14-4624-cv

United States Court of Appeals

for the

Second Circuit

PEOPLE OF THE STATE OF NEW YORK, by and through
Eric T. Schneiderman, Attorney General of the State of New York,

Plaintiff-Appellee,

– v. –

ACTAVIS PLC, FOREST LABORATORIES, LLC,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF APPELLANTS AND REVERSAL

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FED R. APP. P. 26.1
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STATEMENT OF INTEREST

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. This case is of central concern to Cato because it implicates the First Amendment's protection of commercial speech and government compulsion of speech. More specifically, Cato files this brief to ensure that the vague injunction is not interpreted as requiring the Appellants to express certain government-prescribed messages on matters of public importance.

All parties have consented to the filing of this brief.[1]

STATEMENT OF THE CASE

"Alzheimer's disease is a progressive, irreversible, incurable disease of the brain that is the most common cause of dementia worldwide." SA 13. Alzheimer's "afflicts more than five million people in the United States and is the sixth leading cause of death in the United States." SA 13. There is no question

[1] Pursuant to Fed. R. App. P. 29(c)(5) and Local R. 29.1, the Cato Institute certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund its preparation and submission.

that commercial speech related to the best medical treatment options for Alzheimer's patients is a matter of grave public concern. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2659 (2011) ("in the fields of medicine and public health, where information can save lives," a "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue" (quotation marks omitted)).

Those suffering from Alzheimer's suffer "problems with memory and other cognitive functions, social skills, planning, and judgment" and eventually develop neuropsychiatric problems including apathy, depression, agitation, and delusions." SA 13-14. For this patient population, therefore, simplicity of drug delivery is particularly important to medical care.

Namenda is a drug used for treating Alzheimer's that acts by "partially blocking the [N-Methyl D-Aspartate] receptor," thereby preventing "toxicity to neurons in the brain." SA 15-16. Of the drugs that have been approved by the FDA for the treatment of Alzheimer's, Namenda is the only one that uses this biochemical mechanism. SA 15-17.

Appellants Forest Laboratories, LLC and its parent company Actavis plc (referred to collectively as "Forest") brought Namenda IR® (hereinafter "IR") to market in 2004. This drug has proven to be "both safe and efficacious" as a treatment for Alzheimer's, with "patients taking Namenda more easily [being able

to] perform common activities of daily living." SA 31. IR must be administered twice a day. SA 31.

Between 2006 and 2014, Forest spent substantial sums of time and resources to research and develop an "improved version" of Namenda that could be administered just once a day. SA 35. These efforts came to fruition when Namenda XR® (hereinafter "XR") was brought to market in June 2013. SA 7. There is no dispute that once-a-day administration can in some circumstances improve Alzheimer's patient outcomes because "persons with memory problems have difficulty taking medication" and so "[f]ewer pills . . . lead[s] to greater compliance with treatment." SA 35. Moreover, "[s]ome Alzheimer's disease patients experience 'sundowning,' which is the tendency . . . to become more confused, anxious, paranoid, and restless later in the day." SA 36 (noting that up to half of "sundowning" Alzheimer's patients have trouble taking medications at night). The great majority of caregivers for Alzheimer's patients report that XR is a "meaningful and welcome improvement" over IR. SA 38.

After XR's release, Forest marketed and sold both drugs to consumers. SA 130. But the company's promotional focus between the two products varied over that time. SA 51-70. Most notably, on February 14, 2014, Forest announced that it would begin the process of phasing out IR and replacing it with the superior XR. SA 51-52. Nevertheless, Forest took steps to ensure that IR would remain

available to patients whose physicians decided it is medically necessary for them to remain on the old drug. SA 65-66.

Forest publicized its plan to transition patients to XR through various means, including open letters on its website, press releases, and "aggressive marketing" by the company's sales representatives. SA 51-52, 56, 60, 63-64, 76. Pharmaceutical marketing is costly. SA 79 (noting the "substantial investment in marketing" that is required to promote pharmaceutical drugs). It generally consists of developing relationships with, communicating with, and advertising to patients, doctors, and health plans. SA 78-80.

By Order dated December 15, 2014 (hereinafter, "Injunction Order" or "Order"), the district court entered an injunction requiring Forest to "continue to make Namenda IR . . . available on the same terms and conditions applicable since July 21, 2013," which it stated was "the date Namenda XR entered the market." SA 137 (Injunction Order ¶ 1); *compare* SA 7 (noting that XR was actually "launch[ed]" in June 2013). The court further required Forest to "inform healthcare providers, pharmacists, patients, caregivers, and health plans of this injunction . . . and the continued availability of Namenda IR in the same or substantially similar manner in which they informed them of [its] plan to discontinue Namenda IR in February 2014." SA 137-38 (Injunction Order ¶ 2).

