

Seventh Circuit Review

Volume 10 | Issue 2

Article 6

5-1-2015

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Recommended Citation

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**MJ STILL WINNING IN CHICAGO: THE SEVENTH
CIRCUIT CORRECTLY HOLDS THAT JEWEL-
OSCO'S USE OF MICHAEL JORDAN'S LIKENESS
IN ITS ADVERTISEMENT CONSTITUTED
COMMERCIAL SPEECH**

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Cite as: Michael A. Albert, *MJ Still Winning in Chicago: The Seventh Circuit Correctly Holds That Jewel-Osco's Use of Michael Jordan's Likeness in Its Advertisement Constituted Commercial Speech*, 10 SEVENTH CIRCUIT REV. 386 (2015), at <http://www.kentlaw.iit.edu/Documents/Academic Programs/7CR/v10-2/albert.pdf>.

INTRODUCTION

The First Amendment to the U.S. Constitution declares that “Congress shall make no law . . . abridging the freedom of speech.”¹ It is widely understood that the First Amendment’s core purpose is to protect political speech from governmental suppression.² Yet, the First Amendment’s text does not indicate that its protections apply only to

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¹ U.S. CONST. amend I. The First Amendment is applicable to the States via the Fourteenth Amendment’s Due Process Clause. *City of Cincinnati v. Discovery Network, Inc.*, et al., 507 U.S. 410, 412 n.1 (1993) (internal citations omitted).

² *See, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (“The First Amendment reflects a ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.’”) (internal citations omitted).

certain kinds of speech.³ Thus, individuals have sought to apply the First Amendment's protection to other forms of speech, including speech that is commercial in nature.

Initially, the U.S. Supreme Court declined to apply the First Amendment's protections to commercial speech, but, in 1976, the Court granted commercial speech a limited degree of First Amendment protection.⁴ However, since then the Court has struggled to define the distinction between commercial speech and speech that is fully protected by the First Amendment.⁵ The Court often avoids the issue, alluding to the "commonsense distinctions" between commercial speech and "other varieties," without any explanation of what qualifies as a "commonsense distinction."⁶

In early 2014, the U.S. Court of Appeals for the Seventh Circuit addressed the distinction between commercial speech and noncommercial speech in the context of a private law dispute.⁷ In 2012, the U.S. District Court for the Northern District of Illinois held that a supermarket's one-page tribute to Michael Jordan on his Basketball Hall of Fame induction in a special edition issue of *Sports Illustrated* was noncommercial speech that was fully protected by the First Amendment.⁸ On appeal, the Seventh Circuit unanimously reversed the district court's decision.⁹ The Seventh Circuit considered the entire context surrounding the supermarket's one-page tribute to Jordan, and the court held that it was a form of image advertising linked to Jordan for the primary purpose of promoting the

³ Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 631 (1990) ("nothing in the text of the First Amendment creates a distinction between commercial and noncommercial speech.").

⁴ Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council (Va. Pharmacy), 425 U.S. 748, 762 (1976).

⁵ See *Cincinnati*, 507 U.S. at 419 (acknowledging "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category").

⁶ E.g., *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995).

⁷ *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014).

⁸ *Jordan v. Jewel Food Stores, Inc.*, 851 F. Supp. 2d 1102, 1112 (N.D. Ill., 2012).

⁹ *Jordan*, 743 F.3d at 512.

supermarket's brand.¹⁰ Thus, the Seventh Circuit held the supermarket's ad was commercial speech.¹¹

Part I of this comment provides a summary of the commercial speech doctrine from its inception to the present. Part II explains the difficulty of applying the commercial speech doctrine in the context of a private-law dispute and examines other court's differing applications of the commercial speech doctrine in similar cases. Part III reviews the factual and procedural context of *Jordan v. Jewel Food Stores, Inc.*, as well as the district court's and Seventh Circuit's holdings. Finally, part IV analyzes the Seventh Circuit's reasoning, and argues that the Seventh Circuit's flexible application of the commercial speech doctrine is the best path forward in private-law commercial speech cases.

I. THE EVOLUTION OF THE COMMERCIAL SPEECH DOCTRINE

A. *The Old Rule: No Protection for Commercial Speech*

Although the First Amendment was ratified in 1792, it was not until 1942 that an individual claimed constitutional protection for a commercial expression.¹² In *Valentine v. Christensen*, the respondent charged customers a fee to view the submarine he displayed in New York City's State pier.¹³ The respondent attempted to distribute handbills advertising the fee to see his submarine in the city streets, but such commercial advertising was prohibited under the city's sanitary code.¹⁴ However, the city informed respondent that he could distribute his handbills in the streets as long as they concerned "information or a public protest."¹⁵ In response, respondent created a double-sided handbill; one side contained the original advertisement

¹⁰ *Id.*

¹¹ *Id.*

¹² *Valentine v. Christensen*, 316 U.S. 52 (1942)

¹³ *Id.* at 52-53.

¹⁴ *Id.* at 53.

¹⁵ *Id.*

without reference to the fee, and the other side protested the city's prohibition on his use of city facilities to display his submarine.¹⁶ Respondent distributed the double-sided handbill and was cited by the police.¹⁷ He alleged the city's restriction of his commercial advertising violated his First Amendment guarantee to free speech.¹⁸

The U.S. Supreme Court denied respondent's challenge, finding it was "clear the Constitution impose[d] no such restraint on government as [it] respects purely commercial advertising."¹⁹ The Court determined that respondent's distribution of his handbill was not an exercise of his First Amendment freedoms because he merely added the protest of the city's decision to his handbill solely to evade compliance with the ordinance.²⁰ Thus, without citing any precedent, the Court held that commercial speech did not receive any First Amendment protection from governmental regulation.²¹ However, the Court quickly began to question its decision's validity.²²

B. *The Valentine Rule's Erosion*

Over the next several decades the "commercial speech" exception to the First Amendment" created in *Valentine* began to erode.²³ In 1959, Justice Douglas, a member of the *Valentine* Court's unanimous decision, stated that the *Valentine* "ruling was casual, almost offhand.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 54.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*; see also *Kozinski & Banner*, *supra* note 3, at 628 (stating that the *Valentine* decision "cites no authority").

²² See *Bigelow v. Virginia*, 421 U.S. 809, 820 n.6 (1975) (*citing* *Lehman v. City of Shaker Heights*, 418 U.S. 298, 314 n.6 (1974) (Brennan, J., concurring) ("There is some doubt concerning the 'commercial speech' distinction announced in *Valentine v. Christensen* . . . retains continuing validity.").

²³ *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 91 (1977).

And it has not survived reflection.”²⁴ Only five years later, the Supreme Court found a newspaper advertisement both criticizing police action and seeking contributions to the civil rights movement was entitled to the “same degree of protection as ordinary speech.”²⁵

In the following decade the U.S. Supreme Court again rejected the idea that commercial speech was outside the purview of First Amendment protections.²⁶ In *Pittsburgh Press Company v. The Pittsburgh Commission on Human Relations*, the Supreme Court noted that newspaper employment advertisements were “classic examples of commercial speech.”²⁷ However, the Court sustained a governmental regulation prohibiting newspapers from segregating between jobs requesting male and female applicants because the advertisement’s commercial proposals were themselves illegal.²⁸ Thus, the Court upheld the regulation because the advertisements were illegal, not because commercial speech itself was unworthy of constitutional protection.²⁹

Only two years after *Pittsburgh Press*, the U.S. Supreme Court in *Bigelow v. Virginia* reaffirmed that the *Valentine* Court’s “holding [was] a distinctly limited one.”³⁰ In *Bigelow*, the appellant was convicted under a state statute that prohibited the publication of information that could encourage abortions.³¹ The appellant argued that the state statute violated his First Amendment right to free speech.³² The Supreme Court distinguished this case from *Valentine*,

²⁴ *Bigelow*, 421 U.S. at 820 n.6 (1975) (citing *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J. concurring)).

²⁵ *Bigelow*, 421 U.S. at 820 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).

²⁶ *Pittsburgh Press Co. v. The Pittsburgh Comm’n on Human Rel. Comm’n*, 413 U.S. 376, 385 (1973).

²⁷ *Id.*

²⁸ *Bigelow*, 421 U.S. at 821 (citing *Pittsburgh Press Co.*, 413 U.S. at 385).

²⁹ *Bigelow*, 421 U.S. at 821 (“The illegality of the activity was particularly stressed.”)

³⁰ *Id.* at 819.

³¹ *Id.* at 811.

³² *Id.*

noting that the *Valentine* ordinance “was upheld as a reasonable regulation of the manner in which commercial advertising could be distributed.”³³ The Court further stated that *Valentine* obviously does not stand “for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge.”³⁴

Moreover, the *Bigelow* Court stressed that its decision in *Pittsburg Press* reaffirmed the principle “that commercial advertising enjoys a degree of First Amendment Protection.”³⁵ The *Bigelow* Court held that appellant’s advertisement “did more than simply propose a commercial transaction” because it “contained factual material of clear public interest.”³⁶ Thus, the Court concluded that appellant’s advertisement was not “stripped of all First Amendment protection.”³⁷ Consequently, after *Bigelow*, “the notion of unprotected ‘commercial speech’ all but passed from the scene.”³⁸ One year after *Bigelow*, the Supreme Court explicitly overruled its *Valentine* decision.³⁹

C. *The Birth of Modern Commercial Speech Doctrine*

In 1976, the U.S. Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* established what is now known as modern commercial speech doctrine.⁴⁰ In *Virginia Pharmacy*, the appellees challenged a Virginia statute that prohibited pharmacists from advertising prescription drug prices.⁴¹ The Supreme Court bluntly stated the issue was “whether there [was] a First

³³ *Id.* at 819.

³⁴ *Id.* at 819-20.

³⁵ *Id.* at 821.

³⁶ *Id.* at 822.

³⁷ *Id.*

³⁸ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council (Va. Pharmacy)*, 425 U.S. 748, 759 (1976).

³⁹ *Id.* at 760-61.

⁴⁰ *Id.*

⁴¹ *Id.* at 749-50.

Amendment exception for ‘commercial speech.’”⁴² The Court held that information conveyed through commercial speech serves the First Amendment goals of smart and informed public decision making.⁴³ Thus, the *Virginia Pharmacy* Court held that commercial speech was entitled to constitutional protection.⁴⁴ However, the Supreme Court noted that commercial speech only received a “degree” of First Amendment protection.⁴⁵

D. Why The Supreme Court Deemed Commercial Speech Worthy of Constitutional Protection

In *Virginia Pharmacy*, the Supreme Court held that although commercial speech was entitled to First Amendment protection, it could still be reasonably regulated by the state.⁴⁶ The *Virginia Pharmacy* Court offered several policy rationales for its grant of limited First Amendment protection for commercial speech.⁴⁷ Since *Virginia Pharmacy* the Supreme Court has on occasion elaborated and expanded on these rationales.⁴⁸

1. Why Grant Commercial Speech First Amendment Protection At All?

The Supreme Court found commercial speech receives First Amendment protection because it contributes to the free flow of information, which is at the heart of the First Amendment.⁴⁹ The

⁴² *Id.* at 760-61.

⁴³ *Id.* at 765.

⁴⁴ *Id.* at 771 n.24.

⁴⁵ *Id.*

⁴⁶ *Id.* at 770.

⁴⁷ *Id.* at 771 n.24.

⁴⁸ *E.g.*, *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

⁴⁹ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council (Va. Pharmacy)*, 425 U.S. 748, 765 (1976); *see, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

Supreme Court in *Virginia Pharmacy* phrased the question of First Amendment protection for commercial speech in this way: whether a commercial advertisement “is so removed from any ‘exposition of ideas,’ and from ‘truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,’ that it lacks all protection.”⁵⁰ The Court noted that, to a consumer in need of affordable medication, prescription drug prices might be more important than the “day’s most urgent political debate.”⁵¹ Thus, as the Supreme Court stated in *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, “the extension of First Amendment protection to commercial speech is justified principally by the value” of the information it provides to individual consumers.⁵²

Moreover, in addition to the individual consumer, the *Virginia Pharmacy* Court found that society as a whole also has a strong interest in the free flow of commercial information.⁵³ The Court noted that entirely commercial expressions might be of general public interest, such as advertisements for legal abortion services or advertisements for businesses that produce products in the United States instead of abroad.⁵⁴ Accordingly, commercial expression receives First Amendment protection because it “furthers the societal interest in the fullest possible dissemination of information.”⁵⁵

Finally, the *Virginia Pharmacy* Court observed that because the allocation of resources in a free enterprise economy is made through the aggregate of individual economic decisions, it is a matter of public interest that those decisions be “intelligent and well informed.”⁵⁶ Thus, the Court determined the free flow of commercial information was

⁵⁰ *Va. Pharmacy*, 425 U.S. at 762.

