No. 17-1152

In The Supreme Court of the United States

CONTEST PROMOTIONS, LLC,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND NFIB SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Section 611 of the San Francisco Planning Code provides that "[n]o new general advertising signs shall be permitted at any location within the City [of San Francisco] as of March 5, 2002." This ban applies to any sign "which directs attention to a business, commodity, industry or other activity which is sold, offered or conducted elsewhere than on the premises upon which the Sign is located," and also to any sign advertising a product or service that is "only incidentally" offered on the premises. S.F. Planning Code § 602. The Ninth Circuit sustained the dismissal of petitioner's First Amendment challenge to this ordinance, holding that a total ban of this sort is permissible as a matter of law.

The question presented is:

Whether the First Amendment permits a municipality to ban all signs, of any kind, advertising off-premises commercial activity, without making any showing that the ban furthers a substantial government interest in a direct, material, and tailored way.

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INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the protection of our First Amendment rights. This aspect of its advocacy is reflected in the regular representation of those challenging overreaching governmental and other actions in violation of their First Amendment freedoms. *See*, *e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111, 217 U.S. LEXIS 4226 (Jun. 26, 2017); *Bennie v. Munn*, 137 S. Ct. 812 (2017); *Ctr. for Competitive Politics v. Harris*, 136 S. Ct. 480 (2015); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014); *Minority TV Project, Inc. v. FCC*, 134 S. Ct. 2874 (2014).

SLF has an abiding interest in the protection of the freedoms set forth in the First Amendment – specifically the freedom of speech and the freedom to exercise one's religion. This is especially true when the law suppresses free discussion and debate on public issues that are vital to America's civil and political

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[1] All parties have consented to the filing of this brief in letters on file with the Clerk of Court, and the parties were notified of *amici curiae*'s intention to file this brief at least 10 days prior to the filing of this brief. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

institutions, and when the law suppresses one from expressing his or her religious beliefs. SLF is profoundly committed to the protection of American legal heritage, which includes all of those protections provided for by our Founders in the First Amendment.

The National Federation of Independent Business Small Business Legal Center (NFIB SBLC) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitols. Founded as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB SBLC frequently files *amicus* briefs in cases that will impact small businesses.

SUMMARY OF ARGUMENT

In the name of safety and aesthetics, San Francisco banned all new signs on private property advertising any commercial activity that is not offered on the premises where the sign hangs. San Francisco Planning Code § 602. San Francisco provides no evidentiary support for its law, so it remains unclear what makes an off-premises commercial sign more dangerous or aesthetically less pleasing than an off-premises non-commercial sign or an on-premises sign in general. Instead of establishing that off-premises advertising causes commercial harm, San Francisco relies on the shield that has become First Amendment law in the Ninth Circuit, knowing that the lower court refuses to apply this Court's precedent with respect to both commercial speech and content-based restrictions.

The San Francisco ordinance lies outside the scope of the "special commercial speech inquiry" set forth by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). The level of First Amendment protection provided to commercial speech has varied throughout our country's history. At times it received full First Amendment protection, and at times it received none. In 1980, this Court set forth a so-called intermediate level of scrutiny applicable to commercial speech, with the goal of ensuring that governments could enact speech restrictions aimed at preventing commercial harms. *Id*. at 564-66. Since then, governments like San Francisco have relied on application of *Central Hudson*'s lowered bar to restrict commercial speech for any reason they

wish including so-called "safety and aesthetics." *Amici* writes separately to address the resulting conflicts that arise with this Court's reasons for distinguishing between commercial and noncommercial speech in the first place and with this Court's more recent opinions in *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) and *Sorrell v. IMS Health*, 564 U.S. 552 (2011), which support application of a heightened level of scrutiny when the speech restriction is not aimed at preventing commercial harms.

Further, this Court's recent cases show that the Court applies strict scrutiny to laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994). As Petitioner points out, the Court has repeatedly declared that *all* "[c]ontent-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *Sorrell*, 564 U.S. at 566. While the Court's statements remain unequivocal, the Ninth Circuit insists on finding vagueness in them and refuses to apply strict scrutiny to commercial speech restrictions. Such a complete disregard for this Court's precedent warrants review.

ARGUMENT

I. This case presents an opportunity for the Court to clarify that speech regulations designed to promote safety and aesthetics warrant heightened scrutiny.

A. This Court distinguished commercial speech from noncommercial speech because it found commercial speech objective and durable, and thus, less likely to be chilled by regulation.

