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U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of:

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GROCERY MANUFACTURERS :

ASSOCIATION, et al., :

Plaintiffs-Appellants, : Case No. 15-

v. : 1504-cv

WILLIAM H. SORRELL, et al., :

Defendants-Appellees. :

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Thursday, October 8, 2015

New York, New York

Proceedings before Judges Gerard E. Lynch, Susan L. Carney, and Barrington D. Parker.

APPEARANCES:

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P R O C E E D I N G S

JUDGE LYNCH: Okay. We'll now hear Grocery Manufacturers v. Sorrell.

MS. STETSON: Thank you, Your Honors.

And may it please the court, my name is Cate Stetson. I represent the appellants.

This case is a First Amendment compelled commercial speech challenge to a mandatory state labeling law. Now, normally, when a court confronts a commercial speech case, it has to -- as this court said a few years ago in Hayes, it has to do a little bit of an archeological dig. It has to go back into past compelled commercial speech cases. It has to extrapolate from them. It has to sometimes harmonize between them.

This case actually is one of those rare situations where you don't need to do that because there is a case that we say is directly on point, and that's the Amestoy case from 20 years ago. In Amestoy, Vermont passed a mandatory labeling law requiring the labeling of milk that had come from cows treated with a genetically engineered

product.

JUDGE LYNCH: So we can disregard the mercury case and the calorie-counting case? We don't have to harmonize those because Amestoy controls?

MS. STETSON: I don't think you do need to -- I don't think there's any harmonizing to do, Your Honor, precisely for the reasons that the panels in NEMA and the Restaurant Association case said, which was that Amestoy was limited to a particular set of facts. Those facts are quite different from the facts in the mercury case, where you had a situation where there was harm to the environment that was being forestalled in part by mercury disposal regulation.

You had a situation in the calorie-count case where there was a proven harm to health and safety that flowed from excess calories, and so New York did something about it. But the point is in both of those cases, you had panels saying Amestoy is different because in Amestoy what you had is a situation where a state passed a law in

order, essentially, just to inform consumers. Now --

JUDGE CARNEY: But you had a state concession that that was the sole purpose, and that's what the decision turned on. Whereas here, you have state purpose statements that concern public health, environmental impacts, consumer confusion, and religious practices. And the state is taking a quite different position here than they did in Amestoy, aren't they?

MS. STETSON: I was with you right up until you said the state was taking a different position here. I think, Judge Carney, you're right that the state legislature essentially papered the record a little bit more than it did in the Amestoy case.

However, it --

JUDGE LYNCH: Isn't that what we ask them to do? I mean, you say papered the record. I think in your brief you say it's they're trying to work around Amestoy, but isn't that what legislature is supposed to do?

We tell them, "You can't do this," and they say, "Oh, well, I guess we'll try to do that." And then we have to try to decide whether what they've done is effective.

MS. STETSON: Absolutely.

JUDGE LYNCH: So you can't -- I mean, I don't want to -- I understand your point about Amestoy. I understand that it's a very similar kind of law and a very similar case, and it's a case that has significant implications here. But I'm not sure you can just -- don't we have to get into the question of has their what you call "record papering" worked?

That is, do they cite real evidence, or is this just a case of totally bogus junk science? Don't we have to address that at some level?

MS. STETSON: Judge Lynch, I'm not sure that you do. And I think that should be a reassurance to you all. I don't think that we have to conduct, as I've said before in other contexts, the Scopes trial on whether genetically engineered foods are good or bad.

Here is the point, Judge Carney. The point is when the Vermont legislature went back and tried to create a record on genetically engineered foods, what it said in its findings and what it said in its statement of purpose was something that stopped short of a finding or a statement of state purpose. What it said is -- and this is critical, I think -- that there is a lack of consensus as to the health or safety of genetically engineered foods.

JUDGE CARNEY: Why --

MS. STETSON: Now match that --

JUDGE CARNEY: Why isn't a concern about a risk enough? Why does there have to be an established risk to bring this outside of Amestoy and to go beyond what, again, the state conceded there was mere consumer interest?

This is an interest that's been expressed by many people and that has many different ramifications, from a biodiversity perspective, from a health perspective. And why isn't the state entitled to inform its consumers

and its citizens about the presence of genetic engineering on these products? Why isn't that different?

MS. STETSON: Judge Carney, it's not different at all from Amestoy, and this is why. If you go back into the briefing in Amestoy -- and somewhere in this building, it exists because we found it -- what you will find is that the state, in its brief, articulated on the first dozen or so pages of its brief consumer concern 24 times, I counted. Twenty-four times did it say consumer concern about health and safety relating to rBST.

JUDGE LYNCH: But consumer concern is different than scientist concern.

MS. STETSON: It is.

JUDGE LYNCH: If you have a bunch of ignorant people, and these ignorant people, by the way, are the voters and the consumers that you're trying to not tell what you're actually putting in their food. But let's consider them just a bunch of ignoramuses. I can -- you know, it's far from reassuring me. You're worrying me, frankly,

because I thought you guys would welcome the argument that this is all a bunch of nonsense that they're talking about, that there is no scientific basis for this law.

But now you're trying to tell me I don't have to decide whether there is no scientific basis. You're sort of running from that fight and telling me instead because the legislature didn't use the word "finding" or because it said we find, in effect, there are risks and uncertainties. That may be a fully supported, sensible thing, but we should, just because they used the word "risk" instead of "finding," you automatically win.

That doesn't make me comfortable.

MS. STETSON: So a few things, Judge Lynch. First of all, I'm running from nothing. I'm more than happy to engage in the scientific debate.

My point was that I don't think, under the commercial speech context, under Amestoy or really under any of the cases that we can talk about, is it necessary. My point is, when it

comes to what the state has articulated its interest to be, the state has not taken a stand.

