No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FIRST CHOICE CHIROPRACTIC, LLC, ET AL,
PETITIONERS

V.

OHIO GOVERNOR MIKE DEWINE, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This appeal arises out of a First Amendment challenge to a recently enacted Ohio statute that imposes strict limitations upon communications between medical practitioners and prospective patients who have been injured in automobile accidents or crimes. Granting a writ of certiorari will allow this Court to resolve the conflict that has developed amongst the Federal Courts of Appeal over the following question:

> When governmental regulations upon commercial speech are based upon either the identity of the speaker or the content of the message, does the "heightened scrutiny" standard addressed in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) control instead of the intermediate four-part test adopted in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of New York*, 447 U.S. 557 (1980)?

In a reported decision, the United States Court of Appeals for the Sixth Circuit adopted the minority view that *Sorrell* changed nothing with regard to restrictions upon commercial speech, and the more forgiving *Central Hudson* standard governs in all such instances. *First Choice Chiropractic, LLC v. DeWine*, 969 F.3d 675, 682 n.3 (6th Cir. 2020); App. 13. Four other Circuits, on the other hand, employ "heighted scrutiny" when commercial speech is burdened with speaker-based or content-based restraints. *Wollschlaeger v. Governor, Fla.*, 848 F.3d

1293, 1301 (11th Cir. 2017); *In re Tam*, 808 F.3d 1321, 1334-35 (Fed. Cir. 2015); *United States v. Caronia*, 703 F.3d 149, 163-65 (2d Cir. 2012); *Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer*, 961 F.3d 1062, 1069-74 (9th Cir. 2020).

PARTIES TO THE PROCEEDING

Petitioners, First Choice Chiropractic, LLC, James Fonner, D.C., Prestige Chiropractic & Injury, LLC, Rennes Bowers, D.C., Allied Health & Chiropractic, LCC, and Ty Dahodwala, D.C., are all healthcare practitioners and practices based in Ohio. Petitioner, Schroeder Referral Systems, Inc., provides marketing services to medical providers in Ohio.

Respondents, Ohio Governor Mike DeWine, Ohio Attorney General Dave Yost, and the Ohio State Chiropractic Board, are all public officials who are responsible for enforcing the restrictions imposed upon commercial speech by Ohio's 2020-21 Biennial Budget Bill, 2019 Am. Sub. H.B. 166, as codified in Ohio Revised Code § 1349.05.

CORPORATE DISCLOSURE

None of the Petitioners have a parent corporation or are owned in part by any publicly held company.

DIRECTLY RELATED PROCEEDINGS

First Choice Chiropractic, LLC, et al. v. Ohio Governor Mike Dewine, et al., No. 1:19CV2010, United States District Court for the Northern District of Ohio. Judgment Entered January 3, 2020.

First Choice Chiropractic, LLC, et al. v. Ohio Governor Mike Dewine, et al., Nos. 19-4092, 20-3038, United

States Court of Appeals for the Sixth Circuit. Judgment Entered August 13, 2020.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rule

Other Authorities

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Sixth Circuit in Consolidated Docket Numbers 19-4092 and 20-3038 affirming the District Court's Final Judgment were issued on August 13, 2020 and published at 969 F.3d 675. The Memorandum Opinion and Order entered by the United States District Court for the Northern District of Ohio entering final Judgment in favor of Respondents was issued on January 3, 2020, and is unpublished, but available on the Westlaw database at 2020 WL 42355. The Memorandum Opinion and Order entered by the United States District Court for the Northern District of Ohio denying a preliminary injunction in favor of Petitioners was issued on October 16, 2019, and is unpublished.

