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February 11, 2014

Representative Val Hoyle, Chair
House Committee On Rules
900 Court St. NE, H-295
Salem, Oregon 97301

Representative Paul Holvey, Vice-Chair
House Committee On Rules
900 Court St. NE, H-277
Salem, Oregon 97301

Re: HB 4100 – Constitutionality of HB 4100 under First Amendment, Commerce Clause, and Preemption principles of the United States Constitution

Dear Representative Holvey:

You have asked for my analysis regarding the constitutional issues surrounding HB 4100, an act that "makes legislative findings and declarations regarding genetically engineered food."

The legislation does not raise any valid First Amendment, Commerce Clause, and preemption concerns. Therefore, from a constitutional standpoint, the bill is unlikely to be defeated despite challenges in courts on those grounds.

Questions Presented and Brief Answers

Q1. Do bills that require labeling of genetically engineered foods, like HB 4100 violate commercial speech under the First Amendment?

A1. No. Because commercial speech is afforded less protection than traditional speech, the disclosure of "factual and uncontroversial information" need only be "reasonably related" to a government interest. Controversy does not mean whether or not the industry being subjected to the disclosure views the disclosure as controversial in the general sense of the word. In First Amendment legal analysis, "uncontroversial" means that the speaker is not required to adopt a certain viewpoint or endorse a certain position. Labeling schemes that disclosed "factual and uncontroversial information" such as calorie content to reduce obesity, mercury to protect human health and the environment from mercury poisoning, country of origin to facilitate buy American consumer

preferences, and irradiation to avoid consumer confusion were upheld as constitutional. While each example generated controversy within the industry subjected to the disclosure, all passed constitutional muster, because the speaker was not required to adopt or endorse a certain viewpoint but merely disclose accurate information, and they were reasonably related to a government purpose.

The statement "genetic engineering" does not require the speaker adopt or endorse a viewpoint about the benefits or drawbacks of genetic engineering, but rather points out accurate and factual information to the consumer about the use of genetically engineered technology. Therefore, requiring genetically engineered foods be labeled "genetically engineered" to ensure that Oregon consumers are fully informed about the food they purchase and consume to avoid confusion and to have relevant information at the time they choose the food they purchase and consume would be declared constitutional.

Q2. Are state laws that require labeling of genetically modified foods preempted by Federal law?

A2. No. In fact, both consumer safety and industry groups continue to push for federal legislation. Just last week, an influential food lobby group rallied 29 major food organizations in efforts to pass federal legislation that would preempt state labeling efforts.

Q3. Does HB 4100 violate the Commerce Clause of the U.S. Constitution?

A3. No. HB4100 does not violate the Commerce Clause for the following three reasons. First, unlike Hawaii's legislation, HB 4100 applies equally to in-state and out-of state food manufacturers. Second, the state's interest in protecting consumers and agriculture outweighs the incidental burdens on interstate commerce from increased business costs. Third, HB 4100 does not require food manufacturers label food not intended for Oregon or sold outside of the state.

Summary of HB 4100

HB 4100 requires all genetically engineered[1] food raw agricultural commodities[2] offered for retail sale within the state of Oregon and intended for human consumption to be labeled "Genetically Engineered." Additionally, all packages

[1] "Genetically engineered" means produced from one or more organisms in which the genetic

[2] "Agricultural raw commodity" is given the same meaning as in ORS 616.205 (17) and means "any food in its raw or natural state, including all fruits that are washed, colored, or otherwise treated in their unpeeled natural form prior to marketing."

of genetically engineered processed food[3] offered for retail sale within the state of Oregon and intended for human consumption that meet or exceed defined amounts must be labeled "Produced with Genetic Engineering."

Restaurants and alcoholic beverages are exempt from the disclosure requirements.

The Department of Agriculture is charged with enforcing HB 4100 in the same manner as the sale of adulterated, misbranded or imitation foods law. The Department of Agriculture shall adopt rules for carrying out sections 4 and 5 of the Act. The Attorney General may enforce the Act by (a) filing or obtaining an injunction or (b) obtaining assurance of voluntary compliance. Private causes of action are created under the Act "60 or more days after giving notice of the alleged violation to the Attorney General, the State Department of Agriculture, and the person alleged to have committed the violation." Courts may award reasonable attorney fees and other costs.