⁵¹ *Id.* at 763.

⁵² *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985).

⁵³ *Va. Pharmacy*, 425 U.S. at 764.

⁵⁴ *Id.*

⁵⁵ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561-62 (1980).

⁵⁶ *Va Pharmacy*, 425 U.S. at 765.

indispensable to “the proper allocation of resources in a free enterprise economy.”⁵⁷ The *Virginia Pharmacy* Court further noted that the free flow of commercial speech was indispensable to the formation of intelligent opinions about how the economy “ought to be regulated or altered.”⁵⁸ Therefore, the Supreme Court reasoned that the free flow of commercial information indirectly served the First Amendment interest of “enlighten[ing] public decision making.”⁵⁹ Thus, commercial speech is entitled to First Amendment protection because it “performs an indispensable role in the allocation of resources in a free enterprise system” by informing the public “of the availability, nature, and prices of products and services.”⁶⁰

2. Why Protect Commercial Speech Less Than Expressive Speech?

While the First Amendment’s protections do apply to commercial speech, those protections are less extensive than those afforded to other forms of expression because governments retain the right to ensure that the flow of commercial information is “truthful and legitimate.”⁶¹ The Supreme Court in *Ohralik v. Ohio State Bar Ass’n* reasoned that commercial speech content may be regulated because consumer consumption of false or misleading commercial information would actually run counter to “the individual and societal interests . . . in facilitating ‘informed and reliable decision making.’”⁶² Thus, “content-based restrictions on commercial speech” are permissible

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *City of Cincinnati v. Discovery Network, Inc., et al.*, 507 U.S. 410, 412 n.17 (1993) (citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977)).

⁶¹ *Va. Pharmacy*, 425 U.S. at 771 n.24.

⁶² *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 457-58 (1978) (citing *Bates*, 433 U.S. at 364.)

because of the “greater potential for deception or confusion” in advertising.⁶³

Specifically, the *Virginia Pharmacy* Court determined that regulation of commercial speech was constitutionally permissible for two reasons. First, the Supreme Court explained that some content-based regulation of commercial speech to protect consumers was permissible because the truth of commercial speech is “more easily verifiable by its disseminator.”⁶⁴ The Court determined that an advertiser’s claims about his own specific product or service are more easily verifiable because the truth of his claims are subject to greater objectivity than, for instance, a politician’s comments on politics or a reporter’s version of the news.⁶⁵ Therefore, the *Virginia Pharmacy* Court reasoned that it is unlikely that a government prohibition on deceptive advertising would chill commercial speech because advertisers possess the requisite information about their products and services to be sure that their claims are truthful.⁶⁶ As a result, commercial speech receives a lesser degree of First Amendment protection than “other constitutionally safeguarded forms of expression.”⁶⁷

Second, the *Virginia Pharmacy* Court further held that commercial speech regulation was appropriate because it is “more durable than other kinds” of speech.⁶⁸ The Supreme Court reasoned that because commercial advertising is instrumental to profits “there is little likelihood of its being chilled by proper regulation.”⁶⁹ Accordingly, commercial speech receives less constitutional protection than other forms of speech because advertising’s importance to profits makes it less likely “to be inhibited by proper regulation.”⁷⁰

⁶³ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983).

⁶⁴ *Va. Pharmacy*, 425 U.S. at 771 n.24.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Bolger*, 463 U.S. at 64-65.

⁶⁸ *Va. Pharmacy*, 425 U.S. at 771 n.24.

⁶⁹ *Id.*

⁷⁰ *Rogers v. Friedman*, 440 U.S. 1, 10 (1979).

Lastly, the Supreme Court granted commercial speech less First Amendment protection than noncommercial speech out of fear that offering commercial speech equal protection will dilute the strength of the First Amendment as a whole.⁷¹ In *Ohralik*, the Supreme Court noted that commercial speech “occurs in an area traditionally subject to government regulation,” and thus warned that a requirement of equal constitutional protection for commercial and noncommercial speech “could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to” noncommercial speech.⁷² Accordingly, the Supreme Court determined that because commercial speech weighed less “on the scale of First Amendment values,” it was safer to grant commercial speech a “limited measure” of constitutional protection rather than potentially “subject the First Amendment to such a devitalization.”⁷³

E. From Virginia Pharmacy to the Present: The U.S. Supreme Court’s Struggle to Define the Distinction Between Commercial Speech and Noncommercial Speech

The *Virginia Pharmacy* Court’s grant of limited First Amendment protection fostered a new doctrine of free speech jurisprudence; however, that doctrine is chaotic.⁷⁴ The U.S. Supreme Court acknowledged that the contours of commercial speech are difficult to delineate, and often the Court avoids the issues and merely assumes the challenged speech is commercial speech.⁷⁵ In fact, the Supreme Court had an opportunity to clarify the commercial speech doctrine, but punted instead by dismissing a writ of certiorari as improvidently

⁷¹ *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See Kathryn E. Gilbert, *Commercial Speech in Crisis: Crisis Pregnancy Center Regulations and Definitions of Commercial Speech*, 111 Mich. L. Rev. 591, 596 (2013) (“Commercial Speech doctrine is a mess.”)

⁷⁵ *City of Cincinnati v. Discovery Network, Inc., et al.*, 507 U.S. 410, 419, 424 (1993).

granted.⁷⁶ Not surprisingly, judges and scholars disagree as to the commercial speech doctrine's proper interpretation and application.⁷⁷ Thus, the commercial speech doctrine remains open to interpretation.⁷⁸

Nevertheless, the U.S. Supreme Court's convoluted precedents offer several methods to determine whether an expression constitutes "commercial speech."⁷⁹ These methods outline a spectrum that demonstrates the degree to which an expression is "commercial," i.e. whether speech is purely commercial, sufficiently commercial, or noncommercial.⁸⁰ The Supreme Court created roughly four different methods to distinguish between commercial and noncommercial speech for First Amendment purposes.⁸¹ These methods can be characterized as (1) the "core" or "pure" commercial speech test, (2) the "expanded core" commercial speech test, (3) the "*Bolger* framework" for mixed speech, and (4) the "inextricably intertwined" exception.⁸² These methods build on one another; most courts start with the "core" or "pure" commercial speech test and then, if not satisfied, move on to another.⁸³ The Supreme Court's unwillingness to author a uniform commercial speech test makes it difficult to draw the

⁷⁶ See Tom Bennigson, *Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 Conn. L. Rev. 379, 381-82 (2006) (citing *Nike v. Kasky*, 539 U.S. 654, 655 (2003)).

⁷⁷ See Gilbert, *supra* note 72, at 596.

⁷⁸ *Id.*

⁷⁹ See *Cincinnati*, 507 U.S. at 422-23.

⁸⁰ See *id.*; see also *Bd. of Tr. v. Fox*, 492 U.S. 469, 474-475 (1989).

⁸¹ See *Cincinnati*, 507 U.S. at 422-23; see also *Fox*, 492 U.S. at 474-475.

⁸² See *Cincinnati*, 507 U.S. at 422-423; see generally *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council (Va. Pharmacy)*, 425 U.S. 748, 759 (1976); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Fox*, 492 U.S. 469.

⁸³ See, e.g., *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 517-522 (7th Cir. 2014).

bright lines necessary to properly distinguish commercial speech from noncommercial speech.⁸⁴

1. The “Core” or “Pure” Commercial Speech Test

In *Virginia Pharmacy*, the U.S. Supreme Court defined commercial speech as “speech which does no more than propose a commercial transaction.” Notably, the *Virginia Pharmacy* Court first framed the issue generally as whether an advertisement proposing to sell “X prescription drug at the Y price . . . [was] wholly outside” the First Amendment’s protections.⁸⁵ However, the Court then refined and restated the issue as “whether speech which does ‘no more than propose a commercial transaction’” receives any First Amendment protection.⁸⁶ The *Virginia Pharmacy* Court held that commercial speech is entitled to a degree of constitutional protection, and thus affirmatively declared that speech “which does no more than propose a commercial transaction” constitutes commercial speech.⁸⁷ Yet, the Court left several important questions unanswered.

The *Virginia Pharmacy* Court did not elaborate on whether it was a necessary or merely sufficient condition of commercial speech that it “do no more than propose a commercial transaction.”⁸⁸ In other words, it was unclear whether speech that communicated information unrelated to the proposal of a commercial transaction, but nonetheless indirectly proposed a commercial transaction, could constitute commercial speech for First Amendment purposes.⁸⁹ However, while

⁸⁴ See Gilbert, *supra* note 72, at 596 (Describing wildly different commercial speech doctrine interpretations and applications because “the Court has never articulated a singular definition, test, or set of tests for what commercial speech is.”).

⁸⁵ *Va. Pharmacy*, 425 U.S. at 761.

⁸⁶ *Id.* at 762.

⁸⁷ *Id.* at 771 n.24; see, e.g., *Cincinnati*, 507 U.S. at 421 (“We held that even speech that does no more than propose a commercial transaction is protected by the First Amendment.”).

⁸⁸ *Va. Pharmacy*, 425 U.S. at 771 n.24

⁸⁹ See Gilbert, *supra* note 72, at 598-99 (Describing lower court disagreements over the necessary conditions for classifying expression as commercial speech).

it was unclear if the latter could be characterized as commercial speech, there was no question that the former qualified as commercial speech.⁹⁰

Moreover, the *Virginia Pharmacy* Court indicated that an advertisement offering “X prescription drug at the Y price,” was a prime example of speech that “did no more than propose a commercial transaction.”⁹¹ Consequently, courts regard speech that solely and explicitly communicates the fundamental components necessary to a commercial transaction, such as price and product, as “the core notions” of commercial speech, or as “pure” commercial speech.⁹²

In addition to explicit references of product price, the Supreme Court in *Bolger v. Youngs Drug Products. Corp.* held that speech explicitly communicating information regarding a product’s availability, quality, or quantity constitutes core commercial speech.⁹³ Similarly, the *Pittsburgh Press* Court described offers to buy and sell employment services as “classic examples of commercial speech.”⁹⁴ Moreover, the *Ohralik* Court held a lawyer’s in-person solicitation of a prospective client was an “[e]xpression concerning [a] purely commercial transaction.”⁹⁵ In all of these aforementioned cases, the Court found the advertisements were “pure” commercial speech because in each case the advertisements conveyed information that “did no more than propose a commercial transaction.”⁹⁶

While the Supreme Court has identified explicit and direct expressions that communicate only the fundamental components necessary to a commercial transaction as “pure” commercial speech,

⁹⁰ *Va. Pharmacy*, 425 U.S. at 771 n.24.

⁹¹ *Id.* at 761-62.

⁹² *E.g.*, *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

⁹³ *Id.* at 62-63 (finding that a “multi-page, multi-item flyers promoting a large variety of products available at a drug store” fell “within the core notion of commercial speech”).

⁹⁴ *Pittsburgh Press*, 413 U.S. at 385 (describing help-wanted advertisements as “no more than a proposal of possible employment”).

⁹⁵ *Ohralik*, 436, U.S. at 455-57.

⁹⁶ *See generally Bolger*, 463 U.S. at 62-63; *Pittsburgh Press*, 413 U.S. at 385; *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-57 (1978).

the Court has also found implicit and indirect commercial expressions to be “core” commercial speech. The Supreme Court in *Friedman v. Rogers*, held an optometry practice’s use of a trade name was “part of a proposal of a commercial transaction” because the trade name implicitly conveyed information about the prices and services the practice offered.⁹⁷ Similarly, in *Linmark Associates, Inc. v. Willingboro Tp.*, the Court held a homeowner’s display of “for sale” and “sold” signs was indirect speech that “did no more than propose a commercial transaction.”⁹⁸

However, in other cases the Supreme Court drew a narrower scope of “pure” commercial speech. In *Village of Schaumburg v. Citizens for a Better Environment*, the Court held that charitable solicitations were not “a variety of purely commercial speech” because they “did more than inform private economic decisions” and were “not primarily concerned with providing information about the . . . costs of goods and services.”⁹⁹ Similarly, in *Glickman v. Wileman Bros & Elliot, Inc.*, Justice Souter, in dissent, stated that a California fruit campaign’s use of symbolic and emotional techniques to convey messages far removed from proposals to sell fruit “went well beyond the ideal type of pure commercial speech . . . [that did] ‘no more than propose a commercial transaction.’”¹⁰⁰ Accordingly, speech containing elements beyond those necessary to propose a commercial transaction is not considered “pure” commercial speech.

