



PACIFIC LEGAL FOUNDATION

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Specialty Crops Program
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Re: Input Regarding the Establishment of a National Bioengineered Food Disclosure Standard

INTRODUCTION

Pacific Legal Foundation (PLF) appreciates the opportunity to submit its input on the National Bioengineered Food Disclosure Standard. PLF is a donor-supported national nonprofit that fights for private property rights, individual liberty, free enterprise, limited government, and a balanced approach to environmental protection. As the nation's first and most effective pro-liberty public interest law organization, PLF has a track record of success that includes nine victories in its last ten appearances at the Supreme Court of the United States.

On July 29, 2016, President Obama signed into law a bill that will require food and beverage manufacturers to label the presence of any genetically modified ingredients in their products. The law requires the United States Department of Agriculture (USDA) to establish a national standard for disclosure within two years of the President's signature.

On June 29, 2017, the USDA's Agricultural Marketing Service requested input that it will use in establishing the GMO labeling rule. For example, the USDA will consider input from the public when it crafts the scope of the small business exemption and when it determines the types of electronic disclosure (e.g. QR codes) manufacturers can use to disclose bioengineered food.

The GMO labeling rule will violate the First Amendment regardless of how USDA crafts it. Laws that compel speech must directly advance a substantial governmental interest. Although proponents of mandatory GMO labeling may assert that it furthers

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an interest in health and safety, there is broad scientific consensus that genetic engineering poses no distinct risk to human health. Although the USDA cannot eliminate the First Amendment violations inherent in a GMO labeling requirement, it can minimize the frequency of those violations. First, if USDA must adopt a disclosure rule by congressional mandate, the USDA should only require a QR code or digital link printed on packaging that would direct customers to an objective and scientifically supported internet source to learn more about bioengineered food. The link or code should not be accompanied by text that identifies the product as bioengineered. Second, the exceptions contained in the disclosure standard should be interpreted as broadly as possible. These steps would reduce the severity and frequency of First Amendment violations and focus the federal government's role on education rather than unjustified stigma.

These steps would also allow the market to satisfy consumer preferences. Genetic engineering uses the latest technological advances to create crops that are tastier, more nutritious, and less susceptible to disease. For consumers who demand to know whether their food contains GMOs, companies are already voluntarily disclosing that information.

I. Mandatory GMO Labeling Violates the First Amendment

The First Amendment protects both the right to speak and the right not to speak.¹ This right to refrain from speaking extends “not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.”² This flip side of free speech shields every speaker's choice over the content of their own expression.

This principle applies to commercial advertising. For example, in *United States v. United Foods*, the Supreme Court struck down a program that forced mushroom producers to fund ads carrying messages with which they disagreed.³ When a

¹ See *Riley v. Nat'l Fed. of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988) (in striking down a law compelling factual disclosure, the Court said that “freedom of speech” is a term “necessarily comprising the decision of both what to say and what *not* to say”).

² *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995).

³ See generally *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).

company must serve as the unwilling vessel for a message that they would rather avoid, the First Amendment offers relief.

A. A GMO Labeling Requirement That Expressly Identifies Foods As Bioengineered Would Likely Trigger Strict Scrutiny By Targeting Specific Speakers and Specific Content

Courts apply strict scrutiny to laws that discriminate based on content and speaker identity. Such laws must serve a compelling interest and be narrowly tailored to satisfy that interest.⁴ By imposing a labeling requirement solely on those businesses that contain GMO products, the disclosure standard targets a specific category of speakers in a manner that triggers strict scrutiny.

Typically, commercial advertising is subject to intermediate scrutiny—a demanding but less impregnable barrier than strict scrutiny.⁵ Intermediate scrutiny, however, does not apply when a speech regulation is based on content and the speaker’s identity.⁶ When that occurs, the higher level of scrutiny applies, even when the speech is “commercial.”⁷

For example, *Sorrell v. IMS Health* involved a Vermont law that forbade pharmacies from sharing information about physicians’ prescription practices and prohibited

⁴ *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015).

