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| MATTHEW J. PLATKIN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, et al.,<br><br>Plaintiff,<br><br>v.<br><br>EXXON MOBIL CORPORATION, et al.,<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION – MERCER COUNTY<br>DOCKET NO. MER-L-1797-22<br><br>CIVIL ACTION<br>CBLP ACTION |

**DEFENDANT AMERICAN PETROLEUM INSTITUTE'S**
**MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS**

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## INTRODUCTION

The State of New Jersey seeks to punish the entire fossil fuel industry for advocating a view contrary to the State's preferred narrative on one of the most difficult and important public policy issues of our time. But that policy debate over the costs and benefits of fossil fuels—which touches on both their foundational importance to 150 years of economic progress and their contributions to climate change—has more than one side. And neither the First Amendment, New Jersey law, nor common sense allows the State to muzzle that debate with the threat of years of litigation, intrusive discovery, and extraordinary civil liability.

The State asserts four claims against the American Petroleum Institute ("API"): a claim for negligence (Count 2), a claim for impairment of the public trust (Count 3), and two claims under the New Jersey Consumer Fraud Act ("NJCFA") (Counts 7 and 8). These claims fail for the reasons stated in Defendants' Joint Motion to Dismiss, which API adopts and incorporates. But API should be dismissed for two additional reasons. First, API does not sell, and is not alleged to sell, any fossil fuels. So API has not made any statements "in connection with the sale or advertisement of any merchandise" as required for the NJCFA claim. N.J.S.A. § 56:8-2. Second, the State alleges that API provides speech on behalf of its constituent members, so all four of the State's claims against API necessarily attack API's speech. Therefore, even if the State could otherwise state any claim, the First Amendment and its New Jersey analogue fully protect API's speech on this important issue from State censorship couched as a lawsuit.

## BACKGROUND

API is a nationwide, non-profit trade association representing over 600 companies throughout the petroleum and natural-gas industry. Compl. ¶ 30(a). As the State recognizes, API's "stated mission includes 'influenc[ing] public policy in support of a strong, viable U.S. oil and natural gas industry[.]'" Compl. ¶ 30(c) (quoting American Petroleum Institute, About API,

https://www.api.org/about). Absent from the Complaint is any allegation that API sells, produces, refines, or transports fossil fuels—it does not.

The State seeks to use New Jersey's consumer protection statute and common law tort and environmental claims to punish API for its public advocacy. The State cloaks its efforts to suppress this disfavored speech by alleging that API concealed the dangers of fossil fuel products, promoted misleading information designed to undermine public support for the regulation of greenhouse gas emissions, and led a "deceptive greenwashing campaign." Compl. ¶¶ 30, 196-200.

First, the State cites to a 2017 API public policy campaign entitled "Natural Gas Works for New Jersey." Compl. ¶ 30(e). The State alleges that this message is misleading because it "describe[s] natural gas as 'clean energy[.]'" *Id.* (citation omitted). Second, the State cites to API's 2016 renewable fuel standards campaign in New Jersey, which the State alleges was "focused on consumers" and "sought to turn public opinion against stricter standards for ethanol content in gasoline." Compl. ¶ 199. Third, the Complaint highlights API's 2017 "Power Past Impossible" public policy campaign as "greenwashing" because API "told Americans that the petroleum industry could help them 'live better lives'" and used the color green. Compl. ¶ 196. Fourth, the State cites a policy piece on API's website titled, "America's Natural Gas and Oil: Energy for Progress." Compl. ¶ 198. The State contends that this advocacy obscures "the reality that fossil fuels are the driving force behind anthropogenic climate change" and in turn "increase[s] consumers' use of fossil fuels in order to advance API's core mission of growing its member companies' oil and natural gas businesses." *Id.*

To prevail, the State must persuade this Court both to intervene—and rule in its favor—on an intense and complex public policy debate, and then to punish Defendants for taking a contrary view in that debate. The first request would impose on this Court a task it is ill-equipped to meet.

The second request would engage the Court in an egregious violation of the First Amendment. *See NAACP v. Alabama*, 357 U.S. 449, 463 (1958) ("It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize."). For the reasons below, neither task is appropriate based on this legally insufficient Complaint.

