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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE ERISA INDUSTRY COMMITTEE, **Plaintiff,** **v.** **ROBERT ASARO-ANGELO, in his official capacity as THE COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT,** **Defendant.**	**Civil Action No. 3:20-cv-10094** **Judge Brian Martinotti** **Motion Day: December 21, 2020**

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

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Plaintiff The ERISA Industry Committee ("ERIC") respectfully submits this brief in opposition to the motion to dismiss brought by Defendant Robert Asaro-Angelo, Commissioner of the New Jersey Department of Labor and Workforce Development (the "Commissioner").

I. PRELIMINARY STATEMENT

ERIC seeks declaratory and injunctive relief because New Jersey Senate Bill No. 3170 ("S.B. 3170"), an amendment to the Millville Dallas Airmotive Plant Job Loss Notification Act ("NJ WARN Act" or the "Act"), N.J. Stat. Ann. §§ 34:21-1, et seq.,[1] is preempted by federal law. The Commissioner moves to dismiss the Complaint on theories that have nothing to do with the substance of ERIC's claim. He argues that: (1) he is not a proper defendant because he does not enforce the NJ WARN Act, (2) ERIC lacks Article III standing, and (3) the dispute is not ripe. All three arguments are without merit.

First, the Commissioner is ***expressly*** responsible for enforcing the NJ WARN Act. In particular, N.J. Stat. Ann. § 34:1-6 states that "the commissioner shall enforce the provisions of this title." The NJ WARN Act is part of Title 34 of the New Jersey Statutes. So the plain statutory text shows that the Commissioner has enforcement authority. Even if he did not have that express authority, the

[1] The statute is called the "NJ WARN Act" because of parallel federal legislation called the Worker Adjustment Retraining and Notification Act ("WARN Act"), 29 U.S.C. §§ 2100, et seq.

Commissioner needs only to have "some connection" to the Act's enforcement to be a proper defendant, and he clearly does. He is the State's top labor and employment official, and he concededly bears responsibility for establishing NJ WARN Act response teams and for providing information to employees and employers about the Act's requirements.

Second, ERIC adequately alleges that it has Article III standing to bring a claim. The Complaint provides two independent bases for standing—either of which would suffice to allow this action to proceed. First, ERIC is a nonprofit trade organization that has been forced to divert significant resources to educate its members in New Jersey on the implications of S.B. 3171's amendments. That is enough to establish organizational standing under case law from the Third Circuit and this district. Likewise, ERIC has adequately pleaded the requirements for associational standing: the Complaint alleges that its member companies in New Jersey are employers who would have standing to bring this case on their own, and the Commissioner does not dispute the other requirements for associational standing.

Third, this dispute is ripe. The Commissioner argues otherwise because the current effective date of S.B. 3171's amendments has been extended due to the pandemic-related state of emergency. But a statute need not already be in effect for a challenge to that statute to be ripe for adjudication. It is enough that the

statute has been enacted into law. Here, moreover, there is no question that the current state of emergency will eventually end and S.B. 3171 will take effect. There is no need for further developments for this Court to adjudicate ERIC's purely legal challenge to the new statute.

For these reasons and others explained below, the Court should deny the motion to dismiss.

II. RELEVANT BACKGROUND

ERIC is a nonprofit trade organization that represents the interest of employers with 10,000 or more employees that sponsor health, retirement, and other benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq. Compl. ¶¶ 8-9. ERIC member companies are large employers, with employees in every State, including many member companies that employ thousands of individuals in New Jersey. *Id.* ¶ 9. As a national association, ERIC's mission includes lobbying and litigation advocacy for nationally uniform laws regarding employee benefits as contemplated by ERISA, so that ERIC's member companies may lawfully operate under ERISA's protection from a patchwork of different and conflicting state and local laws in addition to federal law. *Id.* ¶ 10.

To that end, ERIC has previously filed other legal challenges to other state and local laws that, like S.B. 3170, are preempted by ERISA. Compl. ¶ 10. A

number of these cases have proceeded without any suggestion that ERIC lacked standing to advance such claims on behalf of its member companies. *See, e.g.*, Order Dismissing Case Pursuant to Settlement, *ERIC v. Read*, No. 17-cv-1605 (D. Or. Apr. 2, 2018), ECF No. 31; *ERIC v. City of Seattle*, No. 18-cv-1188, 2020 WL 2307481 (W.D. Wash. May 5, 2020), *appeal filed* (9th Cir. 2020).

