UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NATIONAL RETAIL FEDERATION,

Plaintiff,

- against -

LETITIA JAMES, in her official capacity as Attorney General of New York,

Defendant.

Case No. 1:25-cv-5500-JSR

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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Defendant Letitia James ("Defendant"), in her official capacity as New York State Attorney General, respectfully submits this memorandum of law, together with the accompanying Declarations of Christopher D'Angelo ("D'Angelo Decl.") and Yuval Rubinstein ("Rubinstein Decl."), in opposition to Plaintiff National Retail Federation's ("Plaintiff" or "NRF") motion for preliminary injunction (ECF No. 9).

PRELIMINARY STATEMENT

The growing use of computer algorithms has transformed online commerce by enabling companies to harvest vast troves of data, such as customers' purchase history and demographic information, to set prices. But many companies have utilized this technology to take advantage of customers without their knowledge or consent. One of the country's largest retail chains, which was feted by Plaintiff at its annual "Big Show" earlier this year, was caught charging $499 for a Smart TV on its online app, with the price jumping to ***$599*** on the app when pulling into the parking lot of a store.[1] Numerous similar incidents have elicited growing public concern about algorithmic pricing. The Federal Trade Commission ("FTC") and several academic studies have documented the harms resulting from companies' misuse of algorithmic pricing, including higher prices, fairness and privacy concerns, and potential disparate impact based upon customers' protected categories.

The State of New York is at the forefront of the burgeoning movement to spotlight the harms to consumers caused by algorithmic pricing. On May 9, 2025, the State enacted what is known as the Algorithmic Pricing Disclosure Act ("Act"). *See* N.Y. Gen. Bus. Law § 349-a. The

[1] Chris Hrapsky, *The Target app price switch: What you need to know*, KARE 11 (Feb. 6, 2019), https://www.kare11.com/article/money/consumer/how-to-avoid-target-app-parking-lot-price-switch/89-9ef4106a-895d-4522-8a00-c15cff0a0514; Fiona Soltes, *Retail's Big Show: How Target's people-first culture and leadership programs are driving success*, NRF (Jan. 13, 2025), https://nrf.com/blog/how-targets-people-first-culture-leadership-programs-are-driving-success.

Act does not restrict the use of algorithmic pricing, but requires companies to post a clear and conspicuous notice advising consumers that "this price was set by an algorithm using your personal data." The purpose of this disclosure requirement is to help consumers make informed decisions concerning products or services that are priced using algorithms utilizing their personal data.

Plaintiff is a trade association whose members advertise online their commercial products, such as insect repellant, haircare products, backpacks, and grilling and smoking products. Plaintiff claims the Act compels its members to engage in speech they do not agree with, thereby violating the First Amendment as applied to its members and on its face. On July 2, 2025—nearly two months after the Act was passed and just days before it was to go into effect on July 8, 2025—Plaintiff filed a motion to preliminary enjoin Defendant from enforcing the Act. But, as demonstrated herein, Plaintiff's motion fails to make a "clear showing" it is entitled to such "an extraordinary and drastic remedy." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (cleaned up).

In particular, Plaintiff cannot establish a likelihood of success on the merits of its First Amendment claim. (Point I, *infra*) Because Plaintiff is bringing a paradigmatic pre-enforcement challenge to a commercial disclosure requirement, Plaintiff's First Amendment claim falls squarely within the domain of *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985). Yet Plaintiff fails to meet the *Zauderer* standard because it cannot demonstrate that the information to be disclosed under § 349-a(2) is not factual or is controversial. Plaintiff's complaint that the disclosure conveys a controversial opinion and misleads customers is meritless and counter to Second Circuit precedent.

The Act also comfortably satisfies *Zauderer*'s rational basis review, and Plaintiff's contention that the disclosure somehow displaces members' "pixel space" does not establish any undue burden. Nor is the Act subject to heightened scrutiny, although the Act readily satisfies intermediate scrutiny in any case. (Point I(B) and (C), *infra*) Moreover, Plaintiff's request to enjoin the Act in *all* its applications, which would shield companies caught misusing algorithmic pricing from legal scrutiny, is unjustified. (Point I(D), *infra*) Finally, Plaintiff fails to establish that its members will be irreparably harmed, while the balance of equities and public interest weigh decisively in the State's favor. (Point II, *infra*) Plaintiff's motion should thus be denied.

BACKGROUND

I. OVERVIEW OF ALGORITHMIC PRICING

A. The Harms to Consumers Resulting From Algorithmic Pricing

One of the core business practices that companies and other sellers utilize is price discrimination: the "charging [of] different prices to different consumers based on a consumer's perceived willingness to pay (WTP)." Christopher R. Leslie, *Predatory Pricing Algorithms*, 98 N.Y.U. L. REV. 49, 72-73 (2023). The recent emergence of pricing algorithms, which "are both faster and more accurate than human price setters," has enabled companies to "determine what price each individual consumer sees on a website," and thereby "hide the lowest prices from consumers with higher WTP." *Id.* at 74. The increasingly sophisticated use of pricing algorithms is fueled by the collection of reams of personal data, including customers' geographic location, purchase history, web browsing history, communications, and physical movements. *See* FTC, *Issue Spotlight: Surveillance Pricing*, at 4-10, https://www.ftc.gov/system/files/ftc_gov/pdf/sp6b-issue-spotlight.pdf (last visited August 8, 2025).

The growing use of algorithmic pricing to exploit consumers' personal data without their knowledge has generated increasing scrutiny, as in the high-profile case of Target's 2019 "app price switch." Hrapsky, *supra*. The offering of "coupons" in the form of personalized booklets that are much different—and more insidious—than the ones clipped from a newspaper has likewise elicited public alarm. Leslie, *supra*, at 74-75; Kashmir Hill, *How Target Figured Out A Teen Girl Was Pregnant Before Her Father Did*, FORBES (Feb. 16, 2012), https://www.forbes.com/sites/kashmirhill/2012/02/16/how-target-figured-out-a-teen-girl-was-pregnant-before-her-father-did/#4e4def1434c6 (discussing "pregnancy prediction" score that enabled Target to send coupons to customers timed to specific stages of pregnancy). The ability to vary prices by geography and income has given rise to concerns about potential disparate impact based upon protected categories. *See* Julia Angwin, Surya Mattu and Jeff Larson, *The Tiger Mom Tax: Asians Are Nearly Twice as Likely to Get a Higher Price from Princeton Review*, PRO PUBLICA (Sept. 1, 2015), https://www.propublica.org/article/asians-nearly-twice-as-likely-to-get-higher-price-from-princeton-review (customers in Queens zip code with 70.5% Asian population were quoted the highest price for online SAT tutoring package).

