

March 5, 2015

The Honorable Joseph Crisco
Chair, Insurance and Real Estate Committee
Legislative Office Building, Room 2800
Hartford, CT 06106

The Honorable Robert Megna
Chair, Insurance and Real Estate Committee
Legislative Office Building, Room 2802
Hartford, CT 06106

Re: House Bill 6869
AN ACT CONCERNING AUTOMOTIVE GLASS WORK APPOINTMENTS

Chairman Crisco, Chairman Megna, Ranking Members, and members of the committee;

Safelite® Group (Safelite®) is the leading provider of vehicle glass repair and replacement (VGRR) products and services in the United States, including the State of Connecticut. Safelite® operates four distinct companies including Safelite AutoGlass®, Safelite® Solutions, Service AutoGlass® and Safelite® Glass Corp. The company was founded in 1947 and has grown today to provide mobile and retail services to more than 95 percent of the U.S. population operating in all 50 states. The company employs over 10,000 associates and provides claims services to more than 175 insurance and fleet companies, including many of the leading property casualty insurance companies. In 2014, Safelite serviced nearly 4.8 million customers across the country while achieving a high-level of customer satisfaction.

HB 6869, AN ACT CONCERNING AUTOMOTIVE GLASS WORK APPOINTMENTS, particularly, Section 1(b)(3) which would amend Section 38a-354a of the general statutes, would prohibit an insurer, third party administrator, agent or adjuster from scheduling an appointment for automotive glass work for an insured. Safelite operates with the highest ethical standards and supports consumer protections in the areas of choice, quality, and safety. Safelite opposes HB 6869 because it is bad policy for Connecticut policyholders *and* it is unconstitutional.

HB 6869 Is Bad Policy For Connecticut Consumers

Currently, Connecticut consumers are extremely satisfied with their vehicle glass claims experience. There are very few, if any, consumer complaints filed with the Department of Insurance or the Department of Consumer Protection. Of the thousands of policyholders serviced by Safelite Solutions on behalf of its insurance clients, 94% are satisfied or extremely satisfied with the “time to serve” they receive in the settlement of their glass claim and 90% express that their expectations were exceeded. However, this level of customer satisfaction would dramatically decrease if insurance companies, TPAs, agents and adjusters are prohibited from scheduling glass claims appointments for Connecticut policyholders.

HB 6869 outlaws a critical part of the high level claims experience Connecticut consumers expect. Today, the filing of a glass claim takes about seven minutes. So, instead of submitting your claim and scheduling the work immediately, the consumer would have to call in, provide some of the necessary claim information, hang up, call to different glass shops, determine on their own which ones can service their needs, schedule the work with the shop, call back into the insurance company, likely speak to a different representative and provide the additional information in order to finalize the claim. How does that help the consumer? It doesn't. It would create confusion, uncertainty and completely disrupt the claims process that consumers currently appreciate.

Why would Connecticut pass a law making it *more* difficult to schedule vehicle glass service? Clearly, this does not help the consumer, so who does it help? Competitors of Safelite – the proponents of the bill – hope that restricting an insurer's or TPA's speech by not allowing it to schedule service, will divert customers away from Safelite and to their shops. Plain and simple. Creative marketing to say the least. But, according to a unanimous Second Circuit Court of Appeals panel, unconstitutional.

HB 6869 Is Unconstitutional

Safelite also **opposes** HB 6869 because it is unconstitutional. When Safelite successfully challenged Public Act 13-67, the Second Circuit Court of Appeals analyzed the true purpose and motivation of the law. According to the Second Circuit, it “...*was designed to benefit Safelite's competitors.*”¹ The Second Circuit Court of Appeals made it very clear that this is *not* a substantial state interest, and ultimately determined it was unconstitutional.