On January 21, 2020, Governor Phil Murphy amended the NJ WARN Act by signing S.B. 3170 into law. Compl. ¶ 17. Before these amendments, the NJ WARN Act required employers with 100 or more full-time employees to provide sixty days' notice to affected full-time employees in the event of a "mass layoff" or "transfer or termination of operations," and imposed certain penalties for failure to comply. *Id.* ¶ 18. S.B. 3170's amendments made sweeping changes to the statute by, among other things, decreasing the threshold for a "mass layoff" from 500 employees to fifty employees and revising the definition of "establishment" to extend to all facilities within the entire State instead of a single facility. *Id.* ¶ 19. The amendments also require covered employers to provide severance pay to all full- and part-time employees affected by the statute's amended definition of qualifying severance events (instead of merely imposing a financial penalty due to failure to provide the required notice). *Id.*

In light of the COVID-19 pandemic, the effective date of these amendments has been temporarily postponed. Compl. ¶ 21. They will take effect 90 days after

the expiration of the Governor's declaration of a state of emergency. *Id.* There is no dispute, however, that S.B. 3170 has already been enacted and will become effective after the expiration of the COVID-19 declaration of emergency. *Id.*

In the meantime, ERIC has had to divert and expend its resources to prepare for and address the harms posed by S.B. 3170's amendments and to educate its member companies on the implications of the amendments. Compl. ¶ 16. ERIC's member companies have also had to expend resources to implement administrative schemes to continuously monitor all potential future New Jersey terminations to determine when severance benefits must be paid under S.B. 3170. *Id.* ¶¶ 6, 36-43.

To prevent further harm to itself and its members, ERIC initiated this action on August 6, 2020. The Complaint seeks a declaration that ERISA expressly preempts S.B. 3170's amendments to the NJ WARN Act, Compl. ¶¶ 34-45, as well as injunctive relief to halt future enforcement of the amended NJ WARN Act, *id.* ¶¶ 46-50.

The Commissioner moves to dismiss the Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), and for failure to state a claim under Rule 12(b)(6).

III. STANDARD OF REVIEW

"A challenge to subject matter jurisdiction under Rule 12(b)(1) may be either a facial or a factual attack." *Davis v. Wells Fargo*, 824 F.3d 333, 346 (3d

Cir. 2016). A facial attack "challenges the subject matter jurisdiction without disputing the facts alleged in the complaint, and it requires the court to 'consider the allegations of the complaint as true'" *Id.* (citing *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 n.3 (3d Cir. 2006)). A factual challenge "attacks the factual allegations underlying the complaint's assertion of jurisdiction, either through the filing of an answer or 'otherwise present[ing] competing facts.'" *Id.* (quoting *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014)).

The Commissioner does not challenge the facts alleged in the Complaint for purposes of his Motion. Because he thus brings a facial attack on the Court's jurisdiction, the Court "must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000).

In deciding a motion to dismiss under Rule 12(b)(6), a court is likewise "required to accept as true all factual allegations in the complaint and draw all inferences from the facts alleged in the light most favorable to [the plaintiff]." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the [plaintiff] pleads factual

content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

IV. ARGUMENT

A. The Commissioner Is A Proper Defendant Because He Is Obligated To Enforce The NJ WARN Act And At A Minimum Is Connected To The Act's Enforcement.

The Commissioner acknowledges that *Ex parte Young*, 209 U.S. 123 (1908), permits ERIC to sue a state official to enjoin the enforcement of an act that violates federal law, irrespective of state sovereign immunity. *See* Brief in Support of Defendant's Motion to Dismiss, Dkt. 10-1 ("Comm'r Br.") at 8. But he claims that he is not an appropriate defendant under *Ex parte Young* because he purportedly lacks enforcement authority for the NJ WARN Act. In support of this claim, the Commissioner relies heavily on his own Department's website, which states that the Department has no enforcement authority under the NJ WARN Act. *See* Comm'r Br. 4, 7-8, 12 (citing http://www.nj.gov/labor/lwdhome/warn/njwarn.html).

