], 92 F.3d 67 (2d Cir.

1996), a decision this Court and others have correctly treated as anomalous. This Court should be similarly wary of attempts to import standards of content and viewpoint neutrality that are simply inapplicable to compelled disclosures.

Because commercial speech is protected principally for its informational value, it may also be *restricted* when it is "more likely to deceive the public than to inform it." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980). That is not a difficult calculus to apply to descriptions of genetically engineered [GE] foods as "natural." On the one hand, such descriptions are *self-evidently* misleading, and the record demonstrates that significant numbers of people are *actually* misled. *See* Kolodinski Decl. (Dist. Ct. Dkt. 63-5) (summarizing survey evidence). On the other hand, neither the Food Companies nor the court below have been able to point to *any* information imparted by describing GE foods as "natural."

The Food Companies' contrived reasons for ratcheting up the level of scrutiny to be applied to a requirement to disclose product information desired by consumers and a restriction on self-evidently deceptive commercial communications represent a perfect example of what has been aptly labeled "First Amendment opportunism." *See* Frederick Schauer, *First*

Amendment Opportunism, in Lee C. Bollinger & Geoffrey R. Stone, eds., ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 177-80 (2002). Such opportunism is little more than a reprise of efforts a century ago to evade labeling requirements by distorting the meaning of Constitutional protections. *See, e.g., Corn Prods. Ref. Co. v. Eddy*, 249 U.S. 427, 431 (1919) (rejecting due process challenge to requiring ingredients on syrup labels); *Savage v. Jones*, 225 U.S. 501, 512 (1912) (rejecting commerce clause challenge to state law requiring fat and protein content to be stated on animal feed labels); *Heath & Milligan Mfg. Co. v. Worst,* 207 U.S. 338 (1907) (rejecting equal protection challenge to requirement that manufacturers list constituents of mixed paints). Today as in 1919, "a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold." *Corn Products*, 249 U.S. at 431. It is no different when the challenge is brought under the First Amendment. *See, e.g.*, *New York State Rest. Ass'n v. New York City Bd. of Health* [*NYSRA*], 556 F.3d 114 (2d Cir. 2009) (rejecting First Amendment challenge to ordinance requiring certain restaurants to publish calorie information).

ARGUMENT

I. BECAUSE COMMERCIAL SPEECH IS PROTECTED PRINCIPALLY FOR ITS INFORMATIONAL VALUE, MANDATED FACTUAL DISCLOSURES AND MEASURES REDUCING CONSUMER DECEPTION ARE SUBJECT TO DEFERENTIAL FIRST AMENDMENT REVIEW.

A lenient standard of review for commercial disclosure regimes accords with the principal reason for conferring constitutional protection on commercial speech in the first place: "Protection of the robust and free flow of accurate information is the principal First Amendment justification for protecting commercial speech, and requiring disclosure of truthful information promotes that goal. In such a case, then, less exacting scrutiny is required." *Nat'l Elec. Mfrs. Ass'n v. Sorrell* [*NEMA*], 272 F.3d 104, 114 (2d Cir. 2001).

The same principle underlies declining to extend First Amendment protection to speech that is inherently misleading or has proven to be actually misleading. "Rather than stifling commercial speech, [restriction of actually misleading commercial communications] ensures that information … will be communicated more fully and accurately to consumers." *Friedman v. Rogers*, 440 U.S. 1, 16 (1979).

Outside commercial speech the First Amendment serves other values as well that may be even more fundamental, notably self-government and

self-realization through self-expression. Speech concerning public affairs receives the highest degree of protection because "it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). *See also First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 n.12 (1978) ("self-government suffers when those in power suppress competing views on public issues from diverse and antagonistic sources"). Freedom of speech also protects "the individual's interest in self-expression." *Id*. *See also* Thomas Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L.J. 877, 879 (1963) ("The right to freedom of expression … derives from the … premise … that the proper end of man is the realization of his … potentialities as a human being").

These constitutional values explain why deferential review is not appropriate for *all* regulations requiring information or restricting misinformation. In non-commercial contexts, even deliberately false statements are protected, because allowing government to prohibit them would "give government a broad censorial power" that would cast a "a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012). Compelled non-commercial speech is likewise subject to heightened scrutiny, because the rights of self-expression and

political participation would both be threatened if government could "prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion." *W. Va. State Bd. of Educ. v. Barnette* (1943) 319 U.S. 624, 637. Even factual disclosures can threaten these values in some non-commercial contexts. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988) (the First Amendment would not "immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects").

