No. 12-656

IN THE

Supreme Court of the United States

SPIRIT AIRLINES, INC., ALLEGIANT AIR, LLC, and SOUTHWEST AIRLINES CO.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* CATO INSTITUTE AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Department of Transportation violated the First Amendment by mandating "total cost" advertising and restricting airlines' truthful speech about the large (and ever-growing) share of each ticket that consists of taxes and fees.

2. Whether the First Amendment provides the government with greater latitude to regulate truthful, non-misleading "commercial" speech than all other forms of truthful, non-misleading speech.

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INTEREST OF THE *AMICI CURIAE*

Pursuant to Supreme Court Rule 37.3(a), the Cato Institute and the National Federation of Independent Business Small Business Legal Center respectfully submit this brief amicus curiae in support of the Petitioners.[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, and publishes the annual *Cato Supreme Court Review*.

This case is important to Cato because it addresses the collapse of constitutional protection for commercial speech and the government's attempt to impede the free flow of information.

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[1] All parties have provided their consent to allow Amici Curiae to file this brief. Letters indicating the parties' consent were filed with the Clerk of the Court. The parties have each received more than ten days' notice of the intention to file this brief.

No party or counsel for any party authored this brief, in whole or in part. In addition, no person other than Amici Curiae, their members, or their counsel made a monetary contribution to fund the preparation or submission of this brief.

The National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The NFIB Legal Center is filing a brief in this case because it believes that the right to speak freely against increasing federal regulations and taxes is of paramount importance.

SUMMARY OF THE ARGUMENT

This case provides the Court with the opportunity to confirm that the First Amendment provides the same protection to commercial speech as to truthful, non-misleading speech on other topics. Except for certain "historic and traditional" categorical exceptions, this Court has repeatedly held that the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States* v. *Stevens*, 130 S. Ct. 1577, 1584–85 (2010) (internal citations omitted).

The one glaring exception to the robust protection for the "marketplace of ideas" has come, oddly enough, with respect to speech directed specifically at the marketplace. *See Lamont* v. *Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). The rationale that has protected speech throughout this Nation's history—the conclusion that "information is not in itself harmful, that people will perceive their own best interests, if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them"—has somehow been compromised when it comes to speech addressing commercial subjects. *Va. State Bd. of Pharmacy* v. *Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

As numerous members of this Court have observed, the Court has never articulated a clear

rationale for why so-called "commercial speech" warrants a level of protection separate and unequal from all other speech. *See Thompson* v. *W. States Med. Ctr.*, 535 U.S. 357, 377 (2002) (Thomas, J., concurring in judgment); *Greater New Orleans Broadcasting Ass'n, Inc.* v. *United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring in judgment); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 501 (1996) (opinion of Stevens, J., joined by Kennedy and Ginsburg, JJ.); *id.* at 510–14 (opinion of Stevens, J., joined by Kennedy, Thomas, and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring in part and concurring in judgment); *id.* at 518 (Thomas, J., concurring in part and concurring in judgment); *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 636 (1995) (Kennedy, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.).

The Court's decision to place truthful, non-misleading speech about commercial matters in a "subordinate position in the scale of First Amendment values," *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), finds no support in the text of the First Amendment or in our Nation's history. *See 44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring in part and concurring in judgment). The precedents have justified this treatment of commercial speech more by an appeal to the *ipse dixit* of "commonsense" than by any grounding in the Constitution. *See Va. State Bd.,* 425 U.S. at 771 n.24.

While political speech lies at the heart of the First Amendment, this Court has not hesitated to expand the freedom of speech to all other forms of expression, be they literary, artistic, religious, or even profane. *See, e.g.*, *Stevens*, 130 S. Ct. at 1584–85; *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 253 (2002). And there is no theoretical or practical reason to think that American citizens are less able to ascertain the truth among variegated and discordant messages in the commercial marketplace than in the political marketplace. *Cf. Florida Bar*, 515 U.S. at 636 (Kennedy, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.) ("The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse the First Amendment secures.").

