

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
 ) MB Docket No. 08-90  
Sponsorship Identification Rules )  
and Embedded Advertising )  
 )  
 )

**COMMENTS OF TRINITY CHRISTIAN CENTER OF SANTA ANA, INC.**

Colby M. May  
James M. Henderson, Sr.  
Colby M. May, Esq., P.C.  
205 3<sup>rd</sup> Street, SE  
Washington, D.C. 20003  
202-544-5171  
202-544-5171 fax

*Attorneys for Trinity Christian Center of  
Santa Ana, Inc.*

Friday, September 24, 2008

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
EXECUTIVE SUMMARY .....	1
COMMENTS OF TRINITY CHRISTIAN CENTER OF SANTA ANA, INC. ....	3
I. BACKGROUND AND INTRODUCTION .....	3
A. Existing Statutory and Regulatory Sponsorship and Disclosure Obligations ....	3
B. The Petition and Complaint of Commercial Alert .....	5
C. The Commission’s Notice of Inquiry and Notice of Proposed Rulemaking .....	6
D. Summary Of Trinity’s Comments In Opposition To Additional New Regulatory Burdens on Commercial Expression .....	8
II. THE COMMISSION SHOULD ESCHEW THE TEMPTATION TO PATERNALISTICALLY FILTER FROM CITIZENS INFORMATION THAT IS LAWFUL AND TRUTHFUL .....	10
A. Citizen Viewers Possess the Right Under the First Amendment to Obtain Truthful Information Even When the Information is of Commercial Nature ....	10
B. Even Were The NOI/NPRM Limited To Product Integration and Product Placement Related to Harmful Activities, The Supreme Court Has Held That The Power to Ban Harmful Activities Does Not Justify Suppression of Truthful Information .....	14
III. BECAUSE COMMERCIAL SPEECH ENJOYS SIGNIFICANT CONSTITUTIONAL PROTECTION, REGULATIONS INTERFERING WITH COMMERCIAL SPEECH SQUARELY SETS THE BURDEN OF PROOF AND PERSUASION ON THE COMMISSION .....	17
A. Limiting Speech as an Indirect Means of Regulating Conduct Is Anathema to the First Amendment .....	18

TABLE OF CONTENTS—cont'd

	<u>Page</u>
B. The First Amendment Requires the Government to Justify a Restriction on Commercial Speech by a Preponderance of the Evidence, and the Facts Claimed to Support the Restriction must Be Subject to De Novo Judicial Review .....	23
C. Proposed Additional Disclosure Requirements on Product Integration and Product Placement Would Be Unconstitutional under <i>Central Hudson</i> .....	25
CONCLUSION .....	27

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Abrams v. United States</i> , 250 U.S. 616 (1919) . . . . .	20
<i>Arkansas Writers' Project v. Ragland</i> , 481 U.S. 221 (1987) . . . . .	16
<i>Bates v. State Bar of Arizona</i> , 433 U.S. 350 (1977) . . . . .	12
<i>Board of Trustees v. Fox</i> , 492 U.S. 469 (1989) . . . . .	25
<i>Bolger v. Youngs Drug Products Co.</i> , 463 U.S. 60 (1983) . . . . .	24
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969) . . . . .	14
<i>Capital Broadcasting Co. v. Mitchell</i> , 333 F.Supp. 582 (D.D.C. 1971) . . . . .	26
<i>Carey v. Brown</i> , 447 U.S. 455 (1980) . . . . .	16
<i>Carey v. Population Services Int'l</i> , 431 U.S. 678 (1977) . . . . .	21
<i>Central Hudson Gas &amp; Electric Corp. v. Public Service Commission of New York.</i> , 447 U.S. 557 (1980) . . . . .	2, <i>passim</i>
<i>City of Cincinnati v. Discovery Network, Inc.</i> , 507 U.S. 410 (1993) . . . . .	11, <i>passim</i>
<i>City of Ladue v. Gilleo</i> , 512 U.S. 43 (1994) . . . . .	13
<i>Edenfield v. Fane</i> , 507 U.S. 761 (1993) . . . . .	17-18, 21, 24-25
<i>Eu v. San Francisco County Democratic Central Comm.</i> , 489 U.S. 214 (1989) . . . . .	13
<i>First Nat'l Bank of Boston v. Bellotti</i> , 435 U.S. 765 (1978) . . . . .	12, 21
<i>Florida Bar v. Went For It, Inc.</i> , 515 U.S. 618 (1995) . . . . .	15, 23
<i>Friedman v. Rogers</i> , 440 U.S. 1 (1978) . . . . .	21
<i>Ibanez v. Florida Department of Business and Professional Regulation</i> , 512 U.S. 136 (1994) . . . . .	15, 23
<i>Linmark Associates, Inc. v. Willingboro</i> , 431 U.S. 85 (1977) . . . . .	13, 17
<i>NAACP v. Cornelius</i> , 473 U.S. 788 (1985) . . . . .	16
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964) . . . . .	22
<i>Ohralik v. Ohio State Bar Ass'n</i> , 436 U.S. 447 (1978) . . . . .	15
<i>Peel v. Attorney Registration and Disciplinary Comm'n</i> , 496 U.S. 91 (1990) . . . . .	21
<i>Perry Education Ass'n v. Perry Local Educators' Ass'n</i> , 450 U.S. 37 (1983) . . . . .	16
<i>Posadas de Puerto Rico v. Tourism Company of Puerto Rico</i> , 478 U.S. 328 (1986) . . . . .	14, 15
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992) . . . . .	16
<i>Rubin v. Coors Brewing Co.</i> , 514 U.S. 476 (1995) . . . . .	12, <i>passim</i>
<i>Sable Communications v. FCC</i> , 492 U.S. 115 (1989) . . . . .	24
<i>Simon &amp; Schuster v. Members of the New York State Crime Victims Board</i> , 502 U.S. 105 (1991) . . . . .	13, 15
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958) . . . . .	26
<i>United States v. Associated Press</i> , 52 F. Supp. 362 (S.D.N.Y. 1945) . . . . .	22
<i>United States v. Edge Broadcasting Co.</i> , 509 U.S. 418 (1993) . . . . .	14
<i>United States v. National Treasury Employees Union</i> , 513 U.S. 454 (1995) . . . . .	13

