IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GROCERY MANUFACTURERS ASSOCIATION, SNACK FOOD ASSOCIATION, INTERNATIONAL DAIRY FOODS ASSOCIATION, and NATIONAL ASSOCIATION OF MANUFACTURERS, Plaintiffs, v. WILLIAM H. SORRELL, in his official capacity as the Attorney General of Vermont; PETER SHUMLIN, in his official capacity as Governor of Vermont; TRACY DOLAN, in her official capacity as Interim Commissioner of the Vermont Department of Health; and JAMES B. REARDON, in his official capacity as Commissioner of the Vermont Department of Finance and Management, Defendants.	Case No. 5:14-cv-117-cr

PLAINTIFFS' REPLY IN SUPPORT OF
THEIR MOTION FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL PROVISION:

FEDERAL STATUTES:

TABLE OF AUTHORITIES—Continued

Page(s)

FEDERAL REGULATION:

VERMONT STATUTES:

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

Defendants are unable to save Act 120 from its many fatal defects. Their First Amendment arguments stumble over each other, advocating completely inconsistent views as to why the labeling mandate or the advertising ban on the use of "natural" and "similar" words for GE-derived food products is constitutional. Their preemption arguments rely on the formalistic and unsupported notion that only what appears in the ingredients list matters, and improperly equate the information private parties may *voluntarily* provide on their food labels to information a state may *require* them to provide on their labels. And perhaps most tellingly, Defendants rely heavily on a draft, non-final rule to defend against Plaintiffs' constitutional challenges—revealing that the statute cannot stand on its own. Finally, their arguments against irreparable harm rest on declarants who either lack industry experience or who work for companies with an obvious and vested interest in upholding the labeling mandate. These declarants do not refute what Plaintiffs have amply proven: Act 120 is harming their members, *now*. This Court should therefore enter the requested preliminary injunction.

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.[1]

A. Act 120's Labeling Requirement Violates the First Amendment.

Under any standard of scrutiny, Act 120's labeling mandate violates the First Amendment. Defendants offer only a string of contradictions to try to show otherwise. They justify the State's labeling regime by citing the alleged health, economic, and environmental risks associated with GE—even though the General Assembly drafted the statute to *avoid* taking

[1] Plaintiffs did not argue for a preliminary injunction based on their Commerce Clause claim. But they did so only to streamline the motion. *See* Pls.' Opening Memo. 2 n.2. Plaintiffs are not conceding anything about their Commerce Clause claim, and continue to press it. *See* Pls.' Opp. to Defs.' Mot. to Dismiss 17-20.

a position on the existence of those risks. Defendants declare after-the-fact that Vermont in fact *has* adopted a position on GE—but then disclaim the heightened scrutiny that necessarily applies. And Defendants seek to benefit from the controversy surrounding GE to establish the rationality of Vermont's legislative process—but then deny the GE labels are controversial. Once Defendants are finished canceling out their own arguments, nothing is left to support the Act.

1. Strict Scrutiny Applies, And Act 120 Does Not Withstand It.

Strict scrutiny applies here because Act 120 burdens speech according to content, speaker, *and* viewpoint; and the labeling mandate fails strict scrutiny because it is not the least restrictive means to further a compelling State interest. *See* Pls.' Opening Memo. 16-22. Defendants do not even bother to argue that Act 120's labeling mandate *meets* the standard for strict scrutiny; instead, they contend strict scrutiny does not apply. They are wrong.

Defendants' argument depends, at bottom, on their contention that there is an impenetrable line between commercial speech and political speech. *See* Defs.' Opp. 14-20. No such line of demarcation exists. Speech in the commercial context is not invariably purely commercial, even if labeled as such by a state. *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). Rather, "[t]he diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." *Id.* For example, where a private company "utilize[s] its own billing envelopes to promulgate its views on controversial issues of public policy," state regulation of those policy statements is subject to strict scrutiny even though the means of conveying the information is a commercial bill. *Consolidated Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 540 (1980).

The same basic rule applies to compelled speech. *See Riley v. National Fed'n of the Blind of N.C, Inc.*, 487 U.S. 781, 796-797 (1988). The Supreme Court has held that courts' "lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature

of the speech taken as a whole and the effect of the compelled statement thereon." *Id.* at 796. As the Court explained, "we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Id.* Rather, in such instance, "we apply our test for fully protected expression." *Id.*

That is precisely what should happen here. As Defendants implicitly concede throughout their brief, Act 120's labeling mandate conveys a particular viewpoint on a controversial policy matter: namely, that GE is bad. At least three aspects of its argument prove as much.

First, Defendants cite Vermont's "legitimate interest in protecting against the environmental risks of GE technology and crops" as justifying the labeling mandate. *See* Defs.' Opp. 23 (emphasis removed). But that reference to environmental protection reveals the real message the State is trying to convey: that foods derived from GE plants harm the environment and should not be purchased. That is the only way the State's environmental concerns are relevant. And that message is antithetical to the consumer transaction that Plaintiffs' members are proposing through their product labels: Speech in furtherance of Vermont's supposed environmental message must necessarily encourage consumers *not to buy* Plaintiffs' members' products. Vermont lacks a compelling interest to disrupt the message that Plaintiffs' members are trying to convey to consumers through their food labels, with a policy message not to purchase the goods. *See Harris v. Quinn*, 134 S. Ct. 2618, 2644 (2014) (state generally may not compel persons to support speech to which they object); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 63 (2006) (describing cases where Court had held that

compelled speech violated the First Amendment because "the complaining speaker's own message was affected by the speech it was forced to accommodate").[2]

Second, according to Defendants, "the vast majority of foods sold in grocery stores" contain ingredients derived from GE plants. *See* Defs.' Opp. 28. And Defendants do not dispute that those who pay more for non-GE materials advertise that fact—in order to recoup the added cost by attracting consumers willing to pay the non-GE premium. *See* Decl. of Thomas Dempsey ¶¶ 12, 27 (Doc. 33-4). Thus, if a processed-food product does not voluntarily advertise that it is certified organic or contains no ingredients derived from GE plants, according to Defendants' own logic, the product likely contains ingredients derived from GE plants. *See generally id.* Consumers therefore already have a mechanism to identify non-GE-plant-derived foods. All the labeling mandate does is stigmatize GE-plant-derived food products by identifying them as different. And on top of that, the mandate compels this speech in a discriminatory manner by requiring only the manufacturers of GE-plant-derived foods to disclose that fact and not requiring those who sell non-GE-plant-derived foods to make a similar disclosure. In this way, too, the Act violates the First Amendment.

Third, Vermont's viewpoint-based agenda is revealed when Defendants attempt to avoid *International Dairy Goods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996), by arguing that

---

[2] Compare these facts to those in *National Electronic Manufacturers Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (hereinafter, *NEMA*). There, a law required manufacturers of mercury-containing light bulbs to label their products and packaging in order to encourage proper disposal of the light bulbs. *Id.* at 115. The law thus encouraged a non-controversial change in consumer behavior—proper waste disposal and recycling—that was not antithetical to the consumer transaction (the sale) proposed by the labels. At most, it applied to consumer conduct *after* the goods were purchased. Similarly, in *New York State Restaurant Ass'n v. New York City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (hereinafter, *NYSRA*), the challenged law required chain restaurants "to post calorie content on their menus and menu boards." *Id.* at 117. The law did not discourage consumers from buying NYSRA members' food altogether. And NYSRA did not oppose disclosure of caloric information generally; indeed, it suggested a number of alternative means by which its members could provide just that information to their customers. *Id.* at 122.