Plaintiff itself has been mindful of this consumer backlash. In 2019, Plaintiff collaborated on a white paper (which has apparently been removed from its website[2]) that analyzed the use of "personalized" pricing. *See* Rubinstein Decl., Ex. A, Joe Beier and Rachel Bonsignore, *Decoding the Personalization Paradox*, GFK (2019), *available at* https://cdn2.hubspot.net/hubfs/2405078/Personalization-White-Paper@GfK-FINAL.pdf. The white paper candidly acknowledged the "hazards of personalization," including the "consumer backlash" to "wide variations in pricing that may feel unfair to customers." *Id.* at 7; Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 763 (2017) (noting that "[a] major topic of discussion at the 2014 National Retail Federation annual convention…was how to introduce discriminatory pricing without triggering consumer backlash").

[2] Beier and Bonsignore, *supra*, https://nrf.com/sites/default/files/2019-07/Decoding%20the%20Personalization%20Paradox.pdf (last visited August 17, 2025).

The harmful impact of algorithmic pricing upon consumers is not only a matter of public perception. A growing body of academic research has documented the harms caused by algorithmic pricing, such as higher prices for consumers, impaired fairness and privacy, and potential disparate impact based upon protected categories.[3] One proposed legislative response is a "right to algorithmic transparency" to "ensure that consumers (and others) can know about the nature, uses, and consequences of algorithms." Bar-Gill et al., *supra*, at 23.

B. Regulatory and Legislative Responses to Algorithmic Pricing

In January 2025, the FTC released the summary of a months-long research study that aimed to "catalog the types of data that companies use to fuel their algorithms and where that data is sourced" in order to understand the "prices [consumers] pay, the products presented to them, and the types of personal data that are used to determine those prices and product offerings." FTC, *Surveillance Pricing 6(b) Study: Research Summaries: A Staff Perspective* (Jan. 2025), at 2, https://www.ftc.gov/system/files/ftc_gov/pdf/p246202_surveillancepricing6bstudy_researchsummaries_redacted.pdf. The FTC's summary also highlighted several "use cases" illustrating the harm to consumers. For example, a consumer profiled as a new parent may be shown higher priced baby thermometers on the first page of their "in-app" search results, based on their residential zip code and time of purchase. *Id.* at 5; Stephanie T. Nguyen & Samuel A.A. Levine, *Surveillance Pricing Update & The Work Ahead*, FTC (Jan. 17, 2025), https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2025/01/surveillance-pricing-update-work-ahead (noting "key takeaways"

[3] *See* Sylvia Lu, *Regulating Algorithmic Harms*, 77 FLA. L. REV.__ (2025) (Law & Economics Working Papers 277), at 19-34, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4949052; Leslie, *supra*, at 67-80; Oren Bar-Gill, Cass R. Sunstein, & Inbal Talgam-Cohen, *Algorithmic Harm in Consumer Markets*, 15 J. LEGAL ANALYSIS. 1, 8-10, 22-23 (2023); Alexander MacKay and Samuel N. Weinstein, *Dynamic Pricing Algorithms, Consumer Harm, and Regulatory Response*, 100 WASH. U. L. REV. 111, 137-44 (2022).

from research study); *FTC Issue Spotlight, supra*, at 11-14 (documenting harms to consumers, including higher prices, privacy risks, "data collection obfuscation," and discrimination).[4]

The mounting concerns about algorithmic pricing have also generated momentum for legislative solutions in states across the country. Through July of 2025 alone, lawmakers have introduced 51 bills across 24 states aimed at regulating algorithmic pricing. Cheyenne Tan, *How U.S. States are Tackling Algorithmic Pricing: 2025 Bill Tracker and Analysis*, CONSUMER REPORTS, https://innovation.consumerreports.org/How-U.S.-States-are-Tackling-Algorithmic-Pricing.pdf (last visited August 8, 2025). Numerous municipalities have also begun to regulate algorithmic pricing, particularly in the rental housing market. *See* Jared Brey, *Several Cities Block AI-Powered Rent Gouging*, GOVERNING (June 10, 2025), https://www.governing.com/urban/several-cities-block-ai-powered-rent-gouging.

II. THE ALGORITHMIC PRICING DISCLOSURE ACT

On May 9, 2025, the State of New York enacted the Algorithmic Pricing Disclosure Act ("Act"), codified in N.Y. Gen. Bus. Law ("G.B.L.") § 349-a. The Act does not restrict the use of algorithmic pricing, but requires companies to include a "clear and conspicuous" disclosure stating that "THIS PRICE WAS SET BY AN ALGORITHM USING YOUR PERSONAL DATA." G.B.L. § 349-a(2). The Act defines "clear and conspicuous" to mean "disclosure in the same medium as, and provided on, at, or near and contemporaneous with every advertisement, display, image, offer or announcement of a price for which notice is required, using lettering and wording that is easily

[4] The FTC's counterparts in other countries have also conducted analyses to examine the impact of algorithmic pricing upon consumers. *See* Competition Bureau Canada, *Algorithmic Pricing and Competition: Discussion Paper*, https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/publications/algorithmic-pricing-and-competition-discussion-paper (last visited August 8, 2025); Competition & Markets Authority, *Policy Paper Update: Dynamic Pricing* (June 20, 2025), https://www.gov.uk/government/publications/dynamic-pricing-project-update/update-dynamic-pricing.

visible and understandable to the average consumer." G.B.L. § 349-a(1)(b). The statutory definition provides covered entities with discretion to format the disclosure, so long as it is "easily visible and understandable to the average consumer." D'Angelo Decl. at ¶ 7.

