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# Constitutional Implications of State GE Food Labeling Laws

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## Summary

The labeling of genetically engineered (GE) foods, sometimes referred to as genetically modified foods (GMO foods), has been the subject of debate among members of the general public, industry participants, and federal and state governments. *Grocery Manufacturers Association v. Sorrell* serves as a case study on the constitutional implications of state GE food labeling laws and provides some insight on the judicial consideration of GE labeling as Congress considers GE labeling legislation in the 114<sup>th</sup> Congress.

### Key Takeaways of This Report

- The Food and Drug Administration (FDA) does not impose specific labeling requirements on food just because it may or may not contain GE ingredients, but some states have responded to public demand for GE labeling by enacting state laws requiring such a labeling scheme. As of the date of this Report, three states have passed mandatory labeling laws for GE foods: Vermont, Connecticut, and Maine. These laws have been controversial and have raised various constitutional considerations, particularly relating to the First Amendment, the Commerce Clause, and the Supremacy Clause.
- While none of these state labeling schemes are yet in effect, certain industry participants have filed suit in federal court against the State of Vermont, in *Grocery Manufacturers Association (GMA) v. Sorrell*, claiming that Vermont's GE labeling law, Act 120, is unconstitutional by imposing undue burdens on speech, and by interfering with federal oversight of the food industry, and the federal regulation of commerce. Vermont's law is scheduled to go into effect on July 1, 2016.
- The litigation in *GMA v. Sorrell* is in its early stages; as of the date of this Report, the court has denied the plaintiffs' request for a preliminary injunction and dismissed some of their claims, but has allowed other claims to continue to trial.
  - The plaintiffs argued that Act 120's prohibition of the use of "natural" on food labeling and the statute's mandate to label GE food violated the plaintiffs' First Amendment rights to freedom of speech. While the court has allowed both of these claims to continue to trial, the court indicated that it found the claim that the prohibition of the term 'natural' on food labels violates the First Amendment to be more likely to succeed at trial, suggesting that a state law that contains disclosure requirements generally, such as mandating labeling food as GE, rather than prohibits companies from using certain words on their labels, may be more likely to pass constitutional muster, at least in the U.S. Court of Appeals for the Second Circuit.
  - The plaintiffs argued that various federal laws on food labeling should preempt Act 120, but the court dismissed these claims (except in the context of meat labeling), concluding that congressional intent to preempt state GE labeling laws, such as Act 120, is not sufficiently clear and manifest. Congress could legislate in this area were it to determine that federal laws should preempt state GE labeling laws.
  - The plaintiffs argued that Act 120 violated the dormant Commerce Clause by impermissibly burdening interstate commerce, but the court dismissed these claims because the statute does not require GE food manufacturers to alter

their labeling practices nationwide. The court did note that, were more states to pass conflicting GE food labeling laws, this may strengthen a claim in the future that the laws violate the dormant Commerce Clause.

- The U.S. House of Representatives recently passed the Safe and Accurate Food Labeling Act of 2015 (H.R. 1599), which would impose voluntary labeling and certification schemes for foods that contain GE plants, and has raised the issue of whether the legislation would preempt state GE labeling laws, including Vermont's Act 120.

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The labeling of genetically engineered (GE) foods, sometimes referred to as genetically modified foods (GMO foods), has been the subject of debate among members of the general public, industry participants, and federal and state governments. The U.S. House of Representatives also debated the issue of GE food labeling when passing the Safe and Accurate Food Labeling Act of 2015 (H.R. 1599, SAFLA) in July 2015. While the Food and Drug Administration (FDA) does not impose specific labeling requirements on food just because it may or may not contain GE ingredients, some states have responded to public demand for GE labeling by enacting state laws requiring such a labeling scheme.

As of the date of this report, three states have passed mandatory labeling laws for GE foods: Vermont, Connecticut, and Maine. While none of these state labeling schemes are yet in effect, some industry participants have filed suit in federal court against the State of Vermont trying to prevent the state's GE labeling requirements from going into effect. These plaintiffs, generally industry representatives of grocery and food manufacturers, have claimed that Vermont's GE labeling law, Act 120, is unconstitutional by imposing undue burdens on speech, and by interfering with federal oversight of the food industry, and the federal regulation of commerce. While *Grocery Manufacturers Association (GMA) v. Sorrell* is in the early stages of litigation, the legal issues that the court must consider have repeatedly appeared in debates over GE labeling on both the federal and state level and in the wider food regulation context. *GMA v. Sorrell* thus serves as a case study on the constitutional implications of state GE labeling laws and provides some insight on the judicial consideration of GE labeling as Congress considers related legislation in the 114<sup>th</sup> Congress.

This report analyzes three constitutional provisions relevant to state GE food labeling laws, the First Amendment, the Supremacy Clause, and the Commerce Clause, by explaining the wider legal background of GE labeling as well as the court's analysis of these constitutional issues in *GMA v. Sorrell*. First, the report begins with a brief discussion about GE foods and the states that have passed mandatory GE labeling laws. Next, the report examines the *GMA v. Sorrell* litigation and the constitutional claims made by the plaintiffs, including a brief background on each constitutional principle. The report concludes with a discussion about the legislation introduced during the 114<sup>th</sup> Congress that would impose a voluntary labeling and certification scheme for GE foods and may impact state law.

## Background

### Genetically Engineered Foods

“Genetic engineering” refers to the scientific methods “use[d] to introduce new traits or characteristics to an organism.”<sup>1</sup> These procedures can create a tolerance to herbicides, promote resistance to viruses, increase yields, and alter acidic content.<sup>2</sup> “Genetically engineered foods” (GE foods), also referred to as “genetically modified foods” (GMO foods),<sup>3</sup> are foods that are derived from these methods or include ingredients that are derived from these methods. Food and

<sup>1</sup> FDA, “Questions & Answers on Food from Genetically Engineered Plants”<http://www.fda.gov/Food/FoodScienceResearch/Biotechnology/ucm346030.htm> (last visited Sept. 28, 2015) [hereinafter “FDA, Q & A”].

<sup>2</sup> Valery Federici, *Genetically Modified Food and Informed Consumer Choice: Comparing U.S. and E.U. Labeling Laws*, 35 *BROOK. J. INT'L L.* 515, 523 (2010).

<sup>3</sup> The Food and Drug Administration (FDA) considers “genetic engineering” to be a more precise term than “genetic modification.” This report will generally use variations of the term “genetic engineering.” FDA, Q & A, *supra* note 1.

ingredients from GE plants were first introduced into the food supply in the mid-1990s.<sup>4</sup> Common GE plants include corn, canola, soybean, and cotton. These plants, in the form of cornstarch, corn syrup, canola oil, and soybean oil, are used as ingredients in common food products, such as salad dressings, cereals, soups, breads, and snack foods.

The FDA has found that GE foods are generally as nutritious as traditionally bred plants.<sup>5</sup> The World Health Organization has reported that GE foods currently on the market are not likely to present human health risks.<sup>6</sup> However, some members of the public generally oppose GE foods and have demanded specific labeling requirements for food products containing GE ingredients.<sup>7</sup>

## Regulation of GE Foods

### Federal Laws

Federal law does not impose specific labeling requirements on food just because it may or may not contain GE ingredients or was derived using GE techniques. The labeling of GE foods follows the same federal labeling requirements and guidelines outlined in the Federal Food, Drug, & Cosmetic Act (FFDCA) as non-GE foods. The FDA has issued informal policy statements emphasizing its position that specific labeling requirements for GE foods are unnecessary because the general labeling provisions in the FFDCA will guide and protect consumers.<sup>8</sup> For more information regarding the federal labeling of GE foods, see CRS Report R43705, *Legal Issues with Federal Labeling of Genetically Engineered Food: In Brief*, by Emily M. Lanza.

### State Laws

Several states have recently passed laws imposing specific labeling requirements on GE food, including Vermont, Connecticut, and Maine.<sup>9</sup> Vermont's GE labeling act will take effect on July 1, 2016.<sup>10</sup> However, both the Connecticut and Maine statutes contain a provision stating that the state will not enforce the labeling requirements outlined in the respective acts until a requisite number of states pass similar legislation.<sup>11</sup> For example, Maine's statute states that the state GE labeling requirements are effective when at least five other contiguous states have adopted

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<sup>4</sup> Federici, *supra* note 2, at 520.

