No. 08-1202

In the
Supreme Court of the United States

IMS HEALTH, INC., *et al.*,

Petitioners,

v.

KELLY A. AYOTTE, Attorney General of New Hampshire,

Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

For decades, publishers have acquired doctors' prescribing histories and used the information to publish reports. Drug companies use that information to deliver information about new products to doctors. New Hampshire has made it a crime to transfer prescribing histories within the state to increase brand-name drug sales. The First Circuit held that the law does not implicate the First Amendment because it targets conduct and involves only speech with "scant societal value." Alternatively, it held that the First Amendment permits the government to "level the playing field" in communications with doctors, notwithstanding that the law in fact "may not accomplish very much."

The Questions Presented are:

1. To what extent does the First Amendment protect the acquisition, analysis, and publication of accurate factual information that is used by third parties for a commercial purpose?

2. Does the First Amendment permit such a prohibition when the government seeks to "level the playing field" by inhibiting truthful speech while simultaneously permitting the use of the identical information for communication of the state's preferred viewpoint?

3. Does the First Amendment permit such a prohibition when it is both grossly underinclusive (because it is so riddled with exceptions that it "may not accomplish very much") and overinclusive (because it inhibits even communication that the state acknowledges benefits public health)?

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INTEREST AND IDENTITY OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petitioner.[1]

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation created its Free Enterprise Project. Through that project, the Foundation seeks to protect the free enterprise system from abusive regulation, the unwarranted expansion of claims and remedies in state civil justice systems, and barriers to the freedom of contract. To that end, PLF has participated in several cases before this Court and others on matters affecting the public interest, including issues related to the First Amendment and commercial speech. *See*, *e.g.*, *Wine & Spirits Retailers, Inc. v. Rhode Island and Providence Plantations*, 128 S.

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Ct. 274 (2007); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003); *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146 (2003); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998). PLF attorneys also have published on the commercial speech doctrine. *See, e.g.*, Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205 (2004). PLF believes its public policy experience will assist this Court in its consideration of the petition.

REASONS FOR GRANTING THE WRIT

In this Information Age, corporate communications represent a distinct and valuable voice, offering information that may be unavailable to other speakers, or information which other speakers (most notably the government) may choose not to reveal. Corporate speech contributes to public debates on matters of general interest, such as the economy, the environment, and foreign trade; and on matters of specific interest, such as the availability, usage, and effects of medical prescriptions, as in this case. Moreover, with greater frequency and subtlety, new technologies and innovative marketing strategies introduce the corporate profit-motive into what otherwise would be fully protected speech. The current commercial speech doctrine cannot predictably resolve disputes resulting from these new modes of expression.

In the past several decades, this Court's approach to speech uttered by business interests ranged from zero protection (*Valentine v. Chrestensen*, 316 U.S. 52 (1942)), to very high protection (*Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*,

425 U.S. 748 (1976)), to a four-part test (*Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980)), which has itself undergone revision (*Bd. of Trs. of the State Univ. v. Fox*, 492 U.S. 469, 480 (1989) (upholding a regulation outlawing Tupperware parties on a university campus)). The analyses differ depending on the speaker (*Bates v. State Bar*, 433 U.S. 350, 384 (1977), and *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (lesser protection accorded to attorney solicitations)) and the social worth of the activity promoted. *Compare Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 342, 348 (1986) (upholding restrictions on advertisements for legal gambling facilities), *with Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (restrictions on solicitations for charity struck down). The divergent lines of commercial speech jurisprudence have produced a well of confusion, exemplified by the First Circuit's split decision in this case.

Corporate speech takes many different forms and addresses issues far beyond offering to sell widgets at low, low prices. Even when the speech is fairly straightforward in its attempt to bolster a bottom line, it is so frequently intermingled with otherwise protected speech that courts simply cannot determine where the speech falls in the tangled web of cases comprising the "commercial speech doctrine." In this case, the expressive activity is simply the compilation of factual data into reports for the purpose of providing that information, sometimes at a price, to those who value it. New Hampshire seeks to stifle this exchange of factual information, as a means of controlling free economic exchange. In an area of the law that is already full of almost incomprehensibly narrow

distinctions, only this Court can cut through the clutter. This case presents a perfect opportunity to do so.

