Docket No. 10-451

IN THE

Supreme Court of the United States

October Term, 2010

Zydeco, Inc.,

Petitioner,

v.

Mary Macdonald,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR RESPONDENT

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TO THE SUPREME COURT OF THE UNITED STATES:

Respondent, Mary Macdonald, appellant in Docket No. 10-0626 before the United States Court of Appeals for the Thirteenth Circuit, respectfully submits this brief and asks this Court to dismiss Petitioner's claim on ripeness grounds or, alternatively, to affirm the Thirteenth Circuit Court of Appeals.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Thirteenth Circuit was entered on September 8, 2010. (R. at 17.) Petitioner then filed for writ of certiorari, which this Court granted on November 8, 2010. (R. at 18.) This Court has jurisdiction to consider the ripeness issue under 28 U.S.C. § 1254(1) (2006). But, Respondent herein contends that this case is not ripe for judicial review because there is no case or controversy under Article III of the United States Constitution. Therefore, neither the lower court nor this Court has subject matter jurisdiction to decide the substantive First Amendment issue. If, however, this Court decides that Petitioner's claim is ripe, then this Court has jurisdiction to consider the First Amendment issue under § 1254(1).

OPINIONS BELOW

The decision and order of the United States District Court for the District of Texifornia is unreported and set out in the record. (R. at 1-10.) The opinion of the United States Court of Appeals for the Thirteenth Circuit is also unreported and set out in the record. (R. at 11-17.)

RELEVANT PROVISIONS

The following provisions of the United States Constitution are relevant to this case: U.S. Const. art. III, § 2, cl. 1; U.S. Const. amend. I. These provisions are reprinted in Appendix A.

The following provisions of the Drug Free Texifornia Act of 2010 are relevant to this case: Texifornia Code §§ 101(1)-(3). These provisions are reprinted in Appendix B.

A provision of the Declaratory Judgment Act of 1934, 28 U.S.C. § 2201(a) (2006), is relevant to this case and is reprinted in Appendix C.

QUESTIONS PRESENTED

I. Is Zydeco's challenge to the Drug Free Texifornia Act of 2010 ripe for judicial review when the Texifornia Attorney General has made public assurances that she will not enforce the Drug Free Act against drug companies?

II. Does the Drug Free Texifornia Act of 2010 unconstitutionally infringe upon Zydeco's commercial speech when Texifornia has demonstrated a significant government interest, the Drug Free Act directly advances that interest, and the Drug Free Act is not more extensive than necessary to achieve its purpose?

STATEMENT OF THE CASE

In early 2010, Zydeco, Inc. ("Zydeco") commenced this First Amendment action against Mary Macdonald, the Texifornia Attorney General, in the United States District Court for the District of Texifornia. (R. at 1.) Zydeco sought declaratory and injunctive relief, arguing that the Drug Free Texifornia Act of 2010 ("Drug Free Act") unconstitutionally infringes upon Zydeco's commercial speech rights. (R. at 6.) Zydeco then moved for summary judgment on its claim. (R. at 6.) Attorney General Macdonald filed a motion to dismiss for lack of ripeness and a cross-motion for summary judgment on the First Amendment issue. (R. at 6, 10.) On January 31, 2010, the district court denied Attorney General Macdonald's motions and granted summary judgment for Zydeco, ruling that the action was ripe and that the Drug Free Act was unconstitutional. (R. at 10.) Attorney General Macdonald appealed.

On September 8, 2010, the United States Court of Appeals for the Thirteenth Circuit reversed and remanded to the district court to enter summary judgment for Attorney General Macdonald. (R. at 15.) Zydeco filed a petition for writ of certiorari in this Court, which was granted on November 8, 2010. (R. at 18.)

STATEMENT OF THE FACTS

This case involves the Texifornia legislature's attempt to address the growing crystal methamphetamine ("crystal meth") epidemic destroying its communities. (R. at 2.) Crystal meth is highly addictive, dangerous, and easily made. (R. at 2.) Unlike other illicit drugs, the materials required for crystal meth production can be legally obtained at hardware stores and pharmacies. (R. at 2.) Pseudoephedrine, a common ingredient in over-the-counter cold medicines, is a primary substance used in crystal meth production. (R. at 2.) In order to curb

the production of crystal meth, Congress passed the Combat Methamphetamine Epidemic Act of 2005, which restricts access to pseudoephedrine by requiring pharmacies to keep products containing pseudoephedrine behind the counter and by limiting sales of these products to nine grams per month per individual. (R. at 2-3.) Such measures, however, have done little to control the crystal meth problem in Texifornia. (R. at 3.) In fact, crystal meth addiction in Texifornia has continued to rise and Texifornia police reported in 2008 that thirty-five percent of persons arrested for any crime in Texifornia tested positive for crystal meth. (R. at 3.) Moreover, since 2003, forty-five Texifornia police officers have been killed by dangerous crystal meth lab explosions. (R. at 2.)

In order to understand the causes of the growing epidemic, the Texifornia legislature and the Texifornia Research Institute conducted multi-year studies of crystal meth addicts and manufacturers. (R. at 3-4.) These studies revealed that crystal meth manufacturers relied upon pharmacy circulars and in-store drug advertisements to avoid detection when purchasing pseudoephedrine products. (R. at 3-4.) After careful analysis and consideration, the Texifornia legislature issued a finding that "[p]oint-of-sale advertising of pseudoephedrine products helps crystal meth manufacturers and abusers to obtain these products with minimal suspicion, because they can determine which brands are available at which local drug stores and ask for them by name." Texifornia Code § 101(1). (R. at 4.) The legislature then enacted the Drug Free Act, which prohibits "point-of-sale advertising of any information about products containing pseudoephedrine" within Texifornia. Texifornia Code § 101(2). (R. at 4.) Drug companies that violate the act are subject to civil penalties. Texifornia Code § 101(3). (R. at 5.)

