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

REPLY BRIEF

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REPLY BRIEF

Respondent State of Washington refuses to confront the important First Amendment question the petition asks. According to the State, Petitioners want this Court either to "review the extensive trial court record and determine that the trial court erred in finding the advertisements deceptive" or to "overturn dozens of cases adopting the threshold principle that deceptive commercial speech falls outside the First Amendment's protections." Brief in Opposition (BIO) 2, 14. Neither is true.

Petitioners accept that the First Amendment does not protect "false, misleading, or deceptive" commercial speech. Petition (Pet.) 16-17. That isn't at issue. The question here is whether "unsubstantiated" commercial speech is unprotected *as a matter of law* irrespective of whether it is actually false, misleading, or deceptive. At no point does the State even attempt to point to any decision of this Court holding that speech which, as the trial court held, is plausibly true is somehow entitled to *no* protection under the First Amendment.

The State jousts with a strawman instead of the issue raised by the petition because it has no answer. The State admits that it never proved that Petitioners' advertisements were "false," "inherently" misleading, or "actually" misleading. Therefore, the only defense that it can muster of the judgment below is that "unsubstantiated" speech can be censored—full stop—because it is *always* misleading. That assertion finds no support in precedent or history. To ban commercial

speech, the State has the burden of proving that an advertisement is false, deceptive, or misleading. The prior substantiation doctrine relieves it of that duty in violation of the First Amendment.

The State offers no other reason to deny review. Not only does it accept that the issue is important, the State highlights that governments frequently deploy the prior substantiation doctrine instead of proving that the speech at issue is actually false, misleading, or deceptive. The State tries to minimize the petition's importance by noting that there is no circuit split and suggesting that Petitioners seek factbound correction of the trial court's ruling. But no court has upheld the prior substantiation doctrine against a First Amendment challenge, Petitioners do not ask this Court to review whether their advertisements were unsubstantiated, and this Court often reviews First Amendment cases in the absence of a split. The State gives no persuasive reason why the Court should chart a different course in this instance.

Finally, the State identifies no vehicle problem. To the contrary, the State concedes that its actions cannot withstand First Amendment review even under *Central Hudson* unless unsubstantiated speech is unprotected as a matter of law. The parties agree, in short, that the validity of the judgment below turns on the answer to the question presented. The Court should grant the petition and decide this important First Amendment issue.

I. The State refuses to confront the question presented.

Nearly all of the State's brief is spent battling strawmen. According to the State, Petitioners ask this Court to conclude that the First Amendment protects "false, deceptive, or misleading commercial speech." BIO 1 (citation omitted). Indeed, the State frames the dispute this way over and over. *See* BIO 1-2, 9-17. But that is untrue. Petitioners accept that "advertising that is false, misleading, or deceptive is not protected by the First Amendment." BIO 10. Petitioners also draw no line between "false" speech, on the one hand, and "misleading" or "deceptive" speech, on the other. BIO 11. The parties agree that the entire category of "false, deceptive, or misleading commercial speech may be banned." *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142 (1994); *see* Pet. 16-17. In short, the premise of the State's opposition is nonresponsive to the question presented.

The issue here is whether the First Amendment allows the State to punish and ban "unsubstantiated" commercial speech as a matter of law irrespective of whether the claims made in the advertisement are in fact false, deceptive, or misleading. As explained, it does not. Pet. 14-20. And the State does not—and cannot—identify *any* decision of this Court holding that "unsubstantiated" speech is entitled to *no* First Amendment protection.

The State's failure to find supportive precedent should be unsurprising. The "historic and traditional categories" of unprotected speech are "well-defined

and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *United States v. Stevens*, 559 U.S. 460, 468-69 (2010). False, deceptive, and misleading speech are on this list. Unsubstantiated speech is not. That is because "unsubstantiated" is just a euphemism for "'potentially misleading'" speech—a category of speech that is entitled to protection under the First Amendment. *Ibanez*, 512 U.S. at 146; *see also* Pet. 14-17.

What the State ultimately seeks, then, is for the Court to *expand* the definition of "false, deceptive, or misleading" speech to encompass "unsubstantiated" speech as a matter of law. But that is not how the First Amendment works. Imposing liability unless the speaker is "prepared with legal evidence to prove the truth of" his speech is the "essence of censorship." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 711-13 (1931). The State can identify no other circumstance in which the government can demand "competent and reliable" evidence before a person is allowed to speak. And Petitioners are aware of none. Pet. 28.

The State emphasizes that "commercial speech is subject to greater regulation than noncommercial speech." BIO 22. But this again misses the key point. False, deceptive, and misleading commercial speech may be banned—unlike analogous political speech. But the State offers no justification for why the First Amendment does not at least require the government to prove that the commercial speech is actually false, deceptive, or misleading before censoring it. Proving

that commercial speech is "unsubstantiated" is not an acceptable substitute for this requirement.

The State also worries that requiring it to make this showing will lead to a parade of horribles. BIO 23-25. But the concern rings hollow. If the government wants to ban an advertisement as false, misleading, or deceptive, again, it just needs to establish that the challenged speech is false, misleading, or deceptive. Brief *Amici Curiae* of States 1-4. This shouldn't be too much to ask before allowing the government to censor commercial speech.

One of the State's own cases, *see* BIO 4, proves the point. In *State v. Hydro Mag Ltd.*, 436 N.W.2d 617 (Iowa 1989), Iowa sued a company over promotional claims it made concerning an electromagnetic water-treatment device. To prove that the advertisements were untrue, the State called customers who testified that the product did not improve their water, a physicist who testified that the claims were false, an engineering professor who had conducted tests that disproved the claims, and it submitted additional scientific studies. *Id.* at 618-19.

