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9  
 10 **THE UNITED STATES DISTRICT COURT**  
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

11  
 12 NATURAL GROCERS, CITIZENS ) Case No. 20-5151  
 13 FOR GMO LABELING, LABEL )  
 14 GMOS, RURAL VERMONT, GOOD )  
 15 EARTH NATURAL FOODS, PUGET ) **COMPLAINT FOR**  
 16 CONSUMERS CO-OP, AND CENTER ) **DECLARATORY AND**  
 17 FOR FOOD SAFETY ) **EQUITABLE RELIEF**

18 *Plaintiffs,*

19 v.

20 SONNY PERDUE, Secretary of the )  
 21 United States Department of )  
 22 Agriculture; BRUCE SUMMERS, )  
 23 Administrator of the Agricultural )  
 24 Marketing Service; and the UNITED )  
 STATES DEPARTMENT OF )  
 AGRICULTURE, )

*Defendants.*

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1 **COMPLAINT**

2 Plaintiffs Natural Grocers, Citizens for GMO Labeling, Label GMOs, Rural  
3 Vermont, Good Earth Natural Foods, Puget Consumers Co-op, and Center for Food  
4 Safety, on behalf of themselves and their members allege as follows:

5  
6 **INTRODUCTION AND NATURE OF ACTION**

7 1. This case is about ensuring meaningful food product labeling, the  
8 public’s right to know how their food is produced, and producers’ and retailers’  
9 rights to provide it to them. Throughout U.S. history, government mandated food  
10 and ingredient information has always been the same: on packages and in language  
11 consumers could understand. This rulemaking is a significant departure from that  
12 standard.

13 2. Genetically engineered (GE) organisms have been a controversial topic  
14 in the public arena since their introduction into the food supply nearly three  
15 decades ago. Advocates, including plaintiffs, sought their labeling, like the labeling  
16 mandated by 64 other countries around the world. After several states passed  
17 labeling laws, Congress finally passed the Bioengineered Food Disclosure Act  
18 (Disclosure Act) in 2016.

19 3. The U.S. Department of Agriculture (USDA), charged with writing the  
20 implementing rules, finished them in 2019. Unfortunately, in its final decision the  
21 agency fell far short of fulfilling the promise of meaningful labeling of GE foods. In  
22 fact in many ways the result is in the direct or de facto concealment of these foods  
23 and avoidance their labeling.

24 4. There are four claims in this action. First is the issue of how the  
25 disclosure is provided under the final rule: electronic or digital forms of labeling,  
26 also known as “QR code” or “smartphone” labeling. Congress included this potential  
27 form of disclosure in the new law, but, recognizing its untested nature, made USDA  
28

1 undertake a study of its potential efficacy to eventually use it alone as a means of  
2 labeling. The study showed undeniably what opponents told the agency: (a) it was  
3 not realistic to have customers in a grocery store use their phone to scan barcodes  
4 for dozens of products, and (b) this form of disclosure would discriminate against  
5 major portions of the population—the poor, elderly, rural, and minorities—with  
6 lower percentages of smartphone ownership, digital expertise, or ability to afford  
7 data, or who live in areas in which grocery stores do not have internet bandwidth.  
8 Defendants’ decision nonetheless to greenlight QR codes without other forms of  
9 labeling on products was arbitrary and capricious and contrary to law, in violation  
10 of the Disclosure Act and the Administrative Procedure Act (APA).

11 5. Second is the issue of what terminology is permitted. For 25 years, all  
12 aspects of the public dialog around GE foods—scientific, policy, market, legislative,  
13 consumer—have used either “genetically engineered” (GE) or “genetically modified”  
14 (GMO) to refer to genetically engineered foods.<sup>1</sup> Those are terms that all federal  
15 agencies, including USDA during this very rulemaking, used. They are what the  
16 public knows, understands, and expects, and what is currently used in the  
17 marketplace by producers. They are what other countries and U.S. trade partners  
18 use internationally. And, Congress used the new term “bioengineered” in the Act, at  
19 the same time, it instructed USDA to also include “any similar term” in its new  
20 standard. Despite that instruction and the overwhelming support from stakeholders  
21 to allow continued use of the far more well-known “GE”/ “GMO” terms, in its final  
22 rule USDA instead excluded “GE” and “GMO,” prohibiting them from use in the on-  
23 package text or symbol labeling, only allowing use of the term bioengineered. That  
24 decision was arbitrary and capricious, contrary to the Act’s plain language and the  
25

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26 <sup>1</sup> For clarity sake, we will use the term “GE” in this complaint to refer to genetically  
27 engineered foods.

1 APA and failed to fulfill the Act's fundamental purpose of informing consumers. It is  
2 antithetical to the Act's purpose because it will confuse and mislead consumers.

3 6. Third is the issue of what foods are covered (or not covered) under the  
4 scope. The vast majority of GE foods are not whole foods but rather highly processed  
5 foods with GE ingredients like sodas and oils, which by some estimates account for  
6 over 70% of all GE foods. The Act provided broad scope to USDA to cover all GE  
7 foods, and the legislative history shows that USDA and Congress made assurances  
8 that the majority of GE foods—those highly refined GE foods—would be covered.  
9 Yet in the final rulemaking, USDA decided to exclude highly refined GE foods,  
10 creating a new extra-statutory limitation. That decision was contrary to the Act and  
11 the APA, and again failed to fulfill the Act's core purpose of informing consumers.

12 7. Fourth is the right of improving on the limited and flawed disclosure  
13 the rules provide, particularly important given all the problems explained above.  
14 Manufacturers and retailers have a fundamental 1st Amendment Right to provide  
15 truthful commercial information to consumers, and consumers have a right to  
16 receive it. In this context, manufacturers and retailers have the right to label foods  
17 as produced through genetic engineering or as genetically engineered. Yet the final  
18 rule attempts to restrict that right in multiple ways, providing only limited and  
19 restricted voluntary labeling beyond its narrow scope. Those speech chilling  
20 restrictions violate the statute's text and purposes as well as the 1st Amendment's  
21 guarantees.

## 22 23 **JURISDICTION AND VENUE**

24 8. This action arises under the U.S. Constitution and laws of the United  
25 States, including the Administrative Procedure Act (APA). Jurisdiction is conferred  
26 on this Court pursuant to 28 U.S.C. §§ 1331, 1343, & 1346.

1 9. Plaintiffs have a right to bring this action pursuant to the APA, 5  
2 U.S.C. § 702.

3 10. This Court has authority to grant declaratory and equitable relief  
4 herein requested pursuant to 5 U.S.C. § 706(2) (setting aside agency action that is  
5 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with  
6 law) and 28 U.S.C. §§ 2201–2202, and Rules 57 and 65 of the Federal Rules of Civil  
7 Procedure.

8 11. An actual controversy exists between the parties within the meaning of  
9 28 U.S.C. § 2201 (declaratory judgments).

10 12. Venue is proper in the U.S. District Court for the Northern District of  
11 California pursuant to 28 U.S.C. § 1391(e).

12  
13 **THE PARTIES**

14 **Plaintiffs**

15 13. Plaintiff **Center for Food Safety** (CFS) brings this action on behalf of  
16 itself and its members. CFS is a public interest, non-profit, membership  
17 organization that has offices in San Francisco, CA; Portland, OR; and Washington,  
18 D.C. CFS represents over 950,000 members, from every state in the country. The  
19 Disclosure Act and USDA’s final rule implementing it adversely affect CFS and its  
20 members.

21 14. CFS’s mission is to empower people, support farmers, and protect the  
22 environment from the harms of industrial agriculture. A large part of that mission  
23 is championing transparency in the food system and preserving informed consumer  
24 choice. For that reason a major CFS program area has always been improving food  
25 labeling and protecting the consumers’ right to know what’s in their food and what  
26 they feed their families.

1           15. For over two decades CFS has worked to ensure that GE organisms  
2 that could adversely affect public health, agriculture, and the environment are  
3 adequately labeled and properly regulated. CFS has a major program area specific  
4 to GE organism oversight, and numerous staff members—scientific, policy,  
5 campaign, and legal—whose work encompasses the topic. CFS staff members are  
6 recognized experts in the field and are intimately familiar with the issue of GE  
7 foods, their inadequate oversight, their risks, and their adverse impacts.

8           16. As part of both of these missions and programs, CFS has long been  
9 committed to securing mandatory GE food labeling across the country. To that end  
10 CFS has worked closely with dozens of state legislatures and leaders in U.S.  
11 Congress on GE food issues and GE food labeling legislation. For example, in 2011,  
12 CFS drafted and filed a rulemaking petition with the Food and Drug  
13 Administration (FDA), on behalf of over 650 companies and organizations, calling  
14 on FDA to require the mandatory labeling of all GE foods, which garnered over 1.4  
15 million individual public comments in support. In the void of federal leadership, in  
16 2012-2016, several states stepped in to protect the public's right to know, and to  
17 that end, CFS also assisted in the successful passage of several state labeling laws,  
18 including the passage of state GE labeling laws in Vermont, Connecticut, and  
19 Maine.

20           17. CFS takes a multi-faceted approach in pursuing its mission, utilizing  
21 legal, political, and grassroots strategies, including public and policymaker  
22 education, outreach, and campaigning. For instance, CFS disseminates a wide  
23 array of informational materials to government agencies, lawmakers, nonprofits,  
24 and the general public regarding the adverse effects of industrial food production—  
25 such as genetically engineered agricultural products and pesticides—on human  
26 health, the environment, and farmers and on the transparency of the food system.  
27 These educational and informational materials include, but are not limited to, news  
28

1 articles, videos, and other multimedia, policy reports, white papers, legal briefs,  
2 press releases, newsletters, product guides, action alerts, and fact sheets. One  
3 example is the book *Your Right to Know: Genetic Engineering and the Secret*  
4 *Changes in Your Food* (Earth Aware Press, 2007).

5 18. Plaintiff **Rural Vermont** is a 501(c)(3) nonprofit organization founded  
6 in 1985 and based in Montpelier, Vermont. Rural Vermont is a grassroots  
7 membership organization that has worked for 35 years to bring the voices of the  
8 people who are affected by public policy decisions into the process of creating public  
9 policy. Its mission is to lead the resurgence of community-scale agriculture, through  
10 education, advocacy, and organizing.

11 19. From 2011 to 2016, Rural Vermont was a founder and leading member  
12 of the “Vermont Right to Know GMOs” Coalition. The Coalition led the grassroots  
13 effort that resulted in the successful passage of the first law in the United States  
14 that required the labeling of food produced through genetic engineering. That effort  
15 brought over 10,000 citizens into the legislative campaign as well as built a  
16 supporting coalition of scores of farms, food producers, restaurants, food co-ops,  
17 schools and other businesses and organizations who supported Vermonters’ right to  
18 know how their food is produced.

19 20. Plaintiff **Citizens for GMO Labeling** is a nonprofit organization  
20 based in Connecticut with a mission of working across the country to pass state  
21 legislation to require the labeling of genetically engineered foods. In 2013  
22 Connecticut passed one of the first GMO labeling laws. However, it required other  
23 states to pass similar laws prior to taking effect. From 2013-2016, Citizens for GMO  
24 Labeling provided support to over thirty state-based campaigns to label genetically  
25 engineered foods and helped pass similar labeling laws in other states.

26 21. While working to pass these laws, staff members were located in MA  
27 and RI and board members in CT, PA, MA, NJ, RI, and NY. The organization  
28



1 testified at state legislative hearings in NH, MA, and RI. In 2015 it hosted an  
2 advocate training for 80 GMO labeling advocates from states including, CT, MA,  
3 NJ, RI, PA, NH, VT, ME, NY, CA, ID, WA, AZ, FL, CO, HA, IA, MI, IL, NC, VA,  
4 DC, OR, NV, OH, DE, MD and GA. The organization's entire budget went toward  
5 passing these state level GMO laws and protecting the laws that CT, VT, and ME  
6 passed.

7       22. The Disclosure Act preempted all current and future state labeling  
8 laws, and did so far beyond the scope and substance of what the law offered the  
9 public. In doing so it undid all the work the organization had undertaken prior to its  
10 passage and made it impossible to continue that work absent judicial review.

11       23. Plaintiff **Label GMOs** is a California-based nonprofit organization  
12 that spearheaded California Prop 37 (2012), a state ballot initiative to require the  
13 mandatory labeling of genetically engineered food. Prop 37 was the first major  
14 state-wide effort at GMO labeling, and was narrowly defeated (51%-49%) after  
15 opponents of disclosure broke the state record for spending in their opposition to it  
16 (\$44 million). However Prop 37 galvanized a grassroots movement across the  
17 United States for the mandatory labeling of genetically engineered food, and  
18 inspired and sent off a chain of aligned future ballot initiatives in Washington  
19 (2013) and Oregon (2014) as well as state legislative efforts, including those that  
20 eventually passed into law in Vermont, Connecticut, and Maine. All of those  
21 disclosure laws and efforts were substantially identical. Label GMOs also worked to  
22 pass Senate Bill 1381 (2014) and other California legislative GMO labeling efforts  
23 prior to the preemption of those efforts by the 2016 Disclosure Act.

24       24. Plaintiff **Good Earth Natural Foods** is an independent natural and  
25 organic grocer based in Marin, California since 1969. Good Earth is committed to  
26 advocating for a healthier and more sustainable food system. Historically Good  
27 Earth was one of the original pioneers and creators of the organic farming  
28

1 standards and labeling, at the state level and then at the federal level, and has  
2 since that time worked to ensure the organic standard retains its original integrity.  
3 Later Good Earth helped start the Non-GMO project and its Non-GMO verified  
4 label. In 2011, Good Earth launched its own in-store labeling of products, including  
5 locally produced and non-GMO verified. In 2012, Good Earth supported Prop 37, the  
6 California Right to Know GMO labeling initiative. Good Earth is committed to full  
7 transparency for its customers, including ensuring that foods produced with genetic  
8 engineering are labeled as such.

9       25. Plaintiff **Puget Consumers Co-op**, which operates stores under the  
10 tradename “PCC Community Markets,” is the nation’s largest community-owned  
11 food market based in Seattle, Washington. Founded in 1953 and with an active  
12 membership of just over 80,000 households, PCC operates 14 stores in the Puget  
13 Sound area and is a Certified Organic retailer.

14       26. PCC aims to create a cooperative, sustainable environment in which  
15 sustainable and organic supply chains thrive. A critical part of that work includes  
16 increasing transparency for consumers on how their food is grown and raised and  
17 what is in their food. To that end, PCC has been a dedicated advocate of GMO  
18 labeling and supporter of GMO absence certification programs, such as Certified  
19 USDA Organic and Non-GMO Project Verified.

20       27. As far back as in 2000, PCC members wrote over 12,000 letters to  
21 Congress in support of GMO transparency in foods. In 2012-2013, PCC led the effort  
22 for statewide GMO labeling as a steering committee member for I-522, the People’s  
23 Right to Know Genetically Engineered Food Act. Although the ballot initiative was  
24 narrowly defeated by record spending, it helped build the momentum for labeling  
25 transparency nationwide and the successful passage of other state labeling laws.  
26 In 2011, PCC pledged to label all GMO items in its stores by 2018. In 2016-2018,  
27 PCC undertook substantial planning and actions to complete this pledge, including  
28

1 after the passage of the 2016 Disclosure Act. However, the final USDA rules forced  
2 PCC to shelve its store labeling plans because of the speech restrictions created by  
3 the disclosure scheme, legal uncertainty from its lack of clarity, and potential  
4 consumer confusion.

5 28. Plaintiff **Natural Grocers** is a Colorado-based specialty retailer of  
6 natural, organic groceries, body care products and dietary supplements since 1955,  
7 currently operating 157 stores in 20 states. Natural Grocers is committed to  
8 educating communities on nutrition and providing only natural and organic  
9 products that meet high standards for ecological sustainability. As part of these  
10 efforts, all Natural Grocers brand products are organic or non-GMO if organic is not  
11 available, and Natural Grocers sells only certified organic produce. Across all stores,  
12 Natural Grocers carries over 9,000 Non-GMO Project Verified products and over  
13 10,000 organic grocery products.

14 29. Natural Grocers has long been a supporter of GMO labeling at both the  
15 state and federal level. In 2014, Natural Grocers supported the Right to Know  
16 Colorado Proposition 105 to label GMO foods and hosted Proposition 105 petition  
17 gatherers in all of its 34 Colorado stores. Natural Grocers is committed to providing  
18 transparency for its customers and consistently posts information on GMOs on its  
19 website to assist its customers in avoiding GMO products.

## 20 21 **Defendants**

22 30. Defendant **Sonny Perdue** is sued in his official capacity as USDA  
23 Secretary. As Secretary, Mr. Perdue has the ultimate responsibility for USDA's  
24 implementation of the Disclosure Act.

25 31. Defendant **Bruce Summers** is sued in his official capacity as  
26 Administrator of the Agricultural Marketing Service (AMS), an agency of the  
27 United States Department of Agriculture. The AMS administers programs at USDA



1           37. Under the APA’s standard of review, the Court evaluates whether the  
2 agency “examine[d] the relevant data and articulate[d] a satisfactory explanation  
3 for its action including a rational connection between the facts found and the choice  
4 made.” *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S.  
5 29, 43 (1983). An action is arbitrary and capricious if the agency “has relied on  
6 factors which Congress has not intended it to consider, entirely failed to consider an  
7 important aspect of the problem, offered an explanation for its decision that runs  
8 counter to the evidence before the agency, or is so implausible that it could not be  
9 ascribed to a difference in view or the product of agency expertise.” *Id.* at 43.

## 11 **THE BIOENGINEERED FOOD DISCLOSURE ACT**

12           38. The purpose of the Disclosure Act is to “establish a national mandatory  
13 bioengineered food disclosure standard with respect to any bioengineered food and  
14 any food that may be bioengineered” within two years following its enactment. 7  
15 U.S.C. § 1639b(a).

16           39. Bioengineering and any similar term is defined to be food “(A) that  
17 contains genetic material that has been modified through in vitro recombinant  
18 deoxyribonucleic acid (DNA) techniques; and (B) for which the modification could  
19 not otherwise be obtained through conventional breeding or found in nature.” 7  
20 U.S.C. § 1639(1).

21           40. While the Act generally uses the term, “bioengineered,” it expressly  
22 includes “and any similar term” when it defines the “bioengineering” classification.  
23 7 U.S.C. § 1639(1).

24           41. A food may “bear a disclosure that a food is bioengineered only in  
25 accordance” with the Act’s implementing regulations. 7 U.S.C. § 1639b(b)(1).

26           42. The Act requires USDA to “establish such requirements and  
27 procedures as the Secretary determines necessary to carry out the standard.” 7  
28

1 U.S.C. § 1639b(a)(2). The Act mandates that USDA also “establish a process for  
2 requesting and granting a determination by the Secretary regarding other factors  
3 and conditions under which a food is considered a bioengineered food” beyond those  
4 set out by the statute elsewhere in the agency’s implementing regulations. 7 U.S.C.  
5 § 1639b.

6 43. While the Act permits the disclosure to be in the form of on-package  
7 text, symbol, or electronic or digital link, it required USDA to first study the efficacy  
8 of the electronic or digital disclosures, “to identify potential technological challenges  
9 that may impact whether consumers would have access to the bioengineering  
10 disclosure through electronic or digital disclosure methods.” 7 U.S.C. § 1639b(c)(1).

11 44. The Act sets forth detailed factors USDA was required to analyze in  
12 the study: the availability of wireless Internet or cellular networks; the availability  
13 of landline telephones in stores; the challenges facing small retailer and rural  
14 retailers; efforts that retailers and other entities have taken to address potential  
15 technological and infrastructure challenges; and the costs and benefits of installing  
16 in retail stores stand-alone electronic or digital link scanners or other technology to  
17 provide disclosure information. 7 U.S.C. § 1639b(c)(3)(A)-(E).

18 45. The Act also requires that USDA “shall” solicit and consider public  
19 comments on the Study, underscoring its importance to the rulemaking process. 7  
20 U.S.C. 1639b(c)(2).

21 46. The Act further specifies that any QR codes used for disclosure must be  
22 accompanied with the text “scan here for more food information” or similar  
23 language as well as include an accompanying phone number. 7 U.S.C. § 1639b(d)(1),  
24 (d)(4). QR codes must provide access “in a consistent and conspicuous manner, on  
25 the first product information page that appears for the product on a mobile device,  
26 Internet website, or other landing page, which shall exclude marketing and  
27 promotional information.” 7 U.S.C. 1639b(d)(2).



1 show that nearly 90 percent of Americans want to know whether the foods they  
2 purchase were produced with genetic engineering.

3 52. Consumers want those GE disclosures for numerous reasons: health,  
4 personal, economic, environmental, religious, and cultural. For example, on the  
5 health side, the public knows that the Food and Drug Administration (FDA), the  
6 Agency charged with ensuring the safety of most foods to eat, does not actually  
7 independently test the food safety of GE foods, or require them to be tested. That is,  
8 FDA does not “approve” GE foods for safety; instead, the Agency has confidential  
9 meetings with industry in which it merely reviews the industry’s own testing, and  
10 even these confidential meetings are voluntary, not required. Market entry for GE  
11 foods is based solely on confidential industry research.

12 53. Scientific studies have shown that genetic engineering of plants and  
13 animals can and has caused unintended consequences. Manipulating genes via  
14 genetic engineering and inserting them into organisms is an imprecise process. The  
15 results are not always predictable or controllable. Mixing plant, animal, bacterial,  
16 and viral genes through genetic engineering, in combinations that cannot occur in  
17 nature, can produce results that lead to adverse health or environmental  
18 consequences.

19 54. U.S. government scientists have stated that the artificial insertion of  
20 genetic material into plants via genetic engineering can cause a variety of  
21 significant problems with plant foods. Such genetic engineering may have  
22 consequential health concerns such as an increase in the levels of known toxicants  
23 and food allergens or the creation of new toxicants and food allergens.