⁵ *See Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017). In addition to strict scrutiny and intermediate scrutiny, the Supreme Court has formulated a narrow rule that relaxes First Amendment scrutiny for speech regulations designed to prevent fraud or deception. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). In *Zauderer*, the Supreme Court held that consumer-protection regulations that compel disclosures need only be “reasonably related” to preventing deception so long as the information disclosed in “factual and uncontroversial.” *Id.* The Court has since confirmed that the *Zauderer* exception does not apply unless a disclosure is “somehow necessary to make voluntary advertisements nonmisleading for consumers.” *United Foods*, 533 U.S. at 416. The exception is inapplicable here because the GMO labeling requirement isn’t designed to prevent deception. Rather, Congress ostensibly crafted the law to help consumers make healthy choices in their purchases.

⁶ *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011).

⁷ *Id.*; *see also Tam*, 137 S. Ct. at 1767 (Kennedy, J., concurring).

pharmaceutical companies from using that information for marketing.⁸ The Supreme Court held that the law—though it targeted commercial speech—was subject to strict scrutiny because it “imposes a burden based on the content of speech and the identity of the speaker.”⁹

Like the prescription-disclosure law in *Sorrell*, a GMO labeling rule would face the rigors of strict scrutiny. GMO labeling requirements target specific content and a specific speaker. Only information regarding bioengineered food would be compelled under the rule, and only those businesses with such food in their products would be subject to it. Businesses that produce non-GMO food—or food without a sufficient ratio to trigger the rule’s demands—wouldn’t need to cede similar advertising space on their packaging.

By compelling certain businesses to affirmatively designate food as bioengineered, the GMO labeling requirement imposes the pall of stigma on a particular category of speaker. This violates a business’s “right to be free from government restrictions that abridge its own rights in order to enhance the relative voice of its opponents.”¹⁰

Businesses subject to the disclosure face a dilemma: they must either seek to rebut this stigma by crowding their packaging with evidence to quiet unfounded worries about GMOs, or they must leave consumers to accept the false implication that GMO products are dangerous enough to deserve an explicit warning. As a result, the GMO rule forces businesses to undermine their own products and the scientific evidence that absolves them.

B. Regardless of How It’s Constructed, a Rule Forcing Businesses To Announce that Their Products Contain Genetically Engineered Food Is Unlikely To Satisfy First Amendment Scrutiny

Regardless of whether strict scrutiny applies under *Sorrell* or intermediate scrutiny applies under the outdated commercial-speech rule, a GMO labeling standard—no matter how the agency crafts it—will likely violate the First Amendment.

Under either form of heightened scrutiny, a speech regulation cannot stand its ground on “mere speculation or conjecture; rather, a governmental body seeking to

⁸ *Sorrell*, 564 U.S. at 558-59.

⁹ *Id.* at 567.

¹⁰ *Pac. Gas and Elec. Co. v. PUC of Cal.*, 475 U.S. 1, 14 (1986) (internal quotation marks omitted).

sustain a restriction on commercial speech must demonstrate that the harms it recites are real” and the regulation will “alleviate them to a material degree.”¹¹

A GMO labeling mandate will fail to satisfy this standard. Forced disclosure wouldn’t substantially further an interest in food safety and consumer health because the alleged harms caused by GMO products are speculative and conflict with scientific consensus.¹² Indeed, GMO products may increase consumer health by making healthy foods more affordable to consumers who would otherwise purchase cheaper, less healthy substitutes.

By contrast, labeling requirements for ingredients such as peanuts, shellfish, gluten, and others would satisfy the First Amendment because they directly advance the government’s interest in protecting public health and safety. Those ingredients can cause life-threatening allergic reactions, and the First Amendment allows the government to prevent an uninformed consumer from becoming sick or worse.¹³

In all, a GMO labeling rule that requires an affirmative designation that a product is bioengineered would likely violate the First Amendment as a form of compelled speech; it would force businesses to carry a stigmatizing label without any foundation in public health or safety.

C. The USDA Should Craft Its Disclosure Rule To Reduce the Frequency and Severity of First Amendment Violations Imposed Under the Disclosure Standard

Although the USDA is under a congressional mandate to impose some form of disclosure requirement related to bioengineered foods, the USDA should do so with

¹¹ *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (holding that a beer labeling rule violated First Amendment).

¹² *See generally*, Genetic Literacy Project, <https://geneticliteracyproject.org/>; *see also, e.g.*, The Economist, *Genetically Modified People* (March 12, 2015); Swaminathan S. Anklesaria Aiyar, *If you Don’t Want Your Food Genetically Modified, Tell Nature to Stop It*, Cato.org (May 22, 2015), <https://www.cato.org/publications/commentary/you-dont-want-food-genetically-modified-tell-nature-stop-it>.

