

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-05500

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS THE COMPLAINT**

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INTRODUCTION

Plaintiff National Retail Federation (NRF)’s complaint contains plausible allegations that the Algorithmic Pricing Disclosure Act, N.Y. Gen. Bus. Law § 349-a, abridges protected speech—a fact the State concedes. The Complaint also adequately pleads facts sufficient to infer that the State cannot justify that abridgement under any level of First Amendment scrutiny. Nothing more is required to deny the State’s motion to dismiss. In seeking dismissal, the State misstates and misapplies the relevant legal standard and raises *factual* objections to NRF’s allegation that the Act lacks constitutional justification. Those are a distraction: the sufficiency of the State’s justifications for the Act—which it bears the burden of proving—will depend on the evidence it marshals. NRF cannot imagine that such evidence exists, but in any event, that evidence is irrelevant to the State’s motion to dismiss, which must be denied.

BACKGROUND

A. NRF members use algorithmic pricing to offer lower prices.

Competitive prices are imperative in the retail sector. Members of NRF—the world’s largest retail trade association—accordingly use data shared by their customers to deliver personalized discounts, promotions, and recommendations. ECF No. 8 (Compl.) ¶¶ 3, 10. Tailoring promotions to consumers based on their buying habits and other voluntarily disclosed information is nothing new. *Id.* ¶¶ 12–13. Groceries and drug stores have long offered coupons at checkout for items similar to those purchased; gas stations offer free car washes to certain credit card holders; and coffee shops offer rewards cards giving repeat customers free coffee every tenth cup. *Id.* These targeted promotions help consumers save money and allow retailers to clear their inventory and encourage customers to purchase products they have enjoyed or might enjoy. *Id.*

So-called “algorithmic pricing” permits retailers to offer similar promotions in more sophisticated ways and on a larger scale. *Id.* Pricing algorithms are computer programs that analyze

data. *Id.* ¶ 11. They operate by following instructions developed by humans that reflect human judgments. *Id.* Many large online retailers, for example, use non-sensitive customer data to deliver personalized deals, discounts, and shopping experiences—adapting longstanding retail practices to the 21st century. *Id.* ¶¶ 10–13. An online retailer with surplus stock of a particular shoe might use an algorithm to discount the price of the shoe for customers who have purchased that brand before. *Id.* ¶ 11. A brick-and-mortar bookstore might use an algorithm to analyze sales records to determine which customers tend to enjoy political thrillers and then send those customers an offer to buy a specially priced bundle of novels in that genre. *Id.* By analyzing customer inputs like purchase history, regional location, and demonstrated interest, pricing algorithms help companies offer promotions, adjust pricing, and reward customer loyalty in ways that would otherwise be difficult to do at scale. *Id.* ¶¶ 10–13. Thus, while the phrase “algorithmic pricing” is sometimes used to refer to impermissible or undesirable price discrimination, it also encompasses a large range of industry tools designed to help consumers. *Id.*

Importantly, as the Complaint alleges, algorithmic pricing in the aggregate *lowers* overall prices. Studies have consistently shown that such pricing plays a powerful role in driving down prices for consumers because algorithms allow companies to be more responsive to supply and demand and to optimize pricing to reflect market conditions. *Id.* ¶¶ 14–15.

B. New York enacts the Algorithmic Pricing Disclosure Act.

Governor Kathleen Hochul signed the Act into law on May 9, 2025. Compl. ¶ 16.

Compelled Disclosure. The Act requires covered retailers who advertise to New York consumers to place a conspicuous, consumer-facing disclosure next to all qualifying products and services stating:

THIS PRICE WAS SET BY AN ALGORITHM USING YOUR
PERSONAL DATA.

NYGBL § 349-a(2). The mandate applies not just to main product listings that display a list price, but arguably even to compact banner ads, tiny thumbnails, and any notification, alert, pop-up, or other display that shows a product and a price. *Id.*

Scope. The Act sweeps broadly—but is simultaneously replete with arbitrary exemptions. It generally applies to any “entity that sets the price of a specific good or service using personalized algorithmic pricing” and that, “directly or indirectly, advertises, promotes, labels or publishes” that price to a New York consumer “using personal data specific to such consumer.” *Id.* It requires that the disclosure appear alongside the published price of all goods or services generated using algorithmic pricing, in a “clear and conspicuous” format. *Id.* “Clear and conspicuous” means that the disclosure must appear “in the same medium as, and provided on, at, or near and contemporaneous with every” display or announcement of the price, “using lettering and wording that is easily visible and understandable to the average consumer.” *Id.* § 349-a(1)(b).

The Act reaches a range of garden-variety pricing practices. “Personalized algorithmic pricing” means “dynamic pricing set by an algorithm that uses personal data.” *Id.* § 349-a(1)(f). “Algorithm” is any “computational automated process” using rules to define operations. *Id.* § 349-a(1)(a). “Personal data” encompasses any information that “identifies or could reasonably be linked, directly or indirectly, with a specific consumer or device.” *Id.* § 349-a(1)(d). “Dynamic pricing” refers to pricing that “fluctuates depending on conditions.” *Id.* § 349-a(1)(e).

At the same time, the Act exempts four categories that seemingly bear no logical connection to each other or to the Act’s ostensible purpose: prices displayed for (i) local delivery, ride-share, and taxi services that use location data (but no other data) to calculate trip pricing; (ii) consumer insurance products; (iii) consumer financial products and services sold by most banks and other specified financial services companies; and (iv) goods sold under a subscription-based

agreement if the price displayed is “less than the price for the same good or service set forth in the subscription-based agreement.” NYGBL §§ 349-a(1)(d), (3). The Act contains no reason for treating these categories any differently from others.

