No. 15-600

IN THE

Supreme Court of the United States

ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC., f/k/a/JANSSEN PHARMACEUTICALS, INC., and/or JANSSEN, L.P.,

Petitioner,

v.

SOUTH CAROLINA ex rel. ALAN WILSON, in his official capacity as Attorney General of the State of South Carolina,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Petition presents three questions. *Amicus curiae* Washington Legal Foundation addresses the following question only:

Whether a State violates the First Amendment by penalizing a defendant for the content of its speech without requiring proof that the speech contains a knowing or reckless falsehood.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes and Constitutional Provisions:

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. In particular, WLF has devoted substantial resources to promoting free speech rights regarding matters of public interest, appearing before this Court and other federal courts in cases raising First Amendment issues. *See, e.g., Nike v. Kasky*, 539 U.S. 654 (2003); *Omnicare, Inc. v. Laborers Dist. Council*, 135 S. Ct. 1318 (2015).

In the medical field, WLF has worked to protect the First Amendment rights of doctors and patients to receive all relevant information about the risks and benefits of products approved by the Food and Drug Administration (FDA). *See, e.g., Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dism'd*, 202 F.3d 331 (D.C. Cir. 2000) (FDA permanently enjoined from preventing manufacturer

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. On December 3, 2015, WLF provided counsel for Respondent with notice of its intent to file this brief. All parties have consented to the filing; letters of consent have been lodged with the Court.

dissemination of peer-reviewed medical texts discussing off-label uses of FDA-approved products); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012).

WLF is concerned that the decision below, if allowed to stand, will be detrimental to public health because it will deter pharmaceutical companies from speaking out on matters of public interest. The South Carolina courts exhibited little or no understanding of the important First Amendment issues raised by this case. The decision below creates a threat that drug companies will be hit with huge state-court judgments for their good-faith statements on matters of public interest. As a result, the exercise of free speech rights will be chilled considerably, depriving doctors and patients of the robust discussion of matters of public interest that is vital to ensuring optimal health care.

STATEMENT OF THE CASE

The facts of the case are set out in detail in the Petition. WLF wishes to highlight several facts of particular relevance to the issues on which this brief focuses.

Petitioner Ortho-McNeil-Janssen Pharmaceuticals, Inc. ("Janssen") appeals from a judgment imposing $124 million in civil penalties under the South Carolina Unfair Trade Practices Act ("SCUTPA"). The South Carolina Attorney General filed the action[2] based on: (1) a November 10, 2003

[2] The Attorney General hired private counsel to file suit on a contingency-fee basis. A small group of private attorneys

letter (the "Dear Doctor Letter" or "DDL") sent by Janssen to doctors nationwide (including some doctors in South Carolina) regarding Risperdal, an antipsychotic drug manufactured by Janssen; and (2) Risperdal's FDA-approved label, which South Carolina contends did not include adequate warnings about certain potential side effects.

Throughout this litigation, Janssen has asserted that the statements contained in the Dear Doctor Letter and its label were truthful, and it introduced substantial evidence of truthfulness at trial. A jury nonetheless determined that Janssen violated SCUTPA, which declares unlawful "unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20(a). It did so after being instructed by the trial judge (over Janssen's objection) that it could determine that Janssen violated SCUTPA even in the absence of a finding that Janssen's speech was false, much less a finding that Janssen knew that the speech was false or acted with reckless disregard of whether it was false or not.

Rather, the trial judge instructed, the jury could determine that Janssen violated SCUTPA based on any conduct it found "immoral" or "unethical" or that "offends established public policy." R.7665. Despite the absence of claims by South Carolina that anyone was deceived by Janssen's speech or suffered any injuries, the trial judge imposed a $327 million civil

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(including counsel for Respondent) has filed numerous similar contingency-fee suits on behalf of States throughout the nation, against both Janssen (with respect to Risperdal) and other large pharmaceutical companies.

penalty on Janssen. He determined that Janssen's conduct with respect to the DDL and its FDA-approved label constituted 553,000 separate violations of SCUTPA. Pet. App. 149.