What the state has said is there is --

JUDGE LYNCH: But why do they have to take a stand? Or why haven't -- put it another way -- they taken a stand? The stand is that the scientific evidence gives us concerns that there are risks, and therefore, we want to deal with that situation.

If there is no scientific basis for saying there's any risk, that's a different situation.

MS. STETSON: So I'd like to make two points in response. The first is to tell you exactly what the state and its many various heads have said about these risks. The cosponsor of the bill said that the legislature couldn't demonstrate any health effects. The governor said, "I'm not saying whether GMOs are good or bad."

The state below said we're just saying there's uncertainty. The Vermont Assistant AG to

Congress, when asked whether he had any evidence of risks to health or safety -- this was in June, by the way -- said, "I have no evidence."

I agree about the scientific consensus, but here is my second point. When we are talking about risks or potential risks, which is actually the phrase in the statute, Judge Lynch --

JUDGE LYNCH: Aren't risks always potential?

MS. STETSON: No, they are not. Risk sometimes -- there is a risk of cancer you get from smoking. That's a proven risk. What we're talking about here is a speculative potentiality, which leads us right into the decision in Hayes, where this court actually in a compelled disclosure case said before we allow the state -- and with respect, this is not a situation where the voters get to dictate things.

Before we allow the state to impinge upon a commercial free speech right, we have to show actual and material harm. The state has to show actual and material harm.

JUDGE LYNCH: Well, isn't that -- isn't that different where all -- under Zauderer, where all that's happening is a factual disclosure, as opposed to compelling some warning, for example?

MS. STETSON: No, I don't think it's different under Zauderer at all. And just to be clear, the path that we're moving down, if you disagree that Amestoy controls, then we get into the question whether Central Hudson or Zauderer applies.

JUDGE CARNEY: I do want to point out as to Amestoy, our holding, what we stated was we hold that consumer curiosity alone is not a strong enough state interest, as I'm sure you know. And regardless of what may have been briefed, that was what we focused on in our holding. And I'm still having difficulty understanding why the concerns expressed about potential risks don't bring this outside of the ambit of Amestoy.

MS. STETSON: The only response I would make, Judge Carney, again is that there are hundreds of pages of affidavits in the Amestoy

case pointing out concerns about risks of rBST.

But to Judge Lynch's question about Zauderer, if we are going to move off of Amestoy and over to Zauderer, you have two questions to confront. The first is one that this panel may not conclude that it's able to address, which is does Zauderer extend beyond protecting against deception?

I understand that this court, panels of this court have ruled to the contrary. The Supreme Court has come down since then, though, in the opposite direction. So I'll just preserve that point.

But with respect to your question, Judge Lynch, about statements of fact. And if I may continue, I know my light is on.

JUDGE LYNCH: Okay, you can have some more time.

MS. STETSON: With respect to your question about statements of fact, Zauderer and Hurley and a number of other cases, including this court's decision in Evergeen, make the point

repeatedly that it's not just about a statement of fact, it's about a factual and uncontroversial statement.

And here is where things get interesting when it comes to labeling because with respect to labeling, the controversy that we're talking about and the reason that this has produced, as I'm sure this court knows, intense controversy is precisely because there is a dispute about whether that information should go on a label. There is a camp of opinion --

JUDGE LYNCH: But see, that strikes me as peculiar. The question is whether -- there's always a controversy. I mean, in Zauderer, the disciplined lawyer argued very strenuously, and I think fairly reasonably, that this shouldn't be put in his ad, that fees are an exception to the fact -- that expenses are different than legal fees when the ad is saying you don't have to pay a legal fee.

And so it was controversial whether that should be put in the ad, but that's not -- the

fact is a simple fact --

MS. STETSON: Right. Judge Lynch --

JUDGE LYNCH: -- that you will have to pay his expenses.

MS. STETSON: I don't think we're talking here about a case or controversy. I think what we're talking about in Zauderer and Evergreen -- take Evergreen, that's the best example -- is a situation where a statement of fact, nevertheless, is controversial.

And here, I think the problem is more --

JUDGE LYNCH: But that was freedom of speech, wasn't it? I mean, pregnancy services company or entity in that case, its whole point was to not talk abortion. That was its whole reason for existence was come talk to us about pregnancy, and we're going to, in effect, tell you about how you can safely have a baby and adoption services and all this other stuff. They don't want to say the word "abortion" at all for political and moral reasons.

That's not -- that's not quite what's

going on here. Here you've got a sort of factual disclosure.

Now let me try and get to what I think are some serious issues in this case that might help you out because I don't think you've been helping me help you so far.

I think one issue that is relevant. Do you know what "clear and conspicuous" means in this statute? Is there any guidance from regulation or legislative history or what you think you'd have to do if this law is upheld to make a clear and conspicuous statement?

MS. STETSON: There is some guidance, I think, in the form of the regulations on what it means. I mean, I take your point because that was also an issue in Hayes and ended up -- ended up being a point of -- a partial point of the reversal in Hayes. That's not been a focus of the party's briefing until now.

JUDGE LYNCH: I know it hasn't. But you see, what I'm getting at here -- and let me just lay out a thought, and I'm going to ask the other

side about this, too. It seems to me there's nothing particularly controversial about the fact that a product contains Red Dye No. 2. That's a fact. If it has it in, it goes in the ingredient list. It's in fine print. It's on the back.

Somebody, some consumer who, for whatever good or bad reason, doesn't want to eat something with Red Dye No. 2 can find it.

It seems to me it would be quite different if a legislature said if you have Red Dye No. 2 in your product, you have to put on the front of the box in big letters "contains Red Dye No. 2," because that starts to sound like a warning, and that -- I take it if they said, "Warning: Red Dye No. 2. This is dangerous to your health," that's a controversial statement.

But just having it in the ingredient list somewhere is not a big deal. And I'm trying to figure out where clear and conspicuous is in the spectrum --

MS. STETSON: Right.