<sup>5</sup> FDA, Q & A, *supra* note 1.

<sup>6</sup> World Health Organization, "Frequently Asked Questions on Genetically Modified Foods," [http://www.who.int/foodsafety/areas\\_work/food-technology/faq-genetically-modified-food/en/](http://www.who.int/foodsafety/areas_work/food-technology/faq-genetically-modified-food/en/) (last visited Sept. 28, 2015).

<sup>7</sup> For example, the Center for Food Safety, a national nonprofit advocacy organization, has petitioned Congress and state legislatures to require mandatory labeling of GE foods. The organization has reported that as of June 10, 2014 over 1.4 million people have submitted comments in support of the petition. Center for Food Safety, "GE Food Labeling: States Take Action," <http://www.centerforfoodsafety.org/issues/976/ge-food-labeling/fact-sheets/3067/ge-food-labeling-states-take-action> (last visited Sept. 28, 2015). The Non-GMO Project, a nonprofit organization, reports that more than 60 countries ban or significantly restrict GE foods. Non-GMO Project, "GMO Facts," <http://www.nongmoproject.org/learn-more/> (last visited Sept. 28, 2015).

<sup>8</sup> See Draft Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering, 66 Fed. Reg. 4839-42 (Jan. 18, 2001); Statement of Policy: Foods Derived From New Plant Varieties, 57 Fed. Reg. 22991 (May 29, 1992).

<sup>9</sup> This report addresses only state laws that have been enacted at the writing of this report and not bills that have been introduced.

<sup>10</sup> 2014 Vt. Acts, No. 120, §7.

<sup>11</sup> CONN. GEN. STAT. §21a-92c (2013); ME. REV. STAT. tit. 22, §2595 (2014).

mandatory labeling of GE food, but if such a condition is not met by January 1, 2018, then the state law will be repealed.<sup>12</sup>

### *Connecticut*

Enacted in 2013, Connecticut's Act Concerning the Labeling of Genetically-Engineered Food provides that certain food items are misbranded unless labeled as "Produced with Genetic Engineering."<sup>13</sup> These foods include wholesale and retail food, raw agricultural commodities, and seeds or seed stock that are, or may have been, at least partially produced by GE.

### *Maine*

In 2014, Maine enacted Act to Protect Maine Food Consumers' Right to Know about Genetically Engineered Food and Seed Stock, which requires any GE food or seed stock offered for retail sale to be labeled as "Produced with Genetic Engineering."<sup>14</sup> GE foods that do not follow this requirement are subject to sanctions for misbranding. The act exempts restaurants, alcoholic beverages, and medical food from these labeling requirements.<sup>15</sup> The statute prohibits any private right of action to enforce these provisions.<sup>16</sup>

### *Vermont*

Enacted in 2014, Vermont's Act Relating to the Labeling of Food Produced With Genetic Engineering requires food offered for retail sale in Vermont that was produced either entirely or partially by GE to be labeled as such.<sup>17</sup> Labeling may include the phrases "partially produced with genetic engineering," "may be produced with genetic engineering," or "produced with genetic engineering." The act also prohibits manufacturers from labeling the food as "natural" if produced entirely or in part from GE.<sup>18</sup> Foods exempted from these requirements include alcoholic beverages, processed food with GE materials that do not account for more than 0.9% of the food's total weight, medical food, and food served in restaurants.<sup>19</sup> According to the statute, the state attorney general has the authority to conduct civil investigations and bring civil actions in order to enforce these provisions.<sup>20</sup>

The act states that the purpose of these labeling laws is to promote public health and food safety by informing persons, if they so choose, to avoid "potential health risks of food produced from genetic engineering."<sup>21</sup> According to this section, the statute also aims to reduce consumer confusion and deception "by prohibiting the labeling of products produced from genetic engineering as 'natural' and by promoting the disclosure of factual information on food labels and to allow consumers to make informed decisions."<sup>22</sup> The statute also claims to protect religious

<sup>12</sup> ME. REV. STAT. tit. 22, §2595 (2014).

<sup>13</sup> CONN. GEN. STAT. §21a-92c (2013).

<sup>14</sup> ME. REV. STAT. tit. 22, §2592 (2014).

<sup>15</sup> *Id.*, §2593 (2014).

<sup>16</sup> *Id.*, §2594 (2014).

<sup>17</sup> VT. STAT ANN. tit. 9 §3043 (2014).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*, §3044 (2014).

<sup>20</sup> *Id.*, §3048 (2014).

<sup>21</sup> *Id.*, §3041 (2014).

<sup>22</sup> *Id.*

practices by “provid[ing] consumers with data from which they may make informed decisions for religious reasons.”<sup>23</sup>

## Litigation over State GE Food Labeling Laws

In 2014, the Grocery Manufacturers Association, the Snack Food Association, the International Dairy Foods Association, and the National Association of Manufacturers filed a complaint in the federal district court in Vermont to invalidate Vermont’s Act 120 on constitutional grounds, specifically claiming that Act 120 violates the First Amendment, the Commerce Clause, and the doctrine of preemption found in the Supremacy Clause.<sup>24</sup> The relief sought by the plaintiffs included a preliminary injunction to prevent Act 120 from taking effect on July 1, 2016, while the court decides whether to issue a permanent injunction invalidating the law.<sup>25</sup> In response to these claims, Vermont filed a motion to dismiss the plaintiffs’ case on August 8, 2014, arguing that the plaintiffs have failed to establish sufficient claims to invalidate Act 120 on constitutional grounds. The district court issued its opinion on these motions on April 27, 2015.

### Preliminary Injunction

In its April 2015 decision, the district court ruled against the plaintiffs’ motion for a preliminary injunction. In order to meet the requirements for a preliminary injunction, a plaintiff must generally show a likelihood of prevailing at trial on the claim(s), the extent of irreparable harm if the injunction is not granted, and any other public interests implicated by the injunction.<sup>26</sup> In *GMA v. Sorrell*, the court held that the plaintiffs were likely to prevail on the merits of their First Amendment challenge to Act 120’s “natural” restriction on labels and their preemption claim regarding Act 120’s GE disclosure requirement under the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA).<sup>27</sup> However, the court held that the plaintiffs failed to demonstrate that their members would be irreparably harmed if the enforcement of Act 120’s natural restriction was not enjoined prior to trial due to the absence of evidence of any actual use by the plaintiffs of “natural” terminology in connection with their GE products.<sup>28</sup> Similarly, due to Act 120’s final rule, which would exempt meat or poultry that is subject to FMIA and PPIA regulation, the court did not find any irreparable harm in the context of the plaintiffs’ preemption claim.<sup>29</sup> Thus, the district court dismissed the plaintiff’s motion for a preliminary injunction, allowing Vermont to continue with its plan to implement Act 120’s labeling requirements starting July 1, 2016. However, as of the date of this report, the plaintiffs have appealed the district court’s ruling to the U.S. Court of Appeals for the Second Circuit,

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<sup>23</sup> *Id.*

<sup>24</sup> *Grocery Mfr. Assoc. v. Sorrell*, No 5:14-cv-00117-cr (D. Vt. Apr. 27, 2015). The plaintiffs also claimed that Act 120’s prohibition on the use of “any words of similar import” at trial is void-for-vagueness under the Fifth Amendment. However, the report does not address this claim as the impetus of the claim, “any words of similar import,” is particular to Vermont’s Act 120, while the report instead focuses on constitutional issues that are more relevant in the wider GE food labeling context.

<sup>25</sup> *Grocery Mfr. Assoc.*, *supra* note 24.

<sup>26</sup> *See, e.g.*, *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008).

<sup>27</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 80. The court also held that the plaintiffs were likely to prevail on their void for vagueness claim, which is not addressed in this report. *See supra* note 24.

<sup>28</sup> *Id.* at 81.

