UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GROCERY MANUFACTURERS ASSOCIATION, *et al*.,	)	
Plaintiffs,	)	
	)	Case No. 5:14-cv-117
v.	)	
	)	**MEMORANDUM OF AMICUS**
WILLIAM H. SORRELL, in his official capacity as the Attorney General of Vermont, *et al*.,	)	**CURIAE FREE SPEECH FOR PEOPLE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**
Defendants.	)	

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INTEREST OF AMICUS CURIAE

With the consent of all parties, amicus curiae has moved to file this brief in support of the defendant Vermont officials.[1] Free Speech For People is a national non-partisan, non-profit organization that works to restore republican democracy to the people, including through legal advocacy under the First Amendment. Free Speech For People's thousands of supporters around the country engage in education and non-partisan advocacy to encourage and support effective government of, by, and for the American people. Free Speech For People has a particular history arguing in defense of public laws against corporate First Amendment challenges, having filed amicus briefs to the United States Supreme Court in *Conestoga Wood Specialties Corp. v. Burwell*, 134 S. Ct. 2751 (2014) and *American Tradition Partnership, Inc. v. Bullock*, 132 S. Ct. 2490 (2012), and the Montana Supreme Court in *Western Tradition Partnership v. Attorney General*, 271 P.3d 1 (Mont. 2011), *rev. sub nom. Am. Tradition P'ship, supra.*

[1] Amicus has no parent corporation, and no publicly held corporation owns more than 10% of amicus. No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Plaintiffs make the astonishing claim that a food labeling requirement is subject to strict scrutiny under the First Amendment.[2] But plaintiffs' argument crosses a commercial bridge too far. Corporate commercial speech does not serve either of the First Amendment's core values of self-government or autonomy, and thus does not merit the amendment's strongest protection. Rather, the Supreme Court has extended limited protection to corporate commercial speech when it serves the secondary First Amendment value of providing accurate information to listeners. Since disclosure requirements for consumers' benefit promote this value, a commercial speaker's interest in avoiding such disclosures is "minimal." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

Far from *offending* the First Amendment, Vermont's law *promotes* First Amendment values by giving Vermonters accurate and useful information that, in turn, enhances their autonomy. A complete First Amendment analysis requires the court to consider the First Amendment interests of the consumers and citizens whom the law was intended to benefit, which far outweigh the minimal First Amendment interests of commercial food manufacturers seeking to avoid labeling requirements. Consequently, this Court should reject plaintiffs' compelled speech claim.

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[2] "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

ARGUMENT

I. Product labeling requirements are reviewed under the deferential rational basis standard, not strict scrutiny.

For over 100 years, the Supreme Court has rejected manufacturers' constitutional challenges to laws requiring labels disclosing product contents. The specific strategies of attack have varied over time, depending on which constitutional theories were ascendant. A century ago, manufacturers raised these types of claims under the Commerce Clause, *e.g., Savage v. Jones*, 225 U.S. 501, 512 (1912) (rejecting challenge to state law requiring food manufacturers to label animal feed with percentages of fat and protein content), the Due Process Clause, *e.g., Corn Products Ref. Co. v. Eddy*, 249 U.S. 427, 431 (1919) (rejecting challenge to state law requiring food manufacturers to label syrups with their ingredients and percentages), or the Equal Protection Clause, *e.g., Heath & Milligan Mfg. Co. v. Worst,* 207 U.S. 338 (1907) (rejecting challenge to state law requiring manufacturers of mixed paints to list paint constituents).

Nowadays, food manufacturers bring such challenges under the First Amendment. This "First Amendment opportunism" is unsurprising given the history of corporate plaintiffs pressing the First Amendment into service for such claims. *See* Frederick Schauer, *First Amendment Opportunism*, in Lee C. Bollinger & Geoffrey R. Stone, ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 177-80 (2002). But, today as in 1919, "a manufacturer or vendor

has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold." *Corn Products*, 249 U.S. at 431.

Scholars have widely recognized that the First Amendment has two core purposes. First, it protects self-government, i.e., public discourse and political participation. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964) (explaining that the First Amendment "'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).[3] Second, it protects autonomy. *See* Laurence H. Tribe, *American Constitutional Law* 577 (1978) (describing speech as "an expression of self" that "enhances personal growth and self-realization"); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 879 (1963) ("[E]very man—in the development of his own personality—has the right to form his own beliefs and opinions."). In these contexts, it makes sense that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v.*

[3] *See also* Robert C. Post, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 73 (2014) ("At its core, First Amendment doctrine is designed to restrict government regulation of public discourse."); Alexander Meiklejohn, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948) (explaining that the First Amendment's purpose is to enable "political self-government" for the purpose of "the voting of wise decisions.").

Barnette, 319 U.S. 624, 642 (1943). And thus strict scrutiny is appropriate when these core First Amendment values are implicated.

