15-1504-cv

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 CHIN, 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. 14-117 - Hon. Christina Reiss)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS, URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, the Washington Legal Foundation (WLF) states that it is a nonprofit corporation organized under § 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation and does not issue stock, and no publicly held company enjoys a 10% or greater ownership interest.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

ARGUMENT 11

I. *Zauderer* Prescribes an Intermediate Level of Review for Commercial Speech Regulation, a First Amendment Review Far More Stringent Than the One Adopted by the District Court 11

II. Vermont Has Failed to Identify Any "Substantial Interest" That It Seeks to Further by Mandating Disclosure of GE Ingredients 16

III. Vermont's Mandated Disclosure Does Not Qualify as the "Purely Factual and Uncontroversial Information" Demanded by *Zauderer* 20

IV. Vermont Has Not Demonstrated That Its Compelled Speech Directly Advances Its Substantial Government Interests and Does So in a Narrowly Tailored Manner 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases:

Am. Meat Inst. v. U.S. Dep't of Agriculture ,
760 F.3d 18 (D.C. Cir. 2014) (*en banc*) 8, 14, 15
Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n,
447 U.S. 557 (1980) . . . . *passim*
Edenfield v. Fane,
507 U.S. 761 (1993) 17, 20
Ibanez v. Fla. Dep't of Business and Prof'l Regulation,
512 U.S. 136 (1994) 9, 19, 20
IMS Health, Inc. v. Sorrell,
630 F.3d 263 (2d Cir. 2010), *aff'd*, 131 S. Ct. 2653 (2011) 1
Int'l Dairy Foods Assoc. v. Amestoy,
92 F.3d 67 (2d Cir. 1996) 8, 17, 18, 26
Nat'l Assoc. of Mfrs. v. SEC,
748 F.3d 359 (D.C. Cir. 2014), *overruled in part* 760 F.3d 18
(D.C. Cir. 2014), *panel reh. granted* (Nov. 18, 2014) 22
Nat'l Electrical Mfrs. Ass'n v. Sorrell,
272 F.3d 104 (2d Cir. 2001) 6, 16, 18
N.Y. State Restaurant Ass'n v. N.Y. City Bd. of Health,
556 F.3d 114 (2d Cir. 2009) 15, 21
Phillips v. Washington Legal Found.,
524 U.S. 156 (1998) 1
Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995) 17
Safelife Group, Inc. v. Jepson,
764 F.3d 258 (2d Cir. 2014) 16, 21
United States v. Caronia,
703 F.3d 149 (2d Cir. 2012 1
United States v. Philip Morris USA, Inc.,
___ F.3d ___, 2015 WL 2445064 (May 22, 2015) 1
Walker v. Texas Div., Sons of Confederate Veterans, Inc.,
135 S. Ct. 2239 (2015) 26
W. Va. Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 13

Page

Zauderer v. Office of Disciplinary Counsel,
471 U.S. 626 (1985) . . . . *passim*

Statutes and Constitutional Provisions:

U.S. Const., amend. I . . . . *passim*

An Act to Regulate the Labeling of Genetically Engineered Foods,
2014 Vt. Acts & Resolves No. 120 (Act 120) . . . . *passim*

9 V.S.A. § 3042(4) 3

9 V.S.A. § 3043(a) 2

9 V.S.A. § 3043(b)(3) 3

9 V.S.A. § 3043(c) 4, 24

9 V.S.A. § 3048(b) 3

Miscellaneous:

Vt. Regulations, Final Rule 121.01(6) 3, 24

Vt. Regulations, Final Rule 121.02(c)(ii) 22

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS, URGING REVERSAL

INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) [1] is a public interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has litigated frequently in support of the speech rights of the business community, appearing before this and other federal courts in cases raising commercial speech issues. *See, e.g., IMS Health, Inc. v. Sorrell,* 630 F.3d 263 (2d Cir. 2010), *aff'd*, 131 S. Ct. 2653 (2011); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012). In particular, WLF has litigated regularly in opposition to government efforts to compel speech. *See, e.g., United States v. Philip Morris USA, Inc.*, ___ F.3d ___, 2015 WL 2445064 (May 22, 2015); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998).

