No. 10-203

IN THE

Supreme Court of the United States

THOMAS J. CAHILL, ET AL.,

Petitioners,

v.

JAMES L. ALEXANDER, ET AL.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment allows a state to impose categorical restrictions on commercial speech when the state concludes that the speech is "unverifiable" or does not "assist the public in the intelligent selection of counsel," where the district court found, and the court of appeals affirmed, that the state offered no evidence that the speech is misleading or that the restrictions are reasonably tailored to advance any legitimate state interest.

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INTRODUCTION

This case presents the fact-bound question of whether the state of New York satisfied the heavy evidentiary burden required to justify its broad categorical restrictions on commercial speech. This Court established the relevant test for addressing that question in its 1980 decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), and has reaffirmed it in numerous subsequent cases. Under the *Central Hudson* test, the state must demonstrate—with actual evidence—"that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). In this case, the record evidence in support of the state's speech restrictions, in the words of the district court, was "notably lacking." Pet. App. 11a. Based on that lack of evidence, the decision below holding the restrictions unconstitutional presents a straightforward application of precedent and implicates no split in authority or other issues worthy of this Court's review.

Attempting an end-run around this well-established precedent, the state asks this Court to revolutionize its commercial-speech doctrine by holding that it need not satisfy *any* burden when it restricts speech that it deems to be "unverifiable" or when it concludes that the speech does not "assist the public in the intelligent selection of counsel." Pet. i. There is no basis in this Court's decisions, however, for the state's proposed rule, and the cases that the state asserts create a split of authority on the issue involved determinations only that the standard had been satisfied under the particular facts at issue in those cases. The state's rule, if adopted by this Court, would eviscerate the *Central Hudson* test while providing no alternative standard under which courts could review commercial-speech restrictions. The rule would not only create an arbitrary and unworkable system, it

would give states the power to prohibit commercial speech at will, without the burden of articulating, much less proving, an interest in doing so. That result would give states untrammeled authority to infringe First Amendment rights without meaningful judicial review—a result that this Court has repeatedly rejected.

The decision below correctly identified the applicable standard of review and applied it to the particular facts of the case. The state's disagreement with that outcome does not provide grounds for review by this Court. *See* S. Ct. R. 10. The Court should therefore deny the petition.

STATEMENT

In November 2006, the Appellate Division of the New York Supreme Court adopted sweeping amendments to the New York Code of Professional Responsibility. The state announced that the amendments were intended to protect consumers against "potentially misleading" advertisements. Pet. App. 5a-6a. However, the amendments actually restricted a wide variety of stock advertising devices—including attention-getting techniques, mottos, testimonials, and depictions of judges—that pose no realistic threat of misleading or otherwise harming consumers.

Although the amendments came on the heels of a report of a New York State Bar Association task force on lawyer advertising, there is no indication in the proposed amendments that they were influenced by the task-force report. To the contrary, as both the district court and the Second Circuit recognized, the amendments directly contradicted the task force's recommendations on nearly every front. *See* Pet. App. 11a-12a, 27a-28a. Where the task force rejected new content-based restrictions on advertising in favor of additional disclaimers, educational efforts, and tougher enforcement of existing rules, the amendments imposed detailed new regulations that were

among the most prohibitive in the country and restricted widespread advertising techniques that consumers see in the media every day. Indeed, the amendments were so restrictive that, had they had been evenly applied to other industries, they would have prohibited virtually every commercial advertisement currently running in most forms of media.[1]

As a result of the amendments, respondent James L. Alexander and his firm Alexander & Catalano found that almost all of the firm's advertisements—which they had run for years without complaint from state disciplinary authorities—were suddenly prohibited in New York. Pet. App. 3a-4a. These advertisements included television commercials featuring dramatizations, comical scenes, and special effects, which, for example, depicted Alexander and his partner as giants towering above local buildings, running to a client's house so fast that they appeared as blurs, jumping onto rooftops, and providing legal assistance to space aliens. *Id.* at 4a. The firm's ads, although at times silly, were popular among the firm's clients and posed no risk of deception or other harm to consumers. But because the ads undeniably contained attention-getting techniques, the firm was forced to pull them off the air and face the prohibitive cost of developing from scratch an entirely new advertising campaign. Pet. App. 4a. The firm was also forced to abandon its long-running slogan—"The Heavy Hitters"—in which it

