COMMENT

CENTRAL HUDSON-PLUS:
WHY OFF-LABEL PHARMACEUTICAL SPEECH
WILL FIND ITS VOICE*

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errors are the Author’s own.
I. INTRODUCTION

So, a compelling question is raised: does speech that would be fully protected as scientific and/or educational speech become transformed into commercial speech, with its reduced level of protection, by the mere fact that a commercial entity seeks to distribute it in order to increase its sales of the product addressed in the speech?\(^1\)

Paying ghostwriters and physicians to submit biased medical journal articles, exaggerating industry-funded research results, and repeatedly publishing the same study in different journals are just some of the tactics pharmaceutical manufacturers have used to push products and profit margins.\(^2\) But is that enough to burden manufacturers’ speech based on the firms’ corporate identity? By characterizing these activities as commercial speech, several courts and the Food and Drug Administration (FDA) have justified regulations prohibiting pharmaceutical companies from disseminating information about any use not approved as indicated by the FDA labeling, known as an “off-label use.”\(^3\) Off-label uses are commonly prescribed by

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physicians and form the standard of care for some patient populations, including pediatric and oncology patients. Because the FDA’s regulatory policy suppresses off-label promotion, physicians rely on compendia to obtain accurate information about off-label uses. Unfortunately, these compendia inadequately inform physicians about appropriate prescribing practices because they are inconsistent and outdated. The resulting informational asymmetry between physicians and pharmaceutical manufacturers has raised questions about the tension between the FDA’s regulatory policies and the manufacturers’ First Amendment right to free speech. A recent Supreme Court development provides one answer to these queries.

This Comment argues that the Supreme Court developed a new test in Sorrell v. IMS Health, Inc to evaluate viewpoint-discriminatory commercial speech restrictions: “Central Hudson-plus.” Not only has the Supreme Court recently expanded its First Amendment jurisprudence to provide more protection for corporate entities, but it is likely to continue this ideological trend. This Comment asserts that the Court will apply the Central Hudson-plus test to overturn the FDA’s regulatory policies regarding off-label speech. Even if the Court continues to apply the standard commercial speech test, this Comment predicts that the FDA’s off-label regulations will fail to

Criminalizing Knowledge: The Perverse Implications of the Intended Use Regulations for Off-Label Promotion Prosecutions, 64 FOOD & DRUG L.J. 441, 441 (2009) (defining off-label use as “[u]se for an indication not in the labeling”).


5. Id. at 6; Amy P. Abernethy et al., Systematic Review: Reliability of Compendia Methods for Off-Label Oncology Indications, 150 ANNALS INTERNAL MED. 336, 341 (2009).

6. See Abernethy et al., supra note 5, at 341 (concluding that compendia failed to include the most recent and highest quality evidence).


9. The development of this framework is the Author’s own; however, see Donald W. Garner & Richard J. Whitney, Protecting Children from Joe Camel and His Friends: A New First Amendment and Federal Preemption Analysis of Tobacco Billboard Regulation, 46 EMORY L.J. 479, 501 & n.119 (1997), for an alternative proposal suggesting that interpretation of the Supreme Court’s holding in 44 Liquormart, Inc. v. Rhode Island will follow a “Central Hudson-plus” analysis, in which “the government [is] required to make an exceptionally high showing on each remaining prong.”
meet constitutional muster. Part II discusses the regulatory framework of the FDA. Part III explores the historical development of the commercial speech doctrine. Part IV proposes an interpretation of IMS Health and applies this analysis to the FDA's regulation of off-label pharmaceutical speech. Part V.A predicts that the FDA will face challenges to its classification of off-label promotion as commercial speech. Part V.B asserts that even if the Supreme Court applies the standard commercial speech framework, the FDA's regulations cannot withstand this analysis. Part VI suggests solutions that could be used by the FDA to comport with the First Amendment. Finally, Part VII concludes this Comment by urging the FDA to align its regulatory policies with the Supreme Court's First Amendment ideology so that patients and physicians may be provided with the most relevant information available.

II. THE FDA'S REGULATORY FRAMEWORK

Though the FDA has little regulatory authority over the practice of medicine, the Federal Food, Drug, and Cosmetic Act (FDCA) delegates responsibility to the FDA to promulgate regulations and investigate statutory violations regarding the sale and marketing of pharmaceutical drugs. Each drug marketed in the United States must contain an FDA-approved label; drugs are considered “misbranded” if the label is false or misleading. Particularly relevant to off-label drug advertising, Section 352(f) requires that the label contain both adequate directions for use and adequate warnings. The FDA's regulations have further defined “adequate directions for use” as

10. This Comment does not propose that manufacturers' speech regarding off-label uses should be entirely deregulated; rather, the Comment asserts that the Supreme Court's test for content-based commercial speech discrimination has changed. The Author urges the FDA to employ any constitutionally permissible enforcement mechanisms available to regulate misleading marketing tactics used by pharmaceutical firms.
11. Hall & Sobotka, supra note 4, at 7.
13. 21 U.S.C. § 352(a) (2006). Drugs are also misbranded if the label fails to prominently include statutorily required language, such as the name of the manufacturer. 21 U.S.C. § 352(b)–(c) (2006).
directions detailing the intended use of the product that could be understood by a layperson.  

Additionally, the FDA has broadly defined “intended uses” as “the objective intent of the persons legally responsible for the labeling of drugs.” Moreover, the FDA gives itself authority to determine the manufacturer’s intent from either a person’s “expressions” or the “circumstances surrounding the distribution of the article.” Further, if a manufacturer has notice of an off-label use, then the company is required to update the labeling. If a manufacturer disseminates information that fails to comply with FDA regulations, then the manufacturer could incur liability under the misbranding provision of the FDCA.

The FDA has also issued several guidance documents that provide insight into the FDA’s regulatory policy governing off-label marketing. The 1997 Guidance Document explains the FDA’s position related to “industry-supported” dissemination of scientific or educational material. Though specifically pointing out the importance of off-label uses, the 1997 Guidance Document bars any discussion of unapproved uses initiated by manufacturers. In 1997, the key issue was whether industry-supported information, programs, and activities maintained independence from the promotional influence of manufacturers. The FDA proposed a series of factors by which it would weigh the nature of the relationship. Additionally, the FDA asserted that regulation of

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17. Id. Intent can be shown by oral or written advertising by a representative of the manufacturer. Id. More perplexingly, intent to misbrand may arise in situations when the manufacturer has knowledge that the drug is used contrary to the warning label or advertisement. See id.
18. Id. Any updated labeling must be approved by the FDA, which would likely require the manufacturer to pursue a supplemental new drug application. See 21 C.F.R. § 202.1(e)(4) (2011).
22. Id. at 64,094–95.
23. See id. at 64,094–96 (framing the 1997 Guidance Document’s goal as delineation between promotional speech and nonpromotional, scientific expression).
24. Id. at 64,095–99. The following factors were used to determine the company’s relative financial influence: (1) control of content and selection of speakers; (2) disclosures
independent scientific activities was not within the purview of its intended regulatory oversight.\textsuperscript{25}

In January of 2009, the FDA clarified its position on the appropriate avenues for dissemination of information about unapproved uses of pharmaceuticals.\textsuperscript{26} The FDA continued to recognize the importance of discussion about off-label uses but asserted its authority to determine whether the manufacturers’ promotional activities violated the FDCA.\textsuperscript{27} Importantly, the FDA highlighted the fact that off-label uses “may even constitute a medically recognized standard of care” and acknowledged the public’s interest in receipt of accurate scientific information.\textsuperscript{28}

The Guidance Document outlines recommendations for the type of reprint articles that can be disseminated in compliance with the FDA’s policy.\textsuperscript{29} For example, scientific journal articles should be peer-reviewed, published by an entity with an independent editorial board, and funded independently from the drug manufacturer.\textsuperscript{30} Additionally, reference publications should be generally accessible through avenues available to those in the field and cannot be influenced by the drug manufacturer.\textsuperscript{31}

There are also restrictions about the content of the information disseminated.\textsuperscript{32} Information disseminated by reprints or reference publications should describe “controlled clinical investigations” and cannot be false, misleading, or hazardous to the public health.\textsuperscript{33} Next, the Guidance Document outlines the manner in which the journal articles may be distributed.\textsuperscript{34} Articles should be an accurate copy of the entire

