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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NATURAL GROCERS, et al.,
Plaintiffs,
v.
THOMAS VILSACK, et al.,
Defendants.

Case No. 20-cv-05151-JD

ORDER RE SUMMARY JUDGMENT

In 2016, Congress amended the Agricultural Marketing Act of 1946 to enact the first national mandatory bioengineered food disclosure standards. *See* 7 U.S.C. § 1639 (the disclosure statute). The purpose of the disclosure statute is to establish uniformity in the way that bioengineered food is labeled and described to consumers. Plaintiffs are retail stores that sell natural and organic food products, and organizations engaged in food safety advocacy. Defendants are the United States Department of Agriculture (USDA), the USDA Secretary, and the Administrator of the Agricultural Marketing Service (AMS), which is a USDA agency responsible for the marketing of agricultural commodities, among other programs.

Plaintiffs filed a 115-page amended complaint that alleges a number of challenges to the disclosure statute and implementing regulations promulgated by the USDA. Dkt. No. 19. In pertinent part, plaintiffs challenge under the Administrative Procedure Act, 5 U.S.C. § 706 (APA), regulations that: (1) permit a text message disclosure option as an alternative to an electronic or digital link disclosure; (2) require disclosures to use the word “bioengineered”; and (3) exclude highly refined foods that do not contain detectable amounts of modified genetic material. Plaintiffs also say that the word-use regulations restrict their speech in violation of the First and Fifth Amendments to the United States Constitution, and that a provision in the disclosure statute

United States District Court
Northern District of California

1 preempting state labeling laws for genetically engineered (GE) seeds violates the Tenth
2 Amendment.

3 Plaintiffs filed a motion for summary judgment, Dkt. No. 54, which the government
4 opposed, Dkt. No. 56. The Court granted applications to intervene by the United States Beet
5 Sugar Association, the American Sugarbeet Growers Association, and the American Farm Bureau
6 Federation, *see* Dkt. Nos. 29, 46, and intervenors filed a consolidated opposition to plaintiffs’
7 summary judgment motion. Dkt. No. 57.

8 Summary judgment is granted in favor of plaintiffs under the APA for the text message
9 disclosure regulation. In all other respects, plaintiffs’ motion is denied.

10 BACKGROUND

11 I. THE DISCLOSURE STATUTE

12 The salient facts are undisputed. In 2016, in response to the adoption of state laws
13 regulating the labeling of GE and genetically modified (GM or GMO) food and seeds, Congress
14 amended the Agricultural Marketing Act of 1946 to establish the first-ever national standard of
15 consumer disclosures for bioengineered foods. AR248811.¹ Congress declared that the purpose
16 of the disclosure statute was “to preempt state and local actions that mandate labeling of whether a
17 food or seed is genetically engineered, and establish a mandatory uniform national disclosure
18 standard for human food that is or may be bioengineered.” *Id.*

19 As used in the disclosure statute, “bioengineering” with respect to a food means a food
20 “(A) that contains genetic material that has been modified through in vitro recombinant
21 deoxyribonucleic acid (DNA) techniques; and (B) for which the modification could not otherwise
22 be obtained through conventional breeding or found in nature.” 7 U.S.C. § 1639(1). “Food” takes
23 the definition in 21 U.S.C. § 321(f) of “(1) articles used for food or drink for man or other animals,
24 (2) chewing gum, and (3) articles used for components of any such article.” *See* 7 U.S.C.
25 § 1639(2). A “food derived from an animal” may not “be considered a bioengineered food solely
26 because the animal consumed feed” containing bioengineered substances. *Id.* § 1639b(b)(2)(A).

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¹ All citations to the administrative record (AR) are in Dkt. No. 59.

1 Congress did not specify a threshold of “the amounts of a bioengineered substance” in a food to
2 trigger a bioengineering classification. *Id.* § 1639b(b)(2)(B).

3 Congress directed the USDA to implement regulations “with respect to any bioengineered
4 food and any food that may be bioengineered,” and to “establish such requirements and
5 procedures as the [USDA] determines necessary to carry out the standard.” *Id.* § 1639b(a). The
6 statute mandates that “[a] food may bear a disclosure that the food is bioengineered only in
7 accordance with regulations promulgated by the [USDA] in accordance with this subchapter.” *Id.*
8 § 1639b(b)(1).

9 Congress issued a number of specific directives to the USDA for the regulations. Among
10 others, Congress required that a bioengineering disclosure on labels for consumers take the form
11 of “a text, symbol, or electronic or digital link,” with the “disclosure option to be selected by the
12 food manufacturer.” *Id.* § 1639b(b)(2)(D). It required that the electronic or digital link be
13 accompanied by “on-package language” indicating that the link provides access to food
14 information, along with “a telephone number that provides access to the bioengineering
15 disclosure.” *Id.* § 1639b(d)(1), (4).

16 The disclosure statute also directed the USDA to “conduct a study to identify potential
17 technological challenges that may impact whether consumers would have access to the
18 bioengineering disclosure through electronic or digital disclosure methods.” *Id.* § 1639b(c)(1). If
19 the study determined “that consumers, while shopping, would not have sufficient access to the
20 bioengineering disclosure through electronic or digital disclosure methods,” the USDA was to
21 “provide additional and comparable options to access the bioengineering disclosure.” *Id.*
22 § 1639b(c)(4).

23 In addition to the consumer disclosure elements, the statute contains a section that
24 preempts state labeling laws for GE food and seeds. This section declares that “[n]o State or a
25 political subdivision of a State may directly or indirectly establish under any authority or continue
26 in effect as to any food or seed in interstate commerce any requirement relating to the labeling of
27 whether a food (including food served in a restaurant or similar establishment) or seed is
28 genetically engineered (which shall include such other similar terms as determined by the

1 [USDA]) or was developed or produced using genetic engineering, including any requirement for
 2 claims that a food or seed is or contains an ingredient that was developed or produced using
 3 genetic engineering.” *Id.* § 1639i(b). Plaintiffs acknowledged in a reply brief that the preemption
 4 provision properly regulates private actors with respect to food labeling, but they challenge
 5 preemption with respect to seed labeling. Dkt. No. 58 at 18-19.

6 **II. THE DISCLOSURE REGULATIONS**

7 The USDA delegated to AMS the task of formulating regulations responsive to Congress’s
 8 directives. 83 Fed. Reg. at 65814. To that end, AMS posted 30 questions for public comment on
 9 its website in June 2017, and received over 112,000 responses. AR282-90; 83 Fed. Reg. at 19860.
 10 In May 2018, AMS published a notice of proposed rulemaking, and received approximately
 11 14,000 comments. 83 Fed. Reg. at 19860, 65814. AMS published the final regulations in
 12 December 2018, with a mandatory compliance date of January 1, 2022. *Id.* at 65814; 7 C.F.R.
 13 § 66.1.

