15-1504-cv

IN THE

United States Court of Appeals for the Second Circuit

GROCERY MANUFACTURERS ASSOCIATION, SNACK FOOD ASSOCIATION, INTERNATIONAL DAIRY FOODS ASSOCIATION, and NATIONAL ASSOCIATION OF MANUFACTURERS,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the
United States District Court for the District of Vermont
Case No. 5:14-cv-117-cr (Hon. Christina Reiss)

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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September 8, 2015

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INTRODUCTION

The best parties to decide the value of commercial speech are the speaker and its audience—not the government. If the government nonetheless decides to force or prohibit commercial speech, it must show a substantial interest warranting that intrusion. And it must legislate in a way that directly and materially advances

that interest in a narrowly tailored manner (under *Central Hudson*) or at the very least in a reasonable manner (under *Zauderer*).

Vermont lost sight of these fundamental obligations. Instead, it waded into a heated public debate and passed a law compelling manufacturers to place a scientifically unwarranted warning label on products containing GE-derived ingredients. It did so to inform consumer purchasing decisions, *see* 9 V.S.A. § 3041, a plainly insufficient interest under *Amestoy*. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996). The State now accessorizes that interest by arguing about what consumers might be interested *in*—namely, any purported health, safety, or environmental risks presented by genetic engineering. But even after the days of hearings, testimony, and review of studies the State touts in its Brief, State Br. 1, the Vermont legislature was able to offer only that "[g]enetically engineered foods *potentially pose risks* to health, safety, agriculture, and the environment." Act 120 § 1(4) (emphasis added). The mere *potential of a risk*, however, is not remotely enough to satisfy the First Amendment, under any applicable standard.

Vermont's ban on the use of "natural" and "words of similar import" on GE-derived food products also flunks the First Amendment—as the District Court rightly held. The State's response is to double down on its insistence that the GE "production process" is "anything but" "natural." State Br. 1. But the State fails to

distinguish GE on that front; *every* food "production process," of course, involves human intervention that alters ingredients from their original state in nature. The State's speech ban impermissibly attempts to make uniform its arbitrary view of what should be considered "natural."

Finally, Act 120 is irreparably harming the Associations' members by forcing them to take action now to comply with the law, or risk enforcement come July 2016. The State argues that Act 120 does not require or prohibit anything until its enforcement date. But manufacturers must circulate compliantly labeled foods with long shelf lives now to meet that enforcement date—meaning that they are already being forced to speak (or not speak, in the case of the "natural" ban). Preliminary injunctive relief should have issued.

ARGUMENT

I. THE GE LABELING MANDATE VIOLATES THE FIRST AMENDMENT.

A. *Central Hudson* Applies.

The standard enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), applies to all state incursions on commercial speech except in a narrow set of circumstances: when the state compels "purely factual and uncontroversial" disclosures "to dissipate the possibility of consumer confusion or deception," *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1986); *see Milavetz, Gallop & Milavetz,*

P.A. v. United States, 559 U.S. 229, 250 (2010) (applying *Zauderer* to "accurate statement[s] identifying the advertiser's legal status" that were "intended to combat the problem of inherently misleading commercial advertisements"). The State unsurprisingly seeks to wedge Vermont's GE labeling mandate into *Zauderer*'s narrow exception. It does not fit, for two independent reasons: the mandated disclosure is not "purely factual and uncontroversial," and it is not designed to prevent deception. *Zauderer*, 471 U.S. at 651.

1. The GE Labeling Mandate Is Not "Purely Factual And Uncontroversial."

The State agrees that *Zauderer* applies only to disclosures that are both "purely factual and uncontroversial." State Br. 20-21 (quoting *Zauderer*, 471 U.S. at 651). It argues that Act 120 meets this standard because it "instructs food manufacturers to disclose an *undisputed fact* about food products they choose to sell to Vermont consumers." *Id.* at 19 (emphasis added).

To begin with, even the State's description of its mandatory disclosure as stating an "undisputed fact" is incorrect. The Associations have all along disputed the factual accuracy of describing a multi-ingredient *food* as "produced with genetic engineering" when the process is applied to certain *plants*. *See* PI Mem. 27-28 (Dist. Ct. Dkt. 33-1); Associations Br. 6-7. They have similarly disputed the accuracy of the statutory definition of "genetic engineering," not least because it conflicts with other definitions in the Vermont code itself. PI Mem. 31;

see also McHughen Decl. ¶¶ 75-85 (Dist. Ct. Dkt. 33-2). Even the "fact" to be carried on the mandatory label is thus very much in dispute.

