No. 12-1379

In The

SUPREME COURT OF THE UNITED STATES

HORACE FRAZIER HUNTER,

Petitioner,

v.

VIRGINIA STATE BAR, *EX REL.* THIRD DISTRICT COMMITTEE

Respondent.

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, THE MARION B. BRECHNER FIRST AMENDMENT PROJECT, AND THE MEDIA INSTITUTE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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STATEMENTS OF INTEREST OF *AMICI CURIAE*[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country. The Center is familiar with the facts and issues presented in this appeal having filed as *amicus curiae* when this case was before the Supreme Court of Virginia.

The Marion B. Brechner First Amendment Project, formerly known as the Marion Brechner Citizen Access Project, is a nonprofit, nonpartisan organization located at the University of Florida in Gainesville, Florida. Directed by attorney Clay Calvert, the Project is dedicated to contemporary issues of freedom of expression, including current issues affecting freedom of information and access to information, freedom of speech, freedom of press, freedom of petition, and freedom of thought. The Project's director has published multiple scholarly

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[1] Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for a 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 *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

articles on both political speech and commercial speech, the subjects at issue in this case.

The Media Institute is an independent, nonprofit research organization located in Arlington, Virginia. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, a competitive communications industry and journalistic excellence. The Institute has participated as *amicus curiae* in numerous court proceedings, including cases before the United States Supreme Court and federal courts of appeal.

SUMMARY OF ARGUMENT

This case implicates fundamental questions concerning the First Amendment, particularly in regard to speech involving elements of both political and commercial expression. This Court has clearly stated that when commercial and noncommercial speech are inextricably intertwined, the heightened level of protection applicable to the noncommercial elements should be applied to the speech as a whole. However, it remains unclear whether a given example of hybrid speech will be determined to meet the inextricably intertwined standard. Such a determination is necessarily contingent upon clear definitions of both political and commercial speech. This petition presents the Court with an opportunity to develop and clarify the proper treatment of hybrid speech and to more clearly define the boundaries of political speech, speech on matters of public concern, and commercial speech.

ARGUMENT

I. THIS CASE PRESENTS THE COURT WITH AN OPPORTUNITY TO CLARIFY THE MEANING OF "INEXTRICABLY INTERTWINED" HYBRID SPEECH

In *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781 (1988), this Court established an unambiguous standard for evaluating speech in which commercial and noncommercial elements are "inextricably intertwined." Contemplating whether North Carolina's regulation of an organization's efforts to solicit charitable donations was subject to strict scrutiny or the less exacting standard applicable to purely commercial speech, this Court concluded that "where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase." *Id.* at 782. As such, the appropriate standard of review was that applicable to "fully protected expression." *Id.*

While the *Riley* holding provides courts with clear guidance regarding the proper standard of review when evaluating a regulation of hybrid speech (*i.e.*, speech in which the commercial and fully protected noncommercial elements are inextricably intertwined), the question of whether a particular expression is, in fact, inextricably intertwined hybrid speech is much less clear. To date, this Court has only found hybrid speech in the context of charitable solicitations. *See, e.g.*, *Riley*, 487 U.S. at 782; *Vill. of*

Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980). The question remains, however, whether this Court's decision in *Riley* applies to the type of non-charitable hybrid speech that makes up Hunter's blog posts. The underlying logic of *Schaumburg* and its progeny suggest that it should. As noted by the *Riley* Court, "regulation of a solicitation must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech . . . and for the reality that without solicitation the flow of such information and advocacy would likely cease." 487 U.S. at 796 (internal quotation marks omitted). If "information and advocacy" are what *Riley* seeks to protect and promote, then it should not matter that the commercial aspects of the speech presented by this case are self-serving rather that charitable. The "information and advocacy" Hunter provides in his blog posts are indistinguishable from the fully protected components of the *Riley* and *Schaumburg* solicitations.

