RECORD NO. 13-3012

In The
United States Court of Appeals
For The Sixth Circuit

LIBERTY COINS; JOHN MICHAEL TOMASO,

Plaintiffs – Appellees,

v.

DAVID GOODMAN, in his official capacity as Director, Ohio Department of Commerce; AMANDA MCCARTNEY, in her official capacity as Consumer Finance Attorney of Division of Financial Institutions, Ohio Department of Commerce,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO AT COLUMBUS

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLEES

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-3012 Case Name: Liberty Coins v. David Goodman

Name of counsel: Paul M. Sherman and Erica Smith

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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF *AMICUS CURIAE*

The Institute for Justice is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the freedom to communicate all forms of information, including commercial information. The Institute has litigated free speech cases throughout the country, including *Pagan v. Fruchey*, 492 F.3d 766 (6th Cir. 2007) (en banc), which is an important precedent for this case. The Institute also files amicus curiae briefs in significant First Amendment cases nationwide, including in the Supreme Court cases *Citizens United v. FEC*, 558 U.S. 310 (2010); *Davenport v. Washington Education Association*, 551 U.S. 177 (2007); and *Randall v. Sorrell*, 548 U.S. 230 (2006). The Institute regularly advocates on behalf of individuals whose right to speak has been infringed by the government. The Institute believes that its legal perspective and experience will provide this Court with valuable insights regarding the constitutional limits on the regulation of commercial speech.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief. And pursuant to FRAP 29(c)(5), no party's counsel authored this brief in whole or in part, and no person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

Over the last thirty years, the Supreme Court has become increasingly suspicious of laws restricting commercial speech. As the Court has noted, consumers have a strong interest "in the free flow of commercial information" and "that interest may be as keen, if not keener by far, than [their] interest in the day's most urgent political debate." *Va. Pharmacy Bd. v. Consumer Council*, 425 U.S. 748, 763 (1976). Consistent with this precedent, and as Appellee Liberty Coins explains in their response brief, the district court below closely scrutinized the Ohio's Precious Metal Dealer Act ("PMDA"), found that it was triggered exclusively by commercial speech, and thus determined that it must be analyzed under the First Amendment. The district court then concluded the law likely could not survive First Amendment scrutiny and granted Liberty Coins' motion for preliminary injunction.

For at least three reasons, the district court did not abuse its discretion in granting the preliminary injunction. First, although the district court concluded that the PMDA was unlikely to survive intermediate scrutiny, the Supreme Court's recent commercial-speech decision, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), subjects the PMDA to an even higher standard of review—strict scrutiny—which it necessarily fails. Second, even if intermediate scrutiny were the appropriate standard of review, courts routinely invalidate laws like the PMDA

that use speech restrictions to burden otherwise legal commercial activities. Finally, the government failed to carry its burden to show the PMDA survives *Central Hudson's* intermediate-scrutiny test because the government did not provide any genuine evidence justifying the PMDA's restrictions on speech, which is a requirement in all commercial-speech cases, even at the preliminary-injunction stage.

I. This Court Should Provide Needed Clarity to Commercial-Speech Doctrine by Holding That the Supreme Court's Ruling in *Sorrell v. IMS Health* Subjects the PMDA to Strict Scrutiny.

In *Sorrell v. IMS Health Inc.*, the U.S. Supreme Court held that laws making content-based and speaker-based distinctions on commercial speech are subject to strict scrutiny. 131 S. Ct. 2653 (2011). This Court has not yet provided guidance to its district courts on the application of *Sorrell* and this case presents an ideal opportunity for this Court to do so. As explained in more detail below, the PMDA singles out marketing and solicitation by precious-metals dealers. Under *Sorrell*, the PMDA is thus content- and speaker-based, and subject to strict scrutiny.

Sorrell involved a challenge to a Vermont law, "Act 80." Like the PMDA, Act 80 only applied to marketing and soliciting by certain speakers. Specifically, Act 80 banned the purchase, sale, and use of doctors' drug prescription information for marketing purposes, unless a doctor consented. Vermont passed Act 80 to curb pharmaceutical companies' practice of "detailing." Detailing is when

pharmaceutical salespeople buy doctors' history of drug prescriptions from a data-mining company and then use this data to tailor their sales pitches to specific doctors. *Sorrell*, 131 S. Ct. at 2659–61. The state was concerned about detailing because the state believed it violated doctors' privacy, exposed doctors to aggressive sales tactics, and raised health-care costs through the increased use of brand-name drugs. *Id.* at 2668. Act 80 freely allowed the use of prescription data for any non-marketing purpose, like health care research and patient education. *See id*. at 2660–61.

The Supreme Court invalidated Act 80, and in doing so held for the first time that both content-based and speaker-based restrictions on commercial speech are subject to strict scrutiny instead of the intermediate scrutiny described in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980). The Court has long considered sales pitches, advertising and other marketing to be protected speech. As Act 80 freely allowed the use of the data for every purpose but "marketing," the Court found Act 80 was content-based. 131 S. Ct. at 2663. The Court also found Act 80 was speaker-based because it effectively applied to only one set of speakers—pharmaceutical manufacturers—the only speakers using the data for marketing purposes. *Id*. at 2663. The Court

thus decided Act 80 was subject to "heightened scrutiny," meaning strict scrutiny.[2] 131 S. Ct. at 2664 ("Act 80 is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted."). The Court ultimately applied *Central Hudson* analysis because it found the law could not even pass this less rigorous standard. *Id.* at 2667. But the Court's finding that the law would be unconstitutional even if it failed "a stricter form of judicial scrutiny" is an important expansion of commercial speech protection. *Id.*

A growing body of scholarly commentators—not all fans of the *Sorrell* ruling—have recognized that *Sorrell* "substantially extend[s] the protection given to commercial speech." Tamara R. Piety, "*A Necessary Cost of Freedom*"? *The Incoherence of Sorrell v. IMS*, 64 Ala. L. Rev. 1, 3 (2012); *see also* Richard Samp, *Sorrell v. IMS Health: Protecting Free Speech or Resurrecting Lochner?*, Cato Sup. Ct. Rev., Sept. 1, 2011 at 148 (stating *Sorrell* "may mark a substantial expansion in First Amendment protection for commercial speech"). Prior to *Sorrell*, the Court had found that *Central Hudson* applies to all commercial speech

[2] The context in which the Court discussed "heighted scrutiny" reveals that the Court meant "strict scrutiny" by this statement. This is evident in part because the Court said that "commercial speech is no exception" to content-based analysis for noncommercial speech. 131 S. Ct. at 2664. As the Supreme Court applies strict scrutiny to content-based restrictions on non-commercial speech, *see United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000), it follows that the Court intends that strict scrutiny apply to content-based distinctions on commercial speech as well.

restrictions, regardless of whether they made any content- or speaker-based distinctions. But "*Sorrell*['s] . . . sweeping language . . . suggests that restricting a disfavored advertising message is never permissible, even if the restrictions serve an important state interest . . . . *Sorrell* seems to leave little room for regulatory regimes that burden truthful advertising out of concern about the effects of the advertising." *Greening the Law of Advertising: Prospects and Problems*, 42 Tex. Envtl. L. J. 27, at 49–50 (Fall 2011). Indeed, "[a]fter *Sorrell* any regulation of marketing could potentially fail the content neutrality test" and be subject to strict scrutiny. Piety, *supra*, at 1.

While *Sorrell* marks a substantial expansion of the right to engage in commercial speech, it is also a natural culmination of the court's evolving commercial speech jurisprudence. In the last two decades, the Supreme Court increased both its suspicion and scrutiny of laws targeting commercial speech.[3] Scholars examining recent Supreme Court commercial speech opinions observed

[3] *See, e.g.*, *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999) (unanimous) (rigorously examining commercial speech restriction and striking it down under *Central Hudson*); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (same); *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) (same).

that *Central Hudson* scrutiny has increasingly moved closer to strict scrutiny.[4] Now, "*Sorrell* may mean that henceforth, in practice, if not formally, commercial speech will be treated as fully protected." Piety, *supra* at 4.

This Court has not yet addressed *Sorrell*'s significance, but other courts have. The Second Circuit recently held that *Sorrell* requires heightened scrutiny for content- and speaker-based restrictions. *United States v. Caronia*, 703 F.3d 149, 164–65 (2d Cir. 2012). In *Caronia*, the court struck down an advertising restriction on pharmaceutical drugs after finding that it failed both heightened scrutiny and *Central Hudson*. *Id.* at 164. Several district courts have similarly used heightened scrutiny to enjoin or strike down content-based restrictions on commercial speech under *Sorrell*. *See Friendly House v. Whiting*, 846 F. Supp. 2d 1053, 1057–58 (D. Ariz. 2012) (granting preliminary injunction after applying "heightened judicial scrutiny"); *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367, 1377, 1379 (S.D. Fla. 2011) (granting preliminary injunction after applying "strict scrutiny"); *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1328,

[4] Mark Tushnet, *The First Amendment and Political Risk*, 4 J. of Legal Analysis 103, 121–122 (Spring 2012) (stating *Sorrell* continues "the Court's trend to assimilate commercial speech to political speech, subjecting both to demanding requirements for justification"); Piety, *supra*, at 4 ("[O]ver time, [the Court] interpreted the *Central Hudson* test more strictly so that some commentators have observed that what began life as an intermediate scrutiny test has evolved into a strict scrutiny test in all but name."); Gormley, *supra*, at 49–50 ("the Court has in practice required that tailoring of commercial speech restrictions be nearly perfect . . . . The Court's decision last term in *Sorrell* strengthens this conclusion.).

1331 (M.D. Fla. 2011) (applying *Sorrell*'s "heightened judicial scrutiny" to several content-based ordinances, which regulated both plaintiffs' commercial and noncommercial speech, and granting preliminary injunction in part); *see also 1-800-411-Pain Referral Serv., LLC v. Tollefson*, No. 12-3034, 2012 U.S. Dist. LEXIS 182499 (D. Minn. Dec. 28, 2012) (applying "heightened judicial scrutiny" to content- and speaker-based restrictions).

This Court should follow these decisions, and provide lower courts in the Sixth Circuit with needed guidance on this important issue. The Western District of Michigan has already acknowledged that *Sorrell* "highlights the evolving nature of First Amendment jurisprudence." *Flying Dog Brewery, LLLP v. Mich. Liquor Control Comm'n*, 870 F. Supp. 2d 477, 488 (W.D. Mich. 2012). The district court below stated that the PMDA was likely subject to "heightened scrutiny" under *Sorrell*. But the district court was hesitant to apply such scrutiny because a recent unpublished opinion by this Court stated that intermediate scrutiny applies to content-based regulations of commercial speech. Opinion and Order, R. 27 at 15 (citing *PHN Motors LLC v. Medina Township*, No. 11–3691, 2012 U.S. App. LEXIS 18719, at *4 (6th Cir. Sept. 4, 2012)). As the district court noted, *PHN Motors* did not discuss or mention *Sorrell*.

This Court should use this case as an opportunity to clarify the proper standard of review for commercial speech so that lower courts will not be forced to

speculate. *Sorrell* requires strict scrutiny for content-based regulations on commercial speech. Therefore, consistent with *Sorrell* and with the Supreme Court's long recognition that consumers' interest in "the free flow of commercial information . . . may be as keen, if not keener by far, than [their] interest in the day's most urgent political debate" *Va. Pharmacy Bd.*, 425 U.S. at 765, this Court should hold that the PMDA must be reviewed with strict scrutiny. By explicitly using strict scrutiny, this Court would provide necessary protection for commercial speech and valuable clarification to its district courts.

II. Even Under *Central Hudson* Review, Federal Courts Routinely Invalidate Laws Like the PMDA.

Although *amicus* believes that this case is most properly resolved by applying strict scrutiny under *Sorrell*, this case can also be resolved, as the district court did, through the straightforward application of the *Central Hudson* test. The Supreme Court has made clear that the government has a heavy burden under this test: unless the government can prove that the restricted commercial speech is misleading or proposes an illegal activity, the government must justify the PMDA by proving that the asserted governmental interest is substantial; that the regulation directly and materially advances the asserted governmental interest; and that the regulation is not more extensive than is necessary to serve that interest. *See Bd. of Trs. v. Fox*, 492 U.S. 469, 475 (1989) (quoting *Central Hudson*, 447 U.S. at 566); *Pagan v. Fruchey*, 492 F.3d 766, 771 (6th Cir. 2007) (en banc).

Courts routinely use *Central Hudson* to strike down speech restrictions in circumstances similar to this case. Multiple federal appellate courts, for example, have invalidated title acts, which require people who lawfully perform certain kinds of work to obtain a license to use words that accurately advertise their work. These laws "allow[ed] all to practice, but few to speak." *Abramson v. Gonzalez*, 949 F.2d 1567, 1573 (11th Cir. 1992). In this Court's ruling in *Parker v. Kentucky Board of Dentistry*, for example, a state board allowed dentists to practice in any specialty area but prohibited these dentists from "holding [themselves] out to the public" as specialists unless they had specialty licenses. 818 F.2d 504, 506 (6th Cir. 1987). A dentist challenged the law because he wanted to advertise his orthodontic practice but did not have an orthodontist license. This Court struck the law down, finding that because the state permitted the underlying conduct, it could not "justify an outright ban on the use of particular terms relating" to that conduct. *Id.* at 510. *Parker* is also notable because, like this case, the restriction at issue was framed as a limitation on "holding out," which this Court recognized was a limitation on speech, not a mere restriction on conduct. *See id.* at 509.

Similarly, in *Byrum v. Landreth*, the Fifth Circuit considered a law that allowed interior designers to operate without a license, but required a license if they wanted to call themselves interior designers. 566 F.3d 442 (5th Cir. 2009). Although the district court denied a preliminary injunction, the Fifth Circuit

reversed, finding the state failed to produce evidence justifying such a broad regulation on truthful speech. *Id.* at 448. The court found that if the government wanted to protect the public from incompetent designers, it could have prevented the designers from falsely stating they were licensed. *Id.* at 449. The Eleventh Circuit came to the same conclusion about a law allowing only licensed psychologists to call themselves psychologists, despite the fact that the state allowed people to lawfully operate as psychologists without a license. *Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992). The court stated, "as long as Florida has not restricted the practice of psychology, the state may not prevent the plaintiffs from calling themselves psychologists in their commercial speech. . . . [T]hey must be allowed to say truthful things about their work." *Id.* at 1576. *See also Locke v. Shore*, 682 F. Supp. 2d 1283, 1294–96 (N.D. Fla. 2010) (invalidating restriction on truthful advertising of lawful interior-design services); *Roberts v. Farrell*, 630 F. Supp. 2d 242, 244 (D. Conn. 2009) (same).

Just as in these title cases, Plaintiffs here are permitted to engage in the underlying business of dealing in precious metals. Br. of Pls.-Appellees at 14. And just like in the title cases, Plaintiffs may not truthfully communicate with the public about services they lawfully offer unless they first submit to expensive, time-consuming, and burdensome licensing requirements. The PMDA's

restrictions on precious metal dealers thus violate the First Amendment in exactly the same way as the restrictions discussed above.

This analysis is not affected by the government's attempt to portray precious-metal dealing as a harmful business. Even if the government's wholly unsubstantiated claims were true, *Central Hudson* strenuously protects truthful commercial speech even when government considers the underlying advertised conduct to be dangerous or otherwise undesirable. In *Lorillard Tobacco Company v. Reilly*, for instance, the Supreme Court struck down two laws intended to shield children from tobacco ads; one law banned outdoor tobacco ads within 1,000 feet of a playground and the other restricted indoor tobacco ads to at least five feet up from the floor. 533 U.S. 525 (2001). The Court found that although the governmental "interest in preventing underage tobacco use is substantial, and even compelling," the laws restricted too much truthful speech about a lawful activity. *Id.* at 564.