HB 4100 will be submitted to the people for their approval or rejection at the next regular general election held in this state. If approved by voters, HB 4100 has an effective date of January 1, 2016 for both raw agricultural commodities and processed food.

Constitutional Issues

First Amendment

The First Amendment affords limited protection to commercial speech, unlike non-commercial (traditional) speech, which offers much stronger and broader protections to the speaker. When analyzing commercial speech courts look to the category of speech being compelled, and apply a legal standard of review accordingly. There are two main categories of compelled commercial speech: (1) factual information, and (2) expressions, endorsements or requirements that compel the speaker to adopt a certain viewpoint. Based on the category of compelled commercial speech, courts apply the appropriate legal standard: (1) the *Zauderer* test applies to disclosure laws that require the speaker to disclose purely factual information and (2) the *Central Hudson* test applies to restriction laws that require a speaker to endorse or express a particular point of view.

[3] "Processed food" means "food other than (a) a raw agricultural commodity, or (b) food that is prepared in whole or in part at the site of retail sale and sold in a form for immediate consumption, including but not limited to food sold in restaurants."

Compelled Speech

While no exact definition exists for commercial speech, relevant Supreme Court case law informs our interpretation. In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, commercial speech was defined as an "expression related solely to the economic interests of the speaker and its audience."[4]

Zauderer (reasonableness)

Factual disclosure statements to prevent consumer confusion or deception are subject to a reasonable relationship test.[5] For our purposes, while many extend this rationale beyond disclosures about confusion and deception, because the disclosure in question here deals with preventing consumer confusion we need not address that issue.

> In *Zauderer*, the Court clarified that because "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," the commercial actor's "constitutionally protected interest in not providing any particular factual information in his advertising is minimal."[6] In the context of factual information disclosures, a state may compel commercial actors "to provide somewhat more information than they might otherwise be inclined to present."[7]

Zauderer involved a disclosure law that required attorneys who advertised that they worked on contingency fees include a disclosure statement that their clients may be responsible for some litigation fees and costs regardless of the lawsuits final outcome. The Supreme Court looked to the language of the disclosure in question and held that a lower standard of review applied for matters of factual information. For factual information disclosures, Courts apply the *Zauderer* reasonableness test, rather than the *Central Hudson* intermediate scrutiny test.

Factual and Uncontroversial

From a legal perspective, Courts interpretation of "factual and uncontroversial" means accurate statements that do not require the speaker to endorse a certain viewpoint. It does not mean that the disclosure fails to create a public controversy amongst the people subjected to the disclosure.

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[4] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980).
[5] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985)
[6] *Cent. Hudson Gas & Elec. Corp.* at 651 (citation omitted).
[7] *Id.* at 650.

As discussed above, in *Zauderer*, the disclosure created a controversy amongst lawyers who utilized contingency fee agreements. Likewise, Vermont's mercury labeling disclosure law created a controversy amongst light bulb manufacturers, however, both passed constitutional muster because they required the speaker to disclose accurate and factual statements.[8] In *Spirit Airlines*, the D.C. Circuit court considered a First Amendment challenge to a Department of Transportation (DOT) rule that required airlines prominently display the total cost of airfare, including tax and fees on advertisements and websites.[9] DOT's purpose was to provide consumers with more complete information to prevent consumer deception. *Sprit Airlines* held, where the law is "directed at misleading commercial speech, and where [it] impose[s] a disclosure requirement rather than an affirmative limitation on speech, *Zauderer*, not *Central Hudson*, applies." Furthermore, as discussed in *Spirit Airlines*, the consumer deception need not be affirmatively established in the record based on prior consumer confusion and could be "based on common sense and…experience."[10]

Most recently, in *American Meat Institute*, a memorandum opinion, the Court held that "disclosures about where an animal was born, raised, and slaughtered" were "purely factual and uncontroversial."[11] Congress passed a Country of Labeling Origin Rule (COOL)[12], and USDA promulgated final rules to implement the legislation.[13] The legislative purpose of the COOL statute was to supplement incomplete information available to consumers in the event they felt compelled to buy American meat or avoid meat from certain countries. Disclosures that target "incomplete commercial messages" satisfy *Zauderer's* "consumer deception" prong.[14]