The “core” or “pure” commercial speech analysis is conducted first because it is the most easily discernable form of commercial expression.¹⁰¹ Thus, if a court finds the challenged speech falls within

⁹⁷ *Friedman v. Rogers*, 440 U.S. 1, 11-13 (1979).

⁹⁸ *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 91 (1977).

⁹⁹ *Vill. of Schaumburg v. Citizens for a Better Env’t.*, 440 U.S. 620, 632 (1980).

¹⁰⁰ *Glickman v. Wileman Bros & Elliot, Inc.*, 521 U.S. 457, 479 n.1 (1997) (Souter, J., dissenting) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council (Va. Pharmacy)*, 425 U.S. 748, 762 (1976)).

¹⁰¹ *See, e.g., Bolger*, 463 U.S. at 66-67.

the boundaries of core commercial speech, the inquiry ends.¹⁰² However, it is generally accepted that speech can be overwhelmingly commercial in nature, but still do more than merely propose a commercial transaction.¹⁰³ Thus, the Supreme Court formulated a second commercial speech definition to determine whether an expression is commercial or noncommercial speech.¹⁰⁴

2. The “Expanded” Commercial Speech Test

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the U.S. Supreme articulated a broader definition of commercial speech.¹⁰⁵ The Court defined it as “expression related solely to the economic interests of the speaker and its audience.”¹⁰⁶ At issue in *Central Hudson* was a state regulation ordering electric utility companies “to cease all advertising” promoting the use of electricity because of a fuel shortage.¹⁰⁷ The regulation allowed informational advertising not clearly intended to promote sales, but it prohibited advertising intended to stimulate utility sales as contrary to national conservation policy.¹⁰⁸ The appellant challenged the regulatory ban on promotional advertising as an unlawful restraint on commercial speech.¹⁰⁹

The Supreme Court determined that the state’s total ban on any form of promotional advertising restricted only commercial speech

¹⁰² See *id.* (“Proper classification” of speech containing commercial and noncommercial elements “presents a closer question.”).

¹⁰³ See Kozinski & Banner, *supra* note 3, at 639-640 (explaining examples of speech that does more than merely propose a commercial transaction, “but was obviously intended to propose a transaction”).

¹⁰⁴ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

¹⁰⁵ *City of Cincinnati v. Discovery Network, Inc., et al.*, 507 U.S. 410, 423 (1993).

¹⁰⁶ *Central Hudson*, 447 U.S. at 561; see also *Cincinnati*, 507 U.S. at 423.

¹⁰⁷ *Central Hudson*, 447 U.S. at 559.

¹⁰⁸ *Id.* at 560.

¹⁰⁹ *Id.*

because the regulation's ban specifically "excluded 'institutional and informational' messages."¹¹⁰ The *Central Hudson* Court acknowledged that states could create content-based commercial speech regulations, but the Court concluded that the state's promotional advertising ban violated the First Amendment because the regulation was more extensive than necessary to serve the states conservation interests.¹¹¹

Two of the *Central Hudson* Court's concurring Justices criticized the majority's definition of commercial speech.¹¹² Justice Stevens in his concurrence, joined by Justice Brennan, found the state's complete ban on promotional advertising extended beyond "mere proposals to engage in certain kinds of commercial transactions."¹¹³ Justice Stevens determined the state's order restricted expression "relating to the production and consumption of electrical energy" which he described as "questions frequently discussed and debated by our political leaders."¹¹⁴ Thus, Justice Stevens concluded that the state's regulation allowed for the suppression of fully protected First Amendment speech "because it would outlaw . . . advertising that promoted electricity consumption by touting [its] environmental benefits."¹¹⁵ As a result, Justice Stevens criticized the *Central Hudson* majority's definition of commercial speech as "unquestionably too broad."¹¹⁶

In response, the *Central Hudson* majority declared there was "no support" for Justice Stevens' claims.¹¹⁷ The majority determined that Justice Stevens' narrow definition of commercial speech would "grant broad constitutional protection to any advertising that links a product

¹¹⁰ *Id.* at 561-562 n.5

¹¹¹ *Id.* at 571-72.

¹¹² *Id.* at 579-81 (Stevens, J., concurring) (arguing that the constitutional definition of commercial speech "should not include the entire range of communication that is embraced within the term 'promotional advertising'").

¹¹³ *Id.* at 580.

¹¹⁴ *Id.* at 581.

¹¹⁵ *Id.* at 562 n.5 (majority opinion).

¹¹⁶ *Id.* at 580-81 (Stevens, J., concurring) ("The breadth of the ban thus exceeds the boundaries of the commercial speech concept, however that concept may be defined.").

¹¹⁷ *Id.* at 562 n.5 (majority opinion).

to a current public debate,” and they warned that this would “further blur the line” between commercial and noncommercial speech.¹¹⁸ Thus, the *Central Hudson* majority held that although advertisers receive full First Amendment protections for “direct comments on public issues,” there was “no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions.”¹¹⁹

Accordingly, the *Central Hudson* Court affirmatively determined that speech that did more than merely propose a commercial transaction could, in certain circumstances, constitute commercial speech.¹²⁰ The Court effectively reasoned that appellant’s promotional advertisements only referenced a public issue in order to induce a potential commercial transaction.¹²¹ Thus, the Court effectively held that an expression’s overarching purpose can factor into a court’s determination of whether that expression constitutes commercial speech.¹²² The Court also effectively held that expression can constitute commercial speech even though it does not reference a product or service’s price, quantity, or availability.¹²³ Therefore, the *Central Hudson* Court’s commercial speech definition broadly expands the amount of expression that can qualify as commercial speech.¹²⁴

¹¹⁸ *Id.* The *Central Hudson* majority worried that further blurring the commercial/noncommercial speech distinction would lead to the fears the Supreme Court articulated in *Ohralik*; a dilution in the strength of First Amendment protections.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 559-563.

¹²¹ *Id.* at 562 n.5.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*; see also *City of Cincinnati v. Discovery Network, Inc., et al.*, 507 U.S. 410, 423 (1993) (acknowledging that company’s mailing of informational pamphlets to potential customers would undoubtedly have been considered commercial speech under “the broader definition of commercial speech advanced in *Central Hudson*”).

Central Hudson's "expanded" commercial speech test is the most encompassing definition of commercial speech.¹²⁵ However, the Supreme Court has not applied this commercial speech definition to any case since *Central Hudson* because the "expanded" commercial speech test has been heavily criticized for its potential to inadvertently suppress speech that may deserve greater constitutional protection.¹²⁶ Thus, although the "expanded" commercial speech test "has never expressly been disavowed," it "has largely fallen into disuse."¹²⁷ The Supreme Court's apprehension of *Central Hudson*'s "expanded" commercial speech test led to the creation of a third test to determine the "proper classification" of speech that "presents a closer [constitutional] question."¹²⁸

3. The "Bolger" Framework for Mixed Speech

Three years after *Central Hudson*, the U.S. Supreme Court faced "a closer question" over the commercial/noncommercial speech distinction in *Bolger*.¹²⁹ In *Bolger*, the appellee ("Youngs") manufactured, sold, and distributed contraceptives, and marketed its products through a public "campaign of unsolicited mass mailings."¹³⁰ Youngs marketed three materials to the public: (1) "multi-page, multi-item flyers promoting a large variety of products available at a drugstore, including prophylactics;" (2) "flyers exclusively or substantially devoted to promoting prophylactics;" and (3) "informational pamphlets discussing the desirability and availability of prophylactics in general or Youngs' products in particular."¹³¹

The appellant, United States Postal Service ("USPS"), sought to stop Youngs from mailing these materials under a federal statute

¹²⁵ *Cincinnati*, 507 U.S. at 423.

¹²⁶ *Central Hudson*, 447 U.S. at 579-81; see also *Cincinnati*, 507 U.S. at 423.

¹²⁷ *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 516 n.6 (7th Cir. 2014).

¹²⁸ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983).

¹²⁹ *Id.*

¹³⁰ *Id.* at 62.

¹³¹ *Id.*

prohibiting “the mailing of unsolicited advertisements for contraceptives.”¹³² Youngs argued the federal statute was an “impermissible content-based restriction” on its mailings which Youngs proclaimed was “fully protected” speech.¹³³ Conversely, USPS argued that all of Youngs’ mailings were commercial speech.¹³⁴

The *Bolger* Court began by acknowledging that it must carefully examine the federal statute’s application to Youngs’ mailings “to ensure that speech deserving of greater constitutional protection [was] not inadvertently suppressed.”¹³⁵ The Supreme Court quickly determined that Youngs’ first two mailings constituted core commercial speech because they consisted “primarily of price and quantity information.”¹³⁶ However, the Court recognized that Youngs’ third mailing, the informational pamphlets, could not be “characterized merely as proposals to engage in commercial transaction.”¹³⁷ As a result, the Court determined that Youngs’ informational pamphlets’ classification “as commercial or noncommercial speech” presented a closer constitutional question.¹³⁸

Youngs’ first informational pamphlet specifically described the advantages of several “Trojan-brand condoms” that Young’s manufactured.¹³⁹ The second informational pamphlet, titled “Plain Talk about Venereal Disease,” discussed condoms generally, and only identified Youngs as the distributor of Trojan-brand condoms at the “very bottom of the last page.”¹⁴⁰ Importantly, the *Bolger* Court noted

¹³² *Id.* at 63. The USPS alleged Youngs’ mailings violated 39 U.S.C. § 3001(e)(2).

¹³³ *Id.* at 65-66.

¹³⁴ *Id.* at 66.

¹³⁵ *Id.*

¹³⁶ *Id.* at 66 n.12.

¹³⁷ *Id.* at 66.

¹³⁸ *Id.*

¹³⁹ *Id.* at 66 n.13.

¹⁴⁰ *Id.*

that a company's general references to a product "does not . . . remove it from the realm of commercial speech."¹⁴¹

The *Bolger* Court identified three factors relevant to the commercial/noncommercial speech classification of Youngs' informational pamphlets.¹⁴² First, the Court stated that the "mere fact that these pamphlets are conceded as advertisements clearly does not compel the conclusion that they are commercial speech."¹⁴³ Second, the Court indicated that "the reference to a specific product does not by itself render the pamphlets commercial speech."¹⁴⁴ Third, the Court found that "an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech."¹⁴⁵ However, the *Bolger* Court held that the "combination of all these characteristics" strongly indicated that Youngs' "informational pamphlets are properly characterized as commercial speech."¹⁴⁶ Yet, the Court noted that it was not necessary for all three characteristics to "be present in order for speech to be commercial" and further stated that it had "no opinion as to whether reference to any particular product or service is a necessary element of commercial speech."¹⁴⁷

Ultimately, the *Bolger* Court concluded that Youngs' informational pamphlets constituted commercial speech despite containing valuable information on important public issues.¹⁴⁸ The Court held that Youngs' informational pamphlets did not receive full First Amendment protection simply by "link[ing] a product to a current public debate."¹⁴⁹ The Court reiterated that a company only

¹⁴¹ *Id.*

¹⁴² *Id.* at 66-67.

¹⁴³ *Id.* at 66.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 67.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 67-67 n.14.

¹⁴⁸ *Id.* at 68.

¹⁴⁹ *Id.* at 68 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 n.5 (1980)).

receives full First Amendment protection for its direct comments on public issues, and it does not receive “similar constitutional protection when such statements are made in the context of commercial transactions.”¹⁵⁰ Thus, the Court reasoned that advertisers attempting to mislead the public should not be able to evade lawful regulation “simply by including references to public issues.”¹⁵¹

Since *Bolger*, the U.S. Supreme Court has not had an opportunity to expand upon the three factor test. However, scholars and lower courts have reasoned that *Bolger*’s framework applies when speech is mixed with both commercial and noncommercial elements.¹⁵² The *Bolger* framework is generally applied according to this three-question inquiry: (1) was the speech an advertisement, (2) did the speech reference a specific product, and (3) was there an economic motivation for the speech?¹⁵³ Like the *Bolger* Court determined, an affirmative answer to all three questions provides strong support for labeling the speech as commercial speech, but an affirmative to answer to all three questions is not a necessary condition of commercial speech.¹⁵⁴ Thus, a “court must examine the ‘content, form, and context,’ of the speech ‘as revealed by the whole record’ to determine whether the speech is commercial speech.”¹⁵⁵

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See, e.g., *Bad Frog Brewery v. N.Y. State Liquor Auth.*, 134 F.3d 87, 97 (1998).

