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## **A Constitutional Food Fight: Commercial Speech & Organic/Non-GMO labeling**

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### **Abstract**

*Walking through the grocery store after work, a consumer is met with aisles upon aisles of processed food options with large excited labels reading “organic,” “non-GMO,” “natural”. Over in the milk case there in between the rows of 2%, non-fat, and skim there is organic milk, non-genetically modified milk, and non-rBGH milk. Before leaving the consumer stops by the seafood selection to pick up salmon, choosing whichever looks the best, without knowing that one option was specifically genetically engineered to grow faster. With food packaging covered in terms like GMO, genetically modified organism, and rBGH, recombinant bovine somatotropin, the trip to the grocery store in America is more complicated than ever before, leading to a constitutional food fight.*

*The development of new labeling regulations and standards for organic and genetically modified food products has brought into question how far the government can go to mandate and require labeling of certain food products. These regulations and standards ride a fine line of infringing on the rights of a corporation and fulfilling the consumer’s desire to know what they are eating.*

*This paper examines the rise of organic and non-genetically modified food products and their subsequent regulations, or lack thereof, in addition to constitutional issues surrounding the mandated labeling of such food products. This food fight is messy, but for food corporations, a defense is building for their rights.*

**Keywords: Commercial Speech, Core Speech, Corporate Personhood, Organic, Genetically Modified Organisms, Mandated Labeling, Right to Know**

### **A. Introduction**

Walking through the grocery store after work, a consumer is met with multiple aisles of processed food options with large excited labels reading<sup>1</sup> “organic,” “non-GMO,” “natural”. Over in the milk case there in between the rows of 2%, non-fat, and skim there is organic milk, non-genetically modified milk, and non-rBGH milk. Before leaving the consumer stops by the seafood selection to pick up salmon, choosing whichever looks the best, without knowing that one option was specifically

genetically engineered to grow faster.<sup>2</sup>The trip to the grocery store in America is more complicated than ever before leading to a constitutional food fight.

For the typical consumer this labeling can be confusing and overwhelming, especially if they are uninformed. For a corporation this can be a nightmare, trying to ensure that food products are meeting consumer demands, without buckling to pressure to unnecessarily disclose through labeling when labels are often misunderstood. While mandated labeling is not a new concern for corporations, the recent rise of consumer demand of

<sup>1</sup> Andrew Pollack, *Genetically Engineered Salmon Approved for Consumption*, N.Y. Times, Nov. 20, 2015, at A1.

<sup>2</sup>*Id.*



organic and non-genetically modified food products has created a unique market. As consumer demand for these types of products has risen rapidly over the last few decades the public has been confronted with conflicting accounts of health and safety concerns and definitions of what these products even are.<sup>3</sup> As government regulations begin to form and solidify and consumer demand mounts, the food fight around organic and non-genetically modified food products has become a fight that food corporations must face. This complex market of newfound consumer paranoia and ignorance regarding what genetically modified organisms and organic food products are, these corporations are faced with legal and ethical questions. When the definitions of organic and genetically modified are not widely agreed upon by consumers and carry strong connotations for the general public, the labeling of such foodstuffs can alter public perception and scalability. While consumers are demanding their right to know what is in their food through mandatory labeling, those in the food industry have to wonder if their First Amendment rights are being infringed.

The development of new labeling regulations and standards for organic and genetically modified food products has brought into question how far the government can go to mandate and require labeling of certain food products. These regulations and standards ride a fine constitutional line of infringing on the rights of a corporation and fulfilling the consumer's desire to know what they are eating.

This paper examines the rise of organic and non-genetically modified food products and their subsequent regulations, or lack thereof, in addition to constitutional issues surrounding the mandated labeling of such food products. Common definitions and regulations of organic and genetically modified food products will first be established to create a common understanding. Hallmark cases and tests will be used to analyze the rights of corporations and constitutional issues regarding mandated labeling. Finally the consumer "right to know" will be balanced with these rights to consider the legal options of corporations as the constitutional food fight over mandated labeling continues.

<sup>3</sup> Kelly A. Leggio, *Limitations on the Consumer's Right to Know: Settling the Debate over Labeling of Genetically Modified Foods in the United States*, 38 San Diego L. Rev. 893 (2001).

