No. 13-1124

In the
Supreme Court of the United States

MINORITY TELEVISION PROJECT, INC.,

Petitioner,

v.

FEDERAL COMMUNICATION COMMISSION, et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In 1969, this Court held that the First Amendment permits government to restrict the speech of broadcasters in ways that this Court would never tolerate in other media. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969). This distinction was premised on the fact that only broadcasters—and only a handful of them—could reach American families in their living rooms. Today, millions of speakers can reach Americans in their living rooms, and practically anywhere else, with almost unlimited audiovisual content. Should this Court overrule *Red Lion*'s obsolete rationale for diminishing the First Amendment's protection of broadcasters?

2. At a minimum, in light of this Court's subsequent application of strict scrutiny to bans on paid political messages that are "broadcast," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010), does strict scrutiny apply to laws prohibiting broadcasters from transmitting paid political messages?

3. Consistent with the prevailing approach in the courts of appeals, does a ban on speech fail intermediate scrutiny if the only evidence before Congress supposedly linking the ban to the government's asserted interest consists of guesswork lacking any concrete factual support?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF)[1] respectfully submits 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. Fed. Election Comm'n*, 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). PLF believes its public policy experience will assist this Court in its consideration of the petition in this case.

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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.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

The Federal Communications Commission (FCC) found that Minority TV accepted paid ads from a wide variety of for-profit companies that underwrote programming, including Ford Motor Corp., General Motors, Korean Air Lines, and State Farm. Pet. App. at 10a, 87a. The FCC fined Minority TV $10,000 for violating 47 U.S.C. § 399b, which bans advertising by for-profit entities, on issues of public importance or interest, or by political candidates. The station challenged the statute primarily on First Amendment grounds, relying on *Citizens United*, which held that political speech does not lose First Amendment protection simply because its source is a corporation. The Ninth Circuit, sitting *en banc*, refused to apply strict scrutiny, and instead purported to use the intermediate scrutiny analysis articulated in *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364 (1984). It affirmed summary judgment for the FCC. Pet. App. at 6a. Chief Judge Kozinski (joined by Judge Noonan) dissented, describing intermediate scrutiny as subjective, "mushy and toothless," and contending that the panel applied such scrutiny improperly. Pet. App. at 50a-51a. Minority TV petitioned for certiorari.

The petition focuses on the aspect of Section 399b that regulates political speech. But the challenged statute prohibits *all* paid advertising—political or not—except on behalf of non-profit organizations. *See* 47 U.S.C. § 399b (prohibiting paid "message[s] or other programming material" that "promote any service, facility, or product offered by any person who is engaged in such offering for profit"). The Ninth Circuit

upheld the statute as a whole, including both its censorship of political and commercial speech.

This case therefore also presents the question of how to scrutinize the law's effect on commercial speech. The constitutional protection for commercial speech, and the level of scrutiny courts must apply to determine whether infringements on commercial speech can be justified, is an unresolved matter which this Court has been asked repeatedly to clarify. 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.

REASONS FOR GRANTING THE PETITION

I

SPEECH RIGHTS OF BROADCASTERS AND ADVERTISERS RAISE FUNDAMENTAL ISSUES OF NATIONAL IMPORTANCE

This Court has time and again come close to addressing the conflicts and confusion arising from the inherent struggle between the commercial speech doctrine and the First Amendment's broad protection of free speech. But it has thus far avoided squarely answering the question. For example, over the dissent of three Justices, the petition in *Nike v. Kasky* was dismissed as improvidently granted on the final day of the 2003 term, 539 U.S. 654, at the cost of what Justice Breyer described as a "heavy First Amendment price." *Id.* at 683 (Breyer, J., dissenting from dismissal). The Court again touched on aspects of commercial speech in subsequent years, most notably in *Citizens United*

and *Sorrell v. IMS Health Inc.,* 131 S. Ct. 2653 (2011). In both those cases, the Court held that, at least in some respects, corporate or commercial speech enjoyed full protection under the First Amendment. *See Citizens United*, 130 S. Ct. at 907 (political speech cannot be suppressed based on the speaker's corporate identity); *Sorrell*, 131 S. Ct. at 2659 (content-based ban on commercial speech is entitled to heightened scrutiny). But the hallmark of commercial speech law remains "substantial uncertainty and confusion." Thomas C. Goldstein, *Nike v. Kasky and the Definition of "Commercial Speech"*, 2002-2003 Cato Sup. Ct. Rev. 63, 70; *see also 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.").

