No. 22-175

In The
Supreme Court of the United States

STEVEN M. RECHT, ALESHA BAILEY,
AND STEPHEN P. NEW,

Petitioners,

v.

PATRICK MORRISEY, in his Official Capacity as Attorney General of the State of West Virginia,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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Question Presented

West Virginia enacted a statute that restricts commercial speech in lawyer advertisements seeking personal injury clients in medical device or drug cases and also requires certain specifically-worded disclaimers. Lawyers Steven M. Recht and Stephen P. New, and consumer of legal services Alesha Bailey, sued, arguing that the statute unconstitutionally infringed the lawyers' First Amendment right to make truthful statements in advertisements. The district court applied strict scrutiny and held the law unconstitutional. The Fourth Circuit reversed, holding that the law is entitled to no more than intermediate scrutiny under *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980), and that the law failed that scrutiny. It also upheld the mandated disclosures as justified on "health and safety" grounds. In *Reed v. Town of Gilbert, Ariz.*, 1576 U.S. 155, 165 (2015), this Court established the following categorical rule for speech regulations: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."

The question presented is whether this categorical rule applies to commercial speech.

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Interest of Amicus Curiae

Pacific Legal Foundation litigates matters affecting the public interest at all levels of state and federal courts.[1] PLF represents entrepreneur clients who rely on commercial communications to build their businesses and livelihood and to educate the public about matters within their expertise. In furtherance of PLF's continuing mission to defend individual and economic liberty, the Foundation has participated in several cases before this Court on matters affecting the public interest, including issues related to the First Amendment and commercial speech. *See, e.g.*, *City of Austin, Texas v. Reagan National Advertising of Austin, LLC*, 142 S.Ct. 1464 (2022); *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015); *Spirit Airlines, Inc. v. Dep't of Transp.*, 569 U.S. 903 (2013); *and Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

PLF represents entrepreneurs whose livelihoods depend on their ability to communicate with potential clients and the general public. These include:

- Peggy Fontenot, a Native American artist who challenged state laws that forbade her advertisement as a Native American because

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

her tribe is recognized by a state rather than the federal government;

- Adam Kissel, an independent fundraiser for free-market nonprofit clients, who challenged a state law that required him to submit all communications for state review and approval prior to speaking to potential donors;
- Debbie Pulley, a veteran midwife and activist, who was subjected to a state law forbidding her from describing herself as a midwife in her lobbying efforts without the state's permission; and
- Geoff Tracy, a chef and restauranteur who challenged a state law prohibiting the advertisement of "Happy Hour," which he sought to promote via his Twitter account.

With its experience representing these and other entrepreneurs, PLF believes that the fractured First Amendment doctrine—which carves out commercial speech for lesser protection—lacks a principled foundation. Commercial enterprises depend on communication to draw clients and expand their business and should be entitled to full First Amendment protection for their truthful expression.

Introduction and Summary of Reasons for Granting the Petition

The Prevention of Deceptive Lawsuit Advertising and Solicitation Practices Regarding the Use of Medication Act, W. Va. Code § 47-28-1, *et seq*., regulates legal advertisements and solicitation by lawyers seeking potential clients in cases involving alleged harms caused by pharmaceuticals or medical devices. The Act prohibits use of the word "recall"

unless the recall was ordered by a government agency or was the product of an agreement between the manufacturer and a government agency. *Id.* § 47-28-3(a)(4). It also prohibits legal advertisements from using the phrases "'consumer medical alert', 'health alert', 'consumer alert', 'public service health announcement', or substantially similar phrase suggesting to a reasonable recipient that the advertisement is offering professional, medical, or government agency advice about pharmaceuticals or medical devices rather than legal services" and prohibits "display[ing] the logo of a federal or state government agency in a manner that suggests affiliation with the sponsorship of that agency." *Id.* § 47-28-3(a)(2)–(3).