Act 120 does not implicate these concerns. Democratic participation is not threatened by requiring food manufacturers to disclose product contents to consumers or by prohibiting them from misrepresenting those contents. To the contrary, the relevance of commercial speech to "public decisionmaking in a democracy" is that it allows "private economic decisions" that affect society's allocation of resources and "opinions as to how [the economic] system ought to be regulated or altered" to be "intelligent and well informed." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976). That end is served – not hindered – by making available more, and more accurate, information.

Likewise, neither the mandates nor the prohibitions of Act 120 infringe significant interests in self-expression. Compelled commercial

disclosures present "little risk that the state is forcing speakers to adopt disagreeable state-sanctioned positions, suppressing dissent, confounding the speaker's attempts to participate in self-governance, or interfering with an individual's right to define and express his or her own personality." *NEMA*, 272 F.3d at 114. The point applies equally when misleading commercial claims are regulated. The First Amendment "does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." *State Bd. of Pharmacy*, 425 U.S. at 772.

In sum, the heightened scrutiny appropriate for reviewing speech regulations that threaten political liberty or self-expression has no relevance to measures that enhance the flow of commercial information without infringing the "individual freedom of mind" safeguarded by the First Amendment. *Barnette*, 319 U.S. at 637. Applying a heightened standard here would elevate the interest of the commercial speaker in hiding information over that of the consumer audience in being informed – an inversion of the First Amendment.

II. VERMONT'S INTERESTS ARE MORE THAN SUFFICIENT TO JUSTIFY THE LABELING MANDATE.

Bearing in mind the First Amendment interests implicated – and those not implicated – by Act 120 makes it clear that this Court should decline the Food Companies' invitation to subject the law to more stringent scrutiny

than Supreme Court precedent dictates. This applies not only to the contention that some higher level of scrutiny might apply than the "reasonable relationship" review of *Zauderer*, 471 U.S. 626, but equally to the Companies' efforts to make the *Zauderer* standard appear more stringent than it actually is by importing a foreign requirement that the state's interest be substantial. This is not to say that Vermont lacks substantial interests; its interest in making available to consumers information of concern to them is substantial by itself.

A. A Substantial State Interest Is Not Required To Justify Commercial Disclosure Mandates.

Plaintiffs' effort to read a substantial state interest requirement into the *Zauderer* standard is unsupported by reason or precedent. The premise underlying the *Zauderer* standard is that more deferential scrutiny is appropriate for commercial disclosures than for restrictions on commercial speech. Plaintiffs do not explain why it would make sense to apply lenient review to the fit between state interest and means of realizing it (as they concede is the rule of *Zauderer*) but not to the state interest itself. *See* Appellants' Opening Br. [AOB], at 46-47. Given that the protected interest in resisting commercial disclosures is "minimal," *Zauderer*, 471 U.S. at 651, a substantial state interest cannot be needed to override it.

That no substantial interest is required has long been the view of this court, as evidenced by its consistent likening of the *Zauderer* standard to "rational basis" review. *See Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 264 (2d Cir. 2014); *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 245 n.6 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 435; *Conn. Bar Ass'n v. United States*, 620 F.3d 81, 96 (2d Cir. 2010); *NYSRA*, 556 F.3d at 132. "Rational basis" review, of course, demands only that legislation be "rationally related to *legitimate* governmental objectives," *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (emphasis added). In *Connecticut Bar Ass'n* the Court explicitly upheld statutes under *Zauderer* review on the basis of a "legitimate government concern"). 620 F.3d at 101. *See also Beeman v. Anthem Prescription Mgmt., LLC*, 315 P.3d 71, 95 (Cal. 2013) (commercial disclosure mandates need only "a conceivable legitimate state purpose").

The view that *Zauderer*'s standard is similar or equivalent to rational basis review is widely shared. *See Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 283 (4th Cir. 2013); *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1212 (D.C. Cir. 2012), *overruled on other grounds by Am. Meat Inst.* [*AMI*] *v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 555 (6th Cir.

2012); *United States v. Marzzarella*, 614 F.3d 85, 96 (3d Cir. 2010); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005).

To find that *Zauderer* review imposes a substantial state interest requirement would be a groundless departure from settled law.

B. Enabling Vermont Consumers To Access Product Information That Matters To Them *Is* A Substantial State Interest.

Although mandating commercial disclosures does not require a substantial state interest, consumers' interest in the information would be enough by itself to meet that improperly heightened standard. Given that the entire commercial speech framework is based on the constitutional value of access to information, it would be odd to conclude that providing information to consumers is *not* a substantial interest under that framework.

