No. 14-403

IN THE
Supreme Court of the United States

LIBERTY COINS, LLC., and
JOHN MICHAEL TOMASO,
Petitioners,

v.

DAVID GOODMAN, in his official capacity as Director, Ohio Department of Commerce; and AMANDA MCCARTNEY, in her official capacity as Consumer Finance Attorney of Division of Financial Institutions, Ohio Department of Commerce,
Respondents.

On Petition for a Writ of Certiorari to the U.S. Court Of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In addition to the issues raised in the petition, this case presents the following important question:

This Court has held that truthful commercial speech is protected unless the transaction or service advertised is illegal. Does that First Amendment exception apply where the underlying transaction is only illegal if it has been advertised?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES & REGULATIONS

INTEREST OF *AMICI CURIAE*[1]

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. This case concerns Cato because it implicates First Amendment protections for commercial speech, regarding which the constitutional doctrine is unsettled.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The text of the First Amendment contains no caveats. Its protection of speech is not limited to the political, the literary, the philosophical, or the artistic. The Constitution considers freedom of speech to be a basic individual right, regardless of the content or purpose of that speech.

Despite the Amendment's broad phrasing, this Court has identified certain content-defined

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[1] Pursuant to this Court's Rule 37.3(a) and with parties given timely notice, letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* made a monetary contribution its preparation or submission.

categories of speech as being beyond the scope of the First Amendment's protection: obscenity, child pornography, true threats, fighting words, defamation, fraud, incitement, and speech integral to criminal conduct. *United States v. Stevens*, 130 S.Ct. 1577, 1584 (2010).

These categories of unprotected speech are not the product of an "ad hoc balancing of relative social costs and benefits." *Id.* at 1585. Instead, each represents a "previously recognized, long-established category of unprotected speech." *Id.* at 1586. Because these exceptions are artifacts of historical understandings of the Constitution's limits, courts do not have a "freewheeling authority to declare new categories of speech outside the scope of the First Amendment," nor will this Court recognize new exceptions to the First Amendment for speech that has not been "historically unprotected." *Id.*

Seventy years ago, this Court recognized an additional exception for commercial speech when it held that the First Amendment imposed no "restraint on government as respects purely commercial advertising." *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). Subsequently, this Court abolished the broad exception created in *Chrestensen*, recognizing that commercial speech is protected by the First Amendment unless it is either a) deceitful, or b) advertising an illegal transaction. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980).

This Court has been clear that it reserves to itself the power to designate the boundary between protected and unprotected speech. When confronted with a lower court's decision that a statement

constitutes unprotected speech, this Court conducts "an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of the U.S., Inc.,* 466 U.S. 485, 505 (1984).

The decision below warrants such careful scrutiny. The Sixth Circuit held, contrary to this Court's precedent, that truthful statements accurately describing the nature of the speaker's business or advertising his general willingness to engage in lawful transactions with members of the public are not instances of constitutionally protected speech.

According to the Sixth Circuit, because the challenged law—Ohio's Precious Metals Dealers Act (PMDA)—made it illegal for Petitioners to engage in the otherwise lawful business he advertised *as a consequence of having advertised it*, his statements fell squarely within *Central Hudson*'s vestigial exception for speech advertising unlawful commercial transactions. Pet. App. at A-27 ("The PMDA does not burden the commercial speech rights of unlicensed precious metal dealers because such *dealers do not have a constitutional right to advertise . . . an unlicensed business* that is not in compliance with the reasonable requirements of Ohio Law.") (emphasis added).

That argument is superficially elegant but ultimately unpersuasive. It is undisputed that the First Amendment does not protect advertising an illegal business, but this Court has never applied that rule to cases where the law—rather bizarrely, in

amicus's view—only criminalizes a business if it has been advertised. The Sixth Circuit's rule is not only unsupported by this Court's First Amendment jurisprudence, it positively undermines it. The decision below creates a formalistic quibble that would allow states to proscribe speech this Court has declared to be constitutionally protected, giving that speech only the "protections" of rational basis review.

