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Direct-to-Consumer Advertising of Prescription Drugs: Constitutionally Protected Speech or Misinformation?

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DIRECT-TO-CONSUMER ADVERTISING OF PRESCRIPTION DRUGS: CONSTITUTIONALLY PROTECTED SPEECH OR MISINFORMATION?

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INTRODUCTION

What should happen in an ideal society when a person gets sick? Should they have easy access to an educated medical professional—someone who can listen to their symptoms, learn about their history, and examine them for physical traits—who will then recommend treatment? Or should they simply turn on their television, wait a couple of minutes, and get inspiration from an advertisement for a prescription drug? This Note will argue that not only is the latter option far too prevalent, but that it is indeed a consequential harm that should be banned or, at the very least, limited by regulation, paving the way for overall better public health.

The problem should be familiar to anyone living in the United States. While watching a favorite primetime show, the commercials inevitably start to play.¹ A staggering number of these commercials will tout new (or old) prescription drugs to alleviate a whole host of ailments—from depression and sleeplessness to high cholesterol and heart disease.²

This Note will argue that the United States can and should regulate direct-to-consumer (DTC) prescription drug advertisements on television more strictly—preferably by proscribing them altogether. In Part I, this Note will discuss the issues of soaring drug prices, disappointing health care outcomes, a glut of misleading drug advertisements affecting the doctor-patient relationship and personal health, and the problem with the current approach to prescription drug advertising. Part I will also discuss the misleading

1. See Travis M. Andrews, *Six Days Worth of Commercials: That's How Much Watching Netflix Instead of Cable Saves the Average TV Viewer Annually*, WASH. POST (May 11, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/05/11/six-days-worth-of-commercials-thats-how-much-watching-netflix-instead-of-cable-saves-the-average-tv-viewer-annually/> [<https://perma.cc/2PGX-4MN9>] (“[I]f the average user spent as much time watching regular cable as he does Netflix, then he would consume around 160 hours of television commercials every year.”).

2. See Joanne Kaufman, *Think You're Seeing More Drug Ads on TV? You Are, and Here's Why*, N.Y. TIMES (Dec. 24, 2017), <https://www.nytimes.com/2017/12/24/business/media/prescription-drugs-advertising-tv.html> [<https://perma.cc/G327-33K2>] (“According to Kantar Media ... 771,368 such ads were shown in 2016, the last full year for which data is available, an increase of almost 65 percent over 2012.”).

nature of DTC prescription drug advertisements and some examples of the harm they have caused. Additionally, Part I will propose a solution that focuses on limiting the influence of DTC advertising to reduce consumer confusion and deception. Part II will introduce and discuss the constitutional test for restrictions on commercial speech. In Part III, this Note will apply the constitutional test, enunciated in the *Central Hudson* case,³ to demonstrate that proscribing DTC prescription drug ads or confining them to certain, more fitting places would be a constitutional policy. Part III will also explain how the Note's proposed solutions fit into the existing statutory framework and refute some anticipated counterarguments to this Note's proposed solutions.

I. THE MANY PROBLEMS WITH DTC PRESCRIPTION DRUG ADVERTISING AND WHAT TO DO ABOUT IT

This Part will briefly discuss the United States health care system and its unique focus on prescription drugs, the prevalence of direct-to-consumer advertising, and the issues DTC advertising causes, or at least fosters.

A. The United States Health Care Industry

"America's health care system is neither healthy, caring, nor a system."

Walter Cronkite⁴

The health care industry constitutes one of the largest sectors of the United States' economy.⁵ This fact is not particularly out of line with the rest of the world, which also spends vast sums of money on health care.⁶ However, the United States' relative spending on

3. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562-63 (1980).

4. Clinton Found., *Healthcare is Local* (July 17, 2013), <https://stories.clintonfoundation.org/healthcare-is-local-bcc165cc22eb> [<https://perma.cc/G6BS-JZ7X>].

5. Smiljanic Stasha, *The State of Healthcare Industry—Statistics for 2021*, POLICYADVICE (Aug. 6, 2021), <https://policyadvice.net/insurance/insights/healthcare-statistics/#:~:text=10.,according%20to%20the%20latest%20estimates> [<https://perma.cc/K92S-KB8Y>].

6. See, e.g., *US Healthcare Industry in 2023: Analysis of the Health Sector, Healthcare Trends, & Future of Digital Health*, INSIDER INTEL. (Jan. 1, 2023), <https://www.insiderintelligence.com/insights/healthcare-industry/> [<https://perma.cc/PK2J-96PY>] [hereinafter *US*

health care dwarfs the rest of the world's.⁷ The United States health care market, of course, is structured quite differently from the rest of the world's.⁸ Largely as a result of a lack of government intervention into the health insurance field by the United States government (with the notable exceptions of Medicaid and Medicare),⁹ private per capita spending on health care costs is higher in the United States than in any other developed country.¹⁰ For example, the United States' per capita private spending on health care stands at \$4,092;¹¹ this number is more than five times higher than Canada (the second highest in the grouping) and about forty times higher than Norway and Sweden.¹² The Health care industry constitutes a gargantuan chunk of the United States economy, and while this does translate to high levels of investment and innovation;¹³ it also carries high levels of risk to consumers. Quite simply, the health care sector, and all of its component parts, are too large a part of the market for the United States not to regulate—a fact not lost on the government.¹⁴

Healthcare Industry in 2023] ("The global healthcare market will reach \$665.37 billion by 2028, according to Verified Market Research.").

7. See RYAN NUNN, JANA PARSONS & JAY SHAMBAUGH, A DOZEN FACTS ABOUT THE ECONOMICS OF THE U.S. HEALTH-CARE SYSTEM 8 fig.2 (2020), https://www.brookings.edu/wp-content/uploads/2020/03/HealthCare_Facts_WEB_FINAL.pdf [<https://perma.cc/SJX5-NYR2>].

8. See ROOSA TIKKANEN & MELINDA K. ABRAMS, U.S. HEALTH CARE FROM A GLOBAL PERSPECTIVE, 2019: HIGHER SPENDING, WORSE OUTCOMES? 3 (2020), https://www.commonwealthfund.org/sites/default/files/2020-01/Tikkanen_US_hlt_care_global_perspective_2019_OECD_db_v2.pdf [<https://perma.cc/424W-XA3T>].

9. Medicare protects against a citizen's health care costs once that citizen reaches the age of 65. 42 U.S.C. § 1395c ("The insurance program for which entitlement is established by sections 426 and 426-1 of this title provides basic protection against the costs of [health care for] ... individuals who are age 65 or over."). Medicaid, on the other hand, kicks in based on income in relation to the poverty level. See 42 U.S.C. § 1396a(10)(A)(i)(I)-(IX), (10)(A)(ii)(I)-(XXIII) (providing the provisions for eligibility for Medicaid).

10. TIKKANEN & ABRAMS, *supra* note 8, at 3.

11. *Id.*

12. *Id.*

13. See NUNN ET AL., *supra* note 7, at 8.

14. See, e.g., 21 C.F.R. § 208.20 (2022) (listing requirements for medication guides). For a more detailed explanation of the United States government's role in investment and innovation in health care and other "private" sectors, see generally MARIANA MAZZUCATO, THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS (Anthem Press 2013).

*B. The Pharmaceutical Industry's (Sometimes Nefarious)
Role in the Health Care System*

While this Note does not focus on the health care system in the United States as a whole, it does focus on one core component of the system—and a very costly component, at that. The pharmaceutical industry is among the largest beneficiaries of the current health care system.¹⁵ For instance, the American pharmaceutical industry holds “almost half of the global pharmaceutical market, with sales of drugs in the country making up 48% of the global market for pharmaceuticals as of 2019.”¹⁶ This makes the United States the country with the single largest pharmaceutical industry—constituting a plurality of the revenue of the pharmaceutical industry worldwide.¹⁷ While the pharmaceutical companies would certainly love to rest on these laurels, the people and government of the United States are, in large part, to thank for these massive revenue figures.¹⁸ For example, a Government Accountability Office report to the Committee on the Judiciary put in stark relief the contributions to pharmaceutical company revenues the Medicare program—to the tune of \$560 billion from Medicare Parts B and D—provided from 2016-2018.¹⁹

15. See, e.g., TIKKANEN & ABRAMS, *supra* note 8, at 3 (“The average U.S. resident paid \$1,122 out-of-pocket for health care, ... [including] prescription drugs [and] health insurance deductibles.”); Cheryl Barton, *Annual Revenue of Top 10 Big Pharma Companies*, THEPHARMALETTER (Mar. 3, 2020), <https://www.thepharmaletter.com/article/annual-revenue-of-top-10-big-pharma-companies> [<https://perma.cc/M8CB-22QA>] (footnote omitted) (“According to market research, the worldwide pharmaceutical market was worth nearly \$1.3 trillion in 2019 and the top 10 pharma companies accounted for around a third of sales.”); *15 Astonishing Statistics and Facts About U.S. Pharmaceutical Industry*, PHARMAPPROACH (Nov. 21, 2020), <https://www.pharmapproach.com/15-astonishing-statistics-and-facts-about-u-s-pharmaceutical-industry/> [<https://perma.cc/SS58-58C3>] [hereinafter *15 Astonishing Facts*].

