



March 15, 2016

Senate Bill 764, the *Deny Americans the Right to Know (DARK) Act*, raises significant legal questions as to its constitutionality under the U.S. Constitution's Equal Protection and Due Process Clauses and the First Amendment, and as such should not be passed.

***Equal Protection and Due Process under Law:** The DARK Act likely does not satisfy the Constitution's mandates for equal protection and due process to all Americans under the law. The Equal Protection Clause of the Fourteenth Amendment provides that no state shall deny any person "equal protection of the laws." U.S. Const. Amd. 14. This constitutional mandate also applies to the federal government and Congressional actions, as applied through the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). A law that only allows basic information about food production, such as whether it is genetically engineered, to be given through technology-enhanced means, such as smart phone scans, and expressly prohibits any on-package labeling of GE foods, is inherently discriminatory, because vast percentages of Americans do not own smart phones and cannot access such information. Worse still, a significant portion of the population denied this basic information is made up of the poor, minorities, and rural Americans. There are also religious groups that cannot use such technology, such as some Amish.

The fundamental purpose of the DARK Act is economic protectionism of the large food and agricultural corporations, the industry that produces genetically engineered products. Such a naked preferential purpose is not a legitimate, let alone significant, governmental interest that bears any relationship to the public good, indeed, it is harmful to it. Courts are particularly suspicious of a legislature's circuitous path (here, QR codes, or calling a 1-800 number from a grocery aisle for every product) to a purportedly legitimate end when a direct path (on-package labeling) is available. *See, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). Where a legislature has picked politically influential winners over politically vulnerable parties—solely for the purpose of helping the winners, at the expense of the losers—a court can be confident that the governmental entity is not legislating in the public interest, because the legislative process is skewed toward a particular private interest.

***First Amendment:** The First Amendment guarantees the right to disclose truthful and non-misleading information on food labels. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995). The rights at stake here include the rights of businesses to convey truthful and factual information concerning whether a product is genetically engineered, and the consumers' right to receive that information. *Stanley v. Georgia*, 394 U.S. 557, 564 (1972) (The First Amendment "protects the right to receive information and ideas."). The government "may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479 (1965).

In flatly prohibiting the disclosure of on-package labeling of genetically engineered food, the DARK Act has to pass muster under First Amendment scrutiny. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). To be constitutional, any such law

requires a “substantial” governmental interest, which is lacking in this case. The purpose of the DARK Act is economic protectionism, which is not a legitimate, let alone substantial, governmental interest. The argument that there is a state “patchwork” to address with a federal standard is also illusory, since there actually is no patchwork of state law: the existing state labeling laws are consistent. And the argument that the DARK Act will inform consumers is not a true substantial interest in the bill, because the bill will not actually inform consumers, since it provides only voluntary labeling, and only through QR codes or a 1-800 number, or other secondary, discriminatory means, rather than on-package labeling.

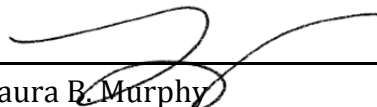
The DARK Act also fails to pass muster under *Central Hudson* because it does not “directly advance” the governmental interest asserted. *Central Hudson*, 447 U.S. at 557. Again, if the governmental interest is “informing Americans” about whether food products are genetically engineered, the bill does not so inform Americans, since the labeling it mandates is only voluntary. Further, that voluntary labeling is not on packages but again through QR codes, smart phones, or other secondary means. Many Americans do not have access to that secondary information and the means of accessing that information are unnecessarily burdensome, a far cry from “directly advancing” any such governmental interest. The tiered, delayed regulatory process that the current DARK Act sets up also does not “directly advance” informing consumers; it does the opposite, deny it, and delay it.

Finally, the DARK Act also fails to pass muster under *Central Hudson* because it is impermissibly “more extensive than necessary” to serve any purported governmental interest. *Central Hudson*, 447 U.S. at 557. A blanket prohibition on on-package disclosures of whether a food is produced with genetic engineering is far greater than necessary to serve any reasonable government interest.

Respectfully submitted,ⁱ



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ⁱ Mr. Kimbrell and Ms. Murphy are amicus counsel in *Grocery Manufacturers Association v. Sorrell*, No. 5:14-cv-00117-cr (D. Vt. filed June 12, 2014), the case upholding the constitutionality of Vermont’s GE food labeling law. See 102 F. Supp. 3d 583 (D. Vermont April 27, 2015). Both have also authored and published articles on the constitutionality of GE food labeling. George A. Kimbrell, *The Constitutionality of State-Mandated Labeling for Genetically Engineered Foods: A Definitive Defense*, 39 Vt. L. Rev. 341 (2014); Laura Murphy, *More Than Curiosity: The Constitutionality of State Labeling Requirements for Genetically Engineered Foods*, 38 Vt. L. Rev. 477 (2013).