"Vermont *has* taken a position" "on the risks of GE foods." Defs.' Opp. 22. That argument brushes past the legislature going to some lengths *not* to take a position on "the risks of GE foods." But accepting Defendants' contention for the sake of argument, it serves only to further doom the labeling mandate. By rationalizing the mandate based on Vermont's newfound substantive position on the supposed risks of GE, Defendants impliedly confess what must be true for the mandate to advance that alleged interest in any way: Act 120 necessarily, and impermissibly, "requires the utterance of a particular message favored by the Government." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994); *see also Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 244 (2d Cir. 2014) (quoting *Turner Broad. Sys.*, 512 U.S. at 642), *cert. denied*, No. 13-1462, 2014 WL 2586961 (Nov. 3, 2014). It serves as a warning to consumers about the unproven and speculative risks of GE-plant-derived foods, forcing Plaintiffs' members to convey the State's message that—as the State puts it—"there are legitimate reasons for consumers to avoid genetically engineered foods." Defs.' Opp. 23.

The labeling mandate cannot withstand strict scrutiny.

2. Act 120 Does Not Withstand Intermediate Scrutiny.

Act 120's labeling mandate fails *Central Hudson*-based intermediate scrutiny also. The State cannot show a substantial interest, directly advanced by the Act, bearing a reasonable fit with the means employed by the Act. *See Amestoy*, 92 F.3d at 72 (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)). Strikingly, Defendants' opposition brief never offers any reason why *Central Hudson*'s intermediate-scrutiny test should not apply. *See* Defs.' Opp. 15 (declaring *Zauderer* applies, but never explaining why); *id.* at 15-20 (arguing that *strict* scrutiny does not apply); *id.* at 21-29 (explaining why the mandate supposedly satisfies both *Zauderer* and *Central Hudson*). That silence is telling, and decides this case, because Defendants lack any answer to any element of the *Central Hudson* test.

No Substantial State Interest. The most the General Assembly was willing to state expressly about the supposed risks of GE was that they are "potential[]." Act 120, § 1(4). It then concluded that labeling should be required because it would "give[] consumers information they can use to make decisions about what products they would prefer to purchase." *Id.* § 1(5)(E). Having failed to stake out a position on that risk-of-a-risk, however, all the legislature's interest amounts to is the one rejected in *Amestoy*: "mere consumer concern," which "is not, in itself, a substantial interest." 92 F.3d at 73 n.1. *Amestoy* compels a finding of unconstitutionality.

This puts Defendants in a bind. In an attempt to avoid the result compelled by *Amestoy*, Defendants are forced to contend "that there are legitimate reasons for consumers to avoid genetically engineered foods." Defs.' Opp. 23. Defendants cite nothing for this supposed finding. But even accepting it at face value, Defendants cannot both disclaim a policy message to avoid strict scrutiny while at the same time invoking it to avoid *Amestoy*. Either Vermont has taken a position on the supposed risks of GE-plant-derived foods or it has not. If it has, the labeling mandate cannot stand because it compels Plaintiffs' members to state a controversial policy message on their labels. *See Evergreen Ass'n*, 740 F.3d at 244 (quoting *Turner Broad. Sys.*, 512 U.S. at 642). If it has not, the mandate fails *Amestoy* because Vermont has no substantial interest in satisfying mere consumer curiosity. *See* 92 F.3d at 73.

Vermont has offered no other interest that suffices. Defendants' burden to demonstrate the constitutionality of the Act under *Central Hudson* is a weighty one: "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real." *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993). The Court evaluates "the precise interests put forward by the State" to determine whether they meet this standard. *Id.* at 768.

Defendants thus must show that Vermont has "a reasonable concern for human health or safety or some other sufficiently substantial concern." *Amestoy*, 92 F.3d at 74.

Defendants cannot meet this burden. They dig deep into the legislative record to substantiate the supposed reasonableness of the State's concern for health, safety, and the environment, but they come up short, identifying only outdated, retracted, or debunked studies. Rebuttal Decl. ¶¶ 3-43, 68-71, 76-89. They offer nothing that demonstrates a rational, reasonable process based on facts, rather than biased and agenda-driven opinion. Take, for example, Defendants' "experts." Rather than offer a molecular geneticist with the requisite plant-based expertise to refute the declaration of Dr. Alan McHughen, they offer Dr. Michael Antoniou, whose expertise is based on *animal* cells (and thus quite irrelevant to the genetic engineering of plants), and Dr. Charles M. Benbrook, an agricultural economist. Neither is qualified to refute Dr. McHughen's findings. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993) (allowance of expert testimony "is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline"). And neither can dispute that widely respected professional societies such as the American Association of the Advancement of Science, the American Medical Association, the U.S. National Academy of Science, as well as the expert federal agencies charged with regulating the safety of foods at a national level, have *all* concluded that approved GE plants present no material risk to health or safety. That is why Drs. Antoniou and Benbrook are left only to reiterate the same outdated, retracted, or debunked studies that anti-GE groups introduced into the legislative record. But repetition cannot make up for the many deficiencies of those studies. *See id.* at 593 (describing the importance of "peer review and publication" to determine "whether a theory or technique is scientific knowledge").

Defendants also cite Vermont's supposed environmental concerns with GE—which, as we already explained, helpfully proves the unlawful viewpoint the State is attempting to compel. These environmental concerns also lack scientific support because they rest on the same types of non-peer-reviewed studies and fringe reports that have been thoroughly debunked by those practicing actual science. Dr. McHughen's rebuttal declaration explains this in detail. Rebuttal Decl. ¶¶ 76-89.[3] In short, for the same reasons that the record fails to legitimate health and safety concerns, it fails to legitimate any environmental risks.

That leaves the supposed religious motivation behind the law. And there, Defendants double down rather than retreat in the face of Plaintiffs' warning that such a motivation raises additional First Amendment problems. They contend that "facilitating dietary choices based on those religious beliefs is a legitimate state interest." Defs.' Opp. 24. But the State treads on dangerous ground if it goes beyond merely requiring *government* officials to *accommodate* religious interests, *see Cutter v. Wilkinson*, 544 U.S. 709 (2005) (cited by Defendants), but forces *private parties* to *facilitate* religious-based decisions, *see Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985). Furthering private religious practice is not a legitimate government interest—and certainly not a substantial one. *See Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (a "statute's principal or primary effect must be one that neither advances nor inhibits religion"); *id.* at 585 (intent to promote religion "clear" if law enacted to serve "religious purpose"). Defendants cannot rely on religion to support the constitutionality of their law.[4]

---

[3] For example, Dr. McHughen explains how (i) the U.S. National Academy of Sciences has squarely rejected Dr. Antoniou's and Dr. Benbrook's environmental concerns; (ii) Benbrook's weight-based analysis has been largely rejected as unscientific; and (iii) Antoniou's conclusions are tainted from his reliance on Benbrook's illogical analysis. Rebuttal Decl. ¶¶ 76-89.

