

# Illuminating the DARK Act

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## Introduction

Access to information is an essential component to a functioning society and democracy. As a society, we depend on accurate information to make important decisions. Labeling of food products is just one way to provide consumers with information about the products they purchase. Labels can provide the consumer with information about what a product is, where it was produced, the product's nutrition content, as well as any safety warnings. Providing clear and transparent information that is accessible to all potential consumers allows them to make informed decisions. But, what happens when those in control, like the food and agriculture industry, do not want consumers to have total access to information about their products and therefore push for different ways of labeling to conceal information and limit access?

This Note analyzes The Safe and Accurate Food Labeling Act of 2016 (“S. 764”),<sup>1</sup> known by opponents as the DARK Act (Denying Americans the Right to Know). This Note will address both sides of the debate on labeling, and how S. 764 was intended as compromise legislation. Regarding the GMO portion of the bill, proponents argue that it is a fair compromise and allows for a uniform, national labeling standard. Opponents claim it is far from a compromise because it is essentially an “un-labeling bill” disguised as a genetically modified organism (“GMO”)<sup>2</sup> labeling bill, designed by special interests in the food industry to avoid transparent labeling.

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1. Amending the Agricultural Marketing Act of 1946 (7 U.S.C. § 1621 et seq.).
2. Genetically modified organisms (“GMOs”) or genetically engineered foods, are foods produced in a lab from organisms in which the genetic material (“DNA”) has been altered in a way that does not occur naturally by mating and/or natural recombination. This process allows selected individual genes to be transferred from one organism to another, and also between unrelated species. One of the objectives for developing GM organism plants is for crop protection as they

Part I of this Note begins with a brief history surrounding the debate over GMOs. This includes a discussion about the concerns and benefits of GMOs and the contention over the labeling of foods that are genetically engineered and/or contain GMOs. This Note will discuss state labeling laws that were implemented in response to consumer demands, specifically, Act 120 from Vermont, which prompted the passage of S. 764.

Part II is an introduction to the DARK Act which explains S.764. This part explores the legislative history which lead to the enactment of S.764, including the various lobbying efforts behind it as well. This part further explores who and what is left in the dark under the Act. For example, numerous state labeling laws are now preempted from requiring mandatory, on-package labeling.

Part III explores the implications of the Act, primarily the constitutionality of the bill. This part addresses the due process and equal protection violations behind this legislation as well as analyzing the governmental interest behind the Act. This part also dissects the mandated technological component of the labeling requirement, specifically how it discriminates against rural, poor, and elderly populations who do not own smart phones and or do not have internet access.

Part IV explores whether all Americans have the same rights in an increasingly digital society? This part offers a couple of solutions to mandatory GMO labeling that will solve the issues presented by the Act. One example is to have a mandatory uniform symbol as part of the labeling requirement, where consumers are able to identify the label and completely understand that it means a product contains GMOs, rather than having to do any further research. Another potential solution would be to implement technology in stores that allows consumers to access labeling information. Lastly, this part explores the tensions with consumer preferences and argues that this is pushing the food industry towards transparent labeling voluntarily.

## I. The Debate Surrounding GMOs

The controversy over labeling food that contains genetically engineered ingredients originated over two decades ago with the emergence of GMOs in the American food supply in 1994.<sup>3</sup> Today, over seventy percent of

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have an increased tolerance toward herbicides. This tolerance is achieved by introducing a gene from a bacterium conveying resistance to some herbicides. WORLD HEALTH ORG., *Food Safety: Frequently Asked Questions on Genetically Modified Foods*, May 2014, [http://www.who.int/foodsafety/areas\\_work/food-technology/faq-genetically-modified-food/en/](http://www.who.int/foodsafety/areas_work/food-technology/faq-genetically-modified-food/en/).

3. Elizabeth Weise, *Genetically Engineered Foods, Q & A*, USA TODAY, Oct. 28, 2012, <http://www.usatoday.com/story/news/nation/2012/10/28/gmo-questions/1658225/> (identifying 1994 as the first year a GMO product was brought to the U.S. market); *GMO Timeline—A History of*

products sold in U.S. grocery stores contain GMOs.<sup>4</sup> The debate is divided among pundits who believe combining science and food is completely safe and a solution to world hunger and malnutrition and others who are cautious of the lack of history and complete data on the health and safety of GMOs. Debates surrounding labeling efforts emphasize this contention and highlight the concerns on each side, however, pro-labeling arguments are more persuasive because they stand for consumer choice and transparency.

### **A. Those Who Accept GMOs Argue Against Mandatory Labeling**

At the heart of the debate lies a disagreement about facts. Many of the arguments from each side conflict with the facts the other side rely upon. For example, proponents of GMOs argue that the benefits far outweigh any of the health risks, which are considered “theoretical.”<sup>5</sup> Proponents argue that GMO crops have lowered the price of food and lessened the amount of pesticides and herbicides used on crops, which increases fieldworker safety.<sup>6</sup> Proponents further claim that GMO crops will be the solution to food shortages as populations continue to grow and climate change threatens crops. They argue GMOs have the ability to produce higher yields; better withstand high and low temperatures; tolerate insects, diseases, and pesticides; and grow in dry soils better than non-GMO crops.<sup>7</sup> The biggest concern GMO proponents appear to have with labeling efforts is that they believe the concerns are based on misconceptions.

#### *1. GMOs Have Not Been Proven Unsafe*

The debate centers on the safety of GMOs. Proponents state that over the past couple of decades, people have consumed trillions of meals containing genetically modified ingredients and have yet to find a single verified case of illness that has been attributed to genetic alterations.<sup>8</sup>

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*Genetically Modified Foods*, GMO AWARENESS, 2012, <http://gmo-awareness.com/all-about-gmos/gmo-timeline-a-history-of-genetically-modified-foods/> (listing important dates in the development of GMOs, including 1994 as the first year a GMO product was on the U.S. market).

4. See Travis Nunziato, “*You Say Tomato, I Say Solanum Lycopersicum Containing Beta-Ionone and Phenylacetaldehyde*.” *An Analysis of Connecticut’s GMO Labeling Legislation*, 69 FOOD & DRUG L.J. 471, 472 (2014) (assessing the percentage of products sold in the United States that contain GMOs to be seventy percent).

5. See David H. Freedman, *The Truth About Genetically Modified Food*, SCI. AM., Sept. 1, 2013, <https://www.scientificamerican.com/article/the-truth-about-genetically-modified-food/> (David Zilberman, a U.C. Berkeley agricultural and environmental economist and one of the few researchers considered credible by both agricultural chemical companies and their critics, explains the benefits and misconceptions of GMOs.).

6. Freedman, *supra* note 5.

7. Freedman, *supra* note 5.

8. Freedman, *supra* note 5.

Several respected organizations, such as the American Medical Association, National Academy of Sciences, and the World Health Organization, support this position, stating that hundreds of peer-reviewed studies confirm that GMOs pose no danger to health.<sup>9</sup> GMO proponents argue that because there are no proven dangers, GMOs should not trigger a label requirement.<sup>10</sup>

## 2. *Labeling Unfairly Stigmatizes GMO Products*

Because proponents cite to studies proclaiming the safety of GMOs and decades of use without adverse health effects, they claim that labeling is not necessary and unfairly stigmatizes these products.<sup>11</sup> Food companies worry that by attaching a label that says “genetically engineered” to their products, consumers will misinterpret that as a warning label.<sup>12</sup> The labels will mislead consumers, proponents believe, and consumers will be deterred from buying the products.<sup>13</sup> This would result in consumers purchasing fewer GMO products, leading food companies to eventually remove the genetically engineered ingredients from their products.<sup>14</sup> In fact, some food companies consider labeling as a concealed effort by GMO opponents to eliminate genetically engineered crops from agriculture.<sup>15</sup> The food industry claims that GMOs have been proven safe and labeling would create an unfair stigma on GMOs; proponents argue profit interests of these companies should not supersede the consumers’ desire to know the contents of their food.

