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Testimony of Vermont Assistant Attorney General Todd Daloz Before the United States House of Representatives Committee on Energy and Commerce Subcommittee on Health June 18, 2015

Summary

Chairman Pitts, Ranking Member Green, and members of the Subcommittee, thank you for the opportunity to testify today. As you are no doubt aware, the State of Vermont has been deeply involved in the labeling of food produced with genetic engineering, passing a law requiring the labeling of such products a little over a year ago. Vermont's Attorney General, Bill Sorrell, is tasked with enforcing this law and has adopted the regulations that will implement the labeling requirement. I am here today to testify on behalf of Attorney General Sorrell about your draft legislation ("Discussion Draft") and to discuss Vermont's experience with labeling food produced with genetic engineering.

One of the primary roles of states in our federal system is to act, to paraphrase Justice Brandeis, as laboratories of democracy to develop "novel social and economic experiments without risk to the rest of the country."[1] That is what Vermont has done in requiring the labeling of food produced with genetic engineering. Our primary concern with the draft legislation

[1] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

before you today is that it would prematurely end all state efforts to require labeling – before Vermont's labeling law even takes effect – without offering a substantive federal requirement in its place. We urge the Committee not to support a bill that preempts all state labeling requirements for genetically engineered foods. My testimony is summarized below:

- Federal preemption of state labeling laws is premature. The amendment to the Federal Food Drug and Cosmetic Act (21 U.S.C. 343-1(a)) proposed in section 103 and to the Agricultural Marketing Act (7 U.S.C. 1621 *et seq.*) proposed in section 203 of the Discussion Draft would prevent Vermonters – and citizens in other states that may pass a similar labeling law – from easily accessing factual information about their food by preempting such legislation in the fifty states. And it would do so without providing any meaningful substitute on the federal level.

- There is a robust history of state leadership and innovation on regulatory issues that has led directly to important national standards. From topics as diverse as child labor laws and credit reporting, states have been on the vanguard, developing and testing policies that, given time to mature, have ultimately been adopted on a national level.

- The Discussion Draft has a number of positive elements reflecting the important role the federal government has to play in the regulation of food labeling law. Developing an appropriate, recognized standard for labeling food as produced *without* genetic engineering, and a robust certification protocol, would be an important step.

- The heart of Vermont's labeling law – Act 120 – is providing consumers with accurate factual information about their food at the point of purchase. The law was passed after significant legislative fact finding, taken over the course of two years.

- Vermonters, reflecting consumers across the United States, overwhelmingly support the factual disclosure that food has been produced using genetic engineering. As with other consumer protection measures, Vermont's law responds to this wide-spread public support for factual labeling.

- In the face of a constitutional challenge from groups representing food manufacturers, the federal judiciary has upheld Vermont's law through the first stages of litigation. A federal district judge recently denied the manufacturers' groups' request for a preliminary injunction and dismissed a number of their constitutional claims, including that the law was preempted by existing federal statutes. Importantly, the Court indicated that Vermont's law would likely survive constitutional scrutiny under the First Amendment.

Vermont's Genetically Engineered Food Labeling Law

On May 8, 2014, after hearing testimony from more than one hundred individuals and reviewing literature on all sides of the issue over the course of two years, the Vermont Legislature enacted Act 120[2] to address concerns related to genetically engineered ("GE") foods. Act 120 came about in response to tremendous constituent concern over the lack of available information about the use of GE foods in grocery products in the absence of a federal standard for such labeling, and in the face of a threatened – now actual – constitutional challenge. Put simply, this first-in-the-nation[3] labeling law requires manufacturers and retailers to label GE foods offered for retail sale in Vermont.[4]

The Purpose of Act 120

At its core, Act 120 endeavors to provide consumers with accurate factual information on which they can base their purchasing decisions. In enacting this law, the Vermont Legislature expressly recognized a variety of principal reasons why consumers would want this information, and codified them at Vt. Stat. Ann. tit. 9, sec. 3041(1)-(4). As the Legislature found, consumers want to "make informed decisions regarding the potential health effects of the food they purchase and consume," and, if they choose, to "avoid potential health risks of food produced from genetic engineering."[5]

Likewise, the Legislature recognized that consumers wish to "[i]nform the[ir] purchasing decisions . . . [based on] concern[s] about the potential environmental effects of food from

[2] Vermont's laws are referred to colloquially by act number (e.g. Act 250) based on the order of passage during a legislative biennium, rather than by a formal title (e.g. Statewide Land Use and Development Act).