It is an unexceptional exercise of state police powers to ensure that consumers have access to, and are not deceived about, information material to their purchasing decisions. Even *amicus curiae* U.S. Chamber of Commerce acknowledges that "governments may require disclosure of product-related information like weight, volume, and contents that are recognized as critical to purchasing decisions." Chamber Br. at 17. But for some consumers it will matter more whether a cereal contains GMOs than just how many ounces are in a box. "Consumer preferences may be heavily influenced by … the manner in which goods are produced [even when it

does] not bear on the functioning, performance, or safety of the product…. *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 889 (Cal. 2011) (finding that consumers were harmed in purchasing locks falsely advertised as made in U.S.).

For many Vermont citizens the presence or absence of GMOs matters in their food purchasing decisions. *See, e.g.*, Ex. B-4 at 22-25 (Dist. Ct. Dkt. 64-5) (Thompson Reuters national survey of over 100,000 households showing that majority is unwilling to eat GE meat or fish, and 40% are unwilling to eat GE vegetables, fruits, and grains); *id.* at 26-30 (testimony presenting polls showing overwhelming majority of Vermonters support GMO labeling). To assert, as the Food Companies do, that the state has a substantial interest in providing accurate information about price or weight, but not about the presence of GMOs, reveals an implied premise that certain factors *ought* not to matter to consumers. *See* AOB at 30 ("At best, [GMO labeling] suggests that manufacturers attach relevance to information that is scientifically irrelevant"). But for courts to decide which information *should* matter to consumers is to take precisely the "the type of highly paternalistic approach" that has been disfavored since First Amendment protection was first extended to commercial speech. *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

The Food Companies implausibly seek to reduce serious concerns grounded in personal values to the mere "consumer curiosity" found an insufficient ground for mandated disclosures in *IDFA,* 92 F.3d 67, 74. Setting aside questions about the continuing vitality of *IDFA*, *see infra* at sec. II.C., efforts to align one's market decisions with one's values are far from mere curiosity, whether those values concern environmental impacts, religious motivations, or simply a natural lifestyle.

Drawing on *IDFA*, the Food Companies argue that because Vermont itself does not believe GMOs to be unsafe, sacrilegious, etc., consumers' concerns about such issues do not give rise to a state interest that consumers be informed of the presence of GMOs. *See* AOB at 41-42. But that distinction cannot be part of the holding of *IDFA*, for it would undermine *any* state interest in informing consumers. Under the Companies' proposed interpretation, Vermont would have a substantial interest in, for example, compelling mail-order retailers to provide accurate information about watch brands only if the state itself adopted the belief that a Rolex watch is more desirable than a less expensive off-brand competitor. That is not the law.

Vermont has a substantial interest in facilitating citizens' access to information that is important to them in deciding what products to purchase.

C. Extending *IDFA* Would Confuse Commercial Speech Jurisprudence.

The Food Companies' contrary argument relies almost entirely on this Court's divided panel decision in *IDFA v. Amestoy*, 92 F.3d 67, an outlier decision that this Court and others have interpreted narrowly, and have correctly declined to extend to other contexts.

The *IDFA* majority reviewed a labeling requirement for milk produced with bovine growth hormone [BGH] under *Central Hudson* intermediate scrutiny without even asking whether *Zauderer* "reasonable relationship" review might apply instead. *See* 92 F.3d at 72. Since then this Court has repeatedly made clear that when commercial speech "regulations compel disclosure without suppressing speech, *Zauderer,* not *Central Hudson,* provides the standard of review." *Conn. Bar Ass'n*, 620 F.3d at 93. Adopting the wrong standard of review in turn led to other errors, including the spurious requirement that the state interest in a commercial disclosure case be substantial, *IDFA*, 92 F.3d at 73, and the conclusion that demonstrated consumer concern is not itself a substantial interest. *See id.* at 73-74.

Subsequent decisions have understandably cabined this anomalous decision, unanimously describing it as "expressly limited to cases in which a state disclosure requirement is supported by no interest other than the

gratification of 'consumer curiosity.'" *NEMA*, 272 F.3d at 115 n.6 (2d Cir. 2001); *accord Conn. Bar Ass'n*, 620 F.3d at 96 n.16; *NYSRA*, 556 F.3d at 134. The *IDFA* decision has never broken out of that cabin: this Court cites it only to distinguish it.[2]

Given how far out of step the *IDFA* decision is with established commercial speech law, it is to be hoped that an opportunity arises for this Court to overrule it *en banc*. *Cf. AMI*, 760 F.3d at 22 (*en banc* court overruling panel decisions limiting scope of *Zauderer* review). Until then it will serve only to confuse otherwise consistent doctrine. In the meantime, this Court should continue to cabin *IDFA* by confining it narrowly to its facts, rather than compounding the confusion.

