CENTER FOR FOOD SAFETY

July 30, 2013

Hearing on Biotechnology in Foods
New York State Assembly
Consumer Affairs and Protection Committee

Testimony of Andrew Kimbrell, Executive Director, Center for Food Safety

Good morning Chairman and members of the committee. My name is Andrew Kimbrell and I'm the founder and executive director of the Center for Food Safety.

CFS is a nationwide consumer and environmental nonprofit organization whose mission includes furthering the public's right to know how their food is produced, through labeling and other means. We have over 350,000 farmer and consumer members across the country, including tens of thousands in New York State.

CFS has worked on the issue of genetically engineered crops and GE labeling for nearly two decades, at both the federal and state levels. We have worked with dozens of states and leaders in Congress on the crafting of GE labeling bills.

New York's state GE food labeling bill (**A3525-A)** is a well-supported and carefully crafted initiative that comports well with New York State and federal law and after it is enacted will not be susceptible to successful legal challenges.

First, New York can compel the labeling of foods produced through genetic engineering, because it is a factual disclosure that is "reasonably related" to numerous legitimate New York state interests.[1] Thus the law will not improperly impinge on commercial speech rights.

These state interests include, but are not limited to:

- Public health. That is, preventing consumer confusion or deception by disclosing a fact of production about which consumers have health and safety concerns.

  GE crops do not undergo independent testing prior to commercialization. Documents uncovered in Center for Food Safety litigation show that scientists within FDA have indicated that GE foods could pose serious risks. Nonetheless, FDA only holds a voluntary, and confidential, meeting with industry before allowing commercialization of these foods, and relies entirely on the data the industry chooses to show them; the agency does none of its

NATIONAL OFFICE: 660 Pennsylvania Ave., S.E., Suite 302, Washington, D.C. 20003 phone: 202-547-9359 fax: 202-547-9429
CALIFORNIA OFFICE: 303 Sacramento Street, 2nd Floor, San Francisco, CA 94111 phone: 415-826-2770 fax: 415-826-0507
PACIFIC NORTHWEST OFFICE: 917 SW Oak Street, Suite 300, Portland, OR 97205 phone: 971-271-7372 fax: 971-271-7374

email: office@centerforfoodsafety.org | www.centerforfoodsafety.org | www.truefoodnow.org

own testing and makes no findings of safety.

Further, because there is yet unfortunately no mandatory labeling of GE foods, health professionals have no way of tracking if these foods are causing adverse health effects.

- Economics: New York citizens should have the choice to avoid purchasing foods whose production could harm the state's farmers and agricultural markets.

  New York's export markets could be jeopardized by contamination from GE crops. This is because over 60 countries—including the EU, Russia, Japan and China—and many key U.S. trading partners have laws requiring the labeling GE foods, and will reject GE contaminated foods.

  Similarly, New York's organic industry is also threatened by contamination from GE crop production, since organic systems prohibit, and organic consumers reject, genetic engineering.

- Environment: GE crops, which are overwhelmingly engineered to do one thing only—be resistant to herbicides—have massively increased overall herbicide use in U.S. agriculture, by hundreds of millions of pounds. They have also created an epidemic of herbicide-resistant superweeds covering over 60 million acres of U.S. farmland. These "pesticide promoting" GE crops only lead to more herbicide use, causing damage to our agricultural areas and to our drinking water, and pose health risks to farm workers, wildlife, and consumers. GE crops have also reduced biodiversity through the transgenic contamination of local varieties and native flora. New York consumers should have the choice to avoid purchasing foods whose production can lead to such environmental harms.

Thus New York has much more than the mere rational basis required to compel the commercial speech required by any state GE labeling bill.

Second, New York State's labeling bill (**A3525-A)** is in harmony with the dormant commerce clause.

Although the Constitution empowers Congress to regulate interstate commerce, states may regulate articles in interstate commerce, so long as they do not discriminate against out-of-state interests.[2] **A3525-A** would not so discriminate because it requires labeling no matter where the GE crops are produced.

Further, if a state law thus has only indirect effects on interstate commerce, it is proper unless the burden it imposes is "clearly excessive" in relation to its local benefits.[3] New York's myriad interests in protecting its consumers' right to know, health, economic interests, and environment easily outweigh any labeling inconvenience to food companies, a far cry from "clearly excessive." Courts have repeatedly held these types of local benefits to be sufficient.

Labeling of GE foods is not an effort to shut down the advance of science and technology; rather, it is an effort aimed at offering the public full disclosure, preserving the right of free choice in

the marketplace, and creating a better food industry. Requiring GE foods to be labeled should have no adverse impact on a company's ability to conduct new, forward thinking research. In fact, if future GE products claim to offer consumers' benefits, labeling offers these companies an opportunity to distinguish these beneficial products from other ones in the marketplace.

Of course currently none of these beneficial products exist: One of the main reasons for opposition to GE labeling is that, despite three decades of research and hundreds of millions of dollars in public and private investment, the industry has failed to come up with even one trait that attracts consumers. Their products offer only potential risk and no benefits to consumers in cost, nutrition, flavor, etc.

Finally, food labeling is an area historically governed by state law. Although federal law may preempt state law in three ways: express preemption, field preemption and implied conflict preemption, neither of the two theoretical sources of preemption here—federal regulation of GE foods and federal labeling law—apply.

First, as noted, the federal government, unlike many other countries, does not require foods produced through genetic engineering be labeled. Unlike much of the world we don't have a law specifically focused on overseeing genetically engineered organisms, or their labeling. In fact FDA only has addressed the GE labeling issue over twenty years ago, in a 1992 policy statement. As such, it cannot be given preemptive effect, because it does not carry the force of law.[4]

Second, regarding labels more generally, the process of genetic engineering is not a category covered by any other federal labeling law. The 1990 Nutritional Labeling and Education Act has an express preemption provision for some forms of labeling such as nutrients or health claims, but importantly if a category is not listed there, there is no implied preemption, *i.e*, it is not preempted.[5] The labeling of foods produced through the process of genetic engineering is simply not a category covered.

In sum, the intention of **A3525-A** is simple: it merely requires that foods that are produced using genetic engineering be labeled as such. The initiative is intended to provide New York consumers with information about the foods they purchase that is currently hidden. One of the great freedoms we have as Americans is the basic right to choose in the marketplace. If we want to know if our food contains gluten, high fructose corn syrup, trans-fats or MSG, we can simply read the label. This information has empowered millions of Americans to take control of what we eat and feed our families, for health, religious, environmental or ethical reasons. However these freedoms are being denied to the more than 90 percent of Americans who want to know if their food is genetically engineered. Since FDA has to date refused to label GE foods, it is up to individual states to lead the way—as New York has in many other areas—and protect this state's interests, including its public's health, its public's right to know, its agricultural economy, its farmers and its native ecosystems.

Thank you for this opportunity to provide testimony, and I am happy to provide further analysis or respond to any follow-up questions from the Committee.

[1] *See, e.g.*, *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651, 661 (1985).
[2] *See, e.g.*, *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).
[3] *See, e.g.*, *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).
[4] *See, e.g.*, *Holk v. Snapple*, 575 F.3d 329, 341-42 (3d. Cir. 2009).
[5] *Id.* at 336; 101 Pub.L. 535, 104 Stat. 2353, 2364 (Nov. 8, 1990).