## B. Organic & Non-Genetically Modified Food Products

### 1. Organic Food Products

The presence of organic food products in the market in the United States reaches as far back as the 1940s, by the 1960s and 1970s the organic movement had taken off and farmers and food companies alike began marketing food as organic<sup>4</sup>. Since its fledging beginnings, the organic sector has continued to expand rapidly with the retail sales for organic products more than doubling between 1994 and 2014.<sup>5</sup> While many Americans seek organic products for their perceived health benefits, many consumers do not really know what organic means.

The Organic Food Production Act in 1990 served as a first step towards creating a unified understanding of organic food products. OFPA served to establish national standards under the United States Department of Agriculture, ensure consistent standards, and facilitate interstate commerce of organic products.<sup>6</sup> To be certified organic by the USDA federal guidelines under OFPA, food products must be grown and processed relying on natural substances and methods. Produce must be grown in soil without prohibited substances, including synthetic fertilizers and pesticides, applied for three years, meat must be raised in living conditions that accommodate natural behaviors, not administered antibiotics or hormones, and fed organic feed, and processed foods may not have artificial preservatives, colors, or flavors.<sup>7</sup> No organic foods are grown or handled with genetically modified organism.<sup>8</sup> In addition, organic farmers

<sup>4</sup> Michelle T. Friedland, *You Call that Organic? – The USDA's Misleading Food Regulations*, 13 N.Y.U. Envtl. L.J. 379 (2005).

<sup>5</sup> Cary Funk & Brian Kennedy, *American's views about and consumption of organic foods*, Pew Research Center (December 1, 2016). <http://www.pewinternet.org/2016/12/01/americans-views-about-and-consumption-of-organic-foods/>

<sup>6</sup> Andrew J. Nicholas, *As the Organic Food Industry Gets Its House in Order, the Time Has Come for National Standards for Genetically Modified Foods*, 15 Loy. Consumer L. Rev. 277 (2003).

<sup>7</sup> Miles McEvoy, *Organic 101: What the USDA Organic Label Means*, United States Department of Agriculture (March 22, 2012). <https://www.usda.gov/media/blog/2012/03/22/organic-101-what-usda-organic-label-means>

<sup>8</sup> *Id.*



must select cultivation techniques that improve the condition of the soil and minimize erosion, to promote creating a better environment.<sup>9</sup> These regulations create a common definition for organic products, and while consumers are not always aware of the implications of these regulations on what they are purchasing and consuming, producers have common methods and processes to follow.

## 2. Genetically Modified Food Products

Genetic modification is a process where genetic material is manipulated to modify an organism's characteristics.<sup>10</sup> While the first genetically engineered food product was introduced in 1994, for centuries prior crops have been selectively bred to improve crop yield, enhance nutritional value, improve resistance to drought, cold temperatures, insects, and improve shelf life.<sup>11</sup> Genetically modified organisms today have come to be known as those that are genetically engineered a technology that combines genetic material from dissimilar and unrelated organisms.<sup>12</sup> This is often done to create a more desirable product. This differs from selective breeding and cross-breeding, as the precursor to genetic engineering identified similar plants and traits and bred them to create a more useful product. In the last two decades, over 150 genetically engineered crops have been approved for use in the United States including types of corn, alfalfa, soy, and cotton.<sup>13</sup> While GMOs are primarily limited to commodity crops, within those crops GMO varieties make up over ninety percent of the available varieties.<sup>14</sup> Generally speaking there are three categories of GMOs. One type are crops that have

been genetically modified to resist insects or be herbicide tolerant, the second type are crops that have been physically altered, while the third type are crops that are used to produce products traditionally produced by other means.<sup>15</sup>

Genetically modified organisms do not just permeate the food supply through approved products, as many GMO products are then used as feed for livestock or compose processed foods.<sup>16</sup> In this sense, GMOs permeate nearly every part of the food industry from meat products, to fruits and vegetables, to processed foods. Unlike organic food products, genetically modified organisms and their counterpart currently do not have comprehensive congressionally backed legislation to define which food products are GMO and which are non-GMO, instead they are regulated under environmental, health, and safety laws. The more dispersed regulations for genetically modified food products indicate that there is not an overarching consensus on the labeling and definition of GMO products.

## 3. Consumer Preferences of Organic and Non-GMO Products

While organic and non-GMO food products have been present in some degree in American food markets for decades now, the market for these food products have surged in recent years. The organic sector is so large now that sixty-eight percent of U.S. adults have purchased organic food products within the past 30 days and more importantly a majority of Americans are making their purchasing decisions based on labeling and ingredient labels.<sup>17</sup> Furthermore, seventy-three percent of conventional grocery stores are stocking organic products and increasing shelf space for these products.<sup>18</sup> While the organic sector is surging, the relatively new non-GMO sector of food products is just starting to develop with consumers.

