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SUPREME COURT OF THE STATE OF WASHINGTON

HIRED HANDS, LLC, and KENNETH SMITH,

Appellants,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Department's rule requiring electrical workers to wear and display certificates of competency is a regulation of professional conduct subject to rational basis review. It does not violate the First Amendment because it rationally relates to the State's legitimate interest in protecting the public from unsafe electrical installations. Washington's electrical laws "provide assurances that individuals performing the inherently dangerous task of electrical work are trained and competent." *Nat'l Elec. Contractors Ass'n, Cascade Chapter v. Riveland*, 138 Wn.2d 9, 21, 978 P.2d 481 (1999). The certification rule allows consumers, contractors, and the Department to easily determine a worker's qualifications, discouraging unqualified individuals from attempting dangerous installations.

This proper exercise of the Department's authority violates no constitutional right. Hired Hands, LLC, and Kenneth Smith (Hired Hands) assert that the rule impermissibly compels speech and violates due process. But courts review regulations of professional conduct that incidentally affect speech under a rational basis standard. And even if this Court finds that the rule regulates speech as speech, because the law requires only the disclosure of factual, uncontroversial commercial information, it is not subject to heightened scrutiny. There is no free speech violation when the Department's certification rule reasonably

relates to the State's legitimate interest in protecting the public. Because the Department's regulation easily passes constitutional muster, this Court should affirm the superior court and uphold the certification rule.

II. ISSUES

1. Courts review laws regulating professional conduct that incidentally implicate speech under a rational basis standard. A similar level of scrutiny applies to laws that require only factual, uncontroversial disclosures in commercial speech. Does the certification rule violate Hired Hands' free speech rights when it regulates professional conduct, requires the disclosure of only factual, uncontroversial information, and reasonably relates to the State's legitimate interest in protecting the public from dangerous electrical work?
2. Laws affecting a liberty interest in personal appearance are subject to rational basis review, and the fundamental right to bodily integrity is limited to liberty deprivations that strip the very essence of personhood. Does the certification rule violate Hired Hands' right to personal appearance or bodily integrity when the rule requires only that professional electricians wear a wallet-sized license on their outer clothing and rationally relates to the State's legitimate interest in protecting the public?
3. The certification rule provides fair notice that an electrician must wear and visibly display a certificate on the front of the upper body when working, subject to certain safety exceptions. Is the certification rule unconstitutionally vague?

III. STATEMENT OF THE CASE

A. **The Legislature Adopted Electrical Legislation to Protect the Public from Unsafe Electrical Installations and Level the Playing Field for Law-Abiding Contractors**

In 2009, the Legislature amended RCW 19.28.271 to allow the Department to require electrical workers to wear certificates of

competency while working. The Legislature heard testimony from constituents about contractors supporting the underground economy by using uncertified workers to perform electrical work.¹ A journey-level electrician explained the “reality” that these contractors continuously modify their practices to avoid complying with the electrical laws.²

RCW 19.28.271(1) permits the Department to “establish by rule a requirement that the individual . . . wear and visibly display his or her certificate or permit.” The law is part of broader licensing requirements. To obtain a journey-level certificate, a worker must take and pass an examination that tests the worker’s knowledge of “technical information and practical procedures,” as well as the applicable electrical codes. RCW 19.28.201(2). A journey-level worker must train for at least 8,000 hours in the electrical trade, RCW 19.28.191(1)(f), and complete substantial in-class education requirements. RCW 19.28.205. To work on a jobsite, an electrician must be licensed, RCW 19.28.161(1), and trainees and apprentices must be supervised. RCW 19.28.161(2), (3).

¹ See Bill Information for House Bill 1055, “Available Videos,” <https://app.leg.wa.gov/billsummary?BillNumber=1055&Year=2009&Initiative=false> (last visited February 1, 2019).

- Jan 23, 2009 House Commerce & Labor, beginning at 36:30.
- Mar 17, 2009 Senate Labor, Commerce & Consumer Protection, beginning at 11:40.

² See Note 1, *supra*, Mar 17, 2009 Senate Labor, Commerce & Consumer Protection, beginning at 14:26.

The Legislature explained that the certification requirement would help prevent dishonest contractors from using uncertified workers to perform electrical work, “level the playing field for honest contractors,” and “protect workers and consumers.” Laws of 2009 ch. 36 § 1.³ The certification requirement, like all electrical laws, ensures that electrical installations conform “with approved methods of construction for safety to life and property.” RCW 19.28.010(1).

B. To Promote Safe Electrical Installations, the Department Adopted a Rule Requiring Electricians to Wear and Display a Wallet-Sized License

In 2013, following a moratorium on rulemaking, the Department adopted a rule requiring electrical workers to wear their certificates. It explained that the certification rule would “enable consumers to better identify their electrical workers’ credentialing” and “to confirm that the worker is qualified to perform a safe electrical installation.” AR 6-7. It noted that the rule would also help ensure that only competent workers perform dangerous electrical work:

Electrical inspectors witness only a very small fraction of the electrical work being performed in the state. This proposal allows everyone on the jobsite as well as consumers, who hire electrical contractors, to know the

³ The certification legislation is not unique. Many laws require professionals to display their credentials while working. *See, e.g.*, Or. Rev. Stat. § 455.415 (electrical workers, plumbers, elevator technicians, solar heating installers); Haw. Rev. Stat. § 444-9.5(c) (electricians); Tenn. Code Ann. § 63-1-109 (healthcare practitioners); N.J. Stat. Ann. § 34:8A-8 (farm crew leaders).

certification status of persons performing electrical work. An electrical contractor who takes unfair competitive advantage by sending unsupervised trainees or uncertified individuals to a jobsite will be more at risk of being caught if all electrical workers are required to display their certificates.

