No. _____

In the

Supreme Court of the United States

LIBERTY COINS, LLC; and
JOHN MICHAEL TOMASO,

Petitioners,

v.

DAVID GOODMAN, in his official capacity as Director, Ohio Department of Commerce; and AMANDA McCARTNEY, in her official capacity as Consumer Finance Attorney of Division of Financial Institutions, Ohio Department of Commerce,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

MAURICE THOMPSON
1851 Center for Constitutional Law
208 East State Street
Columbus, OH 43215
Telephone: (614) 340-9817
E-mail: Mthompson@OhioConstitution.org

TIMOTHY SANDEFUR*
**Counsel of Record*
DEBORAH J. LA FETRA
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: tsandefur@pacificlegal.org

Counsel for Petitioners

QUESTION PRESENTED

When a statute purporting to regulate conduct is triggered solely by a person engaging in communication or expression, that statute is subject to heightened First Amendment scrutiny. *See*, *e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 370 (2002). Ohio's Precious Metals Dealer Act, Ohio Rev. Code § 4728.01(A), imposes various regulations on people who deal in precious metals, but *only* "if, in any manner, including any form of advertisement or solicitation of customers," they "hold[] [themselves] . . . out to the public as willing to purchase such articles." Is that statute subject to heightened First Amendment scrutiny, or only to lenient rational basis scrutiny, as the court below held?

CORPORATE DISCLOSURE STATEMENT

Petitioners Liberty Coins, LLC, and John Michael Tomaso are not publicly held companies, and no publicly held company owns 10% or more of the Liberty Coins' stock.

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PETITION FOR WRIT OF CERTIORARI

Liberty Coins, LLC, and John Michael Tomaso respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is published at 748 F.3d 682 (6th Cir. 2014), and included in Petitioners' Appendix (Pet. App.) at A. The opinion of the district court granting the motion for preliminary injunction is published at 977 F. Supp. 2d 783 (S.D. Ohio 2012), and is included in Pet. App. at B. The panel opinion denying the petition for rehearing en banc is not published and is included in Pet. App. at C. Selected exhibits from the verified complaint are also included in the Appendix. Pet. App. at D.

JURISDICTION

On December 5, 2012, the district court granted Liberty Coins' motion for a preliminary injunction of Ohio Revised Code § 4728. The defendant state officials filed a timely appeal to the Sixth Circuit Court of Appeals. On April 8, 2014, a panel of the Court of Appeals reversed the injunction. Liberty Coins filed a timely petition for rehearing *en banc*. On June 5, 2014, the panel denied the petition, no judge of the Court of Appeals having requested a vote. *See* Fed. R. App. P. 35(f). This Court has jurisdiction under 28 U.S.C. § 1254(1). On August 12, 2014, Justice Kagan granted Petitioners' application to extend the time within

which to file the petition to October 3, 2014. *Liberty Coins, LLC v. Goodman*, No. 14A173 (U.S. filed Aug. 12, 2014) (order granting application to extend time).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

Ohio Rev. Code § 4728.01 provides in pertinent part:

> As used in this chapter:
>
> (A) "Precious metals dealer" means a person who is engaged in the business of purchasing articles made of or containing . . . precious metals or jewels of any description if, in any manner, including any form of advertisement or solicitation of customers, the person holds himself, herself, or itself out to the public as willing to purchase such articles.

Ohio Rev. Code § 4728.02 provides in pertinent part:

> (A) . . . no person shall act as a precious metals dealer without first having obtained a license from the division of financial institutions in the department of commerce.

STATEMENT OF THE CASE

Although the Ohio Precious Metals Dealers Act was enacted in 1983, coin dealers were rarely subjected to the statute's licensing requirement until 2011. That year, at the behest of pawnbrokers, jewelry stores, and other businesses that buy and sell gold and other precious metals, the Ohio Department of Commerce began enforcing the statute against coin dealers such as John Michael Tomaso and his business, Liberty Coins, LLC. The basis for these enforcement efforts was the statute's "speech trigger"—a provision of the law which classifies a person as "a precious metals dealer" solely on the condition of the person engaging in speech. That law provides that a person is a "precious metals dealer," and is subject to the licensing requirement and other regulatory burdens, not if he or she buys or sells precious metals, but only if the person also communicates to the public that he or she is engaged in that business.

A. Liberty Coins, LLC

John Michael Tomaso, a professional coin dealer for 35 years, owns and operates Liberty Coins, LLC, a retail store in Delaware, Ohio. Liberty Coins buys, sells, and trades silver and gold coins, jewelry, hallmark bars, ingots, and numismatics. As a small business, Liberty Coins relies on limited advertising to reach potential customers. It advertises through four cost-effective means:

- A "We Buy Gold" sign in the store window;

- A freestanding sign outside the store's front door that says, "Buying Gold and Silver";

- A 1 x 3.25" newspaper advertisement in the *Delaware Gazette*'s classified ad section:

- Mr. Tomaso's business card, which contains contact information and states: "Gold and Silver Scrap, Buy - Sell - Trade."

Pet. App. at D-3 - D-4, D-14. An honest and successful business, Liberty Coins has never been charged with violating any criminal or civil laws.

B. The Precious Metals Dealers Act

Ohio's Precious Metals Dealers Act (PMDA) defines any person who "purchas[es] articles made of

or containing gold, silver, platinum, or other precious metals or jewels of any description *if, in any manner, including any form of advertisement or solicitation of customers, the person holds himself, herself, or itself out to the public as willing to purchase such articles*." Ohio Rev. Code § 4728.01(A) (emphasis added). No person may act as a precious metals dealer without a license. *Id.* § 4728.02. Thus under its express terms, the occupational licensing requirement applies based on a person's communication, rather than that person's conduct. Under the statute, a precious metals dealer is not just a person who buys precious metals, but a person who both buys metal and says that he does.

