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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEW JERSEY CIVIL JUSTICE INSTITUTE and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Plaintiffs,

-against-

GURBIR S. GREWAL, in his official capacity as Attorney General of the State of New Jersey,

Defendant.

Civil Action No. 3:19-cv-17518

District Judge Anne E. Thompson
Magistrate Judge Lois H. Goodman

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Motion Date: March 2, 2020

Oral Argument Requested

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INTRODUCTION

Plaintiffs challenge a 2019 amendment to the New Jersey Law Against Discrimination ("NJLAD") that purports to prohibit businesses and workers from entering into pre-dispute arbitration agreements. *See* N.J.S.A. 10:5-12.7 ("Section 12.7"). As detailed in Plaintiffs' motion for summary judgment (Dkt. 13), Section 12.7 impermissibly targets what the Supreme Court recognizes as the "primary" characteristic of an arbitration agreement: "a waiver of the right to go to court and receive a jury trial." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017). Section 12.7 is therefore preempted under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA").

Rather than respond on the merits, the defendant, the Attorney General of New Jersey, argues that this Court lacks jurisdiction over the claims in this case for two reasons. Neither contention is persuasive.

First, Defendant argues that Plaintiffs have not adequately alleged that they have organizational or associational standing to bring a claim on behalf of themselves or their members. But it is undisputed that Plaintiffs are organizations that represent businesses that are directly regulated by Section 12.7 and routinely engage in the conduct that Section 12.7 forbids. For the reasons we explain below, the Complaint adequately alleges both organizational and associational standing—and, in any event, standing is proven beyond a doubt by the additional evidence submitted with Plaintiffs' motion for summary judgment.

Moreover, it is telling that Defendant does not deny that he has the power to enforce Section 12.7 and carefully avoids any statement disavowing his intent to exercise that power. Those facts themselves confirm that Plaintiffs' members face a credible fear of prosecution under the statute—which is why they have standing to seek relief now.

Second, Defendant argues that even if Plaintiffs have standing, their claims are not ripe. But Plaintiffs have alleged—and, indeed, shown in their summary judgment motion—that Section 12.7 is currently inflicting real harm on Plaintiffs and their members. Defendant points to nothing that would be gained from postponing the Court's resolution of the purely legal questions presented by this case. Accordingly, this Court has the "virtually unflagging" obligation to exercise its jurisdiction. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014) (citation omitted).

BACKGROUND

Section 12.7 provides that any provision in an employment agreement that waives any substantive or procedural right under the NJLAD is unenforceable. N.J.S.A. 10:5-12.7(a). It further provides that "[n]o right or remedy under" the NJLAD "or any other statute or case law" may be "prospectively waived." *Id.* at 12.7(b). Because the NJLAD and other state employment statutes provide that individuals have a right to sue in court for violations of employment laws, Section 12.7's effect—if it were enforceable—would be to invalidate all pre-dispute arbitration agreements between employers and employees.

Plaintiffs—the New Jersey Civil Justice Institute ("NJCJI") and the Chamber of Commerce of the United States of America (the "Chamber")—filed a complaint against the Attorney General of New Jersey seeking declaratory and injunctive relief against the enforcement of Section 12.7. The Complaint alleges that pre-dispute arbitration furthers each Plaintiff's mission and that both Plaintiffs have members that are New Jersey employers who frequently enter pre-dispute arbitration agreements with their employees. Compl. ¶¶ 13-14. And the Complaint alleges that Section 12.7 impedes the Plaintiffs' missions and harms their respective members. *Id.*

Specifically, the Chamber represents U.S. businesses in every economic sector and geographic region of the country. Compl. ¶ 14. Its mission is to advocate for policies that help businesses grow and create jobs in their communities, including in New Jersey. *Id.*; Decl. of Glenn Spencer, Dkt. 13-3, ¶ 4. Because arbitration allows its members to resolve disputes in a manner that is typically faster, cheaper, and more efficient than in litigation, the Chamber seeks to preserve the ability of its members, and the business community more broadly, to enter into arbitration agreements with their workers to resolve workplace-related disputes. Compl. ¶ 14; Spencer Decl. ¶¶ 5-6.

