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**A RIGHT TO KNOW ABOUT GMOs:
WHAT *AMERICAN MEAT INSTITUTE V. USDA* MEANS FOR
VERMONT'S FOOD LABELING LAW**

*Charlotte Davis**

*Food labeling is a common sense part of everyday life in America, but just how much and what labeling is acceptable under the First Amendment's compelled speech protections is a more controversial topic. In May of 2014, Vermont adopted a new law to label foods produced using genetically modified organisms (GMOs). Several manufacturers feel GMO labeling violates their First Amendment rights and are challenging this law. Although there are some arguments in their favor, the recent precedent set by the D.C. Circuit in *American Meat v. USDA* does not bode well for the manufacturer's case. This Recent Development argues that under this new precedent the Vermont District Court should uphold the Vermont GMO labeling law as an acceptable use of compelled commercial speech that does not violate manufacturer's First Amendment rights.*

I. INTRODUCTION

Is there a right to know whether foods are created using genetic engineering technologies? Many people in Vermont believe so.¹

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¹ See e.g., *Vermonters Fill State House in Support of GMO Labeling*, VERMONT RIGHT TO KNOW GMOs (Apr. 16, 2012), <http://www.vpirg.org/news/vermonters-fill-state-house-in-support-of-gmo-labeling/> (reporting on the large group of people rallying in support of a GMO labeling law in the state); *Vermont Label GMOs*, VERMONT PUB. INTEREST RESEARCH GRP. (Oct. 8, 2014), <http://www.vpirg.org/vt-label-gmos/>.

The companies who make these foods staunchly disagree.² This question has given rise to months of statewide campaigning, political discourse, a new law, and a new lawsuit.³ *Grocery Manufacturers Ass'n v. Sorrell*⁴ could very well determine the future of GMO food labeling in the United States, and a recent ruling from the D.C. Circuit sheds light on how that future will look.⁵

Governor Peter Shumlin signed a bill (“Act 120”) into law on May 8 of 2014, making Vermont the first state to require the labeling of foods produced using GMOs.⁶ Little more than a month

² *Labeling Food and Ingredients Developed from GM Seed*, MONSANTO, <http://www.monsanto.com/newsviews/pages/food-labeling.aspx> (Mar. 2013) (“We oppose current initiatives to mandate labeling of ingredients developed from GM seeds in the absence of any demonstrated risks. Such mandatory labeling could imply that food products containing these ingredients are somehow inferior to their conventional or organic counterparts.”); *See generally* Complaint, Grocery Manufacturer’s Ass’n. v. Sorrell, No. 5:14-cv-00117 (D. Vt. June 12, 2014) (claiming that the mandatory labeling law is inappropriate on several grounds) *available at* http://ago.vermont.gov/assets/files/Consumer/GE_Food/GE%20Complaint.pdf.

³ Terri Hallenbeck, *How GMO Labeling Came to Pass in Vermont*, BURLINGTON FREE PRESS (Apr. 27, 2014), <http://www.burlingtonfreepress.com/story/news/politics/2014/04/27/gmo-labeling-came-pass-vermont/8166519/> (“64 countries, including the European Union, Australia, Japan and China, require labeling of GMO foods. No other U.S. states do. Connecticut passed a law in 2013 that would require labeling if at least four neighboring states with a combined population of 20 million pass similar laws. Maine passed a labeling law this year that would require labeling once five neighboring states, including New Hampshire, pass similar laws.”). *See generally* Am. Meat Inst. v. USDA, 760 F.3d 18 (D.C. Cir. 2014) (holding that a federal law requiring country of origin labeling for meat was not a violation of meat producers’ First Amendment right to free speech).

⁴ Complaint, Grocery Mfr.’s Ass’n. v. Sorrell, No. 5:14-cv-00117 (D. Vt. June 12, 2014).

⁵ *See* Andrew Westney, *Food and Beverage Cases We’re Still Waiting on in 2014*, LAW360, Aug. 6, 2014 (quoting Hogan Lovells, who stated, “[*Grocery Mfr.’s Ass’n. v. Sorrell*] is a big deal, and it will set a big precedent”).

⁶ Dana Ford & Lorenzo Ferrigno, *Vermont Governor Signs GMO Food Labeling into Law*, CNN.COM (May 8, 2014), <http://www.cnn.com/2014/05/08/health/vermont-gmo-labeling/> (“Maine and Connecticut passed laws requiring labeling, but they won’t go into effect until other states pass GMO-labeling laws. Vermont is the first to pass a ‘no strings attached’ bill . . .”).

after the enactment, a number of food manufacturers sued Vermont claiming the law is unconstitutional and must be struck down.⁷ The manufacturing companies argued that the law violates their First Amendment right to free speech, which manifested here as the right to choose not to speak on whether the foods they package and produce are the products of genetic engineering.⁸

Meanwhile, the U.S. Court of Appeals for the D.C. Circuit decided another compelled speech case involving food labeling. *American Meat Institute v. USDA*⁹ challenged a national food labeling law that required food manufacturers to label all meat with country-of-origin information.¹⁰ In an unexpected decision, the court upheld the labeling law and disagreed with the American Meat Institute's reading of the First Amendment compelled speech doctrine.¹¹ The question now on the mind of anyone involved with the Vermont law or the food production industry is whether the reasoning in *American Meat* will apply to GMO food labeling.¹²

⁷ Nancy Remsen, *Trade Groups Sue VT Over GMO Labeling Law*, BURLINGTON FREE PRESS (June 13, 2014), <http://www.burlingtonfreepress.com/story/news/politics/2014/06/12/gma-sues-vt-gmo-law/10389209/> (“Four national organizations whose members would be affected by Vermont's new labeling law for genetically engineered foods filed a lawsuit Thursday in federal court challenging the measure's constitutionality.”).

⁸ Complaint at 13 no. 43, *Grocery Mfr.'s Ass'n. v. Sorrell*, No. 5:14-cv-00117 (D. Vt. June 12, 2014) (“Act 120 compels manufacturers to use their labels to convey an opinion with which they disagree, namely, that consumers should assign significance to the fact that a product contains an ingredient derived from a genetically engineered plant.”).

⁹ 760 F.3d 18 (D.C. Cir. 2014) [hereinafter *Am. Meat*].

¹⁰ *Id.* at 21 (“The Secretary responded with a rule requiring more precise information—revealing the location of each production step. For example, meat derived from an animal born in Canada and raised and slaughtered in the United States, which formerly could have been labeled ‘Product of the United States and Canada,’ would now have to be labeled ‘Born in Canada, Raised and Slaughtered in the United States.’ (citations omitted)”).

¹¹ *Id.* at 27 (finding the compelled speech in this case to be acceptable under the *Zauderer* test); *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985) (“[W]e hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.”).

¹² See Jonathan Randles, *Vermont GMO Law Stirs Up New Fight Over Corporate Speech*, LAW360 (July 31, 2014) available at <http://www.mintz.com/>

This Recent Development will attempt to answer that question. Part II will introduce the background concepts of this analysis by describing GMOs in general and surveying the controversy surrounding GMO foods. Part III will consider the most significant concepts in this analysis by explaining Vermont's new labeling law and discussing *American Meat*. Part IV will discuss how *American Meat* applies to *Grocery Manufacturer's Ass'n*. Part V will briefly consider the alternative result; that is, that the compelled speech argument is valid even with the precedent set by *American Meat*. Part VI will serve as a brief conclusion.

II. BACKGROUND OF THE SCIENCE

A. *What is a Genetically Modified Organism?*

A genetic scientist creates a genetically modified organism ("GMO"), in this case a plant grown for human consumption, by taking DNA from one organism and adding it into a different organism.¹³ While most of the DNA that is added to plants is from bacteria, some scientists have created other combinations, including adding DNA from humans, other plants, and animals to plants.¹⁴ This DNA contains a specific gene.¹⁵ When the new DNA

DesktopModules/Bring2mind/DMX/Download.aspx?EntryId=2790&PortalId=0 &DownloadMethod=attachment (claiming that the Vermont case could be affected by the recent *American Meat* ruling).

¹³ *What is Genetic Engineering and How Does it Work?*, AG BIOSAFETY: U. NEB.—LINCOLN, http://agbiosafety.unl.edu/basic_genetics.shtml ("Genetic engineering is the process of manually adding new DNA to an organism.") (last visited Sept. 11, 2014).

¹⁴ *Health Risks*, INST. FOR RESPONSIBLE TECH., <http://www.responsibletechnology.org/health-risks> ("The five major varieties [of GM food crops]—soy, corn, canola, cotton, and sugar beets—have bacterial genes inserted, which allow the plants to survive an otherwise deadly dose of weed killer.") (last visited Oct. 10, 2014); *About GMOs*, NON-GMO SHOPPING GUIDE, <http://www.nongmoshoppingguide.com/about-gmos.html> (listing several GMO combinations including: "[h]uman genes . . . inserted into corn to produce spermicide," "[c]orn engineered with hepatitis virus genes," and "[a]rctic fish genes [that] gave tomatoes and strawberries tolerance to frost.") (last visited Oct. 10, 2014).

¹⁵ *What is Genetic Engineering and How Does it Work?*, *supra* note 13 ("Genetic engineering, also called transformation, works by physically removing a gene from one organism and inserting it into another . . .").

is added to the organism's natural DNA, the organism is able to "express the trait encoded by that gene."¹⁶ This process, called genetic engineering, usually confers some benefit on the organism, such as making it more insect-resistant.¹⁷

While the explanation above seems simple, the process of genetic engineering is still in its experimental phase. It requires specific technologies, genetic research, and a little luck.¹⁸ Before scientists can even begin to create a GMO by adding new DNA into the organism, they must study the genetic sequence of both the donor organism and the organism receiving the new DNA.¹⁹ This research allows scientists to determine which genes carry the specific traits that they want to add to the other organism.²⁰ While many techniques are available for transferring DNA from one organism to another, the most commonly used are the *Agrobacterium tumefaciens*-mediated transfer, microprojectile bombardment ("gene gun" or biolistic method), and direct gene transfer to protoplasts.²¹ Figure 1.1 explains the agrobacterium and gene gun methods:

¹⁶ *Id.*

¹⁷ *Id.* (explaining the process of selecting a desired trait from one organism, isolating it, and adding it to another organism).

¹⁸ Sophia Kolehmainen, *In Depth: Genetically Engineered Agriculture: Precaution Before Profits: An Overview Of Issues In Genetically Engineered Food And Crops*, 20 VA. ENVTL. L. J. 267, 269 (2001) (calling "for a moratorium on the sale of genetically modified food and crops until adequate safety testing answers the questions the technology raises").

¹⁹ *Id.* at 270 (describing the importance of isolating the correct gene in the donor plant, so that the host plant will express the desired trait).

²⁰ *Id.*

²¹ OLIVER BRANDENBURG, ET AL., BIOSAFETY RES. BOOK: MODULE A: INTRODUCTION TO MOLECULAR BIOLOGY AND GENETIC ENG'G 43 (Food and Agriculture Organization of the United Nations, 2011) available at <http://www.fao.org/docrep/014/i1905e/i1905e00.pdf>.

