No. 19-988

In The Supreme Court of the United States

LIVING ESSENTIALS, LLC;
INNOVATION VENTURES, LLC,

Petitioners,

v.

STATE OF WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The Washington Court Of Appeals, Division One

BRIEF OF *AMICI CURIAE* GOLDWATER INSTITUTE, CATO INSTITUTE, AND REASON FOUNDATION IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
TREVOR BURRUS
CATO INSTITUTE
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

MANUEL S. KLAUSNER
LAW OFFICE OF
MANUEL S. KLAUSNER
333 S. Grand Ave., Ste. 4200
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerlaw.us

JACOB HUEBERT*
SCHARF-NORTON CENTER
FOR CONSTITUTIONAL
LITIGATION AT THE
GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@
goldwaterinstitute.org
**Counsel of Record*

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Under the "prior substantiation" doctrine, a business may be held liable for making a factual claim if a court concludes the business lacked adequate "substantiation" for the claim before making it—even if the business believed the claim to be true, the government cannot prove it to be false, and there is no evidence that it actually misled or harmed anyone. Does this violate the First Amendment?

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases and files *amicus* briefs when it or its clients' objectives are directly implicated.

The Institute devotes substantial resources to defending the vital constitutional principle of freedom of speech. The Institute has litigated and won important victories for free speech, including *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 546 U.S. 721 (2011) (matching-funds provision violated First Amendment); *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012) (First Amendment protects tattoos as free speech); and *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016) (scheme imposing different limits on different classes of donors violated Equal Protection Clause). The Institute has appeared frequently as *amicus curiae* in free-speech cases before this Court and others. *See*, *e.g.*, *Janus v. AFSCME*, 138

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received timely notice of *amici*'s intention to file this brief, and have consented. Pursuant to Supreme Court Rule 37.6, counsel for *amici* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *amici*, their members, or counsel, made a monetary contribution to fund its preparation or submission.

S. Ct. 2448 (2018); *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

The Cato Institute is a nonpartisan think tank dedicated to individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Reason Foundation ("Reason") is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason participates as *amicus curiae* in cases raising significant constitutional, legal, or public policy issues.

This case interests *amici* because of their commitment to the Constitution's broad protections for the freedom of speech, including commercial speech.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long held that commercial speech is entitled to less First Amendment protection than non-commercial speech. While content-based restrictions on speech generally receive strict scrutiny, restrictions on commercial speech have been accorded only the lesser scrutiny prescribed by *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980).

But the Court has never sufficiently explained *why* commercial speech should receive inferior protection. Indeed, there are no good reasons.

First, there is no merit to the idea that commercial speech warrants inferior protection because the First Amendment exists primarily or exclusively to protect political speech for the sake of democratic deliberation. The Constitution's authors made no reference to any distinction between commercial speech and other kinds of speech; indeed, they often combined the two themselves.[2] They understood free speech to be an inherent right of the individual that must be protected against government intrusion *for the individual's sake*. And there is no reason to believe that this individual

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[2] As, for example, in the famous protests against the Stamp Act, which combined commercial and political statements, or in protests against censorship by commercial printers such as Benjamin Franklin. *See* Michael W. Field, Note, *On Tap*, 44 Liquormart, Inc. v. Rhode Island: *Last Call for the Commercial Speech Doctrine*, 2 Roger Williams U. L. Rev. 57, 62–63 nn.30 & 31 (1996).

right ceases, or warrants less protection, when an individual proposes a commercial transaction.

Second, the potential for fraud cannot justify inferior protection for commercial speech because fraudulent speech is not entitled to First Amendment protection in any event. That means courts could easily uphold restrictions targeting fraudulent speech while subjecting restrictions on commercial speech in general to strict scrutiny, just as they uphold restrictions on unprotected non-commercial speech, such as defamation, while subjecting other restrictions to strict scrutiny.

