3 Ariz. J. Envtl. L. & Pol'y 1023

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Comment
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*1023 GMO LABELING: CALIFORNIA'S PROPOSITION 37 AND FEDERAL CONSTITUTIONAL IMPLICATIONS

While genetically modified organism (GMO) labeling laws have been proposed on national, state, and local levels, it is probable that California will become the first state to pass a GMO labeling law. California's Proposition 37, or the Right to Know Genetically Engineered Food Act, is subject to voter approval on November 6, 2012.[1] The proposed act would require food partially or entirely produced with genetic engineering to be conspicuously labeled ""Genetically Engineered" or "Partially Produced with Genetic Engineering."[2] Any food commodity not so labeled will be deemed misbranded.[3] The law also prohibits genetically modified (GM) foods from being labeled as ""natural" or any close derivative.[4]

Similar legislation was proposed in Vermont and Connecticut, but have failed amid headlines such as "GMO Legislation Update: Monsanto Trumps Democracy in Vermont, Connecticut"[5] and "Connecticut Fears Monsanto -- Bill to Label GM Ingredients Dead Due to Law Suit Worries."[6] Connecticut lawmakers attributed the failure of the proposed legislation to threatened lawsuits by food producers.[7] Food manufacturers and GM seed producers, such as Monsanto, that fear labeling will reduce their profits will likely challenge the constitutionality of the proposed act. Allegations will likely include that GMO labeling is preempted by federal law and that it will unduly burden interstate commerce.

*1024 I. FEDERAL PREEMPTION

The Supremacy Clause of the U.S. Constitution[8] "invalidates state laws that 'interfere with, or are contrary to,' federal law."[9] Federal laws may supersede state laws in several ways.[10] Express preemption occurs when "Congress is empowered to pre-empt state law by so stating in express terms."[11] Implicit preemption arises absent express preemptive language through field or conflict preemption.[12] Field preemption occurs when it can be inferred that "Congress 'left no room' for supplementary state regulation."[13] Conflict preemption arises when "compliance with both federal and state regulation is a physical impossibility."[14]

A. Express Preemption

Express preemption occurs when a federal statute explicitly states that it intends to preempt state law.[15] The Federal Food, Drug, and Cosmetic Act specifically lists food standards of identity that must be identical to federal regulations.[16] This includes certain standards for labeling, but does not include a definition for false and misleading labeling, a definition of "natural", or anything related to GMO labeling.[17] The act does not expressly preempt state law associated with GMO labeling.

B. Implicit Preemption

The Food and Drug Administration (FDA) labeling requirements define a misbranded food as a "false or misleading representation with respect to another food ...."[18] California's Proposition 37 enlarges the definition of misbranded to any food "entirely or partially produced with genetic engineering and that fact is not disclosed."[19] The FDA has specific requirements for food labels, but also allows volunteer labeling of additional information.[20]

***1025** Courts generally analyze implicit preemption with an assumption against preemption.[21] In *Holk v. Snapple Beverage Corporation*, the Third Circuit found that Congress had not regulated so comprehensively in the food or beverage field as to leave no room for states.[22] The court considered the state's historic governance of food labeling and a state's interest in health and safety.[23] It found that federal labeling laws, which had not specifically defined "all natural," did not implicitly preempt state law.[24]

The FDA is authorized to "promote honesty and fair dealing in the interest of consumers."[25] California lawmakers have an obligation to promote health and safety in California. While the proposed law adds an additional level to the definition of a misbranded food item, it does not appear to directly or indirectly conflict with federal regulations. States have the unique ability to meet the needs of their people and act as "laboratories of democracy."[26] California lawmakers drafted Proposition 37 to add an additional level of protection for consumers and not to directly conflict with federal law. As there is not clear evidence that Congress intended for federal regulations to preempt GMO labeling laws, federal preemption most likely does not apply.

II. COMMERCE CLAUSE

The Commerce Clause of the U.S. Constitution authorizes Congress to regulate commerce among the several states.[27] The Dormant Commerce Clause, a legal doctrine inferred from the Commerce Clause, limits or restricts state regulations that would affect interstate commerce.[28] When analyzing if state action has violated the Dormant Commerce Clause, courts must determine if the state law discriminates against interstate commerce.[29] Nondiscriminatory laws that have only an incidental effect on interstate commerce are valid unless the burden exceeds alleged local benefit.[30] The U.S, Supreme Court stated "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[31]

***1026** *A. State Interest*

California's Proposition 37 cannot be seen as protectionist or facially discriminatory as it does not favor in-state economic interests over out-of-state economic interests. California promulgated Proposition 37 to protect public health and safety, a legitimate state interest. The state legislative findings declared that the result of genetic engineering is not predictable or controllable and could lead to adverse health or environmental consequences.[32] The environmental consequences include destruction of agricultural areas and the impairment of drinking water from the use of additional herbicides on GM crops.[33] The pollution of California's water sources and the ingestion of genetically engineered food that could pose future health issues will likely be seen as legitimate state interests.

B. Burden on Interstate Commerce

While California will claim that the burden on interstate commerce is only incidental, manufacturers facing the cost of relabeling goods will claim there is a significant financial burden. Producers and packagers of GM products will likely claim that GMO labeling would force manufacturers to change nationwide labels that already meet federal requirements. They will probably also argue that the creation of special labels, strictly for California, will be costly, and the specific segregation for different labels could slow or inhibit the production line.

