13-4761-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

SAFELITE GROUP, INC., SAFELITE SOLUTIONS LLC,

Plaintiffs-Appellants,

—against—

GEORGE JEPSEN, in his official capacity as Attorney General for the State of Connecticut, THOMAS LEONARDI, in his official capacity as the Commissioner of the Connecticut Insurance Department,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT (NEW HAVEN)

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants Safelite Group, Inc. and Safelite Solutions LLC submit their corporate disclosure statement and state:

1. The parent corporations of Safelite Solutions LLC are Safelite Group, Inc. and Safelite Billing Services Corp.

2. Belron S.A. is the parent Corporation of Safelite Group, Inc.

3. D'leteren, a publicly traded entity in Belgium, owns a majority interest in Belron S.A., the parent company of Safelite Group, Inc.

Dated: March 18, 2014

Respectfully submitted,

By: s/ *Jay P. Lefkowitz*

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INTRODUCTION

Connecticut's recently adopted Public Act 13-67(c)(2), benignly styled "An Act Concerning Automotive Glass Work," is an affront to basic First Amendment principles and should be enjoined. It prohibits an insurance claims administrator from informing policyholders about an affiliated glass repair business *unless* the administrator simultaneously refers policyholders to a local competitor's glass repair business. In so doing, it puts Appellants Safelite Group, Inc. and Safelite Solutions LLC (collectively "Safelite") to a Hobson's choice: *Either* discontinue wholly truthful speech advising customers about Safelite-owned vehicle glass repair services *or*, when making such representations, also provide a referral to a competing local glass repair shop. The First Amendment protects against such attempts to commandeer speech—even commercial speech.

The history of this measure is telling. It was promoted as a measure specifically designed to help steer customers away from Safelite, a large national company, and toward local Connecticut glass repair shops. And, even in defending the statute, the State has explicitly conceded that there is nothing deceptive about the speech the statute will now regulate. The district court nonetheless denied Safelite's motion for a preliminary injunction because it applied the wrong standard. The court held that because the law involves compelled disclosure of information, versus restrictions on speech, it was to be reviewed under the more

lax ("rational basis") standard of *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), rather than the more demanding standard set forth in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980). And because *Zauderer* applied, the district court opined, it did not matter whether the actual purpose of the statute had been blatant (and illegitimate) protectionism, because it was possible to hypothesize some rational basis in defense of the law.

No federal court has ever before upheld a law such as this, where the so-called "disclosure" requirement does not require Safelite to make disclosures about *its own* products and services, but rather requires it to gather information about another competing business and provide that information to customers. This requirement is first triggered by choosing to engage in particular speech (and thus is a content-based burden), and then compels the speaker tacitly to recommend a commercial competitor. The law at issue thus bears no resemblance whatsoever to the neutral, purely factual disclosure requirements upheld by this Court in cases such as *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), and *New York State Rest. Ass'n v. New York City Bd. of Health* (*NYSRA*), 556 F.3d 114 (2d Cir. 2009). Neither these cases nor *Zauderer* hold that, so long as there is some conceivable "rational basis," a state has *carte blanche* to require commercial speakers to convey, as a condition of being allowed to engage in commercial

speech, whatever information the state demands—particularly information about a third party's product. Rather, as the Supreme Court has made clear, a state cannot "require corporations to carry the messages of third parties." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California* (*PG&E*), 475 U.S. 1, 16 n.12 (1986). But that is exactly what Connecticut's new law does. And worse, it does so only when Safelite chooses to recommend its own business, thereby "penaliz[ing] the expression of particular points of view." *Id.* at 9.

When the proper *Central Hudson* standard is applied, it is clear that the State cannot meet its heavy burden and that Safelite is likely to succeed on the merits of its appeal. *See, e.g.*, *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007) (striking down a substantially similar law under *Central Hudson*). The denial of the preliminary injunction should be reversed and the State should immediately be enjoined from enforcing PA 13-67(c)(2).

JURISDICTIONAL STATEMENT

This is an appeal of a December 18, 2013 order of the U.S. District Court for the District of Connecticut (Arterton, J.) denying Plaintiffs-Appellants' motion for preliminary injunction. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and § 1343(a)(3) because this action alleges the deprivation, under color of state law, of rights secured by the Constitution of the United States. Plaintiffs-

Appellants filed a timely notice of appeal on December 23, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred as a matter of law in applying the *Zauderer* test to a statute that does not merely compel disclosure of factual information about the speaker's own products or services, and actually serves to restrict speech.

2. Whether this Court should overrule *National Electric Manufacturers Association v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), and *New York State Restaurant Association v. New York City Board of Health*, 556 F.3d 114 (2d Cir. 2009), and hold that *Zauderer* applies only to disclosures that aim to correct misleading commercial speech or prevent consumer deception.

3. Whether Plaintiffs-Appellents have a likelihood of success on the merits of their constitutional challenge to Public Act 13-67(c)(2) once it is acknowledged that *Central Hudson* applies.

4. Whether Plaintiffs-Appellants will suffer irreparable harm in the absence of a preliminary injunction to prevent injury to their First Amendment rights.

STATEMENT OF THE CASE AND THE FACTS

Plaintiffs-Appellants Safelite Group, Inc. and Safelite Solutions LLC (collectively "Safelite") operate a vehicle glass and claims management business based in Columbus, Ohio. A-11 (O'Mara Decl. ¶ 2). Two of its lines of business are relevant to this motion: Safelite AutoGlass, which provides vehicle glass repair and replacement services, and Safelite Solutions, which is a third-party claims administrator for many insurance companies in Connecticut and throughout the United States. A-12 (O'Mara Decl. ¶ 3). Safelite's claims-management business typically handles the entire lifecycle of a vehicle glass claim. *Id.* (O'Mara Decl.

¶ 5). First, Safelite Solutions answers the initial call from the policyholder, agent, claims representative, or glass shop reporting a vehicle glass claim (known as the first-notice-of-loss call). *Id.* (O'Mara Decl. ¶ 6). During the first-notice-of-loss call, customer service representatives communicate with policyholders through scripted language that guides the customer service representatives through the glass claim. A-13 (O'Mara Decl. ¶ 8).

Policyholders often rely on their insurance company or its representatives during the first-notice-of-loss call to assist with a recommendation of a vehicle glass repair shop and for assistance scheduling an appointment at the shop. A-14 (O'Mara Decl. ¶ 10). Safelite always honors a policyholder's preference for a particular vehicle glass repair shop. A-13 - A-14 (O'Mara Decl. ¶ 9). If the policyholder does not express a preference, however, the customer service representative will recommend a glass repair shop in accordance with the insurance provider's glass program. A-14 (O'Mara Decl. ¶ 11). Many, though not all, of Safelite's insurance-provider glass-program scripts include a recommendation to Safelite AutoGlass, if one is conveniently located or offers mobile repair service that can perform the work where the vehicle is located. *Id.* If no Safelite AutoGlass shop is available, Safelite's scripts may refer the policyholder to an independent glass repair shop that is part of a network of glass repair shops Safelite maintains. *Id.*

In compliance with pre-existing Connecticut law, Conn. Gen. Stat. § 38a-354, Safelite Solutions never requires that the policyholder choose Safelite AutoGlass to perform glass repair work. A-13 - A-14 (O'Mara Decl. ¶ 9). Indeed, Safelite goes beyond what is required and discloses the relationship between Safelite Solutions and Safelite AutoGlass to every policyholder and informs the policyholder that he or she has the right to choose any repair shop. *Id.*

According to the Connecticut Insurance Department, not a single customer in the state complained about how this process was working before PA 13-67 was enacted. In testimony submitted to the Insurance and Real Estate Committee of the Connecticut General Assembly regarding the bill that became PA 13-67, the Connecticut Insurance Department explained that the current laws that forbid insurance companies from requiring consumers to use a specific glass repair shop were working fine: "this is not problematic for consumers." A-16 (State of Conn. Ins. Dep't, Testimony Before the Ins. and Real Estate Comm., Conn. Gen. Assembly (Jan. 31, 2013)). The Department's Consumer Affairs Division "ha[d] received no complaints regarding this issue" and concluded that the bill was "unnecessary." *Id.*

Despite this testimony, the Connecticut General Assembly adopted PA 13-67 in May 2013. Subsection (c)(2) adds to current law the following requirement:

> No glass claims representative for an insurance company doing business in this state or a third-party claims administrator for such

> company shall provide an insured with the name of, schedule an appointment for an insured with or direct an insured to, a licensed glass shop that is owned by (A) such company, (B) such claims administrator, or (C) the same parent company as such insurance company or claims administrator, unless such representative or claims administrator provides the insured with the name of at least one additional licensed glass shop in the area where the automotive glass work is to be performed.

PA 13-67(c)(2).

In adopting the law, the legislature was unabashedly motivated by discriminatory, protectionist goals—that forcing an insurer or claims administrator to refer customers to an unaffiliated glass repair shop would help local businesses compete with out-of-state companies. This was not an unstated motive; it was explicitly identified as the purpose of the new statute many times by a wide array of legislators. For example, Rep. Robert Megna explained that the objective of the law was to "help out those small businesses from disappearing . . . small businesses that employ people, spend money, do economic development in . . . our state." A-78 (Conn. Gen. Assembly, House Session Transcript (May 7, 2013) (unofficial)). He emphasized that "[t]hese are small businesses that are located here in the state, Mr. Speaker, that have property, that buy things, that . . . employ people here in the state." *Id.* Similarly, Rep. David Yaccarino noted that "most of the mom-and-pop shops, the glass is Connecticut, it's all from Connecticut, all Connecticut jobs." A-196 (Conn. Gen. Assembly, Ins. and Real Estate Comm. Hearing Transcript (Jan. 31, 2013) (unofficial)). Rep. Anthony D'Amelio said the

law would protect "the people that contribute to the little leagues in our town. These are the people that contribute to functions in our churches and they're literally being squeezed out of the marketplace." A-105 (House Transcript). Along these same lines, Sen. Kevin Kelly said the law would "give an opportunity for local dealers to participate on an equal footing with, I'm going to say, other, larger glass dealers." A-302 (Conn. Gen. Assembly, Senate Session Transcript (May 22, 2013) (unofficial)). Sen. Joseph Crisco agreed that the law "levels the playing field for the small business[es] in our state." *Id.*

On July 26, 2013, Safelite challenged PA 13-67 as an unconstitutional infringement of its right to engage in truthful commercial speech under the First Amendment and as unconstitutional discrimination against interstate commerce under the dormant Commerce Clause. Complaint for Declaratory Judgment and Injunctive Relief, *Safelite Group v. Jepsen*, No. 13-1068 (D. Conn. Jul. 26, 2013), ECF No. 1. Safelite moved for a preliminary injunction preventing Defendants-Appellees from implementing or enforcing PA 13-67(c)(2) on the ground that Safelite would suffer an irreparable deprivation of its First Amendment rights absent an injunction. Motion for Preliminary Injunction, *Safelite Group v. Jepsen*, No. 13-1068 (D. Conn. Jul. 26, 2013), ECF No. 2. "Initially, both parties contended that *Central Hudson* controlled here," *Safelite Group v. Jepsen*, No. 13-1068, 2013 WL 6709240, at *4 (D. Conn. Dec. 18, 2013), and the State took that

position in its briefing and at the initial oral argument on the motion. The district court then ordered supplemental oral argument to address whether *Zauderer* should apply instead, and the State "adopted the position that *Zauderer*, and not *Central Hudson*, should control." *Id.* The district court then denied Safelite's motion on the ground that Safelite could not show a likelihood of success on the merits because the court would "apply the more lenient *Zauderer* analysis," *id.* at *10, and "[u]nder the deferential standard of rational basis review, Plaintiffs' challenge fails," *id.* at *11. This appeal followed.