At worst, this is an attempt by the Sixth Circuit to reverse 70 years of judicial progress, stripping commercial speech of any constitutional protection. At best, it represents an unwarranted and unreasoned expansion of the exception to the First Amendment for advertisements promoting illegal activity. Either way, the ruling was a substantial deviation from existing precedent that warrants this Court's careful scrutiny under *Bose Corp.*

ARGUMENT

I. UNDER THIS COURT'S PRECEDENT, THE PMDA IS A RESTRAINT ON PROTECTED COMMERCIAL SPEECH

A. The PMDA Is a Restraint on Speech

In *Thompson v. W. States Med. Ctr.* 535 U.S. 357 (2002), this Court clarified that regulations of conduct triggered by content-specific advertising are to be analyzed as restraints on speech subject to heightened scrutiny.

Under Ohio law, no license is required to buy gold, silver, rare coins, and other precious metals. Under the PMDA, however, it is unlawful to operate a business as a precious metals dealer without a

license. (Ohio Rev. Code § 4728.02) Under the PMDA "[a] "precious metals dealer" means a person who is engaged in the business of purchasing [precious metals] if, in any manner . . . the person holds himself out to the public as willing to purchase [precious metals]." §4728.01(A)

The PMDA's plain text makes clear that its licensing and regulatory requirements only apply to businesses that advertise their willingness to buy precious metals to the public. This is also the understanding of the state agency responsible for enforcing the law, which was confirmed by the district court. Pet. App. at B-14 ("[The PMDA] is a prohibition of conduct that only applies to persons who engage in [content-specific] commercial speech.").

In its original demand letter, the Ohio Department of Commerce told Petitioners that the PMDA applied to their business because "Liberty Coins has held itself out to the public as willing to purchase precious metals via signage at the store location." The Department of Commerce later cited the Petitioners' business cards and an advert in a local paper as additional evidence of the PMDA's applicability. Pet. App. at B-3.

B. The First Amendment Protects Petitioners' Speech Because It Truthfully Advertises Lawful Activity

This Court's commercial speech doctrine "may be summarized generally as follows: truthful advertising related to lawful activities is entitled to the protection of the First Amendment." *In re R.M.J.,* 455 U.S. 191, 203 (1982). This is not an ambiguous rule, nor one rejected by the Sixth Circuit. In *Parker*

v. Ky. Bd. of Dentistry, that court followed *R.M.J.* when it held that a law prohibiting dentists from accurately describing the range of treatments they offered violated the First Amendment. 818 F.2d 504 (6th Cir. 1987).

Because there is no suggestion that Petitioners' statements were in any way deceitful, the only reason for possibly considering them unprotected speech would thus be if they advertised an unlawful good, transaction, or course of conduct.

But they did not do that. The advertisements at issue included the following phrases: "We Buy Gold"; "Buying Gold and Silver"; "Paying top competitive prices for gold and silver"; "Liberty Coins is Buying!"; "Professional Numismatist for 35 years;" and "Gold and Silver Scrap, Buy-Sell-Trade." Pet. at 3-4. It is these plainly true statements—Petitioners do indeed buy gold, etc.—that ran afoul of the PMDA.

As discussed above, in the cert. petition, Pet. at 17, and at length in the district court's opinion, Pet. App. at B-11-14, it is not illegal to purchase gold in Ohio, with or without a license. The most that could be justifiably claimed is that if Petitioners' business is properly subject to the PMDA, they could be charged with violating regulations *in connection with* any actual transactions—but there is no independent offense of buying, selling, or possessing gold.

The Sixth Circuit's expansion of the First Amendment exception for deceitful commercial speech means that truthful *advertisements* about a speaker's business are not protected speech unless the *business* is in full and proper compliance with every applicable law, by-law, ordinance, and

interpretive guideline. Given the innumerable federal, state, and local regulations, the Sixth Circuit rule would lead to the absurd situation where no business advertisements are constitutionally protected so long as the relevant authorities could point to a single infraction, no matter how small.

