No. 11-552

In the
Supreme Court of the United States

KANSAS CITY PREMIER APARTMENTS, INC.,

Petitioner,

v.

MISSOURI REAL ESTATE COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Missouri

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

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QUESTION PRESENTED

Whether a court considering a First Amendment challenge to a law that restricts protected speech may presume the law's constitutionality and require the party whose speech is being restricted to prove that the law "clearly and undoubtedly violates the Constitution."

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) and Cato Institute respectfully submit this brief amicus curiae in support of the Petitioner.[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 operates its Free Enterprise Project, that seeks, among other things, to elevate commercial speech to the full protection of the First Amendment to the United States Constitution. 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.*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *Wine & Spirits Retailers, Inc. v. Rhode Island & Providence Plantations*, 552 U.S. 889 (2007); *Nike, Inc. v. Kasky*,

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file 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.

539 U.S. 654 (2003); and *FEC v. Beaumont*, 539 U.S. 146 (2003). 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, *The Right to Earn a Living* (2010).

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual Cato Supreme Court Review, and files amicus briefs. The present case centrally concerns Cato because it involves both the freedom of speech and government infringement on the right to earn an honest living.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

Less than a decade ago, this Court came *this close* to addressing the conflicts and confusion arising from the inherent struggle between the commercial speech doctrine and the First Amendment's broad protection of free speech. Over the dissent of three Justices, however, the petition in *Nike v. Kasky* was dismissed as improvidently granted on the final day of the 2003 term, 539 U.S. 654, at the cost of what Justice Breyer described as a "heavy First Amendment price." *Id.* at 683 (Breyer, J., dissenting from dismissal). The Court has touched on aspects of commercial speech in

subsequent years, most notably in *Citizens United* and *Sorrell v. IMS Health Inc.* In both those cases, the Court held that, at least in some respects, corporate or commercial speech enjoyed full protection under the First Amendment. *See Citizens United*, 130 S. Ct. at 907 (political speech cannot be suppressed based on the speaker's corporate identity); *Sorrell*, 131 S. Ct. at 2659 (content-based ban on commercial speech is entitled to heightened scrutiny). But the time has come for the Court to confront the question directly—whether the First Amendment allows courts to discriminatorily deprive speech of legal protection because that speech is related to a commercial transaction.

The "commercial speech doctrine" as a whole remains fractured, with ever finer distinctions leading to conflicting and irreconcilable results. Freedom of speech deserves better. In this case, the Supreme Court of Missouri's decision allows the state to censor truthful speech as part of an occupational licensing law, itself a troubling infringement on the individual right to earn a living. *Kansas City Premier Apartments v. Missouri Real Estate Comm'n*, 344 S.W.3d 160, 169 (Mo. 2011). The decision below not only failed to apply heightened (much less strict) scrutiny to the content-based restriction on petitioner's speech, but actually presumed the constitutionality of the censorship, placing the burden of escaping the restriction on the speaker, *id.* at 167, while attempting to apply *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980). *Kansas City*, 344 S.W.3d at 168-69. This upside-down approach reflects the deep divisions and confusion generated by the commercial speech doctrine. This Court should grant the petition to cut through the doctrinal knots and

restore the constitutional mandate for a clear, strict-scrutiny approach to all truthful speech.

ARGUMENT

I

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICTS AND CONFUSION INHERENT IN THE "COMMERCIAL SPEECH DOCTRINE"

A. The Ad-hoc Development of the Commercial Speech Doctrine Has Left the Lower Courts in a State of Confusion and Disarray

For 155 years after the First Amendment was ratified, the Court was silent on the subject of commercial, or corporate, speech. Such speech existed, to be sure, but it did not generate any specific jurisprudence. In retrospect, silence was golden, as the decisions that later specifically targeted the constitutional protection for commercial speech resembled a discordant cacophony of sound.