In any event, even an "undisputed fact" can be *controversial*. *See Evergreen Ass'n v. City of New York*, 740 F.3d 233 (2d Cir. 2014); *CTIA-Wireless Ass'n v. City & Cnty. of San Francisco*, 494 F. App'x 752 (9th Cir. 2012); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006); *Nat'l Ass'n of Mfrs. v. SEC*, No. 13-5252, -- F.3d --, 2015 WL 5089667 (D.C. Cir. Aug. 18, 2015). And the mandatory GE labeling disclosure *of course* is controversial. *See Amestoy*, 92 F.3d at 76 (Leval, J., dissenting) ("Genetic and biotechnological manipulation of basic food products is new and controversial."). The question of what it means (or does not mean) for a food to contain GE ingredients remains a subject of volatile public debate. *See, e.g.*, Maria Konnikova, *The Psychology of Distrusting G.M.O.s*, The New Yorker, Aug. 8, 2013, http://goo.gl/h2KbC2; Tania Lombrozo, *The Danger of GMOs: Is It All In Your Mind?*, NPR, Apr. 27, 2015, http://goo.gl/qVjXLk; Elizabeth Whitman, *GMO Labeling Debate*, Int'l Bus. Times, July 30, 2015, http://goo.gl/fd2bVv. Just like the disclosures in *Evergreen*, *CTIA*, *Entertainment Software Association*, and *National Association of Manufacturers*, the mandatory GE disclosures here lead reasonable consumers to construe the speaker as conveying a message on a controversial issue. *See* Associations Br. 29-32.

The State strains to distinguish these cases. It attempts to distinguish *Evergreen*, for example, by categorizing it as a political speech case that mentions *Zauderer* only in "dictum." State Br. 28-29. Not so; the Second Circuit specifically assessed the disclosures as commercial speech, and concluded that *Zauderer* did not apply because the disclosures were controversial. 740 F.3d at 245 n.6 (noting that "[n]either" of the laws struck down as unconstitutional "require disclosure of 'uncontroversial' information"). The State also contends that *Evergreen* did not apply *Zauderer* because the disclosure extended beyond the centers' own services. But that is Vermont's own creative gloss; *Evergreen* itself never suggested anything of the sort.

As for *CTIA*, Vermont recognizes that the city ordinance there, which compelled cell phone retailers to disclose that cell phones emit radiofrequency emissions and ways to reduce exposure to those emissions, "required retailers to disclose 'more than just facts' about their own products." State Br. 28; *see CTIA*, 494 F. App'x at 753 (ordinance could be "interpreted by consumers as expressing San Francisco's opinion that using cell phones is dangerous"). Yes—and so does Act 120. Act 120 requires manufacturers to affirm on their own labels that the presence of GE ingredients is a significant characteristic of a food product. *See* Associations Br. 30; *see also Entm't Software Ass'n*, 469 F.3d at 652-653 (rejecting government requirement that stores post signs explaining video game

ratings because such signs convey a judgment about the rating system's usefulness); *Nat'l Ass'n of Mfrs.*, 2015 WL 5089667, at *7 (law compelling companies to disclose whether their products are derived from "conflict free" sources is "controversial" because it "conveys moral responsibility for the Congo war").

The State also offers up a few cases of its own. None compels a different result because none directly addressed the relevant question here: when is a *factual* message nevertheless *controversial*? In *NYSRA* and *NEMA*, for example, the challengers did not contest the message conveyed; they challenged the legislature's wisdom in forcing them to convey it. *See N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 134 (2d Cir. 2009) (NYSRA disputed not the "factual" aspect of calorie information, but "the City's decision to focus its attention on calorie amounts"); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 n.4 (2d Cir. 2001) (no dispute that mercury labeling is accurate). And when the D.C. Circuit upheld a country-of-origin labeling disclosure, it similarly concluded that the challenger had *not* "suggest[ed] anything controversial about the message," including "that it [was] controversial for some reason *other than* dispute about simple factual accuracy." *Am. Meat Inst. v. USDA*, 760 F.3d 18, 27 (D.C. Cir. 2014) (emphasis added).

Finally, the State suggests that its mandatory GE label does not convey a *controversial* message because the federal Food and Drug Administration (FDA) has concluded that some voluntary GE disclosures are not *misleading*. State Br. 30. But nothing in the relevant precedents supports the notion that a controversial fact must necessarily also be misleading. There also is deep irony in the State's reliance on the FDA for support, when that agency has consistently concluded that GE-derived foods are not materially different than their non-GE counterparts, present no unique health or safety concern, and do not need to be specially labeled. *See* Associations Br. 8-9.

2. *Zauderer* Is Limited To Correcting "Deception."

The Supreme Court confirmed several years ago that correcting potentially misleading commercial speech was one of *Zauderer*'s "essential features." *Milavetz*, 559 U.S. at 250. *See also, e.g.*, *United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001) (refusing to apply *Zauderer* because government had not argued that compelled contributions were "necessary to make voluntary advertisements nonmisleading"); *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146 (1994) (refusing to apply *Zauderer* because government had not demonstrated that speech was "potentially misleading" absent a disclaimer); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 491 (1997) (Souter, J., dissenting) (explaining, without contradiction by the majority, that *Zauderer*

"carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages"). Where a forced disclosure does not correct potentially misleading speech, then, *Zauderer* does not apply. *See* Associations Br. 34-36.

