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SUPREME COURT OF THE STATE OF WASHINGTON

SEATTLE EVENTS, a Washington Nonprofit Corporation, MULTIVERSE HOLDINGS, LLC, a Washington Limited Liability Company, and UNIVERSAL HOLDINGS, LLC, a Washington Limited Liability Company,

Petitioners,

vs.

STATE OF WASHINGTON, The WASHINGTON STATE LIQUOR AND CANNABIS BOARD (WSLCB), an agency of the State of Washington and the members of the WSLCB, JANE RUSHFORD, OLLIE GARRETT, RUSS HAUGE, in their official capacities only, and RICK GARZA, Director of the WSLCB, in his official capacity, only,

Respondents.

ANSWER TO MEMORANDUM OF AMICUS CURIAE INSITUTE FOR JUSTICE IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

Acknowledging that Washington courts have applied the federal constitutional analysis to commercial speech restrictions since *National Federation of Retired Persons* in 1982, Amicus Curiae ask this Court to revisit that long-settled precedent, ignore the principles of *stare decisis*, and deviate from the standard of review that still applies under the First Amendment. It provides little reason for doing so. Importantly, it makes no effort to articulate how any of the factors of RAP 13.4(b) support reexamining 30 years of precedent. The Court should decline Amicus's invitation to disturb the Court's longstanding framework for evaluating commercial speech regulations and deny review.

II. ARGUMENT

Amicus asks this Court to grant review and unsettle decades of settled law. The Court should decline to do so. The Court has properly placed commercial speech within the category of protected speech that receives no greater protection

under the Washington Constitution than the U.S. Constitution, and lower courts and the Legislature have relied on that direction for 30 years. Nor has there been any change to the federal commercial speech analysis since *National Federation*. The Court should deny review.

A. *National Federation* Is Correct and Consistent with the Court's Article I, Section 5 Cases

This Court declared in *National Federation* that the "interpretative guidelines under the federal constitution" applied to the constitutionality of the commercial speech restrictions. *Nat'l Fed'n. of Retired Persons v. Insurance Comm'r.*, 120 Wn.2d 101, 119, 838 P.2d 680 (1992). Since then, this Court has reaffirmed that holding several times. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 119-20, 937 P.2d 154 (1997) (while "the differences in the texts of art. I, § 5 and the First Amendment may justify a different interpretation under the state constitution. . . . that greater protection is not warranted in every context."); *Bradburn v. North Cent. Reg'l Libr. Dist.*, 168 Wn.2d 789, 800, 231 P.3d 166 (2010) ("no greater protection is afforded to . . .

commercial speech"); *see also Kitsap Cnty. v. Mattress Outlet/Gould*, 153 Wn.2d 506, 519 n.1, 104 P.3d 1280 (2005) (Madson, J., dissenting) ("this court has determined that the analysis for assessing the constitutionality of restrictions on commercial speech is the same under the state constitution as under the First Amendment."). Following these clear rulings, this Court recently rejected a petition that, in part, similarly asked the Court to revisit *National Federation*. *State v. Living Essentials, LLC*, 8 Wn. App. 2d 1, 24, 436 P.3d 857 (2019), *review denied*, 193 Wn.2d 1040 (2019).

Amicus acknowledges that since *National Federation*, Washington courts "examine challenges to laws restricting commercial speech using the intermediate standard employed by federal courts." Mem. of Amicus Curiae 2. Amicus simply asks the Court to revisit that 30-year-old decision and perform a *Gunwall* analysis, for no clear reason other than to reach the outcome it prefers. But once the Court "agree[s] that our prior cases direct the analysis to be employed in resolving the legal

issue, a *Gunwall* analysis is no longer helpful or necessary." *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998).

Examining the Court's jurisprudence around article I, section 5 reveals when Washington's constitution is more protective of speech than the United States constitution. In determining the scope of article I, section 5 protection that applies to obscenity, nude dancing, and a telephone harassment law, this Court adopted the federal test. *State v. Reece*, 110 Wn.2d 766, 781, 757 P.2d 947 (1988) (article I, section 5 provided no greater protection than first amendment for obscenity); *Ino Ino*, 132 Wn.2d at 114-123 (federal speech analysis applies to regulations restricting nude dancing); *City of Seattle v. Huff*, 111 Wn.2d 923, 928, 767 P.2d 572 (1989) (federal analysis applied to telephone harassment law).

In fact, Washington has more often followed the federal analysis under the First Amendment when evaluating speech restrictions. *Huff*, 111 Wn.2d at 928 ("We have previously adopted much of the federal analysis to determine if protected

speech may be regulated in state constitutional cases . . . ."); *Collier v. City of Tacoma*, 121 Wn.2d 737, 746, 854 P.2d 1046 (1993) ("We recognize that the free speech clauses of the state and federal constitutions are different in wording and effect, but that the result reached by previous Washington cases in general adopted much of the federal methodology for application to state constitutional cases."). Finding that article I, section 5 of the state constitution affords greater protection has been the exception, rather than the rule.