The Act pairs these prohibitions with mandated disclosures and disclaimers. Petitioners challenge the mandates requiring them to include the following in their communications: "Do not stop taking a prescribed medication without first consulting with your doctor. Discontinuing a prescribed medication without your doctor's advice can result in injury or death," regardless of whether the "legal advertisement solicits clients for legal services in connection with a prescription drug or medical device approved by the U.S. Food and Drug Administration"; and a disclaimer that "the subject of the legal advertisement remains approved by the U.S. Food and Drug Administration, unless the product has been recalled or withdrawn." *Id.* § 47-28-3(a)(1), (5), (6); § 47-28-3(b)(1). Violations are deemed unfair or deceptive acts or practices, *id.* § 47-28-3, and are subject to an enforcement action brought by the Attorney General under West Virginia's privacy laws

or Consumer Credit and Protection Act, or as a misdemeanor. *Id.* § 46A-7-104; § 47-28-4(b)(1), (2).

Petitioners are two personal injury attorneys whose existing marketing for clients and planned advertising would violate different portions of the Act's restrictions and requirements, and one consumer of legal services who received valuable information related to a medication-related injury through legal advertising. The Fourth Circuit below rejected their claims. It afforded great deference to the state's interest in "safeguard[ing] the health and safety of its citizens." App. 3. The court applied the four-part *Central Hudson* test that "accords lesser protection to commercial speech," which has "subsidiary status." App. 10; *see Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). *Central Hudson* held that restrictions on commercial speech must satisfy intermediate scrutiny. *Reed*, however, held that a law is subject to strict judicial scrutiny if "'on its face' [the law] draws distinctions based on the message a speaker conveys." 576 U.S. at 164.[2] Even though the West Virginia law does exactly that, the Fourth Circuit eschewed strict scrutiny in favor of the more lenient analysis of *Central Hudson*. App. 14, *et seq*. The court correctly noted, however, that lower courts believe themselves

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[2] *City of Austin* didn't change this. Petitioners in that case did not challenge the validity of *Central Hudson* after *Reed*, *City of Austin*, 142 S.Ct. at 1474, and the Court therefore continued its treatment of commercial speech as requiring intermediate scrutiny. *Id.* at 1476. *See also id.* at 1480 (Alito, J., concurring in the judgment in part and dissenting in part) ("[U]nder our precedents, regulations of commercial speech are analyzed differently.") (citing S*orrell v. IMS Health Inc.*, 564 U.S. 552, 571–72 (2011)).

bound to apply strict scrutiny to commercial speech until this Court explicitly overrules *Central Hudson*. App. 11.

This Court should dispense with *Central Hudson*'s vision of a bifurcated First Amendment and treat commercial speech as equal to other forms of expression. There is no meaningful distinction that would make *Reed*'s reasoning any less applicable to commercial speech. Even if the Court declines to overrule *Central Hudson*, the Court should grant certiorari to ensure that lower courts follow *Reed* and apply strict scrutiny to content-based restrictions on commercial speech.

Free speech is at the root of our most basic human and social needs, including our economic dealings. Entrepreneurs and many service professionals make their livelihood through creative activity and trade, both of which are directly related to the First Amendment. And everyone depends on commercial messages—advertisements, solicitations, and descriptions of products and services—to improve their economic well-being in one way or another. This brief presents examples of legal battles fought by PLF's entrepreneur clients to demonstrate the importance of commercial communication to build a business and livelihood and to educate the public about matters within the entrepreneurs' expertise.

Finally, the Fourth Circuit decision heavily emphasizes the state's fears that "medically unsophisticated" consumers of medical devices and drugs will make decisions to harm their own health based on lawyer advertising. App. 15–16. The First Amendment does not incorporate the "precautionary principle" that would allow the government to compel

corporate speech based solely on a possibility that someone might react to truthful speech in a way that causes harm.

For these reasons, the Petition should be granted.

Reasons for Granting the Petition

I. *Reed*'s Logic Applies to Commercial Speech

The temporary directional sign in *Reed* pointed to a church service rather than to a commercial enterprise such as a farmer's market. Because the church's sign did not implicate commercial speech, this Court did not opine on it. The resulting combination of *Reed*'s requirement of strict scrutiny for content-based speech restrictions and *Central Hudson*'s flexible multi-factor test under an intermediate level of scrutiny[3] creates a fractured First Amendment doctrine that lacks a principled foundation.