The State contends in response that *Zauderer* is not limited to regulations that prevent deception, and that even if it *is* so limited, Act 120 falls within that scope. *See* State Br. 31. Neither contention is correct. It is quite true that before *Milavetz*, the Second Circuit extended *Zauderer* to all compelled commercial disclosures—in part because the Supreme Court had not communicated a more limited rule. *See NYSRA*, 556 F.3d at 133. But *Milavetz* confirmed *Zauderer*'s proper scope. Indeed, the *Milavetz* Court distinguished a *Central Hudson* case, *In re R.M.J.*, 455 U.S. 191 (1982), on just this ground: as the Court explained, *R.M.J.* triggered *Central Hudson* scrutiny because the disclosures there involved "statements [that] were not inherently misleading." *Milavetz*, 559 U.S. at 250.

The State's second contention—that Act 120's labeling mandate was devised to correct "misleading speech"—is likewise without merit. *Zauderer* permits states to ward off deception *resulting from the speaker's own statements*. *See* 471 U.S. at 652; *see also Milavetz*, 559 U.S. at 250; *Conn. Bar Ass'n v. United States*, 620 F.3d 81, 96 (2d Cir. 2010). The State has made no such showing here; Act 120 would apply to an otherwise blank label.

B. The GE Labeling Mandate Fails Under *Central Hudson*.

There is a reason Vermont resists *Central Hudson* so strenuously: There is no credible argument that Act 120 satisfies *any* of its requirements.

1. Substantial Interest: The State's Asserted Interest Here Is Indistinguishable From *Amestoy*.

Act 120 maps precisely onto the rBST law in *Amestoy*. There, as here, the FDA had found no scientific basis for concerns about rBST. *See* 59 Fed. Reg. 6279 (Feb. 10, 1994). There, as here, Vermont required labels "in response to widespread consumer concern about this new, bio-engineered product." *Amestoy* Appellees' Br., 1995 WL 17049818, at *6. There, as here, the State explained that its interest in assuaging "consumer concern" stemmed from rBST's potentially harmful effects and the lack of studies about long-term health risks, and what Vermont characterized (despite the lopsided science) as "an on-going debate within the scientific community." *Id.* at *11; *see also Amestoy*, 92 F.3d at 73 & n.1; *id.* at 75 & n.3 (Leval, J., dissenting) (citing State's expert, who claimed in an affidavit that the science supporting rBST's health and safety remained unsettled). But as this Court explained in *Amestoy*, "consumer curiosity alone is not a strong enough state interest." 92 F.3d at 74.

Act 120's findings similarly focus on providing consumers with information that they might want. 9 V.S.A. § 3041. The findings similarly mention "a lack of consensus regarding the validity of the research and science surrounding the safety

of genetically engineered foods." Act 120, § 1(2)(D). And the findings call out the purported dearth of "long-term" studies in the United States about "the safety of human consumption of genetically engineered foods." *Id.* § 1(2)(E). This Court in *Amestoy* found all of these justifications wanting, because they boiled down to "the public's 'right to know,' " and because Vermont was unwilling to take a "position on whether rBST is beneficial or detrimental." 92 F.3d at 73 & n.1. The Court should reach the same conclusion here.

Confronted with the rather rare scenario of a controlling, on-point case that is dispositive of its arguments, the State on appeal tries a different tack. It now claims that Act 120 purportedly serves *its own* interest in, among other things, protecting human health and the environment. State Br. 33-35.

This is news. Act 120's findings repeatedly mention the State's interest in providing *consumers* with information to make decisions about *potential* risks. *See* 9 V.S.A. § 3041. The State repeatedly argued below that Act 120 was designed to empower consumers to make informed purchasing choices. *See, e.g.*, State Mot. to Dismiss Reply 9 (Dist. Ct. Dkt. 63) (explaining that Vermont's legislature did not determine that GE food is dangerous but "that there is enough uncertainty * * * to grant Vermonters the right to make educated decisions"); Jan. 7, 2015 Hr'g Tr. 40 ("It's precisely because there is an ongoing debate * * * that the state reasonably concluded that consumers ought to have the information to make the decision

themselves."). And when called upon by Congress to explain Act 120, a State official offered that "the Vermont Legislature expressly recognized a variety of principal reasons *why consumers would want this information.*" *See Nat'l Framework for the Review and Labeling of Biotech. in Food: Hr. Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 113th Cong. 3 (2015) (written testimony of Todd Daloz, Vt. Assistant Att'y Gen.) (emphasis added). That same official went even further at the Congressional hearing, stating that *Vermont does not even disagree* with the "scientific consensus" on the safety of GE foods—but "what consumers do with that information and why consumers want the information is not necessarily the role that Vermont's legislature chose to take." CQ Congressional Transcripts, *H. Energy and Commerce Subcomm. on Health Holds Hrg. on Biotech. Food Labeling Standards*, June 18, 2015, at 27, 52.

