No. 18-1445

IN THE

Supreme Court of the United States

THERESA SEEBERGER,

Petitioner,

v.

DAVENPORT CIVIL RIGHTS COMMISSION AND MICHELLE SCHREURS,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Iowa

RESPONDENT DAVENPORT CIVIL RIGHTS COMMISSION'S BRIEF IN OPPOSITION

ALLISON M. ZIEVE
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th St. NW
Washington, DC 20009

SASHA SAMBERG-CHAMPION
Counsel of Record
SARA PRATT
MICHAEL G. ALLEN
RELMAN, DANE, & COLFAX PLLC
1225 19th St. NW, Suite 600
Washington, DC 20036
(202) 728-1888
ssamberg-champion@relmanlaw.com

Attorneys for Respondent Davenport Civil Rights Commission

July 2019

QUESTIONS PRESENTED

The Fair Housing Act and its state and local analogs bar housing discrimination based on familial status and other bases in multiple ways. Some smaller landlords, like Petitioner, are exempt from certain provisions, such as the ban on evicting people for discriminatory reasons, but not from others, such as the bar on discriminatory statements and advertisements. Here, the Davenport Civil Rights Commission found that Petitioner made statements that a reasonable listener would construe as evidencing a discriminatory preference against renting to certain people based on familial status.

Every court to consider the question has found equivalent laws regulating discriminatory statements consistent with the First Amendment, because such laws serve an important governmental objective and are narrowly tailored to regulate only commercial speech and only to the extent necessary.

The questions presented are:

(1) Does it violate Petitioner's First Amendment rights to regulate her discriminatory statements made in the context of a commercial housing transaction in the same manner as other housing providers' comparable commercial speech?

(2) Has Petitioner waived various arguments central to her petition, including her arguments that her speech was not commercial and that strict scrutiny applies to regulation of commercial speech?

PARTIES TO PROCEEDING AND RELATED CASES

The parties to the proceeding in this Court are listed in the petition for a writ of certiorari.

The following proceedings are directly related to this case:

- *Seeberger v. Davenport Civil Rights Commission and Schreurs*, No. CVCV 51252, Iowa District Court for Polk County. Judgment entered July 7, 2018.
- *Seeberger v. Davenport Civil Rights Commission and Schreurs*, No. 16-1534, Court of Appeals of Iowa. Judgment entered April 18, 2018.
- *Seeberger v. Davenport Civil Rights Commission and Schreurs*, No. 16-1534, Supreme Court of Iowa. Judgment entered Feb. 15, 2019.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

MISCELLANEOUS

INTRODUCTION

The Fair Housing Act of 1968 and the many state and local laws modeled on it, including the Davenport, Iowa ordinance at issue here, regulate discriminatory statements and advertisements connected to the rental or sale of housing. These laws extend to housing providers and others who can make and publish such statements, such as newspapers that solicit or run discriminatory advertisements. The Act and its state and local analogs exempt small landlords such as Petitioner from certain *other* provisions not at issue in this case, such as the ban on evicting tenants for discriminatory reasons. Petitioner contends that, because she is exempt from the ban on discriminatory evictions, the First Amendment bars regulation of her concededly discriminatory statements made in the course of such an eviction. Applying commercial-speech analysis that Petitioner agreed was applicable, the Iowa courts found otherwise.

This case meets none of this Court's criteria for granting review. The decision of the state court below creates no split of appellate authority. On the contrary, courts consistently have found that laws addressing discriminatory statements survive First Amendment scrutiny, including as applied to small landlords exempt from other substantive provisions of fair-housing laws. The courts below joined others in finding that governments have an important interest in regulating discriminatory public statements and advertisements in housing (and not just discriminatory evictions, refusals to rent or sell, and similar housing transactions), given the independent damage that such statements inflict on the accomplishment of the Fair Housing Act's important aims. And the

lower courts here, like other lower courts and the U.S. Department of Housing and Urban Development, have narrowly tailored the laws' regulation of discriminatory statements to further the interests served by fair-housing laws by limiting liability to damage directly caused by discriminatory statements.