The Act also contains narrow exceptions to the disclosure requirement in § 349-a(2). For example, the definition of "personal data" excludes location data used by for-hire vehicles, or transportation network company vehicles, "solely to calculate the fare based on mileage and trip duration between the passenger's pickup and drop-off locations." G.B.L. § 349-a(1)(d). The exception is included because consumers are aware that they will see the price for the distance traveled between the "pickup and drop-off locations." D'Angelo Decl. at ¶ 8.

In addition, the Act has exceptions for (a) persons or entities subject to applicable insurance laws and regulations; (b) financial institutions and affiliates subject to Title V of the Gramm Leach Bliley Act (15 U.S.C. § 6801, et seq., as amended) as well as the statute's rules and implementing regulations; and (c) financial institutions "as defined in subsection (f) of section eight hundred one of the financial services law" of New York State. G.B.L. § 349-a(3)(a), (b) and (c). The Act does not cover these insurance and financial entities given that they are already heavily regulated at the federal and state levels, and subject to disclosure requirements. D'Angelo Decl. at ¶ 9.

Finally, the Act includes an exception for a price offered to consumers with existing subscription-based contracts or agreements for goods or services with an entity, where the price offered is less than the price for the same good or service set forth in the agreement or contract. G.B.L. § 349-a(3)(d). Because the exception is narrowly limited to prices offered below an existing subscription agreement or contract, the concern about personal data being used to charge consumers a higher price is not present. D'Angelo Decl. at ¶ 10.

STANDARD OF REVIEW

"The preliminary injunction is one of the most drastic tools in the arsenal of judicial remedies." *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (cleaned up). Accordingly, preliminary injunctive relief is "never awarded as of right." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008); *Sussman v. Crawford*, 488 F.3d 136, 139-40 (2d Cir. 2007) (preliminary injunction "should not be granted unless the movant, by a *clear* showing, carries the burden of persuasion") (emphasis in original). The moving party bears the burden of establishing that (a) it is likely to succeed on the merits; (b) it is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in its favor; and (d) an injunction is in the public interest. *Winter*, 555 U.S. at 20. Moreover, "statutes and policies implemented through the legislative process are entitled to a higher degree of deference and should not be enjoined lightly." *Goldstein v. Hochul*, 680 F. Supp. 3d 370, 388 (S.D.N.Y. 2023) (cleaned up).

ARGUMENT

I. PLAINTIFF IS UNABLE TO ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS FIRST AMENDMENT CLAIM

A. The Act Satisfies Rational Basis Review Under *Zauderer*

1. The *Zauderer* Standard

It is well-settled that "[c]ommercial speech is subject to less stringent constitutional requirements than are other forms of speech." *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113 (2d Cir. 2001) ("*NEMA*") (cleaned up); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (Supreme Court has "always been careful to distinguish commercial speech from speech at the First Amendment's core"). Moreover, there are "material differences between disclosure requirements and outright prohibitions on speech." *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 650 (1985). Because the First Amendment protection afforded to commercial speech "is justified principally by the value to consumers of the information such speech provides," a commercial speaker's "interest in *not* providing any particular factual information in his advertising is minimal." *Id.* at 651 (emphasis in original).

Under *Zauderer*, the disclosure of "'purely factual and uncontroversial' commercial speech" is "subject to the rational basis test." *N.Y. State Restaurant Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009) ("*NYSRA*") (cleaned up). The analysis involves "a determination of whether the required disclosure is reasonably related to the state's interest[.]" *Poughkeepsie Supermarket Corp. v. Dutchess Cnty., N.Y.*, 648 F. App'x 156, 157-58 (2d Cir. 2016) (cleaned up). The government need not proffer "'evidence or empirical data' to demonstrate the rationality of mandated disclosures in the commercial context." *Connecticut Bar Ass'n v. U.S.*, 620 F.3d 81, 97-98 (2d Cir. 2010) (quoting *NYSRA*, 556 F.3d at 134, n.23).

2. *Zauderer* is Applicable to the Act

Plaintiff contends that *Zauderer* is inapplicable because § 349-a(2) is not intended to "correct[ ] misleading commercial speech." ECF No. 9-1, Memorandum of Law in Support of Motion for Preliminary Injunction ("MOL") at 18. Plaintiff's premise is mistaken, as "[o]nline sellers can…disguise their price discrimination" by "conceal[ing] the low internet prices offered to select consumers" as well as "preventing consumers from directly discerning whether they are being charged a higher price than other consumers." *Leslie*, *supra*, at 77. The Act thus facilitates consumers' awareness of the oftentimes furtive nature of algorithmic pricing.

But Plaintiff's cramped interpretation of *Zauderer* is also contrary to decades of entrenched precedent. *See NEMA*, 272 F.3d at 115 (Vermont's labeling requirement for mercury-containing lamps governed by *Zauderer* even if it "was not intended to prevent 'consumer confusion or deception' per se…but rather to better inform consumers about the products they purchase") (quoting *Zauderer*, 471 U.S. at 651); *NYSRA*, 556 F.3d at 133 (reaffirming *NEMA*'s holding that *Zauderer* is "broad enough to encompass nonmisleading disclosure requirements"); *Poughkeepsie Supermarket Corp.*, 648 F. App'x at 158 (price sticker requirement intended to "provide complete price information to consumers" satisfied *Zauderer*).[5]

Nor is Plaintiff correct in asserting that *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229 (2010) and *Nat'l Inst. of Family & Life Advocs. v. Becerra*, 585 U.S. 755 (2018) ("*NIFLA*") reaffirmed that *Zauderer* only applies to deceptive commercial speech. MOL at 17. The Fifth, Sixth, Ninth, and D.C. Circuits have squarely held, even after *Milavetz*, that *Zauderer*'s domain is not so limited. *R J Reynolds*, 96 F.4th at 882 (citing post-*Milavetz* decisions). *NIFLA* did not involve a commercial advertising disclosure in the first place, and the decision has been construed as holding that *Zauderer* review extends beyond consumer deception. *R J Reynolds*, 96 F.4th at 883; *CTIA v. City of Berkeley*, 928 F.3d 832, 844 (9th Cir. 2019); Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 882 (2015) (interpreting *Zauderer* as being limited to prevention of consumer deception is based upon a "flat and tendentious misreading").