What has made the commercial speech doctrine as difficult to understand in theory, as it has been to apply in practice, is that the Court has held that the reduced protection for commercial speech applies *after* the Court has already determined that the speech does not address "unlawful activity" and is not "misleading." *Thompson*, 535 U.S. at 367. Accordingly, the reduced protection for commercial speech cannot be justified by the government's undeniable interest in protecting consumers from false or deceptive speech. *See, e.g.*, *44 Liquormart*, 517 U.S. at 510 (legislature lacks "broad discretion to suppress truthful, non-misleading information

for paternalistic purposes"); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("false statements of fact" lack constitutional value and are protected only to the extent necessary to "protect speech that matters").

In addition to lacking a principled justification in the First Amendment, courts have struggled with how to separate commercial speech from other forms of expression that are entitled to the highest level of protection. Indeed, this Court has acknowledged on several occasions that the definition of commercial speech is confusing and vague. *See, e.g.*, *Greater New Orleans Broad. Ass'n, Inc.*, 527 U.S. at 184 (1999); *Zauderer* v. *Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637 (1985). Furthermore, commercial speech is often, and increasingly, "inextricably intertwined" with noncommercial speech. *Riley* v. *Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). Without clear guidance from this Court, lower courts across the country have struggled to apply the commercial speech doctrine. The confusion has led to inconsistent results in the case law on First Amendment issues.

This case provides a perfect example. Here, the Department of Transportation has sought to regulate how airlines may communicate with their customers about the burdens imposed by government taxation. Had the airlines criticized the tax burden by taking out an advertisement in the pages of the *New York Times* ad-

dressing that subject, such a message would indisputably be entitled to the fullest First Amendment protection. *Cf. New York Times* v. *Sullivan*, 376 U.S. 254, 265–66 (1964). Yet because the airlines would seek to convey that message to consumers in a *New York Times* advertisement that also communicates the price for airline tickets, or because the airlines would seek to convey such information on their websites, the majority opinion at the D.C. Circuit held the regulation permissible based on the reduced protection for commercial speech. *Spirit Airlines, Inc.* v. *United States Dep't of Transp.*, 687 F.3d 403, 412–13 (D.C. Cir. 2012). This regulation is particularly troubling because, whether the speech at issue here is labeled as commercial speech or not, any rule restricting speech that is truthful but critical of the government and its taxation burdens is noxious to the First Amendment.

As Petitioners explain in their petition for certiorari, and as Judge Randolph notes in his dissent, the majority opinion cannot be reconciled with this Court's existing jurisprudence relating to commercial speech. Yet the difficulty with the decision below lies not only with the panel's apprehension of the governing precedents, but also with the fundamental unworkability of the doctrine.

While the members of this Court have frequently criticized the test for commercial speech set forth in *Central Hudson Gas & Electric Corp.*

v. *Public Service Comm'n of New York*, 447 U.S. 557, 564 (1980), the malleability of the doctrine has led the Court to avoid jettisoning it. *See Thompson*, 535 U.S. at 368 (noting that despite the misgivings of Members of the Court, "there is no need in this case to break new ground" because the regulation would not survive *Central Hudson*); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 554–55 (same); *Greater New Orleans*, 527 U.S. at 184 (same).

Indeed, it has been nearly 20 years since the Court last applied the *Central Hudson* test to uphold a restriction on commercial speech. *See Florida Bar*, 515 U.S. at 620; *see also id.* at 636 (Kennedy, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.). Yet the fact that this Court can apply the vague factors of the *Central Hudson* test in a way to avoid a need to overrule it is not an argument for the continued survival of the test, particularly where lower courts lack such discretion and the freedom of speech is at issue. Indeed, in the years since *Central Hudson*, advances in technology have made the test only more difficult to apply. New communication technologies such as Facebook, Twitter, and other social networking sites allow corporations to provide political commentary while simultaneously engaging in commercial speech.

