No. 19-988

IN THE

Supreme Court of the United States

LIVING ESSENTIALS, LLC, ET AL.

PETITIONERS,

V.

WASHINGTON,

RESPONDENT.

On Petition for Writ of Certiorari to the Court of Appeals of Washington, Division 1

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether this Court should overturn its decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980), and provide the same level of protection to commercial speech as this Court provides to other forms of speech generally.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

At the crux of both economic liberty and free speech is a robust right of economic actors to engage in commercial speech. To protect that right, Liberty Justice Center filed, as counsel for plaintiffs, two recent petitions for writ of certiorari before this Court asking this Court to overturn *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980): *Vugo, Inc. v. City of New York*, No. 19-792, and *Leibundguth Storage & Van Service, Inc. v. Village of Downers Grove*, No. 19-808 (denied March 2, 2020).

SUMMARY OF ARGUMENT AND INTRODUCTION

For the past several decades, this Court has maintained that commercial speech receives lesser protection than other forms of protected speech. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than amici funded its preparation or submission. Counsel timely provided notice to all parties of their intention to file this brief and counsel for each party consented.

This Court's precedent in *Central Hudson Gas & Elec. Corp. v. Public Svc. Comm'n*, 447 U.S. 557 (1980) provides that laws that target commercial speech are subject to intermediate scrutiny. This Court provided a four-part test that considers whether: (1) the commercial speech concerns a lawful activity and is not false or misleading; (2) the asserted governmental interest is substantial; (3) the regulation directly advances the governmental interest asserted; and (4) the restriction is no more extensive than necessary to serve that interest. *Id.* at 566.

But, in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015), this Court held that content-based restrictions on speech – those that apply to particular speech because of the topic discussed or the idea or message expressed – are subject to strict scrutiny.

Reed's broad mandate that restrictions on the content of speech are subject to strict scrutiny is at odds with this Court's principle that commercial speech receives lesser protection than other forms of protected speech. *Reed* holds that content-based restrictions on speech are presumptively unconstitutional because they lend themselves to be used to suppress disfavored speech. 135 S. Ct. at 2229. If restrictions on commercial speech are always subject to lesser First Amendment scrutiny, then restrictions on commercial speech will inevitably lend themselves to suppress disfavored speech.

The result of this unbalanced treatment between the application of the First Amendment to restrictions on commercial speech versus non-commercial speech

is that restrictions on commercial speech that would otherwise violate the First Amendment will be allowed to stand.

In this case, the State of Washington concluded that Living Essentials, LLC, producer of the "Five Hour Energy" drinks, engaged in deceptive advertising because it could not, in the state's view, adequately substantiate a promotional claim. Pet. 2-3. And the court below concluded that the state's finding was a permissible speech regulation under *Central Hudson*. App. 19a-20a. In other words, in order for Living Essentials to engage in commercial speech, the government required it to prove that what it says its absolutely true. Such a requirement applied to non-commercial speech would violate the First Amendment.

Similarly, as shown in the petitions for certiorari in both *Vugo, Inc. v. City of New York*, No. 19-792, and *Leibundguth Storage & Van Service, Inc. v. Village of Downers Grove*, No. 19-808, restrictions that apply only to commercial speech, but do not apply to non-commercial speech, continue to empower speech-suppressing bureaucracies, with very little oversight by the courts.

For these reasons, this Court should overturn *Central Hudson* and apply the same standard of review to restrictions on commercial speech as it does to restrictions on other forms of speech.

ARGUMENT

I. After *Reed*, lower courts have questioned whether content-based restrictions on commercial speech should continue to be analyzed under *Central Hudson* or whether strict scrutiny review should apply.

In *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015), this Court held that a restriction on speech is content-based if it applies to particular speech because of the topic discussed or the idea or message expressed. To determine whether a restriction is content based a court must "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id*. (*citing Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011)). Both obvious facial distinctions, defining regulated speech by particular subject matter, and subtle facial distinctions, defining speech by its function or purpose, are drawn based on the message a speaker conveys, and are content-based restrictions on speech. *Id*.