NJCJI's members include leading employers in New Jersey, as well as small businesses, individuals, and not-for-profit groups. Compl. ¶ 13. Its mission is to advocate on behalf of its members for a civil justice system that treats all parties fairly and resolves disputes expeditiously and impartially. *Id.*; Decl. of Alida Kass,

Dkt. 13-4, ¶ 5. Because arbitration allows parties to resolve disputes fairly and with less cost and burden than through traditional litigation, a critical part of NJCJI's work includes advocating to preserve the right of parties to enter into pre-dispute arbitration agreements. Compl. ¶ 13.

The Complaint also alleges harm to Plaintiffs' members. Members that are unwilling to violate Section 12.7 in order to avoid the risk of facing actions to enforce the statute are forced to change their current practices and forgo their federal right to contract to resolve workplace disputes through less costly and more expeditious arbitration. Compl. ¶ 35. Their employment-related disputes will be diverted to costlier, more time-consuming, and more burdensome traditional litigation. *Id.* ¶¶ 26-40. Other members have continued their standard business practices of entering these agreements, but face enforcement actions brought by the Attorney General or private individuals. *Id.* ¶¶ 30-32. That fear is real: The Office of the Attorney General has prioritized enforcing the NJLAD, and the Attorney General himself has advocated for restrictions on arbitration agreements in the employment context. *Id.* ¶ 32.

Defendant filed its Motion to Dismiss on January 7, 2020. *See* Dkt. 12. On the same day, Plaintiffs filed a motion for summary judgment seeking a permanent injunction against the Attorney General prohibiting enforcement of Section 12.7 with respect to arbitration agreements governed by the FAA. Dkt. 13. Plaintiffs' summary judgment motion was accompanied by affidavits demonstrating the impact

on Plaintiffs themselves as organizations and also detailing the harms that Section 12.7 imposes on their members. *See* Dkt. 13-3, 13-4.

STANDARD OF REVIEW

Defendant brings a "facial 12(b)(1) challenge, which attacks the complaint on its face without contesting its alleged facts." *Hartig Drug Co. v. Senju Pharm. Co.*, 836 F.3d 261, 268 (3d Cir. 2016). "[A] facial attack calls for a district court to apply the same standard of review it would use in considering a motion to dismiss under Rule 12(b)(6), *i.e.*, construing the alleged facts in favor of the nonmoving party." *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014). And the Court "may dismiss the complaint only if it appears to a certainty that the plaintiff will not be able to assert a colorable claim of subject matter jurisdiction." *Cohen Family 2007 Trust v. U.S. ex rel. U.S. Army Corps of Eng'rs*, 2018 WL 6061581, at *3 (D.N.J. Nov. 20, 2018) (quotation marks omitted).

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE SECTION 12.7.

A plaintiff meets the constitutional requirements for standing when it pleads a concrete and particularized injury-in-fact that is caused by the challenged conduct and redressable by a decision in its favor. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to

support the claim.'" *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 889 (1990)); *accord In re Horizon Healthcase Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 633-34 (3d Cir. 2017). Here, Plaintiffs have met their burden to allege both direct organizational standing, as well as associational standing to sue on behalf of their members.

A. *Plaintiffs have organizational standing because Section 12.7 directly injures them.*

It is undisputed that an organization suffers an injury sufficient to establish standing on its own behalf when it challenges an allegedly unlawful practice that requires it to divert resources to counteract the unlawful conduct or that frustrates its organizational mission. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *Fair Hous. Rights Ctr. in Se. Pa. v. Post Goldtex GP, LLC*, 823 F.3d 209, 214 n.5 (3d Cir. 2016); *see also* Defendant's Brief ("DB") at 6 (acknowledging same standard). Courts find organizational standing when, as here, there is a "direct conflict between the defendant's conduct and the organization's mission," and the organization's "activities have been impeded" by the challenged law or action. *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006) (also collecting cases).