## **B. Those Against GMOs Advocate Labeling Schemes**

Regardless of the benefits and arguments poised by the biotech and the food industries, over ninety percent of Americans are in favor of labeling GMO foods.<sup>16</sup> Whether for the lack of adequate research, health concerns, religious reasons, ethical reasons, social justice concerns, or environmentalism, there are several strong arguments in favor of clearly

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9. Barry Petersen, *Digging for Seeds of Truth in GMO Debate*, CBS NEWS, Jan. 17, 2016, <http://www.cbsnews.com/news/digging-for-seeds-of-truth-in-gmo-debate/2/> (citing to scientific organizations stating GMOs pose no danger to health).

10. Dan Charles & Allison Aubrey, *How Little Vermont Got Big Food Companies to Label GMOs*, NPR, Mar. 27, 2016, <http://www.npr.org/sections/thesalt/2016/03/27/471759643/how-little-vermont-got-big-food-companies-to-label-gmos>.

11. Charles & Aubrey, *supra* note 10.

12. Charles & Aubrey, *supra* note 10.

13. Charles & Aubrey, *supra* note 10.

14. Charles & Aubrey, *supra* note 10.

15. See Charles & Aubrey, *supra* note 10.

16. Gary Hirshberg, *Mandatory GMO Labeling It’s Your Right to Know*, HUFF. POST, July 21, 2016, [http://www.huffingtonpost.com/garyhirshberg/mandatory-gmo-labeling—i\\_b\\_7841144.html](http://www.huffingtonpost.com/garyhirshberg/mandatory-gmo-labeling—i_b_7841144.html).

labeling GMOs.<sup>17</sup> The underlying goal of mandatory, clear, on-package labeling is to provide consumers with the facts so that they can make informed decisions about the food they purchase and ingest.<sup>18</sup>

### *1. Inadequate and Biased Research on GMOs*

Perhaps the most compelling argument is that there have been virtually no independent or government studies assessing the impact of growing and consuming GMO crops.<sup>19</sup> Rather, the Food and Drug Administration (“FDA”) relies on studies designed and conducted by the GMO developers, who then interpret the results and report their conclusion (which is usually “no new or novel risk”) to the FDA under a “voluntary consultation.”<sup>20</sup> The FDA does not verify the reliability of the studies or perform independent analysis, and rarely asks for additional data;<sup>21</sup> this is why the FDA states in these “voluntary consultations” that “you, [the company] have concluded” rather than taking ownership of the data.<sup>22</sup> Not only is it concerning that there is bias throughout the research that has been conducted on GMOs, but there are also no adequate safeguards in approving such data.

It is in the best interests of the biotech industry and GMO developers to conduct studies that produce positive conclusions about the health and safety of their products because of their economic interests. Therefore, it is disconcerting that the FDA allows for such biased and financially motivated data pertaining to the safety of genetically modified food and the impact on human health and the environment. This concern over the bias in the research, the inadequacy of the FDA’s analysis, and the lack of independent research on the impacts of GMOs are the main arguments in favor of clear, on-package labeling of foods that contain GMOs. People feel that because of these potential health concerns and environmental impacts, allowing for on-package labeling is fair to inform consumers to allow them to decide if they want to purchase these products.

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17. Hirshberg, *supra* note 16.

18. See VT. STAT. ANN., TIT. 9, § 3041(1) (2014) (listing as one of the purposes of the statute, “Establish a system by which persons may make informed decisions regarding the potential health effects of the food they purchase and consume . . . .”); see also ME. REV. STAT. TIT. 22, § 2591(2) (2014) (listing as one of the purposes of the statute, “Assist consumers . . . to make informed purchasing decisions.”).

19. Hirshberg, *supra* note 16.

20. Hirshberg, *supra* note 16.

21. Hirshberg, *supra* note 16.

22. Hirshberg, *supra* note 16.

## 2. *There is No Scientific Consensus on the Safety of GMOs*

GMO crops were introduced only twenty years ago, and therefore the long-term health impacts of consuming, and the environmental impacts of growing GMO crops, are unknown.<sup>23</sup> Despite what proponents of GMOs want consumers to believe, there is no common consensus in the scientific community about the safety of GMOs.<sup>24</sup> There is a range of different research methods used, inadequacy of available procedures, and conflicts in data analysis and interpretation.<sup>25</sup> For example, the classic argument that “trillions of GMO meals” have been consumed in the U.S. without any negative health effects is misleading as there have been no epidemiological studies nor any studies investigating the effects GMO food consumption has on human health in regards to incidence, distribution, and control of diseases.<sup>26</sup> Claims like this highlight the misconception that surrounds the research and data on GMOs. Because GMO foods and products are not labeled and monitored, it is scientifically impossible to trace patterns of consumptions and impacts.<sup>27</sup>

There are also constraints on research, especially for the public good, because of property rights issues. For example, developers often require researchers to sign contracts conferring control over publication to the proprietary interests, and without doing so are denied access to this research material.<sup>28</sup> Because of these tensions with accessing research, the various methods of researching, and analyzing data that is available, and the fact that most studies are fairly recent, no scientific consensus about the safety of GMOs has been reached.<sup>29</sup>

## 3. *Environmental & Health Concerns of Increased Use of Pesticides*

One of the biggest arguments in favor of GMOs is the claim that their properties of being engineered to be herbicide-resistant means less chemical

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23. Gary Hirschberg, *Why Labeling Makes Sense*, JUST LABEL IT, Mar. 6, 2013, <http://www.justlabelit.org/right-to-know-center/why-labeling-makes-sense/>; see also Layla Katiraei, *Why There Are No Long Term GMO Studies on Humans*, GENETIC LITERACY PROJECT, Jan. 13, 2016, <https://geneticliteracyproject.org/2016/01/13/no-long-term-gmo-studies-humans/>; Angelika Hilbeck et al., *No Scientific Consensus on GMO Safety*, ENVTL. SCI. EUROPE, Jan. 24, 2015, <https://enveurope.springeropen.com/articles/10.1186/s12302-014-0034-1>.

24. Hilbeck et al., *supra* note 23.

25. Hilbeck et al., *supra* note 23.

26. Hilbeck et al., *supra* note 23.

27. Hilbeck et al., *supra* note 23.

28. Hilbeck et al., *supra* note 23.

29. Hilbeck et al., *supra* note 23.

usage.<sup>30</sup> However, herbicide use in the United States in the past sixteen years has increased eleven percent.<sup>31</sup> The three major GMO crops in the United States—corn, soy, and cotton—have increased overall herbicide use of more than five-hundred twenty-seven million pounds between 1996-2011, from what it would have been absent GMO crops.<sup>32</sup> This has led to numerous species of “super weeds” which are resistant to glyphosate, the active ingredient in Roundup, and the most popular commercial weed killer.<sup>33</sup>

“Super weeds” developed after years of constant exposure to glyphosate, and as a result they are able to survive several courses of Roundup and then pass their resistance on to the next generation.<sup>34</sup> As a result, farmers who grow GMO crops have to use about twenty-five percent more herbicides than farmers who grow traditional seeds.<sup>35</sup> In response, biotech companies want approval of GMO crops that are resistant to higher-risk herbicides, like 2,4-D and Dicamba, which are older herbicides that have contributed to negative environmental and human health impacts.<sup>36</sup> Therefore, the argument that GMO crops require less herbicide use is not only incorrect, but also grossly misrepresents the fact that GMO crops actually require *more* herbicide use than non-GMO crops, and are demonstrating a need for even stronger, higher-risk herbicides.

This is a cause for concern for Americans because exposure to herbicides, which are used to kill “weeds,” has negative implications for human health and the environment.<sup>37</sup> For example, in 2010, the President’s Cancer Panel reported that forty-one percent of Americans would be diagnosed with cancer in their lifetime.<sup>38</sup> The panel cited daily exposure to

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30. See Charles M. Benbrook, *Impacts of Genetically Engineered Crops on Pesticide Use in The U.S.—The First Sixteen Years*, ENVTL. SCI. EUROPE, Sept. 28, 2012, <http://enveurope.springeropen.com/articles/10.1186/2190-4715-24-24>.

31. See *id.*

32. *Id.*

33. *Id.*

34. See Jason Koebler, *Herbicide-Resistant ‘Super Weeds’ Increasingly Plaguig Famers*, U.S. NEWS, Oct. 19, 2012, <https://www.usnews.com/news/articles/2012/10/19/herbicide-resistant-super-weeds-increasingly-plaguig-farmers> (citing stories that some super weeds are growing as tall as eight feet and the only way to stop them is by hacking them with machetes).