As the Complaint details, the Act’s requirements are thus far-ranging and onerous. Retailers’ pricing algorithms use information voluntarily shared by customers, so the Act may apply to the sale of almost any product. The State does not dispute that—because the Act requires the mandated disclosure to be provided “contemporaneous with every advertisement, display, image, offer or announcement of a price,” NYGBL § 349-a(1)(b)—the Act likely will require retailers to place the warning not only on product pages and mobile apps, but also on search result pages, on “suggested product” pages, in the customer’s cart, and on advertisements for products hosted on third-party websites. Compl. ¶ 24.¹

Legislative History. The Act’s legislative history is sparse. The Legislature passed the Act less than two months after its introduction, with little deliberation, no fact finding, and relying on a recent, incomplete study by Federal Trade Commission staff that the agency abandoned less than six months after it began. Compl. ¶ 21. That terminated study resulted in the unprecedented publication of “initial observations” and “research summaries” by “FTC staff” over the dissent of two FTC Commissioners. *Id.* The summaries, which even the FTC staff admitted were incomplete, contain nothing to suggest consumers are deceived, confused, misled, or harmed by algorithmic pricing. *Id.* And as both the FTC and New York State legislators acknowledge, the report left

¹ The Act also applies to discounts offered to members of NRF retailers’ price and loyalty clubs. Although the Act includes an exception for prices offered to consumers based on subscriptions, the exception encompasses only discounted prices for goods or services that are “set forth in the subscription-based agreement or subscription-based contract.” NYGBL § 349-a(3)(d). Retailers’ loyalty member agreements, however, do not always set forth specific static prices or discounts before sale. Compl. ¶ 25. Offering discounts to members of such programs would thus likely require the mandated disclosure. *Id.*

“more work” to be done. *Id.* The legislature in passing the Act nevertheless appears to have relied on these efforts. ECF No. 21 (Mot.) 11. Nothing in the Act or legislative record provides evidence that the Act addresses any real consumer injuries. Compl. ¶ 21. The Act makes no findings, the legislature held no substantive hearings, and there is thus no legislative record to substantiate the Act’s apparent assumptions. *Id.*

Enforcement. The Act was to take effect July 8, 2025. *See* S.B. 3008, ch. 58, pt. X § 4, 248th Leg. Reg. Sess. (N.Y. 2025). To enforce the Act, the Attorney General must first send a cease-and-desist letter identifying alleged violations, and if the target does not cure them within the timeframe the Attorney General sets, she may seek injunctive relief and penalties of up to \$1,000 per violation. NYGBL § 349-a(4). A single product displayed to just 1,000 customers without the disclosure thus exposes a business to a \$1 million penalty.

C. The Act harms NRF members and their consumers.

The Complaint plausibly alleges that, absent relief, NRF members will be forced to endorse a baseless government opinion at war with their own convictions, misrepresent their actual practices, risk losing consumer trust, and incur non-recoverable and ongoing compliance costs.

First, the Act will force NRF members and other covered businesses to express an opinion about how they operate even if they fundamentally disagree with that opinion, and even if they believe that message will mislead or confuse customers. Compl. ¶¶ 1, 23, 33. Putting aside the effects of that message on customers, NRF members will be injured by being forced to speak the Government’s message despite their disagreement with that message. *Id.*

Second, NRF members will incur substantial costs to ensure this disclosure appears for millions of customers, for countless products, and in the wide array of places mandated. *Id.* ¶¶ 23–24. And because the Act applies only to New York consumers, NRF members will have to develop

technology to create a virtual boundary around New York to determine to whom it needs to publish the disclosure. *Id.* ¶ 24.

Third, the Act will require *removal* of NRF members’ own speech. The pixel space on any given online product page is valuable real estate. *Id.* ¶ 27. The nature of the “conspicuous” mandated disclosure means that retailers will have to surrender a significant amount of that space, and to do so for every mention of the product across the internet. *Id.*

Finally—and perhaps most importantly—NRF members reasonably fear that the mandated disclosure will mislead consumers about the types of data retailers use to calculate prices and the effect of that use on product prices. Upon seeing the disclosure, consumers will naturally—but falsely—conclude that the NRF member relied on *sensitive* personal information (e.g., age, gender, race, credit score, income level) in setting price. *Id.* ¶ 26. Furthermore, consumers will naturally—but again falsely—conclude that this information was used to *increase* prices. *Id.* These misconceptions will result from the imprecise and decontextualized nature of the mandatory notice, undermining the hard-earned trust that consumers place in NRF retailers. *Id.*

D. NRF files this action and moves for a preliminary injunction.

NRF filed the Complaint and a motion for preliminary injunction (ECF No. 9) on July 2, 2025. As reflected by a July 14 filing, the State agreed to stay enforcement of the Act until thirty days after this Court’s final order on Plaintiff’s motion for a preliminary injunction. ECF No. 16. The State moved to dismiss the Complaint on July 28, 2025. ECF No. 20. Oral argument on the motion to dismiss and NRF’s motion for a preliminary injunction is set for September 10, 2025.

ARGUMENT

A motion to dismiss under Rule 12(b)(6) must be denied if a complaint contains sufficient factual matter that, if accepted as true, states a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). As the State concedes (Mot. 5), the Court must assume all well-

pleaded factual allegations to be true, draw all reasonable inferences in Plaintiff’s favor, and determine whether the complaint plausibly alleges an entitlement to relief given those inferences and allegations. *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011).

