No. 11-954

IN THE
SUPREME COURT OF THE UNITED STATES

BULLDOG INVESTORS GENERAL PARTNERSHIP, *et al.*
Petitioners,

v.

SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF *AMICI CURIAE* OF CATO INSTITUTE, COMPETITIVE ENTERPRISE INSTITUTE, JOHN BERLAU, DEIRDRE BRENNAN, JAMES McRITCHIE, ANTONY PAGE, AND ANDREW WEINMAN IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

Amici are journalists, academics, and think-tanks who have a noncommercial interest in vindicating the public's First Amendment right to receive information about hedge funds.[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, it publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs.

Competitive Enterprise Institute is a nonprofit organization that promotes free competition and civil liberties. Among its areas of concern are the free-speech rights of listeners and viewers. *See, e.g., Brown v. Entertainment Merchants Association*, 131 S.Ct. 2729 (2011) (joining amicus brief filed on behalf of consumer and student groups).

John Berlau is a fellow at the Competitive Enterprise Institute and former financial journalist

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[1] This brief is filed with the consent of all parties, who received 10 days notice. Grants of consent have been filed with this brief. No party's counsel authored this brief in whole or in part. No person or entity, other than *Amici*, paid for, or contributed money for, the preparation or submission of this brief.

who writes extensively for publications such as the *Wall Street Journal*.

James McRitchie is the publisher of Corpgov.net, a website that provides public information concerning corporate governance and shareholder's rights.

Antony Page is a professor at Indiana University School of Law—Indianapolis who specializes in securities regulation. *See, e.g.,* Antony Page, *Taking Stock of the First Amendment's Application to Securities Regulation*, 58 S.C. L. Rev. 789 (2007).

Andrew Weinman is an investment analyst at the Howard Hughes Medical Institute. His graduate school research into hedge fund arbitrage strategies was hampered by his inability to access the Bulldog Investors web site due to restrictions on its speech.

Deirdre Brennan has for years published the independent hedge fund news website called FINalternatives. Ms. Brennan worked previously as an editor and reporter for the publishing firm *Institutional Investor*, where she covered hedge funds. In her experience, hedge funds are one of the most difficult areas of the financial industry to cover, because their managers cannot freely discuss the facts of their business with journalists without fear of prosecution. Freeing hedge funds from the solicitation ban would enable them to come out from the shadows and educate the public as to what they actually do, promoting transparency.

All *Amici* are interested in gaining unfettered access to non-misleading information published by issuers of unregistered securities for academic, journalistic, or other non-investment reasons.

Under the regulation at issue here, journalists, academics, students and others who are not wealthy or financially sophisticated cannot gain access to truthful, non-misleading information published by hedge funds on websites and in emails for one reason alone: because they are not eligible to buy securities issued by hedge funds. Only people who are able to satisfy government-prescribed criteria of wealth and financial sophistication may do so.

These regulations infringe on noncommercial speech protected by the First Amendment, because *amici* are not persons to whom the issuer proposes a transaction. The parties have stipulated that the information *amici* cannot obtain does not concern an illegal transaction. See Pet. App. 68.

But even if the sequestered information is deemed to be commercial speech, regulations that restrict public access to truthful information about a lawful product are unconstitutional. The First Amendment protects the free flow of truthful information promoting even products that some people are legally ineligible to buy, like alcohol, firearms, and tobacco. Here, information about hedge funds is inaccessible even to people who want it for journalistic, research or other non-investment reasons. For these and other reasons, the

regulations' obstruction of access to truthful information about lawful securities violates the First Amendment.

SUMMARY OF ARGUMENT

The Massachusetts Supreme Judicial Court held that the petitioners' truthful, non-misleading speech could be suppressed in order to give them an incentive to register their securities. See Pet. App. 30a, 34a (stipulated that Bulldog Investors' communication is truthful and non-misleading).

This was an invalid objective, since, as the court below conceded, federal law preempts the State of Massachusetts from requiring such registration. Thus, Massachusetts is attempting to do indirectly what it admits it is forbidden to do directly.