Plaintiffs readily satisfy that standard. Contrary to Defendant's assertion that the complaint relies solely "on representative standing" (Dkt. 12-2 at 7), the Complaint explains that Plaintiffs' *own* missions include advocating for the use of

"pre-dispute arbitration agreements" and against "anti-business regulatory actions" that restrict such use. Compl. ¶ 14; *see also id.* ¶ 13.

Moreover, the declarations accompanying Plaintiffs' summary judgment briefing leaves no doubt that Plaintiffs themselves are harmed, elaborating on the reasons that Section 12.7's restriction on arbitration agreements directly impedes Plaintiffs' missions. Thus, NJCJI's mission is to advocate for a civil justice system that treats all parties fairly and resolves disputes expeditiously and impartially. Compl. ¶ 13; Rule 56.1 Statement, Dkt. 13-2 ¶ 19. A key element of that mission is to reduce the cost and improve the efficiency of dispute resolution in New Jersey. Dkt. 13-2 ¶ 19. This mission is directly obstructed by Section 12.7's bar on pre-dispute arbitration agreements, because the provision would redirect cases from the more efficient and cost-effective arbitral forum into costlier, less efficient traditional litigation in court. Dkt. 13-2 ¶ 31. Section 12.7 is therefore squarely at odds with NJCJI's mission to work toward a more efficient system for resolving civil disputes.

Section 12.7 similarly impedes the Chamber's mission. The Chamber, the world's largest business federation, advocates for pro-business policies on behalf of the business community and challenges anti-business government actions. Compl. ¶ 14; Dkt. 13-2 ¶ 23. As part of that work, the Chamber routinely advocates in federal and state courts against legislative and regulatory actions that restrict businesses from entering into pre-dispute arbitration agreements. Compl. ¶ 14; Dkt.

13-2 ¶ 23. Because Section 12.7 squarely prohibits businesses from entering into pre-dispute arbitration agreements, it obstructs the Chamber's ability to promote pro-business policy and safeguard the ability of businesses with operations in New Jersey to enter arbitration agreements with their workers. Dkt. 13-2 ¶ 24. And, if it is allowed to stand, Section 12.7 will set a troubling precedent that impedes the Chamber's efforts to advocate in favor of arbitration on behalf of its members in other States.

Moreover, both Plaintiffs have confirmed that their missions are "frustrated" by Section 12.7 because they have "had to divert resources in order to" address the harms posed by Section 12.7 and promote efficient dispute resolution in New Jersey—a showing that the Third Circuit has confirmed is "sufficient to establish standing." *Fair Housing Rights Ctr.*, 823 F.3d at 214 n.5; *see also, e.g.*, *Scott v. Schedler*, 771 F.3d 831, 837 (5th Cir. 2014) ("'[A]n organization has standing to sue on its own behalf where it devotes resources to counteract a defendant's allegedly unlawful practices.'") (quoting *Ass'n of Cmty Orgs. For Reform Now v. Fowler,* 178 F.3d 350, 360 (5th Cir. 1999)); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014) (organizational plaintiffs had standing based on showing "that they had diverted resources" to counteract the challenged actions); *Eschenbach*, 469 F.3d at 132-33 (organization had standing based on its allegations that the challenged regulations "have caused a drain on [the organization's] resources and time because

the organization has had to divert significant time and resources" towards "helping its members and the public" address the harms posed by the challenged regulations).

Here, the NJCJI has explained that Section 12.7 has caused it to "divert[] resources from its other efforts to promote efficient dispute resolution in New Jersey"—including, specifically, "holding meetings with members, producing educational materials, and hosting educational events." Kass Decl. ¶ 10. Likewise, the Chamber has explained that "[b]ecause of Section 12.7, the Chamber has had to divert resources from other critical projects promoting pro-business legal reforms," including "conven[ing] discussions with members to explain the arbitration statute and to address its implications and ramifications for employers in New Jersey." Spencer Decl. ¶¶ 12-13.