The time has come for the Court to confront the question directly—whether the First Amendment allows courts to discriminatorily deprive speech of legal protection because that speech is related to a commercial transaction.

As a general rule, "the speaker and the audience, not the government, assess the value of information presented." *Edenfeld v. Fane*, 507 U.S. 761, 767 (1993). For this reason, "the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring). Commercial speech plays an important role in diffusing and checking governmental accumulations of power. *Citizens United*, 130 S. Ct. at 898 (First Amendment is premised on "mistrust of governmental power".). Commercial financial support for speakers and

publishers is essential to ensuring that freedom of expression is not just a privilege enjoyed by politically well-connected or government-subsidized entities. Protections for commercial speech counteract the dominance of government officials who can command free access to the press simply by virtue of their position, and ensure that other speakers can have their say. *See* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. Davis L. Rev. 663, 686 (1997).

Judge Kozinski's dissent below emphasizes this fact:

> Can broadcasters that are so dependent on one source of revenue be truly free to speak in ways that are critical of that source? . . . Washington is a small town with a long memory, and no one wants to get into a grudge match with the goose that lays golden eggs. The only true independence, the only truly free speech, comes from having a multitude of funding sources, so that none is so crucial that it can't be dispensed with. Deriving a portion of revenue from commercial advertising, along with other sources, can help secure that independence.

Pet. App. at 71a (Kozinski, J., dissenting).

Given that most individual citizens either cannot, or choose not to, compete in public debates dominated by the mainstream press and the government, the option of paying a broadcaster or publisher to express their own views adds an important element to public deliberation and 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).

This is perhaps nowhere made clearer than in the case of *New York Times v. Sullivan*, 376 U.S. 254 (1964), in which this Court upheld the expressive rights of a newspaper publisher and a group of private citizens who paid for a political advertisement in order to respond to what they believed was an unfair description of their protests. The Court decided that case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id*. at 270.

Citizens United affirmed the principle that the First Amendment forbids the government from discriminating between different speakers based on their identity or popularity, holding that even corporate speech (at least on political matters) receives the full protection of the First Amendment. 130 S. Ct. at 913. Although directed at political speech, *Citizens United* takes seriously the fundamental principle that the First Amendment safeguards the "marketplace of ideas" with all its "free market" connotations. *Id.* at 904-07, 914. The Court also rejected as a basis for legislation the notion that the government should address the market power of large corporations within the "marketplace of ideas." *Id.* at 899; Darrel C. Menthe, *The Marketplace Metaphor and Commercial Speech Doctrine: Or How I Learned to Stop Worrying About and Love Citizens United*, 38 Hastings Const. L.Q. 131, 133 (2010); *cf. McCutcheon v. Fed. Election Comm'n*, 572 U.S. __, slip op. at 15 (Apr. 2, 2014) ("The Government may no more restrict how many

candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse.").

Relegating speech by those who have commercial interests to second-class constitutional status silences one side of a debate in just this way. *Cf. Citizens United*, 130 S. Ct. at 899 ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content."). Allowing limits on commercial speech biases the democratic process in a manner designed to achieve the state's desired result. This 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" or government-defined "high quality educational programming" (Pet. App. at 7a) reflects a patronizing and offensive mistrust of citizens' ability to make personal choices based on the greatest range of information. *See McCutcheon*, slip op. at 17 ("The First Amendment does not protect the government, even when the government purports to act through legislation reflecting 'collective speech.'"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 520 (1996) (Thomas, J., concurring) (Noting the "antipaternalistic premises of the First Amendment" and "the impropriety of manipulating consumer choices or public opinion through the suppression of accurate 'commercial' 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).

This case is ideal for addressing issues postponed in recent commercial speech cases, including *Sorrell*, 131 S. Ct. at 2667, *Nike*, 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 accord to all speakers the full protection to which the Constitution entitles them.