That standard of review is dispositive here because NRF challenges an Act that even the State admits regulates speech and thus triggers at least *some* form of “heightened judicial scrutiny.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557, 565 (2011). Once a plaintiff demonstrates that there is any regulation of speech, “the focus ... shifts to the defendant to show that its actions were nonetheless justified and tailored.” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524, 524 (2022). Dismissal on a motion to dismiss is “rarely, if ever” warranted in such cases because “factual development” is necessary to assess whether a challenged law “is constitutionally permissible.” *Cornelio v. Connecticut*, 32 F.4th 160, 172 (2d Cir. 2022).

It does not matter for present purposes whether—as NRF claims—the Act is subject to intermediate scrutiny under *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557 (1980), or if—as the State claims—it is subject to more-deferential scrutiny under *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).² “Rather than wading through the bog to determine exactly what level of scrutiny should be applied, and what constitutional protection there is,” this Court should instead simply hold that NRF “enjoys *enough* First Amendment protection to overcome [the State’s] motion to dismiss.” *Randall v. Scott*, 610 F.3d 701, 710 (11th Cir. 2010). Under either standard, NRF plausibly alleges the Act fails review, a conclusion evident from the State’s attempt to dispute NRF’s well-pled allegations by asserting putatively contradictory facts. *See Courthouse News Serv. v. Quinlan*, 32 F.4th 15, 21 (1st Cir.

² NRF preserves its argument (Compl. ¶ 30) that strict scrutiny applies. *See* ECF No. 9-1 (PI Mot.) 11 & n.5.

2022) (no need to “determine which standard applies because the plaintiffs have plausibly alleged a First Amendment violation under even the less demanding test”).

The Court should deny the motion.

I. NRF Has Plausibly Alleged The Act Fails The *Zauderer* Test.

The State’s motion relies on application of the *Zauderer* standard, which it mischaracterizes as rational basis review. *See* Mot. 13–15. But *Zauderer* is “far more stringent than mere rational basis review.” *Am. Meat Inst. v. USDA*, 760 F.3d 18, 33 (D.C. Cir. 2014) (Kavanaugh, J., concurring).

A compelled disclosure only survives *Zauderer* if it “is neither unjustified nor unduly burdensome.” *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 776 (2018) (*NIFLA*). Critically, that is a burden the State (not NRF) must ultimately satisfy. *Id.* Much like intermediate scrutiny, *Zauderer* requires the State to show that the law will “remedy a harm that is ‘potentially real, not purely hypothetical[.]’” *Id.* at 776 (citation omitted); *see also id.* at 799 (Breyer, J., dissenting) (criticizing majority for interpreting *Zauderer* to require “searching standard” approximating intermediate scrutiny). It also requires the State to show that the compelled disclosure is narrowly tailored to sweep no more “broad[ly] than reasonably necessary,” and not so pierced with exemptions that it renders the law “disconnected from” the government’s putative interest. *Id.* at 776–78. The State does not mention *NIFLA* at all, even though that is the Supreme Court’s most recent, detailed, and controlling elaboration of what *Zauderer* requires. And while the Second Circuit has compared the *Zauderer* test “to a level of scrutiny *resembling* rational basis review[.]” *CompassCare v. Hochul*, 125 F.4th 49, 64 (2d Cir. 2025) (emphasis added), its most recent statement on the subject makes clear that, despite this old label, “aspects of the *Zauderer*

analysis are arguably more stringent than traditional rational basis review.” *Volokh v. James*, --- F.4th ---, 2025 WL 2177513, at *7 n.6 (2d Cir. Aug. 1, 2025).³

Assuming *Zauderer* applies, NRF has plausibly alleged that the disclosure requirement is unjustified and unduly burdensome. See *Cornelio*, 32 F.4th at 175 (denying motion to dismiss where plaintiff “plausibly allege[d] that the disclosure requirement is overbroad”). “[T]he party invoking the First Amendment need only plead facts that, if substantiated, would establish the opposing party’s liability.” *Brooklyn Branch of NAACP v. Kosinski*, 657 F. Supp. 3d 504, 520 (S.D.N.Y. 2023); see also *Brown v. District of Columbia*, 390 F. Supp. 3d 114, 126–27 (D.D.C. 2019) (Brown Jackson, J.) (motion to dismiss arguing that scrutiny was satisfied was premature).

A. NRF has plausibly alleged the disclosure requirement is unjustified.

Under *Zauderer*, a compelled disclosure is justified only if it will “remedy a harm that is potentially real, not purely hypothetical[.]” *NIFLA*, 585 U.S. at 776–77 (internal quotation marks and citation omitted). “[P]rophylactic rules” are not enough. *Id.* at 776 (citation omitted). Nor are unsubstantiated claims that the public may be misled. See *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 73 (2d Cir. 1996). Mere “consumer curiosity[.]” too, is insufficient “to sustain the compulsion of even an accurate, factual statement.” *Id.* at 74 (disclosure would have failed *Zauderer*). Thus, in *NIFLA*, the Supreme Court held that the government could not justify a requirement that unlicensed crisis pregnancy centers disclose that they are unlicensed because the

