No. 10-779

In the
Supreme Court of the United States

WILLIAM H. SORRELL, as Attorney General of the State of Vermont, et al.,
Petitioners,

v.

IMS HEALTH, INC., et al.,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CATO INSTITUTE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a law that restricts access to information in nonpublic prescription drug records and affords prescribers the right to consent before their identifying information in prescription drug records is sold or used in marketing runs afoul of the First Amendment.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) and Cato Institute respectfully submit this brief amicus curiae in support of the Respondents.[1]

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation created its Free Enterprise Project. Through that project, the Foundation seeks to protect the free enterprise system from abusive regulation, the unwarranted expansion of claims and remedies in state civil justice systems, and barriers to the freedom of contract. To that end, PLF has participated in several cases before this Court and others on matters affecting the public interest, including issues related to the First Amendment and commercial speech. *See*, *e.g.*, *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Wine & Spirits Retailers, Inc. v. Rhode Island and Providence Plantations*, 552 U.S. 889 (2007); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003); *Fed.*

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Election Comm'n v. Beaumont, 539 U.S. 146 (2003); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998). PLF attorneys also have published on the commercial speech doctrine. *See*, *e.g.*, Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205 (2004); Timothy Sandefur, *Rights Are a Seamless Web*, 26 Rutgers L. Rec. 5 (2002).

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. This case is of central concern to Cato because it addresses the collapse of constitutional protections for commercial speech and the attempt by government to impede the free flow of information.

SUMMARY OF ARGUMENT

In this Information Age, corporate communications represent a distinct and valuable voice, offering information that may be unavailable to other speakers, or information which other speakers (most notably the government) may choose not to reveal. Corporate speech contributes to public debates on matters of general interest, such as the economy, the environment, and foreign trade; and on matters of specific interest, such as the availability, usage, and effects of medical prescriptions, as in this case.

Moreover, with greater frequency and subtlety, new technologies and innovative marketing strategies introduce the corporate profit-motive into what otherwise would be fully protected speech.

The commercial speech doctrine as described in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980), cannot predictably resolve disputes resulting from these new modes of expression. While hard cases may make bad law, sometimes "it is bad law that is creating the hard cases." Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 Conn. L. Rev. 961, 984 (1998). *Central Hudson* falls into this category. This Court should abandon the unworkable *Central Hudson* approach and review all restrictions on speech—whether the speaker is an individual, an association, or a corporate entity—under the strict scrutiny standard.

ARGUMENT

I

CENTRAL HUDSON'S CONFUSING AND UNWORKABLE APPROACH TO "COMMERCIAL SPEECH" VEERS INTO VIEWPOINT DISCRIMINATION AND SHOULD BE ABANDONED IN FAVOR OF STRICT SCRUTINY

In 1942, this Court declared that commercial speech received no First Amendment protection, *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), then reversed course in 1976 to hold that it was entitled to very serious protection. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1976). Four years later, the court devised a

four-part test for scrutinizing restrictions on commercial speech, *Central Hudson*, 447 U.S. at 564, then revised that test, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996). Depending on the speaker and the message conveyed, this Court has produced inconsistent rulings in similar cases. *See, e.g., Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (allowing regulation of commercial expression by attorneys); *Bates v. State Bar*, 433 U.S. 350, 384 (1977) (disallowing regulation of commercial expression by attorneys). Thus, *Central Hudson*'s inherent flexibility has "left both sides of the debate with their own well of precedent from which to draw." Floyd Abrams, *A Growing Marketplace of Ideas*, Legal Times, July 26, 1993, at S28. *See also* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212, 1222 (1983) ("commercial speech" was "an empty vessel into which content is poured").

Most troubling, the Court has based its analysis of commercial speech on the alleged "social worth" of the speech at issue—contravening a cardinal First Amendment precept that speech should not receive lesser or higher protection depending on its content. *Compare Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 342, 348 (1986) (allowing restrictions on advertisements for legal gambling facilities), *with Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (disallowing restrictions on solicitations for charity). *See also* Alan Howard, *The Mode in the Middle: Recognizing a New Category of Speech Regulations for Modes of Expression*, 14 UCLA Ent. L. Rev. 47, 88 (2007) (Noting how courts often "do precisely what the First

Amendment forbids any government official from doing: judging the social worth of the speaker's underlying message" in order to exempt speech from "the general rule against content-based regulations.").

