# *First Line of Defense:* HOW BUSINESSES USE THE FIRST AMENDMENT TO OVERRULE GOVERNMENT LAWS AND REGULATIONS

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Free speech and the First Amendment are quintessential, well-known American values. What is far less known is that the First Amendment has become a potent weapon for businesses to successfully challenge government regulations. Specifically, through a series of decisions, the U.S. Supreme Court increasingly has relied upon the First Amendment to hold that laws regulating businesses are unconstitutional because they impermissibly infringe on a business's commercial free speech rights. Justice Breyer commented on the potential breadth of this weapon in dissent in the Supreme Court's most recent (2018) decision on this topic:

> *Because much, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content, the majority's approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation.*

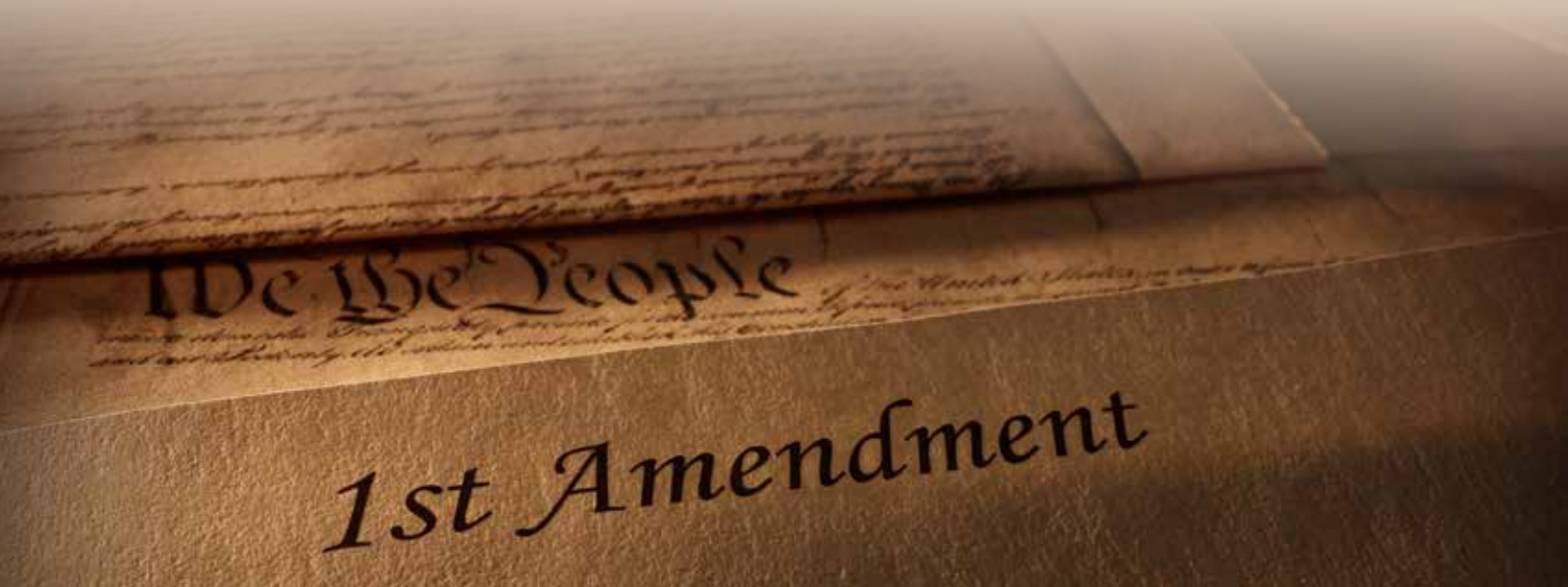
It is important to understand how this "new weapon" is used by businesses to overrule all types of government regulations through litigation. This article explores this in-depth, starting with a history of commercial speech and our nation's highest court.

## COMMERCIAL SPEECH AND SCOTUS: A COMPLEX HISTORY

Commercial free speech has a complex and confusing history at the Supreme Court. The first time that the Court granted constitutional protection to commercial free speech was in 1976. There, in a case involving the Virginia Board of Pharmacy, the Supreme Court overturned a law making it illegal for pharmacists to advertise prices, holding that so long as the advertisement was truthful, it was protected by the First Amendment to satisfy the public interest in the free flow of information.[1]

In 1980, the Supreme Court overturned a New York law that banned utility advertising in an attempt to decrease energy usage during the energy crisis. The Supreme Court adopted a four-part test – now known as the *Central Hudson* test – for determining whether government regulation of commercial speech was proper: (1) the speech could not be false or misleading; (2) the government interest in regulating the speech had to be substantial; (3) the regulation had to directly advance the government's interest; and (4) the regulation had to be no more extensive than necessary. This test has been characterized as requiring an "intermediate level" of scrutiny.[2]

In 1985, the Supreme Court upheld an Ohio law that required lawyers to put certain disclaimers in every contingency fee advertisement. The Court held that the government may compel commercial speakers to make certain disclosures if the disclosures were (1) factual and uncontroversial, (2) reasonably related to a non-speculative government interest, and (3) not unduly burdensome.[3] Because the required disclaimer met these requirements, which be-



came known as the *Zauderer* test, the Court upheld the Ohio law. Notably, courts have struggled to apply the *Zauderer* test, which was more lenient than the *Central Hudson* test, reaching different conclusions on how and when the *Zauderer* test should apply.