Where this Court has found fully protected speech *not* to be inextricably intertwined with the commercial message it accompanied, *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469 (1989), the determining factor was the extent and integration of the protected expression, not the nature of the commercial interest. In *Fox*, it was determined that the inclusion of a brief home economics lesson before a sales pitch for housewares did not "convert[] . . . [the] presentations into educational speech" any more "than opening sales presentations with a prayer or a Pledge of Allegiance

would convert them into religious or political speech." *Id.* at 474–75. After looking at the speech in its entirety, the Court was able to recognize and ferret out the inclusion of protected expression as mere window-dressing. It did not matter whether the sales pitch was for a charity or a private enterprise because the "information and advocacy" tacked on to it was so plainly superficial and secondary to the obvious purpose of the speech that the commercial and noncommercial elements, while related, were wholly independent of one another.

This case presents the Court with an opportunity to explicitly endorse a crucial implication of the *Riley* decision—specifically, that all hybrid speech is, by default, presumed to be inextricably intertwined. Thus, when a court evaluates speech that potentially combines fully protected elements with those receiving a lesser standard of protection, it must begin the inquiry by asking whether the expression—taken as a whole—contains any fully protected speech. If it does, the more stringent standard of review is presumed to apply. That presumption can only be rebutted if a court then finds the protected expression to be so superficial and secondary to the obvious commercial purpose of the speech. Only then may the commercial elements properly be excised and regulated according to the applicable standard. In short, *Fox* establishes a floor for hybrid speech analysis; it demonstrates the disjunction of commercial and noncommercial speech that must be present in order to override *Riley*'s default presumption of heightened protection.

II. THE COURT SHOULD HEAR THIS CASE TO CLARIFY WHAT CONSTITUTES POLITICAL EXPRESSION AND SPEECH ABOUT MATTERS OF PUBLIC CONCERN

In addition to providing an opportunity to clearly define inextricably intertwined hybrid speech, this case raises important issues concerning the definitions of political speech and speech on matters of public concern. Given the centrality of such speech to numerous aspects of First Amendment jurisprudence, any lack of clarity regarding these categories threatens to subject protected expression to unconstitutional regulation. The analysis described in *Riley*, for example, assumes that clear definitions exist so that courts may identify certain speech as belonging to one category or another. This Court, however, has never precisely outlined the elements of political speech, nor detailed its relationship to matters of public concern, leaving lower courts to speculate about the proper classification of speech like that presented by the instant case.

This Court has repeatedly recognized the primacy of political speech, calling such expression "central to the First Amendment's meaning and purpose." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 311 (2010). *See also Meyer v. Grant*, 486 U.S. 414, 425 (1988) (Political speech is "an area where protection of robust discussion is at its zenith."); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 410–11 (2000) (Thomas, J., dissenting) ("Political speech is the primary object of First Amendment protection."). Speech about matters of

public concern is equally valuable as it constitutes "the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74–5 (1964), and thus lies "at the heart of the First Amendment's protection." *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). *See also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."); *Connick v. Myers*, 461 U.S. 138, 145 (1983) ("Speech on public issues occupies the highest rung of the hierarchy of First Amendment values."). The extent to which political speech and speech on matters of public concern refer to the same thing, however, remains unclear. Because identifying and classifying expression as political speech or speech on matters of public concern (or both) is crucial to numerous aspects of First Amendment jurisprudence, any ambiguity as to the definition or boundaries of either category threatens protected expression and should be resolved.

Despite "practically universal agreement" that the First Amendment exists first and foremost to protect political expression, *Mills v. Alabama*, 384 U.S. 214, 218 (1966), this Court has never clearly defined core political speech. Instead, that label is applied to specific subsets of speech on a case-by-case basis. *See, e.g.*, *Citizens United*, 558 U.S. at 319 (determining that "electioneering communication" is one type of political speech); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) ("Speech concerning the criminal justice system has always been viewed as political speech.").

Those looking to this Court for a definitive description of speech on matters of public concern fare no better. Acknowledging that "the boundaries of the public concern test are not well defined," this Court recently attempted to "articulate some guiding principles" for dealing with such speech. *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011). This Court concluded that speech deals with matters of public concern "when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *Id.* (internal citations omitted). Although intended to clarify the boundaries of speech on public concerns, the disjunctive test articulated in *Snyder* has instead been called out for raising more questions than it answered. *See* Clay Calvert, Defining "Public Concern" After Snyder v. Phelps: A Pliable Standard Mingles with News Media Complicity, 19 Vill. Sports & Ent. L.J. 39, 70 (2012) ("The two-part test is, in a nutshell, riddled with ambiguities that lower courts must now sort through.").

