No. 21-1684

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STEVEN M. RECHT, ALESHA BAILEY, and STEPHEN P. NEW,
Plaintiffs-Appellees,
v.

PATRICK MORRISEY, in his Official Capacity as Attorney General of West Virginia,
Defendant-Appellant,

and

JIM JUSTICE, in his Official Capacity as Governor of West Virginia,
Defendant.

On appeal from the United States District Court for the Northern District of West Virginia (5:20-cv-00090-JPB)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

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September 7, 2021

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-1684 Caption: Steven Recht v. Patrick Morrisey

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Chamber of Commerce of the United States of America
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Elbert Lin Date: 9/7/2021

Counsel for: The Chamber of Commerce

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RULE 29 STATEMENT

Amicus curiae files this brief with the consent of all parties under Federal Rule of Appellate Procedure 29(a)(2). No party or its counsel authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a particular interest in this case due to the work of its Institute for Legal Reform ("ILR"), which champions legal-reform initiatives that promote economic growth and opportunity. In 2017, ILR issued a report documenting the substantial public health threat posed by legal advertisements

presenting misleading information about prescription drugs and medical devices. *See* U.S. Chamber Inst. for Legal Reform, *Bad for Your Health: Lawsuit Advertising, Implications and Solutions* (Oct. 2017) ("*Bad for Your Health*"), https://tinyurl.com/yfwb5h37. The West Virginia Prevention of Deceptive Lawsuit Advertising and Solicitation Practices Regarding the Use of Medications Act (the "Act") responds to this serious public health threat.

INTRODUCTION

For most of the last century, states have regulated legal advertisements and even banned them entirely. It was not until 1977 that the Supreme Court recognized legal advertising as commercial speech protected by the First Amendment. *Bates v. State Bar of Arizona*, 433 U.S. 350, 371 (1977). Even then, the Court continued to accord states broad authority to prohibit false, deceptive, and misleading statements in legal advertisements. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985) (collecting cases). States can also mandate limited disclosures "as long as [those] disclosure requirements are reasonably related to the State's interest in preventing deception of consumers." *Id.* at 651.

Like many other regulations of legal advertising, West Virginia's law easily passes muster under the *Zauderer* framework. The Act targets specific aspects of legal advertisements that are likely to mislead and confuse viewers, and that

doctors have confirmed do, in fact, deceive patients into believing the ads are unbiased medical advice. Indeed, that is why the law passed unanimously out of the West Virginia Senate and why a chorus of diverse organizations—the American Medical Association, the AARP, the Federal Trade Commission, and the Chamber—have condemned these misleading ads.

But the district court did not even apply the *Zauderer* framework, opting instead to forge a totally new path in First Amendment law. Rather than apply settled precedent for commercial speech and legal advertising specifically, the court created its own one-size-fits-all test, purportedly derived from a trio of Supreme Court cases—*Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), *Reed v. Town of Gilbert*, 576 U.S. 155, 156 (2015), and *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020). It then used this novel standard to apply unwarranted strict scrutiny to West Virginia's legal advertisement law. Those cases, however, did not do away with the Court's settled *Zauderer* framework for legal advertisements—let alone the entire commercial speech doctrine. They address content-based restrictions in other First Amendment contexts and simply have no application here.

The district court's rewriting of First Amendment law cannot be permitted to stand. At minimum, this Court should reverse and remand with instructions to

apply the correct legal standard. Alternatively, this Court could itself apply the correct legal standard and uphold the Act's provisions.

BACKGROUND

A. West Virginia responds to misleading medical drug and device litigation advertisements.

Advertisements seeking plaintiffs for medical drug and device litigation bombard television viewers with increasing frequency. *Bad for Your Health* at 6. Often airing at times calculated to reach elderly viewers, these advertisements—broadcast on behalf of law firms and claims-generating organizations alike—seek to enlist plaintiffs for mass tort lawsuits. *See* Daniel M. Schaffzin, *Warning: Lawyer Advertising May Be Hazardous To Your Health! A Call To Fairly Balance Solicitation Of Clients In Pharmaceutical Litigation*, 8 Charleston L. Rev. 319, 336 (2013). While not all such advertisements are inherently deceptive, those that are misleading often have one or more of the following characteristics.