The PMDA imposes a number of burdens on precious metals dealers. The Division of Financial Institutions in the Ohio Department of Commerce will grant a precious metals dealer license when, after an investigation, it finds the applicant to be a "person of good character" (as determined by the unbounded discretion of the state), having financial responsibility, reputation, and experience as a precious metals dealer or in a related business, and having a "net worth of at least ten thousand dollars and the ability to maintain that net worth during the licensure period." *Id.* § 4728.03(B)(1). An applicant must thus disclose considerable personal, professional, and financial information to the state, including a list of all his assets and liabilities, to obtain a license. *Id.* §§ 4728.03-4728.04. There is also a substantial licensing fee, of several hundred dollars. *Id.* § 4728.03(c).

A business licensed under the PMDA must "keep and use books and forms approved by the superintendent of financial institutions," that disclose

the maker of each item purchased, "a full and accurate description including identifying letters or marks thereon of the articles purchased," and information about the seller, including "name, age, place of residence, driver's or commercial driver's license number or other personal identification, and a short physical description." *Id.* § 4728.06. These records are subject to warrantless searches by the police or other authorities, "at all times at the licensed location." *Id.*; *see also* Ohio Admin. Code § 1301:8-6-03(D) (permitting warrantless inspection of all business records at any time). The PMDA also requires licensed businesses to make available "a description of all articles received by the licensee on the business day immediately preceding, together with the number of the receipt issued." Ohio Rev. Code § 4728.07. Finally, although the precious metals trade is marked by rapid and dramatic fluctuations in price, the state requires all dealers to hold all purchased gold and silver items for five days before offering them for sale. *Id.* § 4728.09(A).

The Act authorizes the superintendent of financial institutions, or his designee, to investigate any precious metals dealer, or anyone suspected of engaging in that trade without a license, and any business under investigation must provide "free access to the books and papers thereof and other sources of information." *Id.* § 4728.05(A). The government may subpoena witnesses and documents, and may seek an injunction, temporary restraining order, or other relief in court. *Id.* § 4728.05(C), (D). The Act provides for both civil and criminal penalties. After notice and a hearing, if the superintendent finds a person or business to be operating in violation of the PMDA, he may issue a cease and desist order and impose a

penalty of up to $10,000 for each violation. *Id.* § 4728.05(E). Violations of the Act are also criminal offenses, and a person guilty of a violation is subject to both misdemeanor and felony penalties. *Id.* § 4728.99.

The Act contains many exemptions for individuals and businesses. Who is not subject to the PMDA?

- Professional precious metals dealers when engaged in transactions with other precious metals dealers. *Id.* § 4728.11(A).

- "[C]ollectors, speculators, or investors" who "hold themselves out as having knowledge or skill" related to precious metals or the "practices involved in their purchase or sale." *Id.*

- Banks, credit unions, or savings and loan associations. *Id.* § 4728.11(C).

- Retail store jewelers buying silverware or jewelry, so long as the store has a general business license and such purchases represent no more than 25% of the store's inventory (*not* included in this 25% are articles with "numismatic" value independent of the precious metal content—and such numismatic objects may be sold by anyone without a PMDA license). *Id.* § 4728.11(E), (F). Jewelers and others exempt under these provisions must still comply with certain record-keeping requirements. *Id.* § 4728.12.

- Pawnbrokers who hold a license under a separate provision of the PMDA. They also

must comply with the record-keeping requirements. *Id.* § 4728.02(B).

C. Ohio Department of Commerce Threatens Liberty Coins with Prosecution

In the first half of 2012, approximately 62% of the value of Liberty Coins' purchases were of gold and silver items exempt from the PMDA. Pet. App. at B-22 - B-23. But in August, 2012, an investigator from the Consumer Finance Division of the Ohio Department of Commerce, acting on an anonymous tip, Pet. App. at A-8, visited Liberty Coins and photographed the signage. *Id.* The government subsequently sent Mr. Tomaso a letter warning that "Liberty Coins has held itself out to the public as willing to purchase precious metals via signage at the store location. Based upon the language of the PMDA, the Division has evidence that your business has violated the PMDA." Pet. App. at A-9, D-8. The October 1, 2012, letter ordered Liberty Coins to "produce business records" to "enable the Division to determine a fine amount consistent with settlements made for similar violations of the law" and concluded that a failure to respond would result in a cease and desist order that imposes a fine of up to $10,000 and could prevent the division from finding that Tomaso exhibited the "good character" necessary to obtain a license. Pet. App. at A-9, D-7 - D-8.

Mr. Tomaso requested clarification of the letter, and an extension of time to respond. A Department of Commerce attorney, Respondent Amanda McCartney, answered Mr. Tomaso by email, granting the extension and identifying, *as separate violations*, each of the four methods he used to advertise his business—the signs in the window and outside the door; the newspaper

advertisements, and the business cards. Pet. App. at B-4, D-2 - D-4. Each violation was subject to a fine of up to $10,000, and each violation after the first was subject to prosecution as a felony. Pet. App. at A-7, D-4. Mr. Tomaso and Ms. McCartney exchanged several emails, and as a result of the government's threats, Mr. Tomaso took down his signs, stopped the ads, and did not hand out any more business cards. Pet. App. at A-10, B-23 - B-24. Fearing prosecution, Mr. Tomaso also stopped buying all nonexempt gold and silver items. *Id.*

D. The District Court Enjoins Enforcement of the PMDA's Suppression of Truthful Commercial Speech

Liberty Coins and Mr. Tomaso sued Ohio Department of Commerce officials in federal district court under 42 U.S.C. § 1983, alleging several constitutional causes of action. Liberty Coins sought declaratory relief, a temporary restraining order, and preliminary and permanent injunctions to enjoin the state's enforcement of the Act, as well as nominal damages, costs, and attorneys' fees. Pet. App. at A-3. This petition focuses on the facial claim that the PMDA violates the First Amendment's protection of commercial speech.