In 1942, this Court declared in an almost offhand manner that commercial speech received no First Amendment protection, *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), but this aberration was reversed in 1976, when the Court held that commercial speech was entitled to very serious protection. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 761-62 (1976). Four years later, the Court devised a four-part test for scrutinizing restrictions on commercial speech, *Cent. Hudson*, 447 U.S. at 564, then revised that test essentially to combine two of the

analytical elements. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996). The difficulty of applying even the revised test is reflected in the fact that, depending on the speaker and the message conveyed, this Court has produced inconsistent rulings in similar cases. *Compare Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (allowing regulation of commercial expression by attorneys); *with Bates v. State Bar*, 433 U.S. 350, 384 (1977) (disallowing regulation of commercial expression by attorneys). It is apparent that *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) ("[C]ommercial speech" was "an empty vessel into which content is poured.").

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) ("[A]mbiguities 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) ("[T]he 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*

Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1342 (2010) (Thomas, J., concurring in part and concurring in the judgment) ("I have never been persuaded that there is any basis in the First Amendment for the relaxed scrutiny this Court applies to laws that suppress nonmisleading commercial speech."); *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.").

Against this shifting background, lower courts continue to struggle to discern when speech is properly labeled "commercial." For example, in *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 505 (6th Cir. 2008), the Sixth Circuit was uncertain whether a law prohibiting a utility from identifying on a commercial invoice the source of tax levied on utility users implicated commercial or political speech. The court found the prohibition to be a "hybrid . . . that implicates commercial *and* political speech," and complained that "[i]t remains difficult to pin down where the political nature of these speech restrictions ends and the commercial nature of the restrictions begins." *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."); *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.").

When lower courts decide that speech is sufficiently "commercial" and that *Central Hudson* does apply, the resulting analyses range all over the map. *See*, *e.g.*, *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 "the *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 *Cincinnati v. Discovery Network*, 507 U.S. 410, 419 (1993))); *Oxycal Labs., 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.").

B. The Lower Courts Need Guidance in Reconciling the More Robust First Amendment Implications of *Citizens United* and *Sorrell* with the Increasingly Unworkable *Central Hudson* Test

Justice Breyer's dissent in *Nike*, followed by the Court's decisions in *Citizens United* and *Sorrell*, offer tantalizing glimpses of a First Amendment jurisprudence that does away with these often-

arbitrary distinctions. *Nike*, 539 U.S. at 675 (If the Court decided the case, "a true reversal [of the California decision marginalizing the First Amendment protection of some types of corporate speech] is a highly realistic possibility."); *Citizens United*, 130 S. Ct. at 908 ("When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."); *Sorrell*, 131 S. Ct. at 2667 (Because "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied," the Court did not need to decide whether all speech hampered by the Vermont anti-detailing statute was commercial.).

If the decisions in *Citizens United* and *Sorrell* suggested a trend toward greater protection of corporate or commercial speech, this Court's reluctance thus far to explicitly disavow *Central Hudson* has left lower courts little room to ascertain a broader principle beyond the cases' factual circumstances. For example, in *Dex Media West, Inc., v. City of Seattle*, No. C10-1857JLR, 2011 U.S. Dist. LEXIS 69075 (W.D. Wash. June 28, 2011), the district court considered a city ordinance that banned the distribution of "yellow pages" phone directories unless the distributors obtained a license, paid a per-directory distribution fee, and advertised the city's "opt-out" registry on the front cover. *Id.* at *3-*4. In challenging the ordinance, the distributor argued that the directories were entitled to full First Amendment protection, as they contained not only advertisements, but also maps, information regarding community affairs and public safety, as well