- *First*, they open with an "alert" or "warning" that mimics a public service announcement, suggesting they will convey impartial medical information.[1]
- *Second*, they display without context the logo of the U.S. Food and Drug Administration ("FDA") and other government entities, or the medical

[1] *See* Press Release, FTC, FTC Flags Potentially Unlawful TV Ads for Prescription Drug Lawsuits (Sep. 24, 2019) ("FTC Press Release") (cautioning that "sensational warnings or alerts . . . may initially mislead consumers into thinking they are watching a government-sanctioned medical alert or public service announcement"), https://tinyurl.com/2t6kad8u.

Caduceus symbol, suggesting that those agencies and the medical community sponsor or endorse the message.[2]

- *Third*, they misrepresent scientific research, overstating remote risks and glossing over (or omitting entirely) a product's benefits.[3]
- *Fourth*, they fail to caution viewers not to discontinue a prescription without consulting the doctor who prescribed the medication, upending a system of medically informed judgment designed to protect patients.[4]
- *Fifth*, they disclose the sponsoring law firm or lead generator only in fine print, usually near the end of the message, preventing viewers from accurately assessing the advertisement's content from the outset.[5]
- *Sixth*, they imply that medical devices or drugs have been taken off the market or lost FDA approval when, in fact, they have not.[6]

These tactics in legal advertisements can and do deceive viewers—often with tragic effects. Surveys uniformly find that a significant percentage of respondents would stop taking prescribed medications after viewing drug litigation

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[2] *Bad for Your Health* at 13.

[3] *See Bad for Your Health* at 10–12; FTC Press Release, *supra*, at 1 (explaining that ads "may misrepresent the risks associated with certain pharmaceuticals").

[4] *See* FTC Press Release, *supra*, at 1.

[5] *See Bad for Your Health* at 14.

[6] *See* FTC Press Release, *supra*, at 1 (noting that ads "could leave consumers with the false impression that their physician-prescribed medication has been recalled"); *see also* Christopher F. Tenggardjaja et al., *Evaluation of Patients' Perceptions of Mesh Usage in Female Pelvic Medicine and Reconstructive Surgery*, 85 Urology 326, 327 (2015) (finding over half of new patients at urology clinic believed falsely that government agencies or manufacturers had recalled female mesh products).

advertisements.[7] And physician reports show that, in fact, these ads have driven patients to discontinue drug treatments against medical advice.[8]

Joining medical groups, the federal government, and several other states, West Virginia took steps last year to respond to the threat of misleading drug litigation advertising tactics. Targeting the specific tactics discussed above, West Virginia passed the challenged Act. W.Va. Code §§ 47-28-1–5.[9] The Act prohibits a legal advertisement that: (1) presents a legal ad as a "consumer alert" or "health alert," (2) displays a government agency's logo inappropriately, or (3) uses the word "recall" to describe a product not recalled by a government agency. W.Va. Code § 47-28-3(a)(2)–(4). The Act also requires certain disclosures, including: (1) a warning not to stop taking prescribed FDA-approved medications

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[7] *See, e.g.*, Jesse King & Elizabeth Tippett, *Drug Injury Advertising*, 18 Yale J. Health Pol'y L. & Ethics 114 (2019), https://tinyurl.com/rjw5rf3v; *Bad for Your Health* at 20–22.

[8] *See* Letter from Anna K. Abram, Deputy Commissioner, FDA, to Hon. Andy Harris, M.D., U.S. House of Representatives, at 1–2 (undated 2017) (ECF No. 24-1) (documenting instances of cardiovascular harm, *including six deaths*, after patients discontinued treatment over an advertisement); Letter from Maren McBride, FDA, to Hon. Andy Harris, M.D., U.S. House of Representatives, at 1 (Feb. 6, 2019) (ECF No. 24-2) (identifying 213 reports of instances in which a patient saw an advertisement and discontinued medication).

[9] Every member of the West Virginia Senate—14 Democrats and 20 Republicans—voted in favor of the final bill. https://tinyurl.com/25nb7mks. Indeed, on three separate occasions throughout the legislative process, the Senate passed iterations of the bill in unanimous fashion. *See* https://tinyurl.com/4bspweea.

without first consulting a doctor, (2) a statement that a product (whether a prescription drug or a medical device) remains approved by the FDA, if true, and (3) statements identifying the sponsor of the ad and the law firm that will represent clients. *Id.* § 47-28-3(a)(5)–(6), (b)(1)–(2).