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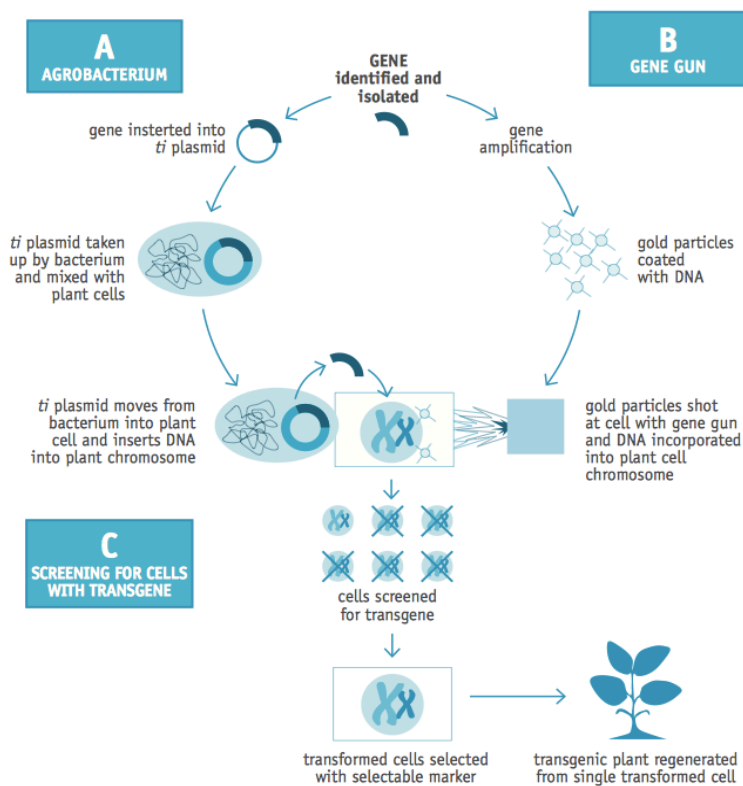


Figure 1 – A represents the Agrobacterium method; B represents the gene gun method²²

The final method noted above—direct gene transfer to protoplasts—utilizes protoplasts, which are plant cells that lack rigid cell walls.²³ Scientists can add DNA to protoplasts by chemically treating the protoplasts or through the processes of electroporation or microinjection.²⁴ The chemical treatments require the scientists to combine the DNA and protoplasts and then to wash the mixture in several different chemical solutions, which alter the protoplast’s membrane so that the new DNA can enter the

²² Image reproduced from *id.* at Fig. 4.1.

²³ BRANDENBURG, *supra* note 21, at 46 (“Protoplast: Cultured plant cells whose cell wall has been removed.”).

²⁴ *Id.*

cell and be taken into the cell's own DNA.²⁵ The electroporation method sends mixed electric pulses through the protoplast and the DNA to increase the cell's permeability, which allows the DNA to be taken in by the cell.²⁶ Microinjection injects the protoplast with the new DNA, where it is then taken into the cell's own DNA.²⁷

Even with the broad array of technology available to scientists wishing to create GMOs, the procedures still involve a significant amount of luck.²⁸ Cell death is significant problem in several techniques.²⁹ Further, the desired trait may not always manifest in the anticipated fashion, causing undesirable results.³⁰

²⁵ *Id.* at 48 (“After mixing the isolated DNA and the protoplasts, followed by different washes, the DNA may be taken up by the protoplast. The role of PEG [chemical solution] is to alter the plasma membrane properties, causing a reversible membrane permeabilization, thus enabling exogenous macromolecules to enter the cell cytoplasm.”).

²⁶ *Id.* (“[E]lectrical pulses are applied to the DNA-protoplast mixture, provoking an increase in the protoplast membrane permeability to DNA.”).

²⁷ *Id.* at 49 (“Microprojectile Bombardment: Plant cell transformation by shooting DNA-coated microparticles into plant material.”).

²⁸ See Kolehmainen, *supra* note 18, at 271–72 (“[I]t is . . . very difficult to predict if and where the new genetic material will be incorporated into the DNA of the recipient cell. Often the insertion methods described above will lead to insertion of multiple copies of the foreign genetic material either at a single site, or in multiple locations of the recipient cell.”); see also MICHAEL K. HANSEN, GENETIC ENG’G IS NOT AN EXTENSION OF CONVENTIONAL PLANT BREEDING 3 (Consumer Policy Institute/Consumer’s Union, 2000), available at <http://consumersunion.org/wp-content/uploads/2013/02/Wide-Crosses.pdf> (“Any new genetic material that enters the genome must fit into this complex regulatory whole or it may end up destabilizing the whole.”).

²⁹ Kolehmainen, *supra* note 18, at 271 (“It is common for the insertion technique to kill the recipient cell”); BRANDENBURG, *supra* note 21, at 48–49 (“[E]lectrical pulses must be carefully controlled as cell death can occur”); *id.* (“Furthermore, the presence of vacuoles that contain hydrolases and toxic metabolites that may lead to cell death after vacuole breakage presents a severe restriction to micro-injection.”).

³⁰ See Kolehmainen, *supra* note 18, at 272 (“Scientists also have to deal with the fact that the genes, once incorporated, do not always perform as predicted, and results can be surprising.”); see also HANSEN, *supra* note 28, at 4 (“In nature, most offspring are viable; the vast majority of seeds germinate and produce organisms that survive and reproduce [In GM plant production] only one in thousands (or tens of thousands or in some cases even millions) of attempts achieves the desired results in terms of a seed that incorporates the

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While genetic modification of organisms may still be experimental because of its unpredictability, it is not new technology. Genetic modification science took off in the 1970s, when two scientists were able to move DNA from a frog to bacteria.³¹ Throughout the 1970s and 1980s, genetic modification grew into its own distinct scientific field.³² During those decades scientists modified the DNA of, among other things, mice, pigs, and plants.³³ In 1994, manufacturers sold a genetically modified tomato, the Flav'r Sav'r™, in United States grocery stores,³⁴ thus beginning the era of genetically modified foods. Today, an increasing amount of food in the United States is genetically modified, and many of the most common GMO foods are plants that make up a substantial part of the average American's diet, such as corn and soybeans.³⁵ The widespread use of GMOs for

desired traits, and expresses them in a useful fashion generation after generation, and doesn't have undesirable side effects.”).

³¹ WIS. LEGIS. REFERENCE BUREAU, GENETICALLY MODIFIED CROPS, Brief 12-10, at 1 (2012) *available at* <http://legis.wisconsin.gov/lrb/pubs/wb/12wb10.pdf> (“Herbert Boyer and Stanley Cohen demonstrated that DNA could be transferred across species by successfully transferring frog DNA into bacterial cells in 1973.”).

³² *See A Brief History of Genetic Modification*, CITIZENS CONCERNED ABOUT GM, <http://www.gmeducation.org/faqs/p149248-a-brief-history-of-genetic-modification.html> (last visited Sept. 11, 2014). Numerous advancements in the field of genetic modification occurred from 1973 to 1980: in 1973, Stanley Cohen and Herbert Boyer “invented the technique of DNA cloning,” thereby allowing transplantation of genes between various species; in 1976, the National Institutes of Health created guidelines for researching genetic modification; and in 1980, the first genetically modified mouse was created, and four independent groups of scientists created genetically modified plants. *See id.*

³³ *See id.* (listing genetic modifications including a transgenic mouse, a giant mouse, a sunflower with bean genes, a mouse enlarged with human growth hormone, virus resistant tobacco, and a transgenic pig.).

³⁴ WIS. LEGIS. REFERENCE BUREAU, *supra* note 31, at 1 (“The tomato was modified to prolong maturation, which prevented it from over ripening before arriving at the supermarket.”).

³⁵ *See About Genetically Engineered Foods*, CTR. FOR FOOD SAFETY, <http://www.centerforfoodsafety.org/issues/311/ge-foods/about-ge-foods#showJoin> (“[U]p to 85% of U.S. corn is genetically engineered (GE), as are 91% of soybeans and 88% of cotton It has been estimated that upwards of 75% of processed

consumption and the controversies surrounding it leads to the next section of this paper.

B. *The Controversy over GMO Foods*

Proponents of GMO foods argue that population growth is forcing the world into a food crisis and GMOs will provide some relief.³⁶ Adversaries of GMOs have health, religious, and environmental concerns about the practice of altering organisms.³⁷ This discussion goes beyond national borders and is widely discussed and debated on almost every continent.³⁸

1. *Positive Aspects of GMOs*

Dominating the pro-GMO food supply arguments are concerns over demands for food, population growth, climate change, and a dwindling amount of space for farming operations.³⁹ As the global

foods on supermarket shelves . . . contain genetically engineered ingredients.”) (last visited Sept. 11, 2014).

³⁶ See Letter from Sir Mark Walport & Dame Nancy Rothwell, Co-Chairs of the Council for Sci. and Tech., to David Cameron, Prime Minister of England (Nov. 21, 2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288823/cst-14-634-gm-technologies.pdf (arguing that a failure to use land sustainably may result in people going hungry and cultivation of currently unused wilderness, and that GM technologies can minimize these problems by “help[ing] farmers of all kinds manage their land”; “enhance[ing] the nutritional value of foods for humans and animals”; and “reducing the need for dietary supplements”).

³⁷ WIS. LEGIS. REFERENCE BUREAU, *supra* note 31, at 2–3 (“Proponents of [GMO] labeling argue that consumers have a right to know whether or not their food has been modified. Some proponents cite personal or religious concerns about consuming products that may have ingredients containing DNA from a different organism.”); see also NO. 120. AN ACT RELATING TO THE LABELING OF FOOD PRODUCED WITH GENETIC ENG’G, VT LEG #299899 v.1, 3–5, available at <http://www.leg.state.vt.us/docs/2014/Acts/ACT120.pdf> (last visited Sept. 15, 2014) (hereinafter NO. 120).

³⁸ See e.g., Walport & Rothwell, *supra* note 36 (describing GMO concerns in England). See also SHENAZ MOOLA & VICTOR MUNNIK, *GMOs IN AFRICA: FOOD AND AGRI. 5* (The African Centre for Biosafety 2007), available at <http://stopogm.net/sites/stopogm.net/files/GMOAfrica.pdf> (discussing African concerns with GMO foods and international aid).

³⁹ See David Rotman, *Why We Will Need Genetically Modified Foods*, MIT TECH. REVIEW (Dec. 17, 2013), <http://www.technologyreview.com/featuredstory/>

population booms and climate change creates drought, extreme temperatures, and altered seasons in places that were once perfect for growing crops, GMO foods could well be the best option for producing enough food to feed everyone.⁴⁰ GMOs provide plants that are enhanced to overcome these challenges.⁴¹ GMOs can resist insects, pesticides, viruses, bacteria, and water salinity.⁴² GMOs could provide increased nutritional value in some foods.⁴³

The development of GMOs that are resistant to insects could reduce the amount of chemical insecticide used globally, which would benefit the environment and agricultural laborers.⁴⁴

522596/why-we-will-need-genetically-modified-foods/ (explaining how GMOs may protect us from a food crisis in the future).

⁴⁰ *See id.* (“Climate change is likely to make the problem far worse, bringing higher temperatures and, in many regions, wetter conditions that spread infestations of disease and insects into new areas. Drought, damaging storms, and very hot days are already taking a toll on crop yields, and the frequency of these events is expected to increase sharply as the climate warms.”).

⁴¹ *See id.* (describing a new GMO potato that is resistant to blight, a common and major concern for the plant that is exacerbated by hot, humid weather).

⁴² THE WORLD CONSERVATION UNION, CURRENT KNOWLEDGE OF THE IMPACTS OF GENETICALLY MODIFIED ORGANISMS ON BIODIVERSITY AND HUMAN HEALTH: AN INFORMATION PAPER 16–18 (2007) *available at* http://cmsdata.iucn.org/downloads/ip_gmo_09_2007_1_.pdf (describing GMO crop benefits including herbicide tolerance/insect resistance and abiotic stress tolerance).