[3] Both Maine, Me. Rev. Stat. tit. 22, Ch. 565, sec. 2591-2596 (2013), and Connecticut, Conn. Pub. Act No. 13-183 (2013), have also passed similar labeling laws; however, these laws will not go into effect until certain external conditions are met.

[4] It bears mention that the current Discussion Draft of H.R. 1599 would not appear to affect the "natural prohibition" portion of Act 120, Vt. Stat. Ann. tit. 9, sec. 3043(c). Accordingly, my testimony does not address this portion of Vermont's law.

[5] 9 V.S.A. sec. 3041(1).

genetic engineering."[6] The Legislature found that the use of GE crops contributes to genetic homogeneity, loss of biodiversity, and increased vulnerability of crops to pests, diseases, and variable climate conditions.[7] It also found that pollen drift from GE crops threatens to contaminate organic crops and impairs the marketability of those crops.[8] In addition, the Legislature found that GE crops can adversely affect native plants through the transfer of unnatural DNA, thereby displacing natural wildlife.[9] The Legislature concluded that a labeling requirement will allow Vermonters who are concerned about the environmental impact of GE foods to adjust their purchasing decisions accordingly.[10] Finally, the Legislature understood that consumers desire "data from which they may make informed decisions for religious reasons."[11]

In articulating these purposes, the Vermont Legislature relied on a wealth of testimony. Scientists, traditional and organic farmers, manufacturers, consumers, attorneys, regulators, and lobbyists alike provided hours of testimony on *both* sides of the issues: the benefits and risks of GE foods and whether consumers should (or should not) be informed whether a product was made with GE technology or derived from GE crops.[12]

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[6] *Id*. sec. 3041(2).
[7] 2014 Vt. Acts & Resolves No. 120, sec. 1(4)(C).
[8] *Id.* sec. 1(4)(D).
[9] *Id.* sec. 1(4)(E).
[10] Vt. Stat. Ann. tit. 9, sec. 3041(2).
[11] *Id*. sec. 3041(4).
[12] By way of example, in support of labeling the Legislature heard from Dave Rogers, Policy Advisory with Northeast Organic Farming Association, who spoke to the need for rigorous testing and the unintended consequences of GE technology, *see* Tr. of Hearings Before the S. Comm. on Agric. (Jan. 10, 2014); from Gary Hirshberg, Founder and former CEO of Stonyfield Farm, who highlighted recent studies showing harms associated with increased pesticide and herbicide use, and who explained that the national "Just Label It" campaign is not "anti-GE" but has "concerns about the absence of independent, longer term, third party safety and health testing," *see* Tr. of Hearings Before the S. Comm. on Agric. (Jan. 15, 2014); and from Dr. Martin Donahue, of Oregon Physicians for Social Responsibility, who testified about increased pesticide use and associated health concerns, and who directed the Legislature to various sources for scientific studies, *see* Tr. of Hearings Before the S. Comm. on Agric. (Jan. 16, 2014). On the other side, for example, Robert Merker from the FDA testified that the FDA's testing and regulatory procedures are sufficient to ensure the safety of GE foods, s*ee generally* Tr. of Hearings Before the H. Comm. on Agric. (Feb. 19, 2013); Val Giddings, Senior Fellow at the Information Technology and Innovation Foundation, testified that the current science and regulatory regime raise no safety concerns, *see* Tr. of Hearings Before the H. Comm. on Agric. (Feb. 15, 2013); and Karin Moore, Vice President and General Counsel, GMA, testified that the