16. *15 Astonishing Facts*, *supra* note 15.

17. *Id.*

18. *Id.*; see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-280, *PRESCRIPTION DRUGS: MEDICARE SPENDING ON DRUGS WITH DIRECT-TO-CONSUMER ADVERTISING 15* (2021), <https://www.gao.gov/assets/gao-21-380.pdf> [<https://perma.cc/4FYZ-ZCQW>] (Medicare spending on prescription drugs).

19. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 18, at 15.

Pharmaceutical products are important, and indeed, they can be very helpful for the right people in managing pathological symptoms with prescription drugs.²⁰ These drugs, when used correctly, can help people enjoy longer lives, endure less serious disease-related symptoms, and have overall better health.²¹ However, every pharmaceutical drug has side effects that can cause adverse effects to consumers. In some particularly notable cases, certain prescription drugs have caused societal tectonic shifts, such as the opioid crisis, which stemmed from several pharmaceutical drugs—most notably, OxyContin.²²

In the early years of peddling its product, OxyContin, Purdue Pharmaceuticals spent about six to twelve times more on promotional efforts than it spent on its older products during their early stages.²³ Purdue went all out to ensure that its product, OxyContin, would be the go-to pain medication for patients with certain types of acute or chronic pain.²⁴ And it worked.²⁵ However, with the

20. See *US Healthcare Industry in 2023*, supra note 6 (“Many different types of companies and healthcare institutions work together to provide patient satisfaction and a better quality of care—but sometimes it comes at a large cost.”).

21. See *id.*; see also U.S. CENSUS BUREAU, P25-1145, LIVING LONGER: HISTORICAL AND PROJECTED LIFE EXPECTANCY IN THE UNITED STATES, 1960 TO 2060 3 fig.1 (2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p25-1145.pdf> [<https://perma.cc/6DDM-NWCW>] (reporting marked increase in life expectancy coinciding with increased widespread use of prescription drugs).

22. See, e.g., Jan Hoffman, *Purdue Pharma Is Dissolved and Sacklers Pay \$4.5 Billion to Settle Opioid Claims*, N.Y. TIMES (Sept. 1, 2021), <https://www.nytimes.com/2021/09/01/health/purdue-sacklers-opioids-settlement.html> [<https://perma.cc/JQ96-AMZJ>] (discussing bankruptcy settlement where owners of Purdue Pharmaceuticals agreed to dissolve their company and turn over billions of dollars to “address the deadly opioid epidemic”); *Overdose Death Rates*, NAT’L INST. ON DRUG ABUSE (Jan. 20, 2022) [hereinafter *Overdose Death Rates*], <https://www.drugabuse.gov/drug-topics/opioids/opioid-overdose-crisis> [<https://perma.cc/EGR8-9ZQ7>] (“Opioid-involved overdose deaths rose from 21,088 in 2010 to 47,600 in 2017 and remained steady in 2018 with 46,802 deaths. This was followed by a significant increase through 2020 to 68,630 overdose deaths.”).

23. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-04-110, PRESCRIPTION DRUGS: OXYCONTIN ABUSE AND DIVERSION AND EFFORTS TO ADDRESS THE PROBLEM 21 (2003), <https://www.gao.gov/assets/gao-04-110.pdf> [<https://perma.cc/KW83-FWG6>].

24. See *id.* at 23 (discussing how in the first years of OxyContin, Purdue conducted many national pain management conferences, used a “patient starter coupon program” to give patients free limited-time prescriptions, released educational videos about pain management, and launched websites to spread pertinent information to consumers).

25. See Katie Benner, *U.S. Seeks to Block Bankruptcy Plan That Would Free Sacklers from Opioid Claims*, N.Y. TIMES (Sept. 16, 2021), <https://www.nytimes.com/2021/09/16/us/politics/sackler-bankruptcy-plan.html> [<https://perma.cc/AM47-A7WG>] (“But OxyContin made

benefit of hindsight and the experience of losing hundreds of thousands of Americans to the throes of opioid addiction, it is now obvious that Americans from all walks of life were deceived with regard to the drug's efficacy, and more importantly, with regard to its safety.²⁶

While the bulk of promotional work related to the opioid catastrophe was directed towards health care practitioners,²⁷ it is a story that represents just how easy it is for massive pharmaceutical companies to mislead *people*, to a devastating effect.²⁸

The dangers of the unregulated and misleading peddling of prescription drugs are not only a story related to the opioid crisis. Prescription drugs and their side effects (both personal and macro-economic) affect scores of people across the country each day.²⁹ For example, a common concerning side effect of many drugs that pharmaceutical companies frequently advertise is depression, including the risk of suicidal thoughts.³⁰ Of course, it depends on the

the Sackler family incredibly wealthy. From 2008 to 2017, the family withdrew \$10.4 billion from Purdue Pharma.”).

26. See *Overdose Death Rates*, *supra* note 22.

27. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 23, at 21 (“The remaining 69 percent of pharmaceutical promotional spending involved sampling (55 percent) ... and direct-to-consumer advertising (14 percent)—both activities that Purdue has stated it does not use for OxyContin.”).

28. If doctors, professionals who have received years of training in the medical field, can be hoodwinked into unwittingly (or, in some cases, wittingly) causing the opioid crisis, what does that suggest about ordinary consumers' ability to accurately perceive the information in direct-to-consumer drug ads? See Marla B. Royne & Susan D. Myers, *Recognizing Consumer Issues in DTC Pharmaceutical Advertising*, 42 J. CONSUMER AFFS. 60, 61 (2008) (internal citations omitted) (“Critics maintain that DTC advertising ... confuses patients by representing promotional messages as educational. Further, opponents believe that DTC advertising increases demand for more expensive medications and medicalizes normal human experience, rather than providing consumers with information ... to make better health-care decisions.”).

29. See Jim Martin, Opinion, *Hold Big Pharma Accountable for Misleading Consumers*, DAILY CAMERA (Feb. 23, 2021, 7:01 PM), <https://www.dailycamera.com/2021/02/23/jim-martin-hold-big-pharma-accountable-for-misleading-consumers/> [<https://perma.cc/KVK5-2JMA>] (describing son's battle with addiction to Adderall culminating in son's suicide); *Addiction to Prescription Drugs*, HARV. MED. SCH. (Dec. 2, 2014), <https://www.health.harvard.edu/addiction/addiction-to-prescription-drugs> [<https://perma.cc/S8JC-582V>] (describing prevalence of addiction to prescription drugs).

30. See Julia Belluz, *Depression and Suicide Risk Are Side Effects of More than 200 Common Drugs*, VOX (June 15, 2018, 8:06 AM), <https://www.vox.com/science-and-health/2018/6/14/17458726/depression-drugs-suicide-side-effect> [<https://perma.cc/S3PC-NCJF>] (“Since depression affects more than one in 20 adults in the US every year, and suicide rates have

drug, but one of the components that contributes to depression is isotretinoin.³¹ In the United States, suicide is the tenth leading cause of death and causes tens of thousands of deaths each year.³² One of the contributing factors to this emergent and growing public health crisis that cannot be ignored is the proliferation of prescription drugs.³³ And the growing prevalence of prescription drugs can be tracked alongside increased expenditures on DTC prescription drug advertising, suggesting that the induced demand brought on by said advertising is responsible in part for some of the many crises the country faces today (namely, suicide and depression).³⁴

The cost of health care in the United States is also extraordinarily high and substantially burdens citizens who require medical treatment.³⁵ Because the current health care system is so reliant on the

been steadily climbing here for years, these new findings are an important reminder that the drugs a person takes for one health condition may be making them sick in other ways.”).

31. See, e.g., Uwe Gieler & Tanja Gieler, *Suicidal Risk with Isotretinoin Treatment—A Never-ending Story*, 34 J. EUR. ACAD. DERMATOLOGY & VENEREOLOGY 1131, 1131-32 (2020) (discussing the link between isotretinoin and suicidal ideation as well as other studies regarding the same).

32. See SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., SUBSTANCE USE AND SUICIDE: A NEXUS REQUIRING A PUBLIC HEALTH APPROACH 2 (2016), <https://store.samhsa.gov/sites/default/files/d7/priv/sma16-4935.pdf> [<https://perma.cc/HS45-F72K>] (“In 2013, there were more than 41,000 deaths as a result of suicide in the U.S.... Suicide is the tenth leading cause of death, claiming more lives each year than death due to motor vehicle crashes.” (internal citation omitted)); Julia Belluz, *Anthony Bourdain’s Death Is One in a Growing Public Health Tragedy*, VOX (June 8, 2018, 10:45 AM), <https://www.vox.com/science-and-health/2018/6/8/17441330/anthony-bourdain-suicide-rates-us-cdc> [<https://perma.cc/2GWR-ESZD>] (“In 2016, nearly 45,000 Americans died by suicide.”).