⁴³ *Id.* at 18 (describing the benefits of rice with enhanced levels of beta-carotene, known as Golden Rice, which provides necessary vitamins to impoverished, nutritionally deficient people around the world).

⁴⁴ *Id.* at 35 (“[S]ome [insect resistant] crops have led to a reduction in the use of other pesticides that are highly toxic to humans and animals, resulting in indirect health benefits. This is of particular benefit to farm workers, especially in developing countries where human-crop interactions are higher, manual labour is widespread and quality controls tend to be more lax.”); R.H. Phipps & J.R. Park, *Environmental Benefits of Genetically Modified Crops: Global and European Perspectives on Their Ability to Reduce Pesticide Use*, 11 J. ANIMAL & FEED SCI. 1, 1 (2002), *available at* <http://www.ask-force.org/web/Benefits/Phipps-Park-Benefits-2002.pdf> (“It is estimated that the use of GM [plant] varieties modified for herbicide tolerance and insect protected GM varieties of cotton reduced pesticide use by a total of 22.3 million kg of formulated product in the year 2000. Estimates indicate that if 50% of the maize, oil seed rape, sugar beet, and cotton grown in the EU were GM varieties, pesticide used in the EU/annum would decrease by 14.5 million kg of formulated product (4.4 million kg active ingredient). In addition there would be a reduction of 7.5

Drought-resistant plants that grow without using up more precious water resources have environmentally friendly outcomes as well.⁴⁵ Additionally, the FDA has stated that the tests they use to analyze GMOs ensure that no foods go to consumers until health and safety questions have been resolved.⁴⁶ Many proponents of GMO foods have stood behind this stamp of approval.⁴⁷

2. *Concerns about GMO Foods*

Unlike the proponents of GMO foods, opponents challenge the FDA's assurances by citing a number of studies, which expose alleged uncertainties surrounding GMOs.⁴⁸ When it comes to opposing GMO foods, health concerns are by far the most frequently discussed issue.⁴⁹ Opponents of GMOs cite several

million h[ectare] sprayed which would save 20.5 million liters of diesel and result in a reduction of approximately 73,000 t[on] of carbon dioxide being released into the atmosphere.”).

⁴⁵ CURRENT KNOWLEDGE OF THE IMPACTS OF GENETICALLY MODIFIED ORGANISMS ON BIODIVERSITY AND HUMAN HEALTH: AN INFORMATION PAPER, *supra* note 42, at 18 (“With more of the world's agricultural land becoming more saline, and with freshwater supplies already over-exploited in many places, farmers will increasingly need to use salty water for irrigation even though high soil salinity can severely limit agricultural productivity and lower crop quality. Developing crops and trees that can tolerate salinity is therefore a key priority.”); *id.* (“Water stress caused by drought is a major factor limiting plant growth and crop productivity worldwide and therefore research in many countries is focusing on developing GM crops that are tolerant to drought, such as wheat in Egypt . . .”).

⁴⁶ FDA FACTS: FOOD FROM GENETICALLY ENGINEERED PLANTS, U.S. DEP'T OF HEALTH AND HUMAN SERS./FOOD AND DRUG ADMIN., 2 (Apr. 7, 2013), <http://www.fda.gov/downloads/Food/PopularTopics/UCM385844.pdf> (last visited Nov. 19, 2014) (“Foods from genetically engineered plants intended to be grown in the United States that have been evaluated by FDA through the consultation process have not gone on the market until the FDA's questions about the safety of such products have been resolved.”).

⁴⁷ *Labeling Food and Ingredients Developed from GM Seed*, *supra* note 2 (“[Monsanto] agree[s] with the AMA and support[s] FDA's guidance on labeling food products containing GM ingredients.”).

⁴⁸ *About Genetically Engineered Foods*, *supra* note 35 (“The haphazard and negligent agency regulation of biotechnology has been a disaster for consumers and the environment.”).

⁴⁹ *See e.g., id.* (expressing concern over health risks from GMOs); *see also* INSTIT. FOR RESPONSIBLE TECH., <http://responsibletechnology.org> (last visited

studies showing varying results as to the health and safety of GMO foods as evidence that these foods are not yet fully safe for human consumption.⁵⁰ One study found that pigs fed GMO corn and soybeans were more likely than pigs fed non-GMO corn and soybeans to have gastrointestinal inflammation.⁵¹ Studies like these have led opponents of GMO foods to conclude that no scientific consensus exists on whether GMOs are safe for humans.⁵²

Many GMO opponents also have environmental concerns about the widespread use of these products.⁵³ These concerns include crosspollination of GMO foods with organic foods; pesticide-producing GMO foods exacerbating water toxicity problems; and the evolution of super weeds that are resistant to herbicides and thus require more chemicals to be sprayed on the

Sept. 12, 2014) (listing “Health Risks” as the second option under the “GMO Education” tab on homepage); *see also* VT. RIGHT TO KNOW GMOS, <http://www.vtrighttoknowgmos.org/faq/> (last visited Sept. 12, 2014) (answering the FAQ “Why should we label genetically engineered food?” with a health-based reason).

⁵⁰ *Reports and Articles*, VT. RIGHT TO KNOW GMOS, <http://www.vtrighttoknowgmos.org/resources/reports-articles-webinars/> (“A number of published scientific studies and reports have raised important and unanswered questions about the healthfulness and safety of GE foods.”).

⁵¹ *See generally* Judy Carman, et al., *A Long-Term Toxicology Study On Pigs Fed A Combined Genetically Modified (GM) Soy And GM Maize Diet*, 8(1) J. ORGANIC SYS. 38 (2013), <http://www.organic-systems.org/journal/81/8106.pdf> (finding that “GM-fed pigs had a higher rate of severe stomach inflammation with a rate of 32% of GM-fed pigs compared to 12% of non-GM-fed pigs (p=0.004).”).

⁵² *Statement: No Scientific Consensus on GMO Safety*, EUR. NETWORK OF SCIENTISTS FOR SOC. & ENVTL. RESP. (Oct. 10, 2013), <http://www.ensser.org/increasing-public-information/no-scientific-consensus-on-gmo-safety/> (“[W]e strongly reject claims by GM seed developers and some scientists, commentators, and journalists that there is a “scientific consensus” on GMO safety . . .”).

⁵³ *Dangers to the Environment*, INST. FOR RESPONSIBLE TECH., (last visited Sept. 12, 2014), <http://www.responsibletechnology.org/gmo-dangers/dangers-to-the-environment> (listing several environmental concerns with GMO food production).

plants and the soil.⁵⁴ Several religious concerns accompany GMOs, many of which stem from environmental and health risks.⁵⁵

III. BACKGROUND OF THE LAW

In order to fully understand the challenge to the Vermont GMO law and to compare it to *American Meat*, a general overview of the compelled speech decisions leading up to the case is beneficial. The predominant case regarding commercial speech and the First Amendment is *Central Hudson Gas & Electric Corp. v. Public Service Communication*.⁵⁶ The *Central Hudson* test requires the compelled speech to meet heightened scrutiny because it is

⁵⁴ *Id.*

⁵⁵ FAITH & GMOS, <http://www.faithandgmos.org> (last visited Sept. 12, 2014) (listing a number of reasons why religious leaders support GMO labeling including: “Environmental impacts of genetically modified plants, which contradict man’s role as steward of the land;” “Spiritual concerns that since the technology transfers genes between species and creates combinations of organisms that could never naturally occur in nature, it is a violation of God’s law;” and “Concerns about the health dangers of genetically engineered foods, which have not been adequately studied for their health impacts”); Deniza Gertsberg, *GMO Foods: The Islamic Perspective*, *GMO J.: FOOD SAFETY POL.* (July 28, 2009), <http://gmo-journal.com/2009/07/28/gm-foods-the-islamic-perspective/> (“According to some Muslim scholars [growing GM crops for the benefit of GM companies] would violate certain Islamic principles that people should help the needy and the hungry without being motivated by profit.”); Deniza Gertsberg, *GMO Foods: The Christian Perspective*, *GMO J.: FOOD SAFETY POL.* (Aug. 1, 2009), <http://gmo-journal.com/2009/08/01/gm-foods-the-christian-perspective/> (“Because there are unknown risks with GMOs with respect to health and the environment, and because there are many other considerations such as corporate ownership and control of the GM seeds that many say will enslave poor farmers to the GM companies, many Christian theologians either advocate following a precautionary principle or reject the use of GMOs entirely.”); *but see* Deniza Gertsberg, *GMO Foods: The Islamic Perspective*, *GMO J.: FOOD SAFETY POL.* (July 28, 2009), <http://gmo-journal.com/2009/07/28/gm-foods-the-islamic-perspective/> (“[I]f the purpose behind the modification is essential or done to prevent harm and promote the welfare of all, then such a modification is permissible. As such, if one were to take the position that genetic modification is conducted to reduce reliance on pesticides and herbicides, which pollute the environment, or feed the hungry, which is an action benefiting the welfare of the public, then genetic modification is arguably justifiable under Islamic law.”).

⁵⁶ 447 U.S. 557 (1980).

infringing on a First Amendment right,⁵⁷ and consists of four parts. Under the test the court must find that (1) the expression concerns lawful activity and is not misleading; (2) the government's interest is substantial; (3) the labeling law directly serves the asserted interest; and (4) that the labeling law is no more extensive than necessary.⁵⁸

From this case evolved another line of analysis for mandated disclosures in commercial speech. *Zauderer v. Office of Disciplinary Counsel of Supreme Court*⁵⁹ provides the test for this type of compelled speech. In essence, the *Zauderer* test is the first two parts of the *Central Hudson* test,⁶⁰ making it a more lenient standard because the government need not show a “fit” between law and its substantial interest.⁶¹ Up until the *American Meat* decision, *Zauderer* only applied to small subset of compelled commercial speech cases where the government was compelling speech to combat consumer deception.⁶² *American Meat* expands *Zauderer* beyond consumer deception,⁶³ which is, in part, why it is important to the GMO labeling law case.

American Meat also altered the long-standing rule that consumer interest is not enough to create a substantial government interest. In *Dairy Food Association v. Amestoy*,⁶⁴ the Second Circuit struck down a Vermont law requiring labeling milk for rBST because they found that consumer interest was not enough to create a substantial government interest.⁶⁵ *American Meat* uses consumer interest as a factor in determining whether the government's interest is substantial, which could also have an impact on Vermont's labeling law.

The law on compelled commercial speech prior to *American Meat* seemed firmly in favor of the grocery manufacturer's

⁵⁷ *Id.* at 573 (Blackmun, J., concurring).

⁵⁸ *Dairy Food Ass'n v. Amestoy*, 92 F.3d 67, 72 (2d Cir. 1996).

⁵⁹ 471 U.S. 626 (1985).

⁶⁰ *See generally Am. Meat*, 760 F.3d 18.

⁶¹ *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1212 (D.C. Cir. 2012).

⁶² *Id.* at 1213.

⁶³ *Am. Meat*, 760 F.3d at 22.

⁶⁴ 92 F.3d 67 (2d Cir. 1996).

⁶⁵ *Id.* at 74.

argument that the GMO labeling was unconstitutional, but now much of that law has changed, which may allow Vermont to uphold its new law.

