UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CONSUMER DATA INDUSTRY ASSOCIATION, Plaintiff, v. MATTHEW J. PLATKIN, Attorney General of the State of New Jersey, Defendant.	Hon. Georgette Castner, U.S.D.J. Civil Action No. 3:19-cv-19054 (GC)

STATE'S SUPPLEMENTAL BRIEF

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PRELIMINARY STATEMENT

Federal law guarantees every person a free annual credit report, but does not guarantee limited-English proficient (LEP) consumers that they will receive this report in a language they can actually understand. New Jersey—one of the most diverse states in the Nation—therefore took the sensible step of giving residents the option to receive their free report in Spanish and certain other non-English languages to be determined in a separate Division of Consumer Affairs regulation.

Although that agency regulation has not been finalized, that does not defeat Article III *standing*: because the statute requires Spanish translations now, CDIA's members' intention to provide the free reports in English only is proscribed by the statute itself, satisfying the irreducible constitutional minimum needed for standing. But to the extent CDIA also seeks to lodge a speculative attack on a future regulation specifying the additional non-English languages, its arguments are irrelevant as a matter of law to the validity of the statute, and in any event fail for lack of *ripeness*.

The merits of CDIA's First Amendment challenge, meanwhile, should be reviewed under the standard for compelled factual disclosures, because N.J. Stat. Ann. § 56:11-34 requires companies to provide more information than they would prefer, but in no way *restricts* what they can say. It easily passes review: it is a classic disclosure of purely factual information, and reasonably advances the State's important interest in preventing consumer confusion without chilling speech.

ARGUMENT

I. CDIA's Claims Fail On The Merits, But Not For Lack Of Standing.

National Shooting Sports Foundation v. Attorney General New Jersey (NSSF), 80 F.4th 215 (3d Cir. 2023), does not defeat CDIA's standing to sue. *NSSF* applied the well-worn test to establish Article III standing for a pre-enforcement challenge—which is how courts determine whether the challenger's fear of enforcement satisfies the "irreducible constitutional minimum" of injury in fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158-59 (2014). Specifically, the pre-enforcement challenger must show that it (or its members) intends to engage in conduct that is "arguably forbidden" by the statute, and that "the threat of enforcement against them is substantial." *NSSF*, 80 F.4th at 219 (quoting *Driehaus*, 573 U.S. at 159). NSSF's suit faltered both because its "vague" description of its members' conduct failed to establish intended conduct arguably proscribed by the law, *id.* at 220, and because no other "traditional signs of" threatened enforcement existed, *id.* at 220-22.

By contrast here, the conduct is clear: CDIA's members intend to provide free annual credit reports in English only. That conduct is arguably proscribed by N.J. Stat. Ann. § 56:11-34, which states that credit reporting agencies "shall make" the reports "available" upon a consumer's request "*in Spanish* or any other language that the Director of the Division of Consumer Affairs determines is the first language of

a significant number of consumers in the State." *Id.* (emphasis added). While the agency has yet to finalize the regulation specifying the remaining languages, Spanish is specifically listed in the statute—meaning the intended conduct would presently constitute a violation, specifically as to Spanish. *See N.J. Bankers Ass'n v. Att'y Gen. N.J.*, 49 F.4th 849, 856 (3d Cir. 2022) (credible threat of enforcement met where all parties agreed the intended conduct "is subject to" the statute's prohibition, even absent explicit threat to prosecute that party).[1] That suffices to establish standing.

That said, while CDIA maintains that the statute is invalid based on its speculation about the number of languages the state agency *might someday* require translation into, this fails on multiple grounds—including ripeness. For one, the number of languages is irrelevant as a matter of law to CDIA's legal claims. As to preemption, the Fair Credit Reporting Act (FCRA) is wholly silent as to the language of a credit report in the first place, *see* ECF 76 at 1-4, and CDIA built no record establishing that it is impossible to comply with both the state and federal laws—a specious claim to begin with, since one of its members has provided free Spanish translations nationwide since 2021 with no suggestion that translation renders compliance with FCRA *impossible*, *see* ECF 58-3 at 8-9 (citing Press Release,

[1] The Attorney General and Division of Consumer Affairs have authority to enforce N.J. Stat. Ann. § 56:11-34 under, *inter alia*, N.J. Stat. Ann. § 56:8-4(b), which treats commercial practices that violate N.J. Stat. Ann. § 56:11-34 as "conclusive[]" violations of the New Jersey Consumer Fraud Act. *Id.* § 56:8-4(b).