SUMMARY OF ARGUMENT

The State of Connecticut cannot constitutionally prohibit Safelite's truthful speech to its insurance customers' policyholders or force Safelite to convey a government-mandated message without demonstrating that the speech regulation serves a substantial state interest, directly and materially advances that interest, and is narrowly tailored. *Central Hudson*, 447 U.S. at 566. In this case, the district court excused the State from its burden of justification by holding that PA 13-67(c)(2) required no more than "the disclosure of purely factual information" and was therefore subject only to rationality review under *Zauderer*.

The district court, however, extended *Zauderer* beyond its rationale and beyond this Court's cases applying *Zauderer*. The lax *Zauderer* standard applies only to accurate factual disclosures about a commercial speaker's own products or

services. PA 13-67(c)(2) does not fit that description. *First*, PA 13-67(c)(2) does not require "disclosure," *Zauderer*, 471 U.S. at 650, but forces commercial speakers to convey information about third parties. It requires Safelite to gather information about another competing business and to transmit that information to its customers in a way that promotes the competing business at Safelite's expense. *Second*, PA 13-67(c)(2) does not relate to "purely factual and uncontroversial information," *id.* at 651, but forces businesses effectively to advertise for their competitors. In context, providing information about a competing business at the point of sale amounts to an endorsement of that business. *Third*, PA 13-67(c)(2) does not necessarily result in the provision of "more information," *id.* at 650, because it encourages covered claims administrators to comply with the regulation by saying nothing about their affiliated shops. Because the obligation to convey information about competitors is triggered when Safelite speaks about its affiliated business, the law places a content-based burden on Safelite's constitutionally protected expression and may well result in customers receiving less information about their commercial options than they would absent the regulation. In these ways, the reasons articulated in *Zauderer* for applying reduced judicial scrutiny to regulations that compel purely factual disclosures do not apply to PA 13-67(c)(2).

In fact, the Supreme Court has made clear in subsequent decisions that *Zauderer* scrutiny applies only where the compelled disclosure is required to

correct misleading or deceptive commercial messages. Accordingly, *Zauderer* does not apply for another independent reason: there is no suggestion that Safelite's communications with its policyholders are misleading or deceptive. In light of this clarification from the Supreme Court, this Court should reconsider precedents holding that *Zauderer* scrutiny applies to a wider range of regulatory purposes. But, with or without such reconsideration, there certainly is no justification for extending those precedents beyond their limits as the district court did below.

The district court's denial of the preliminary injunction was based on its erroneous legal conclusion that the speech regulation of PA 13-67(c)(2) was subject only to lenient scrutiny under *Zauderer* rather than the *Central Hudson* test normally applied to regulations of commercial speech. When the proper *Central Hudson* test is applied, it becomes clear that Safelite has a likelihood of success on the merits of its appeal and therefore a preliminary injunction should issue. *See Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 70 (2d Cir. 1996) ("[P]reliminary injunctive relief is appropriate when the movant shows (a) irreparable harm and (b) . . . likelihood of success on the merits") (internal quotation marks omitted). Safelite will suffer an irreparable deprivation of its First Amendment rights in the absence of an injunction.

STANDARD OF REVIEW

This Court reviews an order denying a preliminary injunction for abuse of discretion. *Int'l Dairy*, 92 F.3d at 70. Abuse of discretion may consist of an error of law, *Polymer Tech. Corp. v. Mimran*, 975 F.2d 58, 61 (2d Cir. 1992), and therefore a decision "based on an error of law qualifies automatically as an abuse of discretion." *County of Seneca v. Cheney*, 12 F.3d 8, 11 (2d Cir. 1993); *see also Suffolk Parents of Handicapped Adults v. Wingate*, 101 F.3d 818, 824 (2d Cir. 1996) (concluding "the district court's preliminary injunction was premised on an error of law, and, consequently, was an abuse of discretion"). The district court's legal conclusions are reviewed *de novo*. *County of Seneca*, 12 F.3d at 11.

In "First Amendment cases, an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) (internal quotation marks omitted). In this case, therefore, the Court will review the legal conclusions of the district court *de novo* and reverse if those conclusions are erroneous.

ARGUMENT

I. *CENTRAL HUDSON*, NOT *ZAUDERER*, DEFINES THE STATE'S BURDEN.

The district court denied a preliminary injunction because it found there was

likely not a First Amendment violation when it applied the lenient *Zauderer* standard to PA 13-67, rather than the *Central Hudson* standard. But the district court reached the wrong conclusion because it applied the wrong test. Its application of *Zauderer* here is plainly inconsistent with the Supreme Court's opinion in *Zauderer* itself as well as more recent decisions, such as *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010). This is not a mere "disclosure" requirement, as this Court has addressed in prior cases. Rather, it is a content-based restriction on speech that is lifted only if the speaker agrees to also carry a compelled message of tacit endorsement for its competitors. It is hard to imagine a regime more antithetical to First Amendment values. The denial of the preliminary injunction must be reversed.

A. *Zauderer* applies only to "disclosures" about one's own business, not to compelled speech about third parties.

By applying *Zauderer*, the district court erred because PA 13-67(c)(2) is not a "commercial disclosure requirement," nor is it analogous to disclosure laws upheld in prior cases. Indeed, PA 13-67(c)(2) does not require Safelite to "disclose" anything about its own business or the products and services it offers for sale. It does not promote the "free flow of accurate information" from Safelite to its customers, *Sorrell*, 272 F.3d at 114, or merely require Safelite "to provide somewhat more information than [it] might otherwise be inclined to present" about its services, *Zauderer*, 471 U.S. at 650. Rather, PA 13-67(c)(2) requires Safelite to

gather information about *other* businesses—namely, the names and locations of competing glass repair shops—and relay that third-party information to customers.

This is far removed from the routine disclosure requirements this Court addressed in *National Electric Manufacturers Association v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), and *New York State Restaurant Association v. New York City Board of Health* (*NYSRA*), 556 F.3d 114 (2d Cir. 2009). In those cases, the disclosure laws applied (a) regardless of whether the business chose to affirmatively engage in speech about its product or service, and (b) were aimed "to better inform consumers about the products they purchase" from *that* business. *Sorrell*, 272 F.3d at 115. The commercial speaker was required to provide factual information about the products it was selling, not someone else's. *Id.* The manufacturers of fluorescent light bulbs in *Sorrell* were required to "to inform consumers that the products contain mercury," regardless of whether they chose to engage in any other speech about their product. *Id.* at 107. Likewise, the chain restaurants in *NYSRA* were required "to post calorie content information" about the food items on their menus, regardless of whether they chose to use their First Amendment rights to express other information or opinions about the food. 556 F.3d at 117.

PA 13-67 is nothing like that. The speech it compels is not a disclosure about *Safelite's* business or products, but *an advertisement for competing businesses*. The First Amendment does not permit such requirements. To the

contrary, they are blatantly inconsistent with both this Court's and the Supreme Court's decisions addressing compelled disclosures. Those cases make clear that, in the limited circumstances where compelled disclosures are permissible, they are permitted to provide purely factual information about a business's *own* goods or services. In *Zauderer* itself, the Court explained that the disclosure requirement imposed on a provider of legal services was permissible because it mandated "purely factual and uncontroversial information ***about the terms under which his services will be available***." 471 U.S. at 651 (emphasis added); *see also id.* at 651 n.14 (noting that a lower level scrutiny is appropriate where a commercial speaker must "divulge accurate information ***regarding his services***") (emphasis added). Similarly, in *Milavetz*, the advertiser was required to provide "an accurate statement identifying ***the advertiser's legal status and the character of the assistance provided***" by the advertiser to its clients. 559 U.S. at 250 (emphasis added). While the State "has substantial leeway in determining appropriate information disclosure requirements for business corporations," the Court has emphasized that "[n]othing in *Zauderer* suggests, however, that the State is equally free to require corporations to ***carry the messages of third parties***, where the messages themselves are biased against or are expressly contrary to the corporation's views." *PG&E*, 475 U.S. at 15 n.12 (emphasis added). Even a commercial speaker has "the right to be free from government restrictions that

abridge its own rights in order to 'enhance the relative voice' of its opponents." *Id.* at 14; *see also Cent. Illinois Light Co. v. Citizens Util. Bd.*, 827 F.2d 1169, 1173 (7th Cir. 1987) ("While *Zauderer* holds that sellers can be forced to declare information about themselves needed to avoid deception, it does not suggest that companies can be made into involuntary solicitors for their idealogical opponents.").

Although there might conceivably be narrow circumstances where a state could justifiably compel commercial speakers to relay information about third parties, that would at least require a showing that the compelled speech directly and materially advances a substantial government interest and is narrowly tailored to achieve that interest; in other words, it must satisfy the *Central Hudson* test. *See Central Hudson*, 447 U.S. at 566. This Court recently affirmed that requirement when it held that at least intermediate scrutiny applied to a New York City law that required crisis pregnancy centers to make "mandatory disclosures" to customers that included government recommendations for pregnancy treatment. *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 238 (2d Cir. 2014). This Court held that even if the "required disclosures regulate commercial speech," *Zauderer* could not apply where the disclosure requires a commercial speaker "to state the City's preferred message." *Id.* at 245 n.6. Even if the message takes the form of factual information, it effectively requires the speaker "to advertise on behalf of the City."

Id. at 250.

The "factual disclosure" line of cases applying *Zauderer* provides no warrant for subjecting compelled speech about third parties to mere rational basis review. Thus, the district court's decision upholding such compelled speech under rational-basis review represents an unprecedented and unjustified expansion of those cases.

B. PA 13-67 requires Safelite to provide more than a "purely factual and uncontroversial" disclosure.

The district court also erred in applying *Zauderer* for a separate, independent reason: the statement compelled by PA 13-67(c)(2) is not "purely factual and uncontroversial information" as in *Zauderer*, *Sorrell*, and *NYSRA*. Identifying a competing local business to a customer at the point of referral constitutes an advertisement for that business, if not effectively an endorsement.[1] Advertisements generally consist of factual information—such as the name and location of a business offering the desired product or service—but in context, such information is not "purely factual" because it communicates a message that

[1] For example, when a person asks her tailor, "Where can I get my clothes dry-cleaned in this area?," no one would expect the tailor to provide the name of a dry cleaner he thinks is incompetent or dishonest. (And if he did, the customer would be justifiably outraged if, after a bad experience with the dry cleaner, the tailor responded, "I never suggested the dry cleaner was any good.") Rather, the conveying of the name itself carries with it a tacit endorsement of at least minimal adequacy.

customers should consider patronizing the identified business.

This is similar to requiring retailers who advertise not only to be fair and accurate in how they disclose their own prices, but also to include information about the prices of other retailers in the area. It would be quite the pyrrhic victory for the courts to have recognized a First Amendment right to advertise, *see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976), only then to allow a state to burden that right with compelled disclosures about competitors, so as to render the advertising positively counterproductive.

PA 13-67(c)(2) requires Safelite to provide a customer seeking glass repair with the name of a glass repair business "in the area where the automotive glass work is to be performed" for the customer. In that context, the customer will understand that information as a recommendation of the identified shop, or at least as a representation that the identified shop is able to do the work that the customer needs—even if Safelite does not believe that the shop is able to complete the work in a satisfactory manner. Indeed, the uncontroverted factual record in the district court demonstrated that "because vehicle glass claims are not a frequent occurrence, policyholders often rely on their insurance company or its representatives to assist with a recommendation of a vehicle glass repair shop." A-14 (O'Mara Decl. ¶ 11).

Worse yet, because of another pre-existing provision in the law that now takes on greater force given the new enactment, Safelite is required to provide the name without being able to provide truthful information that using the other shop could "result in delays in or lack of guarantee for the automotive glass work." PA 13-67(b)(2). So the law now requires Safelite to mislead its customers by implying equivalency without mentioning differences (delay and warranty) that would be of great significance to the consumer.

