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Enforcing an Unenforceable Law: The National Bioengineered Food Disclosure Standard

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ENFORCING AN UNENFORCEABLE LAW: THE NATIONAL BIOENGINEERED FOOD DISCLOSURE STANDARD

ABSTRACT

Congress hastily crafted the National Bioengineered Food Disclosure Standard (“GE labeling law” or Act), which it passed in July of 2016, to preempt various state laws that were cropping up around the country seeking to label genetically engineered ingredients (GEs). This Comment anticipates that the Act will face free speech challenges that may find the GE labeling law unconstitutional, especially following recent trends in First Amendment jurisprudence that have been increasingly applying stricter scrutiny upon constitutional review. Due to inconsistent applications of the two governing tests that review compelled commercial speech—the Central Hudson and Zauderer standards, respectively—this Comment suggests that the Supreme Court, in the context of the GE labeling law, determine the appropriate scrutiny level that courts should apply when reviewing First Amendment cases involving compelled commercial speech. This Comment finds that the GE labeling law will not likely withstand scrutiny under Central Hudson, but should survive less stringent review under Zauderer.

If the GE labeling law passes First Amendment review, the Act’s weak enforcement provisions will invite a wave of litigation. This litigation will likely come from two sources: (1) consumer lawsuits and (2) competitor lawsuits arising under the Lanham Act. This Comment concludes that if the law survives First Amendment review, policing via private litigation will be a necessary complement to federal enforcement. Specifically, this Comment argues that competitor lawsuits under the Lanham Act will be the most effective enforcement tool, and their utility may be applicable to enforcing other laws.

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INTRODUCTION

The National Bioengineered Food Disclosure Standard (“GE labeling law” or Act) will likely face litigation. An overview of the pro- and anti-labeling arguments that will give rise to litigation will help contextualize future suits.

Genetically modified organisms (GMOs) are not new to the marketplace, but consumer frenzy about labeling them is.¹ The infamous war against GMOs is spurred, in part, by an aversion to a misnomer; consumers are not actually afraid of every GMO, but they have conflated their fear of genetically engineered (GE) ingredients with all GMOs.² The true labeling clash involves whether to disclose the presence of GE ingredients. Labeling advocates—supporting transparency and a consumer’s right to know—are pitted against labeling opponents—many from the food industry—who defend that GE ingredients pose no real “health, safety, or nutritional risks.”³

In the absence of a national regulatory scheme, various states passed GE labeling laws,⁴ which were largely galvanized by consumer demand.⁵ The pioneer state labeling law was to take effect in Vermont on July 1, 2016.⁶ In response, Congress raced to pass the National Bioengineered Food Disclosure Standard, which President Barack Obama signed into law on July 29, 2016.⁷ With the Act, the United States now joins sixty-four other countries that

¹ See generally Aamena Ahmed, *The Push to Label Genetically Modified Products*, N.Y. TIMES (Mar. 22, 2014), <https://www.nytimes.com/2014/03/23/us/the-push-to-label-genetically-modified-products.html>.

² See Ryan Haas, *Food for Thought: The Difference Between GMO and GE Foods*, OR. PUB. BROADCASTING (Oct. 2, 2014, 7:00 AM), <http://www.opb.org/news/blog/newsblog/food-for-thought-the-difference-between-gmo-and-ge-foods/> (last updated Feb. 18, 2015).

³ 162 CONG. REC. S1475 (daily ed. Mar. 15, 2016) (statement of Sen. McConnell). Both the U.S. Department of Agriculture and the Food and Drug Administration, “the two agencies charged with ensuring the safety and delivery of our Nation’s food supply,” support that bioengineered crops are safe for consumers. *Id.*

⁴ See, e.g., CONN. GEN. STAT. ANN. § 21a-92c (West 2015) (effective July 1, 2015 pending adoption of similar laws in other Northeast states); ME. REV. STAT. ANN. tit. 22, § 2593 (Supp. 2016) (effective August 1, 2014); VT. STAT. ANN. tit. 9, § 3043 (West Supp. 2016).

⁵ See Molly Ball, *Want to Know if Your Food Is Genetically Modified?*, ATLANTIC (May 14, 2014), <https://www.theatlantic.com/politics/archive/2014/05/want-to-know-if-your-food-is-genetically-modified/370812/> (stating that labeling was hardly on politicians’ “radar until a massive amount of constituent pressure put it there”).

⁶ VT. STAT. ANN. tit. 9, § 3043.

⁷ National Bioengineered Food Disclosure Standard, 7 U.S.C. §§ 1639, 1639a–c, 1639i–j, 6524 (Supp. 2018). In fact, the House of Representatives had passed its own voluntary GE labeling bill, the Safe and Accurate Food Labeling Act of 2015, but due to “the time constraint imposed by the Vermont law, the House and Senate [were] unable to conference the two bills.” 162 CONG. REC. H4934 (daily ed. July 14, 2016) (statement of Rep. Conaway). Thus, Congress passed the bill although it “didn’t have time to debate these issues and hear expert testimony. The U.S. Senate did not have one single hearing so that any of those 325 million Americans could be heard.” 162 CONG. REC. S4850 (daily ed. July 7, 2016) (statement of Sen. Leahy).

require GE labeling standards.⁸ As Gary Hirshberg, founder of the labeling advocacy group Just Label It, told the *New York Times* upon passage of the law, “What today really means is that we’ve left the legislative period of this battle after seven years and moved into the regulatory and marketplace phase of it, which was where it was always headed anyway.”⁹

The federal GE labeling law involves a mandatory disclosure, which necessarily implicates First Amendment free speech issues. This Comment argues that, should the statute come before it, the Supreme Court should revisit the two controlling tests that govern the scrutiny levels for mandatory disclosures such as the GE labeling law. The *Central Hudson* test, which emerged from *Central Hudson Gas & Electric Corp. v. Public Service Commission*, requires intermediate scrutiny;¹⁰ the *Zauderer* test, which arose from *Zauderer v. Office of Disciplinary Counsel*, demands a reasonable relationship between the mandatory disclosure and the government interest.¹¹ While the two standards may seem distinct, in practice, however, the *Zauderer* standard often resembles intermediate scrutiny. A growing yet undefined trend toward stricter scrutiny has materialized for two reasons. First, litigants challenging compelled disclosures have been urging more stringent standards. And second, in addition, or as a result, courts have been applying higher scrutiny levels, which require more substantial government interests to justify infringements on free speech, especially in the context of public health.¹²

The two tests are antiquated—they emerged in 1980¹³ and 1985,¹⁴ respectively—and recent First Amendment cases have commingled their applications, unsettling and blurring the standards.¹⁵ In light of the rattled standards and the fact the Supreme Court has yet to consider mandatory

⁸ *International Labeling Laws*, CTR. FOR FOOD SAFETY, <http://www.centerforfoodsafety.org/issues/976/ge-food-labeling/international-labeling-laws#> (last visited Dec. 26, 2017). Countries with mandatory GE labeling regulations include “member nations of the European Union, Russia, China, Brazil, Australia, Turkey and South Africa.” *Id.* Indeed, as Senator Tester remarked, even “places you would never ever think of as having transparency . . . require GMO labeling.” 162 CONG. REC. S4787 (daily ed. July 6, 2016) (statement of Sen. Tester).

⁹ Stephanie Strom, *G.M.O. Labeling Bill Gains House Approval*, N.Y. TIMES (July 14, 2016), <https://www.nytimes.com/2016/07/15/business/gmo-labeling-bill-gains-house-approval.html>.

¹⁰ 447 U.S. 557, 573 (1980) (Blackmun, J., concurring).

¹¹ 471 U.S. 626, 651 (1985).

¹² See Samantha Rauer, Note, *When the First Amendment and Public Health Collide: The Court’s Increasingly Strict Constitutional Scrutiny of Health Regulations That Restrict Commercial Speech*, 38 AM. J.L. & MED. 690, 691–92 (2012).

¹³ *Cent. Hudson*, 447 U.S. at 557.

¹⁴ *Zauderer*, 471 U.S. at 626.

¹⁵ See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2235 (2015) (Breyer, J., concurring).

disclosures in the health context, the GE labeling law would be an opportune occasion to define clearly the appropriate level of scrutiny for compelled commercial disclosures as well as the types of government interests that would satisfy both intermediate scrutiny under *Central Hudson* or the more relaxed standard under *Zauderer*. Indeed, Justices Ginsburg and Thomas have expressed interest in reassessing the *Zauderer* standard.¹⁶ More specifically, the Supreme Court should clarify whether the *Zauderer* standard requires a *substantial* government interest.

If the GE labeling law withstands likely First Amendment challenges, or until successful First Amendment litigation overturns the law, the government should anticipate two other sources of litigation: (1) consumer class actions arising under parallel state laws or existing state consumer protection laws and (2) competitor suits by manufacturers seeking to enforce the GE labeling law through the Lanham Act. This Comment forecasts that private litigation will be necessary to enforce the GE labeling law due to the ineffective enforcement provisions in the language of the Act. In particular, this Comment concludes that competitor suits under the Lanham Act will likely be the most powerful instrument to enforce the Act.

This Comment proceeds in four Parts. Part I explains the debate surrounding GE foods that incited Congress to enact the National Bioengineered Food Disclosure Standard with the aim of preempting a patchwork of disparate state laws across the country. Part II analyzes the language of the Act, exposing the weaknesses in the GE labeling law that will give rise to the litigation discussed in Parts III and IV. Part III explores the likely First Amendment challenges that GE labeling opponents will raise in response to compelled commercial speech from the mandatory disclosure requirement. Finally, if the Act survives the free speech issues discussed in Part III, Part IV concludes that private litigation will be necessary to enforce the GE labeling law due to weak enforcement provisions in the Act. This Comment ultimately concludes that private enforcement via competitor suits will be the most effective enforcement tool.

¹⁶ Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 153 (2016) (citing *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080 (2002) (Thomas, J., dissenting)).

I. GMOs VS. GES: TERMINOLOGY AND BACKGROUND INFORMATION ABOUT THE GE LABELING LAW

This Part describes the development of genetically engineered food and its ubiquity in the American and global food supply. This background sets the stage for the debate over GE labeling that spurred the passage of the federal GE labeling law.

Through hybrid and selective breeding, “[h]umans have been modifying crops for thousands of years.”¹⁷ In fact, much of the food on our plates today would bear little resemblance to their look, taste, and texture from decades ago because the majority of our cultivated crops are genetically altered.¹⁸ For instance, commercially available garden strawberries are a hybrid between a species native to North America and a species native to South America,¹⁹ but these strawberries are not considered to contain GMOs. As a result of traditional genetic modification through hybridization, our modern diets are comprised of varied plant-based foods. But unlike hybridization, genetic engineering may introduce genes from other unrelated species into a plant to create desired traits, such as splicing fish genes into tomato DNA to make them more frost-resistant.²⁰ Although GE tomatoes are not currently sold in supermarkets, “Frankentomatoes” like the one just described became “an unofficial emblem of the anti-GMO movement.”²¹

An introduction to relevant scientific terminology should help clarify and contextualize some of the tensions that may arise in both pro- and anti-labeling arguments. “Genetic modification” is a broad term that may encompass *any* genotype alteration of a plant, whether via new or traditional techniques.²² On balance, the Food and Drug Administration (FDA) uses the term “genetic engineering” in reference to the scientific process of making “targeted changes to a plant’s genetic makeup to give the plant a new desirable trait.”²³ GE foods are often produced through recombinant deoxyribonucleic acid (rDNA)

¹⁷ *Consumer Info About Food from Genetically Engineered Plants*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/Food/IngredientsPackagingLabeling/GEPlants/ucm461805.htm> (last updated Oct. 19, 2015) [hereinafter *Consumer Info About GE Food*].