³ The Second Circuit’s “rational basis” label derives from cases decided before “the Supreme Court ... specified a governing framework that determines when *Zauderer*’s less-exacting standard should apply instead of *Central Hudson*’s intermediate scrutiny.” *Expressions Hair Design v. Schneiderman*, 877 F.3d 99, 103–04 (2d Cir. 2017). The Court’s decision in *NIFLA*, 585 U.S. at 776–78, provides that framework—and clarifies that *Zauderer* is not rational basis review. But even if this Court were to find that rational basis review applies, the motion should still be denied. See, e.g., *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1184 (10th Cir. 2009) (refusing dismissal on pleadings because “[w]hether the plaintiffs can marshal enough evidence to prevail on the merits of their claim that the Ordinance is irrational is a different matter entirely”).

government “point[ed] to nothing suggesting that pregnant women do not already know that the covered facilities are staffed by unlicensed medical professionals.” 585 U.S. at 777; *see also, e.g., Ibanez v. Fla. Dep’t of Bus. & Prof. Regul., Bd. of Accountancy*, 512 U.S. 136, 145 (1994) (invalidating law requiring certified financial planners to disclose that they were accredited by a private organization because there was no evidence the public might otherwise be harmed); *Hayes v. N.Y. Att’y Grievance Comm.*, 672 F.3d 158, 167 (2d Cir. 2012) (applying *Ibanez* to invalidate compelled disclosure for similar reason).

The Complaint plausibly pleads that the Act is unjustified. The Complaint alleges that the disclosure requirement is “driven by transparency goals untethered from any evidence of real, cognizable harms or of actual consumer deception.” Compl. ¶ 36. It also alleges—and the State does not dispute—that the Act contains no findings, the legislature held no substantive hearings, and there is thus no legislative record to substantiate the Act’s apparent assumptions. *Id.* ¶ 21.

The State claims the FTC staff study on which it relied “emphasized that algorithmic pricing *can* lead to consumers being charged different prices for the same products and services and *potentially* being subjected to discriminatory pricing.” Mot. 11 (emphasis added). But NRF does not rely solely on the inadequacies of the FTC staff study to allege the Act is unjustified. As the Complaint also alleges, for example, independent, peer-reviewed studies confirm that price-setting algorithms generally benefit consumers in the aggregate by increasing market efficiency, lowering prices, increasing output, and decreasing companies’ abilities to collude. *Id.* ¶ 15. In any event, the study’s use of the terms “can” and “potentially”—combined with the admission of the FTC staff that authored the study that it comprises only “initial observations” and “[r]esearch [s]ummaries,” and “do[es] not necessarily reflect the views of the Commission”—shows that the State’s concerns are hypothetical. *FTC Surveillance Pricing 6(b) Study: Research Summaries: A*

Staff Perspective, at 1 n.2 (Jan. 2025) (cited Compl. ¶ 21). The State cannot regulate commercial speech prophylactically like this, *NIFLA*, 585 U.S. at 776, hoping a justification for a regulation materializes down the road. Cf. *IMDb.com, Inc. v. Becerra*, 257 F. Supp. 3d 1099, 1102 (N.D. Cal. 2017) (government may not “go fishing for a justification” after “having failed to present any colorable argument or evidence in support of the notion that its speech restriction is actually necessary”), *aff’d*, 962 F.3d 1111 (9th Cir. 2020).

The State also relies heavily on a five-paragraph, unpublished, summary order from the Second Circuit holding a law survived *Zauderer* review, *Poughkeepsie Supermarket Corp. v. Dutchess County*, 648 F. App’x 156 (2d Cir. 2016). See Mot. 6–8, 11–12, 14. That case is easily distinguishable. There, the plaintiff challenged a more-than-decade-old law that the plaintiff conceded was justified by “a rational basis at the time” it was enacted. *Poughkeepsie Supermkt. Corp. v. County of Dutchess*, 140 F. Supp. 3d 309, 316 (S.D.N.Y. 2015). The plaintiff never alleged that the compelled disclosure was not factual or controversial, conceding *Zauderer* applied. And in any event, *Poughkeepsie* predates the Supreme Court’s articulation of the *Zauderer* test in *NIFLA*, and conflicts with both that decision and *Volokh*, 2025 WL 2177513, at *7 n.6. See, e.g., *Pinter v. City of New York*, 976 F. Supp. 2d 539, 557 (S.D.N.Y. 2013) (refusing to follow unpublished decision given later conflicting, published case “provides a thorough, binding, directly on-point analysis”).

The other cases on which the State relies, Mot. 9–12, do not help it. They were decided on the more stringent standard applicable to preliminary injunction motions, *Melendez v. City of New York*, 16 F.4th 992, 1040 n.70 (2d Cir. 2021) (emphasizing difference), reflected evidence of the alleged government interest, or else involved no dispute as to that interest. See, e.g., *Conn. Bar Ass’n v. United States*, 620 F.3d 81, 97 (2d Cir. 2010) (dismissal affirmed where evidence

“uniformly support[ed]” that the law was enacted “against a backdrop of *documented* confusion and deception” of consumers, and plaintiffs themselves “confirm[ed] the persistence of the [government’s] identified concern”); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (*NEMA*) (denying preliminary injunction where plaintiff did not contest government’s interest in consumer safety and only contended it was unrelated to mitigating deception); *SEC v. City of Rochester*, 731 F. Supp. 3d 455, 473–74 (W.D.N.Y. 2024) (no dispute disclosures provided “necessary” information).