33. See Belluz, *supra* note 30; Dima Mazen Qato, Katharine Ozenberger & Mark Olfson, *Prevalence of Prescription Medications with Depression as a Potential Adverse Effect Among Adults in the United States*, 319 J. AM. MED. ASS’N 2289, 2296 (2018) (“[R]eported use of prescription medications that have depression as a potential adverse effect was common. Use of multiple medications was associated with greater likelihood of concurrent depression.”).

34. See Belluz, *supra* note 30; SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, *supra* note 32, at 2; Donald Rogers & Ronald Pies, *General Medical Drugs Associated with Depression*, 5 PSYCHIATRY 28, 38 (2008) (“Drug-induced depression is a significant clinical ... and public health problem.... Nonetheless, a review of the available evidence finds that some drugs or drug classes commonly used in general medicine probably do pose a relatively high risk of DID.”).

35. See, e.g., Jessica Glenza, *Nearly 46m Americans Would Be Unable to Afford Quality Healthcare in an Emergency*, THE GUARDIAN (Mar. 31, 2021), <https://www.theguardian.com/us-news/2021/mar/31/us-affordable-healthcare-uninsured-underinsured> [<https://perma.cc/2TGB-YT6B>].

use of prescription drugs, the high prices charged for prescription drugs is a large component of the overall burden.³⁶ And because the cost of a given product reflects the costs of its inputs, the increasing factor costs associated with marketing likely bear on the soaring costs of prescription drugs.³⁷ Not only does the cost of advertising make the drugs themselves more expensive, the prevalence of DTC prescription drug advertisements may also minimize the reach of generic drugs.³⁸ The end result of this drug and advertising cocktail is that the drugs people are actually *aware of* are more expensive, leading to higher overall health care costs.³⁹

This Note argues that to stem the rapid growth in prescription drug prices and alleviate Americans struggling with addiction or other adverse side effects, the federal government should impose new restrictions on DTC prescription drug advertising. To alleviate the ills of widespread DTC prescription drug advertising, this Note proposes that the government should promulgate a regulation proscribing DTC prescription drug advertisements under its constitutional mandate to ban per se misleading advertising as misleading

36. See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-282, PRESCRIPTION DRUGS: U.S. PRICES FOR SELECTED BRAND DRUGS WERE HIGHER ON AVERAGE THAN PRICES IN AUSTRALIA, CANADA, AND FRANCE 15 (2021) (“[E]stimated U.S. net prices at the retail level were over four times higher, on average, than gross prices paid at the retail level in Australia and France and about 2.8 times higher than gross prices in Canada (Ontario).”).

37. See Lisa M. Schwartz & Steven Woloshin, *Medical Marketing in the United States, 1997-2016*, 321 J. AM. MED. ASS'N 80, 81 (2019) (“There has been marked growth in expenditures on and extent of medical marketing in the United States from 1997 through 2016.”).

38. See, e.g., Deborah Gleeson & David B. Menkes, *Trade Agreements and Direct-to-Consumer Advertising of Pharmaceuticals*, 7 INT'L J. HEALTH POL'Y MGMT. 98, 98 (2018) (“DTCA increases expenditure by stimulating demand for particular, usually patented, products and shifting demand away from cheaper alternatives.”).

39. See *id.*; Simon Gilbody, Paul Wilson & Ian Watt, *Benefits and Harms of Direct to Consumer Advertising: A Systematic Review*, 14 QUALITY SAFE HEALTH CARE 246, 247-49 (2005) (“Patients in the US were more likely to request DTCA drugs, ... and physicians in both settings were more likely to acquiesce to these requests despite feeling ambivalent about the drug that was prescribed.”); AM. ACAD. ACTUARIES, PRESCRIPTION DRUG SPENDING IN THE U.S. HEALTH CARE SYSTEM: AN ACTUARIAL PERSPECTIVE 1, 1 (2018), <https://www.actuary.org/sites/default/files/files/publications/PrescriptionDrugs.030718.pdf> [<https://perma.cc/FKH6-Q6F5>] (“Over the next decade ... the Centers for Medicare and Medicaid Services (CMS) projects that spending for retail prescription drugs will be the fastest growing health category and will consistently outpace that of other health spending.” (internal citation omitted)).

commercial speech.⁴⁰ The government, through the Federal Communications Commission (FCC), could also prohibit DTC prescription drug advertisements under its powers to regulate broadcasters like it did in 1969 with the passage of the Public Health Cigarette Smoking Act.⁴¹ While merely confining DTC prescription drug advertisements would be another potential means of reducing their reach and harmful effect, this Note will argue that an outright prohibition would be easier to administer and more effective. While either of these proposals would reduce the prevalence of misleading information about prescription drugs, reduce health care costs, and repair the doctor-patient relationship, only an outright prohibition on DTC prescription drug advertisements will arrest their harmful societal effects.

II. CONSTITUTIONALITY OF RESTRICTIONS ON COMMERCIAL SPEECH & *CENTRAL HUDSON*

Courts have looked at restrictions on advertising through two main paradigms. One paradigm provides that advertisements are commercial tools, not expression, and therefore not protected speech. If the courts reviewed an outright prohibition on DTC prescription drug advertisements under this first paradigm, they would almost certainly uphold the prohibition as they did the prohibition on cigarette advertisements.⁴² The other paradigm—the focus of this Part—treats advertisements as commercial speech, rather than mere commercial activity. This paradigm subjects restrictions on advertising to a different, lower standard than restrictions on conventional speech. Part of the logic behind affording a lower level of protection to commercial speech lies in the difference in function of conventional speech and commercial speech. For instance, the Court has seen fit to vigorously protect conventional speech against restrictions on the grounds that conventional speech

40. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-71 (1964)) (“Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”).

41. 15 U.S.C. § 1335.

42. See *Cap. Broad. Co. v. Mitchell*, 333 F. Supp. 582, 584 (1971), *aff’d*, 405 U.S. 1000 (1972).

advances national debates and discourse on important issues facing the nation.⁴³ Conversely, commercial speech merely proposes a transaction, and, except for some very rare exceptions, does not engage in political discourse or controversial topics. Instead, commercial speech is analogous to commercial transactions in general, which the government has greater authority to regulate.⁴⁴ Commercial speech is mere “expression related solely to the economic interests of the speaker and its audience,”⁴⁵ whereas more highly regarded types of speech relate to abstract or political ideas that generate public discourse.⁴⁶

One of the landmark cases on commercial speech, the *Central Hudson* case, began with a 1979 New York State Commission’s order prohibiting promotional advertising in the wake of the 1973 Arab oil embargo.⁴⁷ Specifically, the Commission had prohibited electric corporations from “promoting the use of electricity through the use of advertising....”⁴⁸ The reason the Commission elected to ban promotional advertising for electricity use was because “[t]he rates of electric utilities in [New York] continue[d] to rise.”⁴⁹ Not at all happy at the prospect of missing out on potential customers who could be reached through advertisements, the Central Hudson Gas & Electric Corporation challenged the Commission’s order. After each successive state court affirmed the Commission’s promotional advertising restrictions, the United States Supreme Court heard the case.⁵⁰

43. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“[We recognize the] principle that debate on public issues ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”).

44. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 562-63 (1980) (discussing the “commonsense” distinction between commercial speech and other types of speech).

45. *Id.* at 561.

46. See *New York Times Co.*, 376 U.S. at 270.

47. Brief for Appellee at 2, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980) (No. 79-565).

48. *Id.*

49. *Id.* at 5.

50. *Id.* at 2-3.

Reversing the state court judgments, the Supreme Court held that the state's asserted interest in preventing inequities in the utility's rates and preserving electricity did not provide a constitutionally adequate reason for banning Central Hudson's promotional advertising.⁵¹ As support for its holding, the Supreme Court noted that the Commission's order banning promotional advertising affected *all* promotional advertising "regardless of the impact of the touted service on overall energy use."⁵² Additionally, some of the services and appliances the promotional advertisements expounded upon were devices or services that caused no net increase in total energy use, so in a sense, the Commission's order did not even fulfill its own goal.⁵³ Finally, the Court noted the Commission's inability to show that the restrictions had to amount to a ban to be effective; that is, the Commission made no showing that a less restrictive method would not adequately have served the state interests.⁵⁴ One of the important aspects of the case was the dichotomy between the newer, electric sources of heating and the older, analogue heating methods. This distinction was important, at least in part, because the promotional advertising had been geared toward increasing the use of *electric* heating methods, which effectively directed consumers toward more efficient energy use.⁵⁵

Overall, the case stands for the proposition that restrictions on commercial speech should not be more extensive than necessary to further the state's interest.⁵⁶ The case also helped to expound on the four-part test for commercial speech restrictions.⁵⁷ Under the *Central Hudson* four-part test, the court first determines whether the commercial speech at issue concerns lawful activity and is not misleading.⁵⁸ Next, the court determines whether the asserted governmental interest behind the restriction is substantial.⁵⁹ If the

51. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 569-70.

52. *Id.* at 570.

53. *See id.* ("But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use.").

54. *Id.*

55. *See id.*

56. *Id.* at 571.

57. *Id.* at 566.