The district court for the Southern District of Ohio granted the preliminary injunction on December 5, 2012. It rejected the state's argument that the PMDA regulated only conduct, holding that the plain reading of the statute rendered that interpretation "nonsensical" because if mere purchase triggered the licensing requirement, "the entire clause after the word 'if' would be superfluous." Pet. App. at B-12. The statute's language explicitly makes speech, publication,

or other forms of communication the condition on which the licensing requirement applies: "engaging in commercial speech is precisely what triggers the licensing requirement." Pet. App. at B-12.

Because a person "who holds himself, herself, or itself out" as willing to purchase "necessarily engages in commercial speech," *id.*, the district court concluded that the PMDA "is a prohibition of conduct that only applies to persons who engage in commercial speech," Pet. App. at B-14, and that the PMDA was subject to intermediate scrutiny under the rubric developed in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). The PMDA failed the *Central Hudson* test, and the court enjoined enforcement. Pet. App. at B-15 - B-27.

The Sixth Circuit reversed. It brushed aside the First Amendment implications of a regulation triggered by speech instead of conduct, on the grounds that the "PMDA is, first and foremost, a licensing statute." Pet. App. at A-14. Having characterized the statute as a run-of-the-mill business regulation that "neither burdens a fundamental right, nor creates a suspect classification," Pet. App. at A-18, the court held that it would apply rational basis review, rather than any elevated standard appropriate to First Amendment claims. *Id.*

Under this highly deferential test, the court held that the Ohio Legislature reasonably distinguished between precious metal dealers who "hold themselves out" and those who purchase precious metals "informally" (a term the court did not define[1]). Pet.

[1] In fact, the statute *exempts* professional precious metals dealers (continued...)

App. at A-22. The court further held that the legislature could rationally decide that the former are more likely to deal in large quantities of precious metals, and are thus more likely to trade in stolen goods. For this reason, the licensing requirements were rationally related to the goals of curtailing the amount of stolen goods' trafficking and of assisting the police in their attempt to recover stolen property. Pet. App. at A-22.

Having characterized the PMDA as an economic regulation, the court foreclosed any consideration that it might also implicate commercial speech, apparently of the opinion that no regulation could combine elements of both. Pet. App. at A-23 (identifying the "question now before this Court" as "whether the statute regulates commercial speech *or* simply regulates economic activity") (emphasis added). Given its threshold determination that "[t]he statute proscribes business conduct and economic activity, not speech," Pet. App. at A-26, the court needed little time to decide that the PMDA was a valid exercise of the state's police power, and that the district court erred by enjoining its enforcement. Pet. App. at A-28 - A-29.

Liberty Coins' petition for rehearing *en banc* was denied, Pet. App. at C-1 - C-2, and this timely petition followed.

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[1] (...continued)
who deal with other precious metals dealers, or persons who hold themselves out as experts on either the metals or the "skill peculiar to such articles or the practices involved in their purchase or sale." Ohio Rev. Code § 4728.11(A). The statute therefore does not exempt only informal, occasional purchasers, but also those whose sole or primary occupation is precious metals dealing.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This Court has long applied lenient rational-basis scrutiny to laws regulating businesses, including occupational licensing requirements. *See*, *e.g.*, *Schware v. Bd. of Bar Exam'rs of the State of N.M.*, 353 U.S. 232 (1957). On the other hand, it applies more searching scrutiny to laws that restrict free speech, including advertising. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976). But the intersection between the two remains unsettled: when licensing requirements are triggered solely by a business engaging in speech, does heightened scrutiny apply?

This is a question the Court has postponed answering since at least *Thomas v. Collins*, 323 U.S. 516 (1945), in which Justice Jackson famously struggled with the "two well-established, but at times overlapping, constitutional principles" of stringent review for free speech and deferential review for business regulations. *Id.* at 544 (Jackson, J., concurring).

In *Cohen v. California*, 403 U.S. 15 (1971), *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 370 (2002), *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), and other cases, this Court held that heightened scrutiny applies to government regulations of conduct if "the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28. But those cases did not say whether the government may design a licensing requirement in such a way that it requires licensure or imposes other regulations solely as a consequence of the person engaging in speech.

This case squarely presents the question of whether an occupational licensing requirement that *only* applies when a person communicates a message to the public is subject to rational basis review—as the court below held—or to the higher First Amendment scrutiny that applies to other laws that impose burdens based on speech.

This question is very important. As Justices White and Rehnquist and Chief Justice Burger observed in *Lowe v. S.E.C.*, 472 U.S. 181, 230 (1985) (concurring opinion), there comes a point at which "a measure is no longer a regulation of a profession but a regulation of speech or of the press; beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment." Yet neither *Lowe* nor any other decision has given lower courts sufficient guidance in locating that point, particularly in the context of professional regulations that—like the PMDA—are triggered by speech. *See*, *e.g.*, *Accountant's Soc'y of Virginia v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988) (court attempting to "locat[e] the point at which 'a measure is no longer a regulation of a profession but a regulation of speech'" based on concurring opinion in *Lowe*). The result has been conflict among the circuits.

Decisions by the Second, Fifth, Ninth, and Eleventh Circuits conflict with the decision below because they apply First Amendment scrutiny to economic regulations that burden the freedom of expression. For example, *Miller v. Stuart*, 117 F.3d 1376, 1382 (11th Cir. 1997), and *Abramson v. Gonzalez*, 949 F.2d 1567, 1582 (11th Cir. 1992), applied First Amendment scrutiny to laws that required people to obtain licenses before they could describe themselves

as "accountants" or "psychologists." The Fifth Circuit, in *Byrum v. Landreth*, 566 F.3d 442, 447 (5th Cir. 2009), and *MD II Entm't, Inc. v. City of Dallas, Tex.*, 28 F.3d 492, 494 (5th Cir. 1994), applied heightened scrutiny to laws that, respectively, required interior designers to be licensed if, and only if, they advertised to the public that they engaged in interior design, and prohibited adult entertainment clubs if they used certain words in their advertisements. The Ninth Circuit, in *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 819 (9th Cir. 2013), and *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 940-41 (9th Cir. 2011), applied First Amendment scrutiny to laws forbidding the employment of day laborers who advertise by standing on the sidewalk, holding signs. Even the Sixth Circuit itself, in *Parker v. Ky., Bd. of Dentistry*, 818 F.2d 504, 506 (6th Cir. 1987), applied heightened scrutiny to a regulatory burden that, like the PMDA, was triggered not by the practice of the profession, but only by the expression of a message.

