No. 1011156

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SEATTLE EVENTS, a Washington Nonprofit Corporation, et al.,

Petitioners,

v.

STATE OF WASHINGTON, et al.,

Petitioner.

MEMORANDUM OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF PETITION FOR REVIEW

Suranjan Sen
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
(703) 682-9320

William R. Maurer
WSBA No. 25451
INSTITUTE FOR JUSTICE
600 University St., Suite 1730
Seattle, WA 98101
(206) 957-1300

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Cases

Constitutional Provisions

IDENTITY AND INTEREST OF AMICUS

The Institute for Justice (the "Institute") is a non-profit public interest law firm that defends the essential foundations of a free society in courts throughout the United States. As part of that mission, the Institute litigates cases nationwide to defend the free exchange of ideas, including successfully representing the Petitioners in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 131 S. Ct. 2806, 2808 (2011). The Institute has offices in Seattle, litigates cases in Washington courts under the Washington Constitution, and represents plaintiffs in cases involving speech about commercial goods and services. *See, e.g., Ballen v. City of Redmond*, 466 F.3d 736 (9th Cir. 2006) (challenge to municipal restriction on hand-held commercial signs). Because this case touches on all these efforts, it is extremely important to the Institute.

ISSUE OF CONCERN TO AMICUS

Should this Court accept review to clarify and update how Washington courts analyze laws restricting commercial speech?

STATEMENT OF THE CASE

The Institute adopts the Statement of the Case set out in Petitioners' Petition for Review (the "Petition").

ARGUMENT

Petitioners have persuasively argued that this Court should accept review. The Institute submits this memorandum to elaborate on why review is especially crucial here: the need for this Court to clarify and update the standards by which Washington courts examine restrictions on commercial speech under the Washington Constitution. Review is necessary because of this Court's decision in *National Federation of Retired Persons v. Insurance Commissioner*, 120 Wn.2d 101, 838 P.2d 680 (1992), in which this Court held that it would examine challenges to laws restricting commercial speech using the intermediate standard employed by federal courts, specifically

the four-part test set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). However, *National Federation* does not provide a persuasive explanation of why the *Central Hudson* test is appropriate for claims under the article I, § 5 of the Washington Constitution, which guarantees the right of Washingtonians to "freely speak, write and publish on all subjects." Wash. Const. art. I, § 5. The result is that Washington courts, like the court below, must apply a precedent that is both poorly reasoned and permits broad restrictions on speech.

Review is also appropriate because, even if *National Federation* is right, the restrictions here do not simply treat commercial speech worse than noncommercial speech. They discriminate among distinct types of commercial speech based on content. Thus, even if courts should use *Central Hudson* to analyze commercial speech restrictions under article I, § 5, that says nothing about whether it is appropriate to use when analyzing content-based restrictions among commercial speech.

Because the U.S. Supreme Court has held since *National Federation* that courts must use strict scrutiny to analyze content-based restrictions, *National Federation*'s conclusion that courts should apply intermediate scrutiny to all commercial speech restrictions no longer reflects current federal law.

In short, *National Federation* allows the government to broadly restrict commercial speech while no longer accurately reflecting federal law. This Court should accept review to clarify and update this Court's commercial speech jurisprudence.

1. This Court Should Grant Review and Reexamine Its Decision in *National Federation*.

The Petition argues persuasively that "[r]eview should be granted to finally resolve whether Washington's constitution affords greater protection for non-deceptive commercial speech . . ." Petition 14. The Petition correctly notes that no court has conducted a *Gunwall*[1] analysis to the issue of whether article I, § 5 provides greater protections to commercial speech than the

[1] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

First Amendment. Petition 19-28. There are more reasons to reexamine *National Federation*'s conclusion that article I, § 5 and the First Amendment provide identical protections to commercial speech, however.

First, *National Federation* presumed that the Washington Constitution operates the same way as its federal counterpart. This Court has recognized, however, that "there is no presumption that the minimum degree of protection established by the federal constitution is the degree of protection to be afforded under the Washington Constitution." *State v. Reece*, 110 Wn.2d 766, 780, 757 P.2d 947 (1988). Yet *National Federation* did just that—by choosing to follow federal precedents solely because "Washington case law provides no clear rule for constitutional restrictions on commercial speech." *Nat'l Fed'n*, 120 Wn.2d at 119.

Second, *National Federation*'s holding is a non-sequitur: *National Federation* held that the lack of any "clear rule" laid down by Washington courts regarding commercial speech means

the government may impose restrictions on speech that contains a commercial element. That conclusion does not follow. There must be a first time for the court to examine an issue. The fact that there is no precedent on it should not dictate an outcome—the result should be the opposite.