JUDGE LYNCH: -- between it's got to be

legible. You can't put it in print that's so small that no one can find it. And it has to be, as the calories was, as big as the name of the product and/or the price, which seems to me like a bigger deal about -- about that kind of disclosure.

MS. STETSON: Right.

JUDGE LYNCH: What do you think the answer is, or do we know what the answer is?

MS. STETSON: The answer is this falls into the bigger deal category, Judge Lynch.

JUDGE LYNCH: Mm-hmm. Well, where? Tell me why. What do you have to do, and where does it say what you have to do be clear and conspicuous?

MS. STETSON: For a couple different reasons. The first is Vermont understood that it was actually not in a position simply to require a modification to the small ingredient list on the back because that actually runs it right into significant federal preemption issues.

JUDGE LYNCH: Okay. So let me --

MS. STETSON: So what it says is --

JUDGE LYNCH: -- be very precise. Suppose you decided to try to comply with this law by putting underneath, not as part of -- because you can't touch what the FDA requires. But sort of right underneath it, in the same size print as the other ingredients, in the same size as the little thing that says "may contain peanuts," "contains genetically modified food products."

Would you be in violation of the statute, as you understand it?

MS. STETSON: If it's in the same size as everything else? But let me -- before we --

JUDGE LYNCH: Same size as the other ingredients, yeah.

MS. STETSON: I'm going to -- I'm going to reserve the answer until I tell you what is required by Vermont.

JUDGE LYNCH: Okay.

MS. STETSON: And then we can discuss it. Clear and conspicuous means presented in such a manner, given its font, size, color, contrast,

and proximity to other disclosures on the shelf, bin, container, or package, as to be readily noticed and understood by customers.

JUDGE LYNCH: Right.

MS. STETSON: So that's what -- and it's that last phrase that I think puts this much more in your warning light --

JUDGE CARNEY: But that puts it on a par --

JUDGE LYNCH: Well, but answer the question then specifically, which you were going to get to, if you did that, would that be good enough, in your view, to satisfy the statute?

MS. STETSON: I think -- I think the state could come back and say that you haven't sufficiently made it clear and conspicuous enough so as to be readily noticed and understood.

JUDGE LYNCH: Well, but, see, if I have an allergy to peanuts that could kill me, usually I have to look in exactly that place and exactly that size. I mean, it would be very interesting if they're requiring for this perhaps less

established risk a warning that is more dramatic than warnings about things that it's a scientific fact can kill certain people.

But you know, if I'm worried about peanuts, I know where to look. I look, and it's readily apparent once I see that legend, even though it's in the same size print as Red Dye No. 2 and other small things.

So, but you're saying you think you have a significant -- significant basis for thinking that wouldn't be good enough under this statute?

MS. STETSON: I do. And more to the point, Your Honor, one of the complexities of this, I think, that should be resolved in our favor is because of the conversation we're having, because of the fact that when something goes on a label, it is taken to mean something. People look for the peanut, the warning "contains peanuts," "may have been produced in a factory using tree nuts," all of those variations. They look for it because it matters to them, because it's significant.

So that the mere fact that the state is mandating that this go on a label is essentially joined in the camp of opinion that says this matters.

JUDGE LYNCH: But aren't there a lot of --

MS. STETSON: There is a --

JUDGE LYNCH: Excuse me. Aren't there a lot of things on that label that do not smack at all of warning? What percent -- just like the FDA requires, what percentage of your minimum daily requirement of Vitamin A does this give you?

I don't say, "Oh, my God, you know, that's got 15 percent of my minimum daily requirement of Vitamin A. I'm not going to buy this."

MS. STETSON: Of course, you don't.

JUDGE LYNCH: It's information.

MS. STETSON: Of course, you don't. It's information, though, that has value to the consumer. And our point is before the state can impinge on a company's First Amendment right not

to say something, it needs to show that there is a reason, what the value is that's being assigned.

And with respect, it cannot just be that there might be a risk in the air, unproven by any national --

JUDGE LYNCH: Does that require -- this pen has, in letters that I can -- am too old to read, but I'm told it says "Japan." Could Congress require country of origin designations on all products?

MS. STETSON: I think that is an interesting question after the American Meat Institute case. But the problem with the country of origin labeling analogy is that it quickly devolves into the statement that sometimes you find, which is everybody requires labels on everything. So what's the big deal about another, you know, statement?

The big deal is that before a state can require this statement, it needs to back it up. It needs to show a material --

JUDGE LYNCH: So the answer is no? Your

answer is no because there'd be nothing to back up. It's just my curiosity. I either like pens made in Japan or I don't. I want to buy American, and so I won't buy this one. I'll buy one that says "made in USA." Pure consumer curiosity.

I can't think of a reason -- the meat thing, there may even be a better reason, I don't know.

MS. STETSON: No, but the --

JUDGE LYNCH: But on just every product, just put where it comes from?

MS. STETSON: The same -- the same motivation would apply in your hypothetical as the D.C. Circuit found applied in AMI. The reason I said it's an interesting question is because that case, of course, is about to prompt a trade war. But, yes, the D.C. Circuit said when it comes to buying American, that is a substantial state interest.

But here you have a situation where, and respectfully, I have to put a marker down on this, there is no scientific body that is credited in

this country that has stated that there is any risk to anyone or any animal from any GMO, full stop. That's my scientific argument.

But with response -- with respect to the First Amendment, Your Honor, before a statement goes on a label, particularly when its presence on the label is the source of the controversy, that is exactly what puts us, even if we are separate somehow from Amestoy --

JUDGE CARNEY: Well, that's actually a nice segue into the second part of the case about the use of the word "natural," in which you successfully challenge the state's efforts to prevent you from using "natural" on genetically engineered products. And which is kind of interesting itself, but so you can continue to use "natural" on labels as much as you would like.