¹⁸ Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22,984 n.3 (May 29, 1992).

¹⁹ *Consumer Info About GE Food*, *supra* note 17.

²⁰ Jeffrey Smith, *Throwing Biotech Lies at Tomatoes – Part 1: Killer Tomatoes*, HUFFINGTON POST (Dec. 31, 2010, 9:29 PM), https://www.huffingtonpost.com/jeffrey-smith/throwing-biotech-lies-at_b_803139.html.

²¹ *Id.*

²² Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. at 22,984 n.3.

²³ *Consumer Info About GE Food*, *supra* note 17.

techniques, which “involve the isolation and subsequent introduction of discrete DNA segments containing the gene(s) of interest into recipient (host) plants.”²⁴ Although GE techniques may also produce GMOs, FDA’s longstanding position is that the term “genetic engineering” is more precise.²⁵ For clarity, this Comment adopts the terminology of FDA unless directly quoting or referring to the terminology used in another source.

GE techniques strive to cultivate plants with improved flavor and nutritional profiles, higher crop yields, and extended freshness that can better survive pest damage and plant diseases.²⁶ These methods produce innovations such as reducing enzyme levels to resist browning from cuts and bruises on apples.²⁷

Foods created through GE were first introduced to our food supply in the 1990s.²⁸ Since 1992, FDA has taken the position that GE foods do not require additional labeling, reasoning that GE foods do not “differ from other foods in any meaningful or uniform way” and that they do not “present any different or greater safety concern than foods developed by traditional plant breeding.”²⁹ However, FDA has not deemed GE foods as “generally recognized as safe” (GRAS), but has rather announced a GRAS presumption until proven otherwise.³⁰ Amidst the labeling craze, FDA issued information to consumers regarding GE crops, affirming that “[c]redible evidence has demonstrated that foods from the GE plant varieties marketed to date are as safe as comparable, non-GE foods.”³¹ FDA still upholds that “the key factors in reviewing safety concerns should be the characteristics of the food product, rather than the fact that the new methods are used.”³² In sum, FDA maintains that products containing GE ingredients do not require special labeling.

Today, GE crops abound in the American food supply. A 2015 Guidance Document published by FDA included statistics about the prevalence of GE

²⁴ Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. at 22,986.

²⁵ *Consumer Info About GE Food*, *supra* note 17.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. at 22,991.

³⁰ *Alliance for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166, 172 (D.D.C. 2000). “This presumption of safety is rebuttable, because FDA will ‘require food additive petitions in cases where safety questions exist sufficient to warrant formal premarket review by FDA to ensure public health protection.’” *Id.* at 172 (quoting Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. at 22,990).

³¹ *Consumer Info About GE Food*, *supra* note 17.

³² Statement of Policy: Foods Derived from New Plant Varieties Notice, 57 Fed. Reg. at 22,984–85.

foods.³³ Measuring by acreage of planted crops in the 2013 crop year, GE soybeans made up 93% of planted soybeans, GE cotton made up 90% of planted cotton, and GE corn made up 90% of planted corn.³⁴ In the 2009 to 2010 crop year, GE sugar beets accounted for 95% of planted sugar beets.³⁵ Also common in the marketplace are GE varieties of “potatoes, squash, apples, and papayas.”³⁶ To be sure, GE products are part of our everyday diet, and the forthcoming GE label will appear on many items that frequent our shopping carts.

II. THE NATIONAL BIOENGINEERED FOOD DISCLOSURE STANDARD: ITS GENESIS AND AN ANALYSIS OF THE LANGUAGE OF THE ACT

On July 14, 2016, the House of Representatives approved the Senate bill to pass the National Bioengineered Food Disclosure Standard,³⁷ which President Barack Obama signed into law on July 29, 2016.³⁸ The legislation amends the Agriculture Marketing Act of 1946,³⁹ which established an integrative and scientific approach to distribution and marketing of agricultural products.⁴⁰

The media have predicted that the foregoing GE labeling debate will end up in courts,⁴¹ and politicians echo this outlook.⁴² An analysis of the federal GE labeling bill will affirm these forecasts by the media and politicians. This Part analyzes the inception, components, and language of the Act. The analysis also identifies areas that may be susceptible to litigation: namely, the weak enforcement provision that will be the source of necessary private litigation to ensure compliance with the Act. In addition, relevant parts of the *Congressional Record* expound upon these shortcomings, buttressing the idea that the Act will be challenged in court.

³³ U.S. FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY: VOLUNTARY LABELING INDICATING WHETHER FOODS HAVE OR HAVE NOT BEEN DERIVED FROM GENETICALLY ENGINEERED PLANTS (2015).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Consumer Info About GE*, *supra* note 17.

³⁷ *Actions Overview S.764 — 114th Congress (2015-2016)*, CONGRESS, <https://www.congress.gov/bill/114th-congress/senate-bill/764/actions> (last visited Jan. 4, 2018).

³⁸ National Bioengineered Food Disclosure Standard, 7 U.S.C. §§ 1639, 1639a–c, 1639i–j, 6524 (Supp. 2018).

³⁹ *Id.* The provisions regarding GE labeling appear as the National Bioengineered Food Labeling Disclosure Standard in subchapter V and the Labeling of Certain Food in subchapter VI. *Id.*

⁴⁰ 7 U.S.C. § 1621 (2012).

⁴¹ *See* Strom, *supra* note 9.

⁴² *Id.* Senator Richard Blumenthal stated, “A court interpreting the issues that will be raised in litigation—and there’s no question that there will be litigation—will look first and probably only to the language of the statute.” *Id.*

A. Definition of “Bioengineering”

The Act defines the term “bioengineering” in food as a product “that contains genetic material that has been modified through in vitro recombinant deoxyribonucleic acid (DNA) techniques” and a food “for which the modification could not otherwise be obtained through conventional breeding or found in nature.”⁴³

In reaction to the bill’s definition section, FDA has commented that the scope of the term “bioengineering” is too narrow because “contains genetic material” does not accurately reflect whether the product was originally derived from any GE ingredients.⁴⁴ Accordingly, the Act’s interpretation of GEs would, in effect, leave several food products outside the purview of the labeling law even though they may be derived from GE materials. For example, refined “oil made from GE soy would not have any genetic material in it,” and could thus be exempt from product labeling.⁴⁵ In addition, FDA pointed out that “[i]t may be difficult to demonstrate that a particular modification *could not* be obtained through conventional breeding (or even that it *could not* occur in nature).”⁴⁶ Reflecting on this interpretation, Senator Patrick Leahy from Vermont remarked, “This raises more red flags because many of the genes that have been modified or introduced do occur in nature, just not in the particular crop the gene has been added to. They might occur naturally”⁴⁷

Identifying further ambiguity in the language, FDA has questioned whether the modification must result from the “effect of the rDNA construct or the location of the genome” because “the former could arguably be obtained via conventional breeding, whereas the latter cannot.”⁴⁸ Many GE breeding techniques aim to mimic results that may also arise from traditional breeding techniques; however, the GE process is more precise because it has the capacity to isolate and control a single cell, whereas traditional methods may

⁴³ 7 U.S.C. § 1639(1). To be sure, varying interpretations of the definitions in the GE labeling bill may be the basis of future consumer lawsuits concerning misleading labels, which this Comment discusses in section IV.A.

⁴⁴ U.S. FOOD & DRUG ADMIN., EDW16734, FDA/HHS TECHNICAL ASSISTANCE ON SENATE AGRICULTURE COMMITTEE DRAFT LEGISLATION TO ESTABLISH A NATIONAL DISCLOSURE STANDARD FOR BIOENGINEERED FOODS (2016).

⁴⁵ *Id.*; see also 162 CONG. REC. S4787 (daily ed. July 6, 2016) (statement of Sen. Tester) (“That means Roundup Ready soybeans, corn, could ultimately be excluded from labeling of the GMO QR code.”).

⁴⁶ U.S. FOOD & DRUG ADMIN., *supra* note 44.

⁴⁷ 162 CONG. REC. S4845 (daily ed. July 7, 2016) (statement of Sen. Leahy).

⁴⁸ U.S. FOOD & DRUG ADMIN., *supra* note 44.

inadvertently introduce undesirable traits into the plant.⁴⁹ Because GE labeling focuses on *process* rather than the product's contents, this gap may be misleading if the final product is derived from GE materials, yet the product bears no label identifying that the contents are, indeed, GE. Consequently, the term "bioengineering" may prove to be false or misleading, especially because genetic engineering has already been the subject of many consumer class actions.⁵⁰ These lawsuits will likely continue after the mandatory disclosure regulations are implemented.

B. *Establishment of the National Bioengineered Food Disclosure Standard*

Before the law is implemented, the Secretary of the U.S. Department of Agriculture (USDA) has two years from July 29, 2016 to establish the GE disclosure method that manufacturers must include in their product labeling.⁵¹ The legislative history of the bill criticizes that the delegation of authority to USDA has nebulous parameters, which provide little guidance for implementation of the law.⁵² However, this inherent ambiguity may be advantageous in that it could grant USDA latitude to establish implementation regulations that may reflect the goals of both the House of Representatives and the Senate that they did not have time to write into the law.⁵³ In addition, as long as USDA adopts a reasonable interpretation of the bill, courts must, under current law, defer to their interpretations under *Chevron* deference.⁵⁴

⁴⁹ *Consumer Info About GE Food*, *supra* note 17.

⁵⁰ *E.g.*, Behrend, Behrend, & Knittel Farms v. Monsanto Co., No. 4:13-cv-00250-BLW, 2013 WL 4711730 (D. Idaho Aug. 30, 2013); *see also* Carey Gillam, *Monsanto Settles Farmer Lawsuits over Experimental GMO Wheat*, REUTERS, Nov. 12, 2014, <https://www.reuters.com/article/usa-monsanto-wheat/monsanto-settles-farmer-lawsuits-over-experimental-gmo-wheat-idUSL2N0T22O820141112>; Nate Raymond, *Syngenta Agrees to Settle U.S. Farmer Lawsuits over GMO Corn*, REUTERS, Sept. 26, 2017, <https://www.reuters.com/article/us-syngenta-ag-settlement/syngenta-agrees-to-settle-u-s-farmer-lawsuits-over-gmo-corn-idUSKCN1C12K8>.

⁵¹ National Bioengineered Food Disclosure Standard, 7 U.S.C. §§ 1639, 1639b(a) (Supp. 2018). Although FDA has taken the stance for the past twenty years that GE products do not require additional labeling, FDA criticized the fact that the bill gives USDA the "authorities over food labeling that [are] otherwise under FDA's sole regulatory jurisdiction." U.S. FOOD & DRUG ADMIN., *supra* note 44. However, USDA was also the federal agency tasked with implementing the National Organic Program, Organic Foods Production Act of 1990, so the agency's task to develop the GE disclosure is not arbitrary. 7 U.S.C. §§ 6501, 6503 (2012).

⁵² *See* 162 CONG. REC. H4935 (daily ed. July 14, 2016) (statement of Rep. Newhouse). For example, Representative Newhouse stated the bill "is filled with ambiguous statements and, in many places, offers little guidance to USDA on how to best implement the bill's provisions." *Id.*

⁵³ 162 CONG. REC. H4934 (daily ed. July 14, 2016) (statement of Rep. Conway) (stating that due to the "time constraint imposed by the Vermont law, the House and Senate will be unable to conference the two bills").