B. District court permanently enjoins much of the Act.

Before it went into effect, Plaintiffs challenged certain aspects of the Act as an unconstitutional infringement on their First Amendment rights. The district court ultimately enjoined all three of the Act's prohibitions, as well as the "consult your doctor" and "continued FDA approval" disclosures. JA 220.

As to the Act's prohibitions, the court held that "it is undisputed that the Act burdens protected speech," and then framed the analysis as a choice between strict and intermediate scrutiny that "depends on whether the Act imposes content neutral or content based restrictions on speech." JA 223. Because the court believed the Act's prohibitions "impose[d] a specific content-based burden on protected expression," JA 225 (citing *Sorrell*, 564 U.S. at 552), the court applied strict scrutiny to the provisions, JA 227 (citing *Barr*, 140 S. Ct. at 2335); JA 230, and struck them down, JA 230–32.

Turning to the Act's disclosure requirements, the district court observed that "compelled disclosure of commercial speech complies with the First Amendment if the information in the disclosure is reasonably related to a substantial

government interest and is purely factual and uncontroversial." JA 233 (quoting *CTIA - The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 845 (9th Cir. 2019)). Nevertheless, it found that the "consult your doctor" and "continued FDA approval" disclosures failed the test. JA 233–34.

ARGUMENT

I. The district court rewrote First Amendment doctrine.

The district court's opinion fails to follow established First Amendment case law and instead blazes an unprecedented new path for analyzing state regulation of legal advertising, which cannot be reconciled with governing precedent. That error alone warrants reversal.

A. The district court erroneously applied strict scrutiny to the Act's prohibitions.

Misconstruing a trio of recent Supreme Court cases, the district court ignored the longstanding framework, outlined in *Zauderer* and *Central Hudson*, that governs prohibitions on legal advertising.

1. Strict scrutiny never applies to prohibitions on statements in legal advertising.

Restrictions on legal advertising *never* face strict scrutiny. The First Amendment protects speech "along a spectrum." Laws that implicate speech "receive different levels of judicial scrutiny depending on the type of regulation and the justifications and purposes underlying it." *Fusaro v. Cogan*, 930 F.3d 241,

248 (4th Cir. 2019) (quoting *Stuart v. Camnitz*, 774 F.3d 238, 244 (4th Cir. 2014)). Statutes regulating legal advertising fall on the forgiving end of this spectrum.

In 1977, the Supreme Court recognized legal advertising as a form of "commercial speech." *Bates*, 433 U.S. at 371. At most, therefore, legal advertisements must withstand "intermediate scrutiny" under *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980). But as the Supreme Court recognized in *Central Hudson* and later in *Zauderer*, many prohibitions on legal advertising require even less scrutiny.

For over thirty years, it has been "well settled" that states remain "free to prevent the dissemination of . . . false, deceptive, or misleading" legal ads. *Zauderer*, 471 U.S. at 638. As the Supreme Court has expressly recognized, the threat of potential deception "is particularly strong in the context of advertising professional services." *In re R.M.J.*, 455 U.S. 191, 203 (1982). Correspondingly, states have broad authority to prohibit statements in legal advertising that are "inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive." *Id.* at 202; *see also Ficker v. Curran*, 119 F.3d 1150, 1156 (4th Cir. 1997) ("We do not bar the state from regulating legal advertising which is inaccurate or misleading.").

That sort of "[m]isleading advertising may be prohibited entirely" with very limited scrutiny. *In re R.M.J.*, 455 U.S. at 203. "The First Amendment's concern

for commercial speech," the Supreme Court has explained, "is based on the informational function of advertising." *Central Hudson*, 447 U.S. at 563. As a result, "there can be *no constitutional objection* to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Id* (emphasis added). Simply put, "[t]he government may ban forms of communication more likely to deceive the public than to inform it" or "commercial speech related to illegal activity." *Id.* at 563–64.

