UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 13-4761

Caption [use short title]: SAFELITE GROUP, INC., et al. v. GEORGE JEPSEN, et al.

Motion for: Injunction Pending Appeal

Set forth below precise, complete statement of relief sought:

Plaintiffs-Appellants seek, on an emergency basis, an injunction pursuant to FRAP 8 pending their appeal of the district court's order denying Plaintiffs' motion for a preliminary injunction against CT Pub. Act 13-67.

MOVING PARTY: Safelite Group, Inc., et al.

☑ Plaintiff ☐ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: George Jepsen, et al.

MOVING ATTORNEY: Jay P. Lefkowitz, P.C.

OPPOSING ATTORNEY: Matthew J. Budzik

[name of attorney, with firm, address, phone number and e-mail]

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Court-Judge/Agency appealed from: District of Connecticut - Judge Janet Bond Arterton

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain): ____________

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☑ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☑ No
Requested return date and explanation of emergency:

Requested return date: December 26, 2013

Explanation: Challenged law is effective January 1, 2014

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date: ____________

Signature of Moving Attorney: s/ Jay P. Lefkowitz **Date:** 12/23/13

Has service been effected? ☑ Yes ☐ No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: ____________ By: ____________

Form T-1080

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAFELITE GROUP, INC. AND SAFELITE SOLUTIONS LLC Plaintiffs-Appellants, v. GEORGE JEPSEN, in his official capacity as Attorney General for the State of Connecticut; and THOMAS LEONARDI, in his official capacity as the Commissioner of the Connecticut Insurance Department, Defendants-Appellees.	)	**No. 13-4761**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS SAFELITE GROUP, INC. AND SAFELITE SOLUTIONS LLC's EMERGENCY MOTION OF FOR AN INJUNCTION PENDING APPEAL

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Introduction

Absent this Court's immediate intervention, on January 1, 2014, a new, blatantly protectionist Connecticut law will take effect and force Appellants Safelite Group, Inc. and Safelite Solutions LLC (collectively "Safelite") to make 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 another competing local glass repair shop. The First Amendment protects against such attempts to commandeer commercial speech. The history of this measure is telling. As discussed below, 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.

The district court denied Safelite's motion for a preliminary injunction because it applied the wrong legal standard. The court held that, because the law involves compelled disclosure of information instead of 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 enactment.

No federal court has ever before upheld a law such as this, where the so-called "disclosure" requirement is first triggered by choosing to engage in particular speech (and thus is a content-based burden), and then compels the speaker to tacitly recommend a commercial competitor. Neither *Zauderer*, nor any other case in this Circuit or elsewhere, has ever held that, so long as there is some conceivable "rational basis," a state has *carte blanche* to require commercial speakers to, as a condition of being allowed to engage in commercial speech, convey whatever information the state demands. As the Supreme Court has held, the 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, 15 n.12 (1986). Nonetheless, 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.

The law at issue bears no resemblance whatsoever to the neutral, purely factual disclosure requirements upheld by this Court under *Zauderer* 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). When the proper *Central Hudson* standard is applied, as it must be, given

the clear restrictions on speech effectuated by this law, 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*). Moreover, as Appellees ("the State") concede, an injury to Safelite's First Amendment rights represents irreparable harm warranting an injunction. *See* Ex. 6, 12/2/13 Tr. 5:4-10.[1] Accordingly, Safelite respectfully seeks emergency injunctive relief pending appeal pursuant to Federal Rule of Appellate Procedure 8—as well as an emergency administrative injunction pending the Court's consideration of this motion—barring the State from implementing or enforcing PA 13-67(c)(2).[2]

Background

Safelite is a vehicle glass and claims management organization based in Columbus, Ohio. Ex. 1, O'Mara Decl. ¶ 2. Two of its lines of business are

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[1] All exhibits cited in this Memorandum are attached to the accompanying Declaration of Jay P. Lefkowitz.

[2] Plaintiffs-Appellants instant motion is made to the Court of Appeals, rather than the court below, because "moving first in the district court would be impracticable" for the following two reasons. Fed. R. App. P. 8(a)(2)(A)(i). First, this motion presents a matter of great urgency, as PA 13-67 is scheduled to become effective on January 1, 2014, just nine days from now. *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, 734 F.3d 406, 410-11 (5th Cir. 2013) (finding that relief need not be sought first in the district court, as would ordinarily be required, where the challenged statute "was to have taken effect . . . the day after the district court issued its opinion and final judgment"). Second, because consideration of Plaintiffs-Appellants' instant motion requires application of a standard nearly identical to the standard under which the district court denied Plaintiffs-Appellants' motion for a preliminary injunction, *see, e.g.*, *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (noting that "the factors to be considered are the same for both a preliminary injunction and a stay pending appeal"), a mechanical application to the district court, seeking reconsideration of the precise request denied just five days prior, would not only be impracticable, but would likely subject Safelite to the very irreparable harm it seeks to prevent. This Court, therefore, should permit Safelite to move for relief directly in the Court of Appeals, as moving first in the district court would be impracticable. Fed. R. App. P. 8(a)(2)(A)(i).