The injunction is to remain in effect until August 10, 2015. SA 138 (Injunction Order ¶ 4).

Forest requested clarification of the Injunction Order, noting that the "terms and conditions" under which it has marketed IR have varied throughout the 17-month period encompassed by the injunction. Despite acknowledging on the record that it was "not unaware of the difficulties that this [ambiguity] creates for the parties," the district court expressly refused to clarify the scope of the injunction. *See* Brief of Defendants-Appellants, Case No. 14-4624, Dkt. No. 108-1, at 57–58 (2d Cir.). Instead, the court placed the burden of resolving the ambiguity on Forest: "You will have to see what you think it means. I think I know what it means, but we will see . . . . Good luck." *Id.*

SUMMARY OF THE ARGUMENT

The district court's Injunction Order must be reversed because it is impermissibly vague and "therefore fails to provide [Forest] with adequate notice of what conduct is being enjoined." *Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees Int'l Union*, 239 F.3d 172, 174 (2d Cir. 2001) (vacating preliminary injunction on the ground that its terms were impermissibly vague). The Order offers no clarity on what precise "terms and conditions" must be followed by Forest in making IR available, leaving the company in the impossible situation of divining the district court's unarticulated

intent or face a finding of contempt and sanctions. This Court has made clear that an injunction cannot stand if it is so vague that an enjoined party faces "risk of punishment for good faith efforts" to comply with its terms. *Id.*

Even more troubling would be if the Injunction Order were interpreted as requiring Forest to express certain government-prescribed messages on matters of fundamental public importance—namely, the topic of the best available treatment options for the more than five million Americans suffering from Alzheimer's. At minimum, interpreting the Order as compelling Forest to engage in speech that conflicts with its sincerely held and well-substantiated views on how best to treat Alzheimer's would give rise to serious questions as to the Order's constitutionality. Bedrock principles of judicial interpretation require courts to narrowly construe texts so as to avoid grave constitutional concerns. If the Court were to interpret the paragraph one of the Injunction Order at all, it must therefore construe it as not imposing speech obligations on Forest.[2]

[2] Despite being squarely presented with this issue below, *see State of New York v. Actavis*, Civ. No. 14-7473, Dkt. No. 74 (Mem. in Support of Defendants' Mot. to Dismiss Am. Compl.) at 2–3, 13 & n.10 (S.D.N.Y.) (arguing that granting the State's motion for an injunction would "compel speech by [Forest] in violation of the First Amendment"), the district court did not address the First Amendment implications of its Injunction Order. Accordingly, were this Court to interpret paragraph one of the Order as encompassing speech, the injunction would still have to be vacated or reversed outright. This Court has made clear that vacatur is necessary when a district court regulates speech by means of an injunction without adequately conducting the relevant constitutional inquires. *See Salinger v. Colting*, 607 F.3d 68, 84 (2d Cir. 2010).

A contrary construction would violate Forest's First Amendment rights against compelled commercial speech. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (truthful and lawful commercial speech may only be restricted if "the regulation directly advances [a substantial] governmental interest" and "it is not more extensive than is necessary to serve that interest"). Even if the government had a substantial interest in compelling a private party to market and promote what it sincerely believed was an inferior medical treatment to the public, any interpretation of the Injunction Order that mandated such speech would be fatally overbroad. This is true because the government has available to it a range of measures that could achieve the same ends without abridging Forest's First Amendment freedoms. *See United States v. Caronia*, 703 F.3d 149, 165 (2d Cir. 2012) (commercial speech regulation not narrowly tailored if there are "less speech-restrictive alternatives . . . available" to the government).

For the foregoing reasons, in addition to those expressed by Forest in its opening brief, *amicus* respectfully submits that the Injunction Order must be reversed.

ARGUMENT

I. The Injunction Order is Impermissibly Vague.

Rule 65(d) of the Federal Rules of Civil Procedure states that "[e]very order granting an injunction . . . must . . . state its terms specifically" and "describe in reasonable detail . . . the acts or acts restrained or required." Fed. R. Civ. P. 65(d). As the Supreme Court has emphasized repeatedly, "the specificity provisions of Rule 65(d) are no mere technical requirements." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). Injunctions must be precise "to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Id.*; *see also id.* ("Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.").