58. *Id.*

59. *Id.*

result of both of those questions are positive answers, then the court determines whether the regulation directly advances the asserted government interest, and finally, whether the regulation is “not more extensive than necessary to serve that interest.”⁶⁰ Importantly, this last prong does not require the government to demonstrate that its proposed legislation or regulation is the least restrictive means of accomplishing its end, but rather, that it is a reasonable, albeit imperfect, fit in proportion to the government’s interests.⁶¹

This Note argues that first, because the evidence demonstrates that DTC prescription drug advertisements are misleading in fact, the government would be within its rights to proscribe said advertisements.⁶² The government could also proscribe DTC prescription drug advertisements on the basis that they are a danger to public health and that such advertisements are not speech, but rather, commercial tools. The government used this strategy when it passed the Public Health Cigarette Smoking Act of 1969 and banned cigarette advertisements.⁶³ While the government could opt for a less restrictive approach by, say, restricting DTC drug advertisements to certain places where they would reach a more limited audience, this solution would not go far enough to solve the problem and would suffer from more administrative complexity.⁶⁴

III. APPLICATION OF *CENTRAL HUDSON* JUSTIFIES EITHER A BAN OR IMPOSITION OF PLACE-BASED RESTRICTIONS ON DTC PRESCRIPTION DRUG ADVERTISEMENTS

While many commentators agree that something must be done about direct-to-consumer advertisements for prescription drugs, most proposals end up retreating to watered-down positions, afraid they will run afoul of the First Amendment. This Part will first argue that because DTC prescription drug advertisements are per se

60. *Id.*

61. *See* *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989).

62. *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563-64.

63. *See* *Cap. Broad. Co. v. Mitchell*, 333 F. Supp. 582, 584 (1971), *aff’d*, 405 U.S. 1000 (1972).

64. *See* *Coyote Publ’g, Inc. v. Miller*, 598 F.3d 592, 610 (9th Cir. 2010), *cert. denied*, 562 U.S. 1217 (2011).

misleading, the government can act to proscribe them under the *Central Hudson* constitutional framework.⁶⁵ While the *Central Hudson* framework would likely also permit qualified, place-specific restrictions on DTC drug advertisements,⁶⁶ an outright prohibition would be more effective at reducing the harms of DTC advertising. Additionally, this Part will explain that, even apart from the *Central Hudson* framework, a prohibition on DTC prescription drug advertising could be justified on the same basis as the prohibition on cigarette advertising was in the *Capital Broadcasting* case.

Protection of commercial speech was not always a given.⁶⁷ While the Constitution affords some protection to only potentially misleading commercial speech,⁶⁸ certain limited types of prohibitions, so long as they do in fact serve a substantial governmental interest and are properly tailored, have been upheld as commercial speech restrictions under intermediate scrutiny.⁶⁹ The same motivations for upholding certain place-specific prohibitions on commercial speech that the courts have cited in the past provide ample justification for restricting DTC drug advertising to places like primary care offices, hospitals, and pharmacies if an outright ban would be improper.

A. DTC Prescription Drug Advertisements Are Misleading in Fact and Therefore Can Be Banned Under Central Hudson

While it would be difficult to dispute that most DTC prescription drug advertisements concern lawful activity, importantly, as this Section will argue, DTC prescription drug advertisements are misleading and therefore beyond the scope of the Constitution's protection of commercial speech.⁷⁰ Importantly, "the State does not

65. See *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 569-70. But see *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) (holding that subsection of law exempting compound drug manufacturing from ordinary FDA approval scrutiny so long as manufacturers refrained from advertising was unconstitutional because there were less restrictive means of advancing governmental interest).

66. See *Coyote Publ'g, Inc.*, 598 F.3d at 610.

67. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455 (1978) (footnote omitted) ("Expression concerning purely commercial transactions has come within the ambit of the Amendment's protection only recently.").

68. *Id.* at 456.

69. See *Coyote Publ'g*, 598 F.3d at 610.

70. See *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.”⁷¹

The government can impose restrictions on advertising if its content or method of advertising “suggests that it is inherently misleading or when experience has proved that *in fact* such advertising is subject to abuse.”⁷² In essence, when advertising is misleading, deceptive, false, or proposes an illegal transaction, it is completely unprotected.⁷³ Of course, defining “misleading” is not easy, but the courts nonetheless have successfully separated the misleading from the appropriate in several cases.⁷⁴ Merriam-Webster, on the other hand, defines mislead as “to lead astray [or] give a wrong impression.”⁷⁵ Merriam-Webster also defines it more narrowly as “to lead in a wrong direction or into a mistaken action or belief often by deliberate deceit.”⁷⁶ The law is familiar with both conceptions of misleading—the narrow and the broad.⁷⁷ For example, contract law defines misrepresentation as “an assertion that is not in accord with the facts.”⁷⁸ This definition does not require the misrepresentation to be fraudulent—even a bona fide statement of fact is a misrepresentation if not in accord with the facts under contract law.⁷⁹

The courts also recognize that speech which tends to lead the audience astray or give the wrong impression is itself misleading.⁸⁰

71. *Ohralik*, 436 U.S. at 456.

72. *In re M.J.*, 455 U.S. 191, 203 (1982) (emphasis added).

73. *Parker v. Ky. Bd. of Dentistry*, 818 F.2d 504, 509 (6th Cir. 1987); *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976).

74. *See, e.g., Peel v. Att’y Registration & Disciplinary Comm’n*, 496 U.S. 91, 110-11 (1990) (plurality opinion) (finding that an absolute bar on advertising for legal services violated the First Amendment where there was a “complete absence” of evidence of deception); *Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1108 (finding that restrictions on the use of the phrase “board certified” is constitutional and that the defendant’s use of the phrase was misleading); *Barlow v. Miss. State Bd. of Chiropractic Exam’rs*, 233 So. 3d 223, 230 (Miss. 2017) (holding that state disciplinary action did not violate the First Amendment because the appellant-chiropractor’s advertisements used designations other than those allowed under statute and, consequently, were misleading).

75. *Mislead*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/misleading> [<https://perma.cc/8CWT-Q5TA>].

76. *Id.*

77. *See* Restatement (Second) of Contracts § 159 (Am. L. Inst. 1981).

78. *Id.*

79. *See id.*

80. *See Barlow v. Miss. State Bd. of Chiropractic Exam’rs*, 233 So. 3d 223, 230 (Miss. 2017).

One of the areas of commercial speech courts have found deceptive or misleading advertising in is marketing for professional services.⁸¹ Marketing for professional services, as the United States Supreme Court has said, is especially susceptible to abuses that states have a legitimate interest in controlling for three reasons.⁸² First, the public's comparative lack of knowledge decreases their ability to discern the proper from the deceptive.⁸³ Second, the limited ability of the professionals to police themselves limits the extent to which the states can entrust the profession with self-regulation.⁸⁴ Finally, the non-standardized nature of the product advertised makes it difficult to create reliable advertisements as a matter of course.⁸⁵

Barlow v. Mississippi State Board of Chiropractic Examiners presents a good, recent illustration of an unprotected misleading advertisement.⁸⁶ In the *Barlow* case, patients lodged two complaints against Dr. Barlow, a chiropractor.⁸⁷ One of the complaints charged that Dr. Barlow guaranteed a cure for the illnesses of several patients, failed to release medical records, and failed to reimburse patients for medications they could not use.⁸⁸ The other complaint alleged that Dr. Barlow used professional designations other than "chiropractor", "doctor of chiropractic, D.C.," or "chiropractic physician" in violation of state law.⁸⁹ Instead, Dr. Barlow used designations in his advertising including DACNB (Diplomate of the American Chiropractic Neurology Board), FACFN (Fellow of the American College of Functional Neurology), and Chiropractic Neurologist.⁹⁰ After the Mississippi State Board of Chiropractic Examiners held a hearing and elected to discipline Dr. Barlow for using the unauthorized professional designations, Barlow appealed the disposition up to the Mississippi Supreme Court, arguing that

81. *See id.*; *see also In re M.J.*, 455 U.S. 191, 202 (1982)

82. *In re M.J.*, 455 U.S. 191, 202 (1982).

83. *Id.*

84. *Id.*

85. *Id.*

86. *See* 233 So. 3d 223, 230 (Miss. 2017).

87. *Id.* at 226.

88. Brief of Appellee at 6-7, *Barlow v. Miss. State Bd. of Chiropractic Exam'rs*, 233 So. 3d 223 (Miss. 2017) (No. 2016-SA-00110-SCT).

89. *Barlow*, 233 So. 3d at 226.

90. *Id.* at 226 nn.3-4.

the state law prescribing the appropriate professional designations infringed his First Amendment right to free speech.⁹¹

The Supreme Court of Mississippi found the state statute constitutional.⁹² The court there noted that while the First Amendment's protection does extend to commercial speech, the protection for commercial speech is more constrained.⁹³ After listening to the testimony of three witnesses, the patient-complainant, and two doctors, all of whom testified that Dr. Barlow's advertisements were misleading, the court found that Dr. Barlow's advertisements were "actually misleading."⁹⁴ The fact that Dr. Barlow did not define the acronyms he used as designations and referred to himself as a chiropractic neurologist, which gave patients the wrong impression,⁹⁵ was also very important for the court in holding his advertisements misleading.⁹⁶ Because the court in *Barlow* decided that the speech was actually misleading, they did not apply the factors justifying heightened restrictions on professional services commercial speech.⁹⁷ Essentially, *Barlow* and *In re M.J.*, stand for the proposition that misleading advertising may be prohibited entirely.⁹⁸

Applying the *In re M.J.* factors and the *Barlow* case demonstrates that DTC prescription drug advertisements are misleading to consumers and that therefore, the government can heavily regulate them.⁹⁹ First, DTC prescription drug advertisements, according to a large and growing body of research, do in fact mislead the public.¹⁰⁰ The advertisements are misleading for many reasons, but one reason is the way the drugs are marketed.¹⁰¹ DTC drug advertise

91. *Id.* at 227.