STATEMENT OF JURISDICTION

This Court's jurisdiction is drawn from 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY AUTHORITY INVOLVED

The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Ohio anti-solicitation statute that was enacted by Ohio's 2020-21 Biennial Budget Bill, 2019 Am. Sub. H.B. 166, and was in force during the pendency of the proceedings below states:

> (A) As used in this section:
>
> (1) "Agency" and "license" have the same meanings as in section 119.01 of the Revised Code.
>
> (2) "Crime" and "victim" have the same meanings as in section 2930.01 of the Revised Code.
>
> (3) "Health care practitioner" means any of the following:

(a) An individual licensed under Chapter 4731. of the Revised Code to practice medicine and surgery;

(b) An individual licensed under Chapter 4723. of the Revised Code to practice as an advanced practice registered nurse;

(c) An individual licensed under Chapter 4730. of the Revised Code to practice as a physician assistant;

(d) An individual licensed under Chapter 4732. of the Revised Code to practice as a psychologist;

(e) An individual licensed under Chapter 4734. of the Revised Code to practice as a chiropractor.

(B) No health care practitioner, with the intent to obtain professional employment for the health care practitioner, shall directly contact in person, by telephone, or by electronic means any party to a motor vehicle accident, any victim of a crime, or any witness to a motor vehicle accident or crime until thirty days after the date of the motor vehicle accident or crime. Any communication to obtain professional employment shall be sent via the United States postal service.

(C) No person who has been paid or given, or was offered to be paid or given, money or anything of value to solicit employment on behalf of another shall directly contact in person, by telephone, or by electronic means any party to a motor vehicle accident, any victim of a crime, or any witness to a motor vehicle accident or crime until thirty days after the date of the motor vehicle accident or crime. Any communication to solicit employment on behalf of another shall be sent via the United States postal service.

(D) If the attorney general believes that a health care practitioner or a person described in division (C) of this section has violated division (B) or (C) of this section, the attorney general shall issue a notice and conduct a hearing in accordance with Chapter 119. of the Revised Code. If, after the hearing, the attorney general determines that a violation of division (B) or (C) of this section occurred, the attorney general shall impose a fine of five thousand dollars for each violation to each health care practitioner or person described in division (C) of this section who sought to financially benefit from the solicitation. If the attorney general determines that a health care practitioner or person described in division (C) of this section has subsequently violated division (B) or (C) of this section, the attorney general shall impose a fine of twenty-five thousand dollars for each violation.

> (E) After determining that a health care practitioner or person described in division (C) of this section has violated division (B) or (C) of this section on three separate occasions, and if that health care practitioner or person described in division (C) of this section holds a license issued by an agency, the attorney general shall notify that agency in writing of the three violations. On receipt of that notice, the agency shall suspend the health care practitioner's or the person's license without a prior hearing and shall afford the health care practitioner or the person a hearing on request in accordance with section 119.06 of the Revised Code.

Ohio Revised Code § 1349.05. Effective November 22, 2020, this statute was revised by 2020 H.B. 151 but continues to impose restraints upon the Ohio medical community's solicitation of potential patients.

STATEMENT OF THE CASE

Petitioners commenced this action for declaratory and injunctive relief in the United States District Court for the Northern District of Ohio on August 30, 2019. *Doc#:1, Petitioners' Complaint; PageID#:1.* Federal and state constitutional challenges were raised with respect to the enforceability of Ohio Revised Code § 1349.05, which had been incorporated into Ohio's 2020-21 Biennial Budget Bill and was scheduled to take effect on October 17, 2019. These provisions seek to severely restrict the ability of health care practitioners and the marketing companies that serve them to identify and communicate with victims of automobile accidents and crimes. Petitioners alleged that the enactments violated several provisions of the United States and Ohio Constitutions, including the respective guarantees of free commercial speech and equal protection of the law. *Doc#:1, Petitioners' Complaint, pp. 7-12; PageID#:7-12.*

In accordance with Fed. R. Civ. P. 65(a), Petitioners filed their Motion for Preliminary Injunction on September 13, 2013 ("Petitioners' Motion"). *Doc#:3; PageID#:30.* An order was requested barring any enforcement of the relevant portions of the 2020-21 Biennial Budget Bill before they took effect. The Motion was supported with several sworn statements confirming that Petitioners would suffer serious and irreparable financial harm if their constitutional rights were violated. *Id., Exhibits 1-4; PageID#:60-68.*