TABLE OF AUTHORITIES

Page(s)

*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,  
425 U.S. 748 (1976) ..... 12-13, *passim*  
*West Virginia v. Barnette*, 319 U.S. 624 (1943) ..... 14, 15  
*Whitney v. California*, 274 U.S. 357 (1927) ..... 14

Constitutions, Statutes and Regulatory Materials

Communications Act of 1934, as amended  
    section 317 ..... 3  
    section 317(a)(2) ..... 3  
    section 317(c) ..... 3  
    section 507 ..... 4  
Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A ..... 19  
  
47 CFR § 73.1212 ..... 4  
47 C.F.R. § 73.1212(a)(2)(c) (2007) ..... 5  
47 C.F.R. § 73.1212(a)(2)(d) (2007) ..... 5  
  
*In re Nat’l Broad. Co.*, 27 F.C.C.2d 75 (1970) ..... 5  
In the Matter of Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission’s  
    Rules, Report and Order, 34 F.C.C. 829 (1963) ..... 8  
*Letter to Mr. Earl Glickman*, 3 F.C.C.2d 326 (1966) ..... 5  
Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. 43194 (July 24,  
2008) ..... 1, *passim*

Other Authorities

S. LIEMER, UNDERSTANDING ARTISTS’ MORAL RIGHTS: A PRIMER, 7 B. U. PUB. INT. L. J. 41  
(Winter 1998) ..... 19

Webpages

<http://www.commercialalert.org/fcc.pdf> (last viewed September 18, 2008) ..... 1, 5, 25  
<http://www.commercialalert.org/ftc.pdf> (last viewed September 18, 2008) ..... 5  
<http://www.commercialalert.org/FTCletter2.10.05.pdf> (last viewed September 18, 2008) ..... 6  
<http://www.youtube.com/watch?v=vgtfC5LBAW4> (last viewed September 16, 2008) ..... 19

## EXECUTIVE SUMMARY

In September 2003, Commercial Alert filed a complaint and petition with the Commission and with the Federal Trade Commission. *See* <http://www.commercialalert.org/fcc.pdf> (last visited on September 18, 2008). Commercial Alert attacked two practices on broadcast television: product placement and product integration. Product placement results in the appearance of a sponsor's products and services on-screen. Product integration results in the integration of such products and services into the story line of a broadcast program.

On June 26, 2008, responding to Commercial Alert's petition and the Commission's own concern regarding the product placement integration issues, the Commission published a Notice of Inquiry and a Notice of Proposed Rulemaking. *See Sponsorship Identification Rules and Embedded Advertising*, 73 Fed. Reg. 43194 (July 24, 2008). In its NOI/NPRM, the Commission invited Comment on the issues presented by placement and/or integration of commercial products and services into the programming offered by broadcast licensees, including comment on the First Amendment issues raised by proposed additional new rules.

Trinity Christian Center of Santa Ana, Inc. (d/b/a Trinity Broadcasting Network) ("TBN" or "Trinity") submits these comments in opposition to proposed new regulations. Trinity opposes the specific proposed regulation and the general proposition of new additional regulations for two key reasons. First, new additional regulations embody a disturbing kind of paternalistic governmental presumption. The proposed regulations are not limited to, or principally directed at, children's television programming. Yet, the proposal assumes about the typical citizen-viewer a stupidity, an incompetence, a lack of consumer sophistication, that is not warranted by any empirical evidence supporting Consumer Alert's petition. Worse, such paternalism assumes about government officials that they possess a degree of sophistication and understanding different than the citizen-viewer and

makes superior to the citizen-viewer the judgments of such bureaucratic officials. Second, the imposition of new regulations will have the effect of banning a category of otherwise constitutionally protected expression: commercial speech. It is not contended by the Commission, or by Commercial Alert in its petition, that the proposed regulations are directed at false, misleading or fraudulent commercial messages. Thus, as a general proposition, the commercial messages affected by the proposal enjoy presumptive constitutional status under the First Amendment. The Supreme Court applies rigorous analysis to restrictions on commercial speech, typically referred to as the *Central Hudson* test, derived from *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

Under *Central Hudson* and its four part analysis, it will fall to the Commission to sustain the burden of proving that any additional regulation serves a substantial interest directly and that such regulation does so by means narrowly crafted to serve that interest. Unfortunately for the Commission, Commercial Alert failed to provide to the Commission anything other than anecdotes taken from trade magazine and newspapers to support its petition. Thus, the Commission presently lacks any record factual evidence to support a conclusion that it could satisfy its burdens under *Central Hudson*.

Given the current obligation of sponsorship disclosure, and given that it is only Commercial Alert's dissatisfaction with the state of things, there is no reason for the Commission to impose additional regulations. In Trinity's view, the grounds of which are set out more particularly herein, the Petition should be denied and the NOI/NPRM vacated.

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of )  
 )  
 ) MB Docket No. 08-90  
Sponsorship Identification Rules )  
and Embedded Advertising )

**COMMENTS OF TRINITY CHRISTIAN CENTER OF SANTA ANA, INC.**

**I. BACKGROUND AND INTRODUCTION**

**A. Existing Statutory and Regulatory Sponsorship and Disclosure Obligations**

Section 317 of the Communications Act of 1934, as amended, (the “Act”) governs product placements in television entertainment programming. Section 317 requires broadcasters to disclose “any money, service, or other valuable consideration” paid to, or promised to, or charged by the broadcaster in exchange for product placements. Disclosures are not required when product placements are offered without charge or for a nominal fee. Section 317(a)(2) of the Act provides that the Commission is not precluded from requiring sponsorship announcements to be made for political programs, for any program involving controversial issues, if the broadcaster receives consideration in any form as an inducement to air the program.

Pursuant to section 317(c) of the Act, broadcasters are bound to the exercise of reasonable diligence to obtain – from their employees or any other person with whom they deal directly in connection with a program for broadcast – information about product placement arrangements, so that appropriate disclosures may be made. Thus, federal law already mandates ongoing disclosure throughout the production and distribution chains, and imposes on broadcasters the responsibility to identify sponsors. Section 317 of the Act accords to the Commission the authority to waive the

sponsorship requirements in any particular case, or class of cases, should the Commission conclude that the public interest, convenience or necessity does not require such disclosure.