14 The regulations apply to a “regulated entity,” which is defined as “the food manufacturer,
 15 importer, or retailer that is responsible for making bioengineered food disclosures under
 16 § 66.100(a).” 7 C.F.R. § 66.1. A manufacturer or importer is responsible for disclosures for foods
 17 that are “packaged prior to receipt by a retailer.” *Id.* § 66.100(a)(1). A retailer is responsible for
 18 foods the retailer packages itself, or sells in bulk. *Id.* § 66.100(a)(2). The retailer plaintiffs,
 19 Natural Grocers, Good Earth Natural Foods, and Puget Consumers Co-op, are regulated entities to
 20 the extent they package or sell food in bulk in their stores. *See id.*

21 **A. The Electronic Disclosure Study**

22 AMS hired Deloitte Consulting to conduct the study on the accessibility of the electronic
 23 disclosure mandated by Section 1639b(c)(1) of the statute. *See* AR250043-118. The study found
 24 that “key technological challenges,” including a lack of technical knowledge and a lack of
 25 infrastructure, “prevented nearly all participants from obtaining the information through electronic
 26 or digital disclosure methods.” AR250046. It also found that the telephone numbers
 27 accompanying the electronic disclosure “do not provide a viable means of accessing the
 28 bioengineering disclosure.” AR250091. The study recommended “on-package identification,”

1 such as “a landline-enabled bioengineering disclosure” with “24-hour disclosure information via
2 an automated recording,” and “a text message alternative for consumers who have access to a
3 mobile phone.” AR250111.

4 Based on the study, AMS concluded that “consumers would not have sufficient access to
5 the bioengineering disclosure through electronic or digital means under ordinary shopping
6 conditions at this time.” 83 Fed. Reg. at 65828. To improve consumer access to the
7 bioengineering information, and to satisfy Congress’s directive to “provide additional and
8 comparable options to access the bioengineering disclosure,” 7 U.S.C. § 1639b(c)(4), AMS
9 created a fourth disclosure option of text messaging separate from the electronic disclosure
10 method. 83 Fed. Reg. at 65828-29; 7 C.F.R. §§ 66.100(b)(4), 66.108.

11 The final regulations provide that regulated entities can comply with the disclosure
12 requirement by adding one of the following to a food label: (i) the statement “Bioengineered
13 food” or “Contains a bioengineered food ingredient” (the text disclosure); (ii) a symbol that says
14 “bioengineered” (the symbol disclosure); (iii) an electronic or digital disclosure link and
15 accompanying text (the electronic disclosure); or (iv) text message instructions (the text message
16 disclosure). *Id.* §§ 66.100(b)(1)-(4), 66.102, 66.104, 66.106, 66.108.²

17 For the electronic disclosure, a food label must have an electronic or digital link printed on
18 the label, and the link must be accompanied by the statement “Scan here for more food
19 information” and “Call [1-000-000-0000] for more food information.” *Id.* § 66.106. The link
20 must connect directly to a product information page that includes the text disclosure or the symbol
21 disclosure, and the page must exclude marketing and promotional information. *Id.* § 66.106(b).

22 For the text message disclosure, a food label must say “Text [command word] to [number]
23 for bioengineered food information.” *Id.* § 66.108(a). The number must send “an immediate
24 response to the consumer’s mobile device” with the text disclosure or the symbol disclosure, and
25 the response must not contain any marketing or promotional information. *Id.* § 66.108(a)-(c).

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28 ² The regulations also provide alternative disclosure options for small food manufacturers and for
small packages pursuant to 7 U.S.C. §§ 1639b(2)(E), (F). 7 C.F.R. §§ 66.110, 66.112.

1 **B. Mandatory Disclosure Terminology**

2 In the notice of proposed rulemaking, AMS proposed the use of the term “bioengineered”
3 in all disclosures because the “statutory term, ‘bioengineering,’ adequately describes food
4 products of the technology that Congress intended to be within the scope of the [regulations].” 83
5 Fed. Reg. at 19871. The statute itself did not require the use of any particular words.

6 A number of commenters objected to this proposal, and said the disclosure language
7 should include GE or GMO because those terms are better understood by consumers. *See id.* at
8 65851-52. Some commenters suggested that disclosures should include “may be bioengineered,”
9 but others said that would be confusing. *Id.* at 65827, 65852.

10 After reviewing the comments, AMS decided to require “bioengineered” in all disclosures.
11 *Id.* at 65827, 65852-53; 7 C.F.R. §§ 66.100-66.108. The agency declined to use “may be
12 bioengineered” as vague and likely to be confusing. 83 Fed. Reg. at 65827, 65852. AMS was a
13 bit more ambivalent about GE or GMO, but “ultimately determined that bioengineering and
14 bioengineered food accurately reflected the scope of disclosure and the products and potential
15 technology at issue.” *Id.* at 65837. In the view of AMS, GE or GMO might “create
16 inconsistencies with the preemption provisions or muddy the scope of disclosure,” and limiting
17 mandatory disclosure language to bioengineered would provide “disclosure consistency” and
18 minimize “marketplace confusion.” *Id.* at 65837, 65851.

19 AMS took some pains to emphasize that the mandatory disclosure language is intended to
20 be a floor, not a ceiling. As minimum requirements, the text disclosure must say “Bioengineered
21 food” or “Contains a bioengineered food ingredient,” and the symbol disclosure must use the word
22 “BIOENGINEERED.” 7 C.F.R. §§ 66.102(a), 66.104(a). Even so, as detailed in the ensuing First
23 and Fifth Amendment discussion, regulated entities are perfectly free to make additional
24 statements about bioengineered foods so long as they are consistent with federal laws generally.
25 83 Fed. Reg. at 65852; 7 C.F.R. § 66.118; *see also* Dkt. No. 56 at 28 (government brief
26 acknowledging same).

1 **C. Regulatory Definition of “Bioengineering” and Highly Refined Foods**

2 In the notice of proposed rulemaking, AMS called for comments on what bioengineered
3 should mean in light of the statutory definition of “bioengineering.” 83 Fed. Reg. at 19862-63; *see*
4 *also* 7 U.S.C. § 1639(1). AMS presented two “positions” as options. Position 1 defined
5 “bioengineering” to exclude highly refined food products that might have used genetically
6 modified ingredients, but do not have detectable levels of modified genetic material in the final
7 product sold to consumers. 83 Fed. Reg. at 19862-63. Such ingredients include sugar derived
8 from genetically modified sugar cane and sugar beets, corn starch and corn syrup derived from
9 genetically modified corn, and soybean oil derived from genetically modified soybeans. *Id.*
10 Position 2 defined bioengineering to include all foods produced using bioengineering technology
11 or genetically modified ingredients, including highly refined products that do not have detectable
12 modified genetic material. *Id.* at 19863.

13 The position proposals elicited divided comments. *Id.* at 65833-37. Supporters of Position
14 2 argued that consumers are more concerned about the use of bioengineered crops than whether
15 the products derived from those crops contain detectable modified genetic material. *Id.* at 65834-
16 35. Proponents of Position 1 stated that scientific studies have demonstrated an absence of
17 modified genetic material in highly refined foods as the result of processing, and expressed
18 concern that mandating disclosure for all refined products would disparage biotechnology and
19 impose undue compliance costs on regulated entities. *Id.* at 65833, 65836. Critics of Position 1
20 took issue with the detectability point and noted that testing methods would likely improve over
21 time to reveal the presence of previously undetectable modified genetic material. *Id.* at 65834.
22 The concern is that a detection standard would allow refined foods containing modified genetic
23 material to be sold unwittingly to consumers today.