In any event, even if this Court entertains the State's late-breaking embrace of an interest it has repeatedly, expressly, and publicly disclaimed, *Amestoy* still dictates the result here. Vermont attempted to introduce notions of health, safety, and a purported "scientific debate" into the litigation record in *Amestoy*, too. *See* Affidavit of Julie J. McGowan at 26, *Int'l Dairy Foods Ass'n v. Amestoy*, No. 94-119 (D. Vt. July 7, 1995) (Dist. Ct. Dkt. 48) (reviewing scientific literature, finding purported "widespread disagreement" about the safety of rBST, and noting that "[l]ongitudinal studies have been called for to establish the long-term health

effects"). This Court rejected that effort, concluding that "the already extensive record in this case contains no scientific evidence from which an objective observer could conclude that rBST has any impact at all on dairy products." *Amestoy*, 92 F.3d at 73.

Compare all this to *NEMA*, the State's favored citation. State Br. 33. The science supporting harms from mercury was clear: mercury is bad for humans and for the environment. And the "overall goal of the statute" in *NEMA* was "plainly to reduce the amount of mercury released in the environment." 272 F.3d at 115. Vermont took the (uncontroversial) position that mercury pollution was harmful, and that the required labels advanced its "goal of reducing mercury contamination." *Id.* The well-considered, scientifically supported, properly tailored mercury labeling law in *NEMA* is a far cry from Act 120.[1]

2. Direct Advancement: The GE Labeling Mandate Targets Only Speculative Harms.

Even if Vermont designed Act 120 to further health and environmental interests it specifically has disclaimed, the law does not "directly advance" those interests. 447 U.S. at 564. To begin with, the State identifies only a relationship between the forced speech and *potential* health and environmental risks—which is to say, the risk of risks—of GE crops. *See* State Br. 35-40. But Vermont must do

[1] The State makes no attempt to defend its purported interest in forcing private parties to facilitate others' religious practices. *See* Associations Br. 41 n.12.

more than "speculat[e]" about potential risks. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). It must provide evidence that genetic engineering causes *harms*, and that those harms are "real." *Id.* at 771; *see also Ibanez*, 512 U.S. at 143. Vermont also must prove that its law "will in fact alleviate" real harms "to a material degree," and in a "direct" manner. *Edenfield*, 507 U.S. at 768, 771. The tenuous causal chains linking the potential risks to the compelled disclosure are hardly direct.[2]

As to health risks: The General Assembly was willing to acknowledge only the "*potential* health effects" of GE-derived foods. 9 V.S.A. § 3041(1) (emphasis added). And even now the State has offered no suggestion of *actual* harm arising from consumption of GE ingredients; instead, it relies on declarations to the effect that GE plants are different from non-GE plants and that we cannot yet be sure what that means, *see* State Br. 38, or on organizational statements that support labeling or call for additional studies, *see id.* at 12-13. That is the fundamental problem: After decades of research, and after all of this country's major scientific and medical bodies have declared that GE-derived foods are no less safe than their non-GE counterparts, the refrain that *we cannot be sure* is an insufficient response

[2] Moreover, given Act 120's litany of exemptions, the law is so "underinclusive" that "customers * * * would not get the information" the State "contends is necessary to protect consumer choice." *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 266 (2d Cir. 2014).

to a First Amendment challenge. *See Edenfield*, 507 U.S. at 770 (direct-advancement prong "is not satisfied by mere speculation or conjecture"); *Central Hudson*, 447 U.S. at 569 ("conditional and remote eventualities" are insufficient).

And as for the State's supposed environmental interest, the General Assembly again acknowledged only "*potential* environmental effects" of GE-derived foods. 9 V.S.A. § 3041(2) (emphasis added). The State has purported to link environmental harms to practices that may be correlated with certain GE crops, like the use of pesticides. *See* State Br. 8-9, 38-39. But Act 120 does not regulate *pesticides*; in fact, it does not mention pesticides a single time.

In any event, even if the risk-of-environmental-risk were substantiated, the link between the upstream environmental risk-of-risk and the downstream disclosure mandate does not connect. The State's touted studies show only that some GE-crop varieties have traits that might equate to an increased use of certain pesticides. But the same holds true for traditionally bred crops; some withstand certain pesticides better than others.[3] Indeed, the State's studies do not refute that some GE-crop varieties have traits that equate to the *decreased* use of pesticides. *See* William Saletan, *Unhealthy Fixation*, Slate, July 15, 2015, http://goo.gl/YW1q3s; McHughen Rebuttal Decl. ¶¶ 76-89 (Dist. Ct. Dkt. 75-1).

[3] The same goes for "gene flow," State Br. 38, which occurs no differently for GE crops and non-GE crops. McHughen Rebuttal Decl. ¶¶ 90-91.

And more generally, a number of GE-crop varieties are genetically engineered for traits that have no correlation to pesticides at all. Encouraging consumers to purchase non-GE products therefore will not have any uniform effect on the use of pesticides. The State's argument to the contrary "display[s] a profound misunderstanding of science and reality." McHughen Decl. ¶ 105.[4]

The State responds with the old saw that legislatures may tackle one portion of a perceived problem at a time. *See* State Br. 39, 41. But the State's labeling mandate is not tackling even a *part* of the problem it identifies: pesticide use. The label says nothing about pesticides or their use. It pertains to GE ingredients in finished food—several steps and processes removed from pesticides.

