No. 12-656

In the

Supreme Court of the United States

SPIRIT AIRLINES, INC., et al.,

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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The "Total Price Rule" (14 C.F.R. § 399.84(a)) forbids an airline from printing advertisements that make the amount of taxes "prominent" to the reader. This includes, but is not limited to, prohibiting the airline from printing the tax per ticket "in the same or larger size" as the total price. The Court of Appeal, applying the "reasonableness" standard of *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), held that this abridgement of the airlines' speech did not violate the First Amendment because it only requires them to disclose factual information, and left the airlines free to inform people about the tax burden in other ways.

(1) Is *Zauderer*'s reasonableness standard the proper rule to apply to a speech restriction which not only requires a business to provide information to customers, but which also restricts the manner in which the information may be expressed, in the process burdening political speech?

(2) Does the Total Price Rule violate the First Amendment?

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) and the Center for Constitutional Jurisprudence respectfully submit this brief amicus curiae in support of the petition for writ of certiorari.

PLF is widely recognized as the largest and most experienced nonprofit legal foundation representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and federalism. PLF has participated as amicus curiae in several lawsuits involving the free speech rights of America's business owners, including *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), *Citizens United v. FEC*, 558 U.S. 310 (2010), and *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003). PLF attorneys have also published in-depth analyses of the commercial speech doctrine. *See, e.g.*, Timothy Sandefur, *The Right to Earn a Living* ch. 9 (2010), and Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205 (2004).

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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. Letters evidencing such consent have been filed with the Clerk.

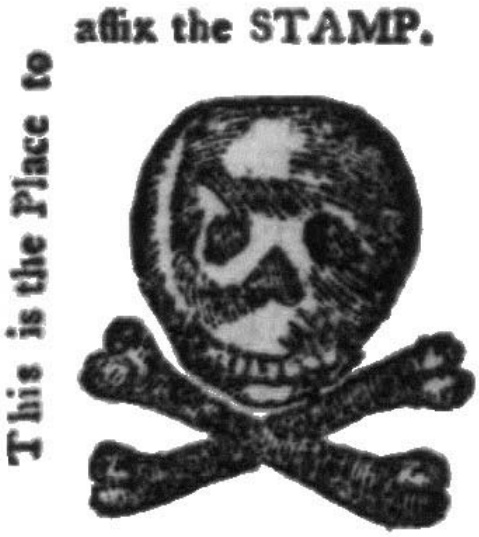
Pursuant to Rule 37.6, amici affirm that no counsel for any party authored this brief in whole or in part, and no person other than amici, their members, or counsel, made a monetary contribution intended to fund its preparation or submission.

CCJ was founded in 1999 as the public interest litigation arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy. The Center provides legal representation and litigation support in cases of constitutional significance. It also advances its mission of ensuring that the balance of powers created by the United States Constitution remains intact. CCJ has participated as amicus curiae before this Court in several cases raising First Amendment speech issues, including *Natso, Inc. v. 3 Girls Enterprises, Inc.*, 132 S.Ct. 1004 (2012), *Seifert v. Alexander*, 131 S.Ct. 2872 (2011), *Doe v. Reed*, 130 S.Ct. 2811 (2010), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). PLF and CCJ believe their public policy experience will assist this Court in its consideration of the petition.

SUMMARY OF REASONS FOR GRANTING THE PETITION

Since this nation's earliest days, speech by commercial entities has been central to public debate over social and political controversies. When the 1765 Stamp Act imposed a tax on printed paper documents, including newspapers and advertisements, incensed American publishers protested the infringement on their commercial speech rights in various ways. Philadelphia printer William Bradford "proclaim[ed] his invincible repugnance" to the Act by printing the following emblem in the place set aside for the attachment of the required tax stamp:[2]

[2] *Available at* http://www.loc.gov/pictures/resource/cph.3a52298/ (last visited Dec. 6, 2012).



John William Wallace, *Colonel William Bradford: The Patriot Printer* 96 (1884). This symbol is, in principle, indistinguishable from the type of expression at issue in this case. Bradford was protesting the Act while nevertheless complying with it, by making the tax "prominent"—drawing consumers' attention to the burdens imposed by the government.