The court below argued that banning such speech promotes the goals of federal and state securities laws. But that conclusion is at odds with the contrary judgment of many federal officials. At the federal level, there is bipartisan recognition that banning speech about unregistered securities harms both First Amendment values and economic growth. In November, by more than 400 votes, the U.S. House of Representatives passed H.R. 2940, which gets rid of the federal ban on advertising of these investment vehicles.

Even assuming, as the court below did, that circumventing federal preemption is a valid state objective, there is no evidence that the suppression of petitioners' speech would advance this objective more

than marginally. The court below relied on the conclusion of the State's hired expert that suppressing Bulldog's speech would give it an incentive to register; but the expert himself did not predict how often registration would ensue from such an incentive, how many registrations would occur, or in what fraction of cases hedge funds would choose to register rather than simply forgoing speaking about their fund in order to avoid the need to register. In the absence of such rudimentary information or specificity, the court below erred in relying on the expert's claims, even assuming a state could ever validly suppress truthful, non-misleading speech to force a speaker to register. Moreover, inducing registration was not the actual reason for the state's ban. That is just a *post hoc* pretext conjured up for purposes of this lawsuit.

Moreover, the court below gave short shrift to the fact that the First Amendment prohibits the government from restricting speech based on its audience. And it undermined First Amendment protections for noncommercial speech by wrongly treating speech to journalists, academics, and the public as if it were commercial speech subject to little First Amendment protection.

It similarly ignored this Court's teaching that a ban on truthful, non-misleading speech cannot be used as an incentive to register. Finally, the state's speech restriction does not "directly" advance its interest in disclosure, and is vastly overbroad.

ARGUMENT

I. The State's Claim That Its Speech Ban Complements A Larger Federal Regulatory Scheme Ignores The Many Federal Officials Who Have Criticized Such Bans.

Although it admitted that federal law prohibits Massachusetts from requiring petitioner Bulldog to register its securities, Pet. App. 40a n.19, the court below nonetheless upheld the challenged speech restriction as a way to induce Bulldog to register. Curiously, it suggested that upholding the restriction was necessary to effectuate the aims of the federal securities laws – a claim at odds with the views of many in Congress, and an assertion that SEC officials have recognized may be outmoded in the age of the Internet.

The court below claimed that the ban was "an integral part of a larger regulatory scheme" by federal and state governments that would be weakened if the challengers prevailed. Pet. App. 42a. It conceded that Massachusetts' rule is far from "the least restrictive means of achieving the government's objective." *Id.* at 38a. But it nevertheless upheld the rule out of a fear that doing otherwise would upset the proverbial apple cart of federal securities regulation, contending that "judicial restraint is appropriate where a court is asked to intrude on a system of securities regulation that has served the nation . . . well since 1933." *Id.* at 43a.

Citing an SEC interpretation of the securities laws that came decades after their enactment, Pet.

App. 9a, *citing Carl M. Loeb, Rhodes & Co.*, 38 S.E.C. 843, 850 (1959); *compare Lowe v. SEC*, 472 U.S. 181, 207 (1985) (SEC definition entitled to little "deference" where it was not drafted until "37 years after the passage of the Act"), the court below argued that Massachusetts' rule "largely tracks the requirements of federal securities laws" in its restrictions on general solicitation and advertising. Pet. App. 12a. Thus, it contended that "the plaintiffs' claims implicitly challenge the constitutionality of this provision of federal regulation," *id.* at 14a (even though it pointed to no similar actions by the federal SEC over Internet speech resembling Bulldog's[2]).

