No. 19-988

In the Supreme Court of the United States

LIVING ESSENTIALS, LLC, ET AL.,
Petitioners,
v.
STATE OF WASHINGTON,
Respondent.

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

BRIEF OF KENTUCKY, ALABAMA, ARKANSAS, GEORGIA, INDIANA, LOUISIANA, MISSISSIPPI, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* SUPPORTING PETITIONERS

DANIEL CAMERON
Attorney General of Kentucky

BARRY L. DUNN
Deputy Attorney General

Office of the Kentucky
Attorney General
700 Capital Avenue
Suite 118
Frankfort, Kentucky 40601
(502) 696-5300
chad.meredith@ky.gov

S. CHAD MEREDITH
Solicitor General
Counsel of Record

MATTHEW F. KUHN
Deputy Solicitor General

BRETT R. NOLAN
Special Litigation Counsel

Counsel for Amici Curiae

March 30, 2020

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTERESTS OF *AMICI CURIAE*[1]

The *amici* States have an interest in protecting their citizens. This means not just guarding their citizens against those who intend to do physical or financial harm to them, but also safeguarding their constitutional rights. These interests often complement each other, but sometimes they threaten to collide. In the commercial arena, the States' obligation to protect consumers from unscrupulous business practices has the potential—if carried too far—to collide with businesses' First Amendment rights to advertise and to communicate with consumers. The *amici* States generally have avoided this conflict in their consumer-protection laws by prohibiting only false, misleading, or deceptive commercial speech, and by placing the burden of proof on themselves rather than requiring businesses to prove that their communications are not false, misleading, or deceptive.

The decision below, however, creates a violent collision between consumer-protection laws and businesses' First Amendment speech rights. In the wake of the Washington Court of Appeals' decision, the State of Washington can now impose liability on a business—not because *the state has proven* the business's speech to be false or misleading—but simply because the business has not substantiated the truthfulness of its statements to the state's satisfaction before speaking. The application of this "prior

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[1] *Amici* have notified counsel for all parties of their intention to file this brief. Sup. Ct. Rules 37.2(a), 37.4.

substantiation" rule is unconstitutional. It is hard to imagine a more serious threat to businesses' First Amendment rights.

This threat implicates the *amici* States' interests in a number of ways. First, a threat to First Amendment rights anywhere is a threat to First Amendment rights everywhere. The *amici* States therefore desire to be heard on this matter to ensure that their citizens' rights are not threatened. Second, and from a more practical standpoint, the *amici* States are home to countless companies that do business from coast to coast, including in the State of Washington. If these businesses want to continue doing business in Washington, they will now have to adjust their behavior to comply with Washington's newfound—and oppressive—prior-substantiation test. No longer can these businesses count on avoiding liability simply by ensuring that their communications are neither false nor misleading. The *amici* States have a strong interest in protecting their domestic businesses from this burden.

SUMMARY OF THE ARGUMENT

Commercial speech is speech. It has as much societal value as other types of speech. Accordingly, restrictions on commercial speech should be evaluated under strict scrutiny rather than the lower level of scrutiny that is currently applied under this Court's precedents.

American life, from the colonial era to the present, has relied heavily on commercial speech. Indeed, this Court has acknowledged that citizens ordinarily have

a greater interest in commercial speech than even the most important political news of the day. Given the historical—and present-day—significance of commercial speech, there is no reason why attempts to restrict it should be evaluated under anything but strict scrutiny. And, yet, they are only evaluated under a medium level of scrutiny. This is not justifiable.

The Court has allowed commercial speech to be more easily restricted for two reasons: (1) it is supposedly more susceptible to verification than other forms of speech; and (2) due to its profit motive, commercial speech is supposedly more durable than other forms of speech. But these rationales do not withstand scrutiny. Commercial speech is no more verifiable than other forms of speech, especially in light of modern marketing strategies. Moreover, many types of speech that receive the highest level of protection are far more durable than commercial speech.