Content-based restrictions on speech are subject to strict scrutiny. *Id*. Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Reed*, 135 S.Ct. at 2231 (citation omitted). In applying strict scrutiny, *Reed* was not an aberration. This court has held on more than one occasion that "[c]ontent-based regulations are presumptively invalid," *R. A. V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), such that "[i]n the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint discriminatory." *Sorrell,* 564 U.S. at 571. *Accord* Elena Kagan, *Regulation of Hate*

Speech and Pornography after R.A.V., 60 U. CHI. L. REV. 873, 873 (1993) (in *R.A.V.*, "the Court struck down a so-called hate speech ordinance, in the process reiterating, in yet strengthened form, the tenet that the First Amendment presumptively prohibits the regulation of speech based upon its content . . . .").

Lower courts have applied *Reed's* content-based analysis; some even overturned previous decisions finding no content-based restrictions on speech. *See, e.g., Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 166 (4th Cir. 2019)[2] (finding an exemption for debt collection to an automated call ban to be content-based); *Wagner v. City of Garfield Heights*, 675 F. App'x 599, 607 (6th Cir. 2017) (finding that a sign ordinance that limited political signs to six square feet but permitting other kinds of temporary signs to be twice that size was content-based and subject to strict scrutiny, and reversing its prior decision before *Reed* finding the restriction content-neutral); *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015) (finding that a panhandling ordinance that banned the oral request for money, but permitted signs requesting money, to be content-based, and reversing its prior decision before *Reed* finding the restriction content-neutral); *Willson v. City of Bel-Nor*, 924 F.3d 995, 1000 (8th Cir. 2019) (finding an exemption to a restriction on the number of signs to be content-based because its distinguished between "flags" and "signs" based on their content); *In re Nat'l Sec. Letter v. Sessions*, 863 F.3d 1110, 1123 (9th Cir. 2017) (finding an FBI requirement preventing a recipient of a national security letter from disclosing the fact that it has received such

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[2] Petition for certiorari granted, No. 19-631, 205 L. Ed. 2d 449 (Jan. 10, 2020).

a request to be content-based, but ultimately upholding a requirement as satisfying strict scrutiny); *Wollschlaeger v. Governor*, 848 F.3d 1293, 1307 (11th Cir. 2017) (finding that an Act preventing doctors and medical professionals from recording information about a patient's firearm ownership, asking a patient about firearm ownership, and unnecessarily harassing a patient about firearm ownership during an examination were content-based restrictions on speech). *See also Price v. City of Chicago*, 915 F.3d 1107 (7th Cir. 2019) (cert. petition pending, No. 18-1516) (identifying the tension between *Reed's* strict-scrutiny analysis and this Court's prior decision in *Hill v. Colorado*, 530 U.S. 703 (2000)); *Bruni v. City of Pittsburgh*, 941 F.3d 73, 92-94 (3d Cir. 2019) (Hardiman, J., concurring) (identifying the tension between *Reed's* strict-scrutiny analysis and this Court's prior decision in *McCullen v. Coakley*, 573 U.S. 464 (2014)).

This Court's precedent in *Central Hudson Gas & Elec. Corp. v. Public Svc. Comm'n*, 447 U.S. 557 (1980) provides that laws that target commercial speech are subject to intermediate scrutiny. This Court provided a four-part test that considers whether: (1) the commercial speech concerns a lawful activity and is not false or misleading; (2) the asserted governmental interest is substantial; (3) the regulation directly advances the governmental interest asserted; and (4) the restriction is no more extensive than necessary to serve that interest. *Id.* at 566.