But neither of these core values is threatened by product labels.[4] Democratic participation is not implicated by a law requiring commercial food manufacturers to disclose product contents to consumers. And plaintiffs cannot assert autonomy interests here, for two reasons.

First, any commercial speaker's autonomy interest in avoiding disclosure of factual information is "minimal." *Zauderer*, 471 U.S. at 651. That is even more so when the information in question provides identification of goods sold at market. *See* Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. Rev. 1153, 1199 (2012) (such "narrow" commercial speech "is not expression that serves any person's autonomy interest that the First Amendment's special protection can be said to reach").

[4] Indeed, most communication in commerce raises no First Amendment issues. *See* James Weinstein, *Fools, Knaves, and the Protection of Commercial Speech: A Response to Professor Redish*, 41 Loy. L.A. L. Rev. 133, 140-41 (2007) (noting "the large range of speech regulated by securities, antitrust, labor, copyright, food and drug, and health and safety laws, together with the array of speech regulated by the common law of contract, negligence and fraud, all without a hint of interference from the First Amendment").

Second, business corporations do not even *have* autonomy interests. As artificial legal entities, they lack cognizable moral claims to autonomy:

> [Corporations'] merely instrumental rationale leaves them with a morally different status than living, flesh-and-blood people—the people who Kant argues must be valued as ends and whose ultimate value a legitimate state must respect. This difference certainly explains why, under any theory centered on the moral importance of individual liberty (the formal right to make, stupidly or wisely, choices about oneself), individuals' right to make speech choices has constitutional status while these entities' rights do not.

C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 Ind. L.J. 981, 987-88 (2009); *see also* Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 Const. Comment. 283, 296 (2011) ("[B]usiness corporate speech does not involve in any direct or straightforward fashion the revelation of individuals' mental contents.").[5]

In fact, a publicly-traded corporation's choices are dictated almost entirely by capital markets' demand for profit maximization. While "[c]onsumers have many values," a publicly traded corporation is "a slave . . . to the financial markets." Symposium, *Should Corporations Have First Amendment Rights?*, 30 Seattle U. L. Rev. 875, 879 (2007). Any significant corporate decision that "deviates from the financial market's current theory of how to maximize share value" will cause the corporation's stock price to drop, and arbitrage-seeking investors will buy the discounted stock and

[5] For similar reasons, a corporation does not have a Fifth Amendment right to refuse to testify on incriminating matters. *See United States v. White*, 322 U.S. 694 (1944).

"coerce or convince management to shift their policies to the profit policy preferred by the market, and then sell the stock at the new high price." *Id.* Because such corporations are under the effective control of capital markets, they lack any "autonomy" interest cognizable under the First Amendment.

Since "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," the Supreme Court has held that commercial disclosure requirements trigger only rational basis review under the First Amendment. *Zauderer*, 471 U.S. at 651. Put another way, the very basis for the Supreme Court's extension of limited constitutional protection to commercial speech is the listener interest in the free flow of information. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (justifying protection of commercial speech because "the free flow of commercial information" is needed so that private economic decisions "be intelligent and well informed").[6] That basis cannot support invalidating a law that *increases* information flow without impinging upon the autonomy of any natural persons.

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[6] The Court's extension of First Amendment protection to commercial speech has been criticized from the outset, *id.* at 784 (Rehnquist, J., dissenting) (recognizing policy value of free flow of commercial information but noting that "nothing in the United States Constitution . . . requires the Virginia Legislature to hew to the teachings of Adam Smith"), and continues to be questioned in the scholarly literature, *e.g.,* Baker, *The First Amendment and Commercial Speech*, 84 Ind. L.J. 981 (2009).

II. Vermont's law promotes First Amendment values by expanding the flow of accurate information and enhancing autonomy.

Vermont's law fulfills the First Amendment value of expanding the information available to the public. The very fact that the "listeners" have demonstrated an interest in this information (to which the manufacturers have asymmetrical access) is itself a cognizable First Amendment interest. *See Am. Meat Inst. v. USDA*, 760 F.3d 18, 48 (D.C. Cir. 2014) (en banc) (noting that "demonstrated consumer interest" is a legitimate government interest in requiring country-of-origin labeling for food products). By contrast, the First Amendment's listener interest assigns no weight to the manufacturers' desire to *deny* listeners the very information that they seek.

Moreover, Vermont's law also promotes the First Amendment value of autonomy. Many Vermonters—enough to persuade the legislature—care deeply about potential environmental, safety, and social impacts of genetically-engineered foods. Whether the state itself (let alone a federal administrative agency) fully endorses these concerns is beside the point. The question, for First Amendment autonomy purposes, is not whether citizens are right to link particular foodstuffs to these values; autonomy requires letting citizens make that decision themselves.