Whether *Zauderer* or a higher standard of scrutiny is eventually held to apply, the State may not overcome the Complaint’s well-pleaded allegations that the Act is unjustified by “simply ‘posit[ing] the existence of the disease sought to be cured.’” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (citation omitted); *NIFLA*, 585 U.S. at 776 (harm to be averted must be “real, not purely hypothetical”).

B. The Complaint adequately alleges that the Act is unduly burdensome.

Under *Zauderer*, a compelled commercial disclosure is also impermissible—even if there is an adequate justification for regulating in the abstract—if the disclosure is unduly burdensome and not narrowly tailored. That means it must not extend more “broad[ly] than reasonably necessary,” “drown[] out” a covered speaker’s message, or target a “curiously narrow subset of speakers” such that the disclosure is “wholly disconnected from” the regulator’s “informational interest.” *NIFLA*, 585 U.S. at 776–78. The Complaint plausibly alleges that the Act fails this prong of *Zauderer* review for all three reasons.

First, the Complaint alleges the law is broader than necessary because it compels a damning warning “no matter what,” *id.* at 777, even though algorithmic pricing yields lower prices in the aggregate. Compl. ¶¶ 15, 33. The State does not dispute this fact and instead claims retailers can “convey additional information” to dispel the misrepresentation. Mot. 12. But that is a factual

assertion that contradicts the Complaint, which alleges retailers lack adequate space for the Government's compelled disclosure. *See* Compl. ¶ 27. This allegation, in turn, creates the inference that retailers also will not have space for any "additional" information. *See id.* (retailers "will have to surrender a significant amount of space" to the disclosure).

Second, the Complaint alleges that the law tends to displace covered retailers' own speech because its placement and formatting requirements force retailers to sacrifice valuable pixel space to fit the required message everywhere prices are displayed, including in crowded product listing pages and thumbnails. *Id.* ¶¶ 27, 36. The State deems these objections "aesthetic" and claims the disclosure would not displace retailers' speech. Mot. 12–13. At this stage, however, the Court must assume the truth of NRF's allegations. *See Cornelio*, 32 F.4th at 172; *see also, e.g., NIFLA*, 585 U.S. at 778 ("29-word statement" would drown out message); *Ibanez*, 512 U.S. at 146 (level of "detail required" by mandated notice effectively "rul[ed] out" speaker's preferred message).

Third, the Complaint alleges that the Act is fatally underinclusive because it targets an arbitrary subset of speakers while exempting banks, credit unions, brokerage firms, insurance companies, and ride-hailing services without explanation, Compl. ¶¶ 20, 30, 32, "even though the latter [are] no less likely" to present the risks the government asserts justify the Act, *NIFLA*, 585 U.S. at 777. The State claims that a commercial disclosure requirement need not "get at all facets of the problem it is designed to ameliorate." *Zauderer*, 471 U.S. at 651, n.14 (Mot. 13 n.6). NRF does not claim otherwise. Rather, NRF plausibly alleges that the Act is so *grossly* underinclusive that it will not advance the State's interests because it "covers a curiously narrow subset of speakers," *NIFLA*, 585 U.S. at 777—exempting banks and insurance companies, for example, that pose the same risks the State asserts but that handle far more sensitive consumer information. *See*

Compl. ¶¶ 20, 30, 32. In *NIFLA*, the Supreme Court held that such irrational “speaker-based” exemptions fail *Zauderer*. *NIFLA*, 585 U.S. at 777.

The State’s reliance on the *Poughkeepsie*, 648 F. App’x 156 (Mot. 6–7), fails on this point, too. Unlike NRF, the *Poughkeepsie* plaintiff did not allege that the forced disclosure regulated more speech “than reasonably necessary” or targeted a “narrow subset of speakers,” *NIFLA*, 585 U.S. at 776–78, but rather only that placing price labels on every item offered for sale would require it to “expend and waste” resources. Second Am. Compl., *Poughkeepsie Supermkt. Corp. v. Dutchess County*, No. 7:14-cv-01702-CS, ECF No. 16 ¶¶ 17–18 (S.D.N.Y. Dec. 1, 2014).

II. NRF Plausibly Alleges The Act Is Subject To And Fails Intermediate Scrutiny.

The Court need not decide what level of scrutiny applies to deny the State’s motion since NRF states a claim even under *Zauderer*. *See supra* Part I. But were the Court to reach that question, the Complaint also adequately alleges facts that, if proven, demonstrate that the Act is subject to and fails intermediate scrutiny. *See Lowe v. Mills*, 68 F.4th 706, 717–18 (1st Cir. 2023) (deeming allegations to trigger strict scrutiny at the pleading stage where plausibly pled).

A. The Complaint adequately pleads that intermediate scrutiny applies.

NRF alleges that the Act is subject to at least intermediate scrutiny for two independent reasons: first, the Act treats commercial speakers differently based on the subject matter of their advertisements; and second, the Act compels commercial speech without qualifying for the modified standard set forth in *Zauderer*. The State offers no good response.