This mix of political and commercial expression was not unusual in that era. The First Amendment's authors contemplated no distinction between commercial and non-commercial speech when they protected expressive rights. Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 Yale J. on Reg. 85, 91 (1999) ("[C]ommercial advertising was a critical part of the Press that the Framers wanted to remain forever free."). A British law censoring Bradford's Stamp Act protest would have been a major

impediment to the Patriot cause. Yet the decision below, in conflict with decisions of the Sixth, Seventh, and D.C. Circuits, endorses a reading of the First Amendment whereby government can censor virtually identical expression by businesses today. That decision applies a deferential "reasonableness" standard to a regulation that restricts the airlines' ability to publish statements critical of the government. *Spirit Airlines, Inc. v. United States Dep't of Transp.*, 687 F.3d 403, 412-13 (D.C. Cir. 2012). That is irreconcilable with a constitutional tradition based on free expression of the type represented by Bradford's skull-and-bones symbol.

The decision below reveals as few cases have done the speciousness of the purported distinction between fully protected speech and commercial speech. That distinction fails on historical and logical grounds. The Constitution does not divide types of speech, and—unlike libel or obscenity—there is no history of a common-law distinction that might plausibly be incorporated into the First Amendment. Troy, *supra*, at 92-121. Conceptually, the effort to draw a line between commercial and non-commercial speech is unsustainable, and all such boundaries have resulted in conflicting and confusing precedents that this Court has been unable to resolve. In consequence, legal authorities now tolerate censorship of speech that is essential to public debates, or which is critical of government. Certiorari should be granted to accord full First Amendment protection to all speech, regardless of the identity of the speaker or the content of the message.

ARGUMENT

I

THIS COURT SHOULD GRANT CERTIORARI TO ELIMINATE THE DISPARITY IN TREATMENT OF SPEECH BY BUSINESSES AND SPEECH BY INDIVIDUALS

Critical to the decision below was the choice of the standard of scrutiny. The decision would have come out differently had the panel employed either the strict standard applicable to speech generally, or the intermediate standard applied to commercial speech under *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980), because the Total Price Rule is clearly broader than necessary to accomplish the government's purported objective of preventing confusion. The government could have sought less intrusive means than dictating to airlines their method of expression in a manner that obstructs their ability to convey a political message. But the court did not address these matters because it employed, and expanded, the reasonableness standard of *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), instead. This case is therefore ideal for addressing issues postponed in recent commercial speech cases, including *Sorrell*, 131 S. Ct. at 2667, *Kasky*, 539 U.S. 654, and *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002). Confusion abounds over the proper standard to apply in cases where businesses speak, publish, or broadcast information and opinions to the public, and the Court should take this opportunity to eliminate this confusion by according all speakers the full protection to which the Constitution entitles them.

A. The Effort to Differentiate Commercial from Non-Commercial Speech Has Led Only to Confusion and Censorship

The only thing that remains clear after decades of commercial speech jurisprudence is that there is no principled distinction between fully protected non-commercial speech and commercial speech which receives mid-range scrutiny under *Central Hudson*. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 420 (1993) ("The absence of a categorical definition [of commercial speech] . . . is . . . a characteristic of our opinions.").

In the past quarter century, this Court has "articulated three inconsistent tests for identifying 'commercial speech,' generating substantial uncertainty and confusion." Thomas C. Goldstein, *Nike v. Kasky and the Definition of "Commercial Speech"*, 2002-2003 Cato Sup. Ct. Rev. 63, 70. Lower courts have been no less prolific. Some have adopted a narrow rule that speech is "commercial" only if it proposes a transaction between the *speaker* and the audience. *Taucher v. Born*, 53 F. Supp. 2d 464, 480-81 (D.D.C. 1999), *rev'd on other grounds*, 396 F.3d 1168 (D.C. Cir. 2005); *Forsalebyowner.com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 876 (E.D. Cal. 2004). Others have taken a broader approach, sweeping additional speech into the disfavored "commercial" category. In *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359 (4th Cir. 2012), for instance, the court upheld an ordinance that prohibited a mural overlooking a dog park and which depicted cartoon dogs and the logo of a dog-sitting business. *Id.* at 363. The mural did not propose any commercial transaction, and did not

"merely advertise" a product or service. It simply portrayed dogs in a manner intended to convey positive feelings. Yet, employing "pragmatic judgment" instead of "wooden logic," *id.* at 365, the court of appeals adopted a "broader definition of commercial speech," *id.* at 369, whereby the mural qualified solely because of the business' economic motivation. *Id.* at 370. The court allowed government censorship of an artistic depiction because the speaker had a commercial interest in it.