II

COURTS CONFLICT ON WHETHER SPEECH CONTAINING BOTH COMMERCIAL SPEECH AND NON-COMMERCIAL SPEECH IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION

The commercials aired by Minority Television in this case are not easily classified in the crude "commercial" and "noncommercial" categories. The FCC rules requiring broadcasters to differentiate between "acceptable underwriting announcements" and "unacceptable commercial advertisements" Pet. App. at 202a, ignore the multifaceted nature of modern commercial speech that resists such pigeonholes. Courts have long recognized that speakers may combine "commercial" and "non-commercial" speech in a single expression or communication. In *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952, 955-56, 965 (9th Cir. 2012), for example, the Ninth Circuit reversed a district court holding that "yellow pages" directories containing non-commercial and community information nonetheless were commercial speech entitled to lesser constitutional scrutiny. The Ninth

Circuit instead held that the directories are entitled to full First Amendment protection, even though the directories are dependent on paid advertising to remain in business. In so doing, the court identified an array of cases involving "mixed-content" or "hybrid" speech deserving of full First Amendment protection, even where one or more aspects of the speech clearly was commercial, *id.* at 960-61 (citing cases). There was no principled reason to "treat telephone directories differently from newspapers, magazines, television programs, radio shows, and similar media" because a "profit motive and the inclusion or creation of noncommercial content in order to reach a broader audience and attract more advertising is present across all of them." *Id.* at 965.

Yet when speech about goods or services for sale is conjoined with speech about public matters, some courts have found in the amorphous nature of the commercial speech doctrine a justification for depriving businesses of their expressive rights, even when that expression involves social or political issues.

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 held that the speech in question was less-protected commercial speech, which it defined 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"), *cert. denied*, 553 U.S. 1005 (2008). *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 to challenge the company's statement that it "only deal[s] with suppliers who maintain the very highest standards and

share our commitment to animal welfare.").[2] Businesses can be liable not just for damages if they publish information that a court deems misleading; they can even be forced to publish advertisements that state the opposite of their views. *See United States v. Philip Morris USA, Inc.*, 907 F. Supp. 2d 1, 8-9 (D.D.C. 2012) (dictating the exact text and appearance of "corrective statements" that businesses will be forced to publish).

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

If the decisions in *Citizens United* and *Sorrell* suggested a trend toward greater protection of corporate or commercial speech, this Court's reluctance

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[2] *Available at* http://lists.envirolink.org/pipermail/ar-news/Week-of-Mon-20030707/003152.html (last visited Apr. 8, 2014).

to explicitly disavow the commercial speech doctrine has left lower courts unable to discern a broader principle beyond the cases' factual circumstances. *See, e.g.*, *B & B Coastal Enters., Inc. v. Demers*, 276 F. Supp. 2d 155, 163 (D. Me. 2003) ("In the First Circuit, regardless of whether a regulation of commercial speech is content-based, the test put forth in the Supreme Court's *Central Hudson* opinion, not strict scrutiny, will be applied to evaluate the regulation's constitutionality."); *Larson v. City & Cnty. of San Francisco*, 192 Cal. App. 4th 1263, 1285 (2011) ("[B]ecause 'regulation of commercial speech based on content is viewed as 'less problematic' than a content-based regulation of non-commercial speech', content-based restrictions on 'commercial speech' are evaluated under an 'intermediate scrutiny test.' ") (citations omitted); *Yeager v. AT&T Mobility, LLC*, 2011 WL 3847178, *4-*5 (E.D. Cal. Aug. 30, 2011) (Dismissing relevance of *Citizens United* because it was "focused on political speech and campaign spending, and has no application" in a case involving appropriation of a public figure's name for an advertisement; and distinguishing *Sorrell* because it involved "the challenge to a state law implicating the First Amendment, [which] is far different from the challenge to a Press Release made here by an individual.").

A. Commercial Enterprises Speak on Social and Political Issues

The mixed content of many corporate communications exists 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.[3] 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).[4] Benetton Group advertisements 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 soldier killed in Bosnia. *See* Christina Passariello & Jennifer Clark, *Benetton Retries Provocation*, Wall St. J., (Nov. 17, 2011), at D5;[5] Gary Levin, *Benetton Ad Lays Bare the Bloody Toll of War*, Advertising Age, (Feb. 21, 1994).[6] 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

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[3] *Available at* http://outofthecloset.org (last visited Apr. 8, 2014).