In light of the many problems with the law on commercial speech, this Court should grant certiorari squarely on the question whether the *Central Hudson* test should be preserved. Such

a grant would ensure that the Court is presented with briefing and materials on the question whether there is any justification for treating truthful, non-deceptive speech on commercial matters as subject to anything other than the highest level of the First Amendment protection. It would also ensure that First Amendment rights are protected consistently throughout the nation.

After so doing, this Court should hold that truthful, non-deceptive speech on commercial matters is subject to the highest level of First Amendment protection. The Government may regulate commercial speech to "insure that the flow of truthful and legitimate commercial information is unimpaired," *Va. State Bd.*, 425 U.S. at 771 n.24, but there is no warrant for diminished protection based on other governmental interests, be they "substantial" or otherwise. Such a holding would create one uniform rule, rectify confusion in the lower courts, and provide predictability and stability in the marketplace. Speech that arises in a commercial context should not receive less protection under the First Amendment than other types of speech.

ARGUMENT

I. THIS CASE PROVIDES AN OPPORTUNITY TO CLARIFY THE LAW ON COMMERCIAL SPEECH

This case presents a strong opportunity for this Court to clarify the law on commercial speech. Petitioners are low-cost airlines that often "identify" and "criticize" the "portion of each fare that is attributable to government-imposed taxes." Petition for Writ of Certiorari ("Petition"), filed November 12, 2012, at p. 18. On its website, petitioner Spirit Airlines, Inc. refers to taxes as "the government's cut." *Id.* Similarly, petitioner Southwest Airlines Co. "has engaged in a political and public-relations campaign specifically opposing the high taxes on air travel." *Id.*

The "Total Price Rule" issued by the Department of Transportation ("DOT") directly impacts petitioners' ability to identify and criticize the taxes and other fees imposed by governmental entities. That rule prohibits petitioners and other airlines from displaying components of the total price of the airfare "prominently" or "in the same or larger size than the total price." *Spirit Airlines, Inc.*, 687 F.3d at 409 (citing the DOT's Airfare Advertising Rule).

This case is not only about the font size in the petitioners' advertisements. It is about the scope of First Amendment protection for political

speech that arises in a commercial context. The Total Price Rule impedes the ability of the petitioners to criticize the taxes and other fees imposed by the government on their customers. *See id.* at 421–22 (Randolph, J., dissenting). A law "looks like a ban on core political speech" if it restricts companies from "announcing who bears political responsibility for a new tax . . . in the forum most likely to capture voters' attention." *BellSouth Telecomms., Inc.*, v. *Farris*, 542 F.3d 499, 504–05 (6th Cir. 2008). Corporations must be able plainly to convey the burden of excessive taxes to customers during the advertising and sales process, which is precisely the moment when consumers would have most concern for the issue.

The D.C. Circuit found that the regulation was justified because the communications concerning government taxes could be found in an "advertisement," that "refer[s] to a specific product" and the speaker "has an economic motivation for it." *Id.* at 412 (quoting *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983). The court found that the prohibition upon drawing prominent attention to the amount of taxes, and the requirement that any such mention be made in small font, was justified based on the reduced protection for commercial speech because it was directed at purportedly misleading communications. *Spirit Airlines*, 687 F.3d at 412–13.

While the majority opinion was mistaken in applying this Court's precedents, including the applicability of *Zauderer* to this case, the subject matter of the communications here demonstrates the fluidity of the boundaries between commercial and non-commercial speech. The Court of Appeals clearly believed that the distinction between commercial and non-commercial speech was material to its decision in the case. Accordingly, this case should permit this Court to clarify that truthful, non-misleading commercial speech enjoys the fullest protection under the First Amendment.