A teleconference was conducted by United States District Court Judge Dan Aaron Polster with the parties' counsel on September 17, 2019. *See Minute Order dated September 17, 2019.* An agreement was reached at that time to refer the dispute to Magistrate Judge William H. Baughman, Jr. *Id.* Petitioners were further granted leave to amend their pleadings to seek only the declaratory and injunctive relief available against state officials to remedy a violation of federal constitutional rights under *Ex Parte Young*, 209 U.S. 123, 155-56 (1908). Their First Amended Class Action Complaint followed three days later, which sought to preclude Respondent-Appellees, Ohio Governor Mike DeWine, Ohio Attorney General Dave Yost, and the Ohio State Chiropractic Board, from enforcing Ohio Revised Code §§ 149.43(A)(1)(mm) and 1349.05 contrary to the First and Fourteenth Amendments to the United States Constitution.[1] *Doc#:8; PageID#:75.*

In accordance with the District Court's briefing schedule, Respondents filed their Memorandum in Opposition to Petitioners' Motion for Preliminary Injunction on September 27, 2019 ("Respondents' Memo."). *Doc#:15; PageID#:98.* No evidentiary materials were cited in or furnished with the response, which instead relied entirely upon legal arguments. *Id.* Petitioners' Reply then followed on

[1] Petitioners' claims for violations of the Ohio Constitution were then brought in a separate class-action proceeding in state court, which presently remains pending. *Allied Health & Chiropractic, LLC v. State of Ohio*, Ohio Court of Common Pleas, Cuyahoga Cty. No. CV-19-922186 (McGinty, J.).

October 4, 2019 ("Petitioners' Reply"), which argued *inter alia* that the state had failed to sustain its burden of justifying the restraint of Petitioners' fundamental right to free speech. *Doc#:19, pp. 9-11; PageID#:140-142.*

With the consent of the parties, Magistrate Baughman held an argument hearing upon the Motion on October 9, 2019. *Doc#:21; PageID#:152.*[2] No witnesses were called, and no evidence was introduced by either party.

On October 16, 2019, Magistrate Baughman issued his Memorandum Opinion and Order denying the request for a preliminary injunction in its entirety ("First Mag. Op."). *Doc#:22; PageID#:153, App. 30.* In finding that the state had satisfied its burden of proof with regard to the First Amendment challenge, the court relied upon legislative materials from a prior session of the Ohio General Assembly that had apparently been obtained through the Internet. *Id., p. 18 n.66; PageID#:170, App. 52.* Petitioners were never alerted before the ruling was issued that the new evidence was being considered and thus had no opportunity to address this unexpected supplementation of the record. As permitted by 28 U.S.C. § 1292(a)(1), Petitioners timely appealed the decision on November 5, 2019. *Doc#:27; PageID#:293.*

The parties then entered Joint Stipulations agreeing that no further evidence would be submitted and consenting to a final adjudication of the claims for

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[2] The transcript of the oral argument was filed with the Clerk on October 25, 2019, and references will be abbreviated herein as "Hng. Tr." *Doc#:24.*

declaratory and injunctive relief on the merits. *Doc#:29; PageID#:303, App. 63.* Magistrate Baughman issued his Memorandum Opinion and Order denying relief to Petitioners upon their federal constitutional claims on January 3, 2020 ("Second Mag. Op."). *Doc#:30; PageID#:305, App. 23.* The Final Judgment in favor of Respondents followed shortly thereafter. *Doc#:31; PageID#:311, App. 21.* Petitioners submitted their second Notice of Appeal on January 6, 2020. *Doc#:32; PageID#:313.*

A Motion to Consolidate the two appeals was filed by Petitioners three days later. *Doc#:16.* With Respondents' consent, the request was granted later that afternoon. *Doc#:18.* After oral argument was held, the United States Court of Appeals for the Sixth Circuit published a decision on August 13, 2020, affirming the District Court's final order. *First Choice Chiropractic*, 969 F.3d 675*, Doc#:41-2, App. 3.* The Court of Appeals issued its judgment entry the same day. *Doc#:41-1, App. 1.*

REASONS FOR GRANTING THE PETITION

Petitioners now seek further review in this Court and offer the following reasons why a writ of certiorari is warranted to resolve the conflict that has arisen over whether the traditional *Central Hudson* intermediate test must give way to heightened scrutiny consistent with *Sorrell* when commercial speech is restrained based upon the identity of the speaker or the nature of the content.