[4] If the statute did not *also* "have a clearly secular purpose," the Act would be more than improperly compelled speech; it would also violate the Establishment Clause. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); *see also McCleary v. ACLU*, 545 U.S. 844, 859-861 (2005). Plaintiffs

No Direct Advancement. Defendants' affirmative argument on direct advancement is that it exists because they say so. *See* Defs.' Opp. 26. According to them, by "requiring disclosure to customers"—no matter how confusing the disclosure or how many exceptions to that disclosure there are—Vermont is *per se* directly advancing an informational interest. *See id.* That simply is not so. As we explained in our opening memorandum, the mandate—that the *food product itself* "shall be labeled as produced entirely or in part from genetic engineering," 9 V.S.A. § 3043(a)—confuses, rather than informs, consumer choice. Describing the *product* as "genetically engineered" does little to convey to the lay consumer the true process of genetic engineering: genetic engineering applies to the *plant*, which then grows food just like every other plant does. Defendants offer only the naked assertion that "certainly Vermonters can understand what it means that a product was 'partially' or 'may' have been produced with genetic engineering." Defs.' Opp. 27. But they offer no evidence—none—that the average consumer knows what genetic engineering even means, much less what "partial" or possible genetic engineering encompasses.

The mandate adds to the confusion by exempting large amounts of foods from its provisions. *See id.* at 28 (describing exemptions). Defendants justify these exemptions for a number of reasons—none of which has anything to do with the information being conveyed to the consumer, and none of which explains how the mandate continues to advance the State's interest in light of the many exemptions. *See id.* More than that, Defendants fail to recognize that by compelling *certain* GE-derived food products to contain the disclosure, but not others, Vermont is misleadingly suggesting that the absence of a GE label signals that the product does not contain GE-derived ingredients, when in fact it might. The problem therefore is not that the

---

reserve the right to add an Establishment Clause claim to the Complaint if Defendants persist in their religious justification.

statute "might have gone farther than it did," *see Jan-Rock Constr., Inc. v. New York State Dep't of Econ. Dev.*, 438 F.3d 195, 211 (2d Cir. 2006); the problem is that the law is "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it," *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190 (1999).

No Reasonable Fit. Defendants also utterly fail to show that the labeling mandate was "a last—not first—resort." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002). Once again, Defendants' affirmative argument is that there is a reasonable fit because the fit is reasonable. *See* Defs.' Opp. 26. In response to Plaintiffs' listing of many options, such as promoting voluntary labeling or funding educational drives, which would have advanced Vermont's purported informational interest without burdening Plaintiffs' members' speech, *see* Pls.' Opening Memo. 29, Defendants offer only that the State "had reasons for rejecting" them, *see* Defs.' Opp. 28-29. By way of further explanation, Defendants first state that voluntary labeling would "leave most of the grocery store in the dark for consumers," and a State informational campaign would not give consumers information about "whether a *particular* food at the grocery store contains GE materials." *Id.* at 29.[5] Then, tellingly, Defendants are quick to assert that the State is entitled to deference on its decision. *Id.* Neither of these things is true.

First, we know according to Defendants' own statement that "the vast majority of foods sold in grocery stores" contain ingredients derived from GE plants. *See* Defs.' Opp. 28. We also already know from the undisputed declaration of Thomas Dempsey that manufacturers who sell products that could contain GE-derived ingredients, but do not, voluntarily advertise that fact. *See* Decl. of Thomas Dempsey ¶¶ 12, 27 (Doc. 33-4). Having taken no issue with Mr.

[5] Defendants' reasons for rejecting Plaintiffs' alternative options also—and again—put them in a double-bind, for both of these statements directly confirm the impermissible "consumer curiosity" interest underlying Act 120.

Dempsey's statement of fact, Defendants are left with nothing to substantiate their claim that consumers are unable to find out whether a particular food contains GE-derived materials. If there is no label telling them otherwise on food products containing commonly GE-derived ingredients, they can safely assume the answer is yes. And to the extent consumers do not already know it, that fact can easily be conveyed to them through the type of state-run educational campaign Plaintiffs described in their opening memorandum.

Second, the State is entitled to no deference on whether the supposed reasonable fit is constitutionally permissible. To quote the case Defendants themselves cite: "since the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." *Board of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (citation omitted). A court gives no deference to a state on whether a selected means falls within constitutional bounds, meaning whether the law is no more burdensome on speech than necessary. Only once *the court* has determined that the regulation fits "[w]ithin those bounds" does it "leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.*; *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2668-72 (2011) (scrutinizing the State's reasonable-fit justification and affording it no deference); *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 469 n.8 (6th Cir. 1991) (explaining that *Fox* rejected the least-restrictive-means standard, but did not otherwise mandate more deferential review of reasonable fit), *aff'd*, 507 U.S. 410, 416-428 (1993) (scrutinizing supposed reasonable fit without deference). Here, because the State failed to prove that the Act is within the allowed constitutional bounds, it deserves no deference. For this reason, and for all the others, Act 120 fails *Central Hudson*.

3. Act 120 Fails The Reasonable-Relationship Test.

Finally, even if Act 120 were subject only to review under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), it would fail even that standard. The compelled

speech is not factual and uncontroversial; the compulsion is not supported by a substantial state interest; and the mandate is not reasonably related to any supposed state interest.

Controversial Message. Defendants do not deny that *Zauderer* review applies only to factual, noncontroversial speech. Therefore one would expect Defendants' opposition brief to devote substantial ink to answering why Act 120's labeling mandate is factual and noncontroversial. Instead, Defendants devote half a page to the topic. *See* Defs.' Opp. 19 & nn.22-23. And the cases Defendants muster in that brief discussion are all either stale, distinguishable, or inapposite.

Two of Defendants' cited cases—*Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67-68 (1983), and *Central Hudson*, 447 U.S. at 562 n.5—concern only whether the burdened speech is fully protected or purely commercial. And on that particular issue, both cases are stale; *Riley* later clarified that when fully protected speech is intertwined with commercial speech, the speech receives the full panoply of constitutional protection. *See supra* at 2-3.

The two more recent cases Defendants cite also do not help them. In *Connecticut Bar Ass'n v. United States*, 620 F.3d 81 (2d Cir. 2010), the Second Circuit concluded that a federal statutory provision requiring debt-relief agencies to identify themselves as such in advertisements was not intertwined with bankruptcy issues frequently the subject of public debate. *Id.* at 95. The court made no mention of the mandated disclosures being controversial. And the decision's context-specific reasoning offers no insight about whether the disclosures mandated by Act 120 are controversial or impermissibly intertwined with public-policy issues.