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 beyond. *Id.* ¶ 3. Safelite's claims management business typically handles the entire lifecycle of a vehicle glass claim. *Id.* ¶ 5. Safelite Solutions answers the first call from the policyholder, agent, claims representative, or glass shop reporting a vehicle glass claim (known as the first-notice-of-loss call). *Id.* ¶ 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. *Id.* ¶ 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. Ex. 1, O'Mara Decl. ¶ 10. Safelite always honors a policyholder's preference for a particular vehicle glass repair shop. *Id.* ¶ 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. *Id.* ¶ 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 Conn. Gen. Stat. § 38a-354, Safelite Solutions never requires that the policyholder choose Safelite AutoGlass to perform glass repair work. *Id.* ¶ 9. Indeed, even going beyond that statute, Safelite discloses the relationship between Safelite Solutions and Safelite AutoGlass to every policyholder and emphasizes that the policyholder has the right to choose any repair shop. *Id.*

According to the Connecticut Insurance Department, not a single customer in the state has complained about how this process was working. 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." Ex. 2, State of Conn. Ins. Dep't, Testimony Before the Ins. and Real Estate Comm., Conn. Gen. Assembly (Jan. 31, 2013) [hereinafter Ins. Dep't Testimony]. The Department's Consumer Affairs Division "has received no complaints regarding this issue." *Id.*

Despite this testimony and the Insurance Department's conclusion that the

bill was "unnecessary," *id.*, the Connecticut General Assembly adopted PA 13-67 in May 2013. PA 13-67 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." Ex. 3, Conn. Gen. Assembly, House Session Transcript (May 7, 2013) (unofficial) [hereinafter House Transcript], p. 62. 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." Ex. 4, Conn. Gen. Assembly, Ins. and Real Estate Comm. Hearing Transcript (Jan. 31, 2013) (unofficial) [hereinafter Comm. Hearing], p. 75. 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." Ex. 3, House Transcript, p. 89. 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." Ex. 5, Conn. Gen. Assembly, Senate Session Transcript (May 22, 2013) (unofficial), p. 73. Sen. Joseph Crisco agreed that the law "levels the playing field for the small business[es] in our state." *Id.*

Argument

In determining whether to grant a stay or an injunction pending appeal, this Court applies four factors: (1) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal, (2) whether the movant will suffer irreparable injury absent an injunction, (3) whether a party will suffer substantial injury if an injunction is issued, and (4) the public interests that may be affected. *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994). Each element supports the entry of an injunction pending appeal here.

I. SAFELITE HAS A SUBSTANTIAL POSSIBILITY OF SUCCESS ON APPEAL.

The district court's conclusion that the more lenient *Zauderer* standard applies to PA 13-67, rather than the *Central Hudson* standard, is inconsistent with both 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). Likewise the district court misapplied this Court's precedent governing commercial disclosures, which involved nothing like the law at issue here. Because PA 13-67 cannot withstand scrutiny under the *Central Hudson* test, Safelite has a substantial possibility of success in its appeal.

A. *Central Hudson*, Not *Zauderer*, Defines the State's Burden.

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

The district court erred in applying *Zauderer* here because PA 13-67(c)(2) is nothing like a "commercial disclosure requirement" analogous to disclosure laws upheld in prior cases. *See, e.g.*, *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001); *New York State Rest. Ass'n v. New York City Bd. of Health* (*NYSRA*), 556 F.3d 114, 117 (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. Accordingly, the commercial speaker was required to provide factual

information about the products it was selling, not someone else's. Manufacturers of fluorescent light bulbs 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, chain restaurants 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. *NYSRA*, 556 F.3d at 117. The law here could not be more different.

Here, PA 13-67(c)(2) is not an "information disclosure requirement." The law 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 offerings, *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 its customers. In other words, the speech mandated by PA 13-67 is not a disclosure about Safelite's business but an advertisement for competing businesses. This is tantamount to requiring attorneys who advertise not only to be fair and accurate in how they disclose their own fees,

but also to include information about the fees of other attorneys 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.

Such results are inconsistent not only with this Court's precedent, but also with 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). 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.

While there might conceivably be narrow circumstances where a state can 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. *See Central Hudson*, 447 U.S. at 566. The "factual disclosure" line of cases provides no warrant for subjecting compelled speech about third parties to a lesser degree of scrutiny. The district court's decision upholding such compelled speech under rational-basis review represents an unprecedented and unjustified expansion of those cases.