1. Intermediate scrutiny applies because the Act mandates disparate treatment based on subject matter.

The Act is subject to at least intermediate scrutiny because—as NRF alleges, Compl. ¶¶ 2, 20, 30–32—it singles out a class of speakers for differential treatment based on the subject matter of their speech. *See Sorrell*, 564 U.S. at 563–66, 571 (applying “heightened scrutiny” to invalidate

law imposing “content-and-speaker-based restrictions” on commercial speech). This principle applies equally to commercial speech, *id.* at 566, because “[t]he vice of content-based legislation” is that it can be used for censorship in every case. *Reed v. Town of Gilbert*, 576 U.S. 155, 167 (2015) (expressing concern that “government officials may one day wield such statutes to suppress disfavored speech”); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425 n.20, 429 (1993) (“disparate treatment of two types of commercial speech” is governed by at least intermediate scrutiny). Thus, in *Sorrell*, the Supreme Court held that *at least* intermediate scrutiny applied to a Vermont law barring pharmacies from publishing information to drugmakers for marketing purposes, when that law exempted dissemination for other purposes to other recipients. 564 U.S. at 563–64; *see also, e.g., U.S. Chamber of Com. v. Lierman*, --- F. 4th ---, 2025 WL 2371034, at *7 (4th Cir. Aug. 15, 2025) (at least intermediate scrutiny applies to “‘content-based burden[s]’ on commercial speech”) (citation omitted).

The Act exempts some or all advertisements from certain retailers—including those selling insurance, financial services, ride-hailing services, as well as those offering particular kinds of memberships that use preset prices, NYGBL §§ 349-a(1)(d), (3)—even though the State’s (baseless) concerns would logically apply equally to their advertising, Compl. ¶¶ 2, 20, 30–32. Singling out other retailers for regulation “favors speech made for” some purposes over others based on its subject matter and renders the Act “a content-based restriction on speech.” *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 591 U.S. 610, 618–19, 620 (2020) (plurality op.) (law exempting robocalls from regulation depending on speaker and message was content-based) (applying *Reed*, 576 U.S. at 169).

The State does not and cannot deny that the Act singles out commercial speakers based on the subject matter of their speech, stating only that this cannot mean that *strict* scrutiny applies.

Mot. 13. NRF disagrees. *See* PI Mot. 11 & n.5. But for present purposes, that dispute is irrelevant. NRF at minimum states a claim that triggers the application of intermediate scrutiny under *Sorrell*, 564 U.S. at 563–66, 571, and *Discovery Network*, 507 U.S. at 425 n.20, 429.

2. NRF has alleged plausible facts that, if true, preclude application of *Zauderer*.

Zauderer review applies (1) only to regulations of deceptive advertising, where the government requires (2) the publication of “purely factual” and (3) “uncontroversial” corrective disclosures. 471 U.S. at 651. NRF has adequately alleged that the Act fails all three requirements, meaning at least intermediate scrutiny applies.

The mandatory disclosure bears no relationship to deceptive advertising. The Complaint plausibly alleges the Act does not seek to correct misleading or deceptive commercial speech. Compl. ¶¶ 21, 35. The State does not dispute this, instead arguing that *Zauderer* is not confined to regulations of deceptive advertising. Mot. 8. That is nonsense. As the Second Circuit has held, *Zauderer* applies only where “disclosure requirements are reasonably related to ... preventing deception.” *CompassCare*, 125 F.4th at 64. The Supreme Court has reiterated this twice. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) (*Zauderer* applies only to mitigate commercial speech with “a tendency to mislead”); *NIFLA*, 585 U.S. at 776. The cases (Mot. 8) on which the State relies—*NEMA*, 272 F.3d at 115, and *NYSRA v. New York City Board of Health*, 556 F.3d 114 (2d Cir. 2009)—predate these decisions. They also predate the Second Circuit’s decisions in *CompassCare*, 125 F.4th at 64, and *Connecticut Bar Association v. United States*, which cite *Milavetz* in holding *Zauderer* applies only to disclosures “reasonably related to the State’s interest in preventing deception,” 620 F.3d at 92 n.14; *see also Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 264 (2d Cir. 2014) (Mot. 14–15) (applying *intermediate* scrutiny where disclosure did not involve deception).

The mandatory disclosure is misleading, not purely factual. A statement is not “purely factual” where it is “literally true but nonetheless misleading and, in that sense, untrue.” *Nat’l Ass’n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1276 (9th Cir. 2023) (internal quotation marks and citation omitted). Indeed, sometimes “the surest way to convey misinformation is to tell the strict truth.” *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 528–29 & n.28 (D.C. Cir. 2015) (internal quotation marks and citation omitted). Whether a compelled disclosure is misleading requires evaluating “the totality of the warning” and its “overall message” in context. *Wheat Growers*, 85 F.4th at 1276–77, 1279 (compelled warning not purely factual where it gave “unsubstantiated” impression of danger); *see also Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 479 (9th Cir. 2022) (same). Here, NRF alleges that the required disclosure is misleading in context because the undefined terms “personal data” and “algorithm” in the mandatory disclosure falsely imply that the price to which that disclosure is attached is exploitative and based on sensitive personal information, even when it is not. Compl. ¶¶ 26, 35. These allegations more than plausibly allege an “overall message” that, in its “totality,” has the predictable tendency to mislead. *Wheat Growers*, 85 F.4th at 1276–77, 1279.

The State faults NRF for “speculating” about how consumers will react to a government warning that algorithms are using their personal data. Mot. 9–10. But NRF’s allegations are plausible, and the Court is required to accept them on a motion to dismiss. *See In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 268 (2d Cir. 1993) (whether nondisclosure of fact renders original disclosure misleading was not suitable for decision on the pleadings); *Brooklyn Branch of NAACP*, 657 F. Supp. 3d at 524 (how a message will be perceived “is a fact question that cannot be resolved on a motion to dismiss”); *Hesse v. Godiva Chocolatier, Inc.*, 463 F. Supp. 3d 453, 469–70

(S.D.N.Y. 2020) (same); *Brady v. Anker Innovations Ltd.*, 2020 WL 158760, at *9 n.9 (S.D.N.Y. Jan. 13, 2020) (same).

