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IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware, Plaintiff, v. BP P.L.C., *et al.*, Defendants.	Civil Action No. N20C-09-097 AML CCLD

REPLY IN SUPPORT OF DEFENDANT AMERICAN PETROLEUM INSTITUTE'S INDIVIDUAL MERITS MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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Introduction

The State's Opposition doubles down on its theory that API—which neither sells nor advertises any seller's fossil fuel product—is liable under the Delaware Consumer Fraud Act ("DCFA") for public advocacy. The State asks the Court to transform the DCFA from a consumer protection statute into a roving license for the State to suppress disfavored speech. The Court should reject this invitation, steer away from grave constitutional problems, and dismiss the claim against an advocacy organization that neither sells nor advertises any particular fossil fuel product.

Otherwise, the State's rewriting of the DCFA would muzzle public advocacy and violate the First Amendment for at least two independent reasons. First, the State's claim attacks *noncommercial* speech on a matter of great public importance. So it is subject to strict scrutiny, which even the State does not contend it can survive. Second, the State's attack fails under strict scrutiny as a content-based restriction—which the State all but concedes. And the State's perfunctory assertion that constitutional issues should be punted past discovery would give the State a license to chill the speech of advocacy groups everywhere. The Court should reject that demand for State censorship and dismiss API with prejudice.

Argument

I. The DCFA claim fails because API's public advocacy was not "in connection with" sales of fossil fuels.

A. The State's uncabined interpretation would create an unprecedented expansion of the DCFA.

API does not produce, sell, or distribute fossil fuel products. Mot. 2. Nor does it advertise any particular seller's fossil fuel products. Rather, API is a trade association organized to "influence public policy" for the fossil fuel industry through outreach to policymakers and voters. Compl. ¶ 37(c); *see also, e.g.*, Compl. ¶ 200 n.192 (citing Energy for Progress campaign, https://energyforprogress.org/the-basics) ("America leads the world in producing affordable, reliable energy while reducing CO2 emission levels. And we can accomplish even more together."). But the DCFA only applies to statements "in connection with the sale, lease . . . or advertisement of any merchandise." 6 Del. C. § 2513; Del. P.J.I. Civ. § 16.5 ("The [DCFA] is limited to transactions involving the sale or advertising of merchandise[.]"). Because API is a stranger to any transaction involving the sale or advertising of merchandise, the Complaint does not allege any relevant "connection with" a fossil fuel transaction. Mot. 3-5.

Yet the State insists that any "connection" suffices. Opp. 5 (asserting that the DCFA "only demands a 'connection' between the defendant's deceptive conduct and 'the sale, lease, receipt, or advertisement of *any* merchandise'"). That cannot be right. In isolation, the phrase "in connection with" "is essentially indeterminat[e],

because connections, like relations, stop nowhere." *Maracich v. Spears*, 570 U.S. 48, 59-60 (2013). The phrase "provides little guidance without a limiting principle consistent with the structure of the statute and its other provisions." *Id.* at 60; *see also Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) ("[A]s many a curbstone philosopher has observed, everything is related to everything else.").

The State provides *no* meaningful limiting principle, let alone one consistent with the DCFA as a whole. At best, the State suggests that any "purpose . . . to increase consumer consumption" taints a speaker with potential DCFA liability. Opp. 7. But that extraordinary theory would taint all public advocacy somehow tied to consumption of any good or service. Recreational fishing associations would be exposed to liability for encouraging the consumption of allegedly dangerous fish. And local tourism associations everywhere would risk ruinous liability for encouraging (but failing to disclose alleged climate injury risks) of travel. The Opposition offers no support for those absurd results.

