

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 FOR *AMICI CURIAE* ROBERT M.
MCKENNA AND MICHAEL C. TURPEN
IN SUPPORT OF PETITIONERS**

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Robert M. McKenna and Michael C. Turpen respectfully present this as their brief as Amici supporting the Petition for Certiorari of Living Essentials and Innovation Ventures (“Petitioners”) seeking review of the judgment of the Washington Court of Appeals in this matter.¹

IDENTITY AND INTEREST OF AMICI

Robert M. McKenna served as Attorney General (“AG”) of the State of Washington from 2005 to 2013. Michael C. Turpen served as AG for the State of Oklahoma from 1983 to 1987. In both Washington and Oklahoma, as in other states, the AGs are the chief law enforcement officers for their states and enforce consumer protection laws prohibiting unfair and deceptive acts and practices in business and trade. When they take office, the AGs swear to uphold and defend the United States Constitution and constitutions of their respective states.

Former AGs McKenna and Turpen take seriously the need to protect the public from false or misleading advertising in commercial speech. However, they believe that the free speech protections afforded by the First Amendment are of vital importance to the preservation of the people’s liberty and of our democracy. They

1. Amici have complied with Supreme Court Rule 37.2(a) by providing notice to counsel of record for all parties at least ten days prior to the deadline to submit this brief. All parties have consented to the submission of this brief. No counsel for any party authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae* or their counsel made a monetary contribution to its preparation or submission.

respectfully submit that the prior substantiation doctrine employed in this case by the courts of the State of Washington in their determination of whether certain commercial speech was misleading violates the First Amendment. They offer this brief in the hope it will be of assistance to the Court in deciding whether to review the judgment of the court below.

II. SUMMARY OF THE ARGUMENT

The substantive issue in this case is whether certain statements of Petitioners in advertising the 5-Hour ENERGY Drink (5-Hour) were deceptive. The courts below applied the prior substantiation doctrine, which requires speakers to have substantiation that constitutes a “reasonable basis” for their claims *before* making the claims. The courts below considered statements lacking a “reasonable basis” misleading as a matter of law, without regard to whether the statements were false. In effect, the courts below used a supposed lack of prior substantiation as a proxy for a finding that Petitioners’ statements were misleading, even though no consumer had actually complained that he or she was misled by the statements.

The First Amendment protects speakers from the courts’ *ad hoc* and freewheeling determination of costs and benefits, or, as here, of “reasonableness.” It requires the most exacting scrutiny of laws restricting speech, and places the burden on the state to demonstrate that speech is not subject to protection. Further, the First Amendment requires the State’s chosen restriction on the speech at issue be “actually necessary” to achieve its interest. Moreover, there must be a direct causal link between the speech restriction imposed and the injury to

be prevented by the restriction. A requirement for prior substantiation is unnecessary to determining whether commercial speech is misleading and as a restriction on speech has no direct causal link with detecting or preventing misleading advertisements. Consequently, a prior substantiation restriction on commercial speech is unconstitutional when applied to determine whether specific commercial speech is misleading.

The trial court below based its rulings on errors of law and fact that the Court of Appeals essentially found harmless. For example, the trial court found Petitioners' claim that 5 Hour was superior to coffee was "certainly plausible, given the science presented to the Court," but also found that this claim remained a hypothesis and was not an established scientific fact. The Court of Appeals recognized that even under the prior substantiation doctrine, Petitioners were not required to establish their claims as scientific fact. Despite the trial court's errors of fact and law, the Court of Appeals affirmed the trial court's ruling. As applied by those Washington state courts, the prior substantiation doctrine requires a commercial speaker to have a basis for its claims that is so strong that it defeats challenges to the reasonableness of its claims at trial. The Washington courts require something more akin to absolute certainty than a reasonable basis. Thus, under those courts' application of the prior substantiation doctrine, a speaker must have, *before* speaking at all, an extraordinary level of substantiation. That burden on commercial speech is unconstitutional under the First Amendment.

III. ARGUMENT

This is not a case based upon an allegation or finding that Petitioners' claims about its 5 Hour Energy Drink were actually false. The State of Washington began its case by making such an allegation but then abandoned it. This is a case based on a theory that an advertiser is required to have substantiation amounting to "reasonable basis" for a claim *prior* to advertising it. Under this theory, where an advertiser *prior* to advertising a claim lacks a "reasonable basis" for it (as a court might later determine in an adversarial proceeding) the advertised claim is *deceptive as a matter of law*. App. 11a. Consequently, the commercial message is denied First Amendment protection.