Seventy-six years ago, the Supreme Court first distinguished between commercial and noncommercial speech, holding that the First Amendment did not protect commercial speech. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). The story of this Court's commercial speech doctrine begins with a man in New York City who wanted to pass out handbills advertising tours of his submarine. *Id*. at 53. The City told him the handbills violated the New York Sanitary Code, which forbade "distribution in the streets of commercial and business advertising matter" but allowed distribution of "handbills solely devoted to 'information or a public protest.'" *Id*. In response, he printed and distributed new handbills with the original ad on one side and a statement protesting the city ordinance on the other side. *Id*. After the police "restrained" him, the submarine owner challenged the constitutionality of the city's restraint on speech. *Id*. at 53-54.

Without providing any legal basis or citing a single source, the Court held, "We are . . . clear that the

Constitution imposes no such restraint on government as respects purely commercial advertising." *Id*. at 54. Despite the lower court's concern about drawing a line between speech made for pecuniary gain and speech for the public interest, the Court did not define commercial or noncommercial speech. *Id*. at 55 (explaining that the case before it was not based on "subtle distinctions" and that it need not "assume possible cases not now presented"). And with that "casual, almost offhand" ruling, *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring), government entities could categorically exclude speech from First Amendment protection simply by categorizing it as "commercial."

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court gave its first indication – subtle as it was – that its categorical exclusion of commercial speech from First Amendment protection would not survive the test of time. It did so by distinguishing the advertisement at issue from the one in *Chrestensen*, explaining that the latter was "purely commercial advertising" and concluding that when speech goes beyond purely commercial advertising it is worthy of constitutional protection. *Id*. at 266. With that backdrop, the Court found the ad placed by civil rights advocates was "not a 'commercial' advertisement in the sense in which the word was used in *Chrestensen*" because it "communicated information, expressed opinion . . . on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." *Id.* To find otherwise, "would be to shackle the First Amendment

in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'" *Id*. (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

Further indications that the Court would soon reject or further limit *Chrestensen* appeared in the dissents of Justices Stewart and Douglas in *Pittsburgh Press v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973),[2] and Justices Brennan, Marshall, and Powell in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974).[3] In the various dissents, the Justices questioned *Chrestensen*'s continued validity, suggesting agreement with Justice Douglas' 1959 observation that the categorical exclusion of commercial speech from First Amendment protection "has not survived reflection." *Cammarano*, 358 U.S. at 514.

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[2] *See Pittsburgh Press*, 413 U.S. at 401 (Stewart, J., dissenting) ("Whatever validity the *Chrestensen* case may still retain when limited to its own facts, it certainly does not stand for the proposition that the advertising pages of a newspaper are outside the protection given the newspaper by the First and Fourteenth Amendment. Any possibility on that score was surely laid to rest in *New York Times v. Sullivan*."); *Id*. at 397-98 (Douglas, J., dissenting) ("Commercial matter, as distinguished from news, was held in *Valentine v. Chrestensen*, not to be subject to First Amendment protection. My views on that issue have changed since 1942, the year *Valentine* was decided. As I have stated on earlier occasions, I believe that commercial materials also have First Amendment protection.").

[3] *See Lehman*, 418 U.S. at 314 n.6 (Brennan, J., dissenting) ("It is sufficient . . . to recognize that commercial speech enjoys at least *some* degree of protection under the First Amendment.").

In 1976, the Court finally dispensed with *Chrestensen* and recognized commercial speech as protected by the First Amendment. *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press*, 413 U.S. at 385). In doing so, the Court wrote in depth about the public interest element of commercial speech stating that "[a]s to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id*. at 763. The Court found that the free flow of commercial products, and the communication of where, how, and why they were made, was "indispensable." *Id*. at 765. "[E]ven if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in democracy, we could not say that the free flow of information does not serve that goal." *Id*. The Court found that few commercial messages lack a public interest element, and that "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." *Id*. Yet, with that admission, the Court explained that its holding did not dispense with categorizing speech as commercial or noncommercial, or with the potential application of different levels of scrutiny for the two categories. *Id*. at 771 n.24.