In *Reed*, this Court warned of "the danger of censorship presented by a facially content-based statute," since government officials may "wield such statutes to suppress disfavored speech." 576 U.S. at 167. *See also Barr v. Am. Ass'n of Political Consultants*, 140 S.Ct. 2335, 2346 (2020) (citing *Reed* for the flat statement that "[c]ontent-based laws are subject to strict scrutiny" without adding qualifiers as to the type of speech); *id.* at 2364 (Gorsuch & Thomas, JJ., concurring) ("The statute is content-based because it allows speech on a subject the government

[3] *Central Hudson*, 447 U.S. at 566; *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) ("we engage in 'intermediate' scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in" *Central Hudson*).

favors (collecting its debts) while banning speech on other disfavored subjects (including political matters).”). *Reed* explained that even seemingly innocuous distinctions drawn by the sign code could be used by “a Sign Code compliance manager who disliked [a] Church’s substantive teachings . . . to make it more difficult for the Church to inform the public of the location of its services.” 576 U.S. at 167–68.

Precisely the same concerns are present in the commercial context, as illustrated here. Some content-based commercial speech restrictions may be subject to strict scrutiny when the government prevents the public from receiving truthful information by quieting truthful speech with a particular viewpoint that it fears might persuade. *See Sorrell*, 564 U.S. at 563–64; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 523 (1996) (Thomas, J., concurring in part). Further, where a regulation draws content-based distinctions purely as a line-drawing mechanism, *Reed* reached the reasonable conclusion that content-based distinctions are the last place a municipality should turn, not the first. 576 U.S. at 163. *Reed*’s principle placing content-based discrimination as a last resort is no less powerful when the speech at issue is commercial.

The principle of free speech does not admit exceptions for controversial speech, including commercial speech that some regard as having little value. *See United States v. Alvarez*, 567 U.S. 709, 750 (2012) (Alito, J., dissenting) (noting that the Court has found it necessary to protect false statements of fact

in order to prevent chilling fully protected speech).[4] There is no carve-out of the First Amendment's protection for professional speech because "the dangers associated with content-based regulations of speech are also present in the context of professional speech" and professional speech is "a difficult category to define with precision." *Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371–72, 2374–75 (2018). So, too, do restrictions on commercial speech present dangers of favoritism and overall diminishment of information and so, too, is the category difficult to define.[5] Although commercial speech has been treated differently—and badly—in some of this Court's rulings, modern First Amendment doctrine should place it on an equal footing with other protected speech. Only this Court's review can resolve the conflict between *Reed* and *Central Hudson*.

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[4] *Cf. Parents Involved in Comm. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

[5] Speech is often made with more than one motivation, making such categorizations near impossible. *See Cohen v. California*, 403 U.S. 15, 26 (1971) ("[M]uch linguistic expression serves a dual communicative function."); Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205, 1207 (2004) ("With greater frequency and subtlety, new technologies and innovative marketing strategies introduce corporate profit-motive into what otherwise would be fully-protected speech. The current commercial speech doctrine cannot predictably resolve disputes resulting from these new modes of expression.").

II. Economic Opportunity Often Depends on Entrepreneurs' Ability to Find Clients by Advertising Their Expertise

The Fourth Circuit was none too pleased by the Petitioners' speech in this case. It chastised the district court for not affording greater deference to the state's interests, which the appellate court said "lies right at the heart of West Virginia's police power" and the state's "premier duty . . . to safeguard the health and safety of its citizens." App. 3. Even the U.S. Chamber of Commerce sided with the state, viewing Petitioners as unworthy because their speech seeks clients to challenge higher-stature pharmaceutical companies. Whatever one's views of personal injury lawyers' advertising,[6] the constitutional doctrines affected by this case affect a wide range of entrepreneurs whose livelihoods depend on their ability to communicate with potential clients and the general public. *See Dana's R.R. Supply v. Attorney Gen.*, 807 F.3d 1235, 1246–48 (11th Cir. 2015) (Florida's "no-surcharge law is more than a mere regulation of commercial speech[:]" "By effectively purging from merchants' vocabularies the doubleplusungood surcharge and replacing it with the State's preferred term, *discount*, the constituency most impacted by the no-surcharge law has been deprived of its full rhetorical toolkit.").

Examples include several entrepreneurs represented by amicus Pacific Legal Foundation attorneys:

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[6] *Bates v. State Bar of Arizona*, 433 U.S. 350, 368–79 (1977), considered and rejected multiple policy objections to attorney advertising.