Likewise, the Supreme Court struck down a law banning advertisement of legal drugs that had not been safety tested and approved by the Federal Drug Administration. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002). The FDA allows pharmacists and doctors to mix and alter approved drugs to form a "compounded drug" that is tailored to a specific patient's needs. Because these drugs have a limited use, they benefit from a limited exception from the FDA's

approval process. *Id.* at 360–62. The government argued it had to stop pharmacists from advertising the availability of these drugs to prevent them from becoming so popular that they undermined the FDA's regulatory scheme. The Supreme Court held that even though this was an important government interest, the law restricted too much speech. The Court reaffirmed that "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Id.* at 371.[5]

As *Lorillard* and *Thompson* demonstrate, if the government believes that precious-metal dealers pose some threat to the public, the government must target *that harm*, rather than targeting truthful commercial advertising. In this case, however, the government has chosen to proceed solely against speech, while leaving the underlying conduct legal. The district court correctly concluded that the First Amendment forbids this approach.

[5] *See also Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999) (striking down application of federal law to prohibit TV and radio advertising of gambling in state where gambling was legal under *Central Hudson*) (unanimous); *44 Liquormart Inc. v. Rhode Island*, 517 U.S. 484 (1996) (striking down state statute prohibiting advertising of retail liquor sales anywhere but at the point of sale under *Central Hudson*); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (striking down federal law prohibiting the disclosure of alcohol content on beer labels under *Central Hudson*) (unanimous).

III. The Government Failed to Provide Genuine Evidence to Justify the PMDA, As It Was Required to Do.

Under Supreme Court and Sixth Circuit precedent, the government cannot justify the PMDA's restrictions on speech with only speculative and conclusory statements. As explained below, the *Central Hudson* test required the government to provide actual evidence showing that a law restricting commercial speech is narrowly tailored to serve the government's asserted interests. Moreover, this requirement of genuine evidence applies even at the preliminary-injunction stage. Applying that standard to this case, it is clear that the government failed to establish that the PMDA directly and materially advances that government's asserted interests or that the government's interests would not be equally well-served by a law that was less speech restrictive.

A. Supreme Court and Sixth Circuit precedent require the government to support restrictions on commercial speech with genuine evidence.

Courts cannot simply defer to government assertions that restrictions on speech accomplish their intended goal; the government must prove it. That is the holding of *Edenfield v. Fane*, in which the Supreme Court struck down a state law restricting certified public accountants from soliciting clients after the state failed to provide evidence justifying the law. 507 U.S. 761 (1993). The state claimed the law protected consumers from fraud, maintained CPA independence, and prevented CPA conflicts of interests. But the government did not provide any

studies, examples of the plaintiff's own conduct, or even anecdotal evidence to show the law directly and materially advanced these interests. *Id.* at 771. The Court held that the government cannot satisfy its burden under *Central Hudson* "by mere speculation or conjecture[,]" but rather must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 770–71.

This Court, sitting en banc, applied *Edenfield* in *Pagan v. Fruchey*, 492 F.3d 766 (2007). In that case, this Court similarly found the government did not carry its burden to justify a law restricting for-sale signs on parked cars. Just as in *Edenfield*, the city provided insufficient evidence that the law directly and materially advanced its interests in traffic safety and aesthetics. *Id.* at 772–73. The only evidence the city provided was a government official's affidavit, which this Court found "amount[ed] to nothing more than a conclusory articulation of governmental interests" and "simple conjecture[.]" *Id.* at 773. This Court found that the affidavit satisfied *Central Hudson*'s second prong by stating a substantial state interest, but that "it fail[ed] to address the third prong at all." *Id.* The government could only carry its burden under the third and fourth prong by showing the challenged law alleviated "concrete, nonspeculative harm." *Id.* at 773 n. 5.

The lesson of *Edenfield* and *Pagan* is clear: federal courts reviewing restrictions on commercial speech must require the government to come forward with genuine, nonspeculative evidence to support those restrictions. As discussed in the following section, this requirement is not limited to the merits stage, but extends also to decisions at the preliminary-injunction stage.

B. The government's burden to provide genuine evidence applies at the preliminary-injunction stage, as well.

In keeping with the Supreme Court's recognition that "the burdens at the preliminary injunction stage track the burdens at trial[,]" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006), *Edenfield*'s requirement of genuine evidence applies at the preliminary-injunction stage as well as at the merits stage. *See, e.g.*, *Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221 (10th Cir. 2005); *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1147 (9th Cir. 1998); *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 72–74 (2d Cir. 1996).

The Fifth Circuit's ruling in *Byrum v. Landreth* is illustrative. In that case, the Fifth Circuit reversed a district court decision denying a motion for preliminary injunction, holding that federal courts reviewing commercial-speech restrictions must inquire "whether there is a sufficient likelihood the State will ultimately fail to prove its regulation constitutional." 566 F.3d at 446. This, in turn, requires the

government to convincingly demonstrate that it has the "ability" to provide evidence to justify the statute's constitutionality. *Id.*

Byrum is also notable for the evidence that it found insufficient to satisfy the third prong of *Central Hudson*. In that case, the government had conducted a survey that it claimed showed that the public believed the job title "interior designer" was misleading when applied to nonlicensed designers. The court found the survey had "no probative value" because it failed to ask specific enough questions or to properly define its terms. *Id.* at 447. The *Byrum* court was also unpersuaded by a legislative report showing that people were confused about what types of services interior designers offered and discussing whether they should be licensed. The court stated the report was irrelevant, as it was prepared three years before the law's passage and offered no legislative suggestions. *Id.*

The Ninth Circuit in *S.O.C.*, 152 F.3d at 1146–47, and the Tenth Circuit in *Pacific Frontier*, 414 F.3d at 1232, similarly found the government failed to provide sufficient evidence to satisfy *Central Hudson*'s fourth prong at the preliminary-injunction stage. In *S.O.C.*, the government claimed its interests in preventing sidewalk congestion and harassment of pedestrians justified its ban on commercial canvassing in certain areas of Las Vegas. 152 F.3d at 1145–47. Yet the government produced no evidence to explain the differential treatment of commercial and noncommercial speech. For instance, the government submitted

affidavits that canvassers occasionally turn violent and caused fights on the sidewalk, but the affidavits did not show whether such problems were typical of commercial canvassers or extended to noncommercial as well. *Id.* The government also failed to show why it had to regulate speech to advance its goals, instead of just regulating conduct. *Id.* at 1147 (reversing district court's denial of preliminary injunction). The Tenth Circuit came to a similar conclusion in *Pacific Frontier*, which involved a city law mandating that solicitors obtain licenses. The court found, *inter alia*, that the city "failed to show why state criminal laws are inadequate" to further the state's interests under *Central Hudson*'s fourth prong. 414 F.3d at 1232 (affirming district court's grant of preliminary injunction).

These cases demonstrate that federal courts reviewing commercial-speech restrictions, even at the preliminary-injunction stage, closely scrutinize the government's evidence to ensure that it meets the high bar set by *Central Hudson* and *Edenfield*. Consistent with these rulings, the government in this case had an affirmative obligation, not only to articulate a substantial government interest, but also to produce genuine evidence showing that the PMDA both directly and materially advances that interest and is not broader than necessary. As explained in the following two sections, even assuming the importance of the government's asserted interest in consumer protection, the government failed on each of these last two counts.

C. *Central Hudson*'s third prong: the government did not provide evidence that the PMDA directly and materially advanced its interests.

Under the third prong of *Central Hudson*, the government was required to provide evidence showing that the PMDA "directly and materially" furthers its asserted interests in preventing crime. Specifically, the government asserted that restricting dealers' speech protects the public from "theft, fraud, money laundering, fencing, restricting the flow of stolen goods, and even terrorism." Br. of Def.-Appellant at 32. But, as the district court noted, the government failed to provide any evidence of how the PMDA furthers these interests, much less how it directly and materially serves these interests. Opinion and Order, R.27 at 18–19. All the government provided was a single "conclusory statement" that the law advanced the government interest, along with some newspaper articles. *Id.* at 18, 20 n.12.

The government claims the district court erred in disregarding these articles, but the district court was entitled to conclude that they were not sufficiently probative of how restricting the ability of dealers to advertise their businesses successfully deters theft, fraud, or—as the government implausibly asserts—terrorism. In any event, the government's meager evidentiary showing in this case is far less than the evidentiary showing that the Fifth Circuit found insufficient in *Byrum*, in which the government produced an original survey and legislative report suggesting that people may be misled by interior design advertising. The Fifth

Circuit rejected that evidence because it wasn't specific enough. *See Byrum*, 566 F.3d at 447–48. The government here has thus fallen far short of satisfying its burden under *Edenfield* and *Pagan*.

When the government fails to meet its evidentiary burden in a commercial-speech case, that is the end of the analysis. As this Court has recognized, it is not the court's role "to search for evidence that a party *could* have located and submitted but did not." *Pagan*, 492 F. 3d at 775 n.7. Accordingly, the district court did not err when, after reviewing the scant evidence produced by the government, it concluded that the government was unlikely to carry its burden under *Central Hudson*'s third prong of showing that the PMDA directly and materially advanced the government's interests.

D. *Central Hudson*'s fourth prong: the government did not provide evidence that the PMDA has a reasonable fit with its purported goals.

Even if the PMDA did somehow advance the state's interests, the government has not provided evidence showing that the law is not "more extensive than is necessary" and is "reasonable," as required under *Central Hudson*'s fourth prong. *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 475, 479–80, (1989); *Pagan*, 492 F.3d at 771.

First, the government has not shown why it must regulate speech instead of just conduct to accomplish its goals. *See S.O.C.*, 152 F.3d at 1147; *Pac. Frontier*,

414 F.3d at 1232. For instance, Ohio already has criminal prohibitions on theft and receipt of stolen property, and has produced no evidence that those laws are insufficient to deter theft of precious metals. Br. of Pls.-Appellees at 45; Pl.-Appellees Opp. to Def.-Appellants Mot. to Stay 18–19.

Second, the government has not shown that the PMDA has a "reasonable" fit with the government's asserted interests. As the district court found, the PMDA's "breadth and number of exemptions undercuts the Defendant's argument that the licensing scheme is narrowly tailored," and instead shows that the act is underinclusive. Opinion and Order, R. 27 at 21.[6] For instance, the PMDA applies only to dealers who "hold themselves out" by advertising and soliciting customers. Br. of Pls.-Appellees at 45 at 13–22. The government failed to provide any evidence justifying the PMDA's disparate treatment of those who advertise, much less provide a coherent rationale for this distinction. *Cf. Parker v. Ky. Bd. of Dentistry*, 818 F.2d 504, 506 (6th Cir. 1987) (reviewing a restriction on dentists "holding [themselves] out to the public" as specialists as a restriction on commercial speech). Indeed, logic suggests that those who publically advertise would be more likely to be running honest businesses than those who refrain from

[6] Underinclusive speech regulations "raise[s] serious doubts" about whether the government is, in fact, serving "the significant interests which [it] invokes[.]" *See, e.g., Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 52–53 (1993) ("[e]xemptions from an otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the government's rationale for restricting speech in the first place.").

such advertising. Thus, just as in S.O.C., the government has failed to justify its exemptions, and the PMDA fails *Central Hudson*'s fourth prong. *See S.O.C.*, 152 F.3d at 1140 (reversing the district court's denial of preliminary injunction).

* * *

In this case, the government produced nothing more than conclusory statements and attenuated evidence to support its restrictions on commercial speech. The evidentiary showing here was even weaker than the evidence found insufficient in cases like *Byrum*, *S.O.C.*, and *Pacific Frontier*. Thus, the district court did not abuse its discretion in granting Plaintiffs' motion for preliminary injunction.

CONCLUSION

The PMDA deprives consumers of valuable information and infringes Liberty Coins' right to speak and operate an honest business. The government has failed to demonstrate that it is likely to overcome the high bars set by cases like *Sorrell*, *Edenfield*, and *Pagan*. Accordingly, the district court's grant of preliminary injunction for Plaintiffs should be affirmed.

Respectfully Submitted,

/s/ Erica Smith

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CERTIFICATE OF COMPLIANCE

This Amicus Brief complies with the type-volume limitation of 6th Cir. R. 32(b) and Fed. R. App. P. 32(a)(7)(B). This brief contains 5,176 words, excluding the table of contents, table of citations, statement with respect to oral argument, the designation of relevant district court documents and certificates of counsel.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 30th day of April, 2013, I caused this Brief of *Amicus Curiae* Institute for Justice to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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ADDENDUM

PHN MOTORS, LLC, dba Bill Doraty Kia; DORALIS HOLDINGS, LLC; SCHERBA INDUSTRIES, INC., dba Inflatable Images, Plaintiffs-Appellants, v. MEDINA TOWNSHIP, Defendant-Appellee, ELAINE RIDGLEY, Defendant-Appellee, and THERESE GEORGE, MEDINA TOWNSHIP BOARD OF ZONING COMMISSIONERS, Defendants.

No. 11-3691

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

12a0975n.06; *2012 U.S. App. LEXIS 18719*; *2012 FED App. 0975N (6th Cir.)*

September 4, 2012, Filed

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PRIOR HISTORY: [*1]
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.
PHN Motors, LLC v. Medina Twp., 2011 U.S. Dist. LEXIS 62512 (N.D. Ohio, June 8, 2011)

COUNSEL: For PHN MOTORS, LLC, dba Bill Doraty Kia, DORALIS HOLDINGS, LLC, SCHERBA INDUSTRIES, INC., dba Inflatable Images, Plaintiffs - Appellants: Laura Mills, Mills, Mills, Fiely & Lucas, Wadsworth, OH.

For MEDINA TOWNSHIP, ELAINE RIDGLEY, Defendants - Appellees: Robert Todd Hunt, Sara J. Fagnilli, Walter & Haverfield, Cleveland, OH.

JUDGES: BEFORE: COOK and STRANCH, Circuit Judges, and STAMP, District Judge. *

* The Honorable Frederick P. Stamp, Jr., Senior United States District Judge for the Northern District of West Virginia, sitting by designation.

OPINION BY: FREDERICK P. STAMP, JR.

OPINION

FREDERICK P. STAMP, JR., Senior District Judge. Plaintiffs-appellants PHN Motors, LLC, d/b/a Bill Doraty Kia, Doralis Holdings, LLC, and Scherba Industries, Inc., d/b/a Inflatable Images (individually, "BDK," "Doralis," and "Scherba" and collectively "appellants") appeal a final order of the United States District Court for the Northern District of Ohio, Eastern Division ("district court"), granting judgment in favor of the defendants-appellees. The judgment came after the district court granted defendants-appellees' (collectively, "Medina") post-trial [*2] motion to dismiss the appellants' mandamus claim, state claim that a relevant local zoning regulation did not apply to them, and *First Amendment* claim, along with a claim for damages, except with regard to defendant Scherba. The judgment was also entered after the district court entered an opinion adopting the recommendations of an advisory jury that the appellants' due process and equal protection claims be dismissed.

I. BACKGROUND

This action was removed to the United States District Court for the Northern District of Ohio on the basis of federal question jurisdiction pursuant to *28 U.S.C. § 1331*. The complaint alleged that Medina Township, Medina Township Board of Zoning Commissioners, Commission Chairperson Alliss Strogin, Township Trustees Michael D. Todd, Sarah Gardner, and Ray Jarrett, Fiscal Officer Therese George, and Zoning Inspector Elaine Ridgley violated the appellants' *First Amendment* right to free expression, and their rights under the *Due Process Clause of the Fifth Amendment* and the *Equal Protection Clause of the Fourteenth Amendment*. The complaint arose from the defendants' interpretation and enforcement of Medina Township Zoning Resolution (MTZR) § 603E, Medina Township's [*3] sign regulations, against the appellants to prohibit them from displaying inflatable devices at appellant BDK's car dealership located in a commercial district of Medina Township.