Moreover, because the damages award against Petitioner was remanded to the Davenport Civil Rights Commission for further proceedings—and because Petitioner cannot end up liable for attorney's fees—it remains uncertain whether and to what extent Petitioner herself will ultimately be aggrieved in any concrete way. And Petitioner identifies no regularly recurring issue regarding similar fact patterns of enforcement against small landlords for discriminatory statements regarding their reasons for eviction; rather, her petition boils down to a request that this Court review for possible error the judgment in a case involving facts that are unique in the 50-year history of laws regulating discriminatory statements in housing.

Petitioner nonetheless suggests that this fact-bound case offers an opportunity for the Court to explore larger questions regarding First Amendment scrutiny of commercial speech regulations. But this case is unsuitable for such purposes because, among other things, Petitioner waived many of the arguments she now seeks to make—including the assertion that her discriminatory statements were not commercial speech, which directly contradicts the position she took below.

STATEMENT

1. Factual Background

Beginning in 2012, Theresa Seeberger rented rooms in a single-family house in Davenport, Iowa, to multiple tenants, including Michelle Schreurs and her teenage daughter. Pet. App. 77. Seeberger also owns one other rental property, but did not own more than three single-family houses for rental at the relevant time. *Id*.

In September 2014, Seeberger visited the property and saw a bottle of prenatal vitamins in the kitchen. Pet. App. 78. She photographed the bottle and sent the photo to Schreurs with a text message: "Something I should know about?" *Id*.

The next day, when Schreurs came home from work, Seeberger was waiting for her at the property. Seeberger asked Schreurs if she had seen the text. When Schreurs said she had not, Seeberger showed her the photograph. Schreurs responded that her daughter was pregnant. Seeberger then stated that Schreurs had to move out of the property, because: "You don't even pay rent on time the way it is, and … Now you're going to bring another person into the mix" and because "obviously, you're going to keep the baby." Pet. App. 79.

Schreurs' teenage daughter overheard Seeberger's statements. She testified that "she was upset" and "cried for a few days because she felt it was her fault her family would not have a place to live." Pet. App. 79. Although Seeberger gave them a month to move out, Schreurs and her daughter slept at a friend's house after this incident. *Id.* at 80. Schreurs eventually moved in with her parents in Muscatine for five months until she could secure housing.

2. Procedural Background

Schreurs filed a complaint with the Davenport Civil Rights Commission. She alleged that Seeberger violated Davenport Municipal Code § 2.58.305(C) by making a statement with respect to the rental of a dwelling "that indicates any preference, limitation, or discrimination" based on familial status. Davenport law defines "familial status" as "one or more individuals under the age of eighteen domiciled with" a parent or custodian, and it extends familial-status protections to, *inter alia*, "any person who is pregnant." Davenport Municipal Code § 2.58.300(D).

After a hearing, an administrative law judge issued a detailed opinion, finding in favor of Schreurs.

As the ALJ recognized, Seeberger, as a "small landlord," was exempt from the prohibition on rental discrimination but not from the housing law's separate provision concerning discriminatory statements or advertisements concerning housing transactions. Pet. App. 89. Applying the same standard applicable to claims under the Fair Housing Act, the ALJ determined that "[a]n ordinary listener listening to Seeberger's statements would find her statements discriminatory on the basis of familial status." *Id*. at 93; *see id*. at 91 nn. 16-18 (citing cases). The ALJ observed that Schreurs testified that Seeberger's termination of her tenancy, and the events surrounding it, caused her both physical and emotional harm. *Id.* at 83. The ALJ awarded Schreurs $35,000 for emotional distress for "the stress she experienced when Seeberger terminated her tenancy." *Id.* at 94. The ALJ also imposed a $10,000 civil penalty because "Seeberger intentionally discriminated against Schreurs" and because "Seeberger's lack of candor

during the investigation and hearing is disconcerting."[1] *Id.* at 97. In a separate decision, the ALJ awarded Schreurs attorney's fees and costs. *Id.* at 55, 73-74. The Commission reduced the emotional distress award to $17,500 but otherwise approved the ALJ's decision. *Id.* at 73.