Zydeco, a national drug company, manufactures Clear-It, a cold medication containing pseudoephedrine. (R. at 5.) Zydeco markets Clear-It in Texifornia, using, among other means, in-store pharmacy advertisements. (R. at 5.) Due to strong public concern for the freedom of speech, limited enforcement resources, and her belief that in-store advertisements are not the primary source of the crystal meth problem, Attorney General Macdonald stated to the media that she will not enforce the Drug Free Act against drug companies. (*See* R. at 5-6.) Attorney General Macdonald reiterated this pledge to Zydeco's chief compliance officer. (R. at 6.) Unsatisfied, Zydeco brought this legal action against Attorney General Macdonald, seeking summary judgment and declaratory and injunctive relief. (R. at 6.)

SUMMARY OF THE ARGUMENT

Attorney General Macdonald should prevail in this action for two, independently sufficient reasons. First, Zydeco's claim is not ripe for judicial review on both constitutional and prudential ripeness grounds. Second, even if this Court decides that Zydeco's claim is ripe, the Drug Free Act's restrictions on commercial speech are constitutional under the test provided in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980).

1. Zydeco's claim is not ripe for judicial review.

A claim is constitutionally ripe only if it presents an Article III "case" or "controversy." In order to determine whether a case or controversy exists, courts require that the plaintiff demonstrate a realistic danger of direct injury. Because Attorney General Macdonald made assurances that she would not enforce the Drug Free Act against drug companies, Zydeco cannot meet this demand. Several factors also prevent Attorney General

Macdonald from changing her stance on non-enforcement, further weakening Zydeco's position.

Even if a claim is constitutionally ripe, courts may deny review on prudential ripeness grounds. A claim is prudentially unripe if (1) the issues are not fit for review and (2) the plaintiff would suffer minimal hardship if review were delayed. The issues of this case are not fit for review because a more developed factual record would aid this Court in determining whether the Drug Free Act is constitutional. Furthermore, it is unlikely that Zydeco's advertisements for Clear-It will be restricted at all. If Zydeco decides to comply with the Drug Free Act, Zydeco would experience only the minimal hardship of curbing its advertising strategy. Any "chilling effect" of such compliance, however, would not rise to the level of hardship necessary for ripeness. If Zydeco chooses not to comply with the Drug Free Act, its hardship would include nothing more than worry over uncertain or contingent events.

2. The Drug Free Act does not violate the First Amendment.

Once courts determine that commercial speech is legal and truthful, any restrictions on the commercial speech must then satisfy the three-pronged *Central Hudson* test. The test requires that (1) the government have a substantial interest in restricting the speech, (2) the restrictions directly advance the stated government interest, and (3) the restrictions are not more extensive than necessary to achieve their stated purpose. If the restrictions satisfy the *Central Hudson* test, then the restrictions do not violate the First Amendment.

The Drug Free Act satisfies all three *Central Hudson* prongs. First, Texifornia's interest in the public health and safety of its citizens and law enforcement personnel is substantial in light of the growing crystal meth epidemic in its community. Second, the

conclusion that the Drug Free Act will directly advance Texifornia's interest in public health and safety is not merely the result of common sense but rather the product of extensive, multi-year studies that demonstrate its probability of success. Third, the Drug Free Act's restrictions on point-of-sale advertising are sufficiently narrow because they are a "reasonable fit" between (1) Texifornia's asserted interest in the public health and safety and (2) the means by which the Drug Free Act seeks to impact that interest. Although broader restrictions could certainly achieve Texifornia's interest, it is difficult to conceive of a narrower restriction that would have the same level of impact.

For these reasons, this Court should dismiss Zydeco's claim as unripe. If this Court, however, decides that the action is ripe, then this Court should affirm the holding of the Court of Appeals for the Thirteenth Circuit that the Drug Free Act does not violate the First Amendment.

STANDARD OF REVIEW

Whether Zydeco's action is ripe for review is a question of law reviewed de novo. *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 452 (7th Cir. 2002) ("We review de novo a district court's decision that it had subject matter jurisdiction."); *Vanguard Research, Inc. v. PEAT, Inc.*, 304 F.3d 1249, 1254 (Fed. Cir. 2002) ("The determination of whether an actual controversy exists under the Declaratory Judgment Act . . . is a question of law that we review de novo.").

Whether the Drug Free Act constitutionally restricts commercial speech is also reviewed de novo. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) ("We must make an independent examination of the whole record . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." (citation

omitted)); *accord Barker v. City of Del City*, 215 F.3d 1134, 1137 (10th Cir. 2000). Thus, both issues before this Court are subject to de novo review.

ARGUMENT

I. Zydeco's Claim Should be Dismissed Because it is Not Ripe for Judicial Review.

Article III of the United States Constitution limits the subject matter jurisdiction of federal courts to "cases" or "controversies." U.S. Const. art. III, § 2, cl. 1. Flowing from this limitation are the myriad justiciability doctrines, each designed to evaluate a particular aspect of a claim for worthiness of review. *Renne v. Geary*, 501 U.S. 312, 316 (1991). Ripeness is a justiciability doctrine that concerns the timing of a suit, specifically questioning whether the suit was brought too early. *See Blanchette v. Conn. Gen. Ins. Corps. (Regional Rail Reorganization Act Cases)*, 419 U.S. 102, 140 (1974). The rationale behind the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

The ripeness doctrine is complex in that it stems not only from the Constitution, but also from concepts of judicial restraint. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). In addition to Article III "constitutional ripeness" concerns, courts look to "prudential ripeness" considerations to determine whether it would be wise to postpone review even if the case or controversy requirement is satisfied. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009). A claim must be both constitutionally and prudentially ripe in order to be worthy of review. *See Regional Rail*, 419 U.S. at 138. This concept is inherent in the language of the Declaratory Judgment Act itself, which requires Article III compliance but assumes additional court discretion: "*In a case of actual controversy within*

its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party seeking such declaration . . ." 28 U.S.C. § 2201(a) (emphasis added).

