



**Statement of the Grocery Manufacturers Association
Submitted to the
Connecticut Joint Committee on Children
Regarding HB 6798**

Thank you for this opportunity to submit comments in opposition to House Bill 6798 on behalf of the Grocery Manufacturers Association, or GMA. GMA is the voice of more than 300 leading food, beverage, and consumer product companies that sustain and enhance the quality of life for hundreds of millions of people in the United States and around the globe. Based in Washington, D.C., GMA's member organizations include internationally recognized brands as well as steadily growing, localized brands.

House Bill 6798, "An Act Requiring the Labeling of Baby Food and Infant Formula Containing Genetically Modified Organisms," is a misplaced proposal which willfully ignores the history of the legislative process which led to the passage of the 2013 GMO labeling legislation. HB 6798 seeks to carve out a narrow category of food from the existing "trigger" requirement by mandating that on and after July 1, 2017, any infant formula or baby food that is partially or entirely produced with genetic engineering and is offered or intended for retail sale in the state shall include labeling that states in a clear and conspicuous manner, "produced with genetic engineering." GMA's position on this type of mandatory labeling law is well documented through, among other things, its challenge to Vermont's mandatory labeling law. In this submission, GMA offers a high-level summary of the legal problems with HB 6798, incorporating by reference the more detailed arguments made in the Vermont litigation.

Background of Existing Labeling Statute

Despite the total dearth of any documented health or safety concerns, a group of activists has called upon legislatures in several states to mandate special labels on food that may contain ingredients derived from genetically engineered crops. The Connecticut legislature looked closely at this policy area for several years and it was only upon arriving at compromise language that the impasse was solved. That compromise requires labeling of food with genetically modified ingredients, but only after a group of more or less neighboring states also passes similar labeling legislation.

The 2013 law was the product of a weeks-long negotiation between the Malloy Administration and the leadership of both parties in both legislative chambers that sought to avoid the creation of a micro-economy for consumer food and beverage products consisting of only the state of Connecticut.

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A press release issued by Governor Malloy on June 1, 2013 announced an “agreement” with “leaders from each of the legislative caucuses” to make Connecticut the first state to pass such GMO labeling legislation and that “for the legislation to take effect, four states (including one state which borders Connecticut) must pass a similar bill. In addition, any combination of northeastern states (Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, New York, Pennsylvania or New Jersey), with a combined population of at least 20 million people, must approve similar legislation.” Governor Malloy is further quoted in his own release as saying “This bill strikes an important balance by ensuring the consumers’ right to know what is in their food while shielding our small businesses from liability that could leave them at a competitive disadvantage. I look forward to working with advocates and stakeholders on this important issue, and thank legislative leaders for their work in crafting this legislation.”

It should also be pointed out that the original legislation, with the trigger provision, was also endorsed by leading anti-GMO lobbyists and GMO-labeling advocacy groups. “The truth is we really think we have nothing to fear from the trigger clause,” Tara Cook-Littman (identified as the “head of GMO Free CT” by *Mother Jones* magazine) told *Mother Jones*. “We’re hoping that the clause will end up being a catalyst to encourage other states to join us.” (*Mother Jones* 6/5/13). According to *Natural News* (June 17, 2013), “GMO Free CT” also said, “While we believe we have a right to know what is in our food today, we are satisfied that the language of the GMO labeling bill will give Connecticut consumers transparency in labeling that will allow them to make informed decisions once the law is triggered.”

What emerges in 2015 is an effort to disregard the work and compromise that went into the original legislation. While GMA continues to oppose the original law and continues to assert that the law is deeply flawed as it suggests that food products derived from biotechnology are potentially unsafe for consumption even though there is overwhelming agreement among regulatory and scientific bodies around the world that these products are in fact safe, we must still point out that the economic realities that were the impetus for the compromise described by the governor and legislative leaders in 2013 continue to exist. No other states except Vermont and Maine have followed Connecticut’s lead in enacting such a labeling mandate, and Vermont’s law is now the subject of litigation, while Maine’s law (which includes a Connecticut-like trigger clause) also awaits passage of similar laws in neighboring states.

House Bill 6798 is an effort to single out the seemingly most emotionally sensitive of nutritional products as a wedge to reopen this debate. Nothing has changed in the two years since passage of Connecticut’s GMO labeling law, except that the same interest groups that championed the original law, including the “compromise” language designed to protect businesses and consumers, have now decided that they cannot wait for Connecticut’s neighbors and partners in their regional economy to act in a similar manner. The governor and legislative leaders recognized the shortcomings of labeling legislation the first time around and this bill would do nothing more than perpetrate an economic hardship on a narrow slice of Connecticut consumers—namely parents. Unfortunately the rewriting of the trigger provision is being advocated in the name of infants and children and is designed to do nothing more than represent an incremental victory for an anti-science ideology.

