MEREDITH STEVENSON (CA Bar No. 328712)
GEORGE KIMBRELL (*Pro Hac Vice*)
AMY VAN SAUN (*Pro Hac Vice*)
Center for Food Safety
2009 NE Alberta St., Suite 207
Portland, OR 97211
Ph: (971) 271-7372
Emails: meredith@centerforfoodsafety.org
gkimbrell@centerforfoodsafety.org
avansaun@centerforfoodsafety.org

Counsel for Plaintiffs

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NATURAL GROCERS, CITIZENS FOR GMO LABELING, LABEL GMOS, RURAL VERMONT, GOOD EARTH NATURAL FOODS, PUGET CONSUMERS CO-OP, NATIONAL ORGANIC COALITION, AND CENTER FOR FOOD SAFETY *Plaintiffs,* v. SONNY PERDUE, Secretary of the United States Department of Agriculture; BRUCE SUMMERS, Administrator of the Agricultural Marketing Service; and the UNITED STATES DEPARTMENT OF AGRICULTURE, *Defendants.*	Case No. 20-5151-JD **FIRST AMENDED COMPLAINT FOR DECLARATORY AND EQUITABLE RELIEF**

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AMENDED COMPLAINT

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

INTRODUCTION AND NATURE OF ACTION

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

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

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

4. There are six claims in this action. First is the issue of how the disclosure is provided under the final rule: electronic or digital forms of labeling, also known as Quick Response code (QR code) or "smartphone" labeling. Congress

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

5. Second is the issue of what terminology is permitted. For 25 years, all aspects of the public dialog around GE foods—scientific, policy, market, legislative, consumer—have used either "genetically engineered" (GE) or "genetically modified" (GMO) to refer to genetically engineered foods.[1] Those are terms that all federal agencies, including USDA during this very rulemaking, used. They are what the public knows, understands, and expects, and what is currently used in the marketplace by producers. They are what other countries and U.S. trade partners use internationally. And, Congress used the new term "bioengineered" in the Act, at the same time, it instructed USDA to also include "any similar term" in its new standard. Despite that instruction and the overwhelming support from stakeholders to allow continued use of the far more well-known "GE"/ "GMO" terms, in its final rule USDA instead excluded "GE" and "GMO," prohibiting them from use in the on-package text or symbol labeling, only allowing use of the term bioengineered. That

[1] For clarity sake, we will use the term "GE" in this complaint to refer to genetically engineered foods.

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1 decision was arbitrary and capricious, contrary to the Act's plain language and the
2 APA and failed to fulfill the Act's fundamental purpose of informing consumers. It is
3 antithetical to the Act's purpose because it will confuse and mislead consumers.

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

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

23 8. Fifth is the issue of states' rights in regulating seeds and their labeling
24 under the broad preemption provisions in the Act. In general states and political
25 subdivisions have a Tenth Amendment Right to regulate their own citizens in the
26 absence of federal regulation. In this instance, states and political subdivisions have
27 a right to directly and indirectly regulate genetically engineered seed labels,
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