A. *Vermont's Labeling Law*

The text of Act 120 begins with preliminary findings made by the Vermont General Assembly.⁶⁶ These findings explain the essential reasoning behind the adoption of such a law. The General Assembly noted that the FDA does not provide for mandatory labeling of GMO foods and treats these products the same way it treats traditionally manufactured foods.⁶⁷ The General Assembly continued by expressing concerns that the FDA does not conduct independent studies of GMOs and uses studies submitted—and often paid for—by the manufacturers themselves to determine the safety of GMOs.⁶⁸ The General Assembly further found a lack of

⁶⁶ See generally NO. 120, *supra* note 37. The preliminary statements list these findings:

The General Assembly finds and declares that:

- (1) Federal law does not provide for the labeling of food that is produced with genetic engineering . . .
- (2) Federal law does not require independent testing of the safety of food produced with genetic engineering . . .
- (3) Genetically engineered foods are increasingly available for human consumption . . .
- (4) Genetically engineered foods potentially pose risks to health, safety, agriculture, and the environment . . .
- (5) For multiple health, personal, religious, and environmental reasons, the State of Vermont finds that food produced from genetic engineering should be labeled as such . . .
- (6) Because both the FDA and the U.S. Congress do not require the labeling of food produced with genetic engineering, the State should require food produced with genetic engineering to be labeled as such in order to serve the interests of the State . . .

Id. at 1–5.

⁶⁷ *Id.* at 1 (“As indicated by the testimony of a U.S. Food and Drug Administration (FDA) Supervisory Consumer Safety Officer, the FDA has statutory authority to require labeling of food products, but does not consider genetically engineered foods to be materially different from their traditional counterparts to require such labeling.”).

⁶⁸ *Id.* at 2 (“[T]he FDA does not independently test the safety of genetically engineered foods. Instead, manufacturers submit safety research and studies, the

consensus on the health and safety of GMOs for human consumption and any long-term studies showing whether GMO foods harm humans.⁶⁹ In addition, the prefatory language of the Act describes the pervasiveness of GMOs in the United States food supply.⁷⁰ The preliminary statements also express the primary concerns that lead to a need for labeling of GMO foods, citing health and environmental concerns as well as religious interests.⁷¹

The actual text of the law spells out its purpose as “(1) Public health and food safety . . . (2) Environmental impacts . . . (3) Consumer confusion and deception [and] . . . (4) Protecting religious practices.”⁷² The law states that if a food is sold in Vermont and is made with GMOs, then it must be labeled with one of the following statements, depending on the type of food: “produced with genetic engineering . . . partially produced with genetic engineering . . . [or] . . . may be produced with genetic engineering.”⁷³ Further, products manufactured

majority of which the manufacturers finance or conduct. The FDA reviews the manufacturers’ research and reports through a voluntary safety consultation, and issues a letter to the manufacturer acknowledging the manufacturer’s conclusion regarding the safety of the genetically engineered food product being tested.”)

⁶⁹ NO. 120, *supra* note 37, at 3 (“(A) There are conflicting studies assessing the health consequences of food produced from genetic engineering. (B) The genetic engineering of plants and animals may cause unintended consequences.”).

⁷⁰ *Id.* (“[I]t is estimated that up to 80 percent of the processed foods sold in the United States are at least partially produced from genetic engineering . . .”).

⁷¹ *Id.* at 5 (“[L]abeling foods produced with genetic engineering as ‘natural,’ ‘naturally made,’ ‘naturally grown,’ ‘all natural,’ or other similar descriptors is inherently misleading, poses a risk of confusing or deceiving consumers, and conflicts with the general perception that ‘natural’ foods are not genetically engineered.”); *see also id.* (“Persons with certain religious beliefs object to producing foods using genetic engineering . . .”).

⁷² NO. 120, *supra* note 37, at 6.

⁷³ *Id.* at 10. The text of the Act reads:

(b) If a food is required to be labeled under subsection (a) of this section, it shall be labeled as follows:

(1) in the case of a packaged raw agricultural commodity, the manufacturer shall label the package offered for retail sale, with the clear and conspicuous words “produced with genetic engineering”;

(2) in the case of any raw agricultural commodity that is not separately packaged, the retailer shall post a label appearing on the retail store shelf or bin in which the commodity is displayed for sale with the clear and conspicuous words “produced with genetic engineering”; or

with GMOs may not be labeled as “natural” under the law.⁷⁴ The law lays out several exceptions to the rule, including exceptions for restaurants, beverages, and foods that are unknowingly exposed to GMO seeds.⁷⁵ The law also includes a penalty scheme for violations⁷⁶ and sections explaining a funding scheme to “pay costs or liabilities incurred by the Attorney General or the State in implementation and administration, including rulemaking, of the requirements under” the law.⁷⁷

The Grocery Manufacturer’s Association and several other plaintiffs challenge the law on several grounds.⁷⁸ However, the food manufacturers’ primary argument, and the focus of this Recent Development, is that the law is an unconstitutional infringement of the their First Amendment right to free speech.⁷⁹ The food manufacturers’ complaints claim that the speech required by Act 120 is forcing them “to use their labels to convey an opinion with which they disagree, namely, that consumers should assign significance to the fact that a product contains an ingredient derived from a genetically engineered plant.”⁸⁰ The food

(3) in the case of any processed food that contains a product or products of genetic engineering, the manufacturer shall label the package in which the processed food is offered for sale with the words: “partially produced with genetic engineering”; “may be produced with genetic engineering”; or “produced with genetic engineering.”

Id. at 10.

⁷⁴ *See id.* (including the terms “naturally made,” “naturally grown,” “all natural,” or any “words of similar import” in its definition of “natural”).

⁷⁵ NO. 120, *supra* note 37, at 11–13.

⁷⁶ NO. 120, *supra* note 37, at 13–14 (“Any person who violates the requirements of this chapter shall be liable for a civil penalty of not more than \$1,000.00 per day, per product.”).

⁷⁷ *Id.* at 15–16.

⁷⁸ *See id.* at 16–21. Other arguments made by the plaintiffs, but not discussed in this paper, include: a First Amendment violation in not allowing GMO manufacturers to label their products as “natural”; a Fifth Amendment violation for vagueness in the section of the statute banning GMOs being labeled as “natural”; a Commerce Clause violation, arguing that most of the burden will fall to out-of-state manufacturers; and a Supremacy Clause violation arguing that only the FDA has the power to mandate labeling. *See id.*

⁷⁹ *Id.* at 13.

⁸⁰ *Id.*

manufacturers' claim that the test is one of "heightened scrutiny" because they disagree with the speech that they are being forced to use.⁸¹ They further assert that Vermont does not have a legitimate state interest strong enough to meet this standard and thus the court should invalidate the law as unconstitutional.⁸² In addition, the food manufacturers assert that the test from *Zauderer* does not apply in this scenario.⁸³ Through this line of argument, the plaintiffs in *Grocery Manufacturer's Ass'n* seem to be trying to distinguish their case from *American Meat*.

In *Zauderer*, the Supreme Court examined several different aspects of Ohio's rules for attorney advertisements.⁸⁴ In its decision regarding the requirement that attorneys working on a contingent fee basis must explain in their advertisements that even if a client loses the case and does not have to pay the attorney a fee court fees may apply, the Court distinguishes between prohibitions on commercial speech and mandated disclosures in commercial speech. In doing so, they create a test for compelled commercial disclosures that is slightly different than the test for prohibitions on commercial speech.⁸⁵ This test, as stated by the Court, is "that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in

⁸¹ *Id.* (citing *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 15 (1986) (plurality opinion) ("Here, that interest must be 'compelling' because Act 120 requires Plaintiffs' members 'to associate with speech with which [they] may disagree.'").

⁸² *Id.* at 14 (claiming Vermont's law serves only to provide for consumer interest, which is not a substantial government interest for compelling corporate speech).

⁸³ *Id.* at 15, *supra* note 2 ("Act 120 is not subject to the *Zauderer* standard because it compels disclosures that are controversial.").

⁸⁴ *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 629 (1985) ("This case presents additional unresolved questions regarding the regulation of commercial speech by attorneys: whether a State may discipline an attorney for soliciting business by running newspaper advertisements containing nondeceptive illustrations and legal advice, and whether a State may seek to prevent potential deception of the public by requiring attorneys to disclose in their advertising certain information regarding fee arrangements.").

⁸⁵ *Id.* at 650-51.

preventing deception of consumers.”⁸⁶ In *Zauderer*, the Court found that the disclosure rule required by Ohio was acceptable under this standard.⁸⁷

B. *The American Meat Institute v. USDA Ruling*

The D.C. Circuit was divided in its decision in *American Meat*. Two judges concurred in the outcome of the case, though with differing opinions on the analysis of law, and two judges dissented. Each of the opinions will be discussed below.

1. *The Majority Opinion*

The final decision in the *American Meat* case is an en banc review by the D.C. Circuit. The panel decision affirmed a denial of preliminary injunction on the basis that the plaintiff’s First Amendment challenges would not succeed on their merits.⁸⁸ The panel originally held that the *Zauderer* test should apply to more than just disclosure mandates concerning deception.⁸⁹ In the most recent decision, the full court agreed with the panel’s decision on this point and affirmed the district court’s ruling.⁹⁰ The decision explains why the *Zauderer* test should apply to disclosure mandates beyond cases where the language being disclosed is meant to prevent deception.

In *American Meat*, livestock producers brought suit to challenge a federal law requiring all meat to be labeled with

⁸⁶ *Id.* at 651.

⁸⁷ *Id.* at 653.

⁸⁸ *Am. Meat*, 760 F.3d 18, 20 (D.C. Cir. 2014) (“[A] panel of this court rejected the plaintiffs’ statutory and First Amendment challenges. The panel found the plaintiffs unlikely to succeed on the merits and affirmed the district court’s denial of a preliminary injunction. On the First Amendment claim, the panel read *Zauderer v. Office of Disciplinary Counsel* . . . to apply to disclosure mandates aimed at addressing problems other than deception (which the mandate at issue in *Zauderer* had been designed to remedy). Noting that prior opinions of the court might be read to bar such an application of *Zauderer*, the panel proposed that the case be reheard en banc. The full court shortly voted to do so.”) (citations omitted).

⁸⁹ *Id.*

⁹⁰ *Id.* (“We now hold *Zauderer* in fact does reach beyond problems of deception, sufficiently to encompass the disclosure mandates at issue here.”).

country of origin information.⁹¹ The label's information must include the country of the animal's birth, the country where the animal was raised, and the country of slaughter.⁹² The question before the court on en banc review was "whether the test set forth in *Zauderer* applies to government interests beyond consumer deception."⁹³ The court began by noting that *Zauderer* clearly "applies to government mandates requiring disclosure of 'purely factual and uncontroversial information' appropriate to prevent deception in the regulated party's commercial speech" because the *Zauderer* case dealt specifically with that issue.⁹⁴ The court cited broad language in *Zauderer* as reason to believe the ruling was not meant to be limited to the facts of the case.⁹⁵ Once the court concluded that *Zauderer* applies to disclosures beyond the case's original facts, they applied the *Zauderer* test to the American Meat Institute's argument.

First, the court determined whether the government had a sufficiently important interest in adopting the labeling scheme.⁹⁶ The American Meat Institute argued the government lacked a valid interest in this law beyond satisfying a consumer's curiosity about the origin of their meat products.⁹⁷ The court disagreed. It held that several factors amounted to a "substantial government interest" in labeling meat for country of origin.⁹⁸ The court's opinion was predominately shaped by a number of interests: (1) the substantial history of labeling for country-of-origin in the United States; (2) a showing of consumer interest in such labeling; and (3) the

⁹¹ *Id.* at 21.

⁹² *Id.* ("For example, meat derived from an animal born in Canada and raised and slaughtered in the United States, which formerly could have been labeled 'Product of the United States and Canada,' would now have to be labeled 'Born in Canada, Raised and Slaughtered in the United States.'").

⁹³ *Id.*

⁹⁴ *Am. Meat*, 760 F.3d 18, 21 (D.C. Cir. 2014).

