

IN THE  
**Supreme Court of the United States**

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THE SHERWIN-WILLIAMS COMPANY,  
*Petitioner,*

v.

THE PEOPLE OF CALIFORNIA,  
*Respondent.*

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**On Petition for Writ of Certiorari  
To The California Court of Appeal,  
Sixth District**

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**BRIEF *AMICUS CURIAE* OF  
ATLANTIC LEGAL FOUNDATION AND  
ASSOCIATION OF NATIONAL  
ADVERTISERS  
IN SUPPORT OF PETITIONER**

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## QUESTION PRESENTED

The petition presents two questions:

1. In conflict with decisions of this Court and the Third Circuit, does the First Amendment permit California to impose tort liability for truthfully promoting a lawful product that it finds to be hazardous in some uses?
2. Does the Due Process Clause allow a state to impose retroactive and grossly disproportionate public nuisance liability to inspect and abate millions of residences based on decades-old promotions without evidence that consumers relied on those promotions or that petitioner's lead paint is in any residence?

*Amici* will address the first question.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 29.6 of the Rules of this Court, *amicus curiae* states the following:

The Association of National Advertisers is a membership trade association with nearly 2,000 members in almost every state. It is incorporated as a nonprofit trade association under the laws of the State of New York, has no parent corporation, and has no stock or other interest owned by a publicly held company.

Atlantic Legal Foundation is a not for profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no corporate shareholders, parents, subsidiaries or affiliates.

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**INTEREST OF *AMICI CURIAE***<sup>1</sup>

Founded in 1910, the Association of National Advertisers (ANA) provides leadership that advances marketing excellence and shapes the future of the industry. The ANA's overarching purpose is to safeguard essential values in advertising as a positive economic force; to enhance the science of advertising and marketing to benefit advertisers and consumers; to improve efficiency in marketing goods and services through responsible advertising; and to promote the common interests and welfare of its members. The ANA makes a difference for individuals, brands, and the industry by driving growth, advancing the interests of marketers and promoting and protecting the well-being of the marketing community. The ANA's

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<sup>1</sup> The parties have consented to the filing of this brief, which consents have been lodged with the Court

Pursuant to Rule 37.6, *amici* affirm 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 *amici curiae* or their counsel made a monetary or other contribution to the preparation or submission of this brief.

Petitioner is a member of ANA.

The Senior Vice President, General Counsel and Secretary of petitioner is a director of Atlantic Legal Foundation and a senior counsel on the legal staff of petitioner is on the Advisory Council of Atlantic Legal Foundation; neither of them participated in the Foundation's decision to file a brief in this case. Petitioner has once or twice made a monetary contribution to Atlantic Legal Foundation for general operating support; in the Foundaton's current fiscal year, that contribution constituted less than two (2.0%) percent of the Foundation's budget.

membership includes nearly 2,000 companies with 25,000 brands that engage almost 150,000 industry professionals and collectively spend or support more than \$400 billion in marketing and advertising annually. The membership is comprised of more than 1,100 client-side marketers and more than 800 marketing service provider members, which include leading marketing data science and technology suppliers, ad agencies, law firms, consultants, and vendors. The ANA's membership includes a cross-section of some of the largest advertisers in the U.S. and worldwide. Further enriching the ecosystem is the work of the nonprofit ANA Educational Foundation (AEF), which has the mission of enhancing the understanding of advertising and marketing within the academic and marketing communities.

This case is of vital importance to the ANA and its members because it raises significant First Amendment issues regarding future liability for commercial speech that was truthful and nondeceptive at the time it was made. Holding our members liable for speech made years prior based on commonly accepted understandings at the time could expose ANA's membership to significant and inappropriate monetary and other damages.

Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm that provides effective legal advice, without fee, to scientists, parents, educators, and other individuals and trade associations. Atlantic Legal Foundation seeks to promote sound thinking in the resolution



of legal disputes and the formulation of public policy. Among other things, the Foundation's mission is to advance the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and use of sound science as the basis for decision-making. Atlantic Legal Foundation's leadership includes distinguished legal scholars, leading lawyers in private practice with national law firms, and general counsels of corporations.

The Foundation has litigated cases as trial and appellate counsel in state and federal courts, and as an *amicus* and as counsel for *amici* in numerous cases in this Court concerning First Amendment rights to free speech and association, most recently last term in *CTIA - The Wireless Association v. City of Berkeley, California*, No. 17-976 (petition granted, judgment vacated and case remanded for further consideration in light of *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018)) and *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018).