This new focus on baby food and infant formula also does not cure the fact that a mandatory labeling regime for food containing ingredients derived from genetic engineering raises serious constitutional concerns. These concerns all stem from a fundamental defect in these legislative efforts: the absence of a legitimate and constitutionally sound state interest in requiring the labeling of foods that contain ingredients derived from genetic engineering. HB 6798 seeks to carve out a narrow category of food from the 2013 trigger requirement. Not only does targeting this category fall short of in any way ameliorating the constitutional defects of the broader labeling law already passed but not yet in effect, it in fact is even more legally suspect.

Legal Issues: Background

The FDA began approving genetically engineered plant varieties in 1994. Now, **70-80% of packaged foods in supermarkets** contain at least one ingredient that was produced with genetic engineering. The most common ingredients derived from genetic engineering are corn, soybeans, and canola. About **90% of the domestic production of each of these crops** is from varieties that have been genetically engineered.

Despite these numbers, FDA has never found it necessary or advisable to require labeling of food produced with ingredients derived from genetic engineering, and indeed, has said that such labeling could be misleading, and therefore impermissible. FDA monitors the safety of food products; in other words, the fruits, vegetables, and grains that makes it to the dinner plate in one form or another.

FDA's monitoring of the safety of infant formula is particularly comprehensive. Section 412 of the federal Food, Drug, and Cosmetic Act contains detailed requirements governing the manufacturing of infant formula. For example, the statute details the specific nutrients that must be present in infant formula, mandates testing of infant formula at various stages of the production process, requires following good manufacturing practices specified by FDA, requires detailed records retention and auditing, requires reporting to FDA of any suspected adulteration or misbranding of infant formula, and requires submission to FDA of all new infant formulas and all "major changes" to infant formulas. FDA regulations in 21 CFR Parts 106 and 107, in turn, detail good manufacturing procedures, quality control procedures, recall procedures, and labeling requirements for instructions for use of infant formula.

Not once in this comprehensive regulatory framework does Congress or FDA require manufacturers of infant formula to indicate whether or not the formula contains ingredients derived from genetically modified plants—and for good reason. Genetic engineering is a method of *production*. It is like hybridization, irradiation, or other forms of genetic manipulation that are common in modern agriculture. Quite rightly, ***FDA's view is that production methods are irrelevant if the food that results is safe.***

FDA has found that foods with ingredients derived from genetic engineering are just as safe as foods with ingredients produced by other methods. Study after study has found that this does not present a unique risk to consumer health. Genetic engineering is a production method, NOT an ingredient in our foods.

The American Medical Association and the National Academies of Science have ratified FDA's approach and agree with its conclusion. They agree with FDA's decision not to label foods that contain ingredients derived from genetic engineering. Other scientific bodies and institutions here and abroad who have looked at the evidence have similarly found no difference in the safety of foods produced with ingredients derived from genetic engineering.

Consumer interest in the methods of food production is surely something to be welcomed. GMA's members would agree that the best consumer is an educated consumer. But ***an educated consumer is one who understands that food made with ingredients derived from genetic engineering is just as safe as its non-GE counterpart.***

The problem with GE labeling is that, fundamentally, it tells consumers the opposite. It embodies baseless, *uninformed* concerns about the safety of food that contain ingredients that are derived from genetic engineering. ***These fears are tantamount to superstition given the evidence.*** This is the source of the constitutional problems with the law: The evidence is just not there.

First Amendment Problems

A law that compels speech, as a labeling law does, is subject to First Amendment scrutiny.¹ Laws that compel speakers to convey particular government-sanctioned messages are subject to strict First Amendment scrutiny.² Because a GE labeling law would not just compel speech in some non-controversial way, ***it would convey the message that food that contains GE-derived ingredients is meaningfully "different" than that with non-GE ingredients,*** strict scrutiny would apply.

Under strict scrutiny, the state has to present a "compelling" interest justifying the law, then show that the law is "narrowly tailored" and the "least restrictive means available" to serve the government's purpose. Given the evidence about the safety of food containing ingredients derived from genetic engineering, it is unlikely the government will even be able to get off the ground under that standard.

State Interest

To justify a law that restricts speech, a state must point to a harm that is concrete and real—not merely hypothetical or speculative.³ ***There is no documented harm associated***

¹ *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1968).

² *See, e.g., Pac. Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986) (plurality opinion) (applying strict scrutiny to vacate state commission rule requiring utility bills to include statements from consumer groups). *See also Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009) (vacating state law mandating labels on violent video games), *aff'd sub nom. Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729 (2011).

