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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CONSUMER DATA INDUSTRY ASSOCIATION, Plaintiff, v. ANDREW J. BRUCK, in his official capacity as ATTORNEY GENERAL FOR THE STATE OF NEW JERSEY, Defendant.	Civil Action No. 3:19-cv-19054-BRM-TJB

PLAINTIFF'S SUPPLEMENTAL BRIEFING IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RELIEF UNDER THE DECLARATORY JUDGMENT ACT

SUMMARY OF THE ARGUMENT

The Consumer Data Industry Association ("CDIA"), on behalf of its members, including the nationwide consumer reporting agencies ("NCRAs") that are the target of the challenged New Jersey law, has standing to proceed with this claim. It has alleged a sufficient injury in fact to satisfy Article III's requirements, and the matter is sufficiently ripe. CDIA challenges the delegation of unfettered discretion given to the Director of the Division of Consumer Affairs to require the NCRAs to communicate with consumers in an unlimited number of languages, but at least 11 in which they do not communicate today. This would require them to materially change their business practices to comply. The claim is ripe because the case raises a pure question of law, and no further factual development, including the details of any regulation to be promulgated, would impact the outcome of this case.

This Court should apply the *Central Hudson* standard of review to the First Amendment claim because the NCRAs' file disclosures include accurate, truthful, non-misleading federally-required information, and do not restrict the free flow of accurate information. The Supreme Court and Third Circuit have only applied the *Zauderer*/*Dwyer* standard to disclosure requirements for (1) advertisements; (2) that are inherently misleading or deceptive; and (3) are designed to redress the risk of deception by requiring the disclosure of additional factual information to minimize the risk of harm from misleading or deceptive claims not applicable here.

ARGUMENT

I. CDIA Has Standing to Pursue This Claim.

CDIA's Complaint alleges that its members will suffer imminent injury resulting from the New Jersey statute's express requirements in the form of compliance obligations that its members would be required to take, regardless of which languages are ultimately included in the regulation. Failure to comply will result in enforcement of the law by the Division of Consumer Affairs in the Department of Law and Public Safety. The claim is ripe for decision, as the case requires no factual development.

A. CDIA Members Have Suffered an Injury-in-Fact.

To establish Article III standing, a plaintiff must establish "at an irreducible minimum an injury in fact; that is there must be some 'threatened or actual injury resulting from the putatively illegal action.'" *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392 (1988) (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)) (internal citations omitted). The U.S. Supreme Court noted "where threatened action by government is concerned, [it does] not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007) (having to "[choose] between abandoning [] rights or risking prosecution—is 'a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate'"). Accordingly, "the party

seeking review need not have suffered a completed harm to establish adversity;" it suffices that there is a "substantial threat of real harm and that the threat . . . remain real and immediate throughout the course of the litigation." *Presbytery of New Jersey of Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1468 (3d Cir. 1994).

In a pre-enforcement challenge, the "threatened or actual injury" element is met where "the law is aimed directly at [the] plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution." *Booksellers*, 484 U.S. at 394. One need not wait for enforcement to occur. Explaining further, the Supreme Court has said:

> We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them.

Id. at 392. *See also Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law."); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014) (standing satisfied where plaintiff alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.").

On pre-enforcement standing, the Supreme Court has reiterated that a petitioner challenging state law on federal supremacy grounds establishes standing where it demonstrates that compliance changes must be made to business operations - even when the law has not yet taken effect:

> The petitioners have plausibly alleged that S. B. 8 has already had a direct effect on their day-to-day operations. See Complaint ¶¶103, 106–109.[1] And they have identified provisions of state law that appear to impose a duty on the licensing-official defendants to bring disciplinary actions against them if they violate S. B. 8. In our judgment, this is enough at the motion to dismiss stage to suggest the petitioners will be the target of an enforcement action and thus allow this suit to proceed.