These principles have been significantly broadened by the Roberts Court. Beginning in 2010 with the landmark decision of *Citizens United,*[4] the Supreme Court expanded the concept of corporate free speech and used that expanded concept to strike down various laws. First, in *Citizens United*, the Supreme Court struck down parts of the Bipartisan Campaign Reform Act of 2002, holding that its limitation on political expenditures was a violation of corporate free speech rights under the First Amendment. Justice Kennedy wrote: "the government lacks the power to restrict political speech based on the speaker's corporate identity." Clearly, the Supreme Court was now looking at commercial speech from the perspective of the *corporate speaker*, not the *listener or consumer.*

In 2011, the Supreme Court struck down a Vermont law that banned data mining companies from selling information on prescription usage to drug companies. Although the case did not pertain to "speech" in a traditional sense because it involved the sale of commercial information, Justice Kennedy again wrote for the majority, stating: "[s]peech in aid of pharmaceutical marketing … is a form of expression protected by the Free Speech Clause of the First Amendment." Applying "heightened judicial scrutiny" because the Vermont law was a content- and speaker-based restriction, the Supreme Court held that the statute was unconstitutional.[5]

In 2015, the Supreme Court held that an Arizona town's sign code was unconstitutional because it regulated speech-based content.[6] Writing for the majority, Justice Thomas applied strict scrutiny to the town's code, explaining that because the code had different rules for "temporary directional signs" used by churches and others as compared to other types of signs, the code was a content-based regulation on its face. In a concurrence, Justice Breyer argued that there was no basis to apply this heightened level of scrutiny to the code because this would lead to numerous other challenges to government regulations, which could not survive this heightened test. Among those mentioned were regulations of securities, regulation of prescription drugs, protection of doctor-patient confidentiality, income tax statements, commercial airplane flight procedure briefings, and even signs at petting zoos recommending persons wash hands upon exiting the area.

## "PROFOUND SHIFT" IN COMMERCIAL SPEECH PROTECTION

Most recently, in June 2018, the Supreme Court relied upon the First Amendment and *Reed* to strike down a California law that required certain licensed and unlicensed family planning centers (most or all of which were pro-life pregnancy centers) to make certain written disclosures to patients.[7] In a 5-4 opinion again authored by Justice Thomas, the Court held that this compelled speech by the State of California was a "content-based" regulation and therefore unconstitutional under the strict scrutiny applied to such laws. In so ruling, the Court seemingly departed from some of its prior decisions and expanded the First Amendment protections applicable to commercial free speech. As one commentator noted in the Harvard Law Review, this case "marks a profound shift in the Court's treatment of compelled commercial disclosures. … Taken as written, [the decision] represents a dramatic expansion of the scope of First Amendment protection for commercial speech and threatens the entire foundation of a broad range of consumer protections."[8]

## LOWER COURTS GRAPPLE WITH COMMERCIAL FREE SPEECH ISSUES

Even before this most recent Supreme Court case, which seems to have dramatically expanded commercial free speech rights, businesses had filed numerous lawsuits successfully challenging laws on the grounds that they impermissibly regulated commercial speech. Here are just a few examples (of many):

- In 2015, the D.C. Circuit struck down an SEC rule that required public companies to disclose whether their products contained "conflict minerals" related to the civil war in Congo.[9] The Court held that the rule was unconstitutional because it compelled companies to speak and the SEC could not justify the rule under the intermediate scrutiny test of *Central Hudson.*
- In 2016, the Arkansas District Court struck down a state statute that prohibited automated telephone calls on the grounds that it was a content-based restriction on commercial speech that violated the plaintiffs' First Amendment rights.[10] The Court applied the strict scrutiny test of *Reed* and held that Arkansas failed to justify its statute under that test.
- In 2017, the Eleventh Circuit held that a Florida law was unconstitutional under the First Amendment and the *Central Hudson* test because it prohibited a creamery's truthful use of the term "skim milk" to describe its product merely because it did not contain Vitamin A.[11]
- In 2017, the D.C. District Court struck down a D.C. ordinance that required makers of disposable wipes to not label wipes as "flushable" and to instead state that they "should not be flushed" if the wipes failed a three-part test for "flushability." The court held that the law violated the manufacturer's First Amendment rights under the *Central Hudson* test because D.C. did not consider less restrictive alternatives to the ordinance.[12]

## WHAT'S NEXT?

As Justice Breyer predicted, courts increasingly are being used to strike down laws on the grounds that they unconstitutionally infringe a business's commercial free speech rights. Although this use of the First Amendment may be counterintuitive to many, there is no doubt that businesses today have a potent new weapon in the First Amendment to challenge laws and regulations that restrict their activities. Although the law continues to evolve in this area, it is safe to predict that the current Supreme Court will only continue to expand these rights as new cases come before it.

1 *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).
2 *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).
3 *Zauderer v. Office of Disciplinary Counsel of Ohio*, 471 U.S. 626 (1985).
4 *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).
5 *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).
6 *Reed v. Town of Gilbert, Arizona*, 135 S.Ct. 2218 (2015).
7 *National Institute of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018).
8 *132 Harvard L. Rev.* 347 (2018).
9 *National Association of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015).
10 *Gresham v. Rutledge, 198 F. Supp.* 3d 965 (E.D. Ark. 2016).
11 *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228 (11th Cir. 2017).
12 *Kimberly-Clark Corp. v. D.C., 286 F. Supp.* 3d 128 (D. D.C. 2017).

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