⁹⁵ *Id.* at 22 ("All told, *Zauderer's* characterization of the speaker's interest in opposing forced disclosure of such information as 'minimal' seems inherently applicable beyond the problem of deception, as other circuits have found.").

⁹⁶ *Id.* at 23.

⁹⁷ *Id.* ("AMI disparages the government's interest as simply being that of satisfying consumers' 'idle curiosity.'").

⁹⁸ *Id.*

justification of the labeling due to significant health concerns with illness from improperly raised, slaughtered, and packaged meats.⁹⁹ The court's analysis relied heavily on the legislative record that accompanied the law, but it noted that this approach is not the only way to denote the existence and the value of state interests under the *Zauderer* test.¹⁰⁰

After the court decided that the government's interest was substantial, it moved on to the second prong (the "fitness prong") of the *Zauderer* test: determining "the relationship between the government's identified means and its chosen ends."¹⁰¹ The court explained that the *Zauderer* test does not require that direct advancement of a state's interest be shown in order to demonstrate a narrowly tailored fit between the means and ends:

To the extent that the government's interest is in assuring that consumers receive particular information (as it plainly is when mandating disclosures that correct deception), the means-end fit is self-evidently satisfied when the government acts only through a reasonably crafted mandate to disclose "purely factual and uncontroversial information" about attributes of the product or service being offered.¹⁰²

Finally, the court notes that while the American Meat Institute did not challenge that the information required by the labeling was factual and uncontroversial, meaning that the issue was not before the court here, the court still stated that even if it was challenged, the labeling would be found to be factual and uncontroversial.¹⁰³ Simply stated, labeling meat by its country of origin does not

⁹⁹ *Id.* (providing a list of factors for consideration, the court noted the "long history of country-of-origin disclosures to enable consumers to choose American-made products; the demonstrated consumer interest in extending country-of-origin labeling to food products; and the individual health concerns and market impacts that can arise in the event of a food-borne illness outbreak").

¹⁰⁰ *Am. Meat*, 760 F.3d at 24 (citing various statements made by legislators); *id.* at 25 (noting that the "constitutionality of a statute should not bobble up and down" at the whim of the legislature's ability to adequately explain its interests).

¹⁰¹ *Id.* at 25 (noting this part of the *Zauderer* analysis measures fit between interest and compelled speech).

¹⁰² *Id.* at 26 (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985)).

¹⁰³ *Id.* at 27.

“communicate[] a message that is controversial for some reason other than dispute about simple factual accuracy.”¹⁰⁴

2. Judge Rogers’s Concurrence

Judge Rogers’s concurrence sought to differentiate between the test in *Zauderer* and the test used in *Central Hudson*. Judge Rogers noted that the *Central Hudson* test applies to restrictions on commercial speech and therefore the government must show, in addition to a substantial interest, that the restriction directly advances this interest. Further, Judge Rogers stated that the restriction is “not more extensive than necessary” (i.e., the fitness prong).¹⁰⁵ By contrast, the *Zauderer* test applies to restrictions on disclosures mandated in commercial speech, and does not require the government to show direct advancement of its substantial interest in order to pass muster.¹⁰⁶ Judge Rogers asserted that the majority’s opinion comes perilously close to molding the *Central Hudson* and *Zauderer* tests into a single test, which could cause confusion for future decisions under either law.¹⁰⁷ Judge Rogers pointed out the similarities between the two tests—namely that they both apply to commercial speech and that the government must show substantial interest that is protected by the restriction or disclosure on commercial speech—and then explained their differences.¹⁰⁸ In support of his argument, Judge Rogers referred to the Supreme Court’s analysis of the *Zauderer* and *Central Hudson* tests and the Court’s recognition of several material differences between compelled disclosures and restrictions on commercial speech.¹⁰⁹ The former is subject to a less rigorous test because

¹⁰⁴ *Id.* at 27 (“[T]he facts conveyed are directly informative of intrinsic characteristics of the product AMI is selling.”).

¹⁰⁵ *Id.* at 28 (Rogers, C. J., concurring).

¹⁰⁶ *See Am. Meat*, 760 F.3d at 28.

¹⁰⁷ *Id.* (Rogers, C. J., concurring) (“I write separately to disassociate myself from the suggested reformulation of the separate standards for First Amendment protection of commercial speech in *Zauderer* . . . , and *Central Hudson*” (citations omitted)).

¹⁰⁸ *Id.* at 28–29 (Rogers, C. J., concurring).

¹⁰⁹ *Id.* at 28 (explaining that the Supreme Court held in *Zauderer* that disclosure requirements are less of an infringement on advertisers’ interests than prohibitions or restrictions on commercial speech).

compelled disclosures are supported by the idea that there should be a free flow of information to consumers.¹¹⁰ Judge Rogers concluded that mistaking these two tests might cause confusion in cases in which the fitness prong of the test is at issue, because this prong does not apply when applying the *Zauderer* test for mandated disclosures.¹¹¹

3. Judge Kavanaugh's Concurrence

Judge Kavanaugh's interpretation of the majority's reasoning was the complete opposite of Judge Rogers's opinion. Kavanaugh claimed that the test used in this case was the *Central Hudson* test, which, when applied to commercial disclosures, follows the *Zauderer* format. Hence, Judge Kavanaugh opined that *Zauderer* is merely a subset of the *Central Hudson* test and not its own distinct rule.¹¹² Unlike Judge Rogers's concurrence, Judge Kavanaugh's opinion thoroughly explains which interests amount to a substantial government interest in this case.¹¹³ Judge Kavanaugh determined that the fitness test requires proving that "the disclosure is purely factual, uncontroversial, not unduly burdensome, and reasonably related to the Government's interest."¹¹⁴ Further, Judge Kavanaugh noted that, while it is currently very difficult to determine the definition of "controversial" for the fitness test applied by *Zauderer*, it was nonetheless clear that the country of origin labeling meets

¹¹⁰ *Id.* (Rogers, C. J., concurring) ("[T]he government's imposition of a commercial disclosure requirement involving 'accurate, factual, commercial information does not offend the core First Amendment Values of promoting efficient exchange of information or protecting individual liberty interests.'") (citations omitted).

¹¹¹ *Id.* at 30.

¹¹² *Am. Meat*, 760 F.3d at 33 (Kavanaugh, C. J., concurring) ("*Zauderer* is best read simply as an application of *Central Hudson*, not a different test altogether. In other words, *Zauderer* tells us what *Central Hudson*'s 'tailored in a reasonable manner' standard means in the context of compelled commercial disclosures: The disclosure must be purely factual, uncontroversial, not unduly burdensome, and reasonably related to the Government's interest.").

¹¹³ *See id.* at 31–32 (finding that historically rooted interests in governing matters of health and safety and supporting for American manufacturers combined to amount to a substantial government interest in compelling commercial disclosure of country of origin on meat products).

¹¹⁴ *Id.* at 34.

this standard due to the “straightforward, even-handed, and readily understood nature of the information, as well as the historical pedigree of this specific kind of disclosure requirement.”¹¹⁵

The distinction between the tests seems to make little difference in the present case because both Judges Rogers and Kavanaugh concur with the majority’s conclusion, either by applying *Central Hudson* or *Zauderer*. However, the juxtaposition between the two creates confusion as to what the majority opinion really says about the test for compelled speech disclosures.

4. Judge Henderson’s Dissent

Judge Henderson’s dissent was brief and mainly discussed her concern with the original panel’s judgment to overrule *R.J. Reynolds Tobacco Co. v. FDA*,¹¹⁶ which held that the *Zauderer* opinion, and thus the *Zauderer* test, was clearly limited to its facts and should not be used in cases involving more than compelled speech to prevent consumer deception.¹¹⁷ While Judge Henderson’s opinion is mostly based on procedural issues that do not pertain to this recent development, it is important to note that there are arguments that merit a reading of *Zauderer* as only applicable to its facts. These arguments will be discussed in Part V.

5. Judge Brown’s Dissent

Judge Brown’s dissent further supports Judge Henderson’s argument as to the inapplicability of *Zauderer* to any compelled speech that does not primarily serve to combat consumer deception.¹¹⁸ In Judge Brown’s view, the *American Meat* majority

¹¹⁵ *Id.*

¹¹⁶ 696 F.3d 1205 (D.C. Cir. 2012).

¹¹⁷ *Am. Meat*, 760 F.3d at 35 (Henderson, C. J., dissenting) (“In *R.J. Reynolds*, the majority found the *Zauderer* standard inapplicable to the graphics warning requirement because ‘by its own terms,’ *Zauderer*’s holding is limited to cases in which disclosure requirements are ‘reasonably related to the State’s interest in preventing deception of consumers.’”) (citations omitted).

¹¹⁸ *See id.* at 37 (Brown, C. J., dissenting) (“[B]oth the text and history of the case emphasize the government’s unique interest in preventing commercial deception. By expanding *Zauderer* beyond deception, the court has now created a standard that is actually even *more* relaxed than rational basis review . . .”).

invites the government to compel any and all commercial speech at its will.¹¹⁹

Beyond claiming *Zauderer* only applies to its facts, Judge Brown asserted that the test is also limited to use as a last resort, which should be used only when compelling speech would be better than an outright ban on commercial speech.¹²⁰ To support this claim, the dissent analyzed several Supreme Court cases that apply *Zauderer* as limited to its facts.¹²¹ Judge Brown then explained what she saw as the new *Zauderer* test under the majority's decision: something less than even the rational basis test.¹²² Further, she agreed with Judge Kavanaugh's assertion that *Zauderer* is merely an application of *Central Hudson* and was not meant to be a separate test for compelled speech.¹²³ Judge Brown noted that under the *Central Hudson* standard, the government must clearly assert its interests. The court cannot go on a fishing

¹¹⁹ *Id.* at 38 (“What began as robust protection from government coercion has now been reduced to an eerie echo of a supermarket tabloid’s vacuous motto: the government may compel citizens to provide, against their will, whatever information ‘[i]nquiring minds want to know!’”).

¹²⁰ *Id.* at 40 (Brown, C. J., dissenting) (“Requiring an advertiser to provide ‘somewhat *more* information than they might otherwise be inclined to present,’ is thus constitutionally permissible when the government’s available alternative is to completely ban that deceptive speech.”).

¹²¹ *Id.* at 40–43 (Brown, C. J., dissenting) (citing several Supreme Court cases where the justices reaffirm *Zauderer* as an applied to disclosures to combat deception); *see also id.* at 42 (citing *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001) (“There is no suggestion in the case now before us that the mandatory assessments imposed to require one group of private persons to pay for speech by others are somehow necessary to make voluntary advertisements nonmisleading for consumers.”)).

¹²² *Id.* at 38 (Brown, C. J., dissenting) (“[E]ssentially, the new standard for compelled commercial disclosures—or perhaps even all commercial speech restrictions—thus becomes rational basis review minus any legitimate justification.”).