35. *Id.*

36. See *id.*

37. See Katarina Lah, *Effects of Pesticides on Human Health*, TOXIPEDIA, May 6, 2011, <http://www.toxipedia.org/display/toxipedia/Effects+of+Pesticides+on+Human+Health> (explaining that some herbicides may cause cancer, reproductive or developmental effects, or endocrine system effects and persistent herbicides contaminate surface water, groundwater, and soil).

38. PRESIDENT’S CANCER PANEL, 2008-2009 ANNUAL REPORT, REDUCING ENVIRONMENTAL CANCER RISK-WHAT WE CAN DO NOW (2010).

numerous chemicals found in our food, air, and water as the main culprit.<sup>39</sup> In addition to cancer concerns, there is a direct correlation between pesticide usage and increased Attention-Deficit/Hyperactivity Disorder (“ADHD”) diagnoses.<sup>40</sup> For example, in the United States, 4.5 million children between the ages of five to seventeen have been diagnosed with ADHD, and rates of diagnosis have increased three percent per year between 1997 and 2006.<sup>41</sup> These health correlations are a big reason why consumers want these products to be clearly labeled. Consumers want a way to avoid dangerous exposure. After years of use, the revelation of data demonstrating the misconceptions about GMO crops and herbicide use, coupled with the numerous health risks of exposure to these chemicals, emphasizes the cause for concern consumers have about genetically modified food products.

#### 4. *Right to Know Consumer Advocacy Campaigns*

Health and environmental concerns are some of the prominent arguments in favor of transparent labeling of genetically modified foods. However, many argue that consumers have the fundamental right to know what is in their food. The Consumer Right to Know Policy argues for GMO labeling based on the premise that consumers should be able to choose whether or not they want to purchase and consume foods that contain GMOs.<sup>42</sup> This policy is not an argument based on the science, health, or safety of GMOs.<sup>43</sup> Rather, this policy is based on the concerns of citizens being able to make informed decisions, specifically, whether they want to consume foods that have been genetically modified.<sup>44</sup> Although the Consumer Right to Know Policy offers compelling basis for clear, mandatory labeling of GMOs, the courts continuously reject this consumer interest rationale.<sup>45</sup>

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39. *Id.*

40. Alice Park, *Study: A Link Between Pesticides and ADHD*, TIME, May 17, 2010, <http://content.time.com/time/health/article/0,8599,1989564,00.html>.

41. *Id.*

42. See Hirshberg, *supra* note 23 (The Consumer Right to Know Policy is based on the principle that individuals have the right to know if and what chemicals they are exposed to in their daily living. In the context of GMOs, it is the policy that these food products should be labeled so that individuals have complete information about the contents of their food.). See *e.g.*, Just Label It! “Right to Know” [www.justlabelit.org/right-to-know-center](http://www.justlabelit.org/right-to-know-center).

43. Steve Keane, *Can a Consumer’s Right To Know Survive The WTO?: The Case of Food Labeling*, 16 TRANSNAT’L L. & CONTEMP. PROBS. 291, 302 (2006) (stating that the concept of The Right to Know is not always grounded in health and safety concerns).

44. *Id.*

45. See *All. for Bio-Integrity v. Shalala*, 116 F.Supp.2d 166, 179 (D.D.C. 2000) (holding that a consumer’s right to know could only be considered once a material difference was found between GMO and non-GMO products. Since the FDA did not find a material difference between GE foods

This Right to Know also plays to the dominant notion that knowledge is power. As explained in an interview with George Kimbrell, the expert on GMOs and the DARK Act at the Center for Food Safety, GMO labeling exposes consumers to the truth about our food system.<sup>46</sup> Kimbrell stated that people are starting to correctly see the battle with agriculture as a battle over how our food is produced.<sup>47</sup> Kimbrell explained GMOs as a pillar of industrial agriculture that is causing issues like environmental contamination and super weeds, issues that concern the public.<sup>48</sup> He stated that once people begin to understand the role GMOs have in our food production, information pertaining to what foods contain GMOs becomes very important to consumers.<sup>49</sup> The food industry is very concerned about consumers having this knowledge and exposing the reality of the agriculture industry.

This cover-up attempt to avoid exposure is similar to Ag-Gag laws that have been passed in seven states.<sup>50</sup> Ag-Gag laws aim to block whistleblowers revealing animal abuses on industrial farms.<sup>51</sup> These laws do so by criminalizing acts of investigation, including possession or distribution of videos, photos, and/or audio taken on a farm.<sup>52</sup> These laws are all done in an attempt to keep the injustices of industrial farming, including animal cruelty, undercover and controlled. Similarly, the labeling of GMOs is about much more than genetically engineered food products; it is about the injustice of our food system and the desire of the few who control it to maintain their power by keeping consumers in the dark.

## C. History—What Happened Pre-DARK Act

### 1. State Labeling Efforts

In response to the overwhelming consumer demand for GMO labeling, states began implementing mandatory GMO labeling laws as an effort to address an area that Congress was resisting.<sup>53</sup> As early as 2005, Alaska

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and their traditional counterparts, the Consumer Right to know Policy was not a sufficient basis on its own for a food labeling law).

46. Interview with George Kimbrell, Legal Director, Center for Food Safety (Apr. 13, 2017).

47. Interview with George Kimbrell, Legal Director, Center for Food Safety (Apr. 13, 2017).

48. Interview with George Kimbrell, Legal Director, Center for Food Safety (Apr. 13, 2017).

49. Interview with George Kimbrell, Legal Director, Center for Food Safety (Apr. 13, 2017).

50. AM. SOC'Y FOR PREVENTION ON CRUELTY OF ANIMALS, *Ag-Gag Legislation by State*, <https://www.aspc.org/animal-protection/public-policy/ag-gag-legislation-state>.

51. *Id.*

52. *Id.*

53. Stephanie Strom, *Connecticut Approves Labeling Genetically Modified Foods*, N.Y. TIMES, June 3, 2013, <http://www.nytimes.com/2013/06/04/business/connecticut-approves-qualified-genetic-labeling.html> (explaining the necessity of including a provision in a bill stating

passed a mandatory labeling law for all genetically engineered fish and shellfish.<sup>54</sup> In June 2013, Connecticut became the first state to pass a labeling bill for products containing genetically engineered ingredients and restrictions on products that could be labeled as “natural.”<sup>55</sup> The Connecticut law required food products that are entirely or partially genetically engineered to be clearly labeled as “produced with genetic engineering.”<sup>56</sup> Shortly after, in early 2014, Maine followed with a similar genetically modified labeling bill, “An Act to Protect Maine Food Consumers’ Right to Know About Genetically Engineered Food and Seed Stock.”<sup>57</sup> Although this was a major win for consumers favoring mandatory labeling, both the Maine and Connecticut legislation included “trigger clauses” in order for the laws to come into effect, constraining both laws from going into effect immediately.<sup>58</sup>

All of these state measures resulted in extensive lobbying efforts from Monsanto, the Grocery Manufacturers Association (“GMA”), and other major agro-chemical companies, but it was the passage of Vermont’s labeling law that prompted swift lobbying efforts in Congress to block these patchwork efforts.<sup>59</sup> Vermont passed the first mandatory GMO labeling bill, Act 120, on May 8, 2014.<sup>60</sup> Act 120 required all foods produced “entirely or in part” with genetic engineering to be labeled with the clear and conspicuous words, “produced with genetic engineering.”<sup>61</sup> Act 120 also has a provision

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that the law would not take effect unless four other states, one of which must share a boarder with Connecticut, passed similar regulations; Gov. Malloy’s was attempting to strike a balance of protecting small businesses and consumers’ right to know).

54. *Id.*

55. See CONN. GEN. STAT. ANN. § 21a-92c(c) (West 2015).

56. CONN. GEN. STAT. ANN. § 21a-92c(c).

57. ME. REV. STAT. ANN. TIT. 22, § 2591 (2014).

58. See Julie M. Muller, *Naturally Misleading: FDA’s Unwillingness to Define “Natural” and the Quest for GMO Transparency Through State Mandatory Labeling Initiatives*, 48 SUFFOLK U. L. REV. 511, 527–28 (2015) (explaining that the trigger clauses of Connecticut and Maine labeling laws included that four states from a specific list had to enact a similar GMO labeling law, and that one of the states must also boarder Connecticut. Maine required similar legislation to be adopted in at least four contiguous states).