This Court has frequently acknowledged the confusion and vagueness that surrounds current commercial speech jurisprudence. *See, e.g., Edenfield v. Fane*, 507 U.S. 761, 765 (1993) ("ambiguities may exist at the margins of the category of commercial speech"); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637 (1985) ("the precise bounds of the category of . . . commercial speech" are "subject to doubt, perhaps"). It has also recognized that "judges, scholars, and *amici curiae* have advocated repudiation of the *Central Hudson* standard and implementation of a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999). *See also 44 Liquormart*, 517 U.S. at 527 (Thomas, J., concurring) (noting that commercial speech cases are impossible to apply "with any uniformity."); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) ("[S]everal Members of the Court have expressed doubts about the *Central Hudson* analysis."). Lower courts, assuming they can even discern when speech is properly labeled "commercial,"[2] similarly apply *Central*

[2] *See BellSouth Telecommunications, Inc. v. Farris*, 542 F.3d 499, 505 (6th Cir. 2008) (Uncertainty whether prohibition on utility from identifying the source of tax levied on utility users on commercial invoice is commercial or political speech. Finding the prohibition to be a "hybrid . . . that implicates commercial *and* political speech," the court complained that "[i]t remains difficult (continued...)

Hudson with results that range all over the map.[3] Yet the law continues to avoid clear distinctions and definitions. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419-20 (1993). The divergent lines of commercial speech jurisprudence have produced a well of confusion.

Commercial speech doctrines developed in previous decades have focused on simple and direct advertising. In recent years, however, as marketing

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[2] (...continued)
to pin down where the political nature of these speech restrictions ends and the commercial nature of the restrictions begins.").

[3] Many lower courts have expressly noted their struggle to apply *Central Hudson*. *See*, *e.g.*, *Alexander v. Cahill*, 598 F.3d 79, 88 (2d Cir. 2010) ("[T]he Supreme Court has offered differing, and not always fully consistent, descriptions as to what constitutes protected commercial speech."); *Nordyke v. Santa Clara County*, 110 F.3d 707, 712 (9th Cir. 1997) (striking down a fairground lease term prohibiting gun shows, appellate court described this Court's commercial speech cases, concluding that "*Central Hudson* test is not easy to apply"); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684 (7th Cir. 1998) (recognizing "'the difficulty of drawing bright lines'" (quoting *Discovery Network, Inc.*, 507 U.S. at 419); *Oxycal Lab., Inc. v. Jeffers*, 909 F. Supp. 719, 724 (S.D. Cal. 1995) (recognizing "that, often, these definitions will not be helpful and that a broader and more nuanced inquiry may be required"). *Cf. Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 980 (2002) (Brown, J., dissenting) ("[T]he commercial speech doctrine, in its current form, fails to account for the realities of the modern world—a world in which personal, political, and commercial arenas no longer have sharply defined boundaries."). *See also Am. Future Sys., Inc. v. Pa. State Univ.*, 752 F.2d 854, 867 (3d Cir. 1984) (Adams, J., concurring) ("The commercial speech doctrine, which offers lesser protection for commercial than for non-commercial communications, has been criticized almost since its inception for its failure to develop a hard and fast definition for this type of speech.").

has become more sophisticated and intertwined with classically protected forms of expression, such a focus has rendered the case law outdated. While past decisions involved direct descriptions of items for sale at particular prices, modern marketing techniques involve the development of complicated "brand identities" and "corporate personalities," in which consumers are not merely interested for the opportunity of engaging in transactions, but in which they and sellers combine in common expressive activities.

Even when the speech is fairly straightforward in its attempt to bolster a bottom line, it is so frequently intermingled with otherwise protected speech that courts simply cannot determine where the speech falls in the tangled web of cases comprising the "commercial speech doctrine." In this case, the expressive activity is simply the compilation of factual data into reports for the purpose of providing that information, sometimes at a price, to those who value it. Vermont seeks to stifle this exchange of factual information, as a means of controlling free economic exchange. In an area of the law that is already full of almost incomprehensibly narrow distinctions, this Court must cut through the clutter.