as political information. *Id.* at *11, *19. The court was unpersuaded, holding, "the presence of noncommercial speech does not alter the commonsense conclusion that yellow pages directories are commercial speech." *Id.* at *14-*15 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983)). The court then analyzed the ordinance under *Central Hudson*, which it described as requiring "intermediate scrutiny," *id.* at *23, and upheld it. *Sorrell* was confined to the context of laws reflecting "government paternalism" that adversely affect "private decision-making." *Id.* at *24-*25. *See also Hart v. Elec. Arts, Inc.*, No. 09-cv-5990, 2011 U.S. Dist. LEXIS 101254, at *29-*30 (D.N.J. Sept. 9, 2011) (Noting that *Sorrell* did not "explicitly overrule" *Central Hudson* and further distinguishing *Sorrell* because it was not an intellectual property case, as was the case under consideration.); *Yeager v. AT&T Mobility, LLC*, No. S-07-2517, 2011 U.S. Dist. LEXIS 96952, at *13, *17 (E.D. Cal. Aug. 30, 2011) (Dismissing relevance of *Citizens United* because it was "focused on political speech and campaign spending, and has no application" in a case involving appropriation of a public figure's name for an advertisement; and distinguishing *Sorrell* because it involved "the challenge to a state law implicating the First Amendment, [which] is far different from the challenge to a Press Release made here by an individual.").

The bottom line in these cases is that neither *Citizens United* nor *Sorrell* overruled *Central Hudson* or *Bolger*, and the lower courts are left in the unenviable position of attempting to reconcile widely disparate cases along the First Amendment spectrum. The Court should grant the petition in this case to simplify and streamline the "commercial speech

doctrine" by applying the same level of strict scrutiny to restrictions on commercial or corporate speech as would be applied to restrictions on speech by other speakers.

II

AN OCCUPATIONAL LICENSING SCHEME THAT CENSORS TRUTHFUL SPEECH OTHERWISE DESERVING OF FIRST AMENDMENT PROTECTION PRESENTS A MATTER OF NATIONAL IMPORTANCE

The decision below held that the speaker of truthful, nonfraudulent speech held the burden of proving the unconstitutionality of the speech restrictions, rather than the state having the burden of justifying the infringement of the speaker's First Amendment rights. *Kansas City*, 344 S.W.3d at 166-67. This holding is plainly at odds with the usual approach of requiring the state to prove the constitutionality of a challenged speech restriction. *Bolger*, 463 U.S. at 71 ("The party seeking to uphold a restriction on commercial speech carries the burden of justifying it."). The decision below apparently results from confusion about the intersection of a presumptively constitutional occupational licensing scheme and the impact of that scheme upon a presumptively unconstitutional restriction on free speech. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 n.13 (1988) (In a challenge to a licensing scheme for professional charitable fundraisers, the Court rejected the "assertion that this statute merely licenses a profession" or that "licensure was devoid of all First Amendment implication.").

This combination of issues has not yet been squarely addressed by this Court. *See* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 834-35 (1999) ("[T]he Supreme Court and lower courts have rarely addressed the First Amendment contours of a professional's freedom to speak to a client. Accordingly, courts have failed to develop a general method for reviewing restrictions on professional speech." (footnote omitted)). The Court did, however, touch on the subject briefly in *Lowe v. Securities & Exchange Commission*, 472 U.S. 181 (1985). That case concerned an SEC order prohibiting the publication of a securities newsletter by a former investment adviser who had lost his license due to fraudulent conduct. *Id.* at 183-84. The question was whether nonpersonalized articles of interest to investors was the type of communication limited to licensed investment advisers under the Investment Advisors Act of 1940, 15 U.S.C. § 80b-1, *et seq*. *See id.* at 183. None of the information published in the newsletters was false or materially misleading. *Id.* at 186.

The Court decided the case on statutory grounds, in an effort to avoid the First Amendment concerns implicated by interpreting the Act to cover Lowe's newsletter. *Id.* at 210 n.58 ("[I]t is difficult to see why the expression of an opinion about a marketable security should not also be protected [by the First Amendment]."). The Court concluded that the statute did not reach the publication of impersonal investment advisory material. *Id.* at 208.

Justice White concurred in the judgment. He would have met the First Amendment issue head-on,

noting that the case, like this one, marks "a collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of freedom of speech and of the press guaranteed by the First Amendment." *Id*. at 228 (White, J., concurring in the judgment). He acknowledged that the government does have the power to regulate some professional conduct, but noted that, "[a]t some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press; beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment." *Id.* at 230. For this reason, Justice White rejected a presumption of the statute's constitutionality. "[A Legislature's] characterization of its legislation cannot be decisive of the question of its constitutionality where individual rights are at issue." *Id.* Turning to the case at hand, Justice White opined:

> If the government enacts generally applicable licensing provisions limiting the class of persons who may practice [a] profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny. Where the personal nexus between the professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command . . . .