Peggy Fontenot is an award-winning American Indian photographer and artist, specializing in hand-made beaded jewelry and cultural items. A member of Virginia's Patawomeck tribe, she has made her living for 30 years traveling the country to show and sell her American Indian art. She regularly participated in Oklahoma art festivals until the state passed a law restricting the definition of "Indian tribe" to include only those tribes recognized by the federal government, claiming it was necessary to prevent the marketing and sale of art fraudulently described as "American Indian-made." However, as a result of this law, Ms. Fontenot—a legitimate member of a state-recognized tribe—could be penalized if she truthfully described her art as "American Indian-made" in the state of Oklahoma.

Instead of forthrightly describing her heritage as a member of the Patawomeck tribe, she could describe her art only generically, omitting material facts about her identity and the culturally-derived style of her art. Aside from the legal penalties she would incur by speaking truthfully, Ms. Fontenot was effectively precluded from participation in the Oklahoma American Indian art market. She was not alone: two-thirds of the categories of American Indian artists are unwelcome in Oklahoma because their tribes are not among those that are federally recognized. She sued and successfully invalidated the law.[7]

Adam Kissel combined his expertise in the field of higher education, his philosophical preference for

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[7] Although Ms. Fontenot alleged violation of her First Amendment rights, the district court ruled on preemption grounds and invalidated the law under the Supremacy Clause. *Fontenot v. Hunter*, 378 F.Supp.3d 1075, 1099 (W.D. Okla. 2019).

freedom and limited government, and a knack for fundraising and philanthropy to build a business that assists charitable organizations with their fundraising efforts. Mr. Kissel wanted to reach out to potential donors on behalf of a Connecticut-based nonprofit focused on civic education, the Jack Miller Center. However, his work stalled before it even got started due to state registration and reporting requirements for paid solicitors.

Connecticut required Mr. Kissel to provide, among other things, copies of scripts or promotional materials three weeks before the start of a fundraising campaign, and to report to the government the names of all donors. These laws effectively killed Connecticut fundraisers' ability to engage in timely, topical, and spontaneous speech, as well as donors' ability to give anonymously. Mr. Kissel sued to defend fundraisers' protection against prior restraint by the government and donors' right to give anonymously. The judge granted his motion for preliminary injunction,[8] which was made permanent when Connecticut agreed to stop enforcing the laws.

Debbie Pulley began attending births in 1970 as a nursing assistant at a Hong Kong Hospital. Later, as a midwife in Georgia, she helped establish the Georgia Midwifery Association, which worked closely with the state's health department to establish and enforce standards of care for midwives—contributions so significant that she received a certificate of honor from the Georgia Secretary of State. The North American Registry of Midwives certified her as a Certified Professional Midwife (CPM) in 1995, which

[8] *Kissel v. Seagull*, 552 F.Supp.3d 277, 297–98 (D. Conn. 2021).

serves as the prerequisite for licensure as a midwife in 35 states. She also serves on the Registry's board, actively advocates for expanded access to midwifery in legislatures and to the public, and runs the office for Atlanta Birth Care.

Although Ms. Pulley is a qualified midwife by any normal definition, she is not allowed to publicly—and honestly—call herself a midwife or CPM in the state of Georgia. In 2015, the Georgia Board of Nursing took over midwifery regulation from the state health department and began requiring midwives to get a nursing degree in order to practice independently. In June 2019, the Board of Nursing sent Ms. Pulley a cease and desist letter forbidding her to identify herself as a "midwife" in any form, and it threatened her with a $500 fine for each violation. Though she retired from active midwifery, Ms. Pulley wants to truthfully describe her qualifications on her website and in her advocacy work—just as doctors and lawyers do when they are not actively practicing their professions.[9]

After Ms. Pulley sued, the state backed down. Under a consent decree, the state will pursue "unlicensed practice of nursing" only in cases where unlicensed individuals are actively practicing or holding themselves out as able to practice in Georgia. Moreover, the state agreed it will not pursue cease and desist actions against unlicensed individuals describing themselves as midwives so long as they are

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[9] *See* Tex. Ethics Comm'n, *Whether a Retired Judge Who Hears Cases by Assignment May Use the Title "Judge" in Political Advertising or Campaign Communications*, Ethics Advisory Op. No. 33, 1996 WL 65052 (Feb. 9, 1996) (answering the question, "yes").

not unlawfully engaged in the actual practice of midwifery.[10]