By folding commercial speech into standard First Amendment analysis applicable to other types of speech, this Court will create a much needed stability in the law. Stability, certainty, and predictability are valued because they promote confidence in the rule of law and make the resolution of disputes a less costly enterprise. Joseph R. Grodin, *Are Rules Really Better Than Standards*, 45 Hastings L.J. 569, 570 (1994). Certainty achieves fairness to those who rely upon the

law, efficiency in following precedent, and continuity and equality in treating similar cases equally. *McGregor Co. v. Heritage*, 631 P.2d 1355, 1366 (Or. 1981) (Peterson, J., concurring). Certainty promotes business innovation and development by letting firms know what they can and cannot do. Further, by eliminating speculation as to what the law is and avoiding a need for interpretation, clarification, or explanation, certainty promotes efficiency for businesses and individuals. Paul E. Loving, *The Justice of Certainty*, 73 Or. L. Rev. 743, 764 (1994). This case presents a perfect opportunity to eliminate the commercial speech doctrine once and for all, and to grant speech of all stripes the full protection of the First Amendment.

II

INNOVATIVE AND VALUABLE COMMERCIAL EXPRESSION DESERVES FULL FIRST AMENDMENT PROTECTION

A. "Common Sense" Cannot Distinguish Commercial from Noncommercial Speech Because the Two Are Often Inextricably Intertwined

Because the government may regulate commercial transactions, the government also assumes the ability to regulate commercial speech. *See* Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 Tex. L. Rev. 777, 780 (1993). Yet, as noted above, "commercial speech" is not easily defined. *See*, *e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995)

(Stevens, J., concurring) ("[T]he borders of the commercial speech category are not nearly as clear as the Court has assumed."); *Edenfield v. Fane*, 507 U.S. at 765 ("[A]mbiguities may exist at the margins of the category of commercial speech."); *cf. Nefedro v. Montgomery County*, 414 Md. 585, 599-600 (2010) (holding that commercial fortunetelling is protected speech, but noting other courts' holdings to the contrary). These "ambiguities" threaten to overcome the rest of the category. Because a profit motive, in and of itself, does not render speech unprotected, *Va. State Bd. of Pharmacy*, 425 U.S. at 761-62, the Court has relied on "common sense," holding that speech receives less-favored status only when it does "no more than propose a commercial transaction." *Id.* at 772 n.24. The two "common sense" distinctions are (1) that commercial speech is more verifiable than other types of speech and (2) that commercial speech is more durable than other types of speech. *Id.*, *see also Central Hudson*, 447 U.S. at 564 n.6. Both distinctions have been criticized by judges and scholars. *See*, *e.g.*, Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627, 635-38 (1990); Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 Minn. L. Rev. 289, 296-97 (1987); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 31-32 (2000).

"Common sense" proves an inadequate mode of analysis for several types of speech that contain elements of clearly protected "pure" speech but produced with the hope of generating a profit. *See United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 468 (1995) (a "prohibition on

compensation unquestionably imposes a significant burden on . . . expressive activity"). Three examples prove the point. First, "'lifestyle' advertising[4] is certainly a significant, and maybe even the dominant, part of modern advertising . . . . The instant one recognizes . . . that modern advertising is multidimensional, the task of designing coherent First Amendment policies for such advertising becomes problematic." Smolla, 71 Tex. L. Rev. at 800. For example, the Ben and Jerry's corporation has established a reputation for social and political activism. It has carefully nurtured a corporate image that "focuses on community involvement and the firm's status as a socially responsible business." Lewis D. Solomon, *On the Frontier of Capitalism: Implementation of Humanomics by Modern Publicly Held Corporations: A Critical Assessment*, 50 Wash. & Lee L. Rev. 1625, 1645 (1993). A consumer who wears a tie-dyed Ben and Jerry's T-shirt, therefore, is choosing to express her association with the brand's image of "social conscience." Matt Haig, *Brand Royalty: How the World's Top 100 Brands Thrive & Survive* 168 (2004).