[2] Even factually, *IDFA* has been eclipsed. The *IDFA* majority emphasized that "neither consumers nor scientists can distinguish rBST-derived milk from milk produced by an untreated cow." 92 F.3d at 73. But more recently, "the use of rBST in milk production has been shown to elevate the levels of … a naturally-occurring hormone that in high levels is linked to several types of cancers." *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 636 (6th Cir. 2010). It is precisely in situations of scientific uncertainty that informational disclosures, rather than command-and-control regulations, are most appropriate. The decision in *IDFA* to strike down a disclosure rule based on an early record has not worn well in light of subsequent scientific developments. The same caution applies here.

III. CONTENT AND VIEWPOINT NEUTRALITY STANDARDS HAVE NO RELEVANCE TO COMMERCIAL FACTUAL DISCLOSURE REQUIREMENTS.

There is no merit to the suggestion – abandoned on appeal by the Food Companies – that heightened scrutiny applies to mandated GMO labeling because the law makes distinctions based on content or viewpoint. *See* Chamber Br. at 25-28. The district court correctly rejected such arguments below, Slip Op. at 46-51. The court did rely on a distinction between content and viewpoint discrimination that was recently supplanted in a very different context by the Supreme Court. *Reed v. Town of Gilbert,* 135 S. Ct. 2218 (2015). However, the district court's conclusion is not threatened by *Reed*, because the concepts of content and viewpoint discrimination simply have no applicability to review of commercial disclosures. Indeed, they have limited applicability to either compelled or commercial speech in general.

To begin with, compelled speech can *never* be content-neutral. By definition, compelling speech requires a speaker to state certain prescribed content. Therefore, asking whether a given speech mandate is "content neutral" is not an illuminating inquiry.

Mandated commercial disclosures either prescribe specific content, *e.g.*, 27 U.S.C. § 215(a) (stating precise wording of warning label required on alcoholic beverage containers), or define a certain subject that must be

addressed, *e.g.*, 21 U.S.C. § 343(q)(1)(C) (requiring food labels to state calories per serving). In *Zauderer* itself the Court upheld a required disclosure of specific content: that legal clients might be liable for litigation costs even if their lawsuits were unsuccessful. 471 U.S. at 650. *See also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 233 (2010) (applying lenient standard of review to requirement that certain advertisements include statement "We are a debt relief agency"); Slip Op. at 48 ("virtually all mandatory disclosure requirements regulate content … in this manner").[3] If claims of content discrimination sufficed to expose a disclosure requirement to heightened review, *Zauderer* would be a dead letter.

Whatever *Reed* may herald, it is implausible to suggest that it requires this result. Subjecting the "[i]nnumerable federal and state regulatory programs [that] require the disclosure of product and other commercial information … to searching scrutiny by unelected courts … is neither wise nor constitutionally required." *NEMA*, 272 F.3d at 116.

[3] This court's decision in *Evergreen*, 740 F.3d 233, is not to the contrary. The court there struck down under intermediate scrutiny certain disclosures required of pregnancy services centers, without deciding whether the disclosures were equivalent under the First Amendment to content-based restrictions on speech, nor deciding whether the disclosure requirement regulated commercial speech. *Id.* at 244-45.

No more applicable to commercial disclosures is the usual requirement that speech regulations be viewpoint neutral. Requiring alcoholic beverage labels to state, "women should not drink alcoholic beverages during pregnancy because of the risk of birth defects," 27 U.S.C. § 215(a) is *not* viewpoint-neutral, however uncontroversial that viewpoint may be, nor is a requirement that certain hazardous substances carry the instruction "Keep out of the reach of children." 15 U.S.C. § 1261(p)(1)(J)(i). Such laws have never been deemed subject to heightened review.

Consequently, when the Court pronounced in *Reed* that "content-based *restrictions* on speech … can stand only if they survive strict scrutiny," 135 S. Ct. at 2231 (emphasis added), it cannot have intended that standard to extend to commercial *disclosures*. In fact it cannot have intended it to extend to commercial speech regulations of any sort.

The law is settled. The Supreme Court "has rejected the argument that strict scrutiny should apply to regulations of commercial speech that are content-specific." *Anderson v. Treadwell*, 294 F.3d 453, 460 (2d Cir. 2002). *See also Central Hudson*, 447 U.S. at 564 n. 6 (unlike "most other contexts … features of commercial speech permit regulation of its content); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983) ("regulation of

commercial speech based on content is less problematic"). Indeed, the entire field of "commercial speech" is based on a content distinction.