¹³ *See* Jonathan H. Adler, *Compelled Commercial Speech and the Consumer “Right to Know”*, 58 Ariz. L. Rev. 421, 439-41 (2016).

fidelity to an even higher law—the First Amendment to the United States Constitution.

The National Bioengineered Food Disclosure Standard grants the USDA some flexibility in promulgating its GMO disclosure rule. Specifically, the disclosure may take the form of a “text, symbol, or electronic or digital link.”¹⁴ If a link or code is used for disclosure, the Standard still requires accompanying language.¹⁵ That language, however, need not specify that the food at issue is bioengineered or that the link relates to bioengineering. The law itself states that generic language such as “Scan here for more food information” would satisfy the disclosure standard.¹⁶

A link or code would ease the severity of the First Amendment violation because the business would no longer be a vessel for a message that stigmatizes them. It also would reduce the content-based nature of the compelled speech, and it would mitigate negative consumer perceptions by pointing the consumer to an objective and scientifically accurate source of information.

The USDA should also craft exceptions to the labeling rule as broadly as possible. This will reduce the number of First Amendment violations perpetrated under the disclosure standard. For instance, the standard allows the USDA to decide how much bioengineered substance must be present in food in order for it to be subject to disclosure.¹⁷ The USDA should widen that exception so that as few products as possible are subject to the rule. The Standard also allows the USDA to exempt “very small food manufacturers.”¹⁸ The USDA should stretch such exceptions to the full extent allowed by the statute to reduce the frequency of constitutional violations perpetrated under the disclosure standard.

If the USDA must fulfill this disclosure mandate, it should also recall that it owes even greater fealty to the First Amendment and construct the mandate to satisfy its demands.

¹⁴ National Bioengineered Food Disclosure Standard, § 293(b)(D).

¹⁵ *Id.* § 293(d)(1)(A).

¹⁶ *Id.*

¹⁷ *Id.* § 293(b)(2)(B).

¹⁸ *Id.* § 293(b)(2)(G)(ii).

II. Mandatory GMO Labeling Is Bad Policy

Over thousands of years, generation after generation of farmers have selectively bred crops to make them better.¹⁹ Today, many crops are bigger, tastier, and more abundant than they were in their “natural” state thousands of years ago.²⁰

Nine thousand years ago, corn was much smaller than it is today²¹, and was only found in Central America.²² Through selective breeding, corn today is larger and more abundant today than it was thousands of years ago.²³ As technology evolved, scientists developed the ability to genetically engineer crops by manipulating DNA.²⁴ Today, corn may be injected with bacterium genes to obviate the need for harmful pesticides.²⁵ And rice may be genetically enhanced to produce beta-carotene to fortify the diets of millions of people in impoverished parts of the world.²⁶

¹⁹ See Keith Aoki, *Food Forethought: Intergenerational Equity and Global Food Supply — Past, Present, and Future*, 2011 Wis. L. Rev. 399, 405 (“In the ten thousand years or so since humans began domesticating crops, the selective breeding and intervention of weeds . . . produced the portfolio of staple crops we depend on today to feed the human race.”).

²⁰ See Mona Domosh, et al., *The Human Mosaic: A Cultural Approach to Human Geography* 286 (2013) (domesticated plants “tend to be bigger than wild species, bearing larger and more abundant food or grain”).

²¹ See *id.* (“[T]he original wild ‘Indian Maize’ grew on a cob only one-tenth the size of the cobs of domesticated maize.”).

²² C. Wayne Smith, et al., *Corn: Origin, History, Technology, and Production* 119 (2004) (“Teosinte and *Tipsacum* are wild relatives of corn native to Mexico and Central America.”).

²³ Domosh, *supra* note 20.

²⁴ See generally Gabriel Rangel, *From Corgis to Corn: A Brief Look at the Long History of GMO Technology*, Science in the News (Aug. 9, 2015), <http://sitn.hms.harvard.edu/flash/2015/from-corgis-to-corn-a-brief-look-at-the-long-history-of-gmo-technology/>.

²⁵ Matthew Niederhuber, *Insecticidal Plants: The Tech and Safety of GM Bt Crops*, Science in the News (Aug. 10, 2015), <http://sitn.hms.harvard.edu/flash/2015/insecticidal-plants/>.