But there is an emerging consensus that such general solicitation bans have outlived their usefulness, if they ever were useful. The federal ban on general solicitation that Massachusetts' rule emulates is now under review at the Securities and Exchange Commission (SEC). In congressional testimony, SEC officials have noted that many consider the policy to be "a significant impediment to capital raising" and have questioned "the continued practical viability of the restriction in its current form given the presence of the Internet and widespread use of electronic communications."[3] As

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[2] *Compare Letter from SEC Chairman Mary L. Schapiro to the Honorable Darrell Issa* (Apr. 6, 2011), at 8 (even "intense media scrutiny" about Facebook securities did not necessarily indicate "general solicitation"; "at no point in time did the staff advise or instruct Facebook" that its publicity violated the law) (www.sec.gov/news/press/schapiro-issa-letter-040611.pdf).

[3] *Testimony of Meredith B. Cross and Lona Nallengara, Hearing before the House Committee on Financial Services*, Sept. 21, 2011 (www.sec.gov/news/testimony/2011/ts092111mbc-ln.htm) (citing the SEC's own Advisory Committee on Smaller Public

the House of Representatives has noted, "This prohibition on general solicitation and advertising has been interpreted to mean that potential investors must have an existing relationship with the company before they can be notified that unregistered securities are available for purchase. Requiring potential investors to have an existing relationship with the company significantly limits the pool of potential investors and severely hampers the ability of small companies to raise capital and create jobs."[4]

Members of Congress of both parties have acknowledged that the general solicitation ban is undermining the goals of transparency and efficiency in capital markets, by limiting the ability of startup entrepreneurs to communicate truthful information about their products to investors and the public. They have recognized that the ban is thwarting the beneficial use of new technologies such as social networking to help entrepreneurs gain the access to capital they need to keep their businesses growing.

As Rep. Carolyn Maloney (D-NY) noted, the ban has harmed the economy and financial markets: "Under our current system, companies seeking to raise capital by selling shares are barred from many types of advertising and solicitations. In effect, our current system tells businesses: Go out and create jobs, but don't tell people who might want to invest

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Companies and others); *see also* Chairman Mary L. Schapiro, *Testimony on the Future of Capital Formation*, House Oversight Committee, May 10, 2011, at 6 (similar) (www.sec.gov/news/testimony/2011/ts051011mls.htm).

[4] House Report on H.R. 2940 (http://financialservices.house.gov/UploadedFiles/HR2940hreport.pdf).

in your company or invest in your idea or invest in America, don't tell them anything. So this message is contradictory at best and patently unfair at worst, and it is bad for businesses at a time when we are asking businesses across this country to lead our economic recovery and to create jobs."[5] Similarly, Rep. Maxine Waters (D-CA) noted that "The current ban on general advertising has been interpreted to mean that companies can only raise capital from investors with whom they have had a preexisting relationship. This requirement would hamper their ability to obtain capital and it's therefore appropriate to modernize this provision."[6] As Rep. Don Manzullo (R-IL) put it, "Requiring potential investors to have an existing relationship with a particular company limits the pool of potential investors and hampers the efforts of small companies who have a great idea to raise much-needed capital to expand and hire workers."[7]

On Nov. 3, 2011, these legislators joined in a successful bipartisan vote to pass H.R. 2940, the "Access to Capital for Job Creators Act," which would repeal the SEC's general solicitation ban and modernize the securities laws to reflect the existence of the Internet and electronic communications.[8]

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[5] 157 Cong. Rec. H7289, H7291 (Nov. 3, 2011) http://www.gpo.gov/fdsys/pkg/CREC-2011-11-03/pdf/CREC-2011-11-03-pt1-PgH7289.pdf#page=2

[6] *Id.* at H7290.

[7] *Id.* at H7293.

[8] *Id.* at H7289 (H.R. 2940 § 2 directs the SEC to repeal the "prohibition against general solicitation or general advertising" contained in 17 CFR 230.502(c). "In addition to eliminating the ban on solicitations and advertisements by issuers and broker-dealers, H.R. 2940 will also enable offline and online forums

Although the bill passed by a margin of more than 400 votes, it faces an uncertain future in the Senate, given the differences in leadership and procedures of that body. Nevertheless, this broad array of voices speaking out against the ban shatters any illusion that it is an "integral" part of securities law.