Equifax, Equifax Offers Credit Reports in Spanish Online and By Mail (Sept. 13, 2021)). Similarly, nothing in the First Amendment analysis turns on the specific number where CDIA built no record demonstrating that the burden on *speech* is different if reports are subject to translation into eleven versus, say, four languages. *See* ECF 58-3 at 14; *infra* at 13-14.

While that should be dispositive, CDIA's speculative attack on a hypothetical regulation is also unripe. *See* ECF 60 at 6-7. Its objection to the specter of a requirement that credit reports be provided in dozens of languages is necessarily "dependent on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (citation omitted); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967) (issue is not ripe unless it is fit for judicial decision and withholding review will cause hardship to parties). And its hypothesizing is especially misplaced when the State has repeatedly disavowed CDIA's misreading of the statute, which confers only limited discretion on the agency. *See* ECF 58-3 at 3-4. CDIA's conjecture about the regulation is irrelevant to the validity of the *statute* in any event, for the reasons just explained. *Supra* at 3-4. This Court can thus proceed to the merits and reject CDIA's claims. But if the Court concludes—contrary to the governing law and the record—that resolution of any of the claims turns on the specific number of languages required, then Article III is clear: those specific issues are not ripe for review.

II. New Jersey's Law Should Be Reviewed Under The First Amendment Test For Compelled Factual Disclosures, Which It Easily Passes.

On the First Amendment merits, N.J. Stat. Ann. § 56:11-34 should be reviewed under the test set forth in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), as it requires disclosing additional information, rather than limits speech. It easily withstands this review: it requires a purely factual disclosure that reasonably relates to the State's important interest in preventing consumer confusion, and does not chill speech.

A. The Law Should Be Reviewed Under Zauderer, Not Intermediate Scrutiny.

Courts apply different standards to laws that *restrict* what commercial entities can say to the public and those that require speakers to disclose *more* information "than they might otherwise be inclined to present." *Zauderer*, 471 U.S. at 650. After all, First Amendment protection for commercial speech derives from "the value to consumers of the information such speech provides," which is why courts closely scrutinize laws that restrict access to such information. *Id.* at 651. Disclosure requirements, on the other hand, *advance* the purpose of that protection by facilitating "the robust and free flow of accurate information." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001). That is particularly true where a law compels disclosure of "purely factual and uncontroversial information," rather than prescribe "what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Zauderer*, 471 U.S. at 651. A speaker's interest "in *not*

providing any particular factual information" is thus "minimal"—and is "substantially weaker" than where "speech is actually suppressed." *Id.* at 651 & n.14. Disclosure requirements are thus subject to more deferential review than are outright restrictions on speech: they need only be "reasonably related" to the State's interest "in dissipat[ing] the possibility of consumer confusion or deception" and must not "chill[]" protected speech. *Id.* at 651.

Zauderer itself, for example, upheld a state-bar requirement that attorneys who advertise their willingness to take on clients for a contingency fee also disclose whether clients might be liable for court costs if their case is unsuccessful. *Id.* at 633, 650. The Court specifically declined to apply means-end scrutiny, explaining that "because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, 'warning[s] or disclaimer[s] might be appropriately required ... in order to dissipate the possibility of consumer confusion or deception." *Id.* at 651 (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982)); *see id.* at 650 (noting intermediate scrutiny applied instead to "the restrictions on advertising content" also at issue in the case). The attorney's First Amendment rights were "adequately protected," the Court concluded, "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.*

The Court reaffirmed the *Zauderer* standard in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010). *Milavetz* considered a federal law

requiring entities who advertise debt-relief services—including law firms—to disclose that their services "may involve bankruptcy relief" and to identify themselves as "a debt relief agency." *Id.* at 233-34. The Court confirmed that, because the law targeted misleading commercial speech and "impose[d] a disclosure requirement rather than an affirmative limitation on speech," the "less exacting scrutiny described in *Zauderer*"—not intermediate scrutiny—governs. *Id.* at 249; *see id.* at 250 (distinguishing ethics rules in *R.M.J.*, which actually "prohibited attorneys from" including certain content in their advertisements).