### **INTRODUCTORY STATEMENT**

A century ago, Sherwin-Williams and many other paint manufacturers and sellers in California and throughout the United States advertised and sold lead paints for residential and other uses. At the time those products were lawful and commonly used on interior and exterior surfaces of residential buildings.

The California trial court and the California Court of Appeal held Sherwin-Williams and other paint manufacturers liable for “public nuisance” based on an advertisement that Sherwin-Williams ran once in 1904 in the Los Angeles Times and the San Diego Union and \$5,000 in donations to a trade organization between 1937-1941 that the organization used to promote better paint, including lead paint, for lumber products. App. 62a; App. 403a-04a. Interior residential use of lead paint was law ful at the time of Sherwin-Williams’ and the trade association’s advertising.

At all times that Sherwin-Williams advertised lead paint in California and at all time the trade association promoted use of lead paint, lead paint was a legal product for interior residential use. Nevertheless, the California courts ruled that factually truthful promotion of lawful products has no First Amendment protection because those products were found decades later to be potentially hazardous. The California courts held that Sherwin-Williams’ commercial speech decades ago was “inherently misleading” because its “promotion” of lead paint “necessarily implied that lead paint was safe.” App. 48a-49a. Petitioner was held liable, not because Sherwin-Williams or the trade association it supported said that lead paint was safe to ingest but because lead paint is now considered hazardous for use on the interior surfaces of residential properties. The trial court candidly acknowledged that medical science did not consider lead paint to pose a health risk at the

time Sherwin-Williams took out an advertisement in two newspapers in 1904 or contributed to a public relations campaign eight decades ago. See *County of Santa Clara v. A. Richfield Co.*, 40 Cal. Rptr. 3d 313, 320 (Cal. Ct. App. 2006) (“*Santa Clara I*”).

This Court has held repeatedly that the First Amendment protects truthful commercial speech and association for lawful goals – even when related to hazardous products. In addition, the California state court decisions in this case are in conflict with a decision of the Third Circuit, which, in an opinion written by then-Judge Alito, held that the First Amendment protects corporate donations to trade associations unless the trade association had a specific purpose of advancing illegal goals. There was no evidence in this case that the trade association had any illegal goal or engaged in any illegal activity.

As petitioner shows, state and local governments throughout the country are using the newly-broadened concept of “public nuisance” and the lax burdens of proof applied in the decisions below to assert liability against numerous companies based on truthful speech and lawful association. See Sherwin-Williams’ Petition at 4, 24-25; see also Petition in *ConAgra Grocery Products Company and NL Industries, Inc. v. California*, No. 18-84 at 32-33.

The California ruling threatens the rights of American businesses to speak and to associate with each other and will have a chilling effect on

commercial speech and the right of association because of the immense liability imposed on the lawful promotion of products. Commercial speech and association will become “unjustifiably risky and would undoubtedly have an unwarranted inhibiting effect upon them.” *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1294 (3d Cir. 1994).

The First Amendment issues presented here calls for review by this Court.

### **BACKGROUND**

The federal government first regulated residential use of lead-based paint in 1971; it banned such use in 1978. Both events occurred decades after Sherwin-Williams’ last alleged promotion of interior lead paint. The federal regulations did not mandate removal of lead paint already in houses. 42 Fed. Reg. 44199-44201. Currently, no California or federal law prohibits the presence of intact and well-maintained lead paint in residential spaces. Intact lead paint is not considered to be a hazard. App. 414a-16a, 360a. Federal and California law only require property owners to prevent deteriorating lead paint and to abate lead hazards from deteriorated lead paint. App. 341a, 357a, 374a-75a.

In this case, the alleged “public nuisance” is the presence of lead paint in millions of unidentified and unspecified private houses and apartment buildings in ten California cities and counties. Petitioner and other defendants have never owned, possessed or exercised control over those

properties. Further, a paint manufacturer defendant is liable merely because it “promoted” lead paints for interior use – not because it actually sold paint to any homeowner or apartment landlord or lessee, and even though there is no proof that the manufacturer’s “promotion” was seen by any person who bought or used the lead paint. In California, the presence of lead paint was presumed, and neither reliance on any company’s promotion nor actual application of a defendant’s product was a necessary element of plaintiffs’ proof. App. 292a.<sup>2</sup>

This case raises patent First Amendment issues because liability attaches simply upon a defendant’s “promotion of lead paint for interior use.” (*Santa Clara I* at 328) and “[t]he fact that the pre-1978 manufacture and distribution of lead paint was in accordance with all then-applicable statutes does not immunize [the manufacturer or

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<sup>2</sup> Indeed, the Court of Appeal held that “the identity of the manufacturer of lead paint at a specific location was of limited relevance” because “Defendants were held liable for *promoting* lead paint for interior residential use,” not for actually selling it. App.96. So long as a defendant’s promotions constituted “at least ‘a *very minor force*’ in leading to the current presence of interior residential lead paint in a substantial number of homes in the 10 jurisdictions,” App.68 (emphasis added), each defendant could be held jointly and severally liable for the abatement of *all* lead paint in residences in the relevant jurisdictions that was either deteriorated or on “friction surfaces.” App.63-70.

distributor] from subsequent abatement as a public nuisance.” Id. at 329.