Yet in *Burke v. City of Charleston*, 893 F. Supp. 589, 608-09 (D.S.C. 1995), *rev'd on other grounds*, 139 F.3d 401 (4th Cir. 1998), the district court found that a similar mural—painted on a business to attract customers—was not commercial speech. And in *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952 (9th Cir. 2012), the court of appeals ruled that a phone book is entitled to full First Amendment protection notwithstanding its "commonsense" commercial nature, *id.* at 964, because "[a] profit motive and the inclusion or creation of noncommercial content in order to reach a broader audience and attract more advertising" is not enough to reduce a publication to less-protected commercial speech status. *Id.* at 965; *see also Bolger v. Youngs Drugs Prods. Corp.*, 463 U.S. 60, 66 (1983) ("[T]he mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech."). If this were not enough contradiction, the Fifth Circuit recently suggested, without holding, that the URL of a website—"texasworkerscomplaw.com"—is commercial speech, even though it obviously does not invite a commercial transaction and even though the website contains truthful non-commercial information about worker's compensation law. The court endorsed

remarkably vague standards for determining whether speech is commercial: "The domain name may . . . be considered commercial speech if (i) it is an advertisement of some form; (ii) it refers to a specific product; and (iii) the speaker has an economic motivation." *Gibson v. Tex. Dep't of Ins.-Div. of Workers' Comp.*, No. 11-11136, 2012 U.S. App. LEXIS 22375, at *9 (5th Cir. Oct. 30, 2012).

Similar confusion arises when the speech itself is the product for which the customer is paying. In *Argello v. City of Lincoln*, 143 F.3d 1152 (8th Cir. 1998), the court ruled that fortune-telling is not commercial speech because it "does not simply propose a commercial transaction. Rather, it *is* the transaction." *Id.* at 1153. *Accord*, *Hilton v. Hallmark Cards*, 599 F.3d 894, 905 n.7 (9th Cir. 2010) (birthday card is not commercial speech because "it is the product"). This Court has held that speech is protected when it is the service for sale, just as much as when a person engages in speech for free. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116-18 (1991). But in an increasingly service-oriented economy, business regulations are increasingly likely to restrict speech activity. For instance, the interior decorators in *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 1004 (2012), were engaged solely in expressive activity: advising people on home aesthetics. Yet the court affirmed the constitutionality of a licensing restriction that barred people from entering that profession and which bore no realistic relationship to protecting public safety. *Id.* at 1191. Although admitting that the interior designers were engaged in expressive activity, it rationalized the restriction by classifying the expression as merely commercial speech. *Id.* And in

Kansas City Premier Apartments, Inc. v. Mo. Real Estate Comm'n, 344 S.W.3d 160, 168 (Mo. 2011), *cert. denied*, 132 S. Ct. 1075 (2012), the Missouri Supreme Court upheld a licensing requirement that censored a website featuring information about apartments for rent, on the theory that the information was only commercial speech. Yet the expression *was the service customers paid for*, and thus no different in principle from the fully protected speech at issue in *Hallmark Cards*, *Simon & Schuster*, or *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Even commercial advertisements do not easily fit into the "commercial speech" category. As Judge Kozinski has observed, television ads are often "thirty-second minidrama[s] that can stand on [their] own as . . . piece[s] of film." Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 639 (1990). An advertisement for the British newspaper *The Guardian*, recently named best commercial of 2012 by *AdWeek*,[3] is an excellent example. The clever two-minute ad portrays the "three little pigs" story re-done as a realistic police raid, and shows how *The Guardian*'s news coverage spurs public debate over that raid and the subsequent trial of the Big Bad Wolf. This advertisement never instructs viewers to subscribe to the newspaper, or proposes any commercial transaction; it is, in *AdWeek*'s words, a "mix of craft and storytelling" which "vividly demonstrat[es] the paper's collaborative concept of 'open journalism.'" Thus an ad that on a "common