I. THIS DISPUTE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT PRESENTLY DIVIDES THE CIRCUIT COURTS OF APPEAL

A. The Conflict Between the Circuits

A number of significant points were never questioned in the proceedings below, which brought the current conflict issue into direct focus. While there is some disagreement regarding the proper scope of Ohio Revised Code § 1349.05, there was no dispute that at a minimum, Ohio healthcare practitioners are prohibited from initiating any contact or communication with a prospective patient involved in an accident or crime in order to obtain professional employment for thirty days. Respondents never openly disagreed, moreover, that this prior restraint on commercial speech is both speaker-based and content-based. No sensible person could possibly suggest otherwise, as only certain healthcare practitioners specified in Subsection (A)(3) are subject to the enactment. And as further directed in Subsection (B) and (C), only speech that is intended to "solicit employment" is banned.

Perhaps most significantly, Respondents never argued at any time that the anti-solicitation statute could survive "heightened" scrutiny review. Their steadfast position, which the court of appeals ultimately accepted, was that nothing changed when *Sorrell,* 564 U.S. 552, was released. *First Choice Chiropractic,* 969 F.3d at 682 n.3; *App. 13.* As previously observed, "heighted scrutiny" is now

applied in other Circuits to speaker-based and content-based restraints on commercial speech. *Wollschlaeger*, 848 F.3d at 1301; *In re Tam*, 808 F.3d at 1334-35; *Caronia*, 703 F.3d at 163-65; *Pacific Coast Horseshoeing School*, 961 F.3d at 1067-74.

And to add to the confusion that now exists, approximately three weeks after the Sixth Circuit's decision was issued below, another panel of the same appellate court reached the opposite conclusion and applied strict scrutiny to a content-based billboard regulation. *Internatl. Outdoor, Inc. v. Troy, Michigan*, 974 F.3d 690, 707-08 (6th Cir. 2020). In stark contrast to the *First Choice Chiropractic* opinion, 969 F.3d 675, this Court's decision in *Sorrell*, 564 U.S. 552, was discussed at length. *Internatl. Outdoor*, 974 F.3d at 705. There was a common jurist on the two panels, Judge Suhrheinrich, who decided to "dissent from the portion of the opinion directing the district court to apply strict scrutiny to a provision in Troy's sign ordinance that defines 'temporary signs' based on their content[.]" *Id.* at 709.

B. The Historical Development of the Conflict

This conflict is the product of the gradually unfolding collision between two fundamental First Amendment principles. Although the proper course had seemingly been laid in *Sorrell*, the Federal Circuit Courts are now at odds over whether the *Central Hudson* intermediate scrutiny test no longer applies, and heightened scrutiny must be employed,

when governmental restraints upon commercial speech are speaker or content based.

In the seminal case of *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-64 (1976), this Court recognized that because society possesses a strong interest in the free flow of information, First Amendment protections extend into the marketplace. Thereafter, the four-part *Central Hudson* test was developed for determining when the government may constitutionally restrain such speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, 447 U.S. at 566. This test is often referred to as "intermediate" scrutiny. *See, e.g., Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1985); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010).

Another line of First Amendment authorities took a hard stance against governmental regulations of speech outside of the commercial context that established or permitted discriminatory treatment founded upon either the identity of the speaker or the message conveyed. *See, e.g., Saia v. New York,* 334 U.S. 558 (1948). As Justice Clarence Thomas once explained for the Court:

> Under that Clause, a government, including a municipal government vested with state authority, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *R.A.V. v. St. Paul*, 505 U.S. 377, 395, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991).

Reed v. Gilbert, Ariz., 576 U.S. 155, 163 (2015) (emphasis added).