The State's last salvo is to urge the Court not to "second-guess the Legislature" on these issues. State Br. 37. But this Court need not second-guess the Vermont legislature any more than it needed to second-guess the Connecticut legislature's ill-supported conclusion that mandatory disclosures directly advanced consumer satisfaction in *Safelite Group*, 764 F.3d at 265. All this Court must do is

[4] Charles Benbrook, the go-to academic for the anti-GE lobby and one of the State's experts, has recently come under heavy fire for his work linking GE with increased pesticide use: the same article the State cites in its Brief (at 10 n.4). *See Charles Benbrook: 'Severed' Former Wash State Organic Consultant Misrepresents Conflicts*, Genetic Literacy Project, Sept. 8, 2015, http://goo.gl/qjGDTq; Steven Novella, *Anti-GMO in the NEJM*, NEUROLOGICAblog, Aug. 25, 2015, http://goo.gl/DGCa22.

conclude that a causal chain that relies only on speculation about risks-of-risks is too tenuous to pass First Amendment muster.

3. Tailoring: The State Gives No Explanation For Choosing Speech-Restrictive Means.

Finally, there is no reasonable fit between the State's newly claimed interests and the means chosen to effectuate those interests. *See Central Hudson*, 447 U.S. at 564. Mandatory labeling is utterly unnecessary in light of the host of less-speech-restrictive alternatives available for providing information to consumers. If consumers want to purchase non-GE foods, they have the means to do so. *See* Associations Br. 11, 44-46. The State's lone response to *Central Hudson*'s "fit" prong is buried in a footnote and consists of the conclusory assertion that "[t]he Legislature had reason to reject those alternatives." State Br. 45 n.26. But a single "conclusory statement[]" does not suffice to meet the State's burden. *Edenfield*, 408 U.S. at 771.

C. The GE Labeling Mandate Fails Even Under *Zauderer*.

Even if the State is right that *Zauderer* rather than *Central Hudson* applies, such that there need be only a reasonable relationship between the State's means and ends, the GE labeling mandate still fails.

To begin with, *Zauderer*, just as much as *Central Hudson*, requires the State to demonstrate a substantial interest. *See Zauderer*, 471 U.S. at 650 (relying on substantial state interest in preventing consumer deception). And for all of the

reasons we have explained, the State cannot demonstrate a credible substantial interest in forcing manufacturers to speak. *See supra* at 10-13.

The State accuses the Associations of trying to "import" the substantial-state-interest requirement into *Zauderer*'s test. State Br. 32. But the substantial-interest requirement *is* part of *Zauderer*. As this Court recently explained, *Zauderer* merely loosened *Central Hudson*'s "fit" requirement—"'*the relationship between means and ends* demanded by the First Amendment in compelled commercial disclosure cases.'" *Safelite*, 764 F.3d at 263 (quoting *NEMA*, 272 F.3d at 115) (emphasis added); *see* Associations Br. 46-48. This Court has continued to apply *Zauderer* only when the government can assert a substantial interest. *See Conn. Bar*, 620 F.3d at 96; *NYSRA*, 556 F.3d at 134; *NEMA*, 272 F.3d at 115 n.6. The Associations thus are not "importing" anything new to the *Zauderer* equation; it is the State that is attempting to export the substantial-interest requirement from the inquiry.

Second, even under *Zauderer* the State's goal still must be "reasonably related" to the labeling mandate. *Milavetz*, 559 U.S. at 253 (quoting *Zauderer*, 471 U.S. at 651).[5] Vermont cannot meet that standard here, because even under

[5] A few prior decisions from this Court have described *Zauderer* as announcing a "*rational basis*" test. *See, e.g.*, *Conn. Bar*, 620 F.3d at 96; *NYSRA*, 556 F.3d at 132. But neither *Milavetz* nor *Zauderer* used that phrase, which is associated with a different constitutional analysis. *See Bd. of Trs. of SUNY v. Fox*, 492 U.S. 469,

Zauderer's more accommodating review, the State must rely on something more than a mere suggestion of potential harm to establish a "reasonable relationship" between the forced speech and the State's goal. *See Edenfield*, 507 U.S. at 770-771. The State protests that *Edenfield*'s requirement of "real" harms applies to *Central Hudson* cases only. That is incorrect; this Court and others repeatedly have applied *Edenfield* to mandatory disclosures. *See, e.g.*, *Hayes v. N.Y. Attorney Grievance Comm.*, 672 F.3d 158, 167-168 (2d Cir. 2012); *Nat'l Ass'n of Mfrs.*, 2015 WL 5089667, at *4.

And the State's already-hypothetical harm is further weakened by the implausible causal relationships the State proposes. Take the State's newly prioritized concern with pesticides. For the labeling mandate to mitigate the purported environmental harm requires at least five steps: (1) the labels convince some consumers not to buy GE-derived foods; (2) which in the aggregate materially reduces demand; (3) which in turn materially reduces GE crop production; (4) which materially decreases the use of certain pesticides; (5) which reduces individuals' exposure to those pesticides in Vermont.