The House's overwhelming recommendation that the ban on general solicitation be repealed undercuts the argument that such bans promote important government interests or that such interests cannot be achieved in less speech restrictive ways. *Compare Meredith Corp. v. F.C.C.*, 809 F.2d 863, 872 (D.C. Cir. 1987) (FCC Report recommending repeal of speech restriction belied government's claims that it "serves the statutory public interest") ; *Schurz Comms. v. FCC*, 982 F.2d 1043, 1047 (7th Cir. 1992) (FCC "tentative decision" agreeing with "staff study" about outmoded nature of FCC rules undermined claim that those rules actually promoted the public interest); *Bell South v. United States,* 868 F.Supp. 1335, 1341 (N.D. Ala. 1994) (FCC's recommendation that Congress repeal the statute at issue undermined the government's claims that it promoted "a substantial governmental interest" and was "narrowly tailored"); *Southern New England Tel. Co. v. United States*, 886 F.Supp. 211, 216, 219 (D. Conn. 1995) (noting that agencies had questioned, and the House had voted to repeal, the challenged law; rejecting argument that courts should "ignore the judgment of the federal agencies responsible for

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that bring together investors with companies that need funding to play an increasingly important role in facilitating capital investment in small companies." House Report on H.R. 2940, http://financialservices.house.gov/UploadedFiles/HR2940hreport.pdf.

regulating" the industry to infer that "the statute continues to fulfill the goals to which it was dedicated.").

The House's conclusion is relevant even though it is not specific to Massachusetts. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (considering other states' experiences as evidence of lack of requisite fit between challenged advertising ban and the State's asserted interest).

The court below effectively deferred to the respondent, giving him "leeway" to regulate based on his weighing of "the benefits and burdens of securities regulation," Pet. App. 39a, 43a; *but see 44 Liquormart*, 517 U.S. at 502 (bans on "non-misleading commercial speech" not entitled to special "deference"). But if anyone is due "deference" here, it is Congress, the chief source of securities regulation (and the "larger regulatory scheme" cited by the court below), not a state official seeking to impose his state's outmoded rule on an out-of-state business.

II. The State's Interest In Circumventing Federal Preemption Is Not Legitimate, Let Alone Substantial Enough To Justify Restricting Speech.

The State's attempt to prevent Bulldog from speaking about its business unless it first registers its securities is an attempt to circumvent federal law. The federal securities laws expressly preempt state registration requirements aimed at covered securities like Bulldog's. *See* 15 U.S.C. § 77r(b)(4)(D). The court below conceded that such registration

requirements are indeed preempted. Pet. App. 40a n.19. But it upheld the challenged speech restriction as a means of forcing firms like Bulldog to register, concluding that "the ban on general advertising of unregistered securities ... provides a powerful incentive for issuers to register", "despite the substantial costs of doing so." *Id.* at 37a.

Thus, the Massachusetts Supreme Court has effectively sanctioned the State's attempt to circumvent federal law. However, circumventing federal preemption is not a legitimate state end. Indeed, it violates the Constitution's Supremacy Clause, so it cannot justify restrictions on Bulldog's speech.

Federal law aims specifically shields entities like Bulldog from costly and burdensome federal and state registration requirements through its "private offering" exemption. See Pet. App. 10a-11a.[9] (As respondent's expert admitted, when enacting the Securities Act of 1933, Congress made the judgment that the exemption of private placements from registration and disclosure would not impair the integrity of the capital markets. JR 380-84.)