The decision below conflicts with these cases by establishing a new rule that when the "primary purpose" of a law is to "regulate the conduct" of a business, courts should review that law only through rational basis scrutiny, even though the law's burdens only apply if a person speaks. Pet. App. at A-23 - A-24. Although the court acknowledged that the statute defines the practice of "precious metals dealer" by reference to speech—Pet. App. at A-7, A-16—the panel essentially concluded that because it incorporates speech into the definition of the profession, the resulting regulatory burden on speech was not subject to heightened First Amendment scrutiny. Pet. App. at A-26 - A-27. Thus the PMDA "proscribes business

conduct and economic activity, not speech," because it "require[s] any party that holds itself out to the public for the purpose of operating a precious metals business to obtain the required license." Pet. App. at A-26. A person may not "spread word to the public that [he] is open for business, [or] place advertisements in the newspaper" unless he "first obtain[s] a license from the State." *Id.*

But as the district court noted, "spreading word" is speech. *See* Pet. App. at B-12 ("A purchaser who holds himself, herself, or itself out necessarily engages in commercial speech."). Under the rule adopted below, a state may restrict communications by *defining a trade in terms of communication*, and then imposing regulations on that trade which function as a restriction of speech.

Given that many states employ the same "holding oneself out" criterion that the PMDA uses, the precedent set here would allow states far greater power over speech than previously allowed. Pet. App. at A-14 - A-15. This means businesses will inevitably refrain from speaking in order to avoid the regulatory burden—which is just the danger of censorship that motivated this Court to expand commercial speech protections in the first place, *see Virginia State Bd. of Pharmacy*, 425 U.S. at 769-70, and which endangers the public by encouraging businesses to operate under the radar.

Resolution of this question is therefore of exceptional national importance.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SECOND, FIFTH, SIXTH, NINTH, AND ELEVENTH CIRCUITS REGARDING THE STANDARD OF SCRUTINY APPLICABLE TO BUSINESS REGULATIONS THAT RESTRICT SPEECH

This Court, as well as the Fifth and Eleventh Circuits, and even the Sixth Circuit itself, have held that a law that imposes regulatory burdens based solely on a speech act should be reviewed under heightened First Amendment scrutiny, instead of the more lenient rational basis review that applies to ordinary economic regulations. The decision below holds to the contrary. Pet. App. at A-27 - A-28.

The PMDA defines the practice of a precious metals dealer by a conjunctive test:

> "Precious metals dealer" means a person who [1] is engaged in the business of purchasing articles made of or containing . . . precious metals or jewels . . . [2] if, in any manner, including any form of advertisement or solicitation of customers, the person holds himself . . . out to the public as willing to purchase such articles.

Thus a person who deals in precious metals is not a "precious metals dealer," and need not obtain a license, no matter how much precious metal or jewelry he

purchases, unless and until he communicates to the public that he is engaged in that business.

The PMDA's many regulations, including the licensing requirement, only apply when the person expresses that message to the public. A person could buy hundreds of pounds of gold and be exempt from the PMDA so long as he did not communicate to the public his willingness to buy; meanwhile, a person who buys only a few ounces violates the statute if he does so communicate.

The court below held that the statute is not subject to heightened scrutiny under the First Amendment, but to deferential rational basis review, because "the primary purpose" of the PMDA "is to regulate the conduct of precious metals dealers," rather than to regulate speech. Pet. App. at A-26. The panel acknowledged that the PMDA only applies "to any party that holds itself out to the public"—that is, who advertises or communicates a message to the public[2]—but found that because the PMDA is "first and foremost, a licensing statute," it is not a speech restriction subject to heightened scrutiny. Pet. App. at A-14.

That holding conflicts with decisions of this Court and other courts of appeal. In *Thompson*, 535 U.S. at 370, this Court found that FDA regulations of

[2] The PMDA specifies that the triggering speech act is the communication of a message "to the public." Ohio Rev. Code Ann. § 4728.01. Thus decisions which have allowed government broader authority to regulate "professional speech" between a client and a professional adviser—*see*, *e.g.*, *Moore-King v. Cnty. of Chesterfield, Va.*, 708 F.3d 560, 568 (4th Cir. 2013)—are inapplicable here. The PMDA restricts not advice, but speech to the public.

pharmaceuticals were subject to First Amendment scrutiny because they applied only in response to protected speech: "essentially, as long as pharmacists do not advertise particular compounded drugs, they may sell compounded drugs without . . . obtaining FDA approval. If they advertise . . . FDA approval is required." *Id.* at 370. In *Holder*, 561 U.S. at 4, the Court held that First Amendment scrutiny applied to the anti-terrorism statute because "the conduct triggering . . . the statute consists of communicating a message." *See also Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (although "the delivery of a tape recording might be regarded as conduct," First Amendment scrutiny applied to law prohibiting transfer of intercepted communications because "the purpose of such a delivery is to provide the recipient with the text of recorded statements").

Lower courts have also held, in conflict with the panel decision here, that laws restricting speech acts by businesses are subject to First Amendment review, rather than to rational basis scrutiny. In *Miller*, *supra*, the Eleventh Circuit applied First Amendment scrutiny to a statute regulating Certified Public Accountants, which—like the PMDA—defined the practice of a CPA by reference to whether the person "offer[ed] to perform" accounting services or "[held] himself . . . out as a certified public accountant." 117 F.3d at 1380 n.2. As in this case, the state claimed that the statute only regulated conduct, and that rational basis scrutiny should apply, *see id.* at 1381, but the court rejected that argument. The fact that the statute "incorporates commercial speech into a class of regulated activity," or that speech was a "'subordinate component' of [a] business transaction," did not

insulate the statute from First Amendment review. *Id.* at 1382.