24 55. Further, independent scientists are prohibited from conducting safety  
25 and risk-assessments of GE materials used in food products due to industry  
26 restrictions on research of those materials. There are no long-term or  
27 epidemiological studies in the U.S. that have examined the safety of human  
28



1 consumption of GE foods. Without GE labeling, there is no accountability or  
2 traceability to link such foods to proliferating public health problems. Mandatory  
3 labeling of GE foods can provide a method for detecting, on a large epidemiological  
4 scale, the potential health effects of consuming such foods.<sup>2</sup> These facts rightly give  
5 consumers pause; thus disclosure through labeling allows them to make their own  
6 choices about whether to buy and consume GE foods.

7       56. Additionally, consumers want the ability to make purchase decisions  
8 that align with their values. On the environmental side, risks do not come from the  
9 unknown, but from the known: GE crops are a key cog of inherently unsustainable  
10 industrial agriculture, and cause significant adverse environmental impacts. With  
11 over 20 years of evidence to rely on, it is well established now that GE crops are at  
12 their heart a pesticide-promoting technology: The overwhelming majority of  
13 commercial GE crops are genetically engineered by pesticide companies, such as  
14 Monsanto, Dow Chemical, and Bayer (now the owner of Monsanto), to withstand  
15 herbicide application (with their pesticide products) or to produce their own  
16 pesticides. Consequently, these GE crops have dramatically increased the overall  
17 pesticide output of American agriculture into our environment. Monsanto's  
18 genetically engineered "Roundup Ready" crops, which are resistant to glyphosate, have  
19 made glyphosate the most used pesticide in history, with roughly 280 million pounds  
20 applied annually in U.S. agriculture since 2012. Newer GE crop varieties have  
21 increased the use of older pesticides on our food, such as dicamba and 2,4-D.  
22 Reliance on these pesticide-promoting GE crop systems has caused a number of  
23 harms, including widespread pollution of our waterways and ecosystems, injury to  
24 beneficial insects such as pollinators, and harm to soil health. The well-established

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25  
26 <sup>2</sup> Philip J. Landrigan, M.D. & Charles Benbrook, Ph.D., *GMOs, Herbicides, and*  
27 *Public Health*, New England Journal of Medicine (2015),  
<http://www.nejm.org/doi/full/10.1056/NEJMp1505660#t=article>.

1 environmental impacts of GE crops (and their attendant pesticides) are widespread  
2 and dire. Many people reasonably want to align their food purchasing choices with  
3 their environmental values.

4       57. Further, protection of the environment and the protection of public health  
5 are intimately intertwined. In 2015, the World Health Organization's International  
6 Agency for Research on Cancer (IARC) concluded that glyphosate is probably  
7 carcinogenic to humans, based in part on epidemiology studies showing increased  
8 risk of non-Hodgkin lymphoma (NHL) among farmers who used glyphosate  
9 formulations. In three lawsuits brought against Monsanto, juries ruled that use of  
10 Roundup and other glyphosate formulations contributed to the development of NHL in  
11 California users of these products. In June, Monsanto's owner, Bayer, agreed to pay up  
12 to \$10.9 billion to roughly 125,000 cancer victims who had filed similar lawsuits against  
13 the company.<sup>3</sup> The amount of glyphosate permitted in the food supply has increased  
14 dramatically since the 1980s, and a growing number of independent studies indicate  
15 that long-term glyphosate exposure poses risks to the liver, kidney and reproductive  
16 system. These are health impacts that conscious shoppers are trying to avoid  
17 supporting to ensure better work environments for farmworkers and their families.

18       58. On the agricultural side, over the past decade-plus, the unintended  
19 mixing of genetically engineered DNA with conventional or organic crops, known as  
20 transgenic contamination, has cost U.S. farmers billions of dollars in market losses.  
21 Numerous foreign markets with restrictions on genetically engineered foods have  
22 restricted imports of U.S. crops due to concerns about such forms of production.

---

23 <sup>3</sup> Ludwig Burger & Tina Bellon, *Bayer to pay up to \$10.9 billion to settle bulk of*  
24 *Roundup weedkiller cancer lawsuits*, Reuters (June 24, 2020),  
25 [https://www.reuters.com/article/us-bayer-litigation-settlement/bayer-to-pay-up-to-](https://www.reuters.com/article/us-bayer-litigation-settlement/bayer-to-pay-up-to-10-9-billion-to-settle-bulk-of-roundup-weedkiller-cancer-lawsuits-idUSKBN23V2NP)  
26 [10-9-billion-to-settle-bulk-of-roundup-weedkiller-cancer-lawsuits-](https://www.reuters.com/article/us-bayer-litigation-settlement/bayer-to-pay-up-to-10-9-billion-to-settle-bulk-of-roundup-weedkiller-cancer-lawsuits-idUSKBN23V2NP)  
27 [idUSKBN23V2NP](https://www.reuters.com/article/us-bayer-litigation-settlement/bayer-to-pay-up-to-10-9-billion-to-settle-bulk-of-roundup-weedkiller-cancer-lawsuits-idUSKBN23V2NP).

1 Some foreign markets are choosing to purchase agricultural products from countries  
2 other than the U.S. because GE crops are not identified in the U.S., which makes it  
3 impossible for buyers to determine whether products meet their national labeling  
4 laws or restrictions.

5 59. Further, the widespread adoption of crops engineered for pesticide  
6 resistance has proliferated an epidemic of resistant “superweeds” now covering  
7 more than 80 million acres of U.S. farmland. These weeds have flourished, infesting  
8 farm fields and roadsides, complicating weed control for farmers, and forcing  
9 farmers to resort to more and increasingly toxic pesticides. Many consumers do not  
10 want to support unsustainable agricultural practices that harm American farmers  
11 and instead want to make choices that align with their support of family farmers,  
12 not agrochemical companies. Again, proper labeling provides them this choice.

13 60. Juxtaposed against these facts, the U.S. public is discovering that the  
14 pesticide industry’s hype about genetically engineered crops is false: Despite billions  
15 of dollars in research and nearly three decades of commercialization, no GE crops  
16 are commercially produced to increase yields, reduce world hunger, or mitigate  
17 global warming. Rather, the commercial reality is that agrochemical companies  
18 have largely succeeded in engineering these crops to be resistant to the companies’  
19 own products—pesticides—in order to reap huge profits.

20 61. Further, studies show that, due to the prior lack of mandatory  
21 labeling, many American consumers are under an incorrect assumption as to  
22 whether the food they purchase is actually produced with genetic engineering, or  
23 not. Requiring disclosure of whether or not foods are genetically engineered will  
24 reduce this consumer confusion and deception.

25 62. Finally, consumers also want mandatory labeling for religious,  
26 cultural, ethical, moral, personal, or dietary reasons. Without mandatory  
27 disclosures, consumers of GE foods may unknowingly violate their beliefs or health  
28

1 restrictions. Labeling will provide consumers with the information they need to  
2 make safe and informed decisions.

## 3 **II. States Respond to Public Demand**

4 63. Our country's history is one of states as the laboratories for democracy.  
5 A 2011 rulemaking petition by some plaintiffs requesting federal labeling resulted  
6 in 1.4 million public comments in support, but no federal agency action. So in the  
7 absence of federal action, public demand for GE labeling prompted state legislatures  
8 to draft and pass their own GE labeling laws. Between 2013 and 2015, more than 30  
9 states introduced substantially similar GE food labeling bills. State labeling ballot  
10 initiatives were narrowly defeated in California (2012), Washington (2013), and  
11 Oregon (2014).

12 64. Connecticut and Maine passed labeling laws in 2013, albeit with  
13 clauses tying their effective dates to the passage of similar laws in other states. In  
14 May 2014, Vermont became the first state to pass a stand-alone labeling law, which  
15 went into effect in July 2016.

## 16 **III. The Federal Disclosure Act**

17 65. In July 2016, Congress enacted the Bioengineered Food Disclosure Act  
18 to "establish a national mandatory bioengineered food disclosure standard for  
19 bioengineered foods and foods that may be bioengineered" within two years  
20 following its enactment. 7 U.S.C. § 1639b(a).

## 22 **CLAIMS**

### 23 **I. Claim 1: Electronic or Digital Disclosures**

24 66. One of the most controversial aspects of the Disclosure Act was its  
25 unprecedented inclusion of novel "electronic or digital" disclosures, a first for  
26 government-mandated food product or food ingredient information. The form of  
27 such electronic disclosures are known as "Quick Response" codes or "QR Codes": a  
28

1 matrix barcode that requires a smart phone with a QR code scanner and broadband  
2 internet in order to access.<sup>4</sup>

3         67. The Act established three potential forms of the bioengineered  
4 disclosure: on-package text, a USDA-established on-package symbol, or an  
5 electronic or digital link. 7 U.S.C. § 1639b(b)(2)(D). Understanding the  
6 unprecedented nature of indirect electronic or digital disclosures and anticipating  
7 problems and unknowns, Congress required USDA to undertake a study to inform  
8 the rulemaking, identifying and analyzing: “the potential technological challenges  
9 that may impact whether consumers would have access to the bioengineering  
10 disclosure through electronic or digital disclosure methods.” 7 U.S.C. § 1639b(c)(1).  
11 The study was to be completed a full year before the regulations were to be finalized  
12 in order to give the agency sufficient time to apply the findings. 7 U.S.C. §  
13 1639b(c)(1).

14         68. The Act set forth detailed factors USDA had to analyze in the study:  
15 the availability of wireless Internet or cellular networks; the availability of landline  
16 telephones in stores; the challenges facing small retailer and rural retailers; efforts  
17 that retailers and other entities have taken to address potential technological and  
18 infrastructure challenges; and the costs and benefits of installing in retail stores  
19 stand-alone electronic or digital link scanners or other technology to provide  
20 disclosure information. 7 U.S.C. § 1639b(c)(3)(A)-(E).

21         69. If USDA then determined based on the study and the record that  
22 “consumers, while shopping, would not have sufficient access to the bioengineering  
23 disclosure through electronic or digital disclosure methods,” the Act required that  
24

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25  
26 <sup>4</sup> These terms—electronic and digital disclosures or QR Codes—are used  
27 interchangeably here, as QR Codes are the only form of “electronic or digital  
28 disclosure” USDA discussed in the rulemaking.

1 USDA “shall provide additional and comparable options” for consumers for  
2 accessing the disclosure. 7 U.S.C. § 1639b(c)(4).

3 **A. The QR Code Study**

4 70. USDA publicly released its Study,<sup>5</sup> *A Third-Party Evaluation of*  
5 *Challenges Impacting Access to Bioengineered Food Disclosure*, undertaken by a  
6 private contractor, Deloitte Consulting LLP,<sup>6</sup> on September 6, 2017, though it is  
7 dated July 2017. It was not supportive of the use of electronic or digital forms of the  
8 disclosure. Rather overall it concluded that “key technological challenges”—such as  
9 lack of technical knowledge, lack of association of digital links with food  
10 information, and lack of infrastructure—prevent consumers from obtaining the  
11 necessary information through the QR Code disclosure.<sup>7</sup>

12 71. Through direct observation of consumers, researchers determined that  
13 these myriad challenges “prevented nearly all participants from obtaining the  
14 information through electronic or digital disclosure methods.”<sup>8</sup> Accordingly the  
15 Study recommended that “in order for the law to have intended outcomes for  
16 interested consumers, USDA and interested groups should address technological  
17 challenges.”<sup>9</sup>

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21 <sup>5</sup> *A Third-Party Evaluation of Challenges Impacting Access to Bioengineered Food*  
22 *Disclosure* (July 2017),  
23 <https://www.ams.usda.gov/sites/default/files/media/USDA%20Deloitte%20Study%20of%20Electronic%20or%20Digital%20Disclosure%2020170801.pdf>.

24 <sup>6</sup>AMS, *Statement of Objectives Study of Electronic or Digital Link Disclosure*  
25 *National Bioengineered Food Disclosure Standard*,  
26 [https://www.ams.usda.gov/sites/default/files/media/Statement%20of%20Objectives\\_f%20or%20posting.pdf](https://www.ams.usda.gov/sites/default/files/media/Statement%20of%20Objectives_f%20or%20posting.pdf).

26 <sup>7</sup> USDA 2017 Study at 4.

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

27 <sup>9</sup> USDA 2017 Study at 65.

1           72. Among other relevant findings—all of which go to the factors  
 2 specifically enumerated by Congress in the law set forth directly above—the Study  
 3 concluded that:

- 4           ○ “Digital links are not inherently associated with additional food  
 5 information, and consumers often assume they are for marketing and  
 6 industry use.”<sup>10</sup>
- 7           ○ “Consumers may not have equipment capable of scanning digital links  
 8 on their own, and in most cases there is not a viable alternative  
 9 provided by retailers.”<sup>11</sup>
- 10          ○ Zero percent of the stores visited for the study were equipped with  
 11 scanners capable of accessing information on a digital link.<sup>12</sup>
- 12          ○ “There are hundreds of scanning apps available in the market, many of  
 13 which are not intuitive to use, causing consumer confusion and  
 14 difficulty opening link results.”<sup>13</sup>
- 15          ○ “85 percent of consumers struggled with complicated mobile software  
 16 applications (“apps”) regardless of their comfort using technology.”<sup>14</sup>
- 17          ○ “Consumers may be unable to connect to broadband, or connect at  
 18 speed that is so slow that they cannot load information.”<sup>15</sup>
- 19          ○ “20 percent of retail stores do not currently have in-store WiFi,  
 20 including 63 percent of small retailers.”<sup>16</sup>
- 21          ○ Landlines “do not provide a viable means of accessing the digital  
 22 disclosure due to limited availability of such phones for consumer use  
 23 and restricted manufacturer call center hours.”<sup>17</sup>
- 24          ○ As to the challenges facing small retailers and rural retailers: “Rural  
 25 retailers are less likely to have broadband access, and small retailers  
 26 will struggle to make costly investments in WiFi networks. As a result,  
 27

28  
 23 <sup>10</sup> USDA 2017 Study at 65.

24 <sup>11</sup> *Id.*

25 <sup>12</sup> USDA 2017 Study at 65.

26 <sup>13</sup> *Id.*

27 <sup>14</sup> *Id.*

28 <sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 5.

1 consumer who shop at these stores will face difficulties accessing  
2 digital disclosures.”<sup>18</sup>

- 3 ○ Installing scanners in retail stores “may prove cost prohibitive,  
4 particularly for small and rural retailers. In addition, there are limited  
5 benefits due to limited consumer knowledge around digital disclosure  
6 today.”<sup>19</sup>
- 7 ○ Smart phone ownership rates: 77 percent of Americans, 67 percent of  
8 Americans in rural locations, 42 percent of Americans 65 or older, 64  
9 percent of low income households.<sup>20</sup> The Deloitte study also cites a Pew  
10 study, which found that 58% of Americans over the age of 65, 36% of  
11 those earning less than 30,000 a year, and 33% of those living in rural  
12 areas do not own a smart phone.<sup>21</sup>
- 13 ○ “[S]martphone ownership is not necessarily a proxy for access, as some  
14 smartphones are not capable of scanning electronic or digital links. A  
15 device might be older, malfunctioning, or lack storage space, inhibiting  
16 one from scanning effectively.”<sup>22</sup>
- 17 ○ “Scanning digital links is not an intuitive process for many consumers  
18 who lack technical knowledge on how to download and use scanner  
19 apps.”<sup>23</sup>
- 20 ○ The Study identified multiple app design issues that frustrated  
21 consumers, sometimes to the point of abandoning attempts to obtain  
22 information. These include inadequate or unclear instructions,  
23 embedded and pop-up advertisements, delays in loading, special  
24 requirements for labels, and variance in display of results.<sup>24</sup>
- 25 ○ “According to the FCC, 34 million Americans (10 percent of the  
26 population) lack access to advanced broadband service. This is  
27 particularly true in rural and tribal areas, with 23 million Americans  
28 living in rural areas (39 percent) and 1.6 million living on tribal lands  
(41 percent) lacking access to advanced broadband.”<sup>25</sup>

22 <sup>18</sup> USDA 2017 Study at 5.

23 <sup>19</sup> *Id.*

24 <sup>20</sup> *Id.* at 17.

25 <sup>21</sup> USDA 2017 Study at 48(citing Pew Research Center, *Mobile Fact Sheet* (January  
26 2017), <http://www.pewinternet.org/fact-sheet/mobile/>).

27 <sup>22</sup> *Id.* at 46.

28 <sup>23</sup> *Id.* at 40.

<sup>24</sup> *Id.* at 52.

<sup>25</sup> USDA 2017 Study at 55.



- 1 ○ “Based on the 10 Mbps standard, this study finds that 20.5 million  
2 people (6.4 percent of the US population) have inadequate broadband  
3 to load a basic electronic or digital link . . . Moreover, while broadband  
4 may technically be available in a specific location, individual access is  
5 often dependent on the provider.”<sup>26</sup>
- 6 ○ Though some grocery stores provide WiFi, “most only provide access  
7 for a limited period of time, sometimes as low as 30 minutes. The  
8 average time spent grocery shopping is 43 minutes. If consumers were  
9 to stop and scan digital links, that time would likely increase and may  
10 come up against WiFi time limits.”<sup>27</sup>
- 11 ○ “[I]n a supercenter with free WiFi advertised around the store, it took  
12 90 seconds to connect to a webpage after scanning a product, far  
13 beyond the two second wait time that most consumers expect . . . .”<sup>28</sup>
- 14 ○ “One year of WiFi in a retail store could cost \$10,050 to cover 0 to  
15 5,000 square feet of space . . . retailers see little return on this costly  
16 investment . . . .”<sup>29</sup>
- 17 ○ 100 percent of consumers polled did not recognize digital links were  
18 associated with food info.<sup>30</sup>
- 19 ○ “Only 15 percent of Americans scanned barcodes or QR codes to find  
20 information about a product’s ingredients or nutrition information in  
21 the prior year; 29 percent had scanned these to find the price of a  
22 product or to check out at a store during the same period.”<sup>31</sup>
- 23 ○ Retailers are “also unaware that digital links include additional food  
24 information” and as such “consumers may receive inaccurate and  
25 inconsistent information from retailers—even if well intentioned—  
26 leading to further confusion.”<sup>32</sup>
- 27 ○ “[B]oth retailers and consumers in the field tended to overlook guiding  
28 words surrounding the digital link . . . .”<sup>33</sup>

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23 <sup>26</sup> USDA 2017 Study at 55.

24 <sup>27</sup> *Id.* at 59.

25 <sup>28</sup> USDA 2017 Study at 59.

26 <sup>29</sup> *Id.* at 67.

27 <sup>30</sup> *Id.* at 4.

28 <sup>31</sup> *Id.* at 43.

<sup>32</sup> *Id.* at 45.

<sup>33</sup> USDA 2017 Study at 45.

- 1           ○ “Consumers may recognize electronic or digital links, but do not know  
2           how to access information due to a lack of familiarity with scanning.”<sup>34</sup>

3           73. As these non-exhaustive examples show, the Act’s required study  
4 found multiple significant problems with the efficacy of digital and electronic  
5 disclosures; its analysis of every factor enumerated by Congress in 7 U.S.C. §  
6 1639b(c)(3)(A)-(E) weighed against the sufficiency of such disclosures.

7           74. Congress also required that USDA “shall” solicit and consider public  
8 comments on the Study, underscoring its importance to the rulemaking process. 7  
9 U.S.C. 1639b(c)(2). However USDA never held a public comment period on the  
10 Study or its findings. Nor, as discussed below, did USDA make any statutorily  
11 required sufficiency determination based on the Study until the final rule, after the  
12 close of public comment.

### 13           **B. The Rulemaking as Related to Electronic and Digital** 14           **Disclosures**

15           75. In summer 2017, USDA put out for comment a scoping document, with  
16 “proposed rule questions under consideration.”<sup>35</sup> Among the thirty questions  
17 presented, USDA addressed the QR code disclosure issue only in passing, and did  
18 not mention Congress’s required study or its findings.<sup>36</sup>

#### 19           **1) Proposed Rule**

20           76. In May of 2018, USDA issued the proposed rule (though referring to it  
21 as an actual proposal is misleading because the agency raised numerous possible  
22 alternatives for various issues it had to decide rather than actually proposing any).

23 \_\_\_\_\_  
24 <sup>34</sup> USDA 2017 Study at 40.

25 <sup>35</sup> AMS, *Proposed Rule Questions under Consideration*,  
26 <https://www.ams.usda.gov/rules-regulations/gmo-questions>.

27 <sup>36</sup> *Id.* at Qt. 25 (“How should AMS ensure an electronic or digital disclosure can be  
28 easily and effectively scanned or read by a device? Context: AMS is aware that  
electronic or digital disclosures need to be effective . . . ,” but without mentioning  
the study or Act’s requirements if they are found not to be).

1 83 Fed. Reg. 19,860 (May 4, 2018). As relevant to the QR Code disclosure, the  
2 proposed rule indicated that the regulations would include the text “scan here for  
3 more food information” or similar language, as required by the statute, as well as  
4 include an accompanying phone number, as also separately required by the statute.  
5 83 Fed. Reg. at 19,875; *see* 7 U.S.C. § 1639b(d)(1), (d)(4). These provisions were later  
6 finalized and codified. *See* 7 C.F.R. § 66.106(a)(1)-(2).

7 77. The proposed rule also addressed the Deloitte Study, but did not  
8 meaningfully grapple with its findings or analysis. 83 Fed. Reg. at 19,875. The  
9 agency set forth the factors Congress required be studied, and that the agency had  
10 to make a post-Study determination regarding its sufficiency for consumers. *Id.*  
11 However, despite USDA having had the study since July 2017, at the time of the  
12 proposed rule in May 2018, the notice simply said that USDA “was still reviewing  
13 the study and its results to decide whether to make that determination.” *Id.*

14 78. Nonetheless, USDA went on to presumptively float “an additional  
15 disclosure option,” “should the Secretary determine that consumers, while shopping,  
16 would not have sufficient access to the bioengineering disclosure through electronic  
17 or digital methods”: a text message option, in which manufacturers could place  
18 instructions “text [number] for more food information” and provide an automated  
19 response. *Id.* at 19,876. USDA did not explain how this would comply with the Act’s  
20 mandates, or solve the problem of having packages with only the insufficient QR  
21 Code disclosure on store shelves.