As an initial matter, the Court should not consider the contents of the Department's website on this motion to dismiss. The Commissioner has not identified any reason why the Court should be permitted to consider the contents of the Department's website at this procedural stage—much less accept as true the Department's self-serving statement that it lacks enforcement responsibility.

ERIC's Complaint makes no reference to the Department's website, and ERIC's claims are not based on that website.

In any event, the Department's website is contradicted by the statute itself. As the Complaint notes, Compl. ¶ 11, unambiguous statutory language says that the Commissioner does have authority—and indeed an obligation—to enforce the NJ WARN Act. The amended NJ WARN Act and all other "Labor and Workmen's Compensation" laws are codified in Title 34 of the New Jersey Statutes. Section 34:1-6 states that "[t]he commissioner ***shall enforce the provisions of this title*** and exercise supervision and control over the deputy commissioners, bureau chiefs and all inspectors, and shall, as often as is practicable, cause inspections to be made of all establishments and places regulated or affected by this title." N.J. Stat. Ann. § 34:1-6 (emphasis added); *see also* N.J. Stat. Ann. § 34:1A-6. The Commissioner is thus required by law to enforce the provisions of the NJ WARN Act and all other laws under Title 34. This provision is enough on its own to bring this action within the scope of *Ex parte Young*. *See PDX N., Inc. v. Wirths*, No. 15-7011, 2016 WL 3098176, at *5 (D.N.J. May 31, 2016) (denying motion to dismiss and applying *Ex parte Young* because "***pursuant to N.J.S.A. 34:1-6***, Defendant Harold Wirth, in his official capacity as Commissioner of the Department of Labor and Workforce Development of the

State of New Jersey, is authorized to enforce the New Jersey Independent Contractor Statute and the Exemption")(emphasis added).

But even apart from the clear enforcement authority provided in N.J. Stat. Ann. § 34:1-6, the Commissioner's undisputed responsibilities in connection with the NJ WARN Act separately establish that *Ex parte Young* applies. Contrary to the Commissioner's portrayal, *see* Comm'r Br. 10, *Ex parte Young* is not restricted to state officials with *direct* enforcement responsibilities over the challenged law. It applies more broadly to state officials with "***some connection with the enforcement of the act***" that is being challenged—regardless of whether that connection "is specially created by the act itself" or "arises out of the general law." *Ex parte Young*, 209 U.S. at 157 (emphasis added).

Here, the Commissioner admits that the NJ WARN Act requires him to establish a "response team" to provide information and counseling on compliance to employees and employers when an event triggers the Act's requirements. Comm'r Br. 10 (citing N.J. Stat. Ann. § 34:21-5). Employers, meanwhile, are statutorily required to notify the Commissioner when the Act's requirements are triggered and then to provide the Commissioner's response team with access to their facilities to enable the response team to meet with affected employees directly. N.J. Stat. Ann. § 34:21-2(c). While these responsibilities may not require the Commissioner to adjudicate or prosecute violations of the NJ WARN Act, they

establish a clear connection between the Commissioner and the Act's enforcement. The Commissioner's response team concededly "provide[s] information, referral and counseling regarding . . . employee rights," and these employees concededly have a private cause of action under the NJ WARN Act. Comm'r Br. 10. Under the statute, those employee rights include "rights based on [the NJ WARN Act] or any other law which applies to the employees with respect to . . . severance pay." N.J. Stat. Ann. § 34:21-5(b)(2)(c). Whether the statute's requirements are fixed by the original NJ WARN Act or the amended version plainly affects the information that the Commissioner's response team provides to assist employees in enforcing their purported legal rights. The Commissioner and his response team's role in facilitating employees' enforcement of their rights under the amended NJ WARN Act against ERIC member companies is more than enough of a connection to support this action under *Ex parte Young*.