Significantly, the Legislature also heard evidence showing consumer confusion about the prominence of GE foods, including two national surveys showing that Americans are generally unaware that many of the products sold in supermarkets today have been genetically engineered. *See* Allison Kopicki, *Strong Support for Labeling Modified Foods*, New York Times (July 27, 2013) (fewer than half those polled knew that many foods sold at supermarkets had been genetically engineered); Thomson Reuters, *National Survey of Healthcare Consumers: Genetically Engineered Food* (Oct. 2010) (only 69.2% knew that food available in stores had been genetically engineered, and only 51.3% of those earning less than $25,000 per year had such knowledge). Motivated by the expressed need for this information, the Legislature developed the provisions of Act 120.

The Labeling Requirements of Act 120

The mechanics of Act 120 are relatively straight forward: manufacturers and retailers must label GE foods offered for retail sale in Vermont with the simple statement that the food is "Produced with Genetic Engineering."[13] As a general matter, packaged food produced entirely or in part from genetic engineering must be labeled on the package by manufacturers as "produced with genetic engineering."[14] In addition, such foods may be labeled as "partially produced with genetic engineering," or "may be produced with genetic engineering."[15] In the case of unpackaged food, Act 120 requires retailers to post a "produced with genetic engineering" label on the retail store shelf or bin where the product is displayed for sale.[16]

FDA and other scientific bodies have found no difference in the safety of foods produced with GE technology, *see* Tr. of Hearings Before the H. Comm. on Judiciary (May 6, 2013).

[13] Vt. Stat. Ann. tit. 9, sec. 3043.

[14] *Id*. sec. 3043(b)(1), (3).

[15] *Id*. sec. 3043(b)(3).

[16] *Id*. sec. 3043(b)(2).

Act 120 exempts certain categories of food from its labeling requirements, including food "derived entirely from an animal which has not itself been produced with genetic engineering"; processing aids and enzymes produced with genetic engineering; alcoholic beverages; processed foods not packaged for retail and intended for immediate consumption; food served in restaurants; food containing only minimal amounts of GE material; and certain foods not "knowingly or intentionally" produced with genetic engineering.[17]

Importantly, Act 120 does not require manufacturers to identify which ingredients were genetically engineered.[18] Nor does it prohibit manufacturers from including additional information or disclaimers on their packaging about the difference (or lack thereof) between GE crops and their traditional counterparts. In fact, in enacting the law, the Legislature saw fit to provide significant flexibility for the Vermont Attorney General to develop regulations implementing Act 120.[19]

Regulations Implementing Act 120

As provided in Act 120, the Vermont Attorney General formally adopted rules regulating the labeling of food produced with genetic engineering on April 17, 2015. *See* Vermont Consumer Protection Rule CP 121 (eff. July 1, 2016). The Rule, CP 121, further clarifies Act 120 by giving detailed definitions of key terms, specific requirements for the size and placement of the required disclosures, thorough descriptions of the various exemptions to the labeling requirements, and details on the enforcement of the law. In so doing, CP 121 draws on areas of existing federal and state law, including FDA and USDA regulations. At its heart, CP 121 ensures Vermont consumers have accurate information available to them at the point they decide

[17] *Id.* sec. 3044 (listing exemptions).
[18] *Id.* sec. 3043(d).
[19] 2014 Vt. Acts & Resolves No. 120, sec. 3.

to purchase a food item, while at the same time providing industry some flexibility in complying with the labeling law.

Prior to adopting the Rule, the Attorney General's Office provided significant opportunities for input from the public, generally, and from industry groups, in particular. Beyond general outreach, our office specifically contacted industry groups, including the Grocery Manufacturers Association, the Snack Food Association, the Vermont Retail & Grocers Association, the Vermont Specialty Food Association, and various organizations representing regional grocery store chains and national commodity producers. Through an on-line questionnaire, submitted questions and comments, multiple face-to-face meetings, and a series of informal public conversations, we heard from numerous Vermonters and people from all across the country and around the world about the importance of this law. Out of this robust process of public input – including the formal notice and comment rulemaking procedures required under the Vermont Administrative Procedures Act, and further discussions with industry groups – CP 121 was formed.

