In the

Supreme Court of Virginia

At Richmond

Record No. 121472

HORACE FRAZIER HUNTER,

Appellant,

– v. –

VIRGINIA STATE BAR, EX REL THIRD DISTRICT COMMITTEE,

Appellee.

OPENING BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

This is an Appeal brought as a matter of right by Horace Frazer Hunter from a Three-Judge Circuit Court convened in the Circuit Court of the City of Richmond pursuant to Virginia Code § 54.1-3935. The Circuit Court reviewed the decision of the Third District Committee, Section II of the Virginia State Bar, conducting its review entirely on the basis of legal briefs and oral argument. All underlying facts upon which the Circuit Court conducted its review, and upon which Mr. Hunter bases this Appeal, were developed on the record in the District Committee proceedings. None of those underlying facts are in dispute. The decision of the Circuit Court, and this Appeal of that decision, turn entirely on the application of law to fact, including the Virginia Rules of Professional Conduct and the First Amendment to the Constitution of the United States.

The case arises from a Charge of Misconduct predicated on the content of a blog written by Mr. Hunter, entitled *This Week in Richmond Criminal Defense*. The blog is accessible to the general public through a link on a website maintained by Mr. Hunter's law firm, Hunter & Lipton, PC. The blog contains a variety of content relating to legal affairs and judicial decisions. Some of the blog entries involve Mr. Hunter's commentary on national legal events, such as a dispute involving former Attorney General

Alberto Gonzales and United States Attorneys' Offices. Others describe legal decisions by state or federal courts in which Mr. Hunter was not a participating lawyer. The majority of entries, however, describe the basic facts and outcomes of cases in which Mr. Hunter served as criminal defense counsel for a criminal defendant, and in which Mr. Hunter obtained a favorable outcome for the defendant.

In the proceedings below the Bar maintained that Mr. Hunter's blog violated Virginia's Rules of Professional Conduct in two ways.

First, the Bar maintained, Mr. Hunter's blog violated Rule 1.6(a), which reads in pertinent part that: "A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation."

It is not disputed that Mr. Hunter did not seek advance consultation and consent from his clients prior to discussing their cases on his blog. It is also not disputed that all of the content contained in the blogs regarding those cases was content revealed in open court on the public record. The

Bar's position was not that Mr. Hunter revealed information protected by the attorney-client privilege, or information that any client requested be kept inviolate, but instead that the material, which included such information as the charges the client faced and the evidence produced at trial for and against the client, fell within the Rule's prohibition on disclosures "which would be embarrassing or would likely to be detrimental to the client."

The District Committee agreed with the Bar, and found Mr. Hunter in violation of Rule 1.6(a). In the Circuit Court Mr. Hunter argued that the First Amendment requires a bright-line principle that overrides Rule 1.6(a) with regard to all proceedings that transpire in an open session of any state or federal court. Mr. Hunter argued that he had a constitutional right to read the entire transcript of any such public trial, on a television program or on the Internet, and that lawyers have historically understood that there is no ethical constraint against their discussing what transpires in such public judicial proceedings, in books, articles, CLE programs, or in the mass media. (Appendix Pages 445-446)

In its Memorandum Order the Circuit Court reversed the District Committee on this issue and ruled in favor of Mr. Hunter, stating: "The Court unanimously finds that the District Committee Determination as to Rule 1.6(a) is contrary to the law as it violates Respondent's rights under

the First Amendment of the United States Constitution and therefore the charge is dismissed." (Appendix Pg. 520).

The Bar also maintained that Mr. Hunter's blog violated the lawyer advertising provisions of the Virginia Rules, specifically Rules 7.1(a)(4) and 7.2(a)(3). Those provisions state in pertinent part:

> **RULE 7.1 Communications Concerning a Lawyer's Services**
> (a) A lawyer shall not, on behalf of the lawyer or any other lawyer affiliated with the lawyer or the firm, use or participate in the use of any form of public communication if such communication contains a false, fraudulent, misleading, or deceptive statement or claim. For example, a communication violates this Rule if it:
> . . . .
> (4) is likely to create an unjustified expectation about the results the lawyer can achieve, . . .
>
> **RULE 7.2 Advertising**
> (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded, or electronic communications, including public media. In the determination of whether an advertisement violates this Rule, the advertisement shall be considered in its entirety, including any qualifying statements or disclaimers contained therein. Notwithstanding the requirements of Rule 7.1, an advertisement violates this Rule if it:
> . . . .
> (3) advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type

> face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.

The Bar maintained that Mr. Hunter's blog constituted "Communications Concerning a Lawyer's Services" and "Advertising" under the Rules, and "commercial speech" under the First Amendment. The Bar argued that under Rule 7.1 Mr. Hunter's blog was "false, fraudulent, misleading, or deceptive" in that it was "likely to create an unjustified expectation about the results the lawyer can achieve." The Bar argued that under Rule 7.2 Mr. Hunter's blog "advertises specific or cumulative case results," and therefore violated the rule unless it contained a disclaimer meeting the requirements of the Rule.