Neither of the cases the State cites on this point changes the analysis. *Connecticut Bar Association*, 620 F.3d at 98 (cited Mot. 10 & n.5), held that an eight-paragraph, 411-word printed disclosure was factual and not misleading when what the plaintiffs said made it misleading—the omission of a few words about hiring a lawyer, required by another part of the law—undisputedly could have been incorporated into the same handout. Here, NRF has alleged that what makes the Act’s mandatory disclosure misleading are the unalterable terms “personal data” and “algorithms,” which rings a bell that cannot be unringed, and which—even if NRF tried—could not be practically addressed by further disclosure in the cramped pixel space available. Compl. ¶¶ 24–27, 33, 36.

City of Rochester, 731 F. Supp. 3d 455 (Mot. 10), is even farther afield. That case was decided on *summary judgment*, after fact development. Moreover, the court did not even address whether the compelled disclosure was “purely factual,” suggesting only that the plaintiff’s ability to “make clear” its views minimized hypothetical burdens on its speech. *Id.* at 471, 474.

The mandatory disclosure is controversial. A message is controversial under *Zauderer* if it forces the speaker to take sides in a public debate. Thus in *NIFLA*, the Supreme Court declined to apply *Zauderer* when the compelled disclosure forced a business “to convey a message fundamentally at odds with its mission.” *CTIA v. City of Berkeley*, 928 F.3d 832, 845 (9th Cir. 2019). NRF alleges that the Act does just that: it requires businesses that use algorithmic technologies to enter the robust public debate about whether those technologies are harmful, and to credit an insinuation that they are. Compl. ¶¶ 10, 23–26, 35. Although the State disputes that NRF’s allegations implicate a “debate,” Mot. 10 n.5, that is not a Rule 12(b)(6) argument—and is an issue on which the State ultimately carries the burden of proof. *NIFLA*, 585 U.S. at 776.

The State argues the disclosure is not controversial because “rules requiring speakers to disclose facts with which the speakers disagree are consistently found not to offend the First Amendment.” Mot. 8 (citation & internal quotation marks omitted). True, businesses may be forced to disclose facts “they do not want to communicate” when the disclosures are quantities like calorie counts, *NYSRA*, 556 F.3d at 134 (Mot. 9), or copies of enacted legal codes, *CompassCare*, 125 F.4th at 66 (Mot. 9), which speak for themselves. *See Volokh*, 2025 WL 2177513, at *11 (not controversial to require businesses to tell consumers that facts “are what they are”). But the government cannot force a business “to convey a message” with which it “fundamentally disagree[s],” even if it is literally true and concerns a topic as anodyne as product safety. *Wheat Growers*, 85 F.4th at 1277–79.

This concern is amplified where, as here, “science is evolving” and the dangers of relevant practices are still being understood. *Id.* at 1283 (mixed record meant safety warning was controversial); *see Cal. Chamber*, 29 F.4th at 472–74, 478 (safety warning was controversial where business disagreed and government’s evidence was controverted); Compl. ¶ 15. And it is especially acute when the disclosure requires businesses to implicitly inculcate themselves in wrongdoing. *See Nat’l Ass’n of Mfrs.*, 800 F.3d at 530 (requiring a business to condemn itself makes a compelled disclosure “more constitutionally offensive”); Compl. ¶¶ 26, 32–33, 35–36.

B. The Complaint adequately pleads that the Act fails intermediate scrutiny.

Intermediate scrutiny requires the State to show that the Act (1) actually and directly advances a real, non-speculative, and substantial state interest, and (2) regulates no more speech than necessary to achieve that end. *See IMS Health Inc. v. Sorrell*, 630 F.3d 263, 275, 276–77 (2d Cir. 2010), *aff’d*, 564 U.S. 552 (2011). The Complaint plausibly alleges the opposite.

No substantial interest. NRF has adequately alleged that the Act fails to advance a non-speculative interest for the same reasons that it has adequately alleged the Act flunks the first prong

of *Zauderer* review. The legislature was “driven by transparency goals untethered from any evidence of real, cognizable harms or of actual consumer deception.” Compl. ¶¶ 32, 36. *See supra* pp. 9–12. And the original impetus for the Act seems to have been the use of mass surveillance to discriminate on the basis of race and ethnicity, Compl. ¶ 21 n.3–6—a concern far removed from the hypothetical pricing concerns the final Act’s disclosure rule actually targets.

The State defends the Act on the ground that it helps consumers make informed decisions. Mot. 11. But again, that is a factual assertion that cannot be squared with NRF’s allegation that the Act will *mislead* customers, not make them more informed. Compl. ¶¶ 33, 35.

Finally, the Act contains a series of unprincipled exceptions to the notice requirement, calling into doubt the Act’s ability to advance the State’s supposed interests. *Id.* ¶¶ 2, 20, 30, 32. Commercial speech regulations must be “effective.” *Edenfield v. Fane*, 507 U.S. 761, 773 (1993). The Complaint alleges that the Act’s irrational exceptions undercut even its putative aims. *See, e.g., Discovery Network*, 507 U.S. at 418–19 (banning news racks for commercial handbills but not for newspapers was irrational and would yield “minimal impact”); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (commercial speech regulation that exempts important sources of the putative problem does not “materially advance [the government’s] aim”); *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 190 (1999) (same).