Indeed, the Third Circuit has held that even state officials with "entirely ministerial duties" under the challenged law are appropriate defendants under *Ex parte Young*. *See, e.g.*, *Constitution Party of Pa. v. Cortes*, 824 F.3d 386, 396 (3d Cir. 2016) (holding that "even entirely ministerial duties can be sufficient under *Young*, because the inquiry is not into the nature of an official's duties but into the effect of the official's performance of his duties on the plaintiff's rights." (internal quotations omitted)); *Finberg v. Sullivan*, 634 F.2d 50, 54 (3d Cir. 1980) (holding

that a court clerk and a sheriff, whose "connection with the postjudgment garnishment [law at issue] consist[ed] of issuing the writ of execution and serving it on the garnishee" were proper *Ex parte Young* defendants). That is true even when the state official argues that he or she lacks direct enforcement authority and that enforcement occurs principally through lawsuits filed by private parties. *See Cortes*, 824 F.3d at 397; Brief for Appellants at 23-24, 31; *Cortes*, 824 F.3d at 386. The Third Circuit has further held that a state official's required notifications under a statute can qualify as sufficiently "specific obligations to make out an *Ex parte Young* claim." *Waterfront Comm'n of N.Y. Harbor v. Governor of New Jersey*, 961 F.3d 234, 240 n.10 (3d Cir. 2020).

The cases that the Commissioner cites on this issue do not support his arguments. For example, in *1st Westco Corp. v. School District of Philadelphia*, 6 F.3d 108 (3d Cir. 1993), the plaintiffs filed a lawsuit against both the Philadelphia school district and the Commonwealth of Pennsylvania, asserting that a particular state statute was unconstitutional. *Id.* at 111. The Third Circuit concluded that claims against the Pennsylvania Attorney General and Secretary of Education in the school district's third-party complaint had to be dismissed because "the statute charge[d] the School District, not the Commonwealth Officials, with enforcing" the relevant statutory provision against the plaintiffs, and the school district actually had enforced the provision against the plaintiffs. *Id.* at 113. The state

Attorney General lacked any duty to provide a binding opinion to the school district on the statute's constitutionality. *Id.* And the statute specifically stated that the Secretary of Education's powers did ***not*** extend over the Philadelphia school district. *Id.* Unlike the law at issue in *Westco*, here N.J. Stat. Ann. § 34:1-6 explicitly gives the Commissioner the authority, and in fact requires him, to enforce all labor and workforce laws under Title 34, including the NJ WARN Act. And because the Commissioner's response team will advise employees of their purported rights under the amendments, including rights to file lawsuits seeking severance pay, and will advise employers of their obligations under the amendments, there is a "real, not ephemeral, likelihood or realistic potential" that the Commissioner's connection to the challenged amendments "will be employed against the plaintiff's interests." *Westco*, 6 F.3d at 114 (citation omitted).

The other case cited by the Commissioner, *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir. 1988), is likewise inapposite. There, the Third Circuit affirmed the dismissal of the Pennsylvania Governor and Attorney General in a case where the plaintiff had also named lower-level officials that already permitted the plaintiff to challenge the allegedly unconstitutional law. *Id.* at 1209. The Third Circuit found "no reason to strain the *Young* doctrine to reach" those defendants given the plaintiff's ability "to challenge the constitutionality of the regulation by naming [the lower-level] administrators" as defendants. *Id.* Here, the same principle could

only apply if ERIC had named the Governor of New Jersey or New Jersey Attorney General as a defendant in addition to the Commissioner. But ERIC has not done so. Moreover, the Commissioner identifies no other state official that ERIC should or could have named to challenge the amendments' legality. And again the Commissioner is explicitly obligated to enforce all laws under Title 34 and is closely connected with counseling employees about their purported NJ WARN Act rights. His connection is not "too remote" under governing standards.

In sum, ERIC has met its burden to plead that the Commissioner has the requisite connection to the enforcement of the NJ WARN Act. To the extent his defense rests on information external to the Complaint on his Department's website to disclaim his enforcement responsibilities, ERIC at a minimum should be entitled to discovery to test such disclaimers.

B. ERIC Has Standing To Challenge S.B. 3171's Amendments To The NJ WARN Act.

As was true in prior lawsuits where ERIC challenged laws preempted by ERISA, *see supra* pp. 3-4, ERIC meets the constitutional requirements for standing in this case by pleading an actual or imminent injury-in-fact that is caused by the challenged conduct and redressable by a decision in its favor. *See Free Speech Coal., Inc. v. Att'y Gen. U.S.*, 825 F.3d 149, 165 (3d Cir. 2016). To separate the standing inquiry from an assessment of the merits, the court must "assume for the

purposes of [a] standing inquiry that a plaintiff has stated valid legal claims." *Cottrell v. Alcon Labs.*, 874 F.3d 154, 162 (3d Cir. 2017) (citation omitted). "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.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)).