The Rule focuses on the requirements and process of labeling in a framework that provides industry with flexibility in compliance. In detailing the placement and prominence of the "Produced with Genetic Engineering" disclosure on packaged, processed foods, CP 121 requires that the disclosure be "easily found by consumers when viewing the outside of the [food's] package" and that the disclosure is "in any color that contrasts with the background of the package so as to be easily read by consumers."[20] A manufacturer is "presumed to satisfy" the "easily found" requirement of the Rule if the disclosure is "located on the same panel as the Nutrition Facts Label or Ingredient List," but a manufacturer is not required to place the

[20] 06-031 Vt. Code R. sec. CP 121.02(b)(iii).

disclosure in any given location.[21] Likewise, a manufacturer meets the "easily read" requirement if the disclosure is either "in a font size no smaller than the size of the words "Serving Size" on the Nutrition Facts label" or is "in a font size no smaller than the Ingredient list . . . and printed in bold type-face."[22] So long as a consumer can easily find and read the disclosure, the purpose of Act 120 is met. These location and font-size standards give packaged, processed food manufacturers flexibility in providing the required disclosure in a manner that works with the constraints of their product's packaging.

In a similar vein, CP 121 provides a variety of means for manufacturers to document that their products fall outside the scope of labeling under Act 120. Manufacturers can rely on the sworn statement of the person who sold them the product, certifying that the food "(1) was made or grown from food or seed that has not been knowingly or intentionally produced with genetic engineering and (2) has been segregated from and has not been knowingly or intentionally commingled with food or seed that may have been produced with genetic engineering."[23] Alternatively, food certified as "organic" by an organization "accredited to make such certifications under the USDA National Organic Program" is also free of the labeling requirements.[24] Finally, the Attorney General is in the process of authorizing third-party organizations to verify that a manufacturer's product has not been produced with genetic engineering. Each of these various avenues provide differing benefits for manufacturers interested in complying with Act 120.

Finally, CP 121 expressly permits, subject to other applicable legal requirements, manufacturers to include other disclosures about the GE contents of their product on the

[21] *Id.*
[22] *Id.*
[23] *Id.* sec. CP 121.03(b)(i).
[24] *Id.* sec. CP 121.03(f)(i).

product's label, enabling them to speak further on the subject of GE food, generally.[25] The Rule specifically allows manufacturers to state that "the United States Food and Drug Administration does not consider food produced with genetic engineering to be materially different from other foods."[26] There is nothing in the Rule, or Act 120, that limits the breadth and depth of these additional, optional disclosures, or their location and prominence on the product's package. Indeed, if a manufacturer so desired, it could dwarf Act 120's required disclosure with the manufacturer's views on the safety and importance of GE food to the national and global food system.

In sum, Act 120, together with CP 121, responds to a wide-spread constituent desire – held by a majority of Vermonters and other consumers around the country – for accurate factual information about the contents of food. But despite the broad demand for this purely factual disclosure, Act 120's labeling requirements were challenged almost immediately upon passage.

Overview of the Litigation Challenging Act 120

In June 2014, one month after Act 120 was enacted, a group of industry associations representing food manufacturers filed suit challenging the Act on various constitutional grounds. After Vermont moved to dismiss the Complaint, the industry associations filed for a preliminary injunction to prevent the State from enforcing the law, claiming they were likely to win their constitutional challenge and would be irreparably harmed if the law were to take effect.

On April 27, 2015, the District Court issued its decision denying the group's preliminary injunction motion in its entirety, finding they were not likely to prevail on their claims or could not establish irreparable harm. The Court also dismissed a significant portion of the group's

[25] *Id*. sec. CP 121.02(c)(ii).
[26] *Id*.