Whole Woman's Health, 142 S. Ct. 522, 536-37 (2021). In *Whole Woman's Health*, practitioners who provided abortion services prior to the enactment of a Texas law banning the same sued for injunctive relief. Individual defendants with licensing and enforcement authority opposed the suit, in part, on the basis that there had been no effort to enforce the law, and thus, plaintiffs lacked standing because there was no imminent threat of harm. *Id.* at 535-536. The Supreme Court disagreed, explaining because the defendants had authority to issue necessary licenses to allow petitioners

[1] The Complaint alleged real and immediate harm in that, absent a ruling of the court, they would face: (a) increased litigation, and [associated] "catastrophic financial liability under [the law's] monetary penalty of at least $10,000 per abortion"; (b) disciplinary actions against those who held professional licenses, and (c) exposure to "potentially ruinous liability for attorney's fees and costs because they attempt to vindicate their own and others' constitutional rights through public-interest litigation." *Whole Women's Health v. Jackson, et al.*, Complaint paras. 103, 107, and 108 (W.D. Tx. Dkt. No.1).

to practice medicine, and because the state "may or must take enforcement actions against the petitioners if they violate [the law]," including imposition of serious penalties and fines, petitioners suffered a legally cognizable injury. *Id.* at 536.

There is no dispute that the NCRAs will have to make changes to their business practices in order to come into compliance with the law because they only record information in English.[2] If they fail to comply, the Attorney General "or his designees have authority to investigate suspected non-compliance, file a civil action to seek enforcement, and request civil penalties for noncompliance."[3] SOF ¶4. Just as in *Whole Woman's Health, Booksellers,* and *MedImmune*, CDIA's members must make material changes to their operations, or face real and substantial enforcement risk with catastrophic penalties. Thus, CDIA has standing.

This Court posited whether a different result is required by the recent decision

[2] Stipulation of Facts, ECF No. 59-1 ("SOF") ¶8 ("the NCRAs do not record credit report information in any other language than English"), *see also* Declaration of Eric Ellman, ECF No. 59-3 ¶11 ("[a]ll information in the consumer's file" is only in English."). Defendant has not, and cannot, reasonably argue that the NCRAs need make no changes to their processes. The law requires them to produce "the disclosures required under the law" in the requested language (SOF ¶13 ("[the law] requires NCRAs to provide file disclosures in a language other than English"), N.J. § 56:11-34(e). Even if compliance could be effectuated by providing a second, translated copy of "the disclosures" (which is not what the law requires, but is argued by Defendant at ECF 38 Brief in Support of Defendant's Motion for Summary Judgment ("D. Br."), pp. 7-8), the NCRAs would have to take action to comply.

[3] The Department of Law and Safey's regulations permit the recovery of civil money penalties of up to $10,000 for an initial violation, and up to $20,000 for each subsequent violation. N.J.A.C. § 13:45-5.2. Additionally, consumers have private rights of action under state law. N.J. Stat. §§ 56:11-38-39.

of the Third Circuit in *National Shooting Sports Foundation v. Attorney General of New Jersey*, 80 F.4th 215 (3d 2023) ("NSSF"), in which the court found that a trade association lacked standing to pursue a pre-enforcement preemption challenge – and the answer is no. *NSSF* is easily distinguishable from the present case in that there is no doubt as to the legal obligations with which the NCRAs must comply.

In contrast to the present case, the law in *NSSF* did not specify what conduct was unlawful; instead, it left its scope open to interpretation by the Attorney General as to what would be considered a violation of law.[4] *Id.* at 221. As such, the plaintiffs could not articulate how their behavior would change beyond a general claim they would be "continually at risk of litigation and potential liability unless they cease[] doing business." *Id.* at 218. The result - their intent to act was not clearly in contrast to the law and was deemed "too general" to satisfy standing requirements. *Id.* at 219 (the "source of any injury to the plaintiffs is the action that the AG might take in the future, not the [Law] itself in the abstract."). Further, the risk of enforcement was deemed too remote to establish standing, in part, given that the Attorney General provided certain assurances that he would only prosecute for "misconduct." *Id.* at 219-220. In other words, the risk of harm was not the law itself, but *how the state*

[4] In particular, that law permitted the Attorney General, "to sue gun-industry members "whose 'unlawful…or unreasonable' conduct 'contribute[s] to a public nuisance in [New Jersey]' through the sale, marketing, distribution, importing, or marketing of a gun-related product." *Id.* at 218.

would interpret the statute in order to enforce it. Here, *it is the law itself* that CDIA challenges. Revised 56:11-34 requires specific conduct that the NCRAs must take, regardless *which* languages the Director ultimately selects.[5] There is no need to defer ruling on the preemption and constitutional questions for the eventual rule to be adopted. *NSSF* is therefore inapplicable.