[3] Tim Nudd, *The 10 Best Commercials of 2012*, AdWeek, Nov. 26, 2012, *available at* http://www.adweek.com/news/advertising-branding/10-best-commercials-2012-145324?page=10 (last visited Dec. 6, 2012).

sense" level appears to be quintessentially "commercial speech" turns out to be a brief dramatic tribute—fittingly enough—to freedom of expression. "[O]n one level, [the *Guardian* ad] propose[s] a commercial transaction, but [it] can be interpreted on more than one level. The distinction between commercial and noncommercial speech is extraordinarily difficult to make in any satisfactory way." Kozinski & Banner, *supra*, at 641.

The failure to formulate a conceptual distinction between fully protected non-commercial speech and commercial speech that receives second-class protection is complicated by the multilayered nature of expression of all sorts. As this Court recognized in *Cohen v. California*, 403 U.S. 15, 26 (1971), expression often serves multiple functions, "convey[ing] not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well." Some expression takes the form of silent protests or gestures, like the black armbands in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), or the refusal to salute the flag in *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943). Some speech articulates no specific message, but just an ineffable aesthetic impression. *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 570 (1995).

Commercial advertising often expresses multiple meanings. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988), recognized that "commercial" speech often becomes inextricably intertwined with political speech, and courts should not "parcel out" the speech, granting heightened scrutiny to some and reduced scrutiny to other speech. *Id.* at 795-96 (citing cases). And *Greater*

New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173 (1999), invalidated an FCC rule banning casino ads, which all parties conceded to be commercial speech, because the advertisements would "convey information . . . about an activity that is the subject of intense public debate" and "benefit listeners by informing their consumption choices." *Id.* at 184-85.

But although this Court has said that expression that blends commercial and political statements should not be subdivided, *Riley*, 487 U.S. at 796, it has also said that speech can be classified as commercial, and thus less protected, even if it "contain[s] discussions of important public issues." *Bolger*, 463 U.S. at 67-68. And when speech about goods or services for sale is conjoined with speech about public matters, some courts have found in the *ad hoc* nature of commercial speech doctrine a justification for depriving businesses of their expressive rights. In *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002), the California Supreme Court allowed a political activist to sue a corporation for "unfair business practices" when it published a rebuttal of allegations that its factories were "sweat shops." Although Nike argued that it had the right to disseminate its views on a public controversy, the state supreme court allowed the case to proceed, using a broad definition of commercial speech as speech "generally or typically . . . directed to an audience of persons who may be influenced by that speech to engage in a commercial transaction with the speaker or the person on whose behalf the speaker is acting," and which "consists of representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents) made for the purpose of promoting the sales of, or other commercial transactions in, the

speaker's products or services." *Id.* at 960-61. This extraordinarily broad definition allows government to silence a wide variety of speakers and messages relating to business concerns.

This Court's dismissal of certiorari in *Kasky* only worsened the confusion and conflict regarding the commercial speech doctrine. Samuel A. Terilli, *Nike v. Kasky and the Running-But-Going-Nowhere Commercial Speech Debate*, 10 Comm. L. & Pol'y 383, 413 (2005). The California Supreme Court's *Kasky* decision remains on the books, subjecting businesses to potential liability for engaging in expressive acts. *See, e.g.*, *All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.*, 183 Cal. App. 4th 1186, 1210 (2010) (allowing lawsuit against trade association that issued seals of approval based on its own definition of "organic"); *People ex rel. Brown v. PuriTec*, 153 Cal. App. 4th 1524, 1530 (2007) (upholding law that prohibited manufacturer of water filters from making "claims that the device affects health or the safety of drinking water"). *See also* Elizabeth Becker, *Animal Rights Group to Sue Fast-Food Chain*, N.Y. Times, July 7, 2003, at A11 (PETA sued Kentucky Fried Chicken because of the company's statement that it "only deal[s] with suppliers who maintain the very highest standards and share our commitment to animal welfare."). Not only are businesses now liable for damages if they publish information a court deems misleading; they can also be forced to publish advertisements that state the opposite of their views. *See United States v. Philip Morris USA, Inc.*, No. 99-2496, 2012 U.S. Dist. LEXIS 168107, at *81-*98 (D.D.C. Nov. 27, 2012) (dictating the exact text and appearance of "corrective statements" that business will be forced to publish).