Second, music videos also blur the line between commercial and noncommercial speech. *See* Kozinski & Banner, 76 Va. L. Rev. at 641. Music itself, of course, is entitled to full First Amendment protection. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). A primary function of a music video is to

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[4] "'[L]ifestyle' advertising provides imagery that is rich in connotations. The choice of models, setting and activities can not only display attractive people as consumers of a brand, but can also display attitudes, emotional experience, social status, etc." *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1186 (E.D.N.Y. 2006).

promote the artist and the song, in hopes of persuading consumers to buy the album on which the song appears. Yet whether the video is treated as lesser-protected commercial speech is not obvious under the Court's current jurisprudence. The Kentucky Supreme Court, apparently the only court to consider this issue, held in *Montgomery v. Montgomery*, 60 S.W.3d 524, 529 (Ky. 2001), that

> [w]hile music videos are not produced primarily for the sale of the video but, rather, the underlying song, this does not strip them of their First Amendment protection. Music videos are in essence mini-movies that often require the same level of artistic and creative input from the performers, actors, and directors as is required in the making of motion pictures. Moreover, music videos are aired on television not as advertisements but as the main attraction, the airing of which, consequently, is supported by commercial advertisements. Simply put, the commercial nature of music videos does not deprive them of constitutional protection.

This holding provoked a dissent that seems equally plausible:

> A music video stands to an album the same way that a movie "trailer" or "teaser" stands in relation to a movie; it represents an attempt to entice a customer to purchase the right to hear or see the larger work. Indeed, music videos are "doubly" commercial speech. MTV, VH1, the Nashville Network, and other music-video cable channels select and show the videos that they believe will

> generate the highest advertising revenue. The video channels' unwillingness to broadcast controversial materials—materials likely to spook boycott-wary advertisers—provide additional evidence of the essentially commercial nature of the undertaking.

Id. at 534 (Keller, J., dissenting). The disagreement between the majority and dissent in *Montgomery* is significant only because the categorization of the video impacts the level of protection to which it is entitled under the First Amendment.

Third, the advent of blogging (sometimes corporate-sponsored and often not) takes word-of-mouth advertising to a whole new level, confounding attempts at characterization. Companies find it very advantageous to engage consumers where they are spending increasing amounts of time—blogs, websites, and social networking sites. Robert Sprague & Mary Ellen Wells, *Regulating Online Buzz Marketing: Untangling a Web of Deceit*, 47 Am. Bus. L.J. 415, 419 (2010) (citing Terence A. Shimp, et al., *Self-Generated Advertisements: Testimonials and the Perils of Consumer Exaggeration*, 47 J. Advertising Res. 453, 453 (2007)) (noting that "the rapid growth of online communication media—such as product chat rooms, blogs, message boards, and ratings websites— . . . have amplified the voice of the consumer and greatly enhanced consumers' ability to talk with one another about products and brands . . ."). Some companies have combined social networking to create "social-shopping" sites where consumers can read product recommendations written by company employees and also by consumers, as well as allowing

consumers to create wish lists and purchase products. *Id.* (citing Emily Steel, *Where E-Commerce Meets Chat, Social Retailing Gains Traction*, Wall St. J., Nov. 27, 2007, at B8). Companies may (and often successfully do) co-opt enthusiastic consumer contributors to their sites and begin providing free samples, gifts, or even cash to provide positive commentary on the companies' products. *Id.* at 453. At what point do the bloggers become mouthpieces for the corporation? It isn't at all clear.

These new methods of corporate communication with potential consumers were not anticipated years before they arrived on the scene, and it is safe to say that future years will bring innovations beyond our current imagining. *Cf. Citizens United v. FEC*, 130 S. Ct. at 890 ("Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux."). As "commercial" speech weaves in and around speech that otherwise would be entitled to full First Amendment protection, this Court should acknowledge that the *Central Hudson* doctrine provides inadequate protection. The commercial speech doctrine has been surpassed by events and deserves to be retired.

B. Corporate Speech Serves Valuable Functions To Convey Truthful Information and Check Other Sources of Information

Corporations play an important role in diffusing and checking societal and governmental accumulations of power. *See* David Millon, *The Sherman Act and the Balance of Power*, 61 S. Cal. L. Rev. 1219, 1243 (1988) ("Commercial opportunity meant more than just personal independence. Equally important, it guaranteed a balance of economic power in society."). Viewed in this light, governmental suppression of corporate speech takes on potentially ominous implications for avoiding the centralization of political power. *Citizens United*, 130 S. Ct. at 898 (First Amendment is premised on "mistrust of governmental power"). One can never be sure whether restrictions on corporate expression are in reality nothing more than governmental attempts to curb or intimidate a potential rival for societal authority.

