NO. 101115-6

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 PETITION FOR REVIEW

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I. INTRODUCTION

For thirty years, this Court has repeatedly stated that commercial speech receives no greater protection under article I, section 5 of the Washington State Constitution than it does under the First Amendment to the U.S. Constitution. Accordingly, Washington courts apply the federal test established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351, 65 L. Ed. 2d 341 (1980), to determine the constitutionality of commercial speech restrictions. The Court of Appeals properly applied this well-settled precedent in affirming Washington's restrictions on cannabis advertising.

Petitioners ask this Court to disturb this long-settled precedent and then declare unconstitutional Washington's restrictions on cannabis advertising. But those restrictions are tailored to protect minors from the harmful effects of cannabis and cannabis advertising, as Washington voters, the Legislature, and federal government have required. Petitioners fail to suggest

any basis for concluding that steps reasonably calculated to protect minors deprive them of any protected right. The Court should deny review.

II. COUNTERSTATEMENT OF THE ISSUES

Should the Court depart from its long-held precedent that article I, section 5 of the Washington Constitution provides no more protection for commercial speech than the First Amendment does?

Do Washington's cannabis advertising restrictions satisfy the *Central Hudson* test for constitutionally-permissible restrictions on commercial speech, which this Court has long-applied?

III. STATEMENT OF THE CASE

A. The People of Washington Decriminalized Some Cannabis Possession and Sales and Created a Tightly Regulated Industry

In 2012, the People of Washington decriminalized certain adult cannabis use and possession and directed the Washington

State Liquor and Cannabis Board[1] to tightly regulate the cannabis market. Laws of 2013, ch. 3, § 1(3). In doing so, the People required that minors be protected from the impacts of the new legal cannabis market. *See, e.g.*, Laws of 2013, ch. 3, §§ 10(9)(b); 18(1)(a); 28.

B. The Initiative Restricted Cannabis Advertising to Minors and Directed the Board to Do the Same

To protect minors, the Initiative, among other things, required the Board to establish "reasonable time, place, and manner restrictions and requirements regarding advertising of cannabis, useable cannabis, and cannabis-infused products that are not inconsistent with the provisions of this act[.]" Laws of 2013, ch. 3, § 10(9). Those restrictions must be designed so as to "[m]inimiz[e] exposure of people under twenty-one years of age to [cannabis] advertising." *Id.*, § 10(9)(b).

The Initiative specifically prohibited cannabis licensees from advertising "[w]ithin one thousand feet of the perimeter of

[1] Then the Liquor Control Board.

a school grounds, playground, recreation center or facility, child care center, public park, or library, or any game arcade admission to which is not restricted to persons aged twenty-one years or older[.]" *Id.*, § 18(1)(a) (codified at RCW 69.50.369(1)). The Initiative exempted "noncommercial message[s]" from these restrictions. § 18(3) (codified at RCW 69.50.369(9)).

C. The Legislature Adopted Additional Outdoor Advertising Restrictions To Protect Minors

In 2017, the Legislature adopted additional advertising restrictions to protect minors from exposure to cannabis-related advertising. Among other things, it limited outdoor advertising to text that identifies a business's name, location, and nature of the business, and it prohibited depictions of cannabis products or images that might be appealing to children. Laws of 2017, ch. 317, § 14(7)(a) (codified at RCW 69.50.369(7)(a)).

The Legislature further prohibited outdoor advertising in locations where children are often present or might be particularly influenced by marketing, such as at stadiums or

video game arcades, but not at adult-only facilities. Laws of 2017, ch. 317, § 14(7)(b)(i) (codified at RCW 69.50.369(7)(b)(i)). The outdoor advertising restrictions do not apply to outdoor advertisements at adult-only events, where the advertisements do "not advertise any marijuana product other than by using a brand name to identify the event." Laws of 2017, ch. 317, § 14(7)(e)(ii) (codified at RCW 69.50.369(7)(e)(ii)).