The risk of liability businesses face for expressing their opinions has led them to censor themselves —starting with Nike, which after the *Kasky* decision chose to keep mum on the question of sweat shops. *See Kasky*, 539 U.S. at 682-83 (Breyer, J., dissenting); Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 Colum. Bus. L. Rev. 1, 42-43 ("[Nike's] self-imposed speech moratorium lasted several years, and when Nike resumed communications regarding its labor practices, it was careful not to assert anything about labor conditions, but instead simply posted an on-line list with its suppliers' names and locations."). Attorneys for Exxon, Bank of America, and other companies acknowledged that as long as *Kasky* remains on the books, they will advise their clients to withhold statements on political matters. Stephanie Kang, *Nike Settles Case With an Activist for $1.5 Million*, Wall St. J., Sept. 15, 2003, at A10. One article advised attorneys in the post-*Kasky* world to tell business clients "that the safest choice is silence. While this is the textbook example of a chilling effect, a business client runs a substantial risk in California if it makes a statement that is mistakenly false, or true but misleading." Jonathan A. Loeb & Jeffrey A. Sklar, *The California Supreme Court's New Test for Commercial Speech*, 25 Los Angeles Lawyer 13, 16 (2002).

B. Speech by Commercial Entities Is Critical to Free and Full Debate of Public Issues

The inconsistent and dubious use of commercial speech doctrine to silence businesses suggests that it represents an "invidious form of viewpoint regulation,"

given that "the speech of profitmaking corporations will widely espouse views consistent with a capitalistic economic and political philosophy" opposed to government overregulation. Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 Geo. Wash. L. Rev. 235, 238 (1998). Whatever the motive, the commercial speech theory forces courts to discriminate against certain types of speech and speakers based on the content of the messages or their motives for speaking.

Discrimination against business-related speech is dangerous as well as unjust because businesses play an important role in national debates, expressing views on many social, political, and even religious issues. Often they do so in their branding or marketing campaigns. For example, Out of the Closet Thrift Stores, a nationwide chain of stores operated by the AIDS Healthcare Foundation, uses a distinctive color palate and advertising designs to project a gay-friendly image.[4] California's In-N-Out hamburger chain prints Biblical citations like "John 3:16" on its packages. *See* Joshua Rhett Miller, *Chick-fil-A Not Alone in Touting Religion Alongside Products*, FoxNews.com, Aug. 1, 2012.[5] Benetton Group has for decades used advertisements that convey controversial social statements, including a depiction of President Obama kissing Venezuelan dictator Hugo Chavez, or a photograph of the bloody, bullet-riddled uniform of a

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[4] *Available at* http://outofthecloset.org (last visited Dec. 7, 2012).

[5] *Available at* http://www.foxnews.com/us/2012/08/01/chick-fil-not-alone-in-touting-religion-alongside-products (last visited Dec. 7, 2012).

soldier killed in Bosnia. *See* Christina Passariello & Jennifer Clark, *Benetton Retries Provocation*, Wall St. J., Nov. 17, 2011, at D5;[6] Gary Levin, *Benetton Ad Lays Bare the Bloody Toll of War*, Advertising Age, Feb. 21, 1994.[7] For some companies, the dividing line between a political/social message and brand image is virtually impossible to discern, as with Chevron's slogan "We agree," intended to project an image of sensibility to public concerns about the environment, or Ben & Jerry's ice cream, which promotes itself as "a company on a mission,"[8] and actively supports left-wing political causes.

Companies often draw customers' attention to the costs government imposes on them. In 2010, Atlanta Kroger stores protested the city's proposed cigarette tax increase by printing receipts with the taxes printed separately in boldface. Jim Galloway, *An Anti-Tax Ad With Every Pack of Cigarettes*, Atlanta Journal-Constitution, Mar. 16, 2010.[9] Gas stations frequently post signs on pumps notifying customers of the federal, state, and local taxes added to each gallon.[10] In

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[6] *Available at* http://online.wsj.com/article/SB10001424052970203611404577041843336351290.html (last visited Dec. 7, 2012).