Plaintiffs dismiss these concerns and complain that Vermont has "cater[ed] to personal, political, and religious views that reject science," Pl. Memo. in Support of Mtn. for Prelim. Inj., Dkt. #33-1, at 35, and sarcastically

suggest that they might amend their complaint to include an Establishment Clause claim, *see id.* at 27.[7] But the Supreme Court has rejected efforts to tell religious citizens that "that their beliefs are flawed." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014). And the Second Circuit has sustained kosher food labeling requirements without any inquiry into whether the state formally endorses the position that kosher food is superior to non-kosher food. *See Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194 (2d Cir. 2012) (rejecting Religion Clause challenge to New York kosher labeling requirement).[8] As with kosher food, the choice to buy, or not buy, genetically-engineered foods may be part of a larger life goal of "conscious consumerism," in which citizens choose to align market decisions with ethical, social, and other values, and Vermont promotes autonomy by providing consumers the information they need to make these decisions.[9]

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[7] Vermont has identified one purpose of the law (out of four) as to "[p]rovide consumers with data from which they may make informed decisions for religious reasons." 9 Vt. Stat. Ann. § 3041(4).

[8] The consumer interests underlying New York's kosher labeling law were not limited to religion; consumers who seek kosher food include not just Jews, but also "Muslims and others with similar religious requirements, persons with special dietary restrictions, and those who simply prefer food bearing the kosher label as a symbol of purity." *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 431 (2d Cir. 2002) (invalidating earlier version of law).

[9] The law also promotes autonomy interests of citizens who choose to buy genetically-engineered foods. Providing information that enables citizens to make an informed decision promotes autonomy whether or not the information leads to a change in the decision. *See Ass'n of Nat'l Advertisers, Inc. v. Lungren*, 44 F.3d 726, 733 (9th Cir. 1994) ("While less ecologically-oriented consumers may continue to choose brands not qualifying for eco-

III. The court should not extend *International Dairy Foods* because its continuing vitality is uncertain.

Plaintiffs ask this court to extend *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996), to this case. In *International Dairy Foods*, the Second Circuit, considering a challenge to a Vermont law requiring labeling of milk produced with bovine growth hormone, inexplicably applied the four-part intermediate scrutiny test of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), rather than *Zauderer*. *See* 92 F.3d at 71-74. That, in turn, led to other errors, *e.g.*, (1) the spurious requirement (in a commercial disclosure case) that the state interest be "substantial," *id.* at 73, a requirement found nowhere in *Zauderer*, and (2) the conclusion that demonstrated consumer interest is not itself a "substantial" interest, *see id.* at 73-74, in a commercial speech framework based on the constitutional value of consumers' access to information.

International Dairy Foods is out of step with more recent precedent. Just five years after its issuance, Chief Judge Walker (joined by Judge Pooler and now-Justice Sotomayor) clarified that "*Zauderer,* not *Central Hudson* . . . describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases," and cabined the anomaly of *International Dairy Foods* by describing it as "expressly limited to

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labelling . . . this choice will at least become a more deliberate and informed one based on more accurate and transparent claims.").

cases 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).[10] *International Dairy Foods* has yet to break out of that cabin: the Second Circuit cites the case only to distinguish it, not to follow it.

Moreover, *International Dairy Foods* is inconsistent with the weight of authority from other circuits. *See Am. Meat Inst.*, 760 F.3d at 48 (noting that "demonstrated consumer interest" is a legitimate government interest in requiring country-of-origin labeling for food products); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 640-42 (6th Cir. 2010) (applying *Zauderer* to uphold labeling law regarding bovine growth hormone, and noting that "the comments show that there is general confusion among some Ohio consumers regarding what substances are (or are not) in the milk they purchase"); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (opinion of Boudin, C.J., and Dyk, J.) ("[T]here are literally thousands of similar [disclosure] regulations on the books-such as product labeling laws. . . . The idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken.").

[10] For that reason, even assuming *International Dairy Foods* is viable law, it is distinguishable from the present case. The Vermont legislature provided four specific legitimate purposes for the law that go well beyond consumer curiosity. *See* 9 Vt. Stat. Ann. §§ 3041(1)-(4).

This court is obviously bound by applicable circuit precedent, and the Second Circuit has not overruled *International Dairy Foods* en banc. But the court of appeals has treated *International Dairy Foods* as an anomaly, and the weight of authority goes against it. Given that similar panel decisions limiting *Zauderer* were recently overruled by the en banc D.C. Circuit in *American Meat Institute*, *see* 760 F.3d at 22, its continuing vitality is uncertain. This court should not compound error by extending it further.

CONCLUSION

Plaintiffs are not likely to prevail on the merits of their First Amendment compelled speech claim, and the court should deny their motion for a preliminary injunction with respect to that claim.

DATED this __th day of _____, 2014.

Respectfully submitted,

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