AR 393. The Department explained that “stakeholders in the electrical industry have long requested that the department do more to combat the underground economy and ensure safer electrical installations.” AR 392-93.

The Washington State Labor Council, the Certified Electrical Workers of Washington, the National Electrical Contractors Association, the Technical Advisory Committee, and the Electrical Board supported the new regulation. AR 1, 6, 393.

The Department adopted this rule:

To work in the electrical construction trade, an individual must possess, wear, and visibly display on the front of the upper body, a current valid [certificate of competency or training certificate].

The certificate may be worn inside the outer layer of clothing when outer protective clothing (e.g., rain gear when outside in the rain, arc flash, welding gear, etc.) is required. The certificate must be worn inside the protective clothing so that when the protective clothing is removed, the certificate is visible. A cold weather jacket or similar apparel is not protective clothing.

The certificate may be worn inside the outer layer of clothing when working in an attic or crawl space or when operating equipment (e.g., drill motor, conduit threading machine, etc.) where wearing the certificate may pose an unsafe condition for the individual.

The certificate must be immediately available for examination at all times.

WAC 296-46B-940(3). A certified electrician who violates the rule is subject to a \$50 civil penalty for a first offense and \$100 for each later infraction. WAC 296-46B-915(3)(a).

The certification card is made of durable plastic and is wallet-sized. CP 124-25. It lists the electrician's name and certification number, and states what type of work the electrician is qualified to perform. CP 124-25. The card is color-coded to show if the worker may work without supervision. CP 125-26. It has a small state seal. CP 125. And it states that the Department has issued the certificate. CP 125.⁴

Hired Hands challenged the certification rule and the enabling statute on constitutional grounds, asserting free speech and substantive due process violations. The company also contended that the rule was unconstitutionally vague. The superior court rejected these arguments and upheld the rule. Hired Hands appeals.

⁴ Hired Hands incorrectly cites to a page of the record showing a wall license issued by the Department to contractors and administrators. *See* AB 21 (citing CP 124). The pictured wall license—which is not issued pursuant to WAC 296-46B-940(3) and need not be worn by electricians performing electrical work—is not at issue in this case. An example of a certificate card is available at CP 125.

IV. STANDARD OF REVIEW

The constitutionality of a statute is a matter of law that courts review de novo. *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 509, 104 P.2d 1280 (2005). The court presumes that duly adopted rules, like statutes, are constitutional. *Longview Fibre Co. v. Dep't of Ecology*, 89 Wn. App. 627, 632-33, 949 P.2d 851 (1998). In general, “a statute’s challenger has a heavy burden to overcome that presumption; the challenger must prove that the statute is unconstitutional beyond a reasonable doubt.” *Sch. Dists. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605, 244 P.3d 1 (2010). In the free speech context, “the State usually bears the burden of justifying a restriction on speech.” *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011) (internal quotations omitted). But the burden is on the party asserting a First Amendment violation to demonstrate that conduct is protected expression. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984).

V. ARGUMENT

The Department’s certification rule is a regulation of professional conduct that is subject only to rational basis review. Laws that compel speech, like laws that restrict it, warrant careful First Amendment scrutiny. *See, e.g., West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 636-42,

63 S. Ct. 1178, 87 L. Ed. 1628 (1943). But as the United States Supreme Court has explained, strict scrutiny is not appropriate in every context. *Nat'l Inst. of Family & Life Advocates v. Becerra*, ___ U.S. ___, 138 S. Ct. 2361, 2372-73, 201 L. Ed. 2d. 835 (2018). The First Amendment is not offended by “regulations of professional conduct that incidentally burden speech.” *Id.* at 2372. And where a law requires only factual, uncontroversial disclosures of commercial information, a court will likewise uphold the law when it is not “unjustified or unduly burdensome” and “reasonably relate[s]” to a legitimate state interest. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985).

There is no free speech violation when the Department’s certification rule—which simply requires electricians to disclose their qualifications while working—is a regulation of professional conduct that only incidentally involves speech. And even if this Court finds that the rule regulates speech directly, it passes First Amendment muster where it requires only the disclosure of factual commercial information, does not burden other constitutionally protected speech, and reasonably relates to the State’s interest in protecting the public from dangerous electrical work. This Court should affirm.

A. Because the Certification Rule Is a Regulation of Professional Conduct That Only Incidentally Affects Speech, the Rule Is Subject to Rational Basis Review, and There Is No First Amendment Violation

States have broad authority to regulate professional conduct, and courts review such laws under a rational basis standard. The certification rule is a regulation of professional conduct that only incidentally affects an electrician's speech. Because the rule rationally relates to Washington's legitimate interest in preventing unsafe electrical installations, it does not violate the First Amendment.