A. Zydeco's Claim is Not a Constitutionally Ripe Article III Case or Controversy Because Zydeco Cannot Demonstrate a Realistic Danger of Direct Injury.

Before prudential ripeness considerations can be entertained, courts must first address the threshold question of constitutional ripeness. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297 (1979). In the pre-enforcement context, "A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* at 298. A plaintiff with only "imaginary or speculative" fears does not bring a justiciable claim. *Id.* at 298. This constitutional aspect of ripeness closely aligns with the "injury in fact" prong of a standing analysis. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000).

1. Attorney General Macdonald's Assurances of Non-enforcement Against Zydeco and Other Drug Companies Render Zydeco's Fears Speculative and Unrealistic.

Courts generally only find a plaintiff's fears sufficient when the challenged statute exposes the plaintiff to criminal penalties and the State has either threatened prosecution or expressly refused to make assurances of non-prosecution. *See Younger v. Harris*, 401 U.S. 37, 42 (1971). In *Babbitt*, this Court found a claim ripe for review largely on the grounds that the State refused to make assurances of non-enforcement: "Moreover, the State has not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices. Appellees are thus not without some reason in fearing prosecution for violation of the ban on specified forms of consumer publicity." 442 U.S. at 302. Conversely, courts generally do not find a case ripe when either (1) the statute has not

been enforced or (2) the State has made assurances of non-enforcement. *E.g.*, *Poe v. Ullman*, 367 U.S. 497, 508-09 (1961) (suit dismissed on ripeness grounds because the challenged statute had never been enforced); *Presbytery of N.J. of the Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1470 (3d Cir. 1994) (suit unripe when the State made assurances of non-enforcement). This Court explained in *Poe* that "the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting." *Poe*, 367 U.S. at 507. Moreover, "If the prosecutor expressly agrees not to prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed here." *Id.*

In *Presbytery of New Jersey*, a church and a pastor brought a claim alleging that a New Jersey statute criminalizing discrimination against homosexuals was a violation of their First Amendment rights. 40 F.3d at 1458. The State signed an affidavit indicating that it did not intend to enforce the statute against the church, but refused to make any such promises to the pastor as an individual. *Id.* at 1467. The Third Circuit held that due to the State's assurances, the church's claim was not ripe for review: "The state's representations clearly show that the claims of the institutional plaintiffs, Presbytery and Calvary are not ripe." 40 F.3d at 1470. But, because the State refused to make any assurances to the pastor as an individual, the court held that his claim *was* ripe for review: "The pointed nature of that refusal, both in the state's affidavit and at oral argument, indicates to us that Reverend Cummings and others who engage in the expressive activity he describes face a real threat of prosecution." 40 F.3d at 1468. The court further explained, "Here, the state has had ample opportunity to indicate that it will not prosecute religiously motivated speakers . . . [i]t has

elected not to do so." *Id.* *Presbytery of New Jersey* is a striking illustration of the impact which the State's assurances of non-enforcement have on a ripeness evaluation. The pastor and the church were similarly situated under the statute but the State's indication that it would not prosecute the church rendered the church's claim unripe for review. *Id.* at 1470.

In the present case, Attorney General Macdonald has stated on two separate occasions her intention not to enforce the Drug Free Act against drug companies like Zydeco. (R. at 5-6.) She announced her intention first to the media and then reiterated it to Zydeco's chief compliance officer. (R. at 5-6.) These assurances were affirmative, and analogous to the assurances granted by the State to the church in *Presbytery of New Jersey*. Moreover, at this time the Drug Free Act has not been enforced against any drug company. These factors, as courts have consistently ruled, reduce Zydeco's danger of sustaining a direct injury far below a justiciable level. *See, e.g., Poe*, 367 U.S. at 507; *see also Wis. Right to Life, Inc. v. Paradise*, 138 F.3d 1183, 1185 (7th Cir. 1998).

2. Several Factors Prohibit Attorney General Macdonald from Changing Her Position on Non-Enforcement Against Drug Companies.

The Texifornia district court and the Thirteenth Circuit have characterized Attorney General Macdonald's assurances as empty promises, allegedly doing little to mitigate Zydeco's fear of enforcement. (R. at 7-8, 13.) The lower courts provided as their legal basis the Second Circuit case of *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000). (R. at 7-8, 13.) In *Vermont Right to Life*, the plaintiff, a non-profit organization, brought a First Amendment suit seeking a ruling on the constitutionality of a state statute. 221 F.3d at 379. On appeal, the Second Circuit evaluated whether the organization faced a "credible threat" despite the State's claim that it had "no intention of suing [the organization] for its activities." *Id.* at 382-83. The circuit court held that the case was justiciable, reasoning

that "there is nothing that prevents the State from changing its mind. It is not forever bound, by estoppel or otherwise, to the view of the law that it asserts in this litigation." *Id.* at 383. Although the lower courts attributed a good deal of significance to the reasoning in *Vermont Right to Life*, it is of little consequence to the present case, on two grounds: (1) The Second Circuit's reasoning is deeply problematic in light of other justiciability jurisprudence; and (2) the facts of *Vermont Right to Life* are distinguishable from the present case.