ERIC has sufficiently pleaded facts that establish Article III standing under two independent theories: (1) direct organizational standing and (2) associational standing.

1. ERIC has organizational standing because it adequately alleges that S.B. 3170 Amendments have and will continue to injure it directly.

The Commissioner does not dispute 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* Comm'r Br. 15-16 (acknowledging same standard and citing *Havens* and *Post Goldtex*). Courts have consistently found organizational standing when, as here, 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) (collecting cases); *see also N.J. Civil Justice Inst. v. Grewal*, No. 19-17518, 2020 WL 4188129, at *3 (D.N.J. July 21, 2020) (denying motion to dismiss for lack of standing in a declaratory judgment action brought by an organization that adequately alleged that the challenged law caused it injury by requiring it to divert its resources).

The Commissioner nevertheless claims that ERIC has failed to allege an injury-in-fact for purposes of direct organizational standing. In his view, the Complaint is purportedly "silent as to whether providing educational material to [ERIC's] member companies is outside the normal scope of business, the level of resources it has had to divert, and what programs or services were adversely impacted as a result of the alleged diversion." Comm'r Br. 17-18.

This argument ignores the pleading burden that ERIC needs to meet at this stage of the case. As noted above, "general allegations of injury" are enough to defeat a motion to dismiss because courts are required to assume that all factual allegations are true and to view them in a light favorable to plaintiffs. *Lujan*, 504 U.S. at 561. Furthermore, the Third Circuit has held that "[t]he injury-in-fact requirement [in particular] is 'very generous' to claimants demanding only that the

claimant allege[ ] some specific, 'identifiable trifle' of injury." *Cottrell*, 874 F.3d at 162 (citation omitted).

ERIC's Complaint satisfies that standard. Specifically, ERIC alleged that its mission as an organization is to promote nationally uniform laws regarding employee benefits as contemplated by ERISA on behalf of its member companies. Compl. ¶ 10. It further alleged that enforcement of S.B. 3170's amendments to the NJ WARN Act directly conflicts with that mission. *Id.* ¶ 16. In addition, ERIC alleged that to counteract the upcoming enforcement and implementation of S.B. 3170's amendments, ERIC has had to divert and expend its resources to educate its member companies on the amendments' implications. *Id.* ¶¶ 11-16. These allegations are sufficient to survive a motion to dismiss. *See Grewal*, 2020 WL 4188129, at *4 ("Plaintiffs' allegations that they have been forced to divert their resources . . . through developing educational materials and organizing meetings and educational events are akin to the allegations that the Supreme Court upheld at the motion-to-dismiss stage in *Havens*.").

In arguing otherwise, the Commissioner again claims that he is not responsible for enforcing the NJ WARN Act. As discussed above, however, that argument is incorrect. In the ways just explained, the Commissioner has the power and obligation under New Jersey law to enforce S.B. 3170's amendments to the NJ WARN Act, and he is sufficiently connected to the amendments' enforcement

through his response team. *See supra* Section IV.A. ERIC has adequately pleaded that it needs to divert its resources in response to this enforcement of S.B. 3170's amendments. Compl. ¶¶ 11, 16. ERIC has sufficiently pleaded direct standing.

2. ERIC has associational standing because it adequately alleges that S.B. 3170 Amendments injure its members.

Beyond the injury to ERIC itself, ERIC has associational standing to bring suit on behalf of its members because (1) its members would otherwise have standing to sue in their own right, (2) the interests at stake are germane to ERIC's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 283 (3d Cir. 2002) (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

The Commissioner does not dispute that ERIC adequately pleaded the second and third elements of associational standing. Instead, he merely contends that, under the first element, "(1) the Complaint fails to sufficiently plead that Plaintiff has 'members' on whose behalf it can assert associational standing[,] and (2) even if Plaintiff has 'members,' those members do not have standing in their own right." Comm'r Br. 20. Both contentions are mistaken.

a. ERIC adequately alleges that it has members on whose behalf it can assert associational standing.