¹⁵³ See, e.g., *Pourous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (1999).

¹⁵⁴ *Bolger*, 463 U.S. at 67-67 n.13.

¹⁵⁵ See *Dryer v. National Football League*, 689 F. Supp. 2d 1113, 1118 (D. Minn., 2010) (quoting *Connick v. Myers*, 461 U.S. 138, 147-148 (1983); see also *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) (“The diverse motives, means and messages of advertising may make speech ‘commercial’ in widely varying degrees.”)).

a. *Is the Speech an Advertisement?*

The Bolger framework's first factor centers on whether the challenged speech is an advertisement.¹⁵⁶ Courts have considered speech an advertisement in a variety of circumstances. First, courts have classified speech as an advertisement when there is a concession that the speech is an advertisement.¹⁵⁷ The *Bolger* Court stated that the fact that a challenged expression *is conceded* to be an advertisement does not by itself compel an expression's classification as commercial speech.¹⁵⁸ It follows then that a "company's admission that the speech in question is advertising may strongly indicate that it is commercial."¹⁵⁹

Second, courts consider speech that conveys an overwhelmingly positive tone to promote a brand or product to be advertisements.¹⁶⁰ In *Facenda v. National Football League Films, Inc.*, the Third Circuit determined that that N.F.L. Films, Inc.'s ("NFL") video program, "The Making of Madden NFL 06," constituted an advertisement because the program explained the product with only "a positive tone."¹⁶¹ Notably, the Third Circuit reasoned that the fact that "no one in The Making of Madden had a negative thing to say about the game" rebutted any "argument that the program ha[d] a documentary purpose."¹⁶²

Moreover, in some cases a company's use of its slogan or logo can help qualify speech as an advertisement.¹⁶³ In *Bad Frog Brewery v.*

¹⁵⁶ See, e.g., *Facenda v. National Football League Films, Inc.*, 542 F.3d 1007, 1017 (2008).

¹⁵⁷ See, e.g., *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 112-113 (6th Cir. 1995).

¹⁵⁸ *Bolger*, 463 U.S. at 66.

¹⁵⁹ *Semco*, 52 F.3d at 113 (holding that because the speaker did not admit that its speech was an advertisement, the speech did constitute an advertisement under the Bolger framework).

¹⁶⁰ See, e.g., *Facenda*, 542 F.3d at 1017-1018.

¹⁶¹ *Id.* at 1017.

¹⁶² *Id.* at 1018.

¹⁶³ See, e.g., *Bad Frog Brewery v. N.Y. State Liquor Auth.*, 134 F.3d 87, 96-97 (1998).

New York State Liquor Authority, the Second Circuit found that Bad Frog Brewery's ("Bad Frog") use of its logo on a beer label helped consumers identify the product's source.¹⁶⁴ The Second Circuit held this minimal information served to propose a commercial transaction and thus, constituted "a form of advertising."¹⁶⁵

b. Does the Speech Reference a Specific Product?

The *Bolger* framework's second factor is satisfied when speech refers to a specific product or service.¹⁶⁶ The *Bolger* Court held that Youngs identification of itself as the distributor of Trojan-brand prophylactics "at the very bottom of the last page" constituted a reference to a specific product.¹⁶⁷ Similarly, the Third Circuit in *Facenda* held that *Bolger*'s second factor was "easily satisfied because the program's sole subject [was] Madden NFL 06."¹⁶⁸

Furthermore, speech can refer to a specific product without reference to the product's brand name.¹⁶⁹ The *Bolger* Court explained that "a company with sufficient control of the market place for a product may be able to promote the product without reference to its own brand names."¹⁷⁰ Additionally, the D.C. Circuit in *United States v. Phillip Morris USA, Inc.*, held that the fact that cigarette producers advertised "cigarettes generically without specific brand names . . . [did] not change the commercial nature of the speech."¹⁷¹ Finally, a

¹⁶⁴ *Id.* at 96.

¹⁶⁵ *Id.* at 96-97.

¹⁶⁶ *See, e.g., Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 519-520 (7th Cir. 2014).

¹⁶⁷ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 n.13 (1983).

¹⁶⁸ *Facenda v. National Football League Films, Inc.*, 542 F.3d 1007, 1017 (2008).

¹⁶⁹ *See, e.g., United States v. Phillip Morris USA, Inc.*, 566 F.3d 1095, 1143-1144 (2009).

¹⁷⁰ *Bolger*, 463 U.S. at 66 n.13.

¹⁷¹ *Phillip Morris USA*, 566 F.3d at 1144 (citing Nat'l Comm'n on Egg Nutrition v. Federal Trade Comm'n, 570 F.2d 157, 163 (7th Cir. 1977)).

district court found it plausible that a reference to a brand itself could constitute a reference to a specific product.¹⁷²

c. Does the Speaker Have an Economic Motivation for the Speech?

The final *Bolger* factor asks whether the speaker has an economic purpose for the speech.¹⁷³ The U.S. Supreme Court has noted that “all advertising is at least implicitly a plea for its audience’s custom,” and most courts acknowledge that almost every company has an economic motivation for their advertisements.¹⁷⁴ Therefore, speech delivered in the context of a commercial transaction strongly indicates an economic motivation for the speech.¹⁷⁵

For example, in the Seventh Circuit Court of Appeals case of *Briggs & Stratton Corp. v. Baldrige*, the appellants were a corporation doing business in Arab states.¹⁷⁶ Many Arab countries enforced a trade boycott of Israel and sent questionnaires to companies doing business in Arab states inquiring about those companies’ relationships with Israel.¹⁷⁷ Companies that did not answer the questionnaire were blacklisted from doing business in Arab states.¹⁷⁸ Federal law prohibited appellants from responding to the questionnaire, so they alleged the federal law violated their First Amendment rights.¹⁷⁹

The appellants conceded they had an economic motivation for the speech, but they argued that their dominant motivation for answering

¹⁷² *Dryer v. National Football League*, 689 F. Supp. 2d 1113, 1120-1121 (D. Minn., 2010).

¹⁷³ *E.g.*, *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (1999).

¹⁷⁴ *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 639 (1985); *see, e.g.*, *Dryer*, 689 F. Supp. 2d at 1119 (“no serious dispute that NFL has an economic motivation” for its speech).

¹⁷⁵ *E.g. Bolger*, 463 U.S. at 68.

¹⁷⁶ *Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915, 916 (7th Cir. 1984).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

the questionnaire was to make a political statement.¹⁸⁰ However, the Seventh Circuit disagreed, reasoning that appellants “proposed answers to [the] boycott questionnaires” only served to allow appellants “to maintain commercial dealings with the Arab world.”¹⁸¹ Thus, the Seventh Circuit held that appellants had a substantial economic motivation for their proposed speech because it was delivered in the context of a commercial transaction.¹⁸²

Additionally, speech is economically motivated when its overarching purpose is to promote a company’s brand or product.¹⁸³ The *Bolger* Court found that Youngs had an economic motivation for distributing informational pamphlets to potential customers because the action served to promote Youngs’ products generally.¹⁸⁴ Likewise, the Third Circuit in *Facenda* stated that *Bolger*’s third factor was satisfied because the program’s “general promotion of NFL-branded football provide[d] . . . indirect financial motivation.”¹⁸⁵

4. The “Inextricably Intertwined” Exception

Before a court concludes that an expression containing both commercial and noncommercial elements is commercial speech, a court must determine whether the speech “merely links” the product or brand to a public issue or whether the commercial elements of the challenged speech are “inextricably intertwined” with the expression’s noncommercial elements such that the entire expression receives full

¹⁸⁰ *Id.* at 917.

¹⁸¹ *Id.* at 918.

¹⁸² *Id.*

¹⁸³ *See, e.g.,* Yeager v. Cingular Wireless LLC, 673 F. Supp. 2d 1089, 1097 (E.D. Cal., 2009).

¹⁸⁴ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 (1983).

¹⁸⁵ *Facenda v. National Football League Films, Inc.*, 542 F.3d 1007, 1017 (2008).

First Amendment protection.¹⁸⁶ This is known as the “inextricably intertwined” exception to commercial speech.¹⁸⁷

In 1980, the Supreme Court first explained the “inextricably intertwined” exception in *Village of Schaumburg v. Citizens for a Better Environment*.¹⁸⁸ In *Citizens for a Better Environment*, a village ordinance prohibited door-to-door solicitation “of contributions by charitable organizations that do not use at least 75 percent of their receipts for ‘charitable purposes.’”¹⁸⁹ The respondent, a charitable organization promoting environmental protection, applied for a permit “to solicit contributions in the Village.”¹⁹⁰ However, the village denied the request because respondent “could not demonstrate that 75 percent of its receipts would be used for ‘charitable purposes.’”¹⁹¹ Respondent sued the village, arguing the ordinance violated the First Amendment.¹⁹²

The *Citizens for a Better Environment* Court noted that charitable fundraising involves First Amendment protected speech, including the “propagation of views and ideas, and the advocacy of causes.”¹⁹³ The Court recognized that regulations regarding the solicitation of funds must account “for the reality that solicitation is characteristically intertwined with . . . speech seeking support for particular causes” regarding important public issues.¹⁹⁴ The Court further reasoned “that without solicitation the flow of such information and advocacy would likely cease.”¹⁹⁵ Therefore, the Court concluded that charitable solicitations are not “a variety of purely commercial speech,” and that respondent’s charitable solicitations were entitled to full First

¹⁸⁶ See, e.g., *Bd. of Tr. v. Fox*, 492 U.S. 469, 474-475 (1989).

¹⁸⁷ *Id.*

¹⁸⁸ *Vill. of Schaumburg v. Citizens for a Better Env’t.*, 440 U.S. 620 (1980).

¹⁸⁹ *Id.* at 622.

¹⁹⁰ *Id.* at 624.

¹⁹¹ *Id.* at 625.

¹⁹² *Id.*

¹⁹³ *Id.* at 632.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

Amendment protection.¹⁹⁶ Thus, the *Citizens for a Better Environment* Court held that speech combining commercial and noncommercial elements receives full First Amendment protection when elimination of an expression's commercial elements would essentially eliminate the speaker's opportunity to disseminate the expression's noncommercial elements.¹⁹⁷

Eight years later, The Supreme addressed the “inextricably intertwined” exception again in *Riley v. National Federation of the Blind of North Carolina*.¹⁹⁸ In *Riley*, a North Carolina law required charitable fundraisers “to disclose to potential donors . . . the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity.”¹⁹⁹ A coalition of charitable organizations brought suit against North Carolina alleging this law violated their First Amendment rights.²⁰⁰ North Carolina countered that this law only regulated “commercial speech because it relat[ed] only to the professional fundraiser's profit from the solicited contribution.”²⁰¹

The *Riley* Court held that speech does not “retain its commercial character when it is inextricably intertwined with otherwise fully protected speech.”²⁰² In a later case, the Supreme Court explained that the charitable organization's commercial speech in *Riley* was inextricably intertwined “because state law required it to be included” with the noncommercial speech.²⁰³ Accordingly, the *Riley* Court determined that commercial speech is “inextricably intertwined” with noncommercial speech when their combination is required by law.²⁰⁴

¹⁹⁶ *Id.* at 632-633.

¹⁹⁷ *Id.* at 632.

¹⁹⁸ *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781 (1988).

¹⁹⁹ *Id.* at 786.

²⁰⁰ *Id.* at 787.

²⁰¹ *Id.* at 795.

²⁰² *Id.* at 796.

²⁰³ *Bd. of Tr. v. Fox*, 492 U.S. 469, 474 (1989) (citing *Riley*, 487 U.S. at 796).

²⁰⁴ *Id.* (citing *Riley*, 487 U.S. at 796).

In 1989, the Supreme Court in *Board of Trustees. v. Fox* combined the *Citizens for a Better Environment* and *Riley* holdings into one uniform rule.²⁰⁵ In *Fox*, a state university regulation prevented “private commercial enterprises” from operating on state university campus facilities.²⁰⁶ However, a company marketed houseware products to college students by “demonstrating and offering products for sale to groups of 10 or more prospective buyers at gatherings” hosted in college dormitories.²⁰⁷ During these gatherings, the company also distributed information on other subjects such as financial responsibility and home economics.²⁰⁸ A company representative hosted a gathering “in a student’s dormitory room” and the campus police charged her with violating the university’s regulation.²⁰⁹ The students brought suit against the university alleging the regulation violated their First Amendment rights.²¹⁰

The *Fox* Court held there was “no doubt” that the company’s gatherings constituted commercial speech.²¹¹ Nevertheless, the students argued that the company’s “pure speech and commercial speech [were] ‘inextricably intertwined’” such that the entire speech must be considered noncommercial.²¹² The Supreme Court disagreed and stated that commercial speech is “inextricably intertwined” when the law requires it to be included with noncommercial speech.²¹³ The *Fox* Court elaborated on the boundaries of the “inextricably intertwined” exception, declaring:

By contrast, there is nothing whatever ‘inextricable’ about the noncommercial aspects of these presentations. No law of man

²⁰⁵ *Fox*, 492 U.S. at 474-475.