The same circuit struck down a Florida licensing requirement that applied to persons who called themselves psychologists—yet which did not require a license in order to actually practice the profession. *Abramson*, 949 F.2d at 1570-71. Like the Ohio PMDA, the licensing requirement was triggered not by the activity but by the advertisement; as the court put it, "*anyone* may currently *practice* psychology . . . but only those who have met the examination/academic requirements of the statutes can *say* that they are doing so or hold themselves out as psychologists." *Id.* at 1574. The court therefore applied heightened First Amendment scrutiny. *See id. See also Johnson v. California State Bd. of Accountancy*, 72 F.3d 1427, 1432 (9th Cir. 1995) (describing *Abramson* as a case in which "'holding out' or its equivalent was used to ban the dissemination of commercial information").

The Fifth Circuit in *Byrum* applied First Amendment scrutiny to a Texas law that required a person to obtain a license in order to refer to himself or herself as an "interior designer." As in this case—where a person need not obtain a license to *operate* as a precious metals dealer, but must get a license if he operates and communicates that fact to the public—the law in *Byrum* did not require a person to obtain a license in order to practice the trade of interior design, but did require the person to be licensed in order to represent himself or herself by the term "interior designer." 566 F.3d at 444. The court analyzed this restriction on commercial speech under

the test of *Central Hudson*, 447 U.S. at 566,[3] and found that it violated the First Amendment. *Byrum*, 566 F.3d at 448-49.

Also, in *MD II Entm't*, 28 F.3d at 493, the same circuit held that a zoning restriction that applied to entertainment clubs based on whether they advertised as "topless," "adult," or used "other term[s] calculated to attract patrons with nudity," was subject to *Central Hudson* analysis because that restriction applied to "businesses which use certain terms in their advertising." *Id.* at 494. Although the city argued that the ordinance was "merely a definition that does not regulate speech at all," the court found that it was "a content-based restriction on commercial advertising." *Id.*

The Second Circuit also applied heightened scrutiny to a regulation of pharmaceuticals which was triggered only by an act of communication, in *United States v. Caronia*, 703 F.3d 149, 162 (2d Cir. 2012). There, the government prosecuted a pharmaceutical sales representative for promoting a drug for purposes not approved by the FDA. *Id.* at 152. The representative argued that the prosecution violated his First Amendment rights, but the government claimed that it did not, because the statute only prohibited "misbranding," and the defendants' speech was only used to prove his intent. *Id.* at 160-61. But the court held that heightened scrutiny applied, since the

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[3] *Central Hudson*'s "heightened" scrutiny requires that the speech in question be lawful and not actually or inherently misleading; that the government interest in restricting it be substantial; that the restriction directly advance that interest, and that the restriction be no more extensive than necessary to serve that interest. 447 U.S. at 566.

statutory penalties were triggered by "certain speech about the off-label use of drugs." *Id.* at 165.

The Ninth Circuit also recently applied heightened scrutiny to an Arizona law that prohibited the "conduct" of hiring of day laborers from the side of the road, because that prohibition was triggered by communication. *Valle Del Sol*, 709 F.3d at 819. The prohibition was arguably a restriction of commercial behavior—and, indeed, other courts have held that similar prohibitions are subject only to rational basis review when they are not aimed at speech. *See*, *e.g.*, *Thayer v. City of Worcester*, 755 F.3d 60, 76 (1st Cir. 2014). But the Arizona law was a "content-based restriction[] on commercial speech," 709 F.3d at 819, because its prohibitions only applied to people who were communicating their availability and desire to work. *See id.* at 817. While the state could certainly regulate employment or street traffic, the law in question was subject to heightened free speech scrutiny because it "target[ed] one type of speech—day labor solicitation." *Id.* at 819. *Accord*, *Comite de Jornaleros de Redondo Beach*, 657 F.3d at 940-41.

Even the Sixth Circuit itself, in *Parker*, applied free speech analysis to a law that prohibited a licensed dentist "from holding himself out to the public as a specialist," but which did "not prohibit[] [him] from performing . . . in the areas of specialization." 818 F.2d at 506. In other words, as in this case, a person could engage in the practice without a license, but was not allowed to inform the public that he did so. The court applied what it called "traditional First Amendment commercial speech analysis" to the restriction on advertising. *Id.* at 510.

Here, however, the Court of Appeals refused to follow *Parker* or these other cases, and held that rational basis review applies to regulatory burdens that are triggered by a person communicating a message to the general public, so long as those burdens have the "primary purpose" of regulating economic activity. Pet. App. at A-25 - A-26. Because the PMDA is "first and foremost" concerned with regulating businesses, the panel considered it irrelevant that the PMDA's regulations come into play only if and when the person expresses a message. Pet. App. at A-14.

Petitioners are aware of no prior decision—and the court below cited none—supporting that proposition. On the contrary, in *Thompson*, this Court recognized that the "primary purpose" of FDA rules is to regulate medicine and to protect the public, but nevertheless applied heightened scrutiny because the rule in question "use[d] advertising as the trigger" for imposing regulatory burdens on the speaker. 535 U.S. at 370. In *Cohen*, 403 U.S. 15, the disorderly conduct statute was first and foremost aimed at conduct, not speech—yet this Court held that First Amendment scrutiny applied because the defendant was prosecuted solely for engaging in an act of communication. *See id.* at 18. And although the anti-terrorism law at issue in *Holder* was primarily meant to protect national security, heightened First Amendment scrutiny applied because the "conduct triggering coverage under the statute consists of communicating a message." 561 U.S. at 28.

The court below viewed such cases as non-conflicting, because they "neither address[ed] nor even ask[ed]" whether the statutes at issue "regulate[d] commercial speech or simply regulate[d] economic

activity." Pet. App. at A-23. According to the panel, those cases "applied the *Central Hudson* test without first determining whether the statute implicated protected commercial speech or economic interests." Pet. App. at A-25.