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480 (1989) (distinguishing *Central Hudson* from the " 'rational basis test' used for Fourteenth Amendment equal protection analysis"). The *Fox* Court in fact referenced *Zauderer* in this same paragraph; presumably if that case had applied "rational basis" review, the Court would have cited *Zauderer* rather than the equal-protection standard.

As for the purported risks to human health, the best the State can do is argue that health risks need not be "proved with absolute certainty." State Br. 41. The Associations have never suggested that they must. Even *Zauderer*, however, demands *some* modicum of proof, and that is what the State lacks: proof of any reasonable connection between the labeling mandate and human health. *Cf. NEMA*, 272 F.3d at 115 (reasonable relationship between mandatory label and reduction of mercury pollution where label would inform consumers of mercury in lamps and encourage their proper disposal).

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT ACT 120'S SPEECH RESTRICTIONS ARE UNCONSTITUTIONAL.

The District Court correctly concluded that Act 120's ban on the use of the word "natural" and "any words of similar import" on food products containing GE-derived ingredients likely flunks *Central Hudson*, because the State's suggested meaning of "natural" encompassed processes beyond genetic engineering, yet the ban applied only to GE food. As such, "the State is hard pressed to identify a substantial state interest that is served by restricting the use of undefined terms by some, but not all, similarly-situated commercial speakers." JA91. The court thus concluded that the Associations were likely to succeed on the merits of that aspect of their First Amendment claim. JA86-94.

In an effort to identify an alternative basis for affirming the District Court, the State challenges that holding. State Br. 45-51. Its arguments lack merit.

The State insists that the ban on "natural" is necessary to correct otherwise "misleading" speech. State Br. 46-48; *see Central Hudson*, 447 U.S. at 563. The District Court concluded, however, that there was no universal definition of "natural" that could render the Associations' members' use of the word "misleading" in the least, because there was nothing against which to measure their use of the word. The General Assembly had not even defined "natural." And the State otherwise had offered only circular definitions that covered myriad other agricultural processes. JA87-88.

The State next cites a few state consumer-protection-law cases where courts found at the motion-to-dismiss stage that the plaintiffs had plausibly pleaded facts showing that manufacturers' use of "natural" on certain products containing GE ingredients confused consumers. *See* State Br. 47. But the State cannot permissibly draw from these early-stage rulings a principle applicable in the First Amendment context. Under the First Amendment, the use of "natural" is not inherently misleading because it lacks a uniform, objective, and measurable meaning. *See Alexander v. Cahill*, 598 F.3d 79, 93-95 (2d Cir. 2010); *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 391 (8th Cir. 2004).

The State also contends that "natural" is *actually* misleading. *See* State Br. 48. But the State supported its contention below with surveys that asked broad and leading questions and left out definitions of key terms. JA89 & n.42. The

District Court also observed that the State had ignored a key finding in one of its own favored surveys: " 'natural as a marketing term remains vague and unappealing to consumers.' " JA89 (quoting report). Other courts have rejected the use of surveys in analogous contexts. *See, e.g.*, *Am. Italian Pasta*, 371 F.3d at 393, 394 (surveys would introduce "even more uncertainty into the market place" that "could chill commercial speech"); *Mead Johnson & Co. v. Abbott Labs.*, 201 F.3d 883, 886 (7th Cir. 2000) (refusing to allow "survey research" "to determine the meaning of words"), *opinion amended in other part on denial of reh'g*, 209 F.3d 1032 (7th Cir. 2000).[6] The State's cited cases, meanwhile, demonstrate only that courts may rely on surveys to evaluate *non-speech-related effects*. *See Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 626-627 (1995) (solicitations infringe privacy); *Conn. Bar Ass'n*, 620 F.3d at 97 (bankruptcy confuses debtors). Or the courts may use surveys to evaluate whether a phrase is used in a manner to suggest something objectively untrue. *See Bronco Wine Co. v. Jolly*, 129 Cal. App. 4th 988, 1009 (2005) (geographic origin of product), *as modified on denial of reh'g* (June 20, 2005).

[6] Surveys might show a word is misunderstood—but that is not the same thing as being misleading. *Mead Johnson*, 209 F.3d at 1034 (denying rehearing) (" '[m]isleading' is not a synonym for 'misunderstood' "); *see also Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 106 (1990) (plurality op.) (terminology "may not be understood fully by some readers," but that does not make it "misleading"); *Mason v. Fla. Bar*, 208 F.3d 952, 957 (11th Cir. 2000) ("[u]nfamiliarity is not synonymous with misinformation").

At bottom, the State's argument that the prohibited use of "natural" is misleading rests on its say-so. Its argument is as meritless as it is dangerous. After all, "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Yet that is precisely what the State is doing here: declaring what shall be orthodox on the hotly debated issue whether GE-derived food products are "natural."

