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 *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Should this Court overrule *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) and similar cases holding that "commercial speech" is entitled to a lesser form of First Amendment protection?

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## INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual right of Freedom of Speech. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Janus v. American Federation of State, County, and Mun. Employees*, 138 S.Ct. 2448 (2018); *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719 (2018); and *Arlene's Flowers v. Washington*, 138 S.Ct. 2671 (2018).

## SUMMARY OF ARGUMENT

In *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018), this Court rejected the creation of the category of "professional speech" that could be excluded from the protections of the First Amendment. *Id*. at 2371-72. Here, the State of Washington seeks to create a new category of speech that does not receive First Amendment protection – "unsubstantiated speech." Washington claims the right to censor this speech without the obligation to prove anything in the speech untrue. Instead, Washington claims that the speaker must first prove, to a scientific certainty, that the claims made by the speaker are true before the speaker can make the

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[1] All parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

statement. This new constitutional doctrine apparently only applies to "commercial speech." Politicians, newscasters, and the denizens of the "twitter-verse" need not back up their claims with scientific proof.

Washington's rule highlights the problems with this Court's commercial speech doctrine. First, the decisions of the lower courts show that there is no clear consensus as to what constitutes "commercial speech" and therefore speech is being regulated differently in different parts of the country. Further, several members of this Court have questioned whether the commercial speech doctrine is even justified by the First Amendment. The doctrine does not appear to have a basis in either the text or the history of the Free Speech Clause. This Court should grant review in this case to at least clarify if not overturn the commercial speech doctrine.

## REASONS FOR GRANTING THE WRIT

### I. The Lower Courts Have Been Unable to Settle on a Consistent Definition of Commercial Speech.

This Court recognized that commercial speech was protected by the First Amendment in *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). Commercial speech, according to the Court, was "indispensable to the proper allocation of resources in a free enterprise system" – an interest as weighty as the free-flow of information to inform public decision-making. *Id.* That seeming full embrace of First Amendment protection for commercial speech was short-lived, however. In *Central Hudson*, this Court asserted that there was a "'commonsense' distinction between speech proposing

a commercial transaction" and other types of speech. *Central Hudson*, 447 U.S. at 562. Thus, the Court ruled that the First Amendment provided only a lower lever of protection to commercial speech. *Id.*

Yet, the Court has also rejected the idea that the mere existence of a profit motive destroys the protection of the First Amendment. *See*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952); *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988); *Buckley v. Valeo*, 424 U.S. 1, 96 (1976); *Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). Similarly, the fact the speech involves a commercial transaction (*i.e.*, someone is paying for the speech) does not take the speech out of the ambit of the Speech Clause. *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 794 n.8 (1988).

Although this Court has stressed the need to protect commercial speech from some forms of government regulation, it has also, on occasion, assumed that such speech could be censored altogether. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 520, 522-23 (1996) (Thomas, J. dissenting). A significant problem this Court has identified with the commercial speech doctrine is that "the line between commercial and non-commercial speech is not always clear." *Matal v. Tam*, 137 S.Ct. 1744, 1765 (2017). The *Tam* Court's recognition of this problem was not a new revelation. Two decades earlier this Court noted: "The absence of a categorical definition [of commercial speech] . . . is . . . a characteristic of our opinions.". *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S.

410, 420 (1993). It should come as no surprise, therefore, that the lower courts have been unable to apply a consistent definition of commercial speech and that the protections granted by the Speech Clause of the First Amendment vary widely from jurisdiction to jurisdiction.

Some lower courts have adopted a narrow rule that speech is "commercial" only if it proposes a transaction between the *speaker* and the audience. *Taucher v. Born,* 53 F. Supp. 2d 464, 480-81 (D.D.C. 1999), *rev'd on other grounds,* 396 F.3d 1168 (D.C. Cir. 2005); *Forsalebyowner.com Corp. v. Zinnemann,* 347 F. Supp. 2d 868, 876 (E.D. Cal. 2004). Others have taken a broader approach, sweeping additional speech into the disfavored "commercial" category. In *Wag More Dogs, LLC v. Cozart,* 680 F.3d 359 (4th Cir. 2012), for instance, the Fourth Circuit upheld an ordinance that prohibited a mural overlooking a dog park and which depicted cartoon dogs and the logo of a dog-sitting business. *Id.* at 363. The mural did not propose any commercial transaction and did not advertise a product or service. It simply portrayed dogs in a manner intended to convey positive feelings. Yet, the Court of Appeals adopted a "broader definition of commercial speech," whereby the mural qualified solely because of the business's economic motivation. *Id.* at 365, 369-70. Thus, the mural was deemed commercial speech and subject to censorship.

By contrast, in *Complete Angler, LLC v. City of Clearwater,* 607 F. Supp. 2d 1326 (MD Fla, 2009), the district court ruled that a "marine-themed" mural on the wall outside of a bait and tackle shop did not constitute commercial speech. *Id.* at 1328. Similarly, the California Court of Appeal rejected the argument that

a mural is commercial speech simply because it is painted on the side of commercial establishment. *City of Indio v. Arroyo*, 143 Cal. App. 3d 151, 158 (1983). *See also Bolger v. Youngs Drugs Prods. Corp.,* 463 U.S. 60, 66 (1983) ("[T]he mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech.').

The murals in *Complete Angler* and *City of Indio* were clearly meant to attract attention to the commercial establishment. Nonetheless, the courts in those cases rejected that such a motivation alone rendered the artwork unprotected. The Seventh Circuit, by contract, has ruled that an economic motivation for the speech renders speech "commercial" even if no economic transaction is proposed. *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 517 (7th Cir. 2014).