24 In the final regulations, AMS adopted a modified version of Position 1. It defined
25 bioengineering to exclude foods with undetectable modified genetic material. *Id.* at 65816-17;
26 7 C.F.R. § 66.1. AMS also created something of a safety net by adopting a “List of Bioengineered
27 Foods,” which are crops and food ingredients presumed to be bioengineered. 7 C.F.R. § 66.6; 83
28 Fed. Reg. at 65826. The current list comprises “[a]lalfa, apple (Arctic™ varieties), canola, corn,

1 cotton, eggplant (BARI Bt Begun varieties), papaya (ringspot virus-resistant varieties), pineapple
2 (pink flesh varieties), potato, salmon (AquAdvantage®), soybean, squash (summer), and
3 sugarbeet.” 7 C.F.R. § 66.6. AMS committed to updating the list as warranted on an annual basis.
4 *Id.* § 66.7. A highly refined food produced with a listed item as an ingredient is presumed to
5 require disclosure, and would be exempted only if the regulated entity proved that the product is
6 not bioengineered. 83 Fed. Reg. at 65818-19, 65826; 7 C.F.R. §§ 66.5, 66.6, 66.9; *see also* Dkt.
7 No. 56 at 5 (“A crop or food included on the List or a food made from or with an item on the List
8 requires disclosure unless a regulated entity has records demonstrating that its food product is not
9 bioengineered (*e.g.* is organic or does not contain detectable modified genetic material).”). In
10 sum, AMS determined that highly refined foods would not be subject to the disclosure statute and
11 regulations unless: (1) they had detectable amounts of modified genetic material; or (2) they
12 included ingredients from the presumed bioengineered list and the regulated entity did not prove
13 that the food was not bioengineered.

14 AMS concluded that this approach would likely be overinclusive. 83 Fed. Reg. at 65826
15 (“While we acknowledge that this framework may result in regulated entities placing a BE
16 disclosure on a food that they do not know with certainty is bioengineered, we believe that it is
17 appropriate to err on the side of disclosure to provide consumers with the fullest information about
18 food that could be bioengineered.”). AMS also concluded that many highly refined foods may not
19 require a bioengineering disclosure even with the use of a listed ingredient because “the refining
20 process removes the genetic material so that it can no longer be detected. If the genetic material is
21 not detected, then it is not possible to conclude that the food product or ingredient contains
22 modified genetic material.” *Id.* at 65834.

23 **III. PLAINTIFFS’ LAWSUIT**

24 Plaintiffs filed this lawsuit approximately 18 months after AMS published the final
25 regulations. Dkt. No. 1. The amended complaint alleges that the regulations concerning the text
26 message disclosure, mandatory disclosure terminology, and the definition of bioengineering, are
27 not in accordance with law and are arbitrary and capricious under the Administrative Procedure
28 Act. Dkt. No. 19 ¶¶ 133-42, 205-10, 271-79. Plaintiffs also say that the disclosure statute and the

1 regulations violate the First and Fifth Amendments to the Constitution by limiting their freedom to
 2 use words other than “bioengineered” in communications with consumers. *Id.* ¶¶ 317-33, 392-
 3 401. To be clear, plaintiffs do not bring a constitutional challenge to the mandatory use of specific
 4 words in the standardized disclosures. They object only that the regulations, in their view, do not
 5 let them say more. Plaintiffs also contend that the preemption of state labeling laws for GE seeds
 6 violates the Tenth Amendment. *Id.* ¶¶ 361-67.

7 DISCUSSION

8 IV. LEGAL STANDARDS

9 The standard of review for claims brought under the APA is well established. *See, e.g.,*
 10 *Ecological Rts. Found. v. FEMA*, 384 F. Supp. 3d 1111, 1118-19 (N.D. Cal. 2019). An agency
 11 action will be upheld unless it is found to be “arbitrary, capricious, an abuse of discretion, or
 12 otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *Defenders of Wildlife v. Zinke*, 856
 13 F.3d 1248, 1256-57 (9th Cir. 2017). An agency decision is arbitrary and capricious “if the agency
 14 relied on factors Congress did not intend it to consider, entirely failed to consider an important
 15 aspect of the problem, or offered an explanation that runs counter to the evidence before the
 16 agency or is so implausible that it could not be ascribed to a difference in view or the product of
 17 agency expertise.” *Defenders of Wildlife*, 856 F.3d at 1257 (internal quotations omitted). “An
 18 agency decision construing a statute is not in violation of the APA where the agency accurately
 19 applies an unambiguous statute, or permissibly construes an ambiguous statute, and its conclusion
 20 is ‘well supported by substantial evidence in the record.’” *Corrigan v. Haaland*, 12 F.4th 901, 906
 21 (9th Cir. 2021) (internal quotations omitted). “The Court’s deference extends to less than stellar
 22 work by an agency, so long as its analytical path and reasoning can be reasonably discerned.”
 23 *Ecological Rts. Found.*, 384 F. Supp. 3d at 1119 (citing *San Luis & Delta-Mendota Water Auth. v.*
 24 *Jewell*, 747 F.3d 581, 627 (9th Cir. 2014)). Neither party here has suggested that the regulations
 25 present an issue under the major questions doctrine, and the Court has independently concluded
 26 that they do not. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2609-10 (2022).

27 The Court will not substitute its own judgment for that of the agency, but will “engage in a
 28 careful, searching review to ensure that the agency has made a rational analysis and decision on

1 the record before it.” *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 521 (9th Cir. 2010)
2 (internal quotations omitted). The Court will not “rubber-stamp” agency decisions that are
3 “inconsistent with a statutory mandate or that frustrate the congressional policy underlying a
4 statute.” *Nat. Res. Def. Council, Inc. v. Pritzker*, 828 F.3d 1125, 1139 (9th Cir. 2016) (internal
5 quotations omitted).

6 Summary judgment is an appropriate procedure for deciding challenges under the APA.
7 *See, e.g., Ecological Rts. Found.*, 384 F. Supp. 3d at 1119. Summary judgment may be granted
8 when there is no genuine issue of material fact and the moving party is entitled to judgment as a
9 matter of law. *Brickman v. Fitbit, Inc.*, No. 3:15-cv-02077-JD, 2017 WL 6209307, at *2 (N.D.
10 Cal. Dec. 8, 2017) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). Because this is
11 a record review case, the summary judgment motion will be decided upon a review of the
12 administrative record as it existed at the time of the agency’s decision. *Karuk Tribe of Cal. v. U.S.*
13 *Forest Serv.*, 681 F.3d 1006, 1017 (9th Cir. 2012) (en banc); *Jewell*, 747 F.3d at 602 (quoting
14 *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). In so doing, the Court relies on the portions of the
15 record that the parties have cited and argued. It is not the Court’s task to “scour the record in
16 search of a genuine issue of triable fact.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996)
17 (internal quotations omitted). Extra-record materials and “post-hoc rationalizations” for or against
18 the agency’s decision will not be considered for the merits of the APA claims. *Jewell*, 747 F.3d at
19 602-03. Plaintiffs’ declarations, Dkt. Nos. 54-1 to 54-16, are not part of the administrative record
20 and were considered only for purposes of determining plaintiffs’ standing to sue. *Ecological Rts.*
21 *Found.*, 384 F. Supp. 3d at 1119.