California’s application of its public nuisance theory in this case shows that it is a direct threat to the commercial speech of manufacturers, distributors and trade associations. Plaintiffs’ experts acknowledged that Sherwin-Williams never ran any advertisements in California specifically promoting the use of lead paint in residential interiors (App. 347a. 369a) and plaintiffs presented no evidence that any Sherwin-Williams’ promotion caused lead paint to be used in any residence in the relevant geographic area.

Sherwin-Williams advertised a line of paints that included exterior paints (some of which included white lead) and interior paints (none of which included white lead) one time in 1904 – more than 100 years ago. App. 392a-395a. The Court of Appeal held that this advertisement – which never mentioned lead, which did not involve interior lead paints, and which never suggested the use of lead paint on interior surfaces of residences nevertheless was deemed “promotion” of lead paint for interior use.

The California courts also relied on contributions Sherwin-Williams made to the Lead Industries Association (“LIA”), a trade association of dozens of member companies that mined, smelted, and refined lead or that made lead products. App. 12a-13a. During a five-year period

between 1937 and 1941, Sherwin-Williams donated \$1,000 annually to a LIA promotional campaign directed at lumber products companies, suggesting that they endorse better paint, including lead paint. App. 399a. This campaign did not encourage the use of lead paint on residential interior surfaces. Neither California court found that Sherwin-Williams ever saw or approved any LIA advertisement for an illicit product or the illegal use of any product. Neither California court found that LIA was Sherwin-Williams' agent, App. 337a. The Court of Appeal nevertheless concluded that Sherwin-Williams' donations to the LIA made it a "promoter" of lead paint for interior residential use. App. 62a-63a.

In the California Court of Appeal Sherwin-Williams argued that the Superior Court's finding of liability and that court's abatement order violated its First Amendment and federal due process rights. The Court of Appeal rejected those arguments. The court held that the promotion of lead paint was "misleading" because it "necessarily implied that lead paint was safe," App. 48a-49a, and the promotion of lead paint for interior use, "while knowing that such use would create a public health hazard," deprived the speech of "any First Amendment protection." App. 49a, and the "lead paint promotional advertising and participation in trade-association-sponsored lead paint promotional advertising were not entitled to any First Amendment protections." App. 48a.

The Court of Appeal also applied a principle of “collective guilt,” holding each defendant jointly and severally liable for harms resulting from the “promotion” of lead paint by others and all damages ensuing, so long as its historical promotions were at least a “very minor force” in the collective presence of lead paint inside residential homes in the relevant jurisdictions. App. 67a.<sup>3</sup>

### **SUMMARY OF ARGUMENT**

The petition should be granted because the decisions of the California courts conflict with this Court’s First Amendment jurisprudence protecting commercial speech and lawful association and renders nugatory that protection for commercial speech.

The petition should also be granted because imposing liability based on membership in a trade association threatens important First Amendment rights that are an essential aspect of freedom of speech.

The California court decisions in the lead paint case is a direct and serious threat to the First

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<sup>3</sup> Although the Court of Appeal limited liability for damages to pre-1950 structures because plaintiffs failed to show that any defendant had promoted the use of lead paint in residential interiors after that date, App. 70a, Sherwin-Williams’ was held liable through 1950 even though its last “promotional activity” was its final contribution to the LIA promotional campaign in 1941.



Amendment's protections warranting this Court's intervention.