²⁶ National Academies of Sciences, *Genetically Engineered Crops: Experiences and Prospects* 227 (2016) (“Golden rice, which was produced through genetic engineering to increase beta-carotene content, is one of the most recognized

Last year, more than 100 Nobel laureates signed a letter urging Greenpeace to end its opposition to genetically modified organisms.²⁷ As the laureates explained: “Scientific and regulatory agencies around the world have repeatedly and consistently found crops and foods improved through biotechnology to be as safe as, if not safer than those derived from any other method of production.”²⁸ The letter also notes that the “environmental impacts [of GMOs] have been shown repeatedly to be less damaging to the environment, and a boon to global biodiversity.”²⁹

The laureates point to Golden Rice as one example of the benefits of GMOs. Golden Rice may “reduce or eliminate much of the death and disease caused by a vitamin A deficiency (VAD), which has the greatest impact on the poorest people in Africa and Southeast Asia.”³⁰ This would provide relief to approximately “250 million people,” including “40 percent of the children under five in the developing world.”³¹

In addition to preventing illness in the most impoverished corners of the globe, genetic engineering may be a key ally in fighting hunger. The world’s population is growing at a rapid pace, and experts say that global food production will have to double by 2050.³² According to some scholars, genetic engineering could produce rice that’s resistant to floods, maize that can grow in nitrogen-poor soil, and even potatoes that can immunize consumers against hepatitis B infection.³³

There is broad scientific consensus that genetic engineering poses no distinct risk to human health.³⁴ As the American Association for the Advancement of Science put

examples of the use of genetic-engineering technology to improve a crop’s nutritional value.”).

²⁷ Joel Achenbach, *107 Nobel laureates sign letter blasting Greenpeace over GMOs*, Washington Post (June 30, 2016), https://www.washingtonpost.com/news/speaking-of-science/wp/2016/06/29/more-than-100-nobel-laureates-take-on-greenpeace-over-gmo-stance/?utm_term=.cdb4026d6d97.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See Brian Spooner, *Globalization: The Crucial Phase* 196 (2015).

³³ Christopher Gerry, *Feeding the World One Genetically Modified Tomato at a Time: A Scientific Perspective*, Science in the news (Aug. 9, 2015), <http://sitn.hms.harvard.edu/flash/2015/feeding-the-world/>.

³⁴ Adler, *supra* note 13 at 459-60.

it: “The World Health Organization, the American Medical Association, the U.S. National Academy of Sciences, the British Royal Society, and every other respected organization that has examined the evidence has” reached the exact same conclusion: “consuming foods containing ingredients derived from GM crops is no riskier than consuming the same foods containing ingredients from crop plants modified by conventional plant improvement techniques.”³⁵

Despite the scientific consensus that genetic engineering is safe, some consumers may prefer food that has not undergone genetic engineering. Many companies are voluntarily catering to those preferences. Chipotle Mexican Grill, for example, boasts that “when it comes to our food, genetically modified ingredients don’t make the cut.”³⁶ Consumers can find similar information on a side panel on boxes of Cheerios, which states “not made with genetically modified ingredients.”³⁷ And although Campbell Soup “continues to recognize that GMOs are safe,” it has undertaken efforts to “disclose [] ingredients derived from [GMOs].”³⁸ In sum, consumers who demand to know whether their food has been genetically engineered can find plenty of companies that are willing to cater to them.

³⁵ See *id.* at 459 n.192.

³⁶ Chipotle, *Food with Integrity, G-M-Over It*, <https://www.chipotle.com/gmo>

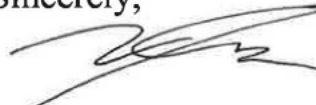
³⁷ Stephanie Strom, *Many G.M.O.-Free Labels, Little Clarity Over Rules*, New York Times (Jan. 30, 2015), <https://www.nytimes.com/2015/01/31/business/gmo-labels-for-food-are-in-high-demand-but-provide-little-certainty.html>.

³⁸ Campbell’s, *Campbell Announces Support for Mandatory GMO Labeling* (Jan. 7, 2016) <http://investor.campbellsoupcompany.com/phoenix.zhtml?c=88650&p=irol-newsArticle&ID=2127542>.

CONCLUSION

Mandatory labeling of genetically engineered food violates the First Amendment. Although Congress has saddled the USDA with an unconstitutional mandate, the USDA should design the rule to minimize the frequency of First Amendment violations imposed by the GMO labeling requirement.

Sincerely,



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