92. *Id.* at 230.

93. *Id.* at 229-30.

94. *Id.* at 230.

95. *See id.* ("[Barlow] referred to himself as a 'chiropractic neurologist,' which the witnesses testified led to confusion for patients that they were seeing a medical doctor.").

96. *Id.*

97. *Id.*

98. *See id.*; *In re M.J.*, 455 U.S. 191, 202 (1982).

99. *See Barlow*, 233 So. 3d at 229-30 ("The government may proscribe commercial speech that is misleading or related to unlawful activity.").

100. *See, e.g.*, Michael S. Wilkes, Robert A. Bell & Richard L. Kravitz, *Direct-to-Consumer Prescription Drug Advertising: Trends, Impact, and Implications*, 19 HEALTH AFFS. 110, 119 (2000).

101. *See, e.g.*, Dominick L. Frosch, Patrick M. Krueger, Robert C. Hornik, Peter F. Cronholm & Frances K. Barg, *Creating Demand for Prescription Drugs: A Content Analysis of Television Direct-to-Consumer Advertising*, 5 ANNALS FAM. MED. 6, 10-12 (2007) ("Almost

ments use a variety of visual and auditory techniques, such as bright colors, happy people, and fun activities, paired with exposition of highly detailed and specialized product information, in a way that most average consumers simply cannot comprehend—a method analogous to Dr. Barlow’s use of colorful acronyms behind his name.¹⁰²

However, one need not analogize to the *Barlow* case to demonstrate the misleading nature of DTC prescription drug advertisements.¹⁰³ One of the consequences of DTC prescription drug advertisements on consumers is “miscomprehension,”¹⁰⁴ and the inclusion of adverse effects alongside beneficial effects of the medication has not alleviated any consumer confusion.¹⁰⁵ Another disturbing—and inherently misleading—facet of DTC prescription drug ads is a consequence of its solitary goal of selling drugs to consumers—marketing strategy itself.¹⁰⁶

Consider the Picture-Superiority Effect.¹⁰⁷ This theory posits that consumers will better recall advertisements that more closely resemble pictorial displays or that incorporate pictorial elements.¹⁰⁸ The point is that where an advertisement takes advantage of sensory cues, rather than informative cues, the advertiser will reap more rewards in the form of higher revenue.¹⁰⁹ This creates a perverse incentive whereby drug companies will, to earn more revenue, create less informative advertisements in favor of those that simply please the eyes and ears. In the context of medicine—something integral to so many people’s health—honest information

all ads [examined under this study] used positive emotional appeals Emotional appeals may prompt viewers to discount information about risks and benefits that is important when considering medication use DTCA often attempts to persuade viewers on grounds other than rational consideration of medical costs and benefits.”).

102. See *Barlow*, 233 So. 3d at 230.

103. See Wilkes et al., *supra* note 100, at 119.

104. *Id.* at 117.

105. *Id.*

106. *Id.* at 113.

107. For an overview of the Picture-Superiority Effect and its consequences, see Terry L. Childers & Michael J. Houston, *Conditions for a Picture-Superiority Effect on Consumer Memory*, 11 J. CONSUMER RSCH. 643, 643 (1984).

108. See *id.* at 652.

109. *Id.*

ending up on the cutting room floor leads to more misleading advertisements.¹¹⁰

In fact, the strategies drug companies use to market their prescription drugs is a fascinating display of the tendency to decrease honest information in favor of emotional appeals and otherwise sensory stimulation.¹¹¹ In a 2016 study, Professors Applequist and Ball analyzed the content of 868 product advertisements that aired on four channels over a period of thirteen weeks.¹¹² As an aside, these numbers demonstrate that consumers are bombarded with DTC prescription drug ads; the numbers revealed in the methods portion of Applequist and Ball's article reveals that each major news channel played a prescription drug ad at an average rate of three times per hour.¹¹³

An example of these misleading tactics is the phenomenon of certain cholesterol drug advertisements using footage of healthy-looking people doing activities associated with active, healthy lifestyles, yet revealing that even they are in need of help.¹¹⁴ The implicit purpose, aside from dazzling the viewer with images of healthy, active lifestyles, is to convince viewers that if people who look like *that* need a drug to manage their cholesterol, then certainly the view must as well.¹¹⁵ The medicine is "portrayed as the sole solution to the condition, and the type of behavioral changes necessary to improve one's health status are limited to taking the drug."¹¹⁶

110. See *id.* at 652-53.

111. Janelle Applequist & Jennifer Gerard Ball, *An Updated Analysis of Direct-to-Consumer Television Advertisements for Prescription Drugs*, 16 ANNALS FAM. MED. 211, 213-14, 213 tbl.1 (2018).

112. *Id.* at 212-13.

113. *Id.* The study monitored twenty-two hours of television per week for thirteen weeks for a total of 286 hours of television monitored. During those monitored times, DTC prescription drug advertisements aired 868 times, meaning an average of three DTC drug ads played each hour during the monitored time. *Id.*

114. Crystal Adams & Brittany M. Harder, *Diet, Exercise ... and Drugs: Social Constructions of Healthy Lifestyles in Weight-Related Prescription Drug Advertisements*, 28 CRITICAL PUB. HEALTH 439, 443 (2018).

115. *Id.*

116. *Id.*

The Society of General Internal Medicine, after conducting a content analysis of television DTC prescription drug advertisements, determined that the amount of misleading or false claims was disconcertingly high.¹¹⁷ Specifically, the study found that of the DTC drug advertisements surveyed during the study period, “[o]ver half of major claims (57%) were potentially misleading in some regard, and there was no difference in the proportion of potentially misleading claims in prescription versus nonprescription drug ads.”¹¹⁸ The study identified the three types of misleading claims as those with selected facts, minimal facts, and nonfacts—with nonfacts representing the largest portion.¹¹⁹ Additionally, the survey found a 10 percent incidence of false claims—claims that lacked a valid evidentiary basis.¹²⁰ Putting these figures together, the authors concluded that from 2008 to 2010, false or misleading claims “appeared in 66% of televised drug advertisements.”¹²¹

The reports and research above demonstrate that DTC prescription drug advertisements employ misleading tactics and convey misleading information to viewers. They promise to their viewers a changed lifestyle, grand improvements in overall health, and sometimes, even relief from one’s ailments—if only the consumer ingests the pill.¹²² The central paradox of the prescription drug advertisement is that there is no timeline—the deal is that you will take this pill for the rest of your life, you will never be cured, and you will never get better.¹²³

117. Adrienne E. Farber & David H. Kreling, *Content Analysis of False and Misleading Claims in Television Advertising for Prescription and Nonprescription Drugs*, 29 J. GEN. INTERNAL MED. 110, 116 (2013). The article explained that “each category is increasingly misleading and potentially harmful to consumers: Objectively True Claims; Selected Facts Claims; Minimal Facts Claims; Nonfacts Claims; and False Claims.” *Id.* at 112.

118. *Id.* at 114.

119. *Id.* at 115 tbl.4.

120. *Id.* at 115.

121. *Id.* at 116.

122. See Adams & Harder, *supra* note 114, at 443.

123. See *id.* (representing an emblematic cholesterol drug advertisement that conveys to the viewer that there is no cure, really, and all one can do to manage symptoms is to take the drug).

B. Limiting DTC Prescription Drug Advertisements Would Advance Several Substantial Governmental Interests

The governmental interest in increasing consumer knowledge of pharmaceutical products and in overall decreasing the potential for patients to be misled by pharmaceutical companies is substantial. The government's interest in regulating the transmission of prescription drug advertisements directly to consumers could variously be described as an interest in safeguarding public health,¹²⁴ reducing health care costs (including prescription drug prices),¹²⁵ or increasing the quality of health care.¹²⁶ Any of these named interests would likely be substantial, and therefore, a government regulation would likely clear this constitutional burden. Because the restrictions on DTC prescription drug advertising would certainly further a substantial government interest, the only remaining question to assure their validity is whether the regulations are sufficiently tailored.¹²⁷

C. Note's Proposed Solutions Would Be Properly Tailored

Even assuming, arguendo, that DTC drug advertisements are not misleading, regulations restricting DTC prescription drug advertisements to more logical places (e.g., doctors' offices, hospitals, and pharmacies) would (a) directly advance the relevant governmental interest, and (b) be properly tailored. Therefore, they would be constitutionally valid.¹²⁸

124. See *IMS Health, Inc. v. Sorrell*, 630 F.3d 263, 277 (2d. Cir. 2010) (recognizing Vermont's substantial interest in safeguarding public health but holding that law did not advance said interest), *aff'd*, 564 U.S. 552 (2011); see, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 461 (1978) ("The substantive evils of solicitation have been stated over the years ... in the form of overreaching, overcharging, underrepresentation, and misrepresentation.").