B. Speech regulations that do not address commercial harms deserve full First Amendment protection.

Four years after the Court contemplated[4] different levels of scrutiny for commercial and noncommercial speech, the Court decided *Central Hudson*, 447 U.S. 557. There it held that all commercial speech restrictions were subject to intermediate scrutiny, retracting some of the First Amendment protection that it afforded commercial speech in *Virginia Board of Pharmacy*. Specifically, the Court set forth the familiar *Central Hudson* four-part test. If commercial speech "is neither misleading nor related to unlawful activity," the government "must assert a substantial interest" that its restriction serves. *Id.* at 564. The government must also show that the restriction "directly advance[s] the state interest involved," and does so in a narrowly tailored way: "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Id*. "In this analysis, the [g]overnment bears the burden of identifying a substantial interest and justifying the challenged restriction." *Greater New*

[4] While the Court in *Virginia Board of Pharmacy* declined to establish a different level of scrutiny for commercial speech, it did explain that the government may regulate speech to ensure it is not "false . . . deceptive or misleading." 425 U.S. at 771. Two years later it also clarified that governments may regulate commercial speech that is coercive. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978).

Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 183 (1999).

The Court has never fully explained why it "took a sudden turn away from *Virginia Board of Pharmacy* in *Central Hudson*[.]" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 526 (1996) (Thomas, J., concurring in part and in judgment). One rationale for establishing this "intermediate" level of scrutiny for commercial speech is that speech proposing a commercial transaction is more objective, verifiable, and durable, and thus, less likely to be chilled. *Va. State Bd. of Pharm*., 425 U.S. at 771 n.24.

> Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.

Id.

Another is "that 'commercial speech, the offspring of economic self-interest' is supposedly a 'hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation.'" 44 *Liquormart*, 517 U.S. at 523 n.4 (Thomas, J., concurring in part and in judgment) (quoting *Central Hudson*, 447 U.S. at 564 n.6). The lack of "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value'; than 'noncommercial' speech," *id*., has caused many to question the continued validity and scope of *Central Hudson*. *See*, *e.g*., *id*. at 518-24; *id.* at 517-18 (Scalia, J., concurring in part and in judgment) ("I share Justice Thomas's discomfort with the *Central Hudson* test, which seems to me to have nothing more than policy intuition to support it."); *Discovery Network*, 507 U.S. at 437 (Blackmun, J., concurring) ("I believe the Court should . . . hold that truthful, noncoercive commercial speech concerning lawful activities is entitled to full First Amendment protection.").

While this Court has declined invitations to overrule *Central Hudson*,[5] recent decisions show that the scope of *Central Hudson* is much narrower than once thought. In *Discovery Network*, the Court suggested that commercial speech may be entitled to greater protection than that afforded by *Central Hudson* when the regulation does not seek to protect the public from commercial harms. *Discovery Network*, 507 U.S. at 416

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[5] *See*, *e.g.*, *Discovery Network*, 507 U.S. at 416 n.11 (declining to address the continued vitality of *Central Hudson* because the ordinance at issue could not even withstand the *Central Hudson* test).

n.11. The challenged regulation banned commercial newsracks, but not noncommercial ones. *Id*. at 412. The city looked to its interest in safety and esthetics to justify the ban. *Id*. The Court ultimately found Cincinnati's "sweeping ban that bars from its sidewalks a whole class of constitutionally protected speech" could not withstand scrutiny under *Central Hudson* because the City did not establish a "fit" between its goals and the ban. *Id*. at 430. In holding, the Court explained that "the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech" is a government's "interest in *preventing commercial harms*." *Id*. at 426 (emphasis added).

The Court reiterated these sentiments in *Sorrell*, referring to *Central Hudson* as a "special speech inquiry." 564 U.S. at 571. Reviewing the content-based commercial speech restriction, the Court explained,

> [T]he government's legitimate interest in protecting consumers from "commercial harms" explains "why commercial speech can be subject to greater governmental regulation." *Discovery Network*, 507 U.S. at 426; *see also 44 Liquormart*, 517 U.S. at 502. The Court has noted, for example, that a "State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there." *R.A.V. [v. St. Paul]*, 505 U.S. [377,] 388-89 [1992].

Id. at 579.

This Court's opinions in *Discovery Network* and *Sorrell* underscore Justice Blackmun's assertion that "there is no reason to treat truthful commercial speech as a class that is less 'valuable' than noncommercial speech." *Discovery Network*, 507 U.S. at 431 (Blackmun, J., concurring). They also support applying a heightened level of scrutiny here, where San Francisco banned off-site commercial signs in the interest of safety and aesthetics, *not* to address commercial harms. Finally, as this Court found in *Discovery Network*, the distinction between commercial speech and noncommercial speech "bears no relationship *whatsoever* to the particular interests that the city has asserted." *Id*. at 424 (majority opinion). Thus, applying *Central Hudson* to a speech regulation aimed at improving or protecting the safety and aesthetics of a city just because the regulated speech is commercial rather than noncommercial, undermines and erodes any protection remaining in our First Amendment.