\textsuperscript{25} Id. at 64,096–99.
\textsuperscript{26} Id. at 64,096.
\textsuperscript{27} Good Reprint Practices, supra note 20, at 2–3.
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 3.
\textsuperscript{30} Id. at 4.
\textsuperscript{31} Id. For example, reference publications could be purchased in medical bookstores or through subscription websites. Id.
\textsuperscript{32} Id. at 4–5.
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 5–6.
original document, cannot contain highlighting or summarization, should include the approved FDA labeling, should be disseminated separately from any other promotional advertising, and should include a copy of any articles reaching an alternative conclusion.\textsuperscript{35} If the physician, as an information recipient, has additional questions, the appropriate response is for the sales representative to direct all questions to a department other than sales and marketing, such as the medical affairs department.\textsuperscript{36}

In December 2011, the FDA introduced a Draft Guidance advising pharmaceutical firms how to appropriately respond to unsolicited questions about off-label uses.\textsuperscript{37} Unsolicited requests are “completely independent of the relevant firm,” whereas solicited requests are “prompted” by the manufacturer.\textsuperscript{38} The FDA may then use any response to a solicited request as evidence of the manufacturer’s intent to misbrand a drug in violation of the FDCA.\textsuperscript{39} The FDA further distinguishes between public and nonpublic unsolicited requests, dictating that responses to public requests include only “the [manufacturer’s] contact information and should not include any off-label information.”\textsuperscript{40} Appropriate responses to nonpublic unsolicited questions should be directed to the person posing the question; be narrowly tailored; include unbiased scientific information, in addition to reprints of any other articles suggesting alternative views; and be answered by scientific liaisons rather than sales and marketing employees.\textsuperscript{41} The manufacturer’s response should also include various disclaimers, a reference list, and the approved FDA label.\textsuperscript{42}

\textsuperscript{35} Id. at 5. Moreover, the journal articles should contain a prominent, explicit, and permanently attached statement that discloses the manufacturer’s interest in the drug product, any financial interest the author may have in the drug, all safety concerns not mentioned in the article, and that the use discussed in the reprint has not obtained FDA approval. Id. at 5–6.

\textsuperscript{36} Id. at 5 & n.7.

\textsuperscript{37} CTR. FOR DRUG EVALUATION & RESEARCH, FDA, GUIDANCE FOR INDUSTRY: RESPONDING TO UNSOLICITED REQUESTS FOR OFF-LABEL INFORMATION ABOUT PRESCRIPTION DRUGS AND MEDICAL DEVICES 1, 7–12 (2011) [hereinafter DRAFT GUIDANCE], available at http://www.fda.gov/downloads/drugs/guidancecomplianceregulatoryinformation/guidances/ucm285145.pdf. This guidance document is a draft guidance, which the FDA stipulates does not create legal rights and is only distributed for comment purposes. Id. at 1. This Comment incorporates the Draft Guidance to illustrate the FDA’s current thinking and underlying regulatory initiatives.

\textsuperscript{38} Id. at 4–5.

\textsuperscript{39} Id. at 5 & n.7; see also supra notes 13–19 and accompanying text (describing the FDA’s interpretation of the FDCA).

\textsuperscript{40} DRAFT GUIDANCE, supra note 37, at 3, 11.

\textsuperscript{41} Id. at 7–9.

\textsuperscript{42} Id. at 9.
addition to this long, exhaustive list of requirements, the FDA also requests that a manufacturer keep detailed records about the identity of the individual requesting information, the response provided to that individual, and any subsequent exchanges.\footnote{Id.}

In September 2011, the FDA updated its 2006 Compliance Policy Guide, which described the FDA’s enforcement policy for marketing unapproved drugs.\footnote{2011 COMPLIANCE GUIDE, supra note 3, at 2, 4–7.} Closely aligning its language with that of Judge Lamberth’s in \textit{Washington Legal Foundation v. Friedman} (WLF I), the FDA articulated its interest as encouragement of manufacturers to comply with the FDCA.\footnote{See id. at 3 (indicating the FDA’s interest in encouraging manufacturers to comply with the FDCA by requiring manufacturers to provide the FDA with evidence of a drug’s safety before marketing it to the public); infra note 86 and accompanying text (affirming legislative intent to encourage supplemental drug applications as a substantial government interest).} Additionally, manufacturers who illegally marketed unapproved uses of drugs could expect enforcement actions based on the FDA’s categorization of the risk of financial influence.\footnote{Id. at 4–5. “Health fraud drugs” were defined as any drug that involved misrepresentation about efficacy and benefits or failed to demonstrate scientific validity. Id. at 4.} The highest priority for FDA enforcement actions belongs to “drugs with potential safety risks,” ineffective drugs, and “health fraud drugs,” among others.\footnote{U.S. CONST. amend. I.}

\section*{III. DEVELOPMENT OF THE COMMERCIAL SPEECH DOCTRINE}

\subsection*{A. First Amendment Protection for Commercial Speech}

\textit{Established in Virginia Citizens}

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.”\footnote{Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 753–54 (1976); see also Edward J. Eberle, \textit{Practical Reason: The Commercial Speech Paradigm}, 42 CASE W. RES. L. REV. 411, 440–44 (1992) (illustrating the “seminal” nature of \textit{Virginia Citizens} by highlighting the Court’s rationale).} One of the seminal cases challenging whether the First Amendment affords protection to commercial speech was \textit{Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.}\footnote{Id. at 3–5.} A patient who required daily prescription drugs to manage her health and two nonprofit corporations challenged the constitutionality of a Virginia statute that prevented pharmacists from advertising the
prices of prescription drugs. Specifically, the plaintiffs argued that the statute abridged their First Amendment right to receive prescription drug information from pharmacists.

The Supreme Court first analyzed whether the First Amendment right to free speech attached to information recipients or to those wishing to disseminate advertising materials. Concluding that the First Amendment encompassed a reciprocal right to receive information, the Virginia Citizens Court next addressed whether the First Amendment protected commercial speech. Alluding to the murky precedent regarding commercial speech, the Court decided that an advertiser is entitled to First Amendment protection even though his speech is primarily economic. The majority declined to expressly distinguish commercial transactions, such as drug price advertising, from forms of fully protected free speech that convey ideas based on “truth, science, morality, and arts in general.” Moreover, the Court lauded society’s interest in the free flow of information, arguing that access to commercial advertising was indispensable to society’s educated decisionmaking process. This interest remains relevant today, as physicians need accurate, recent information about off-label uses to treat patients who require unconventional care.

B. Central Hudson: The Commercial Speech Standard

To resolve the questions left open in Virginia Citizens and its progeny, the Supreme Court clarified the modern commercial speech test in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York. In Central Hudson, a New York regulation completely banned utility advertising. The

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51. Id. at 753–54.
52. Id. at 756.
53. Id. at 756–58; see also EDWIN P. ROME & WILLIAM H. ROBERTS, CORPORATE AND COMMERCIAL FREE SPEECH 55–56 (1985) (acknowledging that the First Amendment protects the interests of advertisers, consumers, and society).
55. Id. at 762 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)) (internal quotation marks omitted). Instead, the Court affirmed that commercial speech warranted protection under the First Amendment. Id.
56. Id. at 764–65.
57. Abernethy et al., supra note 5, at 341–42.
appellant, Central Hudson Gas & Electric Corp., argued that the regulation violated its First and Fourteenth Amendment rights by restraining its commercial speech. The Court struck down the ban, articulating that the government must assert a substantial interest to restrict lawful, nonmisleading speech. Next, the regulation must both directly support the government interest and be the least restrictive suppression of commercial speech. The Court declined to recognize a substantial government interest that could completely suppress commercial speech, denouncing that view as “highly paternalistic.” Furthermore, the Court highlighted the First Amendment’s presumption that dissemination of some information was preferable to none. However, the protection afforded to commercial speech is less than other areas of expression. The Supreme Court reasoned that a commercial speaker’s heightened knowledge of his particular market and his relative position as the best person to explain and evaluate the accuracy of his claims provides the basis for according less First Amendment protection to commercial speech.