Just as federal law preempts the state from ordering Bulldog to register, it also prevents the State from pressuring it to register by conditioning

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[9] Registering its securities with the SEC would subject Bulldog to a host of burdensome Sarbanes-Oxley and Dodd-Frank regulations that Congress intended to apply mainly to large public companies, not the relatively small funds Bulldog operates. State registration would impose filing and processing fees and ongoing record-keeping and reporting obligations.

its ability to speak based on whether or not it registers. States cannot pressure companies into accepting regulation that is preempted by federal law. Such regulation is preempted even when an entity agrees to it in exchange for a government benefit. *Wisconsin Dept. of Industry v. Gould*, 475 U.S. 282, 289-90 (1986) (state contract conditions preempted by federal law despite being in voluntary "agreements"); *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008) (state cannot condition government contracts on firms' giving up their ability to speak for or against unionization). Even "agreements" with a state constitute state action subject to preemption. *See, e.g., Golden State Transit Corp. v. Los Angeles,* 475 U.S. 608, 618 (1986) (city may not condition franchise renewal on settlement of labor dispute). For example, state court consent decrees are subject to preemption by federal law – even where the regulated party has agreed to them. *Ridgway v. Ridgway*, 454 U.S. 46, 53 (1981) (federal law preempted settlement decree entered into "by voluntary agreement").

This echoes the "doctrine of 'unconstitutional conditions,'" under which a state may not require a person to give up a constitutional right "in exchange for a discretionary benefit." *Dollan v. Tigard*, 512 U.S. 374, 385 (1994); *see Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 38 (1910) (state cannot condition firm's opportunity to do business in the state on compliance with state rules that would otherwise be beyond the state's authority).

States cannot condition rights or benefits on a firm's acceptance of state regulation that would

otherwise be preempted, even when they seek to promote goals shared by federal law. *Gould*, 475 U.S. at 289-90 (preempting state law declining to do business with repeat violators of National Labor Relations Act). And states may not use even "indirect" means to regulate in ways preempted by federal law. *See Ingersoll-Rand v. McClendon*, 498 U.S. 133, 139 (1990); *see also* 15 U.S.C. 77r(a) ("no law, rule, regulation, or order or other administrative action of any State . . . requiring . . . registration or qualification of securities, . . . shall directly or *indirectly* apply to a security that ... is a covered security; or ... shall directly or *indirectly* prohibit, limit, or impose conditions . . .") (emphasis added).

Given its illegal aim, the state's interest should not be treated as valid. Even laudable and weighty goals do not qualify as compelling state interests for First Amendment purposes when they are pursued inconsistently. *See Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 547 (1993) (refusing to treat animal protection as compelling interest, where it was pursued inconsistently). An illegal goal is worse than one that is inconsistently pursued, and thus even less valid.

III. The State's Expert Failed To Show The Direct and Material Advancement Of Government Interests Needed To Justify The Ban.

Even if the court below is right that banning petitioners' speech will provide them with an additional incentive to register with the State, this is not enough. Not every marginal increase in the

incentive to register qualifies as a sufficiently direct and material advancement of this interest to satisfy the First Amendment. That would be like "burning the house to roast the pig." *See Sable Communications v. FCC*, 492 U.S. 115, 131 (1989).

As this Court recently noted, marginal increases in compliance with a regulatory goal are not essential enough to justify restrictions on otherwise-protected speech:

> Even if the sale of violent video games to minors could be deterred further by increasing regulation, *the government does not have a compelling interest in each marginal percentage point by which its goals are advanced.*

Brown v. Entertainment Merchants Assoc., 131 S.Ct. 2729, 2741 n. 9 (2011) (emphasis added). Restrictions on commercial speech must "contribute in a material way to solving the problem." *Edenfield v. Fane,* 507 U.S. 761, 776 (1993); *see also Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 795 (1988) (speech restriction not valid merely because it is "the most efficient means of preventing fraud," where narrower ban on fraud would also advance state's interest; "the First Amendment does not permit the state to sacrifice speech for efficiency"). So it is not enough that there is merely "some correlation" between a speech restriction and the interest that justifies it, if the correlation is rather low.