## ARGUMENT

### I. The Complaint fails to state an NJCFA claim because API's alleged activities were not "in connection with" the sale or purchase of fossil fuels.

The NJCFA does not apply to API, which neither sells merchandise nor engages in activities "in connection with" the sale of merchandise within the meaning of the statute. The NJCFA prohibits "[t]he act, use or employment by any person of any commercial practice that is unconscionable or abusive, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such . . . in connection with the sale or advertisement of any merchandise or real estate." N.J.S.A. § 56:8-2. "Merchandise" includes "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." N.J.S.A. § 56:8-1(c).

The key statutory requirement here is that a deceptive act is made "in connection with the sale or advertisement of any merchandise or real estate." N.J.S.A. § 56:8-2. New Jersey courts have recognized that an NJCFA claim thus fails when the defendant "[does] not offer to sell anything to any consumers." *Hoffman v. Encore Capital Grp., Inc.*, No. A-3008-07T1, 2008 WL 5245306, at *3 (N.J. App. Div. Dec. 18, 2008) (internal quotations omitted); *see also, e.g., Geter v. ADP Screening & Selection Servs.*, No. 2:14-cv-3225, 2015 WL 1867041, at *7 (D.N.J. Apr. 23, 2015) ("Plaintiff's [NJ]CFA claim fails because he did not purchase anything from [defendant]."). The statute thus "does not protect against all unconscionable activity, but only

protects against fraud *in a sale*." *PNC Bank, Nat'l Ass'n v. Great Gorge Vill. S. Condo. Council, Inc.*, No. 16-7648 (SRC)(CLW), 2017 WL 436389, at *2 (D.N.J. Feb. 1, 2017) (emphasis added).

The NJCFA's remedial provision confirms that the statute covers only practices tied to a sale. An NJCFA violator is "liable for a refund of all moneys acquired by means of any practice declared herein to be unlawful." N.J.S.A. § 56:8-2.11. A non-seller like API could not refund money for a product or service that it never sold to begin with. That provision thus reinforces that the NJCFA's "in connection with" requirement does not apply to general public policy advocacy. Yet the Complaint fails to allege that API sells fossil fuels or any other merchandise for that matter. The Court should therefore dismiss the NJCFA claims against API, just as other states have rejected consumer fraud claims against trade associations and similar non-sellers.[1]

Nor does API's mere association with the Fossil Fuel Defendants bring it within the purview of the NJCFA. As courts interpreting the NJCFA have consistently held, an NJCFA claim cannot proceed on a theory where the alleged fraudulent activities are merely peripheral to the sale of merchandise *by other parties*. *See, e.g., DepoLink Court Reporting & Litig. Support Servs. v. Rochman*, 430 N.J. Super. 325, 339 (App. Div. 2013) ("[T]he CFA is inapplicable . . . because any misrepresentations by the collection agency . . . were not in connection with the sale of merchandise to defendant."); *see also Joaquin v. Lonstein Law Office, P.C.*, No. 3:15-cv-08194, 2017 WL 2784708, at *1 (D.N.J. June 27, 2017) (dismissing NJCFA claim, where "Defendants' allegedly fraudulent attempts to collect for unpaid subscription fees were conducted on behalf of

[1] No reported cases have applied the NJCFA to a trade association like API. This is not surprising, as cases around the country have refused to extend similar statutes to trade associations that sell nothing to consumers. *See, e.g., Hogan v. Maryland State Dental Ass'n*, 843 A.2d 902, 904-906 (Md. App. 2004); *Knutsen v. Dion*, 90 A.3d 866, 869-74 (Vt. 2013) (similar); *Klein v. Boyd*, 949 F Supp. 280, 285 (E.D. Pa. 1996) (similar).

a third party—DIRECTV—and did not involve the sale of merchandise to Plaintiff"); *Boyko v. Am. Int'l Grp., Inc.*, No. 1:08-cv-02214, 2009 WL 5194431, at *4 (D.N.J. Dec. 23, 2009) (explaining that NJCFA did not apply to activity "on behalf of a third party who might have sold merchandise" because that activity "is not itself a sale of merchandise"). These authorities all confirm that API's policy advocacy does not fall within the constructs of "[t]he [NJCFA's] focus[,] [which] is to compel those *who sell* consumer goods and services to the public to develop practices that will minimize consumer fraud." *Marascio v. Campanella*, 298 N.J. Super. 491, 501 (App. Div. 1997) (emphasis added).[2]

## II. The State's attempt to punish API's advocacy violates bedrock constitutional guarantees.

The State's claims against API also violate the First Amendment's proscription on "abridging the freedom of speech, or of the press; or the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. Articles 6 and 18 of the New Jersey Constitution grant the same protection. *Palardy v. Twp. of Millburn*, 906 F.3d 76, 80 (3d Cir. 2018). The State's claims against API violate these core speech rights by seeking to censor public discourse and advocacy on a matter of significant controversy and public importance.