## 22 2) QR Codes: Public Comments and Other Evidence

23 79. The Study echoed existing secondary sources on the lack of efficacy of  
24 these types of indirect electronic and digital disclosure for consumers. During the  
25 proposed rule comment period, commenters presented further evidence to the  
26 agency regarding their problems as opposed to on-package labeling.

1           80. Consumers Union cited 2018 research by the Pew Research Center,  
 2 which determined that almost 58 million Americans do not own smart phones.<sup>37</sup>  
 3 This percentage is higher among older Americans in rural areas. Only 46% of people  
 4 over 65 years old own a smartphone, compared to 94% of those aged 18-29, and only  
 5 65% of people in rural areas own a smartphone, compared to 83% of those in urban  
 6 areas and 78% of those in suburban areas.<sup>38</sup> Additionally, only 67% of people with  
 7 an income of less than \$30,000 own a smartphone, compared to 93% of those with  
 8 an income of more than \$75,000.<sup>39</sup> Studies show this income aspect will  
 9 disproportionately affect minorities, due to the wage/wealth gap.<sup>40</sup>

10           81. The International Food Information Council further commented on  
 11 strong consumer preferences for on-package text or symbols. Based on the  
 12 organization's survey, 73% of consumers ranked symbols or visual representations  
 13 1st or 2nd (out of 6 options) on their list of preferences, while 63% of consumers  
 14 ranked text on a food package 1st or 2nd.<sup>41</sup> In contrast, less than 20% ranked text  
 15 messages, internet websites, telephone numbers, and electronic or digital links as a  
 16 1st or 2nd preference.<sup>42</sup>

17           82. The Study results are consistent with a 2016 study conducted by the  
 18 Annenberg Public Policy Center that found only 15 percent of Americans scanned  
 19  
 20  
 21

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22 <sup>37</sup> Consumers Union comment, at 19 (citing Pew Research Center, *Mobile Fact Sheet*  
 (February 5, 2018), <http://www.pewinternet.org/factsheet/mobile/>).

23 <sup>38</sup> *Id.*

24 <sup>39</sup> Consumers Union comment, at 19 (citing Pew Research Center, *Mobile Fact Sheet*  
 (February 5, 2018), <http://www.pewinternet.org/factsheet/mobile/>).

25 <sup>40</sup> Katherine Schaeffer, *6 facts about economic inequality in the U.S.* (Feb. 2020),  
 26 <https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/>.

27 <sup>41</sup> International Food Information Council comment, at 6.

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

1 barcodes or QR codes to search for ingredients and nutrition facts in 2015, while 29  
2 percent scanned them to search for prices or to check out.<sup>43</sup>

3 83. Overall these existing studies show that digital and electronic labeling,  
4 like QR codes or websites, will not provide disclosure to a large portion of  
5 Americans, and that this portion is disproportionately minority, low-income, and  
6 elderly people. Half of low-income people do not own smartphones. Almost half of  
7 rural people do not own smart phones. Minorities are a disproportionate percentage  
8 of low-income and rural Americans. Two-thirds of the elderly do not own smart  
9 phones. In fact, USDA's study determined that only 77 percent of Americans own a  
10 smart phone.<sup>44</sup>

11 84. Even those who have the phones and service plans are not guaranteed  
12 consistent access to the internet.<sup>45</sup> Few people have ever used a QR code—only 16  
13 percent have ever scanned a QR code, and only 3 percent of those people do it  
14 regularly.<sup>46</sup>

15 85. Moreover, smart phones and data plans are expensive, and nearly half  
16 of those who have smart phones have had to cancel or shut off their cell phone  
17 service for a period of time because the cost of maintaining that service was a  
18 financial hardship.<sup>47</sup>

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19 <sup>43</sup> Annenberg Public Policy Center, *Will Consumers Use QR Codes to Learn About*  
20 *Genetically Modified Food?*, at 43, 62 (August  
21 2016), <http://www.annenbergpublicpolicycenter.org/will-consumers-use-qr-codes-to-learnwhether-food-is-genetically-modified/>.

22 <sup>44</sup> USDA 2017 Study at 48.

23 <sup>45</sup> Charlie Osborne, *The state of LTE 4G networks worldwide in 2014 and the poor*  
24 *performance of the US*, ZDNet (Feb. 21, 2014), <http://www.zdnet.com/article/the-state-of-lte-4g-networks-worldwide-in-2014-and-the-poor-performance-of-the-us/>.

25 <sup>46</sup> The Mellman Group, *National Survey of Likely 2016 General Election Voters*, 20-  
26 21 (Nov. 2015), <http://4bgr3aepis44c9bxt1ulxsyq.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/15pre1123-d1-JLI-d9.pdf>.

27 <sup>47</sup> Aaron Smith, *U.S. Smartphone Use in 2015*, Pew Research Center: Internet &  
28 Tech. (Apr. 1, 2015), <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/>.

1           86. As such, allowing labeling based on QR codes is discriminatory against  
2 the low-income, rural Americans, minorities, the elderly and other groups less likely  
3 to own a smart phone or know how it is used. Even for those who own smart phones,  
4 access to networks and/or internet while shopping is not guaranteed.

5           87. Smartphone ownership, access to a working phone, and access to  
6 reliable broadband is not all. Even among those who own smartphones, there are  
7 varying degrees of digital readiness. “Digital readiness” describes the extent of  
8 smartphone usage among individual owners. A study published by the Pew  
9 Research Center in 2016 looked into the varying degree of readiness among  
10 differing demographics.<sup>48</sup>

11           88. A user’s digital readiness is based on their level of digital skills and  
12 their trust in the technological environment. There are several levels of readiness,  
13 including unprepared, traditional learner, reluctant, cautious clicker, and digitally  
14 ready. The unprepared are the least digitally ready and make up 14 percent of  
15 Americans. The reluctant make up 33 percent of owners, and while they have a  
16 slightly higher skill level, they have a low level of awareness of new technology and  
17 thus are infrequent technology users. Forming 5 percent of smartphone owners, the  
18 traditional learners choose not to engage digital tools to pursue their interests or  
19 inform themselves. The cautious clickers make up 31 percent of owners that have  
20 knowledge but do not use technology as frequently as the digitally ready, who make  
21 up 17 percent of owners and frequently use technology. The first three levels consist  
22 of owners who are less likely to use digital tools, such as QR codes, to inform  
23 themselves due to lack of technological knowledge or lack of trust in the  
24

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26 <sup>48</sup> John B. Horrigan, *Digital Readiness Gaps*, Pew Research Center: Internet &  
27 Technology 3 (Sept. 20, 2016), <http://www.pewinternet.org/2016/09/20/digital-readiness-gaps/>.

1 technological environment. The last two groups consist of owners who are  
2 considered to be digitally prepared.

3 89. This shows that, due to lack of skill, knowledge, or trust,  
4 approximately 52 percent of smartphone owners would nonetheless still be unlikely  
5 to use QR codes, and would thus be left without an effective form of GE disclosure.  
6 The Pew study also further shows that such disclosure would be discriminatory. The  
7 completely unprepared group is disproportionately represented by the demographic  
8 characteristics of female users, ages 50+, lower income households, and lower levels  
9 of formal education. In contrast, the digitally prepared group is more likely to be  
10 represented by middle aged users, higher income households, and higher levels of  
11 formal education.

12 90. Even among the technologically enabled participants who participated  
13 in the online Deloitte survey, many participants noted challenges in accessing a  
14 working phone with the app needed to scan QR codes. While only six percent of  
15 participants did not own a smart phone, the percentage doubled for those that  
16 would still struggle to access QR codes due to malfunctioning phones, lack of storage  
17 space in the phone for a scanning app, and lack of scanners available in stores.

18 91. Even for users with space for a scanning app, no single app yet exists  
19 to scan for food information in a manner consistent with 7 U.S.C. 1639b(d)(2).<sup>49</sup>  
20 Currently, hundreds of free scanning apps are available, but these apps use  
21 advertisements to garner profit, which would violate the Act's mandate to "exclude  
22 marketing and promotional information" from the digital link.<sup>50</sup> Many scanning  
23 apps used by consumers in the Deloitte study led to inconsistent results, pop-up  
24  
25

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26 <sup>49</sup> USDA 2017 Study at 52-53.

27 <sup>50</sup> *Id.* at 53.



1 advertisements, and unexplained delays in loading, which caused user confusion  
2 and eventual abandonment.<sup>51</sup>

3 92. It is also the case that Americans simply do not associate QR codes  
4 with information about the contents of food products. This is unsurprising given the  
5 unprecedented form of this disclosure. Not only do very few Americans regularly use  
6 QR codes,<sup>52</sup> the majority of QR code scans came from magazines, websites, mail,  
7 billboards or signs, and emails, and not from packages.<sup>53</sup> Removing Americans who  
8 do not own smartphones (23 percent), and then cut that percentage down again for  
9 those that have ever scanned a QR code, and then again for those that have scanned  
10 a QR code to gain product information from a product label, the percentage of  
11 Americans that would actually have access to GE disclosure via QR codes is in the  
12 single digits.

13 93. In addition, electronic labeling disclosures put an undue burden on the  
14 shopper. Even if consumers had access and knowledge to use a QR Code, it is  
15 unrealistic for a shopper to scan all of the many items they are shopping for on any  
16 given shopping trip (which for a family of four could easily amount to more than 50  
17 items). This would be an undue burden on the consumer and greatly impede access  
18 to information that is currently required for all other forms of food labeling.

19 94. Especially during the current COVID-19 pandemic, many Americans  
20 are visiting grocery stores less frequently to avoid exposure to the virus and  
21

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22  
23 <sup>51</sup> *Id.* at 52.

24 <sup>52</sup> The Mellman Group, *supra* note 46, at 21.

25 <sup>53</sup> Chadwick Martin Bailey, *9 Things to Know About Consumer Behavior and QR*  
26 *Codes*, CMB Consumer Pulse (2012), [https://www.cmbinfo.com/cmb-cms/wp-](https://www.cmbinfo.com/cmb-cms/wp-content/uploads/2012/01/Consumer-Pulse-Template-QR-Codes-Final.pdf)  
27 [content/uploads/2012/01/Consumer-Pulse-Template-QR-Codes-Final.pdf](https://www.cmbinfo.com/cmb-cms/wp-content/uploads/2012/01/Consumer-Pulse-Template-QR-Codes-Final.pdf) (finding  
28 that only 18 percent of those who reported scanning a QR code found them on  
packages and only 8-10 percent said they were highly interested in using a  
smartphone to scan a QR code).



1 purchasing more items during each visit.<sup>54</sup> Requiring a shopper to scan every single  
 2 item he or she purchases would not only place an undue burden on the shopper, but  
 3 would increase a shopper's exposure risk. Consumers cannot opt to purchase  
 4 groceries online and research this information from home, as "The amended Act  
 5 does not authorize AMS to require an independent website disclosure." 83 Fed. Reg.  
 6 at 65,862. Such online disclosures are only voluntary.

7 95. For these reasons, numerous manufacturers and organizations oppose  
 8 digital links as a disclosure option. Nature's Path, the largest certified organic  
 9 breakfast cereal producer in North America, commented that digital links do not  
 10 ensure fair and equal disclosure to all consumers because "high percentages of the  
 11 population have barriers to access electronic presented information."<sup>55</sup> Similarly,  
 12 Stonyfield, maker of the second leading brand of organic yogurt in North America,  
 13 expressed concern that disclosure via QR code could create "technological hurdles"  
 14 for consumers that lack technology to access the disclosure or because the  
 15 technology fails to consistently work.<sup>56</sup>

16 96. Other companies opposed to digital disclosure include Straus,<sup>57</sup> Global  
 17 Organics,<sup>58</sup> Next Foods,<sup>59</sup> Hain Celestial Group,<sup>60</sup> One Degree Organic Foods,<sup>61</sup>  
 18 Organic Valley,<sup>62</sup> and Patagonia.<sup>63</sup> Numerous organizations also expressed  
 19 disapproval of digital links as a disclosure option including the Institute for

20 \_\_\_\_\_  
 21 <sup>54</sup> Russell Redman, *How the coronavirus crisis is changing grocery shopping*,  
 22 Supermarket News (April 3, 2020), <https://www.supermarketnews.com/center-store/how-coronavirus-crisis-changing-grocery-shopping>.

23 <sup>55</sup> Nature's Path comment, at 3.

24 <sup>56</sup> Stonyfield comment, at 4.

25 <sup>57</sup> Straus comment, at 9.

26 <sup>58</sup> Global Organics comment, at 2

27 <sup>59</sup> Next Foods comment, at 3.

28 <sup>60</sup> Hain Celestial Group comment, at 4.

<sup>61</sup> One Degree comment, at 3.

<sup>62</sup> Organic Valley comment, at 5.

<sup>63</sup> Patagonia comment, at 5.

1 Agriculture and Trade Policy,<sup>64</sup> National Family Farm Coalition,<sup>65</sup> National Co-op  
2 Grocers,<sup>66</sup> National Sustainable Agriculture Coalition,<sup>67</sup> Consumers Federation of  
3 America,<sup>68</sup> and the Environmental Working Group.<sup>69</sup>

### 4 **3) The Inadequacy of Text Message Disclosure**

5 97. Commenters also pointed out that the Deloitte Study showed a text-  
6 messaging option would disadvantage the same population group as the QR code  
7 group. Many Americans in rural areas lack reliable cellphone service that would  
8 allow them to send or receive text messages.

9 98. Among those that do, the Study showed a lack of association between a  
10 phone number and food ingredient information. Neither consumers nor retailers  
11 associate “text here for more food information” messaging with basic food ingredient  
12 information (unsurprising and logical, given the unprecedented nature of  
13 presenting food ingredient information in such a manner). Consumers will not know  
14 what “food information” the message is referring to, as it is exceedingly vague.  
15 “Scan here for more food information” or “text here for more food information” does  
16 not give the consumer any idea that the information is about whether the food is  
17 produced with genetic engineering.

18 99. Many consumers polled in the Deloitte Study were concerned with  
19 their ability to receive information on their phones due to lack of reception.<sup>70</sup> Text  
20 messaging does not alleviate this problem: cell service is required to send and  
21 receive text messages. A grocery store having WiFi would not address the inability  
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23 <sup>64</sup> Institute for Agriculture and Trade Policy comment, at 9.

24 <sup>65</sup> National Family Farm Coalition comment, at 1.

25 <sup>66</sup> National Co-op Grocers comment, at 6.

26 <sup>67</sup> National Sustainable Agriculture Coalition comment, at 8.

27 <sup>68</sup> Consumers Federation of America comment, at 5.

28 <sup>69</sup> Environmental Working Group comment, at 18.

<sup>70</sup> USDA 2017 study at 39, 54, 57.

1 to text without reception, because text messages are not sent over WiFi.<sup>71</sup> For a QR  
2 code disclosure, consumers would need a charged smartphone with data, the QR  
3 scanning app, and good service in order to get the information. With text-messaging  
4 as the alternative, consumers would still need a charged cellphone with text  
5 messaging capabilities and good service to be able to receive the GE disclosure  
6 information. This alternative barely differs, including many of the same barriers,  
7 making the information inaccessible to the same people from either source.

8       100. Text messaging would disadvantage the same population groups as the  
9 QR code option: low income people, people who live in rural areas, and older people.  
10 Lower income people, less educated people, people of color, people in rural  
11 communities, and older citizens are less likely to own cellphones.<sup>72</sup> These groups  
12 overlap with those who viewed technological challenges as a setback to the QR code  
13 system.

14       101. The Study shows that lower income participants were more likely to be  
15 concerned with their ability to access QR code scanning tools.<sup>73</sup> The same setback  
16 would apply to a text message option. Lower income communities experience 15  
17 percent less coverage from cell providers, be it because there are fewer telecom  
18 bases in low income areas or because the telecom bases are located closer to  
19 suburban areas.<sup>74</sup> Either way, low income communities get worse service and are  
20 therefore less able to send or receive text messages inside grocery stores. Without  
21 service, text messaging for GE information is not a feasible alternative for these  
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23 <sup>71</sup> SMS text messages may be sent via WiFi, but only through an SMS text app on a  
24 smartphone, creating the same issues with digital disclosure via QR code.

25 <sup>72</sup> Pew Research Center, *Mobile Fact Sheet*, Pew Research Center: Internet & Tech.  
(Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/mobile/>.

26 <sup>73</sup> USDA 2017 study at 48.

27 <sup>74</sup> Pantelis Koutroumpis & Aija Leiponen, *Crowdsourcing Mobile Coverage*, 40  
Telecomm. Policy 532 (Jun. 2016).

1 communities for the same reason QR codes are not a feasible option in the first  
2 place: lack of access to technology.

3 102. Inconsistency in cellular plans would also make this information more  
4 accessible to some than others. For example, not all Americans have unlimited  
5 texting.<sup>75</sup> For consumers who have pay-as-you-go texting, they would have to pay  
6 for each text they send to get information that could be listed directly on label. This  
7 scheme creates a barrier for low income consumers who cannot afford unlimited  
8 texting, making it harder for them to access the information.

9 103. Even when people have unlimited access to texting, this alternative  
10 still assumes that consumers will want to use texting for information at the grocery  
11 store as a practical matter. The average American adult only sends 10 text  
12 messages per day, and that number decreases as age increases.<sup>76</sup> This means that if  
13 someone 50 years old is in a grocery store and wants to access the GE disclosure  
14 information for just 5 items, they would have to text 5 different numbers to get  
15 information on these products, increasing the amount they texted that day by 50  
16 percent.

17 104. Further just as with the QR code option, the burden of texting a  
18 number for every product greatly increases the amount of shopping time. The  
19 average grocery store visit lasts under an hour,<sup>77</sup> and even that amount of time is  
20 probably too long for the busy family member doing the shopping.<sup>78</sup> Especially

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21 \_\_\_\_\_  
22 <sup>75</sup> Josh Zagorsky, *Almost 90% of Americans Have Unlimited Texting*, Instant Census  
23 Blog (Dec. 8, 2015), <https://instantcensus.com/blog/almost-90-of-americans-have-unlimited-texting>.

24 <sup>76</sup> Amanda Lenhart, *Cell Phones and American Adults*, Pew Research Center:  
25 Internet & Tech. (Sept. 20, 2010), <http://www.pewinternet.org/2010/09/02/cell-phones-and-american-adults/>.

26 <sup>77</sup> Jack Goodman, *Who Does the Grocery Shopping, and When Do They Do It?*, The  
27 Time Use Institute (Apr. 2016), <http://www.timeuseinstitute.org/Grocery16paper.pdf>.

28 <sup>78</sup> *Id.*

1 during the current COVID-19 pandemic, shoppers have been reducing grocery store  
2 visits and attempting to spend less time in stores to reduce their exposure risk. The  
3 logistics and practicability of having a family shopping in a grocery store send a text  
4 message and wait for a response for each of the 50 products the family purchases is  
5 unworkable in the real world.

6 105. Rather than electronic or digital disclosures or text messages, 89  
7 percent of people who identified themselves as concerned about and wanting to  
8 know if food was produced through genetic engineering reported they made a  
9 decision about which food to buy by looking at the label.<sup>79</sup>

10 106. Further, putting a phone number on a package for consumers to text is  
11 not an “additional” option—the Act already required that the QR code disclosures  
12 also list a toll-free phone number from the outset, having nothing to do with the  
13 required Study, the agency’s insufficiency determination, and its remedy. 7 U.S.C. §  
14 1639b(d)(4).

15 107. Numerous manufacturers agree that text messaging does not provide  
16 an “additional” option for consumers. Patagonia commented that a text message  
17 option is not “additional” because “millions of Americans who live in rural areas  
18 may not have reliable cellphone service that would allow them to send or receive  
19 text messages.”<sup>80</sup> Further, Straus commented that text message disclosure would  
20 pose an obstacle for consumers that must pay for text messages sent and received.<sup>81</sup>

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25 <sup>79</sup> Cary Funk & Brian Kennedy, *The New Food Fights: U.S. Public Divides Over*  
*Food Science*, Pew Research Center (Dec. 1, 2016),  
26 <http://www.pewinternet.org/2016/12/01/the-new-food-fights/>.

27 <sup>80</sup> Patagonia comment, at 5.

28 <sup>81</sup> Straus comment, at 9.

1 108. Other companies and organizations opposed to text messaging as an  
 2 “additional” option include Numi,<sup>82</sup> Next Foods,<sup>83</sup> Hain Celestial Group,<sup>84</sup> Puris,<sup>85</sup>  
 3 Consumers Union,<sup>86</sup> Environmental Working Group,<sup>87</sup> International Food  
 4 Information Council,<sup>88</sup> and National Co-op Grocers.<sup>89</sup>

5 **4) Final Rule**

6 109. In the Final Rule, USDA again discussed the electronic and digital  
 7 disclosure method, and the Study on its efficacy or lack thereof. 83 Fed. Reg. 65,814,  
 8 65,828 (Dec. 21, 2018). After reciting the required study’s factors, USDA finally  
 9 made the finding Congress required:

10 After reviewing the study and comments submitted to the [proposed rule]  
 11 related to the study, the Secretary has determined that consumers would not  
 12 have sufficient access to the bioengineering disclosure through only electronic  
 13 or digital means under ordinary shopping conditions at this time.

14 83 Fed. Reg. at 65,828.

15 110. USDA acknowledged that “most consumers in the study experienced  
 16 technical challenges in accessing the bioengineered food disclosure on their phones.”  
 17 *Id.* at 65,828; *id.* 83 Fed. Reg. at 65,855 (“AMS acknowledges that some consumers  
 18 may lack access to technology required to utilize electronic or digital link  
 19 disclosure.”).

20 111. The Act spoke to these exact circumstances: in the event USDA  
 21 concluded that consumers “would not have sufficient access to the bioengineered  
 22

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23 <sup>82</sup> Numi comment, at 7.

24 <sup>83</sup> Next Foods comment, at 3.

25 <sup>84</sup> Hain Celestial Group comment, at 4.

26 <sup>85</sup> Puris comment, at 2.

27 <sup>86</sup> Consumers Union, at 20.

