UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GROCERY MANUFACTURERS ASSOCIATION, *et al.*, *Plaintiffs,* v. WILLIAM H. SORRELL, in his official capacity as the Attorney General of Vermont, *et al.*, *Defendants.*	)	Case No. 5:14-cv-00117-CR

AMICI CURIAE
VERMONT PUBLIC INTEREST RESEARCH GROUP & CENTER FOR FOOD SAFETY'S
SUR-REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Act 120 is constitutional. Plaintiffs' Reply in Support of Their Motion for a Preliminary Injunction mainly reheats and rehashes Plaintiffs' prior arguments, with a sprinkling of additional cases. As explained below, their arguments remain unconvincing.

I. ACT 120 COMPLIES WITH THE FIRST AMENDMENT.

A. Act 120 is not subject to strict scrutiny.

Plaintiffs' strict scrutiny arguments continue to lack any sound legal basis: courts do not apply strict scrutiny to government regulation of commercial speech, especially to factual disclosure requirements like that of Act 120. *See* VPIRG-CFS Mem. in Support of MTD & Opp. to PI (Amici MTD-PI), Doc. 64, at 12, 18-23. Plaintiffs still fail to cite even a single case holding to the contrary. This Court should not take the unprecedented and far-reaching step of applying strict scrutiny to Act 120's compelled commercial disclosure.

Plaintiffs cite two new cases they claim support the proposition that "produced with genetic engineering" is not commercial speech. *See* Pls.' Reply in Support of PI (PI Reply), Doc. 75, at 2. However, *Bigelow v. Virginia* merely held that speech made in the context of advertising does not lose all First Amendment protection just because it appears in advertising form. 421 U.S. 809, 818, 825-26 (1975). The Court reasoned that an advertisement for abortion services was entitled to some protection because it provided valuable information not only to those interested in abortion, but also to those interested in "the subject matter or the law of another State and its development, and to readers seeking reform in Virginia." *Id.* at 822. Also, the advertisement related to "constitutional interests." *Id.* (citing *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973)). The other case, *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, held that a corporation's dispersal of its views about nuclear energy was entitled to some protection, and the Court did not characterize

the speech in question (billing envelope inserts) as "commercial." 447 U.S. 530, 532-35 (1980). Neither of these cases supports the notion that factual information on a label is not commercial speech. They are also distinguishable. Unlike Virginia's law in *Bigelow*, Act 120 does not restrict entities from providing factual information in their advertising materials, and also does not do so on subjects relating to "constitutional interests" (e.g., abortions and the right to privacy). And, unlike New York's provision in *Consolidated Edison*, Act 120 does not restrict entities from promoting their own views about public policy issues.

Plaintiffs' related argument—that a government's significant interests in support of a commercial factual disclosure somehow transmogrify the disclosure into viewpoint discrimination—is untenable and would have far-reaching consequences for commercial disclosure requirements. *See* Amici MTD-PI (Doc. 64) at 21-23. On this point, Plaintiffs state that Vermont cannot require companies to carry "a policy message not to purchase the[ir] goods," citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc*. PI Reply (Doc. 75) at 3-4. It is true that *Rumsfeld* cited several cases where the Court "limited the government's ability to force one speaker to host or accommodate another speaker's message," but each of those cases involved a governmental requirement that an entity host a third-party's message about the third party. 547 U.S. 47, 63 (2006). Those cases are inapposite here because, first, "produced with genetic engineering" is a fact, not a message, *see* Amici MTD-PI (Doc. 64) at 14-18, 20-23; and, second, "produced with genetic engineering" is not about a third-party, it is about the product on which it is placed.[1] *See Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18,

[1] Plaintiffs also continue to misconstrue *Harris* and *Evergreen* for the proposition that Act 120 requires them to convey a message. *See* PI Reply (Doc. 75) at 3, 5, & 6. As explained in Amici's prior Memorandum, those cases are distinguishable and are not incompatible with Act 120. Amici MTD-PI (Doc. 64) at 16-17, 21.

27 (D.C. Cir. 2014) (en banc) (noting that country-of-origin labeling does not "'require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views.'") (citation omitted).

B. Act 120's disclosure requirement is uncontroversial.

Plaintiffs continue to misinterpret *Zauderer*'s requirement that a disclosure be "factual and uncontroversial," citing the existence of a "political controversy" as determinative. *See* PI Reply (Doc. 75) at 14 (emphasis omitted). However, Plaintiffs fail to cite even a single case holding that a purely factual commercial disclosure—e.g., a product disclosure that is free of images or opinions—is "controversial."[2] To the contrary, the Second and D.C. Circuits have both decided that purely factual commercial disclosure requirements were *un*controversial under *Zauderer*. *See N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 134 (2d Cir. 2009); *Am. Meat Inst.*, 760 F.3d at 27 (concluding that country-of-origin labeling was uncontroversial and noting label did not "communicate[] a message that is controversial for some reason other than dispute about simple factual accuracy").

Essentially, Plaintiffs argue that a company's desire to withhold a fact of production renders that fact "controversial" under *Zauderer*. *See* PI Reply (Doc. 75) at 13-14. But that argument would have no stopping point: under it, a company could dodge *Zauderer*'s rational-basis review for any factual disclosure simply by objecting to revelation of that fact. Here,

[2] The cases that Plaintiffs persist in citing for their "controversial" proposition, *see* PI Reply (Doc. 75) at 13-14, are inapposite, as thoroughly discussed in Amici's principal brief. *See* Amici MTD-PI (Doc. 64) at 16-18, 21. None of those cases actually held that the disclosures were "controversial;" rather, the disclosures in those cases included information that was not purely factual, e.g., images or express recommendations from a third party, which is not the case here. *See id.*

because the disclosure "produced with genetic engineering" is textual and purely factual, it is not "controversial" under *Zauderer*. *See* Amici MTD-PI (Doc. 64) at 16-18.