In addition to the Act's disclosure obligations under section 317, those who give or get compensation for product placements have a duty to disclose such exchanges to the respective broadcasting station. *See* section 507 of the Act. This obligation helps to ensure disclosure of consideration and section 317 compliance with the law. The duty under section 507 of the Act is not lightly to be ignored, since a violator can be subject to a fine of up to \$ 10,000, imprisonment of up to one year, or both.

The Commission has had delegated to it, under section 317 of the Act, the necessary authority to issue rules and regulations needed to carry out the sponsorship identification requirement. In furtherance of its duties and obligations, the Commission issued rules interpreting section 317 of the Act. *See* 47 CFR § 73.1212. That section provides:

When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce:

- (1) That such matter is sponsored, paid for, or furnished, either in whole or in part, and
- (2) By whom or on whose behalf such consideration was supplied

Closely mirroring section 317 of the Act, the Commission's regulation does not require disclosure when product placement was provided without charge or for nominal consideration, unless the product was used in a way that is not reasonably related to the use of such product in that particular program.

Moreover, under the regulation, the disclosure announcement must disclose the sponsor's true

identity. *See* 47 C.F.R. § 73.1212(a)(2)(d) (2007). The regulation requires broadcasters to exercise due diligence in carrying out their disclosure obligations. *See* 47 C.F.R. § 73.1212(a)(2)(i) (2007).. The Commission has explained its view of the purpose of section 317 of the Act: to insure that audience members are clearly informed that what they are viewing has been paid for, and that the entity paying for the broadcast must be clearly identifiable. *See In re Nat'l Broad. Co.*, 27 F.C.C.2d 75 (1970); *Letter to Mr. Earl Glickman*, 3 F.C.C.2d 326 (1966). The Commission also has issued guidelines regarding the nature of disclosures to insure their adequacy:

Although the exact wording of a sponsorship identification is left to the discretion of the licensee, in this instance the announcement should at least state in language understandable to the majority of viewers that suppliers of goods or services have paid the network or producer of the program to display or promote the products or services, and each such supplier should be properly identified. In order to achieve the purpose of Section 317 and our Rules, the video portion of such announcement should be given in letters of sufficient size to be readily legible to an average viewer; should be shown against a background which does not reduce their legibility, and should remain on the screen long enough to be read in full by an average viewer.

*In re Nat'l Broad. Co.*, 27 F.C.C.2d 75 (1970).

#### **B. The Petition and Complaint of Commercial Alert.**

In September, 2003, Commercial Alert filed a complaint and petition with the Commission. *See* <http://www.commercialalert.org/fcc.pdf> (Complaint and Petition) (last viewed September 18, 2008). On the same date, Commercial Alert filed a similar complaint and petition with the Federal Trade Commission. *See* <http://www.commercialalert.org/ftc.pdf> (Complaint and Petition) (last viewed September 18, 2008). The gravamen of the Complaint and Petition, in each case, was that, in the view of Commercial Alert, the Commission's licensees were shirking their statutory and regulatory obligations of sponsorship identification and disclosure through the devices of product placement and product integration.

On February 10, 2005, the Federal Trade Commission responded to Commercial Alert. *See*

<http://www.commercialalert.org/FTCLetter2.10.05.pdf> (Letter) (last viewed September 18, 2008).

The FTC declined to take any action on the Complaint and Petition of Commercial Alert, concluding “we believe that the existing statutory and regulatory framework provides sufficient tools for challenging any such deceptive acts or practices.” *Id.*

### **C. The Commission’s Notice of Inquiry and Notice of Proposed Rulemaking**

On June 26, 2008, the Commission released a Notice of Inquiry and Notice of Proposed Rulemaking in MB Docket No. 08-90. *See Sponsorship Identification Rules and Embedded Advertising*, 73 Fed. Reg. 43194 (July 24, 2008) (hereinafter NOI/NPRM). That matter involved the petition of Commercial Alert for the Commission to revisit its regulations regarding sponsorship disclosure. In the Notice of Inquiry and Notice of Proposed Rulemaking, the Commission evinced its interest in further pursuing issues related to product placement and integration in programming carried by the Commission’s broadcast licensees. More particularly, the Commission indicated that it is considering “the complex questions involved with the practice of embedded advertising, and . . . examin[ing] ways the Commission can advance the statutory goal . . . of ensuring that that [sic] the public is informed of the sources of program sponsorship [and] balancing the First Amendment and artistic rights of programmers.”

Of particular interest, the Commission seeks answers to several questions:

How often are these embedded advertising practices occurring and in what form? Are the existing rules effective in ensuring that the public is made aware of product placement and product integration in entertainment programming? Are persons involved in the production or preparation of program matter intended for broadcast fulfilling their obligations under Section 507? Are broadcasters and cable operators fulfilling their reasonable diligence obligations under Section 317(c) and the Commission’s rules? Does embedded advertising fit within the exception to disclosure requirements that applies where the commercial nature and identity of the sponsor is obvious?

NOI/NPRM ¶ 11. In addition, the Commission has invited comment on whether the current

sponsorship rules should be modified to address “new developments in the use of embedded advertising techniques.” Specifically, the Commission invited responses to the following questions:

Are the concurrent disclosures requested by Commercial Alert necessary to ensure that the public is aware of sponsored messages that are integrated into entertainment programming? Would concurrent disclosures be more or less disruptive to radio programming? Are other rule modifications warranted? Should we require disclosures before or after, or before and after, a program containing integrated sponsored material? Should we require disclosure during a program when sponsored products and/or services are being displayed? Should we require both visual and aural disclosure for televised announcements? Should these disclosures contain language specifying that the content paid for is an “advertisement” or other specific terms? Should we require that radio disclosures be of a certain duration or of a certain volume?

NOI/NPRM ¶ 12.

Recognizing the potential constitutional mischief of expansions of the current rule, the Commission also invited “comment on the First Amendment implications of possible modifications to the sponsorship identification rules to address more effectively embedded advertising techniques.” *Id.* at ¶ 13. Moreover, the Commission inquires whether “the imposition of concurrent disclosure requirements or other regulations infringe on the artistic integrity of entertainment programming . . . ? Would such a regulation be paramount to a ban on embedded advertising . . . ?” *Id.* at ¶ 13.