In response to these concerns, the district court suggested that Safelite may counteract that appearance of endorsement by informing customers "that it is mandated by law to also provide the name of a non-affiliated repair shop and could even say that Safelite did not recommend that shop and instead recommend using Safelite AutoGlass." *Safelite Group*, 2013 WL 6709240, at *6. That would not cure the First Amendment problem. Rather, it would force Safelite to convey a message with which it disagrees strongly: that the State has forced it to disclose other companies because it is somehow inappropriate or suspect for Safelite to recommend its affiliated shops. In addition, the awkward script the district court wrote clearly suggests that the State itself views these shops as appropriate alternatives. And if Safelite really were to take up the district court's invitation to start affirmatively disparaging the other shop it mentions, the consumer would likely be turned off by this caddish, aggressive behavior. The law will have forced

Safelite to change its corporate persona and 'go negative.'

"That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster. For corporations as for individuals, the choice to speak includes within it the choice of what not to say." *PG&E*, 475 U.S. at 16 (internal citations omitted). Put otherwise, "[t]he danger that [Safelite] will be required to alter its own message as a consequence of the government's coercive action is a proper object of First Amendment solicitude." *Id.*

In *Evergreen Association*, this Court recognized that the First Amendment does not tolerate compelled speech simply because "the regulation here does not require the speaker to claim the message as its own," 740 F.3d at 250, even assuming that the "required disclosures regulate commercial speech," *id.* at 245 n.6. The Court acknowledged that a mandatory disclosure may be objectionable precisely because it forces the commercial speaker to alter the way it otherwise would speak about its business and the services it provides. *Id.* at 249-50 ("The Services Disclosure will change the way in which a pregnancy services center, if it so chooses, discusses the issues of prenatal care, emergency contraception, and abortion."). Speakers "must be free to formulate their own address." *Id.* at 250; *see also PG&E*, 475 U.S. at 9 (recognizing First Amendment problems when commercial speakers must "alter their speech to conform with an agenda they do not set").

The ability of Safelite to engage in counter-speech, therefore, does not neutralize the First Amendment problem or justify the application of anything less than intermediate scrutiny. Safelite cannot, consistent with the First Amendment, be forced to convey the government's preferred message or adopt the district court's "counter-speech" approach. In this way, the statement mandated by PA 13-67(c)(2) "ultimately communicates a subjective" and, within this industry context, a "highly controversial message" that "is unlike a surgeon general's warning of the carcinogenic properties of cigarettes" because it is not based on objective facts about the commercial transaction Safelite wishes to propose. *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006). For that reason, the law must be subject to more than *Zauderer* review. *Id.* "[L]aws that compel the reporting of 'factual and uncontroversial' information by commercial entities are scrutinized for rationality," but laws that require the transmission of an "opinion-based" message receive more heightened review. *NYSRA*, 556 F.3d at 134.

C. PA 13-67 is a content-based restriction on commercial speech.

The district court's failure to apply *Central Hudson* is all the more egregious because the statute serves as a clear restriction and burden on speech. Indeed, the State conceded as much below. A-473 (12/2/13 Tr. 46:20). The speaker is permitted to speak *if and only if it also carries the state's message*—otherwise it must stay silent. Thus, as its enactors intended (which the State made clear below),

"[i]t restricts from being able to self-refer." *Id.* (12/2/13 Tr. 46:20-23).[2] The sponsors of PA 13-67(c)(2) touted the law precisely because it "literally prevents them from self-referring." A-96 (House Transcript).

Under the law of this Circuit, "[t]he *Central Hudson* test should be applied to statutes that *restrict* commercial speech." *Sorrell*, 272 F.3d at 115. The district court's refusal to do so cannot be sustained. It reasoned that "PA 13-67(c)(2) contains no restrictions on speech," because it merely "creates a 'trigger,' mandating that Safelite provide the name of a competitor if, and only if, Safelite directs claimants to its affiliated repair shops." *Safelite Group*, 2013 WL 6709240, at *7. That reasoning ignores a vital point: The "trigger" of PA 13-67(c)(2) is the exercise of Safelite's First Amendment right to recommend a Safelite shop. The penalty applies only if Safelite chooses to engage in the constitutionally protected speech of expressing a particular viewpoint—endorsing its own product. A State may not force a speaker to "shoulder a special and potentially significant burden if they make that choice." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 739 (2008). "The resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Id.*

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[2] In its briefing before the district court, the State asserted that the *Central Hudson* test governed this case. Defendants' Memorandum in Opposition to Motion for Preliminary Injunction at 12, *Safelite Group v. Jepsen*, No. 13-1068 (D. Conn. Sept. 30, 2013), ECF No. 41.

The Supreme Court has held that a content-based trigger *is* a restriction on speech precisely because it "penalizes the expression of particular points of view." *PG&E*, 475 U.S. at 9. Where the "expression of a particular viewpoint triggered an obligation" to communicate a third-party message, the Court held that the effect is to "deter" speakers "from speaking out in the first instance" and "*inescapably* dampens the vigor and limits the variety of public debate." *Id.* at 10 (internal quotation marks omitted). In other words, content-based triggers restrict speech and threaten "the robust and free flow of accurate information." *Sorrell*, 272 F.3d at 114.

The idea that Safelite would choose to refrain from recommending its own services, as opposed to forcibly endorsing others, is far from fanciful. As the industry leader with an extraordinary reputation for excellence, Safelite might well opt to rely on that reputation rather than risk promoting a subpar competitor. This, of course, would serve only to "reduc[e] the free flow of information and ideas that the First Amendment seeks to promote." *PG&E*, 475 U.S. at 14. In this way, PA 13-67 may well cause *less* information to be provided to consumers.[3]

[3] The district court somehow concluded that "Safelite acknowledges that PA 13-67(c)(2) contains no restrictions on speech." *Safelite Group*, 2013 WL 6709240, at *7. Safelite acknowledged no such thing. *See, e.g.*, Memorandum in Support of Motion for Preliminary Injunction at 15, *Safelite Group v. Jepsen*, No. 13-1068 (D. Conn. Jul. 26, 2013), ECF No. 2-1 ("PA 13-67(c)(2) bans Safelite from recommending or referring customers to Safelite AutoGlass unless it also provides a recommendation or referral to an unaffiliated glass

At bottom, the content-based trigger of PA 13-67 dramatically distinguishes this case from *Sorrell* and *NYSRA*. In those cases, the commercial speaker was required to make certain disclosures simply because it engaged in a particular business. Any manufacturer of mercury-containing products was required to disclose the presence of mercury. *Sorrell*, 272 F.3d at 107. Any chain restaurant was required to disclose the calorie content of its food products. *NYSRA*, 556 F.3d at 117. These disclosures were triggered by the underlying conduct, not by the companies' desire to engage in speech. Therefore, the disclosure laws did not place a special burden on constitutionally protected expression.

To be sure, there are some instances in which speech is necessarily the trigger because the purpose of the compelled disclosure is precisely to correct the speaker's potentially misleading or deceptive statements. *See Zauderer*, 471 U.S. at 651; *Milavetz*, 559 U.S. at 250. That is not this case. The State concedes here that "[t]here's no misleading or unlawful language in the plaintiffs' communications." A-431 (12/2/13 Tr. 4:19-20). What is left, then, is that the district court in this case is the first and only court to hold under *Zauderer* that a state may burden speech which is not potentially misleading or deceptive by

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repair shop."). As the State acknowledged, the law prevents Safelite from providing an exclusive recommendation of its own shops, it places a content-based burden on Safelite's constitutionally protected speech about its own business, and it may result less information being provided to consumers.

imposing a requirement that anyone who conveys a particular message is required to counter it with another. That is an unmistakable restriction and burden on constitutionally protected speech.

There is another significant restriction at play here as well. As mentioned, another part of the law restricts Safelite from informing customers about delay and warranty issues affecting competitors—even those competitors Safelite would now be required to mention should the new law take effect. *See Safelite Group*, 2013 WL 6709240, at *6-7 (discussing PA 13-67(b)(2)). This restriction standing alone is bad enough (and is under challenge). But when the new *requirement* to mention other businesses is now combined with the existing *prohibition* on saying certain accurate (albeit negative) things about those businesses, the constitutional affront is manifest.[4]

[4] The district court refused to consider the impact of PA 13-67(b)(2) on the compelled speech required by PA 13-67(c)(2) because PA 13-67(b)(2) was not at issue on Safelite's motion for a preliminary injunction (although it is being challenged in the case). *Safelite Group*, 2013 WL 6709240, at *7. Safelite did not seek to preliminarily enjoin the speech restriction of PA 13-67(b)(2) because the same speech restriction is already in effect under Conn. Gen. Stat. § 38a-354(b)(2). Nevertheless, the district court erred in ignoring the interrelationship between the two provisions of PA 13-67. This is not like the statutory provisions at issue in *Zauderer*, in which the regulations imposed independent requirements on the commercial speaker, and therefore could be considered in isolation. Here, the restrictions on what can be said work together with the requirement to provide information about a competitor to mandate an incomplete and misleading message.

II. IF THE COURT REACHES THE ISSUE, IT SHOULD OVERRULE PRIOR PRECEDENT AND HOLD *ZAUDERER* APPLIES ONLY TO DISCLOSURES THAT PREVENT CONSUMER DECEPTION.

Although this Court need not reach the issue, the district court's premise that *Zauderer* applies here (as opposed to *Central Hudson*) was flawed because the Supreme Court clarified in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), that *Zauderer* applies only to disclosures that prevent consumer deception or confusion. Should the Court reach this issue, it should recognize that "the prior rulings of this Court on this issue have been effectively overruled by the Supreme Court." *United States v. Frias*, 521 F.3d 229, 232 n.3 (2d Cir. 2008).

This case presents the issue of *Zauderer*'s scope because the district court relied on "the distinct approach taken by the First and Second Circuits" to *Zauderer* in declining to apply *Central Hudson*. *Safelite Group*, 2013 WL 6709240, at *10 n.7. Specifically, the district court refused to follow the Fifth Circuit's decision striking down a substantially similar law in *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007), because "the Fifth Circuit's analysis of compelled commercial speech differs significantly from that of the Second Circuit." *Safelite Group*, 2013 WL 6709240, at *10. The Second Circuit maintains that *Zauderer* is "broad enough" to apply to disclosure requirements "even if they address non-deceptive speech." *NYSRA*, 556 F.3d at 133 & n.21; *see also Sorrell*, 272 F.3d at 115. By contrast, the Fifth Circuit holds that *Zauderer*

applies only to disclosures which address "the potential for customer confusion." *Allstate*, 495 F.3d at 166. Because the parties agree that in this case "[t]here's no misleading or unlawful language in the plaintiffs' communications," A-431 (12/2/13 Tr. 4:19-20), this disagreement over *Zauderer*'s reach makes a decisive difference.

In *Milavetz*, the Supreme Court described *Zauderer* as applying to disclosures "directed at *misleading* commercial speech." 559 U.S. at 249. The Court explained that because a speech regulation "is directed at *misleading* commercial speech . . . and because the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech . . . the less exacting scrutiny described in *Zauderer* governs our review." *Id.* The Court emphasized that its application of *Zauderer* depended on the fact that the "required disclosures are intended to combat the problem of inherently misleading commercial advertisements" and that the deferential *Zauderer* standard of review was based on the states' "authority to regulate inherently misleading advertisements." *Id.* at 250. The Court further explained that *Zauderer* applied because the evidence "is adequate to establish that the likelihood of deception in this case 'is hardly a speculative one.'" *Id.* at 251 (quoting *Zauderer*, 471 U.S. at 652).