¹²³ *Am. Meat*, 760 F.3d 18, 45 (Brown, C. J., dissenting) (“Although we have sometimes characterized the *Zauderer* standard as similar to rational basis review, . . . , even the court acknowledges it is essentially an application of *Central Hudson*’s intermediate scrutiny.”) (citation omitted).

expedition to find such interests, as Judge Brown claims the majority does here.¹²⁴

Moving on to the fitness prong of the *Zauderer* test, Judge Brown lambasted the court's assessment that no connection is needed between the interest and the compelled speech.¹²⁵ She returned to the court's assessment of labeling history as a government interest promoting the country of origin labeling and determined this argument invalid on its facts by finding that labeling laws were first created in a time when the First Amendment's free speech clause was seldom used in commercial contexts.¹²⁶

Judge Brown concluded her dissent by asserting that the law is not narrowly tailored to any of the interests identified by the majority, and is in reality a way to protect American meat producers by making their products seem more appealing than those of their global competitors' (who generally are able to sell their meat at lower prices).¹²⁷ She foretells a day when the same

¹²⁴ *Id.* at 46 (Brown, C. J., dissenting) ("Although the court declines to 'consider to what extent a mandate reviewed under *Zauderer* can rest on other suppositions as opposed to the precise interests put forward by the State,' Maj. Op. at 12, it nonetheless relies on interests the agency never asserted and even denied were rationales for the rule. This takes the evil of post hoc rationalization to a whole new level. And the court forgets that it is assessing the propriety of administrative action, when a reviewing court is limited to the administrative record and must judge the rule 'solely by the grounds invoked by the agency.'").

¹²⁵ *Id.* at 48 (Brown, C. J., dissenting) (stating "[s]eriously? With logic like this, who needs a Ministry of Truth?" after describing the majority's assessment that the fitness prong under *Zauderer* is comparable to the *res ipsa loquitur* doctrine in tort law).

¹²⁶ *Id.* at 49 (Brown, C. J., dissenting) ("For example, in 1907, when faced with the constitutional validity of a state law criminalizing the use of an American flag emblem on labels, the litigants and the Court 'ignored potential free speech claims.'" (citing David M. Rabbant, *The First Amendment in Its Forgotten Years*, 90 *Yale L.J.* 514, 523 (1981); *Halter v. Nebraska*, 205 U.S. 34, 38 (1907); Alex Kozinski & Stuart Banner, Response, *The Anti-History and Pre-History of Commercial Speech*, 71 *Tex. L. Rev.* 747, 756–57 (1993) ("No speech-related claim was made in *Halter*, probably . . . because the litigants didn't conceive of bottle-labeling as speech.")).

¹²⁷ *Am. Meat*, 760 F.3d 18, 52 (Brown, C. J., dissenting) ("This case is really not about country-of-origin labeling. It is not even about patriotism or

meat producers who wanted this decision will find themselves on the other side of the fence—being forced to share information with consumers that they would rather not—and they will rue the day they decided to push the courts for more latitude in compelled commercial speech law.¹²⁸

IV. HOW *AMERICAN MEAT* APPLIES TO *GROCERY MANUFACTURER'S ASS'N*

The challenge by the plaintiffs in *American Meat* and the challenge to Vermont's GMO food labeling law, Act 120, have several similarities. Primarily, they both assert a First Amendment compelled speech argument to challenge food labeling.¹²⁹ Further, they both require an examination of when courts should apply the *Zauderer* test to such challenges.¹³⁰ The D.C. Circuit answered this question by holding that *Zauderer* should apply outside of its facts and be extended to interests beyond deception. Because *Grocery Manufacturer's Ass'n* deals with food labeling and government interests beyond (but including) consumer deception, *Zauderer* would reasonably be the test applied by the U.S. District Court for the District of Vermont, and possibly the Second Circuit on appeal, when deciding the case.

protectionism. And it is certainly not about health and safety. What is apparent from the record and the briefing is that this is a case about seeking competitive advantage. One need only look at the parties and amici to recognize this rule benefits one group of American farmers and producers, while interfering with the practices and profits of other American businesses who rely on imported meat to serve their customers.”)

¹²⁸ *Am. Meat*, 760 F.3d 18, 52 (Brown, C. J., dissenting) (“Of course the victors today will be the victims tomorrow, because the standard created by this case will virtually ensure the producers supporting this labeling regime will one day be saddled with objectionable disclosure requirements Only the fertile imaginations of activists will limit what disclosures successful efforts from vegetarian, animal rights, environmental, consumer protection, or other as-yet-unknown lobbies may compel.”).

¹²⁹ See *Am. Meat*, 760 F.3d 18, 20 (D.C. Cir. 2014); Compl. at 13, *supra* note 2.

¹³⁰ See generally *Am. Meat*, 760 F.3d 18 (D.C. Cir. 2014) (holding *Zauderer* applies to cases outside of its original facts); Compl. at 15, *supra* note 2 (stating that *Zauderer* should not apply in this case because the labeling is controversial).

A. *The Substantial Government Interest Prong*

Following the example set by *American Meat*, the U.S. District Court will likely first determine if there is substantial government interest served by requiring GMO labeling of the manufacturers. In *American Meat*, history, consumer desire, and health concerns were enough to justify finding a substantial state interest, but the court did not expressly state that these were the only factors that should bear weight on the decision.¹³¹ Regardless, Vermont may be able to work within the factors used in *American Meat* to show that its interest is substantial enough to justify the labeling of GMO food.

1. *Legislative History and Intent*

The *American Meat* court relied on history, explaining that country of origin labeling has long been accepted and is now a “common sense” practice in American labeling.¹³² Vermont could likely make a similar argument for ingredient labeling, which has its own, albeit shorter, history in the United States. Many laws, mostly at the federal level, already mandate labeling for ingredients, allergens, color and dyes, nutrition, and trans-fat.¹³³ Laws for these types of labels began as early as 1950, and efforts to pass labeling laws have gained substantial support in the last twenty years.¹³⁴ These laws, which assist consumers in making

¹³¹ *Am. Meat*, 760 F.3d at 23 (“Because the interest motivating the 2013 rule is a substantial one, we need not decide whether a lesser interest could suffice under *Zauderer*.”).

¹³² *Id.* at 24 (“The Congress that extended country-of-origin mandates to food did so against a historical backdrop that has made the value of this particular product information to consumers a matter of common sense.”).

¹³³ See generally U.S. DEP’T OF HEALTH AND HUMAN SERVICES, A FOOD LABELING GUIDE: GUIDANCE FOR INDUSTRY TABLE OF CONTENTS (Jan. 2013) available at <http://www.fda.gov/downloads/Food/GuidanceRegulation/UCM265446.pdf> (citing multiple times to Federal Food, Drug & Cosmetic Act, Pub. L. No. 111-353, 184 Stat. 3885 (2011)).

¹³⁴ *Significant Dates in U.S. Food and Drug Law History*, U.S. FOOD AND DRUG ADMINISTRATION <http://www.fda.gov/aboutfda/whatwedo/history/milestones/ucm128305.htm> (last updated Mar. 25, 2014) (noting the 1950 “Oleomargarine Act requires prominent labeling of colored oleomargarine, to distinguish it from butter” and noting numerous other legislative acts requiring food labeling in the 1990s through the present.).

food choices, are “common sense” to most Americans now too.¹³⁵ GMO food labeling is hard to differentiate from the labeling required for coloring or trans-fat, as many of these characteristics are found in manufactured foods.

Vermont’s law should also pass muster under the second and third factors in the substantial government interest test, but to do so its proponents will have to go beyond the text of the law and show the intent of the legislators who created it. The court in *American Meat* tied its discussions of consumer desire and health concerns into a single analysis: the legislative history of the food labeling law.¹³⁶ In doing so, the court relied heavily on legislative intent when deciding if issues like consumer interest and public health interests are substantial for the purposes of the law.¹³⁷ Vermont’s legislature clearly states the purposes of Act 120 in the preliminary statements and the text of the law.¹³⁸ This clarity in the text of the law alone will likely be insufficient to show substantial purpose under *American Meat*, but the legislative record may better the argument for substantiality here. In regards to Act 120, Vermont politicians made numerous statements during the passage of the GMO food labeling bill that supported a clear interest in consumer

¹³⁵ Kristin Kiesel et al., *Nutritional Labeling and Consumer Choices*, 3 ANN. REV. RES. ECON. 0, 21 (2011), available at <http://www.csus.edu/indiv/k/kieselk/AR%20KieselMcCluskeyvillasBoas.pdf> (concluding “that label use has the potential to improve dietary quality”); *Consumer Labels*, FOOD & WATER WATCH, <http://www.foodandwaterwatch.org/food/consumer-labels/> (last visited Nov. 19, 2014) (“Ninety percent of people want labeling for [genetically engineered] foods. In the U.S., there has been a huge coalition effort to build enough pressure to get the Food and Drug Administration to require these labels”).

¹³⁶ *Am. Meat*, 760 F.3d at 24–25 (citing numerous statements made by legislators).

¹³⁷ *Id.* at 25 (“[T]he ‘precise interests’ served by the 2013 rule are simply those advanced by Congress in adopting the statute.”).

¹³⁸ *See generally* NO. 120, *supra* note 37 (“[T]he State should require food produced with genetic engineering to be labeled as such in order to serve the interests of the State, notwithstanding limited exceptions, to prevent inadvertent consumer deception, prevent potential risks to human health, protect religious practices, and protect the environment.”).

knowledge and health risks.¹³⁹ For example, Vermont Rep. John Bartholomew stated:

Numerous studies and findings have identified potential health risks associated with these foods in both animals and humans, including tumors, liver and kidney problems, flu-like symptoms, skin irritation, immune system responses, digestive disorders, serious reproductive disorders, and an increased incidence of food intolerance and food allergies. . . . Unfortunately, significant disagreement remains among scientific experts about the safety of genetically engineered foods. There are numerous unanswered questions because important safety studies have not been done. Labeling will serve as a risk management measure to deal with scientific uncertainty.¹⁴⁰

Vermont's congressional record goes further than that in *American Meat* by discussing environmental and religious concerns surrounding GMO foods.¹⁴¹ Vermont's legislature cites polling that shows consumer desire for GMO labeling.¹⁴² The D.C. Circuit noted that consumer polling is an important part of the substantial interest analysis in *American Meat*.¹⁴³ The combination of standard factors (history, consumer desire, and health concerns) and the statements from the Vermont legislature will likely amount to a finding of a substantial government interest if the case is decided under the logic of the *American Meat* case.

2. *Health Risks of Experimental Technology*

Scientists' reliance on the use of relatively experimental technologies for developing GMOs further points towards a

¹³⁹ See generally An Act Relating to the Labeling of Food Produced with Genetic Engineering, H.112, 2013-2014 Sess., (Vt. 2014), <http://www.leg.state.vt.us/database/status/summary.cfm?Bill=H%2E0112&Session=2014> (last updated May 8, 2014) (recording all legislative action on GMO food labeling law).

¹⁴⁰ JOURNAL OF THE HOUSE, VERMONT LEGISLATURE 1524 (May 10, 2013), available at <http://www.leg.state.vt.us/docs/2014/journal/HJ130510.pdf#page=17>.

¹⁴¹ See, e.g., *id.* at 1527 (“We ask for this right [of informed choice] based on emerging health concerns, religious laws, moral and ethical convictions, economic opportunity, environmental concerns and consumer choice.”).

¹⁴² *Id.* at 1525 (“Polls have shown that 95% of Vermonters want these products labeled.”).

¹⁴³ *Am. Meat*, 760 F.3d 18, 24 (D.C. Circuit 2014) (“The record is further bolstered by surveys AMS reviewed, such as one indicating that 71–73 percent of consumers would be willing to pay for country-of-origin information about their food.”).

substantial government interest in labeling. The court in *American Meat* noted as part of its health risk analysis that concerns over outbreaks of foodborne illness may bolster the government's interest.¹⁴⁴ Similarly, if a GMO technology is found to cause specific health risks, there is no way to know which foods contain products made with that specific GMO technology. While the *American Meat* court did not discuss this, it could play a role in the decision of the *Grocery Manufacturer's Ass'n* case. Concerns over GMO technology also reach beyond foodborne illness. If a GMO plant causes disease in other plants or animals, it could devastate the United States food supply by wiping out a large portion of the agricultural industry.¹⁴⁵ While at first glance this seems to be an extreme or unrealistic outcome, research indicates that it is a realistic risk. With GMOs making up a large part of the food supply, a plant disease carried by these organisms would quickly limit the amount of safe and healthy foods for both consumption and plant reproduction. Further, GMOs reduce crop varieties, creating "monocultures," where one gene is utilized to create a staple crop, resulting in a more rapid spread of disease and a more difficult recovery.¹⁴⁶ With regards to the experimental nature of GMO technology, concerns over plant disease and damage to the food supply are valid and only serve to strengthen the argument for GMO labeling.