There is little question that N.J. Stat. Ann. § 56:11-34 imposes a "disclosure requirement," not an "affirmative limitation on speech." *Milavetz*, 559 U.S. at 249. The statute expressly requires that credit reporting agencies make the disclosure already required by federal law "available" to consumers in Spanish and certain other languages. N.J. Stat. Ann. § 56:11-34. But it does not prevent the companies from providing the disclosure in English—which they are free to do, so long as they also honor a consumer's request to disclose the information in a qualifying language—nor does it otherwise limit in any way what information the companies can convey to consumers. Simply, New Jersey "has only required [credit reporting agencies] to provide somewhat more information than they might otherwise be inclined to present." *Zauderer*, 471 U.S. at 650. To withstand First Amendment scrutiny, the translation requirement thus need only pass *Zauderer* review.

B. The Law Requires A Purely Factual Disclosure That Is Reasonably Related To Preventing Consumer Confusion.

New Jersey's law easily withstands review: it requires disclosure of "purely factual and uncontroversial information" that is "reasonably related" to the State's interest in preventing consumer confusion, and does not chill speech. *Id.* at 651.

Initially, CDIA can hardly contest that the required disclosure is "factual." The statute requires that the *same information* the company is already disclosing be translated into another language—so that, *e.g.*, a Chinese-speaking resident has the same ability to understand that information as any English speaker. Indeed, New Jersey is only requiring a translation of information that federal law compels the companies to disclose to consumers, and no one disputes that the underlying disclosure is factual. *See CTIA - The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 845, 847 (9th Cir. 2019) (disclosure was "purely factual" under *Zauderer* where it compels local retailers "to provide, in summary form, the same information that the FCC already requires cell phone manufacturers to provide to those same consumers"). If something as suggestive as the requirement in *Milavetz* that a law firm self-identify as a "debt relief agency" is sufficiently factual, *see* 559 U.S. at 250, then so is a requirement merely to translate the same content into another language. And this disclosure is "uncontroversial," since translating the report does not itself communicate any message, much less a controversial one—the content of the report is "entirely anodyne," whether printed in English or Spanish or Korean.

Recht v. Morrisey, 32 F.4th 398, 418 (4th Cir. 2022) (noting "[t]he question is not whether the *existence* of a given disclosure requirement is controversial," but rather "whether the *content* of a required disclosure is controversial.").

That requirement is reasonably related to New Jersey's important interest in preventing consumer confusion. The State undeniably has an interest in avoiding the confusion LEP residents predictably feel trying to comprehend a credit report printed in English. Indeed, the information in one's credit report is critical for all consumers. It can dictate the terms on which they may purchase or rent a car or home, or the amount of college financial aid they receive; or even determine whether an employer will offer them a job. *See* ECF 55 at 3. And reading that report may be the first time someone learns of the ramifications of past unwise uses of credit. *See* U.S. GOV'T ACCOUNTABILITY OFF. GAO-10-518, FACTORS AFFECTING THE FINANCIAL LITERACY OF INDIVIDUALS WITH LIMITED ENGLISH PROFICIENCY 2, 9-10 (2010) (cited at ECF 43-1 at 26-27). Government doubtless has an interest in ensuring consumers can see this information—indeed, Congress required the underlying federal disclosure precisely "to allow the consumer to determine the accuracy of the information set forth in her credit file." *Gillespie v. Equifax Info. Servs., LLC*, 484 F.3d 938, 941 (7th Cir. 2007).