In *Illinois ex rel. Madigan v. Telemarketing Associates*, 538 U.S. 600 (2003) the Court drew a crucial distinction between three of its earlier cases that invalidated on First Amendment grounds state prohibitions on collecting supposedly excessive commissions by charitable fundraisers – and a straightforward fraud claim against a fundraiser for collecting money by knowing and deliberately false representations. In doing so, the Court affirmed the State's burden to prove falsehood in fraud cases, clearly analogous to the obligation of the State to prove Petitioners' claims were misleading in the present case. In *Madigan* the Court stated:

In *Schaumburg, Munson*, and *Riley*, the Court invalidated laws that prohibited charitable organizations or fundraisers from engaging in charitable solicitation if they spent high percentages of donated funds on fundraising--

whether or not any fraudulent representations were made to potential donors. Truthfulness even of all representations was not a defense . . . In contrast to the prior restraints inspected in those cases, a properly tailored fraud action targeting fraudulent representations themselves employs no “broad prophylactic rule.”

538 U.S. at 619. The fundraisers’ high commissions lacked any nexus to the likelihood that the solicitation is fraudulent. *Id.* Likewise, in the present case, supposedly inadequate prior substantiation lacks any nexus to the claim that the speech was misleading. Similarly in the courts below the supposed lack of “reasonable” prior substantiation renders a statement misleading as a matter of law, and truth is not a defense. The theory applied by the Washington Court allows the speaker to be found to have made a misleading statement even if the statement is true, so long as some court determines after the fact that the speaker lacked “reasonable substantiation” before making the statement.

In contrast to a prior restraint on solicitation, or a regulation that imposes on fundraisers an uphill burden to prove their conduct lawful, in a properly tailored fraud action the State as plaintiff bears the full burden of proof *Id.*, 538 U.S.620. In *Madigan*, the Court explained that a false statement alone did not subject a fundraiser to fraud liability because, under Illinois law, to prove a defendant liable for fraud, the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false; further, the complainant must demonstrate that the defendant

made the representation with the intent to mislead the listener, and succeeded in doing so. *Id.* In a Consumer Protection Act claim, the speaker is not required to have malicious intent or to know that the statement is false or misleading; however, to impose liability the statement must be misleading. In applying the prior substantiation doctrine, the Washington Courts imposed the burden for proving that the statement is not misleading on the speaker based on Petitioner's supposed lack of prior substantiation, just as the earlier cases discussed in *Madigan* found falsity of fundraisers' representation based only on the high percentage of donations that they kept. In all of these cases, state laws relieved the government of its constitutional duty to actually prove representations were false or misleading. This shift of the burden is not permissible under the First Amendment.

In its earlier case of *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781, 101 L. Ed. 2d 669, 108 S. Ct. 2667, the Supreme Court expressed concern that case-by-case litigation over the reasonableness of fundraising fees would inhibit speech. *Madigan*, 538 U.S. 620, n. 9 (citation omitted). That concern arose in large measure because the North Carolina statute there at issue placed the burden of proof on the fundraiser. The Court has long cautioned that, to avoid chilling protected speech, the government must bear the burden of proving that the speech it seeks to prohibit is unprotected. *Id.* The present case presents just such a burden on Petitioners of proving in advance that their representations are reasonable, that relieved the State of Washington of its constitutionally required burden of proving Petitioners' speech was unprotected as misleading.

The State of Washington did not prove or even argue that the claims Petitioners made about 5-Hour were false, that any consumer had been harmed by 5-Hour, or that any consumer had claimed any injury, unfairness or deception whatsoever as a result of Petitioners' advertising or as a result of using the product. The trial court concluded that Petitioners' claim that 5-Hour works better than caffeine alone in sustaining energy, alertness and focus over several hours was "*certainly plausible*, given the science presented to the Court," but found that the claim remained a hypothesis, not an established scientific fact. App. 125a (emphasis added). Under the unconstitutional "prior substantiation" standard adopted by the Washington courts, the absence of scientific facts established in advance made Petitioners' statements about 5-Hour's superiority to coffee misleading as a matter of law. This prior substantiation requirement denies Petitioners' commercial speech the protection of the First Amendment.

A. The prior substantiation doctrine requires virtually unassailable substantiation of an advertising claim *before* saying a word. Without that substantiation the claim is misleading as a matter of law, according to the Washington courts.

The Court of Appeals had before it evidence supporting Petitioners' claims about 5 Hour that was "certainly plausible," although not sufficient to establish the claims as scientific fact. The Court of Appeals agreed with Petitioners that the company was not required to prove its claims were "established scientific fact." Nevertheless the Court of Appeals affirmed the trial

court's ruling that Petitioners' advertising was unfair and deceptive as a matter of law while finding the evidence in support of those claims to be "certainly plausible" and supported by science