After all, the Sixth Circuit claims that businesses "do not have a constitutional right to advertise," unless their business is "in compliance with the reasonable requirements" of the law. Pet. App. A-27.

C. The Sixth Circuit Improperly Applied a First Amendment Exception to a Type of Speech That Has Been Historically Protected

In *Stevens*, this Court said that whether a category of speech is protected is a question of historical practice, turning on the existence of a "long-settled tradition of subjecting that speech to regulation." 130 S.Ct. at 1585. While there is a clear historical record of not protecting commercial speech that is misleading or that advertises inherently illegal transactions, *amicus* is "unaware of any similar tradition excluding . . . from 'the freedom of speech' codified in the First Amendment," *id.*, advertisements for goods and services which are not the subject of generally applicable criminal prohibitions and can be legally offered without restraint or license.

Amicus submits that there is no such long-standing tradition of commercial speech making lawful sales suddenly unlawful. Moreover, this Court has previously extended the protection of the First Amendment to speech advertising conduct of an

identical legal status to that of the transactions proposed by Petitioners' adverts. *See*, *e.g.*, *Thompson*, 535 U.S. 357.

In *Thompson*, this Court chose not to adopt the Sixth Circuit's rule. Like the PMDA, the law challenged in that case made the transactions advertised by the pharmacists impossible for them to perform without violating an applicable regulation and risking prosecution. 535 U.S. at 365. There, as here, the advertised conduct (compounding medicine and buying gold, respectively) was generally legal. In both cases, it was advertising that conduct that triggered certain licensing requirements, regulations, and prohibitions. If the Sixth Circuit was correct in claiming that Petitioners here have no right to advertise their business, then neither did the pharmacists in *Thompson*.

In short, any claim that the Sixth Circuit's rule here recognizes a historical practice of regulating a category of speech such that the speech is constitutionally unprotected under *Stevens* must account for how this Court—and the numerous lower courts that have followed *Thompson*—remained oblivious to that tradition's existence.

D. In the Alternative, Petitioners' Speech Is Protected Because It Advertised Conduct That Could Be Lawful or Unlawful Depending on the Buyer

This Court has repeatedly held that where a business deals in products that could be legally sold to one group but not to another, the advertisement of those goods is constitutionally protected. For example, this Court has held that advertisements for

tobacco products are protected speech, even though it would be a crime to sell those products to minors. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). *See also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (holding that liquor advertising is protected speech, despite the fact that there are many situations in which selling liquor is illegal); *Rubin v. Coors Brewing Co.,* 514 U.S. 476 (1995) (same regarding beer labeling).

Accepting for the sake of argument that the PMDA was both constitutional and fully applicable to the Petitioners, the statements at issue advertised potential transactions that could be either legal and illegal, depending on who is buying. The PMDA does not prohibit an unlicensed dealer from purchasing gold from a person who also deals in precious metals as part of his occupation, or from "collectors, speculators, or investors." §4728.11(A). This means that even after advertising, there remained a class of persons from whom Petitioners could purchase gold without violating the PMDA.

This places Petitioners and other unlicensed precious metals dealers in the same position as the retailers in *Lorillard* and *44 Liquormart*: they can conduct business with some people but not others. If the First Amendment protects the right of cigarette and liquor companies to advertise in order that they might reach that segment of the population with whom they may lawfully transact, it must protect a similar right for coin dealers.

II. THERE IS NO REASON TO EXTEND A FIRST AMENDMENT EXCEPTION TO ADVERTISEMENTS FOR GOODS AND SERVICES THAT ARE NOT INHERENTLY ILLEGAL

While *amicus* questions the soundness of a legal doctrine that bases the level of constitutional protection afforded speech on subjective assessments of the "value" of its content, that is how this Court's precedent treats commercial speech. Yet even that jurisprudential theory gives no support to the decision below.

A. Exceptions to the First Amendment Only Apply to Speech with No Value

While there are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem," these exceptions are limited to utterances that are of "such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72 (1942).

