NO. 1011156

SUPREME COURT OF WASHINGTON

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

Petitioner,

vs.

STATE OF WASHINGTON, THE WASHINGTON STATE LIQUOR AND CANNABIS BOARD (WSLCB), et al.

Respondents.

REPONSE TO AMICUS INSTITUTE FOR JUSTICE MEMO IN SUPPORT OF REVIEW

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I. SUMMARY OF PETITIONERS' RESPONSE

Petitioners agree with the following observations of the Institute for Justice:

A. The seminal Washington commercial speech case, *National Federation of Retired Persons v. Insurance Commissioner*, 120 Wn.2d 101, 838 P.2d 680 (1992), failed to address the *Gunwall*[1] factors and no subsequent commercial speech cases have done so outside the limited context of lewd or obscene expression, as in *State v. Reece*, 110 Wn.2d 766, 757 P.2d 947 (1988).[2] (Amicus Memo at 4-8.)

Because members of the public make daily decisions based on advertising, and because of the importance of Washingtonians' rights to "freely speak, write and publish on all subjects," this Court should finally address the continued lack of clarity that results

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[1] *State v. Gunwall,* 106 Wn.2d 54, 720 P.2d 808 (1986).
[2] *See also, Ino Ino v. City of Bellevue,* 132 Wn.2d 103, 115-22, 937 P.2d 154 (1997).

from Washington's appellate courts' avoidance of conducting a *Gunwall* analysis respecting Article I, § 5 in the context of non-deceptive commercial expression outside the area of obscenity or lewd conduct. *Cf. Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 511 n. 1, 104 P.3d 1280 (2005). (Amicus Memo at 7.)

B. Since this Court's decision in *National Federation,* the U.S. Supreme Court has used strict scrutiny, rather than intermediate scrutiny, in commercial speech cases that implicate content-based restrictions on commercial messages. (Amicus Memo at 9-12.)

Such content-based restrictions are presumptively unconstitutional unless the government proves they are narrowly tailored to serve compelling state interests. *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). Despite this Court's ruling in *City of Lakewood v. Willis*, 186 Wn.2d 210, 375 P.3d 1056 (2016), the Court of Appeals, below,

erroneously failed to apply *Willis* and the U.S. Supreme Court cases it relied upon, including *Reed v. Town of Gilbert* and *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 131 S. Ct. 2653, 180 L.Ed.2d 544 (2011), to commercial speech. (Amicus Memo at 12-14.)

II. RESPONSIVE ARGUMENT

A. This Court Has Yet to Fully Consider Art. I, § 5 in a Case that Involves Non-Deceptive Advertising and No *Gunwall* Analysis Has Been Conducted in Such a Case.

This Court routinely reviews constitutional issues under Washington's constitution, first. *Pers. Restraint of Williams,* 198 Wn.2d 342, 353, 496 P.3rd 289 (2021). Yet this was not done in *Mattress Outlet,* 153 Wn.2d at 511*,* because the violation of the First Amendment standard was abundantly clear.[3] As

[3] Respondents' suggestion (Answer at 18) that Justice Madsen's dissent in *Mattress Outlet* settles the issue should be rejected. That dissent merely recognized that *National Federation* and *Ino Ino* had considered commercial speech under Art. 1 § 5. by use of the *Central Hudson* test. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n. of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). Justice Madsen neither cited nor applied *Gunwall*.

discussed at length in the Petition for Review, since *National Federation* was decided, no Washington appellate court has conducted a *Gunwall* analysis outside the context of obscenity or lewd conduct. Instead, courts have cited to *National Federation* where this Court chose to adopt the federal First Amendment standard without conducting any *Gunwall* analysis of the more expansive constitutional language in Washington or the reasons for that language. Apart from the obscenity cases, this Court has conducted a *Gunwall* analysis only in the contexts of (i) judicial gag orders or (ii) issue and political speech. *State v. Coe*, 101 Wn.2d 364, 679 P.2d 353 (1984); *Bering v. SHARE*, 106 Wn.2d 212, 233–34, 721 P.3d 918 (1986); *Collier v. Tacoma,* 121 Wn.2d 737, 747-48, 854 P.2d 1046 (1993).

Amicus' observation is correct:

> The constitution deserves—and demands—more thorough treatment than that given to it in *National Federation*. Yet courts must apply *National Federation,* ensuring that the Washington Constitution's core constitutional speech protections languish without explanation or full effect. This Court should grant review to rectify that situation.