Yet the State's "expert," Professor Franco, did not make any effort to quantify how *much* banning

petitioners' speech would incentivize registration with the state of Massachusetts, or what fraction of businesses prevented from speaking would choose to register to obtain the ability to speak to Massachusetts residents. And as the very trial court that relied on his claims noted, "Professor Franco does not purport to quantify the effectiveness of the regulatory scheme, and the Court is not in a position to do so." Pet. App. at 78a. Instead, he relied on his interpretation of economic theories. *Compare Reno v. ACLU*, 521 U.S. 844, 885 (1997) ("theoretical but unproven" benefit of limiting offensive, indecent Internet speech in "fostering the growth" and wider use of the Internet was outweighed by First Amendment presumption against "governmental regulation of the content of speech"). Franco's expert report is as vague and unspecific as one this Court found wanting in *Walmart v. Dukes*, 131 S.Ct. 2541, 2553 (2011), in which an expert concluded that a company's culture fostered discrimination, but could not say whether that affected 0.5% of company decisions, or 95%.

Contrary to Franco's claims, it is obvious that out-of-state businesses like Bulldog would choose simply not to communicate with Massachusetts residents rather than go through a complicated registration process that imposes "substantial costs," see Pet. App. 37a. And that is what has happened here: in response to the administrative proceedings against it, Bulldog made its web site inaccessible to the public. See Pet. App. 7a, 56a.

Banning Bulldog's truthful communications with persons to whom it cannot and does not propose

a transaction (such as journalists and academics) does not "directly advance" the state's purported interest in disclosure. *See Edenfield,* 507 U.S. at 770. Moreover, the ban precludes disclosures by Bulldog even if they are equally or more informative than government-mandated disclosures would be.

IV. The State's Alleged Interest In Disclosure Is A Pretext That Cannot Support Its Speech Restriction.

The State's doubtful rationale that the speech restriction will encourage registration and related disclosures is irrelevant because it is simply a *post hoc* justification. See Pet. at 12, 15-16 (noting the "*post hoc*" nature of this "interest" and the "state court's after-the-fact invention of a disclosure-oriented governmental purpose").

Even under the intermediate scrutiny that applies to commercial speech restrictions, the "stated interests" relied on by the state must be the "actual interests" promoted by the restriction. *Edenfield v. Fane*, 507 U.S. 761, 768 (1993), *citing Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 730 (1982). A state's "justification must describe actual state purposes" that motivated the challenged rule's adoption, "not rationalizations for actions in fact differently grounded," and new justifications may not be "invented post-hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533, 535-36 (1996), *citing Hogan, supra. See also O'Brien v. Baltimore***,** 768 F.Supp.2d 804, 810 (D. Md. 2011) (ordinance imposing mandatory disclosures may not be based on new "justifications" generated "following

its enactment," *citing U.S. v. Virginia, supra*); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1268 (10th Cir. 2008) (in First Amendment case, court cannot rely on "factitious governmental interest found nowhere but in the defendants' litigating papers."); *White River Amusement Pub, Inc. v. Hartford*, 481 F.3d 163, 171 (2d Cir. 2007) ("pre-enactment evidence" required even for ordinance regulating sexually oriented businesses) (citing cases). Here, the State's disclosure-oriented interests were clearly concocted for purposes of this litigation.

V. The First Amendment Prohibits Arbitrary Restrictions Based On The Identity Of The Speaker Or Its Audience.

As the court below conceded, Bulldog's website and email about its securities are speech, and a ban or restriction on such speech requires First Amendment review. Pet. App. 15a-16a. If the speaker here was not an issuer of unregistered securities, no one would suggest that the government could ban or restrict truthful speech about those securities.

Put simply, the rule restricts *who* may read truthful information when it is published by *issuers* of unregistered securities, but imposes no such restriction when *non-issuers* publish identical information. This violates the First Amendment requirement of speaker- and listener-neutrality. *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653, 2663, 2671 (2011).

The rule permits an issuer of unregistered securities to communicate truthful, non-misleading

information (such as the information on Bulldog's website and email) to sophisticated investors. But it bars the flow of identical information from the issuer to people who are *not* sophisticated investors but are interested in it for journalistic, academic or other non-investment reasons. This is true even though the subjects discussed in Bulldog's website and email included shareholder activism, corporate governance and regulatory policy, which are matters of public concern, *see* Administrative Record (AR) 137-139, and contained "news articles about the funds." Pet. App. 87a. It is undisputed that this same information about numerous hedge funds can be read by the general public in various newsletters and publications about hedge funds. *See* JR 147-231.