But notwithstanding your win in the District Court on this, the District Court declined to enter a preliminary injunction in your favor. Could you -- I understood your argument to be primarily that this concerns the First

Amendment. Therefore, we presume irreparable harm. We don't have to make any showing.

Is there more than that? Have you made much of a showing of what costs are going to be put to or have been put to already? Could you speak to that?

MS. STETSON: I can, Judge Carney. But first, let me pause on the First Amendment point because you're exactly right. We did win on the "natural" ban in the District Court. The court stopped short of granting the PI because she found that we hadn't been sufficiently specific enough about what harms would befall what manufacturers if she were not to enter the injunction as against the "natural" ban.

The problem with that is, of course, twofold. The first is we have plenty of declarations, and I'd point you in particular to Bradley and Hermansky.

JUDGE CARNEY: But they mostly seem to do with conducting inventory. "We have to review our inventory." "We might have to change a

label." But they were very inspecific --

MS. STETSON: Oh, no. I disagree, Your Honor. If you look at paragraph 11 of the Bradley declaration, you look at paragraph 15 of Hermansky, what you will find is that both of those say we make products that are subject to both prongs of this law, the ban and the compulsion.

It's not just a question of looking at inventory --

JUDGE CARNEY: They're very generic. But they were very generic.

MS. STETSON: Of course, they were. Precisely for the reason we won below, which is that it wasn't possible for us to figure out what products were and were not within the scope of the ban.

JUDGE LYNCH: They may be -- they may be saying we make products that are subject to the "natural" ban. But I would have thought, having gotten reversed once by the Supreme Court on a standing ground, that in order to challenge that

law, you'd have to say more than just we make a product, that because it contains genetically modified ingredients would be subject to the ban on using the word "natural."

I should think you'd have to say "and we either have advertised it as all natural or we plan to advertise it as all natural," you know? Not just that your First Amendment rights are theoretically abridged, right? I mean, I don't know that I get to come in and challenge a regulation that says you can't wear on the back of a judicial robe a slogan that says "F the draft" without saying "I'd like to do that."

I might be offended that somebody is telling me what I can put on my robe. But unless I have concrete plans to do it or have done it, where do I get the standing to challenge -- and here when I am talking about standing, we're talking about the further thing of get a preliminary injunction --

MS. STETSON: Right.

JUDGE LYNCH: -- to stop this law in its

tracks because it prevents me from doing something that maybe I might someday conceivably want to do.

MS. STETSON: I think the declarations are far more forceful than that, Judge Lynch, is the answer.

And first of all, you're right that we're not talking about standing. The District Court had no trouble finding standing on any point here. What we're talking about is the availability of injunctive relief, as against these industry plaintiffs who have members who are subject to the "natural" ban, full stop. We say that they're going to be affected by both prongs of this.

And then, Judge Carney, to your point, we say in order for us even to figure out which of these products is going to be subject to the "natural" ban, not just what we use in terms of the words, but what it contains, what ingredients are we talking about. Are we talking about corn, soy, sugar, all of which are predominantly genetically engineered at this point? How are we

going to figure out from our suppliers whether they source us only with GE or not with GE or something mixed up in between? All of those --

JUDGE LYNCH: That's just money. Yeah.

JUDGE PARKER: Can we hear from appellees?

JUDGE LYNCH: All right. I guess --

MS. STETSON: One last point. It's not just money when you're talking about suppliers who have declared, as Richard Michaud did, that he's going to lose his job if the supply chain into Vermont stops, and that's a possibility.

Thank you.

MR. ROBBINS: May it please the court, I'm Larry Robbins, representing appellees.

Judge Lynch, I'd like to start with the clear and conspicuous question that you posed to Ms. Stetson. The attorney general has defined that term. It is the very first definition in CP Rule 121. Let me read the entire definition because I think it disposes of the question.

"Clear and conspicuous means presented

in such a manner, given its font, size, color, contrast, and proximity to other disclosures on the shelf, bin, container, or package, as to be readily noticed and understood by consumers. A disclosure is not clear and conspicuous if, among other things, it is obscured by the background against which it appears."

So this is not a case, which like, for example, the D.C. Circuit's decision involving tobacco disclosures, where there was a required illustration of somebody smoking out of a tracheotomy hole. This is a case where you simply have to put it on the label in a way that doesn't obscure it. It has to be visible to consumers, which is, of course, the very purpose that --

JUDGE LYNCH: There's nothing that says it has to be of a certain font or size or as big as anything else on the label?

MR. ROBBINS: No, there is not. Let me dispose of a couple of other propositions that Ms. Stetson said about the statute, which I think can also be disposed of just by looking at the statute

itself.

First of all, there is the contention that somehow the State of Vermont was agnostic about whether there was a risk or not, and it just, in a sense, threw up its hands. No, that is not true.

The State of Vermont in its findings, never mind what people said on the floor or in debates or in cloakrooms, what they put in the statute in a finding was, among other things, that it is in the interest of the state, according to Subsection 6, in order to serve the interests of the state, notwithstanding limited exceptions, to prevent inadvertent consumer deception, prevent potential risks to human health, protect religious practices, and protect the environment.

Nor were they agnostic about whether these risks were real. They said, among other things, that the use of genetic engineered crops is increasing in commodity agricultural production practices, which contribute to genetic homogeneity, loss of biodiversity, increased

vulnerability of crops to pests, diseases, and variable climate conditions. That was a finding in the statute itself.

This is not a case, in short, anything remotely like Amestoy. This court has understood Amestoy to be confined to the circumstance in which the statute had no purpose other than to sate consumer curiosity alone, as Judge Carney pointed out in one of her questions. And this court has said that three times in confining the scope of the Amestoy decision.

It said in it in NYSMA. It's in NYSRA. It said it in NEMA, and it said it again in Connecticut Bar. This case is not controlled. Indeed, it's nothing like the Amestoy decision. That, I respectfully suggest, is a red herring.