[4] *Available at* http://www.foxnews.com/us/2012/08/01/chick-fil-a-not-alone-in-touting-religion-alongside-products/ (last visited Apr. 8, 2014).

[5] *Available at* http://online.wsj.com/news/articles/SB10001424052970203611404577041843336351290 (last visited Apr. 8, 2014).

[6] *Available at* http://adage.com/article/news/benetton-ad-lays-bare-bloody-toll-war/88321/ (last visited Apr. 8, 2014).

promotes itself as "a company on a mission,"[7] and actively supports left-wing political causes.

These new methods of corporate communication with potential consumers were not anticipated years before they arrived on the scene, and future years will bring innovations beyond our current imagining. *Cf. Citizens United*, 130 S. Ct. at 890 ("Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux."); *McCutcheon v. FEC*, 572 U.S. __, slip op. at 36 (2014) (Acknowledging the effect of modern technology, particularly the Internet, on the continued validity of campaign finance regulations.).

In this connection, it is worth remembering that this Court once held that motion pictures were not protected at all by the First Amendment, because "the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit." *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 244 (1915). It was more than three decades later that this Court recognized that films are "a significant medium for the communication of ideas," and that their First Amendment protection "is not lessened by the fact that they are designed to entertain as well as to inform." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). In a similar way, this Court once held that commercial expression was categorically cast out of the First Amendment's sight. *Valentine v. Chrestensen*,

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[7] Ben & Jerry's Mission Statement, *available at* http://www2.benjerry.com/cms/site/au/activism/mission-statement (last visited Apr. 8, 2014).

316 U.S. 52 (1942). This Court has already repudiated that per se rule, recognizing that commercial speech must fall within the First Amendment at least to some degree, and that corporate speakers are protected by the Amendment. Yet current precedent persists in discriminating against speech and speakers on the basis of an often arbitrary categorization of "commercial" or "non-commercial," and given that neither *Citizens United* nor *Sorrell* overruled *Central Hudson* or *Bolger*, lower courts are left with the unenviable task of reconciling widely disparate cases along the First Amendment spectrum, and picking and choosing what speakers and what messages receive constitutional guarantees.

The Court should grant the petition in this case to simplify and streamline the "commercial speech doctrine" by applying the same strict scrutiny to restrictions on all speech: commercial or corporate speech no less than speech by other speakers.

B. Innovations in Corporate Expression Blur the Distinction Between Types of Speech

Innovations in advertising have all but eliminated the distinction between "commercial" and "non-commercial" speech. The rise of product placement is illustrative. Since the iconic Reese's Pieces scene in *E.T.*, and spurred by the invention of recording devices that allow consumers to skip television commercials, product placement now dominates the entertainment industry. Advertising can even be seen on the game show *Jeopardy!*—where entire categories are devoted

to brands, countries, and companies.[8] Some movies can be described as "one massive product placement vehicle," that essentially suggest commercial transactions to the audience. *See*, Adam Thierer, *Advertising, Commercial Speech, and First Amendment Parity*, 5 Charleston L. Rev. 503, 517 (2011). While in some movies the embedded advertisements are just that—in others, the advertisements become part of broader, non-commercial points that the filmmakers want to express.[9]

For instance, while the sci-fi thriller *Minority Report* raked in $25 million in product placements, those advertisements were used to attack the institution of advertising itself. Said *New York Times* movie critic Elvis Mitchell: "[T]he onslaught [of commercials] is presented as intrusive; each has been geared to speak directly to the individual consumer about, paradoxically, escape. The movie turns product placement into omnipresent white noise fodder."[10] Yet, the featured companies viewed the movie spot as a

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[8] *See* Abe Sauer, *Alex, What Is Jeopardy Product Placement for Met Opera?*, Brand Channel (Apr. 19, 2011), http://www.brandchannel.com/home/post/Met-Opera-Jeopardy.aspx (last visited Apr. 8, 2014).