<sup>29</sup> *Id.* at 83.

arguing that the district court should have granted the preliminary injunction because Act 120 violates the plaintiffs' First Amendment right of freedom of speech.<sup>30</sup>

## Motion to Dismiss

The district court granted in part and denied in part the defendant's motion to dismiss for failure to state a claim. To survive a motion to dismiss, the plaintiff's complaint must contain sufficient factual allegations "to raise a right to relief above the speculative level."<sup>31</sup> When considering such a motion, the court must determine whether the plaintiff's claims "give rise to an entitlement to relief."<sup>32</sup> On the basis of this motion, the district court in *GMA v. Sorrell* dismissed most of the plaintiffs' claims that Act 120 is invalid on the basis that the state law violates the Commerce Clause and the Supremacy Clause because the court held that the plaintiffs did not state a sufficient claim for relief. The district court permitted the plaintiffs' claims that Act 120 is invalid on the basis of First Amendment violations. Thus, the plaintiffs' First Amendment claims may proceed to trial, although the court also concluded when considering the preliminary injunction that the plaintiffs were likely to succeed on only one of these claims, that Act 120's prohibition on the use of the term "natural" in GE labeling violates the First Amendment.<sup>33</sup>

The following sections address the constitutional issues relevant to the wider discussion of state GE labeling laws, and thus focus in particular on the court's evaluation of the validity of the plaintiffs' First Amendment, Supremacy Clause, and dormant Commerce Clause claims in the context of the defendant's motion to dismiss.<sup>34</sup>

## Constitutional Issues

Vermont's Act 120 and other state labeling laws have triggered controversy regarding the constitutional parameters in which the states can impose voluntary and mandatory GE labeling schemes.<sup>35</sup> The following discussion analyzes the constitutional issues raised by the plaintiffs in *GMA v. Sorrell*. However, these constitutional principles are not confined to Vermont's Act 120 alone, but instead provide a case study on the constitutional implications of state GE labeling laws.

### First Amendment

The First Amendment provides that "Congress shall make no law...abridging the freedom of speech."<sup>36</sup> Different types of speech warrant different levels of protection under the First Amendment.<sup>37</sup> When considering First Amendment claims, the courts rely on a hierarchy of

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<sup>30</sup> Brief for Petitioner, *Grocer Mfr. Assoc. v. Sorrell*, (No 5:14-cv-00117-cr)(2d Cir. 2015).

<sup>31</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

<sup>32</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

<sup>33</sup> The district court also held that the plaintiffs' claims that Act 120's natural ban violates the dormant Commerce Clause and that Act 120 violates the Supremacy Clause under FMIA and PPIA may proceed to trial.

<sup>34</sup> The report focuses on the court's analysis of the constitutional issues in the context of Vermont's motion to dismiss the claims, rather than the plaintiffs' motion for a preliminary injunction.

<sup>35</sup> See, e.g., Niraj Chokshi, *Vermont just passed the nation's first GMO food labeling law. Now it prepares to get sued*, WASH. POST, May 9, 2014.

<sup>36</sup> U.S. CONST. amend I.

<sup>37</sup> CRS Report 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment*, by Kathleen Ann Ruane.

standards that weigh the government's interest against the constitutional principle of freedom of speech. As different types of speech require different levels of protection under the First Amendment, the level of scrutiny that a court chooses dictates how a court will analyze the constitutionality of the law and its effects. Generally, the three levels of judicial review in descending order of severity are as follows: strict scrutiny, intermediate scrutiny, and rational basis review. For example, strict scrutiny requires that the government show that a restriction is the least restrictive means to further a compelling interest, while rational basis review generally requires the government to demonstrate that its policy is rationally related to a legitimate interest.

In the complaint against the State of Vermont, the Grocery Manufacturers Association and other plaintiffs claimed that Act 120 and its mandatory GE labeling requirements violate the Constitution's First Amendment as incorporated against the states by the Fourteenth Amendment.<sup>38</sup> The plaintiffs claimed that the act's prohibition from using "natural"<sup>39</sup> and related words on labels "directly punishes and indirectly chills truthful and non-misleading speech" and thus "cannot withstand First Amendment scrutiny."<sup>40</sup> The plaintiffs also claimed that Vermont's "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"<sup>41</sup> by requiring the disclosure of the presence of GE ingredients, and that such a requirement also violates the First Amendment.<sup>42</sup> The plaintiffs argued that the district court should apply the most exacting level of scrutiny to their claims, while the defendants argued that the court should apply a lower standard of scrutiny.

Act 120's "natural" prohibition and mandatory GE labeling requirement fall into two categories of speech: commercial speech and compelled speech, respectively. While both types of speech warrant some level of protection under the First Amendment, the courts do not always agree about the level of judicial scrutiny to apply when determining the amount of protection under the First Amendment. The following sections discuss the various types of judicial scrutiny as considered by the district court when analyzing the plaintiffs' First Amendment claims.

## Commercial Speech

The restriction of commercial speech, defined as speech made in conjunction with a proposed commercial transaction,<sup>43</sup> balances the availability of commercial information with consumer interest in the dissemination of accurate information.<sup>44</sup> Courts generally consider laws restricting commercial speech under an intermediate level of scrutiny, referring to the four-step analysis established by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>45</sup> When evaluating commercial speech under this standard, courts consider four factors: (1) whether the expression is protected by the First Amendment, meaning that it concerns lawful activity that is not false, misleading, or deceptive; (2) whether the asserted

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<sup>38</sup> Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief, at 14-20, Grocery Manufacturers Association v. Sorrell, No 5:14-cv-00117-cr (D. Vt. Apr. 27, 2015)(hereinafter Amended Complaint).

<sup>39</sup> VT. STAT ANN. tit. 9 §3043 (2014).

<sup>40</sup> Amended Complaint, *supra* note 32, at 16-17.

<sup>41</sup> Amended Complaint, *supra* note 32, at 13.

<sup>42</sup> VT. STAT ANN. tit. 9 §3043 (2014).

<sup>43</sup> *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993).

<sup>44</sup> *See Bates v. State Bar of Arizona*, 433 U.S. 350, 374 (1977); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761-72 (1976).

<sup>45</sup> *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of NY*, 47 U.S. 557 (1980).

government interest being promoted by the restriction is substantial; (3) whether the regulation directly advances the asserted government interest; and (4) whether the restriction is more extensive than necessary to serve that interest.<sup>46</sup> Regarding the third prong, the Court in *Central Hudson* emphasized that the state law at issue should directly advance the state interest involved.<sup>47</sup> Similarly, the Court further explained the third prong by declaring that a state cannot regulate speech that poses no danger to the asserted state interest, yet the state cannot completely suppress information when a narrower restriction on the speech would serve its interest as well.<sup>48</sup>

The Supreme Court in another seminal First Amendment case, *Sorrell v. IMS Health*, however, applied a different standard of judicial review. In *IMS Health*, the Court held that a Vermont statute, which restricted the sale, disclosure, and use of pharmacy records that reveal the “prescribing practices of individual doctors,” violated the First Amendment under “heightened judicial scrutiny.”<sup>49</sup> As cited by the Court, Vermont enacted this prohibition upon findings that the use of prescriber-identifying information furthered the cost of health care by encouraging the reliance on brand name drugs.<sup>50</sup> The Court held that the Vermont statute should be subject to “heightened judicial scrutiny,” because it targeted specific content (prescriber-identifying information) and particular speakers (pharmaceutical marketers).<sup>51</sup> Such a standard was appropriate in this context, according to the Court, because Vermont’s statute sought to regulate speech on the basis that it “disagree[d] with the message it conveys.”<sup>52</sup> In its analysis, the Court seemed particularly concerned with Vermont’s “viewpoint discrimination” and the state’s attempt via such a prohibition to favor its own message by disadvantaging the speech of a particular group.<sup>53</sup> The Court’s protection of commercial speech is designed to protect the consumer’s concern for the free flow of information, which is especially important, as emphasized by the Court, in the field of public health, “where information can save lives.”<sup>54</sup> A heightened level of scrutiny, such as the one imposed by the Court in *IMS Health*, renders restrictions of commercial speech less likely to survive constitutional scrutiny.

### **GMA v. Sorrell Commercial Speech Analysis**

In *GMA v. Sorrell*, the plaintiffs claimed that Act 120’s prohibition of the use of “natural” or similar words on labeling, advertising, or signage on GE foods violated the First Amendment.<sup>55</sup> The plaintiffs specifically alleged that such a prohibition violates the First Amendment because Vermont cannot show that the restricted terms are potentially misleading and such restriction does not materially advance the state’s interest.<sup>56</sup> In its motion to dismiss, Vermont argued that it can ban such language as the language is inherently misleading, and Vermont has a significant interest

<sup>46</sup> *Central Hudson*, 447 U.S. at 563-66.

<sup>47</sup> *Id.* at 564.