## ARGUMENT

### I. THE DECISIONS OF THE CALIFORNIA COURTS CONFLICT WITH THIS COURT'S FIRST AMENDMENT JURISPRUDENCE PROTECTING COMMERCIAL SPEECH

The decisions in the California state courts are incompatible with constitutional guarantees of the right to free speech and free association. The linchpin for the imposition of massive retroactive liability was not the manufacture, sale or application of lead paint to the interiors of residences, but its promotion. Petitioners were explicitly held liable solely for their speech. Moreover, the California courts absolved plaintiffs of any obligation to show reliance on petitioner's speech. The trial court, for example, held explicitly that "[t]he People do not need to prove reliance." App. 298.<sup>4</sup>

The federal government first regulated residential use of lead-based paint in 1971 and banned that use in 1978, long after Sherwin-Williams' ceased promotion of interior lead paint.<sup>5</sup> Until the late 1990s no one understood that very

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<sup>4</sup> And the plaintiffs stipulated that they had no evidence of reliance. Stipulation, ¶1, *Cty. of Santa Clara v. Atl. Richfield Co.*, No. 1-00-CV-788657 (Cal. Sup. Ct. Aug. 13, 2012).

<sup>5</sup> The legislative ban did not require the removal of lead paint already in residences. 42 Fed. Reg. 44199-44201.

low doses of lead could harm adults and children with no apparent symptoms – the same harms underlying the public nuisance alleged here. In *Santa Clara I* (at 321, 331) the court tolled the statute of limitations “until approximately 1998 when scientific studies were published disclosing the dangers of low-level lead exposure”). There was no showing that the defendants knew more about the risks of lead paint than legislators, regulators, the scientific community, or the public.

Intact lead paint is not considered to be a hazard and no federal or California state law prohibits the presence of well-maintained lead paint in residential interiors. App. 414a-16a, 360a.<sup>6</sup>

The California courts imposed liability on Sherwin-Williams for a single advertisement that appeared in two newspapers in 1904 for a product line that, while it included exterior lead paints, contained no interior lead paints. This advertisement promoted a legal product for a lawful use. The ad did not make any false or misleading statement about the properties of lead paint or state that lead paint was safe to ingest, or suggest that lead paint should be used for interiors of residences. The courts below did not find that petitioners’ speech was false or misleading in any traditional sense; rather, they found that a

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<sup>6</sup> Federal law and California law require only that property owners prevent and abate lead hazards from deteriorating lead paint. App. 341a, 357a, 374a-75a.

century-old advertisement for a then-lawful product for a then-lawful use was “inherently misleading” because it “implicitly asserted” that lead paint was safe for interior residential use, which the trial court concluded (with the benefit of hindsight) is not true. App.57.

The California Court of Appeal held that the speech was “not entitled to any First Amendment protections,” App. 48a, because the lead paint is now considered to be unsafe for interior residential use and that the ad was “inherently misleading” because the court retroactively applied a current standard to advertisements published a century earlier. The courts below used “contemporary knowledge” developed as “medicine has advanced” to impose hundreds of millions of dollars of liability for petitioner’s speech. App. 314a, Santa Clara I at 320. In short, the California courts imposed a duty of clairvoyance on the defendants.

The California Court of Appeals decision conflicts with this Court’s settled and current First Amendment precedents recognizing that commercial speech is generally entitled to First Amendment protection. See *Nat’l Inst. of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018). The First Amendment protects the right to advertise goods and services. Advertising has been “a part of our culture” since before the formation of the Nation. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996) (plurality opinion) and commercial speech is “indispensable” and essential to a “free enterprise economy because it is essential

to ensuring that “private economic decisions” are “intelligent and well informed.” *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

Commercial speech is protected so long as it “is neither misleading nor related to unlawful activity.” *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564 (1980); see also *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002). The First Amendment protects “truthful, nonmisleading speech about a lawful product” *44 Liquormart*, 517 U.S. at 504 (plurality opinion).

The California courts’ formulation and application of the “public nuisance” theory are especially problematic from a First Amendment perspective. First, liability rests entirely on speech – the “promotion of lead paint for interior use” (*Santa Clara I* at 328) – not actual manufacture or sale of a product. Second, liability is absolute: it does not matter that the manufacture, sale and promoted use of the product was entirely lawful at the time of that activity. “The fact that the pre-1978 manufacture and distribution of lead paint was in accordance with all existing statutes does not immunize it from subsequent abatement as a public nuisance.” *Id.* at 329.

California’s public nuisance doctrine contradicts this Court’s precedents, which hold that truthful speech about lawful products is protected regardless of whether a court considers the products “safe.” Indeed, promoting a lawful product

is speech protected by the First Amendment even if the product or activity is known at the time to be harmful to health. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (tobacco); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 184-85 (1999) (gambling); *44 Liquormart*, 517 U.S. at 504 (alcoholic beverages). If speech can lose its constitutional protection retroactively, based on later-discovered facts that do not negate the truth of the speech when uttered, protection for commercial speech is nugatory.