When a content-based restriction applies only to commercial speech, the lower courts have questioned whether to apply strict scrutiny under *Reed*. Most lower Courts hold that *Central Hudson* continues to

apply, while noting the tension between *Reed* and *Central Hudson*. *See Vugo, Inc. v. City of New York*, 931 F.3d 42, 44 (2d Cir. 2019); *Wollschlaeger*, 848 F.3d at 1307 (finding content-based restrictions on the speech of doctors and medical professionals unconstitutional, but applying intermediate scrutiny); *Lone Star Sec. & Video, Inc. v. City of L.A.*, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016) ("although laws that restrict only commercial speech are content based . . . such restrictions need only withstand intermediate scrutiny" (citation omitted)); *CTIA - The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1061 (N.D. Cal. 2015) (refusing to apply strict scrutiny to content-based restriction on commercial speech); *Cal. Outdoor Equity Partners v. City of Corona*, No. CV 15-03172 MMM (AGRx), 2015 U.S. Dist. LEXIS 89454, at *26-27 (C.D. Cal. July 9, 2015) (finding that *Reed* does not apply to commercial speech); *Citizens for Free Speech, LLC v. Cty. of Alameda*, 114 F. Supp. 3d 952, 969 (N.D. Cal. 2015) (failing to apply *Reed* where a restriction applied to commercial speech only); *Chiropractors United for Research & Educ., LLC v. Conway*, 2015 U.S. Dist. LEXIS 133559, 2015 WL 5822721, at *5 (W.D. Ky. Oct. 1, 2015) ("Because the [challenged] [s]tatute constrains only commercial speech, the strict scrutiny analysis of *Reed* is inapposite."); *Mass. Ass'n of Private Career Sch. v. Healey*, 159 F. Supp. 3d 173, 192-93 (D. Mass. 2016) (holding that *Reed* does not apply to commercial speech); *Reagan Nat'l Advert. of Austin, Inc. v. City of Cedar*, 387 F. Supp. 3d 703, 712-13 (W.D. Tex. 2019) ("*Reed* does not require the application of strict scrutiny to content-based regulations of commercial speech."); *Vugo, Inc. v. City of Chicago*, 273 F. Supp. 3d 910, 914-15 (N.D. Ill. 2017) (noting that this "Court continues to follow the *Central Hudson* framework and

to apply its intermediate scrutiny standard in commercial speech cases, even where they involve content-based restrictions."); *Peterson v. Vill. of Downers Grove*, 150 F. Supp. 3d 910, 928 (N.D. Ill. 2015) (noting that absent an express overruling of *Central Hudson*, lower courts must continue to apply *Central Hudson* to content-based restrictions on commercial speech); *RCP Publ'ns Inc. v. City of Chicago*, 204 F. Supp. 3d 1012, 1018 (N.D. Ill. 2016) (finding "that *Central Hudson* and its progeny continue to control the propriety of restrictions on commercial speech."); *De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 128 F. Supp. 3d 597, 613 (E.D.N.Y. 2015) (finding the restriction to be content-based, but applying the *Central Hudson* test to find the restriction unconstitutional); *see also* Daniel D. Bracciano, Comment, *Commercial Speech Doctrine and Virginia's 'Thirsty Thursday' Ban*, 27 GEO. MASON U. CIV. RTS. L.J. 207, 227–28 (2017) (explaining that since "*Reed* was not a commercial speech case . . . lower courts have been hesitant to apply the standard broadly").

Some lower courts have recognized that there is merit in the view that *Reed* supersedes *Central Hudson*. In a recent opinion in the Seventh Circuit, Judge Easterbrook understood the Sixth Circuit to have applied *Reed* to invalidate a content-based regulation on billboard advertising. *See Leibundguth Storage & Van Serv., Inc. v. Vill. of Downers Grove*, 939 F.3d 859, 860 (7th Cir. 2019) (Easterbrook, J.) ("One circuit recently held that *Reed* supersedes *Central Hudson*. *See Thomas v. Bright*, 937 F.3d 721, 2019 U.S. App. LEXIS 27364 (6th Cir. Sept. 11, 2019)"). The Sixth Circuit observed that it read the Tennessee law at issue to "apply to only commercial speech, namely, advertising," but declined to sever those commercial applications of the

law from the non-commercial, striking down the entire law as content-based under *Reed*. *Thomas,* 937 F.3d at 726. *See also Wollschlaeger*, 848 F.3d at 1324 (Wilson, J., concurring) ("[A]fter the Supreme Court's decision in *Reed* last year reiterated that content-based restrictions must be subjected to strict scrutiny, I am convinced that it is the only standard with which to review this law.").