BDK contends that it had displayed approximately twenty-seven temporary inflatables owned by and rented from appellant Scherba throughout the year between October 2008 and the date of the trial before the district court, [1] and been cited multiple times by the township Zoning Inspector for violation of MTZR § 603E as a result of these displays. In their complaint, the appellants claimed that MTZR § 603E as written is unconstitutionally vague and, as applied to them, infringes upon their free speech rights under the *First Amendment of the United States Constitution*. They further alleged that the regulation was enforced "unevenly" and unequally because it was only "sometimes" enforced against the plaintiffs, and because it was enforced unequally in residential and commercial districts. After removal, certain defendants moved to dismiss, and the Honorable Donald C. Nugent, United States District Judge, granted the motions, dismissing defendants Michael D. Todd, Sarah Gardner, Ray Jarrett, and Allison Strogin from [*4] the case. Defendants Therese George and the Medina Township Board of Zoning Commissioners were later dismissed pursuant to a stipulation between the parties.

1 The plaintiffs contend that these inflatables "were and are holiday decorations and seasonal displays" such as "Santa Claus, Easter bunnies, Halloween witches, and the like." (Appellant Opening Br. *6.) The defendants maintain, and the district court found, that the inflatables are for advertisement purposes. (Joint Appellee Br. *6.)

The district court held a four-day trial before an advisory jury in May 2011. At the close of the trial, Medina made an oral motion to dismiss appellants' claims. The district court granted this motion as to the appellants' claims for damages against all defendants except for defendant Scherba, as to appellants' state law claim that MTZR § 603E does not apply to them, and as to appellants' mandamus claim and *First Amendment* claim. The remaining claims for violations of the appellants' due process and equal protection rights were submitted to the advisory jury, which found in favor of Medina. In an opinion entered after the trial, the district court adopted the findings of the advisory jury in favor [*5] of Medina. With regard to the due process claim alleging that MTZR § 603E is unconstitutionally vague as written, the district court concluded that: (1) MTZR § 603E is not unconstitutionally vague, (2) the legislative intent behind MTZR § 603E is not ambiguous, but is clear from the language of the regulation, (3) the appellants had fair notice from the language of MTZR § 603E that the section prohibited the display of inflatables, (4) the language of MTZR § 603E is sufficiently clear to allow a person of normal intelligence to understand that inflatable devices such as those displayed at BDK are prohibited; and (5) it is clear that the legislature intended to use MTZR § 603E to prohibit the display of the type of inflatables displayed at BDK.

With regard to the equal protection claim that the regulation was unequally enforced in commercial and residential districts, the district court found that: (1) the BDK property is not similarly situated with residential properties in all relevant respects, (2) Medina had a rational basis for enforcing MTZR § 603E in commercial districts but not in residential districts, and (3) Medina's enforcement of MTZR § 603E against the appellants was not [*6] motivated by animus or ill-will against any of the appellants. Accordingly, the court found that the appellants' equal protection rights were not violated. In accordance with these findings and those made orally in response to Medina's post-trial motion to dismiss, the district court entered judgment in favor of the Medina on all claims and dismissed this action.

The appellants then timely appealed the judgment to this Court. On appeal, the appellants challenge the district court's dismissal of their *First Amendment* claims, its finding that MTZR § 603E is not unconstitutionally vague so as to violate the appellant's due process rights, and the district court's conclusion that the Medina's enforcement of MTZR § 603E in commercial districts but not in residential districts does not violate the appellants' equal protection rights under the *Fourteenth Amendment of the Constitution*. We review the district court's findings of fact for clear error, and its conclusions of law *de novo*. For the reasons that follow, this Court will affirm the district court on all charges of error.

II. ANALYSIS

A. MTZR § 603E does not violate the Appellants' *First Amendment* right to freedom of speech

The appellants [*7] first argue on appeal that the district court erred in dismissing their *First Amendment* claims. They maintain that MTZR § 603E constitutes a content-based regulation on both commercial and non-commercial speech, and that as a result, under either the intermediate or the strict scrutiny test, violates the protections afforded to the freedom of speech within the *First Amendment*. Medina, on the other hand, maintains that the speech which MTZR § 603E regulates with regard to the appellants is commercial in nature only, and that the regulation is content-neutral. Thus, the regulation is subject only to intermediate scrutiny. Further, Medina asserts that Medina Township's asserted substantial interests-aesthetics and safety-easily pass the requirements of intermediate scrutiny.

This Court first finds that MTZR § 603E represents a content-neutral restriction upon speech. MTZR § 603E restricts the elements that may be added to signs in the township, and disallows "elements which revolve, rotate, whirl, spin or otherwise make use of motion to attract attention." It further bans signs which "contain or consist of flags, banners, posters, pennants, ribbons, streamers, spinners, balloons, and/or [*8] any inflatable devices, search light or other similar moving devices." (Defs' Appx. *25.) Medina's stated purpose behind these regulations and restrictions, as articulated in the Medina Township Development Policy Plan, is:

> a. To improve the commercial areas of Route 18 and 42 there was the need to clean up these areas' generally sloppy appearance and the need for stricter sign controls. (*See* Defs'-Appellees' Joint Br. *14 and Defs'-Appellees' Appx.*76.)
>
> b. The need to carefully control the size, height, quality and number of business identification signs in Medina Township to ensure the safety of auto travelers and to maintain the aesthetic quality of the community. This policy recognizes the need for businesses to advertise their goods and services. However, without standards that are enforced uniformly, visual quality along the highway deteriorates, and visual traffic hazards develop. (Defs'-Appellees' Appx. *100.)

The United States Supreme Court has repeatedly held that the difference between content-based regulations, which regulate or restrict speech with the purpose of controlling the content of expression, and content-neutral, time, place or manner regulations, is the government's [*9] purpose behind the regulation. *Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)* ("The government's purpose is the controlling consideration."). Further, "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.*

The appellants do not support their conclusion that MTZR § 603E is a content-based regulation, nor can they do so. The regulation does not, on its face, regulate speech based upon its content, and Medina justifies the restrictions "without reference to the content of the regulated speech." *Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)*. Additionally, while it is true that commercial entities, which are more likely to utilize signage with the restricted elements for the purposes of attracting patrons, may be impacted more significantly by these regulations than other types of establishments in the township, this is an incidental rather than intended effect and, as explained above, does not affect the content-neutrality of the regulation.

Further, even if this Court agreed with appellants that the relevant regulation represented a content-based [*10] regulation, the proper scrutiny applicable to MTZR § 603E would be unchanged because the speech at issue in this case is clearly of a commercial nature. [2] Commercial speech is defined by the United States Supreme Court as "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y. 447 U.S. 557, 561, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)*. While the appellants raise an argument that the inflatables are used as holiday decorations, and thus are noncommercial speech, this Court is unconvinced by this argument. Though it is true that a number (but notably, not all) [3] of the inflatables displayed at BDK do depict elements associated with popular holidays, it is clear from the BDK advertisements provided to this Court that the inflatables are used as a brand-recognition tool and are intended to attract business. (*See* Defs'/Appellees' Appx. *141-152, video exhibits.) Any holiday decoration purpose that these inflatables may serve is clearly only intended to further advance these economic interests. Accordingly, the speech at issue in this case is commercial in nature.

2 As noted above, the district court found that the inflatables were used [*11] by BDK for advertising purposes. Accordingly, this conclusion is reviewed for clear error.

3 One inflatable depicted a hot air balloon reading "Cash For Clunkers Headquarters," and others depicted animals such as a dinosaur, a cartoon dog, a cartoon hamster, and a cartoon monkey, none of which are known to this Court to be connected with any holiday.

Commercial speech by its very nature involves commercial transactions, and thus is provided lesser protection by the Constitution than is non-commercial speech. *Cent. Hudson, 447 U.S. at 562-63*. Whether regulations on commercial speech are content-based or content-neutral, intermediate scrutiny is applied. *Pagan v. Fruchey, 492 F.3d 766, 770, 778 (6th Cir. 2007)*; *City of Tipp City v. Dakin, 186 Ohio App. 3d 558, 2010 Ohio 1013, 929 N.E.2d 484, 495 (Ohio Ct. App 2010)*. In short, intermediate scrutiny requires that a restriction on speech be narrowly tailored to further a substantial government interest. *See Ward, 491 U.S. at 798-99*. In order to apply this level of scrutiny to regulations on commercial speech, the United States Supreme Court developed a four-part test:

> (1) The commercial speech must concern lawful activities and must not be misleading;
>
> (2) The government must establish [*12] a substantial interest in support of the regulation;
>
> (3) The regulation must directly and materially advance the substantial government interest; and
>
> (4) The regulation must be narrowly tailored to achieve the government's desired result.

See Cent. Hudson, 447 U.S. at 566. The parties agree that the first element of the *Central Hudson* test is met in this instance. Further, the parties agree that public safety and concerns of visual aesthetics qualify as substantial government interests. *Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 507-08, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)*. (*See* Appellants' Opening Br. *12, Defs'/Appellees' Joint Br. *19.) The appellants appear to argue, however, that Medina has failed to adequately "establish a substantial interest in support of the regulation." (*See* Appellants' Opening Br. *13-14 ("[T]he burden of identifying a substantial interest in justifying the challenge restrictions was never addressed by the Township."))

This Court disagrees with this assertion. Medina has clearly identified two substantial interests, which have long been determined to clearly qualify as such in the context of the *Central Hudson* test. First, Medina points to aesthetics. This is supported by the prior-drafted [*13] Medina Township Development Policy Plan, quoted above, which lists the need to clean up the appearance of the commercial areas of Medina Township through sign controls. Further, as noted by Medina, aesthetic concerns have been deemed substantial interests *as a matter of law*, when used to justify regulations restricting signage. *Metromedia, 453 U.S. at 507-08*.

Secondly, Medina points to traffic safety as another substantial interest, again strengthened by the prior-drafted Development Policy Plan and also found by the United States Supreme Court to qualify as a substantial government interest. *Id. at 507-08*. The appellants contend that this interest is weakened by trial testimony that the Chief of Police "could not find a safety concern" in connection with the inflatables placed at BDK. (Appellants' Opening Br. *13.) However, the opinion of the police chief with regard to the specific inflatables placed at BDK does not weaken the legitimacy of the regulation as a whole, or of the substantial safety interest advanced to support it. Accordingly, this Court agrees with the district court that prong two has been satisfied.

Next, the appellants contend that the third and fourth prongs have [*14] not been satisfied with regard to MTZR § 603E. The main crux of their argument as to these final two prongs is that Medina Township enforces the ban on inflatables in commercial districts, but allegedly does not enforce the ban in residential districts. However, this is again an argument that the ban is content-based, an argument which this Court has already rejected above, and does not address the required showings of the third and fourth prongs of the *Central Hudson* test. These prongs require that the regulation be "narrowly tailored" to the substantial interests advanced, and that it actually "directly" and "materially" advance those interests. *Pagan, 492 F.3d at 771*. These prongs do not require that a restriction be the "least restrictive means" by which the government may advance its stated objectives, but only that it must be "reasonable" and "not more extensive than necessary." *Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 479-80, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989)*; *Pagan, 492 F.3d at 771*. This Court finds that the relevant ban on inflatables meets these requirements. Large, eye-catching inflatable devices clearly run the risk of distracting drivers' attention from the road and from other [*15] traffic as they pass such inflatables, and banning the devices in order to prevent such distractions directly advances the interest of traffic safety and is a reasonable way to do so. Further, banning the use of inflatable devices clearly directly

advances the interests of limiting visual clutter and "cleaning up" the commercial districts, and is a reasonable means by which to accomplish this goal.

Finally, the ban on inflatables in not more extensive than necessary to advance these interests. The inflatables displayed at BDK apparently serve a dual purpose of advertising and attracting the attention of customers, and of decorating for various holidays. The inflatable ban by no means precludes BDK from utilizing other means to accomplish these purposes, and the record before this Court indicates that it does, in fact, utilize multiple forms of permissible signage and other means for this. Accordingly, MTZR § 603E does not violate the appellants' *First Amendment* rights to freedom of speech, and this Court affirms the district court in dismissing the appellants' claims asserting as much.

B. MTZR § 603E is not void for vagueness

The next issue raised on appeal is the district court's refusal [*16] to find MTZR § 603E unconstitutionally vague in violation of the appellants' due process rights. In determining whether a statute or regulation violates a citizen's due process rights, a court must evaluate whether a regulation gives fair notice or warning of the conduct regulated or prohibited. The standard used in this determination is whether a person of ordinary intelligence would be able to determine what conduct is regulated or prohibited by the statute or regulation. *Columbia Natural Res., Inc. v. Tatum, 58 F.3d 1101, 1105 (6th Cir. 1995)*. This Court notes that its inquiry begins with the premise that local zoning regulations are presumed valid. *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio, 699 F.2d 303, 308 (6th Cir. 1983)*.

Appellants argue that this regulation is unconstitutionally vague in its ban of inflatables because "Section 603(e) implies the element of movement with an inflatable but does not distinguish those inflatables that are not designed to move defined as static from designed to move inflatables such as a wavy man seen many times at gas stations." (Appellant's Opening Br. *18.) Also, the appellants maintain, § 603A, which [*17] lists prohibited signs, does not prohibit inflatables. The appellants further advance the argument that the regulation is invalid because its enforcement is left solely to the Zoning Inspector, who is unsupervised and enforces at her discretion, often based upon complaints or the recommendations of trustees. The appellants finally assert that the fact that the regulation is not enforced in residential areas serves as evidence of the ambiguous nature of the ban on inflatables.

The district court concluded, applying this standard, that MTZR § 603E is not vague, confusing, ambiguous, or inconsistent; that the legislative intent behind the regulation was clear and not susceptible to multiple reasonable meanings; that a person of ordinary intelligence would know that inflatables of the type displayed at BDK are prohibited by the regulation; that the legislative intent to prohibit inflatables is clear; and that the enforcement of MTZR did not violate the appellants' rights of due process. (Memorandum Op. of Dist. Ct. *5-6.) After *de novo* review, this Court affirms.

MTZR § 603E reads as follows:

> Movement - No sign shall employ any parts or elements which revolve, rotate, whirl, spin or otherwise [*18] make use of motion to attract attention. No sign or part thereof shall contain or consist of flags, banners, posters, pennants, ribbons, streamers, spinners, balloons, and/or any inflatable devices, search light or other similar moving devices. Such devices, as well as strings of lights, shall not be used for the purpose of advertising or attracting attention when not part of a sign. (Defs'/Appellees' Appx. *25).

Initially, this Court finds that the plain language of § 603E is not ambiguous and that a person of ordinary intelligence would understand that it bans all types of inflatables used for advertising purposes or to attract attention. Despite the fact that §603A does not list inflatable devices as prohibited "signs" under the meaning of the regulation, § 603E unambiguously bans all types of inflatables, specifically stating in the final sentence that these devises are banned when used to advertise or attract attention, whether part of a sign or not. Further, even though § 603E is entitled "movement" and there are multiple references to a ban generally on devices that employ movement in order to attract attention, a full reading of the section makes clear that not all devices banned [*19] by the section so employ motion. "[F]lags, banners, posters, pennants, ribbons, streamers . . . [and] balloons," are not necessarily designed to directly employ motion to attract attention, thus a reasonable person would be able to conclude that all types of the devices listed, including all types of inflatables, are banned by the regulation when used to attract attention or for advertising. Also, all inflatables move to some extent, as inflatables of the type displayed by BDK are soft and often move in even the slightest breeze.