WLF is concerned that, unless the decision below is overturned, State governments will possess largely unchecked authority to require speech by

[1] Pursuant to Local Rule 29.1, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief. Counsel for the parties have consented to the filing of this brief.

commercial entities without regard to whether the compelled speech serves a substantial government interest and whether the speech qualifies as noncontroversial. No decision from this Court or the Supreme Court has ever condoned such unchecked authority.

This brief focuses on the district court's application of inappropriate legal standards to Appellants' First Amendment claims and on why Appellants are likely to prevail on the merits of those claims if the appropriate standards are applied. WLF concurs with each of the other arguments raised by Appellants in their brief but does not address them separately.

STATEMENT OF THE CASE

The facts of the case are set out in detail in the opening brief of Plaintiffs-Appellants. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

With its adoption of Act 120 in May 2014, Vermont became the first (and thus far only) State in the country to require labeling of foods that contain, or may contain genetically engineered ("GE") ingredients. Act 120 requires a "food offered for sale by a retailer [in Vermont] after July 1, 2016" to be labeled as "produced entirely or in part from genetic engineering if it is . . . entirely or partially produced with genetic engineering." 9 V.S.A. § 3043(a). The Act

provides that the packaging of "processed foods" (defined as any food other than a raw agricultural commodity) that contains GE ingredients must bear one of three labels: (1) "produced with genetic engineering"; (2) "partially produced with genetic engineering"; or (3) "may be produced with genetic engineering." 9 V.S.A. § 3043(b)(3). The "may be" language is reserved for products whose manufacturers do not know whether the products contain GE ingredients. The Act defines "genetic engineering" as "a process by which food is produced from an organism or organisms in which the genetic material has been changed" in one of two specified manners. 9 V.S.A. § 3042(4).

The Act authorizes the Vermont Attorney General to issue regulations to carry out the Act. 9 V.S.A. § 3048(b). The Attorney General's implementing regulations further define the term "genetic engineering"; the regulations provide that "[t]he term 'genetic engineering' does not encompass a change of genetic material through the application of traditional breeding techniques, conjugation, fermentation, traditional hybridization, in vitro fertilization, or tissue culture." Final Rule § 121.01(6).

The Act also determines that food containing GE ingredients is not "natural." The Act prohibits manufacturers of food containing GE ingredients from using labeling, advertising, or signage indicating that the food is "'natural,'

'naturally made,' 'naturally grown,' 'all natural,' or any words of similar import that would have a tendency to mislead a consumer." 9 V.S.A. § 3043(c). The Act does not define the term "natural," nor does it bar the use of the term "natural" to describe any food product that does not contain GE ingredients.

Appellants (collectively, "the Associations") filed a lawsuit in federal district court in Vermont, claiming among other things that the Act violated their First Amendment free speech rights. They argued that the Act's labeling requirement constituted compelled speech, and that this speech regulation could not pass constitutional muster under the review standard articulated in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

In April 2015, the district court granted in part Vermont's motion to dismiss and denied the Associations' motion for a preliminary injunction. JA 20-103. In response to the Association's compelled speech claim, the court initially addressed the appropriate standard of review. It concluded that *Central Hudson*'s "intermediate" review standard generally applies only to government *suppression* of commercial speech and thus was inapplicable to the compelled commercial speech at issue here. JA 71-73. Instead, it applied a less-exacting "reasonable relationship" test, supposedly derived from the Supreme Court's decision in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). As explained by

the court, the reasonable relationship test provides that compelled commercial disclosures are constitutionally permissible if they are either "reasonably related to the government's interest in preventing deception of consumers" or if they "promote informed consumer decision-making in order to address a potential cause of harm." JA 71.

The court held that the reasonable relationship test is applicable so long as the compelled commercial disclosure "is purely factual and not controversial" and "is supported by a State interest beyond merely satisfying commercial curiosity." *Ibid.* It determined that the Act satisfied both of those criteria, JA 73-79. The Associations argued that the GE labeling requirement is "controversial" because it "conveys a negative message about their product"; the court said that any such negative message was insufficient to render the labeling requirement controversial because the Act did nothing to "prevent [the Associations] from 'correcting' that message with their own disclosures." JA 76.