<sup>48</sup> *Id.* at 565 (internal citations omitted).

<sup>49</sup> *Sorrell v. IMS Health*, 131 S.Ct. 2653, 2659 (2011).

<sup>50</sup> *Id.* at 2661.

<sup>51</sup> *Id.* at 2665.

<sup>52</sup> *Id.* at 2664.

<sup>53</sup> *Id.* at 2663-64.

<sup>54</sup> *Id.* at 2664.

<sup>55</sup> Amended Complaint, *supra* note 32, at 18-19. VT. STAT ANN. tit. 9 §3043(c) (2014) (“A manufacturer of a food produced entirely or in part from genetic engineering shall not label the product in the package, in signage, or in advertising as natural, naturally made, naturally grown, all natural, or any words of similar import that would have a tendency to mislead a consumer”).

<sup>56</sup> Amended Complaint, *supra* note 32, at 18-19.

in protecting consumers from this deceptive language.<sup>57</sup> The district court disagreed with Vermont, concluding that the plaintiffs have sufficiently stated a plausible claim that such prohibition is invalid under the First Amendment.<sup>58</sup>

Following Second Circuit precedent, the district court applied the *Central Hudson* test to Act 120's "natural" language prohibition.<sup>59</sup> Referring to the first factor in the *Central Hudson* test, the court began its analysis by considering whether the use of "natural" on GE foods is inherently misleading. Emphasizing the difference between inherent and potential deception, the court concluded that the state had not provided sufficient "evidence of deception" that "natural" used in conjunction with GE food has actually misled consumers to support such an "outright ban on commercial speech."<sup>60</sup> Instead, the court found that the state can only show that such speech is *potentially* misleading.<sup>61</sup> While potentially misleading speech may be protected by the First Amendment,<sup>62</sup> the court concluded that the ban cannot withstand the remaining factors under *Central Hudson's* intermediate scrutiny test.<sup>63</sup> The court concluded that the state cannot articulate a substantial state interest in banning the use of "natural" terminology in advertising, labeling, and signage of GE foods on the basis of the language being "potentially misleading."<sup>64</sup> The court noted that the state had not shown that Act 120's prohibition directly and materially advances a state interest and is not more extensive than necessary to serve that interest.<sup>65</sup> In support of this conclusion, the court pointed to the absence of a definition of "natural" within the act, which created an opportunity that the prohibition may "sweep too widely or too narrowly." The court viewed such an unwieldy scope as preventing any "fit" between Act 120's prohibition and any state interest.<sup>66</sup> Additionally, the court viewed as significant that the act does not restrict the use of the term "natural" as used in all food labeling but only in the context of GE food labeling, which led it to question the governmental interest in this instance.<sup>67</sup>

The court concluded that the plaintiffs have stated a plausible claim that Act 120's natural restriction is invalid under the First Amendment and consequently denied Vermont's motion to dismiss (and, when considering the preliminary injunction, further concluded that the plaintiffs were likely to succeed upon this claim at trial).<sup>68</sup> Thus, the plaintiffs' First Amendment claim against the statute's prohibition on the use of the term "natural" on GE labels may proceed to trial. In reaching this conclusion, the district court in *GMA v. Sorrell* particularly focused on the large scope of the ban and an absence of a state interest in banning words that may only be

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<sup>57</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 67.

<sup>58</sup> *Id.* at 75.

<sup>59</sup> *Id.* at 71 (citing *National Electr. Mfr. Assoc. v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001)).

<sup>60</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 70.

<sup>61</sup> *Id.* at 71.

<sup>62</sup> See *Alexander v. Cahill*, 598 F.3d 79, 89-90 (2d Cir. 2010) ("States may not place an absolute prohibition on certain types of potentially misleading information... if the information also may be presented in a way that is not deceptive" (internal citations omitted)).

<sup>63</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 71.

<sup>64</sup> *Id.* at 72.

<sup>65</sup> *Id.* at 72-73.

<sup>66</sup> *Id.* at 73.

<sup>67</sup> *Id.*

<sup>68</sup> As discussed above, the court denied the preliminary injunction on other grounds. Under the district court's most recent order, the plaintiffs' First Amendment claims have survived the defendant's motion to dismiss, and thus the First Amendment claims will be the focus of the ongoing litigation.

*potentially* misleading. This suggests that similar bans on the use of the term “natural” on labeling enacted at both the state and federal level may be challenged as a First Amendment violation.

## Compelled Speech

As cited by the plaintiffs in the complaint, the First Amendment protects “both the right to speak freely and the right to refrain from speaking at all.”<sup>69</sup> The Supreme Court has generally invalidated the government’s attempts to compel speech. For example, the Supreme Court, in *Wooley v. Maynard*, invalidated a New Hampshire law that required residents to display the motto “Live Free or Die” on their automobile license plates.<sup>70</sup> The Court held that New Hampshire in this context did not have a sufficiently compelling interest to require residents to display the state motto on their license plates. The state’s interests in this case were to facilitate the identification of passenger vehicles, and to promote appreciation of history, individualism, and state pride.<sup>71</sup> The Court found the means by which the state chose to pursue these aims were too broad and could have been more narrowly achieved.<sup>72</sup> Additionally, the state’s second claimed interest was not ideologically neutral because it communicated an official view and forced people, such as the appellees, to be “the courier for such message” for the state.<sup>73</sup>

However, when considering compelled speech in the commercial context (such as commercial disclosure requirements), the Supreme Court has held that an advertiser’s “constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal, and thus has applied a lower standard while considering commercial disclosure requirements.”<sup>74</sup> For example, the Supreme Court in *Zauderer v. Office of Disciplinary Counsel* upheld an Ohio law requiring advertisements for legal services done on a contingency fee basis to disclose whether clients were liable for costs regardless of the outcome of their cases. According to the Court, the First Amendment rights of an advertiser “are adequately protected as long as disclosure requirements are reasonably related to the state’s interest in preventing deception of consumers.”<sup>75</sup> The Court held that that the state’s law requiring contingent-fee advertisements to disclose a client’s liability for costs is sufficiently reasonably related to the state’s interest in protecting consumers from being misled by such advertisements.<sup>76</sup> Thus, an important consideration when a court considers compelled speech is the type of speech that is being compelled, and a court will likely apply a lower scrutiny when such speech is commercial.

## GMA v. Sorrell Compelled Speech Analysis

While both the plaintiffs and the state agreed that Act 120’s GE disclosure requirement implicates the First Amendment by compelling speech, the parties disagreed about the level of judicial

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<sup>69</sup> *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). *See also* *Riley v. Nat’l Fed. For the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) (“There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees freedom of speech, a term necessarily comprising the decision of both what to say and what not to say”).

<sup>70</sup> *Wooley*, 430 U.S. at 713.

<sup>71</sup> *Id.* at 716.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 717.

<sup>74</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (emphasis in original).

<sup>75</sup> *Id.* at 651.

<sup>76</sup> *Id.* at 653-54.

review appropriate in this context.<sup>77</sup> Consequently, the court focused most of its consideration on which level of scrutiny to apply in order to evaluate whether the plaintiffs had sufficiently stated their claim that the First Amendment prohibits Act 120's GE disclosure requirements.

First, the court considered whether a strict level of scrutiny should apply.<sup>78</sup> In the complaint, the plaintiffs argued in favor of strict scrutiny because Act 120 compels political speech (i.e., fully protected speech) and is viewpoint discriminatory, but the court disagreed.<sup>79</sup> First, the court concluded that Act 120's association with current public debate on GE food labeling does not sufficiently "transform" the disclosure into political speech.<sup>80</sup> The court continued that the GE disclosure requirement does not qualify as viewpoint discrimination because the statutory requirement mandates the disclosure of facts and does not require industry participants, such as the plaintiffs, to convey a preferred message about GE food labeling. The court noted that the requirement applies regardless of the manufacturer's own view on GE foods.<sup>81</sup> Thus, according to the court, strict scrutiny should not apply in this context.