ARGUMENT

I

THE LEVEL OF SCRUTINY APPLIED TO EXPRESSIVE CONDUCT BY BUSINESS INTERESTS PRESENTS A MATTER OF CRITICAL PUBLIC CONCERN

A. *Central Hudson* Has Proven Unworkable

The variety and pervasiveness of commercial and mixed commercial/noncommercial speech present in the market today cannot be analyzed adequately under the modern commercial speech doctrine. The decision below relies on this Court's cases, but in so doing, unmoors the precedents from the underlying source—the First Amendment. In *Central Hudson*, 447 U.S. at 566, this Court formulated a four-part test against which restrictions on commercial speech would be weighed:

> For commercial speech to come within [the First Amendment], [1] it at least must concern lawful activity and not be misleading. Next, we ask [2] whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

This Court later expanded *Central Hudson's* inherent flexibility. *See, e.g., Bd. of Trs. of the State Univ. v. Fox*, 492 U.S. at 480 (requiring a "reasonable fit" rather than

the least restrictive means to comply with the fourth prong). Unfortunately, this flexibility has "left both sides of the debate with their own well of precedent from which to draw." Floyd Abrams, *A Growing Marketplace of Ideas*, Legal Times, July 26, 1993, at S28. *See also* Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212, 1222 (1983) ("commercial speech" was "an empty vessel into which content is poured").

Even this Court has been unable to apply the *Central Hudson* analysis in any predictable way. *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419-20 (1993) ("This very case illustrates the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category. . . . The absence of a categorical definition . . . is also a characteristic of our opinions considering the constitutionality of regulations of commercial speech."). Many lower courts have expressly noted their struggle to apply *Central Hudson*. *See, e.g., Nordyke v. Santa Clara County*, 110 F.3d 707, 712 (9th Cir. 1997) (striking down a fairground lease term prohibiting gun shows, appellate court described this Court's commercial speech cases, concluding that "*Central Hudson* is not easy to apply"); *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684 (7th Cir. 1998) (recognizing "the difficulty of drawing bright lines" (quoting *Discovery Network*, 507 U.S. at 419)); *Oxycal Lab., Inc. v. Jeffers*, 909 F. Supp. 719, 724 (S.D. Cal. 1995) (recognizing "that, often, these definitions will not be helpful and that a broader and more nuanced inquiry may be required"); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 527

(1996) (Thomas, J., concurring) (courts have had difficulty in applying the *Central Hudson* balancing test "with any uniformity"). *Cf. Kasky v. Nike, Inc.*, 45 P.3d 243, 269 (Cal. 2002) (Brown, J., dissenting) ("[T]he commercial speech doctrine, in its current form, fails to account for the realities of the modern world—a world in which personal, political, and commercial arenas no longer have sharply defined boundaries."). *See also Am. Future Sys., Inc. v. Pa. State Univ.*, 752 F.2d 854, 867 (3d Cir. 1984) (Adams, J., concurring) ("The commercial speech doctrine, which offers lesser protection for commercial than for non-commercial communications, has been criticized almost since its inception for its failure to develop a hard and fast definition for this type of speech."). Moreover, this Court has noted the entreaties of "certain judges, scholars, and amici curiae" to repudiate *Central Hudson* and "implement[] a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184 (1999); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001).

The commercial speech doctrine as currently applied by this Court and lower courts can lead to highly unpredictable results, such as the decision below. Pulling a little of this and a little of that from a variety of this Court's opinions, and recognizing the expression under consideration was in "uncharted waters" (Pet. App. at 25) the First Circuit Court of Appeals developed a new doctrine unlike any this Court—or any other court—ever articulated. Pet. App. at 22-23 (holding that compilation and conveyance of truthful, factual information is conduct that falls outside the protection of the First Amendment). When the state of the law reaches this point, affected parties have no means by

which to adapt their actions or their speech to prevent themselves from running afoul of the law. This uncertainty chills protected speech as those fearing liability shy away from expression that might be construed as "commercial."