The court then concluded that Vermont had demonstrated a reasonable relationship between the Act's labeling requirement and the interests that Vermont hoped to advance—including the safety of food products, the protection of the environment, the accommodation of religious beliefs and practices, and the promotion of informed consumer decision-making. JA 80-85. The court

expressed doubt that the reasonable relationship test actually requires a government to demonstrate that the interests it seeks to promote are "substantial"; but even if it does, the court concluded, Vermont established that its interests were substantial. JA 81-83.

SUMMARY OF ARGUMENT

No party to these proceedings disputes that the government is entitled to adopt broadly applicable laws that require sellers to disclose truthful, noncontroversial information about their products so that consumers can know what they are buying. *See Nat'l Electrical Mfrs. Ass'n v. Sorrell* ["*NEMA*"], 272 F.3d 104, 116 (2d Cir. 2001) (listing numerous federal and state laws that impose disclosure requirements). But the information that Vermont is requiring manufacturers to convey cannot plausibly be deemed routine and noncontroversial. Vermont requires labeling for ingredients in which the genetic material has been changed in one of two specified ways (and has branded such ingredients as not "natural"), but not for ingredients in which the genetic material has been changed by other means—such as by use of traditional hybridization techniques. The district court did not challenge the Associations' evidence that GE ingredient labeling would convey a negative message about their products. It nonetheless adopted review standards that granted the Associations virtually no First

Amendment protections against the compelled speech at issue here.

The district court's cursory review of the Associations' First Amendment claims conflicts sharply with this Court's and the Supreme Court's First Amendment case law. The district court was correct that this Court has mandated that compelled commercial speech be reviewed pursuant to standards articulated by the Supreme Court in *Zauderer*. But correctly understood, *Zauderer* requires review of commercial speech regulation under an "intermediate" standard that—while not as strict as the First Amendment review required for restrictions on truthful political speech—is far stricter than the "reasonable relationship" standard adopted by the district court.

Government regulation of commercial speech is generally subject to review under the intermediate standard articulated in *Central Hudson*.[2] As the D.C. Circuit recently explained, *Zauderer* is best understood as a special application of *Central Hudson* to a particular type of case: cases in which the government has a substantial interest in regulating the commercial speech but in which, instead of

[2] Under *Central Hudson*, the government may regulate commercial speech that is neither inherently misleading nor related to an unlawful activity only upon a showing that: (1) the government has a substantial interest that it seeks to achieve; (2) the regulation directly advances the asserted interest; and (3) the regulation serves that interest in a narrowly tailored manner. *Central Hudson*, 447 U.S. at 566.

banning the commercial speech altogether, it seeks to advance its substantial interest by requiring the commercial speaker to append certain messages to the speech. *Am. Meat Inst. v. U.S. Dep't of Agriculture*, 760 F.3d 18, 26 (D.C. Cir. 2014) (*en banc*). Under those circumstances, the D.C. Circuit explained, *Zauderer* directs that the second and third prongs of the *Central Hudson* test (direct advancement and narrow tailoring) are met so long as "the government acts only through a reasonably crafted mandate to disclose 'purely factual and uncontroversial information' about attributes of the product or service being offered." *Ibid.* (quoting *Zauderer*, 471 U.S. at 651).

Act 120 cannot survive the intermediate First Amendment scrutiny mandated by *Central Hudson* and *Zauderer*. First, Vermont has failed to articulate any substantial interest that it seeks to further by mandating disclosure of GE ingredients. This Court has made clear that a mere desire to appease consumer curiosity is not a sufficiently substantial interest to justify impinging on First Amendment rights by forcing a commercial speaker to convey the government's message. *Int'l Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67, 73-74 (2d Cir. 1996). While conceding that "some of the State's interests border on the appeasement of consumer curiosity," JA 78, the district court concluded that Vermont had sufficiently demonstrated a substantial state interest by alleging an interest in "[t]he

safety of food products, the protection of the environment, and the accommodation of religious beliefs" as well as an interest in "promot[ing] informed consumer decision-making." JA 82-83. But the Supreme Court has made clear that a government speech regulator may not satisfy the "substantial basis" test by alleging interests at such a high level of generality. Rather, the government's burden entails pointing to harms that are "potentially real, not purely hypothetical" and that its speech regulation is designed to alleviate. *Ibanez v. Fla. Dep't of Business and Prof'l Regulation*, 512 U.S. 136, 146 (1994). Given the overwhelming scientific consensus that food ingredients consisting of organisms produced through genetic engineering pose no potential harms that are distinct from harms posed by new organisms produced by other means, the interests cited by Vermont are "purely hypothetical" and do not meet the substantial interest test imposed by First Amendment case law.