The court then considered whether intermediate scrutiny should apply to its evaluation of Act 120's GE disclosure requirement.<sup>82</sup> The district court concluded that intermediate scrutiny should not apply in this particular context because Act 120's mandatory GE labeling requirement compels the disclosure of uncontroversial *commercial* speech that is factual in nature and furthers an insubstantial state interest only in satisfying consumer curiosity.<sup>83</sup> While the plaintiffs contended that Act 120's GE disclosure requirement is not commercial in nature because it emerged from a debate about food safety, the court instead focused on the nature of the labeling requirements as a factual disclosure regarding ingredients made in conjunction with the purchase and sale of food.<sup>84</sup> Similarly, the court highlighted that the statute mandates the disclosure of only factual information that is involved with a commercial transaction and thus the information itself is not "controversial."<sup>85</sup>

Moreover, the court stated that "it [could not] conclude that Act 120's GE disclosure requirement is supported only by a desire to gratify consumer curiosity" when considering the type of government interest at issue in this case.<sup>86</sup> Under Second Circuit precedent, a state interest of this nature cannot withstand First Amendment scrutiny.<sup>87</sup> In the *International Dairy Foods Association v. Amestoy*, the Second Circuit held that a Vermont statutory requirement to disclose whether a synthetic bovine hormone was used in the production of milk was unconstitutional under the First Amendment because "Vermont [did] not claim that health or safety concerns prompted the passage of the Vermont labeling law, but instead defend[ed] the statute on the basis of strong consumer interest and the public's right to know."<sup>88</sup> For the Second Circuit, consumer

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<sup>77</sup> See *Grocery Mfr. Assoc.*, *supra* note 24, at 44.

<sup>78</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 44 (citing *Brown v. Entm't Merchs Ass'n*, 131 S.Ct. 2729, 2738 (2011)).

<sup>79</sup> Amended Complaint, *supra* note 32, at 15.

<sup>80</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 45.

<sup>81</sup> *Id.* at 49.

<sup>82</sup> See *supra* "Commercial Speech" Section.

<sup>83</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 52.

<sup>84</sup> *Id.* at 54.

<sup>85</sup> *Id.* at 57.

<sup>86</sup> *Id.* at 60.

<sup>87</sup> See *Int'l Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).

<sup>88</sup> *Id.* at 73 (internal citations omitted).

curiosity does not provide a strong enough state interest in this context.<sup>89</sup> The district court in *GMA v. Sorrell* considered the “Purposes” outlined in Act 120, which highlighted the safety and environmental impact of GE foods, and did not view Vermont’s interest as solely in support of consumer curiosity.<sup>90</sup>

The court then considered whether the reasonable relationship test under *Zauderer* (which is similar to rational basis review) should apply to Act 120’s GE disclosure requirement. Describing the *Zauderer* standards as “less exacting scrutiny,” the Supreme Court held in *Zauderer* that First Amendment rights “are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”<sup>91</sup> The district court focused its analysis on the reasonable relationship test and how such a relationship should apply to the government’s interest in this context. The Court stated that the disclosure requirement does not have to “get all the facets of the problem it is designed to ameliorate” in order to have a reasonable relationship to the government’s interest.<sup>92</sup>

Although the district court concluded that intermediate scrutiny should not apply, and that the plaintiffs were not likely to prevail on this argument at trial, the court determined that such an analysis is a question of law subject to reasonable debate.<sup>93</sup>

Similarly, the court ultimately concluded that although *Zauderer* may apply in this context, whether there is a reasonable relationship is still a question of law. Thus, the court held that the plaintiffs’ First Amendment claims relating to Act 120’s disclosure requirements survived the motion to dismiss.<sup>94</sup> Thus, the plaintiffs’ First Amendment claims may proceed to trial.

## Preemption

In the complaint, the plaintiffs allege that Act 120 is expressly preempted or conflict preempted by various federal laws.<sup>95</sup> The preemption doctrine is rooted in Article VI of the U.S. Constitution, which states that the laws of the United States “shall be the supreme Law of the Land;... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”<sup>96</sup> Thus, courts have long recognized that federal laws preempt state laws that conflict with federal law, rendering these state laws without effect.

Federal preemption occurs when “(1) Congress enacts a statute that explicitly pre-empts [sic] state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field.”<sup>97</sup> The “purpose of Congress is the ultimate touchstone” of a court’s primary inquiry for each type of preemption claim.<sup>98</sup> A court may find Congress’s preemptive intent through the text, structure, or purpose of the statute.<sup>99</sup> A court generally begins this analysis

<sup>89</sup> *Id.* at 74.

<sup>90</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 59.

<sup>91</sup> *Zauderer*, 471 U.S. at 651.

<sup>92</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 65. *See Zauderer*, 471 U.S. at 651.

<sup>93</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 60.

<sup>94</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 65.

<sup>95</sup> Amended Complaint, *supra* note 32, at 23-25.

<sup>96</sup> U.S. CONST. art. VI, cl. 2.

<sup>97</sup> *See, e.g.*, *Chae v. SLM Corp.*, 593 F.3d 936, 941 (9<sup>th</sup> Cir. 2010)(internal citations omitted).

<sup>98</sup> *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008)(internal citations omitted).

<sup>99</sup> *See id.*

with the “assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”<sup>100</sup> This presumption is heightened when an issue area historically falls within a state’s police powers.<sup>101</sup> Food and beverage labeling typically falls within this province of state regulation.<sup>102</sup>

The following section examines the three types of preemption (express, conflict, and field) as analyzed by the district court in *GMA v. Sorrell*.

## Express Preemption

The plaintiffs allege that the Nutrition Labeling and Education Act (NLEA),<sup>103</sup> a statute enacted to regulate the nutrient claims on food labels, expressly preempts Act 120’s labeling requirements.<sup>104</sup> When a statute contains an express preemption provision, a court generally begins its analysis with the text of the provision.<sup>105</sup> The Supreme Court has directed lower courts to focus on the plain wording of an express preemption clause to determine congressional intent.<sup>106</sup> A court may also consider the legislative history of the statute at issue.<sup>107</sup> NLEA contains five express preemption clauses that prohibit states enacting food labeling requirements that are “not identical” to specific mandatory food labeling requirements within the FFDCa.<sup>108</sup> The

<sup>100</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 320 (1947).

<sup>101</sup> *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 144 (1963).

<sup>102</sup> *Plumley v. Mass.*, 155 U.S. 461, 472 (1894) (“If there be any subject over which it would seem the states ought to have plenary control ... it is the protection of the people against fraud and deception in the sale of food products”).

<sup>103</sup> P.L. 101-535, which amended the FFDCa.

<sup>104</sup> Amended Complaint, *supra* note 32, at 24. The plaintiffs also bring preemption claims under the Federal Meat Inspection Act (FMIA) and the Poultry Products Inspection Act (PPIA). The preemption provision under FMIA (21 U.S.C. § 678) (and similarly PPIA, 21 U.S.C. § 467e) states that “[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State.” While the court denies the state’s motion to dismiss the preemption claims under these acts, the court acknowledged that the final rules enforcing Act 120 may exempt packaged and processed food containing meat or poultry and thus Act 120 would not implicate FMIA or PPIA. *Grocery Manufacturers Association v. Sorrell*, No 5:14-cv-00117-cr, at 43 (D. Vt. Apr. 27, 2015).

<sup>105</sup> *See U.S. Smokeless Tobacco Mfg. Co. LLC v. City of New York*, 708 F.3d 428, 432 (2d Cir. 2013) (internal citations omitted).

<sup>106</sup> *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1977 (2011).

<sup>107</sup> *See Wyeth v. Levine*, 555 U.S. 555, 566 (2009).

<sup>108</sup> 21 U.S.C. § 343-1(a)(1)-(5).