Nevertheless, commercial-speech restrictions continue to be evaluated under the intermediate-scrutiny balancing test that this Court established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). This multi-factor test is inconsistent with the Court's most recent free-speech decisions. Further, it lends itself to inconsistent results and has created an atmosphere in which some states have felt free to impose overly burdensome restrictions on the content of commercial speech. The State of Washington has done so in this instance by punishing the Petitioners' speech not on the basis that it is actually false or misleading, but merely on the basis that the Petitioners failed to

substantiate the truth of their statements to Washington's satisfaction prior to making them. *See State v. Living Essentials, LLC*, 436 P.3d 857 (Wash. Ct. App. 2019).

Washington's application of the prior-substantiation rule is inconsistent with the First Amendment for a number of reasons. But, the larger doctrinal problem here is that Washington's adoption of this unconstitutional rule was made possible by the improperly low level of protection given to commercial speech and the malleable nature of the *Central Hudson* test.

It is past time for the Court to discard the indeterminate *Central Hudson* test and bring the treatment of commercial speech into line with the rest of the Court's jurisprudence on content-based speech regulation. That is, the Court should apply strict scrutiny to content-based restrictions on commercial speech. This case presents an excellent opportunity not just for the Court to put an end to the inconsistent results that the *Central Hudson* test permits, but to also replace a malleable, multi-factor balancing test with a familiar standard that is easily applied and much more easily understood.

Adopting strict scrutiny for commercial-speech restrictions will not inhibit states' ability to protect consumers from unscrupulous actors who would defraud or mislead them. False and misleading speech designed to harm others is generally not protected by the First Amendment. And, in any event, traditional restrictions on false, misleading, and deceptive trade practices should satisfy strict scrutiny. Moreover,

applying strict scrutiny to commercial-speech *restrictions* will not impact the validity of laws mandating certain factual *disclosures* in commercial and professional transactions, like informed-consent requirements.

ARGUMENT

I. Commercial speech is at least as valuable to American life as other forms of speech protected under the First Amendment.

Commercial speech helped fuel the American Revolution. The years leading up to the Revolution witnessed an unprecedented growth in public communication.

> Every medium of written expression was put to use. The newspapers, of which by 1775 there were thirty-eight in the mainland colonies, were crowded with columns of arguments and counter-arguments appearing as letters, official documents, extracts of speeches, and sermons. Broadsides—single sheets on which were often printed not only large-letter notices, but in three or four columns of minuscule type, essays of several thousand words—appeared everywhere; they could be found posted or passing from hand to hand in the towns of every colony. Almanacs, workaday publications universally available in the colonies, carried . . . a considerable freight of public comment. Above all, there were pamphlets: booklets consisting of a few printer's sheets, folded . . . and sold . . . usually for a shilling or two.

Bernard Bailyn, *The Ideological Origins of the American Revolution* 1–2 (Enlarged ed. 1992). And what made all of this possible? Commercial speech.

The explosive growth in the dissemination of revolutionary ideas was inextricably linked with the growth of advertising. *See* Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 Yale J. on Reg. 85, 97 (1999). "Without . . . advertisements, the colonial press so important to the Revolutionary cause would almost certainly have been less vibrant, if it would have existed at all." *Id.* at 98. As remains true today, "[a]dvertising represented the chief profit margin in the newspaper business" during the colonial era. *Id.* (quoting Frank Luther Mott, *American Journalism—A History of Newspapers in the United States Through 250 Years: 1690–1960* 56 (3d ed. 1963)).

Advertising was so important in the colonial era and early Republic that most newspapers reserved nearly all of "page one for advertising, sometimes saving only one column of it for reading matter." *Id.* at 99 (quoting Mott at 157). And, "[o]ften, more than half of the standard colonial newspaper was taken up by advertising." *Id.* For example, 70% of the *New York Mercury* consisted of advertising in 1766. *Id.* (citing A. Lee, *The Daily Newspaper in America* 32 (1937)).

But commercial speech was not important in the Revolutionary era just because it provided funding that made political and philosophical speech possible. Rather, commercial speech was beneficial in and of itself. It was understood "to have independent value in educating and informing the reading public." *Id.* at 100.