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[1] Only one amendment relevant to this case bore any resemblance to the recommendations of the task force: a moratorium on contact with victims and victims' families in personal injury and wrongful death cases. Based on the task force's findings, the district court and the Second Circuit upheld the moratorium rule, and respondents do not challenge that determination in this Court.

had invested many years and dollars developing public name recognition. *Id.*[2]

Alexander, Alexander & Catalano, and the nonprofit group Public Citizen sued the state's disciplinary authorities in their official capacities, seeking a declaratory judgment that the amended rules were unconstitutional restrictions on commercial speech and an injunction against the rules' enforcement. Pet. App. 98a.[3] On cross-motions for summary judgment, the district court granted judgment to the plaintiffs based on this Court's decision in *Central Hudson*. Pet. App. 88a. Under the *Central Hudson* test, unless restricted speech is misleading or involves advertising for illegal goods or services, the state must satisfy a three-part test by showing: (1) that "the asserted governmental interest is substantial;" (2) that the regulation "directly advances the governmental interest asserted;" and (3) that the regulation "is not more extensive than is necessary to serve that interest." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) (quoting *Central Hudson*, 447 U.S. 557). Emphasizing the "notabl[e]" lack of evidence that the rules advanced any legitimate state interests or were reasonably tailored toward those interests, the court concluded that the state had failed to meet its burden of justifying restrictions on commercial speech under the second two prongs of the *Central Hudson* test. Pet. App. 11a-12a.

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[2] The petition's other examples of prohibited slogans (such as "the best in the business" and "always winners") were never used by Alexander & Catalano, or, to respondents' knowledge, by other lawyers in New York.

[3] Public Citizen sued on behalf of its members in New York, who were denied access to information about legal services as a result of the rules. Pet. App. 92a.

The Second Circuit affirmed. The court agreed with the district court that the defendants had "failed to carry their burden" under *Central Hudson*'s second and third prongs because the state had not shown that its rules materially advanced any legitimate state interest or were narrowly tailored toward the state's claimed objectives. Pet. App. 22a-34a. The court observed that the defendants had "introduced no evidence that the sorts of irrelevant advertising components" prohibited by its rules "are, in fact, misleading." Pet. App. 27a. Instead, the court concluded that the state appeared to have "conflate[d] irrelevant components of advertising with misleading advertising," though those concepts "are not one and the same." *Id.* The court stressed, however, that the state's "lack of sufficient evidence under ... *Central Hudson* [did] not foreclose a similar regulation being enacted validly in the future." Pet. App. 23a. It thus noted that its decision "returns the matter to the applicable legislating body" to "take a 'second look'" at whether there is a need for the rules. *Id.*

ARGUMENT

I. There Is No Split of Authority Among the Lower Courts.

A. In *Central Hudson*, this Court held that a state seeking to justify restraints on commercial speech that is not false or misleading has the burden of demonstrating that the restrictions were a response to evidence of a serious and intractable problem, and that it adopted the restrictions as "a last—not first—resort." *Thompson*, 535 U.S. at 373. This Court has stressed that the state's burden is a "heavy" one, *44 Liquormart v. Rhode Island*, 517 U.S. 484, 516 (1996), that requires submitting actual evidence, not just speculation and conjecture, that the restrictions are necessary to further an important state interest. *See Edenfield*, 507 U.S. at 770-71.

The state argues that the relevant commercial-speech test remains unsettled, citing a variety of lower court decisions that upheld state restrictions on particular advertisements. It is not surprising, however, that states applying *Central Hudson*'s fact-intensive test are sometimes successful in satisfying their burden. Because *Central Hudson* is an evidentiary test, the inquiry in each case turns on the specific facts and evidence submitted by the state in that case. The cases on which the state relies involved different rules and different evidence, and whether the states in those cases satisfied their burdens under *Central Hudson* says nothing about whether the state satisfied its burden here.

For example, the state relies on *Farrin v. Thigpen*, where the district court upheld the state's restriction on a particular advertisement that the court expressly found to be deceptive. 173 F. Supp. 2d 427 (M.D.N.C. 2001). Although the advertisement included a "fictional vignette," the court did not base its decision on the ground that dramatizations are unprotected by the First Amendment. *Id.* at 442. Indeed, the court disclaimed that interpretation of its holding, noting that "the use of dramatization was not a factor" and that "[n]o one contend[ed] that, through the dramatization, viewers will mistake the actors for actual insurance adjusters." *Id.* Instead, after a trial that included evidence on the advertisement's deceptiveness, the court made a factual finding that the advertisement was a materially deceptive depiction of an insurance company's settlement process and was thus prohibited by the state's ethics rules against false and misleading ads. *Id.* at 440.[4]

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[4] The Indiana Supreme Court's decision in *In re Keller*, also cited by the state, involved the same advertisement at issue in *Farrin*. 792 N.E.2d 865 (Ind. 2003). Like *Farrin*, the court found the ad

(continued ...)