⁵⁴ *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

In the language of the bill, Congress suggests three potential disclosure options to USDA: (1) a text, (2) a symbol, or (3) an electronic or digital link, such as a Quick Response (QR) code.⁵⁵ Accompanying a QR code, a manufacturer must provide language such as, “Scan here for more food information.”⁵⁶ This mandatory language is, in fact, one word longer than the phrase: “Made with genetically engineered ingredients,” which is the sort of plain language that many right-to-know supporters, state labeling laws, and other countries advocate.⁵⁷

Part of USDA’s task under § 1639b(c)(1) of the Act was to “conduct a study to identify potential technological challenges that may impact whether consumers would have access to the bioengineering disclosure through electronic or digital disclosure methods.”⁵⁸ USDA published the results of its study in July 2017, finding that there are, indeed, technological challenges for all of the study’s participants, but the agency is confident “these challenges can be overcome through appropriate implementation of the [l]aw.”⁵⁹

USDA still has time to formulate the implementation regulations, including the mandatory disclosure format. Because agency action at this point is merely speculative, this Comment focuses on the litigation that will likely arise notwithstanding the type of disclosure USDA ultimately implements.⁶⁰

⁵⁵ 7 U.S.C. § 1639b(b)(2)(D). A QR code is “a digital code [that] requires a smart phone or other scanning device to decipher. Those who do not have access to a smart phone—more than 50% of rural and [low-income] populations, and more than 65% of the elderly—will have to rely upon scanners provided by another party to access information about GMO content.” 162 CONG. REC. S4848 (daily ed. July 7, 2016) (statement of Sen. Leahy).

⁵⁶ 7 U.S.C. § 1639b(d)(1)(A).

⁵⁷ See, e.g., Vt. Consumer Protection R. § 121.02 (2016) (implementing VT. STAT. ANN. tit. 9, § 3043 (West Supp. 2016) by requiring both packaged and unpackaged raw or processed food to have “a clear and conspicuous disclosure reading ‘Produced with Genetic Engineering,’ ‘Partially Produced with Genetic Engineering,’ or ‘May be Produced with Genetic Engineering’”); 162 CONG. REC. H4935 (daily ed. July 14, 2016) (statement of Rep. Pingree) (“The solution is simple: list GMO ingredients on the back of the package in the ingredient list in plain English. . . . [Other countries] require a simple, on-package label that anyone can read.”).

⁵⁸ 7 U.S.C. § 1639b(c)(1).

⁵⁹ DELOITTE, STUDY OF ELECTRONIC OR DIGITAL LINK DISCLOSURE: A THIRD-PARTY EVALUATION OF CHALLENGES IMPACTING ACCESS TO BIOENGINEERED FOOD DISCLOSURE 4 (2017). As anticipated, these challenges are particularly acute for rural shoppers and retailers, who may not have the technology to access the digital disclosure. *Id.* at 5.

⁶⁰ For more information regarding USDA’s current stance on the GE labeling law and the agency’s interpretation of its role, see 162 CONG. REC. S4846 (daily ed. July 7, 2016) (statement of Sen. Leahy).

C. Federal Preemption of State Food-Labeling Standards

Because one of the primary goals of the Act was to preempt the Vermont and other state-law bills, the National Bioengineered Food Disclosure Standard expressly preempts these laws.⁶¹ Accordingly, federal preemption over state laws should not be an issue in courts.⁶²

D. The Enforcement Provision

Weak federal enforcement beseeches enforcement from other sources. Here, the enforcement provision of the legislation is essentially empty,⁶³ which may transfer the burden of enforcement to private parties through consumer and competitor litigation. In fact, the enforcement provision delegates enforcement—explicitly and implicitly—to outside entities.

Explicitly, the Act suggests that states may enact parallel labeling laws that can provide independent enforcement authority.⁶⁴ These independent state GE labeling laws must be “identical to the mandatory disclosure requirement.”⁶⁵ In short, states will “enforce it on behalf of USDA” if they enact their own parallel state laws.⁶⁶ Irony aside, the very same federal law that was enacted to thwart fifty patchwork state laws explicitly recommends that the states independently adopt their own versions, albeit they must be coextensive with the federal Act. What may be troubling is that if some states choose not to enact a parallel provision, then the states that do would likely bear the brunt of the enforcement responsibility and burden.

Implicitly, the enforcement provision invites outside enforcement because it is inherently inefficient. Although the enforcement section expressly states that it is “a prohibited act for a person to knowingly fail to make a disclosure,”⁶⁷ this warning lacks grit. First, the Act specifically precludes USDA from any recall authority,⁶⁸ which is a common enforcement action by

⁶¹ 7 U.S.C. § 1639i(b). The legislative history confirms on several occasions that the “legislation is needed to avoid a situation where 50 [s]tates set up 50 different labels, which would only create confusion for consumers, farmers, and food companies.” 162 CONG. REC. H4935 (daily ed. July 14, 2016) (statement of Rep. Peterson).

⁶² See U.S. CONST. art. VI, cl. 2.

⁶³ 7 U.S.C. § 1639b(g).

⁶⁴ *Id.* § 1639b(e).

⁶⁵ *Id.*

⁶⁶ 162 CONG. REC. S4846 (daily ed. July 7, 2016) (statement of Sen. Leahy); see 7 U.S.C. § 1639b(e).

⁶⁷ 7 U.S.C. § 1639b(g)(1).

⁶⁸ *Id.* § 1639b(g)(4). The bill states: “[USDA] shall have no authority to recall any food subject to this subtitle.” *Id.*

FDA and USDA in other areas;⁶⁹ and second, the Act does not contain civil penalties. The legislative history condemns both of these omissions by criticizing that the Act does not afford USDA authority to recall products and that it is “void of any fines or punishments for violators, and there is no compliance deadline for companies.”⁷⁰

The Act is unclear as to whether FDA may retain its independent recall enforcement authority; however, the bill states: “Nothing in this subtitle . . . creates any rights or obligations for any person under the Federal Food, Drug, and Cosmetic Act”⁷¹ This may be construed as Congress declining to grant FDA additional authority outside the purview of its current misbranding authority.⁷²

As seen in the language of the Act, there are several weaknesses that invite litigation. In light of the fact that USDA has yet to formulate the implementation regulations of the GE labeling bill, and because the disclosure format is still being considered and developed,⁷³ this Comment focuses on the litigation that will likely arise from the GE labeling law, as predicted by the media and Congress.⁷⁴ Accordingly, private litigation will be key to effective enforcement if the law survives First Amendment challenges. However, a threshold issue to address before discussing enforcement problems is the likelihood of First Amendment challenges to the GE labeling bill.

III. LIKELIHOOD OF OVERCOMING FIRST AMENDMENT CHALLENGES

This Part examines likely First Amendment legal challenges in response to the mandatory GE disclosure. If First Amendment objections declare the law unconstitutional, then the other shortcomings in the law—specifically, the lack of effective enforcement—may become obsolete issues. However, even if First Amendment challenges successfully result in deeming the law

⁶⁹ *Id.* § 1633 (granting USDA recall authority); 21 U.S.C. § 350l (2012) (granting FDA recall authority); *see also* 9 C.F.R. § 418 (2018) (granting USDA recall authority of meat and poultry).

⁷⁰ 162 CONG. REC. S4846 (daily ed. July 7, 2016) (statement of Sen. Leahy). By contrast, the Vermont labeling bill, for example, would have allowed for civil penalties of up to “\$1,000 per day . . . per each uniquely named, designated, or marketed product.” Vt. Consumer Protection R. § 121.04(e)(i) (2016).

⁷¹ 7 U.S.C. § 1639c(b).

⁷² 21 U.S.C. § 343(a) (2012).

⁷³ On June 28, 2017, USDA’s Agricultural Marketing Service released a thirty-question questionnaire to gather input from “interested parties to comment on the proposed rule during the rulemaking process” with the aim of releasing a final rule by July of 2018. *Proposed Rule Questions Under Consideration*, U.S. DEP’T AGRIC.: AGRIC. MARKETING SERV., <https://www.ams.usda.gov/rules-regulations/gmo-questions> (last visited Jan. 10, 2018).

⁷⁴ *See* Strom, *supra* note 9.

unconstitutional, this litigation may take time, and the enforcement matters will remain pertinent until the law is overturned.

First Amendment challenges are likely because compelled commercial disclosures, such as a mandatory GE label, have previously faced litigation.⁷⁵ Mandatory disclosures have become increasingly common to regulate information, often implemented in the interests of consumer protection, including public health.⁷⁶ This type of information regulation is considered a “lighter-touch” governance rather than direct regulation, allowing a more flexible form of regulation by arming consumers with information.⁷⁷ Although the public may view these labels as “choice affirming,” they still implicate First Amendment concerns⁷⁸ as they compel speech through words or pictures. Indeed, paternalistic guidance through mandatory disclosures “strikes closer to the core of the First Amendment’s animating rationales than do mandates or bans on conduct.”⁷⁹

Indeed, a challenge to a mandatory GE label has already reached courts in response to the now-defunct Vermont GE labeling bill.⁸⁰ Correspondingly, First Amendment challenges to the Act will mimic the lawsuit initiated by a consortium of food industry trade associations—including the Grocery Manufacturers of America, Snack Food Association, and International Dairy Foods Association—that challenged infringements on First Amendment rights after the passage of the Vermont GE labeling law.⁸¹ In *Grocery Manufacturer’s Ass’n v. Sorrell* (*GMA v. Sorrell*), the District Court of Vermont upheld the constitutionality of the Vermont labeling law;⁸² however, this outcome will not necessarily predict future First Amendment challenges to the federal GE labeling law given that recent First Amendment jurisprudence

⁷⁵ See, e.g., *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996).

⁷⁶ See Shanor, *supra* note 16, at 166.

⁷⁷ See *id.* at 171.

⁷⁸ See *id.* at 135, 172, 174. Mandatory disclosures are considered “lighter-touch regulation” because they “enhance the public’s power of choice by eschewing the sometimes costly, inefficient, and heavy-handed burden of direction regulation of behavior.” *Id.* at 167.

⁷⁹ *Id.* at 172.

⁸⁰ *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 621 (D. Vt. 2015).

⁸¹ *Id.* Manufacturers that opposed the Vermont law, and supported plaintiffs’ motion for a preliminary injunction to enjoin the bill, included Coca-Cola Co., PepsiCo, Inc., General Mills, ConAgra Foods, Inc., and Kraft Foods Group, Inc. *Id.* at 599.

⁸² In *GMA v. Sorrell*, the Vermont District Court “recognized that that there are ‘material differences between disclosure requirements and outright prohibitions on speech,’” and overturned the plaintiffs’ petition for an injunction to enjoin the law. *Id.* at 621, 648 (quoting *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 650 (1985)).

involving commercial speech, including the appropriate level of scrutiny a reviewing court should apply, is “elusive.”⁸³

In addition, current First Amendment challenges have proven to be “a powerful deregulatory engine.”⁸⁴ These challenges have been especially successful in the commercial speech context.⁸⁵ Plaintiffs initiating First Amendment claims have been pushing courts to apply stronger scrutiny levels,⁸⁶ and stricter review makes it more difficult for laws to pass constitutional muster. Given the murkiness enveloping the questions of which level of scrutiny to apply and what government interests will be satisfactory to meet the government’s burden, the GE labeling law’s chances of survival are indefinite.

A. *How Mandatory Commercial Disclosures Fit Within the First Amendment Context and Current Free Speech Jurisprudence*

An overview of the First Amendment interests involving compelled commercial disclosures will help anticipate the controversies that will likely crop up from the GE labeling law. The First Amendment prohibits laws that restrict the freedom of speech,⁸⁷ and “protects ‘both the right to speak freely and the right to refrain from speaking at all.’”⁸⁸ However, “the degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or non-commercial speech”⁸⁹ because commercial speech receives less constitutional protection than noncommercial speech.⁹⁰ The doctrine of commercial speech is a relatively recent development, first recognized by the Supreme Court in the mid-1970s in

⁸³ *Am. Meat Inst. v. USDA*, 760 F.3d 18, 23 (D.C. Cir. 2014) (en banc).