These concerns take on a constitutional dimension when an injunction is implicates the enjoined party's free speech rights. *See, e.g.*, *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 50–52 (2d Cir. 1996) (noting First Amendment concerns with an injunction order, and vacating the injunction as vague and overbroad under Rule 65(d)); *Metropolitan Opera Ass'n*, 239 F.3d at 179 (same); *see also Winters v. People of State of New York*, 333 U.S. 507, 509 (A law that is "so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free

speech is void" as a violation of due process); *United States v. Williams*, 553 U.S. 28, 304 (2008) (conviction is void for vagueness "if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement").

Here, paragraph one of the Injunction Order requires Forest to "continue to make Namenda IR . . . tablets available" to the public "on the same terms and conditions applicable since July 21, 2013." SA 137. This command is impossibly vague. Because of the district court's refusal to clarify the scope of this provision, Forest is left with no option but to guess at what "terms and conditions" the district court might believe are sufficiently material or relevant to making IR "available" to the market. Accordingly, the district court plainly failed to "describe in reasonable detail . . . the acts or acts restrained or required" by its Order. Fed. R. Civ. P. 65(d). Because of the district court's failure to identify with precision what actions Forest must take to comply with paragraph one of the Order, it faces the "risk of punishment," in the form of a finding of contempt or the imposition of sanctions, despite its "good faith efforts" to comply with its terms. *Metropolitan Opera Ass'n*, 239 F.3d at 178. The Injunction Order is thus incapable of being administered in a rational, standard-driven fashion and must be vacated or reversed. *See id.* at 179 (vacating injunction where "the terms of the injunction are

so vague and imprecise that the [enjoined party] cannot fairly determine what future speech is permitted and what speech might place it in contempt").

II. Constitutional Avoidance Requires Interpreting Paragraph One of the Injunction as Not Compelling Forest to Engage in First Amendment Protected Speech.

A "longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 445 (1988); *see also Ashwander v. TVA*, 297 U.S. 288, 346–347 (1936) (Brandeis, J., concurring). The Court is therefore under an "obligation to avoid constitutional problems" by "narrowly constru[ing]" the Injunction Order's terms. *McConnell v. Fed. Elec. Comm'n*, 540 U.S. 93, 180 (2003). As described more fully below, paragraph one of the Injunction Order cannot be construed as mandating Forest to disseminate particular government-prescribed messages because doing so would violate Forest's First Amendment right against compelled commercial speech. Accordingly, to the extent that paragraph one of the Injunction Order can be interpreted at all, principles of constitutional avoidance require it to be construed as not imposing any speech obligations on Forest.

III. Construing Paragraph One of the Injunction Order As Imposing Speech Obligations on Forest Would Render the Order Unconstitutional.

A. Speech in Aid of Pharmaceutical Marketing Is Protected by the First Amendment.

Commercial speech serves a critical "informational function" for a public comprised of commercial consumers. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish."). Indeed, a "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977). This is especially true "in the fields of medicine and public health, where information can save lives." *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011). The Supreme Court has therefore recognized that "[s]peech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment." *Id.* at 2659.

It is well settled that, just as the First Amendment limits the government's power to prevent people from speaking, "freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006); *see also Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1 (1986) (government

may not compel a utility company to make certain types of speech in a company newsletter included in the company's billing envelope).

B. If Construed as Applying to Speech, Paragraph One of the Injunction Order Would be Content- and Speaker-Based.

Construing the Injunction Order as imposing speech obligations on Forest would render the Order both "content- and speaker based, and therefore, subject to heightened scrutiny." *United States v. Caronia*, 703 F.3d 149, 165 (2d Cir. 2012) (applying "heightened" scrutiny to invalidate commercial speech regulation restricting the promotion of "off-label" uses of pharmaceutical drugs). The Order would be content-based because "it [would] distinguish[] between favored . . . and disfavored speech." *Id.* In particular, the Order would favor speech regarding Forest's older product, IR, by compelling the company to market and promote IR to patients, doctors, health plans, and the general public—in competition with Forest's other, disfavored products. The Order would be speaker-based because it would specifically target only one speaker—Forest—while allowing every other speaker to express themselves freely on the issue. *See id.* (determining that a law "is speaker-based because it targets one kind of speaker—pharmaceutical manufacturers—while allowing others to speak without restriction").

C. Regulations of Commercial Speech Are Only Permissible if They Directly Advance a Substantial Governmental Interest and Are Narrowly Tailored to Advance that Interest.