Thus, a person of ordinary intelligence could simply not reasonably conclude that only certain types of inflatables were banned by § 603E.

This is further strengthened by the clear legislative intent behind the regulation, as articulated throughout the Medina Township Development Policy Plan. The regulations are intended to "clean up" the commercial district by limiting visual clutter and distraction to passersby. This Court's literal interpretation of the regulation, as described above, results in the greatest furtherance of these goals. Thus, the regulation is not ambiguous on its face.

The appellants also contend that inflatable devices can be interpreted [*20] as signs under the regulations. While the appellant's further contend that because "temporary signs" are allowed under § 605K, the inflatables, which are each only displayed for a short time, could be permitted as such. However, the MTZR is clear on this interpretation as well. Article VIII of the regulations clearly states that: "Where this Resolution imposes a greater restriction upon the use of buildings and premises . . . than are imposed or required by other . . . regulations . . . the provisions of this Resolution shall control." Accordingly, while it may be argued that, if inflatables can be signs, they can be allowed as temporary signs, the more specific total ban of inflatables controls pursuant to Article VIII.

Also, MTZR § 603E is not void for vagueness in its application. While the zoning inspector is solely charged with enforcement of the regulations, and she admitted at trial that her enforcement of the ban on inflatables "could be better," the regulation is clear in its prohibition of inflatables, and both the township and the zoning inspector have consistently taken the position that all inflatables used for advertising are banned by § 603E. Nor has evidence been presented [*21] that anyone in the township, appellants included, has ever been given any indication that the regulation does not ban inflatables used as advertisements. Further, as a result of the fact that there is only a single enforcement agent, it naturally follows that not every violation will be met with an enforcement action; this is true with most all violations of township and other regulations. This fact does not make the regulations themselves unconstitutionally vague. The appellants also contend that the MTZR does not provide for adequate oversight in the zoning inspector's enforcement. However, this Court finds this argument to be without merit. MTZR, Appx. I provides that enforcement by the zoning inspector is overseen by the Board of Zoning Appeals and that citizens may utilize this oversight through an appeals process.

As the appellants assert, "a vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)*. However, MTZR § 603E does not delegate policy matters in such a way, and [*22] while the appellants feel that it is not uniformly enforced, any lack of uniformity is not a result of ambiguity in the text of the regulation and does not make the regulation void for vagueness. The resolution clearly prohibits the display of all types of inflatables and does not leave any room for interpretation or subjective application. Accordingly, the district court is affirmed in its dismissal of the appellants' due process claim.

C. MTZR § 603E and the enforcement thereof does not violate the appellant's equal protection rights under the *Fourteenth Amendment*

The third and final issue before this Court on appeal is the district court's dismissal of the appellants' equal protection claim. In this claim of error, the appellants contend that Medina's enforcement of MTZR § 603E in commercial districts and simultaneous refusal to enforce the regulation in residential districts is without legitimate governmental interest, and thus violates the *Equal Protection Clause of the Fourteenth Amendment*.

The *Equal Protection Clause of the Fourteenth Amendment* provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This provision thus requires [*23] that all similarly situated individuals be treated similarly. *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)*. In evaluating an equal protection claim, as with the due process claim evaluated above, this Court again begins with the premise that the regulation challenged is presumed valid. *Id. at 440*. When the party asserting unequal treatment does not assert unequal treatment as part of a protected or suspect class, the Court evaluates the claim as a "class of one," and utilizes a rational basis review. *Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)* (per curiam). This standard affords a strong presumption of validity and simply requires that the challenged regulation be rationally related to a legitimate state interest. *City of Cleburne, Tex., 473 U.S. at 440*. Further, in accordance with this permissive standard, the burden of proving invalidity of the challenged regulation is placed upon the challenging party; here, the appellants. In order to satisfy this burden, the appellants must first adequately show that the individuals receiving preferential treatment under the regulation are "similarly situated," then

they must show that the unequal [*24] treatment is not rationally related to a legitimate government interest. This Court agrees with the district court in concluding that the appellants have failed to satisfy this burden.

First, the appellants have not presented sufficient evidence to convince this Court that the property in residential districts is similarly situated with the commercial property upon which BDK sits. As Medina points out, property zoned for commercial use and that zoned for residential use is materially different in a number of ways. Important to the instant inquiry, residential districts, by definition, usually draw significantly less traffic than do commercial districts because consumers do not congregate in these districts seeking the various goods and services available in commercial districts. These districts are often primarily used by those who live in them and are not often a destination for large numbers of people from outside the residential area. Also, commercial districts, and specifically that in which BDK is located, are often considered, as Medina asserts, the gateway to the township, or visitors' first impression of the town. For these reasons, the township has a greater interest in more [*25] strictly regulating the aesthetics and safety of these areas. Finally, the Supreme Court has noted that, "individual residents themselves have strong incentives to keep their own property values up and to prevent 'visual clutter' in their own yards," more so than do commercial property owners. *City of Ladue v. Gilleo, 512 U.S. 43, 58, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994)*.

Even if the appellants could show that residential districts are similarly situated with the property upon which BDK sits, they have failed to show that the differential treatment lacks a rational connection to a legitimate government interest. The zoning inspector testified at trial in this case that she did not enforce the regulation barring the display of inflatables against those in residential districts because those inflatables are not banned by § 603E because they were not used "for advertising" or "to attract attention to any object, product, place, activity, person, institution, organization, or business," as is required by § 603A in order for an inflatable to constitute a "sign," and that inflatables in residential districts are only intended to draw attention to the inflatable itself. The district court in this case reached the factual [*26] conclusion that this was true, and this Court finds no clear error in this conclusion. The zoning inspector also testified that if an inflatable was discovered in a residential district as being used for the purpose of advertising or drawing attention of passersby to a good or service rather than to the inflatable itself, the owner of that inflatable would be cited as being in violation of MTZR § 603E. Finally, the appellants have not provided evidence that Medina acted with ill-will or animus toward them in enforcing the regulations. Accordingly, the district court is similarly affirmed in its dismissal of the appellants' equal protection claim.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court in its entirety.

1-800-411-Pain Referral Service, LLC, Truman Injury PLLC, and Sergio Triana, Plaintiffs, v. Richard Tollefson, D.C., Ralph Stouffer, Matthew Anderson, D.C., Howard Fidler, D.C., Robert Daschner, D.C., Kay Strobel, Teresa Marshall, D.C., Minnesota Board of Chiropractic Examiners, in their official capacities, Defendants.

Civil No. 12-3034 (SRN/TNL)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

2012 U.S. Dist. LEXIS 182499

December 28, 2012, Decided
December 28, 2012, Filed

COUNSEL: [*1] Eric C. Tostrud and David W. Asp, Lockridge, Grindal, Nauen, PLLP, Minneapolis, Minnesota, for Plaintiffs.

Kermit N. Fruechte, Minnesota Attorney General's Office, St. Paul, Minnesota, for Defendants.

JUDGES: SUSAN RICHARD NELSON, United States District Judge.

OPINION BY: SUSAN RICHARD NELSON

OPINION

MEMORANDUM OPINION AND ORDER

SUSAN RICHARD NELSON, United States District Judge

This matter is before the Court on Plaintiffs' Motion for a Preliminary Injunction [Doc. No. 6]. The Court heard oral argument on December 17, 2012. For the reasons stated below, Plaintiffs' Motion is denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 4, 2012, Plaintiffs filed this action for a declaratory judgment that certain pending amendments to Minnesota's No-Fault Automobile Insurance Act (the "No-Fault Act"), *Minn. Stat. § 65B.54, subd. 6(d)(1)-(3), (5),* and *(6),* violate the *First Amendment to the Constitution of the United States*. (Complaint ¶¶ 38-59 [Doc. No. 1].) Through the instant motion, Plaintiffs seek to enjoin Defendants from enforcing the statute, which will otherwise go into effect on January 1, 2013.

Plaintiff 1-800-411-Pain Referral Service, LLC ("411 Pain") is a legal and medical referral service, incorporated in the [*2] State of Florida. (Id. ¶ 11.) 411 Pain maintains a referral network with chiropractors and medical doctors, to whom accident victims are referred after calling 1-800-411-PAIN. (Id. ¶¶ 15, 17.) Advertising "assistance for accident victims through billboards, radio, television, print, and internet advertisements," 411 Pain promotes itself in several states, including Minnesota. (Id. ¶ 16.) 411 Pain contends that its extensive advertising provides a benefit to the providers in its network, who might otherwise be unable to undertake such advertising campaigns on their own. (Id. ¶ 17.) Plaintiffs Truman Injury PLLC ("Truman Injury") and Sergio Triana, D.C. are part of 411-Pain's chiropractic network in Minnesota. (Id. ¶ 22.) Defendants are members of the Minnesota Board of Chiropractic Examiners. (Id. ¶ 14.) Plaintiffs allege

that Defendants, in their official capacities, have the authority to take disciplinary action for violations of *Minn. Stat. § 65B.54, subd. 6(e)*. (Id. ¶ 14.)

Minnesota's No-Fault Act, enacted in 1974, requires that insurers provide certain benefits to insureds who are injured in car accidents. *Minn. Stat. § 65B, §§ 41-71*. Under the No-Fault Act, insurers are required [*3] to pay basic economic loss benefits regardless of the fault of the insured, including up to $20,000 for medical expense loss, and up to $20,000 for income loss, replacement service loss, funeral loss, survivor's economic loss, and survivor's replacement services loss. *Minn. Stat. § 65B.44, subd. 1(a)(1)-(2)* (2007). The No-Fault Act also contains a subdivision addressing the unethical practices of health care providers, prohibiting them from initiating direct contact with injured automobile accident victims. *Minn. Stat. § 65B.54, subd. 6*. (2009). The constitutionality of some of the 2012 amendments to Subdivision 6(d) forms the basis of the instant motion for emergency injunctive relief. Subdivision 6, with the amendments either underscored or stricken below, provides as follows:

> Subd. 6. **Unethical practices.** (a) A licensed health care provider shall not initiate direct contact, in person, over the telephone, or by other electronic means, with any person who has suffered an injury arising out of the maintenance or use of an automobile, for the purpose of influencing that person to receive treatment or to purchase any good or item from the licensee or anyone associated with the licensee. [*4] This subdivision prohibits such direct contact whether initiated by the licensee individually or on behalf of the licensee by any employee, independent contractor, agent, or third party, including a capper, runner, or steerer, as defined in section 609.612, subdivision 1, paragraph (c). This subdivision does not apply when an injured person voluntarily initiates contact with a licensee.
>
> (b) This subdivision does not prohibit licensees, or persons acting on their behalf, from mailing advertising literature directly to such persons, so long as:
>
> (1) the word "ADVERTISEMENT" appears clearly and conspicuously at the beginning of the written materials;
>
> (2) the name of the individual licensee appears clearly and conspicuously within the written materials;
>
> (3) the licensee is clearly identified as a licensed health care provider within the written materials; and
>
> (4) the licensee does not initiate, individually or through any employee, independent contractor, agent, or third party, direct contact with the person after the written materials are sent.
>
> (c) This subdivision does not apply to:
>
> (1) advertising that does not involve direct contact with specific prospective patients, in public media such [*5] as telephone directories, professional directories, ads in newspapers and other periodicals, radio or television ads, Web sites, billboards, mailed or electronically transmitted communication, or similar media if such advertisements comply with paragraph (d);
>
> (2) general marketing practices, other than those described in clause (1), such as giving lectures; participating in special events, trade shows, or meetings of organizations; or making presentations relative to the benefits of ~~chiropractic~~ a specific medical treatment;
>
> (3) contact with friends or relatives, or statements made in a social setting;
>
> (4) direct contact initiated by an ambulance service licensed under chapter 144E, a medical response unit registered under section 144E.275, or by the emergency department of a hospital licensed under chapter 144, for the purpose of rendering emergency care; or
>
> (5) a situation in which the injured person:
>
> (i) had a prior professional relationship with the licensee;
>
> (ii) has selected that licensee as the licensee from whom the injured person receives health care; or
>
> (iii) has received treatment related to the accident from the licensee.
>
> (d) For purposes of this paragraph, "legal name," for an [*6] individual means the name under which an individual is licensed or registered as a health care professional in Minnesota or an adjacent state, and for a business entity, a name under which the entity is registered with the secretary of state in Minnesota or an adjacent state, so long as the name does not include any misleading description of the nature of its health care practice; and "health care provider" means an individual or business entity that provides medical treatment of an injury eligible as a medical expense claim under this chapter. In addition to any laws governing, or rules adopted by, a health care provider licensing board, any solicitation or advertisement for medical treatment, or for referral for medical treatment, of an injury eligible for treatment under this chapter must: (1) be undertaken only by or at the direction of a health care provider; (2) prominently display or reference the legal name of the health care provider; (3) display or reference the license type of the health care provider, or in the case of a health care provider that is a business entity, the license type of all

> of the owners of the health care provider but need not include the names of the [*7] owners; (4) not contain any false, deceptive, or misleading information, or misrepresent the services to be provided; (5) not include any reference to the dollar amounts of the potential benefits under this chapter; and (6) not imply endorsement by any law enforcement personnel or agency.
>
> (e) A violation of this subdivision is grounds for the licensing authority to take disciplinary action against the licensee, including revocation in appropriate cases.

(Minn. Session Law, Ch. 255, amending *Minn. Stat. § 65B.54, subd. 6(a)-(e)*, at 1-2, Ex. 2 to Aff. of David W. Asp [Doc. No. 8-1]) (underscored in original). [1]

> 1 The definition for the terms "runner, capper, or steerer, previously defined in *Minn. Stat. § 609.612, subd. 1(c)*, was likewise amended as follows:
>
> > (c) "Runner," "capper," or "steerer: means a person who for a pecuniary gain directly procures or solicits prospective patients ~~or clients~~ through telephonic, electronic, or written communication, or in-person contact, at the direction of, or in cooperation with, a health care provider when the person knows or has reason to know that the provider's purpose is to ~~fraudulently~~ perform or obtain services or benefits under or relating to [*8] a contract of motor vehicle insurance. The term runner, capper, or steerer does not include a person who solicits or procures clients either through public media, or consistent with the requirements of *section 65B.54, subdivision 6*.

(Id.) (underscored in original).

A. Legislative History

During the 2011-12 legislative session, in Senate File 2342 and House File 2749, the Minnesota Legislature discussed, and ultimately unanimously approved, the amended language in the No-Fault Act that Plaintiffs challenge in this suit. The legislative history of the 2012 amendments to the No-Fault Act reflects an effort by the insurance industry and health care providers, specifically chiropractors, to enact reforms to Minnesota's No-Fault Act. (See Bob Johnson Comments, 3/16/12 Senate Commerce Comm. Hrng. at 1:02:18-1:03:44, Ex. 2 to Aff. of Hans A. Anderson [Doc. No. 20-1].) The legislative record before the Court also reveals an intent to prohibit deceptive, misleading advertising in the context of automobile accidents. Discussion at Senate committee hearings included specific references to the billboard advertising of 411-Pain and another similar medical and legal referral company known as "1-800-ASK [*9] GARY":

> **Sen. Paul Gazelka**: I see billboards all around the metro down here, you know, certain health care providers, you know, "After you dial 911, dial 411- PAIN." And I know it's all related to this coverage you're talking about now (no-fault insurance). And I think the concept is good, I think people appreciate being able to get the coverage, but if you look at the differences in premium(s) for Minnesota versus our neighboring states, this I believe, is one of those areas. But I guess I want you to address that. Certainly this was an abuse, over the years, I'm assuming it still is, but I think we need to have open dialogue about that.
>
> **Bob Johnson, President of the Insurance Federation of Minnesota:** I could say a lot about this one. Hopefully will. I think just for today, maybe I comment the billboards [sic]. You mentioned two billboards. One, a police officer, "After you dial 911, dial 1-411 PAIN." That's a Miami-based chiropractor that runs those billboards. There's also quite a few around town that's got a wrestler on it now and says "1-800 ASK GARY." That's a Miami-based chiropractor. You know, it's a free market so people can come and do business here. And it's clearly for auto [*10] accident victims that the solicitation is intended, because then the number, say if you're in a car accident, you have access to dollars under the no-fault system.

