SUPREME COURT OF THE UNITED STATES

No. 91–1200

CITY OF CINCINNATI, PETITIONER *v.* DISCOVERY NETWORK, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 24, 1993]

JUSTICE BLACKMUN, concurring.

I agree that Cincinnati's ban on commercial newsracks cannot withstand scrutiny under *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557 (1980), and *Board of Trustees of State University of N.Y.* v. *Fox*, 492 U. S. 469 (1989), and I therefore join the Court's opinion. I write separately because I continue to believe that the analysis set forth in *Central Hudson* and refined in *Fox* affords insufficient protection for truthful, noncoercive commercial speech concerning lawful activities. In *Central Hudson*, I expressed the view that "intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech," but not for a regulation that suppresses truthful commercial speech to serve some other government purpose. 447 U. S., at 573 (opinion concurring in judgment). The present case demonstrates that there is no reason to treat truthful commercial speech as a class that is less "valuable" than noncommercial speech. Respondents' publications, which respectively advertise the availability of residential properties and educational opportunities, are unquestionably "valuable" to those who choose to read them, and Cincinnati's ban on commercial newsracks should be subject to the same scrutiny we would apply to a regulation burdening noncommercial speech.

In *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), this Court held that commercial speech "which does `no more than propose a commercial transaction'" is protected by the First Amendment, *id.*, at 762, quoting *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 385 (1973). In so holding, the Court focused principally on the First Amendment interests of the listener. The Court noted that "the 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," 425 U. S., at 763, and that "the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system . . . [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered." *Id.*, at 765. See also *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 364 (1977).

The Court recognized, however, that government may regulate commercial speech in ways that it may not regulate protected noncommercial speech. See generally *Virginia Pharmacy Bd.*, 425 U. S., at 770–772. Government may regulate commercial speech to ensure that it is not false, deceptive, or misleading, *id.*, at 771–772, and to ensure that it is not coercive. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 457 (1978). Government also may prohibit commercial speech proposing unlawful activities. *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S., at 388. See *Bates* v. *State Bar of Arizona*, 433 U. S., at 384.[1] To permit government regulation on these

[1]In the context of noncommercial speech, by contrast, this Court has adopted rules that protect certain false statements of fact and speech advocating illegal activities. See, *e.g.*, *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279–280 (1964) (liability for false

grounds is consistent with this Court's emphasis on the First Amendment interests of the listener in the commercial speech context. A listener has little interest in receiving false, misleading, or deceptive commercial information. See *id.*, at 383 ("[T]he public and private benefits from commercial speech derive from confidence in its accuracy and reliability"). A listener also has little interest in being coerced into a purchasing decision. See *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S., at 457 ("[I]n-person solicitation may exert pressure and often demands an immediate response, without providing the opportunity for comparison or reflection"). Furthermore, to the extent it exists at all, a listener has only a weak interest in learning about commercial opportunities that the criminal law forbids. In sum, the commercial speech that this Court had permitted government to regulate or proscribe was commercial speech that did not "serv[e] individual and societal interests in assuring informed and reliable decisionmaking." *Bates* v. *State Bar of Arizona*, 433 U. S., at 364.

So the law stood in 1980 when this Court decided *Central Hudson* and held that *all* commercial speech was entitled only to an intermediate level of constitutional protection. The majority in *Central Hudson* reviewed the Court's earlier commercial speech cases and concluded that the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." 447 U. S., at 563. As a descriptive matter, this

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statements regarding public officials may not be imposed without a showing of "actual malice"); *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969) (government may not proscribe advocacy of illegal action "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

statement was correct, since our cases had recognized that commercial speech could be regulated on grounds that protected noncommercial speech could not. See n. 1, *supra*. This "lesser protection" did not rest, however, on the fact that commercial speech "is of less constitutional moment than other forms of speech," as the *Central Hudson* majority asserted. *Ibid.*, at n. 5.[2] Rather, it reflected the fact that the listener's First Amendment interests, from which the protection of commercial speech largely derives, allow for certain *specific* kinds of government regulation that would not be permitted outside the context of commercial speech.

The *Central Hudson* majority went on to develop a four-part analysis commensurate with the supposed intermediate status of commercial speech. Under that test, a court reviewing restrictions on commercial speech must first determine whether the speech concerns a lawful activity and is not misleading.[3] If the speech does not pass this

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[2]*Central Hudson*'s conclusion that commercial speech is less valuable than noncommercial speech seems to have its roots in an often-quoted passage from *Ohralik*: "[W]e . . . have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). As I explain in the text, however, the "limited measure of protection" our cases had afforded commercial speech reflected the fact that we had allowed "modes of regulation that might be impermissible in the realm of noncommercial expression" and not that we had relegated commercial speech to a "subordinate position in the scale of First Amendment values."

[3]*Central Hudson*'s reference to "misleading" speech

preliminary threshold, then it is not protected by the First Amendment at all. *Id.*, at 566. If it does pass the preliminary threshold, then the government is required to show (1) that the asserted government interest is "substantial," (2) that the regulation at issue "directly advances" that interest, and (3) that the regulation "is not more extensive than is necessary to serve that interest." *Ibid.* The Court refined this test in *Board of Trustees of State University of N.Y.* v. *Fox*, 492 U. S., at 480, to clarify that a regulation limiting commercial speech can, in fact, be more extensive than is necessary to serve the government's interest as long as it is not unreasonably so. This intermediate level of scrutiny is a far cry from strict scrutiny, under which the government interest must be "compelling" and the regulation "narrowly tailored" to serve that interest. See, *e.g.*, *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652, 657 (1990).