Similarly, in *In re Zang*, 741 P.2d 267, 274 (Ariz. 1987), the Arizona Supreme Court upheld disciplinary sanctions against lawyers who starred in "very dramatic" television commercials, but not because the commercials were dramatic. Rather, the court concluded, based on record evidence, that the lawyers in their commercials portrayed themselves as skilled trial practitioners, when in fact they had very little trial experience and "scrupulously avoided" taking cases to trial. *Id.* at 277. Although the court did generally caution lawyers against overly dramatic advertisements, noting that such advertisements "should be examined carefully to assure that they are neither false nor misleading," the court also specifically stated that dramatic advertisements were not prohibited by the state's ethics rules. *Id.* at 279.

The decision that comes closest to adopting the rule advanced by New York is *Florida Bar v. Pape*, in which the Florida Supreme Court upheld disciplinary sanctions against a firm for its use of the slogan "pit bull" and the image of a pit-bull dog. 918 So. 2d 240 (Fla. 2005). Although *Pape* included some broadly worded dicta regarding the irrelevance of the advertisements, the precise basis for the court's holding was that the pit-bull image suggested that the advertising lawyer would "get results through combative and vicious tactics that will maim, scar, or harm the opposing party." *Id.* at 246. Relying on evidence regarding the public's perception of pit bulls, the court concluded that the advertisement "suggest[ed] behavior, conduct, or tactics that are contrary to [the] Rules of Professional Conduct." *Id.* The court's decision was therefore based on its conclusion that the advertisements constituted a promise to violate the rules, and thus fell outside the protection of the First Amend-

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"more likely to deceive the public than inform it." *Id.* at 869

ment. *See Central Hudson*, 447 U.S. at 566 (holding that advertisements that advertisements for illegal goods and services are not protected by the First Amendment).

Regardless of the correctness of the state's cases on their facts, those cases do not conflict with the lower court's decision here. The court in this case recognized *Central Hudson* as the proper standard, and its conclusion that the state failed to satisfy that standard because it submitted no evidence in support of its rules was a straightforward application of that test. *See* S. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

B. Although the petition suggests (at 3) that the state sought to prohibit "deceptive and misleading advertising," it has never presented any evidence that anyone could conceivably have been misled by the advertising devices it prohibited. The state produced no disciplinary records, studies, surveys, or empirical research of any kind suggesting that its amended rules addressed anything but non-existent problems. Nor has the state even clearly articulated why it believes that stock advertising devices—such as attention-getting techniques, actors portraying judges, testimonials, endorsements, and mottos—are deceptive or otherwise harm consumers. As the Second Circuit noted, "given the prevalence of these and other kinds of special effects in advertising and entertainment, we cannot seriously believe ... that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics." Pet. App. 28a. Indeed, the Federal Trade Commission—the agency charged with enforcing federal laws against unfair and deceptive trade practices—wrote to the state to warn it that consumers would not be misled by the prohibited advertising devices but that the rules could hurt

consumers by making it more difficult to find a lawyer and by stifling competition in the legal marketplace. Pet. App. 34a, 104a-105a.

The state (at 6-7, 30) relies on the state bar association's task-force report for the proposition that the speech at issue here is misleading, but the task force itself did not conduct any empirical research or consider any evidence on what sorts of advertising techniques are likely to mislead the public. In any event, as both the district court and Second Circuit recognized, the report does not support the state's position. *Id.* at 11a-12a, 27a-28a. The report recommended revisions to the advertising rules that revolved around a central theme: The state should not adopt new content-based restrictions on lawyer advertising, but should instead require disclaimers on potentially misleading ads, step up enforcement of existing rules, increase efforts to educate lawyers about the rules, and conduct outreach efforts to educate the public about the legal system and the role of lawyers. *See id.*; *see also Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977) ("If the naiveté of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective."). The state's decision to adopt categorical restrictions on lawyer advertising directly contradicted these recommendations. Accordingly, the only evidence offered by the state cuts against its position.