All of the above injuries are attributable to Section 12.7, which—in the context of arbitration agreements governed by the FAA—"directly conflicts" with Plaintiffs' missions and "impede[s]" their activities. *Eschenbach*, 469 F.3d at 133. A declaratory judgment invalidating Section 12.7 with respect to arbitration agreements governed by the FAA would redress these injuries.

In short, the Complaint adequately alleges organizational standing—particularly when read in conjunction with Plaintiffs' summary judgment evidence. To the extent that the Court requires that the Complaint include the additional detail supplied by Plaintiffs' declarations, Plaintiffs respectfully request leave to amend

the Complaint to conform to the summary judgment evidence. Indeed, the Third Circuit is especially "liberal" in "permit[ting] such amendments to be made in an attempt to cure defective allegations of jurisdiction," in furtherance of "the interest of justice to avoid dismissal of suits on purely technical grounds." *St. Francis Med. Ctr. v. Sullivan*, 962 F.2d 1110, 1117 (3d Cir. 1992); *see also* 28 U.S.C. § 1653 (providing that "[d]efective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts"). And amendment is further supported by the fact that any "dismissal for lack of subject matter jurisdiction" is by definition "without prejudice." *Figueroa v. Buccaneer Hotel Inc.*, 188 F.3d 172, 182 (3d Cir. 1999). Forcing Plaintiffs to refile a new action would be a waste of judicial and party resources.

B. *Plaintiffs have associational standing to bring this suit on behalf of their members.*

An association has standing to bring suit on behalf of its members when it meets three factors: first, "its members would otherwise have standing to sue in their own right;" second, "the interests at stake are germane to the organization's purpose;" and third, "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citation omitted).

Defendant does not dispute that Plaintiffs have adequately alleged the second and third factors, but he argues that Plaintiffs' members do not have standing to sue

in their own right because, in his view, Plaintiffs have failed to allege an injury-in-fact that is traceable to Defendant. Dkt. 12-2 at 7-10. Defendant is wrong: Plaintiffs have standing on this basis too, both under a motion to dismiss and a summary judgment standard, because their members suffer concrete and particularized injuries directly traceable to Section 12.7 and to the threat that the Attorney General will enforce that provision. *See Lujan*, 504 U.S. at 561.

As the Complaint alleges, employers that rely on pre-dispute arbitration agreements, including Plaintiffs' members, must make a choice going forward: either comply with Section 12.7 and change their practice of entering pre-dispute arbitration agreements (Compl. ¶ 36), or intentionally fail to comply and face the threat of enforcement actions and penalties under Section 12.7 (Compl. ¶ 35). Either option imposes harm that qualifies as an injury in fact.

Tellingly, Defendant does not deny that Section 12.7 harms businesses that routinely rely on pre-dispute arbitration agreements in their employment contracts, such as Plaintiffs' members. Nor could he: in light of the fact that it is undisputed that Plaintiffs' members use arbitration provisions, it is clear that the members would "have standing to sue in their own right." *Laidlaw*, 528 U.S. at 181. Specifically, as the entities directly subject to Section 12.7, Plaintiffs' members have standing to challenge Section 12.7. "'[W]hen an individual who is the very object of a law's requirement or prohibition seeks to challenge it, he always has standing.'"

Constitution Party of Pa. v. Aichele, 757 F.3d 347, 362 (3d Cir. 2014) (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 894 (1983)); *see also Lujan*, 504 U.S. at 561 (explaining that if "the plaintiff is himself an object of the action . . . there is ordinarily little question that the [government] action" caused him injury).