Making truthful information about lawful activity accessible to journalists, academics and others who wish to receive it for noncommercial reasons is noncommercial speech regardless of who is speaking. Commercial speech restrictions are limited to speech that proposes no more than a commercial transaction. They do not apply when, as is stipulated here, no transaction is being proposed because proposing such transactions to journalists and the general public would itself be illegal.

Yet, journalists and academics such as *Amici*, who cannot and will not invest in Bulldog's securities, are now prohibited from reading Bulldog's website, no matter how newsworthy or significant the content may be. Massachusetts' regulation thus impermissibly restricts who may read information, and who may not.

The speech restrictions at issue here violate a central principle: the free flow of truthful information should not depend on the identity of the speaker or the listener. *See Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 193-194 (1999) ("*GNOBA"*) (to "select among speakers conveying virtually identical messages" is presumptively unconstitutional even "in commercial speech cases"). The judgment below fails to comply with this core First Amendment principle of speaker- and listener-neutrality.

VI. The Court Below Ignored The Substantial Impact Of The Challenged Rule On Noncommercial Speech And That It Was Not Narrowly Tailored.

The court below also erred by limiting its review as if the rule reached little but commercial speech. Journalists, academics, and others are barred by the general advertising ban from receiving truthful information about unregistered securities from issuers even though the information is sought, and would be used for, noncommercial, non-investment purposes. The regulation clearly reaches noncommercial speech and is, therefore, unconstitutionally overbroad. *Bd. of Trustees v. Fox,* 492 U.S. 469, 481-484 (1989).

This Court's precedent has narrowly defined commercial speech as "speech that does no more than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001); *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976). Speech does

not receive lessened First Amendment protection merely because it is intended to benefit the speaker financially. *Fox,* 492 U.S. at 482 (distinguishing "speech for profit" from "speech that *proposes* a commercial transaction, which is what defines commercial speech."); *GNOBA*, 527 U.S. at 185 (even if speaker's interest "is entirely pecuniary, the interests of, and benefit to, the audience may be broader"). "That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952).

Here, the would-be audience includes the *amici* journalists who wish to communicate with Bulldog's website (in the manner that Mr. Hickey did) with the intent of learning and writing about Bulldog's securities. The regulation makes Bulldog's speech inaccessible to a general audience that includes journalists, academics and others. This impermissibly stifles noncommercial speech.

On its face, the regulatory regime bans any "offer" of unregistered securities "by any form of general solicitation or general advertising." M.G.L. c.110A, § 401(i)(2). However, this concept of "offer" extends beyond the common-law contract concept to include information that "conditions the public interest in particular securities." Pet. App. 10a. Bulldog was found to have engaged in a prohibited "offer" to sell even though it was stipulated that neither Bulldog nor Mr. Hickey were interested in any transaction, based on an extremely expansive definition of "offer." Pet. 4; *see* Pet. App. 91a, 98a

n.10. The State relied on the fact that Bulldog operated a website with information about the fund's performance and philosophy that "fail[ed] to properly restrict access by prospective investors" because it might "condition the public mind or arouse public interest in" its securities. The State concluded as much even though it admitted that the web site was "not couched in terms of a direct offer." *See* Pet. App. 10a.

Thus, the rule restricts speech by Bulldog even if no transaction would be proposed by it in making such information openly accessible. If its openly accessible communications about shareholder activism and corporate governance are "designed to stimulate interest in Bulldog's funds," Pet. App. 101a, then they are deemed forbidden offers even when they are newsworthy to a journalist or academic to whom no transaction is proposed. Thus, the definition of a prohibited "offer" extends far beyond the relatively narrow ambit of speech to which the commercial speech test applies.