On Seeberger's petition for review, an Iowa state district court affirmed in part and reversed in part. As an initial matter, the court declined to address Seeberger's argument that the Commission wrongly applied the ordinance to her conduct by misconstruing terms such as "familial status" and "statement." The court held that Seeberger had waived that argument by failing to present it to the agency. Pet. App. 56-58.

The district court then rejected Seeberger's claim that the decision violated her First Amendment rights. Pet. App. 58-61. In doing so, it found that Seeberger's speech was commercial in nature, because her statements "pertain directly to the commercial transaction between landlord and tenant." *Id.* at 60. The district court also rejected other challenges to the Commission's decision not relevant here. *Id.* at 67-71.

Nonetheless, the court reversed the Commission's damages award and civil penalty. It found that the ALJ's stated justifications for imposing them appeared to be "tied to the termination of the tenancy by [Seeberger], not just her discriminatory state-

---

[1] *See* Pet. App. 81 (finding Seeberger's testimony that she was living in the house at the time of the discriminatory statements "not credible"); *id.* at 83-84 (describing Seeberger's shifting accounts of why she terminated Schreurs's tenancy).

ments," notwithstanding that Seeberger was exempt from liability for the termination. Pet. App. 65. It remanded to the Commission to reconsider what damages and civil penalty, if any, were appropriate for the statements. *Id.* at 72. Additionally, the district court reversed the attorney's fees award, holding that a fee award was not authorized by the ordinance on these facts. *Id.* at 65-66.

All parties appealed. The Iowa Court of Appeals held that the ordinance did not unconstitutionally infringe upon Seeberger's free-speech rights. Pet. App. 39. It observed that Seeberger conceded the threshold points that her statements were "discriminatory and related to a commercial transaction." *Id.* at 35. It rejected Seeberger's argument that her commercial speech was inextricably intertwined with non-commercial speech that would receive greater protection. *Id.* at 35-37.

The Iowa court then applied the test for evaluating the constitutionality of restrictions on commercial speech that this Court set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). It assumed without deciding that Seeberger's speech concerned activity (her termination of Schreurs' tenancy because of familial status) that was otherwise lawful given the small-owner exemption. Pet. App. 37-38. The court of appeals found that the government has a substantial interest in restricting discriminatory statements, even where no law bars the termination of tenancy, to "prohibit[] landlords from subjecting prospective tenants to the stigmas associated with knowingly being discriminated against." *Id.* at 39. It also found that the ordinance, as applied here, infringes upon no more speech than necessary to achieve that sub-

stantial interest. *Id*. The court of appeals reversed the district court with respect to attorney's fees from the administrative process and remanded to that court to determine whether the fee award was excessive. *Id*. at 42. It affirmed the district court's refusal to award Schreur attorney's fees for the court proceedings. *Id*. at 43.

The Iowa Supreme Court granted review but limited its review to the award of attorney fees incurred in the agency proceeding. On that issue, the court reversed the court of appeals, finding that the Commission could not lawfully award fees under either the ordinance provision upon which it relied or the Fair Housing Act. Pet. App. 14-20. The Iowa Supreme Court otherwise let the court of appeals decision stand and affirmed the judgment of the district court remanding the case to the Commission for further proceedings. *Id*. at 9.

REASONS FOR DENYING THE WRIT

This petition does not satisfy any of the criteria for this Court's review.

First, Petitioner does not claim that any split of authority exists regarding her questions presented, nor could such a claim have merit. No federal court of appeals or state court of last resort has found that the discriminatory-statements provision of the Fair Housing Act and analogous state and local laws at issue here violates the First Amendment in any application. Decisions addressing the application of these laws to statements describing discriminatory reasons for actions that are not themselves illegal have been rare, and Respondent is aware of no other decisions involving the kinds of circumstances present here. The most analogous decisions involving

application of the fair-housing laws, though few in number, are fully consistent with the outcome below.