Nor does Vermont's mandated disclosure qualify as the "purely factual and uncontroversial information" demanded by *Zauderer*. Information about GE ingredients is controversial, in part because Vermont has taken steps to make it controversial. It has not adopted generally applicable food labeling requirements that incidentally require disclosure of GE ingredients. Rather, it has determined that GE ingredients are, for some unspecified reason, to be deemed not "natural."

It has required processed food manufacturers to disclose the presence of GE ingredients while not simultaneously requiring disclosure of ingredients that have a similar history of being developed through genetic modification. In light of Vermont's actions, manufacturers have good reason to fear that the compelled disclosure of GE ingredients will cause some consumers to conclude that the presence of such ingredients is a legitimate health concern, despite the overwhelming evidence that any health and environmental concerns are trivial. Compelled disclosure under such circumstances is the very definition of "controversial" speech.

Because Vermont cannot meet the special conditions mandated by *Zauderer*, it is subject to the second and third prongs of the *Central Hudson* test—it must demonstrate that its compelled speech requirement directly advances its substantial government interests and does so in a narrowly tailored manner. Vermont can meet neither test, and the district court made no effort to demonstrate that Vermont could. The only goal that the GE labeling requirement could plausibly hope to accomplish is to scare some consumers away from purchasing food containing GE ingredients. But Vermont does not contend that that is its purpose in adopting Act 120; indeed, it explicitly eschews any claim that GE ingredients pose a health or safety danger.

Nor can Act 120 qualify as narrowly tailored in light of the numerous alternative means by which Vermont can achieve its goal of promoting informed consumer decision-making. It can, for example, encourage manufacturers whose processed foods do not contain GE ingredients to voluntarily include that information on their food labels. Alternatively, Vermont could take upon itself responsibility for supplying information about GE ingredients directly to consumers. Because each of those alternatives would accomplish Vermont's purposes without interfering with First Amendment speech rights, Act 120 is not narrowly tailored.

ARGUMENT

I. *Zauderer* Prescribes an Intermediate Level of Review for Commercial Speech Regulation, a First Amendment Review Far More Stringent Than the One Adopted by the District Court

The district court recognized that Act 120 imposes restrictions on the Associations' First Amendment rights, and it purported to apply the First Amendment standard of review mandated by the Supreme Court in *Zauderer*. Yet, it ended up applying an extremely relaxed standard of review that was more akin to a rational basis test than to anything normally applied in First Amendment cases. This brief begins with an extensive analysis of *Zauderer* and explains how the district court went astray.

The district court ignored the context within which *Zauderer* arose. It was a largely successful First Amendment challenge to Ohio's efforts to impose significant restrictions on truthful attorney advertising. Applying the three-part *Central Hudson* test, the Supreme Court struck down prohibitions on soliciting legal business through advertisements containing advice and information regarding specific legal problems, *Zauderer*, 471 U.S. at 639-47, and restrictions on the use of illustrations in attorney advertising. *Id*. at 647-49. The district court relied on *Zauderer*'s final section, which upheld Ohio's decision to discipline an attorney because he ran an advertisement that offered services on a contingency basis without simultaneously disclosing that clients could be liable for litigation costs should they lose their case. *Id.* at 650-52. The Supreme Court concluded that by imposing discipline on the attorney, Ohio was directly advancing its "substantial interest" in preventing consumer misunderstandings; it noted that in the absence of a disclaimer regarding court costs, consumers might erroneously conclude that retaining an attorney to file a lawsuit on a contingency-fee basis could never cost the consumer any money. *Ibid.*

Zauderer recognized that requiring an attorney to include a disclaimer in his advertising is a form of compelled speech that is subject to First Amendment

protection without regard to whether the speech is commercial or noncommercial.[3] But in the context of commercial speech, the Court concluded that requiring a company to include in its advertisement a government-mandated disclaimer designed to prevent consumer deception is preferable to prohibiting the advertisement altogether:

> Appellant overlooks material differences between disclosure requirements and outright prohibitions on speech. In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present.