Complaint, disallowing claims that Act 120 is preempted by federal law and violates the Commerce Clause of the United States Constitution.[27]

Significantly, as to the group's First Amendment claims, the Court sided with Vermont on several important questions. In particular, the Court rejected the group's argument that Act 120 must face strict scrutiny. Instead, the Court adopted the Attorney General's position that the lowest level of scrutiny applies to the disclosure law, whereby the State need only show that the GE label is reasonably related to the State's interests. The Court found that the "safety of food products, the protection of the environment, and the accommodation of religious beliefs and practices are all quintessential governmental interests," as is the "desire to promote informed consumer decision-making."[28]

Further, the Court agreed that the disclosure requirement was not a warning label, but rather mandates the disclosure of purely factual and noncontroversial information, precisely as the Legislature intended. Thus, the Court indicated Act 120 would survive the "rational basis" test. Indeed, the Court initially sustained the fundamental "heart and soul" of Act 120 – the mandatory labeling of foods made with genetic engineering.[29]

On May 6, 2015, the group of industry associations filed an appeal from the Court's denial of their preliminary injunction motion with the U.S. Court of Appeals for the Second Circuit.

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[27] The Court held off on dismissing the group's preemption claim concerning the Federal Meat Inspection Act ("FMIA") and the Poultry Products Inspection Act ("PPIA") and Commerce Clause claim to the extent it challenged Act 120's application to signage and advertising outside of Vermont. However, CP 121 makes clear that the law reaches only advertising at or in retail premises for food offered for retail sale in Vermont and does not apply to foods subject to the FMIA and PPIA. Accordingly, these claims are effectively moot.

[28] *Grocery Mfrs. Ass'n v. Sorrell*, No. 5:14-cv-117, 2015 WL 1931142, at *37 (D. Vt. Apr. 27, 2015).

[29] The Court declined to dismiss the group's First Amendment and vagueness challenges to the law's "natural restriction," concluding, for the time being, that the group had sufficiently stated their claim.

Provisions of the Discussion Draft of H.R. 1599

The Discussion Draft presents a vision for the labeling of foods produced with GE that recognizes consumers' strong desire to have factual information about food available to them at the time of purchase; however, rather than ensuring the accuracy of this information – as other federal food labeling regulations do, and as Act 120 will do – the current draft fails to mandate the labeling of GE food, and immediately cuts short any state initiatives in labeling GE Food while presenting only a vague future regulatory structure in its place.

The Discussion Draft suggests an encouraging concept: increased FDA and USDA involvement in the review of GE foods. Indeed, the notion of federal labeling to inform consumers of the presence of GE materials in their food[30] is one the Vermont Attorney General strongly supports. That said, the Discussion Draft falls short in two particulars. First, any such labeling is discretionary, not mandatory, which fails to provide a reliable standard for consumers.[31] Second, any elective labeling is permitted only when the Secretary of Health and Human Services determines that the GE variety of a food is "materially different" from its parent variety; and the definition provided for this operative term is overly strict[32] and fails to recognize the information – apart from nutritional value or presence of allergens – that consumers desire when making a decision to purchase and consume food.

Most importantly, the Discussion Draft expressly preempts state labeling laws that require disclosure if a food was produced with GE.[33] If enacted as drafted, H.R. 1599 would have two central, and in my view, negative effects. The first would be to immediately – upon

[30] *See* Discussion Draft, at 3:13-15 (H.R. 1599, 114th Cong. sec. 101 (June 10, 2015))
[31] *Id*.
[32] *Id*. at 3:20-24, 4:1-7.
[33] *See id*. at 5:5-7 (H.R. 1599, sec. 103); *id*. at 21 (H.R. 1599, sec. 203).

enactment[34] – cancel existing legislation like Vermont's Act 120. The second would be to provide only a incomplete federal structure for the labeling of GE foods, and one that lacks any meaningful statutory standards and places much, if not all, of the responsibility for creating the structure in the hands of a federal agency.