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

The district court also erred in applying *Zauderer* for another 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.[3] Advertisements generally consist of factual information—such as the name and location of a business as well as the prices of products it offers for sale—but in context, such information is not "purely factual" because it communicates a message that customers should consider patronizing the identified business. 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.

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

[3] 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.

equivalency without mentioning differences (delay and warranty) that would be of great significance to the consumer.

In response to this set of 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." Ruling Denying Plaintiffs' Motion for a Preliminary Injunction at 11, *Safelite Group, Inc. v. Jepsen*, No. 3:13-cv-01068 (D.Conn. Dec. 18, 2013) [hereinafter Order]. 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.*

Safelite cannot, consistent with the First Amendment, be forced to convey these messages or adopt these approaches. *See id.* at 9 (recognizing First Amendment problems when commercial speakers must "alter their speech to conform with an agenda they do not set.") In this way, the statement mandated by PA 13-67(c)(2) "ultimately communicates a subjective and highly controversial message" and "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.

3. PA 13-67 is a restriction on commercial speech.

The district court further erred in failing to apply *Central Hudson* for the simple reason that, in this Circuit, "[t]he *Central Hudson* test should be applied to

statutes that *restrict* commercial speech." *Sorrell*, 272 F.3d at 115. There is no question that PA 13-67(c)(2) not only compels but also restricts and burdens speech, and the State conceded as much below. Ex. 6, 12/2/13 Tr. 46:20. "It restricts from being able to self-refer." *Id.* at 46:20-23.[4] Similarly, the sponsors of the law regarded PA 13-67(c)(2) as a restriction because the law "literally prevents them from self-referring." Ex. 3, House Transcript, p. 80. Despite all this, the district court held that "PA 13-67(c)(2) contains no restrictions on speech," asserting that 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." Order 11. That reasoning ignores a vital point: PA 13-67(c)(2) only comes into play if Safelite chooses to exercise its First Amendment right to recommend a Safelite shop. If the legislature said that anyone who says "*x*" must pay a $500 tax, there would be no doubt that it was restricting speech. Here the tax is of a different sort, but the restriction is every bit as acute; it must be paid only if Safelite chooses to engage in the 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

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[4] Indeed, 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, Inc. v. Jepsen*, No. 3:13-CV-01068 (D. Conn. Sept. 30, 2013) [hereinafter Defs.' Br.].

First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Id.*

Indeed, 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.

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 economic conduct, not by the companies' desire to engage in speech. Therefore, the disclosure laws did not place a special burden on constitutionally protected expression.

Of course, 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." Ex. 6, 12/2/13 Tr. 4:19-20. We are left, then, with the district court in this case being the first and only court to hold under *Zauderer* that a state may burden speech which is not potentially misleading or deceptive by 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* Order 11 (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 negative things about those businesses, the constitutional affront is manifest.[5]

4. ***Zauderer* applies only to disclosures that prevent consumer deception.**

Finally, although this Court need not reach the issue, the district court's premise that *Zauderer* applies here (as opposed to *Central Hudson*) was flawed given the ongoing clarification in the law about the scope of *Zauderer*. Specifically, the reason 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), was that the district court viewed the Fifth Circuit as holding that *Zauderer* applies only to disclosures which address "the potential for customer confusion," Order 20 (quoting *Allstate*, 495 F.3d at 166), whereas this

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[5] 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). Order 12. 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 are wholly intertwined with the requirement that a competitor be mentioned.

Court has held otherwise, *see NYSRA*, 556 F.3d at 133 & n.21 (holding that *Zauderer* is "broad enough" to apply to disclosure requirements "even if they address non-deceptive speech").

The district court was correct in observing that this Court has not limited *Zauderer* review to misleading or deceptive communications (although, as explained above, the district court did err dispositively in other aspects of its *Zauderer* analysis). But should this Court reach that issue, it appears increasingly evident that this Court's approach to that question is not in line with the Supreme Court's articulation of the governing rule. Specifically, in *Milavetz*, the Supreme Court described *Zauderer* as applying to disclosures "directed at *misleading* commercial speech." 559 U.S. at 249. The Court in *Milavetz* 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).

This is all in line with *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), in which the Court rejected a *Zauderer*-based defense of compelled speech because that doctrine applies only where disclosures "are somehow necessary to make voluntary advertisements nonmisleading for consumers." *Id.* at 416. Other circuits have expressly adopted that position. *See, e.g.*, *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 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.'").

Indeed, in a recent decision applying *Milavetz*, a panel of this Circuit 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.