"To the founding generation, 'ads were news.'" Jonathan H. Adler, *Robert Bork and Commercial Speech*, 10 J.L. Econ. & Pol'y 615, 620 (2014) (quoting Robert H. Bork, *Activist FDA Threatens Constitutional Speech Rights*, 11 Legal Backgrounder, no. 2, at 2 (1996)). "Advertisements had as much interest as the news columns, perhaps greater interest, for they were more intimately connected with the readers' daily life than were the foreign items that made up so large a part of the news." Troy, *supra*, 16 Yale J. on Reg. at 100 (quoting Frank Presbrey, *The History and Development of Advertising* 154 (1929)).

The country's interest in commercial speech continued unabated throughout the nineteenth century. "In 1847, one publisher stated that advertising had a news-like quality that had as much appeal to readers as did reporting on the day's events." *Id.* at 110 (citing James Playsted Wood, *The Story of Advertising* 159–60 (1958)). And, "in 1869, the *New York Herald* typically held eight columns of editorial comment, thirty-eight columns of news, and *fifty* columns of advertising." *Id.* (emphasis added) (citing Wood, *supra*, at 169). By the latter half of the nineteenth century, it was unmistakable that "[a]dvertising had become a major part of American culture." *Id.* at 111.

And nothing has changed since then. If anything, commercial speech has only grown in value to the American people. For instance, commercial speech played a critical role in America's efforts in World War I, helping "to sell $24 billion in war bonds to twenty-two million Americans and raise $400 million for the

Red Cross." *Id.* at 116 (citing Presbrey, *supra*, at 565). Shortly thereafter, in 1926, President Coolidge observed that "[t]he preeminence of America in industry . . . has come very largely through mass production. Mass production is only possible where there is mass demand. Mass demand has been created almost entirely through the development of advertising." President Calvin Coolidge, Address before the American Association of Advertising Agencies (Oct. 27, 1926) (available at https://memory.loc.gov/ammem/coolhtml/coolbibTitles02.html).

More recently, commentators and scholars have extolled the informative and educational value of commercial speech. Nobel laureate economist George Stigler noted that commercial speech is "an immensely powerful instrument for the elimination of ignorance." George J. Stigler, *The Economics of Information*, 69 J. Pol. Econ. 213, 220 (1961). It has the "'power to improve consumer welfare' since it 'is an efficient and sometimes irreplaceable mechanism for bringing consumers information that would otherwise languish on the sidelines." Adam Thierer, *Advertising, Commercial Speech, and First Amendment Parity*, 5 Charleston L. Rev. 503, 507 (2011) (quoting John E. Clafee, *Fear of Persuasion: A New Perspective on Advertising and Regulation* 96 (1997)). "In other words, advertising educates." *Id.* at 508. "It . . . raises general awareness about new classes or categories of goods and services. It helps citizens in their capacity as consumers to become better aware of the options at their disposal and the relative merits of those choices." *Id.*

Further, the information conveyed in commercial speech does not just influence consumers in their commercial transactions; it also influences political debates. "Much commercial speech is imbued, if not saturated, with normative and political content." Jonathan H. Adler, *Persistent Threats to Commercial Speech*, 25 J.L. & Pol'y 289, 297 (2016) (citing Jonathan H. Adler, *Compelled Commercial Speech and the Consumer "Right to Know"*, 58 Ariz. L. Rev. 421, 429–31 (2016)). This naturally follows from—or perhaps leads to—the reality that "[c]ommercial decisions are often freighted with political content, as when a retailer refuses to stock a dairy product due to the treatment of livestock or when a manufacturer decides to source its materials from a given country or source of labor." Adler, *supra*, 10 J.L. Econ. & Pol'y at 629. Likewise, "[c]onsumption can be a political act and consumption decisions can play a role in a broader discourse with political implications." *Id.* at 630. As a result, "much commercial speech relates to and informs political discourse about the role of government in economic life, the extent to which certain activities should be regulated, and so on." *Id.* (citing Dietlind Stolle, Marc Hooghe & Michelle Micheletti, *Politics in the Supermarket: Political Consumerism as a Form of Political Participation*, 26 Int'l Pol. Sci. Rev. 245 (2005)).