These restrictions were intended to further the Initiative's goal of protecting minors. Senator Rivers testified that "trying to limit our appeal away from children is first and foremost," and that the Legislature had a responsibility to honor the "tightly regulated system" passed by the People through I-502 as well as a "moral responsibility to ensure that kids are not bombarded by images that glorify something that they . . . shouldn't be making a decision on until they are twenty-one years old." An Act Relating to Marijuana: Hr'g on ESSB 5131 Before the H. Commerce & Gaming Comm., 65th Leg., Reg. Sess. (Wash.

March 20, 2017) (testimony of Senator Rivers; 25:12-25:57).[2] The committee also noted that the intent of the legislation was to protect children from cannabis advertising and that the restrictions were a reasonable means of achieving that goal. An Act Relating to Marijuana: Hr'g on ESSB 5131 Before the H. Commerce & Gaming Comm., 65th Leg., Reg. Sess. (Wash. March 21, 2017) (11:48-12:08).[3]

Seth Dawson, representing the Washington Association for Substance Abuse Prevention, requested "as much regulation of advertising as possible," particularly in light of the results of the 2016 Washington Healthy Youth Survey, which revealed "eighth-graders have dropped significantly in their perception of harm when it comes to using marijuana." An Act Relating to Marijuana: Hr'g on ESSB 5131 Before the H. Commerce & Gaming Comm., 65th Leg., Reg. Sess. (Wash. March 20, 2017) (testimony of Seth Dawson, 26:56-28:20). In fact, Dawson

[2] https://www.tvw.org/watch/?eventID=2017031214
[3] https://www.tvw.org/watch/?eventID=2017031239

testified that the Association opposed even the "limited amount of billboard advertising" permitted. *Id.* at 27:14-28:20.

A cannabis industry lobbyist testified that the legislation "strikes a great balance of putting some clear bright lines in place for advertising without restricting our industry's ability to go out and compete with the illicit market," and the industry "strongly supports" the bill. An Act Relating to Marijuana: Hr'g on ESSB 5131 Before the H. Appropriations Comm., 65th Leg., Reg. Sess. (Wash. 2017) (April 1, 2017) (testimony of Ezra Eickmeyer, 1:32:04-51).[4]

Before these advertising restrictions were passed, the U.S. Department of Justice had announced that it would deemphasize drug enforcement priorities for locally legalized cannabis industries, on the condition that state regulations prioritized, among other things, "[p]reventing the distribution of marijuana minors." CP 252-55 (Mem. for All U.S. Attorneys, from James

[4] https://www.tvw.org/watch/?eventID=2017041000

M. Cole, Deputy Attorney General, re: Guidance Regarding Marijuana Enforcement (August 29, 2013)).”[5] The Department warned that if state enforcement efforts were not “sufficiently robust to protect” public health and safety and “prohibit[] access to marijuana by minors,” “the federal government may seek to challenge the regulatory structure itself . . . .” CP 254.

The Legislature was keenly aware of the federal government’s requirements. *See* An Act Relating to Marijuana: Hr’g on ESSB 5131 Before the H. Commerce & Gaming Comm., 65th Leg., Reg. Sess. (Wash. March 20, 2017) (testimony of Senator Rivers; 25:12-25:57). Senator Rivers testified, “In discussions, you and I have talked about making sure that we’re sticking to the Cole memorandum as closely as possible. . . .” *Id.* at 24:47-25:05.

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[5] The Department of Justice later rescinded the “Cole memo” because it no longer was deemphasizing prosecution of marijuana offenses permitted under state law. Mem. from Attorney General Jefferson Sessions for All United States Attorneys (January 4, 2018) (on file with U.S. Dep’t of Justice).

D. The Board Adopted Rules Consistent with the Legislation

The Liquor and Cannabis Board adopted rules to implement the Initiative and Legislature's restrictions on cannabis advertising to minors. WAC 314-55-155. The provisions at issue here largely mirror the challenged statutory provisions.