CDIA recently won a challenge to its standing in another preemption case in the Fifth Circuit in *Paxton v. Consumer Data Industry Association*, 2023 WL 4744918 (5th Cir. 2023). In *Paxton*, CDIA challenged a Texas law prohibiting the reporting of medical debt information in consumer reports on the basis that it is also preempted by FCRA section 1681(t)(b)(1)(E). *Id.* The state argued that CDIA lacked standing because the threat of enforcement was "too speculative" to satisfy the injury in fact requirement, and that the lack of enforcement to date made the claim unripe. *Id.* at *4. The district court disagreed and held that CDIA had established sufficient standing to pursue its claim, found the claim ripe, and denied the motion to dismiss. *Id.* at *5. On appeal, the Fifth Circuit affirmed:

> Here, the statutory provision in question, § 20.05(a)(5), is expressly directed to CRAs, i.e., CDIA's members, and no one else. *Cf. Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 264 (5th

[5] It is not that any particular language is problematic; it is the fact that the companies will be forced to conduct business in these new languages that creates the harm. The Director does not have discretion to elect not to enact a rule, or to select fewer languages. *See* N.J. Stat. §56:11-34(e). In fact, at oral argument, counsel for Defendant advised that the rule has been in progress and is close to publication. Clearly the state has every intention of following, and likely enforcing, the law.

> Cir. 2015) **("If a plaintiff is an object of a regulation 'there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.'")** (*quoting Lujan*, 504 U.S. at 561)). …. [G]iven that CDIA has sufficiently alleged that certain members must either make material operational changes to comply with § 20.05(a)(5), or expose themselves to a substantial threat of enforcement by the Texas Attorney General, pursuant to §§ 20.11 and 20.12, we agree that CDIA has alleged the requisite "injury in fact" required for standing.

Id. (emphasis added) (citations omitted). While the subject matter of the state laws are different, the result is the same – CDIA's members are the target of the law; members must make changes to their businesses to comply with law; and because an order of the court will redress the harm, CDIA has standing.

B. CDIA's Challenge to New Jersey Law is Ripe.

CDIA's claim is also ripe and ready for judicial review. Ripeness "deals with the time, if any, at which a party may seek pre-enforcement review of a statute or regulation." *Triple G Landfills, Inc. v. Board of Comm'rs*, 977 F.2d 287, 288 (7th Cir. 1993) (citation omitted). "It seeks to avoid the premature adjudication of cases when the issues posed are not fully formed, or when the nature and extent of the statute's application are not certain." *Triple G*, 977 F.2d at 288-89 (*citing Abbott Labs. v. Gardner*, 387 U.S. 136 (1967) (abrogated on other grounds)).

Abbott Laboratories established a two-part test for determining the ripeness of a claim: "first, whether the relevant issues are sufficiently focused so as to permit judicial resolution without further factual development; and second, whether the

parties would suffer any hardship by the postponement of judicial action." *Triple G*, 977 F.2d at 289. As the Fifth Circuit has explained:

> A court should dismiss a case for lack of "ripeness" when the case is abstract or hypothetical. The key considerations are "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." **A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required.**

Orix Credit Alliance, Inc. v. Wolfe, 212 F.3d 891, 895 (5th Cir. 2000) (quoting *Abbott Labs., supra*) (emphasis added), *see also Triple G*, 977 F.2d at 289 (the Seventh Circuit explained that the first prong of the ripeness test is satisfied where the lawsuit "mounts a facial attack upon the validity of the [law] itself, not a challenge to a particular administrative decision reached thereunder. The issues posed are purely legal ... and would not be clarified by administrative proceedings or any other type of factual development."). As the Third Circuit explained where "[f]actual development would not add much to the plaintiffs' facial challenges to the constitutionality of the statute" a pre-enforcement declaratory judgment action may be brought to answer the federal question presented. *Presbytery*, 40 F.3d at 1462. This cases also raises pure questions of law not reliant upon factual development. The law is facially problematic, and the first prong of the *Abbott Labs* test is satisfied.