The confusion engendered by the opinion below weighs heavily in favor of this Court's review. Stability, certainty, and predictability are valued because they promote confidence in the rule of law and make the resolution of disputes a less costly enterprise. Joseph R. Grodin, *Are Rules Really Better Than Standards*, 45 Hastings L.J. 569, 570 (1994). Certainty achieves fairness to those who rely upon the law, efficiency in following precedent, and continuity and equality in treating similar cases equally. *McGregor Co. v. Heritage*, 631 P.2d 1355, 1366 (Or. 1981) (Peterson, J., concurring). Certainty promotes business innovation and development by letting firms know what they can and cannot do. Further, by eliminating speculation as to what the law is and avoiding a need for interpretation, clarification, or explanation, certainty promotes efficiency for businesses and individuals. Paul E. Loving, *The Justice of Certainty*, 73 Or. L. Rev. 743, 764 (1994).

B. Several Justices Recognized the Importance of Revisiting the Commercial Speech Doctrine in *Nike, Inc. v. Kasky*

This Court recognized the need to address the confusion generated by the commercial speech doctrine when it granted the petition for a writ of certiorari in *Nike, Inc. v. Kasky*, 537 U.S. 1099 (2003). The Court later dismissed the petition as improvidently granted, but several Justices nonetheless wrote to highlight the

magnitude of the issue, and the fact that it was not going away. *Nike, Inc. v. Kasky*, 539 U.S. 654. Justice Kennedy appended only a one-line opinion that the Court should not have dismissed the case. *Id.* at 665. But Justice Breyer's dissent, with Justice O'Connor concurring, argued that the case should have been decided on the merits and contains some intriguing suggestions regarding the evolving jurisprudence in the area of commercial speech. First, Justice Breyer acknowledged that the Court's refusal to issue an opinion on the merits may have the effect of causing corporations to refrain from speaking when they otherwise would participate in public dialogue. *Id.* at 667 ("In my view, however, the questions presented directly concern the freedom of Americans to speak about public matters in public debate, no jurisdictional rule prevents us from deciding those questions now, and delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on."). Justice Breyer suggested that the principle guiding resolution of the case is the Court's previous recognition that speech on matters of public concern needs "breathing space" to survive. *Id.* at 676 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964)). Based on the primacy of this principle, Justice Breyer would have applied heightened scrutiny to the statute challenged in *Nike*, and would further have held those provisions unconstitutional. *Id.*

Justice Breyer wrote particularly about the one of the nine challenged Nike communications that he thought veered closest to the "commercial speech" line (and thus least likely to warrant protection): a letter to university presidents and athletic directors. *Id.* at 676. Justice Breyer accepted this Court's characterization of the letter as one containing several commercial

elements: it was written by a commercial speaker to a commercial audience on the subject of the company's own business practices. *Id*. at 677. However, Justice Breyer found other, less commercial, elements more compelling: the letters were not in any kind of traditional advertising format, did not present or propose any commercial transaction, and "provide[d] 'information useful in discussions with concerned faculty and students." *Id*. Perhaps most importantly, "the letter's content makes clear that, in context, it concerns a matter that is of significant public interest and active controversy, and it describes factual matters related to that subject in detail." *Id*. Justice Breyer further noted that the facts asserted in the communication were central to the public debate, not peripheral. *Id*. at 678.

Having determined that these communications were worthy of heightened scrutiny, *id*., Justice Breyer opined that "there is no reasonable 'fit' between the burden it imposes upon speech and the important governmental 'interest served.'" *Id*. at 679 (citation omitted). While finding public worth in false advertising statutes as a general matter, Justice Breyer was particularly troubled by the provision in the Unfair Competition Law that permits a private right of action without any showing of injury and regardless of whether the business acted intentionally. *Id*. Moreover, "[u]ncertainty about how a court will view these, or other, statements, can easily chill a speaker's efforts to engage in public debate . . . . At the least, they create concern that the commercial speaker engaging in public debate suffers a handicap that noncommercial opponents do not." *Id*. at 680 (citations omitted). Summing up the impact of the California Supreme Court's decision, Justice Breyer wrote that "[t]he upshot is that commercial speakers doing business in

California may hesitate to issue significant communications relevant to public debate because they fear potential lawsuits and legal liability." *Id.* at 682.

The California Supreme Court's split decision in *Kasky v. Nike* starkly revealed the disarray in this aspect of First Amendment jurisprudence. By accepting the petition, the Court embraced an opportunity to revisit the question: To what degree do we value corporate speech, and, consequently, to what degree will corporate speech be protected under the First Amendment? Unfortunately, when the Court dismissed the petition, the opportunity was set aside for another day.