First, the Second Circuit's definition of "credible threat" was relaxed to the point where even a well-established mitigating factor—an assurance of non-enforcement—was not taken seriously. This goes against both Second Circuit and Supreme Court precedent. *E.g.*, *Carlin Commc'ns, Inc. v. FCC*, 749 F.2d 113, 123 n.20 (2d Cir. 1984) ("Where the Government does not intend to prosecute, there is no justiciable 'case or controversy.'"); *Renne*, 501 U.S. at 320 ("Respondents have failed to demonstrate a live dispute involving the actual or threatened application of § 6(b) to bar particular speech."). Furthermore, to find justiciability on the assumption that anyone can change their mind goes logically against the fundamental search for a reliable degree of certainty inherent in justiciability doctrines. The premise that even reliable sources have unpredictable and capricious tendencies leads more logically to the conclusion that no case is ripe for review. After all, the ripeness doctrine depends upon a reasonable degree of certainty, as this Court observed in *Texas v. United States*: "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" 523 U.S. 296, 300 (1998) (quoting 13A Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3532 (1st ed. 1984). If the observation that anyone can change their mind is

to be afforded legal significance, then it would always be wiser to wait until the law is actually enforced.

Second, the facts of the present case are distinguishable from *Vermont Right to Life*. If we are to take the Second Circuit's observation as true that "there is nothing that prevents the State from changing its mind," Attorney General Macdonald's circumstances are altogether different. In fact, there are several factors which prevent Attorney General Macdonald from simply changing her position on non-enforcement. Unlike the State in *Vermont Right to Life*, Attorney General Macdonald announced her intentions publicly to the media. (R. at 5-6.) According to the National Association of Attorneys General, a state attorney general is, in nearly every state, an elected position. *Current Attorneys General*, NAAG.ORG, http://www.naag.org/current-attorneys-general.php (last visited Jan. 8, 2010). In no state does an attorney general serve for life. *See id.* As a result, the fact that Attorney General Macdonald made public representations to the media will serve as a strong deterrent to her altering her position. If she did change her position, she would provide any future political opponent with campaign ammunition that she "flip flops" or is influenced by special interest groups.

Attorney General Macdonald also gave two reasons why she did not intend to enforce the Drug Free Act against drug companies. (R. at 3.) First, she believes that in-store advertising by these companies is not a significant contribution to the crystal meth problem. (R. at 3.) Second, she lacks the resources to monitor all advertisements; thus, she will focus solely on violations by pharmacies. (R. at 3.) Based on Attorney General Macdonald's stated rationale, several contingencies must occur before she could change her policy of non-enforcement against drug companies. First, she would have to change her mind about the

contribution of drug company advertisements to the crystal meth problem. Because her opinion is based upon the two, multi-year crystal meth studies, her mind will not change unless Texifornia undertakes an additional study with new and conflicting results. At the present time, no such study has been performed. Second, even if Attorney General Macdonald were to change her mind, her office would require additional funding to increase its enforcement resources. Unless Texifornia raises taxes or cuts funding from another program, her resources will not increase. Third, Attorney General Macdonald is a political figure who ultimately must answer to the people of Texifornia. Texifornians are known to value speech rights and have expressed strong criticism of the Drug Free Act. (R. at 5.) If public opinion is going to sway Attorney General Macdonald's position, as the Thirteenth Circuit fears, it will be toward total non-enforcement. (*See* R. at 13.) For these reasons, unlike the Second Circuit's characterization of the State in *Vermont Right to Life*, Attorney General Macdonald's policy could not change overnight. *See Vt. Right to Life*, 221 F.3d at 383.

In light of Attorney General Macdonald's two, consistent assurances and the factors which prohibit her from changing her mind, Zydeco's fears of enforcement are not justified. Therefore, Zydeco's claim fails to satisfy the constitutional ripeness requirement.

B. Zydeco's Claim is Not Prudentially Ripe Because the Issues are Not Fit for Judicial Decision and Zydeco Would Sustain Minimal Hardship if Review Were Delayed.

If a court finds that a claim satisfies the Article III case or controversy constitutional ripeness requirement, it subjects the claim to additional prudential ripeness considerations. *Stormans*, 586 F.3d at 1126. These considerations are two-fold, evaluating "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court

consideration." *Abbott Labs.*, 387 U.S. at 149. In this analysis, "fitness" refers to the quality of the factual record and whether the claim assumes the future occurrence of uncertain events. *See Pac. Legal Found. v. State Energy Res. Conservation & Dev. Comm'n*, 659 F.2d 903, 915 (9th Cir. 1981), *aff'd sub nom. Pac. Gas & Electric*, 461 U.S. 190 (1983) ("[I]f the issue would be illuminated by the development of a better factual record, the challenged statute or regulation is generally not considered fit for adjudication until it has actually been applied."); *see also Mass. Ass'n of Afro-Am. Police, Inc. v. Bos. Police Dept.*, 973 F.2d 18, 20 (1st Cir. 1992) ("The critical question concerning fitness for review is whether the claim involves uncertain and contingent events that may not occur as anticipated, or indeed may not occur at all."). Therefore, even if this Court decides that Zydeco's claim satisfies the Article III claim or controversy constitutional ripeness requirement, its claim fails to satisfy the subsequent prudential ripeness analysis because (1) the factual record is not sufficiently developed, (2) the claim assumes the future occurrence of uncertain events, and (3) Zydeco would face minimal hardship if review were delayed. *See Abbott Labs.*, 387 U.S. at 149.

1. Zydeco's Claim is Not Fit for Review Due to an Underdeveloped Factual Record.

Prudential fitness requires "a concrete fact situation in which competing associational and governmental interests can be weighed." *Cal. Bankers Ass'n v. Schultz*, 416 U.S. 21, 56 (1974). A well-developed factual record is necessary even if "a challenged statute is sure to work the injury alleged." *Babbitt*, 442 U.S. at 300. Courts will also postpone adjudication of purely legal issues if "further factual development would 'significantly advance [the court's] ability to deal with the legal issues presented.'" *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003) (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978)).