The prohibition reviewed in *Central Hudson* itself was not viewpoint-neutral: it prohibited electric utilities from promoting electricity use, without any corresponding prohibitions on promotion of electricity conservation. 447 U.S. 557. *See also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (applying intermediate review to a regulation prohibiting outdoor advertising of cigarettes within 1000 feet of schools, without corresponding prohibition on anti-smoking messages); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999) (applying intermediate review to statute prohibiting casino advertising, without corresponding prohibition on anti-gambling messages).

Reed, which never mentioned commercial speech, may safely be presumed not to have upended *sub silentio* decades of commercial speech jurisprudence.[4] Questions about content and viewpoint neutrality are simply red herrings in this case.

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[4] Nor are those precedents undermined by *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011). Although the Court discussed the constitutional infirmities of content-discriminatory regulations in sweeping terms, *id*. at 2664, it acknowledged that the speech in question might be commercial and might therefore be subject to only intermediate scrutiny. *Id.* at 2667-68. *See also United States v. Caronia*, 703 F.3d 149, 163-64 (2d Cir. 2012) (after the Court in *IMS* determined that the challenged restriction "was content- and

IV. "NATURAL" LABELS ON GE FOODS ARE NOT PROTECTED SPEECH, BECAUSE THEY ARE INHERENTLY AND ACTUALLY MISLEADING.

The decision not to enjoin Vermont's prohibition against marketing GE foods as "natural" should be upheld on the ground that the Food Companies are unlikely to prevail on the merits. *See* Vermont Br. at 46 (when reviewing a preliminary injunction, court may affirm on any ground supported by the record).

Describing GMOs as "natural" is sufficiently misleading to fall outside the bounds of First Amendment protection entirely. Unlike speech that is merely "potentially" misleading, "inherently" or "actually" misleading speech receives no First Amendment protection. *See In re R.M.J.*, 455 U.S. 191, 202-03 (1982) ("where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive … advertising may be prohibited entirely"). The "natural" descriptors are both inherently and actually misleading.

A. Marketing GE Foods As "Natural" Is Inherently Deceptive.

"The government may ban forms of communication more likely to deceive the public than to inform it." *Central Hudson,* 447 U.S. at 563.

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speaker-based," it "did not decide the level of heightened scrutiny to be applied").

Describing genetically engineered foods as "natural" is a paradigmatic example of such a form of communication. It is self-evidently misleading, while its informative value is zero.

It is difficult to imagine a *less* natural way of producing food than by modifying the genetic material of one species and then inserting it into cells of an entirely unrelated species, unless it is when the inserted material is itself laboratory-created. The gross deceptiveness of describing food produced by such technology as "natural" is sufficiently "self-evident," *see Milavetz*, 559 U.S. at 251, to exclude it from First Amendment protection as "inherently" misleading.

The self-evident judgment that GMOs are not natural is supported by the World Health Organization, which defines GMOs as "organisms … in which the genetic material (DNA) has been altered in a way that does not occur naturally." WHO, *Frequently Asked Questions on Genetically Modified Foods*.[5] In fact Monsanto, a member of plaintiff GMA, until recently defined GMOs on its own website as "[p]lants or animals that have had their genetic makeup altered to exhibit traits that are not naturally theirs." *See* Ex. B at 37 (Dist. Ct. Dkt. 24-3). (Interestingly, Monsanto has

[5] *At* http://www.who.int/foodsafety/areas_work/food-technology/faq-genetically-modified-food/en.

apparently modified its website definition during the course of this litigation.[6])

The obvious conclusion that it is inherently misleading to describe GMOs as "natural" is not undermined by either of the district court's grounds for rejecting it: (1) the lack of a statutory or other uniformly agreed-on definition of "natural," Slip Op. at 68 and 68 n.40, or (2) the consideration that virtually any method of food production involves *some* departure from naturally occurring processes. Slip Op. at 69.

1. Marketing GE Foods as "Natural" Misleads Consumers, Regardless of Whether the Term is Clearly Defined.

The word "natural" has meaning to consumers, as evidenced by the large proportion of consumers who prefer to buy natural foods. *See* Ex. B-4 at 22-25 (Thompson Reuters national survey). And, contrary to the district court opinion, regulatory definitions are not entirely lacking. The USDA definition provides useful guidance, though its authority extends only over meat and dairy products. The USDA definition stipulates that "the product and its ingredients are not more than minimally processed," hardly consistent with genetic engineering. USDA, *Food Standards and Labeling*

[6] *See* http://www.monsanto.com/newsviews/pages/glossary.aspx#gmo.