In response to previous arguments opposing Commercial Alert’s petition, the Commission asks, “Does the apparently common existing practice of superimposing unrelated promotional material at the bottom of the screen during a running program belie [the] contention that concurrent identification would effectively preclude product integration as a form of commercial speech because it would ‘infringe on artistic integrity’?” *Id.* Given the certainty that any amendment imposing additional disclosure requirements will be challenged, the Commission invited comment on questions related to the application of the Supreme Court’s commercial speech doctrine to its proposed regulations. Those questions included whether “the government interests at stake here substantial

enough to justify any such requirements[ and h]ow . . . the Commission [can] ensure that any modified regulations are no more extensive than necessary to serve these interests?” *Id.* at ¶ 13.

Finally, despite having previously crafted an exception from disclosure regulations for feature films, the Commission asks whether amended disclosure requirements “should apply to feature films containing embedded advertising when re-broadcast by a licensee or provided by a cable operator,” although “in its prior Order, the Commission granted a Section 317 waiver for feature films.” *Id.* at ¶ 14. The Commission found that there was a lack of evidence of sponsorship within films and observed that there was a lag time between production of feature films and their exhibition on television. In the 1963 Order, the Commission found no public interest considerations that dictated a need for immediate application of Section 317 to feature films re-broadcast on television. *See* In the Matter of Amendment of Sections 3.119, 3.289, 3.654 and 3.789 of the Commission’s Rules, Report and Order, 34 F.C.C. 829, 841 (1963). The Commission continues to waive sponsorship identification requirements for feature films “produced initially and primarily for theatre exhibition.” Accordingly, the Commission seeks comment on the use of embedded advertising in feature films today, and whether it should revisit the decision to waive Section 317 disclosure requirements.

**D. Summary Of Trinity’s Comments In Opposition To Additional New Regulatory Burdens on Commercial Expression**

The stage is set. At a table just below and before a stage sit a panel of industry icons serving as judges. On the stage, young performers chase the dream . . . record contracts, stardom, fortunes. On the judges’ table, by placement of dishware bearing its branded mark, an advertiser also pursues the dream . . . greater brand familiarity and awareness, sales, increased market share. Across America, literally millions of viewers tune in to watch the show.

Does the typical viewer think that these industry icons rose to the top of their game – became

features in the daily lives of millions – because they habitually nurse an iconic beverage? Does the typical viewer see the brand and fail to comprehend the commercial connection between the program and the advertiser? Indeed, is the typical viewer of such a poorly developed mental state that he/she equates a constant flow of one manufacturer’s syrupy sweetness to be the yellow brick road to success in life . . . so driven by such an misbegotten understanding that he/she finds herself compulsively purchasing large quantities of the beverage?

\* \* \*

Trinity respectfully opposes the proposal to impose new regulatory duties of additional disclosure and sponsorship identification. In Trinity’s view, just as the Federal Trade Commission concluded that current regulatory and statutory frameworks provided sufficient tools for addressing deceptive trade practices, the Commission here should conclude that current regulatory and statutory frameworks provide sufficient tools to insure that sponsorship of programming is adequately disclosed, and that broadcasters who fail to make required disclosures are subject to the Commission’s regulatory investigation and discipline.

As an initial matter, Trinity opposes the proposed regulations because of the evident and inappropriate paternalism they embody.

The worse sort of governmental paternalism assumes the simpleton’s ignorance for the adult American television viewer and consumer. In turn, that paternalism asserts about the power and responsibility of government things never imagined by those that framed it to conclude that every such instance of product placement must not only be purified by a disclaiming statement at the beginning or end of a program but that, as the petitioner here seems to desire, that each instance should be immediately accompanied by on screen disclaimers.

Second, Trinity opposes the proposed additional regulations because, in Trinity’s view, the

additional regulations cannot be justified under the *Central Hudson* test applicable to governmental restrictions on commercial speech. Fortunately, earlier inclinations toward paternalism that found countenance in Supreme Court opinions denying First Amendment protection to commercial speech have given way to the modern commercial speech doctrine. Application of that doctrine to the proposed regulations here suggests that the regulations are not likely to survive constitutional scrutiny. Because the heavy burden of justifying restrictions on even commercial speech lies on the government, and because de novo review by the courts will sift this Agency's record for supporting evidence – not Petitioner's or the Commission's suppositions – the Commission should forebear the foolhardy venture petitioned by Commercial Alert.

True, it insults the intelligence of the citizen/consumer/viewer to presume that he/she needs a screen crawl during American Idol on Fox Television stating, repeatedly, "Coca Cola paid for the commercial consideration embodied in the display of Coca Cola cups on the judges' table." Worse, there is little likelihood that the Commission can avoid fatal constitutional defects in a broadened program of disclosure statements, or in a variety of other proposals (such as compelling licensees and program creators to confer with members of the Writers' Guild) that may be devised under the guise of the present NOI/NPRM.

## **II. THE COMMISSION SHOULD ESCHEW THE TEMPTATION TO PATERNALISTICALLY FILTER FROM CITIZENS INFORMATION THAT IS LAWFUL AND TRUTHFUL**

### **A. Citizen Viewers Possess the Right Under the First Amendment to Obtain Truthful Information Even When the Information is of Commercial Nature.**

Ours is a market economy. A market economy, such as that of the United States, proceeds on the assumption that individuals act out of self-interest. A republican democracy, such as that of the United States, depends on an unfiltered flow of lawful and truthful information to, between, and

among citizens. To treat the present subject – additional burdensome regulations on product integrations and product placements – as though the Commission’s hand is freer under the Constitution because of the commercial nature of the communications is to ignore the holdings of the Supreme Court’s commercial speech cases.

Worse still, by adopting regulations of the sort contemplated by Commercial Alert and its supporters, the Commission would fall prey to twin temptations. First, by such an approach the Commission would embody a conclusion that the citizen-viewer *needs* the intervention of the Commission to discern truth from falsity, to discern fact from fiction, to discriminate between orthodoxy and heresy. Second, the Commission would arrogate to itself a power expressly denied to all government officials, that of actually deciding questions of orthodoxy and heresy, not simply in matters of faith, but in all the matters, sublime and mundane, against which the river of commerce in America washes.