<sup>9</sup> Michelle T. Friedland, *supra*, note 4.

<sup>10</sup> Courtney Begley, "So Close, Yet so Far": *The United States Follows the Lead of the European Union in Mandating GMO Labeling. But Did it Go Far Enough?*, 40 *Fordham Int'l L.J.* 625 (2017).

<sup>11</sup> Emily Shanks, *The National Bioengineered Food Disclosure Standard: Texas and the Genetically Modified Organism Food Fight: Comment*, 49 *Tex. Tech L. Rev.* 987 (2017).

<sup>12</sup> George A. Kimbrell & Aurora L. Paulsen, *The Constitutionality of State-Mandated Labeling for Genetically Engineered Foods: A Definitive Defense*, 39 *Vt. L. Rev.* 341 (2014).

<sup>13</sup> Jonathan H. Adler, *Compelled Commercial Speech and the Consumer 'Right to Know'*, 58 *Ariz. L. Rev.* 421 (2016).

<sup>14</sup> George A. Kimbrell & Aurora L. Paulsen, *supra*, note 12.

<sup>15</sup> Andrew J. Nicholas, *supra*, note 6.

<sup>16</sup> Emily Shanks, *supra*, note 11.

<sup>17</sup> Cary Funk & Brian Kennedy, *supra*, note 5.

<sup>18</sup> Christopher T. Jones, *The manic Organic Panic: First Amendment Freedoms and Farming or the Attack of the Agriculture Appropriations Rider*, 26 *J. Land Resources & Envtl. L.* 443 (2006).



As GMO food products have only been approved and available for the last two decades, many consumers still do not know what GMOs are or how they are present in their food products. With companies like Chipotle discontinuing GMO products in their ingredients, there has been an increase in consumer understanding of GMOs and change in preferences, especially among younger Americans. Half of adult Americans say they care some about GMOs and roughly half of Americans 18-29 say that genetically modified food products are worse for your health.<sup>19</sup> With the rise in grocery stores such as Whole Foods and other specialty stores, the market for non-GMO food products continues to increase. Furthermore, half of US adults say they look for non-genetically modified labeling when food-shopping, indicating that similar to organic products, consumers are concerned about buying these products are looking towards labels as cues of these products.<sup>20</sup> With this consumer demand coupled with the rise of organic and non-genetically modified products available to consumers, food producers and retailers are unable to ignore this movement. To stay financially competitive and maintain consumer support producers and retailers must now face how to deal with these consumer preferences and actions.

#### 4. Labeling and Regulation

Standard understandings of organic and non-GMO products have created common regulatory definitions of what these products are, but the regulation and labeling of organic and non-genetically modified products differ in establishment and comprehensiveness. While common definitions allow for understanding on a regulatory and legal level, these common definitions have not fully permeated the consumer understanding. Furthermore, the cues and definitions given by

labeling and regulations may not indicate exactly what consumers think they do.

The organic regulations through the National Organic Program, established under the OFPA, clearly define organic products and how to grow or create them, but the regulations are entirely process oriented. They regulate the process in which these food products are being grown or created, and not the products themselves. It would seem to follow logically that process based rules would eliminate any unwanted pesticides or genetically modified organisms from certified organic products, but these rules fail to consider the unintended indirect or inadvertent contact of pesticides from neighboring farms<sup>21</sup>. The regulations under the National Organic Program indicate that product testing may be required by certifying agents if they have reason to believe the product has been contaminated, but if this contamination is inadvertent the agent may have no reason to ever test.<sup>22</sup> With process-based regulations, consumers are able to know the process of creating or growing the food is in line with organic regulations, but the product itself may not entirely be. Furthermore, unknown to many consumers is that the USDA allows residues of prohibited pesticides up to five percent of the EPA tolerance for such pesticides to manage inadvertent contact.<sup>23</sup> Pesticides that are prohibited from being in certified organic products may be present in trace amounts because of these regulations. For consumers wanting to eliminate prohibited pesticides from their food products certified organic products may not be the answer. A 2010 study by the USDA to evaluate pesticide residue found that fifty-seven percent of sampled fruit and vegetable samples bearing the certified organic seal had no detected residue, but thirty-nine percent had residue less than five percent of the EPA tolerance and four percent contained residues above five percent of the EPA tolerance.<sup>24</sup> While a majority of tested products followed certified organic guidelines, nonetheless consumers were led to believe in some cases that all certified