²⁰⁶ *Id.* at 471-472.

²⁰⁷ *Id.* at 472.

²⁰⁸ *Id.* at 474.

²⁰⁹ *Id.* at 472.

²¹⁰ *Id.*

²¹¹ *Id.* at 473.

²¹² *Id.* at 474.

²¹³ *Id.* at 474-475.

or nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.²¹⁴

Therefore, the *Fox* Court determined that because “no law of man or nature” required the company to combine the “teaching of home economics” with “selling housewares,” the company’s commercial and noncommercial speech were not “inextricably intertwined.”²¹⁵ Thus, the *Fox* Court combined the *Citizens for a Better Environment* and *Riley* holdings into one succinct rule: commercial speech is “inextricably intertwined” with noncommercial speech, such that the entire speech receives full First Amendment protection, when a “law of man or nature” requires the combination of the speech’s commercial and noncommercial elements.²¹⁶

F. *The Current Interpretation and Application of Commercial Speech Doctrine*

In addition to defining the “inextricably intertwined” exception, the *Fox* Court also affirmatively defined commercial speech as speech that seeks to “propose a commercial transaction,” noting that it “is the test for identifying commercial speech.”²¹⁷ The phrase “propose a commercial transaction” is not as limiting as the phrase “no more than propose a commercial transaction.”²¹⁸ Thus, the implication is that

²¹⁴ *Id.* at 474.

²¹⁵ *Id.*

²¹⁶ *Id.* at 474-475.

²¹⁷ *Id.* at 473-474 (1989) (stating that it was “clear about the difference between commercial and noncommercial speech”).

²¹⁸ See *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 516-517 (7th Cir. 2014) (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-68 (1983)).

speech need not be “purely commercial” to constitute commercial speech.²¹⁹ As a result, the *Bolger* framework essentially functions to determine whether an expression is “part and parcel” of a proposal for a commercial transaction.²²⁰ While some ambiguity exists at the commercial speech doctrine’s margins, the hallmark of commercial speech is that it in some capacity seeks to propose a commercial transaction.²²¹ What the lower courts cannot agree on is whether the phrase “propose a commercial transaction” applies in a narrow or broad context.

II. PRIVATE-RIGHT DISPUTES INVOLVING IMAGE ADVERTISEMENTS PRIOR TO *JORDAN V. JEWEL FOOD STORES, INC.*

The commercial speech doctrine is difficult to apply in cases involving advertisements incorporating celebrity identities because the crux of the Supreme Court’s commercial speech cases centered on whether a government’s regulation of commercial speech violated the First Amendment.²²² However, in the case at issue, Jordan’s claims are

²¹⁹ See *id.* (citing *Bolger*, 463 U.S. at 66-68); see also *Fox*, 492 U.S. at 473-474 (defining commercial speech as speech that proposes a commercial transaction, not speech that “does no more than propose a commercial transaction”); see also *Am. Future Sys., Inc., v. Pa. State Univ.*, 752 F.2d 854, 862 (1984) (holding that expressions “were not ‘within the core notions of commercial speech’ because they did more than simply propose a commercial transaction”); but see *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) (“If speech is not ‘purely commercial’ – that is, it does no more than propose a commercial transaction—then it is entitled to full First Amendment protection.”).

²²⁰ *Am. Future Sys.*, 752 F.2d at 862.

²²¹ See *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985) (Stating that “precise bounds of the category of expression that may be termed commercial speech” are “subject to doubt”); see also *Briggs & Stratton Corp. v. Baldrige*, 728 F.2d 915, 917-18 (7th Cir. 1984).

²²² See *Jordan*, 743 F.3d at 514 (“In the public-law context, the commercial/noncommercial classification determines the proper standard of scrutiny to apply to the law or regulation under review.”).

not based on a government regulation, but instead, they are against a private company.²²³

The Supreme Court has never addressed the commercial/noncommercial speech distinction from an “intellectual-property rights” versus “free-speech rights” context.²²⁴ Thus, attempting to apply the Supreme Court’s commercial speech doctrine in a “private rights” context is like trying to fit square pegs into round holes.²²⁵ As the Seventh Circuit acknowledged, appellate court decisions addressing commercial speech in a private rights context “are a conflicting mix of balancing tests and frameworks” resulting in conflicting applications of the commercial speech doctrine.²²⁶

Few cases have addressed the commercial/noncommercial distinction in a private rights context prior to *Jordan v. Jewel Food Stores, Inc.* In 1996, the Tenth Circuit heard a challenge by the Major League Baseball Players Association (“MLBPA”) against an Oklahoma printing company in *Cardtoons, L.C. v. Major League Baseball Players Ass’n*.²²⁷ The MLBPA threatened legal action against Cardtoons for their intention to sell baseball “parody” trading cards that included player caricatures and “humorous commentary about their careers.”²²⁸ The MLBPA argued that Cardtoons’ parody trading cards were commercial speech and therefore, received less First Amendment protection.²²⁹

The Tenth Circuit held that Cardtoons’ parody trading cards were not commercial speech because they did not “merely advertise another

²²³ *Id.*

²²⁴ *Id.* (“The Supreme Court has not addressed the question”).

²²⁵ See Gilbert, *supra* note 72, at 597 (noting that the Supreme Court never set out to define commercial speech, but instead address the constitutionality of a regulation).

²²⁶ *Jordan*, 743 F.3d at 514.

²²⁷ *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 962 (1996).

²²⁸ *Id.*

²²⁹ *Id.* at 970.

unrelated product.”²³⁰ The Court determined that the cards provided “social commentary on public figures, major league baseball players, who are involved in a significant commercial enterprise.”²³¹ Thus, the Tenth Circuit concluded that Cardtoons’ parody trading cards received full First Amendment protection.²³²

In 2001, the Ninth Circuit heard *Hoffman v. Capital Cities/ABC, Inc.*²³³ In *Hoffman*, actor Dustin Hoffman starred in the 1982 movie “Tootsie, playing a male actor” dressed as a woman to get a part on a television show.²³⁴ A “still photograph” from “Tootsie” displayed Hoffman “in a red long-sleeved sequined evening dress and high heels, posing in front of an American Flag.”²³⁵ A magazine published, without Hoffman’s permission, an article altering the “Tootsie” still to make Hoffman appear to be wearing “Spring 1997 fashions.”²³⁶ Hoffman sued the publisher for the misappropriation of his name and likeness, and argued that the publisher’s use of the photograph was commercial speech.²³⁷

The Ninth Circuit held that the publisher’s use of the “Tootsie” photograph was not pure commercial speech because the publisher “did not use Hoffman’s image in a traditional advertisement printed merely for the purpose of selling a particular product.”²³⁸ The Court reasoned that “in context, the article as whole [was] a combination of fashion photography, humor, visual and verbal editorial comment on

²³⁰ *Id.* (The Tenth Circuit, without explanation, did not analyze the issue under the *Bolger* framework or the “inextricably intertwined” exception).

²³¹ *Id.* at 969.

²³² *Id.*

²³³ *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (2001).

²³⁴ *Id.* at 1182.

²³⁵ *Id.*

²³⁶ *Id.* at 1183.

²³⁷ *Id.* at 1183-1184.

²³⁸ *Id.* at 1185. (The Ninth Circuit identified “the ‘core notion of commercial speech’” as speech that “‘does no more than propose a commercial transaction.’” However, the Court made no mention of the *Bolger* framework).

classic films and famous actors.”²³⁹ As a result, the Court reasoned that any commercial aspects of the publisher’s article were “‘inextricably intertwined’ with expressive elements,” and could not be separated “from the fully protected whole.”²⁴⁰ Thus, the Ninth Circuit concluded that the publisher’s article was not “a purely ‘commercial’ form of expression,” and therefore, it did not constitute commercial speech.²⁴¹

In 2008, the Third Circuit decided *Facenda*.²⁴² There, N.F.L. Films Inc. (“NFL Films”) used portions of broadcaster John Facenda’s “voice-over work” in their “television production about the video game ‘Madden NFL 06.’”²⁴³ Facenda’s estate sued NFL films for false endorsement under the federal Lanham Act.²⁴⁴ NFL Films argued that its production constituted informational and artistic expression protected by the First Amendment.²⁴⁵ Facenda’s estate countered that the production was commercial speech entitled to lesser protection.²⁴⁶

The Third Circuit applied the *Bolger* framework and found that NFL Films’ production was an advertisement because it was released in the days immediately before the game went on sale in retail stores, “much like an advertisement for an upcoming film.”²⁴⁷ The Court noted that the production did not refer to any other products and that “the video game’s general promotion of NFL-branded football provide[d] an additional indirect financial motivation.”²⁴⁸ Accordingly, the Third Circuit held that NFL Films’ production was commercial

²³⁹ *Id.* (Notably, the Court determined that the publisher’s use of the “still” did not solely advance a commercial message, but instead was “a compliment to” the magazine’s overarching theme on “Hollywood.”).

²⁴⁰ *Id.*

²⁴¹ *Id.* at 1186.

²⁴² *Facenda v. National Football League Films, Inc.*, 542 F.3d 1007 (2008).

²⁴³ *Id.* at 1011.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 1015.

²⁴⁶ *Id.* at 1016.

²⁴⁷ *Id.* at 1017.

²⁴⁸ *Id.*

speech, and it was not close to the boundary “dividing commercial and noncommercial speech.”²⁴⁹

In sum, the circuits are split on the interpretation and application of the commercial speech doctrine in the context of private right disputes. Some courts employ a narrow construction of commercial speech while others find that the commercial speech doctrine should apply in a broad context.²⁵⁰ Courts also give varying weights to the three *Bolger* factors.²⁵¹ Finally, the courts diverge on the scope of the inextricably intertwined exception; some courts, like the Seventh Circuit in *Jordan*, apply a narrow scope, while others like the Ninth Circuit in *Hoffman*, apply a broad scope.²⁵²

III. A SUMMARY OF *JORDAN V. JEWEL FOOD STORES, INC.*

A. *Factual Background*

Jordan v. Jewel Food Stores, Inc. began as a “right-of-publicity dispute” pitting basketball hall of famer Michael Jordan (“Jordan”) against Jewel Food Stores, Inc. (“Jewel”).²⁵³ Jewel, commonly known as “Jewel-Osco,” operates approximately 175 grocery stores in the Chicago-land area.²⁵⁴ While many outside the Midwest may be unfamiliar with Jewel-Osco supermarkets, most people know of Michael Jordan, the former superstar Chicago bulls’ basketball

²⁴⁹ *Id.* at 1017-1018.

²⁵⁰ *See id.*; *see also Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1185-86 (2001).

²⁵¹ *See, e.g., Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 112-114 (6th Cir. 1995).

²⁵² *See Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 519-520 (7th Cir. 2014); *see Hoffman*, 255 F.3d 1185-1186.

²⁵³ *Jordan*, 743 F.3d at 511.

²⁵⁴ *Id.*; Jewel was Founded in 1899. Today Jewel is owned by New Albertson’s Inc., a privately held grocery company. In addition to operating supermarkets across the Midwest, Jewel Food Stores, Inc. actively supports local charitable and not-for-profit organizations. *See Jewel-Osco*, <http://www.jewelosco.com/our-company/traditions-history/> (last visited Apr. 30, 2015).

player.²⁵⁵ During his career Jordan won numerous championships and awards, and the N.B.A.'s official website refers to Jordan as "the greatest basketball player of all time."²⁵⁶

Upon Jordan's induction into the Basketball Hall of Fame on September 11, 2009, *Sports Illustrated*, published by Time, Inc. ("Time"), developed "a special edition of *Sports Illustrated Presents*" to celebrate Jordan's career.²⁵⁷ The commemorative issue was titled "Jordan: Celebrating a Hall of Fame Career" and was only available for purchase in select stores.²⁵⁸ The special issue's cover page was a picture of Jordan flying through the air appearing likely to throw down a slam-dunk.²⁵⁹

Prior to publication, Time offered Jewel free advertising space inside this special issue in exchange for Jewel's promise "to stock and sell the magazine in its stores."²⁶⁰ Jewel accepted Time's offer and designed a "full page" advertisement ("ad") for the magazine.²⁶¹ Jewel's ad combined "textual, photographic, and graphic elements," and it included Jewel's logo and slogan in the ad's center.²⁶² Jewel's logo and slogan "are both registered trademarks" and were located in

²⁵⁵ *Jordan*, 743 F.3d at 512 n.1.