The FDA issued draft guidance on voluntary labeling of bioengineered foods in 2001, and its findings showed that the label change would be a onetime burden and that the recordkeeping related to verifying if the food contained GM products would not likely be a significant burden relative to the size of most operations.[34] Most food manufactures that would challenge GMO labeling probably operate on a large scale and the burden will not likely be significant.

The California legislature is addressing a legitimate local concern and has done so with the least-restrictive means possible. Monsanto's website claims that consumers can "easily avoid" products with GM ingredients by purchasing only certified

organic products.[35] Whole Foods Market, a national grocery store chain that provides a large variety of organic products and that tries to keep GMO products off its shelves, admits that its stores sell GMO products "due to the pervasiveness of GMOs."[36] The only way consumers can truly avoid GM products, if they so choose, is to know what products have bioengineered ingredients. Labeling is most likely the least-restrictive means to inform consumers.

***1027 Conclusion**

It will not likely be found that Proposition 37 is preempted by federal law. State actions of this kind are neither expressly preempted by the federal Food, Drug and Cosmetic Act, nor implicitly preempted by Congress's actions. The outcome of a Dormant Commerce Cause claim depends largely on how GM manufacturers and producers impute the costs of relabeling in California. There are various studies that show there would only be a relatively small cost associated with changing the labels and tracking GM products. However, preemption and Commerce Clause implications could be avoided by enacting a GMO labeling law at the federal level. If ninety percent of the public is truly in favor of GMO labeling,[37] politicians will not be able to ignore their constituents indefinitely.

Footnotes

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1 California Right to Know Genetically Engineered Food Act of 2012, 2012 Cal. Legis. Serv. Prop. 37 (West) (if approved at Nov. 6, 2012 election, to be codified at CAL. HEALTH & SAFETY CODE §§ 110808 to 110809.4, 111910, 110663) [hereinafter Proposition 37].

2 *Id.* at sec. 3, § 110909(a).

3 *Id.*

4 *Id.* at sec. 3, § 110809.1.

5 Tanya Sitton, *GMO Legislation Update: Monsanto Trumps Democracy in Vermont, Connecticut*, EAT DRINK BETTER (May 11, 2012), http:// eatdrinkbetter.com/2012/05/11/gmo-legislation-monsanto-trumps-democracy-vt-ct/.

6 Mat McDermott, *Connecticut Fears Monsanto -- Bill to Label GM Ingredients Dead Due to Lawsuit Worries*, TREEHUGGER (May 8, 2012), http:// www.treehugger.com/environmental-policy/connecticut-fears-monsanto-bill-label-genetically-modified-ingredients-dead-lawsuit-worries.html.

7 *Genetically Modified Food Labels Legislation Fails in Connecticut,* HUFFINGTON POST (May 10, 2012, 1:54 PM), http:// www.huffingtonpost.com/2012/05/10/genetically-modified-food-labels_n_ 1506897.html.

8 U.S. CONST. art. VI, cl. 2.

9 Hillsborough Cnty. v. Automated Med. Labs., Inc., 471 U.S. 707, 712 (1985) (quoting Gibbons v. Ogden, 9 Wheat. 1, 211 (1824)).

10 *Id.* at 713.

[11] *Id.* (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

[12] *Id.*

[13] *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[14] *Id.* (quoting Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).

[15] *See id.*

[16] 21 U.S.C. § 343 (2012).

[17] *Id.* § 343(a)(2).

[18] 21 C.F.R. § 101.18(a) (2012).

[19] Proposition 37, *supra* note 1, at sec 3, § 110809(a).

[20] Draft Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering, 66 Fed. Reg. 4839-01 (Jan. 18, 2001).

[21] Holk v. Snapple Beverage Corp., 575 F.3d 329, 334 (3d Cir. 2009) (citing Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992)).

[22] *Id.* at 337 (quoting United States v. Locke, 529 U.S. 89, 111 (2000)).

[23] *Id.*

[24] *Id.*

[25] 21 U.S.C. § 341 (2012).

[26] Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999).

[27] U.S. CONST. art. I, § 8, cl. 3.

[28] United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.3d 245, 255 (2d Cir. 2001) *aff'd*, 550 U.S. 330 (2007).

[29] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960)).

[30] *Id.*

[31] *Id.*

[32] Proposition 37, *supra* note 1, at sec. 1(a).

[33] *Id.* at sec. 1(h).

[34] Draft Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering, 66 Fed. Reg. 4839-01 (Jan. 18, 2001).

[35] *What's the Problem with Labeling Genetically-Modified (GM/GMO) Foods?*, MONSANTO, http://www.monsanto.com/newsviews/pages/food-labeling.aspx (last updated June 21, 2012).

[36] A.C. Gallo, *Let's Talk About GMOs at Whole Foods Market*, WHOLE FOODS MARKET (Sept. 27, 2012), http://www.wholefoodsmarket.com/blog/lets-talk-about-gmos-whole-foods-market.

[37] Proposition 37, *supra* note 1, at sec. 1(e).