Arguably, HB 6869 is *more* offensive than Public Act 13-67 because it is a *complete* gag order, restricting the insurer, its TPA, agent or adjuster from offering to schedule any glass work. Make no mistake. The purpose of HB 6869 is no different than Public Act 13-67—it is designed to benefit Safelite's competitors who are on record stating it is “unfair” that Safelite Solutions is allowed to refer potential customers to its retail shops. In fact, five weeks after the Second Circuit decision, the independent glass shops stated at an industry conference that the Second Circuit “got it wrong” and that the loss at the Second Circuit was just the “first round.” They further stated that “[d]rafting legislation for 2015 legislative session has begun. We want to *level the playing field*... The Connecticut legislature is on the side of the independent glass shop. They are not happy that they've been sued and that we lost the last round.”² (Emphasis added).

Any notion that HB 6869 is intended to help *consumers* is belied by the very words of the bill proponents, Safelite's competitors, who unabashedly continue to use the legislative process as the rallying cry against Safelite. Again, the Second Circuit panel unanimously concluded that this is not a substantial state interest permissible under the law.

¹ See *Safelite v. Jepsen et al.*, 764 F.3rd 258, 265 (2014). The Court went on to state that it was “... skeptical that the government's asserted consumer protection interests are genuine...” Id. Not so coincidentally, many of the same proponents of Public Act 13-67 are the same proponents of HB 6869 who have analogized this battle to a boxing match against the same opponent--Safelite.

² See <http://www.glassbytes.com/2014/10/how-did-we-get-the-anti-steering-law->

Safelite's challenge to Public Act 13-67 was an expensive fight, but one we felt was necessary to protect not just Safelite, but our insurance clients and ultimately the Connecticut consumer whose interests are clearly lost in this debate. While legal challenges are never our first choice, Safelite is willing to protect its interests again if necessary.

To date, the only argument proffered in support of HB 6869 appears to be testimony before this committee on February 19, 2015. It was stated that there should be a "no scheduling" law because one customer had to wait 6 days before her vehicle glass could be replaced. By logical extension, one must presume that passage of HB 6869 would somehow help service this customer. In fact, that is not the case.

Conclusion

In Safelite's filed testimony from the hearing on January 31, 2013 related to Public Act 13-67, the company outlined key economic and industry factors that were adversely impacting the Connecticut VGRR industry. Those factors included financial hardship, high fuel prices, fewer miles driven, weather and fraud. Today the economy has improved, gas prices have plummeted, individuals are driving more, the weather conditions are more conducive to the vehicle glass industry, and fraud is on the decline (but always a factor). Safelite data indicates that since 2013, the number of affiliate jobs has increase 27% among competitors. This is an indication that the VGRR industry conditions have improved. Finally, Safelite has substantially increased the number of licensed repair and replacement technicians it employees in the state since 2013 to continue providing an outstanding claims experience for Connecticut consumers and adding jobs to the economy.

We would urge the Committee to oppose HB 6869. It is bad for Connecticut consumers and it is unconstitutional. Safelite remains committed to protecting the interests of Connecticut consumers and welcomes the opportunity to work with the Joint Committee on Insurance and Real Estate to assure that policyholders continue to have a positive vehicle glass claims experience.

Sincerely,

Scot Zajic
Vice President, Legislative Affairs
Safelite Group, Inc.

**SAFELITE GROUP, INC., Safelite
Solutions LLC, Plaintiffs-
Appellants,**

v.

**George JEPSEN, in his official capacity
as Attorney General for the State of
Connecticut, Thomas Leonardi, in his
official capacity as the Commissioner
of the Connecticut Insurance Depart-
ment, Defendants-Appellees.**

Docket No. 13-4761-cv.

United States Court of Appeals,
Second Circuit.

Argued: May 19, 2014.

Decided: Sept. 4, 2014.

Background: Insurance claims manage-
ment services provider and its subsidiary
brought action challenging state law pro-
hibiting insurance companies and claims
administrators from requiring insureds to
patronize their affiliates for repair pur-
poses, or from mentioning their affiliates
with regard to glass claims unless they
also named competitor. The United States
District Court for the District of Connecti-
cut, Janet Bond Arterton, J., 988
F.Supp.2d 199, denied plaintiffs' motion for
preliminary injunction, and they appealed.