In the present case, Zydeco is seeking judicial review of a statute that restricts the content of its advertisements. Although this could be construed as a strictly legal question, several yet undeveloped facts would significantly aid the court in its review. First, because it is unlikely that the Drug Free Act will be enforced against Zydeco or any other drug companies, it would be prudent for the court to wait for any indications that Attorney General Macdonald's policy may change before expending judicial resources. Second, it would be wise to delay review until the statute is actually enforced in order to have a concrete example of an advertisement that the State seeks to restrict. At that point, this Court would adequately be able to weigh the State's interest in limiting a specific example of commercial speech, thus enabling this Court to reach a satisfactory conclusion. Third, because the final prong of a commercial speech analysis requires this Court to determine whether the Drug Free Act is narrowly tailored to its asserted government interest, it would be beneficial to wait for a fact situation in which this prong could be adequately addressed. *See Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). As it stands, it is simply unknown whether the Drug Free Act will affect Zydeco in any way.

2. Zydeco's Claim is Not Fit for Review Because It Assumes the Future Occurrence of Uncertain Events.

The second aspect of prudential fitness that courts evaluate is whether the claim assumes the future occurrence of uncertain events. In *Marusic Liquors, Inc. v. Daley*, the Seventh Circuit noted, "A claim is unripe when critical elements are contingent or unknown." 55 F.3d 258, 260 (7th Cir. 1995). Likewise, the Tenth Circuit explained that "[i]n determining whether an issue is fit for judicial review, the central focus is on 'whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495,

1499 (10th Cir. 1995) (quoting 13A Wright, Miller & Cooper, Federal Practice & Procedure § 3532 (2d ed. 1987)). Courts sometimes conflate this aspect of the prudential fitness analysis with the Article III constitutional ripeness analysis because the same "contingent or unknown" elements that undermine prudential ripeness also prevent the plaintiff from demonstrating a realistic danger of direct injury. *See, e.g., Babbitt*, 442 U.S. at 300-01. The same is true in the present case. For Zydeco's claim to be fit for review, this Court must assume that Attorney General Macdonald will (1) change her mind, (2) renege on her assurances to the media, (3) acquire the resources to enforce the Drug Free Act against drug companies, and (4) enforce the Drug Free Act against Zydeco. These contingencies may not occur as Zydeco anticipates, and in all probability will not occur at all. *See New Mexicans for Bill Richardson*, 64 F.3d at 1499.

3. Zydeco Would Suffer Minimal Hardship if Review Were Delayed.

Zydeco claims that it is faced with a dilemma: comply with the Drug Free Act and suffer financial losses or continue as before and be vulnerable to civil damages. (*See* R. at 8.) Even if this were a true dilemma, neither contingency would involve significant hardship to Zydeco. First, as described in the district court opinion, the compliance burden that Zydeco would face is limited to removing current in-store advertisements from Texifornia pharmacies and abstaining from producing or displaying such advertisements in the future. (R. at 7.) The district court likened this burden to the burdens faced by adult-content booksellers in *Virginia v. American Booksellers Association*, 484 U.S. 383 (1988) and *American Library Association v. Reno*, 33 F.3d 78 (D.C. Cir. 1994). Upon closer examination, however, the burdens faced by Zydeco are fundamentally different in both form and severity.

In *American Booksellers*, adult-content booksellers brought a First Amendment claim challenging a Virginia statute that made it unlawful "for any person . . . to knowingly display" depictions of "sexually explicit nudity, sexual conduct or sadomasochistic abuse" in a way "whereby juveniles may examine or peruse." *Am. Booksellers Ass'n*, 484 U.S. at 386. The booksellers argued that compliance with the statute would be "economically devastating," requiring them to "(1) create an 'adults only' section of the store; (2) place the covered works behind the counter (which would require a bookbuyer to request specially a work); (3) decline to carry the materials in question; or (4) bar juveniles from the store." *Id.* at 389. Such compliance would also directly affect sales because "bookbuyers generally make their selection by browsing through displayed books, and because adults would be reluctant to enter an 'adults only' store or section of the store." *Id.* The booksellers' risk of non-compliance was a Class 1 misdemeanor, a criminal penalty in Virginia of up to one year in jail and a fine. *Am. Booksellers Ass'n*, 484 U.S. at 387; Va. Code Ann. § 18.2-11 (2006).

Evaluating the booksellers' hardship, this Court sympathized with their dilemma: "That requirement is met here, as the law is aimed directly at plaintiffs, who, if their interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution." *Am. Booksellers Ass'n*, 484 U.S. at 392. Like the store owners and employees in *American Booksellers*, producers and retailers of pornographic material in *American Library* were faced with the choice of entirely reinventing their bookkeeping and disclosure methods or face criminal punishment of up to two years imprisonment and a fine. *Am. Library Ass'n*, 33 F.3d at 81, 83.

Zydeco does not face the dilemma of either reinventing its business model or facing incarceration. Instead, Zydeco must either curb a portion of its advertising strategy or face a

civil, monetary penalty per violation. (R. at 5.) Moreover, the penalty is entirely hypothetical because Attorney General Macdonald has given assurances that she will not enforce the Drug Free Act against drug companies. Such assurances would undoubtedly have altered the Court's reasoning in *American Booksellers*, as evidenced by its holding on the ripeness issue: "*The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise.* We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them" (emphasis added). *Am. Booksellers Ass'n*, 484 U.S. at 393. Based on this reasoning, if the State in *American Booksellers* had stated a policy of non-enforcement, as Attorney General Macdonald has done, the Court may have reached a different conclusion.