In principle, delegation to an agency is a logical and appropriate legislative tool – indeed, the Vermont Legislature delegated the crafting of Act 120's regulations to the Attorney General. In the Discussion Draft, however, vital components to the National Standard for Labeling Genetically Engineered Food are absent (e.g. the identity or criteria for selecting "certifying agents," which are central in the development of a Genetically Engineered Food Plan[35]), making the proposal a bare skeleton. This lack of guidance, coupled with the immediate preemption of existing state and voluntary[36] labeling programs, highlight the central drawback of the proposed bill: rather than advancing a uniform national standard for mandatory GE food labeling, H.R. 1599 halts any efforts to label such foods and delays implementation of the proposed voluntary system until administrative regulations pass through the gauntlet of rulemaking. This would create a regulatory vacuum and would further delay consumers' access to accurate information about the food they are consuming.

In effect, passage of H.R. 1599, as presented in the Discussion Draft, would impose preemption without concurrent federal action.

[34] *Id*. at 21:3-4.

[35] *Id*. at 18:8-14 (H.R. 1599, sec. 201).

[36] Section 102 of H.R. 1599 (Discussion Draft, at 4:12-19), would have the effect of preventing even some private efforts to label foods as produced with or without genetic engineering by potentially rendering these efforts "misbranding" and thus unlawful until the required regulations are adopted.

The Federalism Values in Consumer Protection

States and the federal government share responsibility for protecting consumers. As noted above, what is most troubling about this proposed legislation is that it would prematurely end state efforts to require labeling – before Vermont's law even takes effect – and offers no substantive federal requirement in its place. Vermont does not oppose all federal regulation in this area or even all concepts in this proposed law. The FDA and Department of Agriculture have primary responsibility for regulating food safety, and those agencies must take any steps necessary to protect our food supply. At some point, a federal labeling requirement might appropriately supersede state-imposed labels. But if the federal government is not ready to require national labeling for foods produced with genetic engineering, Congress should not rush in to ban state efforts to provide this information to their citizens. And Congress certainly should not do so before state measures have even become effective.

Cutting off state efforts in this area is contrary to established principles of federalism. Vermont's labeling law is a direct response to strong public support in our state for mandatory labeling and consumers' right to know. It is no surprise that a state would take the first step in this area. One of "the most valuable aspects of our federalism" is that "the 50 States serve as laboratories for the development of new social, economic, and political ideas."[37] Historically, many important reforms began as state initiatives, including women's right to vote, minimum-wage and child labor laws, and unemployment insurance.[38] By preempting state labeling laws before any label even appears on a package of food, this proposed bill would permanently disable the States' ability to experiment and to provide useful lessons and models for national legislation.

[37] *FERC v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., dissenting).
[38] *Id.* at 788-89 (O'Connor, J., dissenting) (collecting supporting citations).

State innovation continues to play an invaluable role in our federal system. State and local governments are more accessible and more responsive to new problems and concerns. We do not have to look back a hundred years to find examples of state initiatives that provide a model for later federal regulation:

- Vermont and other states pioneered consumer protections in credit reporting – a fact that is reflected in the Fair Credit Reporting Act's provisions leaving untouched certain pre-existing state laws.[39]
- Federal law will soon require disclosure of calorie and other nutritional information on chain-restaurant menus nationwide.[40] The effort to get this important information to consumers began in New York, which as the New York Times explained, "became a kind of natural experiment when it began requiring chain restaurants to post calorie counts on menus in 2006."[41] After a number of other states and cities adopted similar disclosure rules, the National Restaurant Association joined consumer groups in supporting a national rule.[42]
- Another area in which federal regulation followed on successful state initiatives is transparency in the marketing of prescription drugs. The federal Physician Payment Sunshine Act,[43] and its implementing rules, create "a national program that promotes

[39] 15 U.S.C.A. sec. 1681t; *see, e.g.*, Vt. Stat. Ann. tit. 9, sec. 2480e. In 1991, major credit reporting agencies mistakenly listed hundreds of Vermonters as tax "deadbeats," harming their ability to obtain mortgages and other financing. The Vermont Legislature quickly responded by passing the Vermont Fair Credit Reporting Act. Vt. Stat. Ann. tit. 9, sec. 2480a et seq. The federal response took several more years. *See* Michael Epshteyn, Note, *The Fair and Accurate Credit Transactions Act of 2003: Will Preemption of State Credit Reporting Laws Harm Consumers?* 93 Geo. L.J. 1143, 1162-64 (2005).