1. The certification rule's requirement for electricians to disclose their qualifications while working is a regulation of professional conduct that is subject to rational basis review

The Department's certification rule is squarely aimed at professional conduct, subject to rational basis review. "[S]tates may regulate professional conduct, even though that conduct incidentally involves speech." *Becerra*, 138 S. Ct. at 2372. Courts review such regulations under a reasonableness standard. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). While the certification rule incidentally implicates speech by requiring certified electricians to disclose their qualifications while working, because the rule's goal is preventing unsafe installations by unqualified individuals, it is a regulation of professional conduct subject to

rational basis review. *See Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 222, 143 P.3d 57 (2006); *see also Casey*, 505 U.S. at 884.

The First Amendment does not prevent regulation of commerce. “[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.” *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-56, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978) (listing the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers’ threats of retaliation for employees’ labor activities as areas subject to proper state regulation). Thus, the United States Supreme Court has upheld a law requiring physicians to communicate specific, state-mandated information to their patients before performing an abortion. *Casey*, 505 U.S. at 884. The Court explained that the law regulated speech only “as part of the practice of medicine, subject to reasonable licensing and regulation by the State.” *Id.*⁵

Here, the Department’s requirement that electricians wear certificates of competency while working regulates speech only as part of

⁵ *Casey* is not limited to the abortion context, as Hired Hands appears to believe. AB 10-11. The decision expressly states: “[T]he physician’s First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.” *Casey*, 505 U.S. at 884.

its regulation of the electrical profession. It does not regulate speech for speech's sake. Instead, like other electrical laws, it helps to ensure that only qualified workers perform dangerous electrical installations—a regulation of professional conduct.

Like the practice of medicine, the electrical profession is subject to reasonable licensing and regulation. *See Richardson v. Coker*, 188 Ga. 170, 174, 3 S.E.2d 636 (1939) (explaining that “the nature of electricity” justifies regulation of the electrical industry); *see also Nat’l Elec. Contractors*, 138 Wn.2d at 21-22. And like the disclosure requirement in *Casey*, the certification rule directly relates to the practice of electrical work. 505 U.S. at 884. Hired Hands does not contend, nor could it, that the State cannot require that only qualified individuals perform dangerous electrical work. A certificate of competency demonstrates a worker’s qualifications to work safely in this industry.

The rule only incidentally affects speech when it requires little expression beyond what is already required to perform electrical work. Underlying Hired Hands’ arguments is the company’s belief that the certification rule forces electrical workers to express a message they would not otherwise make. But the electrical laws require that all persons working in the electrical construction trade have obtained a certificate of competency issued by the Department. RCW 19.28.161(1). Thus, simply

by performing electrical work, these individuals express that they have met the Department’s requirements to obtain a certificate—announcing to all observers that they are qualified to perform the work. The rule requiring that they display their certificates simply verifies statements the workers are already making (or catches them if they dissemble). As in *Casey*, the rule’s effects on speech are incidental.

Contrary to Hired Hands’ argument, *Becerra* does not change the result mandated by *Casey*. AB 11-12. There, the Court invalidated a California law requiring anti-abortion medical clinics to provide a government-disseminated notice about the availability of “free or low-cost” abortions. *Becerra*, 138 S. Ct. at 2369. In finding *Casey* inapplicable, the Court explained that the California law did not regulate professional conduct. *Becerra*, 138 S. Ct. at 2373-74. It noted that the required disclosures were “not tied to” any particular medical procedure, and that the clinics must make the disclosures “regardless of whether a medical procedure is ever sought, offered, or performed.” *Id.* at 2373. Under these circumstances, the Court found that the law regulated “speech as speech.” *Id.* at 2374.

By contrast, here, the certification rule requires electrical workers to wear certificates of competency only when “work[ing] in the electrical construction trade”—tying the requirement to the practice of that trade.

WAC 296-46B-940(3). Unlike the situation in *Becerra*, the disclosure requirement does not apply “regardless of whether [electrical work] is ever sought, offered, or performed.” *See* 138 S. Ct. at 2373. Because the rule’s disclosure requirement is tied directly to the practice of electrical work, it is a regulation of professional conduct that only incidentally involves speech. Rational basis review applies.

2. The certification rule rationally relates to the State’s legitimate interest of requiring safe electrical work

Hired Hands does not attempt to address Washington’s well-recognized power to regulate professional conduct to ensure safe electrical work under the rational basis test. States have “broad power to establish standards for licensing practitioners and regulating the practice of professions.” *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975). The law here rationally relates to a legitimate state interest. *See Amunrud*, 158 Wn.2d at 222 (under rational basis review, a law is constitutional if it rationally relates to a legitimate state interest). Electrical work is “inherently dangerous,” implicating the “public interest in health and safety.” *Nat’l Elec. Contractors*, 138 Wn.2d at 21-22. Protecting the health and welfare of workers and the public is a legitimate state interest. *See Am. Legion Post #149 v. Dep’t of Health*, 164 Wn.2d 570, 604, 192 P.3d 306 (2008).