Thus, Central Hudson established a four-prong test for commercial speech: (1) The expression must be protected by the First Amendment, and if the expression is commercial speech, it must neither contain misleading information nor advance unlawful behavior; (2) the government must have a substantial interest in the regulation; (3) if so, the regulation must directly advance the government’s interest; and (4) the regulation must not be more extensive than necessary. Though the judgment garnered the support of eight justices, a few voiced concerns about the test. In his concurrence, Justice Blackmun questioned whether the suppression of information should ever be a permissible means of regulation. Justice Stevens’s concerns addressed whether the majority’s definition of commercial

60. Id. at 560.
61. Id. at 564, 571–72.
62. Id. at 564.
63. Id. at 562 (internal quotation marks omitted).
64. Id.
65. Id. at 563.
66. Id. at 564 n.6. The Court further noted that commercial speech is not as likely to be silenced by overbroad regulation. Id.
67. Id. at 566.
68. Id. at 558.
69. See id. at 574–75 (Blackmun, J., concurring) (arguing that the First Amendment prohibits the government from restricting commercial speech because of the message’s effect on public decisionmaking).
speech, which focused on either the economic interests of the parties or on proposals suggesting commercial transactions, would encompass speech that should be afforded full First Amendment protection.\textsuperscript{70} Today, this concern relates to the FDA’s regulation of off-label speech because off-label information disseminated by manufacturers could encompass scientific speech.

C. Thompson v. Western States: The Modern Affirmation

In Thompson v. Western States Medical Center, the Supreme Court provided insight about how future First Amendment off-label promotion claims might be analyzed in the context of prescription drugs.\textsuperscript{71} Respondents, a group of pharmacies, argued that a statutory prohibition against compounded drug advertising violated the group’s First Amendment rights.\textsuperscript{72} The statutory prohibition in question, the Food and Drug Administration Modernization Act (FDAMA), provided an exemption from the new drug approval process for compounded drugs if pharmacists provided services “for an identified individual patient based on the unsolicited receipt of a valid prescription.”\textsuperscript{73} This exemption allowed pharmacists to sell drugs otherwise considered misbranded under the FDCA.\textsuperscript{74} Using the Central Hudson commercial speech test in its analysis, the Court held that section 127(a) of the FDAMA was unconstitutional and concluded that proscribing all advertising of drug compounding was more restrictive than necessary.\textsuperscript{75} The Western States Medical Center

\textsuperscript{70}. Id. at 579–80 (Stevens, J., concurring); see also Rome & Roberts, supra note 53, at 87–88 (recognizing the value in Justice Stevens’s concurrence because his analysis focused on the consequences of defining commercial speech too broadly and too narrowly). Justice Stevens concluded that the advertising ban in Central Hudson was not a commercial speech case. Central Hudson, 447 U.S. at 583 (Stevens, J., concurring).


\textsuperscript{72}. W. States Med. Ctr., 535 U.S. at 365. Drug compounding is a standard pharmacy practice used to prepare commercially unavailable medications for patients. Id. at 360–61.


majority carefully noted several alternatives to banning speech that could directly advance the Government’s interest, explaining that the Government must decline to restrict speech if it could advance its interests in another manner.\textsuperscript{76} A few suggestions for alternatives to banning speech included: (1) using the factors outlined in the 1992 Guide, such as banning commercial compounding equipment; (2) prohibiting compounding prior to the receipt of prescriptions; or (3) limiting the amount of compounded drugs sold by either the location or the individual pharmacist.\textsuperscript{77}

D. Recent First Amendment Challenges

Prior to \textit{IMS Health}, courts that have addressed tensions between the FDA’s labeling regulations and pharmaceutical companies’ First Amendment rights utilized the commercial speech framework in their analyses.\textsuperscript{78} The lengthy \textit{Washington Legal Foundation} litigation provides an example of the battle between regulators and the First Amendment.

\textit{1. The Washington Legal Foundation Litigation.} In 1998, Washington Legal Foundation (WLF) filed suit to enjoin the FDA from enforcing regulatory policies that proscribed off-label promotional activities.\textsuperscript{79} WLF, a public interest group that advocates for freedom from government regulators, alleged that two FDA Guidance Documents infringed the First Amendment rights of its members.\textsuperscript{80} In his opinion, Judge Lamberth identified the central problem as one of asymmetry between what a physician may prescribe as off-label treatment versus what a manufacturer may communicate about off-label uses.\textsuperscript{81} Next, the district court used the \textit{Central Hudson} commercial speech rubric to evaluate WLF’s claims because the pharmaceutical companies’ activities “propose[d] a commercial transaction.”\textsuperscript{82} Applying

\textsuperscript{76} Id. at 371–72.
\textsuperscript{77} Id. at 372.
\textsuperscript{79} \textit{WLF I}, 13 F. Supp. 2d at 54.
\textsuperscript{80} Id. at 54, 57–58. One guidance document restricted a manufacturer’s ability to distribute reprints of medical textbooks and peer-reviewed journal articles, and the other guidance document restricted manufacturer involvement in continuing medical education (CME) seminars. \textit{Id.} at 57–58.
\textsuperscript{81} Id. at 55.
\textsuperscript{82} Id. at 64–65 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976)) (internal quotation marks omitted). The court
Central Hudson’s four-prong test, the court first concluded that the dissemination of off-label information was neither unlawful nor misleading because the conduct underlying the speech, a physician’s prescription of an FDA-approved drug for an off-label use, was lawful activity. \(^{83}\) Next, the court addressed whether the Government’s interest was substantial, concluding that the Government did have a substantial interest in “protecting the health and safety of its citizens.” \(^{84}\) However, the court carefully scrutinized the two specific interests advanced by the Government under the umbrella of the broader health and safety interest. \(^{85}\) Judge Lamberth’s opinion concluded that fear surrounding physicians’ misuse of scientific information could not justify the FDA policies, but that the Government did have a substantial interest in encouraging the submission of supplemental drug applications for off-label uses. \(^{86}\) Moreover, the court heralded the First Amendment’s preference for dissemination rather than suppression of information. \(^{87}\) Next, the court concluded that the Guidance Documents’ commercial speech restrictions directly advanced the Government’s interest. \(^{88}\) However, the court ultimately determined that the restrictions were more extensive than necessary because less burdensome policies were feasible. \(^{89}\) Therefore, the court ordered a permanent injunction restricting the FDA’s regulatory policies related to the distribution of peer-reviewed journal articles and medical

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\(^{83}\) Id. at 66, 69 (rejecting the FDA’s argument that the manufacturers’ promotional speech itself was unlawful and therefore failed the first prong of the Central Hudson analysis).

\(^{84}\) Id. at 69–70. Moreover, the court even suggested that few other regulatory interests could surpass the importance of the FDA’s general interest in regulating the safety and effectiveness of prescription drugs. Id. at 69.

\(^{85}\) See id. at 69–71 (discussing the merits of the two specific interests: physicians’ receipt of accurate information and approval of off-label uses).

\(^{86}\) Id. Judge Lamberth’s opinion deferred to legislative intent to determine whether the policy of requiring manufacturers to submit new-use applications was a substantial government interest and concluded that Congress had clearly intended for all uses of a drug to be safe and effective. Id. at 71.

\(^{87}\) See id. at 69–70, 73–74 (“The Supreme Court has repeatedly rejected governmental attempts to equate less information with better decision-making . . . . In choosing between the dissemination of more or less information ‘[i]t is precisely this kind of choice . . . that the First Amendment makes for us.’” (second alteration in original) (quoting Va. Citizens, 425 U.S. at 770)).

\(^{88}\) Id. at 72.