The differing treatment also cannot be justified by two additional reasons the Court suggested in early commercial-speech cases: commercial speakers' supposed greater ability to verify the accuracy of their claims, or the commercial speakers' profit motive, which supposedly makes regulation less likely to chill their speech. These notions are doubtful, and even if they weren't, it is not apparent why they would warrant giving commercial speech less First Amendment protection than other speech.

This case illustrates important flaws in the Court's commercial speech doctrine and is an appropriate vehicle for the Court to reconsider *Central Hudson* and extend full First Amendment protection to commercial speech.

ARGUMENT

I. There is no justification for providing commercial speech less protection than other speech.

This Court has long recognized that the First Amendment protects commercial speech, but it has also maintained that commercial speech is entitled to less protection than other forms of protected speech, such as political speech. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) ("*Virginia Board*"). In general, content-based restrictions on speech are subject to strict scrutiny, under which the government must "prove that [a] restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (citation omitted). Content-based restrictions on *commercial* speech, however, are uniquely subject to a form of lesser scrutiny that (in summary) only requires a reasonable fit between the regulation and a substantial government interest that it directly advances. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480–81 (1989); *Central Hudson*, 447 U.S. at 562–66.

Jurists and scholars have long observed that the Court has not adequately explained why content-based restrictions on commercial speech should receive less First Amendment protection than restrictions on other forms of speech. *See*, *e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring in part); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 628

(1990).[3] Explanations that the Court and others have given fail to identify any important difference between commercial speech and other speech that could justify the differing treatment. The Court should therefore grant certiorari and hold that commercial speech should receive the same First Amendment protection as non-commercial speech.

A. Commercial speech is not inherently inferior to political speech under the First Amendment.

One ground commonly cited to justify inferior treatment of commercial speech is that commercial speech is not what the First Amendment exists to protect. Rather, the argument goes, the amendment is concerned primarily, if not entirely, with the protection of political speech—specifically, "public discourse" related to "participation in the process of democratic self-government." Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 4 (2000). That view, however, lacks much support.

First, it receives no support from the amendment's text, which protects "speech" and "press" without limitation. As Kozinski and Banner have observed, that is

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[3] This brief puts aside another problem with the current doctrine that scholars have noted: the difficulty of clearly defining "commercial speech" and separating it from non-commercial speech. *See* Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205, 1217–18, 1228–36 (2004); Kozinski & Banner, *supra* at 638–48.

not conclusive—there are, after all, other forms of "speech" not mentioned in the First Amendment that it indisputably does not protect, such as obscenity—"but it shows that proponents of a commercial speech distinction must base their argument on some other source." Kozinski & Banner, *supra* at 631.

Proponents of the political-speech-only view of the First Amendment have no other source of support. It is true that, in discussing freedom of speech, the Founders emphasized political speech and its importance to self-government. *Id.* at 632. But freedom of commercial speech was hardly unheard of. On the contrary, "commercial messages played such a central role in public life prior to the founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print . . . an advertisement for voyages to Barbados." *44 Liquormart*, 517 U.S. at 495–96 (opinion of Stevens, J.) (citing Benjamin Franklin, *An Apology for Printers*, June 10, 1731, *in* 2 Writings of Benjamin Franklin 172 (1907)); *see also* Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 Yale J. on Reg. 85, 97–101 (1999) (describing how "development of a free press and of a commercial, advertising-driven press were inextricably linked" in colonial and early America).

More important is the Founders' *reason* for protecting freedom of speech: because it is an inherent right of the individual, a critical facet of personal autonomy that must be secured against intrusion for the individual's sake. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 264–87

(2017) (explaining the Founders' conception of free speech as an individual right); Troy, *supra* at 93–96 (discussing the Founders' concern for property rights, which encompass speech rights). The expression clauses were designed to protect "freedom of opinion" or, as Jefferson called it, "the rights of thinking, and publishing our thoughts by speaking or writing." Letter to David Humphreys (Mar. 18, 1789), *in* 7 The Writings of Thomas Jefferson 323 (Albert Ellery Bergh, ed. 1907).