### A. The State seeks to abridge API's freedom of speech.

Freedom of speech is sacrosanct under U.S. law. Indeed, "expression on public issues 'has always rested *on the highest rung of the hierarchy of First Amendment values.*'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)) (emphasis added). Speech on important public issues "is the essence of self-government."

[2] The doctrine of constitutional avoidance would support the same interpretation of the NJCFA. *See Heritage at Indep., LLC v. State*, No. A-4645-08T3, 2010 WL 4067871, at *5 (N.J. App. Div. Aug. 18, 2010). If the guardrails confining the State to claims against merchants selling or offering consumer goods were removed, that would increasingly threaten unconstitutional application of the NJCFA to fully protected noncommercial speech—as the State seeks here. *See infra* at 6-15.

*Id.* The First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (Hand, J.). The nation has "a profound [] commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This "constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *Id.* at 271 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)); *see also id.* at 271–72 (recognizing "[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'") (quoting *Button*, 371 U.S. at 433).

Yet the Complaint unabashedly tries to suppress API's speech "because of disagreement with the message it conveys." *See E & J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin*, 226 N.J. 549, 571 (2016) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92 (1992) ("[The government] has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."). Though the State is using a civil lawsuit as the means, the end is the same censorship barred by the First Amendment. *See Snyder v. Phelps*, 562 U.S. 443, 452 (2011); *James v. Meow Media, Inc.*, 300 F.3d 683, 695–97 (6th Cir. 2002) (affirming dismissal because complaint that sought to regulate speech through tort liability raised "significant constitutional problems under the First Amendment"). To safeguard free speech, courts have dismissed similar speech regulations masquerading as tort claims, including consumer protection claims. *See, e.g.*, *New York Pub. Interest Research Grp., Inc. v. Ins. Info. Inst.*, 161 A.D.2d 204, 206 (N.Y. Sup. Ct. 1990) (dismissing consumer protection suit against defendants seeking "to

influence public officials, voters and citizens in general in order to increase sympathy for the concerns of the insurance industry" because they "engaged in precisely the sort of free debate which the First Amendment was intended to safeguard").

The First Amendment requires the same result here. The debate over the benefits of fossil fuels and the risks posed by global climate change is one of the most difficult and controversial public policy issues of our time. There is no doubt that the State could pass no law directly prohibiting API from weighing in on these matters of critical public importance. The First Amendment equally forbids the same impermissible regulation through this lawsuit.

**1. The State's claims against API are subject to strict scrutiny.**

Because the speech the State attacks is untethered to any commercial transaction, the speech is noncommercial, or policy, speech subject to strict scrutiny. But even if the speech were commercial, the State seeks to silence only opinions with which it disagrees; such content-based restrictions are also subject to strict scrutiny. Either way, strict scrutiny applies. And either way, the State's claims violate the First Amendment.

**a. The State's claims try to suppress noncommercial speech.**

The API speech that the State seeks to muzzle is noncommercial speech, which is at "the highest rung" of First Amendment protection. *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015) (restraints on noncommercial speech are subject to strict scrutiny). The speech is *not* commercial speech, which "does no more than propose a commercial transaction." *Harris v. Quinn*, 573 U.S. 616, 648 (2014); see also *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423 (1993) (commercial speech proposes a commercial transaction). .

API's policy campaigns are plainly noncommercial speech because they propose no transaction. *City of Cincinnati*, 507 U.S. at 423. And they address a topic of great public importance. Indeed, the Complaint identifies no commercial transaction API proposed. Even if

advocacy takes the form of an advertisement, that "does not necessarily render such speech commercial in nature." *Adventure Commc'ns, Inc. v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 440 (4th Cir. 1999). Indeed, the Supreme Court has cast doubt on the proposition that commercial speech merits any less protection than noncommercial speech. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). After all, even the landmark *New York Times v. Sullivan* decision addressed a paid advertisement addressing an important policy issue.