\(^{89}\) See id. at 73 (suggesting that disclosure was a less burdensome means for the FDA to use to implement regulations that conformed with Congress’s intent).
textbooks and the suggestion of content or speakers for CME seminars.\footnote{90}{Id. at 74–75.}

Following the passage of the FDAMA, the FDA filed a Rule 59(e) motion to amend the permanent injunction.\footnote{91}{Wash. Legal Found. v. Friedman (\textit{WLF II}), 36 F. Supp. 2d 16, 17–18 (D.D.C. 1999), \textit{vacated in part sub nom.} Wash. Legal Found. v. Henney, 202 F.3d 331 (D.C. Cir. 2000).} The court reasserted its position that the injunction applied not only to the Guidance Documents but also to the underlying policies advocated by the FDA.\footnote{92}{Id. at 18.} Final judgment was deferred pending supplemental briefs explaining how the FDAMA’s statutory provisions would affect the court’s order and injunction.\footnote{93}{Id. at 19.} After reviewing the parties’ supplemental briefs, the district court again found the FDA’s regulatory policies unconstitutional because the supplemental application requirement burdened more speech than necessary to encourage the filing of new applications.\footnote{94}{See Wash. Legal Found. v. Henney (\textit{WLF III}), 56 F. Supp. 2d 81, 87 (D.D.C. 1999) (offering suggestions to the FDA for less restrictive means to encourage compliance, such as prohibiting profits from off-label prescriptions and imposing fines for failure to file supplemental applications), \textit{vacated in part by} 202 F.3d 331 (D.C. Cir. 2000).}

The Government appealed, arguing that the FDA had no authority to prohibit speech.\footnote{95}{Wash. Legal Found. v. Henney (\textit{WLF IV}), 202 F.3d 331, 332 (D.C. Cir. 2000).} Because no constitutional controversy remained, the D.C. Circuit dismissed the FDA’s appeal and vacated the district court’s order and injunction.\footnote{96}{Id. at 336–37.} Finally, in \textit{Washington Legal Foundation v. Henney} (\textit{WLF V}), Judge Lamberth’s opinion concluded that there was no part of the injunction left intact because the court of appeals had previously vacated the July 30, 1998 injunction “insofar as [it] declare[ed] the FDAMA and the CME Guidance unconstitutional.”\footnote{97}{Wash. Legal Found. v. Henney (\textit{WLF V}), 128 F. Supp. 2d 11, 14–15 (D.D.C. 2000) (first alteration in original) (quoting \textit{WLF IV}, 202 F.3d at 337).} He further lamented the lack of clarity surrounding pharmaceutical manufacturers’ First Amendment rights, despite six years of litigation.\footnote{98}{Id. at 15.}
2. Caronia Sets the Stage. The Eastern District of New York heavily referenced the WLF litigation in its constitutional analysis of a recent misbranding prosecution.\footnote{See United States v. Caronia, 576 F. Supp. 2d 385, 393–94, 396–99, 401–02 (E.D.N.Y. 2008) (relying on the WLF litigation in its analysis of prongs one, two, and three of the Central Hudson test, but distinguishing WLF based on prong four).} In United States v. Caronia, the FDA charged Alfred Caronia with misbranding a drug because he “promoted” off-label information to a physician.\footnote{Id. at 389.} Caronia raised an as-applied First Amendment challenge, but the district court held that the Government satisfied its burden to justify the regulation.\footnote{See id. at 393, 401–02 (contending that there were no nonspeech alternatives likely to advance the Government’s interest in the new drug approval process).} Relying on United States v. Caputo, the court narrowly distinguished the First Amendment challenge in WLF while broadly classifying the challenges raised by Caronia and Caputo as those that “strike[] at the very heart of the FDA’s ability to proscribe manufacturer promotion of off-label uses.”\footnote{Id. at 399 (quoting United States v. Caputo, 288 F. Supp. 2d 912, 922 (2003))} This distinction is important because it suggests that there is—and should be—some limit to the First Amendment rights of manufacturers.\footnote{Id. at 399 (internal quotation marks omitted). In distinguishing the cases, the Caronia court characterized the WLF issue as a challenge to a “specific FDA guidance document,” whereas the Caputo and Caronia challenges related to the misbranding section of the FDCA. Id. But see WLF II, 36 F. Supp. 2d 16, 18 (D.D.C. 1999) (asserting that its opinion reached the merits of the FDA’s underlying regulatory scheme), vacated in part sub nom. WLF IV, 202 F.3d 331 (D.C. Cir. 2000).} Caronia appealed the district court’s judgment.\footnote{See Caronia, 576 F. Supp. 2d at 399 (noting that the WLF and Caputo decisions suggested that extending manufacturers’ First Amendment rights to all forms of off-label promotion would lead to undesirable consequences).} The Second Circuit requested supplemental briefing to address the effects of the Supreme Court’s IMS Health opinion on the Caronia litigation.\footnote{Notice of Appeal at 1, United States v. Caronia, 576 F. Supp. 2d 385 (E.D.N.Y. Aug. 17, 2009) (No. 1:06-cr-00229-ENV).} However, the Court’s decision in IMS Health raised more questions than it answered.

IV. WHY THE SUPREME COURT’S IDEOLOGY IS SHIFTING

A. Factual Background of Sorrell v. IMS Health

The Vermont statute at issue in IMS Health provides a close parallel to the FDA’s regulations concerning off-label promotions.
Vermont state law prevented pharmaceutical firms from using “prescriber-identifying information” in marketing campaigns. Validation for the ban hinged on the legislature’s assertion that the use of prescriber-identifying information by pharmaceutical firms hampered physicians’ ability to make independent, educated decisions. However, a number of statutory exceptions allowed prescriber information to be used for other purposes and by other entities. Therefore, the Supreme Court interpreted the Vermont statute as disfavoring speech based on the type of content—marketing—and disfavoring speakers based on their identity as pharmaceutical manufacturers.

B. The Majority Raises the Bar

Justice Kennedy’s opinion in IMS Health employed the use of a “heightened scrutiny” analysis to determine whether the Vermont statute abridged the First Amendment rights of pharmaceutical firms and data miners. This analysis raises several questions: Has the Court merely modified the conventional Central Hudson commercial speech doctrine when the government’s regulations favor one speaker or view? Or has the Court expanded the level of scrutiny for all commercial speech cases? The majority answered, “[T]he outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.”

Because the Court determined the statute went so far as to prohibit speech based on the speaker’s viewpoint, heightened judicial scrutiny applied. The Court supported its application of heightened scrutiny by relying on cases like R.A.V. v. City of St. Paul, Cincinnati v. Discovery Network, Inc., and Turner Broadcasting System, Inc. v. FCC, even though R.A.V. and

106. Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2660 (2011). Prescriber-identifying information is another term for knowledge surrounding the prescribing tendencies of a particular physician. Id. at 2659–60. Pharmaceutical companies use this information to target and promote drugs to physicians. Id.

107. Id. at 2661. The Vermont legislature claimed physicians might make decisions based on misleading information given to them by sales representatives and would be unable to thoroughly evaluate the manufacturers’ claims due to time restraints. Id.

108. See id. at 2660, 2662–63 (explaining that the Vermont statute allowed prescriber-identifying information to be used by academic entities and for health care research or compliance purposes).

109. Id. at 2663.

110. See id. at 2661, 2667–68 (applying heightened scrutiny based on the act’s speaker- and content-based speech restrictions).

111. Id. at 2667 (citing Greater New Orleans Broad. Ass’n v. United States, 527 U.S. 173, 184 (1999)).

112. Id. at 2663–64.
Turner are noncommercial speech cases and the Discovery Network Court repudiated the Government’s reliance on a distinction between commercial and noncommercial speech as the basis for its justification. These cases affirm that the government cannot favor one speaker, or a particular message, over another without satisfying a higher level of scrutiny. Yet, even an underlying purpose to favor the government’s preferred view violates the First Amendment. Moreover, the Supreme Court’s jurisprudential trend in other areas—such as corporate and political speech—has been to overturn statutes and regulations that disfavor certain viewpoints.

After the IMS Health Court analyzed Vermont’s content-based speech restrictions, the majority then employed a quasi-Central Hudson commercial speech analysis and held that the state burdened expression without adequate justification. Thus, under IMS Health, the Supreme Court will first scrutinize content-based discrimination under a heightened standard of review and then apply what this Comment terms "Central Hudson-plus" to determine whether the government's asserted interest can justify the First Amendment intrusion. Prong four of Central Hudson now extends to require a neutral mechanism of implementation, thereby elevating the bar required to meet constitutional muster.

As this Comment asserts, the Supreme Court has expanded its First Amendment ideology in cases like IMS Health and Citizens United v. FEC and, therefore, will continue to follow this


114. Turner Broad., 512 U.S. at 657–58; R.A.V., 505 U.S. at 382–83; see also Discovery Network, 507 U.S. at 417–19 (denouncing the city's proposed justification for its discrimination between types of newsracks).