Holdings: The Court of Appeals, Winter,
Circuit Judge, held that:

- (1) law was restriction on commercial
speech, rather than informational dis-
closure law, and
- (2) providers were likely to succeed on
merits of their claim.

Vacated and remanded.

1. Federal Courts ⇌3616(2)

Court of Appeals reviews district
court's denial of motion for preliminary
injunction for abuse of discretion.

2. Federal Courts ⇌3567

Court of Appeals reviews district
court's legal conclusions de novo.

3. Constitutional Law ⇌1541

First Amendment does not prohibit
states and federal government from pre-
venting dissemination of commercial
speech that is false, deceptive, or mislead-
ing, or that proposes illegal transaction,
but commercial speech that is not false or
deceptive and does not concern unlawful
activities may be restricted only in service
of substantial governmental interest, and
only through means that directly advance
that interest. U.S.C.A. Const.Amend. 1.

4. Constitutional Law ⇌1564

Informational disclosure law, as op-
posed to prohibition on speech, is subject
to rational review under First Amendment,
that is, determination of whether required
disclosure is reasonably related to state's
interest. U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⇌1609

Insurance ⇌3141

Connecticut law prohibiting insurance
companies and claims administrators from
mentioning their affiliated automotive
glass repair shops unless they also named
competitor was restriction on commercial
speech, rather than informational disclo-
sure law, and thus was permissible under
First Amendment only if it was directly
advanced substantial governmental inter-
est and was not overly restrictive.
U.S.C.A. Const.Amend. 1.

6. Injunction ⇌1253

Insurance claims management ser-
vices providers were likely to succeed on
merits of their claim that Connecticut law
prohibiting insurance companies and
claims administrators from mentioning
their affiliated automotive glass repair
shops unless they also named competitor

violated First Amendment, and thus were entitled to preliminary injunction barring state from enforcing law, even if state had substantial interest in consumer choice; there was no evidence that providers' communications to its customers were false, misleading, or illegal, law advanced state's interest, if at all, in indiscernible or de minimis fashion, consumers were already protected from undue steering and influence under pre-existing law, and law did not apply to insurance companies themselves or to claims administrators that did not own affiliated glass shop. U.S.C.A. Const.Amend. 1.

Jay P. Lefkowitz (Steven J. Menashi, Kirkland & Ellis LLP, New York, N.Y.; Benjamin Carl Jensen, Robinson & Cole LLP, Hartford Connecticut, on the brief), Kirkland & Ellis LLP, New York, N.Y., for Plaintiffs-Appellants.

Joseph J. Chambers, Assistant Attorney General (Matthew J. Budzik, Assistant Attorney General, on the brief) for George Jepsen, Attorney General for the State of Connecticut, Hartford, CT, for Defendants-Appellees.

Before: WINTER, WALKER, and CABRANES, Circuit Judges.

WINTER, Circuit Judge:

Safelite Group, Inc., and its subsidiary, insurance-claims administrator Safelite Solutions LLC, (collectively "Safelite"), appeal from a denial of a preliminary injunction against enforcement of Connecticut's Public Act 13-67 ("PA 13-67"), "An Act Concerning Automotive Glass Work." Safelite claims that the Act violates the First Amendment because it is an impermissible constraint on commercial speech.

We hold that the district court erred in applying rational basis review under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), but rather should have applied intermediate scrutiny under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Concluding that the statute cannot survive such scrutiny on the present record, we vacate and order an injunction preventing enforcement of Public Act 13-67(c)(2).

BACKGROUND

We begin by describing the commercial context. Safelite operates an insurance claims management company throughout the United States. Its affiliate, Safelite AutoGlass, operates in Connecticut and provides auto-glass repair and replacement.