In this case, the Washington Court of Appeals straightforwardly applied *Central Hudson* to the content of Living Essential's advertisements. App. 19a.

Reed's broad mandate that restrictions on the content of speech are subject to strict scrutiny is at odds with *Central Hudson's* holding that restrictions on commercial speech are subject only to intermediate scrutiny. The Court should clarify this inconsistency in First Amendment doctrine.

II. The Court should clarify that content-based speech restrictions are subject to heightened scrutiny, even where the restriction applies only to commercial speech.

This Court should clarify that *Central Hudson* should not be read to license content-based restrictions, and that *Reed* establishes that where a speech regulation embraces content-based distinctions it is subject to the highest judicial scrutiny.

A. *Reed* and this Court's recent cases on the First Amendment are at odds with *Central Hudson*.

Like this case, *Reed* concerned local restrictions on a form of advertising. The Petitioner in that case challenged the town's Sign Code, which contained varied

exceptions for 23 categories of signs, including "Ideological Signs," "Political Signs," and "Temporary Directional Signs" related to local events. *Reed*, 135 S. Ct. at 2224-2225. The Petitioner was a pastor who sought to advertise the time and locations of his church services (the church was without a permanent building and so changed venues often). *Id*. at 2225. The temporary signs the church put up for this purpose brought it into conflict with the town, and so the church and pastor sued claiming the Sign Code was a content-based restriction on speech. *Id*. at 2226.

The Court found the Sign Code's distinctions between who could and could not advertise were content-based and therefore subject to strict scrutiny, rather than applying some lower standard based in the commercial or non-commercial nature of the signs at issue. *Id*. at 2227. Since the particular sign at issue was for a church service rather than a "commercial" transaction, it did not directly address the application of this standard to commercial speech.

Prior to *Reed*, this Court addressed content-based commercial speech restrictions in *Sorrell*. The Petitioners in that case were pharmaceutical makers who wished to purchase pharmacy records to better target the advertising of their products. *Sorrell*, 564 U.S. at 557. Vermont banned them from accessing this information, instead using the information itself as part of a state funded educational initiative to encourage the use of cheaper generic drugs. *Id*. at 560. The Court found that it was a content-based regulation that sought to favor some speech over others: speech that promoted the use of expensive brand name drugs was curtailed, while speech promoting cheaper alternatives was encouraged. *Id*. at 564. The Court rejected

the idea that the "commercial" nature of the discrimination at issue absolved it from constitutional scrutiny. *Id*. at 571. Instead the court applied the heightened scrutiny appropriate to a content-based discrimination. *Id*. at 565.

The Court explained that the First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message the speech conveys or justifies a regulation by referencing the content of speech. *Id*. at 566. Even where a restriction appears to be neutral on its face as to content and speaker, its purpose could be to suppress speech. *Id*. The Court found that "[c]ommercial speech is no exception" to this rule of applying heightened scrutiny to content-based restrictions on speech." *Id*. Nonetheless, in applying the content-based restriction in *Sorrell*, the Court held that "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Id*. at 571.

Unfortunately, lower courts have taken this language from *Sorrell* to mean that the Court should apply the lesser-scrutiny *Central Hudson* test in cases where a content-based regulation restricts commercial speech. *See, e.g., Vugo*, 931 F.3d at 49.

Sorrell and *Reed* stand for the proposition that content-based distinctions require more searching review than the *Central Hudson* framework provides. But because of a lack of guidance from this Court, in the years since "courts have already shown considerable hesitance in applying *Reed* to commercial speech, but have yet to articulate a satisfying doctrinal defense." Lee Mason, Comment, *Content Neutrality and Commercial*

Speech Doctrine After Reed v. Town of Gilbert, 84 U. CHI. L. REV. 955, 958 (2017).

Central Hudson itself never addressed the question of content discrimination. The case struck down a regulation, motivated by the energy crisis of the 1970s, that prevented public utilities from promoting the use of electricity. 447 U.S. at 558. The phrase "content-based" appears only in Justice Blackmun's concurrence, in reference to *Carey v. Population Services International*, 431 U.S. 678, 700-702 (1977), where the Court invalidated a ban on the advertising of contraceptives. 447 U.S. at 577 (Blackmun, J., concurring in the judgment). The Court's failure to even address the issue – perhaps because the total ban on a particular advertisement was so far afield that the Court need not reach such questions – suggests it did not consider the important principles later affirmed in *Sorrell* and *Reed*.