Intermediate scrutiny applies only if commercial speech, including legal advertising, "is neither misleading nor related to unlawful activity." *Central Hudson*, 447 U.S. at 563. Only then is "the government's power [] more circumscribed"; "[t]he State must assert a substantial interest to be achieved by restrictions on commercial speech," and "the regulatory technique must be in proportion to that interest." *Id.*

All of this means that prohibitions on statements in legal advertisements are never subject to strict scrutiny. When legal advertising is false or inherently misleading, or when experience shows that such advertising is subject to abuse, states may prohibit it entirely, with limited scrutiny. If a legal advertisement is not false, misleading, or subject to such abuse, then it receives intermediate scrutiny. That framework is clearly set forth in *Central Hudson* and *Zauderer*, cases that

remain good law and under which states lawfully have regulated, and continue to regulate, legal advertising.

2. The district court ignored the established precedent governing prohibitions on legal advertisements.

The district court did not apply this straightforward framework to the Act's prohibitions on legal advertising. Beginning from a fundamentally incorrect starting point, the court *never even considered* that the Act's prohibitions might not be subject to *either* strict or intermediate scrutiny. Instead, from the outset, the court couched the analytical choice as between strict and intermediate scrutiny. *See, e.g.*, JA 223 ("[T]he next step is to determine the 'applicable level of scrutiny—that is, intermediate or strict."). But under the proper framework, the choice is between intermediate scrutiny under *Central Hudson* and the more deferential scrutiny applied to regulation of "commercial speech that is false, deceptive, or misleading" under *Zauderer*, 471 U.S. at 638.

Accordingly, the district court did not apply *Zauderer*, as it should have done. Indeed, it did not even apply intermediate scrutiny under *Central Hudson*, though that, too, would have been error because the targeted advertising practices

are inherently or demonstrably misleading. Instead, the district court chose the one standard that *never* applies to legal advertising: strict scrutiny.[10]

At least two mistakes led the district court to its flawed approach. *First*, the district court failed to appreciate that inherently misleading statements in legal advertising do not constitute protected speech under the First Amendment. The district court asserted that "it is undisputed that the Act burdens protected speech." JA 223. But West Virginia contested that point, arguing that "the speech these [prohibitions] regulate is not protected speech under the First Amendment," and that Plaintiffs were "mistaken" in arguing otherwise. *See* JA 186. And West Virginia is right. As explained above, the Supreme Court has long made clear that First Amendment protection extends only to *truthful* advertising that advances the "informational function" of commercial speech. As West Virginia pointed out, "commercial speech that is 'actually' or 'inherently misleading' does not receive any protection under the First Amendment." *Id.* (citing *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 110 (1990)).

Second, the district court misinterpreted a trio of recent Supreme Court decisions—*Sorrell*, *Reed*, and *Barr*—as setting forth a one-size-fits-all test for *all*

[10] Although it claimed in passing that the Act's prohibitions would fail intermediate scrutiny, the court only went through the strict scrutiny analysis. JA 230. The court never cited, much less discussed, *Central Hudson*.

speech-related regulation. According to the court, *Sorrell* stands for the broad proposition that "[w]hen a statute is designed to impose a specific content-based burden on protected expression, it follows that heightened scrutiny is warranted." JA 225. Likewise, the court read *Barr* and *Reed* to stand for the principle that any "'law that is content based' is 'subject to strict scrutiny.'" JA 227 (citing *Reed*, 576 U.S. at 165). But as explained below, these decisions arose in different speech contexts and do not displace commercial speech doctrine generally or legal advertising framework specifically. They simply have no application here, and they gave the district court no warrant to ignore *Zauderer* (or *Central Hudson* either, if *Zauderer* had not applied).

3. *Sorrell*, *Reed*, and *Barr* do not support the district court's novel approach to legal advertising.

Contrary to the district court's conclusion, the trio of recent Supreme Court cases did not reduce the First Amendment's "complex array" of speech protections to a single inquiry about content neutrality. *See Fusaro*, 930 F.3d at 248. Nothing in those cases explicitly overruled the legal advertising framework, let alone the entire commercial speech doctrine. And it is well-established that Supreme Court cases should never be read to implicitly overrule prior precedent. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). It is unsurprising, therefore, that no federal appellate court, including this one, has agreed with the district court's novel approach.

i. Nothing in *Sorrell*, *Reed*, or *Barr* overruled First Amendment precedent on misleading legal advertisements.