The South Carolina Supreme Court affirmed the trial court's liability finding and imposed a still-massive-but-somewhat-reduced civil penalty. The court issued an initial opinion in February 2015, then withdrew that opinion and issued a substituted opinion in July 2015. Pet. App. 1-69. The substituted opinion fixed the amount of the civil penalty imposed on Janssen at $124 million. *Id.* at 4.

The court held, *inter alia*, that Janssen waived its right to challenge the judgment on First Amendment free speech grounds because it had not "preserved this issue for review." *Id.* at 32. Although acknowledging that Janssen had raised its First Amendment defense in connection with its proposed jury instructions and again in connection with its motion for JNOV or a new trial, the court said that any effort to assert a First Amendment defense on appeal was precluded by Janssen's failure "to raise any First Amendment issues in its motion for a directed verdict." *Id.* at 33.

The court stated that "in any event," the SCUTPA judgment did not violate Janssen's First Amendment rights. *Id.* at 33a-35a. The court noted that the jury found that "Janssen's acts were unfair *or* deceptive, and thus unlawful under SCUTPA," and held that "[t]he record is replete with evidence that reasonably supports a finding that Janssen's conduct was unfair *and* deceptive." *Id.* at 34-35 (emphasis

added). Citing statements from this Court that "misleading" commercial speech "is not protected by the First Amendment," the South Carolina Supreme Court concluded, "Janssen may not avail itself of the protections of the First Amendment to shield itself from its deceptive conduct and false representations." *Ibid.*

Although the court premised its conclusion that Janssen's speech merited no First Amendment protection on the allegedly misleading nature of the speech, it did not suggest any basis for concluding that the jury did, in fact, find that the speech was false or misleading. To the contrary, the court upheld jury instructions (to which Janssen objected) that permitted the jury to find that an act or practice is "unfair" (and thus violates SCUTPA) if "it offends established public policy or is immoral, unethical, or oppressive." *Id.* at 37.

SUMMARY OF ARGUMENT

This case presents issues of exceptional importance to the Nation's healthcare system. Risperdal, an antipsychotic medication sold by Janssen (as well as by other drug companies under the generic name risperidone), is widely prescribed by doctors throughout the world to treat a variety of serious medical conditions, including schizophrenia, bipolar disorder, and irritability in people with autism. Particularly because antipsychotic medications frequently have major side effects, there is significant public interest—among both consumers and medical professionals—in encouraging an open exchange of information regarding the side effects most often

experienced by users of the various FDA-approved medications. Yet, the decision below, by imposing a huge judgment against a drug manufacturer based on speech not containing a knowing or reckless falsehood, is likely to have a substantial chilling effect on such speech.

Review is warranted to determine whether government speech regulation of this sort is consistent with the First Amendment. South Carolina imposed a massive civil penalty on Janssen for its speech despite the absence of a jury finding that Janssen's speech was false, much less a finding that Janssen knew that the speech was false. Nor did South Carolina introduce evidence that anyone was deceived by Janssen's speech or suffered any injuries. If States are free to punish a drug manufacturer for providing doctors with its good-faith views about the potential side effects of its drugs, all manufacturers will refrain from speaking voluntarily—thereby significantly diminishing the body of informed medical opinion available to doctors and consumers on a matter of considerable public interest.

South Carolina's decision to sanction speakers under these circumstances in inconsistent with the Court's First Amendment case law. The South Carolina Supreme Court held that the trial record contained evidence from which the jury *could* have concluded that Janssen misled doctors and consumers, and that the First Amendment provides no protection whatsoever to misleading/deceptive speech such as Janssen's. Pet. App. 34-35. Even if the jury really had held that Janssen's speech was misleading/deceptive (and it did not), this Court has unequivocally rejected assertions that there "is any general exception to the

First Amendment for false statements." *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (plurality); *id.* at 2553 (Breyer, J., concurring in the judgment). The First Amendment bars sanctions against one who utters a false statement that does not cause injury, in the absence of a finding that the statement is a "knowing or reckless falsehood." *Id.* at 2545. In the absence of a finding that Janssen acted knowingly or recklessly in uttering allegedly false statements, the decision below conflicts with *Alvarez*.