(1/25/11 Sen. Commerce & Consumer Protection Comm. Hrng. at 56:53-58:59, Ex. 1 to Aff. of Rachel Morton [Ex. 9-1].)

Over a year later, on March 16, 2012, the Senate Commerce Committee held a hearing on proposed amendments to the No-Fault Act. Bob Johnson of the Insurance Federation of Minnesota explained the changes, focusing on the proposed language requiring advertisers to disclose health care providers' legal names or clinic names:

> **Bob Johnson, President of the Insurance Federation of Minnesota:** The bill that you have before you, as amended, is a targeted improvement to *65B.54, Subd. 6*. That's a current No-Fault law that deals with unethical practices of providers who treat individuals in car accidents and the operative language as you have in front of you is the new *paragraph (d)* that - again - follows up on the current law that governs the advertisements and the behavior of providers to specifically deal with outreach advertisements, solicitations, activities of providers to deal with and require that the providers use [*11] their own legal name or the legal name of their clinic and to - prohibits the use of fictitious names or assumed names and then also requires that the legal name - that the provider has to be prominently displayed or referenced in the solicitation and accurately describe what their practice is. So it's a follow up to current law that already deals with the outreach solicitations, advertisements, and providers and again it's a pretty selected, targeted reform. It's one of the issues that we had on the table before us amongst a number of issues.

(3/16/12 Senate Commerce Comm. Hrng. at 1:02:18-1:03:44, Ex. 2 to Anderson Aff. [Doc. No. 20-1].)

In response to a question from Senator Ann Rest, inquiring about the nature of the problem that the proposed statutory language sought to address, the Senate bill's sponsor, Senator Gazelka stated:

> . . . [M]y general response would be that perhaps there are some outliers in the industry that use advertisements out of Florida companies that tend to get a lot of care directed their way, and perhaps they have a lot of modalities that they run through the treatment and there's presenting not the tightest language to correct some of that. And no-fault is [*12] fairly broad and so we are trying to deal with one of those issues. We would really rather have them be more specific than what I just said.

(3/16/12 Senate Commerce Comm. Hrng. at 1:05:18-1:06:05, Ex. 4 to Morton Aff. [Doc. No. 9-1].) Kevin Goodno, lobbying on behalf of the Minnesota Chiropractic Association, stated that advertisements that fail to disclose the names of the health care providers to whom consumers are referred, are deceptive:

> **Kevin Goodno, Minnesota Chiropractic Association:** We have been engaged in discussions for over a year trying to deal with and identify various concerns both sides have with the current no-fault system.
>
> From the Chiropractors' Association, the concern that we're trying to address is deceptive advertising. We want people, patients injured, individuals who want to access care because they were injured in an auto accident to know - when they call a number - when they go to somebody who's advertised - that they know that it's either a provider or a referral source or that it's very clear to them what the advertisement is and who those people are that are advertising their wares. And so for us, it's an issue of deceptive advertising making sure that people [*13] who are accessing health care know exactly the conduit by which they're accessing it. And in this case, the language would clarify and specify that you need to use - if you're a health care provider advertising - you need to use your legal name. We do have some concerns there are still some issues outstanding we're still, this is very technical in nature, and trying to figure out what works what doesn't work and we want to make sure there are no unintended consequences. We're committed to continuing to work with the Insurance Federation, Senator Gazelka, and other interested parties to try to make sure that this bill works the way it's intended to. So there is some modif-- there are likely to be some modifications that need to be made to it as Senator Gazelka mentioned - but we do agree that there is a problem out there - or if not a problem - it's a perceived problem with deceptive practices by some providers out there.

(3/16/12 Senate Commerce Comm. Hrng. at 1:06:50-1:07:06; 1:07:11-1:08:28, Ex. 2 to Anderson Aff. [Doc. No. 20-1].)

Also at this hearing, Bob Johnson of the Insurance Federation responded to a question from Senator Terri Bonoff asking why a telephone number or internet [*14] address might be considered misleading in this advertising context:

> **Bob Johnson, President of the Insurance Federation of Minnesota:** Mr. Chairman and Senator Bonoff, there are some names out there that have phone numbers and we believe, I think I can say jointly, believe that to be today misleading to consumers. To just see a phone number, it doesn't actually tell you

> what the business is or what you're doing. So if consumers just see a phone number, that's what the advertisement is, then that's confusing and potentially deceptive or misleading. And so it's a very targeted and I think it's a very limited circumstance where you are going to see that prospect coming up, but it does, and so that's what it is targeted to do is again, if it is not going to impact any provider who has a name that you're gonna be expected to have a provider name or clinic or operation or whatever, it is more likely so it's intended to focus in on that particular, that type of activity.

(3/16/12 Senate Commerce Comm. Hrng. at 1:09:33-1:10:30, Ex. 4 to Morton Aff. [Doc. No. 9-1].)

Four days later, at a March 20, 2012 meeting of the House Committee on Commerce and Regulatory Reform, State Representative Joe Atkins [*15] questioned whether the amended language would eliminate the ability of businesses like 411 Pain and 1-800-ASK GARY to do business in Minnesota. (3/20/12 House Commerce Comm. Hrng. at 1:24:05-1:24:09, Ex. 3 to Morton Aff. [Doc. No. 9-1].) Joel Carlson, speaking on behalf of the Association for Justice, indicated that the proposed language, "on its face," would have such an effect, and Representative Atkins, in response to his own question stated, ". . . as I understand how they operate, it would eliminate their ability to do business in Minnesota." (Id. at 1:24:10-1:24:23.) Representative Tim Sanders interjected, comparing the proposed amendments to past consumer/regulatory legislative efforts aimed at misleading advertising in other areas:

> **Rep. Tim Sanders:** Thank you, Mr. Chair, I think to that point and I think it was a couple years ago Representative Simon carried a bill that I worked with him where we dealt with this type of issue I believe when it dealt with locksmiths and florists where you would call a number in the phone book or something or look on Google. You would Google "Blaine locksmith" and it would actually patch you to a company in New Jersey who would then send you back [*16] to a Blaine locksmith. We fixed that a couple years ago for locksmiths and florists and I believe that this language is fairly similar at least looking. . . that may be some language to look at in that we were trying to fix that language for those industries and I see a similar problem, similar issue as it relates to 1-800-ASK GARY, I guess.

(Id. at 1:24:29-1:25:33.)

Also at the March 20 committee hearing, Representative Mike Nelson asked Representative Jim Abeler, the House sponsor of the bill, whether the proposed amendments would have any effect on limiting chiropractic or personal injury attorney mail solicitations with which automobile accident victims are frequently inundated. (Id. at 1:25:43-1:26:21.) Representative Abeler responded that the objective of the proposed legislation was not to limit such solicitations, but to combat fraud, stating, "We're not trying to get rid of annoyance; we're trying to get rid of fraud." (Id. at 1:26:21-1:26:35.)

On April 25, 2012, the proposed amendments were before the House on a floor vote. (Summary of Legislative History, Ex. 5 to Anderson Aff. [Doc. No. 20-1].) Before the final vote was taken in the House, House members explained the purpose [*17] behind the proposed amendments and expressed their bi-partisan support for the bill:

> **Statements of Representative Jim Abeler:** We did agree on some advertising. In particular there is one group you might have heard the jingle 411 Pain that promises you $40,000. Pretty good deal. Not exactly the purpose of auto insurance is to give people $40,000. And so that's an example of an abuse. Some clinicians abuse the system and treat too long. We didn't get to that agreement on that part. There are some people who will run interference and go attract patients and give them rides and pay them money to go become patients whether they are injured very bad. They are called runners, cappers and steerers. That's a problem. The amendment that's before you is agreed upon by all parties and it involves advertising and adds some peace [sic] to the runners, cappers and steerers piece. In short it says advertising must be undertaken by health care providers, they must display the legal name with a health care provider or their clinic name. They must tell what kind of health provider they are. It must not be false, deceptive or misleading. It must not give reference to dollar amounts like the $40,000 and [*18] it must not imply endorsement by law enforcement or personnel. The second part has to do with giving teeth to the runners and cappers thing. I believe a letter by Ramsey County Attorney Choi brought forward the second part, in particular he endorses the bill as well. It gets rid, it allows them to actually prosecute people for fraudulently procuring and soliciting prospective patients. Members that's the bill.

> **Representative Joe Atkins :** I wanted to indicate the same sentiment as Representative Abeler's work. I think he is up to his eighth version on the effort. He has designated a certain area of advertising that he is targeting here. And it does not affect other areas of advertising for legitimate, appropriate chiropractors, health care providers, lawyers. I traises some questions . I know I asked in committee Representative Abeler if it puts out of business the 1-800-ASK-GARYs, the 1-800-411-PAINs. I actually tried to call them or my assistant tried to call them on Monday - the Gary folks - and he was told they would get back to him in a few days. We represented that this could have a major impact on their business. So we haven't heard anything back from them. But I appreciate the [*19] efforts and we will see where it all goes.

(4/25/12 House Floor Debate at 3:05:52-3:07:17; 3:09:02-3:10:05, Ex. 1 to Anderson Aff. [Doc. No. 20-1].) The House bill containing the proposed amendments to the No-Fault Act, House File 2749, passed unanimously. (Summary of Legislative History, Ex. 5 to Anderson Aff. [Doc. No. 20-1].)

The bill was then returned from the House and was before the Senate for a final vote on April 26, 2012. Addressing the Senate prior to the final vote on Senate File 2342, Republican and Democratic State Senators stated that the amendments were designed to protect injured automobile accident victims from deceptive, misleading advertising at their most vulnerable moments, following a car crash:

> **Sen. Paul Gazelka**: This will protect individuals injured in a motor vehicle accident from solicitations and advertisements that exert undue influence, are deceptive and mislead. First of all, by imposing new restrictions on advertisement targeted to individuals injured in a motor vehicle accident to insure that advertising is not misleading and clearly identifies the health care provider directing the solicitation. The second provision of the legislation strengthens the current [*20] law, prohibiting the use of runners, and cappers, and steerers in soliciting no-fault auto business for health care providers. Members, this is a collaboration of the MN Chiropractors Association, and the Insurance Federation, and other stakeholders. It passed unanimously off the House floor. There's no opposition that I'm aware of now. This has been a work that's been in the making for probably ten years or longer and I'm just thrilled that we're able to get this done.
>
> **Sen. Ron Latz**: Madam President, Members, I think this is a good bill, it's an appropriate protection for consumers and injured parties so they don't get taken advantage of at some of the most vulnerable moments, and I think deserves your widespread support today.

(Minnesota Senate Floor Session video archive, 4/26/12 at 10:27-11:41, http://www.senate.leg.state.mn.us/media/media_list.php?ls=87&archive_year=2012&archive_month=04&category=floor&type=video&ver=new#monthnav, accessed on 12/27/12.) [2] The bill passed unanimously and was signed by Governor Dayton on April 30, 2012. (Minn. Session Law, Ch. 255, amending *Minn. Stat. § 65B.54, subd. 6(a)-(e)*, at 2, Ex. 2 to Asp Aff. [Doc. No. 8-1].)

> 2 Although the parties did not [*21] provide a transcript excerpt of the April 26, 2012 Senate Floor Vote in their exhibits, the Court accessed the video archive at the above-referenced website and transcribed the comments quoted above. The Court takes judicial notice of this portion of the legislative record.

B. Plaintiffs' Advertisements

In support of their motion for injunctive relief, Plaintiffs submit the Declaration of Robert Lewin, the founder and president of 411 Pain [Doc. No. 12], and the Declaration of Dr. Sergio Triana, an individual Plaintiff, and President of Plaintiff Truman Injury [Doc. No. 11]. Mr. Lewin avers that 411 Pain has invested significant resources advertising in Minnesota and has built name recognition in the Minnesota market. (Lewin Decl. ¶ 7 [Doc. No. 12].) He contends that the State of Minnesota does not require 411 Pain to have a license in order to provide referrals for professional services, including referrals for medical treatment (id. ¶ 8), and that 411 Pain's advertisements contain only truthful, non-misleading information. (Id. ¶ 10.)

In connection with his declaration, Lewin submitted the following examples of 411-Pain's advertisements in Minnesota, arguing that they would be prohibited [*22] under the amendments to the No-Fault Act, based on their references to specific dollar amounts of possible benefits (id. ¶ 21): [3]

> TOURISTS JUST LOVE THE MALL AND TOURISTS BRING CAR ACCIDENTS. . . THE ILLEGAL U-TURNS, I CAN DEAL WITH. . . THE 15 MILES PER HOUR IN THE LEFT LANE, USED TO IT . . . BUT THIS NEW ONE. . . LEFT TURN RIGHT BLINKER HAS ME SCREAMING (SFX BEEP BEEP) . . . HOPEFULLY YOU AVOIDED THE ACCIDENT, BUT IF NOT CALL GEORGE AT 1-800-411- PAIN. . . ROAD RAGE IS NOT THE ANSWER . . . GEORGE IS. . . CAR ACCIDENT. . . REMEMBER, AFTER 911, CALL 411. . . 1-800-411-PAIN. . . YOU MAY BE ENTITLED TO FORTY THOUSAND DOLLARS IN INJURY AND LOST WAGE BENEFITS . . . CALL 1-800-411-PAIN 24 HOURS A DAY 7 DAYS A WEEK . . . WHETHER IT'S SATURDAY, SUNDAY, EVEN CHRISTMAS DAY . . . UNLIKE TOURISTS. . . 411-PAIN WORKS EVERYDAY. . . CAR ACCIDENT . . . REMEMBER AFTER 911, CALL 411. . . 1-800-411-PAIN. . . YOU CAN CALL FROM HOME OR THE HOSPITAL, BUT THE ABSOLUTE BEST TIME TO CALL 411 PAIN IS FROM THE ACCIDENT SCENE . . . REMEMBER AFTER 911, CALL 411, 1-800-411-PAIN . . . 1-800-411-7-2-4-6.

(Ex. 1 to Lewin Decl. [Doc. No. 14 at 2])

> YOU'VE GOT A RETIREMENT PLAN, A BUSINESS PLAN, A WEDDING PLAN, AND PROBABLY [*23] EVEN DINNER PLANS. . . BUT DO YOU HAVE AN [sic] CAR ACCIDENT PLAN . . . CAR ACCIDENTS HAPPEN . .. WHAT YOU PLAN TO DO NEXT CAN MAKE ALL THE DIFFERENCE . . . CAR ACCIDENT . . . REMEMBER AFTER 911. . . CALL 411. . . 1-800-411-PAIN. . . 1-800-411-PAIN KNOWS ABOUT CAR ACCIDENTS. . . IT'S WHAT THEY DO. . . CALL 1-800-411-PAIN 24 HOURS A DAY 7 DAYS A WEEK FROM HOME, HOSPITAL OR ACCIDENT SCENE. . . TIME OFF IS A CONCEPT 411 PAIN CAN'T GRASP. . . CALL 1-800-411-PAIN AND LET THEM EXPLAIN THE UP TO $40,000 IN INJURY AND LOST WAGE BENEFITS YOU MAY BE ENTITLED TO. . . PLAN NOW. . . PROGRAM 1-800-411-PAIN INTO YOUR PHONE NUMBER UNDER "ACCIDENT" . . . HERE'S ANOTHER GOOD PLAN. . . DON'T DRINK AND DRIVE AND ALWAYS WEAR YOUR SEATBELT. . . CAR ACCIDENT, REMEMBER, AFTER 911 CALL 411. 1-800-411-PAIN.