Any effort to recast API's policy advocacy as commercial speech must fail. Even if, contrary to its plain words, API's speech could be construed as proposing a commercial transaction, that is at most a minor element of the speech; the speech does much more than that. Any commercial element of API's speech is intertwined with noncommercial speech to influence public policy, which entitles API's challenged speech to full First Amendment protection. *See Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796–98 (1988) (explaining that for "inextricably intertwined" speech, "we apply our test for fully protected expression," and that if "the means chosen to accomplish [the state's purported interest] are unduly burdensome and not narrowly tailored[,]" the regulation cannot stand); *see also In re Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781, 793 (3d Cir. 1999) (applying *Riley* where "speech consists of complex mixtures of commercial and noncommercial elements").

Courts have often recognized that trade association speech is noncommercial. *See, e.g.*, *Nat'l Servs. Grp., Inc. v. Painting & Decorating Contractors of Am., Inc.*, No. 8:06-CV-563, 2006 WL 2035465, at *6 (C.D. Cal. July 18, 2006) (concluding that a trade association's article was "economically motivated only in an indirect sense" and it "attempt[ed] to inform its members of an issue affecting their economic interests" rather than promoting the services of its members); *Gordon & Breach Sci. Publishers S.A., STBS v. Am. Inst. of Physics*, 859 F. Supp. 1521, 1539–41

(S.D.N.Y. 1994) (concluding that challenged statements made by nonprofit entity that ranked its own publications higher than that of the plaintiff was noncommercial, and "[t]he fact that [the defendants] stood to benefit from publishing [the challenged statement]—even that they intended to benefit—is insufficient by itself to turn the articles into commercial speech"). That recognition makes good sense: public policy advocacy, like the trade association speech attacked by the State, does not cross the line into commercial speech unless it is "peppered with advertising" to buy a particular company's products. *See Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 112–13 (6th Cir. 1995). Of course that is not the case here, because API does not sell fossil fuels.

In sum, the State's allegations fail to identify any commercial transaction proposed by API, let alone a transaction that can be disentangled from API's noncommercial speech in the policy debate. The challenged API speech thus is noncommercial speech, and the State's attempt to punish it is subject to strict scrutiny.

**b. Even if the speech were commercial speech, the State seeks to impose improper content-based restrictions on it.**

Even if, contrary to fact, the speech the State attacks were only commercial speech, the State's effort to censor speech based on its content would still violate the First Amendment.[3] "The government may not regulate speech based on hostility—or favoritism—towards the underlying message expressed." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763 (1994). "If the restriction is content based, it is subject to strict scrutiny and is therefore presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Bruni v. City of Pittsburgh*, 941 F.3d 73, 83–84 (3d Cir. 2019). "The First Amendment requires heightened scrutiny whenever the government creates 'a

[3] Just this past term, the Supreme Court reiterated that the few exceptions to this rule exceptions must be policed scrupulously. *Counterman v. Colorado*, 143 S. Ct. 2106, 2113-17 (2023).

regulation of speech because of disagreement with the message it conveys.'" *Sorrell*, 564 U.S. at 566 (quoting *Ward*, 491 U.S. at 791). "Commercial speech is no exception." *Id.* The Supreme Court thus rejected the argument that "a different analysis applies" where a regulation "burdens only commercial speech" because "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Id.* at 571.

The State's allegations confirm that it seeks to regulate API's speech because of its content and because of its viewpoint. "Viewpoint discrimination is an 'egregious form of content discrimination'" that targets speech based not on its subject but rather on "'particular views taken by speakers.'" *Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 432 (3d Cir. 2019). Here, the State's allegations confirm that it seeks to regulate API's speech because of its content and because of its viewpoint. The Complaint targets API's pro-energy speech because it told consumers that the petroleum industry "could help them 'live better lives'" and touted the industry's initiatives in tackling climate change. Compl. ¶¶ 196, 198. The State is trying to snuff out any pro-fossil fuel advocacy. It seeks to impose a blanket ban on all speech in this category. Regardless of whether the speech is noncommercial or commercial, the State's claims are a viewpoint-based restriction and thus "still subject to strict scrutiny under *Reed*." *Int'l Outdoor, Inc. v. City of Troy, Michigan*, 974 F.3d 690, 702–03 (6th Cir. 2020).