California's "18" labeling scheme for video games failed to meet Zauderer's factual and uncontroversial prong, because that the Act's sale and rental prohibition was held unconstitutional. To put it another way, the disclosure relied upon the definition of "violent" created by the Act so when the Act was held unconstitutional, so was the disclosure.[15]

Reasonable relationship

Zauderer's rational relationship test, which asks if the "disclosure requirements are reasonably related to the State's interest in preventing deception of

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[8] *National Elec. Mfrs. Assn. v. Sorrell*, 272 F.3d 104, 113 (2d Cir. 2001).
[9] *Spirit Airlines, Inc. v. United States Department of Transportation*, 687 F.3d 403, 412 (D.C. Cir. 2012).
[10] *Id*. at 413.
[11] *Am. Meat Inst. v. U. S. Dep't. of Agric.,* No. 1:13-cv-01033-KBJ, 2013 WL 4830778 (D.D.C., Sept. 11, 2013).
[12] The Food, Conservation, and Energy Act of 2008, 7 U.S.C. § 1638a (2008).
[13] Final Cool Rule, 78 Fed. Reg. 31,367 (May 24, 2013).
[14] *See American Meat Institute*, citing R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205, 1214 (D.C. Cir. 2012).
[15] *Video Software Dealers Association v. Schwarzenegger*, 556 F.3d 950, 957 (9th Cir., 2009).

customers."[16] Financial disclosure requirements imposed and designed to protect against questionable business practices, and disclosures regarding debt relief assistance intended to combat the problem of inherently misleading commercial advertisements were upheld under rational basis review.[17] Prior courts held "protecting human health and the environment"[18] and compelling the disclosure of calorie content by restaurants "to lead consumers to healthier food" substantial state interests.[19]

Under consumer deception analysis, wanting to know whether or not the apple you're purchasing browns, or the rice you're buying contains 100x more iron, or the apple contains herbicide resistant traits, goes well beyond mere curiosity, and in fact goes to the heart of consumer protection laws aimed at giving consumers accurate and factual point of purchase information.

Especially, for home seed savers and composters, the label "genetically engineered" does not mislead consumers about the quality of the food their purchasing, but rather signifies to the purchaser qualities of the product. So if all things being equal, what if anything but a label signifying that the product is "genetically engineered" would alert a consumer that saving seed was not allowed based on patent infringement or that if an apple tree grows it will produce apples that do not brown.

HB 4100 satisfies *Zauderer's* reasonable relationship test, because the GE labeling disclosure requirement is reasonably related to the following government interests: ensuring that Oregon consumers are fully informed about the food they purchase and consume includes, but is not limited to, helping consumers to avoid confusion and to have relevant information at the time they choose the food they purchase and consume and enabling consumers to consider the potential impact of those choices on their health and welfare; protecting Oregon's agricultural economy and environment; providing consumers with reliable information about how their food is produced.

Central Hudson (intermediate scrutiny)

Compelled speech that requires a speaker to endorse or express a particular point of view is subject to *Central Hudson's* 4-part substantial interest test.[20]

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.

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[16] *Id*.
[17] *Beeman v. Anthem Prescription Mgmt. Llc*, 652 F.3d 1085, 1105 (9th Cir., 2011).
[18] *Id*. at 115.
[19] *NY State Rest. Ass'n*, 556 F.3d 363, 134-135.
[20] *Cent. Hudson Gas & Elec. Corp*. at 651.

> Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[21]

Graphic images with the text 1-800-QUIT-NOW" for cigarettes was held to exceed the "factual and uncontroversial" threshold and trigger *Central Hudson* intermediate scrutiny. In *RJ Reynolds* a law intended to supplement the current surgeon general cigarette warning disclosure that required graphic images and the "1-800-QUIT-NOW" cessation hotline to be displayed along side the textual warnings on cigarette packages were held to go beyond the "purely factual and uncontroversial" threshold, because the images "[were] primarily intended to evoke an emotional response, or, at most, shock the viewer into retaining the information in the text warning."[22] Additionally, the government failed to provide evidence of consumer deception that advertisements without the images would mislead consumers.