The second prong of the ripeness test is satisfied in that a ruling of this Court that the law is preempted or violates the First Amendment would mean that the NCRAs would not have to comply with the law and would face no enforcement

action, or even any claim from consumers. As a result, this claim is ripe for decision.

II. REVISED 56:11-34 INFRINGES ON THE NCRAs' FIRST AMENDMENT RIGHT TO FREEDOM OF EXPRESSION.

This Court also asked if the case should be evaluated under the standards applicable to advertising disclosure requirements that was enunciated by the United States Supreme Court in *Zauderer v. Off. of Disciplinary Couns. Of Supreme Ct. of Ohio*, 471 U.S. 626 (1985); *see also Dwyer v. Cappell*, 726 F.3d 275, 280 (3d Cir. 2014)." [6] *Zauderer* does not apply to the provision of file disclosures, as the lower standard is intended to allow greater regulation of advertising claims that might reasonably mislead or deceive consumers.

A. The Court Must Apply a Heightened Standard of Review Because Revised 56:11-34 Burdens Truthful, Accurate, and Non-Misleading Speech.

The Supreme Court has explained clearly and repeatedly that States "are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading," but "[c]ommercial speech that is not false or deceptive and does not concern unlawful activities, [] *may be restricted only* in the service of a substantial governmental interest, and *only* through means that directly advance that interest."

[6] The parties filed cross-motions for summary judgment, and each argued that the *Central Hudson* test controls; New Jersey did not *acquiesce* to CDIA's position that *Central Hudson* should apply. In fact, Defendant did not even cite *Zauderer/Dwyer* in its papers. *See, e.g.*, D. Br. at 24, ("This analysis requires courts to follow the test laid out by the Supreme Court in *Central Hudson* . . .").

Zauderer, 471 U.S. 626 at 638 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980)); *Ibanez v. Fl. Dept. of Bus. & Prof. Reg., Bd. of Accountancy*, 512 U.S. 136 (1994) (citing *Central Hudson*, 447 U.S. at 566; *Edenfield v. Fane*, 507 U.S. 761, 767 (1993); *In re R.M.J.* 455 U.S.191, 203 (1982)). The *Zauderer*/*Dwyer* standard of review is not applicable here as it solely pertains to disclosure requirements that (1) apply to advertisements; (2) where the advertisements are inherently misleading or deceptive; and (3) the disclosure is designed to redress the risk of deception by requiring the disclosure of additional factual information. Revised 56:11-34 does not meet any of these criteria, and therefore, is subject to heightened scrutiny under the *Central Hudson* framework.

First, the Supreme Court and the Third Circuit have *exclusively* applied the *Zauderer*/*Dwyer* standard to advertisements, and to no other form of commercial speech. Courts generally apply less scrutiny to restrictions on advertisements than other First Amendment activities. The "commercial speech doctrine rests heavily on 'the "common-sense" distinction between speech proposing a commercial transaction . . . and other varieties of speech.'" *Zauderer*, 471 U.S. at 637 (citations omitted). However, commercial speech that communicates non-misleading, factual information implicates core First Amendment interests in the "free flow" of information. *Va. State Bd. of Pharma. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762-64 (1976); *see also New York Times Co. v. Sullivan*, 376 U.S. 254,

266 (1964). Here, the NCRAs are clearly not advertisers with regard to the provision of file disclosures federally required by the FCRA.

Second, the State can impose disclosure requirements on advertisements only insofar as "reasonably related to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651; *Dwyer*, 762 F.3d at 282. The "less exacting scrutiny" described in *Zauderer* governs only when the challenged provision is directed at *misleading* commercial speech. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249-51 (2010). By contrast, where the restricted speech is "not inherently misleading" and the State has failed to demonstrate that the "advertisements were themselves likely to mislead consumers," courts must apply intermediate scrutiny under *Central Hudson*. *Milavetz*, 559 U.S. at 250-51 (citing *in re R.M.J.*, 455 U.S. at 205-06). "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment." *In re R.M.J.*, 455 U.S. at 203. Thus, for *Zauderer to apply*, the file disclosure communications must not only be advertisements, but also inherently misleading, which, of course, they are not.