B. The logic of *Central Hudson* is flawed and inconsistent with *Reed* and this Court's First Amendment framework.

The cases reveal the infirmity of the distinction between "commercial" and "non-commercial" speech. Should door-to-door leafleting be constitutionally protected when engaged in by Jehovah's Witnesses, but not a local restaurant handing out menus? Contraception is a constitutionally protected right, but while advocacy for or against is non-commercial, at bottom contraception advocates propose the purchase of a product. Does that somehow lessen the First Amendment protection of advocates? Video games convey artistic expression, narrative, and may even espouse political or social views, but they are indisputably commercial

products. *See, e.g.*, Gita Jackson, *Disco Elysium Developers Shout Out Marx And Engels In Game Awards Victory Speech*, KOTAKU, Dec. 12, 2019, https://kotaku.com/disco-elysium-developers-shout-out-marx-and-engels-1840403603; *Kasky v. Nike, Inc.*, 45 P.3d 243, 269 (Cal. 2002) (Brown, J., dissenting) ("the commercial speech doctrine, in its current form, fails to account for the realities of the modern world – a world in which personal, political, and commercial arenas no longer have sharply defined boundaries.")

In this case, the burden imposed on Living Essentials by the State of Washington to provide evidence to substantiate the truth of its claims would be unconstitutional against non-commercial speech. *See List v. Ohio Elections Comm'n*, 45 F. Supp. 3d 765, 775 (S.D. Ohio 2014) ("knowingly false political speech does not fall entirely outside of First Amendment protection, and any attempt to limit such speech is a content-based restriction, subject to close review.") (following *Citizens United v. FEC*, 558 U.S. 310, 340 (2010)); *Gertz v. Robert Welch*, 418 U.S. 323, 340-41 (1974). While Living Essentials is forced to prove its claim is *not* false, an individual or group making a false political claim would receive First Amendment protection.

The factual scenario in *Vugo, Inc. v. City of New York*, No. 19-792, further exemplifies reasons why applying different First Amendment standards for commercial and non-commercial speech is problematic. In *Vugo*, the City of New York imposed a ban on commercial advertising in ride-share vehicles, but did not prohibit non-commercial speech. Thus, an interior display that says "Eat at Joe's" is prohibited while an interior display that says "Vote for Joe" is permitted. *See Citizens United*, 558 U.S. at 340 (restrictions on political

speech by incorporated businesses subject to strict scrutiny). Such a restriction is content-based since these displays could be exactly identical save the specific content of the speech and the rule would ban one and allow another. Any justification for not applying *Reed* to content-based restrictions on commercial speech based on some financial benefit the speaker might receive is insufficient to justify such discriminatory treatment. Joe the restauranteur surely would benefit from your patronage, but Joe the politician would similarly benefit from your vote or your donation. And the Seventh Circuit had no problem striking down a content-based ordinance limiting one's ability to solicit charitable donations for oneself. *Norton*, 806 F.3d at 412. Thus, it cannot be the potential monetary interest of the speaker that justifies distinguishing commercial speech from other types of speech. *See also Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (refusing to exempt professional speech from the normal prohibition on content-based restrictions, even though this professional speech may be made by a professional in return for money).

In *Reed*, this Court warned of "the danger of censorship presented by a facially content-based statute," since government officials may "wield such statutes to suppress disfavored speech." *Reed*, 135 S. Ct. at 2229. Even seemingly innocuous distinctions drawn by the Sign Code could be used by "a Sign Code compliance manager who disliked [a] Church's substantive teachings . . . to make it more difficult for the Church to inform the public of the location of its services." *Id*. The same concerns are present in the commercial context. A government official who dislikes a commercial business could make it more difficult for it to inform the

public of its business, or could give favorable treatment to one business over another. *See, e.g., Peterson*, 150 F. Supp. at 932 (allowing an exception to the Village's sign ordinance restrictions on the number and size of signs for one politically-favored business). Or, as relevant in this case, an aggressive government prosecutor might bring a consumer protection complaint against a company for a claim it makes without any evidence that the claim was false, shifting the burden to the company to justify its claim.