22 **V. STANDING**

23 As is true in all federal cases, the “case or controversy” requirement of Article III of the
24 Constitution “limits federal courts’ subject matter jurisdiction by requiring, inter alia, that
25 plaintiffs have standing.” *Chandler v. State Farm Mut. Auto. Ins.*, 598 F.3d 1115, 1121 (9th Cir.
26 2010). “[A] plaintiff must demonstrate standing to sue by alleging the ‘irreducible constitutional
27 minimum’ of (1) an ‘injury in fact’ (2) that is ‘fairly traceable to the challenged conduct of the
28 defendants’ and (3) ‘likely to be redressed by a favorable judicial decision.’” *Patel v. Facebook*

1 *Inc.*, 290 F. Supp. 3d 948, 952 (N.D. Cal. 2018) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330,
2 338 (2016)). An injury in fact is demonstrated when the plaintiff has “suffered ‘an invasion of a
3 legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not
4 conjectural or hypothetical.’” *Spokeo*, 578 U.S. at 339 (quoting *Lujan v. Defenders of Wildlife*,
5 504 U.S. 555, 560 (1992)). “Standing is an ongoing inquiry, and ‘[t]he need to satisfy these three
6 [Article III standing] requirements persists throughout the life of the lawsuit.’” *Trump v. Twitter*,
7 *Inc.*, ___ F. Supp. 3d ___, 2022 WL 1443233, at *7 (N.D. Cal. May 6, 2022) (quoting *Lujan*, 504
8 U.S. at 560-61). “A plaintiff must establish standing with the ‘manner and degree of evidence
9 required at the successive stages of the litigation.’” *Carrico v. City & Cnty. of San Francisco*, 656
10 F.3d 1002, 1006 (9th Cir. 2011) (quoting *Lujan*, 504 U.S. at 561).

11 The government challenges plaintiffs’ standing to sue only with respect to the First and
12 Fifth Amendment claims. *See* Dkt. No. 56 at 30, 36-37. Even so, “[t]he Court has an independent
13 duty to be vigilant about standing,” *Trump*, 2022 WL 1443233, at *7, and will determine standing
14 “claim by claim” for the amended complaint. *In re Capacitors Antitrust Litig.*, 154 F. Supp. 3d
15 918, 924 (N.D. Cal. 2015) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).

16 **A. APA Standing**

17 Plaintiffs have demonstrated standing to sue under the APA, and the government does not
18 contend otherwise. The retail store plaintiffs, namely Natural Grocers, Good Earth Natural Foods,
19 and Puget Consumers Co-op, filed multiple declarations attesting to their stake in disclosing
20 information about bioengineered foods to interested consumers, and how the regulations are said
21 to adversely affect the stores. *See* Dkt. Nos. 54-1, 54-7, 54-9. Several members of the advocacy
22 group plaintiffs, Center for Food Safety, Rural Vermont, Citizens for GMO Labeling, Label
23 GMOs, and National Organic Coalition, filed declarations describing their organizational interests
24 in transparent labeling of bioengineered foods, their individual interests in obtaining information
25 about bioengineered foods, and how the regulations are said to impede those interests by
26 restricting the scope of disclosures. *See* Dkt. Nos. 54-2, 54-3, 54-4, 54-5, 54-6, 54-11, 54-12, 54-
27 13, 54-14, 54-15, 54-16.

1 These alleged injuries are concrete, fairly traceable to the agency’s conduct, and
2 redressable by the Court, and so they establish constitutional standing for the APA claims.
3 Plaintiffs also have statutory standing under the APA because they fall squarely “within the zone
4 of interests” protected by the disclosure statute. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1177
5 (9th Cir. 2004) (internal quotations omitted).

6 **B. First and Fifth Amendment Standing**

7 For the constitutional speech claims, plaintiffs who are regulated entities contend that the
8 mandatory terminology regulations muzzle their right to speak freely about bioengineered foods.
9 *See* Dkt. No. 54 at 24-25; Dkt. No. 58 at 16-17. Several of the plaintiffs, namely the food
10 advocacy groups, are not regulated entities, and suggest that a right to receive information is
11 impaired by the chilling effect on regulated entities. *See* Dkt. No. 54 at 23 n.40 (“Customers of
12 Plaintiff retailers have standing because when there is a right to disseminate commercial
13 information, their customers have a reciprocal ‘listeners’ right to receive the information.”). The
14 standing analysis for the regulated entities establishes that they have no reasonable fear of
15 enforcement or restraint, which also vitiates the listener theory.

16 “First Amendment challenges present unique standing considerations.” *Italian Colors*
17 *Restaurant v. Becerra*, 878 F.3d 1165, 1171 (9th Cir. 2018) (internal quotations omitted). When,
18 as is alleged here, “a plaintiff has refrained from engaging in expressive activity for fear of
19 prosecution under the challenged statute, such self-censorship is a constitutionally sufficient injury
20 as long as it is based on an actual and well-founded fear that the statute will be enforced.” *Barke*
21 *v. Banks*, 25 F.4th 714, 718 (9th Cir. 2022) (internal quotations omitted).

22 Three factors determine whether a plaintiff faces a “credible threat of enforcement.” *Id.* at
23 718-19. They are: “1) the likelihood that the law will be enforced against the plaintiff; 2) whether
24 the plaintiff has shown, with some degree of concrete detail, that she intends to violate the
25 challenged law; and 3) whether the law even applies to the plaintiff.” *Id.* at 719 (internal
26 quotations omitted). “[C]laims of future harm lack credibility when the challenged speech
27 restriction by its terms is not applicable to the plaintiffs, or the enforcing authority has disavowed
28 the applicability of the challenged law to the plaintiffs.” *Lopez v. Candaele*, 630 F.3d 775, 788

1 (9th Cir. 2010). The “inquiry into injury-in-fact does not turn on the strength of plaintiffs’
2 concerns about a law, but rather on the credibility of the threat that the challenged law will be
3 enforced against them.” *Id.* at 792. The same standing rules apply to pre-enforcement plaintiffs
4 who allege vagueness challenges under the Fifth Amendment. *Carrico*, 656 F.3d at 1006.

5 Plaintiffs’ main speech challenge goes to the use of terms such as GE, GMO, and the like.
6 The retail store plaintiffs say they have refrained from labeling foods with GE and GMO out of
7 fear that the disclosure statute and the regulations prohibit the use of language other than
8 “bioengineered.” Dkt. No. 54 at 23-25. Plaintiffs also say that the regulations are impermissibly
9 vague because the statute states that “similar terms” may be incorporated in the definition of
10 bioengineering, but the regulations prohibit them. *Id.* at 27. The retail store plaintiffs are said to
11 have suffered economic and reputational injuries as a result because they terminated plans to label
12 foods as GE or GMO or removed such labels from their stores out of fear that the labels violated
13 the disclosure statute and the regulations. *See* Dkt. No. 54-1 ¶¶ 20-21, 24, 27; Dkt. No. 54-7 ¶¶ 4,
14 17-18; Dkt. No. 54-9 ¶¶ 7, 14-15.