Mr. Hunter refused to accept the characterization of his blog as communication concerning his services, as advertising, or as commercial speech. He instead offered to place a clarification on his website as a disclaimer:

> *This Week in Richmond Criminal Defense* is not an advertisement, it is a blog. The views and opinions expressed in this blog are solely those of attorney Horace F. Hunter. The purpose of these articles is to inform the public regarding various issues involving the criminal justice system and should not be construed to suggest a similar outcome in any other case. (Appendix pgs. 307.1-307.2)

Thus Mr. Hunter sought to alert any viewer that his blog was *not* advertising or commercial speech, and moreover, that his discussion of cases should not suggest similar outcomes in any other case.

The Bar, insisting that Mr. Hunter's speech was advertising and commercial speech, refused Mr. Hunter's offer, and proceeded against him. By this time Mr. Hunter had in fact affixed a disclaimer to his blog postings, in wording slightly modified from his original proposal to the Bar, and even clearer:

> This Week in Richmond Criminal Defense is a blog written by Horace F. Hunter, founder and owner of Hunter and Lipton, PC. The blog contains articles written by him, which focus on issues relevant to the criminal justice system. To the extent that the articles discuss cases in which Horace F. Hunter was personally involved as counsel, they are not intended to predict a similar outcome in future cases. (Appendix Pg. 168)

It was against this backdrop that the Charge of Misconduct on Rules 7.1(a)(4) and 7.2(a)(3) were litigated in the District Committee and the Circuit Court.

In the proceedings before the District Committee Mr. Hunter testified that he had multiple motivations in authoring his blog. One of his motivations was marketing. (Appendix pg. 131) The blog, he conceded, was a way of projecting a professional identity as a criminal defense lawyer, noting that "people want to know that you're more than just trying to

sell them services. They want to know who you are and what you stand for." (Appendix Pg. 131-132) Yet Mr. Hunter insisted in his testimony that he did not regard the blogs as "advertising" or as "soliciting business" in the normal sense of the term. To the contrary, his purpose was also political and ideological. He used the blog to offer broad critiques of the justice system, to comment on the specific facts and outcomes of cases (including many in which he participated as a lawyer and some in which he did not), and to generally advance a point-of-view that was edged toward the values touted by many criminal defense lawyers, such as the notion that persons are presumed innocent until proven guilty, and that not all criminal defendants are guilty, and not all are convicted—acquittals do happen. In Mr. Hunter's words:

> [I]t's intended to combat in large part the public perceptions that is clearly on the side that people are guilty until they're proven innocent. There are shows out there like Nancy Grace and other things that you see and writings all the time, particularly on the Internet; soon as somebody's arrested, okay, they're automatically guilty. And one of the things we do is try to combat that public perception. Even when we're talking about cases that I've dealt with personally, generally there's a comment at the end of the article that says something to the effect of, this case again demonstrates that just because somebody is charged doesn't mean they're guilty. Or what this case represents is the fact that this should have never been a crime in the first place. . . (Appendix Pg. 132)

When asked to elaborate on why he so steadfastly refused to acquiesce in the Bar's insistence that his blogs be labeled advertising, he stated that this would cheapen his message, turning material that he regarded as political and legal commentary into something that was entirely mercenary and profit-driven:

> It cheapens the speech when I have to put in front of that, oh, by the way, this is for advertising purposes only. This isn't—you know, and it just takes some of the articles out of context. And I offered a disclaimer that I thought was appropriate based on what it is I was doing. (Appendix pg. 168)

Mr. Hunter and the Bar were sharply divided on the appropriate First Amendment treatment of the mixed motivations that drove Mr. Hunter's blogs.

From the beginning the Bar's position has been consistent, crystal clear, and unyielding. As articulated clearly and unequivocally by Bar Counsel in the District Committee hearing, *any* "discussion" by a Virginia lawyer of a lawyer's case results is *inherently misleading* in the absence of the disclaimers required by Rule 7.2: "But if your question is, Is any discussion of a lawyer's case results going to be deemed inherently misleading without a disclaimer? I think the answer to that would also be yes." (Appendix Pg. 115)

The Bar argued that Mr. Hunter's marketing motivation was enough to push the blogs over the constitutional edge, rendering them misleading unless accompanied by a disclaimer placing what the Bar saw as the advertising of "specific or cumulative case results" in the context required by Rule 7.2. The Bar argued that the "insinuation" of public issues with commercial speech cannot immunize otherwise commercial speech from regulation. (Appendix pg. 43-44)

Mr. Hunter, in contrast, relied heavily on the undisputed fact that none of the actual content of his blogs was "commercial." All of the content, rather, was classic political speech—speech describing the outcomes of public trials and commenting on those outcomes. Taking a position that was the mirror opposite of the Bar's, Mr. Hunter argued that a commercial motivation alone, particularly when that motivation was mixed with political and ideological motivations—could not turn otherwise political speech into commercial speech. Moreover, Mr. Hunter argued, to the extent that the Bar's position rested on the supposition that readers would mistake his speech for advertising, and would further be misled into false expectations by thinking that their case would turn out as the cases that were described, that concern was eliminated by Mr. Hunter's proffer of his own warning that

his speech was not advertising, and his warning regarding the uniqueness of all cases and avoidance of expectations of similar results.