Plaintiff's citation to *CompassCare v. Hochul*, 125 F.4th 49 (2d Cir. 2025) is also puzzling. MOL at 17. There, the Second Circuit held *Zauderer* applied even though the employee handbook disclosure mandated by Labor Law § 203-e clearly did not address deceptive commercial advertising. *Id.* at 67. The certification order in *Volokh v. James*, __F.4th__, No. 23-356, 2025 WL 2177513, at *9 (2d Cir. Aug. 1, 2025) also refutes Plaintiff's argument by reaffirming

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[5] The Second Circuit's interpretation of *Zauderer* is in line with other circuits. *See R J Reynolds Tobacco Co. v. FDA*, 96 F.4th 863, 883 (5th Cir. 2024) (joining Second Circuit and several other circuits to "hold that *Zauderer* applies even when the government's claimed primary interest is not the prevention of consumer deception" because the *Zauderer* "standard is not that *only* anti-deception interests suffice, but that *any* legitimate state interest suffices") (emphases in original).

Zauderer applies to statutes "designed to address misleading commercial speech" or "presumably, its equivalent, the non-disclosure of information material to the consumer." (cleaned up).

3. Plaintiff Cannot Demonstrate That the Disclosure Required by § 349-a(2) is Not Factual or is Controversial

Plaintiff readily acknowledges that its members routinely use algorithmic pricing to offer discounts, coupons, and promotions to customers. MOL at 3-5. The plain language of § 349-a(2) thus accurately describes the practices of Plaintiff's members. *Poughkeepsie Supermarket Corp.*, 648 F. App'x at 158 (disclosure of item pricing about retailer's own goods was "purely factual"). Plaintiff nonetheless contends that § 349-a(2) is not purely factual because the "overall message" conveyed in the eleven-word disclosure is a "matter of opinion" that Plaintiff and its members "do not share." MOL at 19.

But Plaintiff fails to cite even a single decision within the Second Circuit in support of that proposition. Nor is this conspicuous omission surprising, as "[d]isclosure rules requiring speakers to disclose facts with which the speakers disagree are consistently found not to offend the First Amendment." *SEC v. City of Rochester, N.Y.*, 731 F. Supp. 3d 455, 473 (W.D.N.Y. 2024); *NYSRA*, 556 F.3d at 133-34 (rejecting plaintiff's argument that *Zauderer* should not apply because member restaurants "do not believe that disclosing calorie information would reduce obesity" and "do not want to communicate to their customers that calorie amounts should be prioritized among other nutrient amounts"); *CompassCare*, 125 F.4th at 66 (required notification "does not interfere with [p]laintiffs' greater message and mission" where plaintiffs "remain free to share with their employees, in the handbooks or elsewhere, their moral, political, and religious views").

Plaintiff attempts to shore up its contention that the § 349-a(2) disclosure conveys an opinion by citing a handful of academic articles purportedly showing that algorithmic pricing "results in lower prices" in the aggregate. MOL at 19. Plaintiff's argument is belied by the academic literature documenting the manifold harms to consumers caused by algorithmic pricing, including higher prices. *Supra* at 5. Plaintiff's argument is immaterial under *Zauderer* in any case, as the § 349-a(2) disclosure is no less "factual" than the disclosures upheld by the Second Circuit in cases such as *NEMA*, *NYSRA*, and *Poughkeepsie Supermarket Corp.*; *cf. Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 26 (D.C. Cir. 2014) ("evidentiary parsing" is "hardly necessary" for disclosure mandate "to achieve a goal of informing consumers about a particular product trait").

Nor can Plaintiff sidestep *Zauderer* by speculating that the § 349-a(2) disclosure is "misleading" by "falsely impl[ying] that a price is exploitative," and that customers will "naturally conclude" that "retailers are placing them in danger." MOL at 19-20. Indeed, Plaintiff "offers no evidence to support its claim" that customers will be misled, let alone placed in danger. *Milavetz*, 559 U.S. at 251; *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (to obtain preliminary injunctive relief, the "requirement for substantial proof is much higher" than for summary judgment). The declaration of Plaintiff's general counsel merely proffers the self-serving assertion that its members harbor "fear[s]" and "worr[ies]" that the disclosure will mislead customers.[6] ECF No. 9-3, at ¶ 23. That is decidedly not "substantial proof" establishing that the disclosure required by § 349-a(2) is inherently misleading.

Plaintiff further speculates that customers will "naturally but falsely" conclude that "personal data" refers to "sensitive personal information" such as race, age or income, which some

[6] Plaintiff's supposition regarding what consumers will "naturally conclude" in response to § 349-a(2) is also belied by prior survey data. *See* Daniel E. Herz-Roiphe, *Stubborn Things: An Empirical Approach to Facts, Opinions, and the First Amendment*, 113 MICH. L. REV. FIRST IMPRESSIONS 47, 59 (2014), http://michiganlawreview.org/stubborn-things-an-empirical-approach-to-facts-opinions-and-the-first-amendment (survey of responses to recent compelled disclosure decisions found 86% of respondents determined statement that "Acme, Inc. disclosed that its products had not been found to be 'DRC-conflict free'" was "purely factual") (quoting *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 365 (D.C. Cir. 2014)).

of Plaintiff's members do not collect. MOL at 5, 9, 19. Once again, no evidence is offered to support this bare assertion. Even if some of Plaintiff's members do not collect information such as race or age from customers, there remains the potential that the use of zip codes and other criteria will have a disparate impact. *Supra* at 4. And while the declarations of Plaintiff's members are carefully drafted to represent that they do not utilize algorithmic pricing to "increase" prices for particular customers, (MOL at 5, 19) the members notably do not disavow their use of personal data to charge customers different prices for the same goods. The members' proclamations of innocence regarding their use of algorithmic pricing to offer promotions and coupons to customers do not render the § 349-a(2) disclosure misleading.