28 <sup>87</sup> Environmental Working Group comment, at 21.

<sup>88</sup> International Food Information Council comment, at 6.

<sup>89</sup> National Co-op Grocers comment, at 7.

1 disclosure through electronic or digital disclosure methods,” then the Act required  
2 USDA to provide an “additional and comparable” means by which consumers could  
3 still access the information on the package. 7 U.S.C. § 1639b(c). USDA was required  
4 by the statute to remedy the sufficiency of QR code disclosures if its own study  
5 found it inadequate, and not let it be permitted on packages alone, where it would  
6 be meaningless to many consumers. Rather, Congress required USDA to only allow  
7 QR codes in that scenario if they were combined with another “additional” means of  
8 disclosure that consumers could access, such as on-package text or something  
9 “comparable” to it. 7 U.S.C. § 1639b(c)(4).

10 112. However despite the Secretary’s findings that the QR code option alone  
11 fails to provide sufficient access for millions of Americans, and Congress’s explicit  
12 instructions that USDA remedy that insufficient access, the final rule still allows  
13 QR code disclosure with no “additional” option on packages with QR codes for  
14 consumers that lack access and no “comparable” option to on-package text and  
15 symbols.

16 113. Instead, to “remedy” that failing, USDA then simply added its  
17 proposed text message option to the list of allowable disclosure methods that  
18 manufacturers could utilize. 83 Fed. Reg. at 65,828-29; *see* 7 C.F.R. § 66.108 (text  
19 message option); 7 C.F.R. § 66.100(b)(1)-(4) (adding text message (b)(4) to on  
20 package text (b)(1), on package symbol (b)(2), electronic or digital (b)(3)).

21 114. This did nothing to fix the problem that the Study found, and that  
22 Congress required to be remedied: namely manufacturers could still choose to use  
23 QR codes alone, with no other additional disclosure method required jointly. *See* 7  
24 C.F.R. § 66.106 (electronic or digital disclosures).

25 115. The final rule acknowledges that many commenters opposed a text  
26 message option for the reasons explained above. In addition to leaving QR codes  
27 alone on a package as an option without any additional mandated form of disclosure  
28



1 that would actually work, USDA noted that comments pointed out the many  
2 problems with text messaging, even as its own stand-alone option: among them, the  
3 undue and unreasonable burden of requiring consumers in a grocery store to send a  
4 text message for every product they put in their cart in order to find out if it is  
5 genetically engineered or not; and that text messaging could result in additional  
6 charges or costs to consumers for individual text messages or additional costs for  
7 upgraded phone plans. 83 Fed. Reg. at 65,829 (“consumers may be subject to a text  
8 message fee charged through their wireless telephone carrier”).

9 116. USDA rationalized its text message decision by stating that in its view  
10 the Act required it to set forth a “comparable option to access the BE disclosure, not  
11 that the option be comparable to on-package labeling.” *Id.* at 65,856. The final rule  
12 does not explain how a comparable option to the inaccessible QR code option fulfills  
13 the Act’s purpose of providing mandatory disclosure of GE information to consumers  
14 or brings meaning to Congress’s mandatory Study.

### 15 C. Injuries

16 117. Plaintiffs and their members are injured by USDA’s rulemaking  
17 decision to permit companies to use QR Codes alone for the bioengineered  
18 disclosure, despite the agency’s own determination that such disclosure will be  
19 wholly insufficient for many Americans. These consumer and retailer members are  
20 injured by USDA’s decision to nonetheless allow that QR Code “disclosure” for  
21 genetically engineered foods without any additional on-package disclosure also  
22 required, as mandated by Congress.

23 118. Many of Plaintiffs’ members lack smart phones to access the  
24 bioengineered disclosure, or, even if they have smart phones, are not familiar with  
25 the technology to be able to scan products. Other members live in areas in which  
26 broadband internet is not available in their normal grocery store, and retailers  
27 would need to start providing WiFi at their own expense. Other members would be  
28



1 unduly burdened by attempting to scan with a phone scanner dozens of food  
2 products to find out basic production information mandated by federal law during  
3 each trip to the grocery store. Retailers are not able to provide this information to  
4 their customers in a meaningful way, consistent with other clear forms of labeling.

5 119. These members who will not be able to access the information include  
6 a higher percentage of minorities, elderly, low-income, and rural residents. These  
7 members are injured by not having the same information provided to others as to  
8 whether their food is produced with genetic engineering, or not.

9 120. Plaintiffs and their members are also injured by USDA's decision to  
10 "remedy" the insufficiency of QR Codes by allowing companies the separate option  
11 of text message disclosures. The rule allows QR Code disclosures alone, without any  
12 additional disclosure, including text messages.

13 121. Even by themselves, text messages are not comparable to clear, on-  
14 package traditional labeling. For similar reasons as QR Codes, they injure members  
15 by not providing adequate access to the bioengineered disclosure. Members would  
16 be unduly burdened by attempting to text a 1-800 number for dozens of food  
17 products to find out basic food product information mandated by law. They would be  
18 charged increased fees for text messaging or have to purchase more expensive  
19 mobile phone plans.

20 122. These injuries would be remedied by a decision vacating the  
21 rulemaking.

## 22 23 **FIRST CAUSE OF ACTION**

### 24 ***Electronic and Digital Disclosures (Violation of the*** 25 ***Disclosure Act and the APA)***

26 123. Plaintiffs re-allege and incorporate by reference the allegations set  
27 forth in paragraphs 1 through 122 of this Complaint as if fully set forth herein.

1           124. The Disclosure Act directed Defendants to study the “potential  
2 technological challenges that may impact whether consumers would have access to  
3 the bioengineering disclosure through electronic or digital disclosure methods.” 7  
4 U.S.C. § 1639b(c)(1). The Act set forth detailed factors. 7 U.S.C. § 1639b(c)(3)(A)-(E).

5           125. If USDA determined, based on the statutorily required Study and the  
6 existing record that “consumers, while shopping, would not have sufficient access to  
7 the bioengineering disclosure through electronic or digital disclosure methods,” then  
8 the Act required that USDA “shall provide additional and comparable options” for  
9 consumers for accessing the disclosure. 7 U.S.C. § 1639b(c)(4). USDA’s Study did  
10 formally determine that the electronic and digital disclosures would not provide  
11 consumers the information that Congress intended to be disseminated by passing  
12 the Act.

13           126. USDA nonetheless allowed manufacturers to still “disclose” that fact  
14 through QR Codes alone, without any “additional” disclosure means for consumers.  
15 By requiring USDA to mandate additional and comparable options in these  
16 circumstances, this was exactly the result Congress was intending to avoid.  
17 Defendants’ interpretation of the “additional and comparable option” requirement  
18 as still allowing insufficient and inaccessible disclosure methods such as QR codes,  
19 despite the agency’s own determinations, renders the Study and Congress’s orders  
20 to apply it, meaningless.

21           127. By the plain language of the statute and Congress’s intent, if a  
22 company wants to use a QR Code, it must also place on the food package an  
23 additional and comparable disclosure method to on-package and symbol disclosure.  
24 Otherwise the purpose of the study and Congress’s concerns about the accessibility  
25 of QR codes are circumvented. USDA’s decision makes the Study and the directive  
26 to USDA to address problems it found both empty Congressional mandates.

27

28

1           128. That decision violated the Act, as well as was arbitrary and capricious  
2 agency action, contrary to law and the evidence in the record.

3           129. USDA’s “remedy” for the insufficient QR Code disclosures was to add a  
4 fourth option for manufacturers: a text message option. Even assuming *arguendo*  
5 that text messages would be sufficient to comply with the statute—they are not, as  
6 explained below—but regardless, because QR Codes can still be used alone, that  
7 does nothing to address Congress’s concerns about QR Codes and the Study’s  
8 confirmatory findings on their inadequacies. Adding text messages elsewhere is  
9 adding nothing “additional” at all. Defendants failed to adequately consider or  
10 address how providing text messages as an “additional and comparable option” for  
11 manufacturers will ensure access for the millions of Americans determined by the  
12 Secretary to lack access to QR codes. As such it is arbitrary and capricious agency  
13 action, contrary to law and the record evidence.

14           130. Additionally, text messaging itself as a stand-alone disclosure method  
15 violates the Act and the APA. Text messaging suffers from some of the same  
16 problems as QR Codes. Defendants arbitrarily and capriciously failed to address the  
17 Study’s findings and other record evidence that text messaging also is insufficient  
18 for many consumers due to lack of cell reception, consumers’ failure to associate a  
19 phone number with GE disclosure information, and consumers’ concerns about their  
20 ability to receive disclosure information via text message.

21           131. Text messaging is contrary to the Act because it is not “comparable” to  
22 on-package labeling or symbols. Nor is it even “additional” because the Act already  
23 requires that all labeling be accompanied by a telephone number to call.

24           132. The agency’s decision to choose text messaging because it is  
25 “comparable” to QR Code labeling was also arbitrary and capricious, contrary to the  
26 APA and the Act. It vitiates Congress’s intent to have the agency investigate a  
27 likely problem area, but then “remedy” it with a new measure that shares similar  
28

1 problems with what was held insufficient. The proper comparator is that which is  
2 sufficient to provide consumers the information intended (on-package disclosure),  
3 not what is already held insufficient. That result remedies the problem and makes  
4 the mandated Study meaningful. USDA's interpretation and application of  
5 "additional" and "comparable" options is arbitrary and capricious and contrary to  
6 law.

7       133. USDA's failure to comply with the Act and the APA by allowing QR  
8 codes and text messages in the manner it did harms Plaintiffs' and their members'  
9 interests.

## 11   **II. Claim 2: USDA's Exclusion of Common, Similar Terms**

12       134. Since the introduction of the technology nearly three decades ago, the  
13 common, well-established terminology surrounding these issues has been  
14 "genetically engineered" and/or "genetically modified." These are the terms that  
15 have been employed in the public space, the scientific literature, the policy dialogue,  
16 and the marketplace. For these reasons, these terms, as well as their shorthand,  
17 "GE foods" and "GMOs," are the terms with which consumers are familiar. Yet in  
18 the final rule USDA excluded their use from the standard. That decision was  
19 arbitrary and capricious.

### 20       **A. The Statute**

21       135. While the Act generally uses "bioengineered," it expressly includes  
22 "and any similar term" when it defines the "bioengineering" classification. 7 U.S.C.  
23 § 1639(1).

24       136. As to "bioengineered" itself, the definition goes on to define it as food  
25 that "contains genetic material that has been modified through in vitro recombinant  
26 deoxyribonucleic acid (DNA) techniques; and for which modification could not  
27 otherwise be obtained through conventional breeding or found in nature." *Id.* This is  
28

1 the common definition of “genetic engineering” or “genetic modification,” which  
2 USDA has approved in other programs as “GE”/ “GMO,” and logically uses both  
3 “genetic material” and “modified” and “modification” in it. *Id.*

4 137. At other places, the statute uses the similar, commonly known terms of  
5 “GE” and “GMO.” For example, Congress used and equated the known terminology  
6 as “similar” in directing that food products separately having USDA organic  
7 certification is sufficient to also label that product as “not bioengineered, non-GMO,  
8 or other similar claim” under the Act. 7 U.S.C. § 6524 (organic “certification shall be  
9 considered sufficient to make a claim regarding the absence of bioengineering in the  
10 food, such as “not bioengineered”, “non-GMO”, or another similar claim”).

11 138. In another clause, the savings clause, the Act similarly establishes  
12 that “a food may not be considered ‘not bioengineered’, ‘non-GMO’, or any other  
13 similar claim describing the absence of bioengineering in the food solely because the  
14 food is not required to bear a disclosure that the food is bioengineered under this  
15 subchapter.” 7 U.S.C. § 1639c(c). Here again Congress grouped together “not  
16 bioengineered” and “non-GMO,” and “any other similar claim, describing the  
17 absence of bioengineering.”

## 18 **B. The Rulemaking**

19 139. In the summer 2017 scoping notice, USDA said it was determining  
20 what on-package text to include.<sup>90</sup> The agency noted that some food manufacturers  
21 were already using language compliant with the Vermont law to “identify their food  
22 products as bioengineered, such as “Produced with Genetic Engineering.”<sup>91</sup> As such  
23 the agency said that it was “considering whether to allow manufacturers to continue  
24 using these disclosures under the new national bioengineered disclosure standard.”

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26 <sup>90</sup> AMS, *Proposed Rule Questions under Consideration*, at Qt. 12.

27 <sup>91</sup> *Id.*

1 It also said the agency was also considering “whether manufacturers should be  
2 allowed flexibility to choose from more than one acceptable phrase.”<sup>92</sup>

3 140. Documents received pursuant to the Freedom of Information Act show  
4 that in a follow up document from a May 2, 2017 USDA meeting titled “MPR  
5 Discussion on Bioengineered Food Disclosure Topics” the agency acknowledged that  
6 the agency “could view ‘bioengineering’ and the term ‘genetic modification’ and  
7 corresponding phrases ‘bioengineered food’ and ‘genetically modified organism’ or  
8 ‘GMO’ as similar” due to consumers’ familiarity with these terms. The agency’s only  
9 concern in doing so was that “GMO could have a negative connotation in the  
10 marketplace.”

11 141. However in the 2018 proposed rule, USDA proposed only using the  
12 terms “bioengineered food” or “bioengineered food ingredient.” The agency said it  
13 “considered using alternative phrases such as “genetically modified” or “genetically  
14 engineered,” but said it was “not proposing any similar terms because we believe  
15 the statutory term, ‘bioengineering,’ adequately describes food products of the  
16 technology that Congress intended to be within the scope of the [Act].” 83 Fed. Reg.  
17 at 19,871.

### 18 C. Public Comments and Evidence

19 142. Numerous commenters presented evidence to the agency in opposition  
20 to its decision to limit the text to only bioengineered, and exclude the more  
21 commonly used terminology of “genetic engineering.”<sup>93</sup> These comments emphasized  
22 that “bioengineered” is not a term currently used by consumers, policymakers, food  
23

24 \_\_\_\_\_  
25 <sup>92</sup> AMS, *Proposed Rule Questions under Consideration*, at Qt. 12.

26 <sup>93</sup> See National Co-op Grocers comment, at 5; Natural Products Association  
27 comment, at 16; Organic Valley comment, at 3; Stonyfield comment, at 3; Unilever  
28 comment, at 6; Danone/Mars/Nestle/Unilever joint comment, at 2; Wawa comment,  
at 2; Whole Foods comment, at 3-4.

1 scientists, or companies in the marketplace.<sup>94</sup> Rather the much more well-known  
2 and common terminology of all of these relevant spaces are the similar terms of  
3 “genetic engineering” and “genetically modified.”

4 143. The terms “genetically modified,” “genetically engineered” and the  
5 acronyms “GMO,” “GE,” and “GM” are far more commonly used to designate food  
6 crops and foods subject to the Act’s disclosure than “bioengineered.” This is true of  
7 usage by the federal government itself, the scientific community, the political world,  
8 the food industry, and the general public.

#### 9 **D. Federal Agencies**

10 144. Many federal agencies, including USDA in other capacities, favor the  
11 term “genetically engineered” in their regulatory and guidance materials, and have  
12 concluded that the term “genetically engineered” is interchangeable with  
13 “bioengineered.”

14 145. The White House Office of Science and Technology Policy (OSTP)  
15 provides policy direction to regulators of agricultural biotechnology and uses  
16 “genetic engineering.”<sup>95</sup>

17 146. The Government Accountability Office uses “genetically engineered.”<sup>96</sup>

18 147. EPA uses “genetically engineered.”<sup>97</sup>

19  
20 <sup>94</sup> See Mars comment, at 3; Schwan’s comment, at 8.

21 <sup>95</sup> See Emerging Techs. Interagency Policy Coordination Comm., *National Strategy*  
22 *for Modernizing the Regulatory System for Biotechnology Products* (2016).

23 <sup>96</sup> U.S. Government Accountability Office, *Genetically engineered crops: USDA needs*  
24 *to enhance oversight and better understand impacts of unintended mixing with other*  
25 *crops* (2016); U.S. Government Accountability Office, *Genetically engineered crops:*  
26 *Agencies are proposing changes to improve oversight, but could take additional steps*  
27 *to enhance coordination and monitoring* (2008).

28 <sup>97</sup> See e.g. EPA, *Registration of Dicamba for Use on Genetically Engineered Crops*,  
[https://www.epa.gov/ingredients-used-pesticide-products/registration-dicamba-use-](https://www.epa.gov/ingredients-used-pesticide-products/registration-dicamba-use-genetically-engineered-crops)  
29 [genetically-engineered-crops](https://www.epa.gov/ingredients-used-pesticide-products/registration-dicamba-use-genetically-engineered-crops); See also EPA, *Overview of Plant Incorporated*  
30 *Protectants*, [https://www.epa.gov/regulation-biotechnology-under-tsca-and-](https://www.epa.gov/regulation-biotechnology-under-tsca-and-fifra/overview-plant-incorporated-protectants)  
31 [fifra/overview-plant-incorporated-protectants](https://www.epa.gov/regulation-biotechnology-under-tsca-and-fifra/overview-plant-incorporated-protectants).



1 148. Even for this rulemaking, USDA's own website and landing page called  
2 it the "GMO Disclosure" until, on information and belief, at least February of  
3 2018.<sup>98</sup> Indeed, the URL still does, *see* [https://www.ams.usda.gov/rules-regulations-  
4 terms/gmo-labeling-disclosure](https://www.ams.usda.gov/rules-regulations-terms/gmo-labeling-disclosure).

5 149. USDA also submitted to the U.S. Patents and Trademark office at  
6 least one proposed symbol for this forthcoming bioengineered disclosure that was  
7 "GMO" in a circle.

8 150. USDA in other contexts relies almost entirely on the term "genetic  
9 engineering" and "GE," both in its regulations and in materials that are directed to  
10 the public, for its regulation of GE plants under the Plant Protection Act. *See* 7  
11 C.F.R. Part 340.<sup>99</sup>

12 151. USDA also currently has a Process Verified Program (PVP) for  
13 verifying companies' claims on the absence of "GE"/ "GMO" ingredients in products  
14 in which the agency continues to use the terms "GE" and "GMO" on labels.  
15 Beginning in 2015, the agency announced that, in response to pressures from  
16 industry, it would begin verifying companies' claims on the absence of "GE"/ "GMO"  
17 ingredients in products. This PVP allows companies to pay AMS to verify a claim,  
18 and if approved, to market their products with the USDA process verified label as  
19 "GE" or "GMO" free.

20 152. Through this PVP, USDA has repeatedly verified products as "GE" or  
21 "GMO" free from companies whose definitions of "GE"/"GMO" directly align with  
22 the definition of bioengineered in the Disclosure Act. For example, USDA verifies 70  
23 foods from one of the world's largest suppliers of fresh and prepared produce, Del

24 \_\_\_\_\_  
25 <sup>98</sup> *See, e.g.*

26 [https://web.archive.org/web/20170713175116/https://www.ams.usda.gov/rules-  
27 regulations-terms/gmo-labeling-disclosure](https://web.archive.org/web/20170713175116/https://www.ams.usda.gov/rules-regulations-terms/gmo-labeling-disclosure).

28 <sup>99</sup> *See also* Biotechnology Regulatory Services, [https://www.aphis.usda.gov  
/aphis/ourfocus/biotechnology](https://www.aphis.usda.gov/aphis/ourfocus/biotechnology).



1 Monte, as “non-GMO.” Del Monte defines GMO’s as “foods that have been derived  
2 from organisms whose genetic material (DNA) has been modified through the direct  
3 introduction of a gene from a different organism in a laboratory vs. traditional plant  
4 breeding methods.”<sup>100</sup>

5 153. In its PVP, USDA not only allows the use of the terms “GE” and  
6 “GMO,” but insisted on becoming the first U.S. agency to use these terms for  
7 labeling at the outset. Materials received via the Freedom of Information Act  
8 (FOIA) show emails from the senior advisor to the Secretary of USDA to AMS  
9 members working on a PVP for non-GE claims on packaging in 2015 that declared  
10 the use of “GMO”/ “GE” “the official approach and the policy approach of our  
11 Department as a whole” and emphasized the importance of remaining “firm and  
12 unified” in explaining the agency’s rationale behind the use of the terms “GE”/  
13 “GMO.”

14 154. That rationale, explained in the agency’s 2015 Discussion Points on  
15 “GE”/ “GMO” terminology, insisted that the term, “GMO,” had “a rightful and  
16 undisputed place” in communicating with consumers to ensure public  
17 understanding of the claims on packaging. USDA described the term, “GMO,” as  
18 “permeat[ing] American culture” and emphasized that “GE”/ “GMO” are “nearly  
19 universally utilized, understood and communicated by all American journalists,  
20 broadcasters, public officials, and throughout culture and the public at large as  
21 pertaining to products that have been derived in part through genetic engineering.”  
22 USDA also noted that “GE”/ “GMO” are proper terms as they repeatedly appear on  
23 the agency’s own website and other areas of USDA program work and public  
24 communication.

25  
26  
27 <sup>100</sup> Del Monte, *Frequently Asked Questions*, <https://www.delmonte.com/our-story>.

1           155. Further, more materials received via FOIA from USDA show that  
2 USDA's 2015 policy considered the term, "GMO," as mandated by the Plain Writing  
3 Act of 2010, Executive Order 13563, and associated executive branch directives to  
4 ensure public recognition of the term. Specifically, the agency's Discussion Points  
5 quoted a 2011 federal directive from OIRA which states: "It is important to  
6 emphasize that agencies should communicate with the public in a way that is clear,  
7 simple, meaningful, and jargon-free. A lack of clarity may prevent people from  
8 becoming sufficiently aware of programs or services..." The agency insisted that  
9 both "GE" and "GMO" were mandatory to ensure public recognition of the  
10 terminology of government materials.

11           156. Since the passing of the Disclosure Act, USDA has not removed this  
12 terminology for its PVP, and companies continue working with USDA to verify their  
13 non-GMO/non-GE claims.