This Court later referred to this as "freedom of mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). It explains why even expressions without public political significance—such as a private poem, a Jackson Pollock painting, or an aesthetic judgment—receive the fullest First Amendment protection. *Cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) ("[the] painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll" are "unquestionably shielded" by the First Amendment).

There is simply no reason why the "freedom of mind" the Founders sought to protect should cease, or receive less protection, when the subject is commerce, a topic of great importance to most individuals' everyday lives. The Court has recognized that a "particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia Board*, 425 U.S. at 763. Of course there is much more to life than commerce, but a person's day-to-day

experience of life is greatly affected by the things he or she *buys*, the food he or she eats, the home he or she lives in, or the electronic devices he or she uses. The free communication of information about goods and services in the marketplace is essential to allow individuals to pursue their own conception of a good life—that is, to *pursue happiness*.

Those who maintain that the First Amendment is only or primarily concerned with political speech commonly hold a conception of free speech under which speech is protected, not for the individual's sake, but to facilitate democratic self-government. *See* Post, *supra* at 3; Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 429, 434–36 (1971) (summarizing Alexander Meiklejohn's influential view that "the importance of protecting free communication of information and opinion is not to protect the right of the speaker, but rather to guard 'the freedom of those activities of thought and communication by which we 'govern' '"). But that was not the Founders' conception of free speech. It also is not the view of this Court, which has held that speech need not have any political message to receive full First Amendment protection, *Hurley*, 515 U.S. at 569, and has repeatedly recognized that the First Amendment protects individual rights *against* government efforts to optimize democratic deliberation. *See*, *e.g.*, *McCutcheon v. FEC*, 572 U.S. 185, 207 (2014) (plurality opinion) (First Amendment protects individuals against government efforts, "no matter how well intentioned," "to fine-tune the

electoral process" for the purpose of "level[ing] the playing field, . . . level[ing] electoral opportunities, or . . . equaliz[ing] the financial resources of candidates") (internal marks omitted); *Bennett*, 564 U.S. at 750 ("The First Amendment embodies our choice as a Nation that, when it comes to [campaign] speech, the guiding principle is freedom—the 'unfettered interchange of ideas'—not whatever the State may view as fair." (citation omitted)).

B. The potential for fraud or misleading speech cannot justify inferior protection for commercial speech.

One reason to believe the government should have greater leeway to restrict commercial speech is to prevent fraud. But fraud prevention does not require courts to subject *all* restrictions on commercial speech to reduced First Amendment scrutiny. It merely requires courts to exclude *fraudulent* speech from the First Amendment's protection—as they already do.

Fraudulent speech, like other criminal or tortious speech, is already not entitled to constitutional protection, and this exclusion is hardly controversial. *See Virgina Board*, 425 U.S. at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 & n.10 (1961) (noting that the First Amendment does not bar laws against "libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation

of crime, complicity by encouragement, conspiracy, and the like").

Therefore, the potential for commercial speech to be fraudulent is irrelevant to the level of protection that commercial speech in general should receive. Just as the Court's application of strict scrutiny to content-based restrictions on non-commercial speech has not threatened laws that prohibit certain types of non-commercial speech, such as defamation, so the application of strict scrutiny to content-based restrictions on commercial speech in general would not threaten laws that prohibit fraudulent commercial speech. *See* Lee Mason, *Content Neutrality and Commercial Speech Doctrine After* Reed v. Town of Gilbert, 84 U. Chi. L. Rev. 955, 994–95 (2017) (noting that *Reed* likely does not apply to "traditionally unprotected low-value . . . categories of speech" such as obscenity and defamation and therefore, if extended to commercial speech, would also "not reach . . . factually false or misleading speech"); Martin H. Redish, *Commercial Speech and the Values of Free Expression* at 10 (Cato Policy Analysis No. 813, June 19, 2017)[4] ("Knowingly false statements about commercial products amount to fraud, and there is no reason to believe that the First Amendment protects such activity. It follows only that false commercial speech receive the same protection as false and defamatory political speech. . . ."); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 Sup. Ct. Rev. 123, 153

[4] https://www.cato.org/publications/policy-analysis/commercial-speech-values-free-expression.