²⁵⁶ Jordan is most well-known for leading the Bulls to three consecutive NBA championships from 1991-1993, and after a brief retirement, leading the Bulls to three more consecutive championships from 1996-1998. *See Legends Profile: Michael Jordan*, NBA History, <http://www.nba.com/history/legends/michael-jordan/index.html> (last visited Apr. 30, 2015); *see also*, *Jordan*, 743 F.3d at 513 ("Jordan is a sports icon whose name and image are deeply embedded in the popular culture and easily recognized around the globe.").

²⁵⁷ *Jordan*, 743 F.3d at 512. *Sports Illustrated*, published by Time Inc., is a magazine delivering sports related content to its subscribers. *Sports Illustrated Presents* is a special tribute edition of the magazine used to commemorate an athlete's career. *See Sports Illustrated*, http://en.wikipedia.org/wiki/Sports_Illustrated (last visited Apr. 30, 2015).

²⁵⁸ *Jordan*, 743 F.3d at 512.

²⁵⁹ *See Jordan*, 851 F. Supp. 2d at 1113.

²⁶⁰ *Jordan*, 743 F.3d at 512.

²⁶¹ *Id.*

²⁶² *Id.*

the ad “above a photo of a pair of basketball shoes.”²⁶³ The number that Jordan wore for most of his time with the Chicago Bulls, 23, features prominently on “the tongue of each shoe.”²⁶⁴ The text in Jewel’s ad is positioned above the shoes, logo, and slogan, and it reads:²⁶⁵

A Shoe In!

After six NBA championships, scores of rewritten record books and numerous buzzer beaters, Michael Jordan’s elevation in the Basketball Hall of Fame was never in doubt! Jewel-Osco salutes #23 on his many accomplishments as we honor a fellow Chicagoan who was “just around the corner” for so many years.

The following is a copy of Jewel’s entire “full-page” ad.²⁶⁶



Time accepted Jewel’s ad, and placed it in the commemorative issues’ inside back cover.²⁶⁷

²⁶³ *Id.*

²⁶⁴ *Jordan*, 851 F. Supp. 2d at 1104.

²⁶⁵ *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 512 (7th Cir. 2014).

²⁶⁶ *Id.* at 523.

B. *Procedural Background*

After Sports Illustrated released this commemorative issue, Jordan filed suit against Jewel in the Circuit Court of Cook County alleging that Jewel “improperly used his identity without authorization” and sought “\$5 million in damages.”²⁶⁸ Jewel removed the case to federal court and “moved for summary judgment.”²⁶⁹ Jewel argued that “its ad qualified as ‘noncommercial’ speech,” and therefore, it received full First Amendment protection.²⁷⁰ Jordan filed a cross-motion for summary judgment, arguing that Jewel’s “ad was a commercial use of his identity” and qualified as commercial speech.²⁷¹ Both Jewel and Jordan agreed that a holding that Jewel’s ad was noncommercial speech defeated Jordan’s claims and vice-a-versa.²⁷² The district court ruled in favor of Jewel, and Jordan appealed.²⁷³

C. *The District Court’s Decision*

The District Court for the Northern District of Illinois used the “core” commercial speech test as well as the Bolger framework, and it found Jewel’s ad was “noncommercial speech entitled to full First Amendment protection.”²⁷⁴ The district court also noted that even if Jewel’s ad contained commercial elements, those elements were

²⁶⁷ *Id.* (The commemorative issue also included a congratulatory ad from a “rival Chicago-area grocery chain.”).

²⁶⁸ *Id.* at 513 (Jordan alleged Jewel’s ad violated the Illinois Right of Publicity Act, the Illinois Consumer Fraud and Deceptive Business Practices Act, the Illinois common law of unfair competition, and the federal Lanham Act).

²⁶⁹ *Id.* at 513.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* Jewel and Jordan agreed that the classification of Jewel’s ad as commercial or noncommercial speech was dispositive to the outcome of the case.

²⁷³ *Id.*

²⁷⁴ *Jordan*, 851 F. Supp. 2d at 1106-1111. The District Court made no mention of the Central Hudson’s expanded commercial speech inquiry.

inextricably intertwined with the noncommercial elements, “rendering the page noncommercial as a whole.”²⁷⁵

Regarding the commercial speech distinction, the district court employed a narrow interpretation of commercial speech and held that Jewel’s ad was noncommercial speech because it did not directly propose a commercial transaction.²⁷⁶ The district court found that Jewel’s ad did not propose a commercial transaction because “readers would be at a loss to explain what they have been invited to buy.”²⁷⁷

Furthermore, the district court reasoned that Jordan’s assertion that Jewel’s use of its logo and slogan in the congratulatory text invited “readers to enter into a commercial transaction” “utterly fail[ed] to account for context.”²⁷⁸ The district court held that Jewel’s ad did not propose a commercial transaction because the ad focused on Jordan, not on Jewel and its products and services.²⁷⁹ Thus, the district court concluded that a “reasonable reader” would agree that Jewel touted Jordan’s accomplishments “as a means to congratulate him” on his hall of fame induction and not as means of proposing a commercial transaction.²⁸⁰

Moreover, the district court declared its holding was confirmed by an application of the *Bolger* framework.²⁸¹ With regards to *Bolger*’s first factor, the district court determined “Jewel’s page” did not constitute an advertisement for several reasons.²⁸² First, although Jewel even referred to its page as an “ad,” the district court determined that Jewel’s use of “the word ‘ad’ clearly was used as convenient shorthand” because there was no equally precise term for the page that

²⁷⁵ *Id.* at 1108.

²⁷⁶ *Id.* at 1106-1108.

²⁷⁷ *Id.* at 1107.

²⁷⁸ *Id.*

²⁷⁹ *Id.* The District Court also noted that Jewel’s use of the logo and slogan ensured that the reader understood the congratulatory message came from Jewel.

²⁸⁰ *Id.* at 1108.

²⁸¹ *Id.* at 1108-1109. The District Court viewed the *Bolger* Framework as an alternative method for determining whether speech “proposes a commercial transaction.”

²⁸² *Id.* at 1109-1110.

Jewel placed in the issue.²⁸³ Notably, the district court emphasized the presence of a rival grocery store chain's page in the commemorative issue, that also congratulated Jordan, strongly weighed against finding Jewel's page was an advertisement.²⁸⁴ The district court reasoned that a reasonable reader could not conclude that Jordan endorsed Jewel while also endorsing a rival supermarket, and thus, they would know that "Jewel's page was not an advertisement."²⁸⁵

With respect to *Bolger's* remaining factors, the district court held that Jewel's ad did not satisfy either the second or third factor.²⁸⁶ The district court determined that Jewel's use of its logo and slogan only evoked Jewel's products and services in general, and did not qualify as a reference to a specific product or service.²⁸⁷ The district court noted that "of course" Jewel had an economic motivation to place the page but ultimately held that Jewel's economic motivation to place the page did not overcome the missing *Bolger* elements.²⁸⁸

As a result, the district court held it would be "highly unlikely" that a reasonable reader would "conclude that Jewel was linking itself to Jordan in order to propose a commercial transaction."²⁸⁹ Further, the court declared, without any explanation, that even if Jewel's page contained minimal commercial elements, those elements were inextricably intertwined with the page's noncommercial elements.²⁹⁰ Accordingly, the district court concluded that Jewel's page "was noncommercial speech entitled to full First Amendment protection."²⁹¹

²⁸³ *Id.* at 1109. Also, the District Court noted that Jewel did not pay money to place its page in the magazine.

²⁸⁴ *Id.* at 1110.

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 1110-1111.

²⁸⁷ *Id.* at 1110.

²⁸⁸ *Id.* at 1111.

²⁸⁹ *Id.* at 1108.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 1111.

D. *The Seventh Circuit's Decision*

Jordan appealed the district court's ruling to the Seventh Circuit.²⁹² The appeal was heard by a three-judge panel consisting of Judge Flaum, Judge Sykes, and Judge Randa of the United States District Court for the Eastern District of Wisconsin, sitting by designation.²⁹³ Judge Sykes, writing for a unanimous panel, reversed the District Court's ruling and remanded the case for further proceedings.²⁹⁴

Before applying the commercial speech doctrine to Jewel's ad, the Seventh Circuit first outlined its definition of commercial speech.²⁹⁵ The Court defined commercial speech as "speech that proposes a commercial transaction," but noted that "this definition was just a starting point."²⁹⁶ Further, the Court reasoned that while speech "that does *no more* than propose a commercial transaction 'falls within the core notion of commercial speech,' other communications" outside of this core notion "may also 'constitute commercial speech.'"²⁹⁷ Thus, the Seventh Circuit declared that it was "a mistake to assume that the boundaries of the commercial-speech category are marked exclusively by this 'core' definition."²⁹⁸

The Seventh Circuit elaborated on its commercial speech doctrine interpretation, and reasoned that the "notion that an advertisement counts as 'commercial' only if it makes an appeal to purchase a

²⁹² Jordan v. Jewel Food Stores, Inc., 743 F.3d 509, 513 (7th Cir. 2014).

²⁹³ *Id.* at 510.

²⁹⁴ *Id.* at 512.

²⁹⁵ *Id.* at 515-517.

²⁹⁶ *Id.* at 516. The Seventh Circuit acknowledged that the U.S. Supreme Court has "also defined commercial speech as 'expression related solely to the economic interests of the speaker and its audience.'" (internal citations omitted). However, the Seventh Circuit recognized that this definition "has largely fallen into disuse." *Id.* at 516 n.6.

²⁹⁷ *Id.* at 516.

²⁹⁸ *Id.* The Court reiterated this sentiment, stating that "the commercial-speech category is not limited to speech that directly or indirectly proposes a commercial transaction." *Id.* at 517.

particular product makes no sense today” because modern commercial advertising is creative, “abstract, and frequently relies on subtle cues.”²⁹⁹ Therefore, the court determined that an “advertisement is no less ‘commercial’ because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service” because “often the commercial message is general and implicit rather than specific and explicit.”³⁰⁰

Under this doctrinal premise, the Seventh Circuit found that Jewel’s ad served the dual functions of congratulating Jordan and promoting Jewel’s supermarkets.³⁰¹ The Court stated that Jewel’s tribute to Jordan was “explicit and readily apparent,” but, when considered in context, Jewel’s ad had the “unmistakable commercial function [of] enhancing the Jewel-Osco brand in the minds of consumers.”³⁰² Thus, the Court determined that Jewel’s promotion of its own brand in its ad was “implicit but easily inferred” and was the ad’s “dominant” purpose.³⁰³ Notably, the Court scrutinized Jewel’s use of its slogan and logo, finding that the slogan and logo’s size, style, color, and location in the ad indicated that the ad “plainly aimed at fostering goodwill for the Jewel brand” and was “for the purpose of increasing patronage of Jewel-Osco stores.”³⁰⁴

²⁹⁹ *Id.* at 518. The Court further reasoned that “[a]pplying the ‘core’ definition too rigidly ignores this reality.” *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.* The ad’s “textual focus” was a “congratulatory salute to Jordan.” *Id.* at 517. However, the Court determined that “evaluating the text requires consideration of its context, and this truism has special force when applying the commercial speech doctrine.” *Id.*

³⁰³ *Id.* at 518. Jewel argued that its salute to Jordan was a public-service announcement similar to its “practice of commending local community groups on notable achievements.” *Id.* However, the Court dismissed this argument, noting that there is a “world of difference between an ad congratulating a local community group, and an ad congratulating a famous athlete.” *Id.*

³⁰⁴ *Id.* The Court noted that Jewel’s logo and slogan “prominently featured in the center of the ad and in a font size larger than any other on the page” and that this “set them off from the congratulatory text, drawing attention to Jewel-Osco’s sponsorship of the tribute.” *Id.*

Furthermore, the Seventh Circuit conceded that while Jewel's ad did not reference a specific product or service, the court reasoned that Jewel's ad invited readers to buy products generally from Jewel, such as "a loaf of bread [or] a gallon of milk."³⁰⁵ The court held that simply because Jewel's ad "promote[d] brand loyalty rather than a specific product" did not mean that Jewel's ad was 'noncommercial.'³⁰⁶ Thus, the court reasoned that although the ad's commercial message was "generic and implicit," the ad clearly served as "a form of image advertising aimed at promoting goodwill for the Jewel-Osco brand by exploiting public affection for Jordan at an auspicious moment in his career."³⁰⁷ Accordingly, the Seventh Circuit held that Jewel's ad proposed a commercial transaction and constituted commercial speech.³⁰⁸

Additionally, like the district court confirmed its decision through application of the *Bolger* framework, here the Seventh Circuit also determined its conclusion was confirmed "by application of the *Bolger* framework."³⁰⁹ With regard to *Bolger*'s first factor, the court held that "Jewel's ad certainly qualifie[d] as an advertisement in form" because the ad promoted Jewel-Osco supermarkets to potential buyers.³¹⁰ The court also found that Jewel's ad constituted an advertisement because it was "easily distinguishable" from the magazine's "editorial coverage of Jordan's career."³¹¹ Finally, the Seventh Circuit determined that Jewel's ad was an advertisement because, in context, it looked like an advertisement.³¹²

³⁰⁵ *Id.* Jewel's ad invites readers to buy "[w]hatever they need from a grocery store").