Geoff Tracy is an entrepreneur, cookbook author, and owner of restaurants in the Washington, D.C., area. Top in his class at the Culinary Institute of America, Mr. Tracy's numerous awards include The Best Neighbor Award (for contributions to the community) and Washingtonian Magazine's "Best Local Chef." "Chef Geoff" advertises his restaurants' happy hour specials on his website and on menus displayed outside of his restaurant. These ads show the specials and prices of beers, wine by the glass, and cocktails. They also advertise "Wine Down Wednesday," a weekly offering in which patrons can enjoy a bottle of wine for half price. On "Margarita Thursday" Chef Geoff's offers $5 margaritas. But because they include actual prices and puns rather than the generic "Happy Hour," the ads violated Virginia's advertising restrictions.

The state allows happy hour specials, but banned advertising of happy hour prices, and censored any descriptive terms other than "happy hour" or "drink specials." While restaurants could offer half-priced drinks, it was illegal to call these specials "two-for-one." The state imposed fines and other penalties for violations. Mr. Tracy sued to vindicate his First Amendment right to talk freely and truthfully about his restaurants' happy hours—including prices and creative terminology. After a nearly year-long legal battle, the state changed its law to permit happy hour

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[10] *Pulley v. Thompson*, No. 1:19-cv-05574-AT, Dkt. 31, *Consent Decree and Final Order* (N.D. Ga. July 8, 2020), https://pacificlegal.org/wp-content/uploads/2019/12/Pulley-v.-Thompson-Consent-Order-Final-Judgment.pdf.

advertising, restoring the free speech rights of its citizens.

These entrepreneurs prevailed, but most don't have the resources to fight for their rights. The truth is that for many people, seemingly mundane communications about products, services, prices, and economic opportunities are as important to them in their daily lives as the most contentious or momentous political debates. The free exchange of ideas and information is vital for human progress in both our intellectual and material lives. *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

III. The Court Should Grant Certiorari to Confirm That the "Precautionary Principle" Has No Place in First Amendment Law

The precautionary principle is antithetical to First Amendment doctrine. *See Shurtleff v. City of Boston, Mass.*, 142 S.Ct. 1583, 1593 (2022). Indeed, "much of American free speech doctrine can be seen as a rejection of the precautionary principle." Frederick Schauer, *Free Speech in an Era of Terrorism: Is It Better to Be Safe Than Sorry?: Free Speech and the Precautionary Principle*, 36 Pepp. L. Rev. 301, 304 (2009). The principle extends far beyond mandated disclosures: the idea is that "having identified the possibility of a catastrophic occurrence—whether it be nuclear disaster, environmental upheaval, or the loss of many important species—under conditions of uncertainty, we should err on the side of eliminating those conditions that might possibly produce the catastrophe." *Id.* at 305. Likewise, in the free speech context, if "we define the catastrophe as the overthrow

of the government or a major terrorist attack, a commensurate precautionary principle would demand that we vigilantly restrict speech in the service of guarding against the catastrophe." *Id.* The problem with this idea is that "[a]ctual free speech doctrine, however, demands just the reverse. It requires us to accept the uncertain risk of a catastrophe rather than restrict the speech that might cause it." *Id.* As this Court explained in *United States v. Stevens*, 559 U.S. 460, 470 (2010), the First Amendment guarantee of free speech transcends any "ad hoc balancing of relative social costs and benefits" by establishing the default ground rule that the benefits of free speech outweigh any speculative social costs advanced to restrict it.

Thus, it is not permissible for government to compel speech to counteract an uncertain risk of harm. "The mere existence of [a] risk, however, is not necessarily enough to justify a warning." *Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal.4th 910, 934 (2004). Although *Dowhal* arose in a different context, its insights are instructive. In *Dowhal*, the court noted that even a literally truthful warning can be misleading. *Id.* at 931 (citing, among others, *United States v. Ninety-Five Barrels of Vinegar*, 265 U.S. 438, 444 (1924) (deception "may result from the use of statements not technically false or which may be literally true")). The court explained that whether a label is potentially misleading "is essentially a judgment of how the consumer will respond to the language of the label." *Dowhal*, 32 Cal.4th at 934. Even "a truthful warning of an uncertain or remote danger may mislead the consumer into misjudging the dangers stemming from use of the product and consequently making a

medically unwise decision." *Id*. Thus, "[a]lthough there is reason to believe that nicotine [contained in defendant's gum and patches designed to help consumers quit smoking] can cause reproductive harm, plaintiff has offered no qualitative assessment of this risk" and hence the

> mere existence of the risk . . . is not necessarily enough to justify a warning; the risk of harm may be so remote that it is outweighed by the greater risk that a warning will scare consumers into foregoing use of a product that in most cases will be to their benefit.