Indeed, in an earlier case, four justices expressly maintained that "*Zauderer* carries no authority for a mandate unrelated to the interest in avoiding misleading

or incomplete commercial messages." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 491 (1997) (Souter, J., dissenting, joined by Rehnquist, C.J., and Scalia and Thomas, JJ.).[5]

That position follows from the development of the Supreme Court's approach to regulations of commercial speech. The *Central Hudson* test includes a threshold inquiry into whether the underlying speech concerns lawful activity and is not misleading because "there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Central Hudson*, 447 U.S. at 563, 566. And the Court has long recognized that lesser scrutiny applies where the government regulates "forms of communication more likely to deceive the public than to inform it." *Id.* at 563; *see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

The rule announced in *Zauderer* grew out of the Supreme Court's articulation of standards to govern the states' special authority to regulate misleading speech, and particularly the Court's insistence that where speech may

[5] Justice Souter considered the reach of *Zauderer* in that case—even though it was not cited by the government or by the majority—because *Zauderer* was "our only examination of a commercial-speech mandate before today." 521 U.S. at 490. Thus, the other five justices had no occasion to address this point.

be misleading, "the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation." *In re R.M.J.*, 455 U.S. 191, 203 (1982). In *Zauderer*, the Court "emphasized 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.* (quoting *R.M.J.*, 455 U.S. at 201); *see also id.* at 651 ("[A]n advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.").

The logic of *Zauderer.* applies only where the State is exercising its authority over misleading commercial speech because only in that context do disclosure requirements represent an alternative to "absolute prohibition." *Id.* at 675.; *see also id.* at 638. ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading."). Outside the context of misleading speech, states do not have the authority to "prohibit[] entirely" any "particular content or method" of expression, *R.M.J.*, 455 U.S. at 203, and therefore there is no justification for providing greater leeway to compel speech as an alternative to prohibition.[6] Accordingly, *Zauderer*

[6] Outside the area of misleading speech, the Supreme Court has denied that speech compulsion is less offensive than speech prohibition. "[C]ompulsion to speak may be as violative of the First Amendment as prohibitions on speech."

was clear: "Commercial 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." *Zauderer*, 471 U.S. at 638 (citing *Central Hudson*). In other words, *Central Hudson* applies to any regulation of speech that is not false or deceptive.

It violates the reasoning and language of *Zauderer* and *Central Hudson* to apply *Zauderer* review where the regulated speech is neither false nor deceptive. For that reason, the overwhelming majority of circuits apply *Zauderer* only to disclosures serving the governmental interest in preventing deception. *See, e.g.*, *1-800-411-Pain Referral Serv., LLC v. Otto*, No. 13-1167, 2014 WL 904190, at *11 (8th Cir. Mar. 10, 2014) ("[I]f challenged disclosure requirements are 'directed at *misleading* commercial speech . . . the less exacting scrutiny described in *Zauderer* governs' a court's review of the disclosure rules."); *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 283 (4th Cir. 2013) ("Disclosure requirements aimed at misleading commercial speech need only survive rational basis scrutiny, by being 'reasonably

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Zauderer, 471 U.S. at 650; *see also Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 782 (1988) ("Nor is a deferential test to be applied on the theory that the First Amendment interest in compelled speech is different than the interest in compelled silence. The difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say.").

related to the State's interest in preventing deception of consumers.'"); *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1213 (D.C. Cir. 2012) ("[B]y its own terms, *Zauderer*'s holding is limited to cases in which disclosure requirements are 'reasonably related to the State's interest in preventing deception of consumers.'"); *Pub. Citizen Inc. v. Louisiana Attorney Disciplinary Bd.*, 632 F.3d 212, 218 (5th Cir. 2011) ("A regulation that imposes a disclosure obligation on a potentially misleading form of advertising will survive First Amendment review if the required disclosure is 'reasonably related to the State's interest in preventing deception of consumers.'"); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 641 (6th Cir. 2010) (holding "*Zauderer* applies where a disclosure requirement targets speech that is *inherently* misleading" or that "is *potentially* misleading"); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) ("The Court has allowed states to require the inclusion of 'purely factual and uncontroversial information . . . . as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.'"); *United States v. Wenger*, 427 F.3d 840, 849 (10th Cir. 2005) ("*Zauderer* presumes that the government's interest in preventing consumer deception is substantial."); *United States v. Bell*, 414 F.3d 474, 484 (3d Cir. 2005) (construing *Zauderer* to hold that "the government may impose reasonable regulations on content to prevent deception of customers").

Significantly, a panel of this Circuit, in a recent decision applying *Milavetz*, suggested that the State's interest in preventing consumer deception must be implicated before *Zauderer* applies. In *Connecticut Bar Ass'n v. United States*, 620 F.3d 81 (2d Cir. 2010), this Court explained that each of the provisions under review was "directed at misleading commercial speech" and "requires [commercial speakers] to disclose specific information" without which consumers would be "subject . . . to easy deception." *Id.* at 95-96. "Accordingly, following *Milavetz*," this Court "appl[ied] rational basis review." *Id.* at 96. The Court explained that *Zauderer* applies in the context of misleading speech while *Central Hudson* applies to all other commercial speech regulations:

> As the Supreme Court explained in *Zauderer*, to pass the rational basis test, a mandated disclosure must be "reasonably related to the State's interest in preventing deception of consumers" in circumstances otherwise likely to be misleading. By contrast, for "restrictions on nonmisleading commercial speech regarding lawful activity," to pass intermediate scrutiny, the restrictions must "directly advance a substantial governmental interest and be no more extensive than is necessary to serve that interest."

Id. at 92 n.14 (internal citations omitted).[7]

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[7] The district court relied on *BellSouth Adver. & Publ'g Corp. v. Tennessee Regulatory Auth.*, 79 S.W.3d 506, 520 (Tenn. 2002), as the only precedent it could find "in which any court upheld a requirement that a business refer to a competitor." *Safelite Group*, 2013 WL 6709240, at *9 n.6. The Tennessee Supreme Court, however, held that the challenged regulations in that case were "reasonably related to the state's interest in preventing deception of consumers." *BellSouth*, 79 S.W.3d at 520. The Tennessee Regulatory Authority could require BellSouth to include information about other service

Thus, should it reach the issue, the time has come for this Court to recognize that the more expansive view of *Zauderer* has "been effectively overruled" by the Supreme Court's clarifying decision in *Milavetz*. *Frias*, 521 F.3d at 232. Because the compelled speech mandated by PA 13-67 is concededly unrelated to preventing misleading or deceptive commercial speech, the *Zauderer* standard would therefore be inapposite and a court must instead "apply the intermediate standard set forth in *Central Hudson*." *R.J. Reynolds*, 696 F.3d at 1217. Again, under that standard, an injunction must issue.

Recognizing that *Zauderer* applies only to disclosures aimed at deceptive or misleading speech would preclude the contrary holding as expressed in *New York State Restaurant Association v. New York City Board of Health* (*NYSRA*), 556 F.3d 114, 133 (2d Cir. 2009), and *National Electric Manufacturers Association v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001). But it would not necessarily lead to different outcomes in those cases. First, *NYSRA* may fit within the *Zauderer*

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providers in its telephone directory only because the character of the directory would otherwise lead consumers into "mistakenly believing that no alternative providers of telecommunications services are available." *Id.* The court's holding makes sense precisely because the *Zauderer* standard was applied to prevent misleading or deceptive commercial speech. *See also Walker v. Bd. of Prof'l Responsibility of Supreme Court of Tennessee*, 38 S.W.3d 540, 546 (Tenn. 2001) ("[U]nder current law—as announced in *Zauderer*—as long as the disclosure requirement is reasonably related to the state's interest in preventing deception of consumers, and not unduly burdensome, it should be upheld."). In this case, the State concedes that PA 13-67(c)(2) does not serve that purpose. A-431 (12/2/13 Tr. 4:19-20).

framework because the challenged law in that case was designed to address evidence of customer confusion.[8] In *NYSRA*, New York City argued that *Zauderer* applied because the disclosure of calorie information had been mandated precisely to "reduce consumer confusion and deception," 556 F.3d at 134, and "to prevent misleading advertising practices," *id.* at 133 n.21. This Court did "not reach this argument" because it concluded that such a purpose was unnecessary. *Id.* Second, the laws at issue in both cases could survive even under the *Central Hudson* test. In *Sorrell*, this Court recognized that the law served "Vermont's substantial interest in protecting human health and the environment from mercury poisoning." 272 F.3d at 115 n.6. Vermont argued that the law passed the *Central Hudson* test based on this substantial state interest. *See* Reply Brief of Appellants Sorrell and Kassel at 24, *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001) (No. 99-9450), 2000 WL 33977195 ("Even applying *Central Hudson*, Vermont's mercury-labeling statute still survives constitutional scrutiny."). In *NYSRA*, this Court recognized that "New York City has a substantial interest" in "preventing obesity." 556 F.3d at 134. The Court's decision relied on a series of factual findings and studies concerning the nature of this interest—i.e., the scope of the

[8] *See* Appellees' Brief at 34, *New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009) (No. 08-1892), 2008 WL 6513110 (describing findings by New York City Board of Health regarding customer confusion and deception).

"obesity epidemic"—and its connection to the provision of calorie information at restaurants. *Id.* at 134-36. Indeed, the *NYSRA* opinion already reads like a *Central Hudson* analysis rather than mere *Zauderer* review.

III. PA 13-67 IS UNCONSTITUTIONAL UNDER THE *CENTRAL HUDSON* TEST.

Each of the reasons described above provides an independent basis for recognizing that *Zauderer* is not the governing test and vacating the decision below. Should this Court agree that even one of these arguments has a likelihood of success on the merits, there can be no doubt that Safelite is entitled to have PA 13-67(c)(2) preliminarily enjoined because it is plain that the law cannot possibly survive scrutiny under the *Central Hudson* test.

The *Central Hudson* test applies because, absent some false or misleading statement, recommendations and referrals to engage in lawful activity constitute protected commercial speech. *See Central Hudson*, 447 U.S. at 566. PA 13-67(c)(2) does not attempt to correct any alleged falsity in the recommendations that Safelite provides to its customers. In fact, the State agreed during oral argument that "[t]here's no misleading or unlawful language in the plaintiffs' communications." A-431 (12/2/13 Tr. 4:19-23).

To be sustained, PA 13-67 must satisfy the *Central Hudson* test, which requires a court to determine (1) whether the expression at issue is false or misleading, (2) whether the asserted governmental interest is substantial, (3)

whether the regulation directly and materially advances the governmental interest asserted, and (4) whether the regulation is no more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566. The State carries the burden of justifying the law. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011). And "[t]he State's burden is not slight." *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 143 (1994). The State must also show that its articulated justification for the speech restriction rests on more than "[m]ere speculation or conjecture" and that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* (quotation omitted).

Courts applying the *Central Hudson* standard to laws similar to PA 13-67 have uniformly concluded that such speech regulations are unconstitutional. *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 165 (5th Cir. 2007) (holding unconstitutional a Texas statute that purported to "prohibit[] an insurer from recommending that policyholders have their vehicles repaired at tied repair facilities, except to the same extent it recommends other repair facilities"); *Allstate Ins. Co. v. State of South Dakota*, 871 F. Supp. 355, 358 (D.S.D. 1994) (holding that a restriction on recommending insurer-preferred glass repair shops "is clearly an unconstitutional restriction on commercial speech"); *see also Allstate Ins. Co. v. Serio*, No. 97-670, 2000 WL 554221, at *26 (S.D.N.Y. May 5, 2000) (holding a restriction on body shop referrals to be an unconstitutional abridgment of

commercial speech), *question certified by*, 261 F.3d 143 (2d Cir. 2001), *answered by*, 746 N.Y.S.2d 416 (2002) (modifying regulatory interpretation to eliminate the referral restriction). Safelite clearly has a likelihood of success in prevailing on its claim that PA 13-67(c)(2) violates the First Amendment.