But that is not true: *Holder*, *Thompson*, and similar cases held that question to be irrelevant because *any* regulatory burden triggered by an act of communication is subject to First Amendment review. And in *MD II Entm't*, 28 F.3d at 494, and *Miller*, 117 F.3d at 1380, the courts *did* directly address the question of whether the statutes in question implicated commercial speech or were ordinary economic regulations.

Such analysis was hardly necessary, though, because advertising or holding oneself out to the public is quintessential commercial speech. *See*, *e.g.*, *Virginia State Bd. of Pharmacy*, 425 U.S. at 761. *All* regulations of commercial speech will implicate *economic* interests, by definition—that is just what *commercial* speech is. *Central Hudson*, 447 U.S. at 562 (defining commercial speech as "speech proposing a commercial transaction"). That does not mean that economic regulations burdening speech are subject to rational basis scrutiny. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011).

The "primary purpose" of the laws discussed in *Abramson*, *Parker*, *Byrum*, and other cases, was to regulate economic interests—drug compounding, dentistry, interior design, and so forth. Had the panel's approach been used in those cases, they would have come out differently. Those courts would then have concluded that because the primary purposes of those statutes was to regulate economic matters, their

burdens on speech were only incidental, and subject only to rational basis review. The panel's purported distinction of controlling precedent, and cases from other circuits, is thus illusory; the decision below is actually in direct conflict with them.

The decision below establishes a new rule, in conflict with decisions of this Court and several circuits, that where a law's "primary purpose" is to regulate economic matters, it is subject to no First Amendment scrutiny at all, even where the law defines the "economic matters" in question solely by reference to speech.

II

LOWER COURTS NEED GUIDANCE REGARDING THE LEVEL OF SCRUTINY THAT APPLIES TO "SPEECH TRIGGER" LAWS

This Court has employed heightened scrutiny in a wide variety of contexts when "speech triggers" impose legal burdens or penalties based solely on the act of communication. But the precise application of this rule, as opposed to cases in which the burden on speech is merely incidental, remains unclear. Certiorari is warranted here to clarify when a "speech trigger" in a law that is otherwise concerned with conduct requires the application of heightened scrutiny.

In *Cohen*, the Court applied First Amendment scrutiny to a criminal statute which was applied to a person based on his communication of his beliefs. The government argued that the relatively more lenient review of *United States v. O'Brien*, 391 U.S. 367 (1968), should apply, but the Court rejected this, calling it

"facile." *Cohen*, 403 U.S. at 26. The more differential *O'Brien* standard. The *Cohen* Court held, was not proper when "[t]he only 'conduct' which the State sought to punish [was] the fact of communication." *Id.* at 18. Cohen's speech was itself the trigger for the criminal prosecution. Thus the Court found full First Amendment analysis was appropriate. *Id.* at 26.

In *Holder*, this Court cited *Cohen* for the proposition that where "the conduct triggering" criminal liability "consists of communicating a message," heightened First Amendment scrutiny applies instead of the *O'Brien* test. 561 U.S. at 28. *See also Texas v. Johnson*, 491 U.S. 397, 416 (1989) (First Amendment applies to criminal prosecution of conduct "where the nonverbal conduct is expressive.").

Courts of Appeals have also applied heightened scrutiny when criminal liability is triggered by a speech act.[4] In *Wiegand v. Seaver*, 504 F.2d 303 (5th Cir. 1974), the court applied heightened scrutiny to a state disorderly conduct statute because it was aimed at "the 'conduct' of uttering certain words," *id.* at 305, and found it facially unconstitutional. In *Acosta v. City of Costa Mesa*, 718 F.3d 800, 812 n.6 (9th Cir. 2013), the Ninth Circuit employed First Amendment review when considering an ordinance that prohibited disruptive behavior at city council meetings, "because certain 'remarks' or 'behavior' can be unlawful merely because of their expressive nature," and found it facially unconstitutional as well. And in *United States v. Lee*, 6 F.3d 1297 (8th Cir. 1993) (per curiam), the

[4] Violations of the Ohio PMDA—for example, operating as a precious metals dealer without a license—are criminal offenses, punishable as a misdemeanor in the first instance, and a felony for subsequent offenses. *See* Ohio Rev. Code § 4728.99.

court applied heightened scrutiny, instead of the deferential *O'Brien* standard, to a conviction under the Ku Klux Klan Act, because "the conviction rested entirely on speech, and not on separately identifiable conduct." *Id.* at 1301 (Gibson, J., concurring). *See also Caronia*, 703 F.3d at 165 (heightened scrutiny is required when criminal liability is triggered solely by speech). These cases are premised on the recognition that "speech trigger" laws are especially prone to abridging freedom of expression.

The same concerns apply in cases where speech triggers civil liability or regulatory burdens instead of criminal liability. Thus in *Bartnicki*, people whose telephone conversations were intercepted and handed over to the press filed a civil suit for damages. This Court held that although the transfer of an audiotape of the communications "might be regarded as conduct," 532 U.S. at 527, heightened scrutiny was still appropriate, because "the purpose" of that conduct was to communicate information, and therefore "it is the kind of 'speech' that the First Amendment protects." *Id.* The Court found it "hard to imagine" what "the acts of 'disclosing' and 'publishing'" could be, if not speech. *Id.* (citation and quotation marks omitted). Also, in *Sorrell*, the Court found that a civil statute prohibiting the transmission of information about prescription drugs was an unconstitutional burden on speech, and rejected the state's argument that the statute only regulated conduct, because the statute "impose[d] a burden based on the content of speech." 131 S. Ct. at 2657. Because the statute's restrictions on conduct were triggered by speech, the Court likened it to "a law prohibiting trade magazines from purchasing or using ink," which would be subject to heightened scrutiny even though it purported to

regulate conduct. *Id.* at 2667. Further, in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576 (1988), the Court found that to penalize a labor union for unfair labor practices for distributing handbills to shoppers at a mall would "'collide with the . . . First Amendment,'" *id.* at 578 (quoting *NLRB v. Fruit & Vegetable Packers and Warehousemen, Local 760*, 377 U.S. 58, 63 (1964))—even though the labor law at issue in that case was primarily concerned with economic matters.