True, here the Commission considers the question of further and extended identification of sponsorship, typically of commercial relationships between programmers, broadcasters and traders in goods and services. While this involves advertising, the public interest in receiving truthful product information transcends an often too rigidly drawn division between commercial and non-commercial speech. The Supreme Court recognized the limitations of the distinction between commercial and noncommercial speech. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993). In *Discovery Network, Inc.*, the Court held, “the city’s argument attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.” *Id.* Cincinnati had premised the potential of its sidewalk news rack restrictions on the “low value” of such commercial speech. The Court squarely rejected that view. The Supreme Court found the distinction between the categories of expression

to be artificial and to be incorrectly dismissive of real similarities in content. *Discovery Network, Inc.*, 507 U.S. at 420-21.

The Supreme Court's seminal decision, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), explains why First Amendment obstacles to government suppression of truthful information should not vary depending on whether the speaker's motivation is or is not commercial. There the Supreme Court found the consumer's interest in commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." 425 U.S. at 763. As the Supreme Court put the matter:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

425 U.S. at 765.

This concern – for the free flow of truthful information – again found expression in *Bates v. State Bar of Arizona*, 433 U.S. 350, 364-65 (1977). There the Supreme Court rejected Arizona's "paternalistic" approach of suppressing the dissemination of truthful information as a means of, ultimately, controlling consumer choices. As the Supreme Court explained in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561-62 (1980), "commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information . . . ." See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) ("commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow of commercial information'" (quoting *Virginia Pharmacy*, 425 U.S. at 764)). In fact, in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82

(1995), the Court reiterated that “the free flow of commercial information” to and among citizens serves the interest of citizens in such information and “may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.” *Id.* (quoting *Virginia Pharmacy*, 415 U.S. at 763).

So fundamental is the principle stated in *Virginia Pharmacy* that the Supreme Court has invoked it, not only with respect to its native category of commercial speech but also in the context of restrictions on noncommercial expression. *See, e.g., United States v. National Treasury Employees Union*, 513 U.S. 454, 470 (1995) (striking statute that imposed disincentives on government employees’ speech and noting effect of law to significantly burden public’s right to read and hear; *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (striking primary endorsements ban because its “highly paternalistic approach” to what people may hear hamstrung would-be voters). *Cf. City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994) (restricting free flow of information as means to achieve town’s legislative objective invalid) (discussing *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977)).

Trinity believes the NOI/NPRM raises the specter of harm to the right of the public to receive information even though there is no assertion that the proposed regulations would be limited to misleading, or dishonest, or false information. If the effect of any proposed amended regulation is, effectively, to ban the use of product integration and product placement, then it also is likely to be found unconstitutional under strict scrutiny, the appropriate test for government regulations targeting speech based on content. *Simon & Schuster v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 115-118 (1991).

Governmental suppression of truthful information, here by the imposition of burdensome additional disclosure requirements, in order to control the behavior of citizens is suspect under the First Amendment. Such paternalism, with its resulting suppression of ideas or information because

of the presumed “dangerous” effect that such expression may have on human behavior, is unconstitutional. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969); *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring). *Cf. West Virginia v. Barnette*, 319 U.S. 624, (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein”). Such paternalism has, of course, been rejected even when commercial expression is targeted, Justice Blackmun explained in his *Central Hudson* concurrence:

I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to “dampen” demand for or use of the product. Even though “commercial” speech is involved, such a regulatory measure strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice.

447 U.S. at 574-75.

From all the foregoing it seems fairly certain that, should the Commission adopt amended regulations that effectively ban product integration and product placement, traditional First Amendment strict scrutiny would apply because the effect of such regulations would be to deprive citizen-viewers of truthful information to influence or control their choices as consumers.

**B. Even Were The NOI/NPRM Limited To Product Integration and Product Placement Related to Harmful Activities, The Supreme Court Has Held That The Power to Ban Harmful Activities Does Not Justify Suppression of Truthful Information.**

Unlike *Posadas de Puerto Rico v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986), and *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), cases in which the Supreme Court concluded that States have greater leeway in suppressing truthful advertising where the product or

service is socially harmful and/or might constitutionally be banned, there is no indication in the *NOI/NPRM* that the proposed regulations would be limited either to socially harmful or constitutionally proscribable products and services. Even were the Commission to conclude that expanded regulations might be crafted directed only at such harmful or proscribable products and services, decisions subsequent to *Posadas de Puerto Rico* and *Edge Broadcasting Co.*, have already rejected expansive readings of those cases to permit the paternalistic suppression of accurate information. *See Rubin v. Coors Brewing Co.*, 514 U.S. at 482 n.2.

“[O]nly false, deceptive, or misleading commercial speech may be banned.” *Ibanez v. Florida Department of Business and Professional Regulation*, 512 U.S. 136, 142 (1994) (citations omitted). *Ibanez* embodies the Supreme Court’s recognition that knowledge itself cannot be treated as though it was a discrete harm. That view, of course, squares with the decision in *West Virginia v. Barnette*, in which the Supreme Court made plain that the Constitution deposes every governmental potentate of thought, whether petty or great. Consequently, commercial speech that is not false, deceptive, or misleading may not be deemed injurious in and of itself, and subject to suppression. Any harms thought to be posed by such speech must be related to the circumstances or conditions under which the speech is uttered, and so must be avoided through restrictions short of a ban that leave “ample alternative channels for receipt of information.” *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 457 n.13 (1978).

The Court’s decisions amply demonstrate the fallacy of the view that the “greater” power, that is, to prohibit conduct, includes the “lesser” power, that is, to prohibit the dissemination of truthful information about such conduct. In *Simon & Schuster v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991), the Supreme Court struck a statute requiring that all proceeds earned from writings about a crime, written by those convicted of that crime, be turned over to the

compensation board. As the Court explained, even though New York could have imposed the “greater” burden of channeling all proceeds from crime to victim compensation, it could not constitutionally choose the “lesser” alternative of requisitioning only profits from First Amendment activity. 502 U.S. at 119-20. This condemnation of content-based burdens on speech finds expression in many other cases. *See, e.g., Arkansas Writers’ Project v. Ragland*, 481 U.S. 221, 230 (1987) (although state may tax commercial activities generally, it cannot single out publications for taxation on the basis of content); *Carey v. Brown*, 447 U.S. 455 (1980) (although state may prohibit residential picketing, it cannot single out non-labor picketing for restriction).