Defendants' citation to the fractured decision in *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509 (6th Cir. 2012), fares no better. Defendants quote what appears to be the majority portion of Judge Stranch's opinion, which draws a hard line between "fact" and

"opinion," holding that only compelled controversial *opinions* are barred, not controversial *facts*. *Id.* at 569. But the Supreme Court—which binds the Sixth Circuit just like any other federal court—has explained that a state may in certain circumstances "requir[e] the dissemination of 'purely factual *and* uncontroversial information.' " *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (emphasis added; quoting *Zauderer*, 471 U.S. at 651). If Judge Stranch were right, the *Hurley* Court would have said that the compulsion of *purely factual* information is constitutional, full stop. Instead, the Court required the compelled speech to be *both* factual *and* uncontroversial to meet constitutional muster, recognizing that a compelled "fact" might be controversial—and impermissible.[6] *Discount Tobacco* also directly contradicts the Second Circuit's precedent in *Evergreen*, which shows that even a compelled statement of *fact* may be impermissibly controversial under the First Amendment. 740 F.3d at 245 n.6 (*Zauderer* did *not* govern compelled "mention" of factual, yet "controversial," matters).[7]

In sum, Defendants offer no authorities that actually support their conclusory contention that the labeling mandate compels only factual, noncontroversial speech. And they respond to Plaintiffs' contrary authorities by relegating them to two dismissive footnotes, both of which are wrong. They claim the D.C. Circuit cases cited by Plaintiffs—*National Ass'n of Manufacturers v. SEC*, 748 F.3d 359, 371 (D.C. Cir. 2014), and *R.J. Reynolds Tobacco Co. v FDA*, 696 F.3d 1205, 1216-1217 (D.C. Cir. 2012)—were sweepingly overruled by *American Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (en banc) (hereinafter, *AMI*). They were not.

---

[6] Imagine if it were otherwise. If a government could require disclosure of "purely factual" information, it could require—just to name some readily obvious examples—disclosure of the race or citizenship of the persons who handled the food, or the political affiliations or donation history of the manufacturers' executives.

[7] Defendants wisely do not cite *NEMA* or *NYSRA* to support their argument that the labeling mandate compels factual, noncontroversial speech. In both cases, the Second Circuit construed the plaintiffs' arguments as essentially conceding the point and did not evaluate whether the compelled speech was controversial. *See NYSRA*, 556 F.3d at 134; *NEMA*, 272 F.3d at 113-114.

AMI specifically did not overrule the portions of those decisions explaining the controversial nature of the compelled speech, *see AMI*, 760 F.3d at 22-23 (overruling cases only to the extent they limited the government interest that satisfies *Zauderer*), and that is the proposition for which Plaintiffs cited those cases. *See* Pls.' Opening Memo. 33 n.13.

Defendants also have no ready answer to *CTIA-Wireless Ass'n v. City & Cnty. of San Francisco*, 494 F. App'x 752 (9th Cir. 2012). *CTIA* explained that the compelled disclosure in that case, concerning cell-phone radiation, was controversial because "there is a debate in the scientific community about the health effects of cell phones," and "San Francisco concedes that there is no evidence of cancer caused by cell phones." *Id.* at 753-754 (brackets and quotation marks omitted). Compare that to this case, where the General Assembly identified what it charitably calls the "lack of consensus" about the health and safety of GE-derived foods. *See* Act 120, § 1(2)(D). Even Defendants themselves argue that there is no "consensus" concerning GE. *See* Defs.' Opp. 7-8, 10, 22. To be clear: Plaintiffs have demonstrated the widespread consensus among the professional scientific community about the safety of GE-plant-derived foods in comparison with non-GE-plant-derived foods. But there is nonetheless a great deal of *political* controversy surrounding GE, rational or not—and that is what Defendants frequently end up referencing, paradoxically, to support Vermont's labeling mandate. Accordingly, and once again by Defendants' own argument, the compelled disclosure is controversial speech.

No Substantial Interest. As Plaintiffs have explained, the Second Circuit has not eliminated the substantial-interest requirement for compelled commercial speech. *See* Pls.' Opening Memo. 33-34 (quoting *NYSRA*, 556 F.3d at 134; *NEMA*, 272 F.3d at 115 & n.6). Defendants dismiss the substantial-interest language in *NYSRA* and *NEMA* as an inconsequential "passing description." Defs.' Opp. 21. But then they readily concede that not any rational-basis-

type interest will do; the Court must "assure that, in formulating its judgments, the legislature has drawn reasonable inferences based on substantial evidence." *Id.* at 22 (brackets omitted; quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)). The Act fails under Defendants' own formulation of the standard, because as we have explained, the supposed evidence supporting the disclosure mandate fails to qualify as substantial. *See supra* at 6-8.

Indeed, Defendants' arguments map almost precisely onto the losing arguments by the State officials in *Amestoy*, as well as the dissenting opinion in that case. In *Amestoy*, like here, the State cited the purported "on-going debate within the scientific community over the safety of rBST for humans," noting that "consumers have a legitimate basis for being skeptical about the ability of FDA to detect initially the long-term health effects of drugs the agency approves." *Amestoy* Appellees' Br. 11, 1995 WL 17049818. In *Amestoy*, like here, survey results revealed that "labels indicating the use of biotechnology in producing food products were considered very important by 85 percent of the consumers responding to a 1992 study." *Id.* at 5. And in *Amestoy*, like here, at least one State-picked expert opined that "[i]t is not reasonable to conclude that there is uniform agreement that milk from rBST treated cows is 100% safe for human consumption." *Amestoy*, 92 F.3d at 77 n.3 (Leval, J., dissenting).

Even though the State in *Amestoy* was able to cobble together some supposedly scientific evidence of non-consensus, it could not overcome the fact that "no professionally-recognized scientific group ha[d] concluded that there was doubt about the safety of rbST," and "FDA ha[d] established that there is no human safety or health concerns associated with food products derived from rbST." *Amestoy* Appellants' Opening Br. 13 n.6, 1995 WL 17049817. The same can be said here: *no* professionally recognized scientific group has concluded there was doubt as to the health, safety, or environmental risks of GE; and FDA has concluded GE-derived foods

are not materially different from non-GE-derived foods. *See* Pls.' Opening Memo. 6-10 (discussing authorities). This, plus the absence of substantial evidence of consumer confusion caused by Plaintiffs' members' labels and the illegitimacy of any religious-based interest, means that Defendants have not satisfied their confessed burden of showing that the General Assembly drew reasonable inferences from substantial evidence.

In the end, *Amestoy* dooms Act 120's labeling mandate. In arguing otherwise, Defendants place misleading emphasis on certain language in *Amestoy* (at pages 22-23 of their brief), suggesting that there was supposedly *no scientific evidence* supporting safety concerns in *Amestoy*. That is incorrect; the problem was that there was "no scientific evidence *from which an objective observer could conclude* that rBST has any impact at all on dairy products." 92 F.3d at 73 (emphasis added). This is a qualitative, rather than a quantitative, assessment, and it applies equally here. The record fails to contain substantial evidence supporting Defendants' theories of GE's supposed risks, and it does not support a reasonable inference that there is any real harm that the State is addressing through its labeling mandate. Vermont's purported interests in the mandate, such as they are, cannot sustain it.