The potentially commercial character of Janssen's speech does not serve to distinguish this case from *Alvarez*. Both the plurality and concurring opinions in *Alvarez* cited commercial speech decisions in support of their conclusions that false speech is entitled to at least some degree of First Amendment protection. *See, e.g.*, 132 S. Ct. 2545, 2547 (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976)); *id.* at 2552 (Breyer, J., concurring in the judgment). In support of its "knowing or reckless falsehood" requirement, *Alvarez* cited *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 620 (2003), a commercial speech case in which the Court stated that a commercial telemarketing firm could not be sanctioned by Illinois for its telephone fundraising solicitations in the absence of evidence that it was aware of the falsity of its speech or acted with reckless disregard as to whether it was false. *Id.* at 2545 ("False statement alone does not subject a fundraiser to fraud liability.") (quoting *Telemarketing Associates*, 538 U.S. at 620).

Review is also warranted because the speech at

issue touches upon matters of particular public interest—in this instance, the safety and effectiveness of FDA-approved drugs. Consumers and doctors need that information to make informed choices regarding treatment options. This Court's case law requires heightened First Amendment scrutiny of such speech. The South Carolina Supreme Court's approach—a categorical rejection of all First Amendment protection once it determined that Janssen's statements were misleading—sharply conflicts with case law providing enhanced First Amendment protection for speech touching upon matters of public concern.

In its Opposition brief, South Carolina argues that the Court lacks jurisdiction to hear Janssen's First Amendment claims because the lower court's decision allegedly rested on a state-law ground that is independent of the federal question and is adequate to support the judgment. According to the South Carolina Supreme Court, Janssen failed to preserve First Amendment issues because it failed to raise them in its motion for a directed verdict. That claim is without merit and may well have been raised by the court below in an effort to evade U.S. Supreme Court review of its decision.

Whether the lower court's procedural-default ruling deprives this Court of jurisdiction to hear Janssen's First Amendment claims "is itself a federal question" that the Court is empowered to decide. *Lee v. Kemna*, 534 U.S. 362, 375 (2002). Jurisdiction is barred only if the South Carolina Supreme Court foreclosed appellate review of Janssen's First Amendment claims on the basis of "firmly established and regularly followed state rules." *Id.* at 376.

Because South Carolina has no "firmly established" rule that precluded appellate review of the First Amendment claims, this Court may exercise jurisdiction over those claims.

The court below held that Janssen waived its First Amendment claims by failing to raise them in connection with its motion for a directed verdict. But Janssen's principal First Amendment claim was that the trial court erred when it declined to instruct the jury that it could not rule for the State in the absence of evidence of knowing or reckless falsity. Obviously, Janssen could not possibly have objected to the jury instructions in connection with a motion for directed verdict, because the jury instructions had not yet been given at the time that Janssen filed its directed verdict motion.

Janssen adequately preserved its First Amendment claims by objecting to the jury instructions both before and after they were delivered by the trial judge, and again in connection with its motion for JNOV or a new trial. The South Carolina Supreme Court apparently invented a new procedural rule as a basis for its decision that Janssen was precluded from raising its First Amendment claims on appeal. Because that new rule does not qualify as "firmly established," it cannot foreclose review of those claims by this Court.

REASONS FOR GRANTING THE PETITION

South Carolina has imposed a massive penalty on Janssen for its speech touching on matters of significant public interest, without a finding that the

speech contains a knowing or reckless falsehood—or even that the speech was false. Moreover, South Carolina has not asserted that anyone was deceived by Janssen's speech or were injured by it. Review is warranted to determine whether sanctioning speech in this manner is consistent with the First Amendment.