It is unreasonable and unconstitutional to place on Petitioners the burden of foreseeing *before* they advertised 5 Hour that litigation would result in courts crediting the State's evidence at trial. Petitioners had not heard the State's evidence before it spoke in advertisements for 5 Hour and thus could not consider it in planning what its advertisements would say. It is an evident contradiction for the state courts to find that Petitioners' claims were based on plausible scientific evidence but that the company had no reasonable basis for its claims. In wrongly placing the burden on the speaker, when the Constitution places the burden on the state, the prior substantiation standard, requiring as it does a *prior* reasonable basis for a claim, grants to regulators an impermissible degree of discretion to charge as illegal and beyond the protection of the First Amendment commercial representations that the speaker had good reason to believe were valid. A reasonable basis need not be an ironclad basis, nor must it rest upon scientific certainty. Certain advertising claims might ultimately be shown at trial to lack a proven scientific basis but nevertheless may be reasonable when made in good faith based on plausible evidence supported by science. In the law, what is "reasonable" is a question of fact. The prior substantiation doctrine requires a speaker to be so well armed in advance with substantiation for its advertising claims that it can win a contested case on the reasonableness of its speech before it speaks at all

The prior substantiation doctrine requires the speaker to substantiate the basis of its claims in advance and with sufficient certainty to overcome the State’s later evidence, before it says a word. Under that doctrine, a speaker must not only be reasonable today but must be reasonable tomorrow, and a year from tomorrow, when its claims are challenged in court. Such a burden chills speech and punishes commercial speakers—here by a civil fine of over \$2 million. In this case, the prior substantiation doctrine has stripped away any constitutional protection for speech that was based on evidence that was plausible but not scientifically proven, turning plausible claims into unfair and deceptive statements.

B. Even in determining whether speech is misleading, the First Amendment requires better than prior substantiation.

The First Amendment protects speakers from an *ad hoc* and freewheeling determination of costs and benefits, or, as here, from a regulator *ad hoc* determination of “reasonableness.” *U.S. v. Alvarez*, 567 U.S. 709, 724 (2012) (*Alvarez*). It requires the most exacting scrutiny of restrictions on speech. *Id.* The Court of Appeals accepted the proposition that speech supported by some degree of prior substantiation, however poorly defined, is socially beneficial, while speech that is merely plausible but not supported by such substantiation is not.

Under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564 (1980) (*Central Hudson*) the State’s restriction or regulation of commercial speech must be proportional to the State’s interest, and carefully tailored to achieve the State’s goal.

The prior substantiation test fails that test. The State of Washington's legitimate interest in consumer protection does not require an advertiser making plausible claims to have substantiation for its message amounting to the preponderance of scientific evidence *before* it can speak at all. Such a requirement is disproportionate to the State's need to detect and deter misleading commercial speech.

The First Amendment requires the State's chosen restriction on speech to be "actually necessary" to achieve its interest. *Alvarez*, 567 U.S. at 725. Moreover, there must be a direct causal link between the restriction imposed and the injury to be prevented. *Id.* It simply cannot be argued that the prior substantiation doctrine is "actually necessary" to protect the public from misleading advertising. Nor is prior substantiation necessary to determine if an advertisement is misleading. Certainly, no direct causal link exists between the requirement of prior substantiation and protection from misleading advertising. Doubtless the State of Washington protected its citizenry from misleading advertising before adopting the prior substantiation doctrine and will continue to do so if the Court invalidates that doctrine.

Nor is the prior substantiation doctrine carefully tailored to achieve the State's goal of preventing or punishing misleading speech. Washington, and other states, doubtless can and do prosecute misleading advertisements after the fact and after establishing how the advertisement is actually misleading just as in *Madigan* the State of Illinois could prosecute traditional fraud claims without reliance on the "prophylactic rule" outlawing fundraising if high percentages of contributions were retained by the fundraiser. Given the course of the

State's litigation against Petitioners, in which the trial court made errors of fact and law, and in which the State could produce no consumer who claimed to be misled or harmed by Petitioners' claims about 5 Hour, it is clear that the prior substantiation doctrine fails exacting scrutiny in how it determines whether an advertisement is misleading and fails to satisfy *Central Hudson's* requirements for proportionality and careful tailoring.

Central Hudson declared that if the governmental interest at issue could be served just as well by a more limited restriction on commercial speech, the excessive restriction cannot be upheld. 447 U.S. at 564. The need to prove an advertisement is misleading certainly does not require the heavy-handed tool of the prior substantiation doctrine. Nor does effective enforcement of prohibitions against misleading advertising require it. The State of Washington can protect the public from misleading speech by conducting discovery in the normal course of civil or administrative proceedings to make its case based on the kinds of actual claims and evidence of consumer harm and deception that are utterly lacking in this case.

Allowing the government to suppress speech because it is not substantiated in advance to the level of certainty defensible in subsequent litigation but instead is merely "plausible" excuses government from the burden of proving the speech is actually false or misleading and violates the First Amendment.

CONCLUSION

The prior substantiation doctrine violates the First Amendment because it places the burden on the speaker to demonstrate that the speaker has the right to speak rather than on the State to demonstrate that the speech is not protected, because it is not narrowly tailored to Washington's need to identify and remedy misleading commercial speech and because it bears no direct causal relationship with that need. The Court should grant the writ of certiorari.

Respectfully submitted,

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