II. THE FIRST AMENDMENT, PROPERLY CONSTRUED, DRAWS NO DISTINCTION BETWEEN COMMERCIAL AND NON-COMMERCIAL SPEECH

A. There Is No Constitutional Justification For The Distinction Between Commercial And Non-Commercial Speech

This Court's development of the commercial speech doctrine has been inconsistent since its inception. The Court first addressed commercial speech in *Valentine* v. *Chrestensen*, 316 U.S. 52, 54 (1942), when it "plucked the commercial speech doctrine out of thin air," and held that commercial speech is not entitled to any First Amendment protection. Alex Kozinski & Stuart

Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 627 (1990).

In *Virginia State Board of Pharmacy*, the Court reversed *Valentine* and held that commercial speech indeed was protected by the First Amendment, striking down a state law prohibiting the advertisement of the prices for prescription drugs. 425 U.S. at 761–62. The Court emphasized:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that these decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id.

Four years later, in *Central Hudson*, the Court articulated a four-part test to determine the constitutionality of restrictions on commercial speech under a standard of "intermediate scrutiny." *Cent. Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U.S. 557, 564 (1980). While often criticized by members of this Court, the *Central Hudson* test remains the governing standard for pure commercial speech. The standard, however, is complex and confusing, including with respect to the

threshold question of whether the speech in question is "commercial" in the first place.

This Court's basis for holding that commercial speech occupies a "subordinate" position under the First Amendment has been far from clear. In its original formulation, this Court simply asserted it. *See Valentine*, 316 U.S. at 54 ("We are . . . clear that the Constitution imposes no . . . restraint on government as respects purely commercial advertising."). While *Virginia State Board of Pharmacy* overruled *Valentine*, it too reiterated the "commonsense" notion that commercial speech warranted reduced First Amendment protection. *Va. State Bd.*, 425 U.S. at 771 n.24. Yet the Court has never explained where it obtained the basis for drawing this distinction or why commercial speech, which can certainly address matters of critical importance to the interests of both the speaker and the listener, has a disfavored status under the Constitution when compared to video games, nude dancing, or other forms of expression that the Court has identified as fully protected by the "freedom of speech."

At times, the Court has relied upon a purported governmental interest in protecting Americans from hearing truthful and non-deceptive messages. *United States* v. *Edge Broad. Co.*, 509 U.S. 418 (1993) (upholding restrictions on lottery advertising by broadcasters in non-lottery states); *Posadas de Puerto Assocs.* v. *Tourism Co. of P.R.*, 478 U.S. 328 (1986) (up-

holding a ban on advertising lawful casino gambling on the ground that it could encourage gambling); *Cent. Hudson*, 447 U.S. at 568–69 (finding that the Government has a "substantial interest" in preventing commercial speech that could persuade consumers to consume more energy). Yet the Court has not hesitated to reject that paternalistic idea in every other First Amendment context. *See, e.g.*, *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 253 (2002) ("First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end.").

Indeed, even in the context of commercial speech, the Court has rejected the paternalistic premise for regulation on numerous other occasions. *Thompson*, 535 U.S. at 374–76; *44 Liquormart*, 517 U.S. at 503–04; *Va. State Bd.*, 425 U.S. at 769–70. These decisions, while undeniably correct, have created substantial confusion in the law and left the doctrine in search of any clear justification, one that has proven unworkable in practice as it is unjustified in theory. *See 44 Liquormart*, 517 U.S. at 524 (Thomas, J., concurring in the judgment).

B. The *Central Hudson* Test Provides An Unworkable Standard

In addition to lacking a theoretical justification, this Court has never created a bright-line rule to distinguish commercial from non-

commercial speech, and has defined "commercial speech" in different ways. *Compare Cent. Hudson*, 447 U.S. at 561 (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience"), *with Bolger,* 463 U.S. at 64 (1983) (defining commercial speech as speech that "propos[es] a commercial transaction."). To determine whether speech is commercial, courts weigh various factors, including "(i) whether the communication is an advertisement; (ii) whether the communication refers to a specific product or service, and (iii) whether the speaker has an economic motivation." *Bolger*, 463 U.S. at 66–67.