**2. The State's claims against API cannot survive strict scrutiny.**

Strict scrutiny "is a demanding standard." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011). It is the highest and most rigorous form of judicial review. *Reed*, 576 U.S. at 163–64. It requires that the challenged law be "narrowly tailored to achieve a compelling state interest." *Arsenault v. Way*, 539 F. Supp. 3d 335, 346 (D.N.J. 2021). "Narrow tailoring requires the government to demonstrate that a policy is the 'least restrictive means' of achieving its

objective." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020) (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981)).

As applied to API's alleged statements, the State's claims fail strict scrutiny because they are not narrowly tailored to any compelling government interest. To the contrary, the State attacks API's broad energy information campaigns, which discuss initiatives to reduce the industry's carbon footprint and to provide general information on the oil and gas industry. Compl. ¶¶ 30, 196-200. Endorsing the State's theory here would allow State regulation of policy debates about the benefits of the energy industry, regardless of that regulation's "fit" with any deceptive merchandising practice. *City of Cincinnati*, 507 U.S. at 415, 428 (holding that a city's ban on distribution of commercial material via news racks violated First Amendment absent an established "'fit' between its goals and its chosen means" of restriction); *see also, Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980) ("The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation."). This lack of fit is fatal here, as is the sweeping breadth of the State's speech restrictions. *See, e.g.*, *Washington Post v. McManus*, 944 F.3d 506, 510–12, 521, 523 (4th Cir. 2019) (striking down state statute where the law "burden[ed] too much and further[ed] too little[,]" and the statute did "surprisingly little to further its chief objective"). Even if the State had a compelling interest here in protecting consumers from deception, it is entirely unclear what pro-energy messaging would *not* be prohibited.

To survive strict scrutiny, the State must also demonstrate that there is not another less oppressive way of achieving the same state interest. *Free Speech Coalition, Inc. v. Att'y Gen. United States*, 974 F.3d 408, 421-22 (3d Cir. 2020). Here, a large volume of information is available to consumers, from the State and others, touting the State's view of climate change, and

nothing prevents the State from adding to that volume. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. ---, 138 S. Ct. 2361, 2376 (2018) (striking down an alleged consumer protection law because the state could take a counter-position to that of the regulated party "with a public-information campaign"). Although it would be cheaper for the State to foist that responsibility on API, "[a]dministrative convenience . . . does not present a sufficient justification for infringing First Amendment freedoms." *North Carolina Right to Life v. Leake, Inc.*, 344 F.3d 418, 433 (4th Cir. 2003).

**3. The chilling effect of the State's claims against API confirms that they should be dismissed now.**

Allowing the State's claims to proceed would also have an irreparable chilling effect on policy advocacy. Forcing API to litigate for years claims that plainly violate the First Amendment would act as a warning shot for any trade association that questions the State's preferred message on a disputed topic—enter the public debate and risk the government's heavy hand coming down on you. For this reason, when speech is the subject of a lawsuit, courts routinely recognize the importance of early resolution so as to not to inadvertently and unnecessarily suppress speech. *See, e.g.*, *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."); *Gordon*, 859 F. Supp. at 1542 ("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).

So too here. The Court should resolve this issue now 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). And that is exactly what the State wants.

**B. The Complaint violates API's right to petition the government for redress.**

The Court should also dismiss the State's claims against API because they impermissibly targets API's petitioning activities. The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." Part of this protection is the ability for groups to "'use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests *vis-à-vis* their competitors.'" *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1076 (3d Cir. 1990) (quoting *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972)).