Mr. Hunter additionally argued that his blogs were not simple lists of "case results" as contemplated by the Rule—they were not naked recitations of verdicts—but rather narrative descriptions, often in considerable detail, of the evidence adduced in open trials, which itself would alert consumers that these were not proposals of commercial transactions, and ought not be understood as intended to raise expectations of similar outcomes in other specific cases. (Appendix Pg. 134)

The District Committee found Mr. Hunter guilty of violating Rules 7.1(a)(4) and 7.2(a)(3) and ordered him to post a disclaimer compliant with Rule 7.2(a)(3) within 30 days of the hearing. (Appendix Pg. 229) On review the Circuit Court affirmed, and as a sanction imposed a Public Admonition with Terms, requiring that Mr. Hunter post a disclaimer on his website stating: "Case results depend on a variety of factors unique to each case. Case results do not guarantee or predict a similar result in any future case." (Appendix pg. 520)

Although the District Committee and Circuit Court styled their findings as violations of two Rules, 7.1(a)(4) and 7.2(a)(3), in fact the two Rules

were merged into one violation and one sanction. The Bar has not taken the position, nor did the tribunals below find, that Mr. Hunter's blogs would violate Rule 7.1(a)(4) by creating a misleading "unjustified expectation about the results a lawyer can achieve" *even if* a disclaimer compliant with Rule 7.2(a)(3) were affixed to Mr. Hunter's blogs. Rather, the Bar's position, and the judgments below, are predicated on the supposition that Mr. Hunter's blogs are inherently misleading and create an unjustified expectation of results *unless* the blogs are indentified as advertising, with the Rule 7.2(a)(3) disclaimer posted on them.

ASSIGNMENT OF ERROR

The Ruling of the Circuit Court finding a violation of Rules 7.1(a)(4) and 7.2(a)(3) conflicts with the First Amendment to the Constitution of the United States. (Appendix Pg. 522)

STANDARD OF REVIEW

This Court is obligated under the First Amendment to apply the standard of *de novo* "independent appellate review." *See Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964) ("[A]s in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally permitted"); *Bose v. Consumers Union of the United States*, 466 U.S. 485, 499 (1984)

("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression."); *Gazette, Inc. v. Harris*, 229 Va. 1, 19 (1985) ("[T]he Supreme Court in First Amendment cases arising in state courts repeatedly has held that the independent examination contended for is required on review."); *Shenandoah Pub. House, Inc. v. Gunter*; 245 Va. 320, 325 (1993) (same).

Mr. Hunter urged the Circuit Court to apply this standard. (Appendix Pr. 471-472). The Bar objected, arguing that the appropriate standard was that recited in the Rules of the Supreme Court of Virginia, Part 6, § IV, ¶ 13-19.E, asking whether there is substantial evidence in the record upon which the District Committee could reasonably have found as it did. The Bar thus asserted that the Circuit Court owed deference to the District Committee. (Appendix Pg. 475). In its Memorandum Order the Circuit Court noted Mr. Hunter's argument that the First Amendment independent *de novo* review standard was applicable, but applied the substantial evidence standard. (Appendix Pg. 520)

In this Court Mr. Hunter renews his assertion that the First Amendment imposes a constitutional obligation to review the record *de*

novo. The First Amendment is the higher law. While in *Gazette* and *Shenandoah* this Court has twice before applied this standard in libel actions, it properly acknowledged that the standard is applicable in "First Amendment" cases. *Gazette, Inc. v. Harris*, 229 Va. at 19; *Shenandoah Pub. House, Inc. v. Gunter*; 245 Va. At 325 (1993) That is the correct principle, and controls here. *See, e.g., Jacobellis v. Ohio*, 378 U.S. at 190 (obscenity); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933-34 (1982) (boycott in civil rights protest); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 567–68 (1995) (expressive association); *Rankin v. McPherson*, 483 U.S. 378, 385–86 and n.9, 107 (1987) (public employee speech); *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1067–68 (10th Cir. 2001) (liquor advertising).

This Court must therefore independently examine the whole record to ensure that Mr. Hunter's First Amendment rights have not been infringed.

ARGUMENT

I. THE UNITED STATES SUPREME COURT HAS NEVER HELD THAT POLITICAL SPEECH MAY BE TREATED AS COMMERCIAL SPEECH MERELY ONE OF THE MOTIVATIONS OF THE SPEAKER IS COMMERCIAL

A. THE CONTENT OF MR. HUNTER'S SPEECH IS POLITICAL

Horace Hunter's writings may not possess the jurisprudential elegance of Oliver Wendell Holmes' *The Common Law* (1881). Yet Horace

Hunter's writings are no less entitled to the robust protection of the First Amendment that Oliver Wendell Holmes left this nation as his greatest legacy, a protection grounded in the conviction that our citizens should embrace the faith that the "ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and truth is the only ground upon which their wishes safely can be carried out." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

As the Supreme Court of the United States observed in *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988), a lawyer advertising case in which the Court quoted the famous passage from Justice Holmes in *Abrams*, "[t]raditionally, the constitutional fence around this metaphorical marketplace of ideas had not shielded the actual marketplace of purely commercial transactions from governmental regulation." *Id.* at 483.

At its core, this case is about which side of the "constitutional fence" the writings of Horace Hunter should be placed. Are his writings expression falling within the "metaphorical marketplace of ideas", or are his writings expression falling within the "marketplace of purely commercial transactions"?

Looking solely at the *content* of the writings, the answer is easy. Speech concerning the judicial system is quintessentially "political speech" falling squarely within the ambit of the marketplace of ideas. "[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 575 (1980). "The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations." *Gentile v. State Bar of Nevada*, 501 U.S 1020, 1035 (1991).