The State, however, was forced to rely on the prior substantiation doctrine because it lacked similar proof. Pet. 10-11. Petitioners were promoting a widely available consumer product, they believed that the advertisements were true, there was no evidence the advertisements harmed or misled any consumer, and the trial court found that the advertisements were "certainly plausible, given the science presented." Pet. 19-20.

Indeed, the State conspicuously fails to mention that it brought a count challenging Petitioners' claims about their products as actually false, misleading, or deceptive but later abandoned it for lack of proof. Pet. 9-11. The State thus incorrectly argues that the trial court found that Petitioners aired "baseless" and "deceptive advertisements." BIO 13, 24. It found no such thing. The State had the opportunity to pursue that claim and it chose not to. The State's defense of the judgment below therefore rises and falls with the validity of the prior substantiation doctrine under the First Amendment. Arguing that Petitioners' advertisements were deceptive since they weren't substantiated to the State's satisfaction just begs the question.

II. The State cannot deny the importance of the question presented.

The State makes little effort to downplay the importance of the question presented. To the contrary, the State claims that the prior substantiation doctrine is frequently deployed at both the state and federal level. BIO 12-13. That makes sense. To prove that a commercial is false, deceptive, or misleading requires hard work, and it requires the government to bring forth clear and compelling evidence. Pet. 17-18 (citing *Peel v. Attorney Registration & Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990)).

All that matters under the prior substantiation doctrine, in contrast, is whether the speaker "substantiated the truthfulness of its statements to the state's satisfaction before speaking." Brief *Amici*

Curiae of States 1. This low bar thus makes it easier to censor free speech. The State of course sees this as a feature. The Court should not, however.[1]

The State claims that no company that is "confident in the truth of its assertions" would ever refrain from speaking due to a fear of liability. BIO 2, 23. That is wishful thinking. As explained, Pet. 26-27, companies will refrain from speaking out of fear that they could not satisfy the evidentiary requirements of the prior substantiation doctrine—even if their speech is "believed to be true" and even if it "is in fact true." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). "It is hard to imagine a more serious threat to businesses' First Amendment rights," in short, than the prior substantiation doctrine. Brief *Amici Curiae* of States 2.

Furthermore, the decision below is not limited to companies in the State of Washington. It will have a ripple effect. Businesses advertising nationwide will inevitably need to "adjust their behavior to comply with Washington's newfound—and oppressive—prior-substantiation test" as they no longer may "count on

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[1] The State insists that it had the burden of proof because it proved that Petitioners' advertisements "were not supported by reasonable prior substantiation." BIO 14. But that is no burden at all. Pet. 18-20. The State ignores that the prior substantiation doctrine allows the government to evade this Court's "[e]xacting proof requirements" for banning false, deceptive, or misleading speech. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003); *see also* Pet. 14-16. This eviscerates the safeguards that ensure "sufficient breathing room for protected speech." *Id*. at 620; *see also* Pet. 19.

avoiding liability simply by ensuring that their communications are neither false nor misleading." Brief *Amici Curiae* of States 2.

III. The State's arguments for denying review are unpersuasive.

The State repeatedly notes that the petition presents no circuit split. BIO 1, 10, 13. Petitioners readily admit this. Pet. 28-29. Yet the petition is still worthy of review. *Id*. Importantly, none of the lower court cases to which the State points, *see* BIO 13, upheld the prior substantiation doctrine against a First Amendment challenge, Pet. 18 n.2.[2] The Court should decide that important question.

The State also contends that Petitioners seek factbound error correction of the trial court's ruling. BIO 2, 10, 16. That is wrong too. The Court can rule for Petitioners without reexamining a single factual finding. Again, the question presented is not whether Petitioners violated the prior substantiation doctrine. It is whether the prior substantiation doctrine violates the First Amendment.

Finally, the State argues that review is not warranted because this case "presents no opportunity to revisit *Central Hudson*." BIO 16. Petitioners agree that "there is no need to break new ground" because

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[2] The consent decrees attached to the BIO also are inapposite. BIO App. 1a-23a. As explained, whether the First Amendment tolerates imposition of a prior substantiation duty as a *remedy* for violations of consumer protection laws is not at issue here. *See* Pet. 18 n.2.

the prior substantiation doctrine is unconstitutional even under existing precedent. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999); *see also* Pet. 24. But to the extent that the Court concludes that its precedents dictate upholding "unsubstantiated" speech as deceptive under *Central Hudson*, this is an appropriate case for revisiting this misguided decision. Pet. 21-25. The Court should adopt "a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech." *Greater New Orleans Broad. Ass'n, Inc*, 527 U.S. at 184; *see also* Brief *Amici Curiae* of States 5-25; Brief *Amici Curiae* of Goldwater Institute, et al., 5-21.

In any event, the State now acknowledges that *Central Hudson* cannot save the judgment below if unsubstantiated speech is not deceptive as a matter of law. Indeed, the State *waives* any argument that its actions could survive scrutiny under the last three steps of *Central Hudson*. *See* BIO 17. The parties, in other words, now agree that the question presented is decisive.

Hence, the petition does not raise far-reaching questions such as whether the government (including the FTC) may require prior substantiation for products that can "kill or seriously injure" consumers. BIO 24-25. Whether such a regime could satisfy the three-part balancing test of *Central Hudson* is not at issue. Instead, the Court need only determine whether "unsubstantiated" speech is "misleading or deceptive" as a matter of law. If it is not, then "reversal would be warranted." BIO 17.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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