115. IMS Health, 131 S. Ct. at 2664.


117. See IMS Health, 131 S. Ct. at 2667–68, 2672 (applying the Central Hudson factors following its viewpoint-discrimination analysis and concluding that the state's articulated interests failed to justify its ban on pharmaceutical marketing); id. at 2677 (Breyer, J., dissenting) (characterizing the majority's rule as "a standard yet stricter than Central Hudson").

118. See id. at 2667–68 (majority opinion) (acknowledging the “dispositive” nature of viewpoint discrimination in traditional First Amendment cases, but extending its analysis in commercial speech cases to incorporate the Central Hudson factors).

119. See id. at 2668, 2671–72 (denouncing Vermont’s mechanism of regulation because the statute disfavored speech with which the state disagreed).
philosophy in any future resolution of off-label free speech claims. To illustrate the expansion of the Court’s stance on viewpoint-based discrimination in other contexts, this Comment references Citizens United and Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett. Citizens United’s focus on the First Amendment’s prohibition of “preferred speakers” mirrors that of IMS Health. In Citizens United, the Supreme Court overturned a statute prohibiting corporate contributions to political advocacy groups, characterizing the statute as a “ban on corporate speech.” Furthermore, the Court analogized the ban to other forms of censorship. The Citizens United Court concluded that the Government’s alternative, an exception for PACs, was too burdensome and that the Government’s antidistortion interest was not compelling enough to justify the ban on corporate political speech. Like Judge Lamberth’s suggestion in WLF I, Justice Kennedy advocated disclosure as a less restrictive alternative to complete bans of particular forms of speech. Quoting himself, Justice Kennedy concluded his opinion with reference to the First Amendment’s role in encouraging “civic discourse.” The use of this language ties back to the central theme of the First Amendment—society’s interest in acquiring knowledge from different viewpoints is so crucial that the

120. For an alternative viewpoint postulating that the FDA’s “abstruse regulatory scheme,” like that of the ban in Citizens United, acts like a prior restraint, see Kristie LaSalle, Note, A Prescription for Change: Citizens United’s Implications for Regulation of Off-Label Promotion of Prescription Pharmaceuticals, 19 J.L. & Pol’y 867, 893–96 (2011).
122. Compare IMS Health, 131 S. Ct. at 2671–72 (prohibiting burdens on disfavored speech), with Citizens United, 130 S. Ct. at 898–99 (noting that the government cannot give credence to one speaker’s message over another’s).
123. Citizens United, 130 S. Ct. at 897, 917.
124. See id. at 897 (arguing that Section 441b would make certain types of advocacy a felony). For example, the National Rifle Association’s publication of a book encouraging support for a political candidate because of his gun rights position would be a felony under Section 441b. Id.
125. See id. at 897, 904 (describing the burdens as: cost, appointment of a treasurer, record keeping, filing an organization statement, and reporting changes to any of the preceding information within ten days).
126. Compare WLF I, 13 F. Supp. 2d 51, 73–74 (D.D.C. 1998) (proposing that full disclosure by the drug manufacturer would address the FDA’s concerns but still allow for dissemination of more information, comporting with the First Amendment), amended by 36 F. Supp. 2d 16 (D.D.C. 1999), vacated in part sub nom. WLF IV, 202 F.3d 331 (D.C. Cir. 2000), with Citizens United, 130 S. Ct. at 915–16 (referring to similar cases in which disclosure requirements were upheld, and affirming that disclosure allows citizens to have access to information necessary to make decisions).
government must articulate heightened justification to quell the speech of a particular view.\textsuperscript{128}

Similarly, in \textit{Arizona Free Enterprise}, the Supreme Court concluded that the state was unable to justify an Arizona public financing program that favored the speech of publicly financed candidates over independently financed candidates.\textsuperscript{129} Citing \textit{Citizens United}, the Court argued that requiring a speaker to change his message “certainly contravenes ‘the fundamental rule of protection under the First Amendment.’”\textsuperscript{130} Chief Justice Roberts’s opinion concludes by extolling one purpose of the First Amendment—“free discussion of governmental affairs.”\textsuperscript{131} Though the \textit{Citizens United} and \textit{Arizona Free Enterprise} parallels are drawn from the context of political speech, the Supreme Court has noted that society may have as much interest in the content of commercial messages as it does in political debate.\textsuperscript{132}

It is also instructive to note that in \textit{IMS Health}, Justice Sotomayor joined Justice Kennedy’s majority opinion, along with Chief Justice Roberts and Justices Scalia, Thomas, and Alito.\textsuperscript{133} Justice Sotomayor’s vote likely solidifies the Supreme Court’s stance on content-based commercial speech restrictions. In fact, Justice Sotomayor voted with the majority in \textit{Brown v. Entertainment Merchants Ass’n},\textsuperscript{134} \textit{Christian Legal Society Chapter of the University of California v. Martinez},\textsuperscript{135} and \textit{United States v. Stevens},\textsuperscript{136} several of the Court’s most

\begin{itemize}
\item \textsuperscript{128} See id. at 898, 906 (explaining that strict scrutiny is used because the First Amendment was a response to the suppression of speech, and noting that the Framers used various sources of speech in the founding of the Constitution).
\item \textsuperscript{130} Id. at 2820 (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995)).
\item \textsuperscript{131} Id. at 2828 (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976)) (internal quotation marks omitted).
\item \textsuperscript{133} Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2658–59 (2011).
\item \textsuperscript{134} Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2732, 2741–42 (2011) (joining Justice Scalia’s majority opinion with Justices Kennedy, Ginsburg, and Kagan, and concluding that a California statute banning the sale of videogames to minors failed to survive strict scrutiny).
\item \textsuperscript{135} Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 130 S. Ct. 2971, 2977–78 (2010) (joining Justice Ginsburg’s majority opinion with Justices Stevens, Kennedy, and Breyer, and upholding a school policy as a “viewpoint-neutral condition on access”).
\item \textsuperscript{136} United States v. Stevens, 130 S. Ct. 1577, 1582, 1584, 1592 (2010) (joining Chief Justice Robert's majority opinion with Justices Stevens, Scalia, Kennedy, Thomas, Ginsburg, and Breyer, which invalidated a content-based government regulation that prohibited depictions of animal cruelty).
\end{itemize}
recent viewpoint-discrimination cases. Though eight Justices agreed with the *Stevens* judgment, Justice Sotomayor’s vote with the *IMS Health* majority gives credence to this Comment’s assertion that the Supreme Court’s expansionary view of the First Amendment remains strong.

**C. Central Hudson-Plus Applied**

If a court concludes that the off-label promotion at issue is commercial speech, this Comment asserts that the court will follow the *Central Hudson*-plus test to evaluate whether FDA regulatory policies abridge First Amendment expression. Moreover, the Court likely will conclude that these policies violate the First Amendment rights of pharmaceutical firms. Like the viewpoint-discriminatory Vermont statute in *IMS Health*, the FDA’s regulatory policies prohibit certain speakers—pharmaceutical manufacturers—from freely disseminating information that others may lawfully express. For example, an independent research physician conducting a manufacturer-sponsored clinical trial could explain the study’s findings about off-label uses to his clinical physician colleagues; however, a manufacturer’s scientific liaison is prohibited from conveying the same off-label information, unless responding to a private request.

Like the content-based marketing prohibition in *IMS Health*, current FDA regulatory policy confines the type of content that may be disseminated to reference publications or medical journal reprints, which further limits the interchange of scientific discussion. These restrictions appear to intrude on the “marketplace of ideas,” a foundation of scientific freedom.

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137. *Id.* at 1582.

138. Compare *IMS Health*, 131 S. Ct. at 2663–64 (overturning a Vermont statute that prohibited the use of prescriber-identifying information based on the identity of the speaker and purpose of his message), *with* *GOOD REPRINT PRACTICES*, supra note 20, at 2–5 (prohibiting manufacturers from conveying medical information without adhering to specific guidelines), *and* Hall & Sobotka, supra note 4, at 8 (“Anyone other than the manufacturer (or its agent) is free to say whatever it wants about the off-label use.”).