(1996) ("False statements of fact about products that will cause people to injure themselves would . . . appear to be readily proscribable without any special consideration of their commercial context.").

True, the First Amendment's general exception for fraud would not necessarily allow the government to restrict commercial speech that is not false but merely misleading.[5] *See* Sullivan, *supra* at 153. But restrictions narrowly targeting misleading speech that would have "catastrophic consequences"—a prominent constitutional scholar suggests this could include misleading speech about a "product [that] might kill or seriously injure you"—might survive strict scrutiny. *See id.* at 155.[6]

In any event, if the courts were to treat commercial speech like other speech, society could address the problem of misleading commercial speech the same way it addresses misleading or false non-commercial speech: with *more speech* to counter the misleading

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[5] This case illustrates a problem with categorically exempting "misleading" speech from First Amendment protection as *Central Hudson* does: it encourages the government to expand the category of speech deemed "misleading" as a matter of law—as the State has done here through the prior substantiation doctrine—to shield restrictions on speech from scrutiny they could not survive.

[6] Of course strict scrutiny is at odds with the "prior substantiation" doctrine at issue in this case, which turns the usual First Amendment rule—all speech is protected unless the government proves otherwise, *see Ill. ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 n.9 (2003)—on its head and treats statements as presumptively "misleading" and unlawful unless an advertiser proves that it sufficiently substantiated them in advance.

speech instead of government paternalism. *See United States v. Alvarez*, 567 U.S. 709, 727 (2012) (plurality opinion) ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society."); *Virginia Board*, 425 U.S. at 770 (noting that the "best means" to ensure that consumers are well informed is not "paternalis[m]" but "open . . . channels of communication" so consumers may evaluate competing claims). There is no apparent reason why the free exchange of ideas cannot be trusted to lead to the truth in commercial matters any less than we already trust it to do in political and other non-commercial matters. As the classic law review article on this subject put it:

> The marketplace of ideas philosophy . . . is premised on the notion that good ideas will drive out bad ones, that the common weal is served by permitting interested parties to speak and letting the public choose whom to believe. We don't, for example, silence white supremacists out of fear that the gullible public might be misled by their beliefs; on the contrary, we provide police protection for their parades. Why should we be more paternalistic when the speaker is the egg industry?

Kozinski & Banner, *supra* at 644 (footnote omitted).

There are strong reasons to expect that misleading commercial speech will typically be countered and defeated in the marketplace of ideas. For one, competing businesses have a strong incentive to inform consumers of misleading statements in a competitor's advertisements. Consumers also have a strong

incentive to seek reliable information on whether advertisers' claims are accurate—an incentive so strong that it has given rise to an industry devoted to verifying advertising claims, such as *Consumer Reports* and ConsumerSearch.com. Indeed, individuals are less likely to be misled in the commercial context than in the political context, because consumers who rely on false or misleading speech will typically bear the full cost of their errors. That's unlike the political arena, where a voter pays no personal price for relying on a politician's false or misleading statements because his or her vote doesn't determine the outcome of an election anyway.[7] Further, while it may have been somewhat costly or difficult for consumers to fact-check advertisers' claims in earlier times, it is extremely easy for them to do so now by consulting online reviews of merchants and products before making purchases.

Finally, there is no reason to believe that misleading (but non-fraudulent) commercial speech threatens to cause a type or amount of harm that is so much worse than the potential harm resulting from false or misleading *non*-commercial speech as to warrant a separate category of scrutiny. In fact, false or misleading political speech is arguably more dangerous than nearly *any* commercial speech, as it may harm not only an individual consumer, but also society as a whole. Yet the government rightly lacks virtually any power to restrict false political speech, because of the danger that

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[7] This is why economists consider it rational for voters to remain ignorant of political issues. *See* Ilya Somin, Democracy and Political Ignorance 121 (2013).

such restrictions would chill truthful speech. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 268–83 (1964). And false or misleading statements made in the context of interpersonal relationships can have consequences far more devastating to an individual than would a disappointing commercial transaction. Yet these statements, too, are mostly beyond the government's power to regulate, and properly so. Thus, the potential for harm cannot justify singling out commercial speech for inferior First Amendment protection.