Moreover, any purported concerns as to the § 349-a(2) disclosure being misleading or confusing can be allayed simply by providing additional information to customers concerning retailers' use of algorithmic pricing. *Milavetz*, 559 U.S. at 250 (required disclosure did not prevent plaintiff "from conveying any additional information"); *Connecticut Bar Ass'n*, 620 F.3d at 98 (plaintiff retains option to provide "*more* information than is contained in the mandated disclosures to ensure accurately informed choice") (emphasis in original); *City of Rochester*, 731 F. Supp. 3d at 474 (municipal advisors are "free to make clear" that required disclosure of contingency fee agreement "will not impact their advice or otherwise harm their clients"). Plaintiff complains that its members lack "the ability to *modify* that statement [in § 349-a(2)] to provide context." MOL at 20 (emphasis added). But the First Amendment in no way obligates the State to provide this ability, which would undermine the very purpose of the disclosure.

Finally, Plaintiff contends that § 349-a(2) is "controversial" by asserting—once again without any supporting evidence—that there is a "robust debate" concerning the regulation of algorithmic pricing, and that Plaintiff's members are forced to "credit an insinuation at war with their beliefs." MOL at 20-21. Yet the § 349-a(2) disclosure is no more "controversial" than the disclosures upheld in *NEMA*, *NYSRA*, *Poughkeepsie Supermarket Corp.,* and *Connecticut Bar Ass'n*; *CompassCare,* 125 F.4th at 65 (regardless of whether the "policy judgment" that motivated the reproductive health decision making notice in Labor Law § 203-e was controversial, the "existence and contents of the act" is "not itself controversial").

4. The Act Satisfies Rational Basis Review and is Not Unduly Burdensome

The disclosure in § 349-a(2) readily satisfies *Zauderer*'s "rational basis test." *NYSRA*, 556 F.3d at 132. The growing use of algorithmic pricing to charge consumers different prices for the same goods and services, by culling reams of personal data, has been shown to increase prices, and has also elicited justifiable concerns about fairness, personal privacy, and disparate impact. *Supra* at 3-6. The disclosure is thus reasonably related to the State's interest in enabling consumers to make an informed decision regarding the purchase of products and services that are priced using algorithms. *NEMA*, 272 F.3d at 115 (state's interest in "better inform[ing] consumers about the products they purchase" satisfied *Zauderer*'s "reasonable-relationship rule"); *Poughkeepsie Supermarket Corp.*, 648 F. App'x at 158 (price sticker requirement was "reasonably related to the state's valid interest in providing complete price information to consumers").

Plaintiff maintains that rational basis review is inapplicable under *Zauderer*, even though the Second Circuit recently reaffirmed that "mandatory disclosures in advertising" are subject "to a level of scrutiny resembling rational basis review" under *Zauderer*. *CompassCare*, 125 F.4th at 64. Plaintiff claims this clear-cut statement is somehow "dictum" at odds with *NIFLA*. MOL at 21 & n.6. But *NIFLA* did not involve a challenge to a commercial disclosure requirement, and even the case law Plaintiff cites undermines Plaintiff's reading of *NIFLA*. *See Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1266 (9th Cir. 2023) (challenges to "compelled commercial speech" that are "purely factual and uncontroversial" are subject to "a lesser form of scrutiny akin to a rational basis test"). Plaintiff further errs in asserting that *CompassCare* "did not use a rational basis test" in evaluating the challenged provision. MOL at 21, n. 6. In fact, the Second Circuit expressly noted that it was continuing to "*apply* the standard of rational basis review set out in *Zauderer*." 125 F.4th at 67 (emphasis added).[7]

Plaintiff further asserts that the Act is based upon "non-existent" and "never-proven consumer injury," and that the State cannot enact prophylactic rules. MOL at 21-22. But Defendant need not present "'evidence or empirical data' to demonstrate the rationality of mandated disclosures in the commercial context." *Connecticut Bar Ass'n*, 620 F.3d at 97-98 (quoting *NYSRA*, 556 F.3d at 134, n.23). Moreover, there *is* ample evidence, as documented by the media, academic scholars, and regulatory agencies, that consumers are harmed by algorithmic pricing in numerous ways. *Supra* at 3-6.

Nor can Plaintiff demonstrate that § 349-a(2) is "intrinsically burdensome" to retailers. *Zauderer*, 471 U.S. at 653, n.15. Plaintiff contends that the disclosure is both "broader than necessary" and is also underinclusive based upon the limited exceptions set forth in § 349-a(3). MOL at 23. But Plaintiff fails to cite any case applying the overbreadth doctrine to commercial disclosure requirements, and *Zauderer* makes clear that a commercial disclosure requirement is not subject to a First Amendment challenge merely because "it does not get at all facets of the problem it is designed to ameliorate." 471 U.S. at 651, n.14; *NEMA*, 272 F.3d at 115 (mercury-

[7] The certification order in *Volokh* pondered whether *Zauderer* applies a "traditional rational basis review" without reaching any determination, while "recogniz[ing] that the scrutiny is more relaxed than ordinary intermediate or strict scrutiny." 2025 WL 2177513 at *7, n.6. Because this case involves a commercial advertising disclosure, Defendant submits that *NEMA*, *NYSRA*, and *Connecticut Bar Ass'n*, which were cited in *Volokh*, still provide the applicable review standard.

labeling requirement was rationally related to state's goal even if it "may ultimately fail to eliminate all or even most mercury pollution in the state").

Plaintiff also contends that the eleven-word disclosure is somehow "infeasible," and requires retailers to remove information they wish to provide. MOL at 23. But this purported concern finds no support in the Act, which defines "clear and conspicuous disclosure" only to require that entities "us[e] lettering and wording that is easily visible and understandable to the average consumer." G.B.L. § 349-a(1)(b). This modest requirement provides retailers latitude, and does not mandate any font or size requirement akin to the ubiquitous Surgeon General's warning on cigarette packages and advertisements, which was recently upheld under *Zauderer*. *R J Reynolds*, 96 F.4th at 886; D'Angelo Decl. at ¶7.