Third, the analytical method used in *National Federation* is inconsistent with *Reece*, which asked whether the Washington Constitution "afford[s] greater protection to obscenity" compared with its federal counterpart. 110 Wn.2d at 776. In answering that question in the negative, this Court performed an extensive analysis—addressing all six *Gunwall* factors. *Id*. at 775–81. This Court observed "that obscenity was criminalized [under Washington state law] both immediately prior to and after the ratification of the state constitution," without objection. *Reece*, 110 Wn.2d at 779. This Court concluded that, although "the concept of free speech is interpreted more broadly under the state constitution than under the federal constitution," those protections do not extend to obscenity. *Id*. at 778.

National Federation did not do this. It gave no reason why "commercial speech" should be subject to less constitutional protection except a single quote from a United States Supreme Court concurrence that said, "the constitution allows greater regulation of commercial speech than of noncommercial speech because of a State's interest in protecting the public from those seeking to obtain its money." *Nat'l Fed'n*, 120 Wn.2d at 114 (citing *Thomas v. Collins*, 323 U.S. 516, 544–45, 65 S. Ct. 315, 319–20, 89 L. Ed. 2d 430 (1944) (Jackson, J., concurring)). But paternalism is not a good reason to restrict non-deceptive, non-obscene speech about goods and services. It is also unclear why that interest should be greater than any other protective interest in the face of Washington's facially expansive speech protections. In any event, that rationale cannot justify the restrictions being challenged in this case, which categorically ban the transmission of true information in certain locations.

"[T]he fundamental purpose of our state's constitution . . . [is] to protect and maintain individual rights." *Griffin v. Eller*,

130 Wn.2d 58, 65, 922 P.2d 788 (1996). 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.[2] This Court should grant review to rectify that situation.[3]

---

[2] Subsequent cases have not provided any explanation for Washington's disparate treatment of commercial speech from other kinds of speech, either because they held that the commercial speech restriction at issue failed the federal test (*Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 511 n.1, 24, 104 P.3d 1280 (2005)), or because they were bound by *National Federation* (*State v. Living Essentials, LLC*, 8 Wn. App. 2d 1, 436 P.3d 857 (2018)).

[3] Petitioners do not argue that this Court should overturn *National Federation*, as it involved a deceptive or unlawful practice. That is correct. Regardless, the case does not provide a sufficient foundation for this Court's commercial speech jurisprudence. Whether this Court remedies that by overturning, limiting, or clarifying the decision can be addressed on the merits. At this stage, it is sufficient to say that *National Federation*'s deficiencies are so significant that this Court should review its continued precedential value.

2. Even if *National Federation* Is Correct, Strict Scrutiny Applies Because the Restrictions Here Are Based on Content.

The relevant portion of *National Federation* can be reduced to a simple formula: Washington applies federal law and under federal law, all commercial speech restrictions get intermediate scrutiny. That is no longer accurate, however. Under current federal law, content-based restrictions on speech—even among several types of commercial communications—get strict scrutiny. To still apply *National Federation* on this point—as the court below did—would mean that content-based restrictions of speech are permissible under the Washington Constitution, but not the U.S. Constitution. Given that our constitution is worded far more broadly than the federal, this cannot be the correct result.

Of course, the disparate treatment of commercial and noncommercial speech is based on the content of the communication, and laws that treat commercial speech and noncommercial speech differently "target speech based on its

communicative content" and should be considered "presumptively unconstitutional and may be justified only if 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). This approach is now firmly established in federal precedent. *See, e.g.*, *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2346, 207 L. Ed. 2d 784 (2020) (plurality opinion) ("Content-based laws are subject to strict scrutiny."); *Nat'l Inst. of Fam. & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371, 201 L. Ed. 2d 835 (2018) ("[C]ontent-based regulations of speech are subject to strict scrutiny.").

Despite these holdings, federal courts still apply intermediate scrutiny to commercial speech restrictions. *See Aptive Env't, LLC v. Town of Castle Rock,* 959 F.3d 961, 986 (10th Cir. 2020) (applying *Central Hudson* to a regulation that distinguished between commercial and noncommercial solicitations); *Lone Star Sec. & Video, Inc. v. City of Los Angeles*,

827 F.3d 1192, 1198 n.3 (9th Cir. 2016) ("[A]though laws that restrict only commercial speech are content-based, such restrictions need only withstand intermediate scrutiny." (cleaned up)). This Court need not decide whether this approach is correct, however, because the restrictions here do more than just distinguish between commercial and noncommercial speech. They treat speech differently based on what product the speaker wishes to sell. *See* Petition 3-4 (noting the different treatment of alcohol and cannabis advertisements). As such, even though the laws deal with commercial speech, they are still impermissibly content based and therefore subject to strict scrutiny.