The suggestion that what the legislature did here is simply to paper the record I think is deeply unfair to what actually happened in this case. There were hearings over a two-year period of time, countless committee hearings, countless presentations, some 52 committee hearings, 136

presentations of testimony on both sides of the issue.

And the materials in front of the legislature are anything but junk science. And I want to go back, Judge Lynch, to the question that you posed because I actually share Ms. Stetson's assertion that this court is not called upon under Zauderer to analyze the question of the validity of the science.

I think instead what you're called upon under Zauderer -- and Zauderer does manifestly control this case. What you're called upon to do is to satisfy yourself that the state legislature had legitimate purposes for which this legislation is rationally related.

And in discharging that function, in this court's Zauderer cases -- in the mercury case, in the calorie-counting case, in the Connecticut Bar case -- in discharging the rational basis review standard, what the court has done is first identify the state interest.

Here, the interests -- I'm sorry, Your

Honor?

JUDGE LYNCH: At what level of generality? Because the state can say we have an interest in health and the environment, and I say that's substantial. Those are the most important things that exist for people.

MR. ROBBINS: Yes.

JUDGE LYNCH: But is all of the question about whether there actually is any danger to health or the environment subsumed into the rational fit --

MR. ROBBINS: Yes.

JUDGE LYNCH: -- and we just say that's a substantial -- okay.

MR. ROBBINS: Yes.

JUDGE LYNCH: But then, so you're saying all I have to do is invoke health and the environment. Now I've got a substantial interest, and then the court has to defer to the legislature's judgment about whether there's a rational fit so we all go home?

MR. ROBBINS: Well, I don't know about

the "all go home" part.

JUDGE LYNCH: Well, let me --

MR. ROBBINS: But let me -- but let me --

JUDGE LYNCH: I'll try to be a little more concrete then. There were some references during the discussion with Ms. Stetson as to what her side won and lost in the District Court. But as I understand the procedural posture here, we're only talking about preliminary injunctions. We're talking about predicting likelihood of success on the merits.

MR. ROBBINS: Yes.

JUDGE LYNCH: So with respect to the First Amendment objection to the labeling requirement, that claim was not dismissed by the District Court, right?

MR. ROBBINS: That's correct. It was --

JUDGE LYNCH: That's still in the case, and there's going to be further proceedings, summary judgment, trial on that perhaps?

MR. ROBBINS: Indeed.

JUDGE LYNCH: And with respect to the "natural" prohibition, they didn't win. The judge just predicted they were likely to win and then declined to grant a preliminary injunction on other grounds. That also remains in the case.

MR. ROBBINS: Indeed.

JUDGE LYNCH: So I'm trying to figure out what the trial looks like in this case. If it's not going to be the Scopes trial about GMO products because you're going to say we've got weighty interests, and she's going to say nobody has -- you know, no reputable scientist believes what you say, or something like that, is that what the trial is going to be about?

Because so far, we've got pretty conclusory stuff in the briefs, where, especially on their side, nobody -- nobody believes this.

MR. ROBBINS: Well --

JUDGE LYNCH: But is the District Court going to have a trial about that?

MR. ROBBINS: Well, let me answer it in two parts. But first of all, I want to talk about

the premise of Your Honor's question because when they say, when the plaintiffs say no reputable science believes X or Y, let's be clear about what they are saying that about.

What they are saying that about is the goal of protecting human health. They are not saying that about the environmental concerns. That contention is conspicuously missing in their opening brief, and it's not surprising because there is robust evidence that the proliferation of glyphosate and the use of BT, the BT protein has had substantial adverse effects on environment.

But even in the realm of human health, the trial, if there is a trial on this point -- and respectfully, if this court holds as we ask it to, that this case is controlled by Zauderer, this trial will be a good deal shorter, as well it should be, because this court has held repeatedly that in the realm of Zauderer, the state need not even have an empirical basis for its rational relation. It doesn't need.

So Judge Raggi pointed out in her

opinion for the court in Connecticut Bar, it need not have an empirical grounding. But in point of fact, we will have and do have in this record abundant empirical evidence as to every purpose for this statute.

JUDGE PARKER: When you say "this record," in this case, most -- not most, but a great deal, if not most, of the important information is really not in the record, it's by way of assertions from amicus parties. So when you look at what we're dealing with, basically, we're dealing with a complaint. We're dealing with motion practice addressed to defenses and so forth.

But the meat of the case is really not before us. I mean, the physicians that you have gotten information from and the fact that the National Academies of Science and so forth don't think there's much here is not in any record. It hasn't been vetted. It hasn't been reviewed by a District Court.

MR. ROBBINS: Well, let me say it -- the

materials before the legislature on which the legislature relied in making the findings that it did are absolutely in the record. And we refer the court to Exhibit J that compiled all these materials in the record below.

And I can take the court through one after another of peer-reviewed journal articles supporting the findings of the legislature. But in the end, I respectfully suggest that under Zauderer, which, again, I believe absolutely provides the standard by which the disclosure part of Act 122 is governed, it is not the District Court's function. And she properly regarded it as not her function to assess the validity, the weight.

You know, who has the better science? Those are --

JUDGE PARKER: At trial, what is it you're going to undertake to do?

MR. ROBBINS: Well, if the case -- if this court holds that the GE disclosure part of the statute is controlled by Zauderer, I believe

it will be sufficient simply to remind the court that it has before it a compendium of scientific material on the basis of which the legislature made the findings that it did.

That, I think, actually sets the bar higher than Zauderer requires.

JUDGE LYNCH: But what about the question of fit, of whether this is going to help with those environmental concerns? I mean, it seems to me if there were a human health concern, then one might say, as with cigarettes, look, the stuff is legal. It's up to people to decide. And you know, if we can put this warning on, that'll help because people will see it and they'll decide what to do about it, and there will be less consumption.