The Department’s certification rule works hand in hand with Washington’s other electrical laws to protect the public. These laws “provide assurances that individuals performing . . . electrical work are trained and competent.” *Nat’l Elec. Contractors*, 138 Wn.2d at 21. As the Department explained during rulemaking, by requiring all certified electrical workers to wear and display their certificates, it becomes more likely that the Department, consumers, and general contractors will discover uncertified workers performing electrical work. AR 393. This in turn discourages those workers—and the dishonest contractors who employ them—from attempting dangerous electrical installations, limiting the potential for property damage, injury, and death. *See* AR 393. In this way, the certification rule rationally advances the public interest in health and safety.

The Department’s interest in safety is not pretextual, as *Hired Hands* repeatedly suggests. AB 16, 17, 30-31. Washington’s electrical laws specifically require the Department to “adopt reasonable rules in furtherance of safety to life and property.” RCW 19.28.031(1). Here, the Legislature heard testimony from constituents about contractors evading the electrical laws. During rulemaking, the Department similarly explained that “stakeholders in the electrical industry have long requested that the department do more to combat the underground economy and ensure safer

electrical installations.” AR 392-93.⁶ Hired Hands cannot reasonably contend that safety is not implicated when untrained workers perform dangerous electrical work. The company is correct that the certification rule implicates “market management” because one statutory purpose is to level the playing field between dishonest and law-abiding contractors. *See* AB 3, 17, 31. But contrary to Hired Hands’ suggestion, this is a legitimate governmental objective, and ultimately the Department’s main interest in combating the underground economy is to prevent unsafe electrical installations. Because the certification rule rationally relates to Washington’s legitimate interest in public safety and health, it does not violate the First Amendment.

B. Because the Certification Rule Requires Only Factual, Uncontroversial Disclosures in Commercial Speech, Is Not Unjustified or Unduly Burdensome, and Reasonably Relates to a Legitimate State Interest, It Does Not Violate the First Amendment

Even if this Court finds the certification rule to regulate speech as speech, the law does not violate the First Amendment. Laws requiring factual, uncontroversial disclosures in commercial speech are not subject

⁶ Hired Hands argues that the Department’s newsletter, “Electrical Currents,” shows an improper motivation. AB 16. But the newsletter reflects the Department’s interest in safety: “One of the greatest keys to ensuring safe electrical installations in Washington is the requirement for electrical work to be performed by properly certified electricians and properly supervised trainees.” CP 34. To “help ensur[e] safe electrical installations,” the newsletter appropriately enlists the assistance of certified electricians in discovering “workers who are not properly certified.” CP 34. The newsletter does not suggest any improper state interest.

to heightened scrutiny. *Zauderer*, 471 U.S. at 651. Commercial speech is broadly defined as “expression related solely to the economic interests of the speaker and its audience” or “speech proposing a commercial transaction.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 561-62, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) (internal quotations omitted). When a law requires commercial disclosures of “purely factual and uncontroversial information,” courts will uphold it if it is not “unjustified or unduly burdensome” and “reasonably relate[s]” to a legitimate state interest. *Zauderer*, 471 U.S. at 651. The certification rule meets this test.

1. *Zauderer* applies to all commercial speech; it is not limited to advertising

The United States Supreme Court has declined to apply strict scrutiny to laws requiring providers of commercial services to disclose factual, uncontroversial information about their own services. *Zauderer*, 471 U.S. at 651. Because protection of commercial speech “is justified principally by the value to consumers of the information such speech provides,” a speaker’s constitutionally protected interest in not providing such factual information “is minimal.” *Id.* So the Court has applied a deferential standard much like rational basis review, holding that requirements for factual, uncontroversial information pass First

Amendment muster “as long as [they] are reasonably related to the State’s interest” and are not “unjustified or unduly burdensome.” *Id.* Contrary to Hired Hands’ arguments, AB 18-20, 31-32, *Zauderer* does not require the government to use the “least restrictive means” available to accomplish its goals. 471 U.S. at 650-52, 651 n.14.

Hired Hands appears to contend that *Zauderer* does not apply because this case does not involve “advertising.” *See* AB 13, 25. Not so. The *Zauderer* standard for commercial disclosures is not limited to advertising.⁷ Commercial speech includes any “expression related solely to the economic interests of the speaker and its audience.” *Thomson v. Doe*, 189 Wn. App. 45, 58, 356 P.3d 727 (2015) (quoting *Cent. Hudson*, 447 U.S. at 561-62). Thus, courts have found the *Zauderer* standard applicable in many contexts. *E.g.*, *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (country of origin disclosures for meat products).⁸ And while *Zauderer* involved a law based on the government’s interest in preventing deception, 471 U.S. at 651, federal courts have held

⁷ Hired Hands cites *Becerra* to say *Zauderer* applies only to advertising. AB 12. But the Court in *Becerra* did not find *Zauderer* inapplicable for that reason. Rather, it explained the standard did not apply because the subject of the required disclosure—the availability of state-funded abortions—was anything but “uncontroversial.” *Becerra*, 138 S. Ct. at 2372.

⁸ *See also Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001) (citing laws requiring campaign contribution disclosures, securities disclosures, tobacco labeling, nutritional labeling, pollutant reporting, toxic release reporting, and workplace hazard notification).

that its standard also extends to other legitimate governmental interests. *See, e.g., American Meat Inst.*, 760 F.3d at 22 (informed consumer choice); *New York State Rest. Ass’n v. New York City Bd. of Health*, 556 F.3d 114, 132-134 (2d Cir. 2009) (preventing obesity); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (eliminating mercury pollution). Subjecting such state regulatory programs to “searching scrutiny . . . is neither wise nor constitutionally required.” *Nat’l Elec. Mfrs. Ass’n*, 272 F.3d at 116. *Zauderer* applies.