The State's cases do not support its uncabined interpretation either. *S&R Assocs., L.P. v. Shell Oil Co.*, 725 A.2d 431, 434 (Del. Super. Ct. 1998), did not even address the "in connection with" requirement. In any event, the State omits that—unlike here—that defendant actually *sold* a product to the plaintiff. *See S&R Assocs., L.P.*, 725 A.3d at 434. And the full sentence the State excerpts (Opp. 5) from *Pack*

& Process, Inc. v. Celotex Corp. makes clear that it has nothing to do with non-sellers like API: "'In connection with' is a phrase suggesting a broad interpretation of how involved with the distribution of merchandise *a consumer has to be* in order to bring a cause of action under the statute." 503 A.2d 646, 658 (Del. Super. Ct. 1985) (emphasis added). That defendant both made and sold the specific product in question. *Id.* at 648. Indeed, *Pack & Process* confirms that "[t]he emphasis of the Consumer Fraud Act is on the unlawful practices of *merchants* and not on the specific relationship of the consumer to the alleged unlawful practice." *Id.* at 658 (emphasis added). The State cannot allege that API is a merchant of fossil fuels, so it proposes no viable interpretation of the DCFA covering API.[1]

B. The State's extraordinary interpretation would create dire constitutional problems.

The State's boundless interpretation of the "in connection with" requirement also creates serious constitutional difficulty. *See infra* and Mot. 5-15. This Court

[1] None of the State's out-of-state cases move the needle. *Ramson v. Layne*, 668 F. Supp. 1162, 1167 (N.D. Ill. 1987), did not interpret an "in connection with" requirement. It merely held that an "endorser" who misrepresented a specific company's products could be liable under an Illinois statute—a result perfectly consistent with API's interpretation of the DCFA. And the cursory prediction of Minnesota law in *Tuttle v. Lorillard Tobacco Co.*, 2001 WL 821831, at *6-7 (D. Minn. July 5, 2001), has never been cited by *any* court.

should reject the State's novel interpretation to avoid infringing upon constitutionally protected speech.

"Delaware courts practice constitutional avoidance" to avoid constitutional issues unless they are required to resolve them. *State v. Herbert*, 2022 WL 811175, at *2 (Del. Super. Ct. Mar. 17, 2022). As the Delaware Supreme Court holds, "where a possible infringement of a constitutional guarantee exists, the interpreting court should strive to construe the legislative intent so as to avoid unnecessary constitutional infirmities." *Richardson v. Wile*, 535 A.2d 1346, 1350 (Del. 1988). "Even an incidental impact requires that the statute be narrowly interpreted so that its effect on first amendment freedoms is no greater than is essential to serve a substantial governmental interest." *Id.* When there is "no limiting principle that would guide enforcement" of a statute, the court must impose an "enforceability standard that limits [the statute's] reach" so as not to capture protected First Amendment activity. *Go4Play, Inc. v. Kent Cnty. Bd. of Adjustment*, 2022 WL 2718849, at *9 (Del. Super. Ct. July 12, 2022).

Here, the broader the DCFA's "in connection with" requirement is read, the greater the danger of encroaching on First Amendment rights. The State's interpretation would chill non-transactional policy advocacy (like API's) aimed at *voters* on matters of great public concern. This Court should construe the DCFA to avoid these constitutional problems.

II. The State's attempt to stifle API's advocacy cannot survive First Amendment strict scrutiny.

A. The targeted speech is noncommercial.

The State's speech-suppression effort depends on characterizing API's speech as *commercial.* Opp. 8-14. But API's public policy campaigns are well outside the boundaries of commercial speech.

The State relies on *Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60 (1983), to divine a commercial-speech "test." Opp. 9. But *Bolger* confirms that the "core notion of commercial speech" is "speech which does no more than propose a commercial transaction." 463 U.S. at 66 (internal quotation marks omitted). The Supreme Court now consistently identifies *that* as the commercial-speech test. *See Harris v. Quinn*, 573 U.S. 616, 648 (2014) (Supreme Court "precedents define commercial speech as 'speech that does no more than propose a commercial transaction[.]'"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993) ("proposal of a commercial transaction" is "'*the test* for identifying commercial speech'" (quoting *Bd. of Trustees of State Univ. of NY v. Fox*, 492 U.S. 469, 473-74 (1989))) (emphasis added).

API's speech, however, indisputably proposed no commercial transaction. And even if it somehow did, API's public advocacy on a matter of public concern did far "more than propose a commercial transaction." *Harris*, 573 U.S. at 648. So

under the controlling cases—including *Bolger* itself—the challenged API speech is noncommercial.