The three Supreme Court cases relied on by the district court did not overrule settled law on misleading legal advertisements, or commercial speech doctrine more generally. In *Sorrell*, the Court considered a Vermont law that restricted the sale of doctor-prescribing data. 564 U.S. at 557. At first, the Court observed that "heightened judicial scrutiny [was] warranted" in light of the law's singling out drug company "detailers" that used the data for marketing purposes. *Id.* at 565. But because the state contended that the speech was commercial, the Court ultimately analyzed the law under *Central Hudson*. *Id.* at 571. In doing so, the Court reaffirmed that a "targeted, content-based burden" on commercial speech, like any other regulation of commercial speech, should be evaluated under *Central Hudson*. *Id.* at 572. What is more, the Court explicitly distinguished its misleading speech cases, explaining that "[t]he State nowhere contends that detailing is *false or misleading* within the meaning of this Court's First Amendment precedents." *Id.* at 579 (emphasis added). Accordingly, nothing in *Sorrell* changed the Court's precedents on misleading legal advertisements, or commercial speech doctrine more generally.

Reed and *Barr* likewise did not overrule the Court's commercial speech precedents. *Reed* struck down a town's sign ordinance provisions regulating non-

commercial speech because they stipulated different treatment for different categories of signs, based on the type of information the signs conveyed. 576 U.S. at 159–61. The Court announced a seemingly broad standard for applying strict scrutiny to content-based regulations: "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 163. But the Court was not addressing commercial speech. And it nowhere suggested that this standard should spill over to other First Amendment doctrines—the opinion never mentions commercial speech or any commercial speech precedents.

Barr is similarly inapposite. The case concerned restrictions on robocalls and an exception for calls made to collect government debts. 140 S. Ct. at 2343. There too the Court included a broad statement about content-based restrictions being subject to strict scrutiny. But the Court was explicit that it was not changing or upsetting previous precedent: "Our decision is not intended to expand existing First Amendment doctrine or to otherwise affect traditional or ordinary economic regulation of commercial activity." *Id.* at 2347.

To the extent the district court interpreted *Sorrell*, *Reed*, and *Barr* as *implicitly* (rather than explicitly) overruling *Zauderer* and *Central Hudson*, it was mistaken. Only *Sorrell* even discusses commercial or misleading speech, and there

the Court made clear that it was not changing those doctrines. Moreover, the Supreme Court has repeatedly cautioned lower courts against reading its decisions to implicitly overrule binding precedent. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."); *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority sub silentio."). And this Court has echoed that principle in case after case.[11]

ii. Lower courts nationwide have continued to apply lesser scrutiny to commercial and misleading speech.

Unsurprisingly, no federal appellate court has followed the novel path taken here. Lower court decisions after *Sorrell*, *Reed*, and *Barr*—including decisions from this Court—have continued to apply the commercial speech doctrine and the case law governing misleading speech, further illustrating how far the district court strayed in its analysis.

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[11] *See, e.g.*, *McCleary-Evans v. Md. Dept. of Transp.*, 780 F.3d 582 (4th Cir. 2015) ("[W]e have no authority to overrule a Supreme Court decision no matter . . . how out of touch with the Supreme Court's current thinking the decision seems." (quotation omitted)); *United States v. Danielczyk*, 683 F.3d 611 (4th Cir. 2012) ("[L]ower courts should not conclude that the Supreme Court's 'more recent cases have, by implication, overruled [its] earlier precedent.'" (quoting *Agostini*, 521 U.S. at 237)).

This Circuit, for example, has continued to recognize that *Central Hudson* applies in commercial speech cases. Two years ago, in *Fusaro v. Cogan*, this Court explained that commercial speech "typically receive[s] a lower level of review" as an "area[] traditionally subject to government regulation." 930 F.3d at 249; *see also Stuart*, 774 F.3d at 244 ("'[A]rea[s] traditionally subject to government regulation,' such as commercial speech and professional conduct, typically receive a lower level of review." (citation omitted)). Though the district court cited *Fusaro* and *Stuart*, it appears to have simply ignored their clear instruction.