The Ninth Circuit took this a step further in *First Resort v. Herrera*, 860 F.3d 1263 (9th Cir. 2017). There, the court ruled that the fact that an organization paid for advertising, even though it had no real economic motivation was sufficient to label the speech "commercial". *Id*. at 1273. At issue in *First Restort* was the advertising of a pregnancy counseling organization that opposed abortion. The court ruled that the fact the organization purchased advertising from "Google Adwords" to promote the clinic's *free* services was sufficient to classify the ads as "commercial speech." Although the court noted that *First Resort* had an economic motivation because it used the success stories from its clinics for fundraising, the court went on to rule that economic motivation was not required for speech to be "commercial" and thus subject to lesser protection. *Id*.

These decisions stand in stark contrast to *Greater New Orleans Broad. Ass'n, Inc. v. United States,* 527 U.S. 173 (1999), in which this Court invalidated an FCC rule banning casino ads, which all parties conceded to be commercial speech, because the advertisements would "convey information . . . about an activity that is the subject of intense public debate" and "benefit listeners by informing their consumption choices." *Id. at* 184-85.

The failure to formulate a conceptual distinction between fully protected non-commercial speech and commercial speech that receives second-class protection is complicated by the multilayered nature of expression of all sorts. As this Court recognized in *Cohen v. California,* 403 U.S. 15, 26 (1971), expression often serves multiple functions, "convey[ing] not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well." Some expression takes the form of silent protests or gestures, like the black armbands in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503 (1969), or the refusal to salute the flag in *W. Va. State Bd. of Ed. v. Barnette,* 319 U.S. 624 (1943).

But although this Court has said that expression that blends commercial and political statements should not be subdivided, *Riley,* 487 U.S. at 796, it has also ruled that speech can be classified as commercial, and thus less protected, even if it "contain[s] discussions of important public issues." *Bolger,* 463 U.S. at 67-68. When speech about goods or services for sale is joined with speech about public matters, courts have relied on *Bolger* to use the commercial speech doctrine as a means to deprive businesses of their expressive rights.

In *Kasky v. Nike, Inc.,* 27 Cal. 4th, 939 (2002), the California Supreme Court allowed a political activist to sue a corporation for "unfair business practices" based on the corporation's publication of a rebuttal to allegations that its factories were "sweat shops." Nike argued that it had the right to disseminate its views on a matter of public controversy. The state supreme court rejected this argument and allowed the case to proceed, using a broad definition of commercial speech as speech "generally or typically . . . directed to an audience of persons who may be influenced by that speech to engage in a commercial transaction with the speaker or the person on whose behalf the speaker is acting." *Id.* at 960-61. This extraordinarily broad definition allows government to silence a wide variety of speakers and messages relating to business concerns.

This brief survey demonstrates the need for this Court to turn its attention back to the commercial speech doctrine. The cases demonstrate that there is no consistent rule in the lower courts for classifying speech as "commercial" and thus subject to government regulation, including suppression, that simply would not be permitted for other kinds of speech.

## II. This Case Provides an Opportunity for this Court to Reexamine Whether Commercial Speech Should Continue to Be Relegated to a Lower Level of Constitutional Protection.

The First Amendment's authors contemplated no distinction between commercial and non-commercial speech when they protected expressive rights. Daniel E. Troy, *Advertising:* Not *"Low Value" Speech,* 16 Yale J. on Reg. 85, 91 (1999) ("[C]ommercial advertising was a critical part of the Press that the Framers

wanted to remain forever free."). The Framers had experience with prior restraints on commercial advertisements when the British Stamp Act of 1765 imposed a tax for each commercial advertisement. *Id*. at 101. These experiences led the founding generation to oppose restrictions on commercial speech. *Id*. at 103.

The decision below reveals the issues of trying to distinguish between fully protected speech and commercial speech. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring) ("Indeed, I doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech."). That distinction fails on historical and logical grounds. *See 44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech. Indeed, some historical materials suggest to the contrary."). The Constitution does not divide types of speech, and, unlike libel or obscenity, there is no history of a common-law distinction that might plausibly be incorporated into the First Amendment. Troy, *supra,* 16 Yale J. on Reg. at 92-121.

The use of the designation "commercial speech" as a basis for censorship, content discrimination, or prior restraint has been criticized in a number of opinions by members of this Court. *See*, *e.g.*, *Tam*, 137 S.Ct. at 1744, 1767 (Kennedy, J., concurring joined by Ginsburg, Sotomayor, and Kagan, JJ.); 1769 (Thomas, J., concurring); *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2227 (2015); *Lorillard Tobacco Co. v. Riley*, 533 U.S. 525, 571-72 (Kennedy, J., concurring joined by Scalia, J.), 575 (2001) (Thomas, J., concurring); *44 Liquormart*, 517 U.S. at 501-04 (Opinion of Stevens, J.,

joined by Kennedy and Ginsburg, JJ.), 522-23 (Thomas, J., concurring); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 968 n.16 (1984). This case presents the Court with the opportunity to review whether there is any "philosophical or historical basis" for relegating commercial speech to a second-class status under the Speech Clause.

The lower courts have been unable to apply the distinction between commercial or noncommercial speech on a consistent basis. The result is that the protections of the speech clause vary from jurisdiction to jurisdiction. In the absence of a historical basis for the difference in treatment, there is no reason to maintain the distinction.

## CONCLUSION

The Court should grant the petition for writ of certiorari to reconsider the commercial speech doctrine announced in *Central Hudson*.

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Respectfully submitted,

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