E. The Superior Court and Court of Appeals Affirm the Constitutionality of Washington's Limits on Cannabis Advertising

This suit began in 2019, after the Board issued administrative bulletin 19-01 (later withdrawn and superseded), to provide guidance to cannabis licensees about where they could or could not advertise. CP 41-42. Petitioner Seattle Events, a cannabis advocacy non-profit corporation and event planner, allegedly feared the Board's interpretation would prevent it from attracting sponsors for Seattle Hempfest 2019. *See* CP 1-12 (Amended Complaint). Petitioners Multiverse Holdings, LLC, and Universal Holdings, LLC, licensed cannabis retailers in King County, alleged that if they were to sponsor Hempfest 2019, or

be "referenced in Hempfest's written material and/or signage at Hempfest," they could be subject "to a citation." CP 8-9. They also alleged that they were unsure if "any booth they set up to disseminate information concerning their support of marijuana law reform . . . can bear their business names, logos, or address." CP 9.

The Board then issued Administrative Bulletin 19-03, which superseded Administrative Bulletin 19-01. CP 166-67. The new bulletin clarified that, consistent with RCW 69.50.369(9), non-commercial speech was exempt from the advertising regulations and that "the use of a business trade name on a booth or . . . identification of sponsors who are supportive of an advocacy event (such as Seattle Hempfest)" would not violate the statute. *Id.*

Petitioners filed a second amended complaint, in which they abandoned the bulletin-based claims as moot and instead challenged several of Washington's statutes and regulations

restricting cannabis advertising as unconstitutional. CP 205-248. Specifically, Petitioners challenged:

- RCW 69.50.369(1), barring cannabis advertising within 1,000 feet of specific areas where children are likely to be;
- RCW 69.50.369(7)(b), prohibiting advertising cannabis in locations where minors are typically present (e.g., fairs, malls, video game arcades);
- RCW 69.50.369(7)(b)(ii), requiring that all outdoor signs meet the content restrictions in RCW 69.50.369(7)(c);
- RCW 69.50.369(7)(e), setting forth exceptions to the outdoor advertising requirements.
- WAC 314-55-155(1)(a)(iii), barring statements claiming cannabis has curative or therapeutic effects;
- WAC 314-55-155(1)(b)(i), barring cannabis advertising within 1,000 feet of specific areas where children are likely to be;

- WAC 314-55-155(2)(a)(i), limiting the number of outdoor signs cannabis licensees may affix to their premises; and
- WAC 314-55-155(2)(d), describing how licensees may advertise at adults-only events.

CP 216.

After the superior court granted summary judgment for the State, Petitioners sought direct review in this Court, which the Court denied. In June, the Court of Appeals issued a published opinion affirming the constitutionality of Washington's cannabis advertising restrictions.

IV. REASONS WHY REVIEW SHOULD BE DENIED

The Court of Appeals properly applied this Court's longstanding and unambiguous pronouncements that article I, section 5 of the Washington Constitution affords no greater protections than the First Amendment to the United States Constitution to commercial speech. It also properly rejected Petitioners' argument that strict rather than intermediate scrutiny

applies to Washington's cannabis advertising laws and found that those laws satisfy the four-part test under *Central Hudson*. While the nature of this particular commercial speech—advertising for decriminalized cannabis—may be novel, there is nothing novel about the Court's analysis or the law it applied. Accordingly, there is no need for this Court's further review.