The experimental nature of GMOs could also pose risks to human health. Genes used in GMO foods may not have been part of the food supply before being added to a GMO crop.¹⁴⁷ Because these genes are new to the food supply and enter through a loosely

¹⁴⁴ *Id.* at 23 (noting both individual and market concerns surrounding a food borne illness outbreak).

¹⁴⁵ See CURRENT KNOWLEDGE OF THE IMPACTS OF GENETICALLY MODIFIED ORGANISMS ON BIODIVERSITY AND HUMAN HEALTH: AN INFORMATION PAPER, *supra* note 42, at 10 (noting the importance of measures to ensure that food is safe for consumers, and to "prevent the spread of pests or diseases among animals and plants").

¹⁴⁶ See *id.* at 23 ("Just as relying on monocultures may increase pest problems in conventional agricultural practices, experts warn that increasing reliance on a single gene in growing a variety of crops could also be dangerous.").

¹⁴⁷ See, e.g., text accompanying note 14.

regulated system, there is significant concern that these genes may not be safe for people.¹⁴⁸ Labeling would ameliorate this concern by creating a system by which, in the event a specific gene is found to be unsafe or unhealthy for humans, consumers, retailers, and manufacturers can more easily remove this food from the supply chain or their individual diets.

GMOs may also cause allergic reactions in some people, some of which may be severe.¹⁴⁹ More startling, some of these allergens are latent or unknown due to the changes the gene undergoes when added to a new organism.¹⁵⁰ Labeling would ensure that those with allergies do not inadvertently consume GMOs that cause a reaction,¹⁵¹ and could make pinpointing the exact cause of reactions easier. In light of these concerns, the experimental nature of GMO technology weighs heavily in favor of the Vermont government requiring labeling for GMO food products.

B. *The Fitness Prong*

The second prong of the *Zauderer* test requires the court to determine the fit between the government's interest and the mandated labeling (i.e., compelled speech).¹⁵² The prong is automatically met under *Zauderer* where the compelled speech is factual and not

¹⁴⁸ CURRENT KNOWLEDGE OF THE IMPACTS OF GENETICALLY MODIFIED ORGANISMS ON BIODIVERSITY AND HUMAN HEALTH: AN INFORMATION PAPER, *supra* note 42, at 32 (“At least some of the genes used in GMOs may not have been used in the food supply before, so GM foods may pose a potential risk for human health.”).

¹⁴⁹ *Id.* at 33 (“[G]enetically modified pest-resistant peas caused allergic lung damage in mice . . .”).

¹⁵⁰ *Id.* (discussing a pea gene causing allergic lung damage in mice the authors note that “[t]he innocuous protein does not cause an allergic reaction when extracted from the bean, but when expressed in the pea it is structurally different to the original bean. This subtle change may lead to the unexpected immune effects seen in mice, thus illustrating the unpredictable impacts of gene transfer . . .”).

¹⁵¹ Labeling GMO foods for allergy concerns may seem unhelpful as it is unlikely consumers would know the GMO is causing the allergy, especially in foods that combine both GMO and non-GMO ingredients. However, once all the information is available, labeling could help consumers determine which foods trigger reactions to those suffering from allergies through simple trial and error.

¹⁵² *Am. Meat*, 760 F.3d 18, 26 (D.C. Circuit 2014).

controversial.¹⁵³ Here, the two cases, *American Meat* and *Grocery Manufacturer's Ass'n*, differ. In *American Meat*, the plaintiffs did not challenge the uncontroversial and factual nature of the labeling.¹⁵⁴ In *Grocery Manufacturer's Ass'n*, the plaintiffs do challenge this point.¹⁵⁵ The court in *American Meat* noted that, even if the law were challenged as to its factual and uncontroversial nature, that challenge would fail.¹⁵⁶ The same result is likely in *Grocery Manufacturer's Ass'n*, because the contents of the label, which state the foods are, may be, or are partially made with GMOs, are indisputably factual.¹⁵⁷ That information is not controversial in the common sense meaning of the term, which is the definition the court in *American Meat* uses in its brief statement on the point.¹⁵⁸

With this reasoning, it is hard to imagine a scenario where the plaintiff's challenge in *Grocery Manufacturer's Ass'n* would withstand the standard set forth in *American Meat*.

V. THE POSSIBILITY OF AN ALTERNATIVE RESULT

While the *American Meat* court found the compelled speech at issue in the case acceptable under the *Zauderer* test, the U.S.

¹⁵³ *Id.* (“When the Supreme Court has analyzed *Central Hudson*’s ‘directly advance’ requirement, it has commonly required evidence of a measure’s effectiveness. But as the Court recognized in *Zauderer*, such evidentiary parsing is hardly necessary when the government uses a disclosure mandate to achieve a goal of informing consumers about a particular product trait, assuming of course that the reason for informing consumers qualifies as an adequate interest.”) (citation omitted).

¹⁵⁴ *Id.* at 27 (“In this case, the criteria triggering the application of *Zauderer* are either unchallenged or substantially unchallenged.”).

¹⁵⁵ Complaint, *supra* note 2, at 15 (calling the speech compelled by the Act “controversial”).

¹⁵⁶ *Am. Meat*, 760 F.3d at 27 (discussing how the origin of meat is not a controversial fact in the commonsense meaning of the word “controversial”).

¹⁵⁷ See generally Complaint, *supra* note 2 (failing to assert that the foods manufactured by the plaintiffs are not made using GMO technology).

¹⁵⁸ *Am. Meat*, 760 F.3d at 27 (“We also do not understand country-of-origin labeling to be controversial in the sense that it communicates a message that is controversial for some reason other than dispute about simple factual accuracy.”).

District Court for the District of Vermont could eschew this decision. The Vermont District Court may either (1) act in favor of its own precedent, (2) take a different view of the *Zauderer* test, or (3) choose to follow other persuasive precedent, which could lead to a different result than the one reached in *American Meat*.

A. *Binding Precedent*

The Vermont District Court is not bound by the decisions made by the D.C. Circuit, i.e., the *American Meat* decision, but it is bound by Second Circuit holdings. In *Amestoy*, the Second Circuit struck down a labeling law requiring labels for milk produced by cows given hormone treatments (“rBST”) because it viewed the law as being solely based on consumer interest and not on health and safety.¹⁵⁹ While the Vermont GMO labeling law specifically cites health and safety concerns, this precedent could very well take some of the weight out of factors considered in *American Meat*, such as consumer polling and “right to know” arguments.

In *Amestoy*, the Second Circuit used the test¹⁶⁰ created by *Central Hudson*, which is similar to the *Zauderer* test but has a more rigorous fitness prong.¹⁶¹ While this did not make much difference in the *Amestoy* decision, which was based entirely on the substantial interest prong of the test under *Central Hudson*, it may make a difference in how the U.S. District Court for the

¹⁵⁹ Dairy Food Ass’n v. Amestoy, 92 F.3d 67, 74 (2d Cir. 1996) (“[W]e hold that consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement . . .”).

¹⁶⁰ *Id.* at 72 (“Under *Central Hudson*, we must determine: (1) whether the expression concerns lawful activity and is not misleading; (2) whether the government’s interest is substantial; (3) whether the labeling law directly serves the asserted interest; and (4) whether the labeling law is no more extensive than necessary.”).

¹⁶¹ *Am. Meat*, 760 F.3d at 26 (“When the Supreme Court has analyzed *Central Hudson*’s ‘directly advance’ requirement, it has commonly required evidence of a measure’s effectiveness . . . [b]ut as the Court recognized in *Zauderer*, such evidentiary parsing is hardly necessary when the government uses a disclosure mandate to achieve a goal of informing consumers about a particular product trait, assuming of course that the reason for informing consumers qualifies as an adequate interest.”) (citations omitted).

District of Vermont decides *Grocery Manufacturer's Ass'n*.¹⁶² *Amestoy* also bodes poorly for the Vermont GMO law because the D.C. Circuit's original panel judgment in the *American Meat* case distinguishes its opinion from the *Amestoy* opinion, stating that country of origin labeling is less likely to cause consumers to fear buying meat than labeling milk for the use of novel chemical.¹⁶³ The trial court may find that GMO technology is more like a novel chemical than country of origin labeling.

One part of the *Amestoy* case that supports the Vermont GMO law's favor is Judge Leval's dissent, which provided a contemptuous review of the majority's assertion that consumer interest was the only government consideration while passing its rBST labeling law.¹⁶⁴ Judge Leval's dissent is not binding on the district court, but the Vermont District Court may give Leval's opinion some weight because it agreed with the court's decision to deny the dairy producers a preliminary injunction against the labeling law.¹⁶⁵ The district court may also use Judge Leval's dissent in its decision because his dissent seems to base at least some of its analysis off *Zauderer*,¹⁶⁶ which makes it more like the

¹⁶² Complaint, *supra* note 2, at 15 (claiming that Vermont did not consider alternatives to the labeling law that would have been less demanding of manufacturers).

¹⁶³ *Am. Meat Inst. v. USDA*, 746 F.3d 1065, 1071–72 (D.C. Cir. 2014) (“[I]t seems a good deal less likely that consumers would draw negative hints from COOL information than from the required declarations about use of rBST. Reference to an apparently novel additive on milk cartons might well lead to an inference that the additive might have a dangerous effect, whereas the appearance of countries of origin on packages of meat seems susceptible to quite benign inferences, including simply that the retailers take pride in identifying the source of their products.”).

¹⁶⁴ *Amestoy*, 92 F.3d at 76 (2nd Cir. 1996) (Leval, C. J., dissenting) (“[The majority] simply disregards the evidence of Vermont’s true interests and the district court’s findings recognizing those interests. Nowhere does the majority opinion discuss or even mention the evidence or findings regarding the people of Vermont’s concerns about human health, cow health, biotechnology, and the survival of small dairy farms.”).

¹⁶⁵ See generally *id.* (Leval, C. J., dissenting) (affirming the district court).

¹⁶⁶ *Id.* at 81 (Leval, C. J., dissenting) (“[The Court in *Zauderer*] concluded that ‘because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech

recent precedent of *American Meat* regarding compelled speech and food labeling laws.

Amestoy will likely play some part in the *Grocery Manufacturer's Ass'n* case. The answer to how much of a role it will play lies in determining whether the district court will give more weight to recent persuasive precedent or older binding authority.

B. *Other Persuasive Precedent*

The *American Meat* holding was not decided in a vacuum; there are many other cases discussing the First Amendment as it applies to restrictions and mandatory disclosures on commercial speech.¹⁶⁷ While some of these may lead to the same result as *American Meat* (upholding a restriction or disclosure of commercial speech), others take a contrary view and a different approach. The U.S. District Court for the District of Vermont will be looking to all cases involving commercial disclosures when it decides *Grocery Manufacturer's Ass'n*, and it may choose to follow one of the cases that lends itself to a different result and reasoning than the majority in *American Meat* chose to follow.

