15-1504-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

GROCERY MANUFACTURERS ASSOCIATION, SNACK FOOD ASSOCIATION, INTERNATIONAL DAIRY FOODS ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS,
Plaintiffs-Appellants,

v.

WILLIAM H. SORRELL, in his official capacity as the Attorney General of Vermont; PETER SHUMLIN, in his official capacity as Commissioner of the Vermont Department of Finance and Management; and HARRY L. CHEN, in his official capacity as the Commissioner of the Vermont Department of Health,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT
Case No. 5:14-cv-117-cr (Hon. Christina Reiss)

BRIEF OF AMICI CURIAE STATES OF CONNECTICUT, MAINE, MARYLAND, MASSACHUSETTS, HAWAII, ILLINOIS, NEW HAMPSHIRE, AND WASHINGTON IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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STATEMENT OF INTEREST OF THE AMICI

The States of Connecticut, Maine, Maryland, Massachusetts, Hawaii, Illinois, New Hampshire, and Washington submit this amicus brief in support of defendants-appellees pursuant to Fed. R. App. P. 29(a), which permits a state to file a brief as amicus curiae without consent of the parties or leave of court. In addition, the parties have filed a mutual consent to the filing of any amicus briefs. (Doc. 43).

The plaintiffs challenge the constitutionality of Vermont's law requiring food to be sold at retail for human consumption that is produced entirely or in part with genetic engineering to be labeled as such. Connecticut and Maine have enacted similar statutes.[1] *See* Conn. Gen. Stat. §§ 21a-92 to 21a-92c; Me. Rev. Stat. Ann. tit. 22, §§ 2591-2596. Specifically, Connecticut's law provides that, with certain enumerated exceptions, food intended for human consumption and seed or seed stock that is intended to produce food for human consumption

[1] Connecticut's statute does not become effective until (1) four other states, including one state bordering Connecticut, enact a mandatory labeling law for genetically engineered foods that is consistent with Connecticut's statute, and (2) the aggregate population of such states in the northeast United States enacting a labeling law exceeds 20 million. Conn. Gen. Stat. § 21a-92(a) (2015). Similarly, Maine's statute does not become effective, and would be repealed on January 1, 2018, unless a genetically engineered labeling law is enacted by at least five contiguous states, including Maine. Me. Pub. L. 2013, ch. 436, § 2. Neither of these sets of conditions is yet satisfied.

must be labeled if it is entirely or partially genetically engineered. Conn. Gen. Stat. § 21a-92c; *see also* Me. Rev. Stat. tit. 22, § 2593. Like Vermont's labeling law, *see* 9 V.S.A. § 3043, Connecticut's statute requires genetically engineered food products subject to the statute to be labeled with the clear and conspicuous words "Produced with Genetic Engineering." Conn. Gen. Stat. § 21a-92c(a); *see also* Me. Rev. Stat. tit. 22, § 2593. Violations of these requirements can result in civil penalties and other enforcement measures. Conn. Gen. Stat. § 21a-92c(d)-(g); *see also* Me. Rev. Stat. tit. 22, § 2595.

The Court's resolution of the constitutional issues concerning Vermont's genetically engineered labeling law will obviously have significant ramifications for similar labeling laws. Moreover, subjecting mandatory commercial disclosure laws to heightened judicial scrutiny, as the plaintiffs demand, threatens to undermine a wide range of labeling and public reporting laws that the federal and state governments routinely impose on commercial speakers, including those relating to food, medical and pharmaceutical products, banking and lending practices, securities, and consumer protection disclosures that involve virtually every business.

SUMMARY OF ARGUMENT

Vermont requires food products that are produced with genetic engineering have a label stating that straight forward fact. The mandated disclosures Vermont's law requires – that a product was produced by genetic engineering – is a neutral, accurate factual statement. Under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), compelled disclosures of commercial "factual and uncontroversial" information is subject, for First Amendment purposes, to reasonable basis scrutiny.

Because it mandates disclosing only accurate factual information, Vermont's labeling requirement furthers, rather than obstructs, the availability and flow of commercial information. The information that it requires to be disclosed is information that the citizens of Vermont, through their elected representatives, have determined that they want to have available to them so that they may make their own decisions about whether to purchase food produced with genetic engineering. Although there may be continuing public debate and controversy over genetically engineered food, the existence of that debate itself does not transform the otherwise neutral, accurate disclosure into something

other than "factual and uncontroversial" commercial information. Vermont's labeling law does not mandate any statement about genetic engineering or its products that is not truthful or factual. It does not prohibit, obstruct or deter a commercial speaker's communication with prospective customers in any way. Nor does it require the commercial speaker to communicate a state-sanctioned warning or recommendation. It only requires communication of an accurate factual statement. Against this, the commercial speaker's First Amendment interest in withholding factual information is minimal.