The supporting declarations likewise fail to substantiate Plaintiff's claim that § 349-a(2) will "displace" its members' speech. The assertion by Plaintiff's general counsel that retailers will be "forced to remove their own speech" is wholly conclusory and unsubstantiated. ECF No. 9-3, at ¶ 26. The owner of Grill Sergeant merely expresses the concern that "uncertainty" regarding the disclosure requirement "could lead to additional costs such as legal fees." ECF No. 9-4, at ¶ 18. But such concerns do not make § 349-a(2) unduly burdensome. *See Poughkeepsie Supermarket Corp. v. Cnty. of Dutchess, N.Y.*, 140 F. Supp. 3d 309, 317 (S.D.N.Y. 2015), *aff'd*, 648 F. App'x 156 (2d Cir. 2016) (rejecting plaintiff's argument that item price disclosure requirement "is unduly burdensome based on the resources and labor that must be expended to comply," as compliance costs do "not negate the rationality of the law"); *Am. Hosp. Ass'n v. Azar*, 983 F.3d 528, 541 (D.C. Cir. 2020) (rule was not unduly burdensome by imposing "excessive financial burdens," as party challenging disclosure "must demonstrate a burden on *speech*") (emphasis in original).

B. The Act is Not Subject to Heightened Scrutiny

Plaintiff candidly acknowledges that the Act is "likely not subject to strict scrutiny under Second Circuit precedent," and merely seeks to "preserve" its argument that strict scrutiny is applicable. MOL at 11, n. 5. The relegation of this argument to a passing footnote is reason enough to disregard it. *See Diesel v. Town of Lewisboro*, 232 F.3d 92, 110 (2d Cir. 2000). Plaintiff's concession is also understandable, as the Second Circuit has consistently applied rational basis analysis to commercial disclosure requirements in comparable cases such as *NEMA*, *NYSRA*, *Connecticut Bar Ass'n*, and *Poughkeepsie Supermarket Corp*.

Plaintiff appears to contend that commercial retailers advertising their "mosquito and tick repellent with all-natural ingredients" as well as "flavor injectors" for meat (ECF Nos. 9-2, at ¶ 1; 9-4, at ¶ 2) are entitled to the *exact same level* of First Amendment protection as, for example, religious minorities compelled to recite the Pledge of Allegiance in school. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The Second Circuit recently rejected this very notion, and with good reason. *CompassCare*, 125 F.4th at 64-65; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.,* 515 U.S. 557, 573 (1995) (citing *Zauderer* to distinguish "commercial advertising" from compelled speech cases "outside that context").

Nor is Plaintiff correct in maintaining that the "traditional intermediate scrutiny test for commercial speech" set forth in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) applies. MOL at 11-12. *Central Hudson* involved a First Amendment challenge to the "complete suppression" of an electrical utility's advertising. *Id.* at 571. The Second Circuit has thus emphasized that *Central Hudson* should only "be applied to statutes that *restrict* commercial speech." *NEMA*, 272 F.3d at 115 (emphasis in original). Absent such suppression of commercial speech, "*Zauderer*, not [*Central Hudson*], describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases." *Id.* Plaintiff fails to even argue that § 349-a(2) directly restricts any commercial speech.

The Second Circuit has applied intermediate scrutiny to commercial disclosure requirements in only a "few and narrow" cases that are inapposite to Plaintiff's claim. *Poughkeepsie Supermarket Corp.*, 140 F. Supp. 3d at 314. In *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 74 (2d Cir. 1996) ("*IDFA*"), *Zauderer* review was deemed inapplicable to a statute requiring dairy manufacturers to identify products derived from dairy cows treated with a synthetic growth hormone, as "consumer curiosity alone is not a strong enough state interest."[8] Although Plaintiff cites *IDFA* to assert that "consumer curiosity" is insufficient absent proof of "real cognizable harms," (MOL at 21-22) such harms are manifestly present here. *Supra* at 3-6; *NEMA*, 272 F.3d at 115, n. 6; *NYSRA*, 556 F.3d at 134; *Connecticut Bar Ass'n*, 620 F.3d at 96, n.16 (distinguishing *IDFA* in upholding challenged disclosure requirements as justified by government interests beyond satisfaction of consumer curiosity).

C. The Act Nevertheless Satisfies Intermediate Scrutiny

Although Defendant in no way concedes that § 349-a(2) is subject to intermediate scrutiny, it is noteworthy that the disclosure passes muster even under the *Central Hudson* analysis. "Under *Central Hudson*, courts ask whether (1) the expression is protected by the First Amendment; (2) the asserted government interest is substantial; (3) the regulation directly advances the government interest asserted; and (4) the regulation is no more extensive than necessary to serve that interest." *Vugo, Inc. v. City of New York*, 931 F.3d 42, 50 (2d Cir. 2019), *cert. denied*, 140 S.Ct. 2717 (2020)

[8] In *Safelite Group, Inc. v. Jepsen*, 764 F.3d 258, 264 (2d Cir. 2014), intermediate scrutiny was applied to a Connecticut statute prohibiting insurance companies and claims administrators from recommending an affiliated auto-glass repair company unless the competitor was also named. Plaintiff does not contend that *Safelite* is applicable.

(cleaned up). "The last two steps in the [*Central Hudson*] analysis have been considered, somewhat in tandem, to determine if there is a sufficient fit between the regulator's ends and the means chosen to accomplish those ends." *Id.* at 52 (cleaned up). The fit "need not satisfy a least-restrictive-means standard," and is met so long as it is "simply reasonable." *Id.* (cleaned up).

As an initial matter, Plaintiff errs in contending that § 349-a(2) is subject to "heightened scrutiny" under *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) because it "singles out" a class of speakers based upon the subject matter of their speech. MOL at 12-13. The Second Circuit has held that "*Sorrell* leaves the *Central Hudson* regime in place" in cases involving commercial speech restrictions, *Vugo,* 931 F.3d at 50, and *Sorrell* is even further afield from the commercial disclosure requirement in this case.[9] In fact, the Second Circuit has indicated that the *Central Hudson* analysis is more deferential in cases challenging commercial disclosure requirements, as "a focused rule that effectively mandates only that a merchant disclose certain facts to consumers trenches less heavily on First Amendment interests." *Expressions Hair Design v. Schneiderman*, 877 F.3d 99, 105 (2d Cir. 2017); *Spirit Airlines, Inc. v. U.S. Dep't. of Transp.*, 687 F. 3d 403, 415 (D.C. Cir. 2012) (ticket price disclosure "eas[ily]" satisfied *Central Hudson*).