Petitioners are either confused about the clear holdings from this Court and others, or intentionally try to obscure their meaning. Either way, there is no significant question of constitutional law for this Court to resolve, because what constitutional standard and what level of scrutiny apply to commercial speech restrictions has long been settled by this Court. RAP 13.4(b)(3). *Nat'l Fed'n. of Retired Persons v. Insurance Comm'r.*, 120 Wn.2d 101, 119, 838 P.2d 680 (1992); *Ino Ino v. City of Bellevue*, 132 Wn.2d 103, 116, 937 P.2d 154 (1997) (plurality opinion) ("The federal analysis also applies when confronting art. I, §5 challenges to regulations of commercial speech."). The Court of Appeals correctly

recognized that "our Supreme Court has already determined that the federal constitutional analysis applies to commercial speech claims made under article I, section 5." Slip. Op. at 11.

The Petition also fails to articulate a matter of substantial public interest that this Court should determine. RAP 13.4(b)(4). While it is possible that *invalidating* these statutes would be of substantial public import—by exposing Washington's children to unfettered advertising for marijuana, contrary to the People's and Legislature's intent—the Court of Appeals' opinion upholding the constitutionality of the laws is not. The Court's decision was thorough, well-reasoned, and correct. Further review is unnecessary.

A. Petitioners Did Not Raise the State Constitutional Question in the Trial Court

In the trial court, Petitioners did not argue that the state constitution provides broader protection for commercial speech than the U.S. Constitution. Slip. Op. 9 n.14; CP 361-85, 541-50. On appeal, the State argued that the Court of Appeals should

refuse to reach the state constitutional question, per RAP 2.5(a)(3). Resp'ts' Br. 11-12. Although the Court looked "with disfavor on a party taking a contrary position on appeal than that argued below," the Court nevertheless reached the question because the State had not argued that "judicial estoppel" precluded it. Slip Op. 9-10 n.14. As Petitioners have never asserted a manifest constitutional error exception to the general rule that issues cannot be raised for the first time on appeal, RAP 2.5(a)(3), this Court should refuse to accept review of the state constitutional question.

B. The Court of Appeals Followed Long-Settled Law That Article I, § 5 Does Not Provide Broader Protection than the First Amendment to Commercial Speech

Since at least 1992, this Court has held that article I, section 5 of the Washington Constitution does not afford greater protection to commercial speech than does the First Amendment to the U.S. Constitution. In *National Federation of Retired Persons v. Insurance Commissioner*, 120 Wn.2d 101, 838 P.2d

680 (1992), this Court evaluated the constitutionality of a license requirement to engage in insurance solicitation, which the Court deemed to be commercial speech. This Court concluded that the "interpretative guidelines under the federal constitution" applied to the constitutionality of the commercial speech restrictions, and evaluated the licensing requirement under the *Central Hudson* test. *Nat'l Fed'n of Retired Persons*, 120 Wn.2d at 119.

Five years later, this Court upheld the constitutionality of various restrictions on sexually explicit dancing. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 116, 937 P.2d 154 (1997).[6] It explained that "Const. art. I, § 5 has been interpreted to offer greater protection than the First Amendment in the context of *pure noncommercial speech in a traditional public forum*." *Ino Ino, Inc.*, 132 Wn.2d at 118 (emphasis added) (citing *Collier v. City of Tacoma,* 121 Wn.2d 737, 747, 854 P.2d 1046 (1993)

[6] Three justices concurred in the plurality opinion of four justices. They wrote separately only to dissent on the issue of attorney fees.

(political speech on streets and sidewalks), and *Bering v. Share*, 106 Wn.2d 212, 233-34, 721 P.2d 918 (1986) (abortion clinic protest on city streets and sidewalks)). "In other contexts, however, this court has followed the federal standard when evaluating time, place, and manner restrictions." *Id.* (citing *City of Seattle v. Huff*, 111 Wn.2d 923, 767 P.2d 572 (1989) (telephone harassment ordinance afforded no greater protection); *State v. Reece*, 110 Wn.2d 766, 757 P.2d 947 (1998) (obscenity afforded no greater protection); and *Nat'l Fed'n of Retired Persons*, 120 Wn.2d 101 (commercial speech afforded no greater protection). It explicitly noted that "[t]he federal analysis also applies when confronting art. I, § 5 challenges to regulations of commercial speech." *Id.* at 116 (citing *Nat'l Fed'n of Retired Persons*, 120 Wn.2d at 119).