The plaintiffs' First Amendment commercial speech claims are therefore governed by the less exacting standard articulated in *Zauderer*, as further developed by this Court in *New York State Restaurant Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 131-32 (2d Cir. 2009) ("*NYSRA*"), and *National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113 (2d Cir. 2001) ("*NEMA*"), *cert. denied*, 536 U.S. 905 (2002), and not by intermediate judicial scrutiny under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

ARGUMENT

The plaintiffs' members sell food for profit in states like Vermont and Connecticut. Yet they desire to withhold certain information about the products they sell. A significant portion of Vermont's consuming public, as reflected in the enactment of legislation by their elected representatives, wants that information. As a foremost principle of the First Amendment, speech – and particularly speech about commercial information – should be promoted, not concealed. The plaintiffs' effort to avoid compliance with Vermont's reasonable genetic engineering labeling requirements is distinctly at odds with that First Amendment value.

Commercial speech – in this case, labeling of food products – comes within the protections of the First Amendment. However, "the protection afforded commercial speech is 'somewhat less extensive than that afforded noncommercial speech.'" *NYSRA*, 556 F.3d at 131-32 (quoting *Zauderer*, 471 U.S. at 637). The scope of First Amendment protection for commercial speech to a very large degree depends on "the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government

regulation, and other varieties of speech." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). This is particularly true for laws that just mandate disclosure of commercial information, rather than prohibit speech. *NEMA*, 272 F.3d at 113.

A. The Rational Basis Standard Enunciated in *Zauderer* Governs the Validity of Mandatory Commercial Disclosure Laws under the First Amendment.

State laws mandating disclosure of factual commercial information, like Vermont's genetic engineering labeling law, 9 V.S.A. §§ 3041-3048, further the paramount First Amendment value relating to commercial speech – the free flow of commercial information. Mandated disclosures of factual commercial information, unlike other First Amendment issues, should therefore be judged under a rational basis standard.

The constitutional treatment of commercial mandated disclosure laws was first addressed in the seminal case of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). *Zauderer* addressed the constitutionality of a state court's disciplining of an attorney who failed to include information in advertising that clients might be liable for litigation costs. The Court concluded that mandating the disclosure of

such information in the context of commercial speech did not offend the First Amendment. After observing that, for noncommercial speech, compelled expression can offend First Amendment values just as seriously as prohibiting speech, the Court contrasted mandatory commercial disclosures as raising few First Amendment concerns. In requiring mandatory disclosure of potential fees in attorney advertising, the state had "not attempted 'to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'" *Id.* at 651 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). Instead, the state sought

> only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that [an attorney] include in his advertising purely factual and uncontroversial information about the terms under which his services will be available.

Id. Because of the very different nature of compelled disclosures in commercial speech, such state regulation was subject to lenient rational basis scrutiny, which in *Zauderer* was satisfied by the state's interest in combatting misleading or deceptive advertising. *Id.* at 652; *see*

Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249 (2010); *NEMA*, 272 F.3d at 114-15.

The doctrinal basis for the Court's drawing a line between commercial and noncommercial compelled speech is important. Two factors underlie the distinction. First, the primary First Amendment value relating to the protection of commercial speech is ensuring the availability and free flow of information to consumers. *Zauderer*, 471 U.S. at 651 (citing *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)). Obviously, requiring additional factual information to consumers serves that constitutional value. Second, the commercial speaker's "constitutionally protected interest in *not* providing any particular information in his advertising is minimal." *Id.* (emphasis original). Thus, unlike other areas of protected speech, the balance that is struck in commercial speech weighs very heavily in favor of promoting the delivery of factual information to consumers and against the concealment of such information.

As this Court has explained, "[c]ommercial disclosure requirements are treated differently from restrictions on commercial

speech because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests." *NEMA*, 272 F.3d at 113-14. Mandated disclosure of truthful factual information "furthers, rather than hinders, the First Amendment goal of discovery of truth and contributes to the efficiency of the 'marketplace of ideas.'" *Id.* at 114. Especially in the context of commercial speech – where the principle First Amendment value is the "protection of the robust and free flow of accurate information" – mandated disclosure of factual information receives lowered judicial scrutiny because such disclosures ordinarily serve that constitutional end. *Id.*; *accord NYSRA*, 556 F.3d at 132.