Additionally, in *Amestoy*, the 2nd Circuit found Vermont's RBST-free labeling scheme unconstitutional after applying *Central Hudon's* intermediate scrutiny test holding that "consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement."[23] The 2nd Circuit declined to extend *Zauderer's* reasonableness standard, because the state's purpose of the factual disclosure was to satisfy "strong consumer interest" and the "public's right to know" whether the milk a consumer bought came from a cow treated with RBST synthetic growth hormones. In a later case, involving the constitutionality of Vermont's mercury label scheme, the 2nd Circuit clarified the holding of *Amestoy*, stating in the context of factual statements *Central Hudson* review "was expressly limited to cases in which a state disclosure requirement is supported by no interest other than the gratification of 'consumer curiosity.'"[24]

Moreover, a San Francisco disclosure regarding cell phone exposures was held unconstitutional under *Central Hudson* because the disclosure was in the form of a fact sheet, which contained more than just facts. The law required cell phone sellers to make disclosures at the point of sale in the form of a fact sheet which included recommendations as to what consumers should do if they want to reduce exposure to radiofrequency energy emissions and findings that referenced a debate in the scientific community about the health effects of cell phones that were unsupported by evidence linking cell phones and cancer." [25]

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[21] 447 U.S. 557, 566 (1980).
[22] *R.J. Reynolds*, 696 F.3d at 1216.
[23] *International Dairy Ass'n. v. Amestoy*, 92 F.3d 67 (2nd Cir. 1996).
[24] *National Elec. Mfrs. Assn. v. Sorrell*, 272 F.3d at 115 n. 6.
[25] *CTIA-The Wireless Ass 'n v. City and County of San Francisco,* 827 F Supp 2d 1054, 1061-62 (ND Cal. 2011).

In sum, HB 4100 is not unlike many state laws that require the disclosure of factual information, because the GE label simply states factual information and does not require the speaker to adopt or endorse a particular viewpoint. Therefore, Courts would consider it a routine factual disclosure requirement and *Zauderer's* reasonable relationship test would control the analysis of whether the government's stated interest is reasonably related to the institution of such a law.

Commerce Clause

Not all legislation is equal. Take for instance, similar legislation introduced in Hawaii. At first blush, it may appear that the legislation is identical to what we're talking about here in Oregon, because both dealt with the same topic: labeling genetically engineered food. However, upon closer inspection while the topic is the same, the language and actual text that was introduced is very different.

In Hawaii, the text of the legislation created a framework that differentiated between in-state producers and out-of state producers. In-state producers would be exempt from the labeling requirements; however, all out-of-state products would be subject to the labeling requirements.

Based on that framework, not unsurprisingly, Hawaii's Attorney General issued a legal opinion that found the legislation likely unconstitutional based on commerce clause violations. Luckily, here in Oregon, we're not dealing with that scenario. Oregon's legislation is tailored so that all products, both in-state and out-of-state would be subject to the same labeling requirement. Because HB 4100 does not favor in-state interests it does not raise any constitutional commerce clause concerns.

The Supreme Court articulated "a two-tiered approach to analyzing state economic regulation under the Commerce Clause."[26] Strict scrutiny is triggered when a law "discriminates against interstate commerce on its face, in purpose, or in effect."[27] To meet the strict scrutiny burden the law must "promote a legitimate state interest that cannot be achieved through any reasonable nondiscriminatory alternative."[28] A reduced standard of review is applied, "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[29]

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[26] *Brown-Forman Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573, 578-79 (1986).
[27] *Cherry Hill Vineyard, LLC v. Baldacci,* 505 F.3d 28, 33 (1st Cir. 2007).
[28] *Id*.
[29] *Pike v. Bruce Church, Inc.* , 397 U.S. 137, 142 (1970).