Policy Book (2005) at [unnumbered] 116.[7] "Natural" is also closely aligned in consumer perceptions with "organic," which is explicitly defined by federal regulation to exclude GMOs. 7 C.F.R. § 205.2.

In any event, regardless of whether there is no "single, accepted definition of the term 'natural,'" Slip Op. at 68 n.40, neither the Food Companies nor the district court have posited *any* definitions of "natural" applicable to GE foods.[8] And even if the Companies were able to point to some definition of "natural" that could encompass GMOs, "an otherwise false advertisement is not rendered acceptable merely because one possible interpretation of it is not untrue." *Porter & Dietsch, Inc. v. F.T.C.*, 605 F.2d 294, 303 (7th Cir. 1979); *accord Am. Home Products Corp. v. F.T.C.*, 695 F.2d 681, 687 (3d Cir. 1982).

The lack of a formal definition fails to distinguish "natural" from other terms that have been found to be inherently misleading in reviewing constitutional challenges, *see, e.g., Joe Conte Toyota, Inc. v. Louisiana Motor Vehicle Comm'n*, 24 F.3d 754 (5th Cir. 1994) ("invoice" as used in automobile advertisements), or in reviewing allegations of "false or

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[7] Available at http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005_3.pdf.

[8] None of the definitions surveyed by the Court, Slip Op. at 68 n.40, would apply to GE foods. In fact the definitions are similar enough to weigh against the court's conclusion that the term is undefined.

misleading description of fact" in commerce under the Lanham Act. 15 U.S.C.A. § 1125(a)(1). *See, e.g., Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357 (Fed. Cir. 2013) ("useful lifetime" of a towel); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.,* 290 F.3d 578 (3d Cir. 2002) ("Night Time Strength" heartburn medication); *Porter & Dietsch, Inc. v. F.T.C.*, 605 F.2d 294 (7th Cir. 1979) ("unique preparation," "special formula").

The lack of a clearly defined meaning does not prevent a description from being misleading. To the contrary, the intrinsic meaninglessness of trade names, for example, allows advertisers to "manipulate[]" the "ill-defined associations" they carry, creating "numerous" "possibilities for deception." *Friedman*, 440 U.S. at 12-13. Similarly, car dealers' use of the term "invoice" was found "inherently misleading" and therefore "beyond First Amendment protection," precisely because it had no fixed meaning. *Joe Conte Toyota*, 24 F.3d at 757. It therefore "convey[ed] no useful information," but rather, misled consumers, who mistakenly associated "invoice" with the dealer's actual cost. *Id.* at 758. *See also Adams Ford Belton, Inc. v. Missouri Motor Vehicle Comm'n*, 946 S.W.2d 199, 203-04 (Mo. 1997) ("no useful information [was] conveyed to the consumer" by the term "invoice price" in a car advertisement, because the term was used "at

variance with the commonly understood meaning of the words," making it "inherently misleading and, therefore, beyond First Amendment protection"); *Barry v. Arrow Pontiac, Inc.,* 494 A.2d 804, 812 (N.J. 1985) ("amorphous" terms were misleading); *Bronco Wine Co. v. Jolly*, 129 Cal. App. 4th 988, 1005-06 (2005) (although brand names "have no intrinsic meaning," the word "Napa" in name of wines made from grapes not grown in Napa County was misleading). The Food Companies in this case similarly seek to employ consumers' associations with "natural" to manipulate the public, whether those associations are vague or clearly defined.

Regardless of whether "natural" is well defined, it is far from harmless "puffery," such as has been found not deceptive. In its most extensive discussion of puffery to date, this Court recognized two forms of puffery: (1) "a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than a mere expression of opinion"; and (2) "an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying." *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 160 (2d Cir. 2007). Calling GE foods "natural" falls into neither category. It is far from so general and vacuous as classic examples of puffery, which "no reasonable buyer would

take … at face value," *id.* at 159, such as "The Best Beer in America," *In re Boston Beer Co.,* 198 F.3d 1370, 1372 (Fed. Cir. 1999); "America's Favorite Pasta," *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 391 (8th Cir. 2004); or "the most advanced home gaming system in the universe," *Atari Corp. v. 3D0 Co.,* 1994 WL 723601, *2 (N.D.Cal.1994). *See also Lipton v. Nature Co.*, 71 F.3d 464, 474 (2d Cir. 1995) (vague boasts of an author's "thorough" research); *Bose Corp. v. Linear Design Labs, Inc.,* 467 F.2d 304, 310–11 (2d Cir.1972) ("countless hours of research" made advertised stereo speakers superior).