The inevitable convergence between the intermediate *Central Hudson* test for commercial

speech and this Court's traditional intolerance of content- and speaker-based restrictions finally came to a head in *Sorrell*, 564 U.S. 552. At issue was a Vermont statute that precluded pharmacies, health insurers, and other similar businesses from engaging in certain marketing practices involving prescriber information. *Id.* at 558-59. Justice Anthony M. Kennedy's majority opinion initially found that the legislation "enacts content-and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information." *Id.* at 563-64. The Court then concluded that "heightened judicial scrutiny is warranted." *Id.* at 565 (emphasis added). The state's argument that a lower standard applied "because its law is a mere commercial regulation" was specifically rejected. *Id.* at 566. A distinction was drawn between "restrictions directed at commerce or conduct" that impose "incidental burdens on speech" and those like the Vermont law, which are "directed at certain content" and "aimed at particular speakers." *Id.* at 567. Justice Kennedy and the majority ultimately concluded that Vermont had impermissibly interfered with First Amendment protections in attempting to regulate commercial speech in a content- and speaker-based manner. *Id.* at 571-80.

C. The Applicability of *Sorrell*

Here too, subsections (B) and (C) of Ohio Revised Code § 1349.05 are unmistakably directed at certain speakers—health care practitioners—and the

content of their messages—contact and communications with the intent to obtain professional employment. The Ohio General Assembly has plainly and unmistakably enacted a preference for insurance representatives and other individuals who do not practice in the medical field, who remain free to communicate with victims of accidents mere moments after a motor vehicle collision. The restrictions are both content and speaker based, pure and simple. *Sorrell,* 564 U.S. at 563-66; *see also Discovery Network, Inc. v. Cincinnati,* 946 F.2d 464, 472-73 (6th Cir. 1991) (ordinance prohibiting distribution of commercial handbills was not content-neutral, and violated First Amendment); *Valle Del Sol Inc. v. Whiting,* 709 F.3d 808, 819 (9th Cir. 2013) (strict scrutiny implicated and preliminary injunction granted against content-based day-laborer statute); *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310, 1328 (M.D. Ala. 2019) (state sex offenders reporting and notification statute singled out commercial speech for special treatment and was thus content based, triggering strict scrutiny). The impact of *Sorrell's* concluding passage should not be overlooked:

> The State has burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views. <u>This the State cannot do</u>.

Sorrell, 564 U.S. at 580 (emphasis added).

D. The Fundamentally Flawed Minority View

In the appellate decision rendered below, the Sixth Circuit panel's discussion of the implications of *Sorrell* were relegated to a footnote. *First Choice Chiropractic*, 969 F.3d at 682 n.3; *App. 13.* The panel maintained:

> The plaintiffs cite to the Supreme Court's more recent decision in *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), to suggest that a stricter level of scrutiny applies to content- and speaker-based restrictions on commercial speech like the one at issue here. Yet they fail to explain how the standard applied in *Sorrell* differs from the *Central Hudson* test. Understandably so, because *Sorrell* neither delineated a new test nor modified the *Central Hudson* test. While the Court did state generally that "heightened" scrutiny applies, it ultimately applied the same *Central Hudson* test to the statute at issue. *See id.* at 565, 572. Although the Court struck down the statute as inconsistent with the First Amendment, there is no reason to believe its conclusion was based on a different level of scrutiny.

Id. In adopting the minority view that nothing changed with *Sorrell*, the Sixth Circuit panel plainly misread the decision. As previously observed, this Court's opinion repeatedly recognized that the

lenient, intermediate standard was no longer appropriate for content-based and speaker-based restraints on commercial speech. In the very opening paragraph, the majority had specifically declared: "Vermont's statute must be subjected to heightened judicial scrutiny." *Sorrell*, 564 U.S. at 557 (emphasis added). And later in the opinion, the Court reasoned that the Vermont statute "is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted." *Id.* at 565 (emphasis added). And lest there was any remaining confusion, an entire subsection of the opinion was devoted to explaining why the State's plea for a lesser intermediate standard was unpersuasive. *Id.* at 566-71.