Corporate speech counteracts the dominance of the few media megacorporations, of government officials who can command free access to the press and other means of disseminating information simply by virtue of their position. *See* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. Davis L. Rev. 663, 686 (1997). Given that most individual citizens either cannot, or choose not to, compete in public debates dominated by the press and the government, adding a component of corporate speech provides "a more diverse discourse than a debate dominated by two, so long as the third does not merely echo the others." David Shelledy, *Autonomy, Debate,*

and Corporate Speech, 18 Hastings Const. L.Q. 541, 571-72 (1991).

Consider whether—under the *Central Hudson* commercial speech rubric—the government could prohibit a private university's announcement, for the purpose of increasing enrollment (and thus, revenue), that it was forgoing government funding to avoid conditions attached to the money. If the government could prohibit this statement, on the purported public policy grounds of encouraging all universities to accept public funding and government priorities, not only would a certain element of democratically relevant information be unavailable to people, but "there would also be a legitimate fear that the government was seeking to suppress information concerning a particular commercial activity out of distaste for the values that it represents, and to ensure that more people did not partake in the activity and thereby increase its appeal." Charles Fischette, *A New Architecture of Commercial Speech Law*, 31 Harv. J.L. & Pub. Pol'y 663, 680 (2008).

"[T]he general rule is that the speaker and the audience, not the government, assess the value of information presented." *Edenfeld v. Fane*, 507 U.S. at 767. When the government silences speech, the vast majority of people will not know what they are missing. Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. Ill. L.F. 1080, 1082-83 (1976). Legislators have an incentive to achieve their regulatory goals covertly, avoiding the normal political response. Fischette, 31 Harv. J.L. & Pub. Pol'y at 685; *BellSouth*, 542 F.3d at 505 (law prohibiting utility from accurately stating that rate increase was to cover a tax increase "permits

legislators to duck political responsibility for the new tax"). The Vermont Legislature was very straightforward in its objective to stifle speech that promotes an activity the government disfavors, in an attempt to reduce that activity. By targeting the upstream communications, the government is able to hide its true purpose from all but the most intensely interested observers.[5] *See* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum. L. Rev. 334, 335 (1991) ("[T]he government may not suppress speech on the ground that the speech is likely to persuade people to do something that the government considers harmful.").

Citizens United affirmed the principle that the First Amendment must be neutral as between different speakers, holding that even corporate speech (at least on political matters) is fully protected by the First Amendment and cannot be subject to increased regulation merely because of its corporate authorship. 130 S. Ct. at 913. Although directed at political

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[5] The direct approach of banning sales representatives from engaging in consensual speech with physicians would be unconstitutional under *Virginia State Board of Pharmacy*, 425 U.S. at 761-62, while the general publication of the information itself is also protected under the First Amendment. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985) (compilation and sale of financial records entitled to First Amendment protection). Thus, the state's subterfuge. *Amici* do appreciate the patient privacy concerns raised by this case. As Vermont notes, much of the information would not exist but for government requirements. Pet. at 12. The Court's ruling that the transfer of data-mined information for any purpose is subject to full First Amendment protection should stand as a caution to legislators who demand the revelation of increasing amounts of patient data.

speech, *Citizens United* takes seriously the fundamental principle that the First Amendment safeguards the "marketplace of ideas" with all its "free market" connotations. *Id.* at 904-07, 914. The Court also rejected as a basis for legislation the notion that the government should address the market power of large corporations within the "marketplace of ideas." *Id.* at 899; Darrel C. Menthe, *The Marketplace Metaphor and Commercial Speech Doctrine: Or How I Learned to Stop Worrying About and Love* Citizens United, 38 Hastings Const. L.Q. 131, 133 (2010).[6]

"[T]he Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good." *See Rubin v. Coors Brewing Co.*, 514 U.S. at 497 (Stevens, J., concurring). The government may not prohibit "the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information." *Thompson v. W. States Medic. Ctr.*, 535 U.S. 357, 374 (2002). The state's concern that physicians will make "bad" decisions based on information provided by detailers cannot justify restrictions on truthful speech. Excluding corporate speech from the First

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[6] Legal theorist Ronald H. Coase bridged political speech and commercial speech with the marketplace of ideas concept:

> Coase asked why, if we trusted truth to win out in the marketplace of ideas (political speech), did we not similarly expect truth to win out in the marketplace of goods (commercial speech)? He argued that it made little sense to regulate information about the goods more heavily than information about political ideas when, if anything, "buying harmful ideas is just as bad as buying harmful drugs."