<sup>19</sup> Cary Funk & Brian Kennedy, *Public opinion about genetically modified foods and trust in scientists connected with these foods*, PEW Research Center (December 1, 2016). <http://www.pewinternet.org/2016/12/01/public-opinion-about-genetically-modified-foods-and-trust-in-scientists-connected-with-these-foods/>

<sup>20</sup> Monica Anderson, *Amid Debate over labeling GM foods, most Americans believe they're unsafe*, PEW Research Center (August 11, 2015). <http://www.pewresearch.org/fact-tank/2015/08/11/amid-debate-over-labeling-gm-foods-most-americans-believe-theyre-unsafe/>

<sup>21</sup> Michelle T. Friedland, *supra*, note 4.

<sup>22</sup> *Id.*

<sup>23</sup> United States Department of Agriculture Agricultural Marketing Service, *2010-2011 Pilot Study Pesticide Residue Testing of Organic Produce*, USDA National Organic Program (2012).

<sup>24</sup> *Id.*



organic products were without pesticides, when that was not the case.

The National Organic Program has created various visual cues and labeling standards for organic products that may be misunderstood by consumers. There are three primary labeling standards for organic products: “100 percent organic”, “organic”, and “made with organic”. “100 percent organic” indicates that the product contains 100 percent organic ingredients while “organic” indicates that the product contains a minimum of ninety-five percent organic ingredients while the remaining five percent are nonorganic products that are not commercially available as organic.<sup>25</sup> Both of these labels may include the USDA organic seal. “Made with organic” on the other hand indicates that a product contains at least seventy percent organically produced ingredients and products cannot include the USDA organic seal.<sup>26</sup> Given these regulations labeling standards, consumer may be led to believe these products do not contain any pesticides or non-organic products, when they in fact may.

Organic labeling requirements are for organic products only, meaning that non-organic products are not required to indicate as such. With more and more Americans buying organic products and using labeling and ingredient cues in their purchasing decisions, this labeling and the regulation of the labeling is becoming more and more important.

Genetically Modified food products do not have an overarching federal legislation on regulation, but rather are governed by various departments. The Food and Drug Administration Environmental Protection Agency has regulatory control over plants genetically modified to express pesticide substances.<sup>27</sup> Furthermore, the FDA has eased the impact of regulation of GMOs on producers by relying and regulating mainly products and substances that may be injurious to human health.<sup>28</sup> Genetically Modified Food Products have

only recently received federal legislation regarding labeling.

The National Bioengineered Food Disclosure Standard, signed into law by President Obama in 2016, mandates that the USDA implements a national GMO labeling standard for products intended for human consumption that have been modified through techniques that cannot be accomplished through natural breeding.<sup>29</sup> This new law requires mandatory labeling of genetically modified products, differing substantially from the labeling requirements organic products that are voluntary and focus on organic instead of non-organic.

Prior to the new federal law, the Food and Drug Administration’s policy on GMOs was that if the product was substantially similar to a conventional product, than a label was not required as conventional thought was that there is no evidence that GMO consumption negatively affects health.<sup>30</sup>

Most labeling requirements in the United States are tied to providing information on negative health affects, and since most scientists agree that genetically modified products do not cause negative health affects, labels were needed unnecessary. Federal policy encouraged disclosing genetically modified ingredients in food products, but never mandated the disclosure of them.<sup>31</sup> Since federal requirements of labeling are still developing, the USDA certified organic label is the de facto non-GMO label, since certified organic products are not produced with GMO inputs. In the mean time, private interests developed their own certification for non-GMO products.

The non-GMO project has created a private verification of non-GMO products. Currently there are 43,000 verified products carrying the non-GMO verified sticker for over 3,000 brands.<sup>32</sup> This verification involves a rigorous standard that all verified products must meet that creates a consistent definition and methodology for investigating source

<sup>25</sup> Agricultural Marketing Service, *Organic Labeling Standards*, United States Department of Agriculture. <https://www.ams.usda.gov/grades-standards/organic-labeling-standards>

<sup>26</sup> *Id.*

<sup>27</sup> Thomas O. McGarity, *Seeds of Distrust: Federal Regulation of Genetically Modified Foods*, 35 U. Mich. J.L. Reform 403 (2002).

<sup>28</sup> Courtney Begley, *supra*, note 10.

<sup>29</sup> Emily Shanks, *supra*, note 11.