An integral component to the right to petition is the *Noerr-Pennington* doctrine, which has provided individuals and entities with immunity from liability based on activities arising out of their attempts to influence the passage or enforcement of particular laws. *See Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669–72 (1965); *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961). Courts have applied *Noerr-Pennington* to state unfair trade practices acts and state consumer protection laws. *See, e.g., Suburban Restoration Co., Inc. v. ACMAT Corp.*, 700 F.2d 98, 102 (2d Cir. 1983) ("[W]e are confident that Connecticut's courts would carve out a similar exception to [the Connecticut Unfair Trade Practices Act] and the common law, whether or not they believed that they were required to do so by the Constitution."); *Green Mountain Realty Corp. v. Fifth Estate Tower, LLC*, 13 A.3d 123, 130–31 (N.H. 2010) (applying *Noerr-Pennington* to New Hampshire Consumer Protection Act). Courts in New Jersey apply *Noerr-Pennington* to tort claims too. *See Main St. at Woolwich, LLC v. Ammons Supermarket, Inc.*, 451 N.J. Super. 135, 144 (App. Div. 2017).

Here, the State's attack on API's petitioning activities is brazen. *See, e.g.*, Compl. ¶ 199 (alleging that API led a campaign in New Jersey "to turn public opinion against stricter standards for ethanol content in gasoline"). *Noerr-Pennington* provides API with First Amendment protection to engage in this type of core legislative and public policy activity. *See, e.g.*, *Livingston Downs Racing Ass'n v. Jefferson Downs Corp.*, 192 F. Supp. 2d 519, 531–37 (M.D. La. 2001) (finding *Noerr-Pennington* covered campaigning activities); *Council for Emp't & Econ. Energy Use v. WHDH Corp.*, 580 F.2d 9, 11–12 (1st Cir. 1978) (concluding *Noerr-Pennington* protected activities geared toward "influencing political decisions of the general electorate.").

The State may argue that it does not attack API's protected petitioning activity, and instead addresses API's other statements and activities. That distinction cannot be drawn here. API's petitioning and lobbying of government entities are interrelated with API's promotion of the industry it represents. *Noerr-Pennington* recognizes that API's promotional activities are part and parcel with API's legislative and public policy activities. In *Noerr* itself, for example, the Supreme Court held that the First Amendment protected from antitrust challenge the defendants' publicity campaign, which was "designed to influence the passage of state laws relating to truck weight limits and tax rates on heavy trucks, and to encourage a more rigid enforcement of state laws penalizing trucks for overweight loads and other traffic violations." *Noerr*, 365 U.S. at 131. So even if the alleged activities that purport to support the State's claims against API were based on API's alleged targeting of consumers who are also voters, rather than regulators, *Noerr* protects a publicity campaign targeting both governmental entities and consumers.

### C. The State's negligence claim against API fails because the alleged duty violates the First Amendment.

The Complaint asserts that API breached a "duty to exercise reasonable care in the production and dissemination of information regarding the climate impacts of fossil fuel products

to users of those products and to the public." Compl. ¶ 251. As explained in the Joint Motion to Dismiss, there is no such duty when the alleged dangers of using fossil fuels are well known to Plaintiff and the public. *See* Joint Br. at 40-43. And even if the Court were to find such a duty existed, if applied to API, this alleged duty would plainly run afoul of the First Amendment. *See supra* at 6-14.

Further, several courts—including at least one in New Jersey—have held that no duty arises from the remote relationship between a trade association and the end user of products produced in that trade. *See Meyers v. Donnatacci*, 220 N.J. Super. 73, 81-82 (Law. Div. 1987) (dismissing negligence claim against pool trade association based on theory that association owed duty to disseminate information concerning hazards of shallow-end diving, explaining that the association "owe[d] no duty to the general public who may use products manufactured and/or installed by its members."); *see also, e.g.*, *Sizemore v. Georgia-Pac. Corp.*, 6:94-CV-02894, 1996 WL 498410, at *4 (D.S.C. Mar. 8, 1996) (finding no duty owed to the general public when the trade association did "not design, manufacture, distribute, or sell any building products and did not participate in the manufacture, design, sale, or installation of the paneling in plaintiffs' home"); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F. Supp. 1345, 1349 (S.D. Ind. 1990) (similar); *Klein v. Council of Chem. Associations*, 587 F. Supp. 213, 225 (E.D. Pa. 1984) (similar).

The refusal of courts to impose an expansive and undefined duty "at large" upon non-profit trade associations has equal force here. API sells no fossil fuel products and so is not within the realm of liability contemplated by a common law negligence cause of action.

## CONCLUSION

The Court should dismiss the State's claims against API with prejudice.

Respectfully submitted,

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