B. THE SUPREME COURT HAS NOT DEFINITIVELY RULED ON THE MOTIVATION QUESTION

The Supreme Court has never clearly decided whether expression that is otherwise political is transformed into commercial speech because one of the *multiple* motives of the speaker is marketing and self-promotion. On at least two conspicuous occasions the Court has been invited to provide a definitive answer to this question, but on both occasions the invitation was declined. It appeared that the Court might answer the question in *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), which involved the question of whether Nike's public statements on labor and employment conditions in third-world factories could be regulated as "commercial

speech." The Supreme Court initially granted certiorari on whether a corporation participating in a public debate may "be subjected to liability for factual inaccuracies on the theory that its statements are 'commercial speech' because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions." *Id.* at 657 (Opinion of Stevens, J.). The Court, however, dismissed the writ as improvidently granted, on standing and justiciability grounds.

The Court more recently inched much closer to a resolution of the question, in *Sorrell v. IMS Health Inc.,* 131 S.Ct. 2653 (2011). Yet once again the Court avoided definitively ruling on the issue, because the regulation at issue (discussed in greater detail subsequently in this Brief) was held to be unconstitutional whether the heightened scrutiny applicable to noncommercial speech regulation was applied, or the intermediate scrutiny commercial speech standard was applied. *Id.* at 2667 ("As in previous cases, however, the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.") *citing Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 184, (1999); *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989).

C. THIS COURT CANNOT AVOID RESOLUTION OF THE ISSUE

This Court cannot escape ruling on whether Mr. Hunter's speech is or is not "commercial speech." The issue before the Court cannot be resolved without deciding that question, because Horace Hunter adamantly insists that his speech is *not* commercial speech and *not* an advertisement, and he wishes to broadcast that insistence to the world, in the clear language of his own disclaimer, warning readers that *This Week in Criminal Defense* is an expression of facts and views, not advertising.

Virginia, however, will not allow this. Virginia insists that his speech *is* advertising, and that he *not* tell readers anything to the contrary. Indeed, the lawyer advertising Rules the Virginia State Bar seeks to enforce against Mr. Hunter *only apply* if the speech is commercial speech, as either "communications concerning a lawyer's services" (Rule 7.1) or "advertising" (Rule 7.2).

The conflict between Mr. Hunter and Virginia is brought into even sharper focus by the points on which the contesting parties actually *agree*. Both Mr. Hunter and the Bar deem it appropriate to warn readers that the results of prior cases ought not be treated as predictions of future outcomes. On that issue the positions of the two parties are materially identical. And so the constitutional question narrows to whether the

Commonwealth may *order* one of its citizen-lawyers to profess what he does not believe, that his speech is commercial, and to refrain from stating what he does believe, that it is not.

D. The Conflict Is Intensified Because Virginia Seeks To Impose On Mr. Hunter A Duty To Profess What He Does Not Believe

For Mr. Hunter, the difference between what Virginia seeks to force him to profess, and what he wishes to profess, is no nuance. If this were a minor quibble over the precise wording of a disclaimer, the case would not be here. Mr. Hunter's insistence that he not be prevented from proclaiming that his speech is *not* advertising is grounded in his ideological and political belief system. His writings convey his views about the specific cases he describes, and the larger issues of the criminal justice system. For his speech to be branded as advertising, he insists, cheapens the message, and forces him to profess what he does not believe.

Unless the Commonwealth has it right, and Mr. Hunter's speech is properly deemed "commercial" come fire or high water, Virginia has violated the First Amendment, by forcing Mr. Hunter to profess a belief he does not entertain. *See, e.g*., *Wooley v. Maynard*, 430 U.S. 705 (1977), *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995). "At the heart of the First Amendment lies the principle

that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 641 (1994).

II. MR. HUNTER'S WRITINGS ARE NOT COMMERCIAL SPEECH

A. MULTIPLE RATIONALES POINT AGAINST TREATING MR. HUNTER'S SPEECH AS COMMERCIAL

The Commonwealth does not have it right. If the Supreme Court of the United States has yet to definitively rule on whether otherwise political speech is rendered commercial speech when uttered in part from a commercial motive, it has traveled a long way toward a final answer.

There are at least five powerful arguments that may be extracted from Supreme Court decisions that stand against treating Mr. Hunter's writings as commercial speech: (1) the Court's formal commercial speech definitions focus heavily on whether the speech does *no more* than propose a commercial transaction; (2) the Court's commercial speech decisions, to the extent that they discuss motivation at all, have focused on whether the speech is *solely* driven by commercial interest; (3) the Court has repeatedly insisted that the existence of a commercial motivation does not disqualify speech from the heightened scrutiny protection it would otherwise deserve; (4) the Court has warned that when commercial and political elements of speech are inextricably intertwined, the heightened

protection applicable to the political speech should be applied, lest the political speech be chilled; and (5) the constitutional policy arguments that undergird the reduction of protection for commercial speech have no persuasive force when the content of the speech is political, particularly when, as here, Mr. Hunter has warned readers that his writings should not be taken as a prediction of future results.