[7] *Available at* http://adage.com/article/news/benetton-ad-lays-bare-bloody-tol-war/88321/ (last visited Dec. 7, 2012).

[8] Ben & Jerry's Mission Statement, *available at* http://www.benjerry.com/activism/mission-statement (last visited Dec. 7, 2012).

[9] *Available at* http://blogs.ajc.com/political-insider-jim-galloway/2010/03/16/an-anti-tax-ad-with-every-pack-of-cigarettes (last visited Dec. 7, 2012).

[10] *See*, *e.g.*, http://farm4.static.flickr.com/3537/5764211182_c7c70af

(continued...)

November, 2012, Florida businessman John Metz began adding a surcharge to bills at his 40 restaurants to protest the costs imposed by the Patient Protection and Affordable Care Act, listed separately on the bill as the "ObamaCare Surcharge." Janean Chun, *John Metz, Denny's Franchisee and Hurricane Grill & Wings Owner, Imposes Surcharge for Obamacare*, Huffington Post, Nov. 14, 2012.[11] He told reporters his intention was to express his political views: "I want to explain it to everybody, to let them know what's coming down the pike." Joshua Rhett Miller, *Florida Restaurateur to Impose Surcharge for ObamaCare*, FoxNews.com, Nov. 15, 2012.[12]

Whatever the consequences to Nike or Exxon, small businesses face a greater risk from the chilling of speech. A large corporation has financial and public relations resources to withstand a public lawsuit. Smaller companies, without these resources, will not be able to take that risk, and will refrain from speaking out against their critics. Stephanie Marcantonio, Note, *What Is Commercial Speech?: An*

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[10] (...continued)
845.jpg; http://cedarposts.blogspot.com/2012/03/north-carolina-gas-prices-pain-at-pump.html; http://www.flickr.com/photos/63954631@N07/6797501366/; http://3.bp.blogspot.com/_HP-AL8HuQ_g/SkNsR40OyJI/AAAAAAAACPA/QVglXgtkCRA/s1600-h/GasTaxSticker.png; http://blogs.fourwheeler.com/6805290/editorials/gas-taxed/ (last visited Dec. 7, 2012).

[11] *Available at* http://www.huffingtonpost.com/2012/11/13/john-metz-hurricane-grill-wings-dennys_n_2122412.html (last visited Dec. 7, 2012).

[12] *Available at* http://www.foxnews.com/us/2012/11/15/florida-restaurateur-to-impose-surcharge-for-obamacare/ (last visited Dec. 7, 2012).

Analysis in Light of Kasky v. Nike, 24 Pace L. Rev. 357, 385 (2003). Today, "under the guise of commercial-speech restrictions, a company's First Amendment rights to free speech suddenly could be dashed beneath the provisions of a garden variety consumer statute. Cecil C. Kuhne III, *Testing the Outer Limits of Commercial Speech: Its First Amendment Implications*, 23 Rev. Litig. 607, 627 (2004). Society could then be tragically deprived of the chance to hear the other side of a significant debate—and all in the name of 'protecting' the public." *Id.* This is intolerable in a nation constitutionally devoted to "uninhibited, robust, and wide-open" debate. *Sullivan*, 376 U.S. at 270.

II

THE PETITION SHOULD BE GRANTED TO REASSESS THE VIABILITY OF *ZAUDERER* "REASONABLENESS" SCRUTINY

A. The Court of Appeals' Expansion of *Zauderer* to Allow Censorship as Well as Compulsion Conflicts With the Sixth, Seventh, and D.C. Circuits' Use of Heightened Scrutiny

Zauderer reasonableness scrutiny applies only where government requires a speaker to "include in his [speech] purely factual and uncontroversial information." 471 U.S. at 651. It should therefore have no application to the Total Price Rule, which does not merely require that the price and the tax be published together, but also forbids Petitioners from publishing the tax "*more prominently*" than the other amount. Because the *style* of expression—particularly

where a speaker means to draw the audience's attention to something—has independent First Amendment significance, the restrictions imposed by the Rule raise constitutional concerns above and beyond a disclosure requirement. Nor does the Total Price Rule provide adequate alternatives for the airlines to express their message, since it forbids *any* action which might make the tax "prominent"—thus "foreclos[ing] an entire medium of expression." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994).