<sup>30</sup> *Id.*

<sup>31</sup> Thomas O. McGarity, *supra*, note 27.

<sup>32</sup> *Non-GMO project Standard*, Non-GMO Project (2017). <https://www.nongmoproject.org/wp-content/uploads/2017/09/Non-GMO-Project-Standard-Version-14.2.pdf>



materials, testing ingredients, and preserving practices in the supply chain.<sup>33</sup> Similar to the certification procedure for organic products, the non-GMO project does allow trace amounts of GMO inputs as long as they meet the project's standard.<sup>34</sup> For seeds, they can contain 0.25% GMO inputs, human food and products, 0.9% GMO inputs, cleaning products, textiles, or products not ingested 1.5% GMO inputs, and animal feed and supplements, 5% GMO inputs.<sup>35</sup> For the consumer that is not aware, they could be specifically purchasing an item based on the non-GMO claim only for that product to contain some amounts of GMO inputs, albeit minor. The non-GMO project though is entirely voluntary, which makes the new federal mandated labeling guidelines for GMO products an anomaly in comparison to past handlings of organic and non-GMO products.

The development of new labeling regulations and standards for organic and genetically modified food products has brought into question how far the government can go to mandate and require labeling of certain food products. These regulations and standards ride a fine constitutional line of infringing on the constitutional rights of a corporation and fulfilling the consumer's desire to know what they are eating.

### **C. Rights of a Corporation & the Constitutional Issues of Mandated Labeling**

#### **1. Corporate Personhood**

The theory that corporations are artificial persons that possess rights, corporate personhood, has existed in America since the early 1800s. In the beginning of corporate personhood theory, corporations were viewed as artificial, existing only in the contemplation of law and created by concessions of the state.<sup>36</sup> By the mid 1800s this view had shifted, following with the change in law from corporate charters to incorporation, such that

corporations owed their existence to the people that formed them. Following this type of thinking the Supreme Court ruled in *Santa Clara v. Southern Pacific Railroad Co.* that a corporation was a person, to protect the rights and property of the beings that made up the corporation, launching the development of constitutional rights within corporate personhood.<sup>37</sup>

While the Constitution only ever refers to persons in the sense of human beings, *Santa Clara v. Southern Pacific Railroad Co.* held that a corporation was a person and thus should be protected under the Fourteenth Amendment.<sup>38</sup> Since the 1886 *Santa Clara* ruling the Supreme Court has gone on to grant corporations further constitutional powers. Corporations have been given the rights of protection against unreasonable searches and seizures in *Hale v. Henkel*, protection against double jeopardy in *United States v. Martin Linen Supply Company*, right to trial by jury in *Ross v. Bernhard*, and freedom of speech and freedom of the press.<sup>39</sup> For a corporation, First Amendment rights often take a different form than First Amendment rights for a natural person. Most often a corporation is exercising their freedoms of speech regarding political speech or commercial speech. While *Citizens United* granted corporation's further freedom in political speech, the commercial speech doctrine has also been developing to give corporations further constitutional rights.

#### **2. Commercial Speech & Core Speech**

The First Amendment gives persons the freedom of speech, and under the corporate personhood doctrine, persons come to include corporations. There are many different kinds of speech and these different kinds of speech constitute different levels of protection. Core speech is what the First Amendment protects at its core, the voluntary expression of ideas.<sup>40</sup> In this, persons have the ability to decide for themselves what they want to say, or rather what they do not want to say. This core speech is given full protection under the First

<sup>33</sup>*Id.*

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup> Susanna K. Ripken, *Corporate First Amendment Rights after Citizens United: An Analysis of the Popular Movement to End the Constitutional Personhood of Corporations*, 14 U. Pa. J. Bus. L. 209 (2011).

<sup>37</sup>*Id.*

<sup>38</sup> *Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886).

<sup>39</sup> Susanna K. Ripken, *supra*, note 36.

<sup>40</sup> Jonathan H. Adler, *supra*, note 13.



Amendment, while commercial speech on the other hand is slightly different.