“(a) Except as provided in subsection (b) of this section, no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce—

(1) any requirement for a food which is the subject of a standard of identity established under section 341 of this title that is not identical to such standard of identity or that is not identical to the requirement of section 343 (g) of this title, except that this paragraph does not apply to a standard of identity of a State or political subdivision of a State for maple syrup that is of the type required by sections 341 and 343 (g) of this title,

(2) any requirement for the labeling of food of the type required by section 343 (c), 343 (e), 343 (i)(2), 343 (w), or 343 (x) of this title that is not identical to the requirement of such section, except that this paragraph does not apply to a requirement of a State or political subdivision of a State that is of the type required by section 343 (c) of this title and that is applicable to maple syrup,

(3) any requirement for the labeling of food of the type required by section 343 (b), 343 (d), 343 (f), 343 (h), 343 (i)(1), or 343 (k) of this title that is not identical to the requirement of such section, except that this paragraph does not apply to a requirement of a State or political subdivision of a State that is of the type required by section 343 (h)(1) of this title and that is applicable to maple

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legislative history shows that one of NLEA's goals was to create uniform national standards regarding the labeling of food.<sup>109</sup> Congress also intended NLEA "to clarify and to strengthen [FDA's] legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about nutrients in foods."<sup>110</sup>

### **GMA v. Sorrell Express Preemption Analysis**

According to the district court, in order for the plaintiffs to state an express preemption claim successfully they must show that Act 120's labeling requirements are "not identical" to a labeling requirement in the FFDCa and that a particular FFDCa labeling requirement is entitled to preemptive effect.<sup>111</sup> Regarding the first factor of the test, the plaintiffs pointed to the misbranding prohibition<sup>112</sup> and the nutritional content provisions<sup>113</sup> in the FFDCa (as amended by NLEA) as labeling requirements that preempt Act 120's requirements.<sup>114</sup> The plaintiffs argued that Act 120's GE labeling requirements are "not identical" to the FFDCa mandatory labeling requirements as the state's statute imposes additional and different labeling information than the FFDCa.<sup>115</sup> In making this argument, the plaintiffs relied upon the definition of "not identical" in FDA regulations, which "directly or indirectly imposes obligations or contains provisions concerning the... labeling of food" that are "not imposed by" or that "[d]iffer from those specifically imposed by" federal law.<sup>116</sup>

However, the district court disagreed with the plaintiffs' interpretation of "not identical," stating that this reading of the federal statute departs from the interpretation of the scope of NLEA in case law.<sup>117</sup> According to the district court, the "not identical" language in NLEA does not extend the scope of the statute's preemption provision as far as the plaintiffs proposed.<sup>118</sup> In *Reid v. Johnson & Johnson*, the Ninth Circuit held that NLEA "does not preempt any state law unless the law is 'expressly preempted.'"<sup>119</sup> Similarly, a California district court, in *In re Farm Raised*

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syrup,

(4) any requirement for nutrition labeling of food that is not identical to the requirement of section 343 (q) of this title, except that this paragraph does not apply to food that is offered for sale in a restaurant or similar retail food establishment that is not part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering for sale substantially the same menu items unless such restaurant or similar retail food establishment complies with the voluntary provision of nutrition information requirements under section 343 (q)(5)(H)(ix) of this title, or

(5) any requirement respecting any claim of the type described in section 343 (r)(1) of this title made in the label or labeling of food that is not identical to the requirement of section 343 (r) of this title, except a requirement respecting a claim made in the label or labeling of food which is exempt under section 343 (r)(5)(B) of this title."

<sup>109</sup> 136 Cong. Rec. 20418 (1990)(Remarks of Rep. Waxman).

<sup>110</sup> H.R. Rep. No. 101-538, at 7 (1990).

<sup>111</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 30.

<sup>112</sup> 21 U.S.C. § 343(a)(1).

<sup>113</sup> 21 U.S.C. § 343, *et seq.*

<sup>114</sup> Amendment Complaint, *supra* note 32, at 24.

<sup>115</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 32.

<sup>116</sup> 21 C.F.R. § 100.1(c)(4).

<sup>117</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 32.

<sup>118</sup> *Id.*

<sup>119</sup> *Reid v. Johnson & Johnson*, 780 F.3d 952, 959 (9<sup>th</sup> Cir. 2015)(internal citations omitted).

*Salmon Cases*, held that “Congress made clear that the preemptive scope of section 343-1 [of NLEA] was to sweep no further than the plain language of the statute itself.”<sup>120</sup> Notwithstanding the disagreement over the scope of “not identical to,” the court stated that the plaintiffs still failed to establish that Act 120’s labeling requirements are sufficiently “not identical” to any FFDCA mandatory labeling requirements to trigger preemption.<sup>121</sup> Therefore, the court dismissed the plaintiffs’ express preemption claim under the FFDCA and NLEA for failure to state a plausible claim, emphasizing that the plaintiffs cannot point to a “federal statute or regulation that prohibits Act 120’s GE disclosure requirement” under current federal law.<sup>122</sup>

## Implied Conflict Preemption

Conflict preemption occurs when (1) it is “impossible for a private party to comply with both state and federal requirements,” or (2) state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>123</sup> The Supreme Court in *Florida Lime & Avocado Growers, Inc. v. Paul* proposed an example of conflict preemption as a federal statute that “forb[ids] the picking and marketing of any avocado testing more than 7% oil... [while] the California test exclude[s] from the State any avocado measuring less than 8% oil content.”<sup>124</sup> For the obstacle prong of conflict preemption, a court generally considers whether the state requirement impedes the purposes and objectives of Congress.<sup>125</sup> The Supreme Court has held that “a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act” as it is ultimately Congress’s responsibility, not the courts’, to preempt state law.<sup>126</sup> Additionally, according to the Supreme Court, an express preemption provision does not foreclose the possibility of implied conflict preemption.<sup>127</sup>

## GMA v. Sorrell Implied Preemption Analysis

In the complaint against Vermont, the plaintiffs claimed that Act 120 *conflicts* with the purpose of FFDCA, and in particular NLEA, to promote “national uniformity” of food labeling, and thus should be declared invalid under the Supremacy Clause of the Constitution.<sup>128</sup> The plaintiffs also argued that the food industry cannot market its products efficiently and in a cost-effective manner in all 50 states without a uniform national labeling scheme.<sup>129</sup> The court, however, disagreed with the plaintiffs’ arguments for finding preemption in this context. While acknowledging the plaintiffs’ economic arguments for national uniformity in labeling, the court viewed this argument as insufficient to overcome the presumption against preemption in an area of law normally assigned to state oversight. The court emphasized that due to Congress’s awareness of state food and beverage laws, a court must assume that the federal statute has not supplanted state law “unless Congress has made such intention clear and manifest.”<sup>130</sup> However, the court concluded

<sup>120</sup> *In re Farm Raised Salmon*, 175 P.3d 1170, 1179 (Cal. 2008).

<sup>121</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 35.

<sup>122</sup> *Id.* at 30.

<sup>123</sup> *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995)(internal citations omitted).

<sup>124</sup> *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963).

<sup>125</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2501(2012)(internal citations omitted).

<sup>126</sup> *See Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968, 1985 (2013).

<sup>127</sup> *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 869 (2000)(internal citations omitted).

<sup>128</sup> Amended Complaint, *supra* note 32, at 24-25.

<sup>129</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 37.

<sup>130</sup> *Id.* at 38 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)) (“In areas of traditional state (continued...)”).

that the plaintiffs cannot plausibly allege that Act 120's labeling requirements serve as an obstacle to or conflict with the objectives of Congress as exhibited by FFDCA and NLEA.<sup>131</sup> Therefore, the court stated that it must "presume" that Act 120's requirements can "coexist with federal regulations" and dismissed the plaintiffs' conflict preemption claims for failure to state a plausible claim.<sup>132</sup>

## Field Preemption

Field preemption occurs when state law occupies a "field reserved for federal regulation," leaving no opportunity for state regulation.<sup>133</sup> Like other types of preemption, congressional intent to supersede state laws in a particular field must be "clear and manifest."<sup>134</sup> When considering whether field preemption is appropriate, courts may find congressional action or congressional silence as significant to discern congressional intent. As evidence of field preemption, the Supreme Court has pointed to the "'volume and complexity' of agency regulations [to] demonstrate an implicit intent to displace *all* state law in a particular area."<sup>135</sup> Conversely, a court in *Bruton v. Gerber Products Co.* found the absence of any congressional action when Congress was aware of state law in that particular field as significant when considering this type of preemption.<sup>136</sup> Similarly, a court in *Chacanaca v. Quaker Oats Co.*, also found the absence of an FDA policy governing the word "wholesome" as significant when finding that NLEA did not preempt state law claims alleging the use of "wholesome" on certain foods labeling as misleading.<sup>137</sup> However, courts have also stated that the mere existence of a federal regulatory scheme "does not by itself imply pre-emption of state remedies," as to find otherwise would be "virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive."<sup>138</sup>

Courts tend to rely on the presumption against preemption when considering field preemption in the particular context of food labeling.<sup>139</sup> For example, the defendant in *Holk v. Snapple Beverage Corp.* claimed that federal law preempted the plaintiffs' state consumer protection claims against Snapple's use of the words "All Natural" on its beverage labels.<sup>140</sup> The defendant relied upon the doctrine of field preemption as the basis of its claims. However, the court did not find field preemption in this case, stating that "it does not appear that Congress has regulated so comprehensively in either the food and beverage or juice fields that there is no role for the states," and thus, a "clear and manifest" expression of congressional intent to occupy the field of food

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regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'"(internal citations omitted).