Under prevailing Second Circuit precedent, commercial speech restrictions are unlawful unless they satisfy *Central Hudson*'s "intermediate" standard of review.[3] For a speech regulation to be lawful under *Central Hudson*, the

[3] "In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory." *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2011); *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid"). The Supreme Court has not yet had occasion to squarely determine whether a less exacting review applies to content- and speaker-based regulations of *commercial*—as opposed to political or personal—speech. This is because in every case potentially raising the issue, the Court has found the speech regulation in question to be invalid under even the "intermediate" scrutiny applicable to ordinary commercial speech regulations. *See, e.g.*, *Sorrell*, 131 S. Ct. at 2667 ("As in previous cases . . . the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied."). In the recent case of *Sorrell v. IMS Health*, however, the Supreme Court noted that content- and speaker-based commercial speech regulations must be subjected to "heightened scrutiny" under the First Amendment. *Id.* As even the dissent in that case recognized, the Supreme Court's use of this phrase "suggest[s] a standard yet stricter than *Central Hudson*." *Id.* at 2677 (Breyer, J., dissenting).

This Court, however, has applied *Central Hudson*'s unadorned "intermediate" standard of review for content- and speaker-based restrictions on commercial speech, even after finding *Sorrell*'s "heightened scrutiny" applied. *See Caronia*, 703 F.3d at 164–69. This aspect of the Second Circuit's First Amendment precedent may be inconsistent with the Supreme Court's pronouncement of a "heightened scrutiny" for such speech regulations

Also counseling in favor of a more exacting review than the ordinary *Central Hudson* standard is the fact that the speech restriction at issue here arises from a judicial order, rather than a law or regulation enacted by a popularly elected branch of government. It is well established that judicial orders restricting freedom of speech are especially disfavored. *See Tory v. Cochran*, 544 U.S. 734, 738

government "must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Sorrell*, 131 S. Ct. at 2667–68; *see Central Hudson*, 447 U.S. at 566 (truthful and lawful commercial speech may only be restricted if "the regulation directly advances [a substantial] governmental interest" and "it is not more extensive than is necessary to serve that interest"). To survive the narrow tailoring inquiry, "[t]here must be a fit between the [government's] ends and the means chosen to accomplish those ends" such that "the State's interests are proportional to the resulting burdens placed on speech." *Sorrell*, 131 S. Ct. at 2668. To be sufficiently "narrowly drawn," the speech regulation must not be "more extensive than necessary to achieve the government's substantial interests," and there must not be "less speech-restrictive alternatives . . . available" that would equally serve those interests. *Caronia*, 703 F.3d at 167.[4]

(2005) (judicially imposed "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights").

[4] "[P]urely factual and uncontroversial . . . disclosure requirements" are subject to a more lenient standard of review that asks merely whether the regulation is "reasonably related to the State's interest in preventing deception of consumers." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650 (1985). The Supreme Court has since clarified that *Zauderer*'s scope is limited to situations where the speech regulation in question is "necessary to make voluntary advertisements nonmisleading to consumers." *United States v. United Foods*, 533 U.S. 405, 416 (2001). There has never been any suggestion that Forest's promotional activities were deceptive or misleading.

D. Construing Paragraph One of the Injunction Order as Applying to Speech Would Render It Unconstitutional.

If construed as compelling Forest to engage in First Amendment-protected "speech in aid of pharmaceutical marketing," *Sorrell*, 131 S. Ct. at 2659, paragraph one of the Injunction Order would be unconstitutional. *See Central Hudson*, 447 U.S. at 566. Even assuming the government had a substantial interest in ensuring "reduced drug costs for patients and health plans after generic entry [while] still provid[ing] patients with the same therapeutic benefits as the brand," SA 25, compelling Forest to engage in speech would not be a narrowly tailored means of advancing that interest. As in *United States v. Caronia*, where this Court struck down as inconsistent with the First Amendment an FDA regulation banning promotion of off-label uses for drugs, there are many other, less speech-restrictive alternatives by which the government could achieve its goal. 703 F.3d at 168; *see also Thompson v. Western States Medical Ctr.*, 535 U.S. 357, 373 (2002) ("If the First Amendment means anything, it means that regulating speech must be a last—not first—resort.").