The circumstances in which article I, section 5 has been deemed to provide greater protection than the First Amendment have been limited to political speech in traditional public forums of streets and sidewalks (*Collier*, 121 Wn.2d at 746) and to abortion clinic protests on city streets and sidewalks (*Bering v. Share*, 106 Wn.2d 212, 233-34, 721 P.2d 918 (1986)). As this Court has explained, affording greater protection to "political and other forms of speech is absolutely central to the meaning of Const. art. I, § 5." *JJR Inc. v. City of Seattle*, 126 Wn.2d 1, 9, 891

P.2d 720 (1995). Such speech is the "core of protected expression." *Id.* In contrast, nude dancing, obscenity, and—importantly here—commercial speech, are not.

Thus, the context of the Court's holding in *National Federation* and the related discussion in *Ino Ino*, 132 Wn.2d, 115-119, reveal why the Court has long applied the federal framework in analyzing commercial speech restrictions.

In *National Federation*, this Court noted that the Court had previously determined that, "at least in obscenity cases, the Washington Constitution does not provide greater protection than the federal constitution." *Nat'l Fed'n*, 120 Wn.2d at 119. In the very next sentence, it "therefore" decided to "follow the interpretive guidelines under the federal constitution" to the challenged commercial speech protections. *Id.* By juxtaposingthe protection afforded obscenity with the protection afforded commercial speech, *National Federation* indicated that commercial speech is more like speech that receives constitutional protection coextensive with the First Amendment,

rather than the "core" protected expression like political speech and protests in public forums, which receive greater protection under the Washington Constitution.

This comparison has only been confirmed in the intervening years. In *Ino Ino*, this Court reiterated that "even where a state constitutional provision has been . . . found to be more protective in a particular context, it does not follow that greater protection is provided in all contexts." *Ino Ino*, 132 Wn.2d at 115. The Court once again identified the various contexts in which the federal analysis had applied under article I, section 5. *Id.* at 116. This included obscenity, telephone harassment, commercial speech, nude dancing, and false or defamatory statements. *Id.* (citing cases). It then identified the contexts in which article I, section 5 offers greater protection than the First Amendment. This included only "pure noncommercial speech in a traditional public forum." *Id.* at 118 (citing *Collier*, 121 Wn.2d at 747, and *Bering*, 106 Wn.2d at 233-

34). The Court went on to adopt the federal test for time, place, and manner restrictions on nude dancing. *Id.* at 123.

The Court's article I, section 5 cases have consistently differentiated "core" protected expression from less protected speech, and the latter has long included commercial speech. There is no need to reexamine *National Federation*.

B. This Court's Commercial Speech Doctrine Is Settled Law, and Amicus Makes No Showing That It Is Incorrect or Harmful

Despite the fact that *National Federation* is well-settled precedent, has been reaffirmed by this Court, and has been relied on by lower Washington courts, Amicus claim its "deficiencies are so significant" that the Court ought to revisit it. Mem. of Amicus Curiae 8 n.3. This Court should refuse, as neither Amicus nor Petitioners have made any showing that the ruling is incorrect or harmful. *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 239, 236 P.3d 182 (2010) (quoting *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006) ("[T]he doctrine of

stare decisis 'requires a clear showing that an established rule is incorrect and harmful before it is abandoned.' ")).

First, Amicus does not argue that the rule is *incorrect*. It argues only that the analysis establishing the rule was not sufficiently thorough. Mem. of Amicus Curiae 7-8. Indeed, Amicus does not even argue that the Court must overrule *National Federation*; it argues only that the Court should "reexamine" it. *Id.* at 8 n.8. So it does not contend—let alone "clearly establish"—that the rule is incorrect.

Second, Amicus does not identify any harm that has resulted from applying the *Central Hudson* test to commercial speech restrictions in Washington. Instead, Amicus ignores the requirements for this Court to revisit long-established precedent under stare decisis.

Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Keene v. Edie*, 131 Wn.2d 822,

831, 935 P.3d 588 (1997). Washington's courts have understood and applied the *National Federation* standard for commercial speech restrictions for 30 years. There is no basis for this Court to change that analysis now.

C. Intermediate Scrutiny Applies to Commercial Speech Restrictions

Like the Petitioners, Amicus wrongly contends that federal courts have modified *Central Hudson* to require strict scrutiny when reviewing commercial speech regulations. Mem. of Amicus Curiae 9-10; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351, 65 L. Ed. 2d 341 (1980). Not so. As explained in the State's Answer to Petition for Review, *Central Hudson's* intermediate scrutiny remains good law and continues to apply under both federal and Washington law. Answer to Pet. for Review 22-26. Amicus even acknowledges that laws that distinguish between commercial and noncommercial speech—and are content-based—receive intermediate scrutiny under the federal analysis. Mem. of Amicus Curiae 10-11.

However, Amicus makes the misguided argument that the differential treatment of cannabis advertising versus advertising for other products renders these restrictions "content-based," requiring strict scrutiny review. Mem. of Amicus Curiae 11-13.

