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DOES MANDATORY GMO LABELING FURTHER A COMPELLING PUBLIC INTEREST?

[Agriculture \(/full-blog/category/Agriculture\)](#)

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In 2016, Congress passed a law requiring labeling of bioengineered food products, more commonly known as Genetically Modified Organism or GMO food products.[i] (file:///C:/Users/Spidey22/Downloads/KJJEANRL%20Blog_Land.docx#_edn1) Many believe this mandatory labeling requirement is unconstitutional. The reason for this belief, surprisingly, derives from a 2015 Supreme Court case regarding road signage in Arizona.[ii] (file:///C:/Users/Spidey22/Downloads/KJJEANRL%20Blog_Land.docx#_edn2)

Genetic modification is a process of biotechnology whereby genetic material of an organism is manipulated to deliberately modify the organism's characteristics to create new variations of life.[iii] (file:///C:/Users/Spidey22/Downloads/KJJEANRL%20Blog_Land.docx#_edn3) While humans have been making genetic improvements to plant varieties for thousands of years and have been practicing crossbreeding and hybridization since the late 1800s, biotechnology has evolved such that scientists can more precisely alter the genetic composition of plants with genetic engineering.[iv] (file:///C:/Users/Spidey22/Downloads/KJJEANRL%20Blog_Land.docx#_edn4) As of 2014, genetically engineered crops made up ninety-three percent of US corn acreage, ninety-four percent of US soybean acreage, and ninety-six percent of US cotton acreage.[v] (file:///C:/Users/Spidey22/Downloads/KJJEANRL%20Blog_Land.docx#_edn5)



There are both passionate proponents of GMO foods and fervent opponents as well. GMO proponents point to farmers' ability to plant herbicide-resistant plants and plants that are more resistant to diseases, droughts, and pesticides, which leads to increased crop productivity, longer shelf life, lower use of chemical pesticides, and lower average levels of fungal toxins on produce.[vi] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_edn6) In addition to these benefits, GMO advocates point to other positive impacts including lower food prices, reduction in greenhouse gases, increased production of biofuels, decrease in soil erosion, and social benefits like reduction in hunger in developing countries.[vii] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_edn7) The most common supporters of genetically engineered crops include farmers, processors, distributors, retailers, scientists, food technologists and professionals in other fields dedicated to improving nutrition, protecting the environment and fighting world hunger.[viii] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_edn8)

The adversaries of GMOs claim that, while the process of cutting and splicing genes is a precise process, inserting genes into the DNA of plant cells is an imprecise and uncontrolled process that can lead to DNA mutations that may unpredictably impact the way the genes function in nature.[ix] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_edn9) Opponents of GMOs point to studies, conducted using laboratory and farm animals, suggesting that GMOs may be allergenic or toxic in comparison to non-GMOs.[x] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_edn10) Additionally, GMO opponents point to the fact that the biotechnology industry tends to impose strict restrictions on the acquisition of GMO seeds for research and on publication of such research, which some interpret as a lack of transparency and as evidence that the industry has something to hide.[xi] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_edn11)

Those opposed to the use of genetically engineered crops in food products favor mandatory GMO food labeling. Support for GMO labeling generally stems from consumers' desire to know what their food contains so that they can make better-informed decisions about the foods they purchase. Supporters of mandatory GMO labeling point to transparency as the main reason for supporting mandatory labeling.[xii] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_edn12) In 2016, seventeen states had proposed mandatory GMO labeling laws and three states had passed such laws.[xiii] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_edn13) However, in 2016 Congress stepped in and created law mandating the labeling of GMO food products, known as the National Bioengineered Food Disclosure Standard.[xiv] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_edn14) The National Bioengineered Food Disclosure Standard Act requires that within two years of enactment, the FDA and the USDA establish regulations prescribing the labeling of bioengineered foods.[xv] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_edn15)



(<http://sustainableagriculture.net/blog/gmo-labeling-bill-now-what>)