II. The State's Proposed Rule Flies in the Face of Established Precedent And Would Give States Virtually Untrammeled Authority to Restrict Commercial Speech.

A. Recognizing that the lack of any evidence in support of its rules makes it impossible for it to satisfy its burden under *Central Hudson*, the state advances the

proposition that commercial speech falls completely outside the protection of the First Amendment—and therefore that neither *Central Hudson* nor any other standard of review should apply—when the speech is either "unverifiable," or "do[es] not assist the public in the intelligent selection of counsel." Pet. i. The state relies for this proposition on *Bates*, 433 U.S. at 366. There, this Court left open the question of what standard to apply to "advertising claims relating to the quality of legal services," which the Court noted "probably are not susceptible of precise measurement or verification." *Id.*

After *Bates*, however, this Court stated in *Central Hudson* the now well-established standard to apply in commercial-speech cases, holding that a state must satisfy the standard's three-part test as long as the speech "concern[s] lawful activity" and is not "misleading." *Central Hudson*, 447 U.S. at 566. Since then, the Court has not recognized exceptions to *Central Hudson*, and has repeatedly reaffirmed that "[c]ommercial speech that is not false, deceptive, or misleading can be restricted ... only if the State shows that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." *Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136, 142 (1994). And the Court has applied that standard even to speech that could be described as "unverifiable" or "irrelevant." For example, in *Shapero v. Kentucky Bar Association*, the Court rejected the state's argument that a mailed solicitation could be prohibited because it included statements—such as "It may surprise you what I may be able to do for you"—that "stat[ed] no affirmative or objective fact," constituted "pure salesman puffery," and were an "enticement for the unsophisticated, which commit[ted] [the lawyer] to nothing." 486 U.S. 466, 478 (1988) (internal quotation marks omitted). Recognizing that consumers are not so

easily misled by stock advertising techniques, the Court has also refused to credit "the paternalistic assumption" that consumers of legal services "are no more discriminating than the audience for children's television." *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 105 (1990).

B. In the face of decades of well-established precedent on the proper standard in commercial-speech cases, the state relies on this Court's summary dismissal for lack of a substantial federal question in *Committee on Professional Ethics v. Humphrey*, 377 N.W.2d 643 (Iowa 1985), *summarily dismissed by* 475 U.S. 1114 (1986). The state asserts that *Humphrey* adopted the position it advocates here, and that the summary dismissal indicates this Court's approval of that position. The language of the Iowa Supreme Court on which the state relies, however, does not come from the decision that was summarily dismissed, but from an earlier iteration of the same case that this Court summarily *vacated* in light of its decision in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985). *See* 355 N.W.2d 565, *vacated and remanded by* 472 U.S. 1004 (1985). This Court cannot be said to have adopted the reasoning of a decision it vacated.

To be sure, the Iowa Supreme Court reaffirmed its decision on remand, and this Court summarily dismissed the appeal of *that* decision. But the Iowa Supreme Court's second opinion was based on different reasoning, distinguishing *Zauderer* on the ground that it involved print, rather than television advertising, and concluding that this Court's commercial-speech decisions did not apply to broadcast media. In contrast, the speech restrictions at issue here apply to all forms of media, and the state does not argue that a different rule should apply to ads that appear on television. Moreover, since the summary reversal in *Humphrey*, this Court has applied *Cen-*

tral Hudson to television advertisements. *See Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999); *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993).

In any event, this Court's summary dismissal cannot be read to suggest adoption of the broad rule that the state advances here. This Court has stressed that a summary reversal "is not to be read as a renunciation ... of doctrines previously announced in [] opinions after full argument," and should not be "understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (internal quotation marks omitted). In *Humphrey*, a key factor justifying the decision was the court's conclusion, based on record evidence developed at an evidentiary hearing, that the advertisements misrepresented the experience of the advertising lawyers, who had tried only a few cases. 355 N.W.2d at 567, 570. The court also expressed concern that, while advertising their availability on a contingency fee basis, the lawyers were "conspicuously silent" about the client's responsibility for costs—an omission for which this Court in *Zauderer* had just held the First Amendment did not prevent state disciplinary action. 471 U.S. 626.

Especially given this Court's adoption of the *Central Hudson* test just five years earlier, it is unlikely that the Court would have chosen a summary disposition as a vehicle to announce a major modification to the test. And after more than twenty years of subsequent decisions on the commercial-speech doctrine, which have gradually elaborated on the state's burden under *Central Hudson* but have never mentioned *Humphrey*, it is implausible that the Court's summary dismissal requires application of a different rule.