When car owners with a claim concerning auto-glass call their insurance company, they may, depending on the insurance company, be connected to Safelite Solutions. During this call, a Safelite Solutions representative reads a script that explains the consumer's repair options. If practicable, the script recommends Safelite AutoGlass to do the auto-glass repairs. If a Safelite AutoGlass facility is not available, the agent may recommend a shop that is on a list of seventy non-affiliated glass-repair shops pre-approved by Safelite Solutions. In order to be included on this list, the local repair shop must meet certain criteria and qualifications, and sign a participation agreement.

Under pre-existing Connecticut law, Conn. Gen.Stat. § 38a-354 (2014), automobile insurers and claims administrators are prohibited from requiring where repairs should be made and must give a notice of a right to choose on appraisals or estimates.

According to the statute, appraisers may not "require that appraisals or repairs . . . be made in a specified facility or repair shop or shops." *Id.* § 38a-354(a). Moreover,

[n]o insurance company doing business in [Connecticut], or agent or adjuster for such company shall (1) require any insured to use a specific person for the provision of automobile physical damage repairs, automobile glass replacement, glass repair service or glass products, or (2) state that choosing a facility other than a motor vehicle repair shop participating in a motor vehicle program established by such company will result in delays in repairing the motor vehicle or a lack of guarantee for repair work.

Id. § 38a-354(b). Furthermore, any written appraisal or estimate must contain the following language in bold and in no less than ten-point font:

NOTICE:

YOU HAVE THE RIGHT TO CHOOSE THE LICENSED REPAIR SHOP WHERE THE DAMAGE TO YOUR MOTOR VEHICLE WILL BE REPAIRED.

Id. § 38a-354(c). Safelite alleges its compliance with this law. Although not required by law, the Safelite Solutions script informs consumers of its affiliation with Safelite AutoGlass.

The Connecticut General Assembly undertook an examination of the business model adopted by Safelite with regard to auto-glass repair. In May 2013, it passed

PA 13-67, which took effect on January 1, 2014. The Act reads in relevant part:

No glass claims representative for an insurance company doing business in this state or a third-party claims administrator for such company shall provide an insured with the name of, schedule an appointment for an insured with or direct an insured to, a licensed glass shop that is owned by (A) such company, (B) such claims administrator, or (C) the same parent company as such insurance company or claims administrator, unless such representative or claims administrator provides the insured with the name of at least one additional licensed glass shop in the area where the automotive glass work is to be performed.

PA 13-67(c)(2). Thus, Section 38a-354 prohibits insurance companies and claims administrators from requiring insureds to patronize their affiliates for repair purposes. PA 13-67 additionally prohibits them from mentioning their affiliates with regard to glass claims unless they also name a competitor.

The legislative history of PA 13-67 revealed no consumer dissatisfaction with Safelite's business model but substantial concerns on the part of unaffiliated glass dealers. While the Connecticut Insurance Department stated that current law, as described above, provided adequate protection for consumers,¹ several legislators stated that PA 13-67 was needed to protect local glass dealers not affiliated with Safelite.²

1. At hearings before the Insurance and Real Estate Committee of the Connecticut General Assembly, the Connecticut Insurance Department testified that the existing law, section 38a-354, was "not problematic for consumers." The Department also testified that its Consumer Affairs Division "ha[d] received no complaints regarding" section 38a-354, that it "believe[d] consumers [were] adequately

protected by current law and that [PA 13-67 was] unnecessary."

2. During the House Session on May 7, 2013, Representative Robert Megna spoke in support of the bill that would become PA 13-67, stating that it was designed to "help out those small businesses from disappearing . . . [i.e.,] small businesses that employ people, spend money, do economic development in . . . our

Safelite brought the present action on July 26, 2013, challenging PA 13-67 as infringing its First Amendment rights and constituting discrimination against interstate commerce under the Commerce Clause. Safelite moved for a preliminary injunction, which was denied by the district court. Safelite brought the present appeal. The law took effect on January 1, 2014. Safelite states, without objection, that it has since complied with PA 13-67.