No Reasonable Relationship. Finally, there is no reasonable relationship between the Act's mandate and the State's alleged interests. Plaintiffs' opening memorandum explained that "mandatory labeling is an irrational response" to its asserted interests; in particular, informing consumers about the existence of GE-derived ingredients in food products. Pls.' Opening Memo. 35. The State offers no substantive answer to that contention, other than a throw-away line that "Act 120 is reasonably related to * * * state interests." Defs.' Opp. 24. But yet again, declaring something does not make it so. There is no reasonable relationship between Vermont's alleged interest and the labeling mandate. It fails *Zauderer*.

B. Act 120's Ban On "Natural" And "Similar" Terms Violates The First Amendment And Is Void For Vagueness.

The Act's ban on the word "natural" and "similar" terms on foods derived from GE plants is also unconstitutional. It discriminates based on viewpoint and is therefore invalid on its face. There is no real likelihood of deception absent the ban, plus the *Central Hudson* factors of material advancement and fit are not met. *See In re R.M.J.*, 455 U.S. 191, 203-204 (1982). And the ban is void for vagueness. *See* Pls.' Opening Memo. 36-44. In response, Defendants take two tacks: they cite consumer surveys that they claim show the Act bans misleading speech, and they try to explain away the ban's many shortcomings by citing the draft rule. Both efforts fail.

"Natural" And "Similar" Words Are Not Misleading. In keeping with their practice throughout the brief, Defendants argue that "natural" as applied to GE-derived food products is inherently misleading—because it is inherently misleading. *See* Defs.' Opp. 30. It takes more than that circular justification to carry the day, however, and Defendants have failed to show that "natural" advertising is *actually* misleading. Their own evidence in fact shows the contrary. One of their cited studies acknowledges that consumers view the word "natural" in advertising as commercial puffery: "natural as a marketing term remains vague and unappealing to consumers." Defs.' Ex. J at 815 (Hartman Group, *Organic and Natural 2012*). *See Alexander v. Cahill*, 598 F.3d 79, 95 (2d Cir. 2010) (words commonly seen in advertising are puffery, not misleading statements). The Court should critically scrutinize Vermont's rationale for implementing its ban where, as here, the record evidence "contradicts, rather than strengthens" the rationale. *Edenfield*, 507 U.S. at 772-773. Defendants' evidence does not withstand that scrutiny.

The consumer surveys on which Defendants rely to show actual confusion are problematic for several reasons. *First*, the surveys on which Defendants rely asked overtly leading questions. For instance, the Vermonter Poll asked: "Do you think that a bottle of syrup

labeled 'all natural' contains ingredients that are derived from genetically modified organisms?" Decl. of Dr. Jane Kolodinsky ¶ 26 (Doc. 63-5). The question assumes "natural" conveys a message with respect to GMOs and then suggests a negative answer through its phrasing. Similarly, the Kroneberger et al. (2014) study cited by Dr. Kolodinsky asked those surveyed the extent to which they agreed or disagreed with the statement that it was "fundamentally unnatural" to "*artificially* introduce a gene that exists naturally in wild/crab apples which provides resistance to mildew and scab." *Id.* ¶ 21 (emphasis added). This question guided the answer by describing the process as "artificial[]," and then by asking for a response to the statement that the process was unnatural. *Second*, the surveys typically sought customers' opinions about what they believed "natural" meant writ large, not specific to the commercial context—or, critically, advertising. They were not asked what information, if any, they thought that the word "natural" conveyed in an advertisement. *See id.* ¶¶ 9-22. (And, again, the evidence in fact shows they understand the word to be akin to puffery when used in advertising. *See* Defs.' Ex. J at 815.) *Third*, key definitions were left out of Defendants' presentation of evidence. There is no record information about how the terms "genetically modified organisms" or "genetically engineered" were explained to survey participants. The scope of the First Amendment's protections should not depend on such imprecise, unpredictable, unscientific, and subjective surveys.

The Draft Rule. Defendants also argue that the ban on "natural" and "similar" words passes muster under *Central Hudson* and is not unconstitutionally vague because the draft rule purportedly solves the statute's constitutional problems. *See* Defs.' Opp. 31-33. That is a huge and costly concession, because the draft rule does not factor into the constitutional calculus. This Court must look to the text of the statute, and that text on its face is unconstitutional—which is why Defendants do not stir themselves to defend it. The statute bans "natural" labels

sweepingly "on the package, in signage, or in advertising," and it subjects Plaintiffs' members to liability based on the subjective beliefs of third parties by banning the use of "any words of similar import that would have a tendency to mislead a customer." 9 V.S.A. § 3043(c). As we have explained, a speech ban like the one enacted by the General Assembly must be crafted "in a manner no more extensive than necessary to serve that interest." *Ibanez v. Florida Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136, 142 (1994). This one is not. Nor does it "provide a person of ordinary intelligence fair notice of what is prohibited." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18 (2010) (quotation marks omitted). Indeed, it is "so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* It therefore violates the First Amendment and the Constitution's due process guarantee.

C. Act 120 Is Preempted By Federal Law And The Comprehensive Federal Policy Governing The Products of Genetic Engineering.

Act 120's labeling mandate is preempted because it compels manufacturers to describe their products in a way that suggests that the food products generally, and ingredients specifically, are materially different than identical products without the label. The mandate therefore conflicts with federal law and is preempted.

1. Act 120 Is Expressly Preempted By The FDCA And NLEA.

Defendants argue that Act 120 is not preempted because (i) Act 120 does not alter the ingredient list or the common or usual name of foods and (ii) FDA allows manufacturers to provide the same information voluntarily on labels. Defendants' theory is wrong on both counts.

First, the NLEA preempts any State labeling requirement governing "ingredients" or the "common or usual name" of food that is "not *identical*" to federal law. 21 U.S.C. § 343(a)(1)-(3), (i)(1)-(2) (emphasis added); *see Turek v. General Mills*, 662 F.3d 423, 427 (7th Cir. 2011) ("Even if the disclaimers that the plaintiff wants added would be consistent with the

requirements imposed by the Food, Drug, and Cosmetic Act, consistency is not the test [for NLEA preemption]; identity is."); *In re Pepsico, Inc. Bottled Water Marketing & Sales Practices Litig.*, 588 F.Supp.2d 527, 538-539 (S.D.N.Y. 2008) ("not identical" language in NLEA preempts requirements that "go beyond federal law"). The FDCA does not require a food label to bear any statements about genetic engineering with respect to the food's "ingredients" or "common or usual name." 21 U.S.C. § 343(i)(1), (i)(2). But Act 120 *does* impose that requirement, and it is expressly preempted as a result.