59. See George A. Kimbrell & Aurora L. Paulsen, *The Constitutionality of State-Mandated Labeling for Genetically Engineered Foods: A Definitive Defense*, 39 VT. L. REV. 341 (2014), (discussing the amount of money spent on lobbying against GMO labeling measures); see Ken Roseboro, *GMO Labeling Efforts Reveal the Best and Worst of American Democracy*, THE ORGANIC & NON-GMO REPORT, July 21, 2016, <http://non-gmoreport.com/gmo-labeling-efforts-reveal-the-best-and-worst-of-democracy/>.

60. See An Act Relating to the Label of Food Produced with Genetic Engineering, VT. ACTS & RESOLVES No. 120 (codified as 9 V.S.A. § 3041 et seq. (2014)).

61. . Jonathan Rose, *What Businesses Need to Know About the New Vt. GMO Law*, LAW 360 May 31, 2016, <https://www.law360.com/articles/801771/what-businesses-need-to-know-about-the-new-vt-gmo-law>.

prohibiting the use of the term “all natural” or “naturally made” to describe any foods that must be labeled.<sup>62</sup> The GMA, which represents a majority of the food manufacturers in the U.S., challenged Act 120 on First Amendment claims because of the restrictions on labeling GMOs as “natural.”<sup>63</sup> Act 120 does not have a trigger clause or other conditions, and requires genetically engineered products to be clearly labeled by July 1, 2016.<sup>64</sup>

The legislative intent behind Act 120 is similar to the goals of Right to Know campaigns and represents multiple objectives.<sup>65</sup> Ultimately, the purpose is to reduce and prevent consumer confusion and to establish a system that allows consumers to make informed decisions regarding the potential health effects of the food they consume.<sup>66</sup> The Act also aimed to inform the purchasing decisions of consumers who are concerned about the environmental effects of the production of genetically engineered food.<sup>67</sup> Additionally, Act 120 aimed to provide consumers with data that would enable them to make informed decisions for religious purposes, such as keeping kosher.<sup>68</sup>

Food companies strongly opposed this legislation on the grounds that it would require companies to comply with costly relabeling, which increases costs for consumers.<sup>69</sup> In response, several companies announced that they would begin labeling all of their products containing GMOs with clear, on-package labeling nationwide, because it would be costly to provide separate labeling for Vermont.<sup>70</sup>

## 2. Federal Labeling Efforts

In response to the various state labeling efforts and a concern over “patchwork” labeling legislation across the United States, the House of Representatives passed H.R. 1599, the Safe and Accurate Food Labeling Act, in July 2015.<sup>71</sup> H.R. 1599 would have preempted any state laws

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62. *Id.*

63. 9 V.S.A. § 3043(c).

64. 9 V.S.A. § 3043(a).

65. 9 V.S.A. § 3041(1).

66. 9 V.S.A. § 3041(1).

67. 9 V.S.A. § 3041(2).

68. 9 V.S.A. § 3041(4) (religious concerns to avoid GMOs).

69. Charles & Aubrey, *supra* note 10.

70. Charles & Aubrey, *supra* note 10 (Mars company statement about labeling GMO products).

71. See H.R. 1599, 114th Cong. (2015) (passage in the House of Representatives on July 24, 2015).

requiring the labeling of GMOs or Genetically Engineered (“GE”) foods.<sup>72</sup> Furthermore, the bill only allows for voluntary labeling if there is a “material” difference between the GMO and non-GMO foods, and it could be shown that labeling was a necessary means to prevent consumer confusion or harm to the public.<sup>73</sup> Although H.R. 1599 was not signed into law, it set the stage for the national labeling standard, Senate Bill 764 (“S. 764”).

## II. Introduction to the DARK Act

### A. The Safe and Not-So-Accurate Food Labeling Act

Over ninety percent of Americans favor the labeling of genetically engineered food. In fact, several states began implementing state labeling laws, and food companies were even voluntarily labeling due to consumer preferences and market pressures. Therefore, a federal labeling law was inevitably soon to follow. In July 2016, The Safe and Accurate Food Act, was signed into law by President Barack Obama.<sup>74</sup> The Act aims to establish a national labeling disclosure standard for “bioengineered foods.”<sup>75</sup> The Act directs the Secretary of Agriculture to establish a national mandatory bioengineering food disclosure standard within two years of its enactment.<sup>76</sup> The Secretary must also determine what amount of a bioengineered substance must be present in food to constitute a “bioengineered food.”<sup>77</sup> Under the Act, food containing genetically engineered ingredients must have one of four on-package label options in order to be in compliance.<sup>78</sup> Food manufacturers may use a Quick Response (“QR”) code, a symbol, a 1-800 number, or plain text directing consumers to a website.<sup>79</sup>

Unlike the Vermont Bill, under the Act, there are no penalties for compliance failures, which means the U.S. Department of Agriculture

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72. H.R. 1599, 114th Cong. § 101(2)(A) (2015) (asserting that there must be a material difference in one of these attributes in order to require labeling for GMO products).

73. H.R. 1599, 114th Cong. § 101(2) (A-B) (2015) (explaining that for the Secretary to be able to require GMO labeling, both (A) and (B) must be fulfilled).

74. Phil Lempert, *Sorry Food Industry, The Historic GMO Food Labeling Bill Is Anything But*, FORBES, Aug. 1, 2016, <https://www.forbes.com/sites/phillempert/2016/08/01/sorry-food-industry-the-historic-gmo-food-labeling-bill-is-anything-but/#6e5950226926>; see also Diane C. McEnroe, *5 Things to Know About the Bioengineered Food Labeling Bill*, LAW 360, July 14, 2016, <https://www.law360.com/articles/820952/5-things-to-know-about-the-bioengineered-food-labeling-bill>.

75. See generally 7 U.S.C. § 1639 (2016).

76. See 7 U.S.C. § 1639(a).

77. See 7 U.S.C. § 1639(b)(2)(B).

78. See 7 U.S.C. § 1639(b)(2)(D).

79. Lempert, *supra* note 74.

(“USDA”) does not have authority to require recalls of products that are not in compliance with the law.<sup>80</sup> This is problematic because food manufacturers do not have legal or financial deterrence to comply with the law. Therefore, some products will not have proper labels and consumers will be further misinformed. Congress’ decision to not include penalty provisions in the Act makes it unenforceable, which prevents Americans from being fully informed about the contents of their food.

Under the Act, the Secretary must conduct a study to identify any possible technological challenges that may be presented through the type of digital and electronic methods involved in this regulation.<sup>81</sup> If the Secretary finds that consumers do not have sufficient access to information through the technological methods mandated, the Secretary must then consult with food manufacturers and retailers before altering the option to access bioengineering disclosures.<sup>82</sup>

The genesis of the Act was to destroy states’ patchwork labeling efforts, and the bill contains explicit preemption measures as a result. The Act mandates that no state may establish or continue any requirement relating to the labeling or disclosure of bioengineered food unless such requirement is identical to the disclosure under the Act.<sup>83</sup> This includes requiring any disclosure of food or seeds that are developed or produced using bioengineering.<sup>84</sup>

## **B. The Legislative History and Enactment of S. 764**

Critics view S. 764 as being problematic from the start because of the absence of traditional legislative debates and committee meetings during its formation.<sup>85</sup> The lack of legislative process suggests that Congress fast-tracked S. 764 due to pressure from the food industry to pass the bill before July 1, 2016, the enactment date of Vermont’s Act 120, in order to preempt

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80. See Lempert, *supra* note 74; see also Emily Monaco, *5 Major Fails of the New GMO Labeling Law*, ORGANIC AUTH., Aug. 18, 2016, <http://www.organicauthority.com/5-major-fails-of-the-new-gmo-labeling-law-and-5-ways-its-not-so-bad/> (comparing fines in Vermont law of \$1,000 per day per product not complying with regulations with S. 764’s lack of penalty provisions); *The Latest: Sanders Says GMO Bill in Congress Has Loopholes*, ASSOC. PRESS, July 1, 2016, <http://bigstory.ap.org/article/cf1e9f6cc9a543bea10f9aaadbcbcd266/latest-governor-urges-tweets-vermont-gmo-label-law> (explaining Senator Bernie Sander’s opposition to S. 764 and the lack of penalties for companies who violate the law).