2. The certification rule—which requires only factual, uncontroversial commercial disclosures—does not require any statement or endorsement of belief

The first inquiry under *Zauderer* is whether the Department’s certification rule requires only factual, uncontroversial disclosures in commercial speech. It does. In requiring electrical workers to disclose their professional qualifications, the rule does not touch on political, religious, or literary concerns—areas where courts have applied heightened scrutiny. *Thomson*, 189 Wn. App. at 57 (citing *In re Anonymous Online Speakers*, 661 F.3d 1168, 1176-77 (9th Cir. 2011)). Instead, it requires only factual disclosures relating to the workers’ economic interests. Contrary to Hired Hands’ arguments, the Department’s certification rule does not compel electrical workers to convey or endorse a particular ideological message. AB 14.

“At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.” *Agency for Int’l Dev. v. Alliance for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 213, 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013) (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994)). Thus, a state may not compel schoolchildren to salute the flag and recite the pledge of allegiance, *Barnette*, 319 U.S. 624, or require a citizen to display the state motto “Live Free or Die” on a license plate. *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977). In such cases, the government impermissibly compels the endorsement of ideas of which it approves. *See Agency for Int’l Dev.*, 570 U.S. at 213.

The certification rule requires no such endorsement of government-favored ideas. The certificate card is wallet-sized, lists the electrician’s name and certification number, and states what type of work the electrician is qualified to perform. CP 124-25. It is color-coded to show if the worker may work without supervision. CP 125-26. And it states that the Department has officially issued the certificate. CP 125.

The card conveys no ideological message. While Hired Hands asserts that the rule results in the “prolonged conversion of the worker’s body into a billboard for State messaging,” AB 7, the company is vague

about the specifics of that message. It contends that the certificate “expresses some degree of state association,” AB 6, entailing “compulsion of an ideological message ranging somewhere between State association and fealty.” AB 14. And it assigns particular significance to the presence of the state seal, claiming that it “symbolize[s] the regulatory system, knitting loyalty to it while announcing the rank and function of the worker.” AB 21.

But as Hired Hands must agree, nothing on the certificate card states that the electrical worker expresses “association” with or “fealty” to the Department or its policies. And if it is only the presence of the state seal that the company challenges, it must demonstrate that the act of wearing it inherently conveys a message of fealty.

Courts have rejected arguments that wearing a state symbol necessarily conveys an ideological message. Thus, the Sixth Circuit determined that a prison guard did not show a regulation requiring him to wear an American flag patch constituted speech for First Amendment purposes. *Troster v. Penn. State Dep’t of Corr.*, 65 F.3d 1086, 1091 (3d Cir. 1995). The Court would not hold “as a matter of ‘common sense’” that using the flag was inherently expressive. *Id.* at 1092. It explained that the guard showed no evidence that “anyone (other than himself) would be likely to view the wearing of the patch as communicative or expressive, or

that people who wear such uniforms with such flag patches actually assert anything to anyone.” *Id.* Because the record did not show the flag patch relayed “any message (ideological or otherwise),” the Court held the guard had not sustained his burden to show the patch was “likely to function in a communicative fashion.” *Id.* at 1091.

Here, no reasonable observer would consider the certificate card to express “association with or subservience to state government”—the particularized message to which Hired Hands objects. AB 9. Nothing on the certificate states anything of the kind. And like the guard in *Troster*, Hired Hands points to no evidence in the record showing that anyone except itself would likely view the certificate as expressing this message. Any observer would interpret the certificate to express exactly what it says: that the state has certified the worker to perform electrical work.⁹

There is no First Amendment violation where there is little likelihood that anyone would believe Hired Hands to be endorsing the Department’s policy positions. *Contra* AB 9-10. The Supreme Court has upheld a federal law requiring universities to send messages on behalf of

⁹ Hired Hands contends that its subjective impression of the certificate card’s “offensiveness” is sufficient to trigger strict scrutiny. AB 7. This is incorrect. Were this true, all laws compelling speech would be subject to strict scrutiny, as the party asserting a First Amendment violation will always disagree with the law. But the United States Supreme Court has explained that lower scrutiny applies in the contexts of professional conduct, *Casey*, 505 U.S. at 884, and commercial speech. *Zauderer*, 471 U.S. at 651. Hired Hands’ subjective views do not determine if the rule’s disclosure requirements fall within these categories.

military recruiters despite the schools' disagreement with the military's policies. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 64-65, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) (*FAIR*). And in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 88, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980), it upheld a state law requiring a shopping center owner to allow expressive activities by others on its property. In each case, the Court explained that there was "little likelihood" that the views of others would be identified with the plaintiffs. *FAIR*, 547 U.S. at 64 (citing *PruneYard*, 447 U.S. at 88). It noted that the universities and the shopping center owner remained free to disassociate themselves from those views and that there was no compulsion "to affirm [a] belief in any governmentally prescribed position or view." *Id.* (quoting *PruneYard*, 447 U.S. at 88).