This was the conclusion of the Sixth Circuit in *International Outdoor, Inc. v. City of Troy*, 974 F.3d 690, 703 (6th Cir. 2020). There the court applied to strict scrutiny to a billboard regulation that distinguished among several types of commercial speech and concluded that "the intermediate-scrutiny standard applicable to commercial speech under *Central Hudson* applies only to a speech regulation that is content-neutral

on its face. That is, a regulation of commercial speech that is not content-neutral is still subject to strict scrutiny under *Reed*." *Id*. (cleaned up).

Thus, even if the Washington Constitution does provide less protection to commercial speech than to other kinds of speech, that conclusion does not resolve this case. The State's restrictions (and justifications) are triggered not only by a message's "commercial" character but also its subject matter—cannabis. It is thus a content-based restriction that burdens some commercial speech but not others. Even if the government may distinguish between commercial and noncommercial speech, it does not follow that government may distinguish among kinds of commercial speech based on its subject matter. That is, "[c]ommercial speech is no exception" to the rule that, whenever government "impose[s] a specific, content-based burden on protected expression[,] [i]t follows that heightened judicial scrutiny is warranted." *Sorrell v. IMS Health Inc.*, 564 U.S. 552,

565–66, 65 S. Ct. 315, 89 L. Ed. 2d 544 (2011). *See also Barr*, 140 S. Ct. at 2347.

This conclusion fits with this Court's holdings. When evaluating a facial challenge to an ordinance that prohibited "solicitation with a particular purpose: obtaining money or goods as a charity," this Court employed strict scrutiny. *City of Lakewood v. Willis*, 186 Wn.2d 210, 225, 375 P.3d 1056 (2016) (quotation marks omitted). The reason was that the law in question was content based, as distinguished from, say, "laws restrict[ing] solicitation of *any* kind." *Id*. Thus, this Court stated that the government "cannot impose restrictions based on content" without satisfying strict scrutiny. *Id*. at 224.

The panel below dismissed *Willis* as inapplicable because it "did not concern restrictions on commercial speech specifically or include a commercial speech analysis." Panel Op. 13, 2022 WL 2312043 ¶ 27. Yet *Willis* involved efforts to "obtain money" from the public, which was the sole reason that this Court provided to limit commercial speech protections. *Nat'l Fed'n*,

120 Wn.2d at 114. *Willis* did not perform a "commercial speech analysis" because it held that *all* laws must pass strict scrutiny before they may "impose content-based restrictions on speech." *Willis*, 186 Wn.2d at 224, and quoted *Sorrell*—itself a commercial speech case. *Id*. at 225.

The panel below erred in finding that *National Federation* requires the application of intermediate scrutiny to this case. *See* Panel Op. 10, 2022 WL 2312043 ¶¶ 19–21. If the panel decision stands, it will mean that the Washington Constitution provides *less* protection to speech than does the federal constitution. This Court should grant review to prevent that perverse outcome.

Conclusion

This Court should accept review and reverse the Court of Appeals.

Dated: October 7, 2022 Respectfully submitted,

By: William R. Maurer

William R. Maurer
WSBA No. 25451
INSTITUTE FOR JUSTICE
600 University St., Suite 1730
Seattle, WA 98101
(206) 957-1300
wmaurer@ij.org

Suranjan Sen
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
(703) 682-9320
ssen@ij.org

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This document contains 2221 words excluding the parts of the document exempted from the word count by RAP 18.17(b).

Respectfully submitted October 7, 2022.

s/William R. Maurer
William R. Maurer
WSBA No. 25451

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2022, the foregoing MEMORANDUM OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF PETITION FOR REVIEW was filed through the Court's electronic filing system, which will cause a copy to be served on all parties of record.

s/ William R. Maurer
William R. Maurer
(WSBA No. 25451)

INSTITUTE FOR JUSTICE

October 07, 2022 - 5:01 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,115-6
Appellate Court Case Title:	Seattle Events, et al. v. State of Washington, et al.
Superior Court Case Number:	19-2-02827-8

The following documents have been uploaded:

- 1011156_Briefs_20221007165657SC915712_5481.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Seattle Events v. State - Amicus memorandum.pdf
- 1011156_Motion_20221007165657SC915712_2237.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Seattle Events v. State - Motion for Leave to File Amicus Memo.pdf

A copy of the uploaded files will be sent to:

- LalOlyEF@atg.wa.gov
- cynthiagrill@comcast.net
- douglas@douglashiatt.net
- fred@freddiamondstone.com
- geoffrey.allen@seattle.gov
- jonathan.pitel@atg.wa.gov
- lalseaef@atg.wa.gov
- leah.harris@atg.wa.gov
- ssen@ij.org

Comments:

Motion to File and Memorandum of Amicus Curiae

Sender Name: Hilary Loya - Email: hloya@ij.org
Filing on Behalf of: William R. Maurer - Email: wmaurer@ij.org (Alternate Email: hloya@ij.org)

Note: The Filing Id is 20221007165657SC915712