Other circuits have likewise continued to apply *Central Hudson*, sometimes even in response to the very arguments pressed by Plaintiffs and accepted by the district court below. As the Second Circuit recently explained, "*Sorrell* leaves the *Central Hudson* regime in place, and accordingly we assess the constitutionality of [commercial speech regulations] under the *Central Hudson* standard." *Vugo, Inc. v. City of New York*, 931 F.3d 42, 50 (2d Cir. 2019). And the Second Circuit is not alone. *See, e.g.*, *Greater Philadelphia Chamber of Com. v. City of Philadelphia*, 949 F.3d 116, 138–39 (3d Cir. 2020) ("[T]he Supreme Court has consistently applied intermediate scrutiny to commercial speech restrictions, even those that were content- and speaker-based."); *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 841 (9th Cir. 2017) (en banc) ("*Sorrell* did not modify the *Central*

Hudson standard."); *1-800-411-Pain Referral Service, LLC v. Otto*, 744 F.3d 1045, 1055 (8th Cir. 2014) (the "upshot" of *Sorrell* is that "when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*").[12]

This continued fidelity to the commercial speech doctrine extends to cases that exempt misleading commercial speech from intermediate scrutiny, consistent with *Zauderer*. This Court has upheld a restraint on misleading speech in the wake of *Sorrell* and *Reed* because the content "[was] likely false or misleading commercial speech," noting specifically *Central Hudson*'s admonition that "[t]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity." *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 700 F. App'x 251, 264 (4th Cir. 2017) (citing *Central Hudson*, 447 U.S. at 563). Indeed, because of the misleading nature of the speech in that case, the Court also upheld an order forcing the speaker to issue a retraction. *Id.* (citing *Zauderer*, 471 U.S. at 651). The D.C. Circuit, too, observed just two years ago that "[t]he government may ban forms of communication more likely to deceive the public than to inform it." *Nicopure*

[12] The lone circuit applying *Reed* to any form of commercial speech did so in distinguishable circumstances, when the regulation arose in the context of a *Reed*-like sign ordinance and implicated both commercial and non-commercial speech. *See Int'l Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 703 (6th Cir. 2020).

Labs, LLC v. Food & Drug Admin., 944 F.3d 267, 287 (D.C. Cir. 2019) (quoting *Central Hudson*, 447 U.S. at 563); *see also Express Oil Change, L.L.C. v. Mississippi Bd. of Licensure for Pro. Engineers & Surveyors*, 916 F.3d 483, 488 (5th Cir. 2019) ("Commercial statements that are actually or inherently misleading do not enjoy the protections of the First Amendment.").

In short, overwhelming authority from this Court and other circuits confirms what is clear from *Sorrell*, *Reed*, and *Barr*: The Supreme Court did not change its well-established case law on commercial and misleading speech, and the district court broke new ground in concluding that it did. The court should not have applied strict scrutiny but rather looked to *Zauderer* and *Central Hudson* for the proper framework.

B. The district court also applied the wrong legal standard to the Act's mandated disclosures.

In striking down two of the Act's mandated disclosures, the district court also erred by failing to apply the "reasonable relation" standard established in *Zauderer*. Although the court cited the correct standard—that the disclosure must be merely "reasonably related" to a government interest and "purely factual and uncontroversial"—its brief analysis failed to actually apply this reasonable relation standard. *See Zauderer*, 471 U.S. at 651; *Nat'l Inst. of Family & Life Advocates v. Becerra ("NIFLA")*, 138 S. Ct. 2361, 2372, 2377 (2018).

For example, the court likened the "consult your doctor" disclosure to the "requirement held to be invalid in *Centro Tepeyac*." JA 233. But because it was not clear in *Centro Tepeyac* whether the regulated speech was commercial, that case did not involve an application of *Zauderer*'s reasonable relation test. *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 189 (4th Cir. 2013) (en banc). Instead, while the Court acknowledged in *Centro Tepeyac* that "lesser degrees of scrutiny may apply where the speech at issue is, inter alia, commercial," it analyzed the mandated disclosure in that case under "strict scrutiny"—specifically, whether it was "1) narrowly tailored to 2) promote a compelling government interest." *Id.* The district court's failure even to acknowledge this critical distinction reveals that, despite its lip service to the reasonable relation standard in *Zauderer*, it was not actually applying it.