Instead, Defendant first argues that Plaintiffs are required to identify a specific member of their organizations that has suffered these undisputed harms. DB at 3, 7, 9. But unlike in *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (cited at DB at 7), Plaintiffs do not rely on a mere "statistical probability" that Section 12.7 will injure some unidentified member. Rather, Plaintiffs have pleaded that many of their members are businesses in New Jersey that regularly enter into pre-dispute arbitration agreements with their workers and have continued to do so after March 18, 2019. Compl. ¶¶ 13, 14. *All* of those employers are suffering actual harm: Section 12.7 requires Plaintiffs' members either to forgo their federal right to contract to resolve disputes through arbitration as part of their relationship with workers, or to face enforcement actions that would subject them to increasing fines, costs, and attorney fees. N.J.S.A. 10:5-12.9; 10:5-14.1a.

As the Ninth Circuit has put it in rejecting a similarly strained invocation of *Summers*, so long as "it is relatively clear" that "one or more members" of an association "have been or will be adversely affected by a defendant's action," there

is "no purpose to be served by requiring an organization to identify by name the member or members injured." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). Other courts have similarly found standing when the organization states that at least one of the organization's members faces the requisite harm or risk of harm—without requiring that the member be identified. *See*, *e.g.*, *Disability Rights Wisconsin, Inc. v. Walworth Cnty. Bd. of Supervisors*, 522 F.3d 796, 802 (7th Cir. 2008) (holding that member can satisfy the first factor of the *Hunt* test and have standing to sue in its own right even if it "remain[s] unnamed by the organization"); *Sandusky Cty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (organization did not have to "identif[y] specific voters" it represents that would be harmed by the challenged conduct when it was "inevitable" that members would be harmed); *Doe v. Stincer*, 175 F.3d 879, 882, 884 (11th Cir. 1999) (rejecting argument that an association must "name the members on whose behalf suit is brought"). As Judge Martinotti recently put it, "disclosing members' identities is not a necessary prerequisite to associational standing in all cases"; "associational standing does not follow a blanket rule that associations seeking to bring suit on behalf of their members must identify their membership, but rather whether the factual allegations in a given context sufficiently demonstrate than an association indeed has members that have suffered an injury-in-fact." *New Jersey*

Coal. of Auto. Retailers, Inc. v. Mazda Motor of Am., Inc., 2019 WL 3423572, at *4 (D.N.J. July 30, 2019) (quotation marks omitted).

Earlier this month, a federal district court issued a preliminary injunction preventing enforcement of a substantially similar California statute—concluding it was likely preempted by the FAA—without requiring identification of specific members. *Chamber of Commerce of U.S. v. Becerra*, 2020 WL 605877, at *9 (E.D. Cal. Feb. 7, 2020). In rejecting California's standing arguments, the *Becerra* court explained that "[t]he allegations in the complaint sufficiently plead that many, if not all, members of the plaintiff organizations that routinely utilize arbitration agreements will face harm if [the challenged law] takes effect." *Id.* The harm is all the more clear in the context of Section 12.7, which has gone into effect and which is currently causing harm to Plaintiffs' members.

Defendant next argues (DB at 8) that Plaintiffs can establish standing only by pleading a specific prosecution or express threat of prosecution by the Attorney General under Section 12.7. But, tellingly, the Attorney General does not deny that he has the authority to enforce the statute, nor does he disclaim an intent to exercise that authority. Those facts themselves establish standing. A plaintiff has standing to challenge government civil enforcement of a statute where "the Attorney General has not . . . disclaimed any intention of exercising her enforcement authority." *Mobil Oil Corp. v. Att'y Gen.*, 940 F.2d 73, 76 (4th Cir. 1991); *see also KVUE, Inc. v.*

Moore, 709 F.2d 922, 930 (5th Cir. 1983) (same for criminal statute where "[t]he state has not disavowed enforcement"), *aff'd*, 465 U.S. 1092 (1984). In the context of the FAA in particular, a court applied *Mobil Oil* and *Moore* to conclude that the plaintiffs could bring a challenge to enjoin state enforcement of a law alleged to be preempted by the FAA "despite the absence of imminent prosecution." *Valley View Health Care, Inc. v. Chapman*, 992 F. Supp. 2d 1016, 1032, 1035 (E.D. Cal. 2014).