Consider, for example, that, although in some contexts – most notably nonpublic fora – content-based restrictions on speech are permissible, viewpoint discrimination is not. *See, e.g., Perry Education Ass’n v. Perry Local Educators’ Ass’n*, 450 U.S. 37, 46 (1983); *NAACP v. Cornelius*, 473 U.S. 788, 806 (1985). In *Perry* and in *Cornelius*, a greater power, that of excluding speech on certain subjects, did not encompass a lesser power, that of excluding only some speech on those subjects, depending on viewpoint. Indeed, in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Supreme Court quite pointedly rejected the “lesser” power of proscribing only some speech, based on viewpoint, even though the Court expressly recognized that it was within the power of the City of St. Paul to completely ban certain categories of speech entirely.

While the Commission, in carrying out the intent of Congress, may impose some disclosure requirement, it may not, at Commercial Alert’s behest, suppress truthful information in an effort to deter citizens from engaging in legal conduct of which either the Commission, or Commercial Alert, or, for that matter, Congress may disapprove. Even where the highest level of government interest is at stake – eradicating racial segregation and block-busting – where the government targets conduct that is not only socially harmful and repugnant, but potentially violative of federal civil rights laws,

see *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 94-95 (1977), the Supreme Court still concluded that the government could not constitutionally seek to avert these dangers by suppressing expression:

If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act “irrationally.” *Virginia Pharmacy Bd.* denies government such sweeping powers. As we said there in rejecting Virginia’s claim that the only way it could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading:

There is . . . an alternative to this highly paternalistic approach. That alternative is to assume this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the 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.

431 U.S. at 96-97 (quoting *Virginia Pharmacy*, 425 U.S. at 770).

### **III. BECAUSE COMMERCIAL SPEECH ENJOYS SIGNIFICANT CONSTITUTIONAL PROTECTION, REGULATIONS INTERFERING WITH COMMERCIAL SPEECH SQUARELY SETS THE BURDEN OF PROOF AND PERSUASION ON THE COMMISSION.**

The First Amendment protects commercial speech. *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995); *Edenfield v. Fane*, 507 U.S. 761 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Indeed, the Supreme Court has concluded that much of the information that would be impacted by the proposed rules – truthful, non-misleading information about commercial matters– enjoys the highest degree of protection afforded commercial speech. *Edenfield*, 507 U.S. at 769. Under *Central Hudson Gas & Electric Corp. v. Public Service Comm’n*

of *N.Y.*, 447 U.S. 557, 566 (1980), the Supreme Court employs its familiar, four-part test for restrictions on commercial speech:

For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

Of particular significance to the Commission’s inquiry and proposed rulemaking, the Supreme Court held, in *Edenfield*, 507 U.S. at 770-71, that the government’s burden under the third prong of *Central Hudson*

is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.

As this Commission entertains responses to its inquiry and considers whether and/or how to proceed with respect to new, additional regulations directed to product placement and/or integration, it must bear in mind that the Commission, not licensees, programmers or others, will be compelled to show, under the third prong of the *Central Hudson* test, that proposed new regulations “directly advance[]” the statutory interests in disclosure of sponsorship.

In *Coors Brewing*, 514 U.S. at 490-491, the Supreme Court noted that the availability of other options – each of which could advance governmental interests in ways less intrusive of First Amendment rights – invalidates a restriction on commercial speech. Here, the proposed new disclosure rules are more extensive than necessary. Consequently, the proposed expansion of disclosure requirements is doomed.

**A. Limiting Speech as an Indirect Means of Regulating Conduct Is Anathema to the First Amendment.**

Under the second prong of the *Central Hudson* test, commercial speech may be restricted

only in the service of a “substantial” governmental interest. *See Went For It, Inc.*, 515 U.S. at 624; *Coors Brewing Co.*, 514 U.S. at 482.

The Commission has no legitimate, let alone substantial, interest in reducing the flow of truthful information, even when such information comes in the form of product integration into programming, or product placement. For purposes of analyzing the proposed additional regulations under the second prong of *Central Hudson*, it is entirely fair to say that the proposed regulation effectively bans truthful information. It does this by twin devices: additional, instantaneous disclosures will *consume* broadcast time and *interfere* with artistic integrity.<sup>1, 2</sup> Thus, it is entirely fair to characterize the Commission’s “interest” as one of keeping citizen-viewers uninformed for their own protection. *Cf. Rubin v. Coors Brewing Co.*, 514 U.S. at 497-98 (Stevens, J., concurring in the judgment). That interest enjoys no constitutional solicitude.

Throughout the modern history of the First Amendment, the Supreme Court and

---

<sup>1/</sup> While some may discount that simultaneous disclosure by voice over, or by screen crawl, would have little or no impact on artistic integrity, there is a substantial body of law that secures to artists the power to make decisions for themselves. “Droit moral” embodies the concept that even in placement of art works there must be an appropriate respect given to the creator of a work to determine whether or not the integrity of his/her work is violated by how a piece is placed, or by those things that are in close proximity to the piece. *See generally* S. LIEMER, UNDERSTANDING ARTISTS’ MORAL RIGHTS: A PRIMER, 7 B. U. PUB. INT. L. J. 41 (Winter 1998). Congress has sought to bring the federal law of the United States, with respect to artists’ rights, toward compliance with international law obligation, in part by enacting Visual Artists Rights Act of 1990 (VARA), 17 U.S.C. § 106A. While VARA does not govern audiovisual media, the limitations on enacted law does not denigrate the larger point, which is that whenever a government official, at the behest of a complaining third party, demands that a disclaimer be attached by the artist to his/her work at his/her expense, there is injury to the internationally recognized moral rights of the artist.