⁸⁴ Shanor, *supra* note 16, at 134.

⁸⁵ *Id.*

⁸⁶ *See Grocery Mfrs. Ass’n*, 102 F. Supp. 3d at 621.

⁸⁷ U.S. CONST. amend. I.

⁸⁸ *Grocery Mfrs. Ass’n*, 102 F. Supp. 3d at 621 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

⁸⁹ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983). Commercial speech has rested among First Amendment protections since the Supreme Court’s ruling in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

⁹⁰ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980). “In *Virginia Pharmacy*, the Supreme Court established that commercial speech enjoys First Amendment protection, though of a ‘different [lesser] degree’ than noncommercial speech.” Krista Hessler Carver, *A Global View of the First Amendment Constraints on FDA*, 63 *FOOD & DRUG L.J.* 151, 170 (2008) (alteration in original) (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 772 n.24). After *Virginia State Board of Pharmacy*, “the Court frequently struck down restrictions, however, it stopped short of equating commercial speech with fully protected expression.” Nat Stern & Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 *U. RICH. L. REV.*, 1171, 1177 (2013).

the interest of consumer protection, an area that is typically subject to government regulation.⁹¹ Because the commercial speech doctrine promotes consumer protection, it is considered a listener-based right rather than a speaker-based right.⁹² Further, “the right not to speak inheres in political and commercial speech alike.”⁹³ However, compelled commercial disclosures afford speakers weaker First Amendment protections.⁹⁴

The GE labeling law compels speech, thus potentially jeopardizing the right not to speak. Moreover, the Act rests within in the commercial context. Therefore, the GE disclosure would be classified as commercial speech.⁹⁵ Accordingly, the Act would face challenges to compelled commercial disclosures. But curiously, what makes compelled commercial disclosures “lighter-touch” regulations also “makes them appear more speech-regulating . . . thereby rendering them more susceptible to First Amendment challenge.”⁹⁶

B. Surviving First Amendment Challenges May Hinge on the Scrutiny Level

The scrutiny level a reviewing court applies may, ultimately, be outcome determinative as to whether the GE labeling law withstands First Amendment challenges. Commercial speech serves narrower interests and is afforded fewer protections than noncommercial speech, so commercial speech enjoys a lower level of scrutiny when assessing both the freedom to disclose and compelled disclosures.⁹⁷ There are two tests controlling the doctrine of commercial speech. The Supreme Court established an intermediate scrutiny test in *Central Hudson* to determine whether prohibitions on commercial speech violate First Amendment protections,⁹⁸ and a less exacting standard in *Zauderer*.⁹⁹ Typically, “when ‘regulations compel disclosure without suppressing speech,

⁹¹ LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 143 (3d ed. 2016). Indeed, the “doctrine was forged as a tool of consumer protection” so the public can make wise purchasing decisions. Shanor, *supra* note 16, at 143.

⁹² Shanor, *supra* note 16, at 142, 145–46.

⁹³ LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 364 (2d ed. 2008).

⁹⁴ *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 651 n.14 (1985).

⁹⁵ See GOSTIN & WILEY, *supra* note 91. Commercial speech has three attributes: (1) the speech “identifies a specific product,” (2) it “is a form of advertising” designed to attract consumers, and (3) the speaker may gain economic benefits. *Id.*

⁹⁶ Shanor, *supra* note 16, at 135.

⁹⁷ *Zauderer*, 471 U.S. at 651.

⁹⁸ 447 U.S. 566, 573 (1980) (Blackmun, J., concurring).

⁹⁹ *Zauderer*, 471 U.S. at 651.

Zauderer, not *Central Hudson*, provides the standard of review.”¹⁰⁰ However, if a reviewing court applies *Central Hudson* instead of *Zauderer*, it will be more difficult for the Act to overcome constitutional challenges. The *Zauderer* standard is more relaxed than the *Central Hudson* standard, and “is generally viewed as being akin to a rational basis standard,”¹⁰¹ although some judges have noted that the “*Zauderer* fit requirements are far more stringent than mere rational basis review.”¹⁰² To be sure, as noted by some scholars, the test under *Central Hudson* seems to be inapplicable to mandatory disclosures because the disclosure does not implicate a *restriction* on commercial speech.¹⁰³

While the application of the appropriate level of scrutiny may seem clear-cut, in practice, courts vacillate between the two standards. This uncertainty calls for the Supreme Court to clearly categorize the scrutiny levels or, alternatively, eliminate the dual framework.¹⁰⁴

To further complicate predicting the level of scrutiny a reviewing court will apply, recently the Court has muddled the three traditional levels of scrutiny—rational basis, intermediate review (or heightened scrutiny), and strict scrutiny—opting for a “more nuanced approach, rarely following these formal levels of review,” a stark departure from the “rigidly structured scheme [that] was widely followed for decades.”¹⁰⁵ Recent Supreme Court cases have applied a stricter construction of rational basis review or have declined entirely to identify the level of scrutiny, “suggesting that the Court is moving away from its historical reliance on rigidly defined categories.”¹⁰⁶ As noted by professor and scholar Lawrence Gostin, precise standards afford more predictability, whereas a more flexible approach allows a sliding-scale analysis.¹⁰⁷ In an adaptive model, “[a]s the intrusiveness and unfairness of a policy increase, so does the level of judicial scrutiny,” which “reflects a more

¹⁰⁰ *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 632 (D. Vt. 2015) (quoting *Conn. Bar Ass’n v. United States*, 620 F.3d 81, 93 (2d Cir. 2010)).

¹⁰¹ Micah L. Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. U. J.L. & POL’Y 53, 59 (2016) (first citing *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009); then citing *CITA-The Wireless Ass’n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1064 (N.D. Cal. 2015) (“[C]ircuit courts have essentially characterized the *Zauderer* test as a rational basis or rational review test.” (alteration in original)).

¹⁰² *E.g.*, *Am. Meat Inst. v. USDA*, 760 F.3d 18, 33 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring).

¹⁰³ *See, e.g.*, Berman, *supra* note 101, at 63. Berman also concludes that “there is no clear way in which the *Central Hudson* test can be applied to compelled speech cases.” *Id.* at 64.

¹⁰⁴ *See Stern & Stern, supra* note 90, at 1172.

¹⁰⁵ GOSTIN & WILEY, *supra* note 91, at 147.

¹⁰⁶ *Id.* at 149.

¹⁰⁷ *Id.* at 151.

fluid balancing of individual interests and collective needs, but its flexibility comes at the cost of predictability.”¹⁰⁸ While a nuanced approach may be more flexible, it is harder to predict how a reviewing court will respond. An examination of the two standards will present the considerations of a reviewing court.

1. *The Central Hudson Standard*

Many scholars agree that the test under *Central Hudson* seems to be inapplicable to mandatory disclosures because the disclosure does not implicate a restriction on commercial speech.¹⁰⁹ Whereas the GE labeling law involves a compelled disclosure on food product labeling, *Central Hudson* involved a ban on advertising electric utilities.¹¹⁰ Under the four-part *Central Hudson* analysis, a reviewing court will determine if commercial speech is protected by the First Amendment by examining whether (1) the speech is lawful and not misleading, (2) there is a substantial government interest to justify the government action, (3) the regulation directly advances the government interest, and (4) the regulation is no more extensive than necessary to satisfy the interest.¹¹¹ Although the second prong of the test does not identify which government interests may be substantial, the requirements are stricter than the *Zauderer* standard laid out below.

2. *The Zauderer Standard*

The *Central Hudson* standard is appropriate for most *restrictions* on commercial speech,¹¹² but mandates on commercial disclosures warrant weaker First Amendment protections. At issue in *Zauderer* was whether the State of Ohio could compel attorneys to disclose certain information on lawyers’ advertisements.¹¹³ Noting that commercial speech protections are aimed at consumers rather than speakers, the Supreme Court found that the “interest in *not* providing any particular factual information . . . is minimal.”¹¹⁴ From *Zauderer* emerged a test reflecting weaker protections afforded to speakers when the government mandates commercial speech.

¹⁰⁸ *Id.*

¹⁰⁹ *See, e.g.,* Berman, *supra* note 101, at 63. Berman concludes that “there is no clear way in which the *Central Hudson* test can be applied to compelled speech cases.” *Id.* at 64.

¹¹⁰ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 558 (1980).

¹¹¹ *Id.* at 566.

¹¹² Berman, *supra* note 101, at 63.

¹¹³ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 629 (1985).

¹¹⁴ *Id.* at 651.

The *Zauderer* standard is more relaxed than the *Central Hudson* standard, and “is generally viewed as being akin to a rational basis standard.”¹¹⁵ As succinctly articulated in the concurrence in *Zauderer*, the standard states that the “First Amendment’s protection of commercial speech is satisfied so long as a disclosure requirement is ‘reasonably related’ to preventing consumer deception.”¹¹⁶ After *Zauderer*, the standard has been applied to uphold compelled disclosures—including country-of-origin labels for meats—and calorie counts and nutrition information for restaurant food.¹¹⁷ Scholar Amanda Shanor notes, “This sharp asymmetry in the level of scrutiny makes sense because the constitutional value in commercial speech is that it can provide information to the public so that the public may make more intelligent decisions.”¹¹⁸

A compelled disclosure may fail constitutional review under *Zauderer* if the requirement is “unjustified” or “unduly burdensome.”¹¹⁹ However, “unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech.”¹²⁰ Therefore, if the GE labeling law is overly burdensome, it may be deemed unconstitutional.

Regarding the GE labeling law, the scope of the burden may be contingent upon the type of disclosure USDA ultimately requires; for example, a QR code that a consumer must scan on a smartphone or in-store machine that a grocery store must supply would seemingly be more burdensome on consumers and retailers than plain-language text. Accordingly, the burden to carry out the mandatory disclosure would not fall solely on manufacturers, which a reviewing court should take into consideration.

C. *If Courts Continue Applying Stricter Scrutiny, the GE Labeling Law Might Not Stand*

Because the standard of review under *Zauderer* is more deferential than *Central Hudson*, the GE labeling law’s chances at survival may be contingent upon the scrutiny level a reviewing court applies. To be sure, if the labeling

¹¹⁵ See *supra* note 101.

¹¹⁶ *Zauderer*, 471 U.S. at 657 (Brennan, J., concurring in part and dissenting in part).

¹¹⁷ GOSTIN & WILEY, *supra* note 91, at 145.

¹¹⁸ Shanor, *supra* note 16, at 147.

¹¹⁹ *Zauderer*, 741 U.S. at 651 (majority opinion); *id.* at 657 (Brennan, J., concurring in part and dissenting in part).

¹²⁰ *Id.* at 651 (majority opinion). Indeed, the Court has found that some compelled speech is “as violative of the First Amendment as prohibitions on speech.” *Id.* at 650.

disclosure would not pass the *Zauderer* test, it certainly would not survive scrutiny under *Central Hudson*.¹²¹

Recent First Amendment jurisprudence has expanded the level of protection for commercial speech, and recent applications of heightened scrutiny have made it more difficult for commercial speech regulations to overcome constitutional review.¹²² Outside the realm of compelled commercial disclosures, the recent Supreme Court case *Reed v. Town of Gilbert* demonstrates the zenith of expanding commercial speech protections by subjecting all content-based regulations to strict scrutiny.¹²³ Professor Genevieve Lakier has forecast that the *Reed* decision is only the “tip of the iceberg,” and that “[t]he decision thus demonstrates once again the pronounced deregulatory tilt of the Roberts Court’s First Amendment jurisprudence.”¹²⁴ Although litigants have pushed for the *Reed*’s strict scrutiny to apply to commercial speech, lower courts do not seem to be extending the *Reed* rule to the commercial speech doctrine.¹²⁵ But the decision represents a growing trend toward stricter scrutiny. In conjunction with the Supreme Court’s decision in *Sorrell v. IMS Health Inc.*—which applied heightened scrutiny to commercial speech governance¹²⁶—the decision in *Reed* could have further implications on the commercial speech doctrine.¹²⁷ Notably, if *Reed* does apply to commercial speech, the decision would replace both *Central Hudson* and *Zauderer*.¹²⁸

If this trend continues, opponents to the GE labeling law will likely demand heightened scrutiny, which may even rise to the breed of intermediate scrutiny outlined in *Central Hudson*. Even if a reviewing court applies the *Zauderer* standard—which is, in theory, less exacting—the outcome may be predicated upon the court’s interpretation of the standard; namely, its interpretation of the requisite government interest to satisfy the government’s burden.