125. *Id.*; see also *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 55 (1st Cir. 2008) ("Fiscal problems have caused entire civilizations to crumble, so cost containment is most assuredly a substantial governmental interest.").

126. See, e.g., *Tsilerman v. Daines*, 794 F.3d 310, 315-16 (2015) ("New York has an interest in ensuring that its citizens receive adequate care *and* that they have access to that care.").

127. See *Cent. Hudson Gas & Elec. Corp v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

128. See *id.*

An apt label for the first prong of the tailoring prong of the *Central Hudson* test is the “direct advancement” prong—that is, whether the challenged regulation directly advances the government’s substantial interest.¹²⁹ This analysis can only be completed with the proffered governmental interests in mind.¹³⁰ Therefore, in this section, this Note first discusses whether the place-specific regulations on DTC prescription drug advertising would directly advance the government’s interest in (a) safeguarding public health/increasing the quality of health care, and (b) reducing health care costs.¹³¹

1. Regulation Would Directly Advance Interest in Safeguarding Public Health

A regulation restricting DTC prescription drug advertisements to certain places, like hospitals, pharmacies, and doctor’s offices, would safeguard and improve overall public health.

One of the threats to societal public health outcomes is the phenomenon of advertisements leading people to make harmful choices for their health.¹³² While the simplest solution would be to take the problematic drugs out of circulation writ large, such an approach poses enormous practical concerns and would be highly unlikely to succeed.¹³³ Rather than requiring the creation and coordination of several new government agencies, the limitation of DTC prescription drug advertisements to medical settings would be easy to enforce and would directly reduce the spread of misleading information about prescription drugs.¹³⁴

129. *Id.*

130. *See supra* notes 124-26 and accompanying text.

131. *Id.*

132. *Cf.* Mark Petticrew, Nason Maani Hessari, Cecile Knai & Elisabete Weiderpass, *How Alcohol Industry Organisations Mislead the Public About Alcohol and Cancer*, 37 *DRUG & ALCOHOL REV.* 293, 294, 300-01 (2018) (discussing the alcohol industry’s marketing efforts and its results of misleading the public about cancer risks, thereby worsening public health outcomes in the aggregate in that respect).

133. *See, e.g.*, David Farber, *The War on Drugs Turns 50 Today. It’s Time to Make Peace*, *WASH. POST* (June 17, 2021), <https://www.washingtonpost.com/outlook/2021/06/17/war-drugs-turns-50-today-its-time-make-peace/> [<https://perma.cc/AN8W-P6HE>].

134. *See id.*; Justin P. Johnson & David P. Myatt, *On the Simple Economics of Advertising, Marketing, and Product Design*, 96 *AM. ECON. REV.* 756, 766 (2006) (“[W]e suggest a different taxonomy: an advertisement consists of both *hype* and *real information*. The hype corresponds

Because advertising's purpose is to increase awareness and, at least from the enterprise's perspective, to increase demand, advertising likely increases the likelihood that consumer X will give a certain product a shot.¹³⁵ This becomes problematic from a public health standpoint when the "hype," which "always increase[s] demand," causes people to think that they need a certain medication when it is either not the right treatment for them, or its side effects outweigh the benefits.¹³⁶ Another area where DTC prescription drug advertisements can harm public health is their tendency to cause people to shop around for doctors who would be willing to write the prescription.¹³⁷ This tendency undermines the trust and confidence that is so crucial to the efficacy of that relationship.¹³⁸ By decreasing the likelihood that a given patient would come across a prescription drug advertisement, the risks of doctor-shopping would necessarily decrease because patients would have less occasion to request their doctor to write them a certain prescription. Instead, the doctor would be free to inquire as to the patient's symptoms and make an informed decision based on those criteria, not on the patient's pre-conceived desires.¹³⁹ In other words, a regulation like this would also increase the quality of health care because it would help repair the physician-patient relationship into one that reacts to information provided by the patient, rather than one that reacts to marketing trends.

A regulation that restricted the reach of misleading DTC prescription drug advertisements would directly advance the government's interest in improving public health because, first, it would reduce the proliferation of advertisements that contribute to misuse of prescription drugs, and, second, it would help repair the

to basic publicity for the product.... Absent other issues, hype will always increase demand.").

135. See, e.g., Johnson & Myatt, *supra* note 134, at 766.

136. See *id.*

137. See Robert A. Bell, Michael S. Wilkes & Richard L. Kravitz, *Advertisement-Induced Prescription Drug Requests: Patients' Anticipated Reactions to a Physician Who Refuses*, 48 J. FAM. PRAC. 446, 448 (1999) (noting that roughly 46 percent of prospective patients would likely be disappointed by their physician if the physician refused their request, and that 30 percent would be disappointed and "take action").

138. Many states have enacted physician-patient privilege laws in recognition of the confidence the relationship ideally entails. See, e.g., COLO. REV. STAT. § 13-90-107(1)(d) (2021); *Alcon v. Spicer*, 113 P.3d 735, 739 (Colo. 2005) (en banc) (applying state physician-patient privilege and describing its rationales).

139. See Bell et al., *supra* note 137, at 448.

physician-patient relationship toward a more insular character where the focus is on the patient's health care needs.

2. Regulation Would Directly Advance Interest in Reducing Health Care Costs

A regulation restricting DTC prescription drug advertisements to certain logical places would also likely reduce health care costs, because one of the factors of the cost of medicine—advertising—would be significantly decreased.

Prescription drug advertisements directly cause health care costs to, in the aggregate, increase.¹⁴⁰ The amount of spending in the United States on prescription drugs is massive; in 2010 alone, the spending on hospital care, physicians, clinical services, and prescription drug costs “accounted for roughly 61% of total healthcare expenditures.”¹⁴¹ This chunk of the health care market is nothing to sneeze at, weighing in at about \$2.6 trillion or 17.9 percent of the gross domestic product of the United States.¹⁴²

Annual spending on DTC prescription drug advertisements helps uncover at least some of the inputs to this massive spending total. Pharmaceutical companies spend billions of dollars each year to advertise to consumers on television, and because companies are not charities, this cost is necessarily reflected in the price of the drugs sold.¹⁴³ Reducing the prevalence of prescription drug advertisements, and especially taking them off of one of the most expensive mediums for advertising—prime time cable—would directly cause the cost of inputs to decrease and likely decrease the costs borne by customers.¹⁴⁴

140. See, e.g., Robert A. Bell, Richard L. Kravitz & Michael S. Wilkes, *Direct-to-Consumer Prescription Drug Advertising and the Public*, 14 J. GEN. INTERNAL MED. 651, 651 (1999) (“[I]n the aggregate, prescription drugs represent a substantial health care expenditure.”).

141. Thierry Nianogo, Albert Okunade, Demba Fofana & Weiwei Chen, *Determinants of US Prescription Drug Utilization Using County Level Data*, 25 HEALTH ECON. 606, 606 (2016).

142. *Id.*

143. See GOV'T ACCOUNTABILITY OFF., *supra* note 18, at 9 (reporting that drug manufacturers spent six billion dollars per year to advertise drugs to customers between 2016 and 2018).

144. For a crash course on television advertisement costs and options, see generally Erin Ryan, *TV Advertising Costs: What You Need to Know*, FASTCAPITAL360 (Oct. 7, 2021), <https://www.fastcapital360.com/blog/how-much-do-tv-commercials-cost/> [<http://permalink.cc/JS96-2EWK>].

Because a regulation restricting DTC prescription drug advertisements to medical settings would necessarily decrease the pharmaceutical company's costs on marketing, it would likely directly assist in decreasing the cost of prescription drugs. A regulation like this could be overseen by the DOJ, which has similar monitoring experience in the context of the tobacco industry's advertising.¹⁴⁵

3. Regulation Would Be No More Burdensome Than Necessary

A regulation restricting DTC prescription drug advertisements to certain places like hospitals, doctor's offices, and pharmacies would be no more burdensome than necessary to directly advance the government's substantial interests.

Some of the judicial circuits have elaborated on the standards necessary to uphold state prohibitions on advertising for activities or services the government deems harmful to societal interests. For example, the Ninth Circuit Court of Appeals held that Nevada's outright ban on brothel advertising in public theaters, streets, or on the highways in counties where prostitution was legal was a constitutionally valid "fit that is not necessarily perfect, but reasonable."¹⁴⁶ In Nevada, where partial legalization and regulation of prostitution served the interests of preventing the spread of sexually transmitted diseases and protecting sex workers from abuse, the limitation on the places brothels could advertise had a well-developed policy basis.¹⁴⁷ Moreover, the fact that the prohibition, which was partial, prohibited advertising in regular public places but allowed it in places where the activity likely was already being

145. See *Selected Laws Enacted by the U.S. Government Regarding the Regulation of Tobacco Sales, Marketing, and Use (excluding laws pertaining to agriculture or excise tax)*, CTBRS. FOR DISEASE CONTROL & PREVENTION (Jan. 5, 2022), https://www.cdc.gov/tobacco/data_statistics/by_topic/policy/legislation/index.htm [<http://perma.cc/VLH8-NPPZ>] (explaining that the DOJ has authority to ensure compliance with prohibition of cigarette advertising on television and radio).