A. PA 13-67(c)(2) restricts Safelite's truthful speech about choices consumers lawfully have.

Under the first prong of the *Central Hudson* test, the State cannot merely claim that the regulated speech is "potentially misleading." *Ibanez*, 512 U.S. at 146. Instead, it must demonstrate that the regulated speech is *inherently* misleading—that the speech is "more likely to deceive the public than to inform it." *Central Hudson*, 447 U.S. at 563. In this case, however, the State conceded at oral argument that Safelite's speech is not misleading. A-431 (12/2/13 Tr. 4:19-23).

Everything Safelite Solutions currently tells policyholders about Safelite AutoGlass repair shops is truthful and non-misleading. Safelite simply informs policyholders about the services that Safelite AutoGlass provides. A-13 - A-14 (O'Mara Decl. ¶ 9). Safelite Solutions also voluntarily discloses the relationship between it and its affiliated business, Safelite AutoGlass. And in all the legislative debates and hearings over PA 13-67, no legislator justified PA 13-67(c)(2) on the ground that it prevented false or misleading speech. To the contrary, the Connecticut Insurance Department testified that consumers understood their right

to choose a glass repair shop and that *zero* complaints from consumers had been filed related to that issue. A-16 (Ins. Dep't Testimony). The State therefore "[l]ack[s] empirical evidence to support [a] claim of deception." *Peel v. Attorney Registration & Disciplinary Comm'n of Illinois*, 496 U.S. 91, 108 (1990).

B. No substantial state interest justifies the regulation of Safelite's speech.

"[C]ommercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental.'" *Linmark Associates, Inc. v. Twp. of Willingboro*, 431 U.S. 85, 92 n.6 (1977). A reviewing court "must identify with care the interests the State itself asserts" because "the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions." *Edenfield v. Fane*, 507 U.S. 761, 768 (1993).

Here, the Connecticut General Assembly sought to justify PA 13-67(c)(2) by claiming a need to protect local glass repair shops from competition. This desire to insulate local businesses from competition is not close to being a legitimate—much less a substantial—governmental interest. *See South Dakota*, 871 F. Supp. at 358 ("As to [the State's asserted interest in] preventing local businesses from closing, the State cannot properly protect them from the networks who will charge a lower price and thereby help the local businesses maintain their profit margins.").[9]

[9] The State's asserted interest in protectionism is especially pernicious because Connecticut seeks to advance that interest by unconstitutionally mandating

In its arguments before the district court, the State claimed that PA 13-67 could be justified by the promotion of "consumer choice." But there is no evidence establishing that an interest in "consumer choice" motivated the adoption of PA 13-67(c)(2). And even if this Court were to supplant the actual purpose identified by the legislature and consider the alleged interest in "consumer choice," it is clear that the State's interest is not in "protecting consumer choice" so much as promoting its desire that consumers make particular choices—that is, to redirect consumers to non-Safelite shops. PA 13-67(c)(2) does not help to make consumers more aware of their right to choose a glass repair shop or otherwise prevent consumers from being misled. *See Allstate*, 495 F.3d at 167 (noting that the law there "do[es] not require that customers be informed of a[n] insurer/body shop arrangement or the existence of a law against steering, regulations which would arguably reduce the potential for consumer confusion"). And independent of PA 13-67(c)(2), Safelite's consumers are already informed of their legal rights and of the relationship between Safelite Solutions and Safelite AutoGlass. *See* A-13 - A-

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"differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald*, 544 U.S. 460, 472 (2005) (quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994)). Where a statute's "effect is to favor in-state economic interests over out-of-state interests," the Supreme Court has "generally struck down the statute without further inquiry." *Id.* at 487 (quoting *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

14 (O'Mara Decl. ¶ 9).

The desire to divert customers from one form of lawful business to another is not a legitimate state interest that justifies a restriction on commercial speech.[10] The Supreme Court has "rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information" or in attempting to divert customers from one form of lawful business to another. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002). The Court has held that not even a state interest in reducing lawful "vice activity," such as gambling or drinking, can justify a restriction on commercial speech. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514 (1996). As the Fifth Circuit held with respect to a similar law, "[a]ttempting to control the outcome of the consumer decisions following such communications by restricting lawful commercial speech is not an appropriate way to advance a state interest in protecting consumers." *Allstate*, 495 F.3d at 167

Moreover, the legislative history of PA 13-67 is bereft of any evidence that customer choice was impaired by the current arrangement. To the contrary, the evidence in front of the legislature was that customers were not confused. As

[10] For that reason, PA 13-67(c)(2) is not even "reasonably related" to a legitimate state interest, *NYSRA*, 556 F.3d at 136; *Zauderer*, 471 U.S. at 653, because the interest it serves is illegitimate.

noted, the Connecticut Insurance Department had not received any complaints on that issue from consumers. A-16 (Ins. Dep't Testimony). "A governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real," *Edenfield*, 507 U.S. at 762, and the State cannot make that demonstration here.

C. PA 13-67(c)(2) does not directly and materially advance any state interest.

Even if the State *could* identify a substantial governmental interest that motivated adoption of PA 13-67(c)(2), the statute would still fail because it does not "directly and materially advance[]" that interest. *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 92 (2d Cir. 1998). The State claims that PA 13-67(c)(2) directly and materially advances consumer choice by "ensur[ing] that consumers have at least the minimum information they need to effectively exercise their right to choose a glass repair shop." Defendants' Memorandum in Opposition to Motion for Preliminary Injunction at 13, *Safelite Group v. Jepsen*, No. 13-1068 (D. Conn. Sept. 30, 2013), ECF No. 41. Yet that assertion does not withstand scrutiny.

First, if Safelite opts to avoid the burden of the compelled speech by eschewing recommending its own shops, then customers will not receive *any* information with which to exercise their right to choose a glass repair shop. Moreover, if Safelite does submit to the compelled speech, then PA 13-67(c)(2)

requires Safelite to communicate a potentially misleading recommendation of a competing shop about which Safelite may not have any information (or about which Safelite knows information the law forbids it from sharing, or information that it cannot share by virtue of its need to preserve its own reputation as a company that does not badmouth competitors). As the State and the district court both acknowledged, other provisions of the law prohibit Safelite from accurately informing consumers when choosing an unaffiliated shop will result in delays or lack of a guarantee, even if that information is true. *Safelite Group*, 2013 WL 6709240, at *6. It goes without saying that a statute that either prohibits the dissemination of accurate information to consumers or requires the dissemination of potentially misleading information cannot possibly advance an interest in promoting consumer choice.

Second, PA 13-67 requires that the name of a second shop be given to consumers only by third-party claims administrators, like Safelite, that own affiliated glass repair shops. This limitation belies the State's claim that the goal of the statute is to promote consumer choice. The State does not and cannot explain why consumers who call an insurer or a third-party claims administrator that does not own an affiliated glass repair shop need not receive this "minimum information" as part of Connecticut's alleged interest in protecting consumer

choice.[11] As the Supreme Court recognized in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), a statute does not materially advance an asserted state interest if it provides only "limited incremental support for the interest asserted," as when the State permits identical behavior from a different source that equally impairs the State's asserted interest. *Id.* at 425-27 (finding prohibition on news racks containing "commercial handbills" did not materially advance state interest in aesthetics and safety where city permitted equally unattractive news racks containing other content).

The law is plain: "Rules that burden protected expression may not be sustained when the options provided by the State are too narrow to advance legitimate interests or too broad to protect speech." *Sorrell*, 131 S. Ct. at 2669. PA 13-67(c)(2) fails under both inquiries.

D. The speech restriction of PA 13-67(c)(2) is not narrowly tailored.

PA 13-67(c)(2) is invalid for the independent reason that, even if it were found to serve a legitimate interest, it is not narrowly tailored. A restriction on commercial speech may "extend only as far as the interest it serves. The State

[11] Eight of the top fifteen insurers in Connecticut do not employ third-party administrators with affiliated shops to handle their policyholders' auto glass claims and therefore will not be subject PA 13-67(c)(2). Those insurers have a financial interest in directing their policyholders to repair shops that participate in their own "direct repair programs." Yet their policyholders will not receive what the State regards as the "minimum information" necessary for consumer choice. *See* A-442 - A-443 (12/2/13 Tr. 15:14-16:2).

cannot regulate speech that poses no danger to the asserted state interest nor can it completely suppress information when narrower restrictions on expression would serve its interest as well." *Central Hudson*, 447 U.S. at 565. "[I]f the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson*, 535 U.S. at 371; *see also Sorrell*, 131 S. Ct. at 2668 ("There must be a 'fit between the legislature's ends and the means chosen to accomplish those ends.'").

If the State really were concerned that customers lack sufficient information about their commercial alternatives, the proper remedy would not be to ban Safelite's speech recommending Safelite AutoGlass or to compel Safelite to recommend competing businesses to its customers when it does not wish to do so. Instead, the State could publish its own list of glass repair shops. The State could also trench more narrowly on the First Amendment by requiring straightforward disclosures—of the customer's legal right to choose a glass shop or of the association between the claims administrator and the affiliated glass shop—or the State could look for a non-speech regulation that would further the goal without offending constitutional rights. *See 44 Liquormart*, 517 U.S. at 512 ("[T]he Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct."); *see also R.M.J.*, 455 U.S. at 201 (1982) (noting that "a warning or disclaimer might be appropriately required . . . in order to

dissipate the possibility of consumer confusion or deception"). But far from narrowly tailoring the speech regulation to a substantial interest, the legislature adopted an intrusive law that forces the administrator to choose between total censorship and compelled speech tantamount to endorsing other repair shops.

The availability of these less restrictive alternatives is dispositive of Safelite's constitutional challenge to PA 13-67(c)(2), as courts invalidating similar laws have concluded. *See, e.g.*, *Allstate*, 495 F.3d at 168 ("The State Defendants here fail to demonstrate why a more limited restriction, such as a requirement that Allstate disclose its ownership of Sterling or inform customers of Texas's anti-steering law, would not have adequately served the state's interest in consumer protection."). In sum, because there are various other, less restrictive ways of protecting consumers, PA 13-67(c)(2) is not narrowly tailored and fails the fourth prong of the *Central Hudson* test.

IV. SAFELITE WILL SUFFER IRREPARABLE HARM IF NO INJUNCTION ISSUES.

The State "do[es] not dispute that the alleged First Amendment violation, if proved, would constitute irreparable injury." Defendants' Memorandum in Opposition to Motion for Preliminary Injunction at 17, *Safelite Group v. Jepsen*, No. 13-1068 (D. Conn. Sept. 30, 2013), ECF No. 41. This position reflects the well-established principle that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v.*

Burns, 427 U.S. 347, 373 (1976); *see also Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996) ("Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction.").

"When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984). There is no question that Safelite has satisfied the required element of irreparable harm, given that First Amendment rights are at stake. Here, however, the constitutional injury is also a direct affront to Safelite's goodwill. In many instances, customers may be deeply disappointed in the shop to which they turn based on the information Safelite was forced to provide. The upshot is that Safelite will irreparably lose business opportunities and potentially confuse customers by referring them to competitors Safelite does not endorse—all to the detriment of Safelite's goodwill. It is well-established that the potential loss of goodwill constitutes irreparable harm. *See, e.g.*, *Tom Doherty Associates v. Saban Entm't, Inc.*, 60 F.3d 27, 38 (2d Cir. 1995) (holding that prospective loss of goodwill alone is sufficient to support a finding of irreparable harm). Safelite will also be unable to recover the pecuniary costs of compliance because it does not have a cause of action against the State to recover those costs, and any such suit "would be barred by the Eleventh Amendment." *United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) (holding pecuniary losses under such

circumstances to be irreparable); *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 423 (2d Cir. 2013) (same). Injunctive relief is appropriate here because Safelite has satisfied the required elements of "irreparable harm and . . . likelihood of success on the merits." *Int'l Dairy*, 92 F.3d at 70.