Most notably, the government itself could engage in the speech compelled by the Injunction Order, or take other non-speech related measures to ensure that its preferred message is delivered to patients, doctors, and the general public. *See Caronia*, 703 F.3d at 168 (law not narrowly tailored because government itself could achieve its desired ends by means other than restricting First Amendment

freedoms). "The theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). "Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates." *Id.*

Moreover, even if some minimal amount of speech compulsion were necessary to further the government's interest in reduced drug costs with no diminution in therapeutic benefits, construing paragraph one of the Injunction Order as applying to speech would still render it impermissibly overbroad. *Central Hudson* requires the district court to ensure "a fit between the [government's] ends and the means chosen to accomplish those ends" such that "the State's interests are proportional to the resulting burdens placed on speech." *Sorrell*, 131 S. Ct. at 2668. Construing the phrase "terms and conditions" as referring to speech would transform paragraph one into a broad, indiscriminate command that Forest promote the availability of IR and sell it "on the same terms and conditions" as before. Narrow tailoring, at minimum, requires *some* refinement of the scope of speech subject to government compulsion.

The temporary nature of the Injunction Order would not save it from being impermissibly overbroad and therefore subject to reversal. It is well established that any violation of a constitutional right, no matter the duration, is intolerable and constitutes irreparable harm under the preliminary injunction standard. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury."); *Statharos v. N.Y. City Taxi and Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir.1999) ("Because plaintiffs allege deprivation a constitutional right, no separate showing of irreparable harm is necessary."); *see also Reed v. Town of Gilbert*, No. 13-502, Oral Arg. Tr. 12-18 (Jan 12, 2015) (Chief Justice Roberts, and Justices Scalia, Kennedy, Alito, and Sotomayor expressing skepticism that the temporary nature of a content-based commercial speech restriction is sufficient it to save it from invalidation under the First Amendment); Adam Liptak, *Justices Seem Unsettled by Ordinance Restricting Arizona Town's Signs*, N.Y. TIMES, Jan. 12, 2015, at A17 (same).

E. Construing Paragraph One of the Injunction Order as Applying to Speech Would Also Violate Forest's First Amendment Right Not to Be Forced to Subsidize Speech with which It Disagrees.

It is well established that the First Amendment prevents the government "from compelling certain individuals to pay subsidies for speech to which they object." *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (citing

Abood v. Detroit Bd. Of Ed., 431 U.S. 209 (1977)). Commercial entities also enjoy a First Amendment right against being compelled to subsidize speech that is inconsistent with their own commercial messages. *See United Foods*, 533 U.S. 405. In *United Foods*, the Supreme Court faced a challenge to a regulation that required mushroom producers to subsidize commercial advertisements extolling the benefits of mushrooms generally. *Id.* at 411. A mushroom producer sued, contending that the regulation infringed on its right to express the message that "its brand of mushrooms is superior to those grown by other producers." *Id.* Recognizing that "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that [the government] favors," the Supreme Court invalidated the law as inconsistent with the producer's right to be free from compelled speech. *Id.*

If paragraph one of the Order were construed as applying to speech, it would exhibit the same dangers that animated the Supreme Court in *United Foods*.[5] Such

[5] Indeed, the "First Amendment values" threatened by construing paragraph one of the Injunction Order as applying to speech are far greater than those at stake in *United Foods*. Free and uninhibited public discourse on the best medical treatment options for the five million Americans suffering from Alzheimer's is of paramount public concern. This weighty public health issue stands in stark contrast to what the Supreme Court recognized was the "minor" issue of mushroom quality at issue in *United Foods*. *Id.* The speech at issue here is no less deserving of First Amendment protection than speech regarding mushroom quality. If the

a construction would require Forest to expend considerable sums in service of a message with which it disagrees: promotion of a drug it sincerely believes is an inferior method for treating Alzheimer's compared to another drug available on the market. As the district court acknowledged, the costs that would be associated with making such speech are considerable. SA 78-80 (noting the "substantial investment in marketing" that is required to promote pharmaceutical drugs); *see also Sorrell*, 131 S. Ct. at 2660 (noting that "detailing"—or marketing drugs directly to doctors through direct consultations—"is an expensive undertaking").

The government is free to expend its own funds to disseminate its preferred message on the best treatment options for Alzheimer's. Moreover, even if current jurisprudence allows the government in certain circumstances to force private entities to subsidize the government's own speech, there is no question that the speech that would be compelled by a speech-restrictive interpretation of the Injunction Order would be Forest's own. *See Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 560 (2005) (upholding forced subsidization of promotional campaign because "[t]he message set out in the beef promotions is from beginning to end the message established by the Federal Government"). There is no question that Forest, not the government, designed and delivered its promotion and marketing of IR.

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government cannot compel speech regarding the latter, it surely cannot prescribe certain messages regarding the former.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the Injunction Order must be reversed.

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Dated: January 15, 2015

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,651 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of January, 2015, I filed the foregoing Brief as Amicus Curiae in support of Appellants with the Clerk of the United States Court of Appeals for the Second Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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