C. In addition to lacking any support in case law, the state's proposed rule would be unworkable in practice and would effectively eviscerate *Central Hudson*. As this Court has recognized, "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976). Even if a state considers certain information to be "of slight worth," the First Amendment dictates that it is for "the speaker and the audience, not the government, [to] assess the value of the information presented." *Edenfield*, 507 U.S. at 767. By removing certain categories of non-misleading speech from the scope of the commercial-speech doctrine that the state deems to be "irrelevant" or "unverifiable," the state would grant itself authority to impose restrictions on speech without the need to prove or even articulate an interest in doing so, and without showing that the restrictions are either necessary or effective to advance any legitimate purpose. Such a test would turn *Central Hudson* on its head, replacing the state's heavy burden of proof with effectively unreviewable authority to prohibit broad categories of commercial speech based on justifications with no basis in fact. This Court should decline the state's suggestion that it consider such an unworkable and dangerous test.

III. This Case Presents No Issues of National Importance Warranting This Court's Review.

The state suggests that review in this case is warranted because the decision below jeopardizes rules of other states that have adopted similar restrictions. The New York rules declared unconstitutional here, however, are nearly unique in the nation—only one other state has adopted any of them, and that state's rules are subject to

a pending constitutional challenge.[5] To be sure, other states have rules regarding advertising techniques that could be characterized as "unverifiable" or "non-informational" under the state's proposed test, but almost all those rules restrict such ads only when they are false or misleading. Aside from New York, only Arkansas and Wyoming impose total bans on dramatizations, and those rules, as far as respondents are aware, have never been challenged in court.[6]

A few states also have rules requiring advertisements similar to Alexander & Catalano's to include disclosures or disclaimers. Eight states, for example, require dramatizations to be accompanied by a disclosure that the scenes do not depict actual events.[7] As the Second Circuit recognized, however, disclosure requirements are subject to a different analysis under the First Amendment because they are generally designed to facilitate, rather than restrict, the communication of information to consumers. Pet. App. 33a. Indeed, central to the decisions of both the district court and the Second

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[5] Louisiana adopted New York's rules against the use of trade names and depiction of judges after the New York rules had been declared unconstitutional. The constitutionality of Louisiana's rules is currently under review by the U.S. Court of Appeals for the Fifth Circuit. *Public Citizen, Inc. v. La. Attorney Disciplinary Bd.*, 642 F. Supp. 2d 539 (E.D. La. 2009), *appeal argued*, No. 09-30925 (5th Cir. Oct. 5, 2010).

[6] *See* Ark. Rules of Prof'l Conduct R. 7.2(e); Wyo. Rules of Prof'l Conduct R. 7.2(h).

[7] *See* Cal. Rules of Prof'l Conduct R. 1-400, standard 13; La. Rules of Prof'l Conduct R. 7.2(c)(1)(I); Mo. Rules of Prof'l Conduct R. 4-7.1(i); N.C. Rules of Prof'l Conduct R. 7.1(b); Or. Rules of Prof'l Conduct R. 7.1(a)(10); Pa. Rules of Prof'l Conduct R. 7.2(f); R.I. Rules of Prof'l Conduct R. 7.1(c); S.D. Rules of Prof'l Conduct R. 7.1(c)(15).

Circuit was their conclusion that the state could have achieved its goals using less restrictive methods, such as requiring a disclosure, instead of imposing an outright ban. *Id.*

The state also argues that the decision below "threaten[s] to disrupt the efforts of the States in performing their traditional role of regulating the professional conduct of attorneys who are licensed within their borders." Pet. 29-30 (citing *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)). To say that states have an interest in regulating a profession, however, only begs the question whether the state has an interest in regulating a profession in the ways it has chosen to regulate here. This Court has repeatedly applied the *Central Hudson* test to restrictions on lawyer advertising, and has held that "[p]rophylactic restraints that would be unacceptable as applied to commercial advertising generally are equally unacceptable as applied to ... advertising" by lawyers. *Zauderer*, 471 U.S. at 646-47; *see Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) ("It is now well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection."). Although states have a strong interest in regulating lawyers and other professionals to prevent fraud and protect the public's health and safety, this Court recognized two years after *Goldfarb* that a state does *not* have an interest in restricting commercial speech based on its assumption that "the public is not sophisticated enough to realize the limitations of advertising." *Bates*, 433 U.S. at 375.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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