DISCUSSION

[1, 2] We review a district court's denial of a motion for a preliminary injunction for abuse of discretion. *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 70 (2d Cir. 1996). We review the district court's legal conclusions *de novo*. *County of Seneca v. Cheney*, 12 F.3d 8, 11 (2d Cir.1993). In "First Amendment cases, 'an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir.2013) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984)).

a) *Rational Basis Review versus Intermediate Scrutiny*

When a party challenges a law or regulation on the basis that it restricts or im-

state." He also stated that "[t]hese are small businesses that are located here in the state, ... that have property, that buy things, that ... employ people here in the state." Representative David Yaccarino also spoke in support of the House bill, saying, "I'd like to see a more fair playing field for both Safelite and mainly mom and pops." He also said, "[for] most of the mom-and-pop shops, the glass is Connecticut, it's all from Connecticut, all Connecticut jobs."

Representative Anthony D'Amelio mentioned that he was in support of the law in

permissibly regulates speech protected by the First Amendment, we first look at the genre of speech involved.

[3] It is undisputed that the speech in this case is commercial speech "entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded 'noncommercial speech.'" *Zauderer*, 471 U.S. at 637, 105 S.Ct. 2265. "The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction. Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Id.* at 638, 105 S.Ct. 2265 (citing *Central Hudson*, 447 U.S. at 566, 100 S.Ct. 2343) (other internal citations omitted).

[4] The regulation of commercial speech is subject to different levels of review, depending on the nature of the law. In *Central Hudson*, the Court established that a restriction on commercial speech is subject to intermediate scrutiny, that is, a determination of whether the restriction directly advances a substantial governmental interest and is not overly restrictive.

order to protect "the people that contribute to the little leagues in our town. These are the people that contribute to functions in our churches and they're literally being squeezed out of the marketplace."

During the Senate Session on May 22, 2013, Senator Kevin Kelly also spoke in support of the bill in order to help local businesses: "[T]he underlying purpose of the bill is not only to provide notice to the insured, but also to give an opportunity for local dealers to participate on an equal footing with, I'm going to say, other, large glass dealers."

447 U.S. at 564, 100 S.Ct. 2343. In *Zauderer*, however, the Court created an exception that an informational disclosure law—as opposed to a prohibition on speech—was subject to rational review, that is, a determination of whether the required disclosure is reasonably related to the state's interest. 471 U.S. at 651, 105 S.Ct. 2265.

[5] The district court found that PA 13-67 was simply an informational disclosure law and accordingly applied the rational basis review test. *Safelite Grp. v. Jepsen*, 988 F.Supp.2d 199, 206 (D.Conn. 2013). We disagree and hold that the district court should have applied intermediate scrutiny under *Central Hudson*.

Zauderer involved a state law that regulated commercial speech by attorneys, specifically whether an attorney could “solicit[] business by running newspaper advertisements containing nondeceptive illustrations and legal advice, and whether [the] State [could] seek to prevent potential deception of the public by requiring attorneys to disclose in their advertising certain information regarding fee arrangements.” 471 U.S. at 629, 105 S.Ct. 2265. The plaintiff in *Zauderer* was an attorney who “ran a small advertisement in the Columbus Citizen Journal advising its readers that his law firm would represent defendants in drunken driving cases and that his clients’ full legal fee would be refunded if they were convicted of DRUNK DRIVING.” *Id.* at 629-30, 105 S.Ct. 2265 (alterations omitted). The attorney was disciplined by the Office of Disciplinary Counsel of the Supreme Court of Ohio for violating the Ohio Code of Professional Responsibility, which requires that a client bear certain costs even if the client loses. *Id.* at 631, 634-35, 105 S.Ct. 2265.