[9] *See* Colin McLaughlin, *"The LEGO Movie" is more than a feature-length product placement*, The Daily Texas (Feb. 14, 2014), *available at* http://www.dailytexanonline.com/life-and-arts/2014/02/14/%E2%80%9Cthe-lego-movie%E2%80%9D-is-more-than-a-feature-length-product-placement (last visited Apr. 8, 2014).

[10] *See* Elvis Mitchell, *Halting Crime In Advance Has Its Perils,* New York Times (June 21, 2002), http://www.nytimes.com/movie/review?res=9E02EEDA113BF932A15755C0A9649C8B63 (last visited Apr. 8, 2014).

positive advertising opportunity. Many of them used the same "faux" advertisements shown in the film for actual marketing campaigns.[11]

Product placement not only serves in some films as non-commercial speech, but it fosters non-commercial speech. Such deals are beneficial for both filmmaker and advertiser, and are often necessary to defray the cost of increasingly expensive movie ventures. Some movies would not be possible without embedded advertisements.[12] In this way, product placement may act as social commentary itself, and also enable such commentary. Thus, product placement blurs the line between commercial and non-commercial speech. For example, the recent *LEGO Movie* used Legos not only to appeal to fans of the building bricks, but also as a symbol to express a theme of creativity and "thinking outside the box."[13]

Some companies create their own mini-motion pictures as a means of promoting their goods and services, and also as a means of expressing an opinion about social, political, or other public issues. These advertisements may be directed by Academy Award-winning directors, and star Golden Globe-winning

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[11] *See* Rob Walker, *The Ad-Friendly World of Minority Report*, Slate (June 24, 2002), http://www.slate.com/articles/business/ad_report_card/2002/06/the_adfriendly_world_of_minority_report.html (last visited Apr. 8, 2014).

[12] *See Daniel Craig Defends James Bond Product Placement*, The Telegraph (Apr. 17, 2002), http://www.telegraph.co.uk/culture/film/jamesbond/9209746/Daniel-Craig-defends-James-Bond-product-placement.html (last visited Apr. 8. 2014).

[13] McLaughlin, *supra* note 9.

actors.[14] In 2012, the British newspaper *The Guardian* won a prestigious advertising award for its depiction of newsgathering related to "The Three Little Pigs."[15] The ad begins with a SWAT team closing in on the pigs—all of whom are arrested for the murder of the Big, Bad Wolf. There is public outcry, and many who perceive the pigs as victims air their sympathy on social media, and of course, through *The Guardian*. Yet through further reporting and crowd-sourcing, *The Guardian* reveals that the Wolf had asthma, and could not possibly have huffed and puffed and blown the houses down. This discovery forces the pigs to confess to using the Wolf in their conspiracy to commit insurance fraud for the loss of their houses. But the story is not over. It turns out the pigs were struggling to keep up with their mortgage payments. As mortgage defaults rise, public outrage sparks economic reform—and the pigs are once again hailed as heroes. The happy story ends with a commercial pitch: *The Guardian* gives you "the whole picture." This two-minute film touches on the importance of free speech, fair reporting, social media, economic policy, and the right of criminals to be presumed innocent until proven guilty. But the point still is to sell a newspaper. It is impossible to determine whether a court would categorize it as "commercial" or "political" speech.

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[14] To use just one example, Martin Scorcese's commercial for Dolce & Gabbana, "Street of Dreams," stars Matthew McConaughey and Scarlett Johansson. *See Street of Dreams*, Dolce & Gabbana, http://www.dolcegabbana.com/beauty/ad-campaigns/the-one/ (last visited Apr. 8, 2014).

[15] The ad is available on YouTube at https://www.youtube.com/watch?v=vDGrfhJH1P4 (last visited Apr. 8, 2014).

While *The Guardian*'s ad aired in the traditional form of a television commercial, some companies instead create short films for distribution on other media. American Express created a series of comedic "webisodes" that center around Jerry Seinfeld's exploits with Superman.[16] The commercials promote AmEx and generate traffic to the company's website. BMW likewise produced eight short films starring Clive Owen and directed by various famous directors. The films were wildly popular *qua* films—winning awards from both advertising and entertainment industry groups.[17] Yet there can be no doubt that films were part of an advertising campaign, as BMW saw its sales increase 12% in the campaign's first year and 17% in the second.