Commercial speech is speech that proposes a commercial transaction or an “expression related solely to the economic interests of the speaker and its audience”.<sup>41</sup> Commercial speech historically was not given First Amendment protections, until *Bigelow v. Virginia* in 1975, which first held that a paid advertisement or product label was not stripped of First Amendment protections because it was in that form.<sup>42</sup> This beginning of the commercial speech doctrine laid the foundation that has led to differing opinions on the scope of commercial speech. For a food producer or corporation, commercial speech can give leeway in deciding what to label and advertise their food products as. While commercial speech is not given as full of protection as core speech, due to the First Amendment protections, the government cannot restrict the speech of the corporations just as they please. Since commercial speech can often include implicit political or moral messages in advertising and labeling choices, it is difficult to separate commercial speech from other forms of protected speech. The Supreme Court developed a test for government restrictions on commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*. To be protected under commercial speech the speech must concern lawful activity and not be misleading or fraudulent, it then must consider whether the government has asserted a substantial governmental interest, i.e. preventing consumer deception or protecting public health, whether the regulation “directly advances” the government’s asserted interest, and whether it is “more extensive than is necessary to serve that interest.”<sup>43</sup> The government must bear the burden of proof in establishing that the regulation meets these requirements and thus is permitted. While over time justices, corporations, and scholars alike have argued if the *Central Hudson* test is too permissive or not enough and recent cases have shown the *Central Hudson* test to be a floor and not a ceiling to commercial speech.<sup>44</sup>

As commercial speech can often be associated with core speech, it sometimes is difficult to untangle core speech from commercial speech. Litigants in *Nike v. Kasky* attempted to create a new test to separate core from commercial speech as information concerning products would constitute commercial speech, while information concerning processes would constitute core speech with full First Amendment protections.<sup>45</sup> While the *Nike v. Kasky* test was not upheld, other recent cases in combination with *Nike* indicate that process information may become more privileged than product information.<sup>46</sup> Given that the current organic labeling regulations are entirely process oriented and the coming genetically modified regulations will likely also be process oriented, food companies may have the ability to have further First Amendment protections than currently in place.

A subset of commercial speech and the type of speech at hand most often in dealing with labeling and government regulation is compelled commercial speech, or mandated speech. This is when the government mandates that a disclosure or label be made to commercial speech statements. This could take the form for food companies of mandated labeling of GMO products as such. While compelled commercial speech can fall within the *Central Hudson* test the courts applied *Central Hudson* to compelled commercial speech in *Zauderer v. Office of Disciplinary Council of Supreme Court*. In *Zauderer*, the court held that mandated disclosure requirements could be enforceable as long as they are reasonably related to the State’s interest in preventing the deception of consumers.<sup>47</sup>

### 3. False Advertising

Commercial speech is protected under the First Amendment, but this does not grant corporations the ability to advertise falsely. While

<sup>45</sup> Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 Harv. L. Rev. 525 (2004).

<sup>46</sup> *Id.*

<sup>47</sup> Jeffrey S. Wettengel, *Reconciling the Consumer ‘Right to Know’ with the Corporate Right to First Amendment Protection*, 12 J. Bus. & Tech. L. 325 (2017).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*





corporations can disclose and advertise as they please following the *Central Hudson* test, they also must follow the Lanham Act regarding false advertising. The Lanham Act is the hallmark legislation that prohibits corporations from falsely advertising, infringing on trademarks, diluting trademarks, and other action.<sup>48</sup> The Lanham act likewise imposes liability even in instances where the advertising or labeling was not literally false, but was misleading, deceiving, or confusing to consumers. Plaintiffs are able to prove this liability through a consumer survey.<sup>49</sup>

The Lanham act has come into question when analyzing mandated and voluntary labeling practices in the organic and non-GMO food markets. As consumers often do not understand what the organic certified or non-GMO project verified labels mean, some have questioned if they constitute false advertising.<sup>50</sup> While generally it has been found that the guidelines do not inherently or implicitly lead to false advertising, this remains a factor as corporations decide how to comply with voluntary and mandatory labeling requirements. With a surge in consumer demand for organic and non-GMO products, corporations have to be cognizant if their labeling follows guidelines and if they are being entirely truthful in their advertising.

#### **4. Constitutional Issues of Mandated Labeling**

With the rise in consumer demand for organic and non-genetically modified food products and the signing of The National Bioengineered Food Disclosure Standard corporations are dealing with new and uncertain mandated disclosures. Mandating the disclosure of genetically modified ingredients has brought back up constitutional questions regarding mandated labeling. Mandated labeling is not a simple topic given the rights under corporate personhood. As a corporation has some First Amendment protections under corporate personhood's commercial speech doctrine and compelled commercial speech doctrine, a corporation must consider their rights in agreeing to

comply or litigate mandated labeling requirements. Given that many members of the general public are still unaware of what organic and non-genetically modified really means, mandated labeling could greatly impact the profitability of many food corporations. With increasing consumer demand and a common public perception that non-organic or genetically modified foods are unhealthy or harmful, mandated labeling could greatly affect the consumer satisfaction with brands that do have genetically modified food products and affect profitability. Primarily there are two constitutional issues with mandated labeling that must be analyzed further: infringement on commercial speech and infringement of the state on religious matters.