³ *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

with ingredients derived from genetic engineering. And FDA, which carefully regulates and monitors the ingredients in infant formula, does not prohibit or require any special labeling of infant formula that contains ingredients derived from genetically engineered plants. The government therefore has no compelling interest in warning consumers about foods generally, or baby products and infant formula particularly, containing genetically engineered ingredients.

Consumer interest or “curiosity” is not a compelling state interest, either. That much was established in the *International Dairy Foods Association* case in the Second Circuit and is cited in the bill itself.⁴ Furthermore, because GE labels stigmatize genetic engineering and suggest that it is a harmful production practice, those labels are ***affirmatively misleading to consumers.*** It would therefore be difficult for the state to argue that the labels serve any legitimate interest whatsoever, be it health, safety, curiosity, or something else.

Narrow Tailoring

Connecticut’s original labeling law, were it to take effect, would require labeling for ***70-80% of packaged foods in the supermarket.*** It will be difficult for a state to argue that such a widespread labeling requirement is tailored in any sense. Consumers can already make the assumption that if they’re picking up a product in the supermarket, and that product is not labeled “organic,” it contains an ingredient derived from genetic engineering.

Limiting the labeling requirement to baby food and infant formula does not make the law narrowly tailored absent proof that these specific food items somehow pose a unique risk to consumers that the remaining products do not pose. It arbitrarily targets a category for the emotional effect. But there simply is no documented harm associated with ingredients derived from genetic engineering—in baby food, infant formula, or any other food products.

When ***publicly available information is sufficient to alert consumers*** to the state’s concerns, there is no justification for additional labeling requirements, as the Supreme Court recently recognized in its case on video-game labeling.⁵ There are plenty of resources available to consumers who, despite the evidence, are interested in purchasing only food containing non-GE derived ingredients. These include websites, smart phone apps, and information freely provided by non-government organizations with huge databases of product information.

Least Restrictive Means

The least restrictive means component of the test is another insurmountable obstacle for the state. The Supreme Court has said that, under the First Amendment, “if the Government [can] achieve its interests in a manner that does not restrict speech, or that

⁴ *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).

⁵ *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729 (2011).

restricts less speech, the Government must do so.” ***Restricting speech is the “last—not first—resort.”***⁶ Wouldn’t allowing voluntary GE free labeling be less restrictive? And even less restrictive, how about a consumer education campaign?

One final point about the First Amendment. The common response we hear is that if manufacturers have “nothing to hide,” there’s no First Amendment problem with “making them tell.” But the fact of the matter is that manufacturers really have “nothing to tell.” There is no hidden health or safety concern with GE ingredients. Nor is there any secret that ingredients derived from genetic engineering are commonly used to make retail food products. Mandatory labeling suggests otherwise, and that misleading effect on consumers is the source of the First Amendment problem.

Dormant Commerce Clause

State labeling laws are also susceptible to challenge under what is called the Dormant Commerce Clause. The principle at work here is that the Commerce Clause forbids each individual state from enacting laws that burden interstate commerce. Two types of Commerce Clause violations are possible with a labeling law, and both are relevant in the context of a law like a GE labeling law.

First, the Commerce Clause forbids states from engaging in economic protectionism by discriminating against out-of-state producers. This was an issue in the California and Washington ballot initiatives, and is here as well.

A court can also find that a law discriminates if its putative local benefits are outweighed by its burdens on interstate commerce, under the famous *Pike* test.⁷ ***GE labeling has essentially no benefit to the public:*** it misinforms consumers and warns them to stay away from products that the FDA has found to be safe and healthy. The burdens on commerce are substantial. New labeling requires intensive capital costs, and changes to distribution and manufacturing systems. Because the local benefit of the law is essentially nil, and its burdens excessive, a GE labeling requirement cannot survive the *Pike* balancing test.

Conclusion

The clear purpose of GE labeling laws—whether stated or unstated—is to influence the market so that foods made with ingredients derived from genetic engineering are restricted or eliminated. In the absence of a demonstrated health and safety risk, that purpose is not one the state can adopt as its own. Moreover, a labeling law will not accomplish this overly ambitious goal. Promulgating state law, and imposing excessive burdens and costs on manufacturers—large, medium and small—in the hopes that they will change their supply chains, will neither be constitutional nor effective, and will only cause prices to increase for consumers. The market should be encouraged to do what it has already done in the area of organics and the National Organic Program: allow for

⁶ *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373-374 (2002).

⁷ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

voluntary labeling indicating that this food is free of ingredients derived from genetic engineering.

The bottom line legal analysis underpinning the federal labeling statutes is that everything on a label must be truthful and non-misleading. The proposed bill turns that on its head and proposes to provide false and misleading information to the public about baby food and infant formula. It will increase consumer confusion because there is no rational basis for targeting these products. Consumers will not know what is or isn't required to be labeled. That will not benefit anyone—not the state, and not the consumers of Connecticut.

Respectfully submitted,
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