Defendants counter that Act 120 is not preempted because it does not require changes directly to the ingredient list or the common or usual name of the food. Their theory would turn federal preemption into a game of inches, allowing States to impose non-identical labeling requirements so long as they avoid certain parts of the label. But Section 343(i)'s language plainly states that it imposes requirements for the "common or usual name" on a product's "*label*." 21 U.S.C. § 343(i)(1), (i)(2) (emphasis added); *see also id.* § 321(k) (defining "label" as extending to all "written, printed, or graphic matter upon the immediate container of any article"). And the accompanying NLEA preemption provision explains that "any requirement for the labeling of food of the type required by section 343(i)(2) * * * that is not identical to the requirement of [that] section" is preempted. 21 U.S.C. § 343-1(a)(2); *see also* § 343(a)(3) (same as to the common or usual name of the food under § 343(i)(1)).

The particular language that the State has selected for its labeling mandate exacerbates the problem, because it requires parties to state that their food product as a whole is "produced with," "may be produced with," or is "partially produced with" "genetic engineering." 9 V.S.A. § 3043(b). The words "produced with genetic engineering" convey a message about the *substance* of the food products that words such as "king size," "fair trade," or "from Canada"

simply do not. *Cf.* Defs.' Opp. 36. The mandate suggests the ingredients in those products, and the products themselves, are somehow materially different from products not so labeled. And that effect is the same wherever the words appear. *See, e.g.*, *Cardona v. Target*, 2013 WL 1181963, at *9-*13 (C.D. Cal. Mar. 20, 2013) (state law requiring "honey without pollen to include disclosures such as 'contains no pollen' or 'filtered to remove all pollen' " is not identical to federal labeling requirements and therefore is preempted); *Perea v. Walgreen Co.*, 939 F.Supp.2d 1026, 1039 (C.D. Cal. 2013) ("Plaintiff's claim must fail because [the State standard] creates a requirement for the labeling of 'honey' that is not identical to 21 U.S.C. § 343(i)(1).").

Second, Defendants assert that because FDA's *Draft Guidance for Industry* allows private parties to voluntarily disclose that certain ingredients in their products are derived from genetic engineering, FDA has implicitly sanctioned states' mandatory requirement that private parties provide that information on their food labels. But the conclusion does not follow from Defendants' premise. Preemption limits what *states* may do—not *private parties*. It bars states from imposing requirements "not identical" to federal labeling standards for ingredients and product names. *See* 21 U.S.C. § 343-1(a)(1), (3). This distinction makes perfect sense. A state-mandated disclosure implies something far weightier than a voluntary one: it conveys a warning—an official statement of difference—which is why federal law does not allow states to regulate in the area of ingredients or product names at all. *See Mills v. Giant of Md., LLC*, 441 F. Supp. 2d 104, 108 (D.D.C. 2006), *aff'd on other grounds by* 508 F.3d 11 (D.C. Cir. 2007); *Briseno v. ConAgra Foods, Inc.*, No. 11-5379, ECF No. 54, at 4-13 (C.D. Cal. Nov. 23, 2011). Because Act 120 imposes labeling requirements that are "not identical" to federal labeling standards for both the ingredients and product names, the labeling mandate is preempted. *See* Pls.' Opening Memo. 44-50.

2. Act 120 Is Expressly Preempted By The FMIA And The PPIA.

Defendants do not contest that Act 120 runs afoul of the FMIA's and PPIA's express preemption provisions. *See* 21 U.S.C. §§ 467e, 678; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Grocery Mfrs. of Am., Inc. v. Gerace*, 755 F.2d 993, 997 (2d Cir.), *aff'd*, 474 U.S. 801 (1985). Instead, they argue—again—that the Attorney General's tentative proposed draft rule fixes the problem. *See* Defs.' Opp. 51. It does not.

Once again, the Court's review is of the Act, not a draft rule implementing the Act. And, in any event, a *rule* cannot amend the *statutory* language exempting from the disclosure mandate food products "consisting *entirely* of or derived *entirely* from an animal," so that the Act instead exempts "packaged, processed food containing meat or poultry, the label of which requires approval by the United States Department of Ag., under the FMIA or PPIA." Defs.' Opp. 51 (emphases added; brackets and quotation marks omitted). *See infra* at 24-25.

Setting aside this *ultra vires* amendment attempt, Act 120 is plainly preempted.[8]

3. Act 120 Is Conflict-Preempted.

Act 120's labeling mandate is also conflict preempted because it compels manufacturers to label their products in a misleading manner and because it stands as an obstacle to federal agency's coordination of labeling requirements. Defendants respond by arguing, in essence, that the GE labeling mandate conveys no particular message about the contents of the food, thus presenting no "conflict" with the federal regulatory regime. *See* Defs.' Opp 42-48. But we know from Defendants' First Amendment arguments that the label is intended to and *does* convey a message: it warns about the supposed risks of GE to health, safety, and the

[8] Defendants' argument that Plaintiffs lack standing to argue express preemption under the FMIA or the PPIA makes no sense. But because it appears to reference the motion to dismiss only, Plaintiffs do not address it here other than to note, again, that "[t]he distinction between facial and as-applied challenges 'goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint.' " *Citizens United v. FEC*, 558 U.S. 310, 331 (2010).

environment. Defendants retort that Plaintiffs' members can always include a disclaimer, but the test for preemption is not whether Plaintiffs can counteract a state's mandate by essentially asserting the negative of the mandate on their label in an attempt to comply with federal labeling requirements. Rather, the test is whether (1) "compliance with both federal and state regulations is a physical impossibility" or (2) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (quotation marks omitted). The Act suffers from both defects.

First, the labeling mandate impermissibly conveys a message that the labeled foods are different in some meaningful way. It thus conflicts with the regulations implementing the FDCA, which require a common or usual name to be "uniform among all identical or similar products." 21 C.F.R. § 102.5(a). And the particular language selected by the General Assembly—that the product as a whole is "produced using genetic engineering"—is "false or misleading in any particular," in flat violation of 21 U.S.C. § 343(a), rendering it impossible to comply both with Vermont's edict and with the FDA's. The example that Defendants provide from the *FDA Draft Guidance* shows why this is so: that example specifies the particular ingredient, "cornmeal," that was produced using biotechnology. *See* Defs.' Opp. 44. Here, Act 120 broadly requires manufacturers to state that *the food* is produced with genetic engineering, without specifying whether this disclosure covers all or only some of the ingredients. The label's lack of specificity renders it misleading, and thus mislabeled.

Second, Act 120 is conflict-preempted because it stands in the way of the ability of federal agencies such as APHIS, EPA, FDA, and FSIS to administer the health and safety statutes they are charged with implementing. Defendants argue that the *Coordinated Framework* Plaintiffs cite to support this point is a matter of federal policy, not law, and therefore cannot be

the source of preemption. But courts must evaluate whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade*, 505 U.S. at 98. Courts thus should consider the statute's text, legislative history, and agency guidance to determine whether a state statute is obstacle-preempted. *See In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liability Litig.*, 725 F.3d 65, 102 (2d Cir. 2013). The *Coordinated Framework* represents the sum total of *all* of these considerations, and Vermont's interference with the careful coordination between federal agencies "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade*, 505 U.S. at 98. Vermont's law must yield to that "clear and manifest purpose of Congress." *See* Defs.' Opp. 45 (quoting *Cippollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992)). It is preempted.