146. *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 610 (9th Cir. 2010) (quoting *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999)), *cert. denied*, 562 U.S. 1217 (2011).

147. *Id.*

sought out, struck the right balance between allowing the legally regulated brothels to exist and severely limiting the commodification of sex.¹⁴⁸ In this regard, *Coyote Publishing* illustrates that even content-based restrictions that limit the places advertisements can run are constitutionally valid if they are properly tailored (in this case, allowing the advertisements to reach those who were already interested, but protecting those who were not from exposure to the advertisements).¹⁴⁹

The examples of constitutional commercial speech limitations do not begin and end with brothel advertisements either. Municipal ordinances restricting the display of stationary commercial billboards are illustrative of narrowly tailored and effective regulations that support area-specific restrictions on DTC drug advertisements.¹⁵⁰ While many of the examples in this field come from admittedly content-neutral regulations, the same level of scrutiny—intermediate—applies to content-neutral and commercial speech regulations.¹⁵¹ In *Lone Star Security*, the court held that Los Angeles’s bans on mobile billboard advertising were constitutional after subjecting the bans to intermediate scrutiny.¹⁵² Noting that nothing in the record “suggest[ed] that [Lone Star’s] overall ‘ability to communicate effectively [was] threatened,’” the court upheld the mobile billboard ban.¹⁵³ The court upheld Los Angeles’s bans of mobile billboard advertising because the ordinance only foreclosed one form of expression—mobile billboards—but left open other forms of expression like stationary billboards, bus benches, flyers, newspapers, or handbills.¹⁵⁴

148. *See id.* (emphasis added) (citations omitted) (“By keeping brothel advertising out of public places, where it would reach residents *who do not seek it out*, but permitting other forms of advertising likely to reach *those already interested* in patronizing the brothels, Nevada strikes a balance between its interest in maintaining economically viable, legal, regulated brothels and its interest in severely limiting the commodification of sex.”).

149. *See id.*

150. *See Lone Star Security & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1202 (9th Cir. 2016).

151. *See id.* at 1198 n.3 (citations omitted) (“[A]lthough laws that restrict only commercial speech are content based, such restrictions need only withstand intermediate scrutiny.”).

152. *Id.*

153. *Id.* at 1202.

154. *Id.*

Moreover, the courts have upheld de facto commercial speech restrictions in the context of billboard advertising that poses anti-trust risks. One of the prime examples comes from a case about advertising for alcoholic beverages—particularly salient for this Note’s argument because both alcohol and prescription drugs chemically affect bodily processes.¹⁵⁵

In 2017, a company engaged in installing liquid crystal display advertisements in retail outlets challenged a provision of the California Business Code.¹⁵⁶ The code section practically banned manufacturers of alcoholic beverages from advertising at stores that sold alcoholic beverages at retail.¹⁵⁷ There, the court held that the regulation did not violate the First Amendment because it was narrow in scope and directly advanced the state government’s substantial interest in maintaining its “triple-tiered distribution scheme.”¹⁵⁸ This scheme sought to separate manufacturing interests from wholesale interests, and also to separate wholesale interests from retail interests—all in the pursuit of preventing large firms from dominating local markets and preventing the excessive sale of alcoholic beverages from overly aggressive marketing.¹⁵⁹

The court there upheld the regulation because it was drawn as a means narrowly tailored to achieve the desired objective.¹⁶⁰ The court’s description of how narrowly the regulation had to be tailored to pass *Central Hudson* intermediate scrutiny is particularly important. The Ninth Circuit court relied on language from a 1989 Supreme Court decision that elaborated on the tailoring prong of the *Central Hudson* test.¹⁶¹

155. For just one example of how stimulants, a certain type of prescription drug, affect the brain, see, e.g., *How Do Prescription Drugs Affect the Brain*, PEAKS RECOVERY CTR. (2021), <https://peaksrecovery.com/blog/other-substances/how-prescription-drugs-affect-the-brain/> [https://perma.cc/GG2H-65C7]. Alcohol, a depressant, also affects the brain significantly. See, e.g., Bethany Ranes, *Cognitive Improvement and Alcohol Recovery*, BUTLER CTR. FOR RSCH. (2015), https://www.hazeldenbettyford.org/content/dam/hbff/images/sitecore/files/bcrupdates/bcr_ru28_cognitiveimprovementinrecovery.pdf [https://perma.cc/98MJ-YRJM].

156. *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 842 (9th Cir. 2017) (en banc).

157. CAL. BUS. & PROF. CODE § 25503(h).

158. *Retail Digital Network, LLC*, 861 F.3d at 843.

159. *Id.*

160. *Id.* at 851.

161. *Id.* at 846; *Bd. of Trs. v. Fox*, 492 U.S. 469, 477, 480 (1989) (“The ample scope of regulatory authority suggested by such statements would be illusory if it were subject to a least-restrict-means requirement.”).

Regulations on commercial speech not only intersect with First Amendment jurisprudence, but also with antitrust law.¹⁶² While some might argue that confining DTC prescription drug advertisements could threaten vertical and horizontal integration of the pharmaceutical industry, in truth, passing strict regulations on where and when pharmaceutical companies could advertise their products would have salutary effects in terms of reducing their concentration of commercial power. For instance, the *Retail Digital Network* case was decided against the alcohol manufacturers' advertising interest because allowing them to advertise at retail locations that sold alcohol would pose a threat of vertical and horizontal integration—which would consequently diminish competition in the marketplace.¹⁶³ But that was a regulation that overall sought to reduce the media through which alcohol manufacturers could advertise, not one that solely revolved around the *location* of the advertisements.¹⁶⁴ The regulation was part of a larger scheme to reduce the influence of alcohol manufacturers by limiting the avenues by which they could advertise.¹⁶⁵ If anything, the court's accepting those advertisement-restrictive regulations supports the notion that at the very least, DTC prescription drug advertisements should be confined to certain places in order to decrease their influence on the country as a whole.

The same principle, “not necessarily perfect, but reasonable,”¹⁶⁶ would help uphold the regulation limiting DTC prescription drug advertisements to medical settings like hospitals, doctor's offices, and pharmacies. Like the regulation approved in *Coyote Publishing*, this Note's proposed regulation is one that, while not perfect, is a good fit.¹⁶⁷ Limiting DTC prescription drug advertisements to places where the viewer is already primed to accept those cues—or indeed is already looking for something similar to the product advertised—increases the mutual benefit to the advertiser and the consumer, because the latter is already interested in the former's

162. See *Retail Digital Network, LLC*, 861 F.3d at 843.

163. *Id.* at 851.

164. See CAL. BUS. & PROF. CODE § 25503(h).

165. See *Retail Digital Network, LLC*, 861 F.3d at 844-45.

166. *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 610 (9th Cir. 2010), *cert. denied*, 562 U.S. 1217 (2011).

167. See *supra* note 146 and accompanying text.

product.¹⁶⁸ This model would also better serve the functions courts traditionally associate with commercial speech better because it would more logically orient the flow of information on prescription drugs to those already seeking medical care.¹⁶⁹ Moreover, limiting pharmaceutical manufacturers' DTC prescription drug advertisements to places like hospitals, pharmacies, and doctor's offices would not infringe on their overall ability to communicate, because they would still have numerous channels to advertise through.¹⁷⁰ Finally, this Note's proposed place-specific limitations on DTC prescription drug advertising would decrease the influence of the pharmaceutical companies and consequently the risk of rapid and widespread vertical and horizontal integration.¹⁷¹ While the fit may not be perfect, policies are rarely, if ever, perfect; rather, as the Supreme Court has instructed, the regulation must fit the government's end goal.¹⁷²

D. Historical Tobacco Ad Bans Demonstrate that the Government Can Proscribe Similar DTC Prescription Drug Advertisements

While the notion that DTC prescription drug advertisements are harmful and deserving of regulation is relatively well understood, the notion of banning practices nominally considered "speech" strikes many Americans as, well, un-American.¹⁷³ However, recent historical experience demonstrates that the government can ban harmful commercial speech from Americans' television programming without violating the Constitution.

168. See *Coyote Publ'g, Inc.*, 598 F.3d at 610.

169. See *id.*

170. See *Lone Star Security & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1201 (2016).

171. See *Retail Digital Network, LLC*, 861 F.3d at 844-45.

172. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980).

173. Cf. Emily Elkins, *The State of Free Speech and Tolerance in America: Attitudes About Free Speech, Campus Speech, Religious Liberty, and Tolerance of Political Expression*, CATO INST. (Oct. 31, 2017), <https://www.cato.org/survey-reports/state-free-speech-tolerance-america#downloads> [<https://perma.cc/RRL3-UB23>] ("Most Americans (59%) think people should be allowed to express ... [hate speech] in public, even those deeply offensive to other people."). If survey data suggests that Americans are not even broadly comfortable with banning hate speech, then it should come as no surprise that politicians are wary of proposing bans of other things.