81. See 7 U.S.C. § 1639(c)(1).

82. See 7 U.S.C. § 1639(c)(4).

83. See 7 U.S.C. § 1639(e).

84. 7 U.S.C. § 1639(e).

85. See Andrew Kimbrell, *Why the GMO ‘Labeling’ Bill That Obama Just Signed into Law Is a Sham—and a National Embarrassment*, HUFF. POST, Aug. 5, 2016, [http://www.huffingtonpost.com/andrew-kimbrell/why-the-gmo-labeling-bill\\_b\\_11335918.html](http://www.huffingtonpost.com/andrew-kimbrell/why-the-gmo-labeling-bill_b_11335918.html) (criticizing the lack of hearings and expert testimony for S. 764).

the Vermont law.<sup>86</sup> S. 764 was introduced to the Senate on June 23, 2016, after H.R. 1599 did not pass the Senate in March 2016.<sup>87</sup> The bill passed in the Senate on July 7, 2016, and in the House of Representatives on July 14, 2016.<sup>88</sup> The bill spent less than a month going through the legislative process, which entailed less than a week of debate and no hearings.<sup>89</sup> Critics point to the obvious motives behind this bill and that it was fast-tracked for industry, which drastically pushed for a federal labeling standard before Vermont's Act 120 went into effect.<sup>90</sup>

### C. Lobbying Labeling Efforts

Critics' concerns over the influence the food industry had on this legislation heightened because the industry groups who lobbied against labeling efforts began publicly supporting the Act after it passed. Over 1,000 food and agriculture organizations, including the GMA, publically supported the Act, which included providing press statements after the vote.<sup>91</sup> The GMA represents more than 300 food companies that are opposed to GMO labeling, including major companies that sell GMO products such as Coca-Cola, Pepsi, Kellogg's, Kraft, Nestle, and General Mills. It is hard not to question the health risks of GMOs when the entities claiming they are safe are the companies selling GMO products, and yet simultaneously spending millions annually to oppose GMO labeling efforts. Therefore, the praise for the Act that comes from the industries that have spent millions on lobbying expenditures raises questions for proponents of transparent labeling, sparking skepticism of the actual force of the bill.

Food and biotech companies have increased their lobbying expenditures for legislation relating to GMO labeling efforts in various states and in Congress. For example, these companies spent three times more in 2014 than 2013 on anti-labeling lobbying expenditures.<sup>92</sup> The GMA

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86. *Id.*

87. Tom Philpott, *Congress Just Passed a Bill to Nix GMO Labeling*, MOTHER JONES, June 27, 2016, <http://www.motherjones.com/environment/2016/06/senate-deal-would-crush-vermonts-gmo-labeling-law> (explaining S. 764 was introduced after H.R. 1599 failed to pass in the Senate in March 2016).

88. See Pub. L. No. 114-216, § 101(2)(A), 130 Stat. 834 (asserting that there must be a material difference in one of these attributes in order to require labeling for GMO products).

89. Kimbrell, *supra* note 85 (stating that no hearings were conducted for S. 764).

90. Kimbrell, *supra* note 85 (classifying S. 764 as a product of campaign corruption).

91. Dan Flynn, *Compromise Bill on GMO Labeling Lands on President's Desk*, FOOD SAFETY NEWS, July 14, 2016, <http://www.foodsafetynews.com/2016/07/compromise-bill-on-gmo-labeling-lands-on-presidents-desk/#.V-sYu8ac8UU>.

92. Libby Foley, *Corporate Spending to Fight GMO Labeling Skyrockets*, EWG, Apr. 23, 2015, <http://www.ewg.org/research/anti-label-lobby>.

increased their lobbying expenditures on GMO labeling from \$60,000 in 2013 to \$5.8 million in 2014.<sup>93</sup> This does not include expenditures from GMA's member organizations, which separately disclosed \$25.4 million tied to GMO labeling.<sup>94</sup> Compared to lobbying efforts from GMO labeling advocates, who spent only \$4.3 million in 2013 and 2014 combined, the big food manufacturers and biotech companies outspend supporters nearly twenty to one.<sup>95</sup> Big food, agriculture, biotechnology industries, and trade associations spent over \$100 million on lobbying against labeling of food containing GMOs.<sup>96</sup> The companies that spent the most in 2015 to fight GMO labeling were Coca-Cola, PepsiCo, Kellogg's, Kraft Heinz Co., Land O'Lakes, and General Mills, totaling \$20.6 million.<sup>97</sup> Each year these industries increase their lobbying expenditures to block GMO labeling efforts, while at the same time publicly support for labeling increases.<sup>98</sup>

Tracking the flow of these expenditures in Congress sheds light on why critics are skeptical of the motivation behind the Act. For example, during the 2014 election cycle, large food and biotech companies spent more than \$3.8 million on 404 candidates to oppose labeling.<sup>99</sup> More than one million dollars of this spending went to seventy-nine members of Congress who sit on the House Agriculture or House Energy and Commerce committees. These are the committees that have jurisdiction over the House version of the DARK Act.<sup>100</sup> These figures, coupled with the GMA and the companies they represent expressing their support in favor of the end result of the Act is why proponents of transparent labeling and Right to Know campaigns approached celebrating this bill as a success with caution.

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93. *Id.*

94. *Id.*

95. *Id.*

96. Rob Coleman, *Food Lobby Spends \$101 Million in 2015 to Avert GMO Labeling*, EWG, Feb. 25, 2016, <http://www.ewg.org/research/lobbying-anti-labeling-groups-tops-100m>.

97. *Id.*

98. *Id.* (citing increases in lobbying against GMO labeling efforts with expenditures of \$25.4 million in 2013, \$66 million in 2014, and exceeding \$100 million in 2015).

99. Coleman, *supra* note 96 (EWG looked at political action committee contributions by Bayer, Biotech Industry Org., Coca-Cola, Dow Chemical, DuPont, General Mills, Grocery Manufacturers Association, Kellogg, Kraft, Land O'Lakes, Monsanto, PepsiCo. and Syngenta).

100. Foley, *supra* note 92.

## D. The “DARK Act”

Champions of GMO labeling efforts expressed their dissatisfaction with the law by renaming S. 764 the DARK Act.<sup>101</sup> Critics claim this bill is an “un-labeling” bill more than a labeling bill, because manufacturers can conceal information about GMOs using a QR code, website, or a 1-800 number, making it more difficult for consumers to obtain information about their food.<sup>102</sup> The lack of transparency created by allowing a QR code to constitute a label demonstrates the special interests of industry, not consumers, was a priority in creating this legislation.<sup>103</sup> In addition, the use of technology as a mode of access for labeling information excludes over 100 million Americans from learning adequate information about the contents of their food.<sup>104</sup>

### 1. *Who is Left in the Dark?*

There are equity implications of using technologies as a means of labeling. For example, more than fifty percent of America’s poor and rural populations, a disproportionate number of which are minority communities, and over sixty-five percent of the elderly, citizens sixty years of age and older, do not own smartphones.<sup>105</sup> Combine this figure with those that cannot afford monthly service payments, or those who live in rural areas that lack internet access, and this figure increases to over one hundred million Americans who will not have access to food information under this labeling system.<sup>106</sup> This food labeling bill discriminates against vast portions of U.S. citizens by only allowing basic information about food production and contents to be provided through technological means, such as smart phone scans of QR codes and access to the Internet.<sup>107</sup>

The Pew Research Center data demonstrates that of Americans who make less than \$30,000 a year, only half have a smartphone.<sup>108</sup> Of those fifty percent of Americans, forty-four percent had to let their smartphone service

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101. Stephen Dinan, *Obama Signs Bill Overturning Vermont’s GMO Labeling Law*, WASH. TIMES, Aug. 2, 2016, <http://www.washingtontimes.com/news/2016/aug/2/obama-signs-bill-overturning-vermonts-gmo-labeling/>.