14           157. USDA's sub-agency Food Safety Inspection Service (FSIS) also  
15 continues to use this terminology in labels. FSIS is the agency responsible for  
16 regulating meat, poultry, and egg products, pursuant to the Federal Meat  
17 Inspection Act (FMIA)<sup>101</sup>, the Poultry Products Inspection Act (PPIA),<sup>102</sup> and the  
18 Egg Products Inspection Act (EPIA).<sup>103</sup> This authority includes the labeling of meat,  
19 poultry, and egg products, which must be approved by USDA before products can  
20 enter commerce.<sup>104</sup> Thus these are products that (in the main) do not fall under the  
21 scope of the Act,<sup>105</sup> and instead will remain regulated in labeling by FSIS.

22           158. Pursuant to these standards, FSIS has compliance guidance for  
23 companies seeking to make a label or labeling claims concerning GE absence

24 \_\_\_\_\_  
25 <sup>101</sup> 21 U.S.C. §§ 601–695.

26 <sup>102</sup> 21 U.S.C. §§ 451–470.

27 <sup>103</sup> 21 U.S.C. §§ 1031–1056.

28 <sup>104</sup> See 21 U.S.C. § 607; 21 U.S.C. § 457; 21 U.S.C. § 1036.

<sup>105</sup> 7 U.S.C. § 1639a(c)(2).

1 labeling: the fact that (1) bioengineered or GE ingredients were not used in a meat,  
 2 poultry, or egg product, or (2) how companies can make a labeling claim that a  
 3 product was produced from livestock that were not fed GE grain or feed.<sup>106</sup>

4 159. FSIS allows the use of the terms “genetically modified organism” or  
 5 “GMO” and equates them with bioengineered:

6 At this time, FSIS approves negative claims that contain the terms  
 7 “genetically modified organism” or “GMO” for meat, poultry and egg  
 8 products that do not contain bioengineered ingredients and/or that are  
 9 derived from livestock or poultry that do not consume bioengineered  
 10 feed when substantiated with evidence of compliance with standards  
 11 verified by a third-party certifying organization. FSIS does not define  
 12 “bioengineered.” Instead, FSIS relies on third-party certifiers to verify  
 13 that products meet their standards for the absence of bioengineered or  
 14 non-GMO material. The certifier can utilize either the AMS’s definition  
 15 of “bioengineering” in Pub. L. 114-216 or the U.S. Food and Drug  
 16 Administration’s (FDA’s) definition of “modern biotechnology.” FSIS  
 17 also will continue to allow the use of synonymous terms such as  
 18 “genetically engineered” or “GE.”

15 FSIS examples include:

16 “Pasture raised beef fed a vegetarian diet with no bioengineered  
 17 ingredients,”  
 18 “Chicken raised on a diet containing no genetically engineered  
 19 ingredients,” or  
 20 “Derived from beef fed no GMO feed.”

21 Similarly, with respect to acceptable claim terminology for multi-ingredient  
 22 products, examples of such claims FSIS will accept are:

23 “Contains No GMO ingredients,”  
 24 “No genetically modified ingredients,”  
 25 “Ingredients used are not bioengineered,”  
 26 “No genetically engineered ingredients through the use of modern  
 27

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28 <sup>106</sup> See USDA FSIS, *Statements That Bioengineered or Genetically Modified (GM) Ingredients or Animal Feed Were Not Used in Meat, Poultry, or Egg Products*, <https://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/claims-guidance/procedures-nongenetically-engineered-statement>.

1 biotechnology.”<sup>107</sup>

2 160. After the passage of the Disclosure Act, in August 2016, and again  
3 after the final rule in 2018, FSIS amended their compliance guide to revise it but re-  
4 affirmed the allowed “GE” or “GMO” terminology.<sup>108</sup>

5 161. Consumer information from FDA most often refers to genetically  
6 engineered and GE plants rather than bioengineered.<sup>109</sup> FDA equates and has  
7 approved of the accurate labeling use of these similar terms, concluding in two food  
8 product labeling guidance documents that “bioengineering” is interchangeable with  
9 the terms “modern biotechnology” and “genetic engineering.”<sup>110</sup> “The term ‘modern  
10 biotechnology’ may alternatively be described as ‘recombinant DNA (rDNA)  
11 technology,’ ‘genetic engineering,’ or ‘bioengineering.’” *Id.* FDA explained that  
12  
13

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14 <sup>107</sup> *Id.*

15 <sup>108</sup> See USDA FSIS, *Statements That Bioengineered or Genetically Modified (GM)*  
16 *Ingredients or Animal Feed Were Not Used in Meat, Poultry, or Egg Products*,  
17 [https://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-](https://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/claims-guidance/procedures-nongenetically-engineered-statement)  
18 [compliance/labeling/claims-guidance/procedures-nongenetically-engineered-](https://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/claims-guidance/procedures-nongenetically-engineered-statement)  
19 [statement](https://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/claims-guidance/procedures-nongenetically-engineered-statement).

20 <sup>109</sup> FDA, *Food from New Plant Varieties*, [https://www.fda.gov/food/food-ingredients-](https://www.fda.gov/food/food-ingredients-packaging/food-new-plant-varieties)  
21 [packaging/food-new-plant-varieties](https://www.fda.gov/food/food-ingredients-packaging/food-new-plant-varieties) (“The FDA regulates human and animal foods  
22 derived from plants including those that have been developed using genetic  
23 engineering or genome editing techniques, commonly referred to as ‘GMOs’  
24 (Genetically Modified Organisms) or as ‘bioengineered.’”); FDA,  
25 [https://www.fda.gov/food/food-new-plant-varieties/understanding-new-plant-](https://www.fda.gov/food/food-new-plant-varieties/understanding-new-plant-varieties)  
26 [varieties](https://www.fda.gov/food/food-new-plant-varieties/understanding-new-plant-varieties) (same).

27 <sup>110</sup> FDA, *Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have*  
28 *or Have Not Been Derived from Genetically Engineered Plants*,  
[https://www.fda.gov/regulatory-information/search-fda-guidance-](https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-voluntary-labeling-indicating-whether-foods-have-or-have-not-been-derived)  
[documents/guidance-industry-voluntary-labeling-indicating-whether-foods-have-or-](https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-voluntary-labeling-indicating-whether-foods-have-or-have-not-been-derived)  
[have-not-been-derived](https://www.fda.gov/regulatory-information/search-fda-guidance-documents/guidance-industry-voluntary-labeling-indicating-whether-foods-have-or-have-not-been-derived); FDA, *Draft Guidance for Industry: Voluntary Labeling*  
*Indicating Whether Foods Has or Has Not Been Derived from Genetically*  
*Engineered Atlantic Salmon*, [https://www.fda.gov/regulatory-information/search-](https://www.fda.gov/regulatory-information/search-fda-guidance-documents/draft-guidance-industry-voluntary-labeling-indicating-whether-food-has-or-has-not-been-derived)  
[fda-guidance-documents/draft-guidance-industry-voluntary-labeling-indicating-](https://www.fda.gov/regulatory-information/search-fda-guidance-documents/draft-guidance-industry-voluntary-labeling-indicating-whether-food-has-or-has-not-been-derived)  
[whether-food-has-or-has-not-been-derived](https://www.fda.gov/regulatory-information/search-fda-guidance-documents/draft-guidance-industry-voluntary-labeling-indicating-whether-food-has-or-has-not-been-derived).

1 “[t]hese terms are often used interchangeably by industry, federal agencies,  
2 international bodies, and other interested stakeholders. . . .”<sup>111</sup>

3 162. FDA guidance explains that manufacturers can voluntarily label their  
4 food as not genetically engineered, so long as such information is truthful and not  
5 misleading. FDA gives several examples of potential accurate labeling statements,  
6 such as:

7 “Not bioengineered.”

8 “Not genetically engineered.”

9 “Not genetically modified through the use of modern biotechnology.”

10 “We do not use ingredients that were produced using modern biotechnology.”

11 “This oil is made from soybeans that were not genetically engineered.”

12 “Our corn growers do not plant bioengineered seeds.”<sup>112</sup>

13 163. In these labeling guidance documents, FDA and FSIS are applying  
14 their statutory mandates, under the Federal Food, Drug and Cosmetic Act  
15 (FFDCA), the FMIA, the PPIA, and the EPIA, that prohibit foods from being  
16 misbranded.<sup>113</sup> A food is misbranded if its labeling is “false or misleading in any  
17 particular.”<sup>114</sup> These guidance statements are authoritative statements from FDA  
18 and USDA that using “GE” and “GMO” interchangeably with “bioengineering” is  
19 not false or misleading, and that producers may use them in order to avoid claims of  
20 misbranding.

21 164. The Disclosure Act includes an express admonition that it is not  
22 stripping FDA of any FFDCA authority or any party of any FFDCA obligation,  
23 meaning that the duty to not label in a false and misleading way still applies and

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24 <sup>111</sup> FDA, *Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have*  
25 *or Have Not Been Derived from Genetically Engineered Plants*,  
<https://www.fda.gov/media/120958/download>.

26 <sup>112</sup> *Id.* at 7.

27 <sup>113</sup> 21 U.S.C. § 331(a).

28 <sup>114</sup> 21 U.S.C. § 343(a)(1).

1 there is no regulatory shield simply because a product is classified and labeled  
2 under the Act. 7 U.S.C. § 1639c(b)(1).

### 3 **E. Federal and State Legislation**

4 165. Since the 98th Congress (1983-84) there have been 125 federal bills  
5 containing the phrase “genetically engineered” and 56 bills containing the phrase  
6 “genetically modified” in the context of GE foods.<sup>115</sup>

7 166. The use of the term “bioengineered” in past legislation all appears  
8 related to either defense (warfare) or medical contexts of biotechnology. A Westlaw  
9 search for the term “bioengineered” or “bioengineer[]” returns only 14 prior search  
10 results for the term appearing in federal statutes, four of which are in reference to  
11 the National Institute of Biomedical Imaging and Bioengineering, and two of which  
12 are notes to Federal Rules of Evidence, none in this context. The use of the term  
13 “bioengineered” shows up in federal regulations approximately seven times, none in  
14 this context.

15 167. At the state level, every state that enacted labeling laws (Vermont,  
16 Maine, and Connecticut) prior to the federal law’s passage used the common  
17 “genetically engineered” terminology and not “bioengineered.”

18 168. Every state that introduced labeling legislation (over 30) in the years  
19 prior used the same common language and not “bioengineered.”<sup>116</sup>

### 20 **F. International Use**

21 169. Internationally, none of the top U.S. trade partners for U.S. food  
22 exports that require GE labeling use the term “bioengineered.” For example, the

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23 <sup>115</sup> Govtrack, Advanced Search, [https://www.govtrack.us/congress/bills/browse#text=%22genetically+engineered%22+&congress=\\_\\_ALL\\_\\_](https://www.govtrack.us/congress/bills/browse#text=%22genetically+engineered%22+&congress=__ALL__). ; Govtrack, Advanced  
24 Search, [https://www.govtrack.us/congress/bills/  
25 browse#text=%22genetically+modified%22+&congress=\\_\\_ALL\\_\\_](https://www.govtrack.us/congress/bills/browse#text=%22genetically+modified%22+&congress=__ALL__).

26 <sup>116</sup> *GE Food Labeling: States Take Action* (June 10, 2014),  
27 <https://centerforfoodsafety.org/issues/976/ge-food-labeling/fact-sheets/3067/ge-food-labeling-states-take-action>.

1 European Union uses the terms, “GM” or “GMO,” for labeling,<sup>117</sup> while China uses  
 2 “GM.”<sup>118</sup> On information and belief, all of them use some variation of “genetically  
 3 engineered” or “genetically modified.”<sup>119</sup>

4 1) *Scientific Community*

5 170. In the scientific community, Committees of the National Academy of  
 6 Sciences have addressed genetically engineered foods in several book-length  
 7 reports, and frequently use the term “genetically engineered (GE)” food or crop, but  
 8 seldom or never use the term “bioengineered.”

9 171. A search by CFS of PubMed publications on June 23, 2018 revealed  
 10 that the scientific/medical community most often writes of genetically modified  
 11 food(s) (96.3 percent of hits), less frequently of genetically engineered foods(s) (2.8  
 12 percent of hits), and hardly ever of bioengineered food(s) (just 0.8 percent of hits).

13 2) *Bioengineered alone*

14 172. Etymologically, the term means “engineering life,” and thus has a  
 15 broad array of meanings (discussed below) beyond the direct manipulation of  
 16 genetic material conveyed by the more precise terms, “genetic-ally engineered” and  
 17 “genetic-ally modified.” The prefix “bio-“ is widely understood to mean “life” – from  
 18 high school and college biology courses, through the interchangeable use of biology  
 19 and “life sciences,” and via a plethora of other common terms with the bio- prefix.

20 173. FDA found in focus group testing that consumers “tended to evaluate  
 21 the terms” used to signify genetically modified foods “linguistically,” thus the  
 22  
 23

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24 <sup>117</sup> European Commission, *Traceability and labeling*, available at  
 25 [https://ec.europa.eu/food/plant/gmo/traceability\\_labelling\\_en](https://ec.europa.eu/food/plant/gmo/traceability_labelling_en).

26 <sup>118</sup> Xiao Zhu, et.al, *Genetically Modified Food Labeling in China: In Pursuit of a  
 Rational Path*, 71 Food Drug L.J. 30 (2016).

27 <sup>119</sup> *Genetically Engineered Food Labeling Laws*, available at  
 28 <https://www.centerforfoodsafety.org/ge-map/>.



1 vagueness and breadth of “bioengineered” as “engineered life” would confuse many  
2 consumers.<sup>120</sup>

3 174. The term was coined in 1954 to mean the application of engineering  
4 principles to biological and medical sciences.<sup>121</sup> Ever since, bioengineering has been  
5 associated with either medical science and technology, or space exploration, not food  
6 production.

7 175. The first bioengineering program in U.S. higher education—established  
8 in 1966 at the University of California at San Diego—conducts research on tissue  
9 engineering, regenerative medicine, and four disease focus areas: cancer,  
10 cardiovascular disease, metabolic disorders, and neurodegenerative diseases.”<sup>122</sup>

11 176. MIT’s biological engineering program likewise has a strong biomedical  
12 focus, with research areas including biomaterials, biophysics, cell and tissue  
13 engineering, pharmacology, and toxicology. MIT refers to this program by the  
14 initials “BE,” the same acronym that USDA proposed as a symbol for GE foods.<sup>123</sup>

15 177. The other major use relates to space exploration. The National  
16 Aeronautics and Space Administration has a Bioengineering Branch whose mission  
17 is “developing next generation technologies to enable humans to live beyond low  
18 Earth orbit for extended periods.”<sup>124</sup>

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21 <sup>120</sup> Levy, A.S., Derby, B.M., *Report on Consumer Focus Groups on Biotechnology*,  
22 Consumer Studies Team, Center for Food Safety and Nutrition, FDA, Washington,  
D.C. (2000).

23 <sup>121</sup> Joe Buchanunn, *Professor Heinz Wolff, scientist and TV presenter, dies aged 89*,  
24 Brunel University, London (Dec. 16, 2017), <https://www.brunel.ac.uk/news-and-events/news/articles/Professor-Heinz-Wolff-scientist-and-TV-presenter-dies-aged-89>.

25 <sup>122</sup> University of California San Diego, *About Bioengineering*,  
<http://bioengineering.ucsd.edu/about>.

26 <sup>123</sup> MIT, *About Bioengineering*, <https://be.mit.edu/about>.

27 <sup>124</sup> NASA, *About Bioengineering*, <https://www.nasa.gov/ames/research/space-biosciences/bioengineering-branch>.



1           **G.     The Marketplace and Current Food Product Labeling**

2           178. In the marketplace, the food industry’s use of GMO-free label claims  
3 for absence claims has accustomed consumers to “GMO” as the term of choice to  
4 designate genetically modified crop content (or its absence). The Non-GMO Project  
5 label, which reads “Non-GMO Project Verified,” is found on more than 43,000  
6 products. The market already uses “non-GMO” labels, like the Non-GMO Project  
7 Verified label, which is found on more than 43,000 products with sales exceeding  
8 \$19.2 billion.<sup>125</sup>

9           179. The same is true for GE content: many companies are already out in  
10 the marketplace labeling with the text “produced with genetic engineering” or “may  
11 be produced with genetic engineering.” These include Campbell Soup, General  
12 Mills, Mars, Inc., Frito Lay, and Dannon, among others—all of which use terms like  
13 “produced with genetic engineering” or “partially produced with genetic  
14 engineering,” while none use “bioengineered.”

15           180. USDA has also contributed to consumers’ familiarity by choosing the  
16 terms “GE” or “GMO” for use in its PVP. In addition to appearing on products from  
17 the major brand, Del Monte, USDA verified non-GMO claims currently appear on  
18 products from George’s Inc., one of the top ten largest vertically integrated chicken  
19 producers in America, as well as Natural Products, Inc., a leading manufacturer of  
20 full fat soy ingredients, and several other companies.

21           181. Strong consumer preference for terms like “GMO” have been confirmed  
22 through studies, including research done by Campbell Soup Company. As Katie  
23 Cleary, Campbell’s senior manager of consumer insights stated, “Campbell has

24 \_\_\_\_\_  
25 <sup>125</sup> Non-GMO Project, *Product Verification FAQs*,  
26 <https://www.nongmoproject.org/product-verification/verification-faqs/>. Other  
27 marketplace labels also use the term “Non-GMO,” *see* Ken Roseboro, *New non-GMO*  
*certification programs emerging*, Organic and Non-GMO Report, [http://non-](http://non-gmoreport.com/articles/new-non-gmo-certification-programs-emerging/)  
28 [gmoreport.com/articles/new-non-gmo-certification-programs-emerging/](http://non-gmoreport.com/articles/new-non-gmo-certification-programs-emerging/).

1 tested nine labels related to GE food ingredients in the past few months and found  
2 individuals viewed use of terms like ‘bioengineered or genetically engineered’  
3 confusing . . . The feedback has been very consistent in our research that the  
4 preferred language is GMO.”<sup>126</sup>

5 182. Mars, Inc., the maker of M&Ms, Snickers, and Milky Way, also  
6 requested to use the term “genetic engineering” because “the terms ‘genetically  
7 engineered’ or ‘genetically modified’ are seen as more consumer-friendly as  
8 compared to the term ‘bioengineered,’ as consumers have been exposed to such  
9 terms for a longer period of time.”<sup>127</sup> Schwan’s, maker of Red Baron, Freschetta, and  
10 Tony’s frozen pizza, similarly stated the company’s concern “that consumers will not  
11 understand the term ‘bioengineered’ or ‘bioengineering’ when used to disclose under  
12 the Standard.”<sup>128</sup>

13 183. Numerous other major food manufacturers, trade groups, and grocers  
14 opposed the limiting of allowed text to “bioengineered” and explained to USDA that  
15 consumers need “GE”/ “GMO”, including the National Co-op Grocers, Natural  
16 Products Association, Organic Valley, Stonyfield, Unilever, Danone, Nestle, Wawa,  
17 and Whole Foods.

18 184. As FOIA materials received from USDA show, USDA itself determined  
19 that the term, “GMO,” “permeates American culture” and has “a rightful and  
20 undisputed place” in ensuring consumers understand claims on packaging. An  
21 email from the senior advisor to the Secretary of USDA to AMS members regarding  
22 the PVP for non-GE claims on packaging in 2015 declared the use of “GE”/ “GMO”  
23

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24 <sup>126</sup> Pegg JR, *Campbell Soup finds consumers prefer clear GMO labeling*, Food  
25 Chemical News (Sept. 8, 2016), [www.agra-net.com/agra/food-chemical-news/food-  
26 safety/packaging/campbell-soup-finds-consumersprefer-clear-gmo-labeling-  
526281.htm](http://www.agra-net.com/agra/food-chemical-news/food-safety/packaging/campbell-soup-finds-consumersprefer-clear-gmo-labeling-526281.htm).

27 <sup>127</sup> Mars comment, at 3.

28 <sup>128</sup> Schwan’s comment, at 8.

1 “the official approach and the policy approach of our Department as a whole” and  
 2 emphasized the importance of remaining “firm and unified” in explaining the  
 3 agency’s rationale behind the use of the terms “GE”/ “GMO.”

#### 4 H. Public Awareness

5 185. Online search engines provide good measures of public awareness that  
 6 corroborate the findings discussed above: namely, “bioengineered” is used primarily  
 7 in medical or other non-food contexts, and the public is far more familiar with  
 8 alternatives to “bioengineered food.”

9 186. In Google searches conducted on June 20, 2018, only 6.5% of hits for  
 10 the term “bioengineered” occurred in conjunction with “food” or “crop.” In contrast,  
 11 there were 2.4 times more hits for a subset of biomedical uses of the term.<sup>129</sup>  
 12 Similarly, in U.S. books, only 1 in 20 occurrences of “bioengineered” is conjoined  
 13 with food, in the term “bioengineered food” (Figure 1).