A specific statement's lack of value is thus a *sine qua non* for its inclusion in a category of unprotected speech. Even where a statement fits the general definition of a First Amendment exception, it will be protected if it can be shown to have some value. For example, content which could otherwise be freely regulated as obscenity is entitled to full protection under the First Amendment if it possesses "literary,

artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 27 (1973).

Similarly, there can be no categorical list of words that have no value: harsh vulgarities that might otherwise fall under the exception for fighting words merit constitutional protection where they enable speakers to convey "otherwise inexpressible emotions." *Cohen v. California*, 403 U.S. 15, 26 (1971). Accordingly, Petitioners' statements should only be considered unprotected if they belong to a type of speech that is generally valueless *and* they lack any value when considered on their own merits in the specific circumstances of their utterance. *Pennekamp v. Florida,* 328 U.S. 331 (1946)

B. Commercial Speech Is Generally Valuable

In the first post-*Chrestensen* case explicitly recognizing that the First Amendment protects commercial speech, this Court justified changing the law by pointing to the value of commercial speech to consumers: "[T]he particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,* 425 U.S. 748, 763 (1976). Where there is considerable variation in price, for example, "information as to who is charging what is more than a convenience," it can be essential to a family's well-being. *Id*. at 764 (holding that advertisements which do no more than inform consumers of prices are protected speech).

This Court also recognized that the free-flow of commercial information is of social value generally:

> [S]ociety also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest. The facts of decided cases furnish illustrations: advertisements stating that referral services for legal abortions are available, *Bigelow v. Virginia, supra*; that a manufacturer of artificial furs promotes his product as an alternative to the extinction by his competitors of fur-bearing mammals, *see Fur Information & Fashion Council, Inc. v. E. F. Timme & Son,* 364 F.Supp. 16 (SDNY 1973); and that a domestic producer advertises his product as an alternative to imports that tend to deprive American residents of their jobs, *cf. Chicago Joint Board v. Chicago Tribune Co.,* 435 F.2d 470 (CA7 1970), *cert. denied*, 402 U.S. 973 (1971).

Id.

While not all commercial speech necessarily has additional social value, this Court has been skeptical of its ability to distinguish between "interesting" or "important" commercial speech and "the opposite kind," and it has recognized that even non-interesting commercial speech is vital to the proper functioning of a free market economy:

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in

> large measure will be made through numerous private economic decisions. *It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.* To this end, the free flow of commercial information is indispensable.

Id. at 765 (emphasis added).

In addition to speech that merely provides information, this Court also recognizes the value of speech actively soliciting business. "Solicitation is a recognized form of speech protected by the First Amendment" because, "[i]n the commercial context, solicitation may have considerable value" to the buyer, seller, and society at large. *United States v. Kokinda*, 497 U.S. 720, 725 (1990). As this Court said two decades ago:

> [S]olicitation produces more personal interchange between buyer and seller than [would otherwise occur] … Personal interchange enables a potential buyer to meet and evaluate the person offering the product or service and allows both parties to discuss and negotiate the desired form for the transaction or professional relation. ... For the buyer [solicitation] provides an opportunity to explore in detail the way in which a particular product or service compares to its alternatives in the market … [Banning solicitation] threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard.

Edenfield v. Fane, 507 U.S. 761, 766 (1993).

C. The Factors that Render Advertisement of Criminal Conduct Valueless Do Not Apply to Petitioners' Speech

If commercial speech is protected because of its value to consumers and society, then any exceptions to that protection must be justified by the excepted speech's lack of similar value.

Deceitful advertisements are not protected because the "First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Central Hudson,* 447 U.S. at 563 (internal citations omitted).

Therefore, this Court has "no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics,"[2] because the "First Amendment interest which might be served by advertising an ordinary commercial proposal . . . is altogether absent when the commercial activity itself is illegal." *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, 388-89 (1973). In the eyes of this Court, commercial speech advertising the sale of illegal substances is of *no value* to consumers, society, or the free market.