But the record reveals that LEP individuals face obstacles in understanding their credit report that English speakers do not. For these individuals, receiving the

report in English alone would be confusing or ineffective—and the self-help techniques available to make sense of English-only reports are flawed.[2] Language barriers make it especially difficult to understand the specialized terminology used in credit reports; so LEP individuals may turn to their children, who sometimes mis-translate key terms. *See* CONSUMER FIN. PROT. BUREAU, SPOTLIGHT ON SERVING LIMITED ENGLISH PROFICIENT CONSUMERS 13-14 (2017) (cited at ECF 43-1 at 26). Reliable, certified translation professionals are in short supply, at least for certain languages, *id.* at 21, which may lead LEP consumers to turn to questionable (and sometimes fraudulent) services, *see* U.S. GOV'T ACCOUNTABILITY OFF. GAO-10-518 at 17-18. And New Jersey has substantial populations of these consumers—approximately 12.7% of New Jerseyans are limited-English proficient. *See* U.S. Dep't of Commerce, Bureau of the Census, Am. Cmty. Survey, *Place of Birth by Language Spoken at Home and Ability to Speak English in the United States* (2022), https://data.census.gov/advanced (cited at ECF 58-3 at 13-14); *Zauderer*, 471 U.S. at 652-53 (State need not survey the public before legislating when the possibility of deception or confusion is "self-evident").

[2] Although the laws at issue in *Zauderer* and *Milavetz* were justified based on the government's interest in preventing deception, the Court in *Zauderer* confirmed that it accepts an interest in preventing "the possibility of consumer confusion or deception." 470 U.S. at 651 (quoting *R.M.J.*, 455 U.S. at 201); *see also, e.g.*, *Recht*, 32 F.4th at 418-19 (relying on consumer-confusion rationale to uphold state law).

New Jersey's response to the problem—requiring uniform translation, at least for the most frequently spoken languages—is a reasonable means to avoid that confusion. Where government pursues its interest through a disclosure regime, *Zauderer* requires only "a reasonable means-end relationship," *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 26 (D.C. Cir. 2014) (en banc), "in keeping with the 'minimal' interest that advertisers have in refraining from 'providing any particular factual information.'" *Recht*, 32 F.4th at 418 (quoting *Zauderer*, 471 U.S. at 651); *see id.* at 419 (noting *Zauderer* does not impose further burden to show law will achieve its goal in every "individual instance"); *Dwyer v. Cappell*, 762 F.3d 275, 281 (3d Cir. 2014) (describing *Zauderer* as "akin to rational-basis review").

The state law easily clears that low bar: it is self-evident that providing a LEP individual with a credit report in their primary language avoids the confusion they might experience reading an English-only version. CDIA's own member describes the means-end relationship in the same terms, stressing that a free "translated Spanish report ... will go a long way in breaking down communication barriers for those who speak English as a second language." Press Release, *supra*. And it is plainly reasonable to conclude this measure will avoid confusion when translations of standardized documents have proved effective in a range of contexts—such as the Voting Rights Act, which has long required election officials to print bilingual ballots, to ensure LEP voters understand their choices. *See* 52 U.S.C. § 10503(c).

On the other side of the ledger, New Jersey's translation requirement is not "unjustified or unduly burdensome ... by chilling protected commercial speech." *Zauderer*, 471 U.S. at 651. A disclosure requirement runs afoul of this guardrail if it "is so lengthy that it 'effectively rules out' advertising by the desired means." *Dwyer*, 762 F.3d at 283 (quoting *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 146 (1994)). *Zauderer* thus seeks to smoke out disclosure regimes that effectively "operate[] as a *restriction* on constitutionally protected speech." *Am. Meat Inst.*, 760 F.3d at 27 (emphasis added). But a challenger still must build a record with "facts demonstrating the undue burden" on its ability to speak. *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1063 (8th Cir. 2014).

Here, CDIA has never argued that the translation requirement chills or drowns out its members' speech. Nor could it: New Jersey does not bar the companies from also providing the reports in English, and they can even comply by placing the translated version after the English version—as is often the case with, *e.g.*, multilingual medical bills, COVID-19 home-test instructions, and instructions for all manner of self-assemble consumer products. And it would be especially odd to argue that translating the report "chills" the company's speech, where the purpose of translation is to ensure *more* listeners can understand Equifax's or TransUnion's speech, because of the benefits of that speech to consumers. *Cf. NSSF*, 80 F.4th at 220 (rejecting assertions of "subjective chill" that are "backed by no evidence.").