Likewise, the district court's analysis of the "continued FDA approval" disclosure applies a far more exacting standard of scrutiny than is appropriate under the reasonable relation standard. The district court found the disclosure failed because, in its view, the disclosure made little sense in one context. Specifically, the court determined that "[t]here is little State interest in informing the public [that opioids remain approved by the FDA] in light of the present opioid crisis." JA 234. Even if that suggestion were correct (and as the State argues, it is not, *see* Opening Br. at 38–40), one example of a disputed fit does not disprove a

reasonable relation. Put another way, the State is not required to demonstrate that *every* application of a disclosure perfectly furthers the state interest. *Zauderer*, 471 U.S. at 651 n.14 (explaining that a disclosure requirement need not "get at all facets of the problem it is designed to ameliorate" and "governments are entitled to attack problems piecemeal"). That is the kind of precision demanded under strict scrutiny, not rational basis review.

C. This Court can remand for the district court to review the statute in the first instance under the proper framework.

The district court's fundamental misapprehension of First Amendment doctrine warrants, at minimum, reversal and remand to the district court for application of the correct legal standards. This represents the simplest and usual course of action, as reflected by this Court's frequent admonition that it is "a court of review, not of first view." *Lovelace v. Lee*, 472 F.3d 174, 203 (4th Cir. 2006).[13] But as explained below, this Court could also proceed to apply the proper legal framework and uphold the Act in all respects.

[13] *See also Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 345 (4th Cir. 2016) ("When . . . the district court applies the wrong standards, we tend to remand to allow 'the trier of fact to reexamine the record' using the correct standards." (citation omitted)); *In re Virginia Elec. & Power Co.*, 539 F.2d 357, 360 (4th Cir. 1976) (remanding case "with instructions that the district judge consider anew" a decision that "was based upon a clearly erroneous finding of fact and a misapprehension of applicable legal principles").

II. The Act easily passes constitutional muster under the proper framework.

A. The Act prohibits misleading advertising practices as permitted under *Zauderer*.

The Act's prohibitions fall well within the state's authority to bar statements that are "inherently likely to deceive" or have been proven to do so. *In re R.M.J.*, 455 U.S. at 202. The prohibitions are not broad "prophylactic rules" that make no attempt to distinguish between "deceptive and nondeceptive legal advertising." *Zauderer*, 471 U.S. at 644. Each of the three prohibitions is targeted specifically at "a particular form or method of advertising" that is misleading or that "has in fact been deceptive." *In re R.M.J.*, 455 U.S. at 202.

The first prohibition prevents disguising an offer for legal services as "professional, medical, or government agency advice about pharmaceuticals or medical devices." W. Va. Code § 47-28-3(a)(2). It bars certain phrases that "[p]resent[] a legal advertisement" as something it is not—a public service announcement or health alert. *Id.* That is inherently misleading, and actually deceptive, advertising for which there is ample real-world concern. As the FTC has explained, "sensational warnings or alerts . . . may initially mislead consumers into thinking they are watching a government-sanctioned medical alert or public service announcement." FTC Press Release, *supra*, at 1; *see also* King & Tippett,

supra, at 146–47 (finding "clear evidence that deceptive drug injury advertisements are likely to be misidentified" as public service announcements).

The second prohibition disallows using "the logo of a federal or state government agency in a manner that suggests affiliation with the sponsorship of that agency." W. Va. Code § 47-28-3(a)(3). By its terms, this prohibition applies to only inherently misleading and actually deceptive uses of government logos. Even Plaintiffs did not argue that it would *ever* be truthful to suggest that private legal advertisements have "the sponsorship" of a government agency.