To the extent the Court will consider the potential harm to the State from the issuance of a preliminary injunction, it is clear that the balance of hardships favors Safelite. There is no urgency to PA 13-67 taking effect. As the State admitted during oral argument below, permutations of PA 13-67 have been debated in the legislature "going back several years." A-482 (12/2/13 Tr. 55:19-20). When it was passed in June 2013, the legislature set a January 1, 2014 effective date—evidence that there was no pressing urgency. Moreover, as the State conceded, the speech at issue is neither misleading nor unlawful. A-431 (12/2/13 Tr. 4:19-23). So there is no harm from an injunction that would preserve the status quo pending resolution of this action to prevent Safelite from suffering the loss of its constitutional rights and other potential damages. "[T]he balance of hardships favors [Safelite] because it would suffer irreparable losses from [enforcement of PA 13-67(c)(2)] while [the law] would not meaningfully advance the rationales offered by [the State]." *Entergy Nuclear*, 733 F.3d at 423.

The preliminary injunction also serves the public interest because "it is always in the public interest to prevent the violation of a party's constitutional

rights." *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (citation omitted); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) ("The public as a whole has a significant interest in . . . protection of First Amendment liberties."). That is particularly true because the challenged law serves to *chill* the dissemination of wholly truthful information to consumers, "thereby reducing the free flow of information and ideas that the First Amendment seeks to promote." *PG&E*, 475 U.S. at 14. As explained above, the law's content-based trigger serves to discourage Safelite from making truthful representations about its own affiliate's services, depriving consumers of useful information as they seek to make time-sensitive repairs.

CONCLUSION

For the foregoing reasons, the district court erred in denying the motion for preliminary injunction. That order should be reversed and the matter remanded with instructions to enter a preliminary injunction preventing Defendants-Appellees from enforcing PA 13-67(c)(2) pending resolution of this action.

Dated: March 18, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 11,623 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times Roman 14-point font.

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SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SAFELITE GROUP, INC., *et al.*, *Plaintiffs*, *v.* GEORGE JEPSEN, *et al.*, *Defendants*.	Civil No. 3:13cv1068 (JBA) December 18, 2013

RULING DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

On June 3, 2013, Connecticut Daniel Governor Malloy signed House Bill 5072, "An Act Concerning Automotive Glass Work," into law as Public Act 13-67 ("PA 13-67") to take effect on January 1, 2014. The law is targeted at insurance companies doing business in Connecticut and third-party claims administrators or adjusters that also own automotive glass-repair shops, and mandates that if such entities recommend the use of their affiliated glass repair shop to insurance policyholders, they must also provide the name of at least one non-affiliated repair shop. Plaintiffs Safelite Group, Inc. and Safelite Solutions LLC (collectively "Safelite" or Plaintiffs) seek declaratory and injunctive relief, contending that portions of PA 13-67 violate their rights under the First and Fourteenth Amendments (Count One) and the Dormant Commerce Clause (Count Two). Plaintiffs now move [Doc. # 2] for a preliminary injunction enjoining Defendants (the "State")

from implementing or enforcing PA 13-67(c)(2).[1] For the reasons that follow, Plaintiffs' motion is denied.

I. Facts

A. Background

Safelite, based in Columbus, Ohio, owns Safelite Solutions, which provides claims management services for 18 of the top 30 insurance companies. (O'Mara Decl. ¶ 3, Ex. 1 to Pls.' Mem. Supp.) Safelite Solutions typically manages the entire claims process for an insurance company, maintaining a telephone hotline for policyholders to report claims and schedule appointments for repairs. (*Id.* ¶ 6.) Safelite also owns Safelite AutoGlass, the largest vehicle-glass repair company in the United States, serving more than 4.5 million customers each year. (*Id.*)

If a policyholder does not express a preference for a particular vehicle glass repair shop, Safelite operators will recommend a glass repair shop based on the policyholder's location and the preferences of his or her insurance company. Many insurance companies that employ Safelite Solutions as their claims administrator have selected Safelite AutoGlass as one of their preferred glass repair shops, and Safelite operators recommend that policyholders use Safelite AutoGlass for their repairs because Safelite believes that its own shops provide the best customer service and are the most reliable. (*Id.* ¶ 9–11.) If there is no Safelite AutoGlass location near the claimant, Safelite operators may refer him or her to an independent glass repair shop from Safelite's network of non-affiliated shops, which have agreed to certain pricing terms and other

[1] By agreement of the parties, Plaintiffs are not seeking a preliminary injunction on their Dormant Commerce Clause claim. (*See* Defs.' Mem. Opp'n [Doc. # 42] at 3 n.1.)

conditions regarding their work. (*Id* ¶ 7.) Because most customers do not frequently utilize vehicle glass repair services and rely upon Safelite's telephone operators, Safelite contends that its recommendations provide policyholders with "an extremely valuable service." (*Id.* ¶ 10.)

Although there are over 70 non-affiliated repair shops in Connecticut that are part of Safelite's network, from January 1, 2012 to June 30, 2013, insureds selected Safelite AutoGlass for their repairs approximately 55% of the time. (See Pls.' Amend. Resp. and Obj. to Def. Inter. and Req. for Prod. at Inter. No. 13., Ex. A to Defs.' Mem. Opp'n.) Some of Safelite's insurance company clients require Safelite to provide policyholders with the name of a non-Safelite affiliated repair shop in addition to Safelite AutoGlass. In such instances, the rate at which customers utilize Safelite AutoGlass drops to as low as 41%. (*Id.*)

Against this background, the Connecticut General Assembly debated PA 13-67. The Insurance and Real Estate Committee of the Connecticut General Assembly heard testimony that only two third-party insurance claims administrators maintained relationships with auto glass repair shops in Connecticut: Safelite Solutions and a Massachusetts-based company, which was associated with a Massachusetts-based automotive glass repair shop. (*See* Comm. Hearing, Ex. 5 to Pls.' Mem. Supp. at 61.)

Existing Connecticut law already prohibits "steering"—the practice of an insurer or claims administrator requiring a customer to use a particular auto repair shop—and further mandates that written estimates for repairs contain boldface disclosures to customers of their right to select a repair shop of their choice. *See* Conn. Gen. Stat. § 38a-354. The Connecticut Insurance Department submitted written testimony to the

Committee stating that no customers had complained of being coerced into using a particular repair shop against their will, and opined that PA 13-67 was "unnecessary" because "consumers are adequately protected by current law." (State of Conn. Ins. Dep't, Testimony Before the Ins. and Real Estate Comm., Conn. Gen. Assembly (Jan. 31, 2013), Ex. 3 to Pls.' Mem. Supp. at 1.)

Numerous Connecticut legislators advocated for the law on the basis that it would benefit in-state businesses over out-of-state companies, while some legislators' statements also indicate that the law was motivated to protect consumers from the undue influence of insurance company-affiliated repair shops. For example, Rep. Robert W. Megna explained that "the essence of this bill" was that insurance companies and third-party claims administrators "can't tell an individual to have their automotive glass replaced at a particular shop." (Conn. Gen. Assembly House of Rep. Session Unofficial Tr. (May 7, 2013), Ex. 4 to Defs.' Mem. Supp. at 62.) Rep. Megna expanded his explanation that the bill would "help out those small businesses that employ people, spend money, do economic development—in our state while at the same time prevent[ing] an insurer from essentially trying to influence the place where your automobile gets fixed which is in their best financial interest." (*Id.*)

B. Public Act 13-67

In May 2013, the General Assembly adopted PA 13-67, which provides in relevant part:

> No glass claims representative for an insurance company doing business in this state or a third-party claims administrator for such company shall provide an insured with the name of, schedule an appointment for an insured with or direct an insured to, a licensed glass shop that is owned by

> (A) such company, (B) such claims administrator, or (C) the same parent company as such insurance company or claims administrator, unless such representative or claims administrator provides the insured with the name of at least one additional licensed glass shop in the area where the automotive glass work is to be performed.

PA 13-67(c)(2).[2]

The State contends that "[i]mplicit in Connecticut's enactment of P.A. 13-67 is the legislative determination that Connecticut's existing statutes did not adequately protect consumer choice or prevent insurance claims administrators with affiliated repair shops from steering work to their affiliated shops." (Defs.' Mem. Opp'n at 4.) Safelite contends that the true purpose of the law was to help out local small businesses at the expense of large out-of-state companies and that this purpose was expressly stated by multiple legislators during debate over the bill.

II. Discussion

"[A] preliminary injunction is an extraordinary remedy that should not be granted as a routine matter." *JSG Trading Corp. v. Tray–Wrap, Inc.*, 917 F.2d 75, 80 (2d Cir. 1990). "Generally, preliminary injunctive relief is appropriate when the movant shows '(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary

[2] In their Complaint, Plaintiffs also challenge the constitutionality of PA 13-67(b)(2) and Conn. Gen. Stat. § 38a-354(b)(2), which both prohibit Safelite from telling claimants that choosing a non-affiliated repair shop will result in delays or a lack of guarantee for the work. Plaintiffs have not moved to preliminarily enjoin these provisions.

relief.'" *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 70 (2d Cir. 1996) (quoting *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.,* 596 F.2d 70, 72 (2d Cir. 1979)). An injunction that "stays 'government action taken in the public interest pursuant to a statutory . . . scheme' . . . must satisfy the more rigorous 'likelihood of success prong.'" *Id.* (quoting *Able v. United States,* 44 F.3d 128, 131–32 (2d Cir. 1995) (first alteration in original)). In addition, the "loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) (quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976)).

A. Commercial Speech

"There is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.'" *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637 (1985). "Commercial 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." *Id.* at 638. In *Central Hudson Gas & Electric Corp., v. Public Service Commission of New York,* 447 U.S. 557 (1980), the Supreme Court articulated the test for determining whether a restriction on commercial speech is constitutionally permissible:

> For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

Initially, both parties contended that *Central Hudson* controlled here despite the "material differences between disclosure requirements and outright prohibitions on speech" in the commercial context. *Zauderer*, 471 U.S. at 650. In other contexts, the protections of the First Amendment prohibit compelled speech in addition to compelled silence. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (It is "a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'"). "'Purely commercial speech,'" however, "'is more susceptible to compelled disclosure requirements' than is personal or political speech." *New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009) (quoting *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796 n.9 (1988)).

After the Court asked the parties to address whether the Supreme Court's analysis in *Zauderer* should control in light of the Second Circuit's holdings in *New York State Rest. Ass'n* and *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), Defendants adopted the position that *Zauderer*, and not *Central Hudson*, should control. Plaintiffs maintained that because provisions of PA 13-67 restrict speech and PA 13-67(c)(2) mandates "controversial" and not purely "factual" speech, *Central Hudson* still applies.

In this Circuit, the Supreme Court's analysis in "*Zauderer,* not *Central Hudson Gas & Electric Corp.* . . ., describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases. The *Central Hudson* test should be applied" only "to statutes that *restrict* commercial speech." *Sorrell*, 272

F.3d at 115. In *Zauderer,* the Supreme Court upheld an Ohio law that required attorney advertisements referring to contingent-fee rates to specify whether fees were computed before or after the deduction of court costs and expenses, and to disclose that clients would be liable for costs (as opposed to legal fees) if they lost. 471 U.S. at 633. The Supreme Court reasoned that "[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." *Id.* at 651 (internal citation omitted). The compelled warnings were justified because they were "reasonably related to the State's interest in preventing deception of consumers," who might not understand "the distinction between 'legal fees' and 'costs,'" and might incorrectly conclude "that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge." *Id.* at 652.