A particularly good example is the *R.J. Reynolds* case, which was decided by the D.C. Circuit in 2012, not long before the same

provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal. . . . Disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech¹⁶⁷ The application of these principles to the case at bar yields a clear message. The benefit the First Amendment confers in the area of commercial speech is the provision of accurate, non-misleading, relevant information to consumers. Thus, regulations designed to prevent the flow of such information are disfavored; regulations designed to provide such information are not. (citations omitted)."

¹⁶⁷ See, e.g., *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010) (applying the *Zauderer* standard to disclosure requirements "intended to combat the problem of inherently misleading commercial advertisements"); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980) (striking down a law that would require restrictions on television advertising for electric companies); *Friedman v. Rogers*, 440 U.S. 1 (1979) (finding that the prohibition of the practice of optometry under a trade name did not violate free speech because the state had an interest in protecting the public from deceptive trade names).

court decided *American Meat*. In a decision authored by Judge Brown, who wrote the more thorough dissent in *American Meat*,¹⁶⁸ the court determined that the FDA's requirement of graphic warning labels that included images and the phone number of a smoking cessation hotline were unable to pass constitutional muster under the First Amendment.¹⁶⁹ The court considered the application of *Zauderer*, which it asserted was akin to a rational basis review,¹⁷⁰ but determined that the information on the cigarette boxes and advertisements was not "purely factual and uncontroversial" as *Zauderer* requires.¹⁷¹ In making this decision, the court then analyzed the warning labels under *Central Hudson* and held that the government, while having a substantial interest in reducing smoking among Americans, did not meet the fitness prong because they were unable to show a link between graphic ads and a reduction in smoking.¹⁷² The court spent a significant

¹⁶⁸ *Am. Meat*, 760 F.3d 18, 37 (D.C. Circuit 2014) (Brown, J., dissenting).

¹⁶⁹ *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1222 (D.C. Cir. 2012) ("The Rule . . . cannot pass muster under *Central Hudson*. The APA directs that we 'shall . . . set aside [the] agency action . . . found to be contrary to constitutional right.' We therefore vacate the graphic warning requirements and remand to the agency. In so doing, we also vacate the permanent injunction issued by the district court, in furtherance of our obligation to set aside the unlawful regulation. (citations omitted)").

¹⁷⁰ *Id.* at 1212 ("While [the *Central Hudson*] test is not quite as demanding as strict scrutiny, it is significantly more stringent than *Zauderer's* standard, which is akin to rational-basis review.").

¹⁷¹ *Id.* at 1216 ("The disclosures approved in *Zauderer* and *Milavetz* were clear statements that were both indisputably accurate and not subject to misinterpretation by consumers. . . . The FDA's images are a much different animal. FDA concedes that the images are not meant to be interpreted literally, but rather to symbolize the textual warning statements, which provide 'additional context for what is shown.' But many of the images chosen by FDA could be misinterpreted by consumers. For example, the image of a man smoking through a tracheotomy hole might be misinterpreted as suggesting that such a procedure is a common consequence of smoking—a more logical interpretation than FDA's contention that it symbolizes 'the addictive nature of cigarettes,' which requires significant extrapolation on the part of the consumers.").

¹⁷² *Id.* at 1219 ("FDA has not provided a shred of evidence—much less the 'substantial evidence' required by the APA—showing that the graphic warnings

amount of the opinion explaining how *Zauderer* is clearly limited to government-mandated disclosures that correct misleading advertising.¹⁷³ In fact, the court asserted that *Zauderer*, in recent times, has only been applied to cases that are factually similar to it.¹⁷⁴

When reading the *R.J. Reynolds* case, it seems that the U.S. District Court for the District of Vermont has reason to apply the same reasoning used there instead of the rationale in *American Meat*. Whether or not it chooses to do so will rely on whether it deems the GMO labeling is correcting a consumer deception and whether the labels are uncontroversial. That said, *American Meat* is the more recent precedent, and its decision overruled the portion of *R.J. Reynolds* that claims *Zauderer* can only be applied to combat deception.¹⁷⁵ Strictly speaking, *R.J. Reynolds* is not good law when it comes to this factor—at least, not in the D.C. Circuit. Which decision will matter more to the district court in the *Grocery Manufacturer’s Ass’n* case is anyone’s guess, but with the *Amestoy* precedent looming in the Second Circuit, it would be foolish to discount the importance of *R.J. Reynolds* and *Amestoy*, which both apply *Central Hudson* to commercial disclosures.

C. An Alternative Test

Amestoy, *R.J. Reynolds*, and both of the dissents in *American Meat* have one thing in common: They use the *Central Hudson* test to determine whether a compelled disclosure in commercial speech is constitutional. If the U.S. District Court for the District of

will ‘directly advance’ its interest in reducing the number of Americans who smoke.”).

¹⁷³ *Id.* at 1213–16 (discussing several Supreme Court cases; all of which apply *Zauderer* to disclosure to combat deception).

¹⁷⁴ *Id.* at 1214 (“[T]he Court’s *only* recent application of the *Zauderer* standard involved a disclosure requirement that ‘share[d] the essential features of the rule at issue in *Zauderer*.”) (quoting Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 230–31 (2010)).

¹⁷⁵ *Am. Meat*, 760 F.3d 18, 22 (D.C. Circuit 2014) (“To the extent that other cases in this circuit may be read as holding to the contrary and limiting *Zauderer* to cases in which the government points to an interest in correcting deception, we now overrule them.”).

Vermont decides to give these cases more weight than it does the majority opinion in *American Meat*, then it is likely *Grocery Manufacturer's Ass'n* will be decided under *Central Hudson* as well. While this likely would not change the analysis of the government's substantial interest, it will add a heightened standard to the fitness prong of the test.

Under *Central Hudson* the court must determine that “(1) the expression concerns lawful activity and is not misleading; (2) the government's interest is substantial; (3) the labeling law directly serves the asserted interest; and (4) the labeling law is no more extensive than necessary.”¹⁷⁶ Assuming that the GMO labeling law meets the first two parts of this test, which is the same analysis as the first prong of *Zauderer* (applied to *Grocery Manufacturer's Ass'n* in Part IV); the third and fourth parts are discussed here.

The court in *R.J. Reynolds* and Judge Brown's dissent in *American Meat* both concluded that the government may only rely on interests that it *asserts* in defending compelled commercial speech.¹⁷⁷ According to the dissent in *American Meat*, this means that the court cannot rely on legislative history to show a substantial interest, because the statements made by legislators were not invoked by the government as reasons that their interests in GMO labeling are substantial.¹⁷⁸ Without the legislative arguments, Vermont may still be able to stand behind its other arguments for GMO labeling such as safety and religious concerns, but it would lose much of the force from its arguments because the legislative history provides much-needed context for these concerns.

¹⁷⁶ *Dairy Food Ass'n v. Amestoy*, 92 F.3d 67, 72 (2d Cir. 1996).

¹⁷⁷ *Am. Meat*, 760 F.3d at 46 (Brown, C. J., dissenting) (“[T]he court forgets that it is assessing the propriety of administrative action, when a reviewing court is limited to the administrative record and must judge the rule ‘solely by the grounds invoked by the agency.’”); *R.J. Reynolds*, 696 F.3d at 1218 (“Unlike rational-basis review, the *Central Hudson* standard does not permit this Court to ‘supplant the precise interests put forward by [FDA] with other suppositions.’ We thus begin by identifying FDA’s asserted interests. (citation omitted)”).

¹⁷⁸ *Am. Meat*, 760 F.3d at 46 (Brown, C. J., dissenting).

The biggest roadblock Vermont may encounter in defending the GMO law under *Central Hudson* is the exclusions in the law,¹⁷⁹ which may be attacked as causing the law to lack fitness with the proposed substantial interest in health or religious concerns. The argument would be something such as, “How does labeling potato chips as containing GMOs, but not labeling soda that is made with corn syrup as containing GMOs, directly serve the asserted purpose of protecting consumer health or religious preference?”

The fourth part of the test, which requires that the law be no more extensive than necessary, could also cause trouble for Vermont. The law provides that these products cannot be labeled “natural,”¹⁸⁰ which seems overzealous considering the products are already being labeled as made with GMOs. Vermont’s law could also be deemed too extensive because Vermont could have placed the burden of labeling on those who do *not* use GMOs in their food production, instead of requiring labeling from those who do.¹⁸¹ Since non-GMO producers are a much smaller class,¹⁸² and also arguably the class that would benefit from people knowing that their food is created without GMOs, it would be less burdensome than the current set-up of the law.

The third and fourth parts of the *Central Hudson* test could cause Vermont’s GMO labeling law to fail to pass judicial examination and be deemed unconstitutional. That said, the courts seem largely undecided on how and when *Zauderer* and *Central Hudson* apply, so it will be interesting to see how the Vermont District Court reads the varied precedents at their disposal.

¹⁷⁹ See NO. 120, *supra* note 37, at § 3044, p. 11–13 (listing exceptions set forth in Act 120).

¹⁸⁰ See *id.* (text of labeling law’s ban on “natural” labels for GMO foods).

¹⁸¹ JOURNAL OF THE HOUSE, *supra* note 140, at 1526 (Rep. Smith of New Haven commented on the GMO labeling law stating, “A voluntary labeling option made on the national level or the state level would eliminate Vermont’s exposure to a law suit and still let me know what is in my foods and still give me the option to purchase good healthy foods at a reasonable cost.”).

¹⁸² See *About Genetically Engineered Foods*, *supra* note 35.

VI. CONCLUSION

In their argument that GMO labeling violates its First Amendment right to commercial speech, it is likely that the Grocery Manufacturer's Association will not prevail if the trial court uses *American Meat* as persuasive precedent. The extension of *Zauderer* beyond consumer deception makes compelled commercial disclosures easier for the government to implement and will have repercussions far beyond food labeling. In both *Grocery Manufacturer's Ass'n* and future cases concerning the First Amendment right to commercial speech, Judge Brown may be correct to assume that many of the people who champion the expansion of *Zauderer* today will find themselves irritated by it in years to come.¹⁸³

The Grocery Manufacturer's Association may have stronger arguments in this case, though. While not discussed here, the Commerce Clause concerns associated with this type of labeling and the Supremacy Clause argument may hold significant weight in the case. Regardless of the outcome, this case will impact many other legislature's decisions about GMO labeling, and likely other labeling systems.

Vermont's GMO labeling law has struck a chord with other states. As this Recent Development is written, GMO food labeling laws are being discussed in Oregon, Washington, California, and New York.¹⁸⁴ *Grocery Manufacturer's Ass'n* will either pave the

¹⁸³ See text accompanying note 120.

¹⁸⁴ RIGHT TO KNOW GMO, <http://www.righttoknow-gmo.org/states> (last visited Sept. 13, 2014). GMO labeling was on the ballot in several states during the 2014 Midterm elections. It did not fair well. In Oregon the initiative to label all GMO foods was narrowly defeated (50.5% voting NO to 49.5% voting YES to labeling). Proposition 37, which would have also required GMO labeling was defeated by a similar margin. The initiative in Colorado was defeated much more decisively, with almost 70% voting against GMO labeling. But in Maui, Hawaii voters approved an initiative to temporarily ban GMO crops (the margin here was very tight, with only a 1,077 vote difference). Sam Brodey, *From GMOs to Soda Taxes, Here's What the Election Means for Your Fridge*, MOTHER JONES (Nov. 5, 2014), <http://www.motherjones.com/environment/2014/11/7-midterm-races-food-and-agriculture-implications>. These initiatives could hurt Vermont's consumer interest argument (assuming the court will allow the state

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way or place a significant speed bump in these bills' futures. With the precedent set by *American Meat*, the former outcome looks more likely.

to make it), or it may help the state in showing that this issue is being considered all over the country.