In *Dwyer*, the Third Circuit emphasized that the *Zauderer* analysis applies where the relevant law is "directed at *misleading* commercial speech." *Dwyer*, 762 F.3d at 282 (quoting *Zauderer*, 471 U.S. at 249) (emphasis added). The Third Circuit found that it need not reach the question "whether [the relevant law] is a restriction on speech or a disclosure requirement," because the requirement was "*not*

reasonably related to preventing consumer deception and [was] unduly burdensome." *Id.* at 282 (emphasis added). Therefore, the law was unconstitutional. *Id.* Such additional interference with First Amendment rights may be justified where an actor makes affirmative advertising claims that are deceptive or misleading, but not where such speech is not misleading or deceptive.

Defendant has never suggested that the file disclosures required by federal law are inherently misleading, nor could it. Moreover, CDIA is not aware of a single case that has held that speech is misleading or deceptive—as required by the *Zauderer/Dwyer* framework—simply because the recipient cannot read English. As a result, the Court must apply the *Central Hudson* standard to Revised 56:11-34.

Third, the Supreme Court and the Third Circuit exclusively apply the *Zauderer*/*Dwyer* standard for disclosure requirements to laws that compel disclosure of additional factual information. These additional factual disclosures are intended to cure the potentially misleading or deceptive nature of the claims by the advertiser made in the relevant advertisements. *See e.g.*, *Milavetz*, 559 U.S. at 253 (upholding the relevant provisions because the supplemental factual disclosures were "reasonably related to the [State's] interest in preventing deception of consumers"); *Dwyer*, 762 F.3d 275 ("In contrast, [the relevant law] does not require disclosing anything that could reasonably remedy conceivable consumer deception stemming from Dwyer's advertisement.").

By contrast, Revised 56:11-34 does not address advertising claims, or even generally misleading or deceptive commercial claims. Instead, it would require the NCRAs to fundamentally alter the means in which they store and disclose consumers' file information or provide an entirely different set of information than that which it has in its possession. ECF No. 23, ¶ 8 ("the NCRAs do not record credit report information in any language other than English"). There is no untoward conduct that would justify the infringement on speech, and Revised 56:11-34 must therefore be evaluated under *Central Hudson*.

B. Revised 56:11-34 Must Fail Even Under Rational Basis Review.

Assuming, *arguendo*, that the court will apply the *Zauderer*/*Dwyer* framework, the law still fails. There is no argument that file disclosures are advertisements or inherently misleading or deceptive. Revised 56:11-34 "does not require disclosing anything that could reasonably remedy conceivable consumer *deception*." *Dwyer*, 762 F.3d 275 (emphasis added). "Deception" suggests an intentional act by the speaker to hide or alter the truth – which is precisely the opposite of what NCRAs are doing by providing file disclosures. As a result, Revised 56:11-34 fails to meet the standard enunciated by *Zauderer*. 471 U.S. at 651 (requirements must be "reasonably related to the State's interest in preventing deception of consumers") (emphasis added).

Further, Revised 56:11-34 fails even a standard rational basis review, because

it is not *reasonably* related to a legitimate governmental purpose. *See Dwyer*, 762 F.3d at 281 (suggesting *Zauderer* scrutiny is akin to rational basis review). As explained in our prior submissions, based on data offered by the State, ***no more than 1.75% of New Jersey's population could require file disclosures in any language other than English or Spanish***. ECF No. 60 at 32-33. Further, Defendant has offered no evidence that the majority of people *within that population* lack resources sufficient to understand a file disclosure or obtain assistance to do so. Balancing the requirements imposed on these three businesses against such lack of evidence or harm, as this Court must, the scales clearly tip in the NCRAs' favor. *Id.* at 32-33, n.11. This Court must conclude that Revised 56:11-34 fails rational basis review.

CONCLUSION

This Court has jurisdiction to decide the issues presented. CDIA has established that its members are the targets of a law that purports to regulate their conduct, and, that in order to comply with the law, they must make changes to the way they conduct business today. This Court need not wait for the final rule to be promulgated as the specific languages to be identified are not the issue – it is the sheer number of languages and the associated burden of compliance that is an issue. Therefore, CDIA respectfully requests that the Court grant its Motion for Summary Judgment and find that New Jersey law, N.J. Stat. § 56:11-34(e) is preempted and violates the NCRAs' First Amendment rights.

Respectfully submitted,

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