The Supreme Court cautioned, however, "that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech." *Id.* Ohio, however, had not attempted to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* (internal quotation marks omitted). Instead, the state had "attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available." *Id.*

The distinction between *Central Hudson* and *Zauderer* is critical here. Under *Central Hudson*, the State has the burden of demonstrating that its speech restriction advances a substantial state interest in a "in a direct and material way." *Edenfeld v. Fane,* 507 U.S. 761, 767 (1993)). The Supreme Court has "made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002). Under *Zauderer*, however, "laws mandating factual disclosures are subject to the rational basis test" only, *New York State Rest. Ass'n*, 556 F.3d at 133 n.21, and there need only be "a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose," *Sorrell*, 272 F.3d at 115. The State "has no obligation to produce evidence, or empirical data to sustain . . . rationality." *New York State Rest. Ass'n*, 556 F.3d at 135 n.23 (quoting *Lewis v. Thompson,* 252 F.3d 567, 582 (2d Cir. 2001)) (alterations in original).

Further, the State need not establish that its disclosure requirement is the "least restrictive means," nor that the law is not "under-inclusive:"

> Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized. Similarly, we are unpersuaded by appellant's argument that a disclosure requirement is subject to attack if it is "under-inclusive"—that is, if it does not get at all facets of the problem it is designed to ameliorate. As a general matter, governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied. The right of a commercial speaker not to divulge accurate information regarding his services is not such a fundamental right.

Zauderer, 471 U.S. at 651 n.14 (internal citation omitted).

While the speech requirement in *Zauderer* was intended to combat deceptive advertising, the Second Circuit has held that "*Zauderer's* holding was broad enough to encompass" "laws mandating factual disclosures . . . even if they address non-deceptive speech." *New York State Rest. Ass'n*, 556 F.3d at 133 & n.21. For example, in *Sorrell*, the Second Circuit upheld a Vermont statute that required the manufacturers of enumerated mercury-containing products to label their products and packaging to inform consumers that the products contained mercury and should be recycled or disposed of as hazardous waste. 272 F.3d at 107. The law was not intended to combat consumer deception, "but rather to better inform consumers about the products they purchase" with the hope that newly informed consumers would properly dispose of mercury-containing products and thereby protect "human health and the environment from mercury poisoning." *Id.* at 115–16. Applying *Zauderer*, the Second Circuit concluded that the statute was "rationally related" to the state's environmental goal. *Id.* at 115.

Eight years later in *New York State Rest. Ass'n*, the Second Circuit upheld a New York City Health Code regulation that sought to combat rising rates of obesity by requiring chain restaurants to post the calorie content of items on their menus. 556 F.3d at 117. An association of restaurants argued that the mandate forced them "to communicate to their customers that calorie amounts should be prioritized" over other nutritional indicators, such as fat, sodium, and cholesterol. *Id.* at 134. Although the restaurants conceded that calorie content was "factual," they contended that they did "not believe that disclosing calorie information would reduce obesity," and they should not have "to 'cram' calorie information 'down the throats' of their customers." *Id.* at 133.

The Second Circuit concluded that New York City's regulation was rationally related to its goal of reducing obesity and that under *Zauderer*, the city was not precluded from requiring "'under-inclusive' factual disclosures." *Id.* at 134.

B. The Proper Analytical Framework

The standard of review applicable here depends upon whether PA 13-67(c)(2) restricts commercial speech or merely mandates the disclosure of purely factual information. Initially, both parties analyzed the issue under the *Central Hudson* standard as if PA 13-67(c)(2) in fact restricts speech. Safelite contends that in prohibiting it from referring a customer to its affiliated repair shop unless it also "recommends" an unaffiliated shop, the State provides "an unconstitutional choice between censorship and compelled speech." (Pls.' Mem. Supp. [Doc. # 2-1] at 26.)

At oral argument on December 2, 2013, the State clarified that, as the text of PA 13-67(c)(2) suggests, Safelite need not "recommend" another shop; it merely has to "provide[] the insured with the name" of an additional shop. Indeed, PA 13-67(c)(2) does not restrict what Safelite can say regarding its own shops, and the State represented that Safelite could explicitly inform callers that it is mandated by law to also provide the name of a non-affiliated repair shop and could even say that Safelite did not recommend that shop and instead recommend using Safelite AutoGlass. (Dec. 2, 2013 Oral Argument Tr. [Doc. # 49] at 27.) At oral argument on December 16, 2013, the State acknowledged, however, that Safelite is confined by PA 13-67(b)(2)'s prohibition on stating to claimants that choosing a non-affiliated repair shop "will result in delays in or a lack of guarantee for the automotive glass work."

Although Safelite does not seek to preliminarily enjoin PA 13-67(b)(2), it contends that this provision restricting speech combined with PA 13-67(c)(2)'s compelled speech on the same subject matter moves the analysis from *Zauderer* to *Central Hudson* territory. In support of this contention, Plaintiffs cite the Supreme Court's decision in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), upholding a federal statute compelling debt relief agencies to include certain disclosures in their advertisements, such as "that the assistance [sought] may involve bankruptcy relief." *Id.* at 233 (quoting 11 U.S.C. § 528(b)(2)(A)). The Supreme Court applied *Zauderer* rather than *Central Hudson*, explaining that because the statute "is directed at *misleading* commercial speech . . . . and because the challenged provisions impose a disclosure requirement rather than an affirmative limitation on speech, the . . . less exacting scrutiny described in *Zauderer* governs our review." *Id.* at 249. Plaintiffs contend that this passage demonstrates that *Zauderer* only applies when there are no restrictions on speech.

Whether the speech restrictions of PA 13-67(b)(2) violate the First Amendment on their own is not at issue here, because Plaintiffs have not sought a preliminary injunction regarding this provision. Additionally, even if PA 13-67(b)(2) imposes a speech restriction that is properly analyzed under *Central Hudson*, it does not necessarily follow that the entire statute, and in particular, PA 13-67(c)(2) must be analyzed under *Central Hudson*. In fact, in *Zauderer* itself, the Supreme Court applied *Central Hudson* to strike down two restrictions that had been applied to an attorney advertisement while upholding the disclosure requirement as applied to the same advertisement. *See Zauderer*, 471 U.S. at 638. In doing so, the Supreme Court rejected the very argument

that Safelite now advances—that the *Central Hudson* analysis must be applied to the disclosure requirements just as it was applied to the speech restrictions. *Id.* at 650. Likewise, a portion of the statute at issue in *Milavetz* restricted a debt relief agency from advising a person to "incur more debt in contemplation of" a bankruptcy filing. *Milavetz*, 559 U.S. at 233.[3]

Additionally, the Second Circuit has made clear that despite "the existence of 'doctrinal uncertainties left in the wake of Supreme Court decisions,'" including *Milavetz*, "'from which the modern commercial speech doctrine has evolved,'" courts in the Second Circuit are still "bound by precedent distinguishing commercial and noncommercial speech and applying different standards of review to laws mandating commercial speech disclosures and laws restricting commercial speech." *Connecticut Bar Ass'n v. United States*, 620 F.3d 81, 93 n.15 (2d Cir. 2010) (quoting *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998)); *see also id.* at 95 (noting that the Second Circuit's "conclusion that [the same statute as was at issue in *Milavetz*] regulates only commercial speech comports with this court's prior treatment of similar disclosure requirements." (citing *New York State Restaurant Ass'n,* 556 F.3d at 131–32 and *Sorrell,* 272 F.3d at 113)). Accordingly, *Milavetz* does not mandate a different approach from the Second Circuit's analysis in *New York State Rest. Ass'n* and *Sorrell.*

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[3] The Supreme Court interpreted the phrase to refer "to a specific type of misconduct designed to manipulate the protections of the bankruptcy system," i.e. "advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose." *Id.* at 243. Adopting this "narrower reading" of the restriction, the Supreme Court upheld the provision. *Id.* at 242.

In fact, Safelite acknowledges that PA 13-67(c)(2) contains no restrictions on speech. *See* Pls.' Mem. Supp. at 25 ("The law *permits* all speech by Safelite as long as that speech is accompanied by a referral to an unaffiliated vehicle glass repair shop."). Indeed, PA 13-67(c)(2) does not restrict what Safelite can say, but rather, as the State contended at oral argument on December 16, 2013, creates a "trigger," mandating that Safelite provide the name of a competitor if, and only if, Safelite directs claimants to its affiliated repair shops.

Safelite also contends that cases upholding compelled commercial disclosure are all limited to purely factual disclosures intended to combat potential false or misleading information. It contends that there are no cases that have upheld a disclosure requirement that is specifically triggered by the speaker's making of another statement. But the regulation at issue in *Zauderer* is not meaningfully different; it did not prohibit attorney advertisements but rather required that, if made, such communications be accompanied by appropriate disclosures.

Plaintiffs also contend that *Zauderer* is inapplicable because PA 13-67(c)(2) goes beyond mandating "purely factual and uncontroversial" information. *See Zauderer*, 471 U.S. at 651. Safelite contends that the disclosure is "controversial" for three reasons: (1) Safelite is forced to make it against its will; (2) the disclosure is related to a competitor rather than itself; and (3) in the context in which it is made, the disclosure will be misleadingly seen by claimants as an endorsement of its competitors. It contends that the information is not "factual," because Safelite is required to exercise judgment in order to decide which non-affiliated repair shop to present to its customers.

These arguments are unavailing. Just because there are no objective criteria describing exactly which non-affiliated repair shops Safelite must name, it does not follow that the disclosures are no longer "purely factual and uncontroversial information." PA 13-67(c)(2) does not require it to express any opinion at all regarding these names nor to take a position in any ongoing debate. Safelite's latitude to expressly inform consumers that it does not recommend the non-affiliated repair shop it is compelled to name mitigates any risk that providing the name could be seen as an implied endorsement of that business. The name of a business is a far cry from an encroachment upon the core First Amendment values discussed in *Zauderer*, i.e., an attempt to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Zauderer*, 471 U.S. at 651. In fact, beyond location, nothing in PA 13-67(c)(2) limits the number of non-affiliated repair shops that Safelite can provide to claimants, reducing the degree of judgment that Safelite must exercise. *See* PA 13-67(c)(2) (requiring the provision of "the name of at least one additional licensed glass shop").

Similarly, the fact that Safelite would prefer to not make the required disclosure is insufficient to make it "controversial." For example, in *New York State Rest. Ass'n*, the plaintiffs specifically objected that the disclosure requirements forced them to communicate a message that they found disagreeable—that "disclosing calorie information would reduce obesity" and that it should be prioritized over other nutritional indicators, such as fat, sodium, and cholesterol in evaluating whether food is healthy. *See* 556 F.3d at 133–34; *see also Zauderer v*, 471 U.S. at 650 ("Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present.").

At oral argument on December 16, 2013, Safelite cited *Entm't Software Ass'n v. Entm't Software Ass'n*, 469 F.3d 641, 643 (7th Cir. 2006), which addressed the constitutionality of an Illinois statute that required video game retailers to label "sexually explicit" video games with a four-inch square label with the numerals "18." Contrasting the statute with that in *Sorrell*, the Seventh Circuit held that the requirement violated the First Amendment because the compelled speech did not involve a "purely factual disclosure," but instead forced the retailer to communicate "a subjective and highly controversial message—that the game's content is sexually explicit." *Id.* at 652. A "sexually explicit" video game was defined as a video game

> that the average person, applying contemporary community standards would find, with respect to minors, is designed to appeal or pander to the prurient interest and depict or represent in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act or lewd exhibition of the genitals or post-pubescent female breast.