Even without that controlling precedent in the way, *Bolger* would not help the State. *Bolger* discussed three factors, *none* of which suggest commercial speech here: (1) whether the statement is an advertisement; (2) whether the statement references a particular product; and (3) the speaker's economic motivation in making the statement. 463 U.S. at 66-67.[2]

First, none of API's challenged statements are advertisements proposing a transaction; they simply advocate a perspective on a topic of great public importance. Mot. 8-11. Second, no alleged API statements refer to particular products. The State skirts these factors and instead focuses on the third, asserting API's "economic" motive "to 'advance [its] core mission of growing its member companies' oil and natural gas businesses.'" Opp. 10. But that argument essentially concedes that API *itself* had no financial motive in making those statements or direct interest in increasing the sales of fossil fuels. And even if it did, the *Bolger* court clearly stated that this alone is not enough to turn API's policy statements into commercial speech. 463 U.S. at 67 ("[T]he fact that Youngs has an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn

[2] The State declares that the "*Bolger* test" applies, although *Bolger* shows no intent to create such a test and the State's cases tellingly never use that term. *See* Opp. 9.

the materials into commercial speech."). To the extent that the State suggests that API's statements are commercial speech simply because API's members may benefit, then all trade associations' policy advocacy would become commercial speech—an argument that has been squarely rejected. *See, e.g.*, *Neurotron, Inc. v. Am. Ass'n of Electrodiagnostic Med.*, 189 F. Supp. 2d 271, 277 (D. Md. 2001) (withdrawing First Amendment protection from trade association advocacy would "chill[] [its] speech" and "likely prevent all debate about such subjects from entering into the marketplace"), *aff'd*, 48 F. App'x 42 (4th Cir. 2002).

To avoid this deep-rooted law, the State falls back on its conclusory assertion that "API serves as 'a marketing arm' for the fossil fuel industry." Opp. 13 (citing Compl. ¶¶ 37(c), 110, 272). But as *Neurotron* explains, that argument would neuter the First Amendment as to any trade association. 189 F. Supp. 2d at 274-77. And the State's characterization of API makes no sense given that API has hundreds of member companies that sell thousands of different (and competing) products. As the State acknowledges, API is a trade association and public advocacy organization. Compl. ¶ 37. It is not a marketing firm.

The State thus relies in vain on *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1150 (D.C. Cir. 2009). Opp. 10-11. That decision held only that speech of tobacco product *sellers* was commercial; it never addressed the speech of the trade association defendants. *Id.* at 1135.

The State next cites three cases to assert that "courts consistently have held that the First Amendment does not protect sophisticated public relations efforts designed to mislead consumers about the dangers of a product." Opp. 10 & n.3. But these cases do not support that proposition. In *People v. ConAgra Grocery Prods. Co.*, there were no trade association defendants at all, and the speech at issue was made directly by the sellers. 227 Cal. Rptr. 3d 499, 535-36 (Ct. App. 2017). *Nat'l Comm'n on Egg Nutrition v. FTC*—which is more than 45 years old—far predates the Supreme Court's governing commercial speech precedent. 570 F.2d 157, 159-63 (7th Cir. 1977). And *Western Sugar Co-op. v. Archer-Daniels-Midland Co*. never even *mentioned* the First Amendment, instead addressing the Lanham Act exclusively. 2011 WL 11741501, at *4-5 (C.D. Cal. Oct. 21, 2011). The State thus finds no refuge in commercial speech doctrine for its attempt to suppress speech on the fossil fuel industry.

B. The State's DCFA theory is a content-based speech restriction.

Strict scrutiny also dooms the State's weaponization of the DCFA as a content-based regulation of API's speech. Opp. 14. Content-based restrictions "appl[y] to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015); *accord City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022). A content-based restriction is "presumptively unconstitutional" and subject

to strict scrutiny, ***even if the speech is considered commercial***. *Reed*, 576 U.S. at 163. That is, content-based restrictions "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-10 (1984)). Conversely, a statute is not narrowly tailored if "a less restrictive alternative would serve the Government's purpose." *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 813 (2000).