Moreover, Plaintiffs allege, and Defendant does not dispute, that some of Plaintiffs' members intend to engage in a course of conduct prohibited by Section 12.7 but protected by the Federal Arbitration Act—namely, entering, modifying, or revising pre-dispute arbitration agreements after March 2019. *See* Compl. ¶¶ 13-14. Nor could Defendant suggest otherwise: Plaintiffs allege that their members rely on pre-dispute arbitration agreements as a standard business practice, and a wealth of Supreme Court precedent explains that the FAA protects arbitration agreements from state-law rules that disfavor arbitration. *Id.* ¶¶ 42-46.

The threat that Defendant will enforce Section 12.7 is therefore highly credible:

- The Attorney General has statutory authority to "proceed against any person in a summary manner in the Superior Court of New Jersey to compel compliance" with the NJLAD. N.J.S.A. 10:5-14.1.

- The Complaint alleges that the Office of the Attorney General and its division of Civil Rights has actively enforced the NJLAD against employers. Compl. ¶ 33; *see also* Dkt. 13-2 ¶ 18.
- The Office has made clear an intent to "step up its efforts" to enforce the NJLAD. Compl. ¶ 32.
- The Attorney General has advocated banning arbitration of certain types of workplace claims altogether. *Id.* ¶ 32. Indeed, since the Complaint was filed, he has joined efforts to examine the perceived harms of "mandatory arbitration" in the employment context. Letter to Ann Lesser of the American Arbitration Association, *Request for Information Regarding Arbitration of Employment-Related Claims* 3 (Nov. 12, 2019), https://oag.ca.gov/system/files/attachments/press-docs/AAA-Arbitration-Data-Letter.pdf.

Particularly given Defendant's studied failure to disclaim use of his enforcement authority—in the face of the above facts—the threat of harm is sufficient to establish standing.

Private enforcement of Section 12.7 further bolsters the threat of harm to Plaintiffs' members. As the Supreme Court has explained, the "credibility of [the] threat is bolstered [when] authority to file a complaint . . . is not limited to a prosecutor or agency," but also allows for private individuals to bring suit. *Susan B.*

Anthony List v. Driehaus, 573 U.S. 149, 164 (2014). That is the situation here: both private individuals and the Attorney General may file complaints regarding alleged violations of Section 12.7. *See* N.J.S.A. 10:5-12.11 (private persons aggrieved by a violation of the statute may sue the alleged violator).[1]

This threat of enforcement from all sides, coupled with the allegation that the Attorney General vigorously enforces the NJLAD and has stated a specific interest in restricting arbitration, more than sufficiently allege a "credible" threat. *See Aichele*, 757 F.3d at 362-63 (holding political parties had standing to sue state attorney general to challenge constitutionality of statute regulating ballot access that was likely to be enforced against them by "third parties" and subject them to the threat of "litigation expenses" and "cost awards").

Defendant cites (DB at 8, 9) *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), but that case merely stands for the common-sense proposition that "a private citizen lacks a judicially cognizable interest in the [criminal] prosecution or non-prosecution of *another*." 410 U.S. at 619 (emphasis added). The Court held only that the plaintiff lacked standing to challenge the State's decision to decline to bring a

[1] Private individuals have already invoked Section 12.7 against employers in attempting to invalidate pre-dispute arbitration agreements. *See Hannen v. Group One Auto., Inc.*, No. A-3351-18T2, 2019 WL 7287119, at *2 n.3 (N.J. Super. Ct. App. Div. Dec. 30, 2019); *Guirguess v. Pub. Serv. Elec. & Gas Co.*, No. A-2704-18T1, 2019 WL 6713411, at *4 (N.J. Super. Ct. App. Div. Dec. 10, 2019).

criminal prosecution against the father of her child. Here, in stark contrast, Plaintiffs' members are *themselves* threatened by government enforcement actions.