139. *See* 2011 Draft Guidance, supra note 37, at 2–3 (describing the FDA’s proposed policy for responding to unsolicited requests for off-label information); *cf.* Guidance for Industry, supra note 21, at 64,095 (justifying its identity-based speech restrictions based on the manufacturers’ promotional intentions).

140. Compare *IMS Health*, 131 S. Ct. at 2659, 2663 (invalidating a law that placed limits on the use of prescriber-identifying information for marketing purposes), *with* *GOOD REPRINT PRACTICES*, supra note 20, at 3–6 & n.7 (explaining that a sales representative could not discuss off-label scientific data but should instead refer the physician to the medical affairs officer).

The FDA's restrictions on the scientific exchange at CME seminars may be particularly relevant because these programs foster physicians' knowledge and professional development.\textsuperscript{142}

The FDA's Draft Guidance for responding to unsolicited off-label requests further illustrates the agency's content- and identity-based policies. The FDA recommends that pharmaceutical firms tailor their responses to conform to the guidelines set forth in the Draft Guidance.\textsuperscript{143} This tailoring is required because the FDA classifies the expression's content as marketing.\textsuperscript{144} Firms should distribute “balanced” information, in addition to the message they intend to convey, and restrain their expression to align with the narrowest interpretation of the posed question.\textsuperscript{145} Thus, the firm’s desired expression may be convoluted or overshadowed by other information. Justice Kennedy specifically denounced content-based requirements in \textit{Turner Broadcasting}, noting that “[l]aws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny.”\textsuperscript{146} The FDA's suppression of scientific discourse contradicts the heart of the Supreme Court's First Amendment ideology.\textsuperscript{147} Based on the application of the first step of \textit{Central Hudson}-plus, this Comment concludes that the FDA's regulatory policies impose content- and speaker-based restrictions that compel heightened scrutiny.

Next, this Comment's interpretation of \textit{IMS Health} requires application of the \textit{Central Hudson} factors. Prongs one through three follow the traditional \textit{Central Hudson} framework and will be discussed in Part V. Prong four requires proportionality between the burdens on speech and the government's interest,
but the means used may not “seek to suppress a disfavored message.” Closely following the analysis above, the means used by the FDA to regulate misbranding under the FDCA are both content- and speaker-based. The FDA’s regulatory policies provide guidance about the format and content of information provided to physicians and requested by the public, even though this information is available and permissibly used by others. Additionally, if an individual requests information about an off-label use for a particular disease, the FDA’s suggested response is to provide tailored information about the use related to that disease and to shower the requestor with information about known or suspected risks for the disease in question, as well as any other relevant condition. This tilts the content of the message in favor of the FDA’s preferred view. Moreover, this recommendation does not reasonably advance the FDA’s stated interest in protection of the public health if the manufacturer may only convey information about a drug’s harm to a single individual who privately requests information. Therefore, under Central Hudson-plus, the policies outlined in the FDA’s guidance documents violate pharmaceutical manufacturers’ First Amendment rights.

V. LOOMING PROBLEMS FOR THE FDA

One problem that emerges in the constitutional analysis of off-label speech is whether characterizing this exchange as “commercial speech” envelopes core scientific expression. It is particularly important to clearly distinguish commercial speech from core First Amendment expression to alleviate unnecessary suppression of fully protected speech. The FDA must argue that all of its regulations affect commercial speech; any other classification could be disastrous for its regulatory scheme.

149. See id. at 2668–69 (reasoning that the means used fail to fit the state’s interest, “given the information’s widespread availability and many permissible uses”); supra notes 138–40, 143–45 (citing the FDA’s guidance recommendations).
150. DRAFT GUIDANCE, supra note 37, at 7–8.
152. ROME & ROBERTS, supra note 53, at 100–01.
153. See Roth v. United States, 354 U.S. 476, 484–85, 487 (1957) (providing full protection for scientific speech), abrogated by Marks v. United States, 430 U.S. 188 (1977); Hall & Sobotka, supra note 4, at 15 (positing that classifying manufacturer off-label promotion as anything other than commercial speech could limit the FDA’s ability to regulate off-label speech at all).
Even if the Supreme Court continues to apply Central Hudson, the FDA must develop less restrictive means to advance its interest.

A. Some Off-Label Communications Are Improperly Characterized as Commercial Speech

Though the definition of “commercial speech” has evolved since the Supreme Court first outlined its boundaries, the Court refined its definition of commercial speech in Bolger v. Youngs Drug Products Corp.\(^{154}\) In Bolger, a federal statute prohibited unsolicited advertisements for contraceptives.\(^{155}\) The Court confirmed that many of the mailings at issue could be characterized as commercial speech because they did nothing more than propose a transaction.\(^{156}\) However, the Court declined to view Youngs’s informational pamphlets as pure commercial speech without a more careful evaluation.\(^{157}\) Instead, the Court recognized a series of factors.\(^{158}\) Taken in combination, recognition of an expression as an advertisement, reference to a specific product, and an economic motivation provide evidence that speech is commercial.\(^{159}\)

In contrast with Youngs’s informational pamphlets in Bolger, statements about unapproved uses detailed in medical journal articles, or conveyed by a research scientist employed by the manufacturer, seem more similar to core scientific expression.\(^{160}\) However, the FDA has consistently expressed concerns that pharmaceutical manufacturers’ dissemination of this information “transform[s]” the expression into commercial speech.\(^{161}\) Moreover, dicta in many court opinions support the

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154. See generally ROME & ROBERTS, supra note 53, at 100–07 (describing the history of the Court’s struggle to define commercial speech until its decision in Bolger, when the Court adopted a new framework incorporating other aspects besides content).


156. Id. at 66.

157. See id. at 66–67 (explaining that categorization of the informational pamphlets as commercial speech was an issue that required careful analysis).

158. Id. at 66–68.

159. Id.; see also ROME & ROBERTS, supra note 53, at 106–07 (explaining the Court’s emphasis on the flexible nature of the definition of commercial speech and characterization of the relevant factors as “format, content, and motivation”).

160. Compare Bolger, 463 U.S. at 66–67 n.13 (explaining that Youngs Drug Products Corp. described itself as “the leader in the manufacture and sale of contraceptives” (internal quotation marks omitted)), with Guidance for Industry, supra note 21, at 64,094, 64,096 (recognizing that discussions of off-label uses are important educational freedoms that will not be regulated as long as they are unrelated to the promotion of a manufacturer’s products).

161. See WLF I, 13 F. Supp. 2d 51, 63–64 (D.D.C. 1998) (framing the issue as whether the information contained in the journal article is “transformed” into commercial
assertion that the FDA’s regulatory policies encompass speech that is noncommercial. For example, the Supreme Court carefully delineated the commercial speech used in Virginia Citizens from hybrid mixes of commercial and noncommercial speech. Additionally, the Virginia Citizens Court characterized commercial speech as doing nothing more than “propos[ing] a commercial transaction”, this characterization results in a difficult analogy to reprints of medical journals, which likely provide some useful factual material outside of the manufacturers’ promotional intentions. Likewise, in Central Hudson, the Supreme Court defined commercial speech as “expression related solely to the economic interests of the speaker and its audience.” The Court’s broad view of the type of expression that qualifies as commercial speech should be considered when deciding whether a drug manufacturer’s dissemination of off-label information is solely commercial speech. For example, if a sales representative responds to a question from a physician about off-label uses with a scientific fact, his response is more similar to core scientific expression than commercial speech. On the other hand, both the WLF I and Bolger opinions interpreted the promotional activities in question as commercial speech, even when both forms of expression provided factual information. Other courts may follow suit, given the marketing tactics employed by some pharmaceutical

speech just because a commercial entity is the speaker), amended by 36 F. Supp. 2d 16 (D.D.C. 1999), vacated in part sub nom. WLF IV, 202 F.3d 331 (D.C. Cir. 2000); Guidance for Industry, supra note 21, at 64,095 (explaining that any activity that is dependent on the influence of the manufacturer can become promotional in nature).

162. See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 759–61 (1976) (framing the expression communicated by the pharmacists as “I will sell you the X prescription drug at the Y price,” rather than as a statement that contained additional facts, observations, or editorials (internal quotation marks omitted)).

163. See id. at 762 (quoting Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 385 (1973)) (internal quotation marks omitted) (concluding that even commercial transactions warrant First Amendment protection).