II. This case provides an opportunity for the Court to reaffirm that all content-based restrictions, including those on commercial speech, warrant strict scrutiny.

San Francisco's Ordinance bans all new signs on private property advertising any commercial activity that is not offered on the premises where the sign hangs. As Petitioner explains, the Ordinance is content-based because it categorically excludes signs that advertise items or services provided off-premises, while allowing ones that advertise items or services

provided on-premises. *See* Pet. at 20-21. *See also Sorrell*, 564 U.S. at 563-64 (finding an ordinance that forbade speech used only for marketing was a content-based restriction). Traditional First Amendment principles mandate that "[w]here a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 540 (1980) (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)). "A less stringent analysis would permit a government to slight the First Amendment's role 'in affording the public access to discussion, debate, and the dissemination of information and ideas.'" *Id*. at 541 (quoting *Bellotti*, 435 U.S. at 783).

This Court has explained that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).[6] "Content-based restrictions are the essence of censorial power." *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 699 (1990) (Kennedy, J., dissenting). This Court has concluded time and time again that "[r]egulations

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[6] *See also Cohen v. California*, 403 U.S. 15, 24 (1971); *Street v. New York*, 394 U.S. 576 (1969); *Sullivan*, 376 U.S. at 269-70; *NAACP v. Button*, 371 U.S. 415, 445 (1963); *Wood v. Georgia*, 370 U.S. 375, 388-89 (1962); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (citing *Carey v. Brown*, 447 U.S. 455, 463 (1980); *Mosley*, 408 U.S. at 95-96).

Applying these principles, this Court has, on more than one occasion, held that *all* content-based restrictions on speech are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226; *Sorrell*, 564 U.S. at 566 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) ("The First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.' "). Less than a decade ago, this Court made the unequivocal statement that "commercial speech is no exception" to strict scrutiny analysis of a content-based regulation. *Sorrell*, 564 U.S. at 566. Notably, the government argued that "heightened judicial scrutiny is unwarranted because its law is a mere commercial regulation[.]" *Id*. at 566. This Court rejected that argument; instead finding that even though commercial speech "results from an economic motive, so too does a great deal of vital expression." *Id*. at 567. Further, the Court made clear that governments may not avoid strict scrutiny of their content-based restrictions, simply by categorizing the regulated speech as commercial. *Id*. at 580 ("The State has burdened a form of protected expression that it found too persuasive. At the same time, the State left

unburdened those speakers whose messages are in accord with its own views. This the State cannot do."); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975) (quoting *Button*, 371 U.S. at 429) ("The Court has stated that 'a State cannot foreclose the exercise of constitutional rights by mere labels.' "). Thus, "[r]egardless of the particular label asserted by the State – whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation' – a court may not escape the task of assessing the First Amendment interest at stake. . . ." *Bigelow*, 421 U.S. at 826.

Several years later, this Court reiterated that "[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." *Reed*, 135 S. Ct. at 2228 (quoting *Discovery Network*, 507 U.S. at 429). The Court explained that it has "*insisted* that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference.' " *Id*. at 2230 (emphasis added) (quoting *Turner Broad. Sys*., 512 at 658). And, just in case any question remained regarding the Court's words, it further stated, "Not 'all distinctions' are subject to strict scrutiny, only *content-based* ones are. Laws that are *content neutral* are instead subject to lesser scrutiny." *Id*. at 2232. (emphasis added)

The Court made clear, in both *Sorrell* and in *Reed*, that content-based restrictions receive strict scrutiny. Even so, the Ninth Circuit approached this issue as if uncertainty remains and has not applied the standard

necessary to protect speech from ordinances aimed to silence speakers it disfavors. The Ninth Circuit's blatant disregard for this Court's precedent warrants review, if for no other reason than to ensure that those engaging in commercial speech in the Ninth Circuit receive the same First Amendment protections as commercial speakers elsewhere.

CONCLUSION

For the reasons stated in the Petition for a Writ of Certiorari and this *amici curiae* brief, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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