"Puffery is distinguishable from misdescriptions or false representations of specific characteristics of a product." *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 945 (3d Cir. 1993); *accord United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998). For example, although an advertiser's claim that a towel's "performance … lasts the useful lifetime of the towel" was not clearly defined, the claim was misleading, given that the towel showed signs of wear after a single washing. *Hall*, 705 F.3d at 1368. *See also Novartis,* 290 F.3d at 589-90 ("Night Time Strength" trademark, though lacking clear meaning, was misleading in implying that heartburn medication was specially formulated for nighttime use or provided all-night relief); *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 499-502 (5th

Cir. 2000) (by itself slogan "Better Ingredients. Better Pizza" was non-actionable puffery, but in conjunction with literally true ads about ingredients, it misleadingly implied a discernible difference where there was none). Calling GE foods "natural" likewise makes a claim of superiority, however whether well defined or not, with respect to specific product characteristics – a claim that is entirely unfounded.

2. Even if in Some Sense No Food Product is *Entirely* Natural, It Remains Deceptive to Market GE Foods as Natural.

The district court reasoned that Act 120's "natural" restriction imposes a "standardless restriction that virtually no food manufacturer could satisfy," because almost all food production involves some degree of "'manmade,' 'purposeful interference,'" even if it is only watering, weeding, or pruning. Slip Op. at 69. But the absence of a clear line between natural and artificial does not make the distinction standardless. After all, virtually no surgical procedure is completely safe; it would still be grossly deceptive to market as "safe" a procedure with a 50% mortality rate. Some methods of food production are manifestly less natural than others. Even if it is not clear exactly where to draw the line between foods that are naturally produced and those that are not, it is difficult to imagine *any* way of drawing the line that does not put GE foods unambiguously on the "unnatural" side of the divide.

Furthermore, it is not clear that GE vegetables are no more than a further step on a continuum from naturally occurring plants to selectively bred vegetables to hybrids, etc. There is a huge leap from conventional breeding and even hybridization, which employ processes similar to natural selection, and merely emphasize certain characteristics already found in a given species, to genetic engineering, which employs advanced technologies not found in nature first to insert foreign – or laboratory-created – genetic material into the cell of an unrelated organism and then to make the inserted material "express" itself. *See* Michael K. Hansen, *Genetic Engineering Is Not an Extension of Conventional Plant Breeding: How Genetic Engineering Differs from Conventional Breeding, Hybridization, Wide Crosses & Horizontal Gene Transfer* 1 (2000).[9] Genetic engineering also makes possible the unnatural combination of genetic materials from completely unrelated species or even combination of genetic materials with synthetic "custom-designed genes that do not exist in nature"). *Id.*

3. Calling GE Foods "Natural" Is Highly Unlikely to Inform the Public.

The other side of the balance between the likelihood of deceiving versus informing the public can be simply quantified. At best, describing

[9] *At* http://consumersunion.org/wp-content/uploads/2013/02/Wide-Crosses.pdf.

GMOs as natural provides *no* information.[10] Nowhere in their briefing have the Food Companies been able to point to *any* information that is conveyed when GE foods are so described, nor did the district court identify any.

In sum, then, marketing GE foods as "natural" is likely to deceive the public and highly unlikely to inform anyone of anything. Such communications may be prohibited without offending the First Amendment.

B. Marketing GE Foods As "Natural" Has Been Demonstrated To Be Actually Deceptive.

Describing GE foods as "natural" has been shown to be actually, as well as inherently, misleading, as demonstrated by extensive survey evidence presented to the district court, including a 2010 survey in which 61% of consumers believed that "natural" implied the absence of GE food. Slip op. at 69. *See also* Kolodinski Decl. (summarizing survey evidence showing that most Americans and most Vermonters understand "natural" to exclude GMOs).

The district court rejected survey evidence, however, opining that it "is not the equivalent of actual and unsolicited citizen problems or complaints regarding GE manufacturers' use of 'natural' terminology." Slip Op. at 70.

[10] Of course, this is not to say that "natural" labels cannot in general be informative to consumers. Labeling *GMOs* as natural provides no information, because no sense has been identified in which it is true that GMOs are natural.