Id. at 650. The district court misinterpreted *Zauderer* as stating that compelled commercial speech is subject to "less exacting" First Amendment scrutiny than restrictions on commercial speech. JA 80. *Zauderer* held no such thing; its comparison was between requiring that disclaimers be added to commercial speech and an outright ban on the speech. *Id.* at 651 ("Disclosure requirements trench much more narrowly on an advertiser' interests than do flat prohibitions on speech."). While recognizing that a disclosure requirement—even one designed to

[3] Indeed, the Court noted that government orders directing one to speak against one's will are often subject to more exacting First Amendment review than speech restrictions. *Id.* at 650 ("involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.") (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943)).

further the government's substantial interest in preventing consumer deception—"implicate the advertiser's First Amendment rights," the Court said that it would not closely scrutinize the precise language used in the mandated disclosure, so long as the compelled speech consists of "purely factual and uncontroversial information" and is "reasonably related to the State's interest in preventing deception of consumers." *Ibid.*

The Supreme Court has repeatedly held that if commercial speech is neither inherently misleading nor related to an unlawful activity, the government may regulate the speech only upon a showing that the regulation directly advances a substantial government interest in a narrowly tailored manner. *Central Hudson*, 447 U.S. at 566. It has never suggested that the *Central Hudson* standard is inapplicable government regulation that takes the form of compelled speech. Rather, the test articulated in *Zauderer* can best be viewed—as the D.C. Circuit recently recognized—as a special application of *Central Hudson* to a particular type of commercial speech regulation: cases in which the government has a substantial interest in regulating the commercial speech but in which, instead of banning the commercial speech altogether, it seeks to advance its substantial interest by requiring the commercial speaker to append certain messages to the speech. *Am. Meat Inst.*, 760 F.3d at 26. Rather than requiring a detailed

examination of the second and third prongs of the *Central Hudson* test (direct advancement and narrow tailoring), *Zauderer* focuses on whether the government's mandated message is limited to "purely factual and uncontroversial information" about the product or service being offered:

> To the extent that the government's interest is in assuring that consumers receive particular information (as it plainly is when mandating disclosures that prevent deception), the means-end fit is self-evidently satisfied when the government acts only through a reasonably crafted mandate to disclose "purely factual and uncontroversial information" about attributes of the product or service being offered. In other words, this particular method of achieving a government interest will almost always demonstrate a reasonable means-ends relationship, absent a showing that the disclosure is "unduly burdensome" in a way that "chill[s] protected speech. . . . Thus, to the extent that the preconditions to application of *Zauderer* warrant inferences that the mandate will directly advance the government's interest and show a reasonable fit between means and ends, one could think of *Zauderer* largely as an application of *Central Hudson*, where several of *Central Hudson*'s elements have already been established.

Am. Meat Inst., 760 F.3d at 26-27 (quoting *Zauderer*, 471 U.S. at 651).

This Court's approach to *Zauderer* is largely similar. In reviewing challenges to compelled commercial speech, it has applied *Zauderer* and rejected the challenge in those instances in which the government can demonstrate a substantial interest in undertaking the regulation, and in which the compelled disclosure consists of purely factual and uncontroversial information. *N.Y. State Restaurant Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 131 (2d Cir. 2009) (law

requiring restaurants to disclose calorie content information upheld where requirement was reasonably related to city's substantial interest in reducing obesity and information was both factual and uncontroversial); *NEMA*, 272 F.3d at 113-115 (law requiring the labels of mercury-containing light bulbs to disclose mercury content and to urge care in their disposal upheld where requirement was reasonably related to Vermont's substantial interest in preventing mercury pollution and disclosure language was both factual and uncontroversial.) But where a government has been unable to articulate a substantial interest, *Amestoy*, 92 F.3d at 73-74, or the compelled speech is controversial, *Safelife Group, Inc. v. Jepson*, 764 F.3d 258 (2d Cir. 2014),[4] the Court has not hesitated to strike down compelled government speech on First Amendment grounds.