¹²¹ If the *Zauderer* standard does not apply, the default for a compelled commercial disclosure would be stricter scrutiny under *Central Hudson*. See R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1217 (D.C. Cir. 2012), *overruled by* Am. Meat Inst. v. USDA, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

¹²² See, e.g., Grocery Mfrs. Ass’n v. Sorrell, 102 F. Supp. 3d 583, 621–22 (D. Vt. 2015).

¹²³ 135 S. Ct. 2218, 2227 (2015).

¹²⁴ Genevieve Lakier, *Reed v. Town of Gilbert, Arizona, and the Rise of the Anticlassificatory First Amendment*, 2016 SUP. CT. REV. 233, 235–36 (2017).

¹²⁵ See Lee Mason, Comment, *Content Neutrality and Commercial Speech Doctrine After Reed v. Town of Gilbert*, 84 U. CHI. L. REV. 955, 958 (2017).

¹²⁶ 564 U.S. 552, 557 (2011).

¹²⁷ See Mason, *supra* note 125, at 958.

¹²⁸ See Shanor, *supra* note 16, at 179.

The federal GE labeling law is sufficiently similar to the law at issue in *International Dairy Foods Ass'n v. Amestoy*¹²⁹ to raise doubt as to whether the Act may override First Amendment protections, despite the fact that compelled commercial speech is less protected than noncommercial speech.¹³⁰ In *International Dairy*, a Vermont state law required the labeling of dairy products containing a recombinant version of a hormone called bovine somatotropin, which presented no verified health risk to consumers because only trace levels of the hormone transferred to the final product.¹³¹ Like in *International Dairy*, the federal GE labeling law “indisputably requires [manufacturers] to speak when they would rather not.”¹³²

Because case law demonstrates both successes and failures to First Amendment challenges, forecasting whether the GE labeling law will survive free-speech litigation is uncertain.

Notwithstanding the fact that some litigants argue for stricter scrutiny,¹³³ to realize a change in standards of constitutional review, courts must grant these motions for heightened scrutiny. Indeed, courts may be increasingly applying stricter scrutiny, especially when reviewing public-health regulations.¹³⁴ If this trend continues, it is less likely that the federal GE labeling law will withstand constitutional challenges. In fact, when courts apply intermediate scrutiny under the *Central Hudson* standard, First Amendment challenges are often successful in overturning overly burdensome laws.¹³⁵

Government interest requirements under each test have also made it more difficult for the government to meet its burden. Recently, courts have increasingly required government interests “to have a clear and consistent policy” with evidence that the regulation will carry out the government objective and that the method is no more extensive than necessary.¹³⁶ This is a marked departure from the deference that courts customarily granted the

¹²⁹ 92 F.3d 67 (2d Cir. 1996).

¹³⁰ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980).

¹³¹ 898 F. Supp. 246, 248–49 (D. Vt. 1995). Further, there was no appreciable difference from a consumer standpoint regarding freshness, taste, nutritional value, or even price, *id.* at 249, and “neither consumers nor scientists can distinguish” between the milk produced from cows treated with the recombinant hormone and cows not treated with the recombinant hormone. *Int'l Dairy*, 92 F.3d at 73.

¹³² *Int'l Dairy*, 92 F.3d at 72.

¹³³ *Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583, 621–22 (D. Vt. 2015).

¹³⁴ See Rauer, *supra* note 12, at 691; see also Berman, *supra* note 101, at 54 (explaining that the Supreme Court has made it more difficult to impose restrictions on commercial advertising, but that mandatory disclosures of factual information are a more constitutionally viable alternative).

¹³⁵ Rauer, *supra* note 12, at 691.

¹³⁶ GOSTIN & WILEY, *supra* note 91, at 143–44.

government in early cases applying the *Central Hudson* test.¹³⁷ In addition, lately there have been efforts to dislodge mandatory disclosures from a “subordinate position in the scale of First Amendment” protections.¹³⁸

Moreover, the Supreme Court has yet to review the constitutionality of mandatory disclosures in the public-health context; indeed, “this area of law is rife with circuit splits, ambiguous opinions, and unanswered questions that make it difficult to issue any clear statements about black letter law.”¹³⁹ Taken together, it is difficult to predict whether the GE labeling law will overcome First Amendment challenges. The myriad uncertainties surrounding the standards make the law ripe for review by the Supreme Court. Because of the nebulous requirements of both tests, the Supreme Court should clarify the appropriate scrutiny level—if any specific level should be applied at all—and the requisite government interests for the government to satisfy its burden. If the *Zauderer* standard is, indeed, the appropriate standard in the public-health arena, the Court should determine whether *Zauderer* requires a substantial government interest.

D. After Applying a Three-Factor Analysis, Zauderer Should Be the Appropriate Standard for Compelled Commercial Disclosures Implicating Public Health

Zauderer, and its lesser scrutiny, is likely the appropriate standard to review the GE labeling law because the Act provides for a mandatory disclosure rather than a restriction on speech. Indeed, all public health regulations must, at a minimum, meet the rational basis standard, akin to the *Zauderer* standard.¹⁴⁰ However, in consideration of recent efforts to apply a *Central-Hudson*-type scrutiny—with heightened government interest requirements—to compelled commercial disclosure cases, this prediction is not fail-safe.¹⁴¹

A reviewing court should apply a three-factor analysis to determine the appropriate scrutiny level, whether intermediate scrutiny under *Central Hudson* or a more relaxed level under *Zauderer*. In *GMA v. Sorrell*, the District Court of Vermont applied a three-factor test¹⁴² that examined (1) “whether the

¹³⁷ *Id.*

¹³⁸ *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

¹³⁹ *Berman*, *supra* note 101, at 54.

¹⁴⁰ *GOSTIN & WILEY*, *supra* note 91, at 147.

¹⁴¹ *See, e.g.*, *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583 (D. Vt. 2015).

¹⁴² *Id.* at 626.

compelled speech is ‘commercial’ in nature,” (2) “whether it is purely factual and not ‘controversial,’” and (3) “whether [the] disclosure requirement is supported by [an] . . . interest beyond merely satisfying consumer curiosity.”¹⁴³ If the Supreme Court decides to adopt a formal test to discern the appropriate scrutiny level for compelled commercial disclosures, the three-part *GMA v. Sorrell* test is useful because the test touches upon the important considerations of a reviewing court. Accordingly, this Comment applies the *GMA v. Sorrell* three-part test to conclude that the *Zauderer* reasonable relationship test is the appropriate level of scrutiny for the GE labeling disclosure, a conclusion that hinges upon the fact that the speech at issue is not controversial.

First, like in *GMA v. Sorrell*, the speech at issue in the federal GE labeling bill is commercial in nature. Disclosure requirements are akin to other product labeling requirements, including calorie content on nutrition panels, which “are traditionally regarded as commercial speech even if they effectively discourage the product’s consumption.”¹⁴⁴ Because it is well settled that mandatory disclosures fall within the commercial speech context, the first part of the analysis will not be contentious.

Second, the mandatory speech is not controversial because the label conveys factual information, even though the disclosure regulates the content of the manufacturers’ speech.¹⁴⁵ Although “the very category of commercial speech is a context-based category,”¹⁴⁶ and courts have recognized that “virtually all mandatory disclosure requirements regulate content and speakers in this manner,” the regulations do “not necessarily render them impermissible viewpoint discrimination.”¹⁴⁷ Commercial speech is protected by the First

¹⁴³ *Id.* The District Court of Vermont found that the GE labeling law at issue satisfied each of these three factors, and therefore found that the appropriate level of scrutiny was the reasonable relationship test under *Zauderer*. *Id.* Although both the *Central Hudson* and *Zauderer* tests are controlling because they were promulgated by the Supreme Court, the three-factor test the District Court of Vermont employed is not controlling precedent. *Id.*

¹⁴⁴ *Id.* at 627 (citing *N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health*, 556 F.3d 114, 131, 133 (2d Cir. 2009)). This notion echoes the Supreme Court’s ruling in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67–68 (1983).

¹⁴⁵ *See Grocery Mfrs. Ass’n*, 102 F. Supp. 3d at 624.

¹⁴⁶ Shanor, *supra* note 16, at 151.

¹⁴⁷ *Grocery Mfrs. Ass’n*, 102 F. Supp. 3d at 624; *see also Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (“So-called ‘compelled speech’ may under modern Supreme Court jurisprudence raise a serious First Amendment concern where it effects a forced association between the speaker and a particular viewpoint.”).

Amendment “only to the extent it conveys ‘accurate and reliable’ information to consumers.”¹⁴⁸

Disclosure of factual information, such as the presence of GE ingredients, does not convey “controversial information.”¹⁴⁹ Consequently, the disclosure requirement in connection with the GE labeling law will not likely be considered political and thus would not constitute controversial speech to qualify for broader First Amendment protections—broad enough to warrant higher scrutiny levels. Moreover, the disclosure would not reflect an opinion solely “because it compels a speaker to convey information contrary to its interests.”¹⁵⁰ The federal GE labeling law, like the Vermont state law, requires manufacturers “to speak against their will, regulates the content of that speech, and identifies the class of speakers who must make it.”¹⁵¹ Accordingly, the GE disclosure should not be deemed controversial speech by a reviewing court.

Lastly, a reviewing court will determine whether the Act is motivated by more than consumer curiosity. This factor, specifically, should be clarified by the Supreme Court, as there is a great deal of uncertainty as to which government interests are sufficient to meet this requirement. In practice, the difficulty of reviewing the third factor lies in that courts are unclear as to whether current jurisprudence has ascribed a substantial interest to the rational relationship requirement under *Zauderer*,¹⁵² which would heighten the level of scrutiny. This confusion is compounded by the absence of clear direction from Congress, which “has not squarely addressed whether materiality pertains only to safety concerns or whether it also includes consumer interest.”¹⁵³ In the issue of food labeling, both consumer safety and consumer interest are of

¹⁴⁸ Berman, *supra* note 101, at 66 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

¹⁴⁹ *Grocery Mfrs. Ass’n*, 102 F. Supp. 3d at 630 (citing *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001)).

¹⁵⁰ *Id.* at 629 (citing *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 564 (6th Cir. 2012)).

¹⁵¹ *Id.* at 624. As noted by Professor Berman, “if this were the standard, every warning or disclosure that a manufacturer did not want to convey would be ‘controversial.’” Berman, *supra* note 101, at 70.

¹⁵² See *Grocery Mfrs. Ass’n*, 102 F. Supp. 3d at 633 (“As a threshold issue, it is not clear whether *Zauderer* requires a state to identify a ‘substantial’ governmental interest before it may require a factual, non-controversial commercial disclosure,” even though “*Zauderer*, itself, does not impose this requirement.”). Some circuits, including the Second Circuit, have required a substantial government interest under the *Zauderer* standard for commercial disclosure cases, rather than merely a reasonable relationship. See, e.g., *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (applying the *Zauderer* standard to disclosures aimed at better informing consumers even though the disclosure was not the best means of realizing the goal). However, even courts that have applied this substantial interest standard have not explicitly stated its requirement under *Zauderer*. See *Grocery Mfrs. Ass’n*, 102 F. Supp. 3d at 633.