C. *Amestoy* is inapposite.

Plaintiffs continue to cling to *International Dairy Foods Ass'n v. Amestoy* for dear life, *see* PI Reply (Doc. 75) at 4, 5, 6, 7, 15, 16, 25, 26, but *Amestoy* cannot save their case. As Amici have explained, as a legal matter, the Second Circuit has repeatedly held that *Zauderer*, not *Central Hudson*, applies to factual commercial disclosure requirements and has expressly limited *Amestoy* to instances "in which a state disclosure requirement is supported by no interest other than the gratification of 'consumer curiosity.'" *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 n.6 (2d Cir. 2001) (citation omitted); *see* Amici MTD-PI (Doc. 64) at 13-14.[3] And as a factual matter, the selected citations in Plaintiffs' latest attack, *see* PI Reply (Doc. 75) at 15-16, cannot erase that, unlike *Amestoy*, Act 120 expressly serves numerous legitimate and substantial Vermont interests. *See* Amici MTD-PI (Doc. 64) at 23-28. Plaintiffs conveniently decline to compare Act 120's voluminous record with the record for the rBST law; nor do they contrast Act 120's language, including its findings, with the language of the rBST law; nor do they have any response to the well-established jurisprudence explaining that Vermont's legislative factual findings are entitled to substantial deference. *See id.* at 1-11 (describing reasonableness and accuracy of Act 120's findings), 12-13 (explaining standard of deference). Finally, Plaintiffs fail to mention that, unlike here, in *Amestoy*, Vermont "'d[id] not claim that health or safety concerns prompted the passage of the Vermont Labeling Law.'" 92 F.3d 67, 73 (2d Cir. 1996) (citation

[3] *Amestoy* concerned review under *Central Hudson* likely because the Second Circuit simply assumed that *Central Hudson* applied where the State did not argue to the contrary. *See Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 72 (2d Cir. 1996); Brief for Defs.-Appellees, *Amestoy*, 92 F.3d 67, 1995 WL 17049818, at *29-36.

omitted). Thus, *Amestoy's* true relevance is to show that, here, the circumstances are different and Vermont has legitimate, significant, and substantial interests in Act 120—including those upon which *Amestoy* does not even touch.

II. ACT 120 IS NOT PREEMPTED BY THE NUTRITION LABELING & EDUCATION ACT.

In arguing that Act 120 is expressly preempted by the Nutrition Labeling and Education Act (NLEA), Plaintiffs actually take issue with Congress, not Vermont, complaining that following the NLEA's statutory language is "formalistic" and a "game of inches." *See* PI Reply (Doc. 75) at 1, 20. But statutory language is the first place a court must look when interpreting a statute. *See, e.g., In re WTC Disaster Site*, 414 F.3d 352, 372 (2d Cir. 2005); 2A Sutherland Statutory Construction § 46:1 (7th ed.) ("[t]he plain meaning rule"). The text of the NLEA neither states nor suggests that all information on a product label is part of that product's common or usual name. *See* Amici MTD-PI (Doc. 64) at 37-44. Further, Plaintiffs' statement that the NLEA "imposes requirements for the 'common or usual name' on a product's '*label*,'" PI Reply (Doc. 75) at 20, does nothing to change the fact that Act 120 does not require changes to a product's *name*—which is the relevant inquiry. Plaintiffs' "de facto" name and ingredient arguments would again prove far too much, entirely swallowing up Congress's precise NLEA preemption provision for specific categories only, and improperly making the whole food package off limits to states. *See POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014) (explaining that NLEA's preemption provision "forbids state-law requirements that are of the type but not identical to *only certain* FDCA provisions with respect to food and beverage labeling") (emphasis added).

The new cases that Plaintiffs cite are inapposite and in fact support the well-grounded reading that the NLEA only preempts state laws that actually change common name

requirements. Contrary to Plaintiffs' use of them, the cases do not hold that, if a required label "suggests the ingredients in those products, and the products themselves, are somehow materially different from products not so labeled," then labeling of those products is preempted. *See* PI Reply (Doc. 75) at 21. Rather, the cases held that state law actions to prevent companies from using the word "honey" to describe the companies' products were preempted because "honey" is an acceptable common or usual name under federal law, whether or not the honey contains pollen. *See Cardona v. Target Corp.*, No. CV-12-1148-GHK, 2013 WL 1181963, at *13 (C.D. Cal. Mar. 20, 2013); *Perea v. Walgreen Co.*, 939 F. Supp. 2d 1026, 1039 (C.D. Cal. 2013). There is simply no parallel here. Act 120 neither prohibits companies from labeling products according to their common or usual names nor requires changes to their common or usual names.

CONCLUSION

For these reasons and as explained in Amici's prior Memorandum and the State's filings in this case, Act 120 is constitutional and Plaintiffs' claims should be dismissed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2014, I electronically filed with the Clerk of Court the following document:

Amici Curiae Vermont Public Interest Research Group and Center for Food Safety's Sur-Reply in Support of Defendants' Motion to Dismiss

using the CM/ECF system. The CM/ECF system will provide service of such filing via Notice of Electronic Filing (NEF) to the following NEF parties:

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