II. Vermont Has Failed to Identify Any "Substantial Interest" That It Seeks to Further by Mandating Disclosure of GE Ingredients

This Court has made clear that a mere desire to appease consumer curiosity is not a sufficiently substantial interest to justify impinging on First Amendment

[4] *Jepson* involved a challenge to a Connecticut law providing that an insurance claims management company could not solicit car repair work for itself unless it gave the solicited consumer the name of at least one competing company. The Court concluded that *Zauderer* was inapplicable (and ultimately struck down the compelled disclosure on First Amendment grounds) because the information it was required to disclose was controversial—it assisted a competitor. 764 F.3d at 263-64.

rights by forcing a commercial speaker to convey the government's message. *Amestoy*, 92 F.3d at 73-74. Vermont has striven mightily to argue that it has some interest other than appeasement of consumer curiosity for mandating disclosure of GE ingredients. Those efforts are all unavailing. Vermont is unwilling to take a stand (against the great weight of scientific authority) that including GE ingredients in food does, in fact, raises plausible health and environmental issues; it merely notes that some people have raised those concerns. The district court conceded that "some of the State's interests border on the appeasement of consumer curiosity," JA 78. But the mere articulation of other sorts of interests is not sufficient to pass muster under *Central Hudson* and *Zauderer*; Vermont bears the burden of demonstrating a *substantial* interest in mandatory GE food labeling. It has not come close to meeting that burden.

The government's burden "is not satisfied by mere speculation or conjecture; rather, a government body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real. . . " *Rubin v. Coors Brewing Co*, 514 U.S. 476, 487 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770 (1993)). The district court responded that adoption of Act 120 was itself an indication that Vermont has a "substantial interest in the need to disclose information relevant to potential health consequences from human consumption of

GE food." JA 82. But an "interest in the need to disclose information relevant to *potential* health consequences" is not sufficient to meet the government's burden to demonstrate that "the harms it recites are *real*." The district court compounded its error by explicitly deferring to Act 120's legislative findings, JA 82, when the Supreme Court has made very clear that the burden rests on government speech regulators to demonstrate that they satisfy the *Central Hudson*/*Zauderer* standards.

The district court sought to downplay the importance of *Amestoy*, asserting that "the Second Circuit has repeatedly held that the application of *Central Hudson*'s intermediate scrutiny in that case was solely attributable to the State's concessions," including Vermont's concession that the disclosure requirement was enacted for the sole purpose of satisfying consumer curiosity." JA 77. That is not an accurate description of this Court's case law. *Amestoy* made clear that compelled speech requirements violate the First Amendment if, *inter alia*, they are not supported by a substantial government interest, and the Second Circuit has never backed away from that holding. *See, e.g., NEMA*, 272 F.3d at 115 n.6. *Amestoy* held that the government has not demonstrated the requisite substantial interest when it concedes that its only interest in enacting a compelled speech requirement is a desire to satisfy consumer curiosity. *Amestoy*, 92 F.3d at 73. The district court erred when it read into that holding the converse rule: that it must

defer to Vermont's claim of a substantial interest because Vermont in this case has learned its lessen and has *not* conceded that its sole motivation was a desire to satisfy consumer curiosity.

The district court concluded that Vermont had sufficiently demonstrated a substantial state interest by alleging an interest in "[t]he safety of food products, the protection of the environment, and the accommodation of religious beliefs" as well as an interest in "promot[ing] informed consumer decision-making." JA 82-83. But the Supreme Court has made clear that a government speech regulator may not satisfy the "substantial basis" test by alleging interests at such a high level of generality. Rather, the government's burden entails pointing to harms that are "potentially real, not purely hypothetical" and that its speech regulation is designed to alleviate. *Ibanez*, 512 U.S. at 146.

Ibanez involved Florida disciplinary proceedings initiated against an attorney/CPA who used the title "Certified Financial Planner" (CFA) in her promotional materials. Florida contended that the attorney should have included disclaimers along with her use of the CFA title, to prevent consumers from being misled into believing that the title was bestowed by some state-sanctioned body. The Supreme Court held that a State does not establish its substantial interest in compelling speech by reciting an interest (in *Ibanez*, an interest in preventing

consumers from being misled) at a high level of generality; the Court held that the enforcement action violated the attorney's First Amendment rights in the light of "the failure of the Board to point to any harm that is potentially real, not merely hypothetical" caused by the attorney's failure to include the mandated disclaimer. *Ibid*. The Court added:

> If the "protections afforded commercial speech are to retain their force" *Zauderer*, 471 U.S. at 648-649, we cannot allow rote invocation of the words "potentially misleading" to supplant the Board's burden to demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree.