Although *Zauderer*'s lowered standard for mandated commercial disclosure arose in the context of disclosures addressing deceptive advertising, this and other courts have made clear that it is not limited to those instances. In *NEMA*, which involved mandatory labeling for products containing mercury, this Court unequivocally held that it was *Zauderer*'s rational basis standard, not the intermediate scrutiny of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557

(1980), that "describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases. The *Central Hudson* test should be applied to statutes that *restrict* commercial speech." *NEMA*, 272 F.3d at 115 (emphasis original). The Court expressly reaffirmed this holding in *NYSRA*, which again did not involve deceptive advertising but rather mandated disclosure of calorie information by restaurants.[2] *NYSRA*, 556 F.3d at 133-34; *see also Connecticut Bar Ass'n v. United States*, 620 F.3d 81, 93 (2d Cir. 2010).

Similarly, the D.C. Circuit recently made clear that *Zauderer* applies generally to commercial disclosure requirements, and is not limited to just deceptive speech. In *American Meat Institute v. U.S. Dept. of Agriculture*, which addressed federal country-of-origin labeling requirements, the court emphasized that the essential First Amendment values implicated – the free flow of information to

[2] For this reason, this Court's decision in *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) ("*IDFA*"), which involved mandatory labeling of milk products from cows treated with growth hormones, does not control this case. In *IDFA*, the Court applied *Central Hudson*'s intermediate scrutiny standard without first considering whether the rational basis standard under *Zauderer* governed. As this Court's subsequent decisions in *NEMA* and *NYSRA* make clear, *Zauderer* applies to mandated commercial disclosures beyond the context of deceptive or misleading commercial speech.

consumers and the minimal interest of commercial speakers in concealing information – were "inherently applicable beyond the problem of deception…." 760 F.3d 18, 22 (D.C. Cir. 2014). Under these cases, therefore, *Zauderer* provides the standard under which the Vermont genetically engineered labeling requirement must be judged.

B. The Vermont Law Requires Disclosure of Factual and Uncontroversial Commercial Information Within the Meaning of Zauderer.

The Vermont genetically engineered labeling law requires a straight forward, accurate, factual statement disclosed to consumers: if the food product was entirely or partially produced with genetic engineering, it must be labeled with the statement "produced with genetic engineering." 9 V.S.A. § 3043. Doing so does not require a commercial speaker to take a position on the subject of genetic engineering but rather simply to do what product sellers are routinely required to do when they propose to sell to the consuming public – to provide factual information about the product. *See, e.g.,* 15 U.S.C. § 70b (textile product labeling); 21 C.F.R. § 101.3 (food statement-of-identity labeling); *id.* § 101.4 (food ingredient labeling); *id.* § 101.5 (food manufacturer or distributor); *id.* § 101.9 (food nutrition labeling); 27

C.F.R. § 4.32 (wine labeling); *id.* § 7.32 (malt beverage labeling); *American Meat Institute*, 760 F.3d at 20 (country-of-origin labeling). Although the benefits and risks of genetically engineered food may be the subject of continuing public debate and disagreement, the mere disclosure of the fact the food product is produced by genetic engineering is itself "factual and uncontroversial" within the meaning of the First Amendment standard articulated in *Zauderer*.

The plaintiffs do not, and cannot, contest that the "produced with genetic engineering" label is accurate and factual commercial information. If the food product that is offered for sale was produced with genetic engineering, its label must state so. The plaintiffs nonetheless argue that this otherwise accurate and factual statement is controversial and therefore outside the confines of permissible mandatory disclosure requirements recognized under *Zauderer* and its progeny. This distorts the reference in *Zauderer* to "factual and uncontroversial" information and untethers *Zauderer*'s rule from its doctrinal underpinnings.

In *Zauderer*, the Court noted that the mandated disclosure at issue required "purely factual and uncontroversial information about

the terms" under which services would be offered. 471 U.S. at 651. A court should not unthinkingly take language that is merely descriptive of circumstances of one case as necessarily reflecting the limits of the rule articulated in that case. *See Arkansas Game & Fish Comm'n v. United States*, 133 S.Ct. 511, 520 (2012); *American Meat Institute*, 760 F.3d at 22. "Factual and uncontroversial" should not be given some talismanic quality such that, if the mandated disclosure touches on any subject about which there is some public dispute, it would be outside of *Zauderer*'s scope. Rather, it should be understood and applied in a way that is consistent with and furthers the First Amendment values that mandatory commercial disclosures implicate. Again, as the *Zauderer* Court emphasized, the First Amendment's protection of commercial speech is principally about ensuring consumers receive information relating to commercial transactions. Counterposed against the paramountcy of the free flow of commercial information, the speaker's interest in not providing factual information is "minimal." *Zauderer*, 471 U.S. at 651.