<sup>2/</sup> Contemporary culture provides perhaps what is, undoubtedly, one of the most clear and concise illustrations of the distraction problem of compelled, instantaneous disclosure obligations: the “talking stain” commercial for the laundry detergent “Tide to Go” product line. *See* <http://www.youtube.com/watch?v=vgtfC5LBAW4> (last viewed September 16, 2008) (potential employer interviewing job candidate can hear nothing candidate says due to the distraction of the “talking stain” on candidate’s shirt). While Commercial Alert may not find the proposal of instantaneous verbal and/or visual disclosures distracting, that leaves unanswered whether the citizen-viewer needs such additional help to understand the relation between product sponsors and broadcast programming, and whether the choice of instantaneous disclosures will be any less disturbing than the “talking stain.”

commentators have relied on the metaphor of the market place of ideas. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting) (“best test of truth is the power of thought to get itself accepted in the competition of the market”). That powerful metaphor evokes the agora, where every idea presents itself for the intellectual purchase of others. Those ideas that enjoy broadest purchase succeed in the marketplace of ideas; others, not so successful, fail. The oddity of the First Amendment jurisprudence of the Supreme Court was the gap in time between the rise of that metaphor and the occasion on which the Supreme Court finally concluded that marketplace ideas enjoyed constitutional protection. In our market economy, products rise and fall based on their capacity to obtain at least a faithful niche in the confidence of citizen-consumers. Thus, producers of goods and services seek to educate and inform through visual and verbal information, they know that their success in the economic marketplace depends on their success in the ideas marketplace; in other words, they depend on “intelligent and well informed consumers.” *See Virginia State Board of Pharmacy*, 425 U.S. at 765.

When the market place of ideas finally opened its doors to the market place expression, in *Virginia State Board of Pharmacy*, the Supreme Court identified three distinct rationales, in addition to the speaker’s “right to advertise,” 425 U.S. at 757, for extending First Amendment protection to “dissemination of information as to who is producing and selling what product, for what reason, and at what price.” 425 U.S. at 765.

First, the Supreme Court observed, “the proper allocation of resources” demands consumer decisions that are “intelligent and well informed.” *Id.* Second, the Supreme Court reasoned that absent a constant flow of information to citizen-consumers about the free market system, citizen-consumers could not form “intelligent opinions as to how that system ought to be regulated or altered.” *Id.* Finally, third, the Supreme Court interpreted the First Amendment to preclude

government suppression of commercial speech out of a concern that consumers, once informed, will fail to perceive their own best interests:

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. \* \* \* 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.

425 U.S. at 770.

In *Central Hudson*, the Court stated:

Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the highly paternalistic view that government has complete power to suppress or regulate commercial speech. People will perceive their own best interests if only they are well enough informed, and \* \* \* the best means to that end is to open the channels of communication rather than to close them. \* \* \* Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all.

447 U.S. at 561-62 (internal quotation marks and citations omitted)<sup>3</sup>. See also *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 105 (1990) (plurality opinion) (“reject[ing] the paternalistic assumption that the recipients of petitioner’s letterhead are no more discriminating than *the audience for children’s television*”) (emphasis added).

Commercial Alert proceeded, in its complaint and petition, on the base presumption that

---

<sup>3</sup> See *Edenfield*, 507 U.S. at 767 (“[t]he commercial marketplace . . . provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth, but . . . the speaker and the audience, not the government, assess the value of the information presented”); *Carey v. Population Services Int’l*, 431 U.S. 678, 700 (1977) (“‘substantial individual and societal interests’ in the free flow of commercial information”); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978) (commercial speech cases “illustrate that the First Amendment goes beyond protection of the press and self-expression to prohibit the government from limiting the stock of information from which members of the public may draw”); *Friedman v. Rogers*, 440 U.S. 1, 8-9 (1978) (noting “strong interest in the free flow of commercial information”).

commercial speech must be restricted because consumers, though informed, cannot “perceive their own best interests.” *Virginia Board of Pharmacy*, 425 U.S. at 770. But that paternalistic sentiment is incompatible with the Supreme Court’s extending First Amendment protection to commercial speech. And the Commission should steer clear of the unsound path laid out for it by Commercial Alert’s petition.

No sensible, nor constitutional, distinctions exist that might allow the government to “protect” people by keeping them in ignorance when choosing among goods and services, but not when choosing among ideologies. If citizen-viewers cannot be counted on to perceive “their own best interests” in the marketplace of goods, how can our Republic plan to depend on their perceptions of their own best interests in the marketplace of ideas? There is a cognitive dissonance in thinking the free flow of information about goods and services will divert the citizen-viewer from “the ultimate good desired” in the realm of commerce, but the same kind of “free trade in ideas” will not divert the citizen-voter from “the ultimate good desired” in the political realm.

Commercial Alert’s petition and its underlying complaint seem gravely ignorant of the presupposition embodied in the First Amendment “that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.” *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y.) (L. Hand, J.), *aff’d*, 326 U.S. 1 (1945) (quoted favorably in *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

The Commission has asked whether additional disclosures are even needed for products placed or integrated into programming. That is a key question that must be answered with supportive evidence before the Commission can impose additional regulatory burdens on expression. But what evidence has Commercial Alert provided that people either are incapable of discerning the

sponsorship relationships in these cases? None. No evidence, empirical or statistical or otherwise can be found in Commercial Alert's petition.

**B. The First Amendment Requires the Government to Justify a Restriction on Commercial Speech by a Preponderance of the Evidence, and the Facts Claimed to Support the Restriction must Be Subject to De Novo Judicial Review.**

It bears recalling that there is no claim here that the product placements and product integrations about which Commercial Alert complains effect any kind of legal fraud, deceit, misapprehension or misinformation of the citizen-viewer. Under the *Central Hudson* test, commercial speech that is not false, deceptive, or misleading may be restricted, but only if the government shows that the restriction “directly and materially advances a substantial state interest,” and that the restriction advances that interest “in a manner no more extensive than necessary to serve that interest.” *Ibanez*, 512 U.S. at 143; *Coors Brewing Co.*, 514 U.S. at 486; *Went For It, Inc.*, 515 U.S. at 632 (“What our decisions require . . . is a fit between the legislature’s ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective”) (internal quotation marks and citations omitted).

*Central Hudson*’s third and fourth prongs are exacting. The third prong (“directly advances”) will require that the Commission prove that its proposed regulation “will in fact” produce the desired result; the Commission ““must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”” *Ibanez*, 512 U.S. at 143 (quoting *Edenfield*, 507 U.S. at 770-71). The fourth prong (“no more extensive than necessary”) requires the government to demonstrate that the restriction is “sufficiently tailored to its goal.” *Coors Brewing Co.*, *Coors*, 514 U.S. at 488-89. Fortunately, except for the Petitioner, a restriction on commercial speech will not be

found to be “sufficiently tailored to its goal” if there exist other means by which the Commission could pursue its objectives “in a manner less intrusive” to the First Amendment rights of Commission licensees. *Coors Brewing Co.*, 514 U.S. at 490. See also *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993).