And there are still yet other ways in which commercial speech adds important value to society. "Advertising also keeps markets competitive by keeping competitors on their toes and forcing them to constantly respond to challenges by rivals who are offering better or cheaper services." Thierer, *supra*, 5

Charleston L. Rev. at 511. This yields untold benefits to consumers as it drives up the quality of goods and services and drives down prices. In this respect, commercial speech is essential to the proper functioning of free markets. *See id.*

Significantly, this Court has also recognized the tremendous value of commercial speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court held:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

425 U.S. 748, 765 (1976) (citations omitted). And the Court has repeatedly acknowledged that "a 'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.'" *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011) (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)). This is no small matter as it is universally understood that the high value of political speech places it at the core of First Amendment protection.

Given the overwhelming and critical value that commercial speech has contributed to American life from the colonial era to the present day, one would expect restrictions on commercial speech to be

subjected to the highest level of scrutiny applied under the First Amendment. And, yet, they are not. This is inexplicable.

II. There is no sound reason for evaluating commercial-speech under anything less than strict scrutiny.

Instead of applying strict scrutiny to restrictions on commercial speech, the Court determined in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* that an intermediate level of scrutiny would apply. 447 U.S. at 562–63. The *Central Hudson* analysis is a multi-factor balancing test that first asks whether the speech at issue concerns a lawful activity and is not misleading. *Id.* at 566. If speech concerns unlawful activity or is misleading, then it receives no First Amendment protection at all and may be prohibited outright. *See id.* Otherwise, a reviewing court proceeds to the next three factors. Those factors ask whether: (1) the asserted governmental interest is substantial; (2) the regulation directly advances the governmental interest asserted; and (3) the regulation is not more extensive than is necessary to serve that interest. *Id.* The Court subsequently refined the last factor to clarify that it is not a least-restrictive-means test, but merely requires "a 'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in 'proportion to the interest served.'" *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (citations omitted).

On its face, there is nothing remarkable about the first step of the *Central Hudson* test. There has never been a general constitutional rule protecting fraud in commercial transactions or establishing a right to market illegal products. But the last three parts of the test are an aberration. Content-based restrictions on other forms of protected speech are normally subjected to strict scrutiny. *See Reed v. Town of Gilbert*, 575 U.S. 155, 135 S. Ct. 2218, 2226 (2015).

The Court has justified this disparate treatment for commercial speech on the ground that there is a "'commonsense' distinction" between commercial speech and other varieties of speech. *Cent. Hudson*, 447 U.S. at 562. And what are those "commonsense" distinctions? It appears that only two have ever been identified: (1) that commercial speech is more objectively verifiable than other forms of speech; and (2) that commercial speech is more durable than other forms of speech. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 523 n.4 (1996) (Thomas, J., concurring in part and concurring in the judgment); *Cent. Hudson*, 447 U.S. at 564 n.6; *Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24. Neither of these purported distinctions, however, can withstand scrutiny.

1. It is demonstrably false that commercial speech is more objectively verifiable than other varieties of speech that receive greater First Amendment protection. The truth is that the vast majority of modern commercial speech cannot be easily verified. Over the last century, commercial speech has largely shifted toward communicating general impressions and

images that are not susceptible to easy verification—or any verification at all, for that matter. Take, for instance, the various slogans Coca-Cola has used over the years, including "Things go better with Coke," "I'd like to buy the world a Coke," and "The Coke side of life." How would anyone ever go about objectively verifying the truth of those statements? Such speech is no more verifiable than a statement like "Representative X deserves to be re-elected."

Moreover, even in the occasional instances when commercial speech can be easily verified, the fact of verifiability still does not distinguish it from other forms of speech. For example, no one would dispute that an advertisement stating that a dozen eggs can be purchased at a certain grocery store for a certain price can be readily verified. But this verifiability is not unique to commercial speech. Many types of speech are just as susceptible to such verification. For example, a statement that a legislator voted for or against a particular piece of legislation is just as easily verifiable. Thus, commercial speech as a category cannot be truly distinguishable from other varieties of speech simply because the most basic forms of commercial speech might be verifiable. *See* Troy L. Booher, *Scrutinizing Commercial Speech*, 15 Geo. Mason U. Civ. Rts. L.J. 69, 72 (2004); Donald E. Lively, *The Supreme Court and Commercial Speech: New Words with an Old Message*, 72 Minn. L. Rev. 289, 297 (1987).