Laws that burden in- state and out-of state producers equally are subject to the *Pike* test.[30] Under *Pike's* standard, the 9th Cir. recently held that "there is not a significant burden on interstate commerce merely because a nondiscriminatory regulation precludes a preferred, more profitable method of operating in a retail market."[31] Moreover, "[t]he decision of whether a nondiscriminatory regulation nevertheless significantly burdens interstate commerce depends 'on the interstate flow of goods, not on where the retailers were incorporated, what the out-of-state market shares of sales and profits were, or whether competition would be affected by the statute.'"[32]

HB 4100 will very likely be upheld as constitutional under *Pike,* because it does not discriminate between in-state and out-of state producers, it's burdens on interstate commerce are incidental, and it does not have an extraterritorial impact on commerce because it does not apply to food intended for sale or sold outside of Oregon.

Preemption

Under the Supremacy Clause of the United States Constitution, the "Constitution, and the Laws of the United States . . . shall be the Supreme Law of the Land." U.S. Const. art. VI, cl. 2. State law can be preempted in either of two general ways: if "Congress evidences an intent to occupy a given field," or, if the field has not been occupied entirely, "to the extent it actually conflicts with federal law ... or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."[33] *Cipollone*, sets forth the relevant legal standard for determining whether or not federal law preempts state law:

> Congress' intent may be explicitly stated in the statute's language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.[34]

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[30] *See*, e.g. *National Elec. Mfrs. Ass'n,* 272 F.3d at 104; *International Dairy Foods Ass'n v. Boggs,* 622 F.3d 628 (6th Cir. 2010).
[31] *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 731 F.3d 843, 852 (9th Cir., 2013).
[32] *Id*.
[33] *U.S. v. Manning*, 527 F.3d 828, 836 (9th Cir., 2008).
[34] *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 516 (1992) (quotations and citations omitted).

Express Preemption

Congress has not expressly preempted placement of "genetic engineering" on food labels through the Federal Food, Drug, and Cosmetic Act ("FDCA"), as amended by the National Labeling and Education Act of 1990 ("NLEA").

NLEA, 21 U.S.C. § 343-1 contains the following preemption provisions that prohibit states from enacting laws or regulations that are generally "not identical to the requirement(s)" of the NLEA's labeling provisions concerning: imitation food; food in package form; standard of identity; unidentified foods with no standard of identity; artificial flavoring, artificial coloring, and chemical preservatives; nutrition information if intended for human consumption; limits of nutrition levels and health related claims; major food allergens.

It is unlikely HB 4100 is preempted by federal law, because there are no federal standards of identity for "genetically engineered." Moreover, foods that have established federal standards of identity can bear "genetically engineered" on their label and still comply with the federal standard.[35] Finally, the label "genetically engineered" fails to conflict with any nutrition labeling, nutrition level claims and health-related claims, or any other of the above listed express preemptions.

Implied Preemption

> Absent explicit preemptive language, Congress' intent to supercede state law altogether may be found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or because the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.[36]

There is no support for the basis that Congress has intended to preempt all state laws in the field of food and safety and labeling. Food and safety is traditionally reserved to the state. Indeed, Congress expressly reserved powers to the state in NLEA stating that the Act "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted under [21 U.S.C. § 343-1] of the Federal Food, Drug, and Cosmetic Act."

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[35] *See*, e.g., 21 C.F.R. § 130.8.

[36] *Center for Bio-Ethical Reform v. Honolulu*, 448 F.3d 1101, 1106 (9th Cir., 2006).

Therefore, it is highly unlikely a court would find HB 4100 preempted by federal law because there is no express preemption nor implied preemption against the label "genetically engineered."

Conclusion

For the above reasons, HB 4100 passes constitutional muster under First Amendment, Commerce Clause, and Preemption analysis. It survives First Amendment scrutiny for compelled commercial speech because the disclosure is purely factual, and related to a legitimate state interest. Furthermore, HB 4100 does not create a conflict with any existing federal labeling regulations, so it is likely not preempted. Finally, unlike Hawaii, HB 4100 does not favor in-state over out-of state interests, nor burden interstate commerce any more than other similar labeling regulations currently in place across the country (i.e. calorie content, mercury, GE labeling), HB 4100 is likely defensible under the Dormant Commerce Clause.

Sincerely,

/s/ Melissa D. Wischerath

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