(Ex. 2 to Lewin Decl. [Doc. No. 14 at 4]) (emphasis in original)

> You know the deal . . .
> Car accident . . . 411 PAIN
> Slip and Fall. . . 411 PAIN
> Work accident . . . 411 PAIN
> Motorcycle accident . . . 1-800-411-PAIN. You can say it in your sleep.
> Whether it's Saturday, Sunday or even Christmas Day. Call 1-800-411-PAIN. The best time to call 411 PAIN is from the accident scene. But you're going to be stressed, so [*24] grab your cell and punch in 1-800-411-PAIN. You want someone whose got your back. . . Call 1-800-411-PAIN. . . 411-PAIN has got your back. Call 1-800-411-PAIN 24 hours a day 7 days a week and let them explain the up to $40,000 injury benefits you may be entitled to . . . It's Sunday 5 p.m., there is no way 411 PAIN will answer the phone, WRONG! 411 PAIN works weekends. In an accident, and the guy with the tie says "let's not get our insurance companies involved." No good deed goes unpunished. . . always call 911 and always call 411. REMEMBER after 911 call 411, 1-800-411-PAIN.

(Ex. 3 to Lewin Decl. [Doc. No. 14 at 6].)

> CAR ACCIDENTS HAPPEN. . . TELLING EVERYONE ON FACEBOOK ISN'T SOLVING YOUR PROBLEMS. . . CALLING 1-800-411-PAIN COULD . . . YOU MAY BE ENTITLED TO UP TO $40,000 IN INJURY AND LOST WAGE BENEFITS. . . THAT'S WHY AFTER 911 CALL 411. . . 1-800-411-PAIN. . . CALL 411-PAIN DIRECTLY FROM THE ACCIDENT SCENE. . . LISTEN, YOU

CAN TWEET AND POST ABOUT THE CAR ACCIDENT LATER . . . CAR ACCIDENT. . . REMEMBER, AFTER 911, CALL 411. 1-800-411-PAIN.

(Ex. 4 to Lewin Decl. [Doc. No. 14 at 8]) (emphasis in original).

3 The Court reprints the advertisements in the typeface form in which they appear [*25] in Plaintiffs' exhibits.

Lewin contends that the amended No-Fault Act "drastically limit[s] 411-Pain's ability to advertise in Minnesota. (Lewin Decl. ¶ 18.) He attests that the new law prohibits a referral service like 411-Pain from advertising its services, because 411-Pain does not advertise at the "direction" of any one health care provider. (Id. ¶ 19.) Even if the providers in 411-Pain's network did "direct" 411-Pain's advertising, Lewin contends that the new law "still would completely prohibit 411-Pain from advertising its services for medical referrals." (Id. ¶ 20.) Lewin attests that the requirement that 411-Pain disclose the individual provider names in its network of "dozens of health care providers" would not be feasible on 411-Pain's billboard advertisements, due to space limitations, nor in its radio and television advertisements, due to time limitations. (Id.) Lewin also contends that the new law's prohibition against advertising the specific dollar amounts of benefits available would prohibit the advertisements found in Exhibits 1-4 of the Lewin Declaration, as they contain such dollar-specific references. (Id. ¶ 21.)

While the advertisements found in Exhibits 1-4 of [*26] the Lewin Declaration are radio ads (id. ¶ 11), 411-Pain also advertises on television. Some of 411-Pain's television advertisements feature a vehicle crash, an actor appearing as a police officer or EMT, and an ambulance -- all of which "convey[] to viewers that if they call the phone number associated with 800-411-PAIN or go to 411Pain.com, then they can get help after being injured in an accident." (Id. ¶ 16.) Lewin attests that television ads portraying law enforcement officers contain a "conspicuous and prominent disclaimer" that the law enforcement officer depicted is a "paid actor." (Id.)

Lewin further contends that the enforcement mechanism found in the new law --which subjects health care providers to disciplinary action from a professional licensing board for failure to abide by the new law's provisions -- will cause health care providers to refrain from associating with 411-Pain for fear of disciplinary action. (Id. ¶ 23.) In support of this contention, Plaintiffs submit the Declaration of Mark Soll, D.C., a Minnesota licensed chiropractor who would like to become part of the 411-Pain referral network. (Decl. of Mark Soll ¶ 2 [Doc. No. 13].) Soll asserts that he will not join [*27] 411-Pain's network due to his concern that, in light of the changes to the No-Fault Act, the Minnesota Board of Chiropractic Examiners would take disciplinary action against him. (Id. ¶ 5.)

Chiropractor Sergio Triana attests that his clinic, Truman Injury, is part of 411-Pain's referral network, and would like to remain a part of that network. (Decl. of Sergio Triana ¶ 4 [Doc. No. 11].) In addition, Dr. Triana contends that, but for the new law, Truman Injury itself would create advertisements referencing specific dollar amounts of recovery, informing car accident victims that they "may be entitled to benefits of up to $40,000." (Id. ¶ 6.) Similarly, but for the new law, Triana states that he "would create and run advertisements through Truman Injury" depicting police officers or EMT personnel, with a "paid actor" disclaimer. (Id. ¶ 7.) However, in light of the new provisions in the No-Fault Law subjecting health care providers to disciplinary action for violations of the law, Triana contends that he will refrain from creating and running such advertisements. (Id. ¶ 8.)

Although the amendments to Minnesota's No-Fault Act were signed by Governor Dayton on April 30, 2012, Mr. Lewin, President [*28] of 411-Pain, contends that he only "became aware of a change" to the law in late October 2012 (Lewin Decl. ¶ 17 [Doc. No. 12].) Plaintiff Triana likewise attests that he "recently became aware" of the change in law. (Triana Decl. ¶ 2 [Doc. No. 11].) Plaintiffs commenced this lawsuit on December 4, 2012, and filed the instant motion the following day.

II. DISCUSSION

Pursuant to *Fed. R. Civ. P. 65*, Plaintiffs move the Court for the entry of a preliminary injunction enjoining Defendants from enforcing *Minn. Stat. § 65B.54, Subdivision 6(d)(1)-(3), (5),* and *(6).* (Pls.' Mot. for Prelim. Inj. [Doc. No. 6].) As noted, these provisions require that, in the context of advertising benefits under the State's No-Fault system, any advertisement or solicitation for medical treatment or referral for medical treatment of an injury must:

(1) be undertaken only by or at the direction of a health care provider;
(2) prominently display or reference the legal name of the health care provider;

> (3) display or reference the license type of the health care provider, or in the case of a health care provider that is a business entity, the license type of all of the owners of the health care provider but need not [*29] include the names of the owners;
>
> ***
>
> (5) not include any reference to the dollar amounts of the potential benefits under this chapter; and
> (6) not imply endorsement by any law enforcement personnel or agency. [4]

(Minn. Session Law, Ch. 255, amending *Minn. Stat. § 65B.54, subd. 6(d)(1)-(3), (5)-(6)*, Ex. 2 to Asp Aff. [Doc. No. 8-1].)

> 4 Plaintiffs do not seek to enjoin Part (4) of Subdivision 6(d), which prohibits advertisements containing false, deceptive, or misleading information, or misrepresentation of the services provided (id., subd. 6(d)(4)). (Pls.' Mot. at 1 [Doc. No. 6].)

Plaintiffs contend that, absent the issuance of a preliminary injunction, the amended No-Fault Act will "completely prohibit Plaintiff 411-Pain from truthfully advertising its medical-referral services." (Pls.' Mem. Supp. Mot. for Prelim. Inj. at 1 [Doc. No. 7].) For instance, Plaintiffs argue that by prohibiting references to specific dollar amounts of potential recovery, the amended law stifles their truthful speech which advertises potential benefits of "up to $40,000 in medical-expense and wage-loss benefits after an accident." (Id. at 2-3; 14.) In addition, Plaintiffs argue that the No-Fault Act's new prohibitions [*30] against the implied endorsement of law enforcement impinge their speech. (Id. at 14.) Likewise, Plaintiffs take issue with the provisions requiring that advertisements be undertaken at the direction of a health care provider, and the related provisions that require advertisers to identify the legal name and license type of health care provider to whom consumers are referred. (Id. at 17-19.) These prohibitions, Plaintiffs contend, violate the *First Amendment*, which does not permit such bans on commercial speech based on the identity of the speaker or the content of the message. (Id.) (citing *Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2671, 180 L. Ed. 2d 544 (2011)).* Asserting that they have demonstrated a high likelihood that they will prevail on the merits, Plaintiffs move the Court to grant their motion for a preliminary injunction and to enjoin Defendants from enforcing the new law. (Id.)

In response, Defendants argue that the No-Fault provisions at issue do not run afoul of the *First Amendment*. Rather, Defendants argue, the law strengthens prohibitions against misleading advertising of medical and legal referral services directed to automobile accident victims. (Defs.' Opp'n Mem. at 1 [Doc. No. [*31] 19].) They contend that the Act represents a valid prohibition on speech concerning misleading and unlawful activity. (Id. at 12.) Arguing that Plaintiffs cannot show that they are likely to prevail on the merits and cannot demonstrate irreparable harm, Defendants argue that Plaintiffs' motion for a preliminary injunction must be denied.

A. Standard of Review

A preliminary injunction "is an extraordinary remedy never awarded as a matter of right." *Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 9, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)*. In Planned Parenthood Minnesota v. Rounds, the *en banc* Eighth Circuit clarified the analysis for preliminary injunctive relief. *530 F.3d 724 (8th Cir. 2008)* (*en banc*). The court noted that under its earlier *en banc* decision in Dataphase Systems, Inc. v. C L Systems, Inc., issuance of preliminary injunctive relief

> depends upon a "flexible" consideration of (1) the threat of irreparable harm to the moving party; (2) balancing this harm with any injury an injunction would inflict on other interested parties; (3) the probability that the moving party would succeed on the merits; and (4) the effect on the public interest.

Rounds, 530 F.3d at 729 (citing *640 F.2d 109, 113 (8th Cir.1981)* [*32] (en banc)).

As to the factor of success on the merits, the Eighth Circuit has held that when considering a challenge to a "duly enacted state statute," a court must "make a threshold finding that [the plaintiff] is likely to prevail on the merits." *Id. at 732--33*. This "likely to prevail" standard requires the movant to make a "more rigorous threshold showing" than required under the "fair chance" test applicable to a motion for a preliminary injunction that seeks to enjoin something other than a state or federal statute. *Id. at 730, 733 n.6*. A higher standard to enjoin legislation is warranted, as such a standard "'reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly.'" *Id. at 732*

(quoting *Able v. United States, 44 F.3d 128, 131 (2d Cir. 1995)* (per curiam)). "If the party with the burden of proof makes a threshold showing that it is likely to prevail on the merits, the district court should then proceed to weigh the other Dataphase factors." Id.

B. "Likely to Prevail on the Merits" Dataphase Factor

The *First Amendment* [*33] protects against government regulations "that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641--42, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994)*. "Both commercial and noncommercial speech are protected by the *First Amendment*, although they receive different degrees of protection." *Clear Channel Outdoor, Inc. v. City of St. Paul, 02-CV-1060 (DWF/AJB), 2003 U.S. Dist. LEXIS 13751, 2003 WL 21857830, *5 (D. Minn. Aug. 4, 2003)* (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980))*. Content-based government regulations are considered "presumptively invalid," *R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)*, whereas "non-content based regulation and regulation of commercial speech -- expression solely related to the economic interests of the speaker and its audience -- are subject to intermediate scrutiny." See *United States v. Caronia, F.3d , No. 09-5006-cr, 2012 U.S. App. LEXIS 24831, 2012 WL 5992141, *11 (2d Cir. Dec. 3, 2012)* (citing *Turner Broad., 512 U.S. at 642*; *Central Hudson, 447 U.S. 557, 563-64, 100 S. Ct. 2343, 65 L. Ed. 2d 341))*. Deceptive or unlawful commercial speech is entitled to no *First Amendment* protection at all. *Central Hudson, 447 U.S. at 563-64*.

Courts generally [*34] review the regulation of commercial speech under the four-pronged test set forth in *Central Hudson*, asking whether: (1) the expression is protected (i.e., lawful and not misleading); (2) the government interest is substantial; (3) the regulation directly advances the government's interest; and (4) that interest could be served by a more limited exception. *Id. at 566*; see also *R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1217 (D.C. Cir. 2012)* (discussing Central Hudson test).

Plaintiffs urge the Court to apply "heightened judicial scrutiny" to the provisions at issue, citing the Supreme Court's recent decision in Sorrell. (Pls.' Mem. at 11-12 [Doc. No. 7].) In Sorrell, a 6-3 decision, the Supreme Court examined a Vermont law that prohibited pharmaceutical companies and related entities from using prescriber-identifying information for marketing purposes. *131 S. Ct. at 2661-62*. Applying a two-part analysis, the Sorrell Court first considered whether the government regulation was content- and speaker-based. *Id. at 2662-64*. Concluding that the Vermont statute created content- and speaker-based restrictions on speech, the Supreme Court next applied "heightened scrutiny" to the statute [*35] without expressly "decid[ing] the level of heightened scrutiny to be applied, that is strict, intermediate, or some other form of heightened scrutiny." See *Caronia, F.3d at , 2012 U.S. App. LEXIS 24831, 2012 WL 5992141 at *11* (discussing Sorrell's two-part analysis). Whatever the form of "heightened" scrutiny, the Supreme Court ultimately concluded that the statute was unconstitutional even under the intermediate Central Hudson standard. *131 S. Ct. at 2667* (stating, "To sustain the targeted, content-based burden [the Vermont statute] imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.") [5] The Court thus employs the two-part approach set forth in *Sorrell*, which incorporates the *Central Hudson* standard in the second half of the analysis.

> 5 Specifically, the majority concluded that Vermont's asserted interests in protecting physician confidentiality, protecting physicians from harassing sales behaviors, and protecting the doctor-patient relationship did not support the burden placed on protected expression. *Id. at 2668-2670*. In addition, the majority found that the statute [*36] did not advance Vermont's stated policy goals of lowering the costs of medical services and promoting public health. *Id. at 2670*.

1. Whether the Statutory Provisions are Content- and Speaker-Based Restrictions on Speech

Making a determination of whether a statute is content- and speaker-neutral "is not always a simple task." *Turner Broad., 512 U.S. at 642*. "We have said that the 'principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" *Id.* (quoting *Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989))*. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." Id. (citations omitted).

Plaintiffs contend that the amended law is both a content- and speaker-based prohibition on speech. (Pls.' Mem. at 12 [Doc. No. 7].) The Court agrees as to Parts (1), (5), and (6) of Subdivision 6, as these parts relate to speech prohibitions.