The Act satisfies intermediate scrutiny even applying the traditional *Central Hudson* analysis. First, the State's asserted interest in informing consumers about the harms caused by algorithmic pricing is substantial. *See Real Estate Bd. of N.Y., Inc. v. City of New York*, __F. Supp. 3d__, No. 24 Civ. 9678, 2025 WL 1644046, at *10 (S.D.N.Y. June 10, 2025), *injunction pending appeal denied*, 2025 WL 1907941 (S.D.N.Y. July 10, 2025) ("*REBNY*") ("the protection of the

[9] Plaintiff's citations to *Reed v. Town of Gilbert*, 576 U.S. 155 (2015) and *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610 (2020) are misplaced, as neither case involved commercial speech. To the extent Plaintiff cites *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) to argue the Act is underinclusive, that argument is addressed below. *See infra* at 22.

consumer is probably the most substantial government interest that can be asserted to regulate commercial speech") (cleaned up). Plaintiff does not appear to dispute that the State has satisfied *Central Hudson*'s second prong.

Plaintiff instead argues at length that the Act does not "directly advance" a substantial interest because there is no evidence the Act addresses "any real consumer injuries." MOL at 14. But "New York is not required to produce empirical data come…accompanied by a surfeit of background information in order to satisfy intermediate scrutiny." *Council for Responsible Nutrition v. James*, No. 24 Civ. 1881, 2024 WL 1700036, at *6 (S.D.N.Y. Apr. 19, 2024) (cleaned up) ("*CRN*"). In fact, the "Supreme Court has recognized that state laws may be justified by reference to studies and anecdotes…or even based solely on history, consensus, and simple common sense." *Id.* (cleaned up).

Plaintiff's arguments are meritless in any case. Plaintiff faults the Legislature for not holding any legislative hearings or establishing a record. MOL at 14. In January 2025, the disclosure requirement was introduced in the proposed Executive Budget. *See FY 2026 New York State Executive Budget Transportation, Economic Development and Environmental Conservation Article VII Legislation Memorandum in Support*, at 20 https://www.budget.ny.gov/pubs/archive/fy26/ex/artvii/ted-memo.pdf (last visited August 14, 2025) ("The purpose of the bill is to help enhance consumers' awareness of sellers that offer or sell goods or services at a price based on personalized consumer data."). The Act was eventually passed as part of the State's annual executive budgeting process. *See* N.Y. State Senate, *Adopted Budget Report for SFY 2025-2026* (May 8, 2025), at 59 https://www.nysenate.gov/sites/default/files/open-data/fy-2026-adopted-budget-report-may-8-2025.pdf. Prior to this enactment, the Legislature and Executive were not obligated to conduct hearings or amass a record to justify the disclosure requirement.[10] *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567-68 (1991) (although "Indiana does not record legislative history," the challenged public indecency statute "is clearly within the constitutional power of the State and furthers substantial governmental interests").

In addition, Plaintiff attempts to undermine the State's substantial interest by pointing to the "experience" of its members, critiquing the FTC's 2025 research study summary, and citing to hand-picked academic studies claiming that algorithmic pricing is economically efficient overall. MOL at 14. Yet recent scholarship has illustrated that algorithmic pricing can harm consumers in several markets. Bar-Gill et al., *supra*, at 8-10; MacKay and Weinstein, *supra*, at 144 ("even in competitive markets, the increasing use of pricing algorithms will result in higher prices for consumers"). Academics have also highlighted the other harms to consumers based upon the use of their personal data, which are fully consistent with the FTC's "use cases" highlighted in the January 2025 summary. *Supra* at 5. Indeed, § 349-a(2) exemplifies the "right to algorithmic transparency" that legal scholars have advocated. Bar-Gill et al., *supra*, at 23.

Plaintiff is also mistaken in claiming the Act's enforcement provision in § 349-a(4), enabling Defendant to obtain an injunction without proof of injury or damage, is somehow a concession that the Act does not advance a real consumer interest. MOL at 14. The nondisclosure is *itself* harmful to consumers in several ways, *supra* at 3-6, and need not be supplemented by proof of further harm or damage.

More fundamentally, Plaintiff's policy-based arguments "fail for the simple reason that" the issue before the Court "is not the law's wisdom, only its constitutionality.'" *REBNY*, 2025 WL

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[10] Although the statutes introduced in the Legislature were not the versions ultimately enacted, the legislative history is instructive. *See, e.g.,* Senate Bill S7033, Senate Introducer's Memo., https://www.nysenate.gov/legislation/bills/2025/S7033 (last visited August 14, 2025).

1644046, at *11 (quoting *TikTok Inc. v. Garland*, 145 S.Ct. 57, 75 (2025) (Gorsuch, J., concurring)). The Court should reject Plaintiff's attempt to substitute its judgment for that of the State's elected officials, particularly given the "ample scope of regulatory authority" retained by the State. *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989).

Plaintiff also argues at length that the Act does not satisfy *Central Hudson*'s third and fourth prongs because of the exceptions set forth in § 349-a(1)(d) and (3). MOL at 15-16. But *Vugo* forecloses Plaintiff's argument. The Second Circuit held that the City of New York's exception to the in-ride advertisement ban for a single company, Taxi TV, did not render the ban underinclusive. 931 F.3d at 53-58. As in *Vugo*, Plaintiff fails to establish that the exceptions to § 349-a(2) "reveal[ ] that the government is disfavoring a particular speaker" or compromise the validity of the State's asserted interest in requiring the disclosure. *Id.* at 56-57. Insurance companies and financial institutions are already heavily regulated and subject to existing disclosure requirements. D'Angelo Decl. at ¶9. Moreover, the exception for rideshare companies is reasonable, as customers are aware that they will see the price for the distance traveled. *Id.* at ¶8. The exception for existing subscription-based contracts is similarly reasonable and is narrowly limited to cases where the prices offered are below an existing subscription agreement or contract. *Id.* at ¶10.

Plaintiff's remaining arguments are also meritless. Plaintiff claims the Act is overinclusive by defining algorithmic pricing to encompass "typical" discounting practice. MOL at 15-16. But in many cases, the discounts and "coupons" offered to customers using algorithmic pricing are anything but typical. *Supra* at 3-4. It is also well-settled that overbreadth challenges to commercial speech restrictions may be brought only if the overbreadth "reach[es] some noncommercial speech." *Fox*, 492 U.S. at 482. Plaintiff does not attempt to make this showing.