In 2005, the Court declined to consider whether a *Gunwall* analysis was necessary to evaluate the constitutionality of city's permit requirement for almost all off-site commercial signs, because the law failed even the minimum speech protections of

the federal constitution. *Kitsap Cty. v. Mattress Outlet*, 153 Wn.2d 506, 511 n.1, 104 P.3d 1280 (2005). But in rejecting a requested *Gunwall* analysis, the dissent—which would have held that the permitting ordinance satisfied the *Central Hudson* test—stated, "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." *Mattress Outlet*, 153 Wn.2d at 519 n.1 (Madsen, J. Dissenting) (citing *Ino Ino, Inc. v. Bellevue,* 132 Wn.2d at 116; *Nat'l Fed'n of Retired Persons,* 120 Wn.2d at 119)).

More recently, this Court has reaffirmed that "no greater protection is afforded [under art. I, sec. 5] to obscenity, speech in nonpublic forums, *commercial speech*, and false or defamatory statements." *Bradburn v. N. Cent. Reg'l Library Dist.*, 168 Wn.2d 789, 800, 231 P.3d 166 (2010) (citing *Ino Ino, Inc*., 132 Wn.2d at 116) (emphasis added).

So it is not an "open question," as Petitioners contend, whether the federal speech protections apply to Washington commercial speech restrictions. That question is well-settled.

In an attempt to obscure these clear rulings, Petitioners claim that the article I, section 5 question is resolved only as to misleading speech and obscenity (Pet. at 14, 16-17); misread a single, innocuous footnote in the plurality opinion in *Mattress Outlet* (Pet. at 13, 17); and conflate the first prong of the *Central Hudson* test with the question of whether *Central Hudson* applies at all. Pet. at 15-17. But as shown, the question *is* resolved as to commercial speech generally. *Nat'l Fed'n of Retired Persons*, 120 Wn.2d at 119; *Ino Ino, Inc.*, 132 Wn.2d at 118; *Mattress Outlet/Gould*, 153 Wn.2d at 519 n.1 (Madsen, J., dissenting); *Bradburn*, 168 Wn.2d at 800. The footnote in *Mattress Outlet*'s plurality opinion merely dismisses the suggestion that a *Gunwall* analysis was warranted, because the speech restrictions there did not even meet the minimum federal constitutional protections. *Mattress Outlet/Gould*, 153 Wn.2d at 511 n.1 ("Although our

state constitution may be more protective of free speech than the federal constitution, it is unnecessary to consider a state constitutional analysis because KCC 17.445.070(C) fails the minimum protection provided under the federal constitution.").

And the contention that the Court has not considered what test should apply to "non-deceptive advertising" confuses the first prong of the *Central Hudson* test—whether the speech concerns a lawful activity and is not misleading—with a need to compare the text of article I, section 5 to the First Amendment. No such comparison is needed here, because this Court has already determined that article I, section 5 does not provide broader commercial speech protection than the First Amendment does.

Unlike the Petitioners, lower Washington courts are not confused by this Court's commercial speech precedent. Division One understands that the "Supreme Court's decisive language that we are to apply the four-part test from *Central Hudson* remains binding authority on this court." *State v. Living*

Essentials, LLC, 8 Wn. App. 2d 1, 24, 436 P.3d 857 (2019). In rejecting a requested *Gunwall* analysis, it recognized, "our Supreme Court has already answered that question regarding commercial speech." *Id.* at 23. And, in rejecting Petitioners' contention that the Washington Constitution provides greater protection to commercial speech, Division Two stated, "our Supreme Court has already determined that the federal constitutional analysis applies to commercial speech claims made under article I, section 5." Slip Op. 11 (citing *National Federation* and *Ino Ino*).[7] Thus additional guidance from this Court is unnecessary. Indeed, this Court denied further review of *Living Essentials*, 193 Wn.2d 1040 (2019), and the U.S. Supreme Court denied certiorari, 141 S. Ct. 234 (Oct. 5, 2020). The Court should deny review of this case, too.