The process that culminated in the passage of the Public Health Cigarette Smoking Act of 1969¹⁷⁴ began centuries earlier.¹⁷⁵ Indigenous Americans cultivated tobacco—a plant from the night shade family—for centuries before European settlers invaded.¹⁷⁶ Tobacco use became a worldwide phenomenon after Columbus and the Spanish saw the native people using it and brought it back with them.¹⁷⁷ The rest, as they say, is history.¹⁷⁸

While modes of use vary from country to country, in the United States, the most prevalent mode is through smoking cigarettes.¹⁷⁹ During the twentieth century, the advent of mass production and the development of consumer culture in America led to widespread cigarette smoking.¹⁸⁰ While there were some outspoken opponents¹⁸¹ and even warnings from the Surgeon General about adverse health effects of cigarette smoking, smoking was still commonplace.¹⁸² During the middle of the twentieth century scholars and activists began drawing connections between increasing cancer death rates, spearheading the beginning of resistance to the tobacco industry.¹⁸³

One of the major areas of concern for opponents of cigarette smoking was the tobacco industry's dominance in the world of advertising.¹⁸⁴ A very consequential early successful campaign was John F.

174. Pub. L. No. 91-222, 84 Stat. 87 (1970) (codified as amended at 15 U.S.C. §§ 1331-38).

175. Tobacco is one of the most consequential plants in modern world history. For an introduction to the history of tobacco, see, e.g., ERIC BURNS, *THE SMOKE OF THE GODS: A SOCIAL HISTORY OF TOBACCO* 36-40 (2007).

176. See Shanu Mishra & M.B. Mishra, *Tobacco: Its Historical, Cultural, Oral, and Periodontal Health Association*, 3 J. INT'L SOC'Y PREVENTIVE & CMTY. DENTISTRY 12, 12-13 (2013) ("Archaeological studies suggest the use of tobacco in around first century BC, when Maya people of Central America used tobacco leaves for smoking.").

177. See *id.* at 13.

178. *Id.* ("Today, tobacco is used in various forms in different parts of the world ... [t]he tobacco industry provides thousands of jobs, and is also a major source of income for the advertising industries, printed and electronic media, [and] government.").

179. OFF. OF SURGEON GEN., U.S. DEP'T HEALTH & HUM. SERVS., *THE HEALTH CONSEQUENCES OF SMOKING—50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL* 730 (2014).

180. *Id.* at 19.

181. For example, the temperance movement. *Id.*

182. *Id.*

183. See *id.* at 19-20.

184. *Id.* at 24 (discussing the fairness doctrine's application to tobacco advertisements in the 1960s).

Banzhaf III's 1967 petition to the FCC "to apply the Fairness Doctrine¹⁸⁵ to cigarette advertising to counter the tobacco industry's advertising messages."¹⁸⁶ After a losing court battle, the government forced the national television networks to air antismoking advertising spots during primetime.¹⁸⁷ But things did not stop there. Two years after Banzhaf's successful petition to the FCC, Congress passed the Public Health Cigarette Smoking Act, "which included a *prohibition* on broadcast advertising of cigarettes."¹⁸⁸ When the provisions of the Act became effective in 1971, Americans no longer saw any tobacco advertisements on television broadcasts.¹⁸⁹

But the advertising companies—who were just as unhappy about the new law as the tobacco companies—were not going to forfeit their advertising revenues without a fight. In 1971, six radio companies sued, claiming that the section of the Act banning advertising on television and radio violated the First Amendment right of freedom of speech.¹⁹⁰ Specifically, the radio companies argued that the Act "prohibit[ed] the 'dissemination of information with respect to a lawfully sold product' in violation of the First Amendment."¹⁹¹ The district court disagreed, holding that the Act did not burden the petitioner's speech at all.¹⁹² Additionally, the fact that product advertising was "less vigorously protected than other forms of speech" factored into the court's decision.¹⁹³ The court pointed out that because broadcast licensees were still permitted to "[air their] own point[s] of view on any aspect of the cigarette smoking question" and could still "disseminat[e] information about cigarettes," the Act did not conflict with their free speech rights.¹⁹⁴

185. *Id.* at 24 n.1 ("An FCC regulation that required broadcasters to allot time to contrasting points of view on controversial topics.").

186. *Id.* at 24.

187. *Id.*

188. *Id.* (emphasis added).

189. *See id.*

190. Dennis Miles, *Public Health Cigarette Smoking Act of 1969*, FIRST AMEND. ENCYC. (2009), <https://www.mtsu.edu/first-amendment/article/1089/public-health-cigarette-smoking-act-of-1969#:~:text=The%20constitutionality%20of%20the%20Public,right%20of%20freedom%20of%20speech> [https://perma.cc/HA4U-93GF].

191. *Cap. Broad. Co. v. Mitchell*, 333 F. Supp. 582, 584 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972) (footnote omitted).

192. *See id.*

193. *Id.*

194. *Id.*

The same logic could easily apply to a ban on DTC prescription drug advertisements. A ban on DTC prescription drugs modeled on the language of section 6 of the Public Health Cigarette Smoking Act would, in similar fashion, only prevent *advertising* prescription drugs.¹⁹⁵ Pharmaceutical companies could still broadcast pure information bulletins about their products or air their opinions about prescription drugs, for example.¹⁹⁶ The historical example of the Public Health Cigarette Smoking Act and its brief history in the federal courts is instructive. It demonstrates that, even putting aside arguments that DTC ads are misleading, a flat-out advertising ban would likely be constitutional because it would not prevent entities from disseminating information or voicing their opinion, but instead, prevent them from trying to sell drugs.¹⁹⁷

The lesson from the Public Health Cigarette Smoking Act's treatment in the federal courts, along with the safe harbor for banning misleading advertisements under the *Central Hudson* framework, should encourage policymakers concerned about DTC prescription drug advertising to ban them.

CONCLUSION

The pharmaceutical sector is one of the most profitable industries and holds some of the most promise for increasing overall societal health. But through its use of misleading and excessive advertising, among other practices, it has also contributed to rising health care costs and other public health crises.

This Note presented two main solutions. First, the government could act to proscribe DTC prescription drug advertisements under its powers to regulate commercial speech to protect consumers from misleading advertising. The simplest way would be to pass a law like the Public Health Cigarette Smoking Act of 1969 that bans advertising prescription drugs on any medium subject to the FCC's jurisdiction. Second, and only if the first solution proved untenable, the government could instead enact a more targeted and less restrictive regulation that would confine DTC prescription drug

195. Cf. 15 U.S.C. § 1335 (Public Health Cigarette Smoking Act of 1969 section prohibiting advertising cigarettes).

196. See *Capital Broadcasting*, 333 F. Supp. at 584.

197. Cf. *id.*

advertisements to a more limited zone, protecting the consumer without ridding the pharmaceutical companies of mediums of communication they have grown accustomed to.

This Note first explained the prevalence and harmful effects of widespread DTC prescription drug advertisements in the United States and why the government needs to step in to regulate. This Note then explained the constitutional test for commercial speech pursuant outlined by the Court in the *Central Hudson*. Next, this Note applied the *Central Hudson* framework to a potential ban on DTC prescription drug advertisements (and to other, less favorable place-specific regulations on DTC advertisements) to demonstrate that either policy approach would be permissible. In that Part, this Note provided two separate strands that could justify a total ban on DTC prescription drug advertising. First, the government could point to the misleading nature of DTC prescription drug advertisements and their harmful effects as a justification to ban their advertisements under the *Central Hudson* test. Alternatively, the government could rely on the analogous *Capital Broadcasting* rule, which drew a distinction between banning advertising and banning speech. Under the *Capital Broadcasting* rule, so long as the “speaker” is free to air other, non-advertising messages about the same subject matter or find other channels of communication, a total ban does not violate the Constitution.¹⁹⁸ In that Part, this Note also highlighted examples of regulations that the federal circuit courts have approved to demonstrate the propriety of place-specific regulations. That Part also addressed some potential counterarguments.

The United States is one of two developed countries that allows DTC prescription drug advertisements,¹⁹⁹ and for the sake of public health, lower prescription drug costs, and the sanctity of the physician-patient relationship, the people of the United States would be well-served by regulations that severely limit the nightly inundation of DTC prescription drug advertisements. The most efficient means to accomplish these goals would be to follow the historical example of the Public Health Cigarette Smoking Act of

198. *Id.*

199. HARVARD HEALTH PUBL'G, *Do Not Get Sold on Drug Advertising* (Feb. 14, 2017), <https://www.health.harvard.edu/medications/do-not-get-sold-on-drug-advertising> [<https://perma.cc/3WMX-JDWC>].

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1969 and ban DTC prescription drug advertisements (consequently, such a ban would bring the United States in line with the laws of most other developed countries). While certain limited, place-specific regulations on DTC prescription drug advertisements would likely have a salutary effect on the problems, they would not be as effective at tamping down the harmful effects of misleading DTC prescription drug advertisements.

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