Other courts of appeals do not apply *Zauderer* beyond the narrow context of disclosure requirements. In *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499 (6th Cir. 2008), the court invalidated a ban on separately identifying a tax that is directly analogous to the Total Price Rule. There, the state imposed a tax on telephone companies and forbade them from separately identifying the tax on bills sent to customers. *Id.* at 500. The court puzzled over whether to classify this as political or commercial speech. *Id.* at 504-05. It did not resolve that question, but—in conflict with the decision below—chose not to apply the *Zauderer* standard. Instead, it concluded that barring businesses from making the tax prominent would violate the Constitution under either pure- or commercial-speech standards. *See id.* at 510. Acknowledging that businesses drawing attention to taxes had a "heritage . . . [in] protests over the Townshend Acts," *id.* at 505, the court observed that the restriction appeared designed to insulate government from "political accountability for the tax." *Id.* at 509.

In *Central Illinois Light Co. v. Citizens Util. Bd.*, 827 F.2d 1169 (7th Cir. 1987), too, the Seventh Circuit

struck down a state law forcing public utility companies to publish messages with which the companies disagreed. *Id.* at 1171. The state defended that rule as a mere disclosure requirement, leaving utilities sufficient alternative means of expression. The court rejected this argument: "While *Zauderer* holds that sellers can be forced to declare information about themselves needed to avoid deception, it does not suggest that companies can be made into involuntary solicitors for their ide[o]logical opponents." *Id.* at 1173. And in *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1213 (D.C. Cir. 2012), issued shortly after the panel decision in this case, the court, in conflict with itself, refused to apply *Zauderer* to government-mandated cigarette advertisements which were designed to persuade rather than to inform. As in this case, the government asserted an interest in "effectively" communicating its desired message to the public, but the court found that allowing government to dictate speech in the name of "effectiveness" would threaten the speech rights of businesses. *Id.* at 1221.

By applying *Zauderer* not just to disclosure requirements but also to the content restriction that forbids making the tax "prominent," the decision below expanded that decision and correspondingly threatens a wide array of business-generated speech. The petition should be granted to rectify this conflict and protect business' expressive rights.

B. *Zauderer* Is Inadequate to Resolve the Problem of Compelled Commercial Speech

Compelling someone to endorse an idea with which he disagrees is a grievous violation of the First Amendment. *Keller v. State Bar of Cal.*, 496 U.S. 1, 10

(1990). Businesses, no less than individuals, have the right not to be compelled to disseminate messages with which they disagree. *PG&E Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986); *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). This right illustrates that the First Amendment is concerned not simply with the circulation of information, but also with the personal interests of speakers themselves, be they individuals or associations. Compelled speech violates the autonomy of individuals or groups who value remaining silent on certain occasions. *Cf. Hurley*, 515 U.S. 557. This interest is not adequately captured by the popular "marketplace of ideas" cliché which views the First Amendment as concerned only with increasing the circulation of information, which was the premise underlying *Zauderer*. Subsequent decisions like *PG&E* and *United Foods* have rightly recognized that businesses, no less than individuals, also have a First Amendment right not to speak.

Unfortunately, the deferential *Zauderer* standard allows government to force companies to express ideas with which they disagree. The theory behind allowing disclosure requirements is that the addition of more information is a positive value, but this ignores the right of businesses to remain silent. The bizarre consequence is that under current precedent, a business *cannot* be forced to disseminate facts framed in a persuasive way, *R.J. Reynolds,* 696 F.3d at 1222, but *can* be forced to print and distribute factual information that is unclear and ambiguous to the layperson, *see*, *e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1340-41 (2010) (government may force business to call itself a "debt relief agency," a term not clear to the layperson)—and can be forced to run advertisements with which the

business disagrees, *see*, *e.g.*, *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 973 (1992)—but publishers *cannot* be forced to print those ads. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

Lower courts have reached conflicting decisions with regard to whether *Zauderer* applies to compelled commercial speech. In *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107 (2d Cir. 2001), the Second Circuit applied *Zauderer*, and not *Central Hudson*, to a requirement that lightbulb manufacturers label their mercury-containing fluorescent lights as hazardous waste, because the manufacturers were not being silenced, or forced to espouse beliefs they disagreed with. But in *Borgner v. Brooks*, 284 F.3d 1204 (11th Cir. 2002), the court applied *Central Hudson*, and not *Zauderer*, to a Florida statute requiring dentists to include disclaimers stating that certain dental procedures and specialties were not recognized by the American Dental Association. *Id.* at 1210.