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[7] The U.S. District Court also understands that this Court "has long held that the free speech clause contained in contained in article I, section 5 of the Washington Constitution does not afford any greater protection to commercial speech than does the First Amendment." *Dex Media W., Inc. v. City of Seattle*, C10-1857JLR, 2011 WL 4352121, *5 (W.D. Wash. Sept. 16, 2011).

C. Intermediate Scrutiny Applies to the Challenged Commercial Speech Restrictions

Because the federal constitutional analysis applies to commercial speech restrictions, Washington applies the four-part test the U.S. Supreme Court established in *Central Hudson* to determine whether the restrictions are permissible. *See, e.g., Mattress Outlet*, 153 Wn.2d at 512-15 (applying *Central Hudson* to commercial speech restrictions); *Nat'l Fed'n of Retired Persons*, 120 Wn.2d at 118-19 (same). This entails an intermediate level of scrutiny. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566. The Court of Appeals properly rejected Petitioners' argument that strict scrutiny applies. *Seattle Events*, Slip Op. 11-14.

Contrary to Petitioners' contention, a reference to "heightened scrutiny" in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 559-560, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011), which evaluated a law prohibiting the sale, disclosure, and use of certain pharmacy records for marketing purposes but allowed it for

others, did "not change the commercial speech analysis that should be applied here." *Seattle Events*, Slip Op. 13. As the Court of Appeals correctly noted, the U.S. Supreme Court held the commercial speech restrictions at issue were both content- and speaker-based, thus requiring a "heightened scrutiny." *Id.* (citing *Sorrell*, 564 U.S. at 565). But "[t]he 'heightened scrutiny' applied by the Court was the *Central Hudson* test." *Id.* (citing *Sorrell*, 564 U.S. at 572 ("the State must show at least that the statute *directly advances a substantial governmental interest and that the measure is drawn to achieve that interest*." (citing *Central Hudson*, 477 U.S. at 566)).

As the Ninth Circuit later clarified, "*Sorrell* did not modify the *Central Hudson* standard." *Retail Digital Networks, LLC v. Prieto*, 861 F.3d 839, 841 (9th Cir. 2017). Indeed, *Sorrell* was not the first time "the Court has referred to intermediate scrutiny as 'heightened' scrutiny"; rather the use of the term "heightened scrutiny" was merely intended "to distinguish from rational basis review." *Id.* at 847. Therefore, "*Sorrell* did not mark a

fundamental departure from *Central Hudson*'s four-factor test, and *Central Hudson* continues to apply." *Id.* at 846; *accord R.J. Reynolds Tobacco Co. v. FDA,* 696 F.3d 1205, 1226 n.4 (D.C. Cir. 2012) ("Notwithstanding any intimations it may have made in cases such as *Sorrell* v. *IMS Health Inc.,* . . . the Supreme Court has continued to apply the more deferential framework of *Central Hudson* to commercial speech restrictions."); *Vugo, Inc. v. City of New York*, 931 F.3d 42 (9th Cir. 2019); *Missouri Broadcasters Ass'n v. Lacy*, 846 F.3d 295, 300 n.5 (8th Cir. 2017); *Flying Dog Brewery, LLLP v. Michigan Liquor Control Comm'n*, 597 F. App'x 342, 365 (6th Cir. 2015).

Thus even when commercial speech regulations are characterized as content-based, it is still *Central Hudson*'s intermediate scrutiny that applies. *1-800-411-Pain Referral Service, LLC v.* Otto, 744 F.3d 1045, 1055 (8th Cir. 2014) ("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*."); *United States v.*

Caronia, 703 F.3d 149, 180 (2d Cir. 2012) (Livingston, J., dissenting) ("*Every* commercial speech case, by its very nature, involves both content- and speaker-based speech restrictions.").