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 519-520.

³⁰⁹ *Id.* at 519. The Seventh Circuit found that the *Bolger* framework applies when speech "contains both commercial and noncommercial elements." *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

Upon analyzing *Bolger*'s second factor, the court determined that although that ad did not offer a "specific product or service . . . the ad promote[d] patronage at Jewel-Osco stores more generally."³¹³ Notably, the court stated that an ad's failure to reference a specific product "is far from dispositive, especially where 'image' or brand advertising rather than product advertising is concerned."³¹⁴ In fact, the Seventh Circuit reasoned that "[t]o say that the ad is noncommercial because it lacks an outright sales pitch is to artificially distinguish between product advertising and image advertising."³¹⁵

Finally, the Seventh Circuit held that Jewel's ad satisfied *Bolger*'s third factor by declaring that there was "no question that the ad served an economic purpose."³¹⁶ The court found it obvious that "Jewel had something to gain by conspicuously joining the chorus of congratulations on the much-anticipated occasion of Jordan's induction into the Basketball Hall of Fame."³¹⁷ Moreover, the Seventh Circuit addressed the negative policy implications of the district court's holding, reasoning that "[c]lassifying this kind of advertising as constitutionally immune noncommercial speech would permit advertisers to misappropriate" athlete and celebrity identities "with impunity."³¹⁸ Thus, the court concluded that Jewel's ad satisfied the *Bolger* framework and constituted "commercial speech."³¹⁹

Before concluding, the Seventh Circuit addressed the "proper use" of the inextricably intertwined doctrine.³²⁰ The Seventh Circuit determined that the inextricably intertwined exception's "central inquiry is not whether the speech in question combines commercial and noncommercial elements, but whether it was legally or practically

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 520.

³¹⁶ *Id.* at 519-520.

³¹⁷ *Id.* at 520.

³¹⁸ *Id.*

³¹⁹ *Id.* at 519-522.

³²⁰ *Id.* at 520.

impossible for the speaker to separate them.”³²¹ Thus, the Seventh Circuit held that the “commercial and noncommercial elements of Jewel’s ad were not inextricably intertwined” because “[n]o law of man or nature compelled Jewel to combine the commercial and noncommercial messages” in its ad.³²² Accordingly, the Seventh Circuit affirmed that Jewel’s ad constituted commercial speech.³²³

IV. ANALYSIS OF THE SEVENTH CIRCUIT’S DECISION

A. *The Seventh Circuit’s Decision to Apply the Commercial Speech Doctrine with a Broad Scope was Proper and is the Best Path Forward*

The Seventh Circuit correctly determined that the commercial speech doctrine applies with a broad, rather than narrow, scope. The court’s flexible application of the commercial speech doctrine was proper because it allowed the court to consider Jewel’s ad in context, rather than in isolation. Upon consideration of the ad’s entire context, the court reasoned that Jewel’s ad’s primary purpose was not to pay tribute to Jordan, but it was instead to promote Jewel’s brand to its potential customers.³²⁴ Thus, the Seventh Circuit’s flexible application of the commercial speech doctrine provided the court the opportunity to reach the “commonsense” conclusion that Jewel’s ad constituted commercial speech.

Accordingly, the Seventh Circuit’s flexible interpretation of commercial speech was proper because (1) the case law supports the Court’s broad application of the commercial speech doctrine, and (2) the practical outcomes of the Court’s flexible application of commercial speech doctrine demonstrate that a broad interpretation of commercial speech is the best path forward in private-right commercial speech cases.

³²¹ *Id.* at 521.

³²² *Id.* at 522.

³²³ *Id.*

³²⁴ *Id.* at 518.

1. The Seventh Circuit's Flexible Interpretation of "Speech that Proposes a Commercial Transaction" is Supported by Case Law

The U.S. Supreme Court consistently relies on the "commonsense differences between speech proposing a commercial transaction and other varieties" to find that a variety of expressions qualify as commercial speech.³²⁵ Here, the Seventh Circuit's decision properly interpreted these "commonsense differences" to effectively apply a flexible, rather than rigid, commercial speech interpretation to this case. Although some circuits find that "speech that proposes a commercial transaction" should apply with a narrow scope that is virtually identical to the "core" commercial speech test, most courts interpret the commercial speech doctrine to apply broadly.³²⁶ While there is some ambiguity concerning commercial speech's doctrinal boundaries, the Seventh Circuit's application of a flexible definition of "speech that proposes a commercial transaction" is supported by the U.S. Supreme Court's precedent.³²⁷

First, the Seventh Circuit correctly determined the U.S. Supreme Court's changes to its commercial speech definition implied a tacit support for a flexible, rather than rigid, application of the commercial speech doctrine. Originally, the *Virginia Pharmacy* Court defined commercial speech as "speech that *does no more* than propose a commercial transaction."³²⁸ However, the *Fox* Court altered the

³²⁵ See, e.g., *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985).

³²⁶ See *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184-86 (2001) (applying a narrow interpretation of commercial speech); see *Bad Frog Brewery v. N.Y. State Liquor Auth.*, 134 F.3d 87, 96-97 (1998) (applying a broad interpretation of commercial speech).

³²⁷ See *City of Cincinnati v. Discovery Network, Inc., et al.*, 507 U.S. 410, 419 (1993) (noting the difficulty in "drawing bright lines that will clearly cabin commercial speech in a distinct category").

³²⁸ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council (Va. Pharmacy)*, 425 U.S. 748, 771 n.24 (1976).

wording of its commercial speech definition to simply “speech that proposes a commercial transaction.”³²⁹ The Seventh Circuit inferred that the U.S. Supreme Court’s subtraction of “no more than” from its commercial speech definition implied that commercial speech encompassed expression beyond merely “core” commercial speech.³³⁰ Thus, the Seventh Circuit determined that it was “a mistake to assume that the boundaries of the commercial speech category are marked exclusively by th[e] ‘core’ definition.”³³¹ Accordingly, the Seventh Circuit’s broad, rather than narrow, commercial speech interpretation properly accounted for the U.S. Supreme Court’s changes to its commercial speech definition.³³²

Moreover, the Seventh Circuit appropriately reasoned that the *Bolger* Court’s holding further supported a broad, rather than narrow, application of the commercial speech doctrine. The Seventh Circuit noted that *Bolger* defined “speech that did no more than propose a commercial transaction” as “core” commercial speech.³³³ Yet, the court noted that *Bolger* also held that informational pamphlets that did not directly propose a commercial transaction qualified as commercial speech.³³⁴ Therefore, because *Bolger* explicitly held that speech consisting of both commercial and noncommercial elements constituted commercial speech, the Seventh Circuit appropriately

³²⁹ *Bd. of Tr. v. Fox*, 492 U.S. 469, 473-474 (1989).

³³⁰ *See Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 516 n.7 (7th Cir. 2014).

³³¹ *Id.* The Court further stated that the “core” definition of commercial speech “is just a starting point” because other types of communication could also constitute commercial speech. *Id.*

³³² Additionally, the U.S. Supreme Court has never expressly rejected *Central Hudson*’s formulation of commercial speech. *Id.* at 516 n.6. The *Cincinnati* Court found that *Central Hudson*’s iteration of commercial speech encompassed expression far beyond “core” commercial speech. *Cincinnati*, 507 U.S. at 423. Therefore, the U.S. Supreme Court’s refusal to nullify *Central Hudson*’s expanded commercial speech test is also tacit support for a flexible, rather than rigid, commercial speech interpretation.

³³³ *See Jordan*, 743 F.3d at 516-517 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-68 (1983)).

³³⁴ *Id.* at 517 (citing *Bolger*, 463 U.S. at 66-67).

relied on *Bolger* to apply a flexible interpretation of commercial speech that extends beyond “core” commercial speech.³³⁵

The Seventh Circuit correctly noted that most courts cite the U.S. Supreme Court’s precedents to apply a flexible interpretation of the commercial speech doctrine.³³⁶ Nevertheless, the Ninth and Tenth Circuits apply a narrow definition of commercial speech. In *Mattel, Inc. v. MCA Records, Inc.*, the Ninth Circuit found that speech was “entitled to full First Amendment protection” because it was not “purely commercial.”³³⁷ Similarly, in *Cardtoons* the Tenth Circuit determined that a company’s parody trading cards were not commercial speech simply because they did not “advertise another unrelated product.”³³⁸

However, in both cases the distinction between commercial and noncommercial speech was not either Court’s primary focus. Both the Ninth and Tenth Circuit’s engaged in merely a cursory review of the Supreme Court’s commercial speech precedents, and their incomplete analysis led to their incorrect conclusions of law.³³⁹ In fact, the Second, Third, Sixth, Seventh, Eighth, and D.C. Circuits all found that the Supreme Court’s commercial speech precedents support a broad application of the commercial speech doctrine that encompasses expression beyond “core” commercial speech.³⁴⁰ Accordingly, the

³³⁵ *Id.* at 516-517. The Seventh Circuit reasoned that *Bolger* was “instructive” toward determining the proper interpretation of the “commonsense distinction[s]” between different varieties of speech. *Id.* at 517.

³³⁶ See *Jordan*, 743 F.3d at 516; see also *Dryer v. National Football League*, 689 F. Supp. 2d 1113, 1116 (D. Minn., 2010) (citing to *Cincinnati*, *Fox*, *Bolger*, and *Central Hudson* to declare that it would not limit its commercial speech analysis to only “core” commercial speech because commercial speech has an “elastic definition”).

³³⁷ *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002).

³³⁸ *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 970 (1996).

³³⁹ See *Mattel*, 296 F.3d at 906 (Ninth Circuit only spent one page discussing commercial speech); see *Cardtoons*, 95 F.3d at 970 (Tenth Circuit only devoted one paragraph to commercial speech issue).

³⁴⁰ See, e.g., *Semco, Inc. v. Amcast, Inc.*, 52 F.3d 108, 112-114 (6th Cir. 1995) (Although Mr. Kopp’s article does more than merely propose a commercial

Seventh Circuit's use of a flexible, rather than rigid, commercial speech interpretation was proper because it is supported the Supreme Court's commercial speech precedents and the majority of other court opinions.

2. The Seventh Circuit's Emphasis on the Context of Jewel's Ad Underscores the Practical Necessity of a Flexible Application of the Commercial Speech Doctrine

The Seventh Circuit's broad application of the commercial speech doctrine allowed the court to analyze both the purposes and context behind Jewel's ad. The court's ability to evaluate the ad's entire context and purposes to reach its decision only further illustrates why the Seventh Circuit's broad application of the commercial speech doctrine is the best path forward in private-law cases.

The Seventh Circuit's broad application of the commercial speech doctrine is the most effective application of the commercial speech doctrine in private-law cases because of the prevalence of modern image advertising. The Seventh Circuit noted that if it focused solely on the literal meaning of the ad's text it would have found the ad to be noncommercial speech.³⁴¹ The court reasoned that modern advertising could still communicate strong commercial messages even though the messages were "general and implicit, rather than specific and explicit."³⁴² Thus, the court correctly determined that it needed to consider the ad's entire context rather than focus solely on the plain meaning of the text in the ad in order to properly evaluate whether Jewel's ad constituted commercial speech.³⁴³

Upon consideration of the ad's context, the Seventh Circuit determined that Jewel's ad served the dual functions of

transaction and thus may not meet a core definition of commercial speech, the Supreme Court has extended the category to include speech similar to the article.").