Stripping speech of its First Amendment protection based on a retroactive assessment of its truthfulness is bound to discourage all speech, whether clearly controversial or apparently innocuous. The First Amendment is designed to encourage both.

## **II. IMPOSING LIABILITY BASED ON MEMBERSHIP IN A TRADE ASSOCIATION THREATENS IMPORTANT FIRST AMENDMENT RIGHTS**

The decisions below also offend the First Amendment by holding petitioner responsible for the speech of trade associations to which they made modest monetary contributions. “Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection.” *In re Asbestos Sch. Litig.*, 46 F.3d 1284, 1294 (3d Cir. 1994) (Alito, J.).

The “freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of. . . freedom of speech.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). Free association is essential to constitutional protection because individuals can make their views known by collective effort because individually “their voices would be faint or lost.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-08 (1982).

The right of association includes the right to participate in organizations that promote “business or economic activity” (*Thomas v. Collins*, 323 U.S. 516, 531 (1945)) and the right to associate to advance “economic” ideas is as important as the right to associate to advance political, religious, or cultural beliefs or ideas. *Patterson*, 357 U.S. at 460). Freedom of speech includes the right to associate with others to disseminate ideas and to pool financial resources for expressive purposes. *McConnell v. FEC*, 540 U.S. 93, 255 (2003) (opinion of Scalia, J.) and “the freedom of association is diluted if it does not include the right to pool money through contributions, for funds are often essential if advocacy is to be truly . . . effective.” *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 296 (1981).

In *NAACP v. Claiborne Hardware Co.*, the Court held that freedom of association prohibits punishing a person for the illegal acts of a group with which he or she associates, unless it is shown

that the group had unlawful aims and the person to be penalized had the specific intent to further those unlawful aims. 458 U.S. at 920. The Court has long proscribed “guilt by association,” because a “blanket prohibition of association with a group having both legal and illegal aims” would endanger “legitimate” association, and the Government may enforce the prohibition only where the individual “specifically intend[s]” to accomplish the illegal aims. *Scales v. United States*, 367 U.S. 203, 229 (1961). “[T]he government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims.” *Healy v. James*, 408 U.S. 169, 186 (1972).

Neither the LIA nor the advertising campaign to which Sherwin-Williams contributed had “unlawful goals.” The use of lead paint which for both exterior and interior residential application was completely legal at the time of Sherwin-Williams’ contributions to LIA in 1937-1941. The California courts did not and could not find either that the LIA had unlawful goals or that Sherwin-Williams had a “specific intent to further . . . illegal aims.” See *Claiborne Hardware*, 458 U.S. at 920. Imposing liability on Sherwin-Williams in the absence of any finding of its intent to further an unlawful goal ignores this Court’s precedents.

*In re Asbestos School Litigation*, 46 F.3d 1284 (3d Cir. 1994) is instructive. There, school districts sued former manufacturers of asbestos-containing

building products. They claimed that one defendant was liable because it had donated \$50,000 to “a trade organization which “had disseminated misleading information about the danger of asbestos in schools.” *Id.* at 1287.

The Third Circuit – in an opinion by then Circuit Judge Alito – held that the imposition of liability amounted to a “clear and indisputable” violation of the First Amendment. *Id.* at 1289. Judge Alito found it “abundantly clear that the strict standard set out in *Claiborne Hardware* cannot be met.” *Id.* at 1290. “Even if it [were] assumed for the sake of argument ... that some of the [Safe Buildings Alliance’s] activities were unlawful,” there was “simply no evidence” that the defendant “specifically intended to further such wrongful conduct.” *Id.* “Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection.” *Id.* Making anyone who engages in these activities responsible for the illegal acts of the group, without proof of specific intent to commit those illegal acts, “would make these activities unjustifiably risky and would undoubtedly have an unwarranted inhibiting effect upon them.” *Id.* The Third Circuit added that the district court’s approach had “far-reaching” implications that would “broadly threaten First Amendment rights.” *Id.* at 1294.

The California court’s decision directly conflicts with *Asbestos School Litigation* and, like the



decision of the district court reversed by the Third Circuit, the California Court of Appeal's decision will have "unwarranted inhibiting effect" on expressive association that broadly threatens First Amendment rights.. The California courts' stripping of First Amendment protections from Sherwin-Williams based on contributions to a legitimate trade association engaging in ordinary commercial speech will undoubtedly deter companies and individuals from joining organizations that participate in public discourse and debate. It is a direct and serious threat to the First Amendment's protections.

**CONCLUSION**

The petition raises genuine, serious and pressing First Amendment issues. The Court should grant the petition for writ of certiorari.

Respectfully submitted,  
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