Which makes Petitioners' argument that the cannabis advertising restrictions are content-based because they apply only to advertisements about cannabis, and not alcohol—requiring strict scrutiny review—off base. Importantly, Petitioners have never cited any authority holding that a State must impose the same advertising restrictions on one product as it does another.[8] And they ignore that courts have analyzed restrictions on alcohol advertising under *Central Hudson*, that apply only to alcohol. *E.g., Retail Digital Networks, LLC v. Prieto*, 861 F.3d 839, 841 (9th Cir. 2017); *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996).

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[8] The Sixth and Ninth Circuit cases that Petitioners cite in passing are inapplicable: both dealt with prohibitions on *modes* of communication, with exemptions for specific types of messages or speakers. Pet. at 30 (citing *International Outdoor, Inc. v. Troy*, 974 F.3d 690 (6th Cir. 2020); *Boyer v. Simi Valley*, 978 F.3d 618 (9th Cir. 2020)).

The Court of Appeals also properly rejected Petitioners' reliance on *City of Lakewood v. Willis*, 186 Wn.2d 210, 375 P.3d 1056 (2016), and *Reed v. Town of Gilbert*, 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). *Seattle Events*, Slip Op. 13. *City of Lakewood* involved an "anti-begging" ordinance, and *Reed* concerned restrictions for political, ideological, and temporary event signs. As the Court noted, "These cases did not concern restrictions on commercial speech specifically or include a commercial speech analysis and, therefore, are unpersuasive." *Id.* Importantly, 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 cases).

The Court of Appeals properly determined that intermediate scrutiny applies to Washington's commercial speech restrictions.

D. Washington's Restrictions on Cannabis Advertising are Constitutional Under *Central Hudson*

Commercial speech restrictions are permissible if they pass the four-part *Central Hudson* test: (1) the speech concerns a lawful activity and is not misleading; (2) the government's interest is substantial; (3) the restriction directly and materially serves the asserted interest; and (4) the restriction is necessary. *Mattress Outlet*, 153 Wn.2d at 512. The Court of Appeals properly held that the challenged advertising restrictions satisfy all of these requirements.[9] *Seattle Events*, Slip Op. 14-23.

There is no question that Washington has a substantial interest in protecting minors from the impacts of cannabis and

[9] The Court of Appeals found that cannabis advertising by Washington cannabis licensees concerned lawful activity and is protected under article I, section 5. *Seattle Events*, Slip Op. 15-16.

cannabis advertising. Petitioners concede as much. Appellants' Opening Br. 17; Pet. at 31-32 (not challenging this holding).

Petitioners appear to challenge only the Court's application of the third or fourth prongs of the test. *See* Pet. at 31-32 (reciting the third and fourth prongs only). Yet they merely list cases, without any argument or explanation of how those cases undermine the Court's holding, or even which prong of the commercial speech test they address. The Court should decline to consider this limited challenge, as the Court "will not address constitutional arguments which are not supported by adequate briefing." *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994).

But even if it does entertain the argument, the Court of Appeals properly evaluated the third and fourth prongs of *Central Hudson* and found they were met here.

1. The cannabis advertising restrictions directly advance Washington's substantial interest in protecting minors

In a single clause, without further analysis or argument, Petitioners imply that the Court of Appeals insufficiently examined the legislative record for evidence that the restrictions on cannabis advertising directly advanced Washington's substantial interest in protecting minors. Pet. at 31 (claiming the Court "wholly failed to examine the extent and sufficiency of the evidence for Washington's legislative findings. . . ."). Petitioners are not only incorrect, but misstate the Court's inquiry under *Central Hudson* and this Court's precedent.