[40] *See generally Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments*, 79 Fed. Reg. 71156-01 (Dec. 1, 2014).

[41] Sabrina Tavernise & Stephanie Stromnov, *F.D.A. to Require Calorie Count, Even for Popcorn at the Movies*, N.Y. Times, Nov. 24, 2014.

[42] *Id*.

[43] 42 U.S.C.A. sec. 1320a-7h.

transparency by publishing data on the financial relationships between the health care industry (applicable manufacturers and group purchasing organizations, or GPOs) and health care providers (physicians and teaching hospitals)."[44] Many states, including Vermont, Minnesota, and Massachusetts, led the way in requiring transparency and disclosure of payments to doctors by pharmaceutical companies.[45]

What these examples convey is the value and importance of state legislation. In each case, individual states took the first crack at a serious problem, and in so doing, provided experiences that other states and eventually the federal government could learn from and build on. Sometimes federal legislation reaches farther, to deal more comprehensively with a problem. Sometimes a federal approach will be narrower, recognizing problems with earlier state approaches. Sometimes federal law preempts existing state laws, while in other areas federal law leaves room for complementary state regulation. Regardless, the pioneering state laws provided guideposts, models good and not-so-good, and useful information for voters and policymakers nationwide.

The proposed legislation on GE labeling would cut off this learning process before it even begins. No one benefits from such an approach, least of all the consumers who have pressed loudly and consistently for the right to know how their food is produced.

[44] CMS, *Annual Report to Congress on the Open Payments Program for Fiscal Year 2014*, at 2, *available at*: http://www.cms.gov/OpenPayments/Downloads/Open-Payments-April-2015-Report-to-Congress.pdf .

[45] Vt. Stat. Ann. tit. 18, sec. 4631a, 4632; Minn. Stat. sec. 151.252; Mass. Gen. Laws Ann. ch. 111N; *see also* Cal. Health & Safety Code sec. 119400 – 119402; D.C. Code Ann. sec. 48-833.01 – 48-833.09; Maine Rev. Stat. Ann. tit. 22, sec. 2698-A; Minn. Stat. sec. 151.461, 151.47; Nev. Rev. Stat. sec. 639.570; Vt. Stat. Ann. tit. 22, sec. 4632; W. Va. Code sec. 5A-3C-13.

The Importance of Consumer Choice and Information

Vermonters overwhelmingly supported labeling of food produced with genetic engineering. A central purpose of Act 120 is to allow consumers to make "informed decisions."[46] As the Vermont Legislature found, "[l]abeling gives consumers information they can use to make decisions about what products they would prefer to purchase."[47]

Vermonters are not alone in their interest in having accurate information about their food. A recent national poll found that fully 66% of Americans support mandatory labeling of foods produced with genetic engineering. Both Democrats and Republicans expressed this strong support for labeling GE foods.[48] One popular grocery chain has announced that it will require labeling of foods produced with genetic engineering by 2018.[49]

Opponents of labeling have voiced no persuasive basis for keeping Americans in the dark on this important issue. Food manufacturers contend that foods produced with genetic engineering are safe and argue that GE technology benefits consumers and the environment.[50] Yet they adamantly oppose letting consumers have this information to make their own decisions in the grocery aisle and at the dinner table.[51] As the U.S. Supreme Court has recognized, consumers have a "keen" "interest in the free flow of commercial information."[52] Labeling serves the interest of consumers and food manufacturers. It lets food manufacturers make their

[46] 2014 Vt. Acts & Resolves No. 120, sec. 2 (adding Vt. Stat. Ann. tit. 9, sec. 3041).