15 These points are not well taken. To start, plaintiffs misconstrue the plain language of the
16 statute and the regulations. Nothing in either text forbids the plaintiffs from using GE, GMO, or
17 any other words they want in their communications with consumers. The only requirement is that
18 all disclosures must use the word “bioengineered.” 7 C.F.R. §§ 66.102, 66.104. This is the whole
19 purpose of the disclosure statute: the use of standardized language to ensure that consumers get
20 the same baseline information about bioengineered food irrespective of where they buy it, or from
21 whom. After that, plaintiffs are perfectly free to speak their minds in any manner they choose.
22 The regulations spelled this out by stating that “nothing in the final rule prohibits regulated entities
23 from providing additional statements or other claims regarding bioengineered foods and
24 bioengineered food ingredients, so long as such statements are consistent with all other applicable
25 laws and regulations.” 83 Fed. Reg. at 65852; *see also* 7 C.F.R. § 66.118. The government has
26 expressly affirmed that, “[a]s long as regulated entities use those standard terms, they are permitted
27 to ‘mak[e] other claims regarding bioengineered foods,’ including Plaintiffs’ preferred terms
28 ‘produced with genetic engineering,’ ‘genetically engineered,’ or ‘GMO’ on their disclosures,” so

1 long as the claims are consistent with federal law. *See* Dkt. No. 56 at 28 (quoting 7 C.F.R.
2 § 66.118).

3 Plaintiffs have not demonstrated otherwise. They say that the government’s statement is
4 nothing more than a “convenient, 11th hour” litigation position, but this fails to account for the
5 plain language of the regulations to the same effect. *See* Dkt. No. 58 at 17. Plaintiffs also did not
6 proffer any evidence indicating that “they have ever been threatened with prosecution, that a
7 prosecution is likely, or even that a prosecution is remotely possible.” *Lopez*, 630 F.3d at 787
8 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1972)). “Mere allegations” of a “subjective chill,”
9 which is all plaintiffs have tendered here, are not a substitute for establishing a likelihood of an
10 injury in fact. *Id.* (internal quotations omitted).

11 Overall, the record does not establish that plaintiffs face a well-founded fear of
12 enforcement for using GE, GMO, or any other words above and beyond the mandatory disclosure
13 terminology. Consequently, they do not have standing to challenge the statute or regulations on
14 First or Fifth Amendment grounds. *See Barke*, 25 F.4th at 718-19.

15 The same goes for plaintiffs’ ancillary speech challenges. They object to a provision that
16 prohibits labeling meat or dairy products as bioengineered solely because the products were
17 derived from livestock fed GE feed. *See* 7 U.S.C. § 1639b(b)(2)(A); 7 C.F.R. § 66.5(d)); *see also*
18 Dkt. No. 54 at 24-25. Plaintiffs again have not shown a well-founded fear of enforcement because
19 they did not demonstrate concrete plans to use a “bioengineered” label on any meat or dairy
20 products. *See* Dkt. No. 54-1 ¶¶ 24, 26; Dkt. No. 54-7 ¶ 15; Dkt. No. 54-9 ¶ 13. This devitalizes
21 their standing to sue. *See Lopez*, 630 F.3d at 787 (“Because the Constitution requires something
22 more than hypothetical intent to violate the law, plaintiffs must articulate a concrete plan to violate
23 the law in question by giving details about their future speech such as when, to whom, where, or
24 under what circumstances.”) (internal quotations omitted).

25 Plaintiffs also object that the regulations prohibit use of the phrase “may be
26 bioengineered.” *See* 83 Fed. Reg. at 65827 (“The ‘may be bioengineered’ disclosure cannot be
27 used.”); *see also* Dkt. No. 54 at 24-25. Some of the plaintiffs said that they might like to use “may
28 be bioengineered” on labels in their stores, *see* Dkt. No. 54-1 ¶¶ 22, 27; Dkt. No. 54-7 ¶ 16, but

1 such “some day intentions” are not the stuff of constitutional standing. *Lopez*, 630 F. 3d at 787-88
 2 (internal quotations omitted). Plaintiff Puget Consumers Co-op said that it had devoted substantial
 3 effort to an in-store labeling plan for GE/GMO foods that included “may be bioengineered”
 4 language, *see* Dkt. No. 54-9 ¶¶ 12-13, 19, but undercut that claim substantially by opining that
 5 “bioengineered” is deceptive and that it would not use the phrase with customers. *Id.* ¶ 15
 6 (“[R]ather than using the labeling plan PCC worked on for six years, with the clearly recognized
 7 and widely accepted and understood terms of ‘GE’ or ‘GMO’ for foods with identified genetically
 8 engineered ingredients, the Disclosure Standard forces PCC to use the unknown terminology,
 9 ‘bioengineered’ ... ‘GE’ and ‘GMO’ are the terms that our members know, so using the label,
 10 ‘bioengineered,’ will simply not pass the information to our members in a useful, clearly
 11 understandable way.”). This does not demonstrate a “concrete intent to violate the challenged
 12 law” and consequently does not establish a credible threat of enforcement. *Lopez*, 630 F.3d at
 13 787.

14 C. Tenth Amendment Standing

15 Private plaintiffs who “suffer otherwise justiciable injury” have standing to challenge laws
 16 under the Tenth Amendment when “the constitutional structure of our Government that protects
 17 individual liberty is compromised.” *Bond v. United States*, 564 U.S. 211, 223 (2011). Plaintiffs
 18 presented evidence that they will have paid premiums for organic seeds to avoid purchasing
 19 unlabeled GE seeds after the disclosure statute invalidated state-level GE seed labeling laws. *See*
 20 Dkt. No. 54-4 ¶ 20; Dkt. No. 54-5 ¶ 14; Dkt. No. 54-6 ¶¶ 13-14; Dkt. No. 54-11 ¶ 11. These
 21 economic injuries confer standing, which the government does not oppose. *See Club One Casino,*
 22 *Inc. v. Bernhardt*, 959 F.3d 1142, 1152 n.7 (9th Cir. 2020) (private plaintiffs had standing
 23 pursuant to *Bond*, 564 U.S. at 220-21, to challenge a federal statute under the Tenth Amendment).

24 VI. THE APA CLAIMS

25 A. Electronic and Text Message Disclosure Options

26 Plaintiffs object to the USDA’s decision to provide a text message disclosure option in the
 27 regulations as contrary to the disclosure statute’s command to “provide additional and comparable
 28

1 options to access the bioengineering disclosure,” and consequently unlawful under the APA.
2 7 U.S.C. § 1639b(c)(4); 5 U.S.C. § 706(2)(A). The record establishes that it was.

3 As in all questions of statutory interpretation, “[o]ur analysis begins and ends with the
4 text.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014). The Court
5 gives Congress’s words their ordinary and every day meaning, and may consult dictionary
6 definitions to ensure a plain interpretation. *City of Los Angeles v. Barr*, 941 F.3d 931, 940 (9th
7 Cir. 2019). The “inquiry must cease if the statutory language is unambiguous” and “the statutory
8 scheme is coherent and consistent.” *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563
9 U.S. 401, 412 (2011) (internal quotations omitted). It is also a “fundamental canon of statutory
10 construction” to define words in reference to “context” and “the overall statutory scheme.” *FDA*
11 *v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) (internal quotations
12 omitted).