In theory, *Zauderer* should be applied only where government seeks to prevent confusion or deception of consumers. But "commercial speech is routinely and pervasively compelled for reasons that have little to do with the prevention of deception," Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 Val. U.L. Rev. 555, 584 (2006), and the use of *Zauderer* in such circumstances poses a significant threat to First Amendment values. Moreover, the ideal of compelling disclosure only of "purely factual and uncontroversial" information, *Zauderer*, 471 U.S. at 651, is rarely manifested in reality. Factual

statements are frequently confusing, misleading, context-dependent, or subject to reasonable dispute about their implications. Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 Buffalo L. Rev. 847, 874 (2011) ("Judicial grappling with whether allegedly libelous statements contain factual assertions counsels against facile characterization of required commercial speech as devoid of subjectivity or controversy."). *Zauderer* scrutiny "fails to address those situations in which . . . there is disagreement over whether the regulation simply mandates factual disclosures or compels commercial speech." Dayna B. Royal, *Resolving the Compelled-Commercial-Speech Conundrum*, 19 Va. J. Soc. Pol'y & L. 205, 233 (2011). Applying only a reasonableness standard to compelled commercial speech "fail[s] to recognize that commercial speech may be ideological . . . . Speech that generally proposes a commercial transaction may also be part of a body of belief." *Id.* And although *Zauderer* is supposed to apply only where government seeks to prevent deception or confusion, compelled speech often creates more of both. There is nothing deceptive or confusing about printing the amount of a tax more prominently than the cost of an airplane ticket; on the contrary, confusion and deception are *consequences* of the Total Price Rule.

Nor is it clear why, even if government should be able to regulate speech to prevent *deception*, it should also thereby be allowed to restrict speech to prevent *confusion*. Since confusion can arise from many honest causes outside a speaker's control, allowing government to dictate speech in ways it believes will prevent *confusion* means granting the government a dangerously broad and indefinite power over speech. Silencing or restricting commercial expression "for the

good of the citizenry" reflects a patronizing and offensive mistrust of citizens' ability to understand information, weigh options, and make personal choices based on their understanding. James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky*, 54 Case W. Res. L. Rev. 1091, 1104-06 (2004).

But the most basic problem with *Zauderer* lies in the premise that the value of free speech lies solely in "the free flow of information." On the contrary, the freedom guaranteed by the First Amendment extends also to the autonomous interest every individual and business has in not being forced to endorse or propagate ideas with which the person or business disagrees. And there is no constitutional warrant for ignoring the significance of this interest "merely because the regulations at issue involve commercial speech." *Milavetz*, 130 S. Ct. at 1343 (Thomas, J., dissenting).

Whatever value the reasonableness standard may have had in *Zauderer*, where the required disclosure was a very specific factual statement, easily assessed for its truth, its applicability to a case like this, where the speech at issue is political, and where the restriction forbids the speaker from making that speech "prominent," is dubious at best. Certiorari is necessary to rectify this confusion and establish that businesses, no less than individuals, have the right to speak—or not to speak—as they choose.

CONCLUSION

William Bradford's skull-and-crossbones protest against the Stamp Act is one of the most potent examples of free press in early America. "Indeed, it is probable that to no one man in the Colonies was America more indebted for the repeal of the Stamp Act than to Colonel William Bradford." Wallace, *supra*, at 100. But if published today, under existing First Amendment precedent, the ad might easily be classified as "commercial speech." *Cf. Kasky*, 27 Cal. 4th at 256-57; *Wag More Dogs,* 680 F.3d at 369. A government edict prohibiting the publishing of protest symbols in the places reserved for tax stamps could be rationalized as preventing consumer confusion, and a modern-day Bradford's protest might be silenced.

This Court should abandon the futile and dangerous effort of imposing artificial legal categories on expression, guaranteeing some and allowing others

to be silenced. The petition should be *granted*, and all expression given full First Amendment protection.

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Respectfully submitted,

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