Thus, it may be that the more expansive view of *Zauderer* has "been effectively overruled by the Supreme Court." *United States v. Frias*, 521 F.3d 229,

232 (2d Cir. 2008). In any event, this case presents that issue for consideration because the district court relied on "the distinct approach taken by the First and Second Circuits" to *Zauderer*, Order 19 n.7, in declining to apply *Central Hudson*.

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Each of the reasons just described provides an independent basis for recognizing that *Zauderer* is not the governing test here. Should the Court agree that even one of these arguments has a substantial possibility of success on appeal—and the Court should conclude that all do—then there can be no doubt that Safelite is entitled to have PA 13-67(c)(2) enjoined pending appeal. For, as we shall now explain, it is plain that the law cannot possibly survive scrutiny under the *Central Hudson* test.

B. PA 13-67 Is Unconstitutional Under The *Central Hudson* Test.

The State of Connecticut cannot impose burdens on Safelite's recommending Safelite AutoGlass shops for customers' repairs 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. With PA 13-67(c)(2), the State has not attempted 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." Ex. 6, 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-CIV-0670, 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). Accordingly, Safelite clearly has a substantial possibility of success in prevailing on its claim that PA 13-67(c)(2) violates the First Amendment.

1. 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. However, 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. Ex. 1, O'Mara Decl. ¶ 9. In fact, Safelite Solutions 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. Ex. 2, 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). Not surprisingly, the State conceded at oral argument that Safelite's speech is not misleading. Ex. 6, 12/2/13 Tr. 4:19-23.

2. 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. The desire to protect local businesses from competition is not 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.”).[6]

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. PA 13-67(c)(2) would 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

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[6] The State’s asserted interest in protectionism is especially pernicious because Connecticut seeks to advance that interest by unconstitutionally mandating “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)).

Safelite AutoGlass. *See* Ex. 1, 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. 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 noted, the Connecticut Insurance Department had not received any complaints on that issue from consumers. Ex. 2, 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.

3. 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." Defs.' Br. 13. 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 informing consumers that choosing an unaffiliated shop will result in delays or lack of a guarantee, even if that information is true. Order 11. It goes without saying that a statute that either prohibits the dissemination of 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. 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.[7] 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

[7] Eight of the top fifteen insurers in Connecticut do not employ Safelite Solutions 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—over half of all policyholders in the State—will not receive what the State regards as the "minimum information" necessary for consumer choice.

asserted interest. *Id.* at 425-427 (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.

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

A restriction on commercial speech may "extend only as far as the interest it serves. The State 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 is concerned that customers lack sufficient information about their commercial alternatives, the proper remedy is not 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. The State could 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 In re R.M.J.*, 455 U.S. 191, 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 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.

II. 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." Defs.' Br. 17. 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). That rule is unsurprising, as the deprivation of constitutional rights is an "injury for which a monetary award cannot be adequate compensation," the very definition of irreparable harm. *Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979).

Here, 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. Safelite is forced either to refrain from promoting its own business or to refer its customers to

competing businesses. 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).

III. AN INJUNCTION WOULD NOT UNDULY BURDEN THE STATE.

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." Ex. 6, 12/2/13 Tr. 55:19-20. Its January 1, 2014 effective date represents a choice of a day on the calendar, not some pressing urgency. Moreover, as the State conceded, the current speech at issue is neither misleading nor unlawful. Ex. 6, 12/2/13 Tr. 4:19-23. Thus, the entry of an injunction pending appeal, and at the very least an emergency administrative injunction so that the Court can review this motion, would not cause any harm to the State. The injunction would merely preserve the status quo and prevent Safelite from suffering the loss of its constitutional rights and other potential damages. In these circumstances, injunctive relief pending appeal is appropriate. *See SEC v. Citigroup Global Markets Inc.*, 673 F.3d 158, 168 (2d Cir. 2012)

(finding "no appreciable harm to anyone from issuing a stay" where the stay would do "nothing more than maintain the status quo"); *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 423 (2d Cir. 2013) (enjoining enforcement of state statute where the law "would not meaningfully advance the rationales offered by" the State); *Cavel Intern., Inc. v. Madigan*, 500 F.3d 544, 546 (7th Cir. 2007) (granting the requested injunction because a stay "based on a showing in a particular case that the harm to the challenger . . . would greatly exceed the harm to the state . . . does not operate as a statutory revision or significantly impair democratic governance").

IV. THE PUBLIC INTEREST FAVORS AN INJUNCTION.

Finally, an injunction pending appeal here is in 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 Court should grant an emergency injunction pending appeal pursuant to Federal Rule of Appellate Procedure 8 and an emergency administrative injunction so that the Court may review this motion.

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Respectfully submitted,

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