See Menthe, 38 Hastings Const. L.Q. at 145 (quoting Ronald H. Coase, *Advertising and Free Speech*, 6 J. Legal Stud. 1, 7 (1977)).

Amendment's reach thus has a detrimental impact on the most fundamental values underlying the protection of free speech. *See* Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 Geo. Wash. L. Rev. 235, 264 (1998).

Rational people need to listen to speech from both commercial and noncommercial sources with an equal amount of skepticism; even core political speech can be rife with falsehoods and misleading statements. *See*, *e.g.*, *City of Farmers Branch v. Hawnco, Inc.*, 435 S.W.2d 288, 292 (Tex. Civ. App. 1968) ("[P]ublic officials are not legally required to keep their campaign promises and whether they do or not they are answerable to the voters at the next election."). Most, if not all, speakers have some self-interest, whether financial or personal, in having their views accepted by their audience. This self-interest does not diminish the First Amendment protection sheltering "political candidates seeking elective office, consumer organizations seeking increased consumer protection, welfare recipients seeking increases in benefits, farmers seeking subsidies, and American auto workers seeking higher tariffs on foreign automobiles." Redish & Wasserman, 66 Geo. Wash. L. Rev. at 269-70. Instead, First Amendment values of truth-seeking and democratic participation are advanced when the substance of the debate contains elements from all interested parties. The simple fact that all sides of a debate can participate is "likely to spur expression's thoroughness, thoughtfulness, and breadth of distribution. To exclude all self-interested expression from the scope of the constitutional guarantee, then, would effectively gut free speech protection." *Id.*

Moreover, the argument that this free exchange of information results in such enormous pressure on physicians to prescribe particular drugs reflects a disturbing trend in courts to infantilize adult decision-makers. *See, e.g., Hojnowski v. Vans Skate Park*, 375 N.J. Super. 568, 587 (2005), *aff'd* 187 N.J. 323 (2006) (parent cannot sign pre-tort liability waiver on behalf of son at skateboard park because parents are assumed to be unable to withstand the "coercive pressures exerted by children" at the entrance of a "craved pleasure ground"); Walter Olson, *McDonald's Suit over Happy Meal Toys by California mom Monet Parham new low in responsible parenting*, N.Y. Daily News, Dec. 15, 2010 (Complaint alleges "Because of McDonalds marketing, [her daughter] Maya has frequently pestered Parham into purchasing Happy Meals, thereby spending money on a product she would not otherwise have purchased.").[7] As a particularly well-educated subset of the general population, physicians must be assumed to be capable of rendering their professional opinion about what drug to prescribe in accordance with their medical expertise and ethics. If particular physicians fear they lack the fortitude to resist the detailers' sales push, they may simply ban detailers from their offices.

Many cases involving corporate speech make it obvious that the government's approach is driven largely by viewpoint discrimination. Yet government may not silence one side of a public debate because it disagrees with it. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) (invalidating ordinance that

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[7] *Available at* http://articles.nydailynews.com/2010-12-15/news/27084481_1_french-fries-happy-meals-kids (last visited Mar. 4, 2011).

prohibits showing films containing nudity at a drive-in theater where the screen is visible from a public place). Relegating speech by those who have commercial interests to second-class status silences one side of a debate in just this way. *Cf. Citizens United*, 130 S. Ct. at 899 ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content."). In so doing, the government creates a bias in the democratic process designed to achieve the state's desired result, which is exactly the opposite of what the First Amendment is intended to do. Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. Ky. L. Rev. 553, 580 (1997). Moreover, silencing commercial speech "for the good of the citizenry" reflects a patronizing and offensive mistrust of citizens' ability to make personal choices based on the greatest range of information. James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from* Nike v. Kasky, 54 Case W. Res. L. Rev. 1091, 1104-06 (2004).

CONCLUSION

"One of the most delicate tasks a court faces is the application of the legislative mandate of a prior generation to novel circumstances created by a culture grown more complex." *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 273 (2d Cir. 1981). The current doctrinal framework is ill-suited to handle

the wide range of commercial and mixed commercial/ noncommercial speech present in the market today. The judgment of the Second Circuit Court of Appeals should be *affirmed*.

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Respectfully submitted,

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