(Minn. Session Law, Ch. 255, amending *Minn. Stat. § 65B.54, subd. 6(d)(1), (5)* & *(6)* Ex. 2 to Asp Aff. [Doc. No. 8-1].) The language [*37] in *Subdivision 6(d)(1)* requires that any referrals for medical treatment of an automobile accident injury must be undertaken only by or at the direction of a health care provider. (Id. at *subd. 6(d)(1)*.) This prohibition is speaker-based because it only applies to a narrow class of speakers -- those who are soliciting referrals for medical treatment of an automobile accident injury, but not at the direction of a health care provider. As Plaintiffs' counsel argued at the motion hearing, amended *Minn. Stat. § 65B.54* applies to only those entities and providers who advertise in the context of automobile accidents, as opposed to slip and fall or workplace accidents.

In *Part (5) of Subdivision 6(d)*, the amended statute prohibits references to specific dollar amounts of potential recovery. (Id. at *subd. 6(d)(5)*.) This prohibition therefore distinguishes between favored speech referring to the possibility of economic loss benefits in general, and disfavored speech referring to specific dollar amounts of economic loss benefits.

Subdivision 6(d)(6) of the amended No-Fault Act bans advertisements that imply law enforcement endorsement. (Id. at *subd. 6(d)(6)*.) This prohibition thus prohibits the [*38] content of such speech.

The amendments found in *Parts (2)* and *(3) of Subdivision 6* require the disclosure of the health care provider's legal name and license type. On the subject of disclosure requirements, the Supreme Court has held that advertisers' rights are adequately protected as long as the disclosure requirements in question are reasonably related to the government interest in preventing consumer deception. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985)*. All manner of disclosure requirements designed to protect consumers from misleading commercial speech, or misleading omissions, are found in countless areas of federal and state law, from provisions of the Fair Debt Collection Practices Act requiring debt collectors to meaningfully disclose their identities to consumers, *15 U.S.C. § 1692d(6)*, to a Minnesota statute requiring that advertisements for membership camping contracts prominently disclose the name, address, and phone number of the membership camping operator on whose behalf the advertisement is distributed. *Minn. Stat. § 82A.09, subd. 3(2)* (2009). Addressing certain disclosure requirements in a rule of professional conduct [*39] that required attorneys who advertised contingency-fee services to indicate that a losing client might remain responsible for certain litigation fees and costs, the Zauderer Court observed,

> Thus, in virtually all our commercial speech decisions to date, we have emphasized that because disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception." *In re R.M.J., 455 U.S. 191, 201, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982)*. Accord, *Central Hudson, 447 U.S. at 565*; *Bates v. State Bar of Arizona, 433 U.S. 350, 384, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)*; *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772, n. 24, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976)*.

Zauderer, 471 U.S. at 651.

In *Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1340-41, 176 L. Ed. 2d 79 (2010)*, the Supreme Court reiterated its holding in Zauderer that the standard of scrutiny to be applied to a commercial speech challenge to disclosure provisions in a federal bankruptcy statute was whether the requirements were reasonably related to the government's interest in preventing consumer deception.

The [*40] parties disagree, however, about the standard applicable to the new requirements found in *Subdivision 6(d)(2)-(3)*. Defendants argue that the slightly lower, "reasonably related" standard applies (Defs.' Opp'n Mem. at 13-14), while Plaintiffs contend that the heightened Sorrell standard applies. (Pls.' Mem. at 13 [Doc. No.7].) Because the outcome here is the same under the remaining three Central Hudson factors -- an analysis that is included in the higher Sorrell standard -- the Court will apply the *Central Hudson* factors to these portions of the amended No-Fault Act.

2. Applying the Central Hudson Factors

Under a heightened standard, the Court applies *Central Hudson's* test to determine whether the restrictions on commercial speech in certain provisions of Minnesota's amended No-Fault Act are consistent with the *First Amendment*. *Sorrell, 131 S. Ct. at 2667-68*. The government bears the burden of justifying whether a content-based law is consistent with the *First Amendment*. *Id. at 2667*.

a. Whether the Speech is Misleading or Concerns Unlawful Activity

The threshold question under the four-part Central Hudson test is whether the speech in question is misleading or concerns unlawful activity. [*41] *Central Hudson, 447 U.S. at 566*. "For commercial speech to come within [the *First Amendment*], it at least must concern lawful activity and not be misleading." Id. Writing for the dissent in Sorrell, Justice Breyer observed, "The fact that the Court normally exempts the regulation of 'misleading' and 'deceptive' information even from the rigors of its 'intermediate' commercial speech scrutiny testifies to the importance of securing 'unbiased information. . . .'" *Sorrell, 131 S. Ct. at 2681* (6-3 decision) (Breyer, J., dissenting) (citation omitted). ". . . [W]hen the particular method or content of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely." *In re R.M.J., 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982)*. "Inherently misleading" speech is that which "inevitably will be misleading" to consumers. *Bates v. State Bar of Ariz., 433 U.S. 350, 372, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)*.

While Plaintiffs argue that like the pharmaceutical manufacturers in Sorrell, they are uniquely disfavored speakers under the new No-Fault provisions (see Pls.' Mem. at 12 [*42] [Doc. No. 7]), Plaintiffs' argument overlooks a significant distinction with *Sorrell*. In Sorrell, the State of Vermont in no way argued that the restricted activity was false or misleading, nor that the challenged provision would prevent false or misleading speech. *131 S. Ct. at 2672*. Here, not only do Defendants argue that the restricted activity is false and/or misleading, the legislative record supports their position. For example, the record contains comments from legislators and public stakeholders noting that, as to the referral advertising in question, consumers have little understanding, if any, of what type of services are advertised, who the advertiser is, or whether consumers are entitled to recover a specific dollar amount. Prior to the Senate floor vote on the amended No-Fault language, the Senate bill's sponsor commented that the bill would "impos[e] new restrictions on advertisements targeted to individuals injured in a motor vehicle accident to insure that advertising is not misleading and clearly identifies the health care provider directing the solicitation." (Minnesota Floor Session Video Archive, 4/26/12 at 10:27-11:41.)

Kevin Goodno, a lobbyist for the Minnesota [*43] Chiropractic Association, testified in a committee hearing on the bill, "when [persons injured in automobile accidents] call a number -- when they go to somebody who's advertised - that they [should] know that it's either a provider or a referral source or that it's very clear to them what the advertisement is and who those people are that are advertising their wares." (3/16/12 Senate Commerce Comm. Hrng. at 1:06:50-1:07:06; 1:07:11-1:08:28, Ex. 2 to Anderson Aff. [Doc. No. 20-1].) Underscoring the concern for consumer protection, Senator Ron Latz offered his support for the bill, stating, "[I]t's an appropriate protection for consumers and injured parties so they don't get taken advantage of at some of the most vulnerable moments. . . ." (Minnesota Senate Floor Session Video Archive, 4/26/12 at 10:27-11:41.)

The Court finds that the advertising which the amended No Fault Act seeks to restrict is inherently misleading. Under Central Hudson, deceptive and misleading commercial speech may be freely regulated. *447 U.S. at 563-64*. The examples of radio advertising that Plaintiffs have submitted to the Court fail to identify that 411-Pain is a health care referral source, much less that the [*44] health care in question is chiropractic care. (411-Pain Advertisements, Exs. 1-4 to Lewin Decl. [Doc. No. 14].) Given the content of these advertisements, consumers hearing such ads have no idea what 411-Pain is or does. Instead, 411-Pain's advertisements urge consumers to call 411-Pain immediately, at the accident scene, second only to dialing 911. [6] (411-Pain Advertisements, Exs. 1-4 to Lewin Decl. [Doc. No. 14].)

6 Two of the advertisements suggest that consumers store 411-Pain's number in their cell phones, in anticipation of a car accident. (411-Pain Advertisements, Exs. 2 & 3 to Lewin Decl. [Doc. No. 14].)

In addition, the ads refer to a possible entitlement of "up to $40,000 in injury and lost wage benefits." (411-Pain Advertisements, Exs. 2 & 4 to Lewin Decl. [Doc. No. 14].) While Plaintiffs insist that these representations are truthful, based on the economic loss limits found in *Minn. Stat. § 65B.44, Subdivision 1*, the Court nonetheless finds them misleading. 411-Pain's specific dollar-amount references imply that consumers will receive a floor of benefits, potentially up to $40,000, when, in fact, many consumers will receive nothing. Conversely, these representations also imply [*45] that $40,000 represents the ceiling of possible benefits, when, in fact, a variety of other possible benefits may be available to automobile accident victims -- collision coverage, liability coverage, uninsured motorist coverage, and possibly stacked coverage for motorists not at fault, who have stacked policies. While an attorney or insurance agent qualified to advise clients about coverage could convey this information, 411-Pain's advertisements of "up to" $40,000 in economic loss benefits misleadingly limit the universe of information. Just as 411-Pain's advertisements may prompt some consumers to unnecessarily seek benefits, the proscribed advertising may also keep some consumers from obtaining more benefits.

Furthermore, certain of 411-Pain's television advertisements feature a vehicle crash and an actor portraying the role of a police officer or EMT "with an ambulance conveying to viewers that if they call the phone number associated with

800-411-PAIN or go to 411Pain.com, then they can get help after being injured in an accident." (Lewin Decl. ¶ 16 [Doc. No. 12].) While these ads include a disclaimer stating "Paid Actor" (id. ¶ 16), this depiction of law enforcement or EMT personnel [*46] nonetheless implies their endorsement of 411-Pain's services.

In addition, the language found in *Subdivision 6(d)(1)* of the amended statute requiring that advertising be undertaken at the direction of a provider represents a valid prohibition on speech concerning unlawful activity. 411-Pain contends that it does not advertise "at the direction of" the providers to whom it refers consumers. (Lewin Decl. ¶ 19 [Doc. No. 12].) However, Minnesota law vests authority in the commissioner of health to "adopt rules restricting financial relationships or payment arrangements involving health care providers under which a person benefits financially by referring a patient to another person, recommending another person, or furnishing or recommending an item or service." *Minn. Stat. § 62J.23.* The provision in *Part (1) of Subdivision 6(d)* prohibiting an entity from independently advertising and referring persons for medical treatment -- not at the direction of a health care provider -- thus is aimed at forbidding practices that are both misleading and possibly unlawful. The Court concludes, for all of these reasons, that all of the speech sought to be restricted is, at best, misleading, and is also [*47] possibly unlawful.

b. Whether the Asserted Governmental Interest is Substantial

Under the second Central Hudson factor, the Court determines whether the State's asserted interest is substantial. *447 U.S. at 565-66.* The lone provision of Subdivision 6 (d) which Plaintiffs do not challenge -- found in Part (4), prohibiting advertisements containing false, deceptive, or misleading information -- clearly and unambiguously identifies a substantial governmental interest in protecting the public from misleading and false advertising. (Minn. Session Law, Ch. 255, amending *Minn. Stat. § 65B.54, subd. 6(d)(4)* Ex. 2 to Asp Aff. [Doc. No. 8-1].) Plaintiffs argue, however, that the legislative record merely refers to the advertising at issue as "potentially deceptive or misleading." (Pls.' Mem. at 15 [Doc. No. 7]) (citing Exs. 3 &4 to Morton Aff.) The Supreme Court has held that mere labeling of certain commercial speech as "potentially misleading" cannot supplant the state's burden of identifying a substantial state interest in restricting it. *Ibanez v. Fla. Dep't of Bus. and Reg., 512 U.S. 136, 146, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994).* The Court finds here that the statute expressly refers to false, deceptive, or misleading advertising. [*48] (Minn. Session Law, Ch. 255, amending *Minn. Stat. § 65B.54, subd. 6(d)(4),* Ex. 2 to Asp Aff. [Doc. No. 8-1].) While some statements in the record refer to "potentially misleading" speech, comments in the record also speak to misleading advertising in the present tense, and to the State's interest in protecting against it. (See Bob Johnson Comments, 3/16/12 Senate Commerce Comm. Hrng. at 1:09:33-1:10:30, Ex. 4 to Morton Aff. [Doc. No. 9-1]); Kevin Goodno Comments, 3/16/12 Senate Commerce Comm. Hrng. at 1:06:50-1:07:06; 1:07:11-1:08:28, Ex. 2 to Anderson Aff. [Doc. No. 20-1].)

In addition to the asserted overall governmental interest of preventing fraudulent or misleading advertising aimed at persons injured in motor vehicle accidents, the State has a substantial interest in ensuring that accident victims, who may be under duress, have a clear understanding of who they are contacting for aid and treatment. (Defs.' Opp'n Mem. at 13 [Doc. No. 19].) In addition, the State has an interest in requiring that only parties actually capable of providing health care treatment direct the advertising of their health care services. (Id.) The language at issue in the amended No-Fault language, applicable [*49] to health care providers and those acting at their direction, is aimed at protecting consumers. (Minn. Session Law, Ch. 255, amending *Minn. Stat. § 65B.54, subd. 6(d)(1),* Ex. 2 to Asp Aff. [Doc. No. 8-1].) A state's interest "in ensuring the accuracy of commercial information in the marketplace is substantial." *Edenfield v. Fane, 507 U.S. 761, 769, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993).* In Sorrell, while finding the Vermont statute unconstitutional, the Supreme Court observed, "Indeed the government's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than noncommercial speech.'" *131 S. Ct. at 2672* (quoting *City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993)).*

States have a "compelling interest in the practice of professions within their boundaries." *Florida Bar v. Went For It, Inc., 515 U.S. 618, 625, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995).* Therefore, to protect public health, safety, and other interests, states possess broad licensing and regulatory powers. Id. The Supreme Court has "given consistent recognition to the State's important interests in maintaining standards of ethical conduct in the licensed professions." *Edenfield, 507 U.S. at 770.* [*50] In Minnesota, the Chiropractic Practice Act, *Minn. Stat. § 148.01-108,* establishes the Board of Chiropractic Examiners, and requires licensed chiropractors to adhere to professional standards found in the Act, as well as in the Rules of the Board of Chiropractic Examiners, Minn. Adm. R. 2500. Chiropractors are also obliged to follow certain provisions of the No-Fault Act, Minn. Stat. § 65B. Under the non-amended No-Fault Act, the section regarding "Unethical Practice," addresses only the conduct of licensed health care providers, or those acting on their behalf. *Minn. Stat. § 65B.54, subd. 6(a).* The enforcement provision of the statute, in *Subdivision 6(d)* provides the licensing authority

the power to take disciplinary action against the licensee, including revocation. Id., *subd. 6(d)*. As Defendants note, under the non-amended statute, they are only empowered with the authority to enforce *Subdivision 6(d)* by seeking discipline against licensed chiropractors. (Defs' Opp'n Mem. at 19-11 [Doc. No. 19].) Absent the provisions in the amended No-Fault Act, advertisers and referral sources are permitted to make an end-run around the regulations and prohibitions otherwise enforceable only [*51] against licensed chiropractors. For all of the reasons set forth above, the Court thus finds the State's asserted interests are substantial.

c. Whether the Statute Directly Advances the Asserted Governmental Interest

The Court next considers whether the contested provisions in the amended statute directly advance the asserted governmental interest. *Central Hudson, 447 U.S. at 565-66*. The amended language in *Subdivision 6(d)(2)* and *(3)* directly advances the state interest in prohibiting misleading advertising and ensuring that accident victims have a clear understanding of who they are contacting for aid and treatment. The amended No-Fault provisions advance that interest by requiring advertisements for medical treatment, or referrals for such treatment, to clearly identify the name of the health care provider and the provider's license type. (Minn. Session Law, Ch. 255, amending *Minn. Stat. § 65B.54, subd. 6(d) (2)-(3)*, Ex. 2 to Asp Aff. [Doc. No. 8-1].) So too does the requirement in *Part (1) of Subdivision 6(d)* which requires that advertisements must be undertaken only by or at the direction of a health care provider. This provision advances the State's interest so that car accident [*52] victims have a full understanding that the person or entity to whom they may be referred for treatment is also directing the advertisement.