1. Mr. Hunter's Writings Are Not Speech That Do No More Than Pose A Commercial Transaction

Mr. Hunter's speech is plainly not speech that does *no more* than propose a commercial transaction. Since 1973, however, no less than twelve Supreme Court opinions have invoked the "no more" test as the core definition of commercial speech. *See, e.g., Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 385 (1973) ("no more than propose a commercial transaction"); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (same); *Linmark Associates, Inc., v. Willingboro Tp.* 431 U.S. 85, 98 (1977) (same); *Friedman v. Rogers*, 440 U.S. 1, 10 n. 9 (1979) (same); *Bolger v. Youngs Drugs Prods. Corp*., 463 U.S. 60, 66 (1983) (same); *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 340 (1986) (same); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422, 431 (1993) (same); *Edenfield v. Fane*, 507 U.S. 761, 767, (1993), *United States*

v. Edge Broadcasting Co., 509 U.S. 418, 426 (1993) (same); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (same); *United States v. United Foods, Inc.,* 533 U.S. 405, 409 (2001) (same); *Thompson v. Western States Medical Center*, 535 U.S. 357, 366 (2002) (same).

Many opinions describe the "no more" formulation as the "core" or "usual" test. *United States v. United Foods, Inc*., 533 U.S. at (2001) (commercial speech is "usually defined" under the "no more" test); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. at 422 (describing the "no more" test at the "core notion of commercial speech"); *Bolger v. Youngs Drugs Prods. Corp*., 463 U.S. at 66 (same). The Court has on one occasion described it as *the* test. *Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (the speakers "'propose a commercial transaction," . . . which is the test for identifying commercial speech.") (citations omitted). *See also Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.,* 472 U.S. 749, 790 (1985) (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting) ("'Commercial speech'—defined as advertisements that '[do] no more than propose a commercial transaction,'—may be more closely regulated than other types of speech.") (citations omitted); *Lorillard v. Reilly*, 533 U.S. 525, 574 (2001) (Thomas, J., concurring) (invoking "no more" test as defining characteristic of

commercial speech while arguing that commercial speech should receive same levels of protection as political speech).

To be sure, there must be more to legal argument than a string cite; but this is quite a string.

2. Mr. Hunter's Motivation Is Not Solely Commercial

To the extent that "motivation" has been a salient factor in the Supreme Court's commercial speech jurisprudence, the Court has emphasized that commercial speech is "expression related *solely* to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557, 561 (1980) (emphasis supplied); *In re R.M.J.*, 455 U.S. 191, 204 n. 17 (1982) (same).

Mr. Hunter's writings are not expression solely related to his economic interests or those of his audience. To the contrary, they clearly contain content related his own ideological interests, and his attempts to appeal to the ideological sensibilities of his readers. As the Court explained in *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975):

> Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden.

Mr. Hunter's writings are not, in either substance or form, connected to economic interests alone, in the classic sense of product or service advertising.

The Supreme Court has instructed that application of commercial speech doctrine should rest on "commonsense distinctions[s]" between commercial and noncommercial speech. *Bolger v. Youngs Drugs Prods. Corp*., 463 U.S. at 64 (1983). And so it is that applying common sense, it has been said that "advertising the price of a product or arguing its merits" is a "typical" example of commercial speech. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576, (1988). Even when narrowed to professional settings, however, the word "typical" is an understatement. The parade of Supreme Court commercial speech decisions involving professionals is entirely comprised of speech either overtly proposing commercial transactions or solely relating to economic interests. *See., e.g., Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S.Ct. 1324 (2010) (advertising by debt relief agencies); *Ibanez v. Florida Dep't of Business & Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 138, 142 (1994) (attorney's publication of professional certifications in "Yellow Pages" listings and on business cards and other

materials); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (attorneys sending targeted mail solicitations).

Perhaps most importantly, it was clearly *advertising* that the Supreme Court had in mind when it issued its landmark decision in *Bates* that first brought "lawyer advertising" within the ambit of the First Amendment's protection for "commercial speech." All of the attorney advertising cases that form the progeny of *Bates* similarly involve advertising, marketing, or solicitation in this core sense. *Bates* was all about "advertising," period, and indeed distinguished advertising from "political dialogue". *Bates*, 433 U.S. at 364. In articulating why the First Amendment protects commercial speech, the Court in *Bates* thus explained: "Advertising, though entirely commercial, may often carry information of import to significant issues of the day." *Id.* Elaborating, the Court added that "commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." *Id., citing FTC v. Procter & Gamble Co*., 386 U.S. 568, 603-604 (1967) (Harlan, J., concurring).

This Court has also strongly linked commercial speech doctrine to classic advertising that conveys information about products and services. In *Town & Country Properties, Inc. v. Riggins*, 249 Va. 387 (1995), in

rejecting a claim that certain expression was commercial speech, this Court pronounced: "'The First Amendment's concern for commercial speech is based on the *informational function of advertising*.'" *Id.* at 395 (emphasis added), *quoting Central Hudson*, 447 U.S. at 563. This Court then went on to provide examples of what it meant by the "informational function of advertising" that animates the First Amendment's commercial speech doctrines: "For example, it is not informational in the sense that the advertisement of information on the availability of New York abortions was held protected in *Bigelow v. Virginia. . .*; or in the sense prescription drug price information was held protected in *Virginia State Bd. of Pharmacy*, . . . or in the sense that a lawyer's truthful advertisement concerning availability and terms of routine legal services was held protected in *Bates v. State Bar of Arizona*, . . .; or in the sense in-person solicitation of clients by attorneys was deemed to be commercial speech in *Ohralik v. Ohio State Bar Ass'n*, . . .; or in the sense use of a trade name conveying information about the type, price, and quality of services offered for sale in optometrical practice was held to be commercial speech in *Friedman v. Rogers*, . . . (1979)." *Town and Country v. Riggins*, 249 Va. at 395-96 (internal citations omitted), *citing Ibanez v. Florida Dept. of Business and Professional Regulation*, *Bd. of Accountancy*, 512 U.S. 136.