Finally, Plaintiff asserts that "existing law" provides a "less restrictive alternative" for the State to address price gouging or discrimination. MOL at 16. But the harm to consumers caused by algorithmic pricing is not solely limited to price gouging and discrimination. *Supra* at 3-6. In addition, the Supreme Court has rejected any "least-restrictive-means" requirement in order to "provide the Legislative and Executive Branches needed leeway in a field (commercial speech) traditionally subject to governmental regulation." *Fox*, 492 U.S. at 480-81 (cleaned up). Because the State's "determination…about how to regulate [algorithmic pricing] is reasonable," *Vugo*, 931 F.3d at 54 (cleaned up), Plaintiff's assertion that the State should enforce existing law is unavailing.[11] Nor can Plaintiff dispute that the disclosure requirement "preserves alternative channels for the speech at issue." *Expressions Hair Design*, 877 F.3d at 105 (cleaned up).

D. Plaintiff Cannot Establish That the Act Should be Enjoined on its Face

Plaintiff urges the Court to enjoin the Act not only as applied to its members, but in *all* of its applications. MOL at 24-25. In First Amendment cases, the Supreme Court has imposed a "rigorous standard" whereby a law will be determined to be facially unconstitutional "only if the law's unconstitutional applications substantially outweigh its constitutional ones." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723-24 (2024). Plaintiff's extraordinary request to enjoin the Act

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[11] Plaintiff's reliance upon *Riley v. Nat'l Federation of Blind of N. C., Inc.*, 487 U.S. 781, 796 (1988) is misleading, as the challenged solicitation statute was "inextricably intertwined" with fully protected speech, and subject to strict scrutiny. Plaintiff's citation to *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 280 (2d Cir. 2010), *aff'd*, 564 U.S. 552 (2011), is also misplaced, as Vermont's outright ban on promoting prescription drugs using prescriber data is not remotely comparable to the disclosure requirement in § 349-a(2), and the discussion of "less-speech restrictive" alternatives is thus inapposite. In *N.Y. State Ass'n of Realtors, Inc. v. Shaffer,* 27 F.3d 834, 844 (2d Cir.1994), the Second Circuit faulted the Secretary of State for failing to consider "whether less restrictive measures, such as the implementation of cease and desist orders" could combat "blockbusting," which is likewise inapposite to this case.

in its entirety, before Defendant has even commenced enforcement, does not come close to satisfying this standard.

Plaintiff asserts that "[e]very application of the Act is unconstitutional" under "any level of review." MOL at 25. Not a scintilla of evidence is cited in support of this sweeping assertion. Plaintiff simply rehashes its argument that the Act fails to address a "real problem," which is baseless for the reasons discussed above. In addition, Plaintiff misstates decades of precedent by claiming the State must show the Act is "narrowly tailored" under "any level of review." *Id.*

In essence, Plaintiff maintains that the retailers and companies that have been exposed for utilizing personal data to exploit their customers did nothing wrong. Plaintiff is certainly entitled to laud these organizations at its annual "Big Show" for "creating a culture of care, growth and winning together" if it so wishes. Soltes, *supra*. But what Plaintiff *cannot* do is mount a facial challenge to the Act under the First Amendment in order to shield them from legal scrutiny. Accordingly, Plaintiff's motion should be denied.

II. THE REMAINING PRELIMINARY INJUNCTION FACTORS WEIGH DECISIVELY IN DEFENDANT'S FAVOR

Plaintiff's motion fails to establish that its members will be irreparably harmed absent the "extraordinary and drastic remedy" being sought. *Mazurek*, 520 U.S. at 972. First, Plaintiff asserts that its establishment of a likelihood of success on its First Amendment claim demonstrates irreparable harm. MOL at 25. Because Plaintiff fails to make this showing, as detailed above, it "has likewise failed to establish an irreparable harm." *CRN*, 2024 WL 1700036, at *9.

Nor is there merit to Plaintiff's assertion that its members will incur harm to their "reputation and goodwill" with customers. MOL at 25-26. The conclusory declarations of Plaintiff's members fail to demonstrate that the purported loss of goodwill will threaten the "very viability of the [members'] business" to constitute irreparable harm. *Khan v. Addy's BBQ LLC*, 419

F. Supp. 3d 538, 562 (E.D.N.Y. 2019) (cleaned up). It is also well-settled that the "ordinary compliance costs" of government regulations are "typically insufficient to constitute irreparable harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) (collecting cases). Plaintiff's assertion that it would be precluded by sovereign immunity from recovering damages (MOL at 26) is thus unavailing. Moreover, Plaintiff's claim that its members will be irreparably harmed if they choose not to comply with the Act and incur the statutory fine is misplaced. MOL at 26. Under the Act, Defendant first issues a cease-and-desist letter with a "designated timeline" to cure the statutory violation. G.B.L. § 349-a(4). It is only if the violation continues that Defendant can apply for an injunction and imposition of the statutory fine. *Id.*

Finally, the equities and public interest counsel strongly against a preliminary injunction. *See N.Y. State Restaurant Ass'n v. N.Y. City Bd. of Health*, 545 F. Supp. 2d 363, 368 (S.D.N.Y. 2008), *aff'd*, 556 F.3d 114 (2d Cir. 2009) ("The public interest…in enforcement of legislation enacted in the public interest, weigh[s] heavily against granting a stay of enforcement."); *Maryland v. King*, 567 U.S. 1301, *3 (2012) (Roberts, C.J., in chambers). Because the purported harms to Plaintiff's members "pale in comparison to the State's goal" of informing consumers about the harms of algorithmic pricing, it "would be unquestionably against the public interest to impede enforcement of" the Act. *CRN*, 2024 WL 1700036, at *10.

CONCLUSION

For the reasons set forth above, Defendant respectfully requests that the Court deny Plaintiff's motion, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
August 18, 2025

Respectfully submitted,
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CERTIFICATION

In accordance with Rule 7.1(c) of the Local Rules of the Southern and Eastern Districts of New York, I hereby certify that Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction contains 7,797 words, exclusive of the caption, table of contents, table of authorities, and signature block, as established using the word count function of Microsoft Word.

______/s/__________________________
Yuval Rubinstein