I. Review Is Warranted to Determine Whether the First Amendment Permits Penalizing Speech Without a Finding that the Speech Was Knowingly or Recklessly False

The South Carolina Supreme Court held that Janssen "may not avail itself of the protections of the First Amendment" because the trial record contained evidence that Janssen's speech was false/deceptive. Pet. App. 35. The court failed to acknowledge, however, that the jury never made a finding that Janssen's speech was false/deceptive. Rather, it returned a verdict against Janssen based on jury instructions that permitted a finding of SCUTPA liability based on nothing more than a determination that the speech was "unfair," a term nebulously defined as encompassing any business practice that "offends established public policy or is immoral, unethical, or oppressive." Pet. App. 37. Certainly, nothing in the jury verdict constitutes a finding that Janssen's speech was knowingly or recklessly false, and the South Carolina Supreme Court has not contended otherwise.

A. The Decision Below Conflicts with this Court's Decisions that Provide First Amendment Protection to Allegedly False Speech

Review is warranted to review the lower court's conclusion that a speaker "may not avail itself of the protections of the First Amendment to shield itself" from speech-based sanctions if its speech is false or deceptive. Pet. App. 35. That conclusion directly conflicts with decisions of this Court.

The Court explained in *Alvarez* that virtually all speech is entitled to *some* First Amendment protection. It stated that the categories of speech not entitled to First Amendment protection are very limited and "have a historical foundation in the Court's free speech tradition." *Alvarez*, 132 S. Ct. at 2544 (plurality);[3] *see also id.* at 2553-54 (Breyer, J., concurring in the judgment). Invalidating a federal law that made it a crime to falsely claim receipt of military decorations, the Court explicitly rejected the federal government's contention that there is a "general exception to the First Amendment for false statements." *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (plurality); *id.* at 2553 (Breyer, J., concurring in the judgment).

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[3] The plurality's list of unprotected speech included: (1) advocacy intended, and likely, to incite imminent lawless action; (2) child pornography; (3) speech integral to criminal conduct; and (4) fraud. *Alvarez*, 142 S. Ct. at 2544. It stated that apart from the few listed categories, content-based speech restrictions are almost never permitted. *Ibid.*

The Court acknowledged that a number of its prior opinions included statements indicating that false statements are entitled to little or no First Amendment protection. But as Justice Breyer explained, "These judicial statements cannot be read to mean 'no protection at all.'" *Ibid*; *id.* at 2545 (plurality) ("The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection."). Rather, *Alvarez* held that before the government may sanction allegedly false speech that does not cause injury to others, it must at the very least demonstrate that the statement is "a knowing or reckless falsehood." *Ibid.*

The Court explained that this grant of First Amendment protection to false speech is necessary to avoid chilling speech by those who, although believing that their contemplated speech is truthful, fear that the government might decide otherwise and impose sanctions on them:

> Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech absent evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in the Court's cases, or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

Id. at 2547-48. Indeed, all members of the Court

agreed that the potential for chilling truthful speech is of paramount importance in determining when the First Amendment prohibits government penalizing of false speech. *Id.* at 2553 (Breyer, J., concurring in the judgment) ("[T]he threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart. . . . Hence, the Court emphasizes *mens rea* requirements that provide 'breathing room' for valuable speech by reducing an honest speaker's fear that he may accidentally incur liability for speaking."); *id.* at 2563 (Alito, J., dissenting). The dissenters agreed that false statements are entitled to First Amendment protection to the extent that "their prohibition would chill other expression that falls within the Amendment's scope." *Ibid.* Their dissent was based primarily on their conclusion that no truthful speech would be chilled by a law making it a crime to falsely claim receipt of military decorations. *Ibid.*

The South Carolina Supreme Court held that Janssen's allegedly false speech was not entitled to First Amendment protection, without considering whether its conclusion would chill truthful speech. Yet, the potential chill on truthful speech by drug manufacturers is readily apparent here. If sending Dear Doctor Letters regarding the potential side effects of a drug manufacturer's product exposes the manufacturer to massive civil penalties imposed by a State that disagrees with the manufacturer's good-faith assessment that the DDL is truthful, one can reasonably expect manufacturers to refrain from sending such letters in the future—thereby depriving

doctors and consumers of the robust discussion of matters vital to ensuring optimal health care. Review is warranted to resolve the conflict between the decision below and this Court's decisions regarding the extent to which the First Amendment protects allegedly false speech.