Instead, CDIA's First Amendment theory rests on the *financial* cost of preparing translated reports, *see* ECF 60 at 31. But "financial burdens" alone do not "demonstrate a burden on *speech*." *Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 541 (D.C. Cir. 2020); *see also, e.g., Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470 (1997) (mere fact that an economic regulation indirectly reduces the money available to fund speech "does not itself amount to a restriction on speech"). And even assuming costs alone *could* work a burden on speech, the silence in the record on this point is telling: Equifax has provided free Spanish translations nationwide since 2021, but has never even asserted to this Court that doing so was technically infeasible or in any way restricted its ability to convey its message. Thus, even accepting the questionable proposition that the act of translating a credit report burdens speech, there is no basis in this record to hold that New Jersey's law unduly restricts or chills the companies' speech. *See Zauderer*, 471 U.S. at 651.

CDIA likewise misses the mark with its theory that New Jersey could achieve its goal by requiring translation for fewer languages. *See* ECF 60 at 30-33. For one, that is not the test: *Zauderer* itself explained that the standard of review is not whether a given disclosure requirement is narrowly tailored, but only whether it is "reasonably related to the State's interest" in preventing consumer confusion or deception. *See* 471 U.S. at 651 n.14 (rejecting argument that courts "should subject disclosure requirements to a strict 'least restrictive means' analysis," since such

requirements are themselves less restrictive than other regulations); *Am. Hosp. Ass'n*, 983 F.3d at 541 (confirming the *Zauderer* standard does not entail an inquiry into "less-speech restrictive alternatives"); *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 567-68 (6th Cir. 2012) (same).

In any event, New Jersey had valid reasons for this line-drawing: over 40 languages are spoken in the State, but by cutting off the translation option at roughly the eleven most common languages, the law limits the impact for industry while still benefitting the residents most likely to need assistance. *See* Am. Cmty. Survey, *supra*; *see id.*, *Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over* (2022). The law's tailoring thus only buttresses the reasonableness of this disclosure requirement. And CDIA has never explained how the burden on *speech* is any greater if credit reports are subject to translation into eleven, as opposed to four languages—the only relevant inquiry under intermediate scrutiny, even if that were the test. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556 (2001) (explaining tailoring inquiry is "whether the *speech restriction* is not more extensive than necessary to serve" the relevant interest (emphasis added)).[3]

[3] CDIA's focus on the overall number of languages overlooks that a given consumer can only have their credit report translated into one language—thus, the extent of any burden on speech is the same any time a company translates a credit report, regardless of how many languages are available to choose from. For this reason, as well as the reasons discussed in the State's prior briefs, *see* ECF 43-1 at 29-32; ECF 58-1 at 12-14; ECF 58-3 at 12-14; the statute withstands even intermediate scrutiny.

National Institute of Family and Life Advocates v. Becerra (NIFLA), 138 S. Ct. 2361 (2018), is thus inapposite. The Court invalidated a requirement that licensed clinics disclose information about "abortion, anything but an 'uncontroversial' topic" under *Zauderer*. *Id.* at 2372. But what made the compelled statement "controversial" was that it "took sides in a heated political controversy, forcing the clinic to convey a message fundamentally at odds with its mission." *CTIA*, 928 F.3d at 845; *see Zauderer*, 471 U.S. at 651 (recognizing disclosures that seek to define what is orthodox in "politics" or "religion" are controversial). New Jersey, by contrast, does not require speakers to convey *any* message, but only to translate the same content into another language. *NIFLA*'s reasoning for finding a separate notice "unduly burdensome" is likewise inapposite. That disclosure was required to be displayed in such a conspicuous manner, and to add so much "detail," that it would "drown[] out the facility's own message" and thereby "chill" their speech. 138 S. Ct. at 2378. That feature is lacking here too: this law does not mandate inclusion of any added content in a credit report, nor specify anything about where in the disclosure packet a translated report must be placed. Its requirement merely to translate the same speech into another language is well within the First Amendment's bounds.

CONCLUSION

This Court should grant summary judgment to the State.

Dated: December 4, 2023 Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 4, 2023, I electronically filed the foregoing Supplemental Brief with the Clerk of the United States District Court for the District of New Jersey. Counsel for all parties are registered CM/ECF users and will be served via CM/ECF.

Dated: December 4, 2023

/s/ Tim Sheehan
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