Whereas vulnerability to criminal prosecution is treated by courts as almost universally a hardship, vulnerability to civil penalties is not. In *Abbott Laboratories*, this Court noted that "a possible financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action." 387 U.S. at 153-54. The Drug Free Act does not subject Zydeco to criminal sanctions; at worst, Zydeco could suffer monetary losses. Also, any "chilling effect" that Zydeco may experience would not, in itself, constitute hardship. As this Court explained in *Laird v. Tatum*, "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." 408 U.S. 1, 13 (1972); *cf. Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1194 (D.C. Cir. 1992) (subjective "chill" alone is not sufficient hardship for standing).

Because Zydeco's claim fails to satisfy both the constitutional and prudential ripeness requirements, the claim is not justiciable. Therefore, this Court should dismiss Zydeco's action.

II. If Ripe, This Court Should Affirm the Holding of the Thirteenth Circuit Because the Drug Free Act Does Not Violate the First Amendment.

For many years, commercial advertising enjoyed no First Amendment protection. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) ("[T]he Constitution imposes no such restraint on government as respects purely commercial advertising."). In 1976, this Court changed course and interpreted the First Amendment to include purely commercial speech. *Va. State Bd. of Pharmacy, Inc. v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976). But, because the value of commercial speech is subordinate to that of individual speech, the Constitution affords it less protection. *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989). Therefore, Congress and state legislatures have considerably more latitude in restricting commercial speech than other forms of expression. *See id.* at 478.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, this Court fashioned a specialized, four-step methodology for evaluating the constitutionality of restrictions on commercial speech. 447 U.S. at 566. The first step is a threshold question, followed by a three-pronged test which courts apply to the challenged statute:

> [First], we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [Second], we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must [third] determine whether the regulation directly advances the governmental interest asserted, and [fourth] whether it is not more extensive than is necessary to serve that interest.

Id. Despite periodic expressions of unease with the *Central Hudson* test, it remains intact as the predominant methodology. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367-68 (2002) ("Although several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases . . . there is no need in this

case to break new ground."). In the present case, Respondent concedes that Zydeco's advertising is truthful and does not advocate illegal activity. (*See* R. at 8.) Therefore, the *Central Hudson* threshold issue is met and the Drug Free Act is subject to First Amendment scrutiny. But, because the Drug Free Act satisfies the subsequent three-pronged *Central Hudson* test, this Court should affirm the Thirteenth Circuit's holding that the Drug Free Act is constitutional.

A. Texifornia's Asserted Interest in the Public Health and Safety is Substantial.

1. Public Health and Safety is an Important Government Interest.

The first prong of the *Central Hudson* test requires a "substantial" asserted government interest. *Cent. Hudson*, 447 U.S. at 566. In order to evaluate whether an asserted interest is substantial, courts look to the importance of what the restriction seeks to achieve. *E.g., id.* at 568. In *Central Hudson*, for example, the Public Service Commission of New York banned state utility companies from using advertisements that promoted the use of electricity in order to conserve energy and minimize costs to consumers. *Id.* at 558, 568-69. This Court held that because these purposes were important, they satisfied the substantial interest prong:

> In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial . . . The choice among rate structures involves difficult and important questions of economic supply and distributional fairness. The State's concern that rates be fair and efficient represents a clear and substantial governmental interest.

Id. at 568-69. Like economic interests, this Court considers the public health and safety a substantial government interest. For example, Congress's desire to "[p]reserv[e] the effectiveness and integrity of the FDCA's new drug approval process" was "clearly an

important governmental interest." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 369 (2002). In *Lorillard Tobacco Co. v. Reilly*, "the importance of the State's interest in preventing the use of tobacco products by minors" was so self-evident that it was not even a contested issue. 533 U.S. 525, 555 (2001). In sum, courts look to the importance of the interest that the government asserts, often with minimal scrutiny or analysis.

2. The Methamphetamine Epidemic has Negatively Impacted the Public Health and Safety of Texifornians.

In the present case, the purpose of the Drug Free Act is straightforward: to protect the public health and safety from the devastating effects of crystal meth production and distribution. (R. at 9.) As the district court observed, Attorney General Macdonald has produced "significant evidence" demonstrating Texifornia's meth abuse problem and the dangers posed to bystanders and police officers by meth fumes and meth lab explosions. (R. at 9.) By 2009, fifty percent of patients who entered drug rehabilitation in Texifornia were addicted to crystal meth. (R. at 3.) The number of people who went to the emergency room for crystal meth related illness or injury increased by 250 percent from 2000 to 2005 and increased by another 110 percent by 2009. (R. at 3.) A 2008 Texifornia Police Department report stated that thirty-five percent of criminals arrested in Texifornia had crystal meth in their system. (R. at 3.) Since 2000, sixty-seven Texifornia police officers were killed by meth lab explosions. (R. at 2.) These staggering statistics prompted Texifornia to conduct a four-year study to determine the best possible way to advance its interest in public health and safety. (R. at 3.)

B. The Drug Free Act Directly Advances Texifornia's Asserted Interest.

1. Courts Require Evidence Demonstrating that Restrictions on Commercial Speech Will Advance the State's Interest.

The second prong of the *Central Hudson* test examines "whether the regulation directly advances the governmental interest asserted." *Cent. Hudson*, 447 U.S. at 566. Unlike the first prong, common sense is not enough; courts look for evidence. *See Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 626 (1995) ("[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996). In *44 Liquormart*, Rhode Island enacted a law which prohibited "advertising in any manner whatsoever" the price of alcoholic beverages. *Id.* at 489. The government's asserted interest was to promote temperance by keeping alcohol prices higher than they would be in a competitive price market. *Id.* at 508. This Court agreed that such an interest was important, and even acknowledged the common sense logic of the law:

> We can agree that common sense supports the conclusion that a prohibition against price advertising, like a collusive agreement among competitors to refrain from such advertising, will tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market. Despite the absence of proof on the point, we can even agree with the State's contention that it is reasonable to assume that demand, and hence consumption throughout the market, is somewhat lower whenever a higher, noncompetitive price level prevails.