3. The Presence Of Some Commercial Motivation Does Not Transform Otherwise Political Speech Into Commercial Speech

The Supreme Court has emphasized that "[i]f commercial speech is to be distinguished, it 'must be distinguished by its content.'" *Bates v. State Bar of Arizona*, 433 U.S. at 363, *quoting Virginia Pharmacy*, 425 U.S. at 761. The *content* of Mr. Hunter's blogs is entirely political. The mere existence of some commercial motivation, mixed with political and ideological motivation, does not morph his writings into commercial speech.

A lawyer's motive to promote a professional identity through speaking engagements, books, articles, and blogs commenting on the lawyer's cases, does not turn the lawyer's commentary into commercial speech. Speakers in the American marketplace of ideas constantly engage in the dissemination of information and the expression of opinion for the ultimate purpose, in whole or in part, of raising their profile in the marketplace in hopes of driving members of the public to their products or services. That commercial motivation does not turn the speech itself into advertising or commercial speech, as the First Amendment knows those terms.

As the Court declared in *Virginia Pharmacy*, 425 U.S. at 761, "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. . . . Speech

likewise is protected even though it is carried in a form that is 'sold' for profit." *See also Pittsburgh Press*, 413 U.S. at 384-85 (1973); *Smith v. California*, 361 U.S. 147, 150 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943).

One of the most compelling examples is *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964), in which the political speech at issue was embedded in a paid advertisement soliciting money. In words that apply to the writings of Mr. Hunter, the Supreme Court declared:

> The publication here was not a 'commercial' advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.

Id. at 266.

Sorrell v. IMS Health Inc. is the most recent Supreme Court opinion elaborating on this issue. *Sorrell* involved speech that was, by comparison to Mr. Hunter's writings, far more "commercial" in nature, and devoid of any content that might plausibly be characterized as expressive advocacy on matters relating to politics or culture. *Sorrell* involved practices of "data mining" and "detailing," processes through which pharmaceutical manufacturers promote their drugs. The state of Vermont sought to limit

this practice, through legislation providing that absent the prescriber's consent, prescriber-identifying information could not be sold by pharmacies and similar entities. There were certain limited exceptions, such as a carve-out for "health care research."

The Supreme Court struck down the law, holding that it was a content-based and viewpoint based restriction on speech. The principal line of battle in the Supreme Court was over the appropriate standard of review. Vermont argued that Act 80 was not a regulation of speech, but a commercial restriction on trafficking in a "commodity". The Supreme Court roundly rejected the state's argument, holding that the law prohibited the sale of information subject to exceptions that were based in large part on the content of a purchaser's speech. *Sorrell*, 131 S.Ct. at 2663. The Court in *Sorrell* observed that the creation of information is protected by the First Amendment, even when that information is devoid of advocacy, and is simply a collection of "facts." *Id.* at 2667.

Most critically for the purposes of this litigation, the Court in *Sorrell* strongly suggested, without definitively deciding, that the information being disseminated by the data mining firms was entitled to the heightened scrutiny applicable to political speech, even though the *only* purpose of the dissemination was commercial. "While the burdened speech results from

an economic motive, so too does a great deal of vital expression," the Court observed. *Id., citing Bigelow v. Virginia*, 421 U.S. at 818 (1975); *New York Times Co. v. Sullivan*, 376 U.S. at 266: *United States v. United Foods, Inc*., 533 U.S. at 410–411. In turn, virtually all of the Court's discussion of the controlling First Amendment principles in *Sorrell* invoked the classic doctrines forbidding content-based and speaker-based discrimination, doctrines that form the backbone of modern First Amendment doctrines protecting political speech. *Id.* at 2665. ("Both on its face and in its practical operation, Vermont's law imposes a burden based on the content of speech and the identity of the speaker.").

Even though, as previously noted, the Court in *Sorrell* managed to avoid a final resolution of the commercial motivation issue, that expedient is not available to this Court in this case. This Court must resolve the question of whether the existence of some commercial motivation for the publishing of content that is plainly political demotes the expression to "commercial speech" within the constitutional scheme, because the Bar stubbornly insists that Mr. Hunter's speech is commercial, and Mr. Hunter stubbornly insists that it is not.

In resolving this stand-off, this Court ought not be persuaded by the argument advanced by the Bar below, that the mere insertion of some

elements of political speech into what would otherwise be appropriately classified as commercial speech does not turn the commercial speech into political speech. That truism is true enough, but it mischaracterizes what is going on here. This case is not like the Tupperware parties in *Board of Trustees v. Fox*, 492 U.S. at 474, in which a little gratuitous speech on issues of public concern was included in what was manifestly commercial activity—the sale of plastic containers. There is a fundamental constitutional distinction between speech which has as its principal content the proposing of a commercial transaction, while also sprinkling in some politics, and speech that has politics as its sole content, though the speaker's motivation is sprinkled with some commercial purpose. When political content is simply glommed on explicit sexual speech that would otherwise qualify as obscenity, for example, courts will reject the dodge, and not treat the arbitrary attachment as "socially redeeming value." "'A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication.'" *Miller v. California*, 413 U.S. 15, 25 n. 7 (1973), *quoting Kois v. Wisconsin*, 408 U.S., 229, 231 (1972).