C. Commercial speech's supposed verifiability and durability cannot justify giving commercial speech inferior First Amendment protection.

In early cases on commercial speech, the Court suggested two "commonsense" reasons why commercial speech should receive inferior protection: (1) because commercial speakers are in a position to more easily verify the accuracy of their claims than other speakers and (2) because advertising is driven by the profit motive and therefore is "more durable" than other speech—i.e., less likely to be chilled by regulation. *Virginia Board*, 425 U.S. at 771 n.24; *see also Central Hudson*, 447 U.S. at 564 n.6. Neither rationale withstands scrutiny.

First, it simply is not true that commercial speech is inherently more verifiable than other types of speech. While some commercial speech is objective and subject to verification (e.g., claims about the sugar

content of a brand of soda), much commercial speech makes claims that are subjective (e.g., whether a diet soda tastes just as good as regular) or otherwise not susceptible to objective verification. *See* Kozinski & Banner, *supra* at 635. Indeed, much commercial speech makes no explicit claims about a product but instead tries to create a favorable impression of a product by associating it with a particular image or lifestyle. *See id.*; Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 Tex. L. Rev. 777, 795–800 (1993). On the other hand, plenty of non-commercial speech that receives full First Amendment protection is verifiable—for example, a politician's claims about his or her own background and actions, or claims about products made in a non-commercial context such as *Consumer Reports* magazine. *See* Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. Ky. L. Rev. 553, 568–69 (1997).

Second, even if commercial speech were more readily verifiable than non-commercial speech, it would not follow that it should receive less First Amendment protection. If anything, a claim's verifiability might be a reason to provide it *more* protection because its falsity is more susceptible to exposure by competitors or consumer fact-checking. *See* Kozinski & Banner, *supra* at 636–37.

Third, there is no reason to believe that commercial speech is more "durable" than other speech simply because of advertisers' profit motive. The same profit

motive that prompts businesses to advertise could also cause them to avoid advertising if, as in this case, they could be subject to litigation costs and heavy penalties if the government decides they did not sufficiently substantiate their claims before making them.

Commercial speech is not the only speech motivated by a speaker's pursuit of profit or other personal benefit. For example, politicians seek to improve their electoral fortunes through political speech. But this is not viewed as making their speech "durable" and therefore as grounds for reducing the constitutional protection for their speech. Nor is it obvious that pecuniary self-interest is a uniquely strong motive. "History teaches that speech backed by religious feeling," for example, "can persist in extraordinarily hostile climates." *Id.* at 637. But, again, this is not seen as making religious speech more "durable" and therefore properly subject to lesser constitutional protection. By contrast, profit motives often *deter* commercial speakers from expressing their views, out of fear of retaliation by the state or backlash by customers. In short, the purported "durability" of commercial speech is likely untrue, and, even if true, is not adequate grounds for reducing the judicial scrutiny that applies to limits on that speech.

II. This case is an appropriate vehicle for the Court to extend full First Amendment protection to commercial speech.

This case exemplifies *Central Hudson*'s anomalous, indefensible consequences. It is arbitrary and patently unjust that courts would provide the strongest First Amendment protection to *knowingly false* non-commercial statements, or to various types of hateful or offensive non-commercial speech that are almost universally regarded as being of extremely low or negative value[8] while providing *no protection at all* to the statements at issue in this case, which the government has not shown to be false, and which are not even alleged to have actually misled or harmed *anyone*. By highlighting such problems with the Court's treatment of commercial speech, this case is an appropriate vehicle for the Court to overrule *Central Hudson* and extend full First Amendment protection to commercial speech.