Id. at 505. This Court, however, ruled that absent an evidentiary finding that the law would promote temperance, the second *Central Hudson* prong remained unsatisfied: "However, without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest

in promoting temperance." *Id.*

2. The Texifornia Legislature Study Demonstrates that Restrictions on Point-of-Sale Advertising will Deter Crystal Methamphetamine Producers From Purchasing Pseudoephedrine.

Unlike Rhode Island in *44 Liquormart*, Texifornia has collected substantial evidence that the Drug Free Act will make significant strides in promoting the public health and safety by reducing crystal meth production. From 2005 to 2009, the Texifornia legislature and Attorney General Macdonald conducted a study of "the elements of crystal meth production." (R. at 3.) Six hundred and fifty meth-related arrestees participated, agreeing to answer questions about the crystal meth manufacturing process. (R. at 3.) Eighteen of the twenty-five crystal meth manufacturers that were interviewed reported that they used pharmacy circulars to ascertain the location and price of products containing pseudoephedrine. (R. at 3.) This allowed them to minimize suspicion and circumvent the pseudoephedrine quotas established by the Combat Methamphetamine Epidemic Act of 2005. (R. at 2-3). The crystal meth manufacturers also agreed that the elimination of in-store advertisements of pseudoephedrine products might "thwart their purchase of pseudoephedrine." (R. at 3.)

3. The Texifornia Research Institute Study Demonstrates that Restrictions on Point-of-Sale Advertising will Make it More Difficult for Crystal Methamphetamine Producers to Purchase Pseudoephedrine.

The Texifornia Research Institute ("TRI"), a private organization, conducted a similar study from 2005 to 2009. (R. at 4.) The TRI interviewed 500 crystal meth manufacturers, all of whom stated that they avoided "at all costs" speaking to pharmacists about pseudoephedrine products. (R. at 4.) Of the 500 manufacturers, 450 said that they relied *primarily* on pharmacy circulars for the location and price of pseudoephedrine products. (R.

at 4.) Four hundred and twenty-five manufacturers similarly used in-store advertisements for product information. (R. at 4.) All participants agreed that without pharmacy circulars and in-store advertisements, it would be "far more difficult and less efficient" to acquire pseudoephedrine products. (R. at 4.)

4. The Evidentiary Record Sufficiently Demonstrates that the Drug Free Act Will Inhibit Crystal Meth Producers from Acquiring Pseudoephedrine, a Primary Ingredient in Crystal Methamphetamine.

As a result of the information gathered from the two studies, the Texifornia legislature issued a finding: "Point-of-sale advertising of pseudoephedrine products helps crystal meth manufacturers and abusers to obtain these products with minimal suspicion, because they can determine which brands are available at which local drug stores and ask for them by name." Texifornia Code § 101(1). (R. at 4.)

Texifornia's reliance on two studies, over a four-year time period, followed by a legislative finding, stands in stark contrast to Rhode Island's conclusory assertions in *44 Liquormart*. *See 44 Liquormart*, 517 U.S. at 505. In the present case, the legislature did not rely on speculation whatsoever; rather, the Drug Free Act was the product of years of research and careful analysis. (R. at 3-4.) Moreover, seventy-two percent of the meth manufacturers in the Texifornia study and ninety percent of the manufacturers in the TRI study stated that restrictions on point-of-sale advertising would have a direct impact on their methods of acquiring pseudoephedrine for crystal meth production. (R. at 3-4.) Such statistical evidence demonstrates that the Drug Free Act significantly advances Texifornia's interest. *See 44 Liquormart*, 517 U.S. at 505.

Texifornia's research prior to enacting the Drug Free Act, quite distinguishable from *44 Liquormart*, is analogous to the state bar association's research in *Florida Bar v. Went*

For It, Inc.. In *Florida Bar*, the state supreme court adopted a bar association proposal prohibiting lawyers from sending communications to injured persons within thirty days of the "accident or disaster." 515 U.S. at 620. The stated purpose of the prohibition was to maintain standards of attorney professionalism and protect the privacy and tranquility of accident victims. *Id.* at 621. Prior to developing its proposal, the bar association conducted a two-year study "of the effects of lawyer advertising on public opinion." *Id.* at 620. Furthermore, the bar "conduct[ed] hearings, commission[ed] surveys, and review[ed] extensive public commentary." *Id.* This Court observed that the bar association's evidentiary record was "noteworthy for its breadth and detail" and concluded that the bar association had satisfied the second prong of the *Central Hudson* test. *Id.* at 627-28. Similarly, Texifornia's evidentiary record is more than ample to satisfy this second *Central Hudson* prong.

C. The Drug Free Act is Not More Extensive Than Necessary To Serve Texifornia's Asserted Interest in Public Health and Safety.