13 “When construing a statute, a virtuoso feat of analysis is neither required nor particularly
14 useful.” *Michigan v. DeVos*, 481 F. Supp. 3d 984, 991 (N.D. Cal. 2020). The ultimate goal of
15 statutory construction is to effectuate Congress’s intent in enacting the statute. “In every case, ‘it
16 is the intent of Congress that is the ultimate touchstone.’” *Barr*, 941 F.3d at 940 (quoting *Arizona*
17 *v. United States*, 567 U.S. 387, 453 (2012) (Alito, J., concurring in part and dissenting in part)).
18 The Court bears “the conventional judicial duty to give faithful meaning to the language Congress
19 adopted in the light of the evident legislative purpose in enacting the law in question.” *Graham*
20 *Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 298 (2010)
21 (internal quotations omitted).

22 The language Congress used in Section 1639b(c) of the disclosure statute is
23 straightforward. It directed the USDA to conduct a study “to identify potential technological
24 challenges that may impact whether consumers would have access to the bioengineering
25 disclosure through electronic or digital disclosure methods.” 7 U.S.C. § 1639b(c)(1). No feat of
26 analysis is necessary to conclude that Congress was especially concerned about whether
27 consumers would be able to access bioengineering information through the electronic disclosure.
28 The same subsection of the disclosure statute also required USDA to “provide additional and

1 comparable options to access the bioengineering disclosure” if it determined “that consumers,
2 while shopping, would not have sufficient access to the bioengineering disclosure through
3 electronic or digital disclosure methods.” *Id.* § 1639b(c)(4). In mandating a study on the
4 accessibility of the electronic disclosure, and directing the USDA to act only if the electronic
5 disclosure was determined to be inaccessible, Congress clearly intended for the USDA to provide
6 “additional and comparable options” to improve the accessibility of the electronic disclosure
7 method.

8 AMS’s decision to provide a separate text message disclosure option did nothing to fix the
9 problem of inaccessible electronic disclosures. It merely provided a fourth disclosure option that
10 regulated entities can select *instead of* the electronic disclosure method. *See* 7 C.F.R. § 66.100(b)
11 (stating “the disclosure must be in one of the forms described in this paragraph (b),” and listing the
12 text disclosure, symbol disclosure, electronic disclosure, and text message disclosure as separate
13 options). The result is that the standalone electronic disclosure suffices under the regulations,
14 even though USDA “determined that consumers would not have sufficient access to the
15 bioengineering disclosure through electronic or digital means under ordinary shopping conditions
16 at this time.” 83 Fed. Reg. at 65828.

17 The government says AMS acted appropriately because it “adopted the study’s
18 recommendation to provide food manufacturers with an additional option of disclosing the
19 bioengineering information via text message, a method that is comparable to the electronic or
20 digital link method.” Dkt. No. 56 at 18. It says the words “additional and comparable options”
21 only obligated AMS to provide “similar” disclosure options rather than improvements on the
22 electronic disclosure. *Id.* These arguments are not consonant with the rest of Section 1639b(c),
23 which expressly addresses whether consumers can access the electronic disclosure at all.
24 Congress mandated a study on “whether consumers would have access to the bioengineering
25 disclosure through electronic or digital disclosure methods” precisely to ensure that those methods
26 were accessible and would achieve the goal of disclosure. *See* 7 U.S.C. § 1639b(c)(1).

27 The Deloitte Consulting study also undercuts the government’s arguments. The study
28 determined that access problems abounded. Among other findings, it concluded that “key

1 technological challenges” prevented “nearly all participants” from accessing bioengineering
2 information electronically. AR250046. The study found that “[t]houghtful action can improve
3 access for consumers facing technological challenges,” and identified specific “[o]ffline options”
4 that could “provide greater access for populations who lack smartphones or broadband.”
5 AR250110-11. It recommended that, “[a]s the Law already requires that the electronic disclosure
6 is accompanied by a telephone number,” the number could call into an automated recording that
7 would provide consumers with “24-hour disclosure information.” AR250111. It also
8 recommended that “packages could include a text message alternative for consumers who have
9 access to a mobile phone.” *Id.* AMS partly adopted this recommendation by requiring that the
10 telephone number that accompanies the electronic disclosure must provide access to the
11 bioengineered food disclosure “regardless of the time of day.” *See* 7 C.F.R. § 66.106(a)(2). But
12 the agency failed to take the next step of adding “additional and comparable options,” like the
13 alternative text message instructions, to the electronic disclosure. *See* 7 U.S.C. § 1639b(c)(4).

14 The government tries to defend this inaction by suggesting that adding more requirements
15 to the electronic disclosure “would narrow rather than expand the disclosure options for food
16 manufactures” and “rewrite the [disclosure statute] to require AMS to effectively *eliminate* the
17 electronic or digital link option mandated by Congress, rather than providing an *additional* and
18 comparable option for labeling.” Dkt. No. 56 at 19 (emphasis in original). Not so. The statute
19 already requires that the electronic disclosure be accompanied by a telephone number and by “on-
20 package language” indicating that the link and the telephone number will provide access to “more
21 food information.” 7 U.S.C. §§ 1639b(d)(1), (4). In addition, nothing in the statute permitted
22 AMS to expand the disclosure options for manufacturers beyond the “text, symbol, or electronic
23 or digital link” choices. *Id.* § 1639b(b)(2)(D). It may be that many retailers and manufacturers
24 supported the standalone text message disclosure option, as the government notes. Dkt. No. 56 at
25 21; *see also* 83 Fed. Reg. at 65855-56; AR183199; AR183707; AR233404-05. But that did not
26 relieve AMS of the obligation to comply with Congress’s express direction to “provide additional
27 and comparable options to access the bioengineering disclosure.” 7 U.S.C. § 1639b(c)(4).

1 The government also suggests that the agency’s interpretation of Section 1639b(c)(4) is
2 entitled to deference. Dkt. No. 56 at 20-22. “[C]ourts ‘often apply the two-step framework
3 announced in’” *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), “to
4 determine the validity of an agency’s interpretation of a statute.” *DeVos*, 481 F. Supp. 3d at 993
5 (quoting *King v. Burwell*, 576 U.S. 473, 485 (2015)). “This approach is premised on the theory
6 that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in
7 the statutory gaps.” *King*, 576 U.S. at 485 (internal quotations omitted). When the statute is
8 ambiguous, courts will defer to the agency’s interpretation. *Chevron*, 467 U.S. at 843.

9 The problem for the government is that it cannot make it past step one, which asks whether
10 the statute is ambiguous. When Congress has spoken clearly, as it did in Section 1639b(c)(4) of
11 the disclosure statute, “that is the end of the matter; for the court, as well as the agency, must give
12 effect to the unambiguously expressed intent of Congress.” *Corrigan*, 12 F.4th at 907 (internal
13 quotations omitted). “An executive agency . . . has no authority to rewrite Congress’s plain and
14 unambiguous commands under the guise of interpretation, and no deference is owed when an
15 agency acts in contravention of a statute.” *DeVos*, 481 F. Supp. 3d at 993 (citing *Chevron*, 467
16 U.S. at 842-43).