First Amendment scholar Eugene Volokh has argued that laws that apply based on "what the speaker said—by the persuasive, informative, or offensive force of the facts or opinions expressed," should be subjected to heightened scrutiny because "[t]he right of free speech is at its core the right to communicate—to persuade and to inform people through the content of one's message." *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1301-04 (2005). To allow government to restrict an expressive act, by characterizing it as "conduct," would rob much free speech of its constitutional protection. Thus, "[w]hen speech is punished precisely because of what it communicates," heightened scrutiny is proper, even if the statute in question is not plainly intended to do so. *Id.* at 1310.

But this Court has never expressly adopted that approach, and although *Cohen*, *Thompson*, *Holder*, and other cases have employed it in both civil and criminal contexts, this Court has never addressed how the "speech trigger" rule applies in the context of ordinary business regulations.

Nor has the Court explained whether states can impose similar burdens on speech in the form of occupational licensing requirements: that is, whether states can restrict speech by declaring that any person who uses certain specified words is *ipso facto* engaged in a profession for which a license is required. The closest it has come was *Lowe*, in which all members of the Court expressed discomfort over the Securities and Exchange Commission's claim that the publisher of a newsletter regarding investment strategies was engaged in unlicensed investment advising. *See* 472 U.S. at 204-05, 233. Lower courts, relying on *Lowe*, have drawn rough distinctions between those engaged in a profession, who take a client's affairs in hand, and those who merely speak to the general public. *See*, *e.g.*, *Moore-King*, 708 F.3d at 569; *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 233 F.3d 981, 988-91 (7th Cir. 2000); *Stuart v. Loomis*, 992 F. Supp. 2d 585, 596 (M.D.N.C. 2014); *Taucher v. Born*, 53 F. Supp. 2d 464, 477-79 (D.D.C. 1999). But these decisions have not made clear how courts should approach the *threshold* question of whether the state may classify a person as belonging to a profession—and thus impose regulatory burdens—solely on the basis of a speech act.

This case presents an unusually good opportunity to address this question squarely. No factual disputes are involved that might complicate the resolution of the pure legal question. Nor does the speech at issue involve illegal activity or deceit. And although this case presents a question the Court has never directly addressed before, that question fits within a body of free speech precedent that allows for the straightforward resolution of the question presented: given that in other contexts, First Amendment scrutiny

applies where speech triggers the imposition of regulatory burdens or penalties, does the same rule apply when an occupational licensing law characterizes the trade on the basis of speech?

As the court below recognized, this question is particularly important because many states use the concept of "holding oneself out to the public" as a criterion for determining when a person is engaged in a profession. *See* Pet. App. at A-15 - A-16. But courts have issued few decisions addressing the intersection of that concept with the First Amendment's speech protections. Although courts have held (contrary to the decision below) that states may not prohibit the use of truthful self-descriptive speech without satisfying First Amendment standards—*see*, *e.g.*, *Miller*, 117 F.3d at 1382; *Abramson*, 949 F.2d at 1582; *Byrum*, 566 F.3d at 444—this Court has never explained whether the state may burden truthful speech by characterizing it as holding oneself out to the public. State courts have also been virtually silent on the question. The direct conflict with several courts of appeals and the ubiquity of laws that apply based on "holding oneself out to the public," make resolution of this matter of unusual importance across the United States. A decision from this Court is necessary to clarify the proper level of scrutiny in such cases.

III

THE DECISION BELOW RISKS A DANGEROUS EXPANSION OF DEFERENTIAL RATIONAL BASIS REVIEW INTO THE REALM OF FREE SPEECH

Since at least *Thomas*, 323 U.S. 516, this Court has recognized the dangerous overlap between rational

basis review and the higher scrutiny applied to First Amendment rights when dealing with commercial speech. There, Justice Jackson warned that the distinction between the two categories was "rough" because "the one may shade into the other." *Id.* at 544. Courts dealing with commercial speech cases have accordingly struggled to "locat[e] the point at which 'a measure is no longer a regulation of a profession but a regulation of speech.'" *Bowman*, 860 F.2d at 604. Wherever this speech falls on the sliding scale, however, this Court has consistently refused to apply rational basis scrutiny to such cases. *Central Hudson*, 447 U.S. at 561-62;[5] *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

Serious First Amendment questions are in play when a state suppresses speech by *characterizing it as a profession* and then regulating that "conduct." *See Lowe*, 472 U.S. at 229-30 ("[T]he principle that the government may restrict entry into professions and vocations through licensing schemes has never been extended to encompass the licensing of speech *per se*."). The reason, as Justice Jackson wrote, is that while "the state may prohibit the pursuit of medicine as an occupation without its license," it cannot "make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought." *Thomas*, 323 U.S. at 544 (Jackson, J., concurring).

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[5] Even outside the speech context, this Court has resisted lowering the applicable scrutiny to the exceptionally deferential rational basis level unless strong reasons exist for doing so. *D.C. v. Heller*, 554 U.S. 570, 628 n.27 (2008); *Dolan v. City of Tigard*, 512 U.S. 374, 389-91 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987).

That is what makes the question presented here crucial: can the state impose a speech regulation as a definition—so that a person is categorized as practicing the profession, and his speech thereby subjected to greater government regulation, based solely on whether he speaks?