The case presently before the Court offers an excellent opportunity to revisit the questions that have been postponed for six years and counting.

II

INNOVATIVE AND VALUABLE COMMERCIAL EXPRESSION DESERVES FULL FIRST AMENDMENT PROTECTION

A. "Common Sense" Does Not Suffice To Distinguish Commercial from Noncommercial Speech

Because the government may regulate commercial transactions, the government also assumes the ability to regulate commercial speech. *See* Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 Tex. L. Rev. 777, 780 (1993). Yet "commercial speech" is not easily defined. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring) ("[T]he borders of the commercial speech category are

not nearly as clear as the Court has assumed."); *Edenfield v. Fane*, 507 U.S. 761, 765 (1993) ("[A]mbiguities may exist at the margins of the category of commercial speech."); and *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 81 (1983) (Stevens, J., concurring) ("[T]he impression that 'commercial speech' is a fairly definite category of communication . . . may not be wholly warranted."). These "ambiguities" threaten to overcome the rest of the category.

A profit motive, in and of itself, does not render speech unprotected. *Va. State Bd. of Pharmacy*, 425 U.S. at 761-62. Instead, relying on "common sense," the Court held that speech receives less-favored status only when it does "no more than propose a commercial transaction." *Id.* at 771 n.24. The two "common sense" distinctions are (1) that commercial speech is more verifiable than other types of speech and (2) that commercial speech is more durable than other types of speech. *Id.*, *see also Cent. Hudson*, 447 U.S. at 564 n.6. Both distinctions have been criticized by judges and scholars. *See, e.g.*, Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627, 635-38 (1990); Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 Minn. L. Rev. 289, 296-97 (1987); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 31-32 (2000).

One example of speech that is offered with a profit motive but which also has a genuine positive impact on public health matters is found on Web sites geared toward parents of infants and toddlers. Baby food manufacturers have Web sites chock full of helpful information as to when a baby should achieve developmental milestones, advice on how to encourage

a baby to eat new foods, health advice for the expectant and breastfeeding mother, and so on. Some even have a doctor on staff to answer e-mail inquiries. *See*, *e.g.*, Web site for Earth's Best Organic, Doctor's Corner, http://www.earthsbest.com/md_corner/index.php (last visited Apr. 9, 2009) (baby food company provides the services of an obstetrician/gynecologist and a pediatrician to answer consumers' questions online regarding everything from fertility and pregnancy to teething, allergies, and immunization). Of course, the Web sites also provide information for purchasing products, but one may peruse the sites at length without ever making a purchase. *See, e.g.*, Web site for Gerber products, *at* http://www.gerber.com/ Expert_Advice/(last visited Apr. 9, 2009) (pointing readers to information about nutritional development, new products, and expert advice, "24/7").

It is not always obvious to courts how to treat this type of mixed speech. *See, e.g.*, *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 586 (2d Cir. 2000) (noting that domain names may or may not be commercial speech depending on a variety of factors). Thus the "common sense" distinctions no longer appear a solid foundation for diminished constitutional protection, and attempts to cram innovative methods of commercial expression into this rigid category leads only to confusion. The court below, purportedly applying common sense, nonetheless came to the nonsensical conclusion that the compilation of information from billions of drug prescriptions into reports that present the truthful information in a useful format, is of "scant social value." Pet. App. at 22.

B. Corporate Speech Serves Valuable Functions To Convey Truthful Information and Check Other Sources of Information

Corporations play an important role in diffusing and checking societal and governmental accumulations of power. *See* David Millon, *The Sherman Act and the Balance of Power*, 61 S. Cal. L. Rev. 1219, 1243 (1988) ("Commercial opportunity meant more than just personal independence. Equally important, it guaranteed a balance of economic power in society.").

Viewed in this light, governmental suppression of corporate speech takes on potentially ominous implications for avoiding the centralization of political power. One can never be sure whether restrictions on corporate expression are in reality nothing more than governmental attempts to curb or intimidate a potential rival for societal authority.