As this Court stated in *NEMA*, "[r]equiring disclosure of accurate, factual commercial information presents little risk that the state is

forcing speakers to adopt disagreeable state-sanctioned positions, suppressing dissent, confounding the speaker's attempts to participate in self-governance, or interfering with an individual's right to define and express his or her own personality." *NEMA*, 272 F.3d at 114. Vermont does not seek to make the plaintiffs' members its mouthpiece for a state-sanctioned position on genetically engineered products or to otherwise encourage or discourage any expression of views on the subject. *See American Meat*, 760 F.3d at 27. It simply requires that food products that are produced with genetic engineering be labeled with that one fact. No warning is required. No statement of the potential risks must be included. No suggestion must be made that consumers should avoid genetically engineered foods or even to learn more about genetically engineered products. The mandated disclosure is entirely factual and neutral.

In this sense, the Vermont labeling requirement is entirely different than the San Francisco ordinance requiring disclosures relating to cellular phones that the Ninth Circuit held unconstitutional in *CTIA-Wireless Ass'n v. City & Cty. of San Francisco*, 494 Fed. Appx. 752 (9th Cir. 2012). There, the disclosures went beyond just factual

statements about radio frequency emissions from cellular phones, but also included recommendations about how to reduce exposure to such emissions – effectively a nonfactual warning "that using cell phones is dangerous." *Id.* at 753. Thus, by compelling more than just a factual statement, the ordinance required a commercial speaker to communicate a state-sanctioned message that went beyond the "factual and uncontroversial" disclosures *Zauderer* upheld.

By contrast, the Vermont labeling requirement demands only the communication of accurate, factual commercial information, and nothing else. Although there is controversy in the scientific community and the public generally about genetically engineered products, the information communicated through the mandated label, by itself, is uncontroversial. The label "produced with genetic engineering" is a neutral, factual statement. It does not include or compel any other commentary, warnings, recommendations, references or counterstatements. Such a neutral, factual disclosure should be deemed as "factual and uncontroversial" within the meaning of *Zauderer*. *See American Meat*, 760 F.3d at 27; *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 249-50 (2d Cir. 2014) ("neutral

message" that pregnancy service center has a licensed medical provider satisfied even strict scrutiny under the First Amendment), *cert. denied*, 135 S.Ct. 435 (2014).

A legislature, as it typically does in so many areas of commercial advertising and marketing, *see NEMA* , 272 F.3d at 116, should be able to regulate commercial speech to mandate disclosure of factual product information that consumers want to receive. Particularly where the First Amendment interests of the commercial speaker to withhold information are, as the Supreme Court described, "minimal," *Zauderer*, 471 U.S. at 651, the decision to mandate disclosure is the sort of policy question that courts ought to defer to the judgment of the elected branch of government. Rather than impose its own notions of what information consumers need or do not need to receive, courts should scrutinize Vermont's labeling requirement under *Zauderer*'s reasonable basis standard.

Because there is on-going public debate about genetically engineered food does not render the mandatory disclosures "controversial" within the meaning of *Zauderer*. Indeed, the continuing public and scientific discourse on this subject demonstrates that

mandating accurate factual information, instead of protecting the suppression of such information, ultimately furthers First Amendment values. Vermont chose to give consumers more, not less, information to manage their ***own*** decisions about food purchasing and consumption in light of the on-going debate about genetically engineered foods. Some, no doubt, will choose to ignore the information and others may choose as a matter of caution and preference to avoid labeled products. Courts should defer to legislative judgments to inform and facilitate those choices.

This would be a very different case if Vermont required a label stating that "genetically engineered products are dangerous." Such a statement, at this stage in the public's discourse, could accurately be described as "controversial" within the meaning of *Zauderer*. Instead, Vermont mandates disclosure only of a neutral statement of accurate factual information, and not a warning or cautionary message. Accordingly, the court's scrutiny of the legislative determination to mandate this labeling should be limited to evaluating its rational basis. To do otherwise would require courts to engage in the kind of policy and factual judgments – for example, weighing the competing claims about

the state of scientific or technical understandings – that are ordinarily left best to the legislative branch. In other First Amendment contexts, taking on the task of making those types of factual findings ordinarily ill-suited to the judicial enterprise may be necessary to further the First Amendment value of ensuring the free flow of commercial information. However, when the mandated disclosure is a neutral, factual statement of information that consumers, through their elected representatives, demonstrate that they want about the products they buy, the more searching inquiry of legislative judgments called for by heightened scrutiny simply is not justified by any advance in the availability of commercial information.

