

No. _____

In the Supreme Court of the United States

LIVING ESSENTIALS, LLC; INNOVATION VENTURES, LLC,

Applicants,

v.

STATE OF WASHINGTON,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION
FOR A WRIT OF CERTIORARI TO THE WASHINGTON COURT OF
APPEALS, DIVISION 1**

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for Washington:

Pursuant to Rule 13.5 of the Rules of this Court, Applicants Living Essentials, LLC and Innovation Ventures, LLC move for an extension of time of 30 days, up to and including February 3, 2020, within which to file a petition for a writ of certiorari.

1. Applicants will seek review of the judgment in *Washington v. Living Essentials, LLC*, 436 P.3d 857 (Wash. Ct. App.). A copy of the decision, dated March 18, 2019, is attached as Exhibit A. A copy of the Washington Supreme Court's subsequent order denying Applicants' petition for review, dated October 3, 2019, is attached as Exhibit B. A copy of the trial court's decision, dated October 10, 2016, is attached as Exhibit C. The current deadline for filing a petition for writ of certiorari is January 2, 2020. This application is filed more than 10 days before the date the petition is due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court is based on 28 U.S.C. § 1257.

2. This case presents important questions concerning the protections accorded to commercial speech under the First Amendment.

3. Applicants produce and sell the well-known energy shot 5-hour ENERGY®. Applicants regularly promote their product through a variety of print, radio, and television advertisements throughout the country.

4. In 2014, the State of Washington sued Applicants under the Washington Consumer Protection Act ("CPA"), alleging that certain advertisements Applicants ran in Washington were "unfair or deceptive acts or practices in the conduct of any

trade or commerce.” RCW 19.86.020. In pursuing this claim, the State dropped its falsity claims at trial, and therefore did not attempt to prove that Applicants’ advertisements were actually false. Ex. C at 47. Instead, the State argued that Applicants’ advertisements were “deceptive as a matter of law” because Applicants “lack[ed] adequate substantiation evidence” that their advertisements were true. *Id.* For example, the State claimed that Applicants’ “Construction Site Cowboy” television advertisement, which conveyed that 5-hour ENERGY® was “packed with B vitamins and nutrients to make it last” longer than coffee, was “deceptive” not because that statement was false, but because Applicants lacked sufficient proof that 5-hour ENERGY® was superior to coffee. *Id.* at 14.

5. Applicants argued that the State could not, consistent with the First Amendment, impose liability for statements that were not alleged to be false but merely “unsubstantiated.” Applicants also argued that they did have substantiation for their claims, as they had commissioned literature reviews and conducted scientific studies that supported their advertisements’ assertions about the effectiveness of 5-hour ENERGY®.

6. The trial court sided with the State, rejecting Applicants’ First Amendment arguments and finding Applicants liable under the CPA because there was “insufficient scientific evidence” to support the advertisements’ claims. *Id.* at 53. For example, the trial court found that Applicants’ “Construction Site Cowboy” advertisement conveyed that 5-hour ENERGY® works better than caffeine alone, and

although this assertion was “certainly plausible, given the science presented to the Court,” it “remain[ed] a hypothesis, not an established scientific fact.” *Id.* at 53.

7. The Washington Court of Appeals affirmed. According to the court of appeals, the State could prohibit Applicants’ advertisements without having to satisfy *any* scrutiny under the First Amendment. Ex. B at 15-17. Because Applicants’ advertisements were “unsubstantiated,” the court of appeals concluded, they were necessarily “misleading” and thus entitled to no protection under the First Amendment. *Id.* at 16, 22 (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980)).

8. Good cause exists for granting Applicants’ request for an extension of time to file their petition for a writ of certiorari. *First*, an extension is warranted because this case presents substantial and important questions involving freedom of speech under the First Amendment. As this Court has long recognized, laws that place the burden of truth on the speaker can lead to “self-censorship.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964). That is because such laws cause individuals to make only those statements that “steer far wider of the unlawful zone” because of “doubt whether [their speech] can be proved in court or fear of the expense of having to do so.” *Id.* Here, Applicants produced evidence that their advertisements were true, and the State never attempted to prove that Applicants’ advertisements were false. Yet the court of appeals held that Applicants’ speech was entitled to *no* First Amendment protection—because a trier of fact believed Applicants’ speech was

inadequately substantiated. This conclusion was incorrect and warrants the Court's attention.

9. *Second*, Applicants have retained new outside counsel with Supreme Court expertise to serve as counsel of record in this Court. Additional time is necessary and warranted for counsel to review the record in the case, research relevant case law, and prepare a clear and concise petition for certiorari for the Court's review.

10. *Third*, and last, Supreme Court counsel's pending matters have affected counsel's availability and will continue to do so. Counsel recently has filed two emergency applications for a stay of the mandate with this Court, *see Trump, et al. v. Mazars USA, LLP, et al.*, No. 19A545; *Trump, et al. v. Deutsche Bank AG, et al.*, No. 19A640, and two petitions for a writ of certiorari on an expedited basis, *see Trump v. Vance*, No. 19-635; *Trump, et al. v. Mazars USA, LLP, et al.*, No. 19-715. A third petition for certiorari is forthcoming. *See Trump, et al. v. Deutsche Bank AG, et al.*, No. 19A640. In addition to counsel's Supreme Court matters, counsel has a reply brief due in the U.S. Court of Appeals for the Tenth Circuit in late December, *Oklahoma v. U.S. E.P.A.*, No. 19-5055 (10th Cir.); an opening brief due in the New Jersey Superior Court, Appellate Division, on January 21, 2020, *see Enriquez v. Johnson & Johnson, et al.*, No. CAM-L-4677-18 (N.J. Sup. Ct. Camden Cty.); and, most likely, an opening brief due in the U.S. Court of Appeals for the First Circuit during this time period, *see Students for Fair Admissions v. President & Fellows of Harvard*, No. 19-2005 (1st. Cir) (briefing schedule forthcoming). An extension of time will ensure that

counsel's other matters do not hinder Applicants' ability to file an effective petition in this case.

11. For the foregoing reasons, Applicants hereby request that an extension of time be granted, up to and including February 3, 2020, within which to file a petition for writ of certiorari.

Respectfully submitted,

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