Senate Bill 764, the Deny Americans the Right to Know (DARK) Act, raises significant legal questions as to its constitutionality under the U.S. Constitution’s Equal Protection and Due Process Clauses and the First Amendment, and as such should not be passed.

*Equal Protection and Due Process under Law:* The DARK Act likely does not satisfy the Constitution’s mandates for equal protection and due process to all Americans under the law. The Equal Protection Clause of the Fourteenth Amendment provides that no state shall deny any person “equal protection of the laws.” U.S. Const. Amd. 14. This constitutional mandate also applies to the federal government and Congressional actions, as applied through the Due Process Clause of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). A law that only allows basic information about food production, such as whether it is genetically engineered, to be given through technology-enhanced means, such as smart phone scans, and expressly prohibits any on-package labeling of GE foods, is inherently discriminatory, because vast percentages of Americans do not own smart phones and cannot access such information. Worse still, a significant portion of the population denied this basic information is made up of the poor, minorities, and rural Americans. There are also religious groups that cannot use such technology, such as some Amish.

The fundamental purpose of the DARK Act is economic protectionism of the large food and agricultural corporations, the industry that produces genetically engineered products. Such a naked preferential purpose is not a legitimate, let alone significant, governmental interest that bears any relationship to the public good, indeed, it is harmful to it. Courts are particularly suspicious of a legislature’s circuitous path (here, QR codes, or calling a 1-800 number from a grocery aisle for every product) to a purportedly legitimate end when a direct path (on-package labeling) is available. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). Where a legislature has picked politically influential winners over politically vulnerable parties—solely for the purpose of helping the winners, at the expense of the losers—a court can be confident that the governmental entity is not legislating in the public interest, because the legislative process is skewed toward a particular private interest.


In flatly prohibiting the disclosure of on-package labeling of genetically engineered food, the DARK Act has to pass muster under First Amendment scrutiny. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980). To be constitutional, any such law
requires a “substantial” governmental interest, which is lacking in this case. The purpose of the DARK Act is economic protectionism, which is not a legitimate, let alone substantial, governmental interest. The argument that there is a state “patchwork” to address with a federal standard is also illusory, since there actually is no patchwork of state law: the existing state labeling laws are consistent. And the argument that the DARK Act will inform consumers is not a true substantial interest in the bill, because the bill will not actually inform consumers, since it provides only voluntary labeling, and only through QR codes or a 1-800 number, or other secondary, discriminatory means, rather than on-package labeling.

The DARK Act also fails to pass muster under Central Hudson because it does not “directly advance” the governmental interest asserted. Central Hudson, 447 U.S. at 557. Again, if the governmental interest is “informing Americans” about whether food products are genetically engineered, the bill does not so inform Americans, since the labeling it mandates is only voluntary. Further, that voluntary labeling is not on packages but again through QR codes, smart phones, or other secondary means. Many Americans do not have access to that secondary information and the means of accessing that information are unnecessarily burdensome, a far cry from “directly advancing” any such governmental interest. The tiered, delayed regulatory process that the current DARK Act sets up also does not “directly advance” informing consumers; it does the opposite, deny it, and delay it.

Finally, the DARK Act also fails to pass muster under Central Hudson because it is impermissibly “more extensive than necessary” to serve any purported governmental interest. Central Hudson, 447 U.S. at 557. A blanket prohibition on on-package disclosures of whether a food is produced with genetic engineering is far greater than necessary to serve any reasonable government interest.

Respectfully submitted,

George A. Kimbrell  
Senior Attorney  
Center for Food Safety  
917 SW Oak Street, Suite 300  
Portland, OR 97205  
Tel: (971) 271-7372  
Email: gkimbrell@centerforfoodsafety.org

Laura B. Murphy  
Associate Director, Assistant Professor of Law  
Envt’l & Natural Resources Law Clinic  
Vermont Law School  
PO Box 96, 164 Chelsea Street  
South Royalton, VT 05068  
Tel: (802) 831-1123  
Email: lmurphy@vermontlaw.edu

---