Because the State had failed to demonstrate that the banned use of natural was inherently or actually misleading, it was left to argue that such use was "*potentially* misleading." JA90. But " 'if the protections afforded commercial speech are to retain their force, we cannot allow rote invocation of the words "potentially misleading" to supplant' this burden." *Alexander*, 598 F.3d at 91 (brackets omitted) (quoting *Ibanez*, 512 U.S. at 146). That is the sum of what the State has offered; it has not " 'demonstrate[d] that the harms it recites are real.' " *Id.* (quoting *Fla. Bar*, 515 U.S. at 626). Even were the State's interest in avoiding *potential* confusion sufficient, moreover, the District Court concluded that the State did not adequately establish that the ban directly and materially advanced that interest: "the potential benefits of prohibiting the use of undefined terms by only some food manufacturers and the likelihood those benefits will be achieved remains remote, contingent, and speculative." JA93-94.

On appeal, the State argues only that "legislatures may rationally solve one problem at a time." State Br. 49. Under the State's approach, however, "any regulation that makes *any* contribution to achieving a state objective would pass muster." *Bad Frog Brewery v. N.Y. State Liquor Auth.*, 134 F.3d 87, 99 (2d Cir. 1998). But that is not how it works. As the Supreme Court recently explained, "[u]nderinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1670 (2015); *see Bad Frog Brewery*, 134 F.3d at 100 (applying rule to *Central Hudson*).[7] Enter Act 120: it prohibits "natural" on a subset of GE products, but because of both the arbitrary way the statute defines GE, as well as the Act's many exemptions, *see* Associations Br. 15, 43-44, the statute allows similarly situated speakers to use "natural" "in a comparable way"—even if their products include GE-derived ingredients, or are a result of processes analogous to GE. *Williams-Yulee*, 135 S. Ct. at 1670. This scattershot approach

[7] The State cites *Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94 (2d Cir. 2010), as holding that underinclusiveness is relevant only if the State draws lines in a discriminatory or arbitrary manner. *Channel Outdoor* does not support such a narrow view. *See id.* at 106 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995)). In any event, here, the scheme *is* arbitrary in its effect on the consumer, and the State may not hide behind other legal limitations to avoid that conclusion. *See Bad Frog Brewery*, 134 F.3d at 99-100.

"directly undermine[s] and counteract[s]" whatever "effects" the prohibition would otherwise have. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995).

The District Court thus correctly concluded that the State's ban on "natural" flunked *Central Hudson*.

III. THE ASSOCIATIONS' MEMBERS HAVE AMPLY PROVED THAT THEY WILL BE—AND ARE BEING —IRREPARABLY HARMED.

A. The Associations' Members' Free Speech Rights Are Being Infringed Now.

The " 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.' " *Amestoy*, 92 F.3d at 71 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). This fundamental legal principle decides the irreparable-harm issue.

The State argues otherwise, on the ground that Act 120 is "not yet in operation." State Br. 53. That blinks reality. The Associations' members need to circulate compliantly labeled products with long shelf lives *now* to meet the July 2016 enforcement date. *See* JA32; *see also* Associations Br. 51 & n.15, 59. Even the State's declarants, moreover, opine that packaging changes could take six months, *see* JA32 n.7, and those companies are (to put it mildly) of modest size and scope compared to many of the Associations' members.[8]

[8] The State describes *Ashcroft* v. *ACLU*, 542 U.S. 656, 670 (2004), as "explaining the risk of self-censorship '[w]here a prosecution is a likely possibility' for an

The State also contends that there is "no State action for this Court to enjoin." State Br. 53. Sure there is: the enforcement date of the statute. That the enforcement date exists in the future is not fatal. *See ACLU of Ill. v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986) (affirming preliminary injunction against a city's use of the Christian cross as a Christmas decoration under the Establishment Clause). The *ACLU of Illinois* decision issued months before the "next Christmas," but the court nevertheless found "irreparable harm" because "no one can be certain that the full trial on the merits will be completed by then—no trial date has been set and the parties have told us that they may want to conduct pretrial discovery." *Id.* at 275. So too here. No trial date has been set, though one has been sought, Dist. Ct. Dkt. 116-1, and there is no certainty that the District Court will decide the case before the enforcement date. The preliminary injunction should have issued.

B. Act 120 Requires The Associations' Members To Change Their Business Practices Now.

The Associations' declarants explained that Act 120 required them to "fundamentally change the nature of their operations"—something this Court has

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operational statute." State Br. 53. The words "operational statute" are the State's. In any event, *Ashcroft* proves the Associations' point. Their members' labeling decisions *now* will determine compliance with Act 120 come July 2016, meaning irreparable harm exists *now* because they "may self-censor rather than risk the perils of trial." 542 U.S. at 670-671.

recognized as constituting "irreparable harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005). *See* Associations Br. 56-59. The State offers three arguments in response. All lack merit.