Ibid. (quoting *Edenfield*, 507 U.S. at 771). Vermont's rote invocation of an interest in "[t]he safety of food products, the protection of the environment, and the accommodation of religious beliefs," JA 82, is similarly insufficient to satisfy the substantial interest requirement.

III. Vermont's Mandated Disclosure Does Not Qualify as the "Purely Factual and Uncontroversial Information" Demanded by *Zauderer*

The district court held that Act 120's GE disclosure requirement qualifies as "purely factual and uncontroversial information" within the meaning of *Zauderer* and thus that it is not subject to review under *Central Hudson*'s direct advancement and narrow tailoring prongs. That holding is based on a misunderstanding of what constitutes "uncontroversial" information.

The district court is correct that information is not rendered "controversial" merely because it forces the speaker to say something that he would prefer not to say. For example, if a food is high in calories and low in nutritional value in comparison to other foods, the manufacturer undoubtedly would prefer not to have to list that information on its label. But this Court has held that truthful information about calorie content is not "controversial" as that term was used by *Zauderer*. *N.Y. State Restaurant Assoc.*, 556 F.3d at 134.

The district court erred, however, in concluding that compelled commercial information is not "controversial" so long as it is not "opinion-based." JA 76-77 ("Because Act 120's GE disclosure requirement mandates the disclosure of only factual information—whether a food product contains GE ingredients—in conjunction with purely commercial transactions, it does not require the disclosure of 'controversial' information."). That conclusion not only effectively writes "uncontroversial" out of the "purely factual and uncontroversial information" standard, it is also directly contrary to *Jepson*, which held that information was controversial, and thus outside *Zauderer*'s ambit, even though it was completely truthful. The information mandated in *Jepson* was controversial because it required the speaker to provide information about its competitors, thereby chilling speech by providing the company with an incentive not to speak at all rather than

be forced to assist its competitors. *Jepson*, 764 F.3d at 264.

The Associations have provided evidence that they have good reason to fear that the compelled disclosure of GE ingredients will cause some consumers to conclude that the presence of such ingredients is a legitimate health concern, despite the overwhelming evidence that any health and environmental concerns are trivial. Thus, unlike food manufacturers who wish to avoid truthful disclosures (*e.g.,* high caloric content) because the disclosures could well cause consumers to *correctly* perceive that they should keep their consumption of that food to a minimum if they are to remain healthy, the Association's complaint is that they will suffer reduced sales based on *inaccurate* perceptions that consumers are likely to draw from the GE labeling requirement.

The district court did not dispute the Association's evidence of likely harm. Its only response was to suggest that manufacturers could adopt their own counter-message:

> If GE manufacturers and retailers believe a GE disclosure conveys a negative message about their products, Act 120 does not prevent them from correcting that message with their own disclosures, which may include a statement that the FDA does not consider GE food to be materially different from non-GE food. The Final Rule confirms that such "corrective" messages are permissible. *See* Final Rule § 121.02(c)(ii).

JA 76. But if, as the district court's citation to FDA's position would seem to

indicate, the district court recognized the unfairness of the negative perceptions that many consumers are likely to draw from GE labeling, the only appropriate description of the speech the Associations are being required to utter is "controversial." Other courts have concluded that speech compelled under similar circumstances qualifies as "controversial." *See, e.g., Nat'l Assoc. of Mfrs. v. SEC*, 748 F.3d 359, 371 (D.C. Cir. 2014), *overruled in part on other grounds*, 760 F.3d 18 (D.C. Cir. 2014), *panel reh. granted* (Nov. 18, 2014) (requiring manufacturers to report that their products were not "DRC conflict free" constituted "controversial" speech within the meaning of *Zauderer*, even though the manufacturers were entitled to provide a counter-message to explain why their products should not be deemed ethically tainted).