That question has never been squarely resolved by this Court. But it is closely related to a line of cases involving licensing restrictions for professions that consist of communication. In those cases, the Court has refused to apply deferential scrutiny, out of a concern that the government could easily suppress protected speech by calling it conduct—let alone, calling it "economic" conduct. Thus in *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, this Court rejected the state's contention that laws requiring licensure for professional solicitors was only an economic regulation, and held that First Amendment scrutiny applied. 487 U.S. 781, 801-02 (1988). Without disputing that the state can regulate professions, the Court held, "it will not do simply to ignore the First Amendment interest of professional fundraisers . . . . [A] speaker's rights are not lost merely . . . because he or she is paid to speak." *Id.* at 801. That case relied on *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 628 (1980), in which a city also imposed a licensing requirement on door-to-door solicitation. Although the city argued that First Amendment scrutiny should not apply because the licensing requirement "deal[t] only with solicitation," and was not intended to restrict expression, this Court held that "this represents a far too limited view" of the applicability of the First Amendment. *Id.* Although "drawing the line between purely commercial ventures and protected distributions of written material was a

difficult task," the Court found that "the sale of religious literature . . . was not a commercial enterprise beyond the protection of the First Amendment." *Id.* at 630 (summarizing *Jamison v. Texas*, 318 U.S. 413 (1943)).

In these and a host of other cases involving door-to-door solicitors, this Court and lower courts have emphasized that First Amendment scrutiny must apply even if the state characterizes its restrictions as merely regulations of economic behavior. *See Martin v. City of Struthers, Ohio*, 319 U.S. 141, 144-46 (1943); *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 162-63 (2002); *Hynes v. Mayor & Council of the Borough of Oradell*, 425 U.S. 610, 619-20 (1976); *Project 80's, Inc. v. City of Pocatello*, 942 F.2d 635, 638-39 (9th Cir. 1991); *Krafchow v. Town of Woodstock*, 62 F. Supp. 2d 698, 709 (N.D.N.Y. 1999).

For similar reasons, courts have typically refused to expand the category of "commercial speech" to encompass expression that does anything other than "promote a commercial transaction with the speaker." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984). Government's greater power over commercial speech could threaten the security of speech in general if the category of "commercial" speech were drawn too widely. Justice Stevens warned in *Central Hudson* itself that "it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed." 447 U.S. at 579 (Stevens, J., concurring).

Heeding this warning, lower courts have confined the deferential commercial speech doctrine. For example, in *Dex Media West, Inc. v. City of Seattle*, 696

F.3d 952 (9th Cir. 2012), the Ninth Circuit found that a telephone book—which might initially seem an obvious instance of commercial speech—was entitled to the full protections of the First Amendment, because it blended both commercial and noncommercial messages. Declaring it commercial speech "would . . . provide less protection for vital protected speech, by essentially presuming that any mixed-content speech is commercial unless the types of speech are inextricably intertwined." 696 F.3d at 961. *See also S.E.C. v. Wall St. Pub. Inst., Inc.*, 851 F.2d 365, 372-73 (D.C. Cir. 1988) (refusing to expand commercial speech doctrine to encompass fully protected speech). And in *Gordon & Breach Sci. Publishers S.A., STBS, Ltd. v. Am. Inst. of Physics*, 859 F. Supp. 1521, 1542 (S.D.N.Y. 1994), the district court, acknowledging the "danger[]" and the "chilling effect on speech . . . that could be the result" of "juxtapos[ing]" the commercial and non-commercial categories, refused to hold that a scientific article was commercial speech. This Court has also employed narrowing constructions of federal statutes so as to protect pure speech—rather than apply deferential commercial speech analysis. *See*, *e.g.*, *Edward J. DeBartolo Corp.*, 485 U.S. at 576; *Lowe*, 472 U.S. at 204.

In this case, the Court of Appeals skipped past these concerns entirely, and concluded that because the PMDA "is, first and foremost, a licensing statute," Pet. App. at A-14, and "simply regulates economic activity," Pet. App. at A-23, only deferential rational basis scrutiny applied. This marks a dangerous innovation in free speech jurisprudence, because it allows courts to disregard the burdens a statute imposes on speech—no matter how severe—so long as

a statute is "first and foremost" concerned with economic matters.

If left undisturbed, that precedent could severely undermine constitutional protections for free speech and free press. The restriction on distributing prescription drug information which this Court found facially unconstitutional in *Sorrell* was first and foremost an economic regulation, meant to protect patient privacy and ensure that patients made the best decisions about medications. 131 S. Ct. at 2659. Nevertheless, the Court found that First Amendment scrutiny was proper because the statute restricted the "dissemination of information." *Id.* at 2657.

The use tax levied on paper and ink in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), was first and foremost concerned with revenue—indeed, this Court noted that there was "no indication . . . of any impermissible or censorial motive on the part of the legislature," *id.* at 580—yet the Court explicitly rejected the use of deferential scrutiny and "view[ed] the problem as one arising directly under the First Amendment." *Id.* at 585 n.7.

New York's "Son of Sam Law," which required that proceeds from the sale of memoirs by criminals be paid out to victims, was first and foremost an economic regulation, and was not intended to suppress ideas. Nevertheless, in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991), this Court found that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment," so that "even regulations aimed at proper governmental concerns can restrict unduly the

exercise of rights protected by the First Amendment." *Id.* at 117 (citations and quotation marks omitted).

In all of these cases, the Court refused to apply rational basis review, because it recognized that if such deference were applied whenever the state regulated "conduct" on the basis of speech, it would be too easy for states to suppress speech by characterizing it as economic behavior. In conflict with this basic premise of free speech law, the decision below dangerously expands the application of rational basis scrutiny into a territory formerly reserved for more skeptical First Amendment review. In the absence of certiorari, the precedent set here will drastically expand the power of state governments to restrict speech by calling it a profession. This holding, in direct conflict with other courts of appeals and contrary to holdings of this Court, calls out for review.

CONCLUSION

The petition for writ of certiorari should be *granted*.

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Respectfully submitted,

MAURICE THOMPSON
1851 Center for
Constitutional Law
208 East State Street
Columbus, OH 43215
Telephone: (614) 340-9817
E-mail: Mthompson@
OhioConstitution.org

TIMOTHY SANDEFUR*
**Counsel of Record*
DEBORAH J. LA FETRA
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: tsandefur@
pacificlegal.org

Counsel for Petitioners