Again and again, the Supreme Court has reiterated that the government bears the burden of justification, in *Coors Brewing Co.*, in *Ibanez*, in *Edenfield*, even in an earlier case, *Bolger v. Youngs Drug Products Co.*, 463 U.S. 60, 70 n.20 (1983). The Commission would do well to keep at the forefront of its considerations that the Supreme Court has stated that “mere speculation and conjecture,” *Coors Brewing Co.*, 514 U.S. at 487, will not suffice to meet the government’s burden under *Central Hudson*.

Because the First Amendment’s protections would be meaningless if courts were to defer to regulatory determinations that restrictions on speech are justified, it behooves the Commission to undertake the searching examination of the petition for supporting facts, and to decline to adopt additional, burdensome restrictions without having amassed a significant quantum of such supporting facts. For the courts to which the Commission’s actions will be referred, ultimately, deference is not the rule. Rather, as the Supreme Court has emphasized, deference “cannot limit judicial inquiry when First Amendment rights are at stake.” *Sable Communications v. FCC*, 492 U.S. 115, 129 (1989) (citation omitted). Indeed, with respect to even those factual findings that are “relevant to resolving a constitutional issue,” the Supreme Court has stated that “whatever deference is due legislative findings [cannot] foreclose [its] independent judgment of the facts bearing on an issue of constitutional law.” *Id.*

**C. Proposed Additional Disclosure Requirements on Product Integration and Product Placement Would Be Unconstitutional under *Central Hudson***

The Supreme Court has construed the First Amendment, within the contours of the commercial speech doctrine, as putting squarely on the government's shoulders twin burdens, of proving that its infringement on commercial speech directly advances a substantial interest, and of proving that its infringement is no more extensive than necessary to serve that interest. *Central Hudson Gas & Electric Corp.*, 447 U.S. at 564; *Coors Brewing Co.*, 514 U.S. at 1591-92; *Edenfield*, 507 U.S. at 767-68. The Commission's NOI/NPRM expressly inquires into these factors for the obvious reason that any additional regulation will be subjected to such scrutiny in litigation. It is not only sensible for the Commission to make this inquiry. It is necessary both to make the inquiry, and to forego further regulation absent and compelling sufficient evidence to support both a conclusion that a substantial interest is at stake and that the proposed regulations infringe no more than necessary. *See, e.g., Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989) ("narrowly tailored to achieve the desired objective"); *Edenfield*, 507 U.S. at 770 (regulation will not be "sustained if it provides only ineffective or remote support for the government's purpose;" government does not carry its burden "by mere speculation or conjecture") (citation omitted). Commercial Alert's petition has not equipped the Commission to meet its burdens here.

In its September 30, 2003, letter initiating its complaint and petition, Commercial Alert relies entirely upon anecdote to establish its case. *See* <http://www.commercialalert.org/fcc.pdf> (last visited on September 18, 2008). In fact, the entire complaint-petition relies on nothing more than the conjectures and anecdotes of trade magazines and newspapers. Commercial Alert has not presented the Commission with a single iota of evidence supporting its claims.

Although disclosure of commercial sponsorship is likely to be considered a substantial state

interest, there is no likelihood that a regulation that has the effect of banning commercial speech to control the behavior of citizen-viewers will be found to be a substantial interest. That interest goes by the earlier noted name: paternalism. And that paternalism is very seldom, if ever, constitutionally warranted.

Other, constitutional options are available to the Commission if it concludes that current disclosure requirements are insufficient. The most obvious option would be for the Commission and those who share Commercial Alert's concerns to conduct a campaign educating citizen-viewers about the sponsor relationships embodied in instances of product placement and product integration. Indeed, Commercial Alert might well be directed to lobby the broadcast and advertising industries to engage in self-regulation of the sort undertaken when the tobacco industry was convinced to abandon broadcast commercials entirely. *See Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582, 587-90 (D.D.C. 1971) (three-judge court) (Wright, J. dissenting) (tobacco industry lobbying for broadcast advertising ban resulted from Commission rulings granting equal access for anti-smoking ads that effectively and dramatically reduced tobacco sales).

Or, for that matter, the Commission could take advantage of broadcasters' own judgments about where and when to place commercial breaks in programming and require that necessary disclosures occur during such commercial breaks, rather than at the end of a broadcast. Where here, as in *Coors Brewing Co.*, "the availability of [other] options, all of which could advance the government's asserted interest in a manner less intrusive to [broadcasters'] First Amendment rights," it is clear that the proposed regulation "is more extensive than necessary." 514 U.S. at 490-91. Commercial Alert's invitation to do so notwithstanding, what the Constitution bars the Commission from doing is suppressing truthful information because it considers it harmful. *Cf. Speiser v. Randall*, 357 U.S. 513, 519 (1958) (unconstitutional to restrict government benefits when "aimed at the

suppression of dangerous ideas”).

And, of course, it cannot be forgotten that the Commission and the Congress have already imposed obligations of sponsorship disclosure. Those obligations continue in effect. Sifting Commercial Alert’s Complaint and Petition for evidence that the existing sponsorship disclosure requirements have fallen into a quiet desuetude produces no evidence at all. It is a completely adequate response to Commercial Alert’s Complaint and Petition to conclude, as the Federal Trade Commission did in the proceeding paralleling this one, that current law provides an adequate framework to address Commercial Alert’s concerns.

### CONCLUSION

For the foregoing reasons, the Commission should dismiss the Complaint and Petition of Commercial Alert and should vacate its Notice of Proposed Rulemaking.

Respectfully submitted,

**TRINITY CHRISTIAN CENTER OF SANTA ANA, INC.**

By: 

Colby M. May  
James M. Henderson, Sr.  
Its Attorneys

Colby M. May, Esq., P.C.  
205 3<sup>rd</sup> Street, SE  
Washington, D.C. 20003  
202-544-5171  
202-544-5171 fax

Wednesday, September 24, 2008