Some companies tout the advantages of their products with specific reference to a social problem that the product, or the company, proposes to fix. Commercials may pair advertisements with social commentary—motivated both by profits and genuine concern. The popular upscale Mexican fast food chain Chipotle uses the slogan, "Cultivate a better world," and recently released an advertisement lamenting the

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[16] Stuart Elliot, *Seinfeld and Superman join forces again in spots for American Express, this time on the web*, New York Times (Mar. 30, 2004) http://www.nytimes.com/2004/03/30/business/media-business-advertising-seinfeld-superman-join-forces-again-spots-for.html (last visited Apr. 8, 2014).

[17] *BMW-The Hire*, This is not advertising (July 5, 2011), http://thisisnotadvertising.wordpress.com/2011/07/05/bmw-the-hire/ (last visited Apr. 8, 2014).

state of modern food production.[18] The commercial—or "film" as Chipotle calls it—is set to Grammy award-winning artist Fiona Apple's haunting rendition of "Pure Imagination," from *Willy Wonka and the Chocolate Factory*. The film paints a bleak portrait of a future rife with pollution and surveillance. The title character peeks behind a wall that says "All Natural" to find a chicken being pumped full of a solution that causes it to immediately double in size. He peeks behind another to find frightened cows crated in small boxes. Fed-up with industrial food practices, the scarecrow trades in the fake beef ("100% Beef-ish") and mass-produced cookie cutter lunches for his own fresh, made-to-order creations[19]—which strongly resemble Chipotle's burrito bowls. But the word "Chipotle" only appears once, and the film does not propose a commercial transaction.

As brands steadily associate themselves with lifestyle choices—eat fresh (Subway), shop Christian (Forever 21), buy American (Ford), etc.—the lines between pure advertising and editorializing become

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[18] *The Scarecrow film*, Chipotle.com, http://www.scarecrowgame.com/film.html (last visited Apr. 8, 2014).

[19] When asked by the *Wall Street Journal* whether Chipotle came up with the message, the animators answered in the affirmative: "Kudos to [Chipotle] for not making a commercial to sell burritos but rather to start a dialogue about the change they are trying to make." "Chipotle was very clear the intent was to initiate conversation and . . . really go after some of these companies. We were surprised they wanted to engage on that level and call them out. It wasn't about the [Chipotle] food product but about the change they are trying to make . . ." Alexandra Cheney, *The Story Behind That Fiona Apple Chipotle Ad*, Wall Street Journal (Sep. 19, 2013), *available at* http://blogs.wsj.com/speakeasy/2013/09/19/the-story-behind-that-fiona-apple-chipotle-ad/ (last visited Apr. 8, 2014).

increasingly blurred, further undermining the logic of subjecting "commercial" speech to a lower level of scrutiny.

Technological innovations further make it difficult to distinguish commercial from non-commercial speech—or to try to categorize speech at all. New types of speech such as search engine results, URLs, data, user-generated ads, and company-run weblogs do not easily fit into one category. In the information age, "economic activities [will] increasingly become informational activities." M. Ethan Katsh, *Rights, Camera, Action: Cyberspatial Settings and the First Amendment*, 104 Yale L.J. 1681, 1717 (1995). Under the current commercial/non-commercial distinction, the Yellow Pages has been given the highest level of constitutional protection, while URLs have been relegated to intermediate scrutiny. *Compare Dex Media*, 696 F.3d at 957, with *Gibson v. Texas Dep't of Ins.– Div. of Workers' Comp.*, 700 F.3d 227, 235 (5th Cir. 2012).

Granting all speech, whether "commercial" or "non-commercial," the same level of strict scrutiny ensures that viewers, and not the government, are arbiters of that speech's quality.

CONCLUSION

"One of the most delicate tasks a court faces is the application of the legislative mandate of a prior generation to novel circumstances created by a culture grown more complex." *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 273 (2d Cir. 1981). The current doctrinal framework is ill-suited to handle the wide range of commercial and mixed commercial/noncommercial speech present in the market today. 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. *See* Pet. App. at 79a (It is the Court's "constitutional duty to make the law of free speech clear and predictable.") (Kozinski, J., dissenting).

The petition should be granted.

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Respectfully submitted,

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