D. The Tentative Proposed Draft Rule Is Irrelevant.

One final note about the tentative draft rule that Defendants repeatedly invoke in their brief. In October, the Attorney General issued what that office described as a "preliminary draft of the rule to implement Act 120" and sought initial public comments on the tentative rule, in advance of publishing an *actual* proposed rule, which will also be subject to public comment, sometime next year. *See* Ex. A to Defs.' Opp. (Doc. 63-1 at 2). Defendants rely extensively on the tentative draft rule in their opposition. *See* Defs.' Opp. 3, 11, 12, 20, 27, 31, 33, 43, 47, 51, 60, 67. But the relevant materials before this Court are the statutory text and legislative record—full stop. Not even a *final* rule can change the plain text of the Act, and this proposed, tentative, draft rule is the farthest thing from final. *See* 3 V.S.A. § 836 (setting forth detailed process for promulgating, receiving formal public comment upon, seeking committee review of, and finalizing a rule). Tentative and untested thinking on a rule does not reflect the considered and reasoned judgment that is supposed to result from the administrative process. The current

proposal is irrelevant. *See Eustace v. CIR*, 312 F.3d 905, 908 (7th Cir. 2002) ("proposed regulations have no legal effect"). The Court should disregard it.

The tentative draft rule also impermissibly alters the language of the statute itself, and that is well out of bounds. The Attorney General—whose primary role in the Executive Branch is "the general supervision of criminal prosecutions," 3 V.S.A. § 153(a)—was granted limited authority to "adopt by rule requirements for the implementation of" the Act, Act 120 § 3.[9] He was not granted authority to alter the text of the statute or to make policy judgments reserved for the General Assembly. *See id.* His attempt to do just that in the draft rule exceeds the scope of his authority and should not be considered at all by this Court. *See Martin v. State, Agency of Transp. Dep't of Motor Vehicles*, 2003 VT 14, ¶ 15, 175 Vt. 80, 87, 819 A.2d 742, 749 (2003) ("It is axiomatic that an administrative agency's power to promulgate regulations may extend only as far as its legislative grant of authority."); *see also, e.g.*, *In re Rusty Nail Acquisition, Inc.*, 2009 VT 68, ¶ 7, 186 Vt. 195, 202, 980 A.2d 758, 762 (2009) (an administrative entity may not "define and regulate matters over which it has no expertise or authority"); *In re Club 107*, 152 Vt. 320, 326, 566 A.2d 966, 969 (1989) (an administrative entity "may not, through the promulgation of regulations, expand its authority").[10]

---

[9] Compare this to *Amestoy*, where the General Assembly more sensibly "authorized Vermont's Commissioner of Agriculture to adopt implementing rules," and the Commissioner adopted appropriately *implementing* rules that "essentially require manufacturers to identify dairy products produced with rBST with a blue dot, and retailers to display a sign telling consumers that the blue-dotted products 'contain milk from rBST-treated cows' and that the FDA 'has determined that there is no significant difference between milk from treated and untreated cows.' " 92 F.3d at 75 (Leval, J., dissenting).

[10] Vermont's Administrative Procedures Act defines an "agency" as including an "*officer of state government * * * authorized by law to make rules.*" 3 V.S.A. § 801(b)(1) (emphasis added).

II. PLAINTIFFS WILL BE IRREPARABLY INJURED IN THE ABSENCE OF A PRELIMINARY INJUNCTION.

The clock has already started to run on the time Plaintiffs have to comply with the Act. As several of Plaintiffs' members explained in sworn declarations, they must act *now* in order to meet the July 2016 deadline for compliance. *See* Decl. of Cofi Adams ¶¶ 21-22 (Doc. 33-6); Decl. of Alexander L. Baxter ¶¶ 24-25 (Doc. 33-7); Decl. of Jeff Bradley ¶ 22; Decl. of Steven J. Hermansky ¶ 31 (Doc. 33-9); Decl. of Michael Morgan ¶¶ 32-33 (Doc. 33-10); *see also* Decl. of Rick Blasgen ¶¶ 39-44 (Doc. 33-3); Decl. of Thomas Dempsey ¶¶ 32-35 (Doc. 33-4). And speech compelled in violation of the First Amendment categorically qualifies as irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Defendants answer by contending that Plaintiffs are not yet subject to liability and penalties under the Act. *See* Defs.' Opp 62, 67. True enough. But Plaintiffs are not relying on the liabilities or penalties to show irreparable harm; they are relying on the practical reality that the Act's effective date requires them to change their business practices and speech *now* in order to *avoid* liability and penalties when they kick in. But even if Plaintiffs were relying on a pre-enforcement theory of irreparable harm, that theory is both recognized and permissible. This Court need look no further than *Amestoy* to see this is so: there, the plaintiffs filed suit in April 1994, immediately after the rBST disclosure mandate was signed into law and before the Commissioner of Agriculture filed implementation rules. They "sought to enjoin Vermont's rBST notification law * * * from taking effect on September 12, 1995." *Amestoy* Appellees' Br. 2, 1995 WL 17049818. The district court denied the preliminary injunction, but the Second Circuit reversed, holding that "appellants have amply demonstrated that the First Amendment is sufficiently implicated to cause irreparable harm." *Amestoy*, 92 F.3d at 72. *See also, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 656, 670-671 (2004) (affirming pre-enforcement injunction,

explaining "speakers may self-censor rather than risk the perils of trial"); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 589-590 (7th Cir.) (applying the *Elrod* rule of irreparable First Amendment injury to a pre-enforcement action), *cert. denied*, 133 S. Ct. 651 (2012). The exact same result obtains here under the very similar facts of this case.

In any event, even without their First Amendment claim, Plaintiffs could show irreparable harm. The Act requires Plaintiffs' members to, among other things, identify which products contain GE-plant-derived ingredients; determine whether each product falls within an exception to the Act and, if it does, either reformulate the product to remove the GE-derived ingredients (an option likely impossible given existing purchase commitments and conditions) or re-label the products locally or nationally; and, if Plaintiffs' members re-label the products locally, they must develop unique, Vermont-specific channels of distribution. *See* Pls.' Opening Memo. 55-58 (summarizing Plaintiffs' declarations). If Plaintiffs win on the merits, however, all of these efforts to comply with the unlawful law will be for naught. Plaintiffs cannot unwind the clock after success on the merits; those costs, production changes, realignments of distribution channels, and the like can never be recovered. To the contrary, upon success on the merits, Plaintiffs would have to expend resources to *undo* those changes, absent preliminary relief.