Consider also the modern trend toward marketing that looks more like art or entertainment than traditional advertising. In 2001–02, for instance,

automobile manufacturer BMW hired several famous movie directors to produce a series of eight short films starring British actor Clive Owen and prominently featuring BMW products. *See* Thierer, *supra*, 5 Charleston L. Rev. at 517. The films quickly "became an Internet and DVD sensation." *Id.* "If those eight short BMW films had been produced for widespread cinematic release, there would be no question that strict scrutiny would apply to any efforts to regulate them." *Id.* Nevertheless, there is no reason to believe that any restrictions on those films would be evaluated under any standard other than the *Central Hudson* test. But this makes no sense. "Why should lower scrutiny be applied simply because the films were produced at the request of an automobile manufacturer to showcase [its] new products?" *Id.* The truth of any messages communicated by those films is no more verifiable because the films were produced by BMW than if they had been produced independently.

2. There is also no justification for concluding that restrictions on commercial speech should be evaluated under a lower level of scrutiny because commercial speech is somehow more durable than other forms of speech. The durability rationale stems from the misplaced notion that commercial speech is uniquely hard to chill because it is motivated by a desire for profits. *See Va. State Bd. of Pharmacy*, 425 U.S. at 771 n.24. Just like the belief that commercial speech is inherently more verifiable than other speech, this notion is mistaken.

As an initial matter, it is anything but clear that commercial speech is, in fact, durable. Indeed, the

reality appears to be quite the opposite. As evidenced by the throngs of compliance officers and in-house lawyers employed by modern businesses, the truth is that commercial speakers "are often likely to be among the most risk averse of speakers, always concerned about the possibility of government penalization for their actions." Martin H. Redish & Kyle Voils, *False Commercial Speech and the First Amendment: Understanding the Implications of the Equivalency Principle*, 25 Wm. & Mary Bill Rts. J. 765, 791 (2017).

But, even if one were to assume for the sake of argument that commercial speech is durable because it is motivated by a desire for profits, that still would not justify treating it differently than other types of protected speech. First, commercial speech is not the only form of expression that is backed by a profit motive. "Many forms of public discourse are fueled by an intense and hardy search for profits: motion pictures, books, magazines, and newspapers, to mention only a few." Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 31–32 (2000) (citation omitted). If a profit motive makes speech more durable—and therefore less worthy of full First Amendment protection—then one would expect restrictions on those varieties of speech to receive a lower level of scrutiny too. And, yet, they do not.

Moreover, it simply is not true that speech backed by a profit motive is more durable than other forms of speech. There is perhaps no more durable speech than speech associated with religious beliefs. Throughout history, individuals have deliberately risked

persecution and death to continue spreading their religious beliefs. And political speech is not far behind. Political dissidents have always been willing to communicate their ideas at the risk of death as well. The very fact that the American Revolution happened proves this point. Yet, the extraordinary durability of religious and political speech has never been used as an excuse to reduce the level of First Amendment protection afforded to those types of speech. It is logically incoherent to evaluate restrictions on commercial speech according to a lower level of scrutiny based on its supposed durability.

The so-called "commonsense distinctions" between commercial speech and other varieties of speech are anything but. In reality, there is no principled reason to be more permissive of restrictions on truthful, non-misleading commercial speech than on restrictions of other types of protected speech. Restrictions on commercial speech should be evaluated under strict scrutiny rather than the *Central Hudson* test.

III. The Court should grant *certiorari* to hold that strict scrutiny applies to commercial-speech restrictions and to end the inconsistencies caused by the *Central Hudson* test.