(Memo at 8).

This Court's opinions demonstrate that contextual details and nuances deserve consideration, especially when the restraint on speech involves true public forums, as opposed to limited public forums, and when the limitations on speech are outside the context of lewd or obscene speech and do ***not*** involve deceptive or misleading advertising. *Cf. Bradburn v. N. Central Reg. Library Dist.,* 168 Wn.2d 789, 231 P.3d 166 (2010) (majority op., as well as op. of Johnson, concurring, and Chambers, dissenting) (holding public library's filters restricting pornographic material from the internet violated neither the First Amendment nor Art. I, § 5 in that limited public forum where children had computer access); *State v. Reece,* 110 Wn.2d at 775-81 (*Gunwall* analysis conducted in obscenity context). This Court should finally conduct the *Gunwall* analysis that it has yet to perform in a case that involves non-deceptive commercial advertising outside the obscenity context.

Even if this Court decides, following a full *Gunwall* analysis and consideration of Art. I, § 5's more protective language, that it will continue to use the same tests as the U.S. Supreme Court employs in First Amendment cases, Washington courts still must consider when content-based restrictions on commercial speech are permissible – and when they are not.

In an era when both for-profit and non-profit companies engage in speech that addresses both commercial and social policy, profound policy implications are involved. *See, Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983) (contraceptive advertising including family planning information), and *Kasky v. Nike, Inc.,* 27 Cal. 4th 939, 45 P.3d 243, 119 Cal.Rptr.2d 296 (2002), *cert. dism., Nike, Inc. v. Kasky*, 539 U.S. 654, 123 S.Ct. 2554, 156 L.Ed.2d 580 (2003) (manufacturer's allegedly false claims re: working conditions abroad). This is particularly true in a post-*Dobbs*[4] environment

[4] *Dobbs v Jackson Women's Health Org.,* 597 U.S. ___, 142 S.Ct. 2228 (2022).

where women's health care providers are advertising services across state lines.[5]

B. Content-Based Regulation of Truthful Advertising Must Serve a Compelling State Interest.

The lead opinion in *Willis* relied on *Sorrell* and *Reed* and struck Lakewood's discriminatory ordinance against begging, because political solicitations were permitted but begging was not. Such content-based discrimination is impermissible regardless of whether it applies to charitable, commercial or other solicitations, as this Court explained in *Willis*, 186 Wn.2d at 225, citing *Heffron v. Int'l. Soc. of Krishna Consciousness*, 452 U.S. 640, 649, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981), and *U.S. v. Kokinda,* 497 U.S. 720, 724, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990). *Accord*, *City of Cincinnati v. Discovery Network, Inc*., 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993)

[5] For example, see Planned Parenthood of Greater Washington and North Idaho's website: https://www.plannedparenthood.org/planned-parenthood-greater-washington-north-idaho/patient-resources/our-health-centers?gclid=Cj0KCQiAmaibBhCAARIsAKUlaKRjflG4mcvhZDWyXOtEk9Q3DSfubAi1uHbsc_nNDwm8QhHwncWNsUwaAlL4EALw_wcB (accessed Nov. 8, 2022).

(striking discriminatory content-based restriction of commercial speech: "the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech.").

The Sixth and Ninth Circuits likewise apply *Reed's* strict scrutiny to content-based regulation of commercial speech. *International Outdoor, Inc. v. Troy*, 974 F.3d 690 (6th Cir. 2020); *Boyer v. Simi Valley*, 978 F.3d 618 (9th Cir. 2020).

Unless the record establishes that the restriction on speech is no more extensive than necessary to serve a substantial or compelling governmental interest, the restriction on speech fails to pass constitutional muster. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 556, 563, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. at 416-17; *Edenfield v. Fane*, 507 U.S. 761, 770-73, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). The record considered by the voters in 2012 and by the Legislature in 2017 fails to meet this test.

III. CONCLUSION

Amicus correctly observes that this Court should reassess its approach to non-deceptive commercial speech protection in light of the ongoing uncertainty following the 1992 decision in *National Federation v. Insurance Commissioner* and U.S. Supreme Court decisions in *Reed* and *Sorrel.*

RESPECTFULLY SUBMITTED: November 14, 2022.

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This brief contains 1,330 words, in compliance with RAP 18.17.

CERTIFICATE OF SERVICE

I certify that on the date shown below a copy of this document was sent via email and also via e-filing through the Court's electronic e-filing system, to the following counsel of record

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