Amicus submits that the commercial versus non-commercial enquiry is fundamentally unhelpful in determining First Amendment rights. When faced with a content-based distinction, the Court should follow *Reed's* teaching that for the government to make such distinctions is a grave matter, and must pass muster under a higher standard of scrutiny. As one commentator has suggested in a related area, when a court assesses economically motivated speech, "it first should have to inquire whether the regulation of the same assertion, made to the same audience by an individual lacking a profit motive, would be upheld. . . the answer generally should not vary on the basis of the presence or absence of the profit motive." Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433, 1438 (1990). This is particularly true since a profit motive can come in so many forms – Pastor Reed was presumably sincere in his desire to preach his faith, but the case shouldn't have come out differently if he also desired to increase the tithes that paid his salary. The inconsistent manner in which this Court has applied the commercial speech doctrine suggests that its application, at least

where content-based distinctions are present, is a hinderance to the proper adjudication of First Amendment rights.

C. The inconsistent and unpredictable treatment of commercial speech and the original intent of the Framers are reasons this Court should not rely on *stare decisis* and should overrule *Central Hudson.*

In overturning *Central Hudson*'s application of intermediate scrutiny to commercial speech – even where such restriction is content based – this Court should not defer to the doctrine of *stare decisis*. The doctrine is at its weakest when interpreting the Constitution. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018). It is even weaker when interpreting the First Amendment: "*stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." *Id.*; *see also Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it.").

There is no basis to hold that commercial speech fits in a historic or traditional category of speech where content-based restrictions on speech have been permitted. *See United States v. Alvarez*, 567 U.S. 709, 717 (2012) (Kennedy, J., plurality opinion) (explaining that content-based restrictions on speech have been permitted only for a "few historic and traditional categories" of speech, including incitement, obscenity, defamation, speech integral to criminal conduct, so-called "fighting words," child pornography, fraud, true threats, and "speech presenting some grave and immi-

nent threat the government has the power to prevent"). Indeed, historical material and the understanding of the Framers' intent suggests that they intended that commercial speech receive the same amount of protection as other types of speech. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 522-23 (1996) (Thomas, J. concurring) (citing authorities); *see also Citizens United*, 558 U.S. at 390-93 (Scalia, J., concurring) (collecting authorities on founding era protections for businesses and the First Amendment).

The application of *Central Hudson* to restrictions on commercial speech by the lower courts has been inconsistent and unpredictable. Deborah J. La Detra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205, 1215-17 (2004) (noting the difficulty lower courts have had in applying *Central Hudson* and the growing consensus to reform the commercial speech doctrine); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000) (explaining that *Central Hudson's* lack of jurisprudential foundation has led to divergent and inconsistent approaches); Alex Kozinski and Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627, 628 ("the commercial/non-commercial distinction makes no sense"). Line-drawing between categories of speech is fraught with difficulty; trying to apply labels "either allows most viewpoint regulation to go forward or leaves yet unanswered the central issue of precisely when such regulation is appropriate." Kagan, 60 U. CHI. L. REV. at 880.

None of this is to suggest that commercial advertising is going to suddenly become the wild west where anything goes. Government has a compelling interest in ensuring its citizens do not die from falsely labeled

pharmaceutical products, for instance. Rather, it is to say that judges should not give municipal and state bureaucrats a blank check to regulate speech they do not like by labeling it "commercial" in character. When it attempts to suppress speech, the burden should be on the government to prove that its restraint on speech is necessary; not on the speaker to prove his or her speech is justified. Thus, *Central Hudson* must be overturned.

The commercial speech punished by the State of Washington is entitled to the protection of the First Amendment. The court's decision below upholding this regulation should be reversed because the government does not have a sufficient interest in punishing Petitioners for speech that has not even been shown to be false.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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