In *Central Hudson*, I concurred only in the Court's judgment because I felt the majority's four-part analysis was "not consistent with our prior cases and [did] not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech." 447 U. S., at 573. I noted: "Permissible restraints on commercial speech have been limited to measures designed to protect consumers from fraudulent, misleading, or coercive sales techniques." *Id.*, at 574. Under the analysis adopted by the *Central Hudson* majority, misleading and coercive commercial speech and commercial speech proposing illegal activities are addressed in the first prong of the four-part test. Yet commercial speech that survives the first prong — *i.e.*, that is not misleading or coercive and that concerns lawful

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appears to include speech that is inherently coercive, such as in-person solicitation. See 447 U. S., at 563, citing *Ohralik*, 436 U. S., at 464–465.

activities — is entitled only to an intermediate level of protection. Furthermore, the "substantial" government interest that *Central Hudson* requires to justify restrictions on commercial speech does not have to be related to protecting against deception or coercion, for *Central Hudson* itself left open the possibility that the government's substantial interest in energy conservation might justify a more narrowly drawn restriction on truthful advertising that promotes energy consumption. See *id.*, at 569–572.

Thus, it is little wonder that when the city of Cincinnati wanted to remove some newsracks from its streets, it chose to eliminate all the *commercial* newsracks first although its reasons had nothing to do with either the deceptiveness of particular commercial publications or the particular characteristics of commercial newsracks themselves. First, Cincinnati could rely on this Court's broad statements that commercial speech "is of less constitutional moment than other forms of speech," *id.*, at 563, n. 5, and occupies a "subordinate position in the scale of First Amendment values," *Ohralik*, 436 U. S., at 456. Second, it knew that under *Central Hudson* its restrictions on commercial speech would be examined with less enthusiasm and with less exacting scrutiny than any restrictions it might impose on other speech. Indeed, it appears that Cincinnati felt it had *no choice* under this Court's decisions but to burden commercial newsracks more heavily. See Brief for Petitioner 28 ("Cincinnati . . . could run afoul of First Amendment protections afforded noncommercial speech by affording newsrack-type dispensers containing commercial speech like treatment with newsracks containing noncommercial speech").

In this case, *Central Hudson*'s chickens have come home to roost.

The Court wisely rejects Cincinnati's argument that it may single out commercial speech simply because

it is "low value" speech, see *ante*, at 17, and on the facts of this case it is unnecessary to do more. The Court expressly reserves the question whether regulations not directed at the content of commercial speech or adverse effects stemming from that content should be evaluated under the standards applicable to regulations of fully protected speech. *Ante*, at 5–6, n. 11. I believe the Court should answer that question in the affirmative and hold that truthful, noncoercive commercial speech concerning lawful activities is entitled to full First Amendment protection. As I wrote in *Central Hudson*, "intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech." 447 U. S., at 573.[4] But none of the "commonsense differences," *Virginia Pharmacy Bd.*, 425 U. S., at 771, n. 24, between commercial and other speech "justify relaxed scrutiny of restraints that suppress truthful, nondeceptive, noncoercive commercial speech." *Central Hudson*, 447 U. S., at 578 (opinion concurring in the judgment).

The commercial publications at issue in this case illustrate the absurdity of treating all commercial speech as less valuable than all noncommercial speech. Respondent Harmon Publishing Company, Inc., publishes and distributes a free magazine containing listings and photographs of residential properties. Like the "For Sale" signs this Court, in *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85

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[4]I made no mention in *Central Hudson* of commercial speech proposing illegal activities, but I do not quarrel with the proposition that government may suppress such speech altogether. See *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376, 388 (1973). See also *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 384 (1977).

(1977), held could not be banned, the information contained in Harmon's publication "bear[s] on one of the most important decisions [individuals] have a right to make: where to live and raise their families." *Id.*, at 96. Respondent Discovery Network, Inc., advertises the availability of adult educational, recreational, and social programs. Our cases have consistently recognized the importance of education to the professional and personal development of the individual. See, *e.g.*, *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954). The "value" of respondents' commercial speech, at least to those who receive it, certainly exceeds the value of the offensive, though political, slogan displayed on the petitioner's jacket in *Cohen* v. *California*, 403 U. S. 15 (1971).

I think it highly unlikely that according truthful, noncoercive commercial speech the full protection of the First Amendment will erode the level of that protection. See *post*, at 2 (dissenting opinion); *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S., at 456. I have predicted that "the Court will never provide child pornography or cigarette advertising the level of protection customarily granted political speech." See *R.A.V.* v. *St. Paul*, 505 U. S. ___ (1992) (opinion concurring in the judgment). Yet I do not believe that protecting truthful advertizing will test this Nation's commitment to the First Amendment to any greater extent than protecting offensive political speech. See, *e.g.*, *Texas* v. *Johnson*, 491 U. S. 397 (1989) (flag burning); *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977) (Nazi march through Jewish neighborhood); *Cohen* v. *California*, 403 U. S. 15 (profane antiwar slogan). The very fact that government remains free, in my view, to ensure that commercial speech is not deceptive or coercive, to prohibit commercial speech proposing illegal activities, and to impose reasonable time, place, or manner restrictions on commercial speech greatly

reduces the risk that protecting truthful commercial speech will dilute the level of First Amendment protection for speech generally.

I am heartened by the Court's decision today to reject the extreme extension of *Central Hudson*'s logic, and I hope the Court ultimately will come to abandon *Central Hudson*'s analysis entirely in favor of one that affords full protection for truthful, noncoercive commercial speech about lawful activities.