1. Instead of a "Least-Restrictive-Means" Approach, this Court Should Apply the Modern "Reasonable Fit" Standard.

The third *Central Hudson* prong evaluates whether the challenged statute "is not more extensive than is necessary to serve that interest." *Cent. Hudson*, 447 U.S. at 566. For several years, courts interpreted this prong strictly and very few statutes were able to satisfy its demands. *See, e.g., Cent. Hudson*, 447 U.S. at 564 ("[I]f the governmental interest could be served as well by a more limited restriction of commercial speech, the excessive restrictions cannot survive."); *see also Fox*, 492 U.S. at 476 ("We have indeed assumed in dicta the validity of the 'least-restrictive-means' approach."). But, in 1989, this Court abandoned the least-restrictive-means approach, applying instead a more relaxed "reasonable

fit" standard. *See Fox*, 492 U.S. at 480. Since *Fox*, the third *Central Hudson* prong requires a reasonable fit between the asserted government interest and the means by which the challenged statute seeks to impact that interest:

> What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed. (quotation marks omitted)

Id. In *Fox*, police charged a housewares retailer with trespass for conducting a "Tupperware party" in a state university dormitory in violation of a state statute that prohibited "private commercial enterprises" from operating on campus for such purposes. *Id.* at 471. The students who hosted the "party" challenged the validity of the statute, and the district court found for the university. *Id.* at 472. But, the Court of Appeals for the Second Circuit reversed and remanded, instructing the district court to apply a "least restrictive means" analysis of the statute. *Id.* at 476. This Court reversed, on the grounds that the Second Circuit's instruction was improper and remanded to the district court with the instruction to apply the "reasonable fit" standard. *Id.* at 486.

2. The Drug Free Act Provides a Reasonable Fit Between Texifornia's Interest in Public Health and Safety and the Restrictions on Commercial Speech Necessary to Achieve that Interest.

The Drug Free Act is limited in scope. It does not seek to ban altogether the advertising of medications containing pseudoephedrine; rather, it only applies to "point-of-sale" advertising. Texifornia Code § 101(2). (R. at 4.) The Drug Free Act does not prohibit Zydeco from marketing Clear-It in Texifornia, as long as the advertisements are not

(1) point-of-sale advertisements, (2) false or misleading, and (3) in violation of other state or federal laws. Texifornia Code § 101(2). (R. at 4.) These restrictions are deliberate and flow directly from information collected in the Texifornia studies. (R. at 3-4.) In fact, it would be difficult to conceive of a restriction more narrowly tailored that would similarly "thwart" crystal meth manufacturers' attainment of pseudoephedrine for meth production. (*See* R. at 3.) The Texifornia legislature could have enacted a broader statute proscribing all advertising of pseudoephedrine-containing medications, but it chose not to. The Texifornia legislature could have placed limitations on who may sell these cold medications or where they may be sold, but it did not. If those types of restrictions were in place, the Drug Free Act could be challenged as overly broad or an unreasonable interference with the marketplace. But, the Drug Free Act does nothing to prevent or discourage law-abiding Texifornia citizens from inquiring about or purchasing Clear-It. The Drug Free Act is not broader than the Texifornia legislature reasonably could have determined necessary to further its interests. *Cf. S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 539 (1987) (statute granting United States Olympic Committee exclusive use of "Olympic" words and symbols upheld).

Texifornia citizens, unlike crystal meth manufacturers, will not hesitate to ask the pharmacist what cold medication will best address their symptoms. If Zydeco is truly concerned about their sales, then they must keep pharmacists informed of the cold-alleviating effects of Clear-It. Crystal meth is an enormous problem in Texifornia, leading to addiction and death. (R. at 2.) If anything, the Drug Free Act does not go far enough.

This Court should affirm the holding of the Thirteenth Circuit and grant summary judgment for Attorney General Macdonald because (1) Texifornia has asserted a substantial

government interest, (2) the Drug Free Act directly advances that interest, and (3) the Drug Free Act is not more extensive than necessary.

CONCLUSION

Zydeco's claim is not constitutionally ripe because Zydeco cannot demonstrate a realistic danger of direct harm in light of Attorney General Macdonald's repeated assurances that she would not enforce the Drug Free Act against drug companies. Zydeco's claim is not prudentially ripe because the issues are not yet fit for judicial review and Zydeco would suffer minimal hardship if review were delayed.

The Drug Free Act's restrictions on commercial speech do not violate the First Amendment. Although Zydeco's advertising of Clear-It is legal and truthful, Texifornia has a substantial government interest in restricting in-store advertisements and the Drug Free Act directly advances that interest in a reasonably narrow way.

It is for these reasons that this Court should dismiss Zydeco's action, or alternatively, affirm the holding of the Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

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Attorneys for Respondent

CERTIFICATE OF SERVICE

We certify that a copy of Respondent's brief was served upon Petitioner, Zydeco, Inc., through the counsel of record by certified U.S. mail return receipt requested, on this, the 10th day of January, 2011.

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Attorneys for Respondent

APPENDIX A

Constitutional Provisions

U.S. Const. art. III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX B

Relevant Provisions of the Drug Free Texifornia Act of 2010

Texifornia Code § 101(1)

Point-of-sale advertising of pseudoephedrine products helps crystal meth manufacturers and abusers to obtain these products with minimal suspicion, because they can determine which brands are available at which local drug stores and ask for them by name.

Texifornia Code § 101(2)

No point-of-sale advertising of any information about products containing pseudoephedrine, including price, is permitted within Texifornia. Point-of-sale advertising includes any advertisements that reveal where a pseudoephedrine product is offered for sale, including circulars, advertisements distributed or broadcasted by pharmacies or manufacturers, and in-store advertisements. Other than point-of-sale advertising, advertising of products containing pseudoephedrine is permitted, as long as the information is truthful and not misleading, and as long as the advertisements comply with all other state and federal laws.

Texifornia Code § 101(3)

For advertisements displayed in a store, there shall be a $1,000 fine for each and every violation of this chapter. The display of a single advertisement in multiple stores counts as multiple violations. For advertisements such as circulars or commercials broadcasted or distributed outside of the store, there shall be a $10,000 fine for each advertisement. Multiple broadcasts of a single advertisement count as multiple violations. The distribution of a circular or other print advertisement counts as a single violation per issue.

APPENDIX C

Relevant Provision of the Declaratory Judgment Act of 1934

28 U.S.C. § 2201(a)

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.