Finally, and for much the same reasons, Defendant's protest that any harms suffered by Plaintiffs' members are not fairly traceable to his threatened enforcement of the statute (DB at 10) is misplaced. As discussed, Defendant is charged with enforcing *all* provisions of the NJLAD, and has not disclaimed his authority or intent to enforce Section 12.7 in particular. And that credible threat of enforcement is what gives rise to the harms suffered by Plaintiffs' members—either costs of compliance out of a realistic fear of enforcement, or the risk of enforcement actions and escalating penalties for electing not to comply with a statute that the business believes is preempted and thus unconstitutional. As noted by the court in *Becerra*, the challenged law's "deterrent effect" on "members' ability to freely enter into arbitration agreements without fear of consequence" satisfies the "constitutional minimum" of Article III. 2020 WL 605877, at *8-9.

II. PLAINTIFFS' CLAIMS ARE RIPE FOR ADJUDICATION.

Defendant's backup argument is that Plaintiffs' claims are not yet ripe. DB at 11-13. But Defendant's position is contrary to settled Supreme Court precedent permitting pre-enforcement lawsuits seeking prospective relief against government enforcement of state statutes alleged to be unconstitutional. *Ex parte Young*, 209 U.S. 123 (1908); *accord, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374,

381 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). It also runs afoul of this Court's "'virtually unflagging'" obligation to hear and decide cases within its jurisdiction. *Susan B. Anthony List*, 573 U.S. at 167 (quoting *Lexmark,* 572 U.S. at 125).

There is no dispute about the relevant standard: Under the ripeness doctrine, courts "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967); *see* DB at 11. Both of those factors confirm that Plaintiffs' claims are ripe.

First, the case is fit for judicial resolution now because it presents a pure legal issue. *See Susan B. Anthony List*, 573 U.S. at 167-68 (pre-enforcement challenge ripe where it presented purely legal issue that would not be further clarified by factual development). No factual development is needed for the Court to determine whether Section 12.7 violates the FAA under established Supreme Court precedent. Defendant's only argument against this case's fitness for resolution is that "Plaintiffs' argument relies upon contingent future events that may or may not occur." DB at 12. But Defendant does not deny that he intends to enforce Section 12.7 against some of the Plaintiffs' members. The exact timing and targets of those enforcement actions have nothing to do with the merits of the legal question—whether Section 12.7 as applied to arbitration agreements is preempted by the FAA.

Defendant observes that a number of the Supreme Court's FAA preemption cases are private disputes involving specific arbitration agreements. But far from "support[ing] dismissal," DB at 12, that observation is irrelevant. None of those cases remotely supports the principle that pre-enforcement challenges seeking to enjoin *state* officials—as opposed to private individuals—from enforcing an unconstitutional law are not ripe. To the contrary, the Supreme Court has repeatedly held that courts have jurisdiction to consider claims seeking to enjoin state officials from enforcing a law that is allegedly "pre-empted by a federal statute." *Shaw*, 463 U.S. at 96 n.14; *see also, e.g.*, *Morales*, 504 U.S. at 381 (injunctive relief available to prevent state attorneys general from enforcing state deceptive practices laws with respect to advertising protected by federal Airline Deregulation Act).

Second, denying pre-enforcement review would impose substantial hardship on Plaintiffs and their members because Section 12.7 is currently in effect and impacting their conduct. A "substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately" is obviously "'ripe' for review at once." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990); *see also Abbott Labs.*, 387 U.S. at 152 (a regulation is sufficiently "immediate as to render the issue appropriate for judicial review" where it has a "direct effect on the day-to-day business" of the parties). Courts recognize that parties suffer the requisite hardship establishing ripeness when the parties are forced to choose between refraining from a federally-

protected activity and risking costly proceedings or prosecution. *See Susan B. Anthony List*, 573 U.S. at 167-68. That is exactly what Plaintiffs have alleged here. Compl. ¶¶ 28, 35-36. Accordingly, this case is ripe for judicial review.

CONCLUSION

This Court should deny Defendant's motion to dismiss.

Respectfully submitted,

Dated: February 18, 2020

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