[47] *Id*. sec. 1(5)(E).

[48] *Americans weigh in on GMO labeling in new poll*, Jan. 13, 2015, *available at*: http://www.cbsnews.com/news/poll-most-americans-want-labels-on-genetically-modified-foods/

[49] *Whole Foods Market commits to full GMO transparency*, *available at*: http://media.wholefoodsmarket.com/news/whole-foods-market-commits-to-full-gmo-transparency

[50] *See, e.g.,* Monsanto, *Commonly Asked Questions about the Food Safety of GMOs*, *available at*: http://www.monsanto.com/newsviews/pages/food-safety.aspx#q5; Grocery Manufacturers' Association, *Get the Facts on GMOs*, *available at*: http://factsaboutgmos.org/

[51] *See Grocery Mfrs. Ass'n v. Sorrell*, No. 5:14-cv-117, 2015 WL 1931142 (D. Vt. Apr. 27, 2015).

[52] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976).

case for the benefits of GE technology directly to the American people. And it lets American consumers evaluate the evidence and make an *informed* choice.

Trusting people to make their own decisions is a fundamental American principle. Our current requirements for labeling food reflect and enforce this principle. A consumer can pick up a can of soup, read the label, and find out the ingredients, the amount of sodium and added sugar, the number of calories, and the amount of protein, fat, and carbohydrates. Consumers can readily see whether shrimp were harvested in southeast Asia, grapes grown in South America, or cherries produced in the United States. Food labels provide information needed to avoid nuts or gluten, favor high protein content or stay away from high-fructose corn syrup. Armed with that information – and trusting it to be accurate – parents decide what fruits and vegetables to feed their kids and people with food sensitivities make the choices they consider best for their own health. And some people ignore all the labels and buy what they like to eat, whether it's candy bars or avocados.

A common complaint from those who oppose labeling is that a label is necessarily the equivalent of a warning and that consumers will assume that foods produced with genetic engineering are bad. In fact, the short disclosure required by Vermont law – "produced with genetic engineering" – is not a warning label, and the regulations do not require it to be presented as such. All that is required is a straightforward, accurate disclosure of factual information, similar to labels that say "product of United States" or "product of Mexico," available to consumers at the point of purchase. Indeed, Congress has repeatedly directed that consumers be given information about the country of origin for meat, fish, and fresh produce.[53] In upholding

[53] Pub. L. 107-171, sec. 10816; Pub. L. 110-246, sec. 11002; 7 U.S.C.A. sec. 1638a ("a retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity").

country-of-origin labeling for meat, the D.C. Circuit Court of Appeals observed that "[s]upporting members of Congress identified the statute's purpose as enabling customers to make informed choices based on characteristics of the products they wished to purchase."[54]

The proposed bill would deprive American consumers of information they want to have when deciding what foods to eat and how to spend their money. The bill would preempt state efforts, including Vermont's, to require that this basic information be included on package labeling – but not replace those state laws with any mandatory federal label. Insisting that this information be kept from consumers is profoundly disrespectful of the American consumer's right and ability to make intelligent, informed choices. The Supreme Court has long rejected arguments that presume consumers are incapable of making rational decisions. To the contrary, the Court has recognized that in our "free enterprise economy," the public interest is best served when consumers' decisions are "intelligent and well informed."[55]

Conclusion

The federal government plays a vital role in regulating the labeling of food, and doubtless there is an important role for Congress to play in shaping the national standards for labeling food produced with genetic engineering. But H.R. 1599 does not fulfill that role. It contravenes our federal system by regulating Vermont's ability to enact legislation demanded by its citizens, thwarting the very type of experiment necessary for the development of solid public policy. By preempting Vermont's law and any similar measures that citizens in the other forty-nine states may desire, the proposed law ignores the intellect of American consumers to act upon accurate factual information presented to them.

[54] *American Meat Institute v. U.S. Dep't of Agriculture*, 760 F.3d 18, 24 (D.C. Cir. 2014).
[55] *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976)