B. First Amendment Protection for Allegedly False Speech Extends to Commercial Speech

The South Carolina Supreme Court concluded that regardless whether First Amendment protection extends to false speech in a noncommercial context, it does not extend to false "commercial speech"—that is, speech that does no more than propose a commercial transaction. Pet. App. 34 ("The State correctly notes that commercial speech is not protected by the First Amendment unless it concerns lawful activity and is not misleading."). That conclusion conflicts sharply with this Court's commercial speech case law.

We note initially that there is considerable reason to doubt that the speech at issue in this case should be categorized as "commercial." South Carolina sanctioned Janssen not for speech directed at its potential customers but rather for speech directed at physicians—a Dear Doctor Letter and a product label intended to supply doctors with detailed safety and usage information. But even if Janssen's speech is properly categorized as "commercial," *Alvarez* makes clear that the alleged falsity of that speech does not justify depriving the speech of all First Amendment protection.

To be sure, the Court recognized that the government may impose sanctions on false speech that causes harm to others. *Alvarez*, 132 S. Ct. at 2545 (plurality). False commercial speech may cause such harm by, for example, inducing customers to purchase products under false pretenses. *Alvarez* identified several categories of cases in which false statements may cause harm to others, including defamation, fraud, invasion of privacy, and vexatious litigation. *Ibid.*

The Court nonetheless cautioned that even in cases involving false speech that causes injury, other factors relevant to the First Amendment analysis may limit or preclude imposition of sanctions on the speaker. One such relevant factor is the speaker's *mens rea*. The Court explained that in defamation and fraud cases, falsity alone is not sufficient "to bring the speech outside the First Amendment"; rather, the statement also "must be a knowing or reckless falsehood." *Ibid.*

Commercial speech cases in which a business is alleged to have disseminated misleading advertisements are, in essence, fraud cases; the Court's commercial speech doctrine affords a somewhat reduced level of First Amendment protection to commercial speech to ensure that governments are able to protect consumers from commercial fraud. *See, e.g., Virginia State Bd. of Pharmacy*, 425 U.S. at 771. Thus, *Alvarez*'s statement that the First Amendment's "knowing or reckless falsehood" requirement applies to fraud claims is equivalent to saying that it applies to any effort by the government to penalize allegedly false commercial speech that causes no injury.

The Court's intent that its false-speech protections should apply to both noncommercial and commercial speech is further demonstrated by its citation to *Telemarketing Associates* in support of its "knowing and reckless falsehood" requirement. *Alvarez*, 132 U.S. at 2545. *Telemarketing Associates* was a commercial speech case in which the Court stated that a commercial telemarketing firm could not be sanctioned by Illinois for its telephone fundraising solicitations in the absence of evidence that it was aware of the falsity of its speech or acted with reckless disregard of whether it was false. *Telemarketing Associates*, 538 U.S. at 620.

The decision below also conflicts with the Court's false-speech case law in that it made no effort to ensure that the sanction imposed on Janssen was narrowly tailored. *Alvarez* made clear that any sanction imposed on speech based on its falsity must be narrowly tailored so as to minimize its impact on First Amendment rights. *See, e.g.,* 132 S. Ct. at 2555-56 (Breyer, J., concurring in the judgment) (federal "stolen valor" statute violated First Amendment because "it [was] substantially possible to achieve the Government's objective in less burdensome ways."). In contrast, the court below said nothing to explain how imposing a $124 million penalty on Janssen could qualify as a narrowly tailored remedy for Janssen's allegedly false speech. It did not address, for example, whether action of the sort taken by FDA in response to the November, 2003 Dear Doctor Letter—directing Janssen to send a letter to doctors to correct alleged misstatements in the DDL but not imposing any monetary sanction—would have served South Carolina's purposes without chilling

future speech.