In applying rational basis review, the Court found that by requiring the attorneys to “state that the client may have to

bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present.” *Id.* at 650, 105 S.Ct. 2265. The Court went on to say: “We have, to be sure, held that in some instances compulsion to speak may be as violative of the First Amendment as prohibitions on speech.” *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (holding that a law requiring New Hampshire license plates to display the state’s motto, “Live Free or Die,” violated the First Amendment rights of the owners who contested the law)); *Miami Herald Pub’g Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974) (holding that Florida’s “right to reply” statute granting a political candidate equal space to answer criticism in newspapers violated the newspaper’s First Amendment rights). The asserted governmental interest in *Zauderer* was to ensure that attorneys advertise “in a dignified manner,” 471 U.S. at 647, 105 S.Ct. 2265, and to “ensure that attorneys . . . do not use false or misleading advertising to stir up meritless litigation against innocent defendants,” *id.* at 643, 105 S.Ct. 2265.

In contrast, *Central Hudson* involved a utility company’s challenge to a regulation of the New York Public Service Commission that banned any advertising that “promot[ed] the use of electricity” because the state’s utility system could not “continue [to] furnish[] all customer demands for the 1973-1974 winter.” 447 U.S. at 558-59, 100 S.Ct. 2343. The Court outlined the following test for examining whether such restrictions on commercial speech are protected by the First Amendment:

The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the reg-

ulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Id. at 564, 100 S.Ct. 2343. The Court held that the regulation violated the First Amendment rights of the utility company because the law was overly restrictive. *Id.* at 570–71, 100 S.Ct. 2343.

In interpreting these Supreme Court precedents, our previous cases have drawn a distinction between “standards of review [to be applied] to laws mandating commercial speech disclosures and laws restricting commercial speech.” *Conn. Bar Ass’n v. United States*, 620 F.3d 81, 93 n. 15 (2d Cir.2010). In *National Electric Manufacturers Association v. Sorrell*, 272 F.3d 104, 107 (2d Cir.2001), we upheld a statute that “require[d] manufacturers of some mercury-containing products to label their products and packaging to inform consumers that the products contain mercury and, on disposal, should be recycled or disposed of as hazardous waste.” In *New York State Restaurant Ass’n v. New York City Board of Health*, 556 F.3d 114 (2d Cir.2009) (“NYSRA”), we upheld a New York City regulation that required certain restaurants to post calorie content information on their menus and menu boards. We found that “the First Amendment is not violated, where[,] as here, the law in question mandates a simple factual disclosure of caloric information and is reasonably

related to New York City’s goals of combating obesity.” *Id.* at 118.

In both *NYSRA* and *Sorrell*, we relied on that fact that

[c]ommercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests. Such disclosure furthers, rather than hinders, the First Amendment goal of the discovery of truth and contributes to the efficiency of the “marketplace of ideas.”

Sorrell, 272 F.3d at 113–14 (emphasis supplied).

Indeed, in *Sorrell*, we stated that “*Zauderer*, not *Central Hudson* [], describes the relationship between means and ends demanded by the First Amendment in compelled commercial disclosure cases. The *Central Hudson* test should be applied to statutes that restrict commercial speech.” *Id.* at 115 (citation omitted). Because the district court concluded that the law mandated the disclosure of “purely factual and uncontroversial information,” see *Safelite Grp., Inc. v. Jepsen*, 988 F.Supp.2d 199, 207 (D.Conn.2013) (quoting *Zauderer*, 471 U.S. at 651, 105 S.Ct. 2265), it concluded that rational basis review must apply. See also *id.* at 207 (noting that “Safelite acknowledges that PA 13–67(c)(2) contains no restrictions on speech,” but rather creates a “trigger,” which mandates speech only if Safelite chooses to direct claimants to its affiliates).

On a cursory review, our precedent arguably supports the district court’s conclusion that this law simply requires disclosure of accurate, factual information. But all of our case law applying *Zauderer* review to factual, commercial disclosure—

indeed, as far as we know, all federal cases applying *Zauderer* in that context—has dealt with disclosure requirements about a company's own products or services. See *Sorrell*, 272 F.3d at 116 (listing “innumerable” state and federal regulations that require disclosure, all of which appear to require information about the commercial speakers' own product or service, not about competitors'). This distinction is important, indeed, dispositive in this case.