The Sixth Circuit panel's confusion appears to be rooted in the *Sorrell* decision's continued discussion of *Central Hudson* and the intermediate standard that was followed in that case. *Sorrell,* 564 U.S. at 571-72. Justice Kennedy was simply responding, however, to the arguments that Vermont had raised under the *Central Hudson* framework, and rejecting them one-by-one. *Id.* at 572-80. The content-based restraints upon commercial speech were thus constitutionally unacceptable, regardless of which level of scrutiny was applied. *Id.* But the *Sorrell* majority opinion still leaves no doubt: "In the ordinary case it is all but dispositive to conclude that a law is content based and, in practice, viewpoint discriminatory." *Id.* at 571. Once such restrictions are found, "the outcome is the same whether a

commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Id.*

Indeed, if the Sixth Circuit's view that *Sorrell* changed nothing is correct, then Justices Stephen Breyer, Ruth Bader Ginsburg, and Elena Kagan dissented for no reason. They specifically criticized the "heightened standard" that the majority had employed and maintained that only the intermediate *Central Hudson* test should govern. *Id.* at 585-603. Justice Breyer specifically wrote in dissent: "The far stricter, specially 'heightened' First Amendment Standards that the majority would apply to this instance of commercial regulation are out of place here." *Id.* at 582. Rather obviously, these three Justices did not agree with the Sixth Circuit panel's position that the *Sorrell* majority "ultimately applied the same *Central Hudson* test to the statute at issue." *First Choice Chiropractic*, 969 F.3d at 682 n.3; *App. 13*.

Federal jurists who have read *Sorrell* more carefully have concluded that heightened scrutiny must be applied, not the intermediate *Central Hudson* factors, when legislation attempts to burden commercial speech in a content-based or speaker-based manner. *Wollschlaeger*, 848 F.3d at 1301; *In re Tam,* 808 F.3d at 1334-35; *Caronia*, 703 F.3d at 163-65; *Pacific Coast Horseshoeing School*, 961 F.3d at 1069-74; *International Outdoor*, 974 F.3d at 705-08; *Otto v. Boca Raton, Fla.*, No. 19-10604, 2020 WL 6813994, at *6-9 (11th Cir. Nov. 20, 2020); *GJJM Enterprises, LLC v. Atlantic City*, 352 F. Supp. 3d 402, 406 (D.N.J. 2018). In order to ensure that the First Amendment is applied even-handedly across the

nation, this Court should accept this opportunity to resolve the conflict amongst the Federal Courts of Appeal and confirm that content- or speaker-based restraints remain subject to heightened scrutiny, even when commercial speech is being regulated.

II. THIS DISPUTE PRESENTS A LIVE CASE AND CONTROVERSY

The present dispute remains a live one. "Article III of the Constitution grants the Judicial Branch authority to adjudicate 'Cases' and 'Controversies.' " *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013). Generally, "those who invoke the power of a federal court" must "demonstrate standing—a 'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' " *Id.*, quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984). An "actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974).

Substantial evidence was submitted below during the preliminary injunction proceeding establishing that Ohio's anti-solicitation statute had substantially impaired Petitioners' ability to generate new business while allowing insurance representatives to quickly procure settlements before the full extent of the injuries could be determined. *Doc#:3, Exhibits 1-4; PageID#:60-68*. For evident reasons, Respondents never maintained below that the enactment is constitutionally valid under

heightened judicial scrutiny. Nor did the court of appeals adjudge that such an elevated standard could be satisfied in this instance. *First Choice Chiropractic,* 969 F.3d at 679-85. Accordingly, in the event that this Court does agree with Petitioners that *Sorrell* accomplished more than merely reaffirming existing First Amendment standards, a reversal will be in order.

In closing, it should be observed that the amendments to the anti-solicitation statute that took effect on November 22, 2020, do not alter any of the foregoing analysis. Ohio's healthcare practitioners are still barred from directly contacting potential patients who have been involved in accidents or crimes for the first thirty days following such an incident. *R.C. 1349.05(B).* And subsection (C) has been broadened to prohibit such contact by any third party seeking to solicit employment on behalf of another, not just those working for medical providers. Insurance adjustors and accident investigators thus remain free to approach the victims and offer quick settlements as soon as the dust has settled.

While subsection (D) arguably permits some limited contact during the thirty-day moratorium, the restraints imposed upon speech are still triggered by the identity of the speaker and content he or she would like to express. This does not alter the analysis: "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell,* 564 U.S. at 566. This appeal thus continues to present a live controversy with regard to the constitutional validity of Ohio's speaker-based

and content-based restrictions upon commercial speech.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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