165. See WLF I, 13 F. Supp. 2d at 64–65 (analogizing to the Supreme Court’s overinclusive classification of Youngs’s informational pamphlets in Bolger).


167. See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 67–68 (1983) (concluding that the pamphlets were commercial speech even though they contained other educational information); WLF I, 13 F. Supp. 2d at 64–65 (arguing that CME sponsorships and dissemination of enduring materials were commercial speech because the underlying motivation was to increase sales rather than perform a public service).
firms.\textsuperscript{168} Even so, classification of an expression as commercial speech likely will depend on the specific FDA policy challenged.\textsuperscript{169} To illustrate this point, off-label speech that warns physicians about harmful side effects of increased dosing regimens is more likely to be considered noncommercial speech than informational mailings advocating the benefits of a brand-name product compared to a generic formulation.\textsuperscript{170}

B. The FDA’s Policies Still Fail Central Hudson

In the \textit{IMS Health} dissent, three members of the Supreme Court adhered to the \textit{Central Hudson} framework.\textsuperscript{171} Moreover, the dissent questioned whether the far-reaching implications of the majority’s heightened scrutiny analysis could interfere with traditional regulatory schemes, such as the FDA’s speech restrictions regarding uses of off-label pharmaceutical drugs.\textsuperscript{172} It is possible that the Court declined to provide a clear rule so that it would not be constrained by past precedent if asked to overrule an entire regulatory scheme, like that of the FDA. However, given the strength of Justice Kennedy’s language in \textit{Turner Broadcasting}\textsuperscript{173} and his reliance on \textit{Turner Broadcasting} in formulating the new content-based commercial speech test,\textsuperscript{174} it is unlikely that the majority will stray from the framework it established in \textit{IMS Health}.

The FDA’s interests align with the \textit{IMS Health} dissent, which argued that \textit{Central Hudson} should be used to evaluate economic and commercial speech regulations.\textsuperscript{175} This argument

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\begin{enumerate}[168.]
\item See supra note 2 and accompanying text (surveying strategies implemented by pharmaceutical manufacturers).
\item Hall & Sobotka, supra note 4, at 14–15 (arguing that even though the more traditional approach classifies off-label promotion as commercial speech, each challenged policy will be classified based on its factual background).
\item See id. at 14 (proposing that off-label information about dangerous uses “should enjoy the protection given to scientific speech”).
\item Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2684 (2011) (Breyer, J., dissenting) (concluding that the statute was constitutional under \textit{Central Hudson} because it advanced a substantial state interest that could not be effectively implemented by a less burdensome regulation).
\item Id. at 2677–78.
\item See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–42 (1994) (“[T]he First Amendment . . . does not countenance governmental control over the content of messages expressed by private individuals. Our precedents thus apply the most exacting scrutiny . . . .” (citations omitted)).
\item Supra notes 113–14 and accompanying text.
\item See supra Part IV.C (postulating that the FDA’s regulatory policies will fail \textit{IMS Health}); cf. \textit{IMS Health}, 131 S. Ct. at 2674–75 (Breyer, J., dissenting) (arguing in favor of the historical application of \textit{Central Hudson} because stricter scrutiny of economic regulation could threaten the administrative state).
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focuses on the profit-inducing nature of the pharmaceutical firm’s speech and the FDA’s interest in ensuring the safety and effectiveness of the nation’s drug approval process.  

Several courts have determined that the FDA off-label advertising restrictions satisfy Central Hudson’s prong one, which requires that the regulated speech concern lawful conduct and not be misleading. Next, the FDA’s current regulatory policy must be related to a substantial government interest. One relevant interest the government has asserted successfully in the past is protection of the integrity of the drug approval process and, thus, the health and safety of the public. Judge Lamberth, for example, recognized that the government had a substantial interest in incentivizing manufacturers “to get off-label uses on-label.”

However, Judge Lamberth rejected the FDA’s interest in preempting physician misuse of information. On the other hand, the FDA’s 2009 Good Reprints Guidance Document drops the FDAMA’s requirement for submission of a supplemental new drug application for unapproved uses. This action deemphasizes the government’s substantial interest in incentivizing the new drug approval process and still maintains restrictions that encompass core academic speech.

Under prong three, the FDA’s regulations must directly advance the government’s interest. In the past, the government has asserted that its interests are directly advanced under prong three because its speech provisions draw a line that distinguishes

179.  *E.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 368–69 (2002); *Caputo*, 288 F. Supp. 2d at 921; *see also 2011 COMPLIANCE GUIDE*, *supra* note 3, at 3 (describing the balance of ensuring that all drugs are safe for use without placing undue burdens on consumers or the market).
181.  *Id.* at 69–70 (suggesting that the government may never maintain a substantial interest in shielding the public from information because of concern about misuse); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 773 (1976) (holding that the government cannot completely suppress expression of truthful information about lawful activity out of fear concerning the information’s effect).
182.  *Compare* Good Reprint Practices, supra note 20, at 6 & n.9 (explaining that all other requirements not mentioned in the guidance had been dropped from the FDA’s recommendations), *with* 21 U.S.C. § 360aaa-3 (repealed 2006) (requiring submission of a supplemental application if a manufacturer wished to disseminate information concerning a currently unapproved use).
between behaviors that are likely to harm the public and those that are unlikely to harm the public. For example, in Western States Medical Center, the Government prohibited advertising for compounded drugs while still allowing the traditional pharmacy practice of compounding for individuals. Like small-scale compounding, disseminating information for off-label uses in a field like oncology is unlikely to produce the profit margin necessary to entice manufacturers to submit a supplemental drug application for the off-label use. However, in sharp contrast to the Government’s assertion in Western States Medical Center that advertising was not beneficial to small-scale compounding because of its basis on an individual’s needs, truthful information about off-label uses for chemotherapy is vital to the safety of patients that depend on off-label uses to survive. It is difficult to reconcile the FDA’s suppression of information by certain speakers with its interest in protecting the public health, especially when the manufacturers hold information for which the FDA encourages dissemination in other contexts.

Prong four, which requires restrictions to be only as restrictive as necessary, has created considerable difficulty for the FDA and is frequently discussed in academic scholarship as the prong most likely to violate the First Amendment. Courts that have addressed prong four have held that the FDA’s off-label regulations restrict more speech than necessary. Though the

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185. Id. at 360, 363. The Government argued that prohibiting advertising directly advanced its interest because advertising was a reasonable substitute for large-scale manufacturing. Id. at 370–71. Therefore, its prohibition subjected more drugs to safety and efficacy testing, while allowing compounding services for individuals. Id.
186. See id. at 369–70 (noting that pharmacists cannot make adequate profits from small-scale compounding to require compounded drugs to undergo the drug approval process because the costs would likely force pharmacists to stop compounding); Charles J. Walsh & Alissa Pyrich, Rationalizing the Regulation of Prescription Drugs and Medical Devices: Perspectives on Private Certification and Tort Reform, 48 Rutgers L. Rev. 883, 940–41, 943 (1996) (explaining manufacturers’ reluctance to file supplemental drug applications).
187. W. States Med. Ctr., 535 U.S. at 371–73 (holding that, if possible, the government must find alternative means of regulation other than restricting speech or it must demonstrate why alternative regulation strategies are unsuitable to address its interest).
188. See, e.g., DRAFT GUIDANCE, supra note 37, at 8, 10 (suggesting that the public has an interest in manufacturers’ response to unsolicited requests for information regarding off-label uses because drug companies possess the most current information on the product).
189. Hall & Sobotka, supra note 4, at 21; see also W. States Med. Ctr., 535 U.S. at 371–73 (holding that, if possible, the government must find alternative means of regulation other than restricting speech or it must demonstrate why alternative regulation strategies are unsuitable to address its interest).
190. See, e.g., W. States Med. Ctr., 535 U.S. at 371–72 (holding that the ban on advertising drug compounding was more restrictive than necessary); WLF I, 13 F. Supp. 2d 51, 73–74 (D.D.C. 1998) (holding that less burdensome alternatives existed, such as full disclosure), amended by 36 F. Supp. 2d 16 (D.D.C. 1999), vacated in part sub nom.
FDA's 2011 Draft Guidance recognizes that companies can disseminate information in a “truthful, non-misleading, and accurate manner,” the FDA still requires any disseminated information to conform to lengthy and detailed guidelines. This “paternalistic view” is exactly the kind of overarching intrusion the Supreme Court has repudiated. Additionally, the Draft Guidance recommends extensive recordkeeping of all responses to unsolicited requests. This requirement is even more burdensome than the PAC recordkeeping requirements the Court overturned in Citizens United. Therefore, the FDA policies outlined in the guidance documents burden more speech than constitutionally permissible under prong four of Central Hudson.