<sup>131</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 39.

<sup>132</sup> *Id.* at 38 (quoting *NY State Rest. Assoc. v. NY City Bd. of Health*, 556 F.3d 114, 123).

<sup>133</sup> *See* *U.S. v. Locke*, 529 U.S. 89, 111 (2000).

<sup>134</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>135</sup> *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 884 (2000) (international citations omitted).

<sup>136</sup> *Bruton v. Gerber Products Co.*, 961 F.Supp.2d 1062, 1083-84 (N.D. Cal. 2013).

<sup>137</sup> *Chacanaca v. Quaker Oats Co.*, 752 F.Supp.2d 1111, 1123 (N.D. Cal. 2010).

<sup>138</sup> *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 339 (3d Cir. 2009) (quoting *Hillsborough Cty., FL v. Automated Med. Lab.*, 471 U.S. 707, 717 (1985)).

<sup>139</sup> *See, e.g., Holk*, 575 F.3d at 339 ; *Bruton v. Gerber Prod. Co.*, 961 F.Supp.2d 1062, 1083-84 (N.D. Cal. 2013); *Chavez v. Blue Sky Natural Beverage Co.*, 268 F.R.D. 365, 372-73 (N.D. Cal. 2010).

<sup>140</sup> *Holk*, 575 F.3d at 332.

labeling is absent.<sup>141</sup> Moreover, the Third Circuit emphasized that NLEA “declares that courts may not find implied preemption based on any provision of NLEA.”<sup>142</sup> To support this point, the court pointed to the savings clause in NLEA, which states that the act “shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under [21 U.S.C. § 343-1] of the Federal Food, Drug, and Cosmetic Act.”<sup>143</sup>

### ***GMA v. Sorrell Field Preemption Analysis***

While the plaintiffs did not allege field preemption in their complaint against Vermont, the district court emphasized that the plaintiffs could not have reasonably alleged field preemption anyway.<sup>144</sup> Relying on the principles outlined by the court in *Holk v. Snapple Beverage Corp.*, the court explained that it does not appear that Congress has regulated the field of food and beverage labeling so comprehensively that there is no role for the states.<sup>145</sup> Thus, a claim of field preemption in this context would not have been successful, according to the court.

In its analysis of field preemption and the dismissal of the plaintiffs’ preemption claims, the court emphasized the present absence of congressional intent to supplant state law in the context of food labeling.<sup>146</sup> A legislative change to the federal food labeling framework may signal a different congressional intent in this area.

### **Dormant Commerce Clause**

The Commerce Clause authorizes Congress “[t]o regulate Commerce with foreign Nations, and among several States, and with the Indians Tribes.”<sup>147</sup> Although the Commerce Clause does not “expressly restrain the...[s]tates in any way, [the U.S. Supreme Court has] sensed a negative implication” within the clause, “called the dormant Commerce Clause.”<sup>148</sup> Under this principle, the Supreme Court has long held that the Commerce Clause’s grant to Congress of the sole authority to regulate commerce implicitly prohibits states from unduly burdening such commerce.<sup>149</sup> According to the Supreme Court, a state law is unconstitutional *per se* when it “directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests.”<sup>150</sup> However, in *Pike v. Bruce Church, Inc.*, the Supreme Court held that if a statute has only indirect effects on interstate commerce and regulates evenhandedly, the Court will examine whether the state’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.<sup>151</sup>

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<sup>141</sup> *Id.* at 338.

<sup>142</sup> *Id.* at 337.

<sup>143</sup> *Holk*, 575 F.3d at 337 (quoting P.L. 101-535, §6(c)(1)).

<sup>144</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 27.

<sup>145</sup> *Id.* at 28; *see also Holk*, at 575 F.3d at 337 (“It does not appear that Congress has regulated so comprehensively in either the food and beverage or juice fields that there is no role for the states”).

<sup>146</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 38.

<sup>147</sup> U.S. CONST. art I, § 8, cl. 3.

<sup>148</sup> *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337 (2008).

<sup>149</sup> *See, e.g., Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Cooley v. Board of Wardens of Port of Philadelphia*, 53 U.S. (12 How.) 299 (1851).

<sup>150</sup> *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*, 476 U.S. 573, 579 (1986)(internal citations omitted).

<sup>151</sup> *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

### GMA v. Sorrell Dormant Commerce Clause Analysis

In addition to the claims addressed above, the plaintiffs also alleged that Act 120 violates the Commerce Clause, specifically the dormant Commerce Clause, and on that basis asked the court to declare the act invalid in its entirety.<sup>152</sup> Specifically, the plaintiffs argued that, as there are no food manufacturers based in Vermont, the cost of implementing Act 120's labeling requirements falls on out-of-state companies.<sup>153</sup> As these companies sell food in interstate commerce throughout the country, the plaintiffs argued that these companies would have to establish Vermont-specific distribution channels to meet Vermont's labeling requirements, or the companies would have to revise their labeling on a nationwide basis, which may be cost prohibitive.<sup>154</sup> Thus, the plaintiffs claimed that these costs discriminate against interstate commerce and favor Vermont interests, violating the dormant Commerce Clause.<sup>155</sup>

The district court disagreed with these arguments made by the plaintiff, dismissing the Commerce Clause claims for failing to state a plausible claim for relief.<sup>156</sup> According to the district court, a successful dormant Commerce Clause claim "must plausibly allege that the Vermont General Assembly enacted Act 120 in order to favor Vermont products over the same or similar products from other states" by showing Act 120's discrimination "on its face" or "in its effect."<sup>157</sup> The court did not find evidence of either such discrimination in the context of Act 120.

First, the district court held that Act 120 does not contain any distinctions between in-state and out-of-state commerce "on its face," and thus the plaintiffs could not allege that Vermont enacted Act 120 in order to favor Vermont products over similar out-of-state products.<sup>158</sup> The court then considered the discriminatory effects of Act 120. The court viewed Act 120's prohibition on the use of "natural" on signage and advertising regardless of the location of those activities as a sufficiently plausible per se violation of the Commerce Clause based on discriminatory effects.<sup>159</sup>

However, the court could not find any such discriminatory effects and thus dismissed the plaintiffs' Commerce Clause claims regarding the disproportionate costs and burden on out-of-state companies. Referring to a Second Circuit case, *American Booksellers Foundation v. Dean*, the district court noted that a statute's regulation of commerce "occurring wholly outside that State's borders"<sup>160</sup> can foster a discriminatory effect, and thus violate the dormant Commerce Clause. In *American Booksellers*, the Second Circuit struck down portions of a Vermont statute that prohibited the transfer of sexually explicit material to a minor distributed over the Internet because a state's regulation of Internet activities "projects its legislation into other States."<sup>161</sup> In the context of Act 120, the district court similarly stated that Act 120 prohibits GE manufacturers' use of "natural" on labeling "regardless of where or how those activities take place," and thus burdens interstate commerce by requiring out-of-state commerce to be conducted at Vermont's

<sup>152</sup> Amended Complaint, *supra* note 32, at 21.

<sup>153</sup> Amended Complaint, *supra* note 32, at 21.

<sup>154</sup> *Id.* at 22.

<sup>155</sup> *Id.*

<sup>156</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 27.

<sup>157</sup> *Id.* at 20 (internal citations omitted).

<sup>158</sup> *Id.* at 19-20.

<sup>159</sup> *Id.* at 23.

<sup>160</sup> *Id.* at 22 (quoting *Am. Booksellers Found.*, 342 F.3d 96, 103 (2d Cir. 2003)).