Defendants' declarants quarrel with Plaintiffs' declarants' description of the time and resources required for compliance. We invite the Court to take a close look at Defendants' declarants. They include Dr. Andrew Dyke, a "financial and policy analyst" with no prior industry employment, Decl. ¶ 1 (Doc. 63-6); Jerry Greenfield from Ben & Jerry's, an ice-cream brand with only "70 SKUs in the marketplace at any given time," Decl. ¶ 11 (Doc. 63-7), and

which has publicly committed to sourcing all of its products from non-GE ingredients[11]; and Rhonda Miller of Clif Bar and Company, which has a total of "eight different product lines," Decl. ¶ 3 (Doc. 63-8), and which similarly has made a public commitment to sourcing all of its products from non-GE ingredients.[12]

These declarations do not come close to an effective rebuttal. Dr. Dyke completely lacks the supply-chain expertise of Plaintiffs' expert, Rick Blasgen, or the industry-based experience of other of Plaintiffs' declarants, Thomas Dempsey and Richard Michaud. And Greenfield and Miller, for their part, come from companies that are demonstrably not comparable to those of Plaintiffs' declarants, for multiple reasons.[13] To begin with, of course it will take less time and cost less for companies producing a small number of similar goods. That says nothing about the experiences of companies with far larger ranges of products. And because both Ben & Jerry's and Clif Bar have committed to sourcing their products from non-GE ingredients, Greenfield's and Millers' statements about what supply-chain changes their companies would hypothetically have to make to comply with Act 120 should be taken with a grain of salt. On top of that, both declarants' companies have a financial interest in Vermont's law: they benefit from the mandate requiring their competitors—otherwise known as many of Plaintiffs' members—to affix warning labels to their products or spend massive resources to reformulate them to comply with Act 120.

---

[11] *See* http://www.benjerry.com/values/issues-we-care-about/support-gmo-labeling/our-non-gmo-standards (last visited Dec. 5, 2014) ("Ben & Jerry's 'Non-GMO' standards").

[12] *See* http://www.clifbar.com/faq/clif-bar (last visited Dec. 5, 2014) ("Do Clif Bars contain GMOs or bioengineered ingredients?").

[13] These are: Coca-Cola Company, which sells "250 products * * * associated with 1400 different pieces of package/label artwork" in Vermont alone, Decl. of Cofi Adams ¶ 9 (Doc. 33-6); PepsiCo, Inc., which "sells over 1,700 SKUs in Vermont," Decl. of Alexander L. Baxter ¶ 12 (Doc. 33-7); General Mills, which "currently sells over 4,000 SKUs," Decl. of Jeff Bradley ¶ 7 (Doc. 33-8); ConAgra Foods, Inc., which "has tens of thousands of SKUs," Decl. of Steven J. Hermansky ¶ 9 (Doc. 33-9); and Kraft Foods Group, Inc., with its "3,000 SKUs," Decl. of Michael Morgan ¶ 7 (Doc. 33-10).

Defendants' legal argument against irreparable harm is that Plaintiffs are improperly seeking an advisory ruling. But this contention rests on a basic misreading of *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 2011 WL 2811317 (D. Vt. July 18, 2011). Defendants contend that here, like in *Entergy*, Plaintiffs' harm may only be alleviated by a favorable finding on the merits. Defs.' Opp. 63. Not so. In *Entergy*, the problem with the plaintiff's theory of irreparable harm was that it was based on expenditures the plaintiff wanted to make—namely, refueling its nuclear plant—on the assumption that the law requiring the plaintiff to shut down the plant was invalid. *Entergy*, 2011 WL 2811317, at *1, *3. That harm would be fully remedied by a favorable decision on the merits because the refueling expense would not have been wasted at all—a crucial fact, given that the test for a preliminary injunction is whether the plaintiff will be irreparably harmed if it loses on the preliminary injunction motion *but ultimately prevails on the merits*. *Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010).

In this case, by contrast, Plaintiffs' theory of irreparable harm does not rest on actions Plaintiffs' members are taking on the assumption that the State is wrong. Rather, Plaintiffs are claiming irreparable harm based on actions Plaintiffs' members must take on the assumption that the State is *right*. If the law is later invalidated, and Plaintiffs succeed on the merits, they will have no means to recover for these expenditures and changes in business practices. For this reason, the harms suffered by Plaintiffs are irreparable, and entirely distinguishable from *Entergy*. *See* Pls.' Opening Memo. 59 (citing *Nordic Windpower USA, Inc. v. Jacksonville Energy Park, LLC*, 2012 WL 1388357, at *13 (D. Vt. Apr. 19, 2012); *American Frozen Food Inst. v. United States*, 855 F. Supp. 388, 394 (CIT 1994)).[14]

[14] *See also, e.g.*, *Lawrence & Mem'l Hosp. v. Sebelius*, 986 F. Supp. 2d 124 (D. Conn. 2013) (absent preliminary injunction, hospital's reclassification application would be denied and it would lose millions of dollars in Medicare reimbursements that it could not recoup in a legal

III. THE OTHER PRELIMINARY INJUNCTION FACTORS FAVOR RELIEF.

Defendants do not dispute that the public-interest and balance-of-hardship factors merge here. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). They also do not dispute that the State "does not have an interest in the enforcement of an unconstitutional law," *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (quotation marks omitted), or that "[a] preliminary injunction would preserve the status quo, and under the status quo, consumer interests are amply served by existing labeling," Pls.' Opening Memo. 60. Accordingly, without apparent dispute, this factor plainly weighs in favor of an injunction.[15]

CONCLUSION

For all of these reasons, and those stated in Plaintiffs' opening memorandum, Plaintiffs' Motion for a Preliminary Injunction should be granted.

Dated: December 5, 2014

Respectfully submitted,

/s/ Catherine E. Stetson

Matthew B. Byrne
GRAVEL & SHEA, P.C.
76 St. Paul Street
Post Office Box 369
Burlington, VT 05401
Telephone: 802-658-0220
mbyrne@gravelshea.com

Catherine E. Stetson (*pro hac vice*)
E. Desmond Hogan (*pro hac vice*)
Mary Helen Wimberly (*pro hac vice*)
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
Telephone: 202-637-5600
cate.stetson@hoganlovells.com

Counsel for Plaintiffs

---

action challenging the denial); *American Fin. Servs. Assn. v. Burke*, 169 F. Supp. 2d 62 (D. Conn. 2001) (absent preliminary injunction, plaintiff challenging law prohibiting mandatory arbitration clauses in certain loan agreements would either have to forgo making the loans or make such loans with contracts lacking arbitration clauses; in the event of success on the merits, no relief could reform the contracts to include arbitration clauses, and pecuniary losses could not be recovered due to the state's sovereign immunity); *Synagro-WWT, Inc. v. Louisa Cnty., VA*, 2001 WL 868638, at *5 (W.D. Va. July 17, 2001) ("[Plaintiff] should not be forced into the position of choosing to either violate an allegedly invalid ordinance and suffer the inherent consequences of doing so or comply with the same and suffer a loss with little hope of recovery.").

[15] Because the arguments that Shumlin, Reardon, and Dolan are improper defendants appear to relate only to Defendants' motion to dismiss, we do not respond to them here other than to note that any pleading defects concerning those defendants were corrected in the amended complaint.

CERTIFICATE OF SERVICE

I, Catherine E. Stetson, counsel for Plaintiffs, hereby certify that on December 5, 2014, I electronically filed the foregoing Document through this Court's CM/ECF system, which will send notification of such filing to all registered participants.

/s/ Catherine E. Stetson
Catherine E. Stetson