VI. PRESCRIPTIONS FOR THE FDA TO MEET CONSTITUTIONAL MUSTER

The FDA provides valuable regulatory oversight that protects the health of the American public. With the recent public health crises that have arisen, such as the introduction of melamine-tainted infant formula into certain markets, it is in society's best interest for the FDA to appropriately safeguard our nation's drug supply. Though this Comment has proposed a framework expanding First Amendment protection for off-label speech, the FDA's interest in requiring pharmaceutical manufacturers to produce safe and effective drugs remains fundamental. Off-label treatment involves risk and may entail adverse effects. Moreover, regulation of the pharmaceutical industry is necessary to prevent the dissemination of false,


191. DRAFT GUIDANCE, supra note 37, at 3, 7–12; see also GOOD REPRINT PRACTICES, supra note 20, at 3–6.


193. DRAFT GUIDANCE, supra note 37, at 9.

194. See supra note 125 and accompanying text (describing the burdens placed on PACs).


196. ABOOD, supra note 12, at 44.

197. See id. at 60–61 (detailing the FDA's processes for ensuring safe manufacturing practices).

inaccurate information and to prevent the use of misleading marketing tactics that could severely harm patients persuaded to experiment with medications approved for other indications.\footnote{199}{See, e.g., Walsh & Pyrich, supra note 186, at 914–17 (describing the FDA's regulation of pharmaceutical drug labeling to ensure accurate descriptions for safe and effective use by patients and physicians).}

Even still, because particularly vulnerable patient populations rely on off-label information,\footnote{200}{See Kesselheim, supra note 198, at 235–37 (describing the prevalence of off-label treatment for oncology and psychiatric patients, particularly those with lower incomes).} society has a compelling interest in obtaining truthful, scientific information about off-label uses, risks, and benefits.

To serve these interests, this Comment recommends a few courses of action. First, the FDA could limit less speech.\footnote{201}{See Thompson v. W. States Med. Ctr., 535 U.S. 357, 371 (2002) (noting that one alternative to extensive regulation is to restrict less speech).} For example, the FDA could prohibit advertising campaigns that clearly fall into the category of commercial speech while still allowing discourse between manufacturers and physicians that would be entitled to full First Amendment expression in any other setting.\footnote{202}{See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (stating that an economic interest alone is not sufficient to remove First Amendment protection); Guidance for Industry, supra note 21, at 64,095 (explaining that activities that are independent from a manufacturer's influence are not considered commercial speech by the FDA).} By eliminating speaker-based restrictions, the FDA regulations would likely be analyzed under the traditional \textit{Central Hudson} commercial speech test rather than the heightened scrutiny employed by the Court in \textit{IMS Health}.\footnote{203}{See Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2663–64 (2011) (explaining that the Court applied a higher standard of scrutiny because of the viewpoint-discriminatory nature of the Vermont statute).}

Allowing this type of scientific exchange may elevate the level of care doctors can provide while still adhering to the FDA's interest in protecting the public health and the new drug approval process.\footnote{204}{See Hall & Sobotka, supra note 4, at 23, 35–36 (acknowledging that even the FDA recognizes the importance of allowing physicians access to off-label information so they can make appropriate medical judgments, and further noting that the government itself pays for off-label chemotherapy agents).} However, challengers seeking to assert this alternative would have to confront difficult precedent set forth in \textit{Bolger}, which affirmed that mixed commercial and noncommercial speech could be analyzed under the commercial speech rubric.\footnote{205}{See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66–68 (1983) (clarifying that a company had many avenues to exchange commentary so additional protection for statements made during a commercial transaction was unwarranted); see also \textsc{Rome \\& Roberts}, supra note 53, at 130 (confirming that mixed expressions containing both...}
Second, the FDA could impose “time, place and manner” restrictions on off-label discourse instead of content-based restrictions. One example of a less restrictive means of regulation could be for the FDA to police off-label communications based on the proportionate number of articles distributed to physicians; alternatively, the FDA could allow manufacturers to present off-label findings to physician committees every six months. Regulation by limiting the number of articles distributed to physicians could incentivize pharmaceutical firms to distribute only the most useful information. Additionally, allowing dissemination of off-label information during set time intervals would allow firms to inform physicians of recent developments but also provide time for firms to more fully investigate the safety and effectiveness of off-label uses. By regulating manufacturers’ activities rather than regulating the identity of the content producer, the FDA may avoid First Amendment implications. These proposals would also provide an avenue of discourse aimed at elevating the public’s knowledge, without the financial burdens and time restraints of responding directly to every individual request.

Third, the FDA could introduce nonspeech restrictions. For example, the FDA could require manufacturers to include disclosures in a drug label informational insert, noting that the treating physician may have relied on off-label communications with the pharmaceutical company for any use not indicated in the FDA-approved label; the FDA could also require the manufacturer to provide disclosures or disclaimers about the nature of companies’ off-label discussions with patients and physicians. Disclosures in commercial and noncommercial speech appear to be afforded the same constitutional protection as commercial speech.

206. See Rome & Roberts, supra note 53, at 152, 157 (internal quotations omitted) (concluding that “time, place and manner” restrictions apply with equal force to conventional, “content-neutral regulations of commercial speech” (internal quotation marks omitted)).

207. See, e.g., Va. Citizens, 425 U.S. at 771 (justifying regulation of prescription drug advertisements when done without reference to the speech’s content, when it serves a significant government interest, and when it leaves “ample alternative channels for communication”).


209. See Draft Guidance, supra note 37, at 10–12 (recommending that a manufacturer’s response to an unsolicited public request for off-label information should be detailed, documented, and directed only to the individual making the request).


211. See Kesselheim, supra note 198, at 246–47 (predicting that disclaimers would likely be valid alternative methods to speech restrictions based on Citizens United).
drug label informational inserts could also encourage patients to seek second opinions if their physician failed to disclose the off-label nature of the treatment or if the physician failed to disclose reliance on communication with the pharmaceutical company. Development of nonspeech alternatives to regulate misleading promotional activities could buffer the FDA from constitutional challenges. Finally, another solution is deference to alternative enforcement mechanisms, such as the False Claims Act (FCA). Thus, pharmaceutical firms would incur liability for dissemination of off-label information when the firm conveyed information that it knew was false or misleading. Using the FCA for enforcement could provide greater accountability because it could incentivize firms to devote additional resources to research the safety and effectiveness of off-label uses before discussing those uses with physicians.

VII. CONCLUSION

From establishing First Amendment protection for commercial speech in Virginia Citizens to applying heightened scrutiny in IMS Health, the Supreme Court’s commercial speech jurisprudence has greatly expanded over the past thirty-five years. Because off-label pharmaceutical advertising contains some speech that could be considered core scientific expression under the First Amendment and because the FDA discriminates between speakers, off-label speech prohibitions are ripe for challenge. Moreover, the Court’s reliance on noncommercial speech cases in IMS Health and its extension of the First Amendment to corporate, political speech hints that the Court is poised to grant heightened protection to commercial speech. Even if the Court continues to apply the Central Hudson commercial speech doctrine, the FDA will need to articulate less restrictive means to advance its interests.

At the same time, the FDA’s regulatory policies have failed to keep up with current medical practice and are unlikely to withstand the Court’s new iteration of the Central Hudson standard. Because protecting the nation’s health depends on safe,
effective drugs and access to pertinent information, this Comment urges the FDA to align its regulatory regime with current First Amendment thought. Providing for wider dissemination of truthful, accurate information about off-label uses could aid physicians in the provision of appropriate medical care but also hold manufacturers accountable for distributing misleading information. After all, the true power of the First Amendment is not that it allows all voices to project simultaneously, but that it allows society to hear alternative voices and judge each one’s worth for itself.  

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