The Complaint alleges that ERIC is a nonprofit trade organization with member companies, including numerous members employing thousands of individuals in New Jersey. *See, e.g.*, Compl. ¶¶ 9, 10, 15, 16, 19, 43, 48. The Commissioner asserts that these allegations are not enough under *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir. 1997), claiming that ERIC needs to plead greater, more specific facts demonstrating "indicia of membership." This argument fails because, as the Commissioner's own citations demonstrate, the "indicia of membership" requirement does not apply here.

Instead, that requirement applies when a "***nonmembership*** organization" seeks to claim associational standing. *Disability Rights Pa. v. Pa. Dep't of Human Servs.*, No. 19-737, 2020 WL 1491186, at *6 (M.D. Pa. Mar. 27, 2020). The Supreme Court adopted the "indicia of membership" requirement in *Hunt* to extend associational standing to a group that ***lacked members*** and thus differed from a "traditional trade association." 432 U.S. at 345 (finding associational standing and holding that "while the apple growers and dealers are not 'members' of the Commission in the traditional trade association sense, they possess all of the indicia of membership in an organization"). Thus, in *Magnesium Elektron*, the

Third Circuit cited *Hunt* and its "indicia of membership" test to find that associational standing was present, even though the defendant advanced a "formalistic argument" that associational standing was impossible because the plaintiffs' "charters prohibit[ed] them from having members." *Magnesium Elektron, Inc.*, 123 F.3d at 119.

The "indicia of membership" requirement is therefore irrelevant in this case. ERIC alleges that it is a "***membership***" organization with "***member companies***" in New Jersey on whose behalf ERIC brings this action. Compl. ¶ 15 (emphasis added). At this stage, these factual allegations must be accepted as true.

Moreover, to the extent the Commissioner is suggesting that ERIC needs to specifically identify its members, he is mistaken again. "This District has held that an organization 'need not reveal its membership list at the pleading stage in order to bring suit on its members[']' behalf.'" *Grewal*, 2020 WL 4188129, at *4 (quoting *Forum for Acad. & Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 286-87 (D.N.J. 2003)).

b. ERIC adequately alleges that its members would have standing to bring this action.

The Commissioner next claims that ERIC's members could not have standing because their alleged injury is "too generalized" and "the New Jersey WARN Act applies with equal force to all businesses operating within the state."

Comm'r Br. 23.[2] These claims ignore the well-pleaded allegations of the Complaint. Because of the amendments, New Jersey employers, including some ERIC members, have to establish ongoing administrative and monitoring schemes to comply with the new severance pay provisions. Compl. ¶¶ 6, 40. Moreover, the amendments would require ERIC members to make severance payments, even when it would not be required under the express terms of existing ERISA severance benefit plans or under the NJ WARN Act prior to the amendments. Compl. ¶¶ 6, 19, 38. The fact that these burdens apply to other New Jersey businesses as well does not transform them into a mere generalized grievance incapable of supporting Article III injury. *See, e.g.*, *Grewal*, 2020 WL 4188129, at *1 (denying motion to dismiss and finding that association plaintiff sufficiently pled standing in a case seeking declaratory judgment that N.J. Stat. Ann. § 10:5-12.7, a law applicable to all employers, is preempted by federal law). If the Commissioner's argument were correct, then no plaintiff could ever challenge the constitutionality (or preemption) of a statute of general applicability, even where that statute had substantial direct consequences.

[2] The Commissioner also repeats his argument, as throughout his brief, that he has no enforcement authority with respect to the NJ WARN Act. Again, that argument is without merit. *See supra* Section IV.A.

The Commissioner's cited cases on this point are readily distinguishable. For example, in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the plaintiffs were voters who challenged partisan gerrymandering statewide. The Supreme Court held that such a broad, statewide claim was a "generalized grievance," but acknowledged that claims could proceed on a "district-by-district" basis. *Id.* at 1930. In *Lujan*, the Supreme Court found no standing for plaintiffs who were challenging certain government actions that they asserted endangered animals worldwide, because the plaintiff could not show how they had personally been harmed. 504 U.S. at 562-65. Finally, in *United States v. Richardson*, 418 U.S. 166 (1974), the Supreme Court discussed taxpayer standing and found that the plaintiff had no standing, describing the plaintiff's injury as a generalized grievance in that it is "plainly undifferentiated and common to ***all*** members of the public." *Id.* at 176-77.