Id. Therefore, "even if scientific evidence supports the existence of a risk, a warning is not necessarily appropriate: 'The problems of overwarning are exacerbated if warnings must be given even as to very remote risks.'" *Id*. at 932 (citation omitted).

Dowhal's insights are relevant where, as here, the risk of harm is outweighed by the greater risk that a warning will scare consumers into foregoing potential legal action. The precautionary principle is incompatible with general First Amendment doctrine that requires citizens and legislatures to accept uncertain risks of harm rather than place restrictions on speech. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("If the First Amendment means anything, it means that regulating speech must be a last—not first—resort.").

Moreover, requiring unnecessary warnings leads to consumer frustration and confusion rather than added safety. Over-warning risks decreasing the effectiveness of warnings by burying the important

among the trivial. Described as "sensory overload" by one court, *Dunn v. Lederle Laboratories*, 121 Mich.App. 73, 81 (1982), "the more that product manufacturers warn of risks that never materialize, the less likely product users are to heed those warnings." Robert G. Knaier, *An Informed-Choice Duty to Instruct?* Liriano*,* Burke*, and the Practical Limits of Subtle Jurisprudence*, 88 Cornell L. Rev. 814, 853 (2003). If consumers merely ignored excessive warnings, the problem might be minimal: the only superfluous costs would be those of providing the warnings. However, consumers might begin to ignore not only the excessive warnings, but also those that are crucial to safe product use. *See* Knaier, *supra*, at 853; *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 242 (1998) ("Requiring too many warnings trivializes and undermines the entire purpose of the rule, drowning out cautions against latent dangers of which a user might not otherwise be aware.").

"Overreaction" is the flipside, where consumers inundated with warnings "may become preoccupied with information about trivial hazards. For instance, consumers may forego use of net beneficial products in response to warning statements, or may shift to equally beneficial substitutes that actually pose greater (though perhaps less alarming) risks." Lars Noah, *The Imperative to Warn: Disentangling the "Right to Know" From the "Need to Know" About Consumer Product Hazards*, 11 Yale J. on Reg. 293, 297 (1994). Thus, federal regulators caution against over-warning: for example, the regulations for general labeling conditions for over-the-counter drug labeling acknowledge that "if labeling contains too many required statements . . . the impact of all warning statements will be reduced." *Id.* at 381; *see also* 53

Fed. Reg. 30,522, 30,530 (Aug. 12, 1988) ("The agency agrees that too many warning statements reduce the impact of important statements.").

In short, as Justice Scalia admonished, "[I]t is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them." *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 804 (1988) (Scalia, J., concurring). West Virginia's censorship and compelled disclaimers compel speech that is misleading in tone and effect, and this Court should grant certiorari to hold that the regulations violate the Petitioners' First Amendment right to refrain from unnecessary, alarmist speech.

Conclusion

The Petition should be granted.

DATED: September 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS contains 4,428 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

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

Executed on Sept. 20, 2022.

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AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 21st day of September, 2022, send out from Omaha, NE 2 package(s) containing 3 copies of the BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

SEE ATTACHED

To be filed for:

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Subscribed and sworn to before me this 21st day of September, 2022.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
RENEE J. GOSS
My Comm. Exp. September 5, 2023

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Attachments: 22-175 Recht AC Brief final.pdf; 22-175 Recht Cert of Compliance DJL.pdf; 22-175 Recht POS.pdf

Greetings:

Attached please find electronic courtesy copies of PLF's amicus brief in support of petitioners in this matter. Paper service copies are en route to you as attested by the attached Affidavit of Service.

Best regards,

Brien Bartels | Legal Secretary
Pacific Legal Foundation
255 South King Street, Suite 800 | Seattle, WA 98104
425.576.0484 x3521
Hours: 8:30 am – 5 pm Pacific (Teams at other times)