

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, *et al.*,

Plaintiffs,

v.

THOMAS E. PEREZ, SECRETARY OF LABOR,
and UNITED STATES DEPARTMENT OF
LABOR,

Defendants.

Civil Action No. 3:16-cv-1476-M

Consolidated with:

3:16-cv-1530-C

3:16-cv-1537-N

**PUBLIC CITIZEN, INC.'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
IN SUPPORT OF DEFENDANTS' CONSOLIDATED OPPOSITION TO PLAINTIFFS'
MOTIONS FOR SUMMARY JUDGMENT AND DEFENDANTS' CONSOLIDATED
CROSS-MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Rule 7.2(b), Public Citizen, Inc., respectfully moves this Court for leave to file the attached amicus curiae brief in support of Defendants' Consolidated Opposition to Plaintiffs' Motions for Summary Judgment and Defendants' Consolidated Cross-Motion for Summary Judgment (Doc. 72-1). As set forth in the enclosed Certificate of Conference, defendants and the original plaintiffs in 3:16-cv-1530-C and 3:16-cv-1537-N (the American Council of Life Insurers (ACLI) plaintiffs and the Indexed Annuity Leadership Council (IALC) plaintiffs) consent to Public Citizen's motion for leave to file a brief as amicus curiae. The original plaintiffs in 3:16-cv-1476-M (the Chamber of Commerce plaintiffs) do not oppose Public Citizen's participation as an amicus, but take no position at this time as to the appropriateness of having more than three amicus memoranda filed in support of one side in this litigation.

MEMORANDUM OF POINTS AND AUTHORITIES

On August 8, 2016, this Court issued an order denying the parties' Joint Motion to Establish a Schedule Regarding Potential Amicus Curiae Filings (Doc. 63). It left open the question whether the Court would permit such filings to represent important interests outside those of the parties, and it noted that case law in this district supports consideration of whether, among other things, "information offered through [an] amicus brief is 'timely and useful' or otherwise necessary." *Id.* (quoting *Sierra Club v. Fed. Emergency Mgmt. Agency*, 2007 WL 3472851, at *1 (S.D. Tex. Nov. 14, 2007)).

Public Citizen has reviewed the defendants' opposition and cross-motion for summary judgment, as well as the plaintiffs' motions for summary judgment, and believes that it can concisely offer a new and important perspective that might aid the Court's consideration of a discrete legal issue in the case: whether strict scrutiny applies to content-based restrictions on commercial speech. Although defendants' memorandum responds persuasively to plaintiffs' First Amendment challenge, *see* DOL Mem. at 94-109, Public Citizen's proposed brief offers additional useful analysis in the form of a detailed discussion of *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), two cases on which plaintiffs rely. It also draws this Court's attention to relevant precedent from the Supreme Court and other courts that complements cases cited in defendants' memorandum and describes how the application of strict scrutiny here could have far-reaching consequences for the commercial-speech doctrine and, by extension, the protection of consumers and regulation of the economy.

Public Citizen's perspective is also distinct from that of the government. Public Citizen is a non-profit consumer advocacy organization that appears on behalf of its members and supporters before Congress, administrative agencies, and courts on a wide range of issues,

including the intersection of the First Amendment and consumer interests. Public Citizen has defended commercial speech regulations as amicus curiae in cases where those regulations were important to protecting public health or served other important government and public interests, such as in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), and *POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015). But its attorneys have also represented parties seeking to invalidate overbroad restraints on commercial speech when those restraints harmed competition and injured consumers, including in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). The perspective of an entity that has supported as well as opposed First Amendment commercial speech claims may be beneficial to the Court.

Public Citizen also believes, based on communications with other prospective amici curiae, that its short discussion of the First Amendment issue is unlikely to be duplicative of other proposed amicus briefs. Moreover, because the other amici curiae who are likely to seek leave to participate have indicated an intention to focus on other aspects of the case, combining our discussion of First Amendment strict scrutiny with their presentations did not appear workable.

Finally, Public Citizen's motion to participate is timely. *Sierra Club*, 2007 WL 3472851, at *1. Public Citizen is filing its motion within one week of the party whose position it supports, *cf.* Fed. R. App. P. 29(e), which leaves sufficient time for plaintiffs to prepare their reply due on September 16. Public Citizen decided to file after the government files its opposition and cross-motion to ensure that it did not duplicate arguments made in that submission.

CONCLUSION

For the foregoing reasons, Public Citizen’s Motion for Leave to File an Amicus Curiae Brief in Support of Defendants’ Opposition to Plaintiffs’ Motions for Summary Judgment and Defendants’ Consolidated Cross-Motion for Summary Judgment should be granted. Pursuant to Local Rule 7.1, a proposed order is included with this motion, as well as the proposed brief, a Certificate of Conference, and a Certificate of Service.

Dated: August 26, 2016

Respectfully submitted,

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* *Application for admission pro hac vice pending*

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 7.1(b), counsel for Public Citizen, Inc., conferred with counsel for the parties to determine whether they oppose Public Citizen's motion for leave to participate as an amicus curiae. By email dated August 23, 2016, counsel for defendants stated that defendants consent to the motion. By emails dated August 23 and August 24, 2016, counsel for the ACLI and IALC plaintiffs consented to Public Citizen filing an amicus brief. By email dated August 24, 2016, counsel for the Chamber of Commerce plaintiffs stated that those plaintiffs do not oppose Public Citizen's participation as an amicus, but that they take no position at this time as to whether it is appropriate for more than three amicus briefs to be filed in support of one side in this litigation. These plaintiffs state that they reserve the right to oppose Public Citizen's motion after reviewing the motion and any other motions for leave to file amicus briefs in support of defendants.

/s/ Julie A. Murray
Julie A. Murray

CERTIFICATE OF SERVICE

On August 26, 2016, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties to the three actions—Case Nos. 3:16-cv-01476-M, 3:16-cv-01530-C, 3:16-cv-1537-N—electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Brent M. Rosenthal
Brent M. Rosenthal