The same is true here. Hired Hands and other electrical workers remain free to disassociate themselves from any Department policies with which they disagree. The certification rule does not compel workers to endorse a "governmentally prescribed position or view." *See PruneYard*, 447 U.S. at 88. It merely requires that they display their credentials when performing electrical work. Because it is unlikely that anyone would think that wearing a certificate of competency meant these workers endorsed the Department's policy views, the rule does not require Hired Hands to

affirm a government-favored message. Even if the certification rule regulates speech as speech, its requirements are properly analyzed as ordinary commercial disclosures.¹⁰

3. Because the certification rule does not unduly burden any constitutionally protected speech and reasonably relates to a legitimate state interest in ensuring electrical safety, the rule does not violate the First Amendment

Since the rule requires commercial disclosures of “purely factual and uncontroversial information,” the Court should uphold it because it is not “unjustified or unduly burdensome” and because it “reasonably relates” to a legitimate state interest. *See Zauderer*, 471 U.S. at 651.

a. The rule is not unjustified or unduly burdensome, contrasting with *Becerra*

The certification rule is not unjustified or unduly burdensome. In *Becerra*, the Court applied *Zauderer* in striking down a California law

¹⁰ Hired Hands also suggests that the *Zauderer* standard does not apply because the rule’s factual disclosure requirements are intertwined with “[a] private electrician’s speech.” AB 8 (citing *Riley v. Nat’l Fed’n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988)). But in *Riley*, the Court applied strict scrutiny because the law’s disclosures were “inextricably intertwined” with solicitation of charitable contributions—“fully protected speech” under the First Amendment. 487 U.S. at 796. The same principle applies for initiative-petition circulators, street performers, and newspaper sellers. *See* AB 29. By contrast, Hired Hands identifies no fully protected speech relating to its work in the electrical construction trade.

Similarly, the certification rule does not violate Hired Hands’ “right to eschew association for expressive purposes.” AB 9 (citing *Janus v. Am. Fed’n of State, Cty., & Mun. Employees, Council 31*, ___ U.S. ___, 138 S. Ct. 2448, 2463, 201 L. Ed. 2d 924 (2018)). The challenged rule does not require Hired Hands to “mouth support for views [it] find[s] objectionable” or to “subsidize the speech of other private speakers.” *Janus*, 138 S. Ct. at 2463-64. *Janus* does not apply.

requiring unlicensed pregnancy centers to provide notice that they were not licensed medical facilities and that they had no licensed medical providers on staff. 138 S. Ct. at 2377-78. The Court explained that California’s justification for this requirement was “purely hypothetical” where the State conceded that center visitors likely already knew that the centers were unlicensed. *Id.* at 2377. And it noted that the law was unduly burdensome where it required that the notice be printed in as many as 13 languages, drowning out the centers’ own preferred message. *Id.* at 2378.

The Department’s certification rule suffers no such defects. While Hired Hands contends that the Department failed to prove that consumers lack “knowledge of [electricians’] licensure status,” the State’s interest is not limited to consumer deception. AB 23. Instead, as discussed above, this interest includes protecting workers and the public from unsafe electrical installations. The Legislature heard testimony about contractors evading the certification laws to perform electrical work. Thus this harm was not “purely hypothetical,” as in *Becerra*, but “potentially real” and actual. 138 S. Ct. at 2377.

Hired Hands faults the Department for failing to adduce evidence that wearing a certificate of competency “correlate[s] with safety” or that “defective electrical work pos[es] a threat to public safety.” AB 31. But Washington courts have long recognized that electrical work is “inherently

dangerous,” implicating the “public interest in health and safety.” *Nat’l Elec. Contractors*, 138 Wn.2d at 21-22. They have likewise noted that our electrical laws—like the certification rule here—“provide assurances that individuals performing [this work] are trained and competent.” *Id.* at 21. The certification rule is not unjustified.

Hired Hands’ complaints about the rule’s burdens also miss the mark. It contends that electrical workers are burdened “by the physical nuisance of always needing to have a placard positioned just so” and “by the distraction of constantly checking whether the license has fallen off or is positioned correctly” AB 24.¹¹ But these are not the types of burdens that animated the Court’s decision in *Becerra*. Instead, the Court’s focus was the disclosure requirement’s chilling effect on the pregnancy centers’ otherwise protected speech. *Becerra*, 138 S. Ct. at 2377-78. It explained that “a billboard for an unlicensed facility that says ‘Choose

¹¹ Hired Hands also makes some claims that an electrical worker’s information is private, apparently asserting that it is a burden to reveal this information. AB 14. But the information is not private: it is available on the Department’s public website, and anyone may freely ask about an electrician’s licensure status. Department of Labor & Industries, *Verify a Contractor, Tradesperson or Business*, <https://secure.lni.wa.gov/verify/> (last visited Jan. 27, 2019). Later in its brief, Hired Hands alleges in passing that the certification rule “implicate[s]” privacy concerns. AB 30. But it provides no argument in support of this contention, and the Court should not consider it. “[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *In re Request of Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)). And this Court need not consider “assertions that are given only passing treatment and are unsupported by reasoned argument.” See *Peters v. Vinatieri*, 102 Wn. App. 641, 655, 9 P.3d 909 (2000).