More importantly, Vermont must share in responsibility for the controversial nature of information about GE ingredients; Vermont own actions have contributed to the likelihood that some consumers are likely to react negatively to information that a product contains GE ingredients. Act 120 is not a generally applicable food labeling requirement that incidentally requires disclosure of GE ingredients among a host of other ingredient disclosures. Rather, it has required processed food manufacturers to disclose the presence of GE ingredients while not simultaneously requiring disclosure of ingredients that have a similar history of being developed

through genetic modification. *See* Final Rule § 121.01(6) (Vermont regulations provide that "[t]he term 'genetic engineering' does not encompass a change of genetic material through the application of traditional breeding techniques, conjugation, fermentation, traditional hybridization, in vitro fertilization, or tissue culture.").

Moreover, it has vilified GE ingredients by determining, for unspecified reasons, that they are not "natural" ingredients. The Act prohibits manufacturers of food containing GE ingredients from using labeling, advertising, or signage indicating that the food is "'natural,' 'naturally made,' 'naturally grown,' 'all natural,' or any words of similar import that would have a tendency to mislead a consumer." 9 V.S.A. § 3043(c). The Act does not define the term "natural," nor does it bar the use of the term "natural" to describe any food product that does not contain GE ingredients. Vermont is undoubtedly aware that the term "natural," although it lacks any commonly accepted definition, has highly positive connotations for most consumers. Thus, by singling out GE ingredients as the one category of food that is barred by law from being labeled "natural," Vermont has sent a clear signal to its consumers that they should be wary of food that contains GE ingredients. Vermont should not be permitted to deny the controversial nature of compelled GE labeling when its own actions have contributed to the dilemma

faced by the Association: the likelihood that label disclosures are likely to cause some consumers to conclude, without foundation, that the presence of GE ingredients is a legitimate health concern.

IV. Vermont Has Not Demonstrated That Its Compelled Speech Directly Advances Its Substantial Government Interests and Does So in a Narrowly Tailored Manner

Because Vermont cannot meet the special conditions mandated by *Zauderer*, it is subject to the second and third prongs of the *Central Hudson* test—it must demonstrate that its compelled speech requirement directly advances its substantial government interests and does so in a narrowly tailored manner. Vermont can meet neither test, and the district court made no effort to demonstrate that Vermont could.[5]

The Associations have explained in detail why the numerous exceptions built into Act 120 make it impossible for the GE labeling requirement to "directly advance" its stated goals. Appellants Br. 42-44. WLF will not repeat that explanation here. Suffice to say that Vermont has introduced no evidence in these proceedings that Act 120 could do anything to promote public health or the

[5] As outlined above, Vermont cannot meet the first prong of the *Central Hudson* test: it cannot demonstrate that it has a substantial interest in mandating the disclosure of GM ingredients. But, of course, *Central Hudson* and *Zauderer* require it to meet the substantial interest without regarding to whether the speech it is compelling qualifies as uncontroversial.

environment.

Nor can Act 120 qualify as narrowly tailored in light of the numerous alternative means by which Vermont can achieve its goal of promoting informed consumer decision-making. It can, for example, encourage manufacturers whose processed foods do not contain GE ingredients to voluntarily include that information on their food labels. Indeed, information about foods that do and do not contain GE ingredients is already widely available to those who take an interest in such matters. *See Amestoy*, 92 F.3d at 74 ("[T]hose consumers interested in such information [regarding whether milk comes from cows that have been treated with growth hormone] should exercise the power of their purses by buying products from manufacturers who voluntarily reveal it."). If consumers have a genuine preference for food that does not contain GE ingredients, one can expect manufacturers to respond by widely advertising the availability of their non-GE products.

Alternatively, Vermont could take upon itself responsibility for supplying information about GE ingredients directly to consumers. The government speech doctrine ensures that Vermont cannot be prevented from taking sides in the controversial GE-ingredient debate. *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015). Because each of those alternatives would

accomplish Vermont's purposes without interfering with First Amendment speech rights, Act 120 is not narrowly tailored.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court reverse the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect X5), the word count of the brief is 5,807 words, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of July, 2015, I electronically filed the brief of *amicus curiae* Washington Legal Foundation with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
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