If a court determines that the speech is purely commercial, then it will next determine whether the regulation satisfies intermediate scrutiny by analyzing a four-part test: (1) whether the speech concerns a lawful activity and is not misleading; (2) whether the government has a substantial interest in regulating the speech; (3) whether the regulation directly advances that governmental interest; and (4) whether there is a "reasonable fit" between the regulation and the interest it serves. *Id.* at 68–69 (citing *Cent. Hudson*, 447 U.S. at 562–66); *Bd. of Trs. of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 480–81 (1989) (modifying *Central Hudson*'s fourth prong). The application of each of these factors contains its own analysis, and several exceptions to the commercial speech doctrine further complicate the standard.

1. The Multi-Factored *Central Hudson* Test Does Not Lead To Predictable Results

This Court has repeatedly acknowledged the difficulties with the commercial speech doctrine. *See Lorillard Tobacco*, 533 U.S. at 554 ("several Members of the Court have expressed doubts about the *Central Hudson* analysis"). One problem is that it is difficult to separate commercial speech from other types of speech that receive heightened protection under the First Amendment. *Zauderer*, 471 U.S. at 637 (acknowledging that "the precise bounds of the category of . . . commercial speech" are "subject to doubt, perhaps").

Another problem is that commercial speech cases are also impossible to apply "with any uniformity." *44 Liquormart*, 517 U.S. at 527 (Thomas, J., concurring). Cases are decided in a subject-specific context and have a wide variety of outcomes. *See, e.g.*, Kozinski & Banner, *supra*, at 631; R. George Wright, *Freedom and Culture: Why We Should Not Buy Commercial Speech*, 72 Denver U. L. Rev. 137, 162–66 (1994).

For example, the government cannot prohibit certain kinds of billboard advertising, but it can prohibit the use of certain words. *Compare Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 513–17 (1981), *with San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 535–39 (1987). The government

cannot prohibit the mailing of advertisements for contraceptives, but it can prohibit advertisements for casino gambling. *Compare Bolger*, 463 U.S. at 75, *with Posadas*, 478 U.S. at 344. Furthermore, the government cannot require professional fundraisers to obtain licenses, but it can prohibit college students from holding Tupperware parties in their dormitories. *Compare Riley*, 487 U.S. at 793–95, *with Fox*, 492 U.S. at 479–80.

The lack of clarity with the commercial speech doctrine has led to unpredictability in the case law. To take another example, in *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 384 (1977), this Court struck down a regulation of commercial expression by attorneys. By contrast, in *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 467 (1978), decided one year later, this Court held that a different regulation of commercial expression by attorneys survived First Amendment scrutiny. Because each case turns on a narrow and specific set of facts, it is difficult to anticipate when courts will protect commercial speech and when they will defer to government regulation. *See* Kozinski & Banner, *supra*, at 631 ("Unless a case has facts very much like those of a prior case, it is nearly impossible to predict the winner.").

For these reasons, and litany of other problems with the commercial speech doctrine, this Court has 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*, 527 U.S. at 184.

2. Lower Courts Have Struggled With The *Central Hudson* Test

Without clear guidance from this Court, the lower courts have struggled to apply the commercial speech doctrine. *See e.g.*, *Alexander* v. *Cahill*, 598 F.3d 79, 88 (2d Cir. 2010) ("[T]he Supreme Court has offered differing, and not always fully consistent, descriptions as to what constitutes protected commercial speech."); *Procter & Gamble Co.* v. *Haugen*, 222 F.3d 1262, 1274 (10th Cir. 2000) ("[C]ommercial speech jurisprudence is not remarkable for its clarity."); *Bad Frog Brewery, Inc.* v. *N.Y. State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998) ("[D]octrinal uncertainties [are] left in the wake of Supreme Court decisions from which the modern commercial speech doctrine has evolved."); *Nordyke* v. *Santa Clara County,* 110 F.3d 707, 712 (9th Cir. 1997) ("[T]he *Central Hudson* test is not easy to apply.").