102. *Id.*

103. *Id.*

104. *Id.*

105. Monaco, *supra* note 80; Andrew Kimbrell, *Is the Senate About to Pass a Law That Discriminates Against Over Half of Americans?*, HUFF. POST, Mar. 16, 2016, [http://www.huffingtonpost.com/andrew-kimbrell/is-the-senate-about-to-pa\\_b\\_9471606.html](http://www.huffingtonpost.com/andrew-kimbrell/is-the-senate-about-to-pa_b_9471606.html).

106. Monaco, *supra* note 80.

107. Monaco, *supra* note 80.

108. See Aaron Smith, *U.S. Smartphone Use in 2015*, PEW RESEARCH CTR., Apr. 1, 2015, [http://www.pewinternet.org/files/2015/03/PI\\_Smartphones\\_0401151.pdf](http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf).

lapse at least once for financial reasons.<sup>109</sup> Of all smartphone users, twenty-three percent have cancelled or suspended their phone services because of financial constraints.<sup>110</sup> Furthermore, African Americans and Latinos are about twice as likely as white people to have their smartphone service cancelled.<sup>111</sup> These figures demonstrate how using technology as a means for information access has a discriminatory effect of excluding many groups of people. It is problematic to have this vast number of people excluded from labeling information about their food because food choices play a critical role in Americans' lives.

If you are one of the fortunate Americans who owns and can afford the monthly service bills of a smartphone, you then must have adequate Internet access or a data plan to access labeling information under this bill. Depending on internet access and data service to obtain information about food content is burdensome and a way to ensure consumers will not be able to obtain adequate information. For example, about forty-nine percent of smartphone users say they experience, at least on occasion, trying to access content that does not display properly, and ten percent claim it happens "frequently."<sup>112</sup> Poor signal quality prevents forty-seven percent of smartphone users from using their phone on occasion and thirty-seven percent reach their data limits before the month is up.<sup>113</sup> Therefore, even if one has a smartphone, there are numerous reasons why they will not be able to access the label information once they arrive at the store.

Not only does this discriminate against those with limited technological resources, but also against those with limited time. People may not want to spend additional time doing product research while shopping. This system requires consumers to look up each item individually to see if it is genetically engineered. The amount of time it would take to look up each item to see if it is genetically engineered discriminates against groups with limited time and resources to access this information. Ultimately, this form of labeling will work as a deterrent and consumers will not look up information because they do not have the technology or the time to research every single item they want to purchase.

The burdens the Act imposes on consumers works against the legislative intent of labeling efforts in that it results in less transparency of the contents of food. Consumers may not have the time or means to access

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109. See Smith, *supra* note 108.

110. Smith, *supra* note 108.

111. Smith, *supra* note 108.

112. See Smith, *supra* note 108.

113. Smith, *supra* note 108.

such information, resulting in consumers remaining uninformed about the contents of their food when making their purchasing decisions. The Act places the burden on the consumer to find out if food products contain GMOs, rather than putting the information directly on food labels. This process will require consumers to take additional time to research these products to determine if they contain GMOs and then decide whether or not they will purchase the product. It seems paradoxical to put the burden on the consumer when the manufacturer is the one that profits from the transaction and could easily provide on-package labeling to inform the consumer about what is in their product. What is even more paradoxical is that the Act mandates manufacturers to change the labels but strictly forbids language such as “genetically engineered” or “genetically modified” to accompany disclosures on the packages.<sup>114</sup> It completely discredits the claimed intent of protecting consumers and ensuring they are provided accurate information about the contents of their food when the Act contains numerous restrictions to actually providing easily accessible information through clear, on-package labels.<sup>115</sup>

## 2. *Loopholes in Labeling*

Ironically, the FDA, did not have the most praiseworthy response to the new federal labeling bill. The FDA took issue with giving USDA authority over food labeling that has historically been FDA’s sole regulatory jurisdiction.<sup>116</sup> The FDA expressed concerns with the labeling of bioengineered foods and how this may incorrectly translate to the public as a reflection of the safety of these foods.<sup>117</sup> Perhaps the most troubling concern the FDA expressed is with the definition of “bioengineering” and how it would result in an overly generous reading to exclude many genetically modified foods.<sup>118</sup> For example, the phrase “genetic material” exempts many genetically engineered products from labeling requirements, such as oil made from genetically engineered soy, starches, and purified proteins.<sup>119</sup> The bill also prevents food derived from animals that consume feed that was produced from, contained, or consisted of a bioengineered

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114. See 7 U.S.C. § 1639.

115. Chris Morran, *President Signs Law That Overturns Vermont GMO Labeling Rules, Replaces Them with Barcodes*, CONSUMERIST, Sept. 26, 2016, <https://consumerist.com/2016/07/29/president-signs-law-that-outlaws-vermont-gmo-labeling-rules-replaces-them-with-barcodes/>.

116. See U.S. FOOD AND DRUG ADMIN., *FDA/HHS Technical Assistance on Senate Agriculture Committee Draft Legislation to Establish a National Disclosure Standard for Bioengineered Foods*, EDW, June 27, 2016, <http://src.bna.com/gnD> [hereinafter *FDA Comments on S. 764*].

117. *FDA Comments on S. 764*, *supra* note 116.

118. *FDA Comments on S. 764*, *supra* note 116.

119. *FDA Comments on S. 764*, *supra* note 116.

substance from being considered a bioengineered food.<sup>120</sup> Lastly, the law states that an item is only to be labeled as genetically engineered if the modification could not have occurred through “conventional breeding or found in nature,” and the FDA warned that would be difficult to show.<sup>121</sup> The comments of concern from the FDA, which has years of experience in this domain of food labeling, exemplify why opponents feel S. 764 is a poorly written law with little to no force in accurately labeling food that contains GMOs.

### 3. *Preempted State Laws*

This Act preempts existing GMO labeling laws in all states specifically, Vermont, Maine, and Connecticut, and pending bills in seventeen states, and eliminates any state laws protecting consumers from deceptive claims of “natural” labels on food.<sup>122</sup> The national labeling Act is weaker than Vermont’s labeling law because it allows QR codes to count as a label and it does not have any penalty provisions to ensure compliance.<sup>123</sup> The Act contains two express preemption provisions: Section 293(e) preempts states from requiring any labeling or disclosure of bioengineered food unless it is identical to the federal requirement; and, Section 295 preempts any labeling requirements regarding genetically engineered seeds.<sup>124</sup> Essentially, the Act preempts states from protecting their citizens, especially those in poor, rural, and minority populations using labels, while failing to establish credible federal labeling standards.<sup>125</sup>

## **III. The Dark Act Does Not Satisfy the Constitutional Mandate for Equal Protection for All Americans Under the Law**

The purpose of labeling requirements is to provide Americans with information about the contents of their food, specifically, whether it is

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120. See 7 U.S.C. § 1639(b)(2)(A).

121. *Id.* § 1639(b)(2)(A).

122. Mae Wu, *House Bill Would Keep You in the Dark About What’s in Your Food*, NRDC, July 22, 2015, <https://www.nrdc.org/experts/mae-wu/house-bill-would-keep-you-dark-about-whats-your-food>.

123. Kathleen Masterson, *Congress Passes A GMO Labeling Bill That Nullifies Vermont’s Law*, VPR, July 15, 2016, <http://digital.vpr.net/post/congress-passes-gmo-labeling-bill-nullifies-vermonts-law#stream/0>.

124. McEnroe, *supra* note 74.

125. Jean Halloran, *Consumers Union Letter to US Senators in Opposition of S. 764 to Preempt State GMO Labeling Laws*, CONSUMERS UNION, July 1, 2016, <http://consumersunion.org/research/consumers-union-letter-to-us-senate-in-opposition-of-s-764-to-preempt-state-gmo-labeling-laws/>.

genetically engineered.<sup>126</sup> However, the fact that the Act mandates that this information be accessed through technology is inherently discriminatory because of the economic barriers technology presents in society.<sup>127</sup> Nearly one-third of Americans cannot access this type of mandated labeling, either because they do not own a smartphone, cannot afford to pay for the smartphone services, or live in an areas with limited internet and data connectivity.<sup>128</sup> This labeling scheme raises Equal Protection questions.