¹⁵³ *Alliance for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166, 178 (D.D.C. 2000).

significance. Indeed, “[m]ost affirmative labeling obligations are relevant to health, safety, nutrition or health, and therefore further a ‘substantial interest,’”¹⁵⁴ but because the health concerns underlying GE foods are, to date, unsubstantiated—or, at best, equivocal¹⁵⁵—the government may fail to present a sufficient interest to satisfy its burden under *Central Hudson* or *Zauderer*. Moreover, currently, it is unsettled whether consumer curiosity, scant scientific information, and Congress’s aim to preempt fifty sets of disparate state laws suffice to satisfy the requisite government interest under either *Zauderer* or *Central Hudson*.

At present, it is unclear whether consumer curiosity will satisfy the government’s burden. Interestingly, mandatory disclosures are often galvanized by citizen demand.¹⁵⁶ Indeed, consumer interest was one of the motivating factors to the GE labeling law—in both the state and federal iterations. Accordingly, whether consumer curiosity is a sufficient government interest will likely be a point of debate once the GE labeling law faces litigation.

Courts are split as to whether consumer curiosity suffices as a requisite government interest. In *International Dairy Foods Ass’n v. Amestoy*, the Second Circuit held that “consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement.”¹⁵⁷ Although the Second Circuit court was sympathetic to consumer concerns, the motive was insufficient to compel manufacturers to speak against their will and would open the door to endless disclosure requirements.¹⁵⁸ By contrast, the court in *GMA v. Sorrell* found that the Vermont GE labeling law could “extend beyond the mere appeasement of consumer curiosity,” although the court conceded that the government interests “arguably border” the line.¹⁵⁹ To be sure, the Vermont labeling law was implemented as a consumer protection rule.¹⁶⁰

¹⁵⁴ Carver, *supra* note 90, at 195.

¹⁵⁵ See *Consumer Info About GE Food*, *supra* note 17.

¹⁵⁶ See Shanor, *supra* note 16, at 167.

¹⁵⁷ 92 F.3d 67, 74 (2d Cir. 1996).

¹⁵⁸ *Id.*

¹⁵⁹ *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 631 (D. Vt. 2015). The court cites to the “scientific debate about the safety of GE ingredients,” as well as environmental impacts and “accommodating religious beliefs about GE.” *Id.* Some scholars cite to other governmental interests that might satisfy more than consumer concern under *Zauderer*—or even a substantial interest under *Central Hudson*. See Stephen Tan & Brian Epley, *Much Ado About Something: The First Amendment and Mandatory Labeling of Genetically Engineered Foods*, 89 WASH. L. REV. 301, 315–27 (2014) (citing environmental, economic, social, and cultural impacts of GE farming to be substantial interests that would overcome First Amendment concerns).

¹⁶⁰ Vt. Consumer Protection R. § 121 (2016).

While consumer concerns may seem less urgent than public health, courts have regarded consumer concerns as sufficient government interests to uphold product labeling. In *American Meat Institute v. U.S. Department of Agriculture*, the D.C. Circuit found a sufficient government interest in country-of-origin labels for meat because the law allowed consumers to “make informed choices based on characteristics of the products they wished to purchase” even though the law did not involve any ostensible consumer deception.¹⁶¹ Here, the GE labeling law may withstand First Amendment challenges if a reviewing court finds that the mandatory disclosure is “reasonably related to the State’s interest in preventing deception of consumers.”¹⁶² Notably, to date, all compelled commercial speech cases reviewed by the Supreme Court have involved consumer deception,¹⁶³ and consumer litigation against food manufacturers often cites false and misleading labels.

Whereas the Vermont GE labeling law details government interests in the “Findings” and “Purpose” sections of the Vermont state law,¹⁶⁴ the federal Act does not contain a “Findings” or “Purpose” section to justify its enactment.¹⁶⁵ There was some discussion in the *Congressional Record* regarding the safety of GE foods, but most of the legislative history suggests the driving force behind the Act was to preempt patchwork state laws.¹⁶⁶

A troubling concern is that absent Congress’s direction, courts must intervene to determine the indistinct line between “satisfying consumer curiosity” and substantial government interests.¹⁶⁷ Consequently, this entitles courts “the role of a scientific review committee, second-guessing legislative decisions.”¹⁶⁸ However, without judicial review, government restrictions like this compelled disclosure could go unchecked.

¹⁶¹ 760 F.3d 18, 24–25 (D.C. Cir. 2014) (en banc).

¹⁶² *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

¹⁶³ Berman, *supra* note 101, at 75.

¹⁶⁴ 2014 Vt. Acts & Resolves 346. The court in *GMA v. Sorrell* stated that if the *Zauderer* requirement did, indeed, impose a substantial interest on the part of the government, that the “Findings” and “Purpose” would exhibit a substantial government interest. *Grocery Mfrs. Ass’n*, 102 F. Supp. 3d at 633–34.

¹⁶⁵ National Bioengineered Food Disclosure Standard, 7 U.S.C. §§ 1639, 1639a–c, 1639i–j, 6524 (Supp. 2018).

¹⁶⁶ See, e.g., 162 CONG. REC. H4935 (daily ed. July 14, 2016) (statement of Rep. Peterson) (“This legislation is needed to avoid a situation where 50 [s]tates set up 50 different labels, which would only create confusion for consumers, farmers, and food companies.”).

¹⁶⁷ Berman, *supra* note 101, at 76.

¹⁶⁸ *Id.*

Consumer interest does not always equate with improved consumer safety. Indeed, the effectiveness of mandatory warnings in the public health context on other products is equivocal, which cuts against the argument that the mandatory GE label has a sufficient government interest in the protection of the health of consumers. For example, calorie disclosures, which have been mandatory in New York City since 2008 (and will soon be required of chain restaurants throughout the United States), have had minimal, if any, impact on the choices of consumers.¹⁶⁹

Once the Act is challenged, the government will likely posit that its interest is to prevent consumer deception and to block patchwork state laws.¹⁷⁰ In favor of satisfying the government interest requirement, the Supreme Court has suggested that “compelled disclosures are preferable to restrictions on speech—even when consumer deception is not involved.”¹⁷¹ As seen in *R.J. Reynolds Tobacco Co. v. Food & Drug Administration*,¹⁷² the D.C. Circuit Court concluded that the *Zauderer* standard is appropriate “when the government affirmatively demonstrates that an advertisement threatens to deceive consumers.”¹⁷³ However, this argument may be weaker regarding the federal GE labeling law as the disclosure would not compromise consumer health if a consumer chooses one product that bears the disclosure over a product that does not. The consumer deception argument is rooted in the idea “that consumers should assign significance to the fact that a product contains an ingredient derived from a genetically engineered plant.”¹⁷⁴ But if there is no consumer deception involved based on a credible health claim, this consideration may weigh in favor of GE labeling law opponents. Under

¹⁶⁹ *Id.* at 56. The ineffectiveness of some mandatory disclosures may be rooted in the fact that the burden of changing behavior shifts to the consumer receiving the message. *Id.* at 57.

¹⁷⁰ *Zauderer* has made clear that disclosure need not be necessary to fulfill the government interest, as would be required under the strict scrutiny “least restrictive means” requirement. *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626, 651 n.14 (1985).

¹⁷¹ Berman, *supra* note 101, at 73–74. (explaining that “the *Central Hudson* framework relies heavily on the supposition that ‘more speech’ (i.e., required disclosures) is preferable to restrictions on speech, whether . . . the governmental interest at stake involves countering consumer deception”).

¹⁷² *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), *overruled by Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc).

¹⁷³ *R.J. Reynolds Tobacco Co.*, 696 F.3d at 1214. Although the disclosure in *R.J. Reynolds* was a graphic image, there were also doubts as to whether the image conveyed “‘purely factual and uncontroversial’ information.” *Id.* at 1216 (quoting *Zauderer*, 471 U.S. at 651). Although USDA has yet to determine the form of the disclosure, the format will likely be a text or symbol rather than a graphic image. National Bioengineered Disclosure Standard, 7 U.S.C. § 1639b(b)(2)(D) (Supp. 2018) (proposing USDA implement a disclosure by text, symbol, or link).

¹⁷⁴ *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 621 (D. Vt. 2015) (quoting Plaintiff’s Amended Complaint, Doc. 37-1 at 14 ¶ 43).

Zauderer, the government interest “may be based on rational speculation unsupported by evidence or empirical data.”¹⁷⁵ Despite this lesser standard, there are still doubts as to whether the meager scientific data claiming that GEs pose certain health risks would satisfy the government interest under *Zauderer* to overcome constitutional challenges.

Therefore, the government’s best tactic to overcome the government interest requirement is to highlight the detriment to manufacturers and consumers in allowing patchwork state laws in the absence of a federal law. Federal preemption of state laws supports the interests of both manufacturers and consumers by preventing each state from adopting GE labeling laws with disparate standards.¹⁷⁶

In the interest of manufacturers, if a company had to create tailor-made labels for certain states, labeling could be prohibitively expensive, especially if several states have conflicting requirements. To cover costs, the manufacturer may then transfer the price increase to consumers. Discussing the interest of consumer protection, the *Congressional Record* notes the benefits of a federal regulatory scheme and the dangers of patchwork labeling laws. Senator McConnell stated the GE labeling law “would protect middle-class families from unnecessary and unfair higher food prices that could result from a patchwork of [s]tate food labeling laws.”¹⁷⁷ Addressing disparate state laws, Chairman Conaway indicated that “some [s]tates have begun to implement arbitrary and inconsistent labeling laws that threaten to increase consumer confusion and food costs while ultimately interfering with interstate commerce.”¹⁷⁸ Both of these government interests, individually or together, could pass rational basis scrutiny under *Zauderer*.

IV. TWO TYPES OF PRIVATE LITIGATION WILL BE NECESSARY TO ENFORCE THE GE LABELING LAW

Assuming the federal GE labeling law withstands First Amendment challenges, the weak enforcement provision implores that private litigation aid to enforce the Act. Two types of litigation may prove to be valuable enforcement tools. First, this Part explores a new wave of consumer litigation

¹⁷⁵ Berman, *supra* note 101, at 59 (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)).

¹⁷⁶ 162 CONG. REC. H4935 (daily ed. July 14, 2016) (statement of Rep. Peterson).

¹⁷⁷ 162 CONG. REC. S4778 (daily ed. July 6, 2016) (statement of Sen. McConnell). *But see* 162 CONG. REC. S4787 (daily ed. July 6, 2016) (statement of Sen. Tester) (“This is completely ridiculous, a nightmare for consumers, and an illusion of transparency.”).

¹⁷⁸ 162 CONG. REC. H4934 (daily ed. July 14, 2016) (statement of Rep. Conaway).

that will likely follow in the same vein as current consumer class action suits arising from voluntary disclosure of GE products. Second, this Part discusses a new trend in competitor suits arising under the Lanham Act, which may be a promising way for competitors to enforce the GE labeling law absent persuasive enforcement in the Act. Both consumer litigation and Lanham Act suits may “fill [the] regulatory void” left by federal administrative agencies.¹⁷⁹

A. *Consumer Litigation Will Be a Useful Enforcement Tool*

To enforce the Act, consumers will likely file class actions that will follow the footsteps of scads of existing litigation arising from voluntary GE labels.¹⁸⁰ The presence of a mandatory labeling scheme will not likely preclude suits from consumers, just as the implementation of the federal organic program has not stopped consumer litigation of misleading labels.¹⁸¹ This section examines the current landscape of consumer class actions in the food labeling industry, and addresses hurdles to consumer redress that may pave the way for competitor suits to become a more powerful enforcement tool than consumer class actions.