This case presents a prime opportunity to adopt strict scrutiny for restrictions on commercial speech. The Court seems to have already moved in this direction, and now is the perfect time to say so expressly. The Court's most recent free-speech decisions have clarified that content-based speech regulations—*i.e.*, those that regulate speech based on

its communicative content—must be evaluated under strict scrutiny. *See Reed*, 135 S. Ct. at 2226. And there appear to be only two exceptions to this simple, easy-to-apply rule: (1) regulations that require the disclosure of certain factual, noncontroversial information in connection with a commercial transaction; and (2) regulations on professional conduct that incidentally affect speech, such as informed-consent requirements in the practice of medicine. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, __ U.S. __, 138 S. Ct. 2361, 2372 (2018); *see also EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 424 (6th Cir. 2019), *cert denied*, 140 S. Ct. 655 (2019) (upholding Kentucky's abortion informed-consent requirements). Notably, restrictions on commercial speech are not among those exceptions. Thus, it appears that the continued application of *Central Hudson* would be inconsistent with the Court's most recent free-speech jurisprudence. The Court should take this case to clarify this point.

The Court should also grant *certiorari* to put an end to the inconsistent results caused by the *Central Hudson* test. The test has proven "very difficult to apply with any uniformity." *44 Liquormart, Inc.*, 517 U.S. at 527 (Thomas, J., concurring in part and concurring in the judgment) (footnote omitted). Because the test is an "inherently nondeterminative . . . case-by-case balancing 'test' unaccompanied by any categorical rules," *id.*, the typical end result is that "individual judicial preferences will govern application of the test," *id.* (footnote omitted). Thus, it is hard to predict the outcome of any given case.

Not only does the *Central Hudson* test produce unpredictable results, but its overly malleable, indeterminate nature has also created an atmosphere in which states view themselves as having latitude to subject commercial speech to restrictions that they would never attempt to impose on other forms of protected speech. This case is a perfect example. The State of Washington sued the Petitioners for making allegedly deceptive advertising claims about their product, the energy drink known as 5-Hour ENERGY®. *See Living Essentials, LLC*, 436 P.3d at 863. Even though no court ever found any of the advertising claims to be false or actually misleading, the Washington Court of Appeals nevertheless affirmed the trial court's imposition of more than $4 million in fees and penalties against the Petitioners. *See id.* at 863–64, 876. The court reached this result by redefining a key term in Washington's Consumer Protection Act. Washington's Consumer Protection Act, like practically all others, prohibits misleading commercial statements. *See id.* at 865. The Washington Court of Appeals redefined the term "misleading" to include not just statements that actually meet the well-known definition of "misleading,"[2] but also any statements that are not substantiated to the State's satisfaction prior to being communicated. *See id.* at 866. Thus, under Washington's new rule, an entirely true commercial statement can be punished as "misleading" if it simply

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[2] *See, e.g., Smith v. Gen. Motors Corp.*, 979 S.W.2d 127, 131 (Ky. Ct. App. 1998) (holding that the term "misleading" in the Kentucky Consumer Protection Act has the same meaning as is "generally understood and perceived by the public" (citation omitted)).

lacked—in the State's view—adequate substantiation before it was uttered.

By redefining the term "misleading" in this manner, the State of Washington avoided having its conduct evaluated under the second, third, and fourth prongs of the *Central Hudson* test.[3] *See id.* at 869. The obvious problem with this is that it permits states to prohibit whatever commercial speech they desire to prohibit simply by redefining the term "misleading." Additionally, the prior substantiation rule improperly subjects commercial speakers to a standard that is akin a prior restraint by allowing speech to go unpunished only if it is substantiated to the state's satisfaction *before* being communicated. *See Alexander v. United States*, 509 U.S. 544, 550 (1993) (defining prior restraints (citation omitted)). Furthermore, it improperly saddles commercial speakers with the burden of proving the veracity of their statements rather than requiring the government to prove that they are false or misleading. *See Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 n.9 (2003). But, perhaps the bigger doctrinal problem is that this result was essentially invited by the lower level of protection afforded to commercial speech coupled with the uncertain, indeterminate nature of the *Central Hudson* test.

The latitude that *Central Hudson* gives for creative reinterpretations of consumer-protection laws presents recurring problems that this Court needs to address.