Laws governing public information access, especially pertaining to the contents of food, should not contain unnecessary barriers to access, such as the technology requirements under the Act. This statute implicates the Fifth Amendment, because it is a federal act. To determine if there is an Equal Protection violation, the Court first looks to the classification. The Act has a discriminatory impact on elderly, the poor, and minorities. Under Equal Protection, any classification on the basis of race or ethnicity gets analyzed under strict scrutiny.<sup>129</sup> This requires the government to show that the challenged classification serves a compelling state interest and that the law is narrowly tailored to serve that compelling government interest.<sup>130</sup> Because the Act is not facially discriminatory, the Court will look to whether there is disparate impact, which requires a showing of discriminatory purpose.<sup>131</sup>

Here, although the intent behind the Act is related to food labeling, there is a disparate impact because of the technological component. However, to succeed in proving disparate impact requires a showing of intent, such as comments made during hearings and in the legislative history.<sup>132</sup> This requires more than demonstrating that it is foreseeable that the Act would have a disparate impact.<sup>133</sup> Utilizing technology as a means of accessing information that could easily be placed on a label has a disparate impact on those who cannot afford or do not have the technology, and in this case the impact is on racial minorities, in addition to the elderly and the poor. Requiring one to have a smart phone, internet access, and to be able to afford maintaining these services each month discriminates against racial minorities, who statistically cannot afford these luxuries. Therefore, the Act

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126. *See id.*; *see also* 7 U.S.C. § 1639.

127. S. 764, 114th Cong. (2015).

128. *See* Smith, *supra* note 108.

129. *Brown v. Board of Ed.*, 347 U.S. 482 (1954); *Slaughterhouse Cases*, 83 U.S. 36 (1873); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

130. *Id.*

131. *Washington v. Davis*, 426 U.S. 229 (1976).

132. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979).

133. *Feeney*, 442 U.S. at 256.

could be found by the Courts to fail strict scrutiny because of this disparate impact on racial minorities.<sup>134</sup> The Act and the impacts it will have on denying racial minorities the ability to access information about their food is the type of discrimination the Equal Protection Clause was intended to protect against.<sup>135</sup>

In regards to the classification of elderly persons, age classifications, get rational basis review because it is not a suspect class.<sup>136</sup> Under rational basis, the government need to only show that the challenged classification is rationally related to serving a legitimate state interest.<sup>137</sup> Because this is a highly deferential standard of review, the burden of proof is on the challenger to show that the government cannot advance a conceivable legitimate purpose.<sup>138</sup> The Court will uphold the law if it can infer any rational reason for the government's action, even if it was not the government's actual purpose.<sup>139</sup> Under this standard of rational basis review, the court will likely be able to infer numerous reasons for the labeling requirements under the Act. Because one of the identified intents behind the Act is to provide uniformity in labeling laws across the country, the Court would likely determine that the Act is rationally related to the government interest of ensuring uniformity in that it provides a national labeling standard. This will likely be viewed as a balance between those who cannot access information through smartphones, and the convenience for smartphone users to have this as an option. Therefore, this claim pertaining to discrimination against the elderly would likely not pass rational basis review.

Additionally, the Court has not held that economic status, in this case the poor, is a suspect class,<sup>140</sup> and therefore Equal Protection does not apply to this group. Therefore, it is more likely for the Court to find that the Act violates Equal Protection on the basis of discriminating against racial minorities. Giving the highly deferential standard the Court affords to the government under rational basis review, the Act will likely be found constitutional with regard to any claims of age discrimination.

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134. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

135. *Id.*

136. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).

137. *Kotch v. Board of River Pilot Comm'rs*, 330 U.S. 552 (1947); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979).

138. *Id.*

139. *Id.*

140. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973). The Supreme Court expressly held that poverty is not a suspect classification and that discrimination against the poor should only receive rational basis review.

Although there is no concrete test for determining what constitutes a legitimate governmental interest, it must be “based upon some reasonable ground,” meaning just, proper, and not arbitrary.<sup>141</sup> The government interest behind the Act was to create a nationwide industry regulation that provides consumers with valuable information about the food they purchase and ingest. A secondary effect of the legislation was to preempt the patchwork of state-level legislative actions that addressed food labeling.<sup>142</sup> Proponents argue that a uniform standard of labeling is a reasonable solution for all interested parties, and it satisfies the governmental objective of providing a national labeling standard thereby avoiding patchwork legislation. However, the Act does not explicitly identify the contents of food, and specifically, whether or not it has been genetically engineered or contains genetically modified ingredients. Instead, the bill provides consumers with internet links, 1-800 numbers, and QR codes to then obtain that information. It is hard to argue that this labeling system is “rationally related” to the purpose of providing consumers with information about their food through GMO labeling. Requiring consumers to go through an overly burdensome process of scanning an item at the store, waiting for the information to load, reading the product information to determine if it contains “bioengineered” ingredients, and then repeating this process over for every item they buy is not rationally related to labeling a product as a means of providing the consumer with information.

Upon closer evaluation, this Act actually works against the governmental interest of informing Americans by creating a labeling system that is not accessible to all Americans and is not the most convenient mode possible. The government objective could have been obtained through a less burdensome, more reasonably related, and more simplified way of clear, on-package labeling. This way, consumers would be able to read the label and know whether or not the product contains genetically engineered ingredients without having to take any additional steps. This is a viable and economical option. It would be the same process of printing labels for food manufacturers, while ensuring the greatest reach to all Americans. The Act requires technological means that are not available for all consumers. It is time consuming, burdensome, and ultimately, many consumers will not go through this process to seek out the information. Requiring technology to

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141. Gulf, C. & S. F. R. Co. v. Ellis, 165 U.S. 150, 165 (1897).

142. See Kimbrell, *supra* note 85; see also Jeff Daniels, *GMOs: Congress May Block States from Requiring Labeling*, CNBC, July 22, 2015, <https://www.cnbc.com/2015/07/22/gmos-congress-may-block-states.html>; Mary Clare Jalonick, *House Passes Bill to Prevent Mandatory GMO Food Labeling*, PBS, July 23, 2015, <http://www.pbs.org/newshour/runtdown/house-passes-bill-prevent-mandatory-gmo-food-labeling/>.

access information is far more overly broad than necessary to serve the governmental interest of informing consumers about the contents of their food, especially when traditional labeling has been a successful mode of providing information about food for decades. Therefore, this type of legislation is not rationally related to the governmental interest because of these deterrent effects.

## **IV. Alternatives to The DARK Act**

### **A. Supermarkets Provide Technology**

A remedy to the discriminatory nature of the mandated use of technology to access labeling information would be to provide scanners in the stores. Stores already have price scanners for consumers to use. Therefore, they could either program these scanners to read the QR codes for consumers to access information about the food ingredients, or they could set up new scanners that are compatible with the QR codes or have internet access. This does not account for the burdensome process that scanning each individual item will still involve, or clear any confusion consumers may have about what the label means. However, it may address the issue of equal access to the information by providing the means for consumers to look up the labels if they do not own a smartphone or have Internet access in the store.

This solution only solves a portion of the larger issues presented by the Act. Providing scanners in stores does not guarantee consumers will use them, understand what the labels mean, or even have the time to use the scanners. This option will of course have problems. There may be technology malfunctions in stores, consumers may forget to use the scanners, or run out of time to scan their items, and long lines of customers who want to use the scanners may also be a deterrent to customers waiting in line to scan their items. Ultimately, the issue of consumers not having adequate information about their food so they can make informed decisions about their food consumption and what they feed their families is still unaddressed. Consumers have demonstrated they want to know what is in their food, and although Congress did provide a clear-cut remedy, it appears that the marketplace may be willing to change their stance on labeling to cater to this demand.