Cases involving food products, including GE labeling, are prevalent in consumer class-action litigation.¹⁸² Within the practice of class-action litigation, the subset of consumer class actions serves to represent users of products and services for claims arising under consumer and securities fraud, products liability, and employment discrimination,¹⁸³ especially prevalent in the areas of “insurance, healthcare, data privacy, antitrust, and retail products.”¹⁸⁴ Most states have consumer protection laws that provide a right of action to injured consumers; the majority of these states permit consumers to aggregate their claims through the class action model.¹⁸⁵ In the context of food

¹⁷⁹ Hilary G. Buttrick & Courtney Droms Hatch, *Pomegranate Juice Can Do THAT? Navigating the Jurisdictional Landscape of Food Health Claim Regulation in a Post-POM Wonderful World*, 49 IND. L. REV. 267, 268 (2016).

¹⁸⁰ See, e.g., *Gallagher v. Chipotle Mexican Grill, Inc.*, No. 15-cv-03952-HSG, 2016 WL 454083 (N.D. Cal. Feb. 5, 2016); *Garcia v. Kashi Co.*, 43 F. Supp. 3d 1359 (S.D. Fla. 2014); *Pappas v. Naked Juice Co.*, No. CV 11-8276-JAK, 2012 WL 12248744 (C.D. Cal. Dec. 7, 2012).

¹⁸¹ See, e.g., ASHLEY HARRISON ET AL., AM. BAR ASS'N, RECENT DEVELOPMENTS AND CASE UPDATES IN FOOD LABELING CLASS ACTIONS AND ADVERTISING LITIGATION (2015).

¹⁸² *Id.*

¹⁸³ Paul G. Karlsgodt & Dustin M. Dow, *The Practical Approach: How the Roberts Court Has Enhanced Class Action Procedure by Strategically Carving at the Edges*, 48 AKRON L. REV. 883, 896–97 (2015).

¹⁸⁴ *Id.* at 897.

¹⁸⁵ Michael Isaac Miller, Comment, *The Class Action (Un)Fairness Act of 2005: Could It Spell the End of the Multi-State Consumer Class Action?*, 36 PEPPERDINE L. REV. 879, 891 (2009).

labeling, lawsuits typically claim misleading or deceptive labeling and false advertising.¹⁸⁶ Specific claims may include, for example, “violation of state consumer protection laws, breach of express warranty, breach of the implied warranty of merchantability, and unjust enrichment.”¹⁸⁷

Recent class action cases have had a mixed track record for plaintiffs and defendants. These mixed yet moderate success rates for both plaintiffs and defendants hinge on the class certification stage.¹⁸⁸ An example of a successful plaintiff is the case *Garcia v. Kashi Co.*, in which a class of plaintiffs alleged that the presence of GMOs on a product with “all natural” labeling was deceptive and misleading to a reasonable consumer.¹⁸⁹ The Southern District of Florida denied the defendant’s motion to dismiss, finding that the complaint “sufficiently alleges that a reasonable consumer would expect a product labeled ‘all natural’ to be free of GMOs.”¹⁹⁰ In contrast, defendants have also been successful. In *In re ConAgra Foods, Inc.*, the court denied class certification in a case concerning cooking oil labeled as “100% Natural” despite the presence of GE ingredients.¹⁹¹ Because plaintiffs have garnered some success, consumers continue to seek redress for their food labeling grievances, so it may be presumed that this trend will continue with the federal mandatory GE disclosure as the subject of litigation.

However, there are certain types of cases in which plaintiffs may be more successful. Statistically, plaintiffs more often succeed in claims for false or misleading advertising rather than false health claims because defendants more often prevail in moving to dismiss health claim cases.¹⁹² Before reaching the merits, significant hurdles to plaintiffs, for both health and nonhealth claims, frequently arrive at the class certification stage, when courts often deny putative classes based on a lack of ascertainability.¹⁹³

Despite these barriers, consumers will likely challenge the GE labeling law, as they do in many other labeling grievances, but they will seek redress in state courts. The Act affords no private right of action to individual consumers,

¹⁸⁶ See generally HARRISON ET AL., *supra* note 181 (canvassing class-action lawsuits).

¹⁸⁷ *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 547 (C.D. Cal. 2014).

¹⁸⁸ *Id.*

¹⁸⁹ 43 F. Supp. 3d 1359, 1368 (S.D. Fla. 2014).

¹⁹⁰ *Id.* at 1385. Although the Southern District of Florida denied the defendant’s motion to dismiss in *Garcia v. Kashi, Co.*, defendants may have more success as the pleadings stage. See HARRISON ET AL., *supra* note 181, at 8–9.

¹⁹¹ 302 F.R.D. at 547, 581.

¹⁹² HARRISON ET AL., *supra* at note 181, at 2, 8.

¹⁹³ *Id.* at 10, 14.

so litigation will arise under state laws, either through parallel state GE labeling laws as recommended by Congress¹⁹⁴—provided the parallel laws afford a private right of action—or through existing consumer-protection laws,¹⁹⁵ such as California’s False Advertising Law under California’s Unfair Competition Law (UCL)¹⁹⁶ or California’s Consumer Legal Remedies Act.¹⁹⁷ Certainly, state consumer protection laws may prove to be effective enforcement tools: they often allow for private rights of action and grant state attorneys general leeway to bring enforcement actions against manufacturers for unfair or deceptive trade practices.¹⁹⁸ Consumers may also seek redress through “breach of warranty or common law fraud claims.”¹⁹⁹ Either channel is consistent with recent trends in class-action litigation.²⁰⁰

Through either proprietary state GE labeling laws or state consumer-protection laws, consumers will likely initiate class-action lawsuits because the amounts in controversy of actual consumer injury will not reflect values worth litigating individual lawsuits.²⁰¹ Litigating individual injuries separately is not a wise method of redress because the cost of litigation will far outweigh the value of the product.²⁰² Consequently, “[w]here recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification.”²⁰³

¹⁹⁴ National Bioengineered Food Disclosure Standard, 7 U.S.C. § 1639b(e) (Supp. 2018).

¹⁹⁵ See, e.g., *In re POM Wonderful LLC Mktg. & Sales Practices Litig.*, No. ML 10-02199 DDP, 2012 WL 4490860 (C.D. Cal. Sept. 28, 2012).

¹⁹⁶ CAL. BUS. & PROF. CODE § 17200 (West 2012). “The UCL was enacted to protect citizens against ‘unlawful,’ ‘unfair,’ and ‘fraudulent’ business activities, including false advertising.” HILARY HEHMAN, OFFICE OF COURT RESEARCH, ADMIN. OFFICE OF THE COURTS, FINDINGS OF THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION, 2000–2006: FIRST INTERIM REPORT 8 (2009). Because of the UCL’s relatively lax standing requirements that did not compel plaintiffs to “demonstrate actual harm or seek formal class certification for the representative action,” plaintiffs cited the UCL in 45.6% of business tort cases in the study. *Id.* at 8–9.

¹⁹⁷ CAL. CIV. CODE § 1750 (West 2009).

¹⁹⁸ GOSTIN & WILEY, *supra* note 91, at 503.

¹⁹⁹ Buttrick & Hatch, *supra* note 179, at 279 (citing NICOLE E. NEGOWETTI, GOVERNANCE STUDIES BROOKINGS INST., FOOD LABELING LITIGATION: EXPOSING GAPS IN THE FDA’S RESOURCES AND REGULATORY AUTHORITY 11 (2014)).

²⁰⁰ HEHMAN, *supra* note 196, at 4 (“The number of class action cases filed from 2000 to 2005 increased in contrast to the total unlimited civil filings trend during the same period, which shows an overall decrease.”).

²⁰¹ See, e.g., *In re POM Wonderful LLC Mktg. & Sales Practices Litig.*, No. ML 10-02199 DDP, 2012 WL 4490860 (C.D. Cal. Sept. 28, 2012). Usually, “[t]he most compelling rationale for finding superiority in a class action” is “the existence of a negative value suit.” *Castano v. Am. Tobacco Co.* 84 F.3d 734, 748 (5th Cir. 1996).

²⁰² *POM Wonderful*, 2012 WL 4490860, at *6 (citing *Johnson v. General Mills, Inc.*, 275 F.R.D. 282, 289 (C.D. Cal. 2011)).

²⁰³ *Id.* (alteration in original) (quoting *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010)).

While consumer class actions will likely endure, the continued use of coupon settlements in class actions may elevate competitor suits as a superior method of enforcement. The Class Action Fairness Act of 2005 (CAFA)²⁰⁴ expanded federal jurisdiction for interstate class actions and attempted to curb coupon settlements,²⁰⁵ but did not rule out entirely the possibility of coupon settlements for class-action litigation.²⁰⁶ In fact, CAFA may have had little to no effect on coupon settlements and the tendency for plaintiffs' attorneys to boost their fees.²⁰⁷ Most notably, some federal courts that have addressed this issue have concluded CAFA's provisions on coupon settlements are no more restrictive than the traditional requirements under Rule 23(e) of the Federal Rules of Civil Procedure, governing "fairness, reasonableness, and adequacy,"²⁰⁸ despite CAFA's additional procedural requirement.²⁰⁹ While some federal courts have explicitly addressed the issue,²¹⁰ other courts have implicitly adopted the same standard as Rule 23(e).²¹¹

In the context of food-labeling litigation, federal courts have applied the same standard as Rule 23(e) even after the enactment of CAFA. In *In re Tyson Foods*, a class of consumer plaintiffs alleged that the product was false and misleading, and coupons were part of the relief,²¹² yet there was no mention of a different standard under CAFA than under Rule 23(e), thus implicitly adopting the Rule 23(e) standard.²¹³ On the contrary, some federal courts have applied stricter standards after CAFA.²¹⁴ Although state courts do not need to honor CAFA or the Federal Rules of Civil Procedure, which are applicable in federal courts, some courts look to CAFA for guidance, especially courts that have recognized "how 'mainstream' the concern with coupon settlements has become."²¹⁵ Both state and federal courts may continue to grant coupon settlements. Even if a settlement has the effect of enforcing the GE labeling

²⁰⁴ 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2012).

²⁰⁵ *Id.* §§ 1332(d)(2), 1712.

²⁰⁶ Michael W. Davis et al., *Coupon Settlements Play Continuing Role in Class Action Litigation After CAFA*, 13 CLASS ACTION LITIG. REP. 811 (2012).

²⁰⁷ *See id.*

²⁰⁸ *Id.* at 813.

²⁰⁹ 28 U.S.C. § 1712(e) (2012) (requiring a hearing and "making a written finding that[] the settlement is fair, reasonable, and adequate for class members").

²¹⁰ *See e.g.*, *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37 (D.D.C. 2010) ("The 'fair, reasonable, and adequate' standard imposed by CAFA is identical to the language in Rule 23(e) . . .").

²¹¹ Davis et al., *supra* note 206, at 812–13.

²¹² *In re Tyson Foods Inc.*, No. RDB-08-1982, 2010 WL 1924012, at *1, 3 (D. Md. May 11, 2010).

²¹³ *See* Davis et al., *supra* note 206, at 813.