First, the State contends that economic losses are categorically irrelevant to First Amendment irreparable harm analysis. *See id.* at 54-55. But this Court has already ruled squarely to the contrary in *414 Theater Corp. v. Murphy*, 499 F.2d 1155 (2d Cir. 1974), a First Amendment case. The Court affirmed a preliminary injunction based on "irreparable injury" that was both "economic" in the form of "loss of revenue" and "increase in costs," as well as "personal." *Id.* at 1160.

Second, the State argues that the Associations' members' declarations—concerning the operational changes that are necessary over the next few months to bring their businesses into compliance with Act 120—are "speculative" because they discuss the future. State Br. 56. It offers no support for this argument, which is understandable, because it makes no sense: a litigant would first have to demonstrate *past* irreparable harm in order to invoke the very preliminary-injunctive relief that is supposed to *prevent* irreparable harm. The relevant question is whether there is a "threatened imminent loss," and the fact that the loss is "very difficult to quantify" makes it more rather than less supportive of a preliminary injunction. *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 38 (2d Cir. 1995). *Compare Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d

544, 556 (D.C. Cir. 2015) (cited in State Br. 56-57) (no irreparable harm where there was no record evidence of petitioners' cost of compliance).

Third and finally, the State argues that manufacturers might choose to avoid incurring the colossal costs of complying with Act 120 by "pulling out of the Vermont market altogether." State Br. 55. Needless to say, a law that uses economic pressures to force speakers with a contrary viewpoint to flee the State is just as harmful to First Amendment principles as a direct prohibition of speech. Far from showing an *absence* of irreparable harm, the State's point proves its existence.

C. The Associations' Members Are Irreparably Harmed By The "Natural" Ban.

The State's last argument is that the Associations did not adequately prove that their members use "natural" labels on GE products. State Br. 57. The Associations have already described their record declarations showing just that. *See* Associations Br. 51-53. The State criticizes these declarations as "imprecise." State Br. 58. Any "imprecision" in the declarations, however, is an outgrowth of one of the aspects of the law that the District Court found rendered it likely unconstitutional. As the court explained, the "natural" ban is likely void for vagueness. *See* JA94-99. *Act 120 itself* is what prevents the Associations from identifying with any additional specificity the products that are affected. *See* Associations Br. 53-54.

The State also resists the significance of the other lawsuits where litigants have sued Association members for using "natural" on GE-derived products. State Br. 59. All of those cases show that the State's challenge to the Associations' proof borders on the frivolous—particularly when the State's own brief relies on these same cases. *See, e.g.*, State Br. 47 (citing *Ault v. J.M. Smucker Co.*, No. 13-3409, 2014 WL 1998235 (S.D.N.Y. May 15, 2014)).

The Associations amply proved that Act 120's ban on "natural" irreparably harms their members. The District Court erred in holding otherwise.

IV. THE OTHER PRELIMINARY-INJUNCTION FACTORS FAVOR RELIEF.

The last two factors (balancing-of-hardships and public-interest) also favor a preliminary injunction. The State has no interest in enforcing an unconstitutional law, and the loss of First Amendment freedoms easily outstrips the cost to the State of preserving the status quo. *See* Associations Br. 59-60; *Nken v. Holder*, 556 U.S. 418, 435 (2009); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). In arguing that the public interest nevertheless favors Vermont, the State cites a poll showing general consumer support for labeling laws. *See* State Br. 60. Here is another poll: "over 80 percent of Americans support 'mandatory labels on foods containing DNA,' about the same number as support mandatory labeling of GMO foods 'produced with genetic engineering.'" Ilya Somin, *Over 80 Percent of Americans Support "Mandatory Labels on Foods Containing DNA,"*

Washington Post, Jan. 17, 2015, https://goo.gl/7POfy8. If a pollster makes something sound scary enough, even the most mundane detail can raise alarm.

Concerned consumers have access to as much information about GE-derived foods as they might need to live a GE-free lifestyle. They have access to websites that verify products as "GMO-free," shopping guides that point them to non-GE foods, cell phone apps that assess ingredient lists, grocery stores that favor GE-free foods, and hundreds of manufacturers that label their products as "GMO-free." The public interest is amply satisfied by all of these readily available resources—which, not coincidentally, also demonstrate that the State veered far out of its lane when it forced speech on a topic on which the market is already voluntarily, loudly, and extensively speaking.

CONCLUSION

The State vehemently maintains that its mandatory labeling law is a benign informational disclosure. But "GMO labels don't clarify what's in your food. They don't address the underlying ingredients—pesticides, toxins, proteins—that supposedly make GMOs harmful. They stigmatize food that's perfectly safe, and they deflect scrutiny from non-GMO products that have the same disparaged ingredients." Saletan, *Unhealthy Fixation*. Although the State might have the prerogative to perpetuate misinformation on its own dime, and with its own speech, it cannot force *manufacturers* to do so.

For the foregoing reasons, as well as those stated in the Opening Brief, the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the Brief contains 6,994 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the Brief has been has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2015, I caused the foregoing to be filed through this Court's CM/ECF appellate filer system, which will send a notice of electronic filing to all registered users including the following lead counsel of record for Defendants-Appellees:

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