Lower courts have attempted to make sense of the commercial speech doctrine, but have interpreted the standard for commercial speech in irreconcilable ways. For example, this Court has never indicated whether one of the

Bolger factors is more important than another, but the Fifth Circuit has held that the economic motive of the speaker is the most important factor for the commercial speech doctrine when the other factors are inconclusive. *Procter & Gamble Co.* v. *Amway Corp.*, 242 F.3d 539, 553 (5th Cir. 2001).

In another example, the California Supreme Court has replaced this Court's definitions of commercial speech with its own multi-factor test. *See Kasky* v. *Nike*, 45 P.3d 243, 257–60 (Cal. 2002), *cert. granted*, 537 U.S. 1099 (2003), *and cert. dismissed as improvidently granted*, 539 U.S. 654 (2003).[2] These types of lower court decisions have expanded the scope of communication that qualifies as commercial speech far beyond the *Bolger* definition—speech "that does *no more than* propose a commercial transaction." 463 U.S. at 66 (quoting *Va. State Bd.*, 425 U.S. at 762).

Courts further have added to the confusion by recognizing an exception to the commercial speech doctrine for so-called "hybrid speech." Under the exception, commercial speech may re-

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[2] According to the California Supreme Court, speech is commercial when (a) it is made by someone engaged in commerce or acting on behalf of such a person, (b) it is likely to reach potential customers, and (c) it involves descriptions of business operations, policies, or other attempts to "enhanc[e] the image" of a company's "product or . . . its manufacturer or seller." *Kasky*, 45 P.3d at 257–60.

ceive full First Amendment protection when it is "inextricably intertwined" with otherwise fully protected speech. *Dex Media West, Inc.* v. *City of Seattle*, 696 F.3d 952, 958 (9th Cir. 2012). In addition, courts have held that the hybrid speech exception rarely applies to commercial speech. *See, e.g.*, *Fox*, 492 U.S. at 474 (the exception applies only when a "law of man or nature makes it *impossible*" to separate commercial and non-commercial speech) (emphasis added).

C. This Case Presents A Good Vehicle To Clarify The Law On Commercial Speech

While in recent years this Court has struck down several commercial speech regulations as violating *Central Hudson*, the last time that this Court had the square opportunity to confront the distinction between commercial and non-commercial speech came nearly a decade ago in *Nike* v. *Kasky*, 539 U.S. 654 (2003). Yet rather than clarifying the law, the Court was compelled to dismiss certiorari as improvidently granted, however, because the state judgment under review was not a final judgment, thus depriving this Court of jurisdiction. *Id.* at 657–58.

Since *Nike*, the line between commercial speech and political speech has become increasingly blurred. New communication technologies such as Facebook, Twitter, video streaming, podcasts, text messaging, and other developments in

communications technologies allow corporations to provide political commentary to their customers while engaging in commercial speech. Companies engage consumers in a wide range of topics on blogs, websites, and social networking sites. Robert Sprague & Mary Ellen Wells, *Regulating Online Buzz Marketing: Untangling a Web of Deceit*, 47 Am. Bus. L.J. 415, 418–19 (2010) (citing Terence A. Shimp, et al., *Self-Generated Advertisements: Testimonials and the Perils of Consumer Exaggeration*, 47 J. Advertising Res. 453, 453 (2007)) (noting that "the rapid growth of online communication media . . . [has] amplified the voice of the consumer and greatly enhanced consumers' ability to talk with one another about products and brands.").