There is a good reason for this. Prohibiting a business from promoting its own product on the condition that it also promote the product of a competitor is a very serious deterrent to commercial speech. Moreover, such laws are highly likely to further covertly protectionist, rather than consumer information, goals—in particular, by protecting existing businesses, which may be well known, against new entrants. In the present case, for example, competitors, deeming Safelite to have an advantage in contacting potential consumers, successfully sought the challenged legislation. Safelite's competitive advantage, however, is in lower advertising costs (in the broadest sense). Such lower costs are a legitimate competitive advantage.

On that basis, because the disclosure required here compels speech that goes beyond the speaker's own product or service, we conclude that intermediate scrutiny applies to PA 13-67. As noted, PA 13-67 restricts insurers and claims administrators from mentioning the name of, or scheduling an appointment with, an affiliated glass company unless they also give the name of a competing glass company in the area. The law does not mandate disclosure of any information about products or services of affiliated glass companies or of the competitor's products or services. Instead, it requires that insurance companies or claims administrators choose between silence about the products and ser-

vices of their affiliates or give a (random) free advertisement for a competitor. This is a regulation of content going beyond disclosure about the product or services offered by the would-be speaker. Indeed, it prevents the speaker from making such disclosure by requiring advertisements for a competitor and thereby deters helpful disclosure to consumers. Unlike the earlier mentioned cases that applied *Zauderer*'s rational basis test, the speech requirement here does more to inhibit First Amendment values than to advance them. Accordingly, we conclude that PA 13-67 requires the application of intermediate scrutiny. Cf. *Evergreen Ass'n v. City of New York*, 740 F.3d 233, 250-51 (2d Cir. 2014) (finding that an ordinance requiring pregnancy service centers to disclose that “the New York City Department of Health and Mental Hygiene encourages women who are or may be pregnant to consult with a licensed provider” violated the First Amendment under both intermediate and strict scrutiny because it “require[d] pregnancy centers to advertise on behalf of the City”).

b) *Application of Central Hudson*

Under *Central Hudson*, we must examine whether: (i) the regulated expression is false or misleading; (ii) the government interest is substantial; (iii) PA 13-67 directly and materially advances the governmental interest asserted; and (iv) PA 13-67 is no more extensive than necessary to serve that interest. 447 U.S. at 566, 100 S.Ct. 2343.

First, we determine whether Safelite's commercial speech is tainted by lies, misleading statements, or an illegal purpose, all of which may be regulated. *Central Hudson*, 447 U.S. at 563-64, 100 S.Ct. 2343 (“The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech

related to illegal activity. If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed." (internal citations omitted)).

[6] There is no claim, much less evidence, that Safelite's communications to its customers were false, misleading, or illegal. Indeed, there is no claim of consumer complaints about the effect of Safelite's business model. See Note 1, *supra*. We therefore must conclude that PA 13-67 does not meet the first prong of Central Hudson's intermediate scrutiny test.

We turn now to whether Connecticut's interest in restricting Safelite's speech is substantial, and whether PA 13-67 directly and materially advances that interest. Appellees argue that the government has a substantial interest in "protecting consumer choice, preventing steering, and combating the undue influence of self-interested insurance claims adjusters."

As an initial matter, in light of the record evidence that the legislation at issue was designed to benefit Safelite's competitors, see Note 2, *supra*, we are skeptical that the government's asserted consumer protection interests are genuine and not merely post-hoc rationalizations. See Note 1, *supra*. However, even if we were to acknowledge the government's substantial interest in consumer choice, PA 13-67 advances that interest, if at all, in an indiscernible or *de minimis* fashion. As became clear at oral argument, price is likely irrelevant to the consumer because the insurance company pays everything over a deductible. As is also clear from the history of the law, the record, and oral argument, there is no issue regarding the quality of glass provided by Safelite compared to that provided by competing glass deal-

ers. Nor is there an issue as to the quality of relative repair services. Appellees repeatedly state that the law furthers "consumer choice," but consumer choice is a means to an end: the maximization of consumer satisfaction. By having to mention only the name of a competitor, Safelite does not provide the consumer with information potentially enhancing that satisfaction.