If merely pasting a quotation from Voltaire upon a hardcore depiction of sex that would otherwise be obscene under *Miller* does not turn otherwise obscene material into political speech, so too a commercial

advertiser may not transform otherwise commercial speech into political speech through the same Voltaire quotation. But that is *not* what is going on here. Mr. Hunter's speech, judged by its *content*, as the First Amendment requires, is not advertising at all.

4. When Commercial And Political Elements Are Intertwined, The Heightened Protection Afforded Political Speech Should Be Applied

Mr. Hunter maintains that his partial commercial motivation is not enough to render his writings "commercial speech" within the meaning of the First Amendment. Yet if, for the mere sake of argument, he is wrong, and this Court decides that there is some commercial content to his writings, the *best* the Bar might plausibly claim is that those commercial elements are "intertwined" with manifestly political speech.

This Court has previously shown sensitivity to the importance of separating commercial from non-commercial speech in assessing the constitutionality of regulatory schemes. *See Adams Outdoor Advertising v. City of Newport News*, 236 Va. 370, 386-87 (1988). ("We will assume, without deciding, that insofar as the ordinance regulates commercial speech, it meets the test enunciated in *Central Hudson* and applied in *Metromedia*. However, we will examine the ordinance as it relates to noncommercial communications, bearing in mind that the Supreme Court

has 'consistently accorded noncommercial speech a greater degree of protection than commercial speech.'") *quoting Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981).

In that spirit of special sensitivity to the protection of noncommercial speech, when commercial and noncommercial elements of a message are intertwined, the appropriate constitutional response is to ratchet up, not ratchet down, treating the entirety of the message as protected by the First Amendment's demanding strict scrutiny standard. As the Supreme Court explained *Riley v. National Federation of the Blind of N.C., Inc*., 487 U.S. 781 (1988):

> It is not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking. . . But even assuming, without deciding, that such speech in the abstract is indeed merely "commercial," we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech. Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.

Id. at 796-97 (internal citation omitted). *See also Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 683 F.3d 539, 560 (4th Cir. 2012) ("[E]ven if some speech of regulated pregnancy centers included commercial elements, strict scrutiny would still apply because those elements would be 'inextricably intertwined' with

otherwise fully protected speech."); *Association for Private Sector Colleges and Universities v. Duncan*, 681 F.2d 427, 456 (D.C. Cir. 2012); ("Thus, when the government seeks to restrict inextricably intertwined commercial and noncommercial speech, courts must subject the restriction to the test "'for fully protected expression.'"); *In re Orthopedic Bone Screw Prods. Liability Litigation*, 193 F.3d 781, 793 (3rd Cir.1999) ("Where the commercial and noncommercial elements of speech are 'inextricably intertwined,' the court must apply the "test for fully protected expression.").

On this point Mr. Hunter strongly commends to this Court the opinion of Justice Breyer, joined by Justice O'Connor, in the *Nike v. Kasky* case, which as previously mentioned, involved the political communications of Nike, expressed by the company to defend its reputation and advance its commercial interests. Because Justice Breyer's opinion is a dissent from the dismissal of a writ of certiorari, it has no binding precedential force on this Court, and is offered here only for its persuasive value. Yet that persuasive value is compelling. Justice Breyer in *Nike* observed that the First Amendment "favors application of the . . . public-speech principle, rather than the . . . commercial-speech principle." *Nike*, 539 U.S. at 676 (Breyer, J., dissenting). Justice Breyer noted that "the communications at issue are not purely commercial in nature. They are better characterized as

involving a mixture of commercial and noncommercial (public-issue-oriented) elements." *Id.* He then noted that even the *least* political of the statements at issue in the case involved commercial and noncommercial elements that were "inextricably intertwined." *Id.* at 677. After examining the form, content, and regulatory regime, Justice Breyer concluded that heightened scrutiny, not commercial speech intermediate scrutiny, should apply:

> These three sets of circumstances taken together-circumstances of format, content, and regulatory context-warrant treating the regulations of speech at issue differently from regulations of purer forms of commercial speech, such as simple product advertisements, that we have reviewed in the past. And, where all three are present, I believe the First Amendment demands heightened scrutiny.

Id. at 678-79. Mr. Hunter believes Justice Breyer had the analysis exactly right, and urges this Court to adopt his approach here.

5. The Constitutional Policies That Support Reduced Protection For Commercial Speech Have No Persuasive Force When Applied To Mr. Hunter's Writings

In determining whether to treat speech as commercial or noncommercial, courts should be informed by the rationales for treating commercial speech as deserving of only intermediate scrutiny. Those rationales link the power of the government to regulate the underlying commercial transaction being proposed to the expression that is proposing

that transaction. Commercial speech is afforded less protection because it is "'linked inextricably' with the commercial arrangement that it proposes," such that "the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself." *Edenfield v. Fane*, 507 U.S. at 767, *quoting Friedman v. Rogers*, 440 U.S. at 10 n. 9.