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[3] Even so, the prior substantiation rule fails the *Central Hudson* test, not to mention strict scrutiny. *See* Pet. at 24.

For example, in *Kasky v. Nike, Inc.*, the plaintiffs attempted a novel application of California's consumer-protection law against public statements that Nike had made in defense of its labor practices. 45 P.3d 243, 247 (Cal. 2002). The California Supreme Court held that the state's consumer-protection laws could be applied to Nike's speech even though the speech addressed matters of public concern and was communicated in the midst of a prominent public debate. *See id.* at 262. This Court granted *certiorari*, but subsequently dismissed the writ as improvidently granted. In dissenting from that decision, Justice Breyer lamented that "[i]f this suit goes forward, both Nike and other potential speakers, out of reasonable caution or even an excess of caution, may censor their own expression well beyond what the law may constitutionally demand." *Nike, Inc. v. Kasky*, 539 U.S. 654, 683 (2003) (Breyer, J., dissenting). The same chilling effect will flow from the Washington Court of Appeals' judgment in the decision below. And this chilling effect would not be possible without the *Central Hudson* test.

The Court should grant *certiorari* to clarify once and for all that restrictions on commercial speech are subject to strict scrutiny—a standard that is easily understood, easily applied, and consistent with this Court's recent free-speech decisions.

IV. Applying strict scrutiny to commercial-speech restrictions will not inhibit states' abilities to protect consumers.

Like Washington, the *amici* States protect their citizens from commercial harm through a variety of consumer-protection laws. This is a critical role of the

States, but it is a role that decisions like *Central Hudson* suggest is in tension with a robust First Amendment. That need not be the case. There is ample room under traditional First Amendment principles for states to prohibit false, misleading, and deceptive trade practices, while allowing citizens to benefit from "the free flow of commercial information." *Va. State Bd. of Pharmacy*, 425 U.S. at 763.

1. Every state has enacted some variety of consumer-protection law like Washington's that prohibits false, misleading, and deceptive trade practices. *See, e.g.*, Ky. Rev. Stat. 367.170; Tex. Bus. & Com. Code § 17.46(a). These laws serve important interests, but that does not mean the protections of the First Amendment should automatically be cast aside or subjugated to those interests.

This Court has long recognized that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." *Va. State Bd. of Pharmacy*, 425 U.S. at 771 (citations omitted). While not categorically excluded from the Constitution, "false statements 'are not protected by the First Amendment in the same manner as truthful statements.'" *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (quoting *Brown v. Hartlage*, 456 U.S. 45, 60–61 (1982)). This means the Government can restrict or even prohibit false speech that causes harm to others for one's own gain. *Id.* at 723 (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 771). Classic examples of such exclusion from the ambit of the First Amendment include defamation

and fraud.[4] But the Court has recognized others as well. *See Alvarez*, 567 U.S. at 747–48 (Alito, J., dissenting).

So, even without *Central Hudson*, false or misleading commercial speech should lack the ordinary protections of the First Amendment. But this has nothing to do with its commercial nature. False speech has "no constitutional value," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), particularly when used to "effect a fraud or secure moneys or other valuable considerations." *Alvarez*, 567 U.S. at 723 (citing *Va. State Bd. of Pharmacy*, 425 U.S. at 771). Consumer-protection laws fit squarely into this paradigm. When a state prohibits false, misleading, or deceptive trade practices, those laws (to the extent they restrict speech) restrict the kind of speech that already falls outside the First Amendment. Categorizing it as commercial, and assigning it a lower value because of that categorization, does nothing more than enhance a state's ability to restrict speech that is not false or misleading. And that is a dangerous proposition.