Part (5) of Subdivision 6(d) also advances the government interest by ensuring that advertisements do not entice, induce, or even lull consumers into believing that an automobile accident may lead to a particular sum of compensation. This subdivision therefore forbids references to specific dollar amounts of benefits potentially available to them.

The prohibition against the implied endorsement of law enforcement in advertisements, found in *Subdivision 6(d)(6)*, in an appropriate restriction on misleading advertising. This provision advances the state's interest in protecting consumers from misleading and deceptive advertising by ensuring that consumers have a clear understanding of who they are contacting and are not unduly influenced by an implied endorsement. Ads that imply law enforcement endorsement extend a misleading aura of authorized approval to the services in question. To the extent that Plaintiffs contend that this ban on advertisements impermissibly extends to images of law-enforcement personnel, the statute does not ban the use of such [*53] images altogether -- it merely bans the implication of law enforcement endorsement of a product. The Court concludes that *Part (6) of Subdivision 6(d)* also advances a substantial governmental interest.

d. Whether the Statute is Narrowly Drawn

Under the final Central Hudson factor, the Court must determine whether the statute is "narrowly drawn" and not more extensive than necessary to serve the governmental interest. *447 U.S. at 565-66*. The government is precluded from "completely suppress[ing] information when narrower restrictions on expression would serve its interests as well." *Id. at 565*.

The Court finds that the contested provisions in the amended No-Fault Act are narrowly drawn. The language at issue in *Subdivision 6(d)(1)-(3)* directly advances the governmental interest that only parties actually capable of providing treatment are advertising that treatment (Defs' Opp'n Mem. at 13 [Doc. No. 19]), and is not more extensive than necessary. The prohibitions in *Parts (5)* and *(6) of Subdivision 6(d)*, concerning restrictions against advertising specific dollar amounts and implied law enforcement endorsement are also narrowly drawn to achieve the government interest of providing consumers [*54] with non-misleading, non-deceptive information.

While the legislative history reveals legislators' awareness that these reforms would "have a major impact" on the business of companies such as 1-800-ASK GARY (Rep. Atkins' Statements, 4/25/12 House Floor Debate at 3:09:02-2:10:05, Ex. 1 to Anderson Aff. [Doc. No. 20-1]), the amendments are narrowly tailored and do not prevent Plaintiffs from advertising, despite Plaintiffs' contentions to the contrary. In fact, 411-Pain's owner and founder, Robert Lewin apparently concedes that the new No-Fault Act will prohibit 411 Pain from advertising only "some of its accident-assistance services" -- not all. (Lewin Decl. ¶ 19 [Doc. No. 12].) Referrals for medical treatment will be affected, Lewin contends, because 411 Pain does not advertise at the "direction" of "any one health care provider." (Id.) Defendants, however, disagree, contending that "[i]t stands to reason that a health care provider who pays a third party for advertising services is directing that third party to advertise on their behalf, which is clearly allowed under *part (1) of Subdivision 6(d)*." (Defs.' Opp'n Mem. at 12 [Doc. No. 19].) If 411-Pain is concerned about whether its [*55] adver-

tisements are undertaken at the direction of the health care providers within its network, it may presumably draft contractual language to that effect in its agreements with health care providers.

Lewin also contends that the new law will ban "some of the content" of 411-Pain's current advertising -- specifically current advertising that references specific dollar amounts. (Id. ¶ 21.) However, the provision in question, *Part (5) of Subdivision 6(d)*, is narrowly drawn. Plaintiffs may still advertise the general availability of potential economic benefits under Minnesota's No-Fault Act.

411-Pain also argues that the requirement that it list the providers and identify their provider types is overly burdensome due to the sheer volume of providers in its network. (Lewin Decl. ¶ 20 [Doc. No. 12].) However, 411-Pain has provided no evidence showing the number of chiropractors with whom it does business in Minnesota. Regardless, while this restriction may change the nature of some of 411-Pain's advertisements, it does not eliminate 411-Pain's ability to advertise in Minnesota, and is narrowly drawn to achieve the government's interest. While Plaintiffs argue that this disclosure requirement [*56] is unduly burdensome, the Court finds the disclosure consistent with *Zauderer* and *Milavetz*. See *R.J. Reynolds, 696 F.3d at 1215-17* (distinguishing Zauderer and Milavetz where the disclosure requirement of graphic warnings on cigarette advertising was not a remedial measure designed to correct false or misleading claims). Requiring health care providers who target consumers at their most vulnerable moments to disclose information to better inform the consumers is a measure that advances this substantial government interest.

The record reflects that the Legislature narrowly drafted the legislation with the goal of preventing misleading advertising and ensuring that consumers understand who they are contacting and what services are offered. During the House Committee on Commerce and Reform hearing, in response to a legislator's question as to whether the amended language would eliminate chiropractic mass mail solicitations following a motor vehicle accident, the House bill's sponsor, Representative Abeler, explained that it would not: "We're not trying to get rid of annoyance; we're trying to get rid of fraud." (3/20/12 House Commerce Comm. Hrng. at 1:26:21-1:26:35, Ex. 3 to Morton Aff. [*57] [Doc. No. 9-1].) The Court finds that the amendments in question are narrowly drawn to achieve the State's asserted interests.

Accordingly, the Court concludes that Plaintiffs are not likely to prevail on the merits, for all of the reasons set forth above. While the amendments are content- and speaker-based, they pass the heightened judicial scrutiny of *Central Hudson* and do not violate the *First Amendment.*

As previously discussed, when considering a motion for a preliminary injunction seeking to enjoin a duly-enacted state statute, the Eighth Circuit requires a higher standard of review, out of deference to the legislative process. *Rounds, 530 F.3d at 732*. Indeed, the legislative history of the new No-Fault provisions reflects that, at the time of the final Senate vote, efforts to reform Minnesota's No-Fault Act had been underway for ten years or more. (Sen. Gazelka Comments, Minnesota Senate Floor Session video archive, 4/26/12 at 10:27-11:41.) The specific amendments at issue were under discussion for over a year in two separate bills, in at least three committees. (See Goodno Comments, (3/16/12 Senate Commerce Comm. Hrng. at 1:06:50-1:07:06; 1:07:11-1:08:28, Ex. 2 to Anderson Aff. [*58] [Doc. No. 20-1]; Summary of Legislative History, Ex. 5 to Anderson Aff. [Doc. No. 20-1].) These amendments received widespread bipartisan support. The respective House and Senate bills containing the No-Fault amendments passed both houses unanimously. (Summary of Legislative History, Ex. 5 to Anderson Aff. [Doc. No. 20-1].)

Having found the movants' challenge to a duly enacted state statute unlikely to prevail on the merits, the Court's analysis may end, as Rounds states, "If the party with the burden of proof makes a threshold showing that it is likely to prevail on the merits, the district court should then proceed to weigh the other Dataphase factors." *530 F.3d at 732* (emphasis added). In Rounds, having concluded that the movant failed to produce sufficient evidence of its likelihood to prevail on the merits, the Eighth Circuit found that "we need not address the remaining Dataphase factors," and thus vacated a preliminary injunction entered on compelled speech grounds by the district court. *Id. at 738*. The Eighth Circuit, however, also noted that the likelihood of prevailing on the merits is "one, but not the only, threshold showing that must be met by a movant for a preliminary [*59] injunction." *Id. at 732, n.5*. While it is not necessary to address the remaining Dataphase factors, given that Plaintiffs have not established the likelihood of prevailing on the merits, the Court nevertheless does so, as the Court reaches the same conclusion when all of the *Dataphase* factors are considered.

C. Irreparable Harm

The other key factor in any analysis of preliminary injunctive relief is, of course, irreparable harm. *Chicago Stadium Corp. v. Scallen, 530 F.2d 204, 206 (8th Cir.1976)*. Indeed, "'[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.'" *Rounds, 530 F.3d at 732 n. 5*. Thus, lack of irreparable harm will preclude preliminary injunctive relief regardless of the other factors. *Dataphase, 640 F.2d at 114 n. 9* ("[T]he

absence of a finding of irreparable injury is alone sufficient ground for vacating the preliminary injunction."). Therefore, to warrant a preliminary injunction, the moving party must demonstrate a sufficient threat of irreparable harm. *Bandag, Inc. v. Jack's Tire & Oil, Inc., 190 F.3d 924, 926 (8th Cir. 1999)* (per curiam); see, *Winter, 555 U.S. at 22* (explaining that its "frequently reiterated [*60] standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction").

"The loss of *First Amendment* freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)*; see also *Marcus v. Iowa Public Television, 97 F.3d 1137, 1140-41 (8th Cir. 1996))*. As Plaintiffs note, where "Plaintiffs have established 'a substantial likelihood of success on the merits of [their] *First Amendment* claim, [they] . . . also have established irreparable harm as the result of the deprivation." (Pls.' Mem. at 24 [Doc. No. 7]) (citing *Am. Broad. Companies, Inc. v. Ritchie, No. 08-CV-5285 (MJD/AJB), 2008 U.S. Dist. LEXIS 83909, 2008 WL 4635377, *7 (D. Minn. Oct. 15, 2008)* (internal citations omitted)). Here, however, the Court has reached the opposite conclusion, finding that Plaintiffs are unlikely to prevail on the merits of their *First Amendment* claim. As discussed herein, the Court finds Plaintiffs unlikely to prevail because, on the record before the Court, Defendants' regulation of Plaintiffs' advertising is permissible under the *First Amendment*. As there is no impingement upon Plaintiffs' *First Amendment* [*61] rights, there is no consequential irreparable harm flowing from a deprivation.

In Mr. Lewin's Declaration, he asserts that the amendments will negatively affect 411-Pain's ability to establish and build relationships with a network of health care providers. (Lewin Decl. ¶ 22 [Doc. No. 12].) He contends that 411-Pain cannot stay in business without such relationships. (Id.) In addition, he contends that the threat of disciplinary action from a professional licensing board will keep all health care providers from working with 411-Pain, causing economic harm to 411-Pain and chilling its speech as of January 1, 2013. (Id. ¶ 23-24.)

Plaintiff Sergio Triana asserts that although he would like Truman Injury to continue its participation in 411-Pain's advertising network, he believes that he will be subject to disciplinary action if "Truman Injury accepts a referral of a patient for treatment of an injury eligible under Minnesota's No-Fault Act after January 1, 2013." (Triana Decl. ¶ 4 [Doc. No. 11].) But for Minnesota's new law, Triana contends that he would advertise potential dollar amounts of recovery and run advertisements that feature actors portraying police officers or EMT personnel. [*62] (Id. ¶¶ 6-7.) Similar representations are made, although prospectively, by Dr. Mark Soll, a Minnesota licensed chiropractor who would like to participate in 411-Pain's network, but asserts that he will not join that network, in light of the No-Fault Act amendments, out of fear of disciplinary action. (Decl. of Mark Soll ¶¶ 2; 5 [Doc. No. 13].)

However, Minnesota licensed chiropractors such as Drs. Triana and Soll are already prohibited from disseminating deceptive, misleading, or incomplete advertising, including advertisements that do not contain the licensee's name. *Minn. R. 2500.0200*. If Dr. Triana were to advertise in the manner that 411-Pain indicates that it prefers to do business, he would appear to be in violation of *Minn. R. 2500.0200*. As Defendants point out, "[t]he enactment of *Subdivision 6(d)*, as applied to 411 Pain's intention to build a network of chiropractors to advertise through it, would only prevent a licensed chiropractor from doing what is already forbidden -advertising without providing his or her name. . . ." (Defs.' Opp'n Mem. at 20 [Doc. No. 19].)

The Court finds that irreparable harm has not been established. While the nature of some of Plaintiffs' advertising [*63] may necessarily change, the change does not constitute irreparable harm. The Court thus finds that Plaintiffs have not demonstrated irreparable harm necessary to enjoin the challenged provisions in Minnesota's amended No-Fault Act. [7]

7 The Court notes that, elsewhere, in litigation brought by the Florida Attorney General against 411-Pain pursuant to Florida's Deceptive and Unfair Trade Practices Act, 411-Pain agreed to various settlement terms, publicly available, some of which mirror the restrictions found in the new amendments to *Minn. Stat. § 65B.54, Subdivision 6(d)*. The Court takes judicial notice of the Florida settlement. While the Florida lawsuit focused on 411-Pain's advertisements related to attorney referrals, in the settlement of that case, 411-Pain agreed not to use any advertising promising a specific amount of monetary reward, nor to imply or misrepresent that a law enforcement official directed or mandated that consumers contact 411-Pain after contacting 911 or other emergency services. Stipulated Consent Final Judgment at ¶ 22, Florida Office of the Attorney General v. 1-800-411-Pain Referral Services, LLC., No. 12015527 (Fla. Broward County Ct. June 1, 2012), http://myfloridalegal.com/ [*64] webfiles.nsf/WF/JLUS-8UUQ5L/$File/ 411PainJune2012.pdf, accessed on 12/27/12. In addition, the Florida settlement terms require 411-Pain to "[m]odify any websites and all other online advertising used by [411-Pain] utilizing a "Find a Lawyer" section or equivalent service to reflect only currently licensed lawyers. . . ." Id. at ¶ 23(a).

Therefore 411-Pain has, in Florida, freely undertaken some of measures at issue in this litigation -- measures which it contends, here in Minnesota, will result in irreparable harm.

D. Other Dataphase Factors

The remaining Dataphase factors require the Court to balance the harms between the parties and to consider the effect on the public interest. *Dataphase, 640 F.2d at 113*. The Court has noted the harms asserted by Plaintiffs in the above discussion of irreparable harm. Defendants, on the other hand, assert that deceptive and misleading advertising regarding the course of action that a car accident victim pursues following an accident is harmful to the citizens of Minnesota. (Defs.' Opp'n Mem. at 20 [Doc. No. 19].)

The Court finds that the balance of harms weighs in Defendants' favor. 411-Pain's advertisements provide no information to the public that [*65] a call to 411-Pain will result in a chiropractic or other health care referral. Moreover, callers have no idea to whom they will specifically be referred, as the identify of referral providers is unknown. In addition, 411-Pain touts the possibility of a car accident victim receiving "up to" $40,000 in economic loss benefits. As previously discussed, this specific dollar amount both artificially raises expectations for certain consumers, and, for other consumers, it implies a lower, more limited amount of recovery than that to which an injured car accident victim may be entitled.

As to the effect on the public interest, Robert Lewin of 411-Pain asserts that the amendments in the new No-Fault Act will harm members of the public. (Lewin Decl. ¶ 24 [Doc. No. 12].) He contends that 411-Pain's advertisements are "particularly valuable for accident victims who otherwise would not know who to call for assistance." (Id. ¶ 24.) The Court, however, finds that the public interest in receiving clear and non-misleading information regarding medical referrals weighs in favor of denying Plaintiffs' motion for a preliminary injunction. Failing to provide information about the referral nature of 411-Pain's [*66] business and the identities of the providers in its network does a disservice to the public, as do advertisements that mention specific dollar amounts of potential economic loss recovery, and advertisements that imply law enforcement endorsement.

In conclusion, the Court finds that Plaintiffs are unlikely to prevail on the merits and have not shown irreparable harm in the absence of injunctive relief. The remaining Dataphase factors by which this Court evaluates motions for preliminary injunctions also do not weigh in Plaintiffs' favor. For these reasons, Plaintiffs' motion for such relief is denied.

THEREFORE, IT IS HEREBY ORDERED THAT:

Plaintiffs' Motion for a Preliminary Injunction [Doc. No. 6] is **DENIED**.

Dated: December 28, 2012

/s/ Susan Richard Nelson

SUSAN RICHARD NELSON

United States District Judge