Commercial regulations are, by their very nature, about their specific content or product. *All* commercial speech regulations concern a particular product or service. Indeed, "*Every* commercial speech case, by its very nature, involves both content- and speaker-based speech restrictions." *United States v. Caronia*, 703 F.3d 149, 180 (2nd Cir. 2012) (Livingston, J., dissenting). "The upshot is that when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*." *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1055 (8th Cir. 2014). Like Petitioners, Amicus cites no authority holding that a state must identically regulate speech concerning all or even like products, and that failing to do so subjects the

commercial regulations to strict scrutiny. Thus, even a cursory examination of Amicus's argument reveals its disingenuousness.

Moreover, the cases Amicus relies on to argue strict scrutiny applies here are distinguishable.

International Outdoor, Inc. v. City of Troy, 974 F.3d 690 (6th Cir. 2020), involved regulations limiting the size and placement of billboards, but exempted various types of signs, including real estate signs, political signs, and holiday or seasonal signs, from permit requirements. *Int'l Outdoor, Inc.*, 974 F.3d at 696. The court found that because the restrictions distinguished between commercial and non-commercial speech, "the *Reed* standard applies in this case." *Id.* at 705 (relying on *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015)). But, as explained in the State's Answer to Petition for Review: of the "courts [that] have addressed First Amendment challenges to commercial-speech regulations since *Reed*, almost all of them have concluded that *Reed* does not disturb the Court's longstanding framework for commercial

speech under *Central Hudson*." *Mass. Ass'n of Private Career Schools v. Healey*, 159 F. Supp. 3d 173, 192 (D. Mass. 2016) (citing *Contest Promotions, LLC v. City and Cnty. of S.F.*, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015); *Citizens for Free Speech, LLC v. Cnty. of Alameda*, 114 F. Supp. 3d 952, 968–69, (N.D. Cal. 2015); *California Outdoor Equity Partners v. City of Corona*, 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015); *Chiropractors United for Rsch. & Educ., LLC v. Conway*, 2015 WL 5822721, at *5 (W.D. Ky. Oct. 1, 2015); *CTIA–The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1061, (N.D. Cal. 2015)). *International Outdoor* is an outlier.

Moreover, "*City of Austin [v. Reagan Nat'l Advertising of Austin, LLC*, 142 S. Ct. 1464, 212 L. Ed. 2d 418 (2022)] casts doubt on the continuing viability of [*International Outdoor's*] rejection of the intermediate scrutiny standard for commercial speech," as *City of Austin* recently "reaffirm[ed] that regulations that target off-premises commercial speech remain subject to only an intermediate scrutiny standard of review." *Norton*

Outdoor Advertising, Inc. v. Village of St. Bernard, 2022 WL 2176339 at *10 (S.D. Ohio, June 16, 2022).

Amicus's reliance on *City of Lakewood v. Willis*, 186 Wn.2d 210, 375 P.3d 1056 (2016), is similarly misplaced. As the Court of Appeals noted, that is not a commercial speech case. *Seattle Events v. State*, 22 Wn.2d 640, 653, 512 P.3d 923 (2022). It was because *Willis* involved an "anti-begging" ordinance that regulated "charitable appeals for funds" in "traditional public forums" that the Court applied strict scrutiny. *Willis*, 186 Wn.2d at 217, 224. The case "did not concern restrictions on commercial speech specifically or include a commercial speech analysis and, therefore, [is] unpersuasive." *Seattle Events*, 22 Wn.2d at 653.

Amicus tries to align *Willis* with commercial speech cases by claiming the speech in *Willis* "involved efforts to obtain money." Mem. of Amicus Curiae 13. But the U.S. Supreme Court has described panhandling as "charitable solicitation," which "does more than inform private economic decisions and," unlike commercial speech, "is not primarily concerned with

providing information about the characteristics and costs of goods and services[.]" *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632, 100 S. Ct. 826, 6 L. Ed. 2d 73 (1980). Accordingly, "it has not been dealt with in our cases as a variety of purely commercial speech." *Id.* The *Willis* court understood this and did not analyze the ordinance as a commercial speech regulation. *Willis*, 186 Wn.2d 217.

Intermediate scrutiny continues to apply to commercial speech restrictions under *Central Hudson*, and *National Federation* continues to be good law.

III. CONCLUSION

Washington follows a well-established standard for analyzing commercial speech restrictions. This Court's adoption of that standard was consistent with its article I, section 5 jurisprudence and remains good law. Neither Amicus nor Petitioners have provided any basis for this Court's further review in this matter.

I certify that this document contains 2437 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 14th day of November, 2022.

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PROOF OF SERVICE

I, Jonathan Pitel, certify that I caused to be served a copy of **Respondent's Answer to Memorandum of Amicus Curiae Institute for Justice In Support of Petition for Review** on all parties on their counsel of record on the date below as follows:

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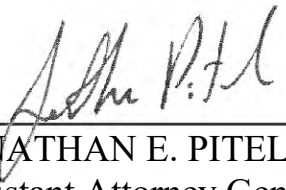
I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 14th day of November 2022, in Olympia, Washington.



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