Even if false and misleading commercial speech had First Amendment value, ordinary consumer-protection laws satisfy strict scrutiny, which requires proving "that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231 (quotation omitted). States have a

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[4] Even where the Court has extended some protections for harmful false speech—for example, in the context of defamation—it has done so for the benefit of protecting truthful speech. *See N.Y. Times v. Sullivan*, 376 U.S. 254, 279–80 (1964).

compelling interest in protecting consumers from deceptive trade practices. *See Sorrell*, 564 U.S. at 579. And consumer-protection laws are usually narrowly tailored to prohibit speech that is actually false or actually misleading. While this would not allow states to redefine words like "misleading" as a means to restrict speech, as Washington has done here, states would be free to continue enforcing reasonable and necessary consumer-protection laws against practices such as false advertising—practices that actually harm consumers who have been deceived.

2. It takes little imagination to see the benefits to consumers that will flow from abandoning the *Central Hudson* framework—a framework that puts the Government in charge of what information consumers will receive. This case presents a prime example of the perils of allowing the Government to serve in such a role.

For over fifty years, this Court has recognized that consumers benefit from "the free flow of commercial information." *Va. State Bd. of Pharmacy*, 425 U.S. at 763. And, yet, *Central Hudson* allows for a barrier between consumers and the information that they might want before making choices in the marketplace. So long as the Government can restrict commercial speech without regard to whether the speech is actually false or misleading, the Government can effectively pick and choose what kinds of information consumers will have when they decide how to spend their limited resources.

The Court should not overlook the "long and sordid history" of using commercial-speech restrictions to

protect the competitive advantage belonging to incumbent market interests. Adler, *supra*, 25 J.L. & Pol'y at 302–06. Consider this case as an example. The State of Washington brought suit against the Petitioners in part for claiming that their product worked better than coffee—something that Washington, the corporate home to several well-known coffee companies, certainly has an outsized interest in. And, to prevail on its consumer-protection claims, Washington did not have to prove that the Petitioners' claims were false or even that they were misleading. Instead, Washington punished the Petitioners because they spoke without first substantiating the truth of their statements according to some sort of state-approved level of scientific certainty. In doing so, it is depriving consumers of information that not one person had complained about. *See* Pet. App. at 9.

A better approach is to recognize commercial speech for what is: speech. That will require states to meet the high burden of strict scrutiny before restricting commercial speech that is not actually false or misleading, while still permitting the states to protect their consumers from deceptive trade practices.

3. Finally, eliminating the *Central Hudson* test and subjecting commercial-speech restrictions to strict scrutiny will not affect states' regulations requiring certain mandatory factual disclosures in commercial and professional contexts. The Court has recognized a fundamental difference between commercial-speech restrictions and factual-disclosure requirements, holding that "disclosure requirements trench much more narrowly on an advertiser's interests than do flat

prohibitions on speech." *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). And the Court has recently reiterated the vitality of that distinction in holding that commercial-disclosure requirements and informed-consent requirements are exceptions to the general rule that content-based speech regulations are subject to strict scrutiny. *See Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2372. Thus, applying strict scrutiny to commercial-speech *restrictions* will have no impact on informed-consent requirements and commercial factual-disclosure requirements.

CONCLUSION

The Court should grant the petition for a writ of *certiorari*.

Respectfully submitted,

DANIEL CAMERON
Attorney General of Kentucky

S. CHAD MEREDITH
Solicitor General
Counsel of Record

BARRY L. DUNN
Deputy Attorney General

MATTHEW F. KUHN
Deputy Solicitor General

Office of the Kentucky Attorney General
700 Capitol Ave., Ste.118
Frankfort, KY 40601
(502) 696-5300
Chad.Meredith@ky.gov

BRETT R. NOLAN
Special Litigation Counsel

Counsel for Amici Curiae

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General of
Alabama

LESLIE RUTLEDGE
Attorney General of
Arkansas

CHRISTOPHER M. CARR
Attorney General of
Georgia

CURTIS T. HILL, JR.
Attorney General of
Indiana

JEFF LANDRY
Attorney General of
Louisiana

LYNN FITCH
Attorney General of
Mississippi

MIKE HUNTER
Attorney General of
Oklahoma

ALAN WILSON
Attorney General of
South Carolina

JASON RAVNSBORG
Attorney General of
South Dakota

KEN PAXTON
Attorney General of
Texas

SEAN D. REYES
Attorney General of
Utah

PATRICK MORRISEY
Attorney General of
West Virginia