### **B. Market Based Strategy—Companies Opt for Clear Labeling**

Market pressure through consumer preferences is already driving food companies to have clear, on-package labeling of their genetically engineered ingredients. Food companies started to label their products in early 2016, prior to the enactment of the Vermont law, as a response to consumer

pressures.<sup>143</sup> Campbell's Soup was the first company to voluntarily label their products that contain genetically engineered ingredients, while the majority of food manufacturers heavily lobbied Congress for a national labeling standard that would preempt the Vermont law.<sup>144</sup> Campbell's uses clear, on-package labeling with plain text identifying GMOs in each product.<sup>145</sup> The first label Campbell's produced for their product SpaghettiO's: "Partially produced with genetic engineering. For more information about G.M.O ingredients, visit, WhatsinMyFood.com."<sup>146</sup> Campbell's even stated they will continue to use clear, on-package labels, not QR codes, regardless of what happens at the federal level.<sup>147</sup>

Campbell's labeling efforts dispelled the main arguments against labeling: that the practice is too costly, and the cost will be passed on to consumers. The company's spokesman Tom Huschen stated, "[t]o be clear, there will be no price increase as a result of Vermont or national GMO labeling for Campbell products."<sup>148</sup> Campbell's is the first of many companies to realize that consumers want information about the contents of their food, and providing that information is best for business and consumer relations.<sup>149</sup> Denis Morrison, Campbell's CEO, stated,

We are operating with a "Consumer First" mindset. We put the consumer at the center of everything we do. That's how we've built trust for nearly 150 years. We have always believed that consumers have the right to know what's in their food. GMO has evolved to be a top consumer food issue reaching a critical mass of [ninety-two percent] of consumers in favor of putting it on the label.<sup>150</sup>

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143. Jade Scipioni, *Why Major Food Companies Are Labeling GMOs Now*, FOX BUS., Mar. 30, 2016, <http://www.foxbusiness.com/features/2016/03/30/why-major-food-companies-are-labeling-gmos-now.html>.

144. Stephanie Strom, *Campbell Labels Will Disclose G.M.O. Ingredients*, N.Y. TIMES, Jan. 7, 2016, <https://www.nytimes.com/2016/01/08/business/campbell-labels-will-disclose-gmo-ingredients.html>.

145. *Id.*

146. *Id.*

147. Katherine Paul, *Campbell's Decision to Label GMOs Destroy Monsanto's Main Argument Against Labeling*, ALTERNET, Jan. 15, 2016, <http://www.alternet.org/food/campbells-decision-label-gmos-destroys-monsantos-main-argument-against-labeling>.

148. Paul, *supra* note 147.

149. See Jeff Harmening, *On GMOs*, GEN. MILLS, Mar. 18, 2016, <https://www.generalmills.com/News/Issues/on-biotechnology>; see also Annie Gasparro, *ConAgra Going Nationwide with GMO Labeling*, WALL ST. J., Mar. 22, 2016, <https://www.wsj.com/articles/conagra-going-nationwide-with-gmo-labeling-1458683600>.

150. Press Release, Campbell's Soup Company, *Why We Support Mandatory National GMO Labeling* (Jan. 7, 2016).

Shortly after Campbell's announced they would start labeling their products that contain GMOs, General Mills followed, along with Mars Inc., Kellogg's, and ConAgra Foods.<sup>151</sup> These are the five largest food companies in the world, and have all made public commitments to GMO labeling.<sup>152</sup> Grocery stores are picking up on consumer preferences by highlighting organic products, which legally cannot contain GMOs.<sup>153</sup> Campbell's and Mars, Inc. told *Consumerist* that they will continue using labels they created for the passage of Vermont Act 120.<sup>154</sup> Under S. 764, companies can still voluntarily label their products that contain GMOs. Companies like Campbell's, ConAgra, General Mills, and Kellogg's have started their own labeling initiatives.<sup>155</sup>

Although this may appear as an altruistic move on industry's behalf, profit motivations and manufacturing norms are the primary motives behind this decision.<sup>156</sup> In the food industry, the chain of distribution requires labeling a year in advance, so food companies had already made their labels to be in compliance with the anticipated Vermont labeling law by time the DARK Act passed.<sup>157</sup> Therefore, it is not a guarantee that food companies will continue to provide clear on package labeling, or if they will adjust and use QR codes. However, since many of these companies, like Campbell's, have made public statements endorsing labeling as a response to consumer preferences, it would likely be a bad business move to recant. Although having a transparent, on-package national labeling standard that does not allow a QR code or website to count as a label would be the most ideal standard, having the food industry voluntarily provide this type of labeling is a major improvement.

Considering that the major food brands are voluntarily labeling GMOs beyond the federal standards and consumer response is positive, this is the likely direction other companies will take. Hopefully brands like Campbell's and General Mills will demonstrate that it is still profitable, and a more

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151. Scipioni, *supra* note 143; Monaco, *supra* note 80.

152. Colin O'Neil, *ConAgra and Kellogg's Join General Mills and Mars to Label GMOs*, EWG, Mar. 23, 2016, <http://www.ewg.org/enviroblog/2016/03/conagra-and-kellogg-s-joins-general-mills-and-mars-label-gmos>.

153. *Id.*

154. See Chris Morran, *Grocery Association to Vermont Stores: Keep Labeling GMO Foods, But Only If You Want to*, CONSUMERIST, Aug. 5, 2016, <https://consumerist.com/2016/08/05/grocery-association-to-vermont-stores-keep-labeling-gmo-foods-but-only-if-you-want-to/>.

155. Monaco, *supra* note 80.

156. Interview with George Kimbrell, Legal Director, Center for Food Safety (Apr. 13, 2017).

157. Interview with George Kimbrell, Legal Director, Center for Food Safety (Apr. 13, 2017).

honest business model, to listen to customers and provide them with clear information about the contents of their food. This transition in the food industry could likely have the positive effect of pushing all food companies to label in fear of consumer distrust, as if they were hiding something by not labeling their products. This movement could also create pressure for companies to use clear labeling, over QR codes or websites, so that they would mirror their competitors. These various market pressures and consumer preferences are likely the best solution to the inadequate and discriminatory measures of the Act, especially considering the current Administration and Congress is even more favorable to industry than they were when this legislation passed under Obama in 2016.

### **C. Do All Americans Have the Same Rights in an Increasingly Digital Society?**

Finally, this form of legislation mandating technological means for accessing information begs the question: do all Americans have the same rights in an increasingly digital society? Or, will we begin seeing new legislation that will implement similar means of providing information through technology and those with limited means will be discriminated against? This Act creates a dangerous precedent by establishing access to information through technological means, preventing equal access to all members of society.

## **Conclusion**

The debate over the safety and impacts on human health and the environment of GMOs, and the adequacy and reliability of the research, is long from over. However, the debate over transparency about what is in our food is settled: Consumers want clear, on-package labeling that is not hidden behind a QR code or website. The reasons consumers may have for wanting to know the contents of their food vary, but they all want to have access to that information to make their own informed decisions about food. There is a trend towards wanting to know more about our food system, how food is produced, and uncovering the justice implications in the agriculture industry.

Unfortunately, the national standard is a far cry from the transparent labeling that consumers prefer. The DARK Act is preventing over one-third of Americans from knowing about the contents of their food because of the unnecessary use of technological barriers to access. This mechanism of limiting access to information perpetuates the tangled web of injustice in our food system, which benefits the main power players in the biotech and food industries. Supporters of this form of labeling are benefiting from their power over the food industry, and are preventing clear labeling. This is just

another way to maintain control and keep people from questioning the health and safety of GMOs. This is made apparent by the millions in expenditures the food and biotech industries spend each year on lobbying efforts. The DARK Act was a major win for the food industry because the process involved in scanning QR codes, or calling 1-800 numbers, not only eliminates those without smartphones and data, but those who do not have the time to scan each item they buy. It does make you wonder, if GMOs are so safe, then why did these food companies lobby so hard against on-package transparent labeling that would be available for everyone to see, not just those with time, a smartphone, and internet connection?

The DARK Act is filled with numerous defects, but the discriminatory aspect of the technology component of the bill is the most concerning. The solutions presented would partially deal with the issues presented by The Act. Stores installing scanners would provide the technological means of access to consumers at the store. However, the issues of the time consumption involved and providing clear adequate information to consumers are not addressed. Fortunately, the market pressures seem to be guiding food manufacturers to voluntarily provide transparent, on-package labeling resembling the Vermont labeling bill. This form of labeling is more aligned with addressing consumers' interests of having adequate information about their food. Although this does not guarantee that all food manufacturers will follow suit of other companies who have voluntarily labeled, there will likely be a shaming effect for those companies who do not, resulting in pressure to also label. Ironically, the special interests of the food industry are what pushed Congress to unveil this anything-but-labeling bill over the interests of consumers, and now some food companies are opting to voluntarily label to give consumers what they asked Congress to do. Ultimately, we will have to wait and see if the food industry continues to label through societal pressures or will simply comply on the low standards mandated by the Act.

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