Life’ would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages.” *Id.* at 2378. In fact, according to the Court, these disclosure requirements likely ruled out “the possibility of having such a billboard in the first place.” *Id.* Hired Hands identifies no similar concerns here.

b. The Department’s certification rule rationally relates to the State’s legitimate interest in safety

A “routine disclosure of economically significant information designed to forward ordinary regulatory purposes” is not subject to “extensive First Amendment analysis.” *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005).¹² By requiring all workers to display their certificates when working, the certification rule provides consumers with important information about whether an electrical worker is qualified to perform the work. And because protecting commercial speech is principally justified by the value it provides consumers, Hired Hands’ constitutionally protected interest in *not* providing this factual information is minimal. *See Zauderer*, 471 U.S. at 651.

The certification rule reasonably relates to Washington’s legitimate interest in preventing unsafe electrical work. The law informs consumers, jobsite contractors, and the Department about whether an individual is

¹² For the First Amendment issue, the joint concurring opinion represents the opinion of the court. *Pharm. Care Mgmt. Ass’n*, 429 F.3d at 297-98.

qualified. By facilitating the easy identification of unqualified workers, it deters them from attempting dangerous electrical installations. While Hired Hands argues that the Department could accomplish its goals through other, less restrictive means, AB 18-20, under *Zauderer*, “a strict ‘least restrictive means’ analysis” does not apply. 471 U.S. at 651 n.14. Similarly, it does not matter that the certification rule does not reach every type of licensed professional. AB 18, 31. “As a general matter, governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied.” *Zauderer*, 471 U.S. at 651 n.14 (citing *Zablocki v. Redhail*, 434 U.S. 374, 390, 98 S. Ct. 673, 683, 54 L. Ed. 2d 618 (1978)). Under *Zauderer*, it is enough that the certification rule rationally advances the State’s legitimate interest in public health and safety. *Id.* at 651-52. For this reason, it does not violate the First Amendment.

C. Wearing a Certificate of Competency Does Not Violate Hired Hands’ Right to Choice of Personal Appearance or Bodily Autonomy

The certification rule does not implicate Hired Hands’ fundamental rights, and there is no due process violation. Fundamental rights include “the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion.” *Washington v. Glucksberg*, 521 U.S.

702, 720, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (citations omitted).

Courts are “reluctant to identify new fundamental rights because, in doing so, a matter is effectively placed ‘outside the arena of public debate and legislative action.’” *Am. Legion Post #149 v. Dep’t of Health*, 164 Wn.2d 570, 600, 192 P.3d 306 (2008) (quoting *Glucksberg*, 521 U.S. at 720).

The certification rule violates no fundamental right. Hired Hands asserts that the rule violates its “right to a choice of personal appearance, unlawfully invading bodily autonomy.” AB 26. But no court has recognized personal appearance as a fundamental right, subject to strict scrutiny. *See DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1366 n.4, 1367 (11th Cir. 1987) (liberty interest in personal appearance not a fundamental right); *Domico v. Rapides Parish Sch. Bd.*, 675 F.2d 100, 102 n.1 (5th Cir. 1982) (same); *Karr v. Schmidt*, 460 F.2d 609, 614-15 (5th Cir. 1972) (same). The United States Supreme Court has assumed, without deciding, that there is “some sort of ‘liberty’ interest” in matters of personal appearance. *Kelley v. Johnson*, 425 U.S. 238, 244, 247-48, 96 S. Ct. 1440, 47 L. Ed. 2d 708 (1976). But the Court likewise reviewed the law at issue—a city ordinance restricting the hair length of police officers—under a rational basis standard. *Id.* at 247-48.

Contrary to Hired Hands’ contention, the Court’s decision in *Kelley* does not require strict scrutiny in cases involving private citizens.

AB 30. Since that case, courts have uniformly applied a rational basis standard in such circumstances. *Hodge v. Lynd*, 88 F. Supp. 2d 1234, 1242 (D.N.M. 2000) (collecting cases); *see also DeWeese*, 812 F.2d at 1367 (rational basis applied to town ordinance prohibiting shirtless jogging). In determining whether a challenged law is “rationally related to a legitimate state interest,” a court may assume any necessary facts of which it can reasonably conceive. *Amunrud*, 158 Wn.2d at 222.¹³

The Department’s certification rule meets this test. As explained above, the requirement for displaying a certificate of competency rationally relates to the State’s legitimate interest in preventing dangerous electrical work by unqualified workers. There is no violation of Hired Hands’ right to personal appearance.

Nor does the certification rule implicate any other fundamental right. Contrary to Hired Hands’ suggestion, wearing a certificate of competency does not implicate the right to bodily integrity. AB 30. This right includes the right to refuse unwanted medical treatment, *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 278, 110 S. Ct. 2841,

¹³ Even under the rational basis standard, no court has sustained the government’s authority to regulate “the dress of its citizens at large.” *DeWeese*, 812 F.2d at 1368. But this is because courts have found that “a state has no legitimate interest in the personal dress of its citizens at large,” *id.*, not because the rational basis standard does not apply. Here, of course, the Department’s certification rule does not apply to all citizens. It applies only to professional electrical workers performing electrical work.