This brings us to the fourth and final prong in the *Central Hudson* test: whether PA 13-67 is more restrictive than necessary to effectuate the government's legitimate interests. "The dictates of *Central Hudson* do not require [a government] to adopt the least restrictive means of advancing its asserted interests," nor "that there be no conceivable alternative, but only that the regulation not burden substantially more speech than is necessary to further the government's legitimate interests." *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 104 (2d Cir.2010) (internal citations and quotation marks omitted).

Pre-existing law provides a thoroughly effective way of protecting meaningful consumer choice. Before PA 13-67 took effect, the script that Safelite employees used (and continue to use) stated that its customers had the right to choose any repair shop. See Conn. Gen.Stat. §§ 38a-354(b)(1), (c). Consumers were further protected from undue steering and influence under the pre-existing law, which prohibited Safelite from "stat[ing] that choosing a facility other than a motor vehicle repair shop participating in a motor vehicle program established by [Safelite] will result in delays in repairing the motor vehicle or a lack of guarantee for repair work." *Id.* § 38a-354(b)(2).³

3. Additionally, even though it is not required to do so by law, Safelite independently dis-

closes that it is affiliated with Safelite Auto-Glass. Requiring such disclosure by law

In addition, PA 13-67 is more extensive than necessary. In its brief, Connecticut acknowledges a number of alternative proposals that were rejected by the State legislature. At least one of these—prohibiting steering unless the consumer was first informed of their right to choose a glass shop—would have served the same governmental interests, but would have been less burdensome on Safelite's speech rights than requiring Safelite to advertise the name of a direct competitor. Such an alternative would simply be a straight-forward disclosure about Safelite's services and its relationship with the insured.

Finally, we conclude that PA 13-67 is also underinclusive, because it only applies to third-party insurance claims administrators who also own an affiliated glass shop. It does not apply to insurance companies themselves or to claims administrators who do not own an affiliated glass shop. Accordingly, customers of those companies would not get the information about glass shops that Connecticut contends is necessary to protect consumer choice.

CONCLUSION

For the reasons stated, we vacate the district court's ruling. Because the case presents few issues of fact or law, and those issues are easily resolved,⁴ as discussed above, we order a preliminary injunction against enforcement of PA 13-67.

would clearly be less restrictive than PA 13-67.

4. The requirements for a party seeking a preliminary injunction are well-settled. First, in every case, the moving party must show "irreparable harm." *Int'l Dairy Foods*, 92 F.3d at 70. A "direct limitation on speech," including those imposed via the regulated, mandatory communication of specific content, "creates a presumption of irreparable harm," *Evergreen Ass'n*, 740 F.3d at 246, and, seeing no rebuttal of this presumption, we hold that

We remand the cause to the district court with instructions to enter a preliminary injunction and for such further proceedings as may be appropriate in the circumstances and consistent with this Opinion.



Ludmila LOGINOVSKAYA,
Plaintiff-Appellant,

v.

Oleg BATRATCHENKO, Thor United Corp., Thor United Corp. (Nevis), Thor Asset Management Inc., Thor Real Estate Management LLC, Thor Opti-Max LLC, Thor Capital LLC, Thor Futures LLC, Thor Realty LLC, Thor Guarant Real Estate Fund, Ltd. (BVI), Thor Real Estate Master Fund, Ltd., Thor Optima LLC, Thor Realty Holdings LLC, John Does 1-20, Tatiana Smirnova, Thor Opti-Max Fund, Ltd., Defendants-Appellees.

the first prong has been satisfied. Second, where "the injunction at issue stays government action taken in the public interest pursuant to a statutory scheme," the movant must demonstrate "likelihood of success on the merits." *Int'l Dairy Foods*, 92 F.3d at 70 (internal citations, quotation marks, and alterations omitted). As our earlier discussion demonstrates, Safelite has clearly met its burden under the second prong and is therefore entitled to relief.