Consider whether—under the First Circuit's theory in this case—the government could prohibit a private university's announcement, for the purpose of increasing enrollment (and thus, revenue), that it was forgoing government funding to avoid conditions attached to the money. If the government could prohibit this statement, on the purported public policy grounds of encouraging all universities to accept public funding and government priorities, not only would a certain element of democratically relevant information be unavailable to people, but "there would also be a legitimate fear that the government was seeking to suppress information concerning a particular commercial activity out of distaste for the values that it represents, and to ensure that more people did not partake in the activity and thereby increase its appeal."

Charles Fischette, *A New Architecture of Commercial Speech Law*, 31 Harv. J.L. & Pub. Pol'y 663, 680 (2008).

When the government silences speech, the vast majority of people will not know what they are missing. Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. Ill. L.F. 1080, 1082-83. Legislators have an incentive to achieve their regulatory goals covertly, avoiding the normal political response. Fischette, *A New Architecture*, 31 Harv. J.L. & Pub. Pol'y at 685. The New Hampshire Legislature was very straightforward in its objective to stifle speech that promotes an activity the government disfavors, in an attempt to reduce that activity. By targeting the upstream communications, the government is able to hide its true purpose from all but the most intensely interested observers. *See* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum. L. Rev. 334, 335 (1991) ("[T]he government may not suppress speech on the ground that the speech is likely to persuade people to do something that the government considers harmful."). Excluding corporate speech from the First Amendment's reach thus has a detrimental impact on the most fundamental values underlying the protection of free speech. *See* 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, 264 (1998).

Corporate speech counteracts the dominance of the few media megacorporations, of government officials who can command free access to the press and other means of disseminating information simply by virtue of their position. *See* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. Davis L. Rev. 663, 686 (1997). Given that most individual citizens

either cannot, or choose not to, compete in public debates dominated by the press and the government, adding a component of corporate speech provides "a more diverse discourse than a debate dominated by two, so long as the third does not merely echo the others." David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 Hastings Const. L.Q. 541, 571-72 (1991).

Government may not silence one side of a public debate because it disagrees with it. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92 (1972). Relegating speech by those who have commercial interests to second-class status silences one side of a debate in just this way. In so doing, the government creates a bias in the democratic process designed to achieve the state's desired result, which is exactly the opposite of what the First Amendment is intended to do. Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. Ky. L. Rev. 553, 580 (1997). Moreover, silencing commercial speech "for the good of the citizenry" reflects a patronizing and offensive mistrust of citizens' ability to make personal choices based on the greatest range of information. 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).

Rational people need to listen to speech from both commercial and noncommercial sources with an equal amount of skepticism; even core political speech can be rife with falsehoods and misleading statements. *See, e.g., City of Farmers Branch v. Hawnco, Inc.*, 435 S.W.2d 288, 292 (Tex. Civ. App. 1968) ("[P]ublic officials are not legally required to keep their campaign

promises and whether they do or not they are answerable to the voters at the next election."). Most, if not all, speakers have some self-interest, whether financial or personal, in having their views accepted by their audience. This self-interest does not diminish the First Amendment protection sheltering "political candidates seeking elective office, consumer organizations seeking increased consumer protection, welfare recipients seeking increases in benefits, farmers seeking subsidies, and American auto workers seeking higher tariffs on foreign automobiles." Redish & Wasserman, 66 Geo. Wash. L. Rev. at 269-70. Instead, First Amendment values of truth-seeking and democratic participation are advanced when the substance of the debate contains elements from all interested parties. The simple fact that all sides of a debate can participate is "likely to spur expression's thoroughness, thoughtfulness, and breadth of distribution. To exclude all self-interested expression from the scope of the constitutional guarantee, then, would effectively gut free speech protection." *Id.*

CONCLUSION

While hard cases may make bad law, sometimes "it is bad law that is creating the hard cases." Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 Conn. L. Rev. 961, 984 (1998). *Central Hudson* falls into this category. Until this Court simplifies First Amendment jurisprudence by protecting commercial speech, lower courts will continue to struggle and the citizenry will be deprived of all sides of important controversies. The decision of the First Circuit Court of Appeals cannot be reconciled

with the First Amendment. It can only serve as authority for other courts to ratchet downward the protection due not only to commercial speech, but to any speech that has even the slightest element of commercial gain for the speaker. The petition for a writ of certiorari should be granted.

DATED: April, 2009.

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