²¹⁴ *See, e.g., id.*

²¹⁵ *Id.* at 814 (quoting *In re Mass. Smokeless Tobacco Litig.*, No. 03-5038-BLS I, 2008 BL 106204 (Mass. Super. Ct. Apr. 09, 2008)).

law, plaintiffs' attorneys will still be enriched far more than a token coupon may provide redress to consumers.²¹⁶ In addition, consumer litigation can tarnish an infringing manufacturer's reputation in the consumer marketplace,²¹⁷ which may compel manufacturers into compliance. Consequently, although consumer litigation does not serve to make injured consumers whole, it will likely remain a valuable enforcement tool. However, consumer litigation alone may be insufficient. Although litigation from competitors under the Lanham Act may not provide consumers redress apart from actual enforcement of the law, damages resulting from Lanham Act cases would serve to make law-abiding competitors whole rather than class-action attorneys. This may lead competitor suits to be the most promising enforcement tool to effect compliance with the GE labeling law.

B. Competitor Suits Under the Lanham Act Will Be the Most Effective Enforcement Tool

Due to the lack of enforcement provisions within the Act itself, competitors hoping for compliance cannot rely solely on the federal government for enforcement. In other disputes in the food industry, competitors have, creatively, been successful litigating under the Lanham Act. The Supreme Court's decision in *POM Wonderful LLC v. Coca Cola Co. (POM Wonderful)*²¹⁸ paved the way for competitor suits to be a viable enforcement tool.²¹⁹ This landmark decision "altered the landscape for both food and beverage manufacturers and consumers,"²²⁰ and since then there has been a host of cases by competitors under the Lanham Act seeking to enforce food-labeling violations.²²¹

²¹⁶ 28 U.S.C. § 1712(a) (2012).

²¹⁷ Andrea M. Pezzullo, Note, *The Crusade Against Misleading Labels: Are Manufacturers the Protectors of Consumer Interests?*, 49 SUFFOLK U. L. REV. 323, 342 (2016).

²¹⁸ 134 S. Ct. 2228 (2014).

²¹⁹ See Pezzullo, *supra* note 217, at 333, 337 ("Many food, beverage, and drug manufacturers [have] brought claims under the Lanham Act to combat their competitors' false labeling.").

²²⁰ *Id.* (citing Mary LeFrance, *LeFrance on Federal False Advertising Claims Arising from FDA-Complaint Labels: POM Wonderful LLC v. Coca-Cola Co.*, 2014 EMERGING ISSUES 7211 (2014)).

²²¹ See, e.g., *ThermoLife Int'l, LLC v. Gaspari Nutrition Inc.*, 648 F. App'x 609 (9th Cir. 2016); *Me. Springs, LLC v. Nestlé Waters N. Am., Inc.*, No. 2:14-cv-00321-GZS (D. Me. Nov. 2, 2015), http://www.med.uscourts.gov/Opinions/Singal/2015/GZS_11022015_2-14cv321_Maine_Springs_v_Nestle_Waters.pdf; Memorandum of Law in Support of Plaintiff's Motion for a Preliminary Injunction, *Conopco, Inc. v. Hampton Creek, Inc.*, No. 2:14-cv-06856-WHW-CLW (D.N.J. Nov. 7, 2014), <http://www.coatsandbennett.com/images/pdf/motion-for-PI.pdf>; Complaint, *Global Beverage Enters. Inc. v. Cytosport, Inc.*, No. 0:14-cv-60950-JIC (S.D. Fla. Apr. 23, 2014).

The holding in *POM Wonderful* allowed a litigation gap through which product manufacturers can sue one another for unfair competition under the Lanham Act.²²² The Lanham Act creates a private right of action for competitors, but not individual consumers.²²³ Until this ruling, it was unclear whether FDA's primary jurisdiction would preclude suits by competitors.²²⁴ In this case, POM Wonderful sued Coca-Cola because the latter extolled the antioxidant virtues of its pomegranate-blueberry juice blend when the product was mostly a blend of apple and grape juices.²²⁵ POM Wonderful alleged that Coca-Cola duped customers into buying the Coca-Cola product and that POM Wonderful was injured as a competitor.²²⁶

Procedurally, to enforce the GE labeling law, competitors will need to sue to enforce the Lanham Act, not the federal GE labeling law.²²⁷ The Lanham Act allows a competitor to challenge misleading product descriptions, even if the labeling complies with the requirements of the Food, Drug, and Cosmetic Act (FDCA).²²⁸ The *POM Wonderful* Court noted the "intersection and complementarity of these two federal laws," and concluded that they do not conflict.²²⁹ Accordingly, USDA will devise and implement the GE labeling law's regulations, but product labeling remains within the purview of FDA,²³⁰ so the FDCA may still be the complementary law working in conjunction with the Lanham Act. Moreover, the Court noted that, in general, "Congress did not intend [federal] oversight to be the exclusive means' of ensuring proper food and beverage labeling,"²³¹ and that "FDCA's delegation of enforcement authority to the Federal Government does not indicate that Congress intended to foreclose private enforcement of other federal statutes."²³² Accordingly,

²²² 15 U.S.C. § 1125 (2012).

²²³ *POM Wonderful*, 134 S. Ct. at 2234.

²²⁴ *See id.* at 2233; Buttrick & Hatch, *supra* note 179, at 281.

²²⁵ *POM Wonderful*, 134 S. Ct. at 2233.

²²⁶ *Id.* at 2235.

²²⁷ *See, e.g., id.* at 2238.

²²⁸ *Id.* at 2233; *see also* Food, Drug, and Cosmetic Act, 21 U.S.C §§ 301–399(f) (2012).

²²⁹ *POM Wonderful*, 134 S. Ct. at 2233. The Court discussed that the two statutes have coexisted since 1946 and if Congress considered "that Lanham Act suits could interfere with the FDCA, it might well have enacted a provision addressing the issue during these 70 years," especially because Congress had included express preemption provisions in other amendments to both acts. *Id.* at 2237. Moreover, the Court concluded, "When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other." *Id.* at 2238 (citing *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 144 (2001)).

²³⁰ 21 U.S.C. § 321(m) (2012).

²³¹ *POM Wonderful*, 134 S. Ct. at 2237 (citing *Wyeth v. Levine*, 555 U.S. 555, 575 (2009)).

²³² *Id.* at 2232.

private competitor enforcement fits comfortably within congressional intent of the regulation of food and beverage labeling.

In connection with the GE labeling law, Congress intended that states enact their own GE labeling provisions by declining to include an enforcement provision in the Act with any real teeth,²³³ and by explaining that state-labeling requirements must be identical to the federal statute.²³⁴ The text of the Lanham Act permits suit against anyone who “misrepresents the nature, characteristics, qualities, or geographic origin” of products or services.²³⁵ Each of these factors may be implicated in the context of GE labeling law. Grievances may include that the product is derived from GE ingredients but not labeled as such—constituting false advertising under the Lanham Act through “false designation of origin, false or misleading description of fact, or false or misleading representation of fact.”²³⁶

There will be two likely incentives for companies to sue one another: (1) absence of mandatory labeling on products that contain GE materials in contravention of the law and (2) false and misleading representations that products with or without GE materials are healthier. To explain the second reason, the presence or absence of the GE disclosure necessarily implicates “that consumers should assign significance to the fact that a product contains an ingredient derived from a genetically engineered plant.”²³⁷ Both claims would target labels that “misrepresent[] the nature, characteristics, qualities, or geographic origin” of the products.²³⁸

These competitor lawsuits will claim both monetary and injunctive relief as provided in § 35 of the Lanham Act, allowing for recovery of defendant’s profits, plaintiff’s damages, and costs of the lawsuit.²³⁹ Relief through the Lanham Act could prove to have a dual effect: seek redress for the injured manufacturer and incentivize the infringing product manufacturer to comply with the GE labeling law.

²³³ See National Bioengineered Food Disclosure Standard, 7 U.S.C. § 1639b(g) (Supp. 2018).

²³⁴ *Id.* §§ 1639b(e), 1639i.

²³⁵ 15 U.S.C. § 1125(a)(1)(B) (2012).

²³⁶ *Id.* § 1125(a)(1).

²³⁷ *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 621 (D. Vt. 2015) (quoting Plaintiff’s Amended Complaint, Doc. 37-1 at 14 ¶ 43).

²³⁸ 15 U.S.C. § 1125(a)(1)(B).

²³⁹ *Id.* § 1117(a).

The federal GE labeling law is devoid of any civil penalties or true mechanics of enforcement,²⁴⁰ so litigation under the Lanham Act may be a necessary and valuable compliance tool. If competitors become the major players, there may be ideological issues with whether private parties should bear the burden of litigating to enforce federal laws. However, as the Supreme Court noted in *POM Wonderful*, federal agencies such as FDA do “not have the same perspective or expertise in assessing market dynamics that day-to-day competitors possess,”²⁴¹ which led the Court to find that competitors are better positioned to be aware of unfair marketing practices.

Some reactions to *POM Wonderful* applaud the “integrated regulation” of private efforts that augment enforcement of federal regulations; for example, some scholars have noted that the “Lanham Act suits will fill the regulatory gaps left by inadequate . . . regulation”²⁴² because FDA’s enforcement is discretionary.²⁴³ Other scholars argue that Lanham Act suits are an insufficient solution to fill the regulatory void.²⁴⁴ An alternative solution proposes that Congress grant a private right of action in the FDCA for individual consumers to sue manufacturers.²⁴⁵ This solution would be unwieldy, and Congress has also addressed the issue of complementary federal and private enforcement,²⁴⁶ so it may be unlikely that Congress would pass a law to the contrary. Enforcement through the Lanham Act, however, utilizes provisions already approved by Congress, and enforcement could start when necessary rather than waiting for Congress to pass another law.

Due to the myriad hurdles involved in certifying consumer class actions, and the unpredictability and mixed success of recent consumer class action cases, competitor suits may provide the best private enforcement of the GE labeling law. *POM Wonderful* has paved a way in which competitors may

²⁴⁰ 7 U.S.C. § 1639b(g) (Supp. 2018).

²⁴¹ *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014). The Court characterized this type of enforcement as “synergies among multiple methods of regulation.” *Id.* at 2239.

²⁴² Jennifer Thurswell Radis, Note, *The Lanham Act’s Wonderful Complement to the FDCA: POM Wonderful v. Coca-Cola Enhances Protection Against Misleading Labeling Through Integrated Regulation*, 47 LOY. U. CHI. L.J. 369, 435 (2015).

²⁴³ See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (finding that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion”). Much of FDA’s discretion is imposed externally by financial constraints, and its resources “do not match the breadth of its responsibilities.” Pezzullo, *supra* note 217, at 338.

²⁴⁴ See, e.g., Pezzullo, *supra* note 217, at 340–41.

²⁴⁵ See, e.g., *id.* at 341 (citing James Springer, Note, *The Success of the Citizen Suit: Protecting Consumers from Inaccurate Food Labeling by Amending the Federal Food, Drug, and Cosmetic Act*, 68 FOOD & DRUG L.J. 401 (2013)).

²⁴⁶ See *POM Wonderful*, 134 S. Ct. at 2233.

serve as a necessary complement to federal enforcement to ensure compliance with the GE labeling law.

CONCLUSION

Review of the GE labeling law likely will fall under the *Zauderer* reasonable relationship standard. Even under this more relaxed standard of review, there stand doubts as to whether the disclosure requirement will survive First Amendment constitutional review absent a sufficient government interest—especially because consumer curiosity alone will not likely satisfy the *Zauderer* standard.

Assuming the GE labeling law withstands First Amendment challenges, states will need to enact parallel laws to deter frivolous consumer class actions that inundate courts. In addition, due to the Act's extremely weak enforcement provisions, private enforcement will be necessary to enforce the GE labeling law. Although consumer class actions could prove to be effective, their mixed success opens the door for alternative methods of private enforcement of the GE labeling law. Accordingly, the most promising enforcement tool will come from manufacturers seeking to enforce compliance under the Lanham Act.

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