17 Consequently, plaintiffs have carried their burden of showing that AMS’s decision to
18 implement a standalone text message disclosure option was “arbitrary, capricious, an abuse of
19 discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

20 For the question of a remedy, the Court will set aside an action “found to be arbitrary,
21 capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* Remand with
22 vacatur is the typical remedy in these circumstances, unless the government establishes why
23 another remedy, such as remand without vacatur, is a better result. *All. for the Wild Rockies v.*
24 *U.S. Forest Serv.*, 907 F.3d 1105, 1121-22 (9th Cir. 2018). Whether remand without vacatur is
25 appropriate “depends on how serious the agency’s errors are and the disruptive consequences of an
26 interim change that may itself be changed.” *Cal. Communities Against Toxics v. EPA*, 688 F.3d
27 989, 992 (9th Cir. 2012) (internal quotations omitted).

28

1 The text message disclosure decision was a significant error, but the government urges a
2 remand without vacatur so that the status quo is maintained while AMS revisits the issue. Dkt.
3 No. 56 at 39-40. It says that vacatur would disrupt consumer access to bioengineering disclosures
4 and exacerbate the very concerns implicated by the agency’s error. *Id.* It also says that vacatur
5 would disrupt the food industry, which was required to comply with the regulations as of January
6 1, 2022. *Id.*; 83 Fed. Reg. at 65814.

7 These are legitimate and persuasive concerns, and plaintiffs have not demonstrated
8 otherwise. Consequently, Sections 66.106 and 66.108 of the regulations are remanded without
9 vacatur to AMS for further consideration in a manner consistent with this order.

10 **B. Mandatory Disclosure Terminology**

11 Although plaintiffs lack standing to challenge the regulations for the mandatory disclosure
12 terminology under the First and Fifth Amendments, they may challenge the regulations under the
13 APA. Plaintiffs say that mandating the use of “bioengineered” in disclosures was contrary to the
14 statutory directive to define “any similar term,” which plaintiffs construe as requiring terms other
15 than just “bioengineered.” *See* Dkt. No. 54 at 15-16; 7 U.S.C. § 1639(1). Plaintiffs also say that
16 the decision was arbitrary and capricious because the term bioengineered is inconsistent with the
17 agency’s past use of terms like GE and GMO, and is potentially misleading to consumers. *See*
18 Dkt. No. 54 at 16-18.

19 None of these contentions is tenable. The statute authorized the USDA to supplement the
20 definition of bioengineering with “any similar term, as determined by the [USDA].” 7 U.S.C.
21 § 1639(1). This is wholly distinct from the disclosure requirements in Section 1639b. Nothing in
22 either section indicates that Congress intended to require that “any similar term” be part of the
23 mandatory disclosure language, and the Court will not strain to find such a hidden meaning when
24 Congress could easily have conveyed such a clear directive. *See Corrigan*, 12 F.4th at 910.

25 Plaintiffs’ arbitrary and capricious arguments are equally unavailing. To start, the use of
26 the term bioengineered cannot be characterized as a change in practice or policy because the
27 disclosure statute and regulations are the first federal actions implementing standards for
28 bioengineered food disclosures. It is true that some of the evidence before AMS indicated that

1 consumers are more familiar with terms like GE and GMO than bioengineered. *See, e.g.*,
2 AR17667; AR95879-80; AR178749-50. But AMS considered GE and GMO for use in the
3 mandatory disclosure terminology, and ultimately determined that those terms could blur the
4 scope of the regulations, and lead to inconsistent disclosures. 83 Fed. Reg. at 65837, 65851. The
5 decision was reasoned and reasonable, and plaintiffs have not shown that it was arbitrary or
6 capricious in any way.

7 **C. “Bioengineering” and Highly Refined Foods**

8 Plaintiffs’ other APA challenge concerns the agency’s definition of “bioengineering,”
9 which excludes foods without “detectable” modified genetic material. 7 C.F.R. § 66.1. Plaintiffs
10 say that this exemption is overbroad and does not regulate “any food that *may* be bioengineered,”
11 as the disclosure statute requires. 7 U.S.C. § 1639b(a)(1) (emphasis added); *see also* Dkt. No. 54
12 at 19-20. Plaintiffs also say that the agency’s decision to adopt an exclusion based on whether
13 modified genetic material is “detectable” was arbitrary and capricious because some studies have
14 identified previously “undetectable” modified genetic material in highly refined foods. Dkt. No.
15 54 at 21-22. Plaintiffs add that AMS arbitrarily and capriciously ignored evidence indicating that
16 consumers are more concerned about whether foods are produced through bioengineering
17 technology than whether modified genetic material is detectable in the final food product. *Id.* at
18 22-23.

19 These objections are not well taken. As discussed in Section II.C above, the regulations
20 are much less exclusionary than plaintiffs suggest because AMS augmented the definition of
21 bioengineering with the “List of Bioengineered Foods.” 83 Fed. Reg. at 65818-19, 65826;
22 7 C.F.R. § 66.6. The list identifies a number of foods known to be bioengineered, and a refined
23 food that contains an item from the list is presumed to be bioengineered and so require disclosure.
24 83 Fed. Reg. at 65826, 65834. The food may escape the disclosure requirement only if the
25 regulated entity provides records demonstrating that it is not bioengineered. *Id.*; 7 C.F.R. § 66.9.
26 As AMS stated, the framework is designed to be overinclusive and “err on the side of disclosure to
27 provide consumers with the fullest information about food that could be bioengineered.” 83 Fed.
28 Reg. at 65816-17, 65826.

1 None of this was arbitrary and capricious. The statute expressly states that the agency
2 “shall” promulgate regulations that “determine the amounts of a bioengineered substance that may
3 be present in a food, as appropriate, in order for the food to be a bioengineered food.” 7 U.S.C.
4 § 1639b(b)(2)(B). AMS did just that. *See* 7 C.F.R. § 66.9 (listing recordkeeping requirements to
5 prove that modified genetic material is not detectable and “[s]tandards of performance for
6 detectability testing”). It may be, as plaintiffs suggest, that future testing methods will be able to
7 better detect modified genetic material in highly refined foods, *see* Dkt. No. 54 at 21-22, but that
8 does not mean the regulations are defective because the current state of testing cannot exhaustively
9 capture all foods that “may” contain bioengineered components. To the contrary, it would be
10 wrong for an agency to require results impossible to obtain with existing technology.

11 In addition, AMS did not ignore the likelihood of progress, and committed to updating the
12 List of Bioengineered Foods on an annual basis. 83 Fed. Reg. at 65834 (“If the modified genetic
13 material in [a] food ingredient becomes detectable under § 66.9 in the future, the food ingredient
14 would be subject to BE disclosure.”); *see also* 7 C.F.R. § 66.7(a). AMS also concluded, based on
15 multiple studies, that “for many refined food products and ingredients, the refining process
16 removes the genetic material so that it can no longer be detected.” 83 Fed. Reg. at 65833-34.
17 AMS ultimately determined that “the products of technology, rather than the technology itself,
18 should determine whether a food meets the BE food definition and requires disclosure.” *Id.* at
19 65834. Plaintiffs do not seriously dispute this observation.