³⁴¹ *Jordan*, 743 F.3d at 517.

³⁴² *Id.* at 517-518.

³⁴³ *Id.*

“congratulating Jordan” and “promoting Jewel’s supermarkets.”³⁴⁴ Jewel argued that its ad was a tribute to Jordan, and the ad was similar to its practice of commending local community groups for their achievements.³⁴⁵ However, the Seventh Circuit evaluated Jewel’s ad in context by acknowledging the important differences that exist between congratulating a local community group and congratulating a world-famous athlete.³⁴⁶

Specifically, the court noted that unlike community groups, famous athletes do not need the extra notoriety that stems from an unsolicited use of their identities.³⁴⁷ The court also noted that famous athletes’ identities have commercial value, whereas community groups do not.³⁴⁸ Further, the court recognized that Jewel’s ad’s congratulatory message incorporated Jordan into Jewel’s trademarked slogan, describing “Jordan as a fellow Chicagoan who was just around the corner for so many years.”³⁴⁹ Thus, the court determined that Jewel’s congratulatory message to Jordan could not be considered the primary purpose of Jewel’s ad because Jewel’s linkage of Jordan to its slogan only made sense if Jewel’s goal was to associate Jordan with Jewel’s brand.³⁵⁰ The court ultimately held that although Jewel’s commercial message was implicit, it was easy to infer that Jewel’s promotion of its brand was the ad’s “dominant” purpose.³⁵¹ Thus, Jewel’s ad constituted commercial speech.³⁵²

Furthermore, the Seventh Circuit’s flexible application of the commercial speech doctrine allowed the court to evaluate the context and purposes behind Jewel’s design of its ad. The court noted that

³⁴⁴ *Id.* at 518.

³⁴⁵ *Id.* Thus Jewel argued that its ad should not be considered commercial speech.

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 519.

³⁵¹ *Id.* at 518.

³⁵² *Id.* at 518-519.

Jewel's logo was displayed in the largest font size on the page.³⁵³ The court also noted that Jewel's ad displayed its logo in the exact center of the page, and that Jewel's logo and slogan were styled in their "trademarked ways."³⁵⁴ Thus, the court reasoned that Jewel's logo and slogan's "style, size, and color" set them apart from the ad's celebratory text and drew the reader's attention to Jewel as the sponsor of the tribute.³⁵⁵ The Seventh Circuit determined that in the context of all these factors that the ad's dominant purpose was not to celebrate Jordan's legacy, but was instead for the primary purpose of fostering "goodwill for the Jewel brand" in the hopes of "increasing patronage at Jewel-Osco stores."³⁵⁶

In sum, the Seventh Circuit's broad application of the commercial speech doctrine was proper here because it allowed the court to consider Jewel's ad in context, and thus discover the dominant purposes of Jewel's ad. If this court were to apply the commercial speech doctrine rigidly, the court would have concluded that Jewel's ad deserved full First Amendment protection simply because the ad did not directly propose a commercial transaction. A flexible application of the commercial speech doctrine allowed the court to avoid this problem and correctly hold that advertisements promoting brand loyalty are just as "commercial" as advertisements directly "proposing a commercial transaction" for a specific product.³⁵⁷

As the Seventh Circuit recognized, a rigid application of the commercial speech doctrine would essentially create a constitutional "distinction between product advertising and image advertising" even though both advertising genres can display an equally clear commercial message.³⁵⁸ Accordingly, the Seventh Circuit's ability to analyze the entire context and purposes of Jewel's ad provides strong support for the proposition that a broad application of the commercial

³⁵³ *Id.* at 518.

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 518-519.

³⁵⁷ *Id.* at 519.

³⁵⁸ *Id.* at 518-520.

speech doctrine provides the most practical path forward in private-law cases.

B. The Seventh Circuit Properly Applied the Bolger Framework to Confirm that Jewel’s Advertisement Constituted Commercial Speech

In its *Bolger* analysis, the Seventh Circuit correctly asked whether the speech: (1) was an advertisement, (2) referred to a specific product or service, and (3) had economic motive.³⁵⁹ First, the Seventh Circuit properly noted that its application of the *Bolger* framework “confirms” its conclusion that Jewel’s ad is commercial speech.³⁶⁰ Commercial speech is defined as speech that proposes a commercial transaction. Thus, the *Bolger* framework serves as a method to determine whether an expression essentially proposes a commercial transaction and therefore, constitutes commercial speech.³⁶¹ Thus, it is doctrinally impossible to hold that an expression proposes a commercial transaction but does not constitute commercial speech under the *Bolger* framework. The Seventh Circuit’s recognition of this principle further demonstrates its proper understanding of the commercial speech doctrine’s application.

With regard to *Bolger*’s first factor, the Seventh Circuit properly concluded that Jewel’s ad qualified “as an advertisement in form.”³⁶² The court noted that Jewel’s ad clearly promoted Jewel’s brand to the readers, and Jewel’s ad could easily be distinguished from the magazine’s “editorial content” because the ad was not an “article,” “column,” or “news photograph.”³⁶³ Further, the court acknowledged that Jewel’s own copywriter admitted that the ad was “too silly [sic].”³⁶⁴ Given the context behind Jewel’s ad, the court correctly

³⁵⁹ *Id.* at 519.

³⁶⁰ *Id.*

³⁶¹ *See* *Am. Future Sys., Inc., v. Pa. State Univ.*, 752 F.2d 854, 862 (1984).

³⁶² *Jordan*, 743 F.3d at 519.

³⁶³ *Id.*

³⁶⁴ *Id.*

determined these facts alone were enough to classify Jewel's ad as an advertisement.

However, several other facts relevant to *Bolger's* first factor solidify the Seventh Circuit's determination that Jewel's ad qualified as an advertisement. For instance the court could have reasoned, like the Third Circuit reasoned in *Facenda*, that the ad's all-positive tone weighed in favor of finding Jewel's ad constituted an advertisement.³⁶⁵ Similarly, the court could have determined, like the Second Circuit determined in *Bad Frog*, that Jewel's use of its trademarked logo communicated enough commercial information to find that Jewel's ad constituted an advertisement.³⁶⁶ Accordingly, it is clear that the Seventh Circuit properly found that Jewel's ad qualified as an advertisement under the *Bolger* framework.

Moving to *Bolger's* second factor, the Seventh Circuit conceded that Jewel's ad did not offer a specific product.³⁶⁷ However, the court noted that the failure to reference a product "is far from dispositive" in image advertising cases because as the court previously noted, brand advertising can be just as commercial in nature as product advertising.³⁶⁸ Because of this reality, the court properly attributed less weight to *Bolger's* second factor in this case.³⁶⁹

Lastly, given that the Seventh Circuit had already determined that the ad's primary purpose was to promote Jewel's brand and increase sales, the court held that there was "no question" that Jewel had an economic motive for its celebratory tribute to Jordan.³⁷⁰ The court also found important that Jewel's marketing representatives stated that it would "be good for [Jewel]" to place its logo in *Sports Illustrated*

³⁶⁵ See *Facenda v. National Football League Films, Inc.*, 542 F.3d 1007, 1017-18 (2008).

³⁶⁶ See *Bad Frog Brewery v. N.Y. State Liquor Auth.*, 134 F.3d 87, 96-97 (1998).

³⁶⁷ *Jordan*, 743 F.3d at 519-520.

³⁶⁸ *Id.* at 519.

³⁶⁹ See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 n.14 (1983) ("[W]e express no opinion as to whether reference to any particular product is a necessary element of commercial speech.").

³⁷⁰ *Jordan*, 743 F.3d at 520.

simply because more people would be exposed to the logo.³⁷¹ As a result, the court held that these facts demonstrate that “Jewel had something to gain” by running its ad at the exact moment of Jordan’s hall of fame induction.³⁷²

Moreover, because the Seventh Circuit determined that the ad’s dominant purpose was to enhance the Jewel brand, the court properly afforded greater weight to *Bolger*’s third factor. In some cases, the Supreme Court states that merely because a speaker could potentially profit from his speech does not by itself make the speech commercial.³⁷³ However, in those cases the Supreme Court makes that point under the premise that the opportunity to profit from the speech is a secondary motivation of the speech.³⁷⁴ Thus, the Seventh Circuit appropriately afforded greater weight to Jewel’s economic motivation for its ad in this case because Jewel’s economic motivation was the primary reason for congratulating Jordan in its ad.

In sum, the Seventh Circuit’s in context consideration of Jewel’s ad allowed the court to attribute the proper weight to each individual *Bolger* factor. The court properly attributed greater weight to Jewel’s economic motivation, because it was the dominant purpose for Jewel’s ad. Likewise, the court properly afforded less weight to *Bolger*’s second factor in order to avoid creating a constitutional distinction between different forms of commercial advertising. Thus, the court correctly held that the ad’s lack of reference to a particular product did not outweigh Jewel’s ad’s substantial satisfaction of *Bolger*’s first and third factors.

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ See, e.g., *Bd. of Tr. v. Fox*, 492 U.S. 469, 482 (1989); *Riley v. Nat’l Fed’n of Blind*, 487 U.S. 781, 795-96 (1988).

³⁷⁴ *Id.*

C. *The Seventh Circuit Properly Applied the Inextricably Intertwined Exception*

Before concluding its analysis, the Seventh Circuit examined the district court's finding that the ad's commercial and noncommercial elements were "inextricably intertwined."³⁷⁵ In the district court opinion, Judge Fienerman conducted a superficial analysis of the exception lasting all of one paragraph.³⁷⁶ Further, the District Court's opinion was brief to the point that it failed to cite *Fox*—the Supreme Court's seminal case on the inextricably intertwined doctrine.³⁷⁷

In contrast, the Seventh Circuit addressed the application of inextricably intertwined exception by first reviewing how it was applied in *Fox*.³⁷⁸ Upon this thorough review, the court determined that the inextricably intertwined exception "applies only when it is legally or practically impossible for the speaker" to separate the speech's commercial elements from its noncommercial elements.³⁷⁹ Contrary to the District Court's loose application of the "inextricably intertwined" exception, the Seventh Circuit reasoned that the exception only applies in highly specific circumstances. The Seventh Circuit's strict interpretation of the inextricably intertwined exception, rather than the District Court's loose interpretation, is a more accurate representation of the *Fox* rule because the *Fox* Court specifically held that the exception only applies when the speaker is "required" to combine the noncommercial elements with the commercial elements in a single expression.³⁸⁰

Here, the Seventh Circuit correctly determined that the ad's two messages, promoting its brand and paying tribute to Jordan, were not "inextricably intertwined" because "no law of man or nature

³⁷⁵ *Jordan*, 743 F.3d at 520-521.

³⁷⁶ *Jordan*, 851 F. Supp. 2d at 1108.

³⁷⁷ *Id.*

³⁷⁸ *Jordan*, 743 F.3d at 521.

³⁷⁹ *Id.* at 521.

³⁸⁰ *Bd. of Tr. v. Fox*, 492 U.S. 469, 474 (1989).

compelled Jewel” to combine these messages into one expression.³⁸¹ In other words, Jewel was capable of saluting Jordan’s accomplishments without simultaneously promoting its own brand. No law of man or nature forced Jewel to do both at the same time. Thus, the Seventh Circuit properly applied the “inextricably intertwined” exception to affirm that Jewel’s ad constituted commercial speech.

CONCLUSION

The U.S. Supreme Court’s reluctance to provide a uniform application of the commercial speech doctrine has left courts free to apply the doctrine as flexibly or rigidly as they see fit. The district court and Seventh Circuit’s directly opposing outcomes in *Jordan* illustrate this result. Other courts’ attempts to resolve this doctrinal struggle have resulted in divergent, and often irreconcilable, commercial speech interpretations.

However, in this case the Seventh Circuit engaged in a flexible commercial speech analysis and evaluated the expression’s entire context before making its decision. This allowed the Seventh Circuit to expand the scope of commercial speech beyond expression that directly proposes a commercial transaction. This flexible application of the commercial speech doctrine is the most practical commercial speech interpretation because it provides a path for courts to hold that clearly commercial expressions qualify as commercial speech even though they do not directly reference a specific product. Thus, if and when the U.S. Supreme Court decides to formulate a uniform commercial speech analysis, the U.S. Supreme Court should follow the path laid out by the Seventh Circuit because it provides the most pragmatic and effective interpretation of the commercial speech doctrine.

³⁸¹ *Jordan*, 743 F.3d at 522.