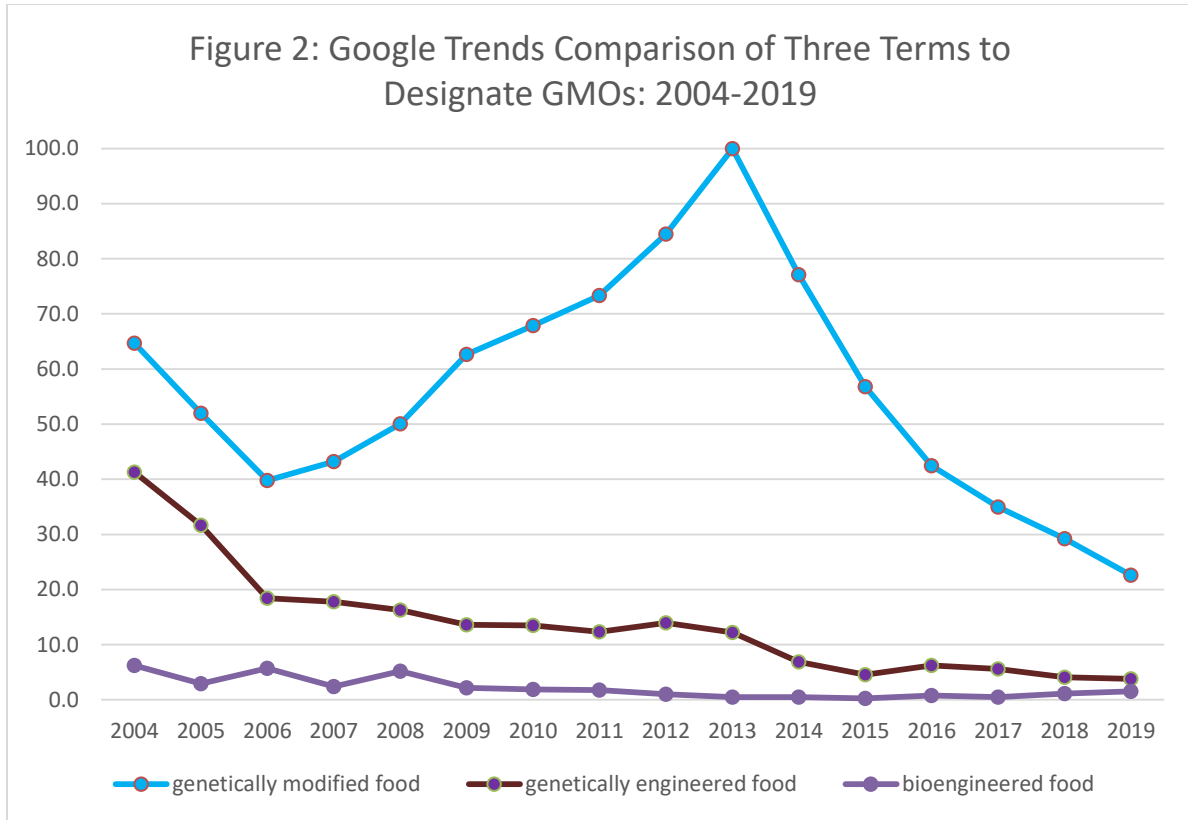


14  
 15 **Figure 1:** Search of U.S. Books for Use of “Bioengineered” With “Food”, Source:  
 16 Google Books Ngram Viewer (June 18, 2018).  
 17  
 18  
 19  
 20

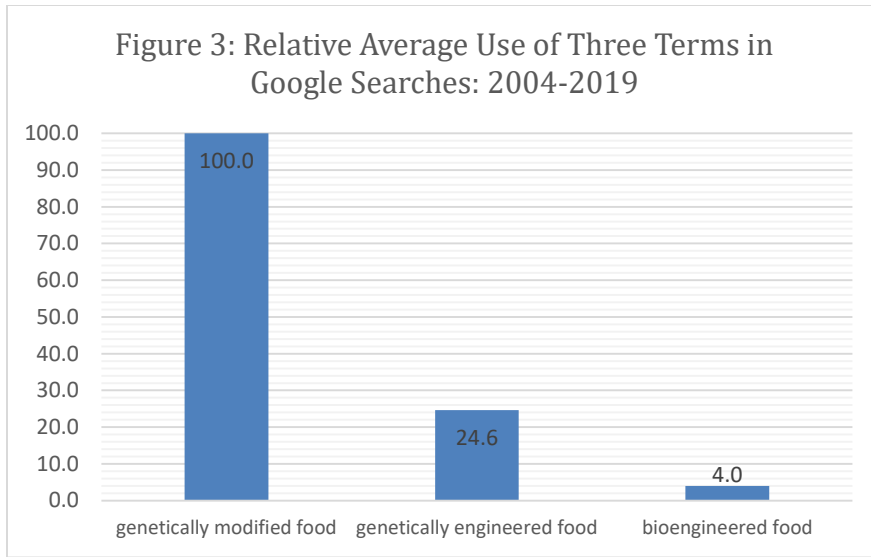
21  
 22 187. Google Trends reports the relative frequency with which users employ  
 23 various search terms over time, and so reflects familiarity with them among those  
 24 interested in learning more about a subject. In every year from 2004 to 2019, the  
 25

26  
 27 <sup>129</sup> Namely: “bioengineered human OR skin OR tissue OR organ OR kidney OR  
 28 pancreas OR heart OR liver OR graft OR hair.”

1 relative usage of three major search terms for GMOs was “genetically modified food”  
 2 > “genetically engineered food” > “bioengineered food.” Since 2009, the frequency of  
 3 “bioengineered food” as a search term has been negligible (Figure 2). Averaged over  
 4 the entire 16-year period, Americans used the former two search terms (combined)  
 5 over 31 times more frequently than “bioengineered food” (Figure 2).

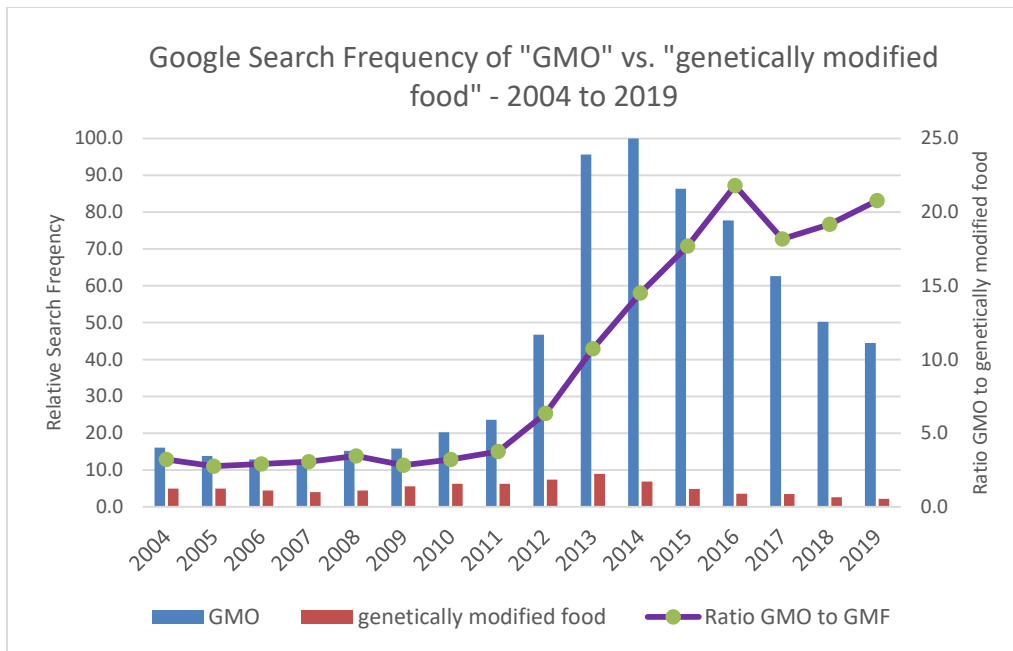


19 **Figure 2.** Based on Google Trends search  
 20 (<https://trends.google.com/trends/?geo=IT>) of the three indicated terms (4/24/20).  
 21 Monthly search frequency results averaged by year; results normalized with most  
 22 intensive search term/year combination (genetically modified food in 2013) set to  
 23 100.  
 24  
 25  
 26  
 27  
 28



10 **Figure 3:** Based on Google Trends search  
 11 (<https://trends.google.com/trends/?geo=IT>) of the three indicated terms (4/24/20).  
 12 Monthly results for entire period summed; results normalized with the most used  
 search term (genetically modified food) set to 100.

13 188. While “genetically modified food” is by far the most used full-text  
 14 search term, even its search usage is dwarfed by that of the acronym “GMO.” As  
 15 shown in Figure 4, “GMO” has become the overwhelmingly predominant term in the  
 16 U.S. since about 2010, and has been searched roughly 20 times more frequently  
 17 than “genetically modified food” since 2016. The disparity between “GMO” and  
 18 “bioengineered” food was too great to display graphically.  
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**Figure 4:** Based on Google Trends search (<https://trends.google.com/trends/?geo=IT>) of the two indicated terms (5/8/20). Monthly search frequency results averaged by year; results normalized with most intensive search term/year combination (GMO in 2014) set to 100.

## I. The Final Rule

189. In the final rule, USDA mandated that on-package text be “bioengineered food,” or, for multi-ingredient foods, “contains a bioengineered food ingredient.” 83 Fed. Reg. at 65,827. See 7 C.F.R. § 66.102(a)(1)-(2).

190. In response to public comments presenting the above information to the agency on the problems with excluding the much more common and established similar terms “GE” and “GMO,” and the concerns about consumers being confused, USDA said only that the agency believes the language “clearly and accurately describes the technology and provides consumers with the information they desire.” 83 Fed. Reg. at 65,852.

1 191. In the final rule USDA made no effort to address the data on use and  
2 consumer confusion presented to it, let alone support its decision with the whole  
3 record.

4 192. In the final rule USDA gave no explanation of how it was compliant  
5 with the statute's use of "similar terms" to "bioengineered."

#### 6 **J. Injuries**

7 193. Plaintiffs and their members are injured by USDA's decision to exclude  
8 the well-established and known similar terms of "genetically engineered" and  
9 "genetically modified" from permissible on-package labeling under the Act.

10 194. Because of USDA's decision, shoppers will be confused or misled by the  
11 disclosure and not receive or understand the information intended by Congress.  
12 Because of USDA's decision, many manufacturer and retailers are forced to change  
13 their current well-known terminology and are instead prohibited from labeling their  
14 products in the way that they wish and that they know would best inform  
15 consumers of the information. Retailers will bear the burden of having to educate  
16 their customers on this confusing terminology.

### 17 **SECOND CAUSE OF ACTION**

#### 18 ***Limitations on Allowed On-Package Disclosure Language*** 19 ***(Violation of Disclosure Act and APA)***

20 195. Plaintiffs re-allege and incorporate by reference the allegations set  
21 forth in paragraphs 1 through 194 of this Complaint as if fully set forth herein.

22 196. The Act specifically refers to "any similar term" to "bioengineered" as  
23 part of the classification. 7 U.S.C. § 1639(1). The Act also uses the similar terms of  
24 "GE" and "GMO" elsewhere, listing them as "similar" terms.

25 197. USDA's decision in the rulemaking to limit on-package disclosures to  
26 only bioengineered is contrary to the plain language of the statute and would  
27

1 unlawfully turn the clause “similar terms” into surplusage, in violation of the Act  
2 and the APA.

3 198. USDA does not explain how it came to the arbitrary decision to limit  
4 the text to only “bioengineered,” and exclude the more common, similar terms “GE”  
5 and “GMO,” or support that decision with any rationale or data. That decision was  
6 arbitrary and capricious.

7 199. The record evidence overwhelmingly indicates that, because consumers  
8 are unfamiliar with “bioengineered,” limiting the language to only this term fails to  
9 adequately inform consumers of the fact that foods are genetically engineered.  
10 “Bioengineering” is not a term currently used by consumers, regulators,  
11 manufacturers, or retailers involved with genetically engineered foods. The thirty-  
12 year history of the GE food labeling topic is virtually absent that term; instead “GE”  
13 and “GMO” are used and known to the public. This is shown through general public  
14 awareness; current marketplace labeling and standards; scientific uses; and  
15 international, legislative, regulatory, and policy applications. Based on this record  
16 evidence, USDA’s determination that the term “bioengineered” alone fulfills the  
17 statutory goal of adequately informing consumers is arbitrary and capricious.

18 200. The Act also requires that USDA “shall” develop the disclosure  
19 standard “in a manner consistent with United States obligations under  
20 international agreements.” 7 U.S.C. § 1639c(a). The final rule’s exclusion of terms  
21 used commonly across the globe conflicts with the standards of numerous U.S.  
22 trading partners and the standards of the Codex Alimentarius, all of which use the  
23 terms GE and GMO.

24 201. USDA’s decision creates a misleading and confusing labeling standard,  
25 violating the Act and the APA. Mandating the use of the bioengineered term alone  
26 is contrary to precedent, the Act, and Congressional intent, and is confusing and  
27 misleading to consumers.

28



### 1 **III. Claim 3: Exclusion of “Highly Refined” Bioengineered Foods**

2 202. Eighty-seven percent of food products containing GE ingredients  
3 contain “highly refined” GE ingredients, such as sodas and cooking oils made with  
4 genetically engineered ingredients.<sup>130</sup>

5 203. Consumers and retailers fully expected that producers would be  
6 required to disclose these ingredients under the Disclosure Act because without  
7 their labeling, the regulations establish a huge loophole that misses the vast  
8 majority of GE foods, contrary to the overarching purpose of the law.

9 204. During the Act’s enactment, Congress, as well as the USDA’s General  
10 Counsel, assured the public that these foods would be covered by the standard and  
11 require disclosure.<sup>131</sup> In fact, Congress assured the public that the Act would  
12 improve on the existing state labeling scope.<sup>132</sup>

13 205. However in the final rule USDA did the opposite and excluded “highly  
14 refined” GE foods from any required disclosure. That decision violated the Act and  
15 was arbitrary and capricious action in violation of the APA.

#### 16 **A. The Act**

17 206. The first prong of the definition of bioengineering, upon which the  
18 disclosure classification mandate is based, explains that the classification includes  
19 any food “that contains genetic material that has been modified through in vitro  
20 recombinant deoxyribonucleic acid (rDNA) techniques.” 7 U.S.C. § 1639(1)(A). That  
21 is, any food that “contains” any GE material is covered.

22 <sup>130</sup> *EWG Analysis: Loophole Could Exempt Over 10,000 GMO Foods From Disclosure*  
23 *Law*, EWG Ag Mag (June 29, 2018), [https://www.ewg.org/agmag/2018/06/ewg-](https://www.ewg.org/agmag/2018/06/ewg-analysis-loophole-could-exempt-10000gmo-foods-disclosure-law#.WzaZrxJKhTY)  
24 [analysis-loophole-could-exempt-10000gmo-foods-disclosure-law#.WzaZrxJKhTY](https://www.ewg.org/agmag/2018/06/ewg-analysis-loophole-could-exempt-10000gmo-foods-disclosure-law#.WzaZrxJKhTY).

25 <sup>131</sup> Letter from Jeffrey M. Prieto, General Counsel, USDA, to Debbie Stabenow,  
26 Senator, U.S. Senate (July 1, 2016), <http://src.bna.com/gvy> (assuring the Senator  
27 that the new law, if passed, provided authority to cover new GE techniques, such as  
28 gene editing, as well as GE foods made from highly refined oils, sugars, or high  
fructose corn syrup produced through genetic engineering).

<sup>132</sup> 162 Cong. Rec. S4906 (daily ed. July 7, 2016).

1           207. The Act further commands that USDA “shall” establish a nationwide  
2 standard for disclosure with respect to “any bioengineered food” but also “any food  
3 that may be bioengineered.” 7 U.S.C. § 1639b(a)(1).

4           208. The Act also includes a provision requiring USDA to, in its  
5 implementing rules, “establish a process for requesting and granting a  
6 determination by the Secretary regarding other factors and conditions under which  
7 a food is considered a bioengineered food” beyond those set out by the statute  
8 elsewhere. 7 U.S.C. § 1639b.

9           209. The Act also requires that USDA “shall” develop the disclosure  
10 standard “in a manner consistent with United States obligations under  
11 international agreements.” 7 U.S.C. § 1639c(a).

## 12           **B. Legislative History**

13           210. Congressional intent was explicitly to cover these types of ingredients  
14 under the scope of the Act.

15           211. Statements from ranking Member of the Senate Agriculture  
16 Committee Senator Debbie Stabenow clarified that the Act’s scope “does not  
17 prohibit the labeling of highly refined products derived from GMO crops including  
18 soybean oil made from GMO soybeans, high fructose corn syrup made from GMO  
19 corn, and sugar made from GMO sugar beets.” 162 Cong. Rec. S4994 (daily ed. July  
20 12, 2016).

21           212. In separate statements to the Senate, Senator Stabenow further  
22 clarified that the Disclosure Act “provides authority to the USDA to label refined  
23 sugars and other processed products.” 162 Cong. Rec. S4783 (daily ed. July 6, 2016).

24           213. Senator Stabenow also stated that the Act would improve on the  
25 existing state labeling scope, 162 Cong. Rec. S4906 (daily ed. July 7, 2016), which  
26 would be impossible if the Act did not include highly refined GE ingredients like  
27  
28

1 sugar and oils in the scope of its mandatory disclosure standard, since all the state  
2 labeling laws included them.

3 214. USDA's General Counsel, Jeffrey Prieto, told Congress that it was the  
4 agency's interpretation of the Act that it is well within USDA's authority to  
5 interpret the definition of bioengineering as including highly refined GE foods. In a  
6 July 1, 2016 letter to answer Congressional questions on this point, Prieto  
7 confirmed that it was USDA's legal interpretation of the Act as giving the agency  
8 authority to include ingredients derived from "novel gene editing techniques such as  
9 CRISPR," and food products which contain "highly refined oils, sugars, or high  
10 fructose corn syrup that have been produced or developed from genetic modification  
11 techniques." 162 Cong. Rec. S4994 (daily ed. July 12, 2016).

### 12 C. Marketplace

13 215. Approximately eighty-seven percent of foods containing genetically  
14 engineered ingredients on supermarket shelves are not whole foods (like genetically  
15 engineered squash), but contain highly refined GE ingredients (like sugar or corn or  
16 their derivatives).<sup>133</sup> By some estimates, that means approximately 70,000 foods  
17 contain a highly refined GE ingredient.<sup>134</sup> In its public comments on the proposed  
18 rule, Grocery Manufacturers Association estimated that excluding highly refined  
19 products would result in 78 percent fewer products labeled.<sup>135</sup> The massive public  
20 support for labeling that resulted in the passage of the Act was based on widespread  
21 understanding of this marketplace reality. American consumers expect foods  
22 containing highly refined products of GE ingredients to be labeled.

23  
24  
25 <sup>133</sup> *EWG Analysis: Loophole Could Exempt Over 10,000 GMO Foods From Disclosure*  
26 *Law*, EWG Ag Mag (June 29, 2018), [https://www.ewg.org/agmag/2018/06/ewg-](https://www.ewg.org/agmag/2018/06/ewg-analysis-loophole-could-exempt-10000gmo-foods-disclosure-law#.WzaZrxJKhTY)  
27 [analysis-loophole-could-exempt-10000gmo-foods-disclosure-law#.WzaZrxJKhTY](https://www.ewg.org/agmag/2018/06/ewg-analysis-loophole-could-exempt-10000gmo-foods-disclosure-law#.WzaZrxJKhTY).

<sup>134</sup> *Id.*

<sup>135</sup> Grocery Manufacturers Association comment, at 2.

1           216. A 2018 study by the University of Vermont found that labeling GE food  
2 reduced consumer distrust of GE food by almost 20 percent.<sup>136</sup> Omitting the vast  
3 majority of foods produced through genetic engineering from any disclosure  
4 requirement would be false and misleading to consumers.

5           217. Numerous major food companies, including Campbell Soup Company,  
6 Coca Cola, Danone, Mars, Nestle, and Unilever already disclose the presence of  
7 highly refined ingredients produced from GE crops, and strongly urged USDA to  
8 include highly refined products in the rule's classification.<sup>137</sup>

9           218. Numerous other major food companies such as Whole Foods, Schwan's,  
10 Wawa, and Happy Family that do not already label GMOs also voiced their  
11 preference for the right to label highly refined GE foods and that failure to do so  
12 would confuse consumers and not serve the purpose of the law.<sup>138</sup>

13           219. For example, Coca Cola commented that failing to label highly refined  
14 ingredients would result in a "disservice" to interested consumers because "It is  
15 critical to the spirit of this law that the final rule be based on the traceability of  
16 ingredients through the supply chain back to a plant, rather than being based on  
17 the presence of genetic material in the finished food."<sup>139</sup> Major food companies,  
18 Danone, Nestle, Mars, and Unilever, agreed in a joint comment letter that  
19 consumers expect disclosure of highly refined ingredients based on traceability to a  
20

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21  
22 <sup>136</sup> Jane Kolodinsky and Jayson L. Lusk, *Mandatory labels can improve attitudes*  
23 *toward genetically engineered food*, 4 SCI. ADV. 6 (June 27, 2018),  
<http://advances.sciencemag.org/content/advances/4/6/eaq1413.full.pdf>.

24 <sup>137</sup> Campbell comments, at 6-7; Coca Cola comment, at 2;  
25 Danone/Mars/Nestle/Unilever comment, at 3.

26 <sup>138</sup> Hershey comment, at 2; Wawa comment, at 2; Unilever comment, at 4; Happy  
27 Family, at 2; American Bakers Association, at 1; Grocery Manufacturers  
28 Association, at 2; Organic Trade Association comment, at 12; Schwan's comment, at  
4; Coca Cola comment, at 3; Whole Foods comment, at 1.

<sup>139</sup> Coca Cola comment, at 2.

1 GE plant source and would be misled otherwise.<sup>140</sup> Numerous companies requested  
2 mandatory disclosure of highly refined ingredients to avoid depriving consumers of  
3 the clarity and consistency they need to make informed choices about the products  
4 they purchase.<sup>141</sup>

5 220. Several companies further requested mandatory disclosure of highly  
6 refined GE foods to avoid the anticipated high costs of analytical testing, further  
7 rulemakings, and ongoing agency policy development required to exclude highly  
8 refined products from disclosure.<sup>142</sup> Unilever, the maker of Hellmann's mayonnaise,  
9 Ben & Jerry's ice cream, as well as over 400 other brands, pointed to the  
10 inconsistency between this standard and other established international standards  
11 of disclosure.<sup>143</sup>

12 221. The European Union and other countries have long required disclosure  
13 of highly refined products, and commented that the U.S. classification should  
14 require the same.<sup>144</sup>

#### 15 **D. Contains vs Detectability**

16 222. The statutory definition of bioengineering does not exempt foods that  
17 contain GE ingredients at levels "undetectable using common testing methods." 83  
18 Fed. Reg. at 65,816. Simply because current testing methods do not detect material  
19 does not mean that the products do not "contain" genetically engineered DNA.

20 223. Commenters pointed out to USDA that DNA testing methods are  
21 rapidly becoming more sensitive. Foods from GE plants that just a few years ago  
22 had no detectable genetically engineered DNA are today found to contain it.