Massachusetts' legal fiction that the web site and email constituted an "offer" is not binding on this Court, which "has a constitutional duty to conduct an independent examination of the record" in First Amendment cases, without deference to the tribunal below. *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 567 (1995) (reversing a Massachusetts Supreme Court decision that applied a "peculiar," expansive definition of discrimination); *see also Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative

finding cannot limit judicial inquiry when First Amendment rights are at stake.").

In any event, this Court has recognized that "standards . . . accord[ing] less protection to commercial speech than to other expression . . . have been subject to some criticism." *United Foods*, 533 U.S. at 409; *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 367-368 (2002) (five Justices have "expressed doubts" about doing so). That reflects "the near impossibility of severing 'commercial' speech from speech necessary to democratic decisionmaking."[10] *44 Liquormart,* 517 U.S. at 521 (Thomas, J. concurring). That hedge funds have been barred from making truthful information about themselves available to journalists, in the name of limits on commercial speech, shows that judicial doubts about those limits are well-founded.

Here, the regulatory definition of "offer" is far too broad and vague to clearly define the kinds of speech that receive less robust First Amendment protection. Issuers cannot easily determine whether their speech will be treated by regulators as "offers" or "solicitation of offers to buy." The uncertainty faced by speakers, and the *ad hoc* discretion possessed by regulators, results in the self-censorship that the First Amendment vagueness doctrine seeks to combat. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

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[10] The Internet communications at issue illustrate this by mixing information about a hedge fund's performance with its opinions about regulatory policy and shareholder activism. They clearly do "more than propose a commercial transaction."

Furthermore, commercial speech restrictions must be "necessary as opposed to merely convenient," and "a last – not first—resort." *Western States,* 535 U.S. at 373. But here, no less burdensome alternatives were tried before banning the speech. Because it prohibits making truthful information accessible to journalists and others to whom no transaction is proposed, the ban restricts far more speech than is necessary. *Fox*, 492 U.S. at 480. Moreover, it leaves open no alternative channels of communication to such audiences, unlike the restriction in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 633 (1995), cited by the court below, which applied only for a "brief period," and left open alternative ways to communicate with prospective clients.

Finally, the ban does not apply to communications with sophisticated investors, and identical information can be made public by non-issuers. These "exceptions and inconsistencies," *Rubin,* 514 U.S. at 489, show that the government does not view the communications at issue as inherently harmful, and that restricting them is unlikely to "cure" any perceived problem.

VII. A Ban On Truthful Speech Cannot Be Justified As An Incentive For Speakers To Register.

The court below adopted Professor Franco's opinion that the ban on general solicitation and advertising incentivizes registration and government-approved disclosures. Pet. App. 36a-37a.

The government can incentivize issuers to provide disclosures by non-speech restrictive means. But it cannot ban truthful, non-misleading speech in order to do so. *Western States,* 535 U.S. at 370, 373 (striking down FDA restriction on advertising of unapproved, unregistered, pharmacy-compounded drugs).

This Court's precedent makes clear that there is a strong "presumption that the speaker and the audience, not the Government, should be left to assess the value of accurate and non-misleading information about lawful conduct," *GNOBA*, 527 U.S. at 195. But here, the state has declared that the value of truthful, non-misleading speech is so slight that it can be banned merely to provide an incentive for petitioners to register, even though it has not quantified the degree to which its ban will lead to any such registrations.

Moreover, the government can hardly show that it is necessary to preclude journalists, academics, and the general public from receiving truthful, non-misleading information about unregistered securities. Indeed, "[d]isclosure, and not paternalistic withholding of accurate information, is the policy chosen and expressed by Congress" in enacting the federal securities laws. *Basic Inc. v. Levinson*, 485 U.S. 224, 234 (1988). The ban on truthful and non-misleading general solicitation and advertising concerning lawful securities transactions contradicts this fundamental policy.

CONCLUSION

For all the foregoing reasons, *amici* urge this Court to grant certiorari.

Respectfully submitted,

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