C. Heightened Scrutiny Is Warranted When the Penalized Speech Touches on Matters of Public Interest

Review is also warranted because the speech at issue touches upon matters of particular public interest—in this instance, the safety and effectiveness of FDA-approved drugs. Information regarding the safety and effectiveness of pharmaceuticals generally, and of atypical antipsychotic medications in particular, is a matter of significant public interest. Consumers and doctors need that information to make informed choices regarding treatment options.

Courts routinely afford heightened First Amendment protection to speech when the issues being discussed are of significant public interest. Thus, when those seeking to disseminate information have been challenged by a party asserting an interest in nondissemination, this Court has consistently resolved such disputes by reference to whether the information involved a matter of public interest. *See, e.g., Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 103 (1979); *New York Times Co. v. United States,* 403 U.S. 713 (1971) (*per curiam*) (publication of Pentagon Papers over objections of federal government justified in part by the fact that the papers included information of great public concern). In *Bartnicki v. Vopper,* 532 U.S. 514 (2001), the Court held that the First Amendment prevented individuals whose illegally intercepted telephone conversations had been broadcast on a radio station from suing the radio station, in large measure

because the conversations involved "information of public concern." 532 U.S. at 534. Similarly, the First Amendment right of government employees to speak freely (without fear of discipline by their employers) hinges largely on the public importance of the matters addressed. *See Pickering v. Bd. of Education,* 391 U.S. 563, 566 (1968).

In *Thornhill v. Thompson,* 310 U.S. 88 (1940), the Court rejected an effort to prevent speech by an entity that wished to speak out on an issue of public importance. The case involved labor picketing that sought "to advise customers and prospective customers" regarding labor conditions "and thereby to induce such customers" to change their purchasing decisions. *Thornhill*, 310 U.S. at 99. Despite Alabama's claim that information being conveyed by picketers was false, the Court overturned an injunction against the picketing because the First Amendment bars the government from "impair[ing] the effective exercise of the right to discuss freely industrial relations which are *matters of public concern*." *Ibid* (emphasis added). The Court reasoned, "Free discussion concerning the conditions in industry and the causes of labor disputes [is] indispensable to the effective and intelligent uses of the process of popular government to shape the destiny of modern industrial society." *Id.* at 103. Similarly, free discussion concerning issues of life-changing importance to medical patients is important in promoting high-quality health care. That goal is jeopardized if state governments are permitted to prevent speech by companies and individuals wishing to discuss those issues in good faith.

The importance of open discussion on matters of public concern is one of the considerations that has led the Court to provide significant First Amendment protection even to false speech, and even when uttered in a commercial setting. As Justice Breyer opined in a case arising in a commercial context, "speech on matters of public concern needs 'breathing space'—*potentially incorporating certain false or misleading speech*—in order to survive." *Nike, Inc. v. Kasky*, 539 U.S. 654, 676 (2003) (Breyer, J., dissenting from dismissal of writ of certiorari) (emphasis added). That breathing space should include a bar on penalties imposed on a speaker in cases of this sort unless there is a finding both that the speech was false and that the speaker acted with knowledge of falsity or else in reckless disregard of the truth. *See New York Times v. Sullivan*, 376 U.S. 254 (1964) (imposing a heightened, "reckless disregard" standard to allegedly false statements contained in a paid newspaper advertisement). The Court arrived at that heightened standard of review based on its recognition of a "profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide open." *Id.* at 270 (emphasis added).

The court below imposed a $124 million penalty on Janssen for speaking on an issue of considerable public importance, without taking into account the importance of that issue. Review is warranted to determine whether imposing a massive sanction on speech of that nature—particularly in the absence of evidence of knowing or reckless falsity and in a case in which the government makes no allegation that anyone was injured—is consistent with the First Amendment.