Id. at 643. Thus, the constitutional infirmity in *Entm't Software Ass'n* was in part that the "State's definition of this term is far more opinion-based than the question of whether a particular chemical is within any given product." *Id.* at 652 (citing *Sorrell*, 272 F.3d at 114). Importantly, the state conceded that its law was a content-based restriction on speech subject to strict scrutiny, and although the Seventh Circuit cited *Sorrell*, its analysis focused not on commercial speech but rather on the restrictions that the law imposed on core First Amendment expression in video games. *See id.* ("Because the [law] potentially criminalizes the sale of any game that features exposed breasts, without concern for the game considered in its entirety or for the game's social value for minors, distribution of

God of War is potentially illegal, in spite of the fact that the game tracks the Homeric epics in content and theme.").[4]

It can hardly be said that simply providing the name of a repair shop implicates core First Amendment values or conveys the same character of information as the term "sexually explicit" did in *Entm't Software Ass'n*. *See Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 526-27 (6th Cir. 2012) (noting that *Entm't Software Ass'n* "involved a state attempting to restrict core speech in the form of 'art and literature'")

Safelite also attempted to distinguish *Zauderer*, *New York State Rest. Ass'n*, and *Sorrell* on the basis that in those cases the plaintiffs were required to disclose information about themselves, whereas PA 13-67(c)(2) requires Safelite to also disclose information about its competitors.[5] Indeed, the State's proffered interest in promoting consumer choice and preventing consumers from being induced to use a glass repair shop owned by a claims administrator like Safelite has the stated intent of influencing consumer behavior in a way that may be economically detrimental to Safelite. But the potential economic detriment to Safelite from identification of its competitors does not encroach upon the

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[4] The Supreme Court subsequently confirmed that video games are expression protected by the First Amendment. *See Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011) ("Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world).").

[5] Another provision of PA 13-67 requires Safelite to inform policyholders of their right under Connecticut law to choose the licensed glass shop of their choice. *See* PA 13-67(1)(c)(1). Safelite does not challenge this provision, and at oral argument on December 16, 2013, referred to this provision as a compelled purely factual disclosure that is unobjectionable.

core First Amendment values that *Zauderer* suggested might violate the First Amendment.[6]

Instead, the "State has attempted only to prescribe what shall be orthodox in commercial advertising." *Zauderer*, 471 U.S. at 651 (1985). As in *New York State Rest. Ass'n* and *Sorrell*, PA 13-67(c)(2)'s compelled disclosure is intended "to better inform consumers about the products they purchase." *Sorrell*, 272 F.3d at 115. In fact, in *New York State Rest. Ass'n*, the statute was explicitly intended to lead consumers to make a particular choice—for "healthier food." 556 F.3d at 134–35.

Other courts have upheld disclosure requirements that, like PA 13-67(c)(2), are intended to encourage competition and reduce the economic power of a dominant player. For example, in *Pharmaceutical Care Management Ass'n v. Rowe*, the First Circuit upheld a Maine law that required pharmacy benefit managers—"middlemen in the lucrative business of providing prescription drugs" with "tremendous market power"—to disclose

[6] At oral argument on December 16, 2013, Safelite contended that it had found no cases in which any court upheld a requirement that a business refer to a competitor. In *BellSouth Adver. & Publ'g Corp. v. Tennessee Regulatory Auth.*, 79 S.W.3d 506, 520 (Tenn. 2002), however, the Tennessee Supreme Court upheld a state regulation that required BellSouth to include on the cover of its phonebook the names and logos of its local competitors, because it was reasonably related to the government's interest in "informing consumers about their choices in the local telecommunications" market and "promoting free competition." The court noted that while the rules in *Zauderer* "compelled attorneys to disclose additional information about themselves," and the Tennessee regulations compelled "BellSouth to disclose information about the identity of its competitors," the "ultimate object" of both regulations was "the same: to inform consumers." *Id.*

to insurance companies financial arrangements with third parties that might benefit the managers to the detriment of health care providers. 429 F. 3d 294, 298 (1st Cir. 2005).[7]

The First Circuit held that the law was "reasonably related" to Maine's stated interest in preventing consumer deception and controlling prescription drug costs, and that the benefit managers had only "a minimal interest in withholding the information" that the law required of them. *Id.* at 310.

Safelite relies heavily upon the Fifth Circuit's decision in *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 164 (5th Cir. 2007), which struck down a Texas law that prohibited "an insurer from providing to tied repair facilities a recommendation, referral or description not provided on identical terms to other preferred repair facilities." Although the State incorrectly contends that the Texas law prohibited an insurer from recommending a body shop that it owned to its customers (*see* Defs.' Mem. Opp'n at 17), the Texas law was more restrictive than PA 13-67(c)(2), because an insurer was prohibited from "recommending" its own shop unless it also recommended an independent shop on equal terms.

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[7] In *New York State Rest. Ass'n*, 556 F.3d at 133, the Second Circuit cited *Rowe* with approval and noted that the First Circuit had also accepted a "broader reading" of *Zauderer*—i.e., that its more lenient review was not limited to disclosures intended to combat consumer deception. Citing *New York State Rest. Ass'n*, *Sorrell*, and *Rowe*, courts in other circuits have noted the distinct approach taken by the First and Second Circuits. *See*, *e.g.*, *Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456, 463 (D. Md. 2011) ("Some courts have suggested that the standard described in *Zauderer* controls all cases involving truthful, compelled commercial speech, even if the disclosure requirements are not intended to prevent consumer fraud."); *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1227 n.6 (D.C. Cir. 2012) (Rogers, *J.* dissenting) (same).

Despite this distinction, *Abbott* is similar to PA 13-67(c)(2) in other material respects, but it is nevertheless inapposite here, because the Fifth Circuit's analysis of compelled commercial speech differs significantly from that of the Second Circuit. In *Abbott*, the Fifth Circuit held that *Zauderer*'s rational basis review was limited to compelled commercial speech designed to combat "the potential for customer confusion" and instead analyzed the Texas statute under *Central Hudson*. *Id.* In *New York State Rest. Ass'n*, however, the Second Circuit explicitly rejected this limitation on *Zauderer* in favor of a "broader" reading. *See New York State Rest. Ass'n*, 556 F.3d at 133 & n.21.

Thus, the Fifth Circuit's reasoning for invalidating the law under the exacting scrutiny of *Central Hudson* is inapplicable here, and this Court will apply the more lenient *Zauderer* analysis. Under rational basis review, even if this Court were to conclude that PA 13-67(c)(2) was "under-inclusive" or did not employ the least restrictive means necessary, such findings would not provide a basis for invaliding the law as long as it is rationally related to a legitimate state interest. *See New York State Rest. Ass'n*, 556 F.3d at 134.

For similar reasons two other decisions cited by Plaintiffs are inapposite. In *Allstate Ins. Co. v. Serio*, No. 97-cv-670 (RCC), 2000 WL 554221, at *1 (S.D.N.Y. May 5, 2000), the New York Department of Insurance regulation at issue not only compelled disclosure, but also restricted speech. Insurance companies were flatly prohibited from providing policyholders with a referral or recommendation to an affiliated repair shop unless customers explicitly requested advice. *Id.* at *7. Further, insurers were prohibited from even attempting to prompt customers to ask for a referral by informing them about the existence of these restrictions or otherwise attempting to prompt customer inquiries.

Id. Given the restriction on speech, the district court analyzed the regulations under *Central Hudson* instead of *Zauderer*.[8]

Similarly, *Allstate Ins. Co. v. State of South Dakota*, 871 F. Supp. 355, 357 (D.S.D. 1994), examined a South Dakota law that contained even greater restrictions on speech than the New York regulation: a blanket prohibition on insurers advising policyholders about the existence of affiliated auto glass repair shops. Because that statute banned certain speech, the *Central Hudson* analysis governed.

Plaintiffs also misplace reliance on *International Dairy*, 92 F.3d at 69, in which the Second Circuit applied the *Central Hudson* analysis to invalidate a Vermont statute that required manufacturers to identify products derived from cows treated with synthetic growth hormones. Because it was undisputed that synthetic growth hormones had no effect on human health, "Vermont's sole expressed" justification for enacting the law was to safisfy "consumer curiosity" regarding the production of dairy products. *Id.* at 73 n.1. By its own terms, the Second Circuit's ruling was limited to holding that this asserted interest "alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement." *Id.* at 74. The Second Circuit distinguished *International*

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[8] Although PA 13-67(b)(2) contains restrictions on speech—albeit far less stringent than those at issue in *Serio*—Plaintiffs have not moved for relief from this provision and only contest the compelled speech of PA 13-67(c)(2). Additionally, *Serio* was decided before *Sorrell* and *New York State Rest. Ass'n*, and on appeal, the Second Circuit declined to address the constitutional issues and instead certified to the New York Court of Appeals the question of whether the Department of Insurance had correctly interpreted state law in promulgating the regulation at issue, *see* 261 F.3d 143, 153 (2d Cir. 2001), which the Court of Appeals held it had not, *see* 98 N.Y.2d 198, 207 (2002). In light of this decision on state-law grounds, on remand, the district court dismissed the challenge as moot. *See* 2003 WL 21418198, at *6 (S.D.N.Y. 2003).

Dairy on this basis in both *Sorrell*, 272 F.3d at 115 n.6 ("The disclosure statute at issue here, however, is based on Vermont's substantial interest in protecting human health and the environment from mercury poisoning."), and *New York State Rest. Ass'n*, 556 F.3d at 134 ("Given New York's interest in preventing obesity . . ., [*International Dairy*] is inapplicable."). Because the State has established that PA 13-67(c)(2) is based on the governmental interest in promoting consumer choice and preventing steering, *International Dairy* is inapplicable, and the Court's analysis is governed by the rational basis review outlined in *Zauderer*, *New York State Rest. Ass'n*, and *Sorrell*.

C. Rational Basis Review

Under the deferential standard of rational basis review, Plaintiffs' challenge fails. They argue that the State's asserted interest in protecting consumer choice and preventing steering is merely a post-hoc rationalization for the State's true protectionist intent, which is not "not in 'protecting consumer choice' so much as it is in ensuring that consumers make particular choices" in favor of local businesses. (Reply [Doc. # 45] at 3.) Safelite also contends that the limited disclosure required by the law does not directly and materially advance the State's interest in consumer protection and is a greater imposition upon speech than is required to advance the State's limited interests. (*See* Pls.' Mem. Supp. at 25–29.)

While some legislators may have expressed a protectionist motivation during the debate over PA 13-67, under rational basis review "the Government has no obligation to produce evidence, or empirical data to sustain the rationality of a statutory classification, and instead can base its statutes on rational speculation. Any reasonably conceivable state of facts will suffice to satisfy rational basis scrutiny. The burden falls to the party

attacking the statute as unconstitutional to negative every conceivable basis which might support it." *Thompson*, 252 F.3d at 582 (internal quotation marks, citations, and alterations omitted).

Whatever might have been the motivation of some legislative proponents, there is ample basis in the record for the Court to conclude that PA 13-67(c)(2) is rationally related to the State's interest in promoting consumer choice and preventing steering. While existing Connecticut law already prohibited steering and mandated some written disclosures, *see* Conn. Gen. Stat. § 38a-354, the State could have rationally concluded that claims administrators owning repair shops nevertheless were able to exercise undue influence and stifle consumer choice. Safelite's position that PA 13-67(c)(2) was unnecessary given the absence of consumer complaints and the existence of other laws to protect consumers is of no moment here, because the State does not bear the burden of producing evidence or empirical data to sustain rationality and can rely instead upon rational speculation. *See Thompson*, 252 F.3d at 582. Safelite also asserts that PA 13-67(c)(2) will not materially advance consumer choice, because providing consumers with the name of just one additional name will not promote overall fair competition, and the law is under-inclusive in that it only applies to Safelite and one other company. Under rational basis review, however, the law may be valid even if the State had alternate means of achieving its goals or if the law is "under-inclusive," i.e., only combats a limited aspect of the problem. *See New York State Rest. Ass'n*, 556 F.3d at 133 n.22.

Because the Court concludes that PA 13-67(c)(2) is rationally related to the State's goal of protecting consumer choice and preventing steering, Plaintiffs have not

demonstrated that they are likely to succeed on the merits of their First Amendment claim.

III. Conclusion

For the foregoing reasons, Plaintiffs' motion [Doc. # 2] for a preliminary injunction is DENIED.

IT IS SO ORDERED.

/s/
Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 18th day of December, 2013.