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23 <sup>140</sup> Danone, Mars, Nestle, Unilever joint comment, at 3.

24 <sup>141</sup> Hershey comment, at 2; Wawa comment, at 2; Unilever comment, at 4; Happy  
25 Family, at 2; American Bakers Association, at 2; Kraft comment, at 2; Grocery  
Manufacturers Association, at 2; Global Organics, at 1-2.

26 <sup>142</sup> Campbell comment, at 7; Hershey comment, at 2.

27 <sup>143</sup> Unilever comment, at 4.

28 <sup>144</sup> European Union comment, at 2.

1           224. For example, a limit of detection of 0.1 percent was once common for  
2 polymerase chain reaction (PCR)-based GMO detection tests, but today's methods  
3 are far more sensitive. German scientists recently developed a real-time PCR  
4 screening assay with a sensitivity over ten-fold greater: < 0.01 percent for several  
5 GM maize events in food and feed.<sup>145</sup>

6           225. More recently, a Japanese team developed a method that can detect  
7 rDNA from GE corn at a 0.005 percent limit of detection, or 20 times more sensitive  
8 than the previous standard, by increasing the amount of DNA template.<sup>146</sup>

9           226. A group of Chinese scientists reported a digital PCR (dPCR) detection  
10 method for screening GMOs with a limit of detection of 0.1 percent in 2015.<sup>147</sup> Two  
11 years later, the same team reported a high-throughput detection method based on  
12 multiplex enrichment quantitative PCR (ME-qPCR), with an absolute limit of  
13 detection of 0.001 percent, one hundred-fold lower than their dPCR method.<sup>148</sup>

14           227. Contrary to claims, oils from GE oilseed crops (e.g. soybeans, canola)  
15 do contain rDNA. The putative absence of rDNA in oils was a consequence of older,  
16 less sensitive testing methods.

17           228. Test method improvements have enabled detection of previously  
18 "undetectable" rDNA. A frequently cited paper on the absence of DNA in soybean  
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21 <sup>145</sup> Huber et al., *Development and validation of duplex, triplex and pentaplex real-*  
22 *time PCR screening assays for the detection of genetically modified organisms in*  
23 *food and feed*, 61 *Journal of Agricultural and Food Chemistry* 10293-10301 (2013).

24 <sup>146</sup> Mano et al., *Highly sensitive GMO detection using real-time PCR with a large*  
25 *amount of DNA template: single-laboratory validation*, 101(2) *J. AOAC*  
26 *International* 507-514 (2018).

27 <sup>147</sup> Fu et al., *A highly sensitive and specific method for the screening detection of*  
28 *genetically modified organisms based on digital PCR without pretreatment*, 5  
*Scientific Reports* 12715 (2015).

<sup>148</sup> Fu et al., *Multiplex enrichment quantitative PCR (ME-qPCR): a high-throughput,*  
*highly sensitive detection method for GMO identification*, 409 *Anal. Bioanal. Chem.*  
2655-2664 (2017).

oil<sup>149</sup> was contradicted just two years later by the same Belgian research team.<sup>150</sup> (USDA cites the former but ignores the latter paper in the final rule (83 Fed. Reg. at 63,834)). Many other scientists have also detected DNA in refined oils: rDNA in soybean oils,<sup>151</sup> as well as DNA in commercial sunflower and maize oils.<sup>152</sup>

229. A simple PubMed search using the term “GMO detection” (without quotation marks) results in 287 hits. The number of papers has significantly increased over time from an average of 0.44 annually in the 1990s, to 10.2 in the 2000s, to 21.2 from 2010-2017. Many of these papers present new testing methods, or significant tweaks on existing methods. These include capillary electrophoresis (PCR-CGE), multiplex quantitative DNA array-based PCR (MQDA-PCR), nucleic acid-sequence-based PCR (NASBA)-implemented microarray analysis (NAIMA), digital PCR (dPCR), loop-mediated isothermal amplification (LAMP), DNA walking, nanopore sequencing, and next generation sequencing (NGS), among others.<sup>153</sup>

230. Sensitivity is continually increasing, and can arise from improvements in DNA extraction procedures, increased ability to amplify ever-shorter DNA

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<sup>149</sup> Gryson *et al.*, *Detection of DNA during the refining of soybean oil*, 79(2) JAOCS 171-174 (2002).

<sup>150</sup> Gryson *et al.*, *Influence of different oil-refining parameters and sampling size on the detection of genetically modified DNA in soybean oil*, 81(3) JAOCS 231-234 (2004) (“We have shown here that it is possible to detect DNA by PCR in oil phase after degumming if the DNA is extracted from a test portion with sufficiently high volume.”)

<sup>151</sup> Bogani *et al.*, *Transgenes monitoring in an industrial soybean processing chain by DNA-based conventional approaches and biosensors*, 113(2) Food Chemistry 658-664 (2009); Costa *et al.*, *Detection of genetically modified soybean DNA in refined vegetable oils*, 230 European Food Research and Technology 915-923 (2010).

<sup>152</sup> Doveri & Lee, *Development of sensitive crop-specific polymerase chain reaction assays using 5S DNA: applications in food traceability*, 55(12) Journal of Agricultural and Food Chemistry 4640-44 (2007).

<sup>153</sup> Milavec *et al.*, *GMO quantification: valuable experience and insights for the future*, 406 Anal. Bioanal. Chem. 6485-97 (2014); Fraiture *et al.*, *An integrated strategy combining DNA walking and NGS to detect GMOs*, 232 Food Chemistry 351-358 (2017); Fraiture *et al.*, *Nanopore sequencing technology: a new route for the fast detection of unauthorized GMO*, 8 Scientific Reports 7903 (2018).



1 fragments (especially important for DNA detection in highly processed foods), more  
2 advanced statistical procedures,<sup>154</sup> methods to minimize PCR inhibition,<sup>155</sup> and  
3 increasing the amount of DNA for PCR analysis, to name just a few innovations.

4 231. USDA has taken no account of this complexity. An agency guidance  
5 states that PCR “is the most widely used and commercially accepted test  
6 method,”<sup>156</sup> but fails to distinguish the plethora of different PCR-based  
7 methodologies that already exist, or their widely varying sensitivities (limits of  
8 detection), as alluded to above. Thus, the problem is not only that a “future test”  
9 will be developed, which detects rDNA that “current tests do not” (83 Fed. Reg. at  
10 68,834), but rather also that the differing sensitivities of existing test methods, and  
11 the failure to prescribe a minimum sensitivity, virtually ensures inconsistent  
12 standards regarding mandatory BE disclosure, widespread confusion in the  
13 marketplace, and distrust of the Disclosure Act among consumers.<sup>157</sup>

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17 <sup>154</sup> Willems et al., *Statistical framework for detection of genetically modified*  
18 *organisms based on Next Generation Sequencing*, 192 *Food Chemistry* 788-798  
19 (2016).

20 <sup>155</sup> Doveri & Lee, *Development of sensitive crop-specific polymerase chain reaction*  
21 *assays using 5S DNA: applications in food traceability*, 55(12) *Journal of*  
22 *Agricultural and Food Chemistry* 4640-44 (2007).

23 <sup>156</sup> USDA, National Bioengineered Food Disclosure Standard: Draft Instructions on  
24 Testing Methods, at 2,  
25 <https://www.ams.usda.gov/sites/default/files/media/NBFDSTestingMethodology.pdf>.

26 <sup>157</sup> Regarding more sensitive future tests, USDA assures firms that they can safely  
27 ignore them. When technological progress increases test sensitivity such that  
28 formerly undetectable rDNA is detectable, such bioengineered foods may  
nevertheless continue to evade BE disclosure, indefinitely, based on refining  
processes validated on the less sensitive, outdated tests methods. See USDA,  
*Frequently Asked Questions: Guidance to Ensure Acceptable Validation of a Refining*  
*Process*, at 3 (answer to Qt.13),  
[https://www.ams.usda.gov/sites/default/files/media/NBFDS\\_FAQrefiningProcessValidation.pdf](https://www.ams.usda.gov/sites/default/files/media/NBFDS_FAQrefiningProcessValidation.pdf).



1           **E.     FDA’s Guidance on Testing Highly Refined Ingredients**

2           232.   FDA’s established labeling standards<sup>158</sup> recognized the difficulty and  
3 variability of these tests, “particularly for highly processed foods such as oils” and  
4 confirmed that GE material may remain in foods at levels currently undetectable.<sup>159</sup>

5           233.   In its guidance document for industry seeking to avoid misbranding in  
6 labeling GE foods, FDA endorsed the use of validated testing methods for  
7 confirming the presence of GE material in food while also advising that specific  
8 testing methodologies “likely will change” as new GE varieties are introduced into  
9 the marketplace.<sup>160</sup> FDA recognized the current difficulty in using tests for highly  
10 refined foods and concluded that it “may be more practical to substantiate a claim  
11 for such foods differently, such as documenting handling practices and  
12 procedures.”<sup>161</sup>

13           234.   FDA recognizes that just because a food or food ingredient may not  
14 contain detectable levels of genetic material from a GE source does not mean the  
15 food does not contain any such genetic material, and does not mean that the food is  
16 not GE; it only means that the genetic material is not detectable using present-day,  
17 readily available scientific methods.<sup>162</sup>

18           **F.     International Standards**

19           235.   Commenters pointed out that the inclusion of highly refined GE foods  
20 was required in order to be consistent with international genetically engineered  
21 food labeling standards and U.S. treaty obligations. This includes, among others,  
22 the *Codex Alimentarius* definition of modern biotechnology, which is internationally

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23           <sup>158</sup> FDA *Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have*  
24 *or Have Not Been Derived from Genetically Engineered Plants*, at 13,  
25 <https://www.fda.gov/media/120958/download>.

26           <sup>159</sup> *Id.* (emphasis added).

27           <sup>160</sup> *Id.*

28           <sup>161</sup> *Id.*

<sup>162</sup> *Id.*

1 recognized by the World Trade Organization as the standard for settling trade  
2 disputes. *See* 83 Fed. Reg. at 65,835. Most countries that already label genetically  
3 engineered foods require that highly refined GE products be disclosed. *Id.* As such,  
4 excluding highly refined GE products could cause trade disruptions and confusion.  
5 *Id.*

### 6 **G. Rulemaking**

7 236. In the proposed rule, USDA put forth two “positions” for highly refined  
8 GE foods. 83 Fed. Reg. at 19,862-63. In the first, highly refined products would not  
9 require disclosure because, even though they contain GE ingredients and contain  
10 them in their original form, the ingredients are so highly processed that the final  
11 product allegedly does not “contain” that genetically engineered content. *Id.*

12 237. In the second, the GE classification would include all foods produced  
13 through bioengineering, including highly refined products. 83 Fed. Reg. at 19,863.  
14 These products contain genetically engineered material before they are processed.  
15 Whether it is further detectable depends on the refinement process and testing  
16 method applied. And, even though a particular test may not detect the modified  
17 genetic material, this does not necessarily mean that there is no modified genetic  
18 material in the food. *Id.*

19 238. USDA invited comment on both positions. *Id.*

20 239. In the final rule, USDA adopted the first option and excluded highly  
21 refined GE foods from any required disclosure. 83 Fed. Reg. at 65,817.

22 240. The agency created a regulatory definition that “foods with  
23 undetectable modified genetic material are not bioengineered foods” and thus do not  
24 require disclosure. *Id.* *See* 7 C.F.R. § 66.1 (defining “bioengineered food,” as, in  
25 relevant part, “a food that contains genetic material that has been modified through  
26 *in vitro* recombinant deoxyribonucleic acid (rDNA) techniques,” but “*provided that*

1 such a food does not contain modified genetic material if the genetic material is not  
2 detectable pursuant to § 66.9.”).

3 241. The agency referenced Section 66.9, which is the regulatory section  
4 setting forth how a manufacturer can “demonstrate that a food, including a refined  
5 food ingredient, does not contain detectable modified genetic material.” 83 Fed. Reg.  
6 at 65,816.

7 242. The agency then concluded that “for refined foods that are derived  
8 from bioengineered crops, no disclosure is required if the food does not contain  
9 detectable modified genetic material.” *Id.*

10 243. Section 66.9 of the rule sets up several ways for manufacturers to  
11 determine whether a food or ingredients contains GE material requiring disclosure.  
12 First, they can use their records to demonstrate that the food is sourced wholly from  
13 non-GE crop sources. 83 Fed. Reg. at 65,817; 7 C.F.R. 66.9(a)(1).

14 244. Second, manufacturers can use their records to show that the food has  
15 been through a refinement process validated to render the genetically engineered  
16 material undetectable. 83 Fed. Reg. at 65,817; 7 C.F.R. 66.9(a)(2).

17 245. Third, regulated entities can demonstrate that GE material is not  
18 detectable by maintaining certificates of analysis or other testing records which  
19 confirm the absence of the genetically engineered material pursuant to that test. 83  
20 Fed. Reg. at 65,817; 7 C.F.R. 66.9(a)(3).

21 246. In the final rule’s response to comments, USDA concluded that “based  
22 on the available scientific evidence, refined beet and cane sugar, high fructose corn  
23 syrup, degummed refined vegetable oils and various other refined ingredients are  
24 unlikely to require BE food disclosures because the conditions of processing serve  
25 effectively to degrade or eliminate the DNA that was initially present in the raw  
26 agricultural commodity.” 83 Fed. Reg. at 65,835.

1           247. USDA rejected comments supporting inclusion of all GE foods,  
2 including highly refined ones, because “highly refined products have undergone  
3 processes that removed genetic material such that it cannot be detected using  
4 common testing methods,” and thus the rule will not require disclosure. *Id.* (“With  
5 the adoption of Position 1, foods with undetectable modified genetic material are not  
6 bioengineered foods.”).

7           248. In the response to comments, USDA acknowledged in part that,  
8 although its own General Counsel “seemingly advocated” for an interpretation  
9 “along the lines of Position 2” (that is, the inclusion of highly refined GE food), the  
10 agency had switched positions, and “will adopt Position 1.” 83 Fed. Reg. at 65,835.

11           249. With regards to international standards aligned with requiring  
12 disclosure of highly refined GE foods, in the final rule, USDA said it had considered  
13 them but felt it was “bound by the plain language of the amended Act.” The agency  
14 interpreted this plain language as requiring that “if a food does not contain  
15 detectable modified genetic material, it is not a bioengineered food and does not  
16 require disclosure.” 83 Fed. Reg. at 65,835-36.

17           250. With regards to the “other factors and conditions under which a food is  
18 considered a bioengineered food” provision of the Act, 7 U.S.C. § 1639b(b)(2)(B),  
19 USDA said it interpreted that provision as “one that limits the scope of the  
20 definition of ‘bioengineered food,’ thus potentially excluding certain bioengineered  
21 products from disclosure,” rather than broadening it. 83 Fed. Reg. at 65,836.

22           251. With regards to all the highly refined GE products that would be  
23 excluded from the standard, USDA declared that the agency “does not have the  
24 authority to require BE disclosure for those foods regardless of the number of food  
25 products that may be affected.” 83 Fed. Reg. at 65,836.

1           **H. Post Final Rule USDA Guidance**

2           252. In July 2020, USDA issued two guidance documents and two  
3 frequently asked question documents (FAQ) to assist manufacturers in their efforts  
4 to comply with the Disclosure Act.<sup>163</sup>

5           253. AMS's *Frequently Asked Questions: Guidance to Ensure Acceptable*  
6 *Validation of a Refining Process* concedes that highly refined foods can contain  
7 currently undetectable genetic material from a GE source.<sup>164</sup> The FAQ explains that  
8 "a future test may detect modified genetic material in a highly refined food or  
9 ingredient that current tests do not."<sup>165</sup>

10          254. This same FAQ, however, assures stakeholders that they need not  
11 avail themselves of more sensitive future tests that would render previously  
12 undetectable rDNA detectable, and the food bioengineered. Rather, such  
13 bioengineered food may continue to evade BE disclosure requirements, indefinitely,  
14 based on a refining process validated by a less sensitive, outdated genetic test.<sup>166</sup>

15           **I. Costs**

16          255. Commenters pointed out that USDA's economic analysis concluded  
17 that excluding highly refined foods from the disclosure mandate would not save  
18 manufacturers any money.<sup>167</sup>

19  
20  
21 <sup>163</sup> National Bioengineered Food Disclosure Standard; Guidance on Validation of a  
Refining Process and Selecting a Testing Method, 85 Fed. Reg. 40,867 (July 8,  
2020).

22 <sup>164</sup> USDA, *Frequently Asked Questions: Guidance to Ensure Acceptable Validation of*  
23 *a Refining Process* (July 2, 2020), at 3 (answer to Qt. 13),  
24 [https://www.ams.usda.gov/sites/default/files/media/NBFDS\\_FAQrefiningProcessVal  
idation.pdf](https://www.ams.usda.gov/sites/default/files/media/NBFDS_FAQrefiningProcessValidation.pdf).

25 <sup>165</sup> *Id.* at 3 (answer to Qt. 13).

26 <sup>166</sup> *Id.*

27 <sup>167</sup> USDA, *Overview of the National Bioengineered Food Disclosure Standard*,  
Webinar Transcript, at Slide 43,  
28 <https://www.ams.usda.gov/sites/default/files/media/BEWebinarTranscript.pdf>.

1           256. Rather, AMS’s failure to require mandatory disclosure of highly  
2 refined foods creates a need to navigate the potentially high costs and complexities  
3 of analytical methods, sample sizes, process variability, and evolving limits of  
4 detection in order to obtain proper documentation, as demonstrated in these  
5 guidance documents.<sup>168</sup> Campbell’s Soup Company commented that regulation of  
6 the processes that remove genetic material would be “impractical to implement for  
7 the agency and industry” due to complex and costly analytical testing methods with  
8 differing degrees of efficacy.<sup>169</sup> Several other companies similarly anticipate  
9 substantial costs of analytical testing for highly refined material and difficulty in  
10 enforcement.<sup>170</sup>

#### 11           **J. Injuries**

12           257. Plaintiffs and their members are injured by USDA’s decision to exclude  
13 “highly refined” GE foods, which encompass the vast majority of all GE foods, from  
14 the disclosure standard.

15           258. Because of USDA’s exclusion decision in the final rule, these GE food  
16 products will remain undisclosed to consumers and retailers. The absence of this  
17 information—the same information provided to consumers in many other countries  
18 across the globe—injures consumers by leaving them in the dark as to the fact that  
19 these foods are actually made with GE ingredients, yet unlabeled.

20           259. The exclusion injures Plaintiffs and their members by depriving them  
21 of this information. It also injures them by causing confusion and  
22 misrepresentation. Consumers will see other products disclosed as GE, but not  
23 processed foods, and wrongly assume that these foods are not GE foods. As tests  
24 with differing sensitivities are adopted, a product made by one manufacturer will be

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25  
26 <sup>168</sup> Kraft comment, at 2; Hershey comment, at 2; Campbell’s comment, at 5-6.

27 <sup>169</sup> Campbell’s comment, at 5.

28 <sup>170</sup> Hershey comment, at 2; Kraft comment, at 2; Campbell’s comment, at 5-6.



1           264. USDA’s determination to exclude the vast majority of GE foods from  
2 any disclosure was contrary to the plain text, the agency’s own prior interpretation  
3 of it, and is arbitrary and capricious under the APA.

4           265. USDA’s decision relied on its insertion of extra-statutory, ultra vires  
5 rationale to conclude that, if a food does not contain detectable modified genetic  
6 material based on the results of unspecified “common testing methods,” it is not a  
7 GE food and does not require disclosure. The Act nowhere uses the term  
8 “detectable.” Detectable does not mean contains. Nor does the word by itself have  
9 any meaning without specification of an analytical method with an associated limit  
10 of detection (numerical degree of sensitivity), which is nowhere specified in the rule.  
11 Thus, the mere fact that a currently-employed “common testing method” does not  
12 detect GE material in no way demonstrates that the food does not contain that GE  
13 material. Two of the three methods for excluding refined foods from the standard  
14 (processing and testing, 7 C.F.R. 66.9(a)(2)-(3)) are extra-statutory and contrary to  
15 the record.

16           266. USDA’s narrow classification and wholesale exclusion of thousands of  
17 GE food products is also contrary to broader provisions in the Act, establishing  
18 authority and ordering the agency to also establish disclosure for not just “any  
19 bioengineered food” but also foods that “may be bioengineered.” 7 U.S.C. §  
20 1639b(a)(1). The Act also required USDA to establish a process for “other factors  
21 and conditions under which a food is considered a bioengineered food.” 7 U.S.C. §  
22 1639b(b)(2)(B). USDA’s determination in the final rule that it is restricted to  
23 classifying as GE only foods that have “detectable” modified genetic material in the  
24 final product is contrary to this statutory text and intent and is arbitrary and  
25 capricious.

26           267. USDA’s failure to establish the “other factors and conditions” process  
27 in the rules also violates the Act, which stated that USDA “shall establish” that  
28



1 process. USDA's determination that the "other factors and conditions" process was  
2 exclusively to narrow the standard further, rather than provide the agency more  
3 discretion and breadth, was also contrary to the text and arbitrary and capricious.

4 268. The provision provides "other factors and conditions under which a  
5 food is considered a bioengineered food," 7 U.S.C. § 1639b(b)(2)(B), not "other factors  
6 and conditions under which a food is [not] considered a bioengineered food." The  
7 plain intent of including the petition process for addressing further "factors and  
8 conditions under which a food is considered a bioengineered food" was to broaden,  
9 not narrow, the classification's scope. 7 U.S.C. § 1639b.

10 269. USDA also acted contrary to law in looking only to the final end food  
11 product. Regardless of final product test results, USDA excluded foods that  
12 knowingly contain GE ingredients prior to that processing. Nothing in the statute  
13 supports that limitation. Consumers care about the production method impacts and  
14 the chemicals associated with GE and their harms to the environment and  
15 farmworkers. By excluding highly processed GE foods, the final rule fails to  
16 accomplish the goals of the Act. By excluding those foods, the final rule is  
17 misleading and confusing to consumers, and permits products to be misbranded.  
18 That decision was contrary to international standards and consumer expectations  
19 and arbitrary and capricious, unsupported by the record.