With certain foods that have a religious association, kosher products, and mandated labeling can unconstitutionally infringe on religion. New York State had a centuries old law regarding the labeling of kosher products, determining what was kosher and what was not.<sup>51</sup> This law was struck down as the State was determining a religious issue. This not only was the State entangling with religion, but also interfering with food producer's and corporation's ability to determine what was kosher following their religious or outside standards.<sup>52</sup> In *Alliance for Bio-Integrity v. Shalala* the courts confirmed that the state cannot mandate labeling for religious reasons.<sup>53</sup> The Alliance for Bio-Integrity argued that by not requiring labeling of genetically modified food products, the FDA was violating freedom of religion. The court found that the plaintiff did not have sound religious claims, but furthermore, the court ruled that mandated labeling for religious dietary preferences would be solely for religious considerations, which is not a proper purpose for the law under the *Lemon* test.<sup>54</sup> These rulings assert that mandated labeling for religious purposes are not proper and mandated labeling by the state may be an improper entanglement with religion.

<sup>51</sup> Jonathan H. Adler, *Regulating Genetically Modified Foods: Is Mandatory Labeling the Right Answer?*, 10 Rich. J.L. & Tech 14 (2003).

<sup>52</sup> *Id.*

<sup>53</sup> Kelly A. Leggio, *supra*, note 3.

<sup>54</sup> *Id.*

<sup>48</sup> Michelle T. Friedland, *supra*, note 4.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*



More frequently the constitutional issues regarding mandated commercial speech are in regard to infringements on the First Amendment rights of corporations. The *Central Hudson* and *Zauderer* tests have both established that for the government to mandate disclosure in labeling there must be a significant public interest such as health risk, economic impact, or physical impact on the consumer. In the case of organic products and non-genetically modified products it is not clear if a significant government interest truly exists or if mandated labeling would rather edge into the government interest being political or ethical. Currently the FDA and scientific community are generally at a consensus that there are not negative health effects to genetically modified or non-organic organisms.<sup>55</sup> Thus the mandating of disclosure would not fulfill a health risk assertion by the federal government. This was found in the case of *International Dairy Foods Association v. Amestoy* where the state of Vermont attempted to require the labeling of milk that had come from cows treated with the recombinant bovine growth hormone (rBGH).<sup>56</sup> The government did not identify any difference between rBGH milk and non-rBGH milk and thus the courts found that the government could not mandate the labeling of such milk.

Often this debate over whether or not to consume and purchase organic and non-genetically modified products is not a strictly health debate as there are differing conclusions as to the potential health benefits or lack thereof, of organic and non-GM products, but rather a political and moral debate over how our food should be produced. Someone purchasing non-genetically modified products or organic products is doing so because they believe these products are better for the environment and more natural, so mandating that consumers be aware of the non-GM or organic properties would serve as a political or ethical statement on the part of the government that consumers need be aware of these properties for health or other benefits.

While a broad view on commercial speech in labeling may allow for producers to have their First Amendment rights protected, they may also allow for producers to make truthful statements that can have misunderstood implications for consumers. While a genetically modified processed food product may be able to use phrases such as “free from dyes” and “natural” leaving implications that could be misunderstood by consumers, the resulting affects overall on the market and consumer misunderstanding would be less than mandating that genetically modified organisms be labeled.<sup>57</sup>

#### D. Consumer Right to Know

As courts consider the constitutional implications of commercial speech and mandated labeling, the consumer’s right to know, is a factor in consideration, but not enough to warrant compelled commercial speech. When mandated labeling, especially on non-genetically modified vs. genetically modified products, is found to not be for products that have any scientific difference, then it is the government attempting to appease a consumer’s right to know.<sup>58</sup> A consumer’s right to know is the premise that consumers have a basic right to know about the characteristics and processes of a product and that without mandated regulations, corporations would not disclose these characteristics or processes.<sup>59</sup> In a way many mandated regulations are there for the purpose of satisfying the curiosity of the consumer. While it may be argued that the consumer right to know is important in consumer satisfaction and health, there is nothing inherently misleading by failing to disclose all product information.<sup>60</sup> As such, consumer pressure for mandated labeling based on this right to know could infringe on the rights of a corporation.