Some companies have combined social networking and commercial speech to create "social-shopping" sites where consumers can read product recommendations written by company employees and also by consumers. Sprague & Wells, *supra*, at 419 n.19 (citing Emily Steel, *Where E-Commerce Meets Chat, Social Retailing Gains Traction*, Wall St. J., Nov. 27, 2007, at B8). Companies may incentivize enthusiastic consumer contributors to add content to their sites. Sprague & Wells, *supra*, at 451–53. The point where bloggers become mouthpieces for the corporation is unclear.

The line between commercial speech and other types of fully protected speech is also blurred when corporations engage in social and

political activism to build their brands and appeal to their customers. Petitioners here provide a good example of businesses advancing a political message in the context of speaking with potential customers. Petition, *supra*, at 18. To take another example, the Ben and Jerry's corporation has developed its ice cream brand around "community involvement and the firm's status as a socially responsible business." Lewis D. Solomon, *On the Frontier of Capitalism: Implementation of Humanomics by Modern Publicly Held Corporations: A Critical Assessment*, 50 Wash. & Lee L. Rev. 1625, 1645 (1993). A customer who wears a tie-dyed Ben and Jerry's t-shirt is choosing to express her association with the brand's image of "social conscience." Matt Haig, *Brand Royalty: How the World's Top 100 Brands Thrive & Survive* 168 (2004).

The First Amendment now affords commercial speech significant protection:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transac-

> tion is entitled to the coverage of the First Amendment.

Edenfield v. *Fane*, 507 U.S. 761, 767 (1993) (citing *Va. State Bd.*, 425 U.S. at 762).

As this case and these examples show, commercial speech provides a critical forum for many kinds of expression and is not a less important type of speech. Accordingly, the distortions and confusion caused by the Court's turn in *Central Hudson* and its progeny have only grown over time with the rapidly-evolving nature of speech.

III. COMMERCIAL SPEECH SHOULD ENJOY THE FULLEST PROTECTION UNDER THE FIRST AMENDMENT

In light of the many problems with the law on commercial speech, this Court should replace the so-called "intermediate scrutiny" of commercial speech with the same "strict scrutiny" that applies to all other forms of speech. Such a decision would cast aside the unjustified "subordinate" position that commercial speech occupies, rectify confusion in lower courts, and provide predictability and stability in marketplace. Businesses need to know what they can and cannot communicate, need to know what governmental regulations will withstand scrutiny in the courts, and need to know that they will be treated equally and fairly under similar cases.

Paul E. Loving, *The Justice of Certainty*, 73 Or. L. Rev. 743, 764 (1994).

The trend in this Court's jurisprudence already has increasingly required heightened scrutiny for several types of commercial speech cases. Regulations of commercial speech receive additional scrutiny when they completely ban the dissemination of certain commercial information. *44 Liquormart*, 517 U.S. at 501. Heightened scrutiny also applies when the government regulates speech for a nonspeech purpose. *Cent. Hudson*, 447 U.S. at 566 n.9. In addition, heightened scrutiny applies when a governmental entity attempts to control the expression of particular viewpoints through the regulation of commercial speech. *44 Liquormart*, 517 U.S. at 512 n. 20; *Sorrell* v. *IMS Health*, 131 S. Ct. 2653, 2664 (2011). There is no reason why this trend cannot continue and extend strict scrutiny to all types of commercial speech.

Speech should not receive less protection merely because the speech arises in a commercial setting. As this Court has already recognized, "[t]he government may not, by [preferring some speakers over others] deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration." *Citizens United* v. *FEC*, 130 S. Ct. 876, 899 (2010). Moreover, "[t]he First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'"

Sorrell, 131 S. Ct. at 2664 (citing *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)). These principles underscore the need to replace so-called "intermediate" scrutiny with strict scrutiny in commercial speech cases.

CONCLUSION

For the foregoing reasons, as well as the reasons that the Petitioners present, this Court should grant certiorari to clarify and rectify the law on commercial speech.

Respectfully submitted,

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