The *Zauderer* Court did acknowledge that there could be instances in which mandated commercial disclosures could run afoul of the First Amendment. It stated that "unjustified or unduly burdensome" disclosure requirements could be unconstitutional "by chilling protected commercial speech." 471 U.S. at 651. Vermont's mandated disclosure does not do so. In this regard, Vermont's genetically engineered labeling requirement stands in stark contrast to the disclosure

requirement this Court recently struck down in *Safelite Group, Inc. v. Jepsen*, 764 F.3d 258 (2d Cir. 2014).

In *Safelite*, this Court reaffirmed that *Zauderer*'s reasonable basis standard applies to mandatory commercial disclosure laws. *Id.* at 263. Unlike Vermont's genetically engineered labeling requirement, however, the disclosure mandate at issue in *Safelite* did not require communication of information about the speaker's own products or services, but rather about those of competitors. Specifically, it prohibited a business from identifying or directing a customer to a glass repair shop it owned or was affiliated with unless it also provided the name of at least one other glass repair shop. *Id.* at 260. This Court emphasized how such a mandated disclosure – triggered by the decision to communicate some information to a customer – "does more to inhibit First Amendment values than to advance them." *Id.* at 264. "Prohibiting a business from promoting its own product on the condition that it also promote the product of a competitor is a very serious deterrent to commercial speech." *Id.* Thus, the disclosure mandate, contingent on the content of the commercial speaker's communication

and requiring information about a competitor's services rather than its own, has the effect of chilling protected commercial speech.

Nothing in the Vermont labeling requirement would have a similar chilling effect. The labeling requirement is not conditioned on anything the product seller communicates, but rather on the fact that the product it offers to sell was produced with genetic engineering. Nor does it require any statement about a competitor or similar subject that would create a deterrent to otherwise protected commercial speech. The product seller cannot sell its genetically engineered food without the mandated label, but it is not in any way prohibited, discouraged or inhibited from communicating with prospective customers. Its protected commercial speech is not chilled by the mandated label.

Finally, Vermont's labeling requirement is not, as the plaintiffs contend, just a matter of simple "consumer curiosity." *See International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) (holding that satisfaction of consumer curiosity alone does not satisfy intermediate scrutiny under *Central Hudson*). The Vermont legislature identified legitimate and substantial policy interests for imposing

genetically engineered labeling. Specifically, its statement of purpose included:

> (1) Public health and food safety. Establish a system by which persons may make informed decisions regarding the potential health effects of the food they purchase and consume and by which, if they choose, persons may avoid potential health risks of food produced from genetic engineering.
> (2) Environmental impacts. Inform the purchasing decisions of consumers who are concerned about the potential environmental effects of the production of food from genetic engineering.
> (3) Consumer confusion and deception. Reduce and prevent consumer confusion and deception by prohibiting the labeling of products produced from genetic engineering as "natural" and by promoting the disclosure of factual information on food labels to allow consumers to make informed decisions.
> (4) Protecting religious practices. Provide consumers with data from which they may make informed decisions for religious reasons.

9 V.S.A. § 3041. Moreover, as discussed fully in appellees' brief, the Vermont legislature made detailed findings supporting each of these interests after conducting an extensive review of available studies and scientific literature as well as hearing testimony about human health risks, environmental consequences, consumer confusion and religious objections associated with genetically engineered food. Appellees Br., at 5-13.

Through their elected representatives, the citizens of Vermont have expressed not just a "curiosity" about genetically engineered foods; they want to have the opportunity to learn, before they purchase a food product, whether a product was produced with genetic engineering, and with that accurate, factual information, make ***their own*** decisions whether to purchase the product. This is a decision, reached through the legislative process, deserving of respect by the courts. That respect takes the form of applying the *Zauderer* standard to the Vermont labeling requirement. And when that standard is applied, just like the mercury labeling in *NEMA*, 272 F.3d at 115-16, the calorie disclosures in *NYSRA*, 556 F.3d at 135-26, and the country-of-origin labeling in *American Meat*, 760 F.3d at 27, the genetically engineered labeling requirement is consistent with the First Amendment.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 32

I hereby certify that this brief complies with the type-volume limitations of Rule 29(d) and Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure in that this brief contains 4,041 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word in Century Schoolbook 14-point font.

/s/ Mark F. Kohler .
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CERTIFICATION OF SERVICE

I hereby certify that on this 31st day of August, 2015, I caused the foregoing to be filed through this Court's CM/ECF appellate filer system, which will send a notice of electronic filing to all registered users.

/s/ Mark F. Kohler .
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