The State never mentions "strict scrutiny" in its Opposition, much less explains how its claim against API is narrowly tailored to achieve a compelling State interest.

Instead, the State asserts that it can regulate content-based speech without running afoul of the First Amendment, citing *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 638 (1985). Opp. 14. But "[a] law that is content based on its face is subject to strict scrutiny *regardless* of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 576 U.S. at 165 (emphasis added). And *Zauderer* has never been recognized as a catch-all means of regulating conduct that the government conveniently labels deceptive. Rather, *Zauderer* addressed only

whether the government may consider "*disclosure requirements*" as a "less restrictive alternativ[e] to actual suppression of speech," as long as the compelled disclosure is "reasonably related to the State's interest in preventing deception of consumers." 471 U.S. at 651 & n.14 (emphasis added); *see also id.* at 650 (explaining that there are "material differences between disclosure requirements and outright prohibitions on speech."). Even then, *Zauderer* only permits compelled disclosure of "purely factual and uncontroversial information." *Id.* at 651. *Zauderer* is not a license for the government to sidestep strict scrutiny when attempting to censor speech.

Moreover, the State's attempt to use the DCFA to regulate API's speech has at best a tenuous relationship to the State's assumed interest—preventing consumer deception—because the State does not tailor its claim against API to specific products that were deceptively marketed. Instead, the State is using the DCFA to attack pro-energy advocacy generally. The State's view of commercial speech would threaten any speech supporting energy abundance through fossil fuels or opposing their regulation, since (according to the State) favorably mentioning fossil fuels transforms public advocacy into proscribable "commercial speech." Such a blanket restriction on energy advocacy is the antithesis of a narrowly tailored regulation and cannot satisfy strict scrutiny.

C. The chilling effect of the State's claim against API requires dismissal.

The State also proposes postponing resolution of these constitutional defects through discovery. Opp. 14-16. But no discovery is needed on *public campaigns* the State claims constitute commercial speech. And there is no fact issue warranting postponement: even the Complaint's cherry-picked quotations fail to show any API speech was commercial. *See supra* 6-9 and Mot. 8-12.

Allowing discovery on whether the alleged speech is commercial would have an irreparable chilling effect on policy advocacy. The Court can and should resolve this issue at this stage, because "the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas." *United States v. Williams*, 553 U.S. 285, 292 (2008).

When speech is the subject of a lawsuit, courts routinely recognize the importance of early resolution of the case to avoid inadvertently and unnecessarily suppressing speech. *See, e.g.*, *Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics*, 859 F. Supp. 1521, 1542 (S.D.N.Y. 1994) ("The conclusion we reach here is supported by a consideration of the chilling effect on speech in the academic and *non-profit context* that could be the result of allowing actions such as this to proceed.") (emphasis added); *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) ("In the First Amendment area, summary procedures are . . . essential. For the stake here, if harassment succeeds, is free debate. . . . The threat

of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself.").

So too here. The State should not be able to force API through years of discovery to determine in *the future* what is plain from the face of the Complaint *today*—API's speech is noncommercial and the State's use of the DCFA claim fails strict scrutiny.

D. Even if the State is not targeting API's petitioning activities, *Noerr-Pennington* still protects API's alleged statements.

The Opposition disclaims that the State is targeting API's protected "regulatory or lobbying" petitioning activities. Opp. 18. But the campaigns the State would suppress are intertwined with core petitioning activities because the audience includes both policymakers and voters. *See* Mot. 16-18. *Noerr* dictates that a publicity campaign targeting both governmental entities and consumers is protected. *Id.* at 17-18. Dismissal is appropriate for this reason too.

Conclusion

The State's DCFA claim against API fails based on the plain language of the statute and because it violates the First Amendment. The Court should dismiss API with prejudice.

Dated: August 17, 2023

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CERTIFICATE OF SERVICE

I, Kevin J. Mangan, here by certify that on this 17th day of August, 2023, I caused a true and correct copy of **REPLY IN SUPPORT OF DEFENDANT AMERICAN PETROLEUM INSTITUTE'S INDIVIDUAL MERITS MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** to be served upon the following counsel of record via File & Serve*Xpress*:

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