No. 04-1383

In the Supreme Court of the United States

IRWIN SCHIFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that a preliminary injunction issued pursuant to 26 U.S.C. 7408, prohibiting petitioner from, *inter alia*, "[a]dvertising, marketing, or promoting any false, misleading or deceptive tax position in any media for the purpose of advising or encouraging taxpayers to unlawfully evade the assessment or payment of federal income taxes," is consistent with the First Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 379 F.3d 621. The order of the district court granting the government's motion for a preliminary injunction (Pet. App. 20-65) is reported at 269 F. Supp. 2d 1262.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2004. A petition for rehearing was denied on January 12, 2005 (Pet. App. 66). The petition for a writ of certiorari was filed on April 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a long-time purveyor of fraudulent tax schemes who has repeatedly been convicted of attempted tax evasion and related offenses. Petitioner's most recent scheme, known as the "zero-income" scheme, encouraged participants to stop the withholding of tax from their wages and to report zero income on their tax returns. Pet. App. 24-27, 29-31.

Petitioner promoted the zero-income scheme through various products, ranging from seminars and personal consultations to books and tapes. The central item in petitioner's product line was his self-published book *The Federal Mafia: How the Government Illegally Imposes and Unlawfully Collects Income Taxes*. Pet. App. 26. Petitioner identified *The Federal Mafia* as the "starting point" for the zero-income scheme, and marketed it as part of various instructional packages. *Id.* at 49, 50-51. Petitioner claimed that the book "shows you how to file the zero return[] [and] stop your wage withholding, and explains the basics." *Id.* at 26. The book contains step-by-step instructions on how to participate in the zero-income scheme, and includes an attachment to be filed with a participant's tax return in order to "establish your claim that you had 'zero' income and are entitled to a full refund of all the taxes you paid for that year." *Id.* at 27. Although the book warns that a participant in the zero-income scheme risks going to jail, it elsewhere states that a participant cannot successfully be prosecuted (and offers petitioner's services as a witness and brief writer in the event that a prosecution occurs). *Id.* at 32-33.

Most relevant for present purposes, petitioner's book promotes many of his other products, and expressly en-

courages its readers to purchase those products. The book contains descriptions of assorted other books, videos, and audiotapes sold by petitioner, together with a price list. At various points, the book suggests that it would be "helpful" if readers purchased another book; encourages readers to attend one of petitioner's workshops and to subscribe to his "audio report"; and describes other products that petitioner is designing to further the zero-income scheme. Pet. App. 46-47; Gov't C.A. Br. 9 & n.4.

Petitioner's zero-income scheme substantially interfered with the federal income tax system. From 2000 to 2002, more than 3000 individuals filed tax returns using the attachment included in petitioner's book. Those individuals attempted to deprive the government of an estimated $56 million in tax revenue. Pet. App. 27-28.

2. The government filed suit against petitioner and two other individuals, seeking to enjoin them from marketing the zero-income scheme. C.A. E.R. 1-19. The government relied on several provisions of the Internal Revenue Code authorizing such relief: (1) 26 U.S.C. 7408, which authorizes injunctive relief against persons who have promoted abusive tax shelters (in violation of 26 U.S.C. 6700) or aided and abetted the understatement of tax liability (in violation of 26 U.S.C. 6701); (2) 26 U.S.C. 7407, which authorizes injunctive relief against persons who have improperly prepared tax returns (in violation of 26 U.S.C. 6694 or 6695); and (3) 26 U.S.C. 7402(a), which authorizes injunctive relief "as may be necessary or appropriate for the enforcement of the internal revenue laws." C.A. E.R. 12-15.

3. The district court granted the government's motion for a preliminary injunction. Pet. App. 20-65. The district court first held that the government had met the

requirements of 26 U.S.C. 7408 by demonstrating (1) that defendant had engaged in conduct in violation of 26 U.S.C. 6700 and 6701 and (2) that injunctive relief was appropriate to prevent recurrence of that conduct. Pet. App. 23-36. The district court then rejected defendants' contention that the injunction would violate the First Amendment. *Id.* at 36-62. At the outset, the court noted that "numerous federal courts have imposed § 7408 injunctions on similar abusive tax schemes without violating the First Amendment." *Id.* at 37. The court reasoned that the injunction was valid as a restriction on false and misleading commercial speech, speech that incites imminent lawless action, and speech that aids and abets criminal activity. *Ibid.*

As is relevant here, the district court determined that portions of petitioner's book constituted commercial speech because the book "includes not only a description of a number of other books written and published by [petitioner], but also a description of a cassette seminar and audio reports, and their prices." Pet. App. 47. The court added that other portions of the book that "further the promotion, marketing and sales of the overall tax scheme" likewise constituted commercial speech. *Id.* at 49. To the extent that the book also contained protected autobiographical and political expression, the court found, "the commercial speech components of *The Federal Mafia* are not 'inextricably intertwined' with its protected expression." *Id.* at 48. In a number of other cases involving First Amendment challenges to injunctions issued under 26 U.S.C. 7408, the court noted, the materials at issue similarly contained a combination of protected and unprotected speech. Pet. App. 51-52. The court concluded that "the commercial speech and tax advice aspects of the scheme (including those contained

in *The Federal Mafia*) can be enjoined to the extent that they are false, misleading or deceptive." *Id.* at 52.