Tellingly, the Bar below produced no witnesses, no survey data, no empirical studies, demonstrating that Mr. Hunter's writings had done any fellow Virginia citizen any palpable harm. The Bar produced no *evidence* that some gullible Virginian, reading Mr. Hunter's narratives on the cases in which he served as lawyer, would jump to the implausible conclusion that Mr. Hunter was suggesting that the citizen's case would turn out the same were the citizen to retain Mr. Hunter.

The Bar instead imposed its discipline on Mr. Hunter by fiat, invoking an inherent authority to declare his narratives inherently misleading. Yet the Constitution vests in the Bar no such inherent authority, unless the misleading character of the advertising is *self-evident*.

The leading case is *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), in which the Court struck down an Ohio prohibition on the use of illustrations in advertising, citing the lack of any solid evidence documenting the misleading nature of such illustrations, dismissing the

state's claims as mere "unsupported assertions." *Id*. at 648. In contrast, however, the Court sustained a disclosure requirement imposed by Ohio, which required that an attorney advertising his or her availability on a contingent-fee basis disclose that clients will have to pay costs even if their lawsuits are unsuccessful. The specific advertisement at issue proclaimed: "if there is no recovery, no legal fees are owed by our clients." The advertisement made no mention of the distinction between "legal fees" and "costs." To members of the public not aware of the meaning of these legal terms of art, the Court observed, this advertisement would suggest that employing the lawyer would be a "no-lose proposition," in that the lawyer's representation in a losing cause would come entirely free of charge. The Court noted that "[t]he assumption that substantial numbers of potential clients would be so misled is hardly a speculative one: it is a commonplace that members of the public are often unaware of the technical meanings of such terms as 'fees' and 'costs'– terms that, in ordinary usage, might well be virtually interchangeable." *Id*. at 652. This is what "self-evident" thus means. The Court in *Zauderer* held that "[w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the . . . public before it [may] determine that the

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

In Mr. Hunter's case, the truth that is self-evident is that no Virginia citizens have actually been misled by Mr. Hunter's writings. Bar authorities might plausibly maintain that a naked "list" of cases and outcomes, such as "Brain Injury: 1 $million verdict," could be appropriately characterized as the advertising of past results in a manner that could mislead consumers into thinking their cases would come out the same way. Mr. Hunter's blogs, however, contain detailed narratives of cases, spiced with his own commentary upon them. No reasonable consumer could be misled by these descriptions into thinking that his or her case would be guaranteed a similar outcome. And whatever residual scintilla of risk might remain that some highly gullible person, reading a description of a prior criminal case, would think, "this is an advertisement telling me that my case will turn out the same way," was entirely eliminated by Mr. Hunter's clear warning to viewers of his writings that his purpose is to express his opinion, and that his expression should not be construed to imply that similar results would be obtained in other cases.

The First Amendment requirement that the government bear the burden of *proving* harm is the bulwark by which freedom is maintained.

See, e.g, Ibanez v. Florida Dep't of Business and Professional Regulation, 512 U.S. at 147; (striking down a disclaimer requirement because the state failed "to back up its alleged concern that the [speech] would mislead rather than inform"); *Edenfield v. Fane*, 507 U.S. at 770-71; (rejecting the state's asserted harm because the state had presented no studies, nor anecdotal evidence to support its position); *Peel v. Attorney Registration & Disciplinary Commission*, 496 U.S. 91, 108 (1990) (rejecting a claim that certain speech was potentially misleading for lack of empirical evidence).

Regulators abhor a vacuum. Our First Amendment tradition, however, abhors the over-regulation of a paternalistic state. *See, e.g., Peel*, 496 U.S. at 105 (1990) ("We reject the paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television."); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 791-792, and n. 31 (1978) (criticizing State's paternalistic interest in protecting the political process by restricting speech by corporations); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. at 97 (criticizing the State's paternalistic interest in maintaining the quality of neighborhoods by restricting speech to residents); *Rubin v. Coors Brewing Company*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring) (Any "interest" in restricting the flow of accurate information because of the

perceived danger of that knowledge is anathema to the First Amendment; . . . the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good."); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. at 738 (Thomas, J., concurring) ("In case after case . . . the Court, and individual Members of the Court, have continued to stress . . . the antipaternalistic premises of the First Amendment"); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. at 790-91 (1988) ("The State's remaining justification–the paternalistic premise that charities' speech must be regulated for their own benefit–is equally unsound. The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.").

As the Supreme Court elegantly proclaimed in *Virginia Pharmacy*, 425 U.S. at 770: "[T]he choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."

CONCLUSION

For the reasons above, Horace Hunter urges this Court to reverse the judgment of the Circuit Court and dismiss all charges of misconduct against him.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing complies with Rules 5:27, and further certifies as follows:

1) The appellant is Horace Frazier Hunter.

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5) Counsel for the appellant requests oral argument in person.

6) On this the 10th day of October, 2012, three copies of the foregoing Opening Brief of Appellant and two copies of the Joint Appendix, along with a copy of both on CD, were sent via third party commercial carrier to opposing counsel at the above address. This same date, fifteen copies of the same, along with a copy of both on CD, were hand delivered to the clerk's office.

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