That is a curious standard, given this Court's regular reliance on survey evidence to determine whether advertising is deceptive. *See, e.g., Johnson & Johnson * Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 299-301 (2d Cir. 1992); *Coca–Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 316-17 (2d Cir.1982). *See also id.* (market study "evidence that some consumers were in fact misled by the advertising" are "the type of proof necessary" "to prove injury in Lanham Act litigation).

But even if evidence of actual, unsolicited citizen complaints is required, the Court need not look far. Plaintiffs' own briefing cites a number of cases in which GMA members are currently being sued for marketing GMOs as "natural." AOB, at 53. In one of those actions the court recently certified eleven statewide classes of consumers claiming damages after paying premium prices for cooking oils "deceptively and misleadingly" marketed as "100% Natural," though they were made from GMOs. *In re ConAgra Foods, Inc.*, --- F.Supp.3d ---, 2015 WL 1062756, at *1, *75 (C.D. Cal. Feb. 23, 2015). Though none of the classes is from Vermont, there is no reason to suppose that Vermont citizens would be less likely to object to the same practice. *See Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995) ("we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether").

In a footnote, the district court also gave surprising credence to the Food Companies' vague boiler-plate assertions that there may have been methodological problems with the surveys relied on by the state. Slip Op. at 70 n.42. In its minimal discussion the court mentions no evidence for its conclusory holding that the surveys "asked overtly leading questions," *id.*, or that there *might be* problems in how terms were explained to survey participants," *id.*, much less why such conclusions should apply sweepingly to all the surveys presented.

The specific survey mentioned by the district court is not the only one to reach the conclusion that not just a significant number, but a *majority*, of consumers are misled when GMOs are marketed as "natural." *See* Consumer Reports National Research Center, *Food Labels Survey: 2014 Nationally-Representative Phone Survey* 8 (2014) (64% of consumers believed that a "natural" label on packaged foods means that no GMOs were used).[11]

Considering only surveys presented to the district court, even if one (implausibly) supposes that *all* of them were methodologically flawed, it is hard to believe that rewording the questions would change a finding that

[11] *At* http://www.greenerchoices.org/pdf/consumerreportsfoodlabelingsurveyjune2014.pdf. 85% thought that a "natural" label *should* mean that no GMOs were used.

61% of consumers were misled, Slip Op. at 69, to a finding that *no* significant number was misled. This Court and others have held much lower percentages to constitute sufficient evidence that advertisements were misleading, *even after finding survey flaws*. In one case this Court reviewed a district court's handling of survey evidence purporting to demonstrate that 43% of consumers would be deceived by an advertisement. *Coca–Cola Co. v. Tropicana Prods., Inc.,* 538 F.Supp. 1091, 1094 (S.D.N.Y.). Based on expert testimony about survey flaws, the district court decided that it could not "conclude that consumers are likely to be misled," because on its analysis "significantly below 15%" would be deceived. *Id.* at 1096. On review, this Court did "not disagree" with the district court's analysis, but held that this still demonstrated that "a significant number of consumers would … likely … be misled." *Coca–Cola*, 690 F.2d at 317. *See also Sara Lee Corp. v. Kayser–Roth Corp.*, 81 F.3d 455, 467 (4th Cir.1996) (district court dismissed survey evidence of 30-40% confusion rate because it questioned the survey's reliability; court of appeal concluded that "even if the true figure were only half of the survey estimate, actual confusion would … nevertheless exist to a significant degree"); *Novartis,* 290 F.3d at 594 (after analyzing evidence of flaws in survey showing 25% of consumers were misled by a trade name, determining that "at least 15% of …

respondents" were deceived, and that this was sufficient to establish likely deception). In the present case surveys indicated far higher rates of consumer deception than in any of the foregoing cases, and the district court's discussion of the survey evidence is little more than a brief summary of Appellants' briefing, rather than a careful consideration of expert analysis, as in the other cases.

Actual deception has been found on evidence similar in kind to – but weaker than – that advanced in this case. Marketing GMOs as "natural" is actually misleading, as well as inherently misleading. No constitutional principle stands in the way of protecting consumers by prohibiting such marketing.

CONCLUSION

Because Act 120 will serve to make consumers better informed without impinging on any significant interests protected by the First Amendment, the district court's denial of a preliminary injunction should be affirmed on the ground that the Food Companies are unlikely to prevail on the merits.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief contains 6972 words, according to Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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DATED: August 31, 2015

/s/ *Seth E. Mermin*
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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2015, I caused to be filed electronically via the Court's CM/ECF System, and thereby served on all counsel, a true and correct copy of this Brief of *Amici Curiae* Public Good Law Center, Free Speech For People, and Consumer Action.

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