The district court thus entered a preliminary injunction barring defendants from "[a]dvertising, marketing, or promoting any false, misleading or deceptive tax position in any media for the purpose of advising or encouraging taxpayers to unlawfully evade the assessment or payment of federal income taxes." Pet. App. 63. The injunction also prohibited defendants from (1) organizing, promoting, marketing, or selling any plan or arrangement that advises or encourages others to attempt to violate the tax laws; (2) assisting or inciting others to violate the tax laws; (3) instructing or assisting others to hinder or disrupt the enforcement of the tax laws; (4) preparing tax returns for others; or (5) engaging in any other conduct that violates 26 U.S.C. 6700, 6701, 6694, or 6695. Pet. App. 63-64. The court stressed that the injunction was designed "not to limit defendants' legitimate tax-related activities or advocacy." *Id.* at 62.

4. The court of appeals affirmed. Pet. App. 1-19. After holding that the district court complied with 26 U.S.C. 7408 in issuing the preliminary injunction, see Pet. App. 6-7, the court of appeals rejected defendants' contention that the preliminary injunction was "unconstitutionally broad as it relates to *The Federal Mafia*," *id.* at 8. The court noted that petitioner was contending that commercial speech should be limited to "advertising pure and simple." *Id.* at 9. Even under that definition, however, the court observed that certain portions of petitioner's book would qualify as commercial speech. *Ibid.* The court ultimately determined that other portions of the book also constituted commercial speech, because "[t]he extravagant claims made in *The Federal Mafia* are designed to convince readers that they can lawfully

avoid paying their income taxes so that the readers will buy other products in [petitioner's] line." *Id.* at 11. The court concluded that "*The Federal Mafia* is an integral part of [petitioner's] whole program to market his various products for taxpayers to utilize his forms and techniques to avoid paying income tax." *Id.* at 12.

Having thus defined the commercial-speech components of petitioner's book, the court of appeals next determined that "the expressive and political portions of *The Federal Mafia* are not 'inextricably entwined' with its commercial elements." Pet. App. 14. Petitioner, the court noted, "can relate his long history with the IRS and explain his unorthodox tax theories without simultaneously urging his readers to buy his products." *Ibid.* "Because the protected and unprotected parts of the book are not inextricably intertwined," the court reasoned, "[petitioner] cannot use the protected portions of *The Federal Mafia* to piggy-back his fraudulent commercial speech into full First Amendment protection." *Ibid.*

Finally, the court of appeals determined that the commercial speech contained in petitioner's book was fraudulent and therefore could be enjoined. Pet. App. 16. The court noted that, "[a]lthough [petitioner's] claims are far-fetched, they could mislead a customer into believing that he or she could use [petitioner's] products to legally stop paying income taxes." *Ibid.* Because the court concluded that the injunction was valid as a restriction on false and misleading commercial speech, it did not reach the district court's alternative bases for rejecting defendants' First Amendment claim: namely, that the injunction was also valid as a restriction on speech that incites imminent lawless action and that aids and abets criminal activity. *Id.* at 16-17.

ARGUMENT

Petitioner contends (Pet. 10-18) that the court of appeals erred by rejecting his First Amendment challenge to the preliminary injunction entered by the district court. The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly concluded that the injunction could properly be applied to petitioner's book to the extent that it contained fraudulent or deceptive commercial speech. This Court has repeatedly made clear that false, fraudulent, or deceptive commercial speech, or commercial speech related to illegal activity, is unprotected by the First Amendment. See, *e.g.*, *Ibanez* v. *Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994); *Edenfield* v. *Fane*, 507 U.S. 761, 768 (1993); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563-564 (1980).

Petitioner does not deny that the speech at issue was fraudulent or deceptive. Instead, he contends that the court of appeals' decision "seems to conflict with the Supreme Court's definition of 'commercial speech,'" Pet. 10, and that "commercial speech" should be "limited to 'advertising pure and simple,'" Pet. 11. Those contentions lack merit.

This Court has stated that the "core notion of commercial speech" is "speech which does no more than propose a commercial transaction." *Bolger* v. *Youngs Drugs Prods. Corp.*, 463 U.S. 60, 66 (1983) (citation omitted). At times, however, the Court has "also suggested that * * * lesser protection was appropriate for a somewhat larger category of commercial speech—'that

is, expression related solely to the economic interests of the speaker and its audience.'" *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 422 (1993) (quoting *Central Hudson*, 447 U.S. at 561). Although the Court has not yet established "the precise bounds of the category of expression that may be termed commercial speech," *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985), it has never held that commercial speech comprises *only* "advertising pure and simple," as petitioner contends, but has instead held that a variety of other types of material constitutes commercial speech. See, *e.g.*, *Bolger*, 463 U.S. at 66-67 (informational pamphlets); *Friedman* v. *Rogers*, 440 U.S. 1, 11 (1979) (trade names).