No narrow tailoring. NRF has adequately alleged that the Act is not narrowly tailored. The definition of “algorithmic pricing” encompasses not only individualized price *increases*—the (primary, if largely imagined) problem the State seems to be seeking to address—but a wide range of typical, consumer-friendly *discounting* practices—such as discounts on items consumers have added to their shopping carts, coupons for consumers who have purchased similar items in the past, and Buy X, Get Y promotions. Compl. ¶¶ 11–13. Because the Complaint pleads that the Act

encompasses far more than just the conduct “the government seeks to deter[.]” “the disclosure requirement . . . plausibly appears to be overbroad.” *Cornelio*, 32 F.4th at 175.

The Complaint also plausibly alleges that New York law already prohibits the ills that the Act seems intended to address—discrimination in pricing, price gouging, and unfair business practices. *Id.* ¶¶ 2, 11 (citing N.Y. Civ. Rights Law § 40-C (discrimination), N.Y. Gen. Bus. Law § 396-r (price gouging), and N.Y. Gen. Bus. Law § 349 (unfair business practices)). NRF has thus adequately pleaded that the Act is not narrowly tailored, as the availability of these “more direct, less speech-restrictive means” is dispositive under intermediate scrutiny. *IMS Health*, 630 F.3d at 280; *see also N.Y. State Ass’n of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 844 (2d Cir. 1994) (law failed intermediate scrutiny because government failed to demonstrate inadequacy of alternatives).

* * * * *

NRF has presented non-conclusory allegations pleading both that the Act is subject to heightened scrutiny and that the State cannot carry its burden of establishing that the Act satisfies that scrutiny. Those allegations independently suffice to defeat the State’s motion to dismiss.

III. NRF Has Plausibly Pled A Claim For Facial Relief.

The State also argues that NRF fails to state a claim for facial relief. Mot. 15–16. But facial relief is a *remedy*; it does not dictate “what must be pleaded in a complaint.” *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). “[A]t the pleadings stage,” it is premature to “speculate on what specific remedies might be appropriate” if NRF succeeds on the merits. *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920, 925–26, 929 (2d Cir. 1968) (reversing dismissal of constitutional claim for this reason). The Supreme Court’s decision in *Moody v. NetChoice LLC*, 603 U.S. 707, 723 (2024), did not alter this principle, as it only addressed the standard to *win*, not plead, a First Amendment claim for facial relief. *See, e.g., Free Speech Coal. v. Knudsen*, 754 F. Supp. 3d 1037, 1049–50 (D. Mont. 2024) (denying motion to dismiss First Amendment facial challenge under

Moody); *McAllister v. Clark County*, 746 F. Supp. 3d 918, 940 (D. Nev. 2024) (same).⁴ Because a “motion for failure to state a claim properly addresses the cause of action alleged, not the remedy sought,” *Goldman v. Reddington*, 417 F. Supp. 3d 163, 176 (E.D.N.Y. 2019) (internal quotation marks and citation omitted), the State’s argument can be rejected for this reason alone. *See* C. Wright & A. Miller, 5 Fed. Prac. & Proc. Civ. § 1255 (4th ed. 2025) (a remedy is a “demand for judgment” and “not considered part of the claim” for purposes of Rules 8 and 12).

In any event, the Complaint adequately alleges that facial relief is appropriate here. Facial challenges arising under the First Amendment are subject to a “less demanding” standard than other facial challenges to “provide breathing room for free expression.” *Moody*, 603 U.S. at 723 (citing cases). A regulation is facially invalid under this standard if even “a substantial number of [its] applications are unconstitutional, judged in relation to [its] plainly legitimate sweep.” *Id.* (internal quotation marks and citation omitted).

Here, the Complaint plausibly alleges that *every* application of the Act is unconstitutional because under any level of review, and in any application, the State must demonstrate that the Act advances a real solution to a real problem. *NIFLA*, 585 U.S. at 776–77. NRF alleges that the State cannot meet this burden because there is no evidence that algorithmic pricing deceives, confuses, or misleads consumers. Compl. ¶¶ 2, 21, 32, 36. Nor can the State show that its compelled disclosure is narrowly tailored even under *Zauderer*, Compl. ¶¶ 2, 20, 23–27, 33, 36, because the Act in any application is over- and underinclusive. *NIFLA*, 585 U.S. at 776–77, 778.

The State again raises only *factual* objections to NRF’s allegations. Mot. 15–16 (challenging “purported impact” on NRF’s members alleged in the Complaint, and disputing the

⁴ Pre-*Moody* decisions are in accord. *See, e.g., Boelter v. Advance Mag. Publishers Inc.*, 210 F. Supp. 3d 579, 603 (S.D.N.Y. 2016) (premature to assess a statute’s facial overbreadth on a motion to dismiss); *Stark v. Patreon, Inc.*, 656 F. Supp. 3d 1018, 1039 (N.D. Cal. 2023) (same).

conclusions of the “academic studies” NRF cites). But NRF has no obligation at the pleading stage to anticipate or rebut the State’s fact-bound justifications. *Cornelio*, 32 F.4th at 169.

CONCLUSION

Plaintiff NRF respectfully requests that the Court deny the Motion to Dismiss.

Respectfully submitted,

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August 18, 2025

CERTIFICATION OF COMPLIANCE

I certify that this Memorandum of Law is 23 pages long, and thus complies with the 25-page limit contained in Judge Rakoff's Individual Rule of Practice 2(e).

/s/ Ambika Kumar
Ambika Kumar