



Proposition 37 Permits “Natural” Labeling for Non-GMO Processed Food

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SUMMARY: Proposition 37, the California Right to Know Genetically Engineered Food Act (“Prop 37”), if approved by the voters on November 6, 2012, will provide that food offered for retail sale in California produced with genetic engineering (“GMO food”) is misbranded unless clearly labeled to say it is genetically engineered. Prop 37 also provides that GMO “processed food” may not on its label, store signage, advertising or promotional materials state or imply that the food is “natural” or words of similar import.

Ballot materials prepared by the Legislative Analyst’s Office (LAO) state that Prop 37 could be interpreted to mean “processed food” is subject to the prohibition against “natural” labels, even if it is not produced with genetic engineering. In our view, this is not the correct interpretation of Prop. 37.

THE FINDINGS, STATEMENT OF PURPOSE AND LANGUAGE OF PROPOSITION 37 DEMONSTRATE THAT THE LABELING REQUIREMENTS ARE DIRECTED TO FOOD PRODUCED WITH GENETIC ENGINEERING, NOT TO PROCESSED FOOD IN GENERAL

The Findings and Declarations in Proposition 37 state that “California consumers have the right to know whether foods they purchase were produced using genetic engineering,” and that “The labeling, advertising and marketing of genetically engineered foods using terms such as ‘natural,’ ‘naturally made,’ ‘naturally grown,’ or ‘all natural’ is misleading to California consumers.”

The Statement of Purpose provides: “The purpose of the measure is to create and enforce the fundamental right of the people of California to be fully informed about whether the food they purchase and eat is genetically engineered and not misbranded as natural so that they can choose for themselves whether to purchase and eat such foods.”

These statements show concern about misbranding of genetically engineered food as natural, but not about labeling non-GMO processed food as natural.

Section 110809, Disclosure With Respect to Genetic Engineering of Food, provides that “any food offered for retail sale in California is misbranded if it is or may have been entirely or partially produced with genetic engineering and that fact is not disclosed.” Subdivision (c) of § 110808 defines “genetically engineered”; and subdivision (d) defines “processed food.”

Section 110809.1, Misbranding of Genetically Engineered Foods as ‘Natural,’ provides:

In addition to any disclosure required by Section 110809, if a food meets any of the definitions in subdivision (c) or (d) of Section 110808 . . . the food may not in California, on its label, accompanying signage in a retail establishment, or in any advertising or promotional materials, state or imply that the food is “natural,” “naturally made,” “naturally grown,” “all natural,” or any words of similar import that would have any tendency to mislead any consumer.

The title of § 110809.1 highlights the fact that it applies to “Misbranding of Genetically Engineered Foods as ‘Natural.’” The introductory phrase, “In addition to any disclosure required by section 110809,” clarifies that the “natural” labeling restriction in § 110809.1 applies only where disclosure is already required—i.e., for food that “is or may have been entirely or partially produced with genetic engineering.”

Basic rules of statutory interpretation require a law to be construed consistently with its purpose and to avoid absurd results. Construing § 110809.1 to prohibit “natural” labels on non-GMO processed food would violate

these rules. Under § 110808(d), "processed food" includes any food subject to "canning, smoking, pressing, cooking, freezing, dehydration, fermentation or milling." Prohibiting "natural" labels on "processed food" regardless of whether it is genetically engineered would affect foods such as 100 percent fruit juice, pure nut butters, dried fruit, flour, ice cream, and virtually any food that is not raw, freshly harvested and unprocessed. Such a result would confound consumer expectations, and it is not consistent with Prop 37's purpose of protecting consumers against undisclosed use of genetic engineering.

STATUTORY INTENT SUPPORTS THE VIEW THAT PROPOSITION 37 IS LIMITED TO FOOD PRODUCED WITH GENETIC ENGINEERING

Background materials for Prop 37 focus on the right to know whether food is genetically engineered, with no expression of intent to regulate "natural" marketing in any other context. In submitting Prop 37 to the Attorney General's Office for review, the LAO described the measure as "a proposed statutory initiative related to the labeling of genetically engineered (GE) food products," noting: "the measure prohibits the use of terms such as 'natural,' 'naturally made,' 'naturally grown,' and 'all natural' in the labeling and advertising of any food that is genetically engineered." The official Yes on 37 website states that the prohibition on "natural" marketing does not apply to food that is not genetically engineered.

THE SINGLE SUBJECT RULE SUPPORTS THE VIEW THAT PROPOSITION 37 IS LIMITED TO FOOD PRODUCED WITH GENETIC ENGINEERING

Article II, § 8(a) of the California Constitution, the "single subject rule," provides: "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." It is settled that courts should construe laws to avoid unconstitutionality. According to the California Supreme Court, "a measure complies with the [single subject] rule if its provisions are either functionally related to one another or are reasonably germane to one another or the objects of the enactment." The object of Prop 37, as expressed in its title and text, is to require disclosure if food sold in California is genetically engineered. A provision that prohibits "natural" labels on non-genetically engineered food would not be germane to the other provisions of Prop 37 or to its object. A court would avoid such a construction because it would violate the single subject rule, rendering the entire measure unconstitutional.

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