This case is a poor vehicle for resolving any residual uncertainty as to the extent to which the category of commercial speech encompasses more than speech that merely proposes a commercial transaction. Although the court of appeals recognized (Pet. App. 10) that "[m]uch thought has gone into the question of what the Supreme Court really meant by the [larger] category of commercial speech" to which the Court referred in *Central Hudson*, the court of appeals did not purport to delineate the bounds of that category in this case. Instead, the court merely noted that petitioner's book contained commercial speech under any definition. Compare Pet. App. 9 (noting that portions of petitioner's book constituted commercial speech "[u]nder [petitioner's] definition"), with *id.* at 11 (suggesting that petitioner's "[e]xtravagant claims" constituted commercial speech under the broader definition set forth in *Central Hudson*). Moreover, the court of appeals did not suggest that the injunction would have been overbroad under any valid narrower definition of commercial speech, nor

does petitioner challenge any particular provision of the injunction as overbroad. Because the court of appeals' decision does not conflict with any decision of this Court concerning the definition of commercial speech, and because there is no indication that the court of appeals would have reached a different outcome even if it had expressly adopted a narrower definition, this Court's intervention is unwarranted.[1]

2. The court of appeals correctly upheld the injunction notwithstanding the fact that petitioner's book indisputably contains some fully protected speech. Where commercial speech is "inextricably intertwined" with otherwise fully protected speech, it is entitled to the fullest First Amendment protection. See, *e.g.*, *Board of Trs.* v. *Fox*, 492 U.S. 469, 474 (1989). A speaker, however, cannot "immunize false or misleading product information from government regulation simply by including references to public issues." *Bolger*, 463 U.S. at 68 (citation omitted); see *Zauderer*, 471 U.S. at 637 n.7.

The court of appeals determined that the commercial-speech component of petitioner's book was not "inextricably intertwined" with the fully protected component, because petitioner could "relate his long history with the IRS and explain his unorthodox tax theories without simultaneously urging his readers to buy his

[1] Petitioner also suggests (Pet. 10, 12-14) that the court of appeals' decision conflicts with its earlier decisions in *American Academy of Pain Management* v. *Joseph*, 353 F.3d 1099 (9th Cir. 2004); *Mattel, Inc.* v. *MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002), cert. denied, 537 U.S. 1171 (2003); and *Hoffman* v. *Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001). This Court, however, does not sit to resolve alleged intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, those decisions do not clearly adopt a different definition of "commercial speech" from that used in the decision below.

products." Pet. App. 14. Petitioner does not contend that the court of appeals' decision on that issue conflicts with any decision of this Court or of another court of appeals. To the contrary, courts of appeals have consistently upheld injunctions under 26 U.S.C. 7408 as permissibly regulating fraudulent or deceptive commercial speech—including in cases where, as here, the materials giving rise to the injunction contained both commercial speech and speech that was fully protected. See, *e.g.*, *United States* v. *Raymond*, 228 F.3d 804, 807, 815 (7th Cir. 2000) (materials providing information regarding "general tax-protest principles" and "forms and instructions that guide the purchaser through the process of 'de-taxing'"); *United States* v. *White*, 769 F.2d 511, 512, 516-517 (8th Cir. 1985) (materials containing "arguments against the constitutionality and legality of the federal tax system" and "detailed instructions" on how to evade taxes); see also *United States* v. *Estate Pres. Servs.*, 202 F.3d 1093, 1106 (9th Cir. 2000); *United States* v. *Kaun*, 827 F.2d 1144, 1152 (7th Cir. 1987); *United States* v. *Buttorff*, 761 F.2d 1056, 1066-1068 (5th Cir. 1985).

Crucially, the preliminary injunction issued by the district court did not directly enjoin petitioner from disseminating his book, but instead merely prohibited petitioner from, *inter alia*, "[a]dvertising, marketing, or promoting any false, misleading or deceptive tax position in any media for the purpose of advising or encouraging taxpayers to unlawfully evade the assessment or payment of federal income taxes." Pet. App. 63. Petitioner thus remains free to disseminate his book without

material that is covered by the injunction.[2] And petitioner remains free to engage in other forms of "legitimate tax-related activities or advocacy," pending the district court's determination as to whether a permanent injunction is warranted. *Id.* at 62.

3. Finally, petitioner contends (Pet. 17-18) that the injunction is overbroad as applied to his book because the injunction separately enjoins him from selling the other products that the book promotes. This Court, however, traditionally refuses to consider arguments that were neither pressed in nor passed upon by the court of appeals. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). In any event, petitioner's argument lacks merit. To the extent that petitioner's book promotes products whose sale would now be prohibited by the injunction, it contains "speech proposing an illegal transaction," which (like fraudulent or deceptive speech) "a government may regulate or ban entirely." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982). Petitioner cites no authority for the contrary proposition.

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[2] As a practical matter, petitioner could readily remove the offending material from his book because he publishes it himself. Moreover, as the district court noted (Pet. App. 48), the commercial speech contained in the book does not finance its publication.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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