The state does not have to demonstrate a specific quantum of "evidence" that might be found in a legislative record to support a restriction on commercial speech. *See Washington Off Highway Vehicle Alliance v. State*, 176 Wn.2d 225, 236, 290 P.3d 954 (2012) ("Traditionally, we give great deference to the legislature's factual findings."). Instead, the Court inquires whether, based on references to studies and anecdotes derived

from other jurisdictions and "history, consensus, and common sense," the restrictions directly advance the state's interest. *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995).

The Court of Appeals appropriately looked to the legislative history, the record, and findings about the impacts of advertising on minors in other contexts. *Seattle Events*, Slip Op. 18-19 (citing studies and legislative findings in the record concerning tobacco and alcohol advertising). In addition to the testimony supporting the restrictions, the Court relied on a 2015 study of youth exposure to advertising for medical marijuana, which showed that "'[g]reater initial medical marijuana advertising exposure was significantly associated with a higher probability of marijuana use and stronger intentions to use one year later.'" *Seattle Events*, Slip. Op. at 19 (quoting CP 257).

Further, as the Court of Appeals understood, "Common sense leads to the conclusion that minimizing marijuana advertising in areas where children congregate regularly would

decrease their exposure to that advertising." *Seattle Events*, Slip Op. 19. The restrictions on cannabis advertising directly and materially advance the state's interest in protecting children from cannabis, satisfying the third prong of *Central Hudson*.

2. Washington's advertising restrictions are not more extensive than necessary

Finally, while Petitioners quote the fourth prong of the *Central Hudson* test—which asks whether the restrictions are "not more extensive than necessary to serve the interests that support it"—they offer no argument about it. Pet. at 31. The Court should not entertain the challenge. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990) ("Without adequate, cogent argument and briefing, this court should not consider an issue on appeal.").

If Petitioners' purpose in citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 563, 121 S. Ct. 2404 (2001), is to suggest that the Court of Appeals inadequately evaluated whether the restrictions on cannabis advertising demonstrated a "reasonable fit" between the legislature's ends and the means chosen to

accomplish those ends, that is not so. *Seattle Events*, Slip Op. 20-24. The Court of Appeals properly determined that Washington's restrictions are not more excessive than necessary.

A statute generally must be "substantially excessive" to be invalidated. *Mattress Outlet*, 153 Wn.2d at 526-27. But Washington's regulations do not impose nearly the same barriers to advertising as Massachusetts's tobacco regulations did in *Lorillard*. *Seattle Events*, Slip Op. 22-23. Instead, they "leave ample opportunities for licensed marijuana business to market their products to those who are of legal age to purchase them, without infringing on the free speech rights of business owners," and only prohibit advertising in "areas where one can reasonably assume that children congregate," while permitting "advertising, even at the [restricted] locations, as long as the location is being used for an adults-only event." *Id*. And "no matter where a marijuana store is located, the challenged restrictions ensure that the business has two signs to advertise its name, location, and the nature of the business." *Id.* Thus even if the Court considers the

issue, the Court of Appeals correctly concluded that the restrictions are not more extensive than necessary and, therefore, "satisfy the fourth and final step of the *Central Hudson* analysis." *Id.* at 24.

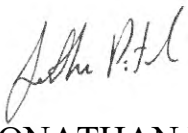
V. CONCLUSION

This Court should deny the Petition for Review.

I certify that this document contains 4996 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 24th day of October, 2022.

ROBERT W. FERGUSON
Attorney General



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PROOF OF SERVICE

I, Dalberta B Faletogo, certify that I caused to be served a copy of **ANSWER TO PETITION FOR REVIEW** on all parties on their counsel of record on the date below as follows:

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SUPREME COURT, STATE OF WASHINGTON
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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 24th day of October 2022, in Olympia, Washington.

DALBERTA FALETOGO, Legal Assistant

AGO/LICENSING AND ADMINISTRATIVE LAW DIV

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