<sup>161</sup> *Am. Booksellers Found.*, 342 F.3d 96, 103 (2d Cir. 2003)(internal citations omitted).

direction.<sup>162</sup> However, the court did not consider this interpretation sufficient to support the plaintiffs' Commerce Clause claim. The district court referred to the Second Circuit's finding in *National Electrical Manufacturers Association v. Sorrell* that in order to violate the Commerce Clause a statute "must impose a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce."<sup>163</sup> The district court did not find such a burden here as Act 120 does not *require* GE food manufacturers to alter their labeling practices *nationwide* to meet these requirements, and ultimately dismissed this claim of the plaintiffs.<sup>164</sup> Thus, except for the plaintiffs' charge against Act 120's "natural" prohibition on signage and advertising, the court dismissed the majority of the plaintiffs' dormant Commerce Clause claims for failure to state a plausible claim for relief.<sup>165</sup>

In reaching this decision, the court emphasized that the potential change to their product labeling that manufacturers may have to make to comply with Vermont state law is not sufficiently discriminatory under the dormant Commerce Clause. Referring to other state GE labeling laws, the court foreclosed the idea that there will be a "patchwork of state labeling requirements" due to "the few states that have enacted GE labeling requirements have not done so in a uniform manner."<sup>166</sup> However, the court suggested that a greater number of state GE laws that actually conflict with each other may strengthen a hypothetical claim of discrimination under the dormant Commerce Clause.<sup>167</sup>

## Legislation in the 114<sup>th</sup> Congress

The Safe and Accurate Food Labeling Act of 2015 (SAFLA) would impact state legislation regulating the labeling of GE foods, including Vermont's Act 120. Generally, SAFLA would establish different certification programs and labeling requirements under the oversight of both the FDA and the USDA.<sup>168</sup> First, Section 101 of SAFLA would direct the FDA to continue its current premarket consultation process for food derived from new plant varieties, including GE plants.<sup>169</sup> Under SAFLA, the FDA may require that the labeling of food produced from, containing, or consisting of a GE plant display a statement to inform consumers of a difference between food so produced and a comparable non-genetically engineered food.<sup>170</sup> Under this proposed requirement, the FDA may require such labeling if the agency has determined that there is a material difference between the two foods and the disclosure of such difference is necessary to protect public health or to prevent the label from being false or misleading. Additionally, SAFLA would amend the Plant Protection Act<sup>171</sup> to create a notification program requiring those who plan to introduce into interstate commerce GE plants for food use to notify the Secretary of Health and Human Services, who must then evaluate the food under the premarket consultation

<sup>162</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 22-23.

<sup>163</sup> *National Electr. Mfr. Assoc. v. Sorrell*, 272 F.3d 104, 109 (2d Cir. 2001).

<sup>164</sup> *Grocery Mfr. Assoc.*, *supra* note 24, at 26.

<sup>165</sup> *Id.* at 27.

<sup>166</sup> *Id.* at 25.

<sup>167</sup> *Id.*

<sup>168</sup> H.R. 1599, 114<sup>th</sup> Cong. (1<sup>st</sup> Sess. 2015). *See also* H.Rept. 114-208 (2015). The bill has passed the U.S. House of Representatives. The Senate has not yet considered the bill.

<sup>169</sup> H.R. 1599, § 101. This certification process was established under the FDA's policy statement "Food Derived from New Plant Varieties" (57 Fed Reg. 22984)(May 29, 1992).

<sup>170</sup> H.R. 1599, § 101.

<sup>171</sup> 7 U.S.C. § 7701 *et seq.*

process described above. SAFLA's Section 111 would then require the entity to submit the evaluation to the Secretary of Agriculture.<sup>172</sup> Section 201 of SAFLA would establish a voluntary GE food certification program within the USDA to govern labeling claims with respect to the use or non-use of GE in the production and process of food.<sup>173</sup> Section 301 of SAFLA would amend Section 403 of the FFDCFA to deem a food misbranded if its labeling contains an express or implied claim that such food is "natural," unless the claim uses terms that have been defined by regulations promulgated by the FDA.<sup>174</sup>

SAFLA also contains several preemption provisions that would potentially impact a state's regulation of GE food labeling, including Vermont's Act 120.<sup>175</sup> Section 113 of SAFLA contains an express preemption provision that reads in relevant part,

[N]o state or political subdivision of a state may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce any requirement with respect to the sale or offering for sale in interstate commerce of a [GE] plant for use or application in food that is not identical to the requirement [imposed in ... ] section 111 of this Act.<sup>176</sup>

Section 111 of SAFLA, as mentioned above, would establish a premarket notification program for GE plants. Specifically, under this section, it would be unlawful to place a GE plant in interstate commerce without approval by the Department of Health and Human Services.<sup>177</sup> Because of the use of the term "not identical," it appears that Section 113 would prohibit states and localities from imposing different or additional *safety* requirements with respect to GE foods that have been reviewed under Section 111 of SAFLA. Section 113 would likely not prevent states and localities from creating laws that parallel federal standards imposed under SAFLA.<sup>178</sup> Similarly, Section 113 would likely not prevent states from creating additional remedies to help enforce the federal GE safety standards created under Section 111.

SAFLA's Section 203 preemption provision reads as follows:

[N]o State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any covered product ... in interstate commerce, any requirement for the labeling of a covered product indicating the product as having been produced from, containing, or consisting of a [GE] plant, including any requirements for claims that a covered product is or contains an ingredient that was produced from, contains, or consists of a [GE] plant.<sup>179</sup>

Section 203's preemption provision also contains a savings clause that would allow a state or a state's political subdivision to establish one of two "voluntary programs" respecting the labeling

<sup>172</sup> H.R. 1599, § 111.

<sup>173</sup> *Id.*, § 201.

<sup>174</sup> *Id.*, § 301.

<sup>175</sup> *Id.*, §§ 113, 203, 303. Currently, Vermont, Connecticut, and Maine appear to be the only states with GE food labeling laws. Vermont's GE labeling act will take effect on July 1, 2016. However, both the Connecticut and Maine statutes contain a provision stating that the state will not enforce the labeling requirements outlined in the respective acts until a requisite number of states pass similar legislation.

<sup>176</sup> *Id.* § 113.

<sup>177</sup> *Id.*, § 113.

<sup>178</sup> See *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 448 (2005) (The Supreme Court held that the preemption clause in the Federal Insecticide, Fungicide, and Rodenticide Act, which prohibited states from enforcing requirements that were "in addition to or different from" the federal requirements, precluded states from imposing different or additional requirements but did not preclude the states from creating additional *remedies*).

<sup>179</sup> H.R. 1599, § 203(b)(1).

of GE and non-GE products, as long as the programs follow standards identical to those under Section 201 of the act.<sup>180</sup>

It appears that Section 203's preemption provision would provide states very little discretion with respect to the substantive standards for a food label of a GE plant. As a result, a state law permitting GE food labeling could not, for example, allow for a label that implied the use of genetic engineering was safer or of a higher quality simply because the product was GE, as such a label would contradict the federal standard proposed by SAFLA.<sup>181</sup> However, the savings clause might permit states to establish standards that would be identical to those Section 201 of the act would establish.

SAFLA's Section 303 contains an express preemption clause that would amend the existing preemption clause within NLEA.<sup>182</sup> Specifically, Section 303 of SAFLA would prohibit a state or political subdivision of a state from

directly or indirectly establish[ing] under any authority or continu[ing] in effect as to any food in interstate commerce ... any requirement for the labeling of food of the type required by [section 301] that is not identical to the requirement of such section.<sup>183</sup>

Courts have interpreted NLEA's preemption provision as prohibiting states from passing labeling laws that are not "identical" to the federal standards.<sup>184</sup> Thus, Section 303 would likely preserve state laws that impose standards that are "identical to" the underlying federal standard.<sup>185</sup> Additionally, the provision may also allow states to impose "different or additional *remedies*" to enforce the underlying substantive federal standards created under SAFLA, which would address the use of the word "natural" on food labels.<sup>186</sup>

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<sup>180</sup> *Id.*, § 203(b)(2).

<sup>181</sup> *See id.*, § 201.

<sup>182</sup> *Id.* § 303.

<sup>183</sup> *Id.*, § 303.

<sup>184</sup> *See* *Bruton v. Gerber Prods. Co.*, 961 F. Supp. 2d 1062, 1080 (N.D. Cal. 2013) ("The NLEA's preemption provision does not, however, prohibit states from enacting food labeling requirements that are identical to the FDA requirements.").

<sup>185</sup> *Id.*, § 303.

<sup>186</sup> *See* *Bates*, 544 U.S. at 448 (reasoning that a state law that creates a different *remedy* to enforce a federal law does not create a "different or additional" substantive standard that could be preempted).