Here, in contrast, ERIC is not attempting to redress an injury that is shared in undifferentiated fashion by all citizens of the State. On the contrary, ERIC alleges that certain New Jersey employers, including some of its members, are specifically harmed by having to create severance pay plans with ongoing administrative burdens to comply with S.B. 3171's amendments to the NJ WARN Act. *See, e.g.*, Compl. ¶¶ 3, 6, 40. This injury is even more particularized than the injury alleged in *Grewal*, which survived a motion to dismiss, where the plaintiffs challenged a law that affected any employers with employment agreements, not

just large employers like ERIC's member companies. *Grewal*, 2020 WL 4188129, at *1. Accordingly, the Court should hold that ERIC has sufficiently alleged all of the requirements for associational standing as well.

C. This Dispute Is Ripe Because S.B. 3171's Amendments To The NJ WARN Act Have Been Signed Into Law.

There is nothing improper about a challenge to a law that has not yet been enforced. In considering whether such pre-enforcement challenges are ripe for adjudication, 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). For pre-enforcement declaratory relief, courts consider "(1) the adversity of the parties' interests, (2) the conclusiveness of the judgment, and (3) the utility of the judgment." *Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534, 539 (3d Cir. 2017).

The Commissioner does not dispute that the Complaint satisfies the last two elements of this test, nor can he do so. If this case is decided in ERIC's favor, there will be a conclusive ruling that ERISA preempts S.B. 3171's amendments to the NJ WARN Act, which will benefit ERIC and its member companies by removing the burdens and expenses arising from those amendments. *Id.* at 542-43 (holding that conclusiveness and utility are shown when a ruling would determine

the legal rights of the parties and provide practical utility to the party seeking relief).

Instead, the Commissioner claims that ERIC cannot demonstrate "adversity of the parties' interests" because (1) he is not responsible for enforcing the NJ WARN Act and (2) the threat of injury is not actual or imminent because the law is not yet effective. Comm'r Br. 27-29. As discussed above, ERIC has sufficiently alleged that the Commissioner is a proper defendant and has the responsibility to enforce the NJ WARN Act. *See supra* Section IV.A. His second argument fails as well.

While the Commissioner is correct to note that the effective date of S.B. 3171 has been extended multiple times (in thirty-day increments) due to the COVID-19 pandemic, he cites no authority suggesting that a postponement in the effective date of an already enacted law makes a challenge to that law premature. The usual rule is that "one does not have to await the consummation of threatened injury to obtain preventative relief." *Surrick v. Killion*, 449 F.3d 520, 528 (3d Cir. 2006) (brackets omitted) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Even if the effective date of the challenged amendments may again be postponed, the Commissioner does not and cannot claim "that the newly enacted law will not be enforced." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (finding pre-enforcement

challenge justiciable). Accordingly, it suffices that ERIC has "alleged an actual and well-founded fear that the law will be enforced" against its members and that it and its member companies are already suffering injury because of the amendments' inevitable enforcement. *Id.*; *see supra* Section IV.B.

Moreover, this case is particularly well suited for pre-enforcement resolution because it is a purely legal dispute and does not depend on the development of a robust factual record. *See, e.g.*, *Grewal*, 2020 WL 4188129, at *7 (denying motion to dismiss and rejecting defendant's ripeness argument because "the question before the Court—whether Section 12.7 is preempted by the FAA—is purely legal, and thus further factual development is not required"). The Commissioner does not and cannot point to anything that would be gained by postponing the Court's decision on the purely legal issue that ERIC has presented. But ERIC and its members will continue to suffer harm if they have to prepare for the enforcement of a law that should never take effect at all given its inconsistency with ERISA and its preemption provision. This dispute is ripe for resolution.

V. CONCLUSION

For the foregoing reasons, ERIC respectfully requests that the Court deny the Commissioner's motion to dismiss. In the alternative, should the Court find that ERIC has not pleaded sufficient facts, ERIC requests an opportunity to amend the Complaint to add any allegations the Court believes are necessary.

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Respectfully submitted,

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