When we're talking about these environmental risks, first of all, it sounds like they're sort of second-order risks. That is, it's not that the genetically modified wheat is causing some harm in itself, it's that that enables the farmers to use more of particular pesticides,

which are carcinogenic and which then get into the environment. And that's bad.

And that's going to get stopped because in one, with all respect, relatively small state, some consumers are going to say we're going to look for the perhaps nonexistent, when it comes to packaged foods, products that -- or very rare ones that you can buy in fancy stores that say "GMO certi -- non-GMO certified products," but that's going to change the agribusiness model --

MR. ROBBINS: Well --

JUDGE LYNCH: -- and affect the environment writ large?

MR. ROBBINS: Let me -- let me address that at two levels. First, Judge Lynch, to the extent that this statute is designed to obviate consumer confusion about what they are purchasing, which was one among the goals, there is an obvious means and fit. I mean, itself, as the D.C. Circuit put it on bank in the AMI case, it's a self-evident fit between means and ends when you're dealing with the goal of obviating

confusion.

But even as to the proposition that, you know, the small market share in Vermont will have an effect further down the line in the behavior of farmers and the effect on the proliferation of glyphosate, I would take the court back to what you said about the mercury recycling, also a Vermont case. And what the court said there in the context of a Zauderer analysis was that it was sufficient for means and fit that it was probable -- I'm reading right from NEMA -- probable that some mercury lamp purchasers, newly informed by the Vermont label, will properly dispose of them and thereby reduce mercury pollution.

Nobody contended that Vermont lamp buyers had such a dramatic impact --

JUDGE LYNCH: Yeah, but that's going to have an impact right there in Vermont probably, right? It's the Vermont buyers who are going to not improperly dispose of mercury in Vermont. That's good for Vermont's environment.

The -- I don't even -- I guess somebody

in Vermont grows wheat, but that's not where most of this stuff is coming from. So all these effects, you know, on the environment are writ very large.

MR. ROBBINS: Well, I will grant that there is a chain of logic and causation, but respectfully, that sort of Hall's graph analysis of what causes what down the line is precisely what we vouchsafe to the legislature to analyze. It is not the court's function, least of all in a doctrine in which this court has said repeatedly the legislature does not even need empirical evidence to justify the cause and effect so long as the court can imagine that it had one, and it surely did here.

That suffices under Zauderer. If we were in the world of Central Hudson, which we are not, I would have to make a more, let's say, robust means end argument than I need to today. But we are not there, and the contention that this label is somehow controversial because it relates to, as plaintiffs have called it, a "hotly debated

topic" cannot be the way to understand controversy within the meaning of Zauderer.

If that were the case, if it were sufficient to be controversial that it relates to a hotly debated topic, then I respectfully suggest Zauderer itself was wrongly decided because any lawyer who's ever been called an ambulance chaser knows perfectly well that contingent fee litigation is itself controversial in that sense.

Now I've spent most of the time thus far on the GE disclosure rule. I'd like to talk about "natural" unless the court has questions?

JUDGE LYNCH: This is a very interesting matter very important matter. I've given both sides extra time. So you have some more time, but let's try and focus it now on the "natural" prohibition and try to be relatively brief there.

MR. ROBBINS: I'll do my best.

JUDGE LYNCH: Thank you.

MR. ROBBINS: So on the "natural" prohibition, we make two arguments. The first is that in point of fact, the "natural" pro --

restriction is constitutional. And in this respect, we disagree with the District Court.

The law is settled, and I think there is no disagreement about this basic principle reflected in the decision of the Supreme Court in Peel and other decisions that where a label is either inherently or actually misleading, it may be prohibited. There was before the legislature survey evidence of a sort exactly of the sort that one would use to determine whether there is confusion.

A 2010 Hartman Group poll concluding that some 61 percent of consumers believe that "natural," the word "natural" implies the absence of GE foods. There was evidence before the legislature that the World Health Organization and Monsanto, one of plaintiff's members, defined -- themselves defined GMOs as organisms that are altered in a way that does not occur in nature.

So, in short, there was evidence both of actual and inherent misleading speech.

What the District Court did was it said,

well, look, the problem here is that "natural" means -- covers even more than the absence of GE. The District Court thought that it lacks a settled meaning because, after all, as the District Court put it at Joint Appendix 88, even bordering, weeding, and pruning do not exist in nature. Well, that's true enough.

But that's the wrong question. The right question is on this record, what do consumers believe "natural" means, and are they mis -- do they misapprehend the meaning in the context of genetic engineering?

JUDGE PARKER: Well, and the other part of that question is if I were a manufacturer, how do I know what -- a food manufacturer or a packager, what I can or can't put on my label? And the catch-all "any words of similar import" that would have a tendency to mislead would give me a lot of pause.

MR. ROBBINS: They would until, Judge Parker, that manufacturer read the attorney general's rule implementing the statute, which

says in Definition 14, that "natural" or any words of similar import means the words "nature," "natural," or "naturally," period.

That's what you can't say if you're selling genetically engineered goods because a substantial percentage of the public on this record understands those particular words to connote the absence of genetic engineering. And if that evidence suffices --

JUDGE CARNEY: But it doesn't really go much farther than that. I mean, "natural" is such a broad and indefinite kind of word, I think, that it can mean just existing in nature, in which case no processed food would qualify as natural. I think there's a lot of difficulty in knowing how to comply with that, even with the attorney general's regulations.

MR. ROBBINS: Well, the -- what the statute says is if you are producing genetically engineered food, you may not call it natural. Judge Parker said, well, but it also says "words of similar import." The attorney general has

dealt with that by confining it to particular words.

So now manufacturers know that if their food is genetically engineered, they may not call it "natural." And by the way --

JUDGE LYNCH: But there's no other prohibition on using the word "natural" that has to do with the use of chemical fertilizers, for example, or anything else that might conceivably by some people be thought not to be natural. But others might disagree, or something like that.

MR. ROBBINS: Yes.