The First Amendment prohibits the enactment of laws abridging the freedom of speech. The First Amendment protects against speech compulsions just as it protects against speech limitations. Information that is required on labels is considered to be "compelled commercial speech" and therefore must adhere to the requirements of the First Amendment.[xvi] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_edn16) Some who believe that mandatory GMO labeling is unconstitutional find support from the Court's 2015 decision in *Reed v. Town of Gilbert*. [xvii] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_edn17)

In *Reed*, the Court found that an Arizona town's sign code singled out specific subject matter for differential treatment, even if it did not target viewpoints within that subject matter.^[xviii] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_edn18) This finding resulted in the holding that "speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."^[xix] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_edn19) Content based speech is subject to the highest level of scrutiny under the First Amendment, strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.^[xx] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_edn20) First Amendment experts agree that when a court applies strict scrutiny in determining whether a law is consistent with the First Amendment only the rarest statute survives the examination.^[xxi] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_edn21)

In the case of GMO labeling, many believe that based on the finding in *Reed*, mandatory GMO labeling would also be determined by the Court to be content based speech; thus requiring the Court to find that labeling furthers a compelling public interest and is narrowly tailored to achieve that interest.^[xxii] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_edn22) Because of the sharp divide among the country and experts in the field, it seems unlikely the Court would find that mandatory labeling meets the high standard of a compelling public interest. Only time will tell.

[i] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref1) National Bioengineered Food Disclosure Standard, Pub. L. No. 114-216 (2016).

[ii] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref2) Henry I. Miller, *Supreme Court Free-Speech Decision Clobbers GMO Food-Labeling Activists*, Forbes, (Sep. 16, 2015, 5:00 AM), <https://www.forbes.com/sites/henrymiller/2015/09/16/supreme-court-free-speech-decision-clobbers-gmo-food-labeling-advocates-but-they-dont-know-it/#6155b5c2533f>.

[iii] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref3) Courtney Begley, *Note: "So Close, Yet So Far": The United States Follows The Lead of the European Union in Mandating GMO Labeling. But Did It Go Far Enough?*, 40 Fordham Int'l L.J. 625, 635 (2017).

[iv] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref4) *Bioengineered Foods: Hearing Before the S. Comm. on Agric., Nutrition, & Forestry*, 109th Cong. 50 (2005) (statement of Robert E. Brackett, Director, Center for Food Safety & Applied Nutrition) (June 14, 2005), <http://www.fda.gov/NewsEvents/Testimony/ucm112927.htm>; Stephanie Amaru, *A Natural Compromise: A Moderate Solution to the GMO & "Natural" Labeling Disputes*, 69 Food Drug L.J. 575 (2014).

[v] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref5) Begley, *supra* note iii at 637.

[vi] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref6) *Id.* at 636.

[vii] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref7) *Id.* at 637.

[viii] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref8) *See The Alliance for Better Foods: About the Alliance*, <http://www.betterfoods.org/Overview/aboutABF.htm> (last visited Apr. 14, 2017).

[ix] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref9) Amaru, *supra* note iv.

[x] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref10) *Id.*

[xi] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref11) *Id.*

[xii] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref12) *See Just Label It: Who are the Companies Fighting for Your Right To Know?*, JustLabelIt.org, (last visited Apr. 14, 2017) <http://www.justlabelit.org/right-to-know-center/labeling-supporters/>.

[xiii] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref13) *2016 State Labeling Legislation Map*, Center for Food Safety, (last visited Apr. 15, 2017) http://salsa3.salsalabs.com/o/1881/p/salsa/web/common/public/content?content_item_KEY=14210.

[xiv] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref14) *Supra* note i.

[xv] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref15) *Id.*

[xvi] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref16) Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know"*, 58 *Ariz. L. Rev.* 421, 434 (2016).

[xvii] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref17) Miller, *supra* note ii.

[xviii] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref18) Reed v. Town of Gilbert, 135 U.S. 2218, 2230 (2015).

[xix] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref19) *Id.*

[xx] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref20) *Id.* at 2231.

[xxi] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref21) Miller, *supra* note ii.

[xxii] (file:///C:/Users/Spidey22/Downloads/KJEANRL%20Blog_Land.docx#_ednref22) *Id.*; Adler, *supra* note xvi.

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