<sup>57</sup> Rebecca Tushnet, *It Depends on What the Meaning of False Is: Falsity and Misleadingness in the Commercial Speech Doctrine*, Loy. LAL Rev. 41 (2007).

<sup>58</sup> SabyGhoshray, *Genetically Modified Foods at the Intersection of the Regulatory Landscape and Constitutional Jurisprudence*, 41 Am. J. L. and Med. 223 (2015).

<sup>59</sup> *Id.*

<sup>60</sup> Jonathan H. Adler, *supra*, note 13.

<sup>55</sup> Jonathan H. Adler, *supra*, note 51.

<sup>56</sup> *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).



By in large the Food and Drug Administration has approached labeling and the consumer “right to know,” by instead focusing on the “need to know” only mandating labeling where it is imperative to the health and safety of consumers.<sup>61</sup> This is illustrated by the relatively few mandated labels from the FDA, as most mandated labels or warnings concern certain allergens. Furthermore the FDA has taken a stance of requiring sound scientific data with application to human health before considering a required label or warning.<sup>62</sup> In these actions the FDA has resisted consumer demands and pivoted to focusing just on what consumers absolutely need to know for health and safety purposes?

While government interests may argue that mandated labeling can protect naïve consumers from harm, this “right to know” could lead to more extensive unexpected consequences. While mandated labeling under the right to know could lead to a greater dissemination of information for consumers, the uninformed consumer, which these measures are supposedly there to protect, could be further swayed by mandated labeling. In today’s culture, the terms organic and genetically modified sometimes have connotations and stigmas that lead consumers to believe that these products are different than what they truly are.<sup>63</sup> This step not only instigates stigmas, but as noted earlier places the government in a place of potentially making political and moral statements that is not neutral. Furthermore, by validating the consumer right to know a floodgate is opened as various consumers want different levels of information on the food they are consuming leaving a lack of limits on how much must be mandated.<sup>64</sup>

## E. Conclusion

Food labeling in America is on the brink of change. Recently the rapid growth of organic and non-genetically modified food products has created a consumer demand for more extensive labeling of such products. The 2016 signing of The National

Bioengineered Food Disclosure Standard leaves the United States on the brink of a constitutional question surrounding mandated labeling. As food producers and corporations look toward the future of marketing and food regulation, the mandated labeling has quickly taken the forefront. While previous regulations, such as the National Organic Program, have involved voluntary labeling and certification of food products, the new legislation calls for mandated labeling. While consumers claim they have a right to know the characteristics of their food products and processes used to create them, corporation’s First Amendment rights are being infringed. Under the corporate personhood doctrine, corporations have particular constitutional rights including commercial speech. To compel commercial speech the government must have a substantial interest using the *Central Hudson* test and organic and non-genetically modified food products do not fulfill this test. While corporations can use their rights to resist mandated labeling, consumers still demanding labeling can look towards non-governmental labeling schemes.<sup>65</sup>

While mandated labeling of all genetically modified food products may be a violation of the rights of corporations, there still may be a solution that benefit consumers, producers, and retailers. While the definition of a genetically modified organism is sufficient, the United States government and Food and Drug Administration should pursue a two pronged approach to the GMO problem: an educational initiative and guidelines for voluntary labeling. By focusing on educating the public about GMOs and organic products and what these labels and definitions means, consumers are more likely to make informed choices, and producers and retailers are less likely to be negatively impacted by consumer misunderstandings. A voluntary labeling scheme, similar to the National Organic Program, would offer government oversight in certification while not infringing on the rights of food producers. For the government to implement a mandatory labeling scheme, research on GMO products would need to definitively show that they differ substantially from their counterparts, have negative health implications, or

<sup>61</sup> Lars Noah, *The imperative to warn: Disentangling the right to know from the need to know about consumer product hazards*, 11 Yale J. on Reg. 293 (1994).

<sup>62</sup>*Id.*

<sup>63</sup> Jonathan H. Adler, *supra*, note 13.

<sup>64</sup>*Id.*

<sup>65</sup> Jonathan H. Adler, *supra*, note 51.



else change the definition of what a GMO is to be even more stringent. Another alternative to this constitutional food fight is turning towards private certifications and databases. The non-GMO project serves as an example to fulfilling consumer demand for further labeling without infringing on

corporation's rights in a mandated scheme. This constitutional food fight is just beginning, while consumers and interest groups are mounting in their pressure for mandated labeling, food corporations do have rights and options to counter.