That is a justified position under existing precedent. After all, individual consumers derive no

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[2] *Amicus* questions whether this Court should still be so certain of that position with regard to newspapers in Colorado, Washington, and other jurisdictions that legalize marijuana.

value from commercial information that cannot legally be acted upon, society at large does not benefit (and may be harmed) when information is disseminated which makes it easier or more likely that people will engage in illegal activity, and the preservation of the free market doesn't extend to the protection of the black market. No amount of accurate information about goods or services *which are inherently illegal* can be said to have value.

But it is not illegal to buy, sell, scrap, or trade gold. Not even in Ohio. Not even without a license.

Consumers *do* benefit from learning that Petitioners are willing to pay "top competitive prices" for their gold, and have over 35 years experience in the trade. Information about who is buying "what product, for what reason, and at what price" is vital if market participants are going to make educated decisions about the value of their property and to whom they should sell it.

Society at large also benefits from the increased liquidity, spending, and investment that result when individuals learn they can turn unwanted gold into currency. And the economy is better off when people have money they can spend buying goods and services than when that money is locked up in jewelry and coinage that has no function save decoration or dust-collection.

If a product is valuable enough that people want to buy it—and valuable enough to society that the government has chosen not to criminalize its possession and trade—then commercial speech about that product is valuable enough to be protected by the First Amendment.

III. THE DECISION BELOW ALTERS THE BOUNDARY BETWEEN PROTECTED AND UNPROTECTED COMMERCIAL SPEECH, A POWER RESERVED TO THIS COURT

This Court recognizes that its charge "is not limited to the elaboration of constitutional principles," but extends to "mak[ing] certain that those principles have been constitutionally applied ... particularly [where] the question is one of alleged trespass across the line between speech unconditionally guaranteed and speech which may legitimately be regulated." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (quoting *Speiser v. Randall,* 357 U.S. 513 (1958)).

That duty is complicated somewhat by the apparent tension between cases like *Chaplinsky,* which justify exceptions to the First Amendment based on the value of speech, and *Stevens*, ruling that the categories of unprotected speech are a product of historical practice. Yet neither line of cases justifies the Sixth Circuit's conclusion that Petitioners' statements were constitutionally unprotected. The court below did not consider whether it was dealing with a category of speech historically subject to prohibition or pervasive regulation. Nor did it find the statement in question to be so lacking in value as to warrant no First Amendment protection whatsoever. Instead it simply accepted that Petitioners' speech was illegal.

When this Court is confronted, as it is here, with a novel ruling concerning the boundaries of unprotected speech, its practice is to carefully review the lower court's decision "to be sure that the speech in question actually falls within the

unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits." *Bose Corp.* 466 U.S. at 505. This Court describes that practice as "a rule of federal constitutional law," arising from the "exigency of deciding concrete cases," and reflecting the "deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Id.* at 510-11.

In *Pennekamp*, Justice Stanley Reed provided a pragmatic and persuasive justification for why this Court must review all decisions affecting the boundary between protected and unprotected speech:

> The Constitution has imposed upon this Court final authority to determine the meaning and application of . . . that instrument . . . . With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character the principles of the First amendment, as adopted by the [14th Amendment], protect. When the highest court of a state has reached a determination upon such an issue, we must give most respectful attention to its reasoning and conclusion, but its authority is not final. Were it otherwise, the constitutional limits of free expression in the Nation would vary with state lines.

328 U.S. at 335.

Surely this reasoning must apply to decisions of the circuit courts as well, for if there is no room for 50 versions of the First Amendment in this country,

there is no room for 13. While this Court has the power to strip the vast majority of commercial speech of meaningful constitutional protection, such a feat is not within the province of three lower-court judges.

CONCLUSION

The state of Ohio passed a law imposing a burdensome licensing and regulatory scheme *only* on industry participants who advertise their otherwise lawful businesses. The Sixth Circuit held that the content of the advertisements targeted by this law fall into a First Amendment-free zone. Because that decision creates a new category of unprotected speech, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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