JUDGE LYNCH: If you're talking about --

JUDGE CARNEY: With preservatives --

MR. ROBBINS: Yes, but likewise, Judge Lynch, there is no evidence in this record that anybody is confused about the word "natural" in any other context. In other words, I understand that, you know, in a platonic sense, the word "natural" can mean you haven't done anything other than Mother Nature itself. So you haven't irrigated your farm. You haven't used a plow.

You know, you haven't used a rake because, you know, rakes weren't in the Garden of Eden either.

But that's not the question. The question is on this legislative record, what were people actually confused about? And the record shows they were confused not about any of these, you know --

JUDGE LYNCH: Well, but they might be confused about a lot of other things. The record didn't -- no one inquired of them about other confusions. Isn't your point just that the legislature is concerned about these particular things --

MR. ROBBINS: Yes.

JUDGE LYNCH: -- and that's all they have to deal with?

MR. ROBBINS: And they don't have to solve all the possible confusion at once, least of all in the area of commercial speech, where the courts have said you may take one step at a time.

But let me turn to the second --

JUDGE PARKER: So if I made a potato

chip from a GE-derived potato, I could not describe it as natural?

MR. ROBBINS: Correct.

JUDGE PARKER: What if I made a potato chip from a regular Idaho potato? I could describe it as natural and naturally made?

MR. ROBBINS: If there are no -- under this statute, the "natural" restriction is confined to the use of genetic engineering. That's correct.

JUDGE LYNCH: If I somehow made a potato chip out of edible plastic, I could call it natural as far as this --

MR. ROBBINS: As far as this statute is concerned. But let me be clear, the questions about where to divide the line, those sound like equal protection arguments. And of course, if they were, if they had brought like an equal protection claim, you know, you're only punishing GE natural abusers. You're not punishing the plastic, the people who are growing potatoes -- if there were a class of such people, by the way.

But that would be --

JUDGE LYNCH: But so many people are growing potatoes in a manner that a lot of your organic farmer amici would regard as not natural -- -

MR. ROBBINS:: Yes --

JUDGE LYNCH: -- and you're not going after them. It's not plastic. They're a realistic example.

MR. ROBBINS: But that's just the nature of economic legislation. And time immemorial, you know, ever since the demise of Lochner, it's been okay to draw those kinds of lines.

JUDGE PARKER: So I couldn't describe my potato chip from a GE-modified potato as natural, but I could, you know, label my can of Spam naturally made, all natural?

MR. ROBBINS: Something tells me Spam -- well, if the assumption, Judge Parker, is that Spam -- there's no genetic engineered --

JUDGE PARKER: It's miscellaneous cow or pig parts.

MR. ROBBINS: Yeah. As far as this statute doesn't address that question. There may be other statutes that do. I'm not aware of them. But again, the fact that what we might think as an abstract matter are comparable cases where "natural" should not be used is not a burden that the State of Vermont has for this kind of legislation.

So let --

JUDGE CARNEY: On this aspect of the case, though, do you agree that it's the Central Hudson analysis that applies?

MR. ROBBINS: No. No, I don't.

JUDGE CARNEY: On Zauderer?

MR. ROBBINS: If the use of the label -- Judge Carney, if the use of the label is either inherently or actually misleading, it is subject to prohibition, and you do not have to reach Central Hudson at all.

If you thought I was wrong about this and that it was merely potentially misleading, which is what the District Court was prepared to

believe, then you have a Central Hudson analysis, and we've explained in our brief, and I don't want to take the time now, why we satisfy that standard.

But I do want to come back to why, nevertheless, a preliminary injunction was properly denied on the "natural" part of the statute. And that is because you will search these affidavits all day long and you will not find a single averment that a single plaintiff member actually plans to use the word "natural" on a GE product.

They didn't say that. I rather suspect because it leads to litigation where people bring class action claims that, you know, they've been using the word "natural" on GE products and they get sued. So, and I understand that. They don't want to get sued. So they don't want to say it.

But the fact is they haven't said it. It was their burden to do so. And the District Court, whose finding in this respect I believe is subject to review as a clearly erroneous standard,

was absolutely clearly correct in concluding that these declarations -- and Ms. Stetson referred, for example, to paragraph 13 of the so-called Bradley declaration from General Mills.

Here is what Bradley had to say in paragraph 13. "Act 120's prohibition of the use of the word "natural" on the labels of products that may contain GE ingredients may also -- may also necessitate changes to General Mills labeling for products sold in Vermont." That's it.

JUDGE LYNCH: Okay. I think we understand that. The District Court was pretty clear about what the affidavit said.

Thank you very much.

MR. ROBBINS: Thank you, Your Honor.

JUDGE LYNCH: Ms. Stetson, you have three minutes. We've heard a lot, and I think we've gotten most of the arguments of both sides. So try to, you know, keep to what's new or directly responsive.

MS. STETSON: Certainly. So on directly responsive, let me start with Zauderer and with

the understanding that if we're at Zauderer, we've concluded that Amestoy doesn't apply, despite it being the same interests supporting in the same way, found wanting for the same reason. Central Hudson doesn't apply, even though this doesn't regulate deception and is controversial.

If we're Zauderer land, I want you to go back and read what Mr. Robbins, the words Mr. Robbins used to describe the Zauderer test. Because what he is suggesting to you is that once you're in Zauderer, the bottom drops out, and you apply what he called a "rational basis test," and you look for any legitimate state interest and you look for just the idea that it might be helpful without evidence.

Here is the problem with that. The problem starts with Zauderer itself, where Justice Brennan in his concurrence said I'm concurring on the idea that there's no difference in the standards we're talking about here.

The problem continues with this court's decision in Hayes, where this court said in a

compelled disclosure case the state needs to show a substantial interest. And more than that, the state needs to show an actual harm, and more than that, the state needs to that the measure that it's putting in place actually ameliorates that harm. And more than that, that it's not so -- that it's no more intrusive than necessary.