The facts of this case belie *Central Hudson*'s assumption that the profit motive makes commercial speech "durable." Petitioners were held liable for statements they believed to be true, and which they supported with evidence, and ordered to pay millions of dollars in civil penalties. *See* Petition at 9–12. How

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[8] *See*, *e.g.*, *Alvarez*, 567 U.S. 709 (protecting false claims of receiving military decorations or medals); *Snyder v. Phelps*, 562 U.S. 443 (2011) (protecting anti-gay protest of soldier's funeral); *United States v. Stevens*, 559 U.S. 460 (2010) (protecting videos depicting animal cruelty); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (protecting virtual child pornography).

much more evidence would have been enough to persuade the trial court that their statements were not merely "plausible," as the court found, Pet. App. 125a, but sufficiently substantiated? One can only guess.

That means Petitioners and other businesses cannot know just how much advance substantiation will be enough to avoid prosecution in the future. Businesses that cannot afford to risk incurring litigation costs or civil penalties therefore have an incentive to err on the side of caution by refraining from making certain statements—including lawful, truthful statements—they otherwise would make. In other words, their speech will be chilled, just as anyone's would be, by a regime under which the government can impose penalties on speakers who cannot prove that they could substantiate their statements to the government's satisfaction before making them.

Even where the prior substantiation doctrine does not apply, this sort of uncertainty and chilling are inevitable under *Central Hudson*. The "inherently nondeterminative nature of [*Central Hudson*'s] case-by-case balanc[ing] test, unaccompanied by any categorical rules," makes it likely "that individual judicial preferences will govern application of the test," with arbitrary, inconsistent, unpredictable results. *44 Liquormart*, 517 U.S. at 527 (Thomas, J., concurring in part). Where speakers cannot know whether their speech will be deemed permissible—and can be heavily penalized for guessing incorrectly—the prudent course is to self-censor.

Finally, another problem with *Central Hudson*—and another reason why the time has come to overrule it—is that it conflicts with *Reed*, 135 S. Ct. 2218. *Reed* held that any content-based restriction on speech—meaning any "regulation of speech . . . [that] 'on its face' draws distinctions based on the message a speaker conveys," including any distinction based on a message's subject matter, function, or purpose—is subject to strict scrutiny. *Id.* at 2227. Many lower courts have concluded that *Reed*'s holding does not apply to restrictions on commercial speech (even though *Reed* contains no such limitation), but some have rightly noted that *Reed* is at odds with *Central Hudson*, which provides for less-than-strict scrutiny of laws that restrict speech based on its commercial content. *See*, *e.g.*, *Leibundguth Storage & Van Serv., Inc. v. Vill. of Downers Grove*, 939 F.3d 859, 860 (7th Cir. 2019) (noting that the Sixth Circuit "recently held that *Reed* supersedes *Central Hudson*" in *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019)), *petition for certiorari filed*, No. 19-808 (Dec. 20, 2019); *Vugo, Inc. v. City of New York*, 931 F.3d 42, 49–50 & nn.6, 7 (2d Cir. 2019) (holding that *Central Hudson* governs challenges to restriction on commercial speech notwithstanding *Reed* and similar cases), *petition for certiorari filed*, No. 19-792 (Dec. 18, 2019). Although the petition in this case does not address the conflict between *Reed* and *Central Hudson*, overruling *Central Hudson* in this case would put an end to confusion and litigation on that issue—and thus ensure that courts fully and consistently protect all speakers' fundamental First Amendment rights.

CONCLUSION

Because it is high time to end the second-class treatment of commercial speech, and also for the reasons stated by Petitioner, the petition should be *granted*.

Respectfully submitted,

ILYA SHAPIRO
TREVOR BURRUS
CATO INSTITUTE
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

MANUEL S. KLAUSNER
LAW OFFICE OF
MANUEL S. KLAUSNER
333 S. Grand Ave., Ste. 4200
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerlaw.us

JACOB HUEBERT*
SCHARF-NORTON CENTER
FOR CONSTITUTIONAL
LITIGATION AT THE
GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@
goldwaterinstitute.org
**Counsel of Record*

Counsel for Amici Curiae