Id. at 232 (White, J., concurring in the judgment) (footnote omitted). While at least recognizing the First Amendment implications of the *Lowe* case, Justice White's concurring opinion was insufficiently protective of free speech rights, in that he carved out a "personalized speech" exception that he believed could be regulated without constitutional infirmity. *Id.* at 233. *See also* Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 Seattle U. L. Rev. 885, 976 (2000) ("Although the *Lowe* Court took a significant step in favor of client empowerment by reaffirming the First Amendment protection of impersonal publications, it fell short of articulating a consistent theory because it endorsed prior restraints on some unlicensed advisors, even when the customer is fully aware of the speaker's unlicensed status.").

More recently, this Court suggested a willingness to take that additional step to protect even "personalized speech." In *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2730 (2010), the Court upheld a criminal statute that prohibits provision of "material support or resources" to foreign terrorist organizations, even when "support" takes the form of speech. The government had argued that only conduct, not speech, was at issue in the case, but the Court rejected this position, holding instead that the statute was a content-based regulation of speech, requiring strict scrutiny. *Id.* at 2723-24 ("If plaintiffs' speech to those groups imparts a 'specific skill' or communicates advice derived from 'specialized knowledge' . . . then it is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge." (citation omitted)). The Court upheld the statute, even under this strict review, but emphasized

that its narrow holding did not cover *independent* speech that might benefit foreign terrorist organizations. *Id.* at 2730.

This case combines the nationally important commercial speech issue with the equally nationally important question of the extent to which the Constitution tolerates occupational licensing.[2] In addition to the Missouri Supreme Court's decision in this case, the Eleventh Circuit also recently addressed the combination of occupational licensing and free speech. The Eleventh Circuit case involves regulation of interior designers, holding that "'[a] statute that governs the practice of an occupation is not unconstitutional as an abridgement of the right to free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation.'" *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011) (citation omitted), *petition for writ of certiorari pending* (Supreme Ct. docket no. 11-

[2] It is not a controversial proposition that established businesses frequently exploit occupational licensing laws to stifle fair competition and thereby raise their own prices. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting) ("[P]rivate parties have used licensing to advance their own interests in restraining competition at the expense of the public interest."). Although licensing may be used legitimately to prevent businesses from harming the public through incompetence or fraud, *see, e.g., Dent v. West Virginia*, 129 U.S. 114, 122 (1889), it is also frequently abused to provide special economic favors to politically influential businesses at the expense of consumers—who are forced to pay more for products and services they need—and potential entrepreneurs—who are barred from the opportunity to compete fairly, earn a living, and provide for themselves and their families. *Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir. 2002); *Merrifield v. Lockyer*, 547 F.3d 978, 991-92 (9th Cir. 2008).

348). The Realtors who benefit from state licensing in this case, and the "professional" interior decorators in *Locke* highlight the adverse effects on a productive society when cartels can silence their competition: "First Amendment rules that restrict the class of speakers who may engage in certain forms of communication—essentially granting 'speech monopolies' to those parties—further entrench the power of those speakers, not only relative to the outlawed would-be speakers, but also relative to prospective clients." Kry, *supra*, at 974 (footnote omitted). Conversely, rules "that increase the number of available sources of information empower both the entrepreneurs who would offer those services and the clients whose options they enhance." *Id.* (footnote omitted). For these reasons, the intersection of occupational licensing and free speech warrants this Court's attention.

CONCLUSION

The *Central Hudson* commercial speech doctrine has failed to provide a framework for the predictable, principled, and consistent resolution of disputes resulting from 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).

This Court should grant the petition in this case to address the unworkable *Central Hudson* approach and restore all speech to full First Amendment protection, including truthful expression that relates to business and commercial transactions.

The petition for a writ of certiorari should be granted.

DATED: November, 2011.

Respectfully submitted,

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