III. THE COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI TO ADDRESS THE WIDESPREAD CONFUSION OVER THE COMMERCIAL SPEECH DOCTRINE

The degree to which the First Amendment protects commercial speech has changed significantly in the decisions of this Court over the last 70 years.

In *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), the Court held that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising." In *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975), however, the Court determined that "commercial advertising enjoys a degree of First Amendment protection" and that the "commercial aspects (of speech) . . . did not negate all First Amendment guarantees." Today, commercial speech receives First Amendment protection but to a lesser degree than other forms of protected expression. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2679 (2011).

For many, including some members of this Court, the shifting nature of constitutional protection for commercial speech is indicative of an inadequate justification for the less-than-full protection afforded commercial speech. The Petitioner's brief accurately sets forth the inconsistency among the lower courts resulting from this doctrinal uncertainty. *See* Brief for Petitioner at 28–35. In addition, a tremendous amount of scholarship analyzing commercial speech protection has been produced with the conclusion that the doctrine raises more questions than it answers. Calling the varying degrees of protection afforded commercial speech "extraordinary oscillations," one author summarized contemporary commercial speech doctrine as "controversial and confused." Robert Post, The Constitutional Status of Commercial Speech, 48 UCLA L. Rev. 1, 42 (2000). This state of affairs "has led to unpredictable and incompatible results," Lora E. Barnhart Driscoll, Citizens United v. Central Hudson: A Rationale for Simplifying and Clarifying the First Amendment's

Protections for Nonpolitical Advertisements, 19 Geo. Mason L. Rev. 213, 253 (2011), and calls for this Court to clarify the "confusing array of decisions regarding the precise parameters of the commercial speech doctrine." Michael W. Field, On Tap, 44 Liquormart, Inc. v. Rhode Island: Last Call for the Commercial Speech Doctrine, 2 Roger Williams U. L. Rev. 57, 58 (1996).

Even a cursory review of the titles of law review articles on commercial speech protection reveals a wide degree of criticism. *See, e.g.*, David L. Hudson, Jr., Justice Clarence Thomas: The Emergence of A Commercial-Speech Protector, 35 Creighton L. Rev. 485 (2002); Howard K. Jeruchimowitz, Tobacco Advertisements and Commercial Speech Balancing: A Potential Cancer to Truthful, Nonmisleading Advertisements of Lawful Products, 82 Cornell L. Rev. 432 (1997); Kerri L. Keller, Lorillard Tobacco Co. v. Reilly: The Supreme Court Sends First Amendment Guarantees Up in Smoke by Applying the Commercial Speech Doctrine to Content-Based Regulations, 36 Akron L. Rev. 133 (2002); Earl M. Maltz, The Strange Career of Commercial Speech, 6 Chap. L. Rev. 161 (2003); David F. McGowan, A Critical Analysis of Commercial Speech, 78 Cal. L. Rev. 359 (1990); Justin A. Redd, Educational Media Company at Virginia Tech, Inc. v. Swecker: First Amendment Lite Waters Down Commercial Speech Protection, 7 J. Bus. & Tech. L. 201 (2012); Edward J. Schoen et. al., United Foods and Wileman Bros.: Protection Against Compelled Commercial Speech-Now You See It, Now You Don't, 39 Am. Bus. L.J. 467, 474 (2002); Brian J. Waters, A Doctrine in Disarray: Why the

First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech, 27 Seton Hall L. Rev. 1626 (1997); Katherine Earle Yanes, Glickman v. Wileman Bros. & Elliot, Inc.: Has the Supreme Court Lost Its Way?, 27 Stetson L. Rev. 1461 (1998).

The disorder created by a lack of doctrinal clarity regarding commercial speech is no less problematic than the issues discussed above concerning the definitions of political speech and speech on matters of public concern. Either issue alone would be sufficient reason for this Court to grant the petition and clarify an important area of First Amendment jurisprudence. This case, however, demonstrates how the two issues are often implicated by the same speech. For a speaker such as Hunter who wishes to exercise his First Amendment right to comment on the judicial system that he happens to also participate directly in, the uncertainty caused by these murky areas of law present a direct threat to constitutionally protected expression.

CONCLUSION

For the reasons discussed above, *amici curiae* respectfully request that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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