111 L. Ed. 2d 224 (1990), to be free from sexual assault, *Doe v. Claiborne Cty.*, 103 F.3d 495, 507 (6th Cir. 1996), and is “infringed by a serious, as distinct from a nominal or trivial, battery.” *Alexander v. DeAngelo*, 329 F.3d 912, 916 (7th Cir. 2003). The right to bodily integrity is fundamental where “the magnitude of the liberty deprivation that [the] abuse inflicts upon the victim . . . strips the very essence of personhood.” *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062-63 (6th Cir. 1998) (alterations in original) (quoting *Claiborne*, 103 F.3d at 506-07).

The requirement that professional electricians wear and display certificates of competency does not implicate this right. The certificate card is wallet-sized and attaches to the electrician’s outer clothing. CP 124-25. The electrician can easily remove it at the end of the workday. Wearing a certificate card is hardly like sexual assault, serious battery, or unwanted medical treatment. The certification rule does not implicate Hired Hands’ right to bodily integrity.

D. The Certification Rule is Not Unconstitutionally Vague

The Department’s rule is not unconstitutionally vague. Indeed, because there is no application of the rule that violates Hired Hands’ free speech rights, the Court should not review its facial challenge. *See City of Spokane v. Douglass*, 115 Wn.2d 171, 182-83, 795 P.2d 693 (1990) (explaining that vagueness challenges not involving free speech rights are

evaluated on an as-applied basis). But even if the Court decides to consider this issue, the regulation is sufficiently clear. A rule need not satisfy “[i]mpossible standards of specificity.” *Blondheim v. State*, 84 Wn.2d 874, 878, 529 P.2d 1096 (1975).

Here, the certification rule provides fair notice that an electrician must wear and visibly display a certificate on the front of the upper body when working, subject to certain safety exceptions. WAC 296-46B-940(3). While Hired Hands asserts it is left “to guess” about when it may cover a certificate, AB 34, the rule permits a worker to cover the certificate “when working in an attic or crawl space or when operating equipment . . . where wearing the certificate may pose an unsafe condition for the individual.” WAC 296-46B-940(3). It allows the certificate to be worn inside outer clothing “when outer protective clothing (e.g., rain gear when outside in the rain, arc flash, welding gear, etc.) is required.” *Id.* Hired Hands quarrels with the use of “etc.,” but “[i]mpossible standards of specificity are not required.” *Blondheim*, 84 Wn.2d at 878; *contra* AB 33. The company raises concerns about the rule’s limitation for cold weather jackets, but this is simply a regulatory choice by the Department to eliminate a potential loophole for the common wearing of a jacket. AB 34.

Hired Hands’ real complaints about the rule are not so much that it cannot understand it, but that it disagrees with it. It argues that maintaining

an awareness of the license is an unsafe distraction, that a lanyard is unsafe, that one could stab oneself with a pin, or one could lose a license. AB 33. But none of these arguments go to comprehension, instead relating to the efficacy of the rule, which is not a vagueness concern. The certification rule is not unconstitutionally vague.

E. Hired Hands Is Not Entitled to Attorney Fees

Hired Hands should not prevail, so it should not receive attorney fees under the Equal Access to Justice Act (EAJA). AB 35-38. But even if it prevails, it should not receive fees. The EAJA allows no award of attorney fees to a prevailing party if the agency's action was substantially justified. RCW 4.84.350(1). An agency's action is substantially justified when it has a reasonable basis in law and in fact. *See Plum Creek Timber Co. v. Forest Practices Appeals Bd.*, 99 Wn. App. 579, 595-96, 993 P.2d 287 (2000). The agency's decision need not be correct—only reasonable. *Id.*

Here, the Department's action in promulgating the certification rule was substantially justified. RCW 19.28.271(1) authorizes the Department to require electrical workers to wear certificates of competency while working. The electrical industry supported promulgation of the certification rule—including the Washington State Labor Council, the Certified Electrical Workers of Washington, the National Electrical Contractors Association, the Technical Advisory

Committee, and the Electrical Board. AR 1, 6, 393. And as explained in this brief, case law supports the Department's position that the certification rule violates no constitutional right. Even if Hired Hands prevails, it is not entitled to attorney fees under the EAJA.¹⁴

VI. CONCLUSION

Hired Hands' arguments lack merit. The certification rule does not violate the First Amendment when it regulates professional conduct and requires only factual, uncontroversial disclosures of commercial speech. The rule does not violate substantive due process when it implicates no fundamental right. And it is not unconstitutionally vague where it reasonably appraises electrical workers of the conduct it requires. This Court should affirm the superior court.

RESPECTFULLY SUBMITTED this 4th day of February, 2019.

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¹⁴ Awarding fees now would be premature. There has been no finding that Hired Hands is a qualified party or that circumstances would not make an award unjust. *See Brown v. Dep't of Soc. & Health Servs.*, 190 Wn. App. 572, 598, 360 P.3d 875 (2015).

NO. 95901-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

HIRED HANDS, LLC, and KENNETH
SMITH,

Petitioners,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

DECLARATION OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the BRIEF OF RESPONDENT and this DECLARATION OF SERVICE in the below described manner:

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RESPECTFULLY SUBMITTED this 4th day of February, 2019.



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