20 Overall, the record with respect to the mandatory disclosure language and highly refined
21 foods does not show that AMS “relied on factors Congress did not intend it to consider, entirely
22 failed to consider an important aspect of the problem, or offered an explanation that runs counter
23 to the evidence before the agency or is so implausible that it could not be ascribed to a difference
24 in view or the product of agency expertise.” *Defenders of Wildlife*, 856 F.3d at 1257 (internal
25 quotations omitted). Consequently, the agency’s actions were not in violation of the APA.

26 **VII. THE TENTH AMENDMENT CLAIM**

27 Plaintiffs’ final challenge is to the preemption of state labeling requirements for GE seeds,
28 *see* 7 U.S.C. § 1639i(b), which is said to violate the Tenth Amendment’s guarantee that “[t]he

1 powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are
2 reserved to the states respectively, or to the people.” U.S. Const. amend. X; *see also* Dkt. No. 54
3 at 28-29. For this claim, plaintiffs rely primarily on the anticommandeering doctrine developed in
4 Tenth Amendment jurisprudence, particularly as discussed in *Murphy v. Nat’l Collegiate Athletic*
5 *Ass’n*, 138 S. Ct. 1461 (2018). *See* Dkt. No. 54 at 28-29.

6 “The anticommandeering doctrine may sound arcane, but it is simply the expression of a
7 fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold
8 from Congress the power to issue orders directly to the States.” *Murphy*, 138 S. Ct. at 1475. The
9 basic principle is that when “a federal interest is sufficiently strong to cause Congress to legislate,
10 it must do so directly; it may not conscript state governments as its agents.” *Id.* at 1477 (quoting
11 *New York v. United States*, 505 U.S. 144, 178 (1992)). Put plainly, Congress cannot order a state
12 to require or prohibit certain acts, or enact laws to those ends. *Id.* at 1476-77. A classic
13 application of the doctrine is found in *New York*, 404 U.S. at 174-76, which struck down a federal
14 statute that required states to enact laws for radioactive waste according to the instructions of
15 Congress. As the Supreme Court stated, the Constitution “confers upon Congress the power to
16 regulate individuals, not States.” *Id.* at 166.

17 As *New York* indicates, the anticommandeering doctrine does not serve to protect the
18 sovereignty of the states for the benefit of the states themselves. “To the contrary, the
19 Constitution divides authority between federal and state governments for the protection of
20 individuals” and their liberty. *Murphy*, 138 S. Ct. at 1477 (quoting *New York*, 404 U.S. at 181).
21 This is accomplished by ensuring a “healthy balance” between state and federal power, which
22 moderates the “risk of tyranny and abuse from either front.” *Id.* (quotation omitted).

23 None of this is particularly germane to the GE seed labeling provision in Section 1639i(b)
24 of the disclosure statute, and for good reason. The plain text of Section 1639i(b) demonstrates that
25 it is not an attempt by Congress to order the states to do something. *See* 7 U.S.C. § 1639i(b).
26 Rather, Section 1639i(b) is a typical federal preemption provision no different from similar
27 provisions in many other federal statutes.

28

1 Preemption is based on the Supremacy Clause, U.S. Const. art. VI cl. 2, and a federal
2 statute may preempt state law without offending the Tenth Amendment. *Murphy*, 138 S. Ct. at
3 1479. To preempt state law, a federal statute must (1) “represent the exercise of a power conferred
4 on Congress by the Constitution,” and (2) “be best read as one that regulates private actors.” *Id.*;
5 *see also City of Portland v. United States*, 969 F.3d 1020, 1049 (9th Cir. 2020), *cert. denied, sub*
6 *nom. City of Portland, Ore. v. FCC*, 141 S. Ct. 2855 (2021) (rejecting a Tenth Amendment
7 challenge because the FCC issued regulations pursuant to authority delegated from Congress
8 under the Commerce Clause and the regulations operated on private entities).

9 For the first element, plaintiffs do not dispute that the disclosure statute as a whole,
10 including Section 1639i(b), is a valid exercise of Congress’s power under the Commerce Clause.
11 *See* Dkt. No. 58 at 18. They even go so far as to agree that Section 1639i(b) properly preempts
12 state GE food labeling laws. *See id.*

13 For the second element, plaintiffs overread the opening words of Section 1639i(b) that
14 “[n]o State or a political subdivision of a State may” establish GE seed labeling requirements. 7
15 U.S.C. § 1639i(b). The Supreme Court has expressly cautioned that “[t]his language might appear
16 to operate directly on the States, but it is a mistake to be confused by the way in which a
17 preemption provision is phrased.” *Murphy*, 138 S. Ct. at 1480. *Murphy* observed that the Airline
18 Deregulation Act of 1978 contained nearly exactly the same formulation to preempt state
19 regulation of airline rates, routes, and services. *Id.* (“[T]he Act provided that ‘no State or political
20 subdivision thereof ... shall enact or enforce any law, rule, regulation, standard, or other provision
21 having the force and effect of law relating to rates, routes, or services of any [covered] air
22 carrier.’”) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)). Even so,
23 the Court had no trouble concluding “it is clear that this provision operates just like any other
24 federal law with preemptive effect” by conferring “on private entities (*i.e.*, covered carriers) a
25 federal right to engage in certain conduct subject only to certain (federal) constraints.” *Id.*

26 So too, here. Section 1639i(b) of the disclosure statute confers on suppliers of GE seeds
27 the right to be free of a patchwork of state laws. 7 U.S.C. § 1639i(b). This manifests Congress’s
28 intent to set national standards and practices for disclosures about bioengineered foods. *See*

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1 AR248811 (“The purpose of the bill is to preempt state and local actions that mandate labeling of
2 whether a food or seed is genetically engineered, and establish a mandatory uniform national
3 disclosure standard for human food that is or may be bioengineered.”).

4 Plaintiffs’ main response is that federal law currently does not have specific provisions for
5 the labeling of GE seeds. *See* Dkt. No. 58 at 18-19. In effect, plaintiffs say that preemption is
6 valid only if Congress has enacted federal laws in the area. But that is not an element of
7 preemption stated in *Murphy*. In addition, the preemption clause in the Airline Deregulation Act
8 was enacted precisely “[t]o ensure that the States would not undo federal deregulation with
9 regulation of their own.” *Murphy*, 138 S. Ct. at 1480 (quoting *Morales*, 504 U.S. at 378). The
10 petitioner in *Morales* made a similar objection that the Airline Deregulation Act did not have the
11 “comprehensive” federal regulatory scheme of statutes with preemption clauses, such as ERISA,
12 but the Supreme Court did not reject preemption on that ground. 504 U.S. at 384. Plaintiffs have
13 not shown that a different result is warranted here.

14 **CONCLUSION**

15 Summary judgment is granted to plaintiffs on the APA claim for the text message
16 regulation, and Sections 66.106 and 66.108 of the regulations are remanded to the USDA without
17 vacatur for reconsideration in light of this order. Summary judgment is denied in all other
18 respects.

19 **IT IS SO ORDERED.**

20 Dated: September 13, 2022

21
22
23 
24 _____
25 JAMES DONATO
26 United States District Judge
27
28