The third prohibition bars misleading use of the word "recall." W. Va. Code § 47-28-3(a)(4) (prohibiting use of term "when referring to a product that has not been recalled by a government agency or through an agreement between a manufacturer and government agency"). This prohibition also rests on sound data. For example, one study found that over half of new patients at a specialty urology clinic mistakenly believed government agencies or manufacturers had recalled mesh products and that nearly 70% received information on the topic from the television. Tenggardjaja et al., *supra*, at 327; *see also* FTC Press Release, *supra*, at 1 (noting that many drug and device litigation ads "could leave consumers with the false impression that their physician-prescribed medication has been recalled"). Plaintiffs have not disputed this data but instead have complained about the prohibition's sweep—which is a weak complaint, given that the prohibition is

limited to "refer[ences] to a product *that has not been recalled*." W. Va. Code § 47-28-3(a)(4) (emphasis added.) In any event, there is no question that the provision legitimately bans *some* inherently false and misleading uses of the word "recall." And that is enough to survive Plaintiffs' purely facial challenge, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008), especially given that "the overbreadth doctrine does not apply to commercial speech," *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982); *accord United Seniors Ass'n, Inc. v. Soc. Sec. Admin.*, 423 F.3d 397, 407 (4th Cir. 2005).

B. The disclosure requirements are reasonably related to West Virginia's interest in preventing deception and are purely factual and uncontroversial.

The state may mandate disclosures in legal ads to correct a "self-evident" possibility of deception. In *Zauderer*, the Supreme Court considered a legal advertisement promoting a contingency fee arrangement that failed to disclose a client's potential liability for "costs." 471 U.S. at 633. Ohio's requirement that the ad disclose the distinction between "fees" and "costs" "easily passe[d] muster" because, "to a layman not aware of the meaning of these terms of art," the advertisement would falsely suggest a "no-lose proposition." *Id.* at 652. As the chance of deception was "self-evident," the court "[did] not require the State to 'conduct a survey of the . . . public before it [may] determine that the

[advertisement] had a tendency to mislead.'" *Id.* at 652–53 (citing *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391–392 (1965)).

More recently, the Court has said that disclosures must convey "purely factual and uncontroversial information," cannot be "unjustified or unduly burdensome," and must seek "to remedy a harm that is 'potentially real not purely hypothetical.'" *NIFLA*, 138 S. Ct. at 2372, 2377. The Court refused to apply *Zauderer* to disclosures about abortion because they were "anything but [] 'uncontroversial.'" *Id.* at 2372. Separately, the Court struck down a disclosure law that was justified by "purely hypothetical" reasons and that required the speaker to post the notice in "as many as 13 different languages" and to "call attention to the notice, instead of its own message, by some method such as larger text or contrasting type or color." *Id.* at 2377–78.

The Act's mandatory disclosures meet all of *Zauderer*'s requirements. To begin with, they seek to prevent deception that is nonhypothetical, "self-evident," and verified by substantial evidence. The need for the "consult your doctor" disclosure is confirmed by survey data and actual physician accounts of patients unilaterally discontinuing a course of medical treatment after viewing a legal advertisement. *See* ECF Nos. 24-1, 24-2; FTC Press Release, *supra*, at 1. And the "continued FDA approval" disclosure addresses the self-evident and documented concern that an ad raising questions about a drug or medical device could mislead

a viewer into thinking the FDA has recalled the product. *See* Tenggardjaja et al., *supra*, at 327; *see also* FTC Press Release, *supra*, at 1.

Moreover, the disclosures here fall in the heartland of *Zauderer*. They address the same content as *Zauderer*—legal advertising—and are purely factual and uncontroversial. It is neither controversial nor "medical advice" to remind a viewer to consult with the medical professional on whose authority and instruction a treatment was assigned in the first place. *See* JA 234. And the second sentence of the disclosure is plainly factual: "Discontinuing a prescribed medication without your doctor's advice can result in injury or death." W. Va. Code § 47-28-3(b)(1). Likewise, disclosing that a drug or device remains approved by the FDA, when that is the truth, is not controversial either. And, unlike in *NIFLA*, these disclosures do not burden the speaker by effectively requiring it to "call attention to the notice, instead of its own message by some method such as larger text or contrasting type or color."

In sum, analyzed under governing law, each of the Act's prohibitions and disclosures is lawful.

CONCLUSION

The Court should reverse the district court's misapplication of settled First Amendment doctrine and remand with instructions to apply the correct precedent. If the Court chooses to apply that precedent itself, it should uphold the Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitations of Rules 29(a)(5) and 32(a)(7)(B), because it contains 6,009 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2021, I electronically filed this brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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