II. The Lower Court's Determination that Petitioner Waived Its First Amendment Claims Does Not Bar Review by this Court

In its Opposition brief, South Carolina argues that the Court lacks jurisdiction to hear Janssen's First Amendment claims because the lower court's decision allegedly rested on a state-law ground that is independent of the federal question and is adequate to support the judgment. According to the South Carolina Supreme Court, Janssen failed to preserve First Amendment issues because it failed to raise them in its motion for a directed verdict. That claim is without merit and may well have been raised by the court below in an effort to evade U.S. Supreme Court review of its decision.

Whether the lower court's procedural-default ruling deprives this Court of jurisdiction to hear Janssen's First Amendment claims "is itself a federal question" that the Court is empowered to decide. *Lee v. Kemna*, 534 U.S. 362, 375 (2002). Jurisdiction is barred only if the South Carolina Supreme Court foreclosed appellate review of Janssen's First Amendment claims on the basis of "firmly established and regularly followed state rules." *Id.* at 376. Because South Carolina has no "firmly established" rule that precluded appellate review of the First Amendment claims, this Court may exercise jurisdiction over those claims.

When this Court reviews a state court decision on direct review pursuant to 28 U.S.C. § 1257, it is

reviewing the judgment; if resolution of a federal claim (in this instance, Janssen's claim that South Carolina's $124 million sanction violates its First Amendment rights) cannot affect the judgment, there is nothing for the Court to review. *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). The First Amendment issue cannot affect the judgment below if, as South Carolina alleges, the South Carolina Supreme Court's rejection of Janssen's First Amendment claim "rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment." *Id.* at 729. The Court lacks power to review such a state-law determination. *Ibid.*

But the Court will not conclude that a state-law rule is "adequate to support the judgment" unless it is "firmly established and regularly followed." *Lee v. Kemna*, 534 U.S. at 376. Because the South Carolina Supreme Court's decision not to permit Janssen to raise its First Amendment claims on appeal was not based on a "firmly established" rule, the decision does not rest on a state-law determination that adequately supports the judgment.

Janssen's principal First Amendment claim was that the trial court erred when it declined to instruct the jury that it could not rule for the State in the absence of evidence of knowing or reckless falsity. Under "firmly established" South Carolina law, Janssen preserved that claim by objecting to the jury instructions both before and after they were delivered by the trial judge, and again in connection with its motion for JNOV or a new trial. *See, e.g., State v. Daniels*, 401 S.C. 251, 258 (2012) ("Appellant's

objections were properly preserved for this Court's consideration on appeal" when he "objected to the offensive language [in the jury instructions] both before and after the trial court delivered his instruction.").

The South Carolina Supreme Court held that Janssen waived its First Amendment claims by failing also to raise them in connection with its motion for a directed verdict. But the case cited by the court in support of its waiver finding—*In re McCracken*, 346 S.C. 87, 93 (2001)—is inapposite because it did not grapple with the timing of objections to jury instructions. Indeed, Janssen could not possibly have raised First Amendment objections to the jury instructions in connection with a motion for directed verdict, because the jury instructions had not yet been given at the time that Janssen filed its directed verdict motion.

A state procedural rule that was applied by the state supreme court for the first time in connection with this case cannot qualify as a "firmly established" rule that is "adequate to support the judgment." *See, e.g.*, *Ford v. Georgia*, 498 U.S. 411, 424-25 (1991) (declining to deem a state procedural rule "firmly established" when it was not announced until after the petitioner's trial.).

The Court should be particularly wary of deferring to a state procedural rule where, as here, the evidence suggests that a state court adopted its procedural rule for the purpose of preventing review of its First Amendment determination by this Court. As Justice Breyer warned in *Alvarez*, the pervasiveness of

statements that are at least arguably false "provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively." *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring in the judgment). That weapon can become particularly deadly unless the Court closely examines efforts by States to prevent review of their First Amendment decisions.

CONCLUSION

Amicus curiae respectfully requests that the Court grant the Petition.

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