And the reason I want to pause on those last two points is because of this environmental issue. Judge Lynch, you, I think, put your finger on the problem, which is that if we are talking about a situation where the suggestion is that a label on a bag of tortilla chips will somehow impact the use of pesticides -- and let me be clear in an aside that pesticides are used on GE and non-GE crops. Commodity agriculture refers to both GE and non-GE crops.

If we are talking about the suggestion that the First Amendment is satisfied when the state compels a label on a bag of tortilla chips because it could have an impact on pesticides, we are getting far removed even from Zauderer.

JUDGE LYNCH: I understand why both sides would like to run away from having a trial about what the real facts are here, and I understand why courts would be reluctant to get into that kind of trial as well. But it seems to me hard to avoid the conclusion that there is a big difference between a legislature legislating based on real concerns about real scientific problems and presenting real potential solutions and one that's not.

And I'm not sure it's helped very much either by saying -- as you put it, not he -- that the bottom drops out or by saying we don't need to go there. Because this court is going to decide in the abstract that this is like Amestoy, and they've got nothing, based on no facts at all that I can see or that have been subject to the crucible of cross-examination in trial.

Or conversely, the other way, that the legislature is fine because it recited a few things. I'd be reluctant to say either of those things, but that seems to be what each side is

offering me.

MS. STETSON: I think, with respect to the legislature saying a few things, that that is what we're suggesting to you. And with respect, Judge Parker, the idea that the conclusions of the National Academies of Science and the American Academy for the Advancement of Science and the AMA and the FDA and the EPA need somehow to be vetted at a factual trial is erroneous.

JUDGE PARKER: So what --

MS. STETSON: Those organizations have spoken.

JUDGE PARKER: What do you foresee a trial here looking like?

MS. STETSON: To be candid, and I think Mr. Robbins recognized the same thing, I think Judge Reiss recognizes the same thing, this is largely uncharted territory. But perhaps the comfort that can be taken here is this.

The reason that we are in this pass, at this pass is because Judge Reiss did not feel comfortable definitively concluding, as you can

tell from her opinion, what standard applies, Central Hudson or Zauderer. Perhaps the best and cleanest path for you to navigate is to accept all the way up to Zauderer the contention that Amestoy can be thrown out. Central Hudson doesn't apply. Look at what Zauderer requires.

What Zauderer requires is a substantial interest, backed up by something other than just a few peer-reviewed studies -- I can find you a peer-reviewed study on anything -- a reasonable risk of harm manifested in some actual facts, and a law that actually ameliorates the harm.

JUDGE PARKER: Okay. And then along with that, you will go back to federal court in Vermont and then do what?

MS. STETSON: Judge Parker, I think that is for us to have to work out with Judge Reiss, depending in the instructions from this court. If this court concludes that there is some discussion to be had in the trial court posing as a finder of fact about, for example, whether -- and this is the language from Zauderer-type cases, whether any

reasonable person could conclude that there's a harm here.

Whether any reasonable person could draw from the array of scientific evidence -- Vermont's on one side, ours on the other -- that the vast mountain of evidence, 2,000 studies we say that show that there is --

JUDGE LYNCH: But you'd have to bring in that mountain to an actual court and have the court work its way through the mountain, which you kind of don't do in the brief. You just say it's all bogus.

MS. STETSON: No, with respect, Judge Lynch, we would have to bring in an expert to talk about the mountain --

JUDGE LYNCH: Yes, exactly. To talk about the mountain.

MS. STETSON: -- which we have, and I would actually commend this to you. If you read the declarations --

JUDGE PARKER: The record here is actually -- I found it, and I'm speaking for my

colleagues, it's quite interesting. But you know, the opinions are completely divergent. You have very powerful evidence on your side. I mean, National Academies of Science and NIH and so forth and so on that there's nothing much to this.

And then some of the amicus materials on the other side cause you pause and say there might be something real here. And that's what --

MS. STETSON: Right.

JUDGE PARKER: -- trials, trials resolve. But I --

MS. STETSON: It cannot -- it cannot be, Judge Parker, under even a Zauderer reasonable relationship standard that a mere divergence of views on a topic suffices to permit a state to compel someone to speak. It has to be taken into account --

JUDGE CARNEY: Compelling -- they're compelling the disclosure of information. It's true it's compelled speech. But still, the disclosure of information is unlike requiring a warning of some kind on the label.

MS. STETSON: Judge Carney, I think we're past the point where we're talking about whether compelled disclosure of information is subject to First Amendment protection. It plainly is, and this court has recognized, in fact --

JUDGE LYNCH: At what level? Because if it -- and I guess we've kind of covered these issues. So I think we've got both sides' positions pretty clearly at this point.

Mr. Robbins, what do you want to do that you're getting up? Because you're out of time.

MR. ROBBINS: Directly, I want to clarify one thing I said. Because it turns out that there is something on the font size of the -- and I just want the record to be absolutely clear. It turns out the attorney general's regulation provides that the GE disclosure must be in a font size no smaller than the size of the words "serving size" on the nutrition facts label required by the FDA or in a font size no smaller than the ingredient list and printed in bold type face.

JUDGE LYNCH: So when that were -- I don't know, how do you read that, whichever is larger or whichever is smaller?

MR. ROBBINS: In other words, it can't be smaller. It can't be smaller, but it need not be larger.

JUDGE LYNCH: All right. Thank you very much.

MS. STETSON: Your Honors, may I make -- may I make one more point on the disclosure, with apologies? What Mr. Robbins said with respect to the disclosure is that it needed to be visible. It needs to be readily understood.

JUDGE LYNCH: We have -- we know what it says. We know what the regulations say, and we now -- he's now clarified any inadvertent misstatement.

Thank you very much. We'll reserve decision.

(Whereupon, the proceedings were concluded.)

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