20 270. The Act also requires that USDA "shall" develop the disclosure  
21 standard "in a manner consistent with United States obligations under  
22 international agreements." 7 U.S.C. § 1639c(a). The final rule's exclusion of the vast  
23 majority of GE foods, highly refined foods, conflicts with the standards of numerous  
24 U.S. trading partners, and the standards of the *Codex Alimentarius*, which includes  
25 these foods. USDA's conclusion that it was nonetheless constrained by the Act to  
26 require that in the final rule conflicts with these international standards and was  
27 contrary to the Act and arbitrary and capricious under the APA.

28

1 **IV. Claim 4: First Amendment Freedom of Speech**

2 271. The final rule, as interpreting and applying the Disclosure Act, also  
3 impermissibly impinges on the First Amendment's guarantee that free speech is to  
4 be protected because it prohibits commercial speech about foods produced through  
5 genetic engineering except in the narrow and inadequate forms approved by USDA  
6 in the final rule.

7 272. The rights at stake include both the rights of producers, retailers,  
8 importers, and other businesses to convey truthful and factual information  
9 concerning whether a food product or ingredient is genetically engineered, as well  
10 as consumers' rights to receive that information.

11 273. This prohibited speech is truthful and thus protected under the First  
12 Amendment because these foods would be produced with genetic engineering as a  
13 factual and scientific matter, whether or not USDA excluded them or disallowed  
14 those foods or that terminology from its exclusive bioengineered disclosure  
15 classification.

16 274. For example, with soda, a label that reads "produced with genetic  
17 engineering" would be truthful and factual if the soda was produced with  
18 ingredients that were genetically engineered, such as genetically engineered beet  
19 sugar and/or genetically engineered high fructose corn syrup.

20 275. Traditional and standard definitions of "genetic engineering" are also  
21 well-established in international standards, in existing and past federal guidance,  
22 and in state laws.

23 276. Many of these foods were already being labeled or were previously  
24 labeled as "produced with genetic engineering" in the marketplace. Both FDA and  
25 Defendant USDA have existing food labeling guidance that discusses and permits  
26 such truthful and factual labeling, as not false and misleading, as discussed *supra*.

27

28

1           277. The absence of these same ingredients is also labeled in the  
2 marketplace, through Non-GMO labeling, which the USDA’s regulatory scheme  
3 does not attempt to restrict.

4           **A. Statute**

5           278. The Act declares that it “shall apply to any claim in a disclosure that a  
6 food bears that indicates that the food is a bioengineered food.” 7 U.S.C. § 1639a(a).  
7 Thus the law’s “labeling” scope is broader than only on-package labels, and instead  
8 applies to “any claim” in any “disclosure.”

9           279. The Act declares that “a food may bear a disclosure that the food is  
10 bioengineered *only in accordance with the regulations*” implementing it. 7 U.S.C. §  
11 1639b(b)(1) (emphasis added). That is, the USDA’s disclosure scheme is restrictive  
12 and exclusive, and entities may not provide disclosure except in accordance with the  
13 new scheme.

14           280. The statute defines “bioengineering” of food as food “that contains  
15 genetic material that has been modified through *in vitro* recombinant  
16 deoxyribonucleic acid (rDNA) techniques . . . .” 7 U.S.C. § 1639(1)(A). This is the  
17 traditional definition for genetic engineering and genetically engineered foods.

18           281. The Act further provides that the rulemaking shall prohibit a food  
19 from being “considered a bioengineered food solely because the animal consumed  
20 feed from” a bioengineered source. 7 U.S.C. § 1639b(b)(2)(A).

21           282. The Act further provides that USDA’s regulations shall exclude “food  
22 served in a restaurant or similar retail establishment.” 7 U.S.C. § 1639b(G)(i).

23           283. The Act further provides that with regards to GE absence labeling, the  
24 statute prohibits a food from being considered “not bioengineered” or “non-GMO” or  
25 “any similar term” describing the absence of bioengineering “solely” because the  
26 food is not required to be disclosed as bioengineered under the Act. *Id.* § 1639c(c).

1           284. In a further showing of exclusivity, the Act expressly preempts States  
2 or any political subdivisions of States from establishing any labeling requirement  
3 different from that required by the Act. *Id.* § 1639b(e).

4           285. The Act also includes a second preemption provision, which again  
5 preempts States and political subdivisions from directly or indirectly establishing  
6 any labeling requirements. This provision is significantly broader than the prior  
7 provision, declaring that no other non-federal governmental entities are permitted  
8 to pass any laws related to “labeling of whether a food (including food served in a  
9 restaurant or similar establishment) or seed is genetically engineered” or “was  
10 developed or produced through genetic engineering, including any requirements for  
11 claims that a food or seed is or contains an ingredient that was developed or  
12 produced using genetic engineering.” *Id.* at 1639i(b). This provision is broader in  
13 several ways: it includes the traditional terminology; it includes foods in  
14 restaurants and similar establishments; it includes seeds; and it includes claims not  
15 just for foods but any ingredients produced with genetic engineering.

16           **B. Final Rule**

17           286. The final rule defines “Bioengineered Food” to mean, *inter alia*, “food  
18 that contains genetic material that has been modified through *in vitro* recombinant  
19 deoxyribonucleic acid (rDNA) techniques . . . .” 7 C.F.R. § 66.1. “Bioengineered  
20 substance” is defined the same. *Id.* This is the common definition for foods produced  
21 through genetic engineering.

22           287. The regulations define “labeling” to include not just the disclosure on  
23 the container but “all labels and other written, printed, or graphic matter: (1) Upon  
24 any article or any of its containers or wrappers; or (2) accompanying such article.” 7  
25 C.F.R. § 66.1. Thus retailer in-store disclosures, such as shelf tags or bin signs,  
26 would be covered as “labeling.”

1           288. “Regulated entity” is defined to include “food manufacturer, importer,  
2 or retailer that is responsible for making bioengineered food disclosures.” 7 C.F.R. §  
3 66.1; 83 Fed. Reg. at 65,831 (“All food manufacturers, importers, and retailers who  
4 offer for retail sale foods on the List of Bioengineered Foods are considered  
5 regulated entities for purposes of the NBFDS insofar as they may be required to  
6 make BE food disclosures.”). That is, any manufacturer or retailer that sells any  
7 foods listed as having bioengineered varieties is responsible for making  
8 bioengineered disclosures.

9           289. The regulations provide that “*except as provided in § 66.116 for*  
10 *voluntary disclosure . . . a label shall not bear a disclosure* that a food is a  
11 *bioengineered food or contains a bioengineered ingredient . . . .*” 7 C.F.R. § 66.3(a)(2)  
12 (emphases added). That is, the regulations prohibit voluntary disclosures except for  
13 those explicitly permitted and detailed in the regulations. 83 Fed. Reg. at 65,830  
14 (“Voluntary labeling is *only permitted* in these circumstances”) (emphasis added).

15           290. The regulations declare that a food “derived from an animal *shall not*  
16 *be considered* a bioengineered food solely because the animal consumed feed  
17 produced from, containing, or consisting of a bioengineered substance.” *Id.* § 66.5(c)  
18 (emphasis added). 83 Fed. Reg. 65,824 (“The amended Act prohibits a food derived  
19 from an animal from being considered a BE food solely because the animal  
20 consumed feed produced from, containing, or consisting of a BE substance.”). That  
21 is, the rules prohibit the disclosure of meat or dairy even if the animal was fed  
22 genetically engineered feed.

23           291. The rules assign responsibility for primary labeling to both the  
24 manufacturer and retailer. For food packaged prior to receipt by the retailer, the  
25 manufacturer or importer “is responsible for ensuring that the food label bears a  
26 bioengineered food disclosure in accordance with this part.” 7 C.F.R. § 66.100.

1           292. For bulk foods, like grains, fruits, and vegetables, “the retailer is  
2 responsible for ensuring the food bears a bioengineered disclosure in accordance  
3 with this part.” 83 Fed. Reg. at 65,825 (“If a retailer packages a food or sells food in  
4 a bulk container and/or display, then the retailer is responsible for ensuring that  
5 the food bears a BE food disclosure in accordance with this part.”); 83 Fed. Reg. at  
6 65,831 (“AMS requires that retailers be held responsible for complying with the BE  
7 food disclosure of bulk food.”).

8           293. The rules further establish that if a food is a bioengineered food it  
9 “must bear a bioengineered food disclosure” and that the disclosure “*must be* in one  
10 of the forms described” in the regulations. *Id.* § 66.100(b). Those forms would be  
11 electronic disclosure, text disclosure, symbol disclosure, or text message disclosure.  
12 *Id.*

13           294. For text disclosure, the only language permitted is “bioengineered  
14 foods,” “bioengineered food,” or “contains a bioengineered ingredient.” *Id.* § 66.102.  
15 “A text disclosure *must bear the text as described in this section.*” *Id.* (emphasis  
16 added). That is, labeling such foods as “genetically engineered” or “genetically  
17 modified” or “produced through genetic engineering” is not permitted.

18           295. Food sold in bulk containers (display case, bin, carton, or barrel),  
19 including seafood, is assigned to retailers, and such disclosures “*must use* one of the  
20 disclosure options described in 66.102 [bioengineered language], 66.104  
21 [bioengineered symbol], 66.106 [QR code/electronic], 66.108 [text message].” *Id.* §  
22 66.114 (emphasis added).

23           296. The voluntary disclosure section has two parts. 7 U.S.C. § 66.116.  
24 First, for “exempt entities,” listed as “a very small food manufacturer, restaurant, or  
25 similar retail food establishment,” they may voluntarily provide disclosure, but the  
26 disclosure “*must be in one or more forms described,*” and listing 66.102  
27 [bioengineered package text], 66.104 [bioengineered symbol], 66.106 [electronic QR  
28

1 codes], 66.108 [phone text message]. *Id.* § 66.116(a)(1)-(4). 83 Fed. Reg. at 65,830  
2 (entities exempt from disclosure – “very small food manufacturers, restaurants and  
3 similar retail food establishments” – may only voluntarily disclose “in the same  
4 manner as those required to provide a BE disclosure.”). 83 Fed. Reg. at 65,858  
5 (“[A]ny methods to voluntarily disclose bioengineered food should match the  
6 disclosure methods available to regulated entities . . .”). That is, if you are an  
7 exempt entity, you can only voluntarily label using the above, and cannot use  
8 “produced through genetic engineering,” or similar commonplace language. 83 Fed.  
9 Reg. at 65,858 (“Therefore, an entity utilizing the voluntary disclosure provisions  
10 must comply with the disclosure requirements for text, symbol, digital or electronic  
11 link, or text message disclosure, as applicable.”).

12       297. Second, the provision covers “foods derived from bioengineering.” *Id.* §  
13 66.116(b); *see* 83 Fed. Reg. at 65,830 (“This means that many refined products  
14 originating from bioengineered crops do not constitute bioengineered foods.”). For  
15 foods that are excluded from mandatory disclosure because they are highly refined,  
16 regulated entities *may* disclose such foods, but only with one of the listed  
17 disclosures: text stating “derived from bioengineering” or “ingredients derived from  
18 a bioengineered source”; a symbol stating “derived from bioengineering”; QR code  
19 electronic disclosure pursuant to § 66.108; or text message disclosure pursuant to §  
20 66.108. *Id.* Thus related entities that wish to disclose processed GE foods cannot use  
21 “produced through genetic engineering” or any other similar terms, and can only  
22 use the above methods.

23       298. This provision also excludes foods that are “not exempt from disclosure  
24 under § 66.5,” meaning that foods excluded under that provision, like meat and  
25 dairy derived from livestock animals fed GE feed, are not covered by it and cannot  
26 even be labeled in the above manner. 7 C.F.R. § 66.116(b); 83 Fed. Reg. at 65,830  
27 (“A food that is ... exempted from disclosure under 66.5(c)-(e) is prohibited from  
28

1 voluntary disclosure under the NBFDS.”); 83 Fed. Reg. at 65,858 (“[V]oluntary BE  
2 disclosure is available in limited circumstances and does not apply to any foods that  
3 the amended Act excludes . . .”).

4 299. Although the statute directs USDA to establish a disclosure standard  
5 “with respect to any bioengineered food and any food that *may be* bioengineered,” 7  
6 U.S.C. § 1639b(1) (emphasis added), in the final rule USDA refused to permit any  
7 “may be” labeling under the standard. 83 Fed. Reg. at 65,827 (“The ‘may be  
8 bioengineered’ disclosure cannot be used.”).

9 300. Finally, despite the above multiple restrictions on speech and the  
10 stated exclusivity of the bioengineered standard, the regulations inexplicably state  
11 that “nothing in this subpart will prohibit regulated entities from making other  
12 claims regarding bioengineered foods, provided that such claims are consistent with  
13 applicable Federal law.” *Id.* § 66.118. Nowhere do the regulations explain this  
14 inconsistency, or what USDA means by “other claims” or believes is permissible.

15 301. The rules include a severability clause stating that “if any provision of  
16 this part is declared invalid . . . the validity of the remainder . . . shall not be  
17 affected.” *Id.* § 66.11.

### 18 C. Injuries

19 302. Retailers, producers, and other would be speakers are injured by  
20 Defendants’ suppression of their speech rights regarding genetically engineered  
21 foods. Absent that prohibition, they could and would communicate to their  
22 customers the factual and truthful information about how these foods are produced.

23 303. These include retail and manufacturer “regulated entities,” as defined  
24 by the regulations, as well as “exempted entities,” as defined by the regulations,  
25 such as “retail food establishments” that wish to voluntarily disclose, depending on  
26 the situation.



1           304. These Plaintiffs’ speech is unconstitutionally chilled by Defendants’  
2 exclusive and preemptive disclosure scheme. Absent prohibition by the new  
3 exclusive federal regulatory scheme, retailers could provide more meaningful  
4 transparency to customers in their stores. This would include the right to label  
5 using the traditional, consumer-known terminology of “genetically engineered” or  
6 “GMO,” rather than “bioengineered”; disclosing highly refined products that are  
7 produced with genetically engineered ingredients; disclosing meat or dairy sourced  
8 from animals fed genetically engineered feed; disclosing food produced in in-store  
9 restaurants, bakeries, or delis; and disclosing other foods that only may be produced  
10 with genetic engineering. These labels could be applied through store shelf tags,  
11 hang tags, bulk bins, or other disclosure means, such as labeling their own store  
12 varieties, if they are produced with genetically engineered ingredients. This chilling  
13 of their speech harms them economically as well as reputationally.

14           305. Defendants’ actions place Plaintiffs at risk of non-compliance  
15 enforcement by USDA, if they are found to be violating the exclusive bioengineered  
16 standard. It also places them at risk of litigation from third parties, under state law  
17 actions or common law claims, who disagree with their disclosures and seek to  
18 enforce the limitations of the narrow federal scheme.

19           306. Consumers are also equally injured by the prohibition. The First  
20 Amendment protects listeners’ rights, that is, the right of consumers to receive this  
21 information. Commercial speech is particularly protected under the First  
22 Amendment because of the value it provides consumers.

23           307. Because of Defendants’ chilling of Plaintiffs’ speech, consumers will not  
24 be able to receive information they expect and would otherwise greatly value having  
25 to do with whether foods are produced through genetic engineering. Grocery stores,  
26 retailers, and producers they rely on and trust are no longer permitted to provide  
27 them that information because of Defendants’ prohibition on their speech. Even the  
28

1 disclosures consumers do receive will be rendered misleading, since most foods  
2 produced through genetic engineering will not be disclosed. Or, even if they are,  
3 they will only be disclosed through QR codes, or the unknown “bioengineered”  
4 terminology.

#### 6 **FOURTH CAUSE OF ACTION**

##### 7 ***Prohibition on Speech (Violation of the First Amendment)***

8 308. Plaintiffs re-allege and incorporate by reference the allegations set  
9 forth in paragraphs 1 through 307 of this Complaint as if fully set forth herein.

10 309. The First Amendment guarantees the right to disclose truthful and  
11 non-misleading information on food labels. *See, e.g., Rubin v. Coors Brewing Co.*,  
12 514 U.S. 476 (1995).

13 310. The prohibited speech is truthful and thus First Amendment protected  
14 because the foods to be labeled are produced with genetic engineering as a factual  
15 and scientific matter, whether or not Defendants have excluded them from the  
16 bioengineered classification.

17 311. Existing federal law under the FDCA prohibits food from being  
18 misbranded, including if it is “false or misleading in any particular.” 21 U.S.C. §  
19 331(a). Yet, as detailed above, federal agencies have long-standing guidance  
20 permitting voluntary disclosures for both presence and absence of genetic  
21 engineering, showing that and how such disclosures are not false or misleading.

22 312. Many of these foods were already being labeled as “produced with  
23 genetic engineering” in the marketplace. Both FDA and USDA have guidance that  
24 discusses and allows such labeling, as not false and misleading, as discussed *supra*.  
25 Indeed, documents obtained from a Freedom of Information Act request indicate  
26 that USDA viewed the terms “GE” and “GMO” as mandatory to avoid misleading  
27 consumers.

1           313. In order to pass Constitutional muster, restrictions on speech must (1)  
2 further a “substantial” governmental interest; (2) must “directly advance” that  
3 interest; and (3) be “no more extensive than necessary,” i.e. narrowly tailored, to  
4 serve that interest. *Central Hudson Gas & Electric Corp. v. Public Service Comm.*  
5 *Of N.Y.*, 447 U.S. 557, 567-68 (1980).

6           314. The final rule prohibits speech in at least 4 separate ways. First, the  
7 final rule prohibits entities from using the common and well-established  
8 terminology (“produced with genetic engineering” or “GMO”) to label genetically  
9 engineered foods for any and all foods that it includes in its bioengineered  
10 classification. This applies to entities either already regulated or otherwise exempt  
11 but intending to label. Instead the only labeling permitted requires the use of the  
12 terms and methods otherwise established by the rule (bioengineered text or symbol,  
13 QR code, or text message) which, as explained above, fail to meaningful provide  
14 disclosure to consumers.

15           315. Second, as discussed, “highly refined” GE foods, the overwhelming  
16 majority of GE foods, are entirely excluded from mandatory disclosure  
17 requirements. The final rule allows voluntary labeling of these foods by entities  
18 (regulated or exempt) intending to label, but only narrowly using its own  
19 terminology of “derived from bioengineering.” It again disallows and prohibits these  
20 entities from using the far more commonly known terms (produced with genetic  
21 engineering) for these GE products.

22           316. Third, numerous types of GE foods are excluded from the  
23 bioengineered classification and standard. This includes any meat or dairy from  
24 livestock fed genetically engineered feed. It also includes GE foods served in a  
25 restaurant or similar retail food establishment, such as in-store bakeries, delis, or  
26 restaurants. For these GE foods, the final rule prohibits any voluntary disclosure.

1           317. Fourth, despite the statute’s instruction that the standard must also  
2 cover foods that only “may be” bioengineered, the final rule excludes any such  
3 labeling from the standard, and goes further, prohibiting any voluntary use of any  
4 such labeling. 83 Fed. Reg. at 65,827 (prohibiting “may be produced with genetic  
5 engineering”).

6           318. Defendants’ prohibitions on speech regarding genetically engineered  
7 foods lacks any governmental interest, let alone any substantial one.

8           319. In fact such chilling of further speech beyond the Act’s narrow  
9 standard is directly contrary to the purpose of labeling and the Disclosure Act: to  
10 inform consumers. More, not less, related speech fulfills the Act’s purposes.

11           320. Even assuming there was a cognizable governmental interest that was  
12 substantial, Defendants’ prohibition on speech does not directly advance any such  
13 interest. The restriction is antithetical to the purpose of informing consumers that  
14 foods are produced through genetic engineering. More, not less speech would  
15 further the Act’s purposes of informing consumers and providing transparency.

16           321. By omitting and not disclosing various GE foods and prohibiting them  
17 from the bioengineered standard, and then prohibiting their voluntary labeling as  
18 GE or otherwise, the agency misleads and confuses consumers, in direct  
19 contravention to the purposes of the Act.

20           322. Nor is the prohibition narrowly tailored, or no more extensive than  
21 necessary. Rather it restricts protected speech broadly, prohibiting speakers far  
22 beyond the disclosure standard the statute establishes. Far from being narrowly  
23 tailored, the final rule restricts speech beyond the contours of the disclosure  
24 classification it establishes, including speech related to restaurant and ready-made  
25 deli foods and speech related to seed labeling.

26           323. In the final rule, Defendants made no effort to show that its  
27 restrictions on speech are supported by governmental interests, let alone

28

1 substantial ones, or to show that these interests are more than just general,  
2 abstract, or hypothetical.

3 324. The only plausible governmental interest here is in reducing consumer  
4 confusion and increasing consistent and honest communication with consumers.  
5 The final rule has the opposite effect. To limit speech as it does the rule must be  
6 supported by a substantial government interest, but there is no cognizable  
7 governmental interest, let alone a substantial one, in prohibiting disclosures on  
8 genetically engineered foods beyond the bioengineered classification. Without  
9 justification, USDA created huge loopholes of foods that are not covered under the  
10 final rule, such as highly refined GE foods. USDA proscribed common, recognizable  
11 forms of labeling through prohibiting the use of the familiar terminology of  
12 “genetically engineered” and “genetically modified.” USDA also allowed forms of  
13 labeling that will not meaningfully inform consumers, such as QR code disclosures  
14 and text message disclosures.

15 325. Plaintiffs request that the Court provide declaratory relief that  
16 entities’ right to provide this truthful and factual information about genetically  
17 engineered foods is protected and cannot be restricted. Plaintiffs further seek that  
18 the Court declare these prohibitions and restrictions unlawful and severed from the  
19 rule.

## 20 21 **RELIEF REQUESTED**

22 WHEREFORE, Plaintiffs respectfully request that this Court:

23 326. Adjudge and declare that USDA’s final rule decision to allow the use of  
24 QR Code disclosure on packages without additional forms of disclosure is contrary  
25 to the Disclosure Act, not authorized by the Act, and constitutes a violation of the  
26 Act and the APA.



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