In addition, the decisions below correctly stated and reasonably applied this Court's precedents for First Amendment scrutiny of regulation of commercial speech to the facts of this case. While Petitioner now contends that her speech was not commercial, she waived that point below.

Finally, this case is not a suitable vehicle for revisiting this Court's larger jurisprudence regarding regulation of commercial speech that "offends." Petitioner has failed to preserve some of the arguments she now wishes to present to this Court. More fundamentally, she errs in equating the fair-housing laws' discriminatory-statement ban—which is narrowly tailored to address practices that damage realization of fair housing, and not simply those that cause offense—with various other laws that are not akin to it.

I. There is no conflict in the lower courts regarding the questions presented.

Petitioner presents two questions for this Court's review: (1) whether imposing liability for Seeberger's discriminatory statements in a commercial housing transaction violates the First and Fourteenth Amendments and (2) whether a local ordinance's regulation of such discriminatory statements should be subject to strict or heightened scrutiny. Pet. i. Petitioner makes no attempt to demonstrate that the decision below conflicts with any decision of another state court of last resort, any federal court of appeals, or this Court with respect to either question. *See* Sup. Ct. R. 10(b), (c). No split of authority exists.

In the more than 50 years since the enactment of the Fair Housing Act in 1968—and the subsequent enactment of a host of virtually identical state and local laws[2]—courts and agencies have imposed liability for various types of discriminatory statements regarding the rental or sale of housing. No federal court of appeals or state court of last resort has held that application of these laws violates the First Amendment—including in the small number of cases that have addressed circumstances in which the speaker was exempted from the Fair Housing Act's bar on discriminatory housing transactions or was not situated to make such a transaction.

For example, the Fourth Circuit has held: "While the owner or landlord of an exempted dwelling is free to indulge his discriminatory preferences in selling or renting that dwelling, neither the Act nor the Constitution gives him a right to publicize his intent to so discriminate." *United States v. Hunter*, 459 F.2d 205, 213 (4th Cir. 1972). The court reasoned that the statement of discriminatory preferences, even by those otherwise free to act on them, interferes with the Fair Housing Act's overall goals, including by deterring affected people from seeking housing. *Id.*; *accord United States ex rel. Jackson v. Racey*, 112 F.3d

---

[2] That these laws are essentially identical to the Fair Housing Act is not coincidence. Through the Fair Housing Assistance Program ("FHAP"), HUD provides funding to state and local agencies such as the Commission and delegates to them the authority to adjudicate controversies under the federal Fair Housing Act as well as their own laws. To participate in FHAP, these agencies must oversee laws that have been certified by HUD as "substantially equivalent" to the Fair Housing Act. *See* 42 U.S.C. § 3616; 24 C.F.R. § 115.201.

512 (4th Cir. 1997) (table decision) (upholding liability for discriminatory newspaper advertisement placed by landlord not subject to ban on discriminatory rentals).

Similarly, the Second Circuit upheld a judgment against a broker who claimed to work only with small owners who were exempt from the Act's provisions barring discriminatory rentals. The court held that the First Amendment permitted application of the discriminatory-statement restriction to the broker. It reasoned that the Fair Housing Act's broad purposes include not only barring the discriminatory denial of housing, but "'protect[ing] against psychic injury' caused by discriminatory statements made in connection with the housing market." *United States v. Space Hunters, Inc.*, 429 F.3d 416, 424 (2d Cir. 2005).

And the Fifth Circuit rejected a First Amendment challenge to the Fair Housing Act's "blockbusting" provision, which bars statements intended to induce the sale or rental of a property by discussing the entry or prospective entry into the neighborhood of a person of a certain race or other protected class. *See* 42 U.S.C. § 3604(e). The court held that this provision can be constitutionally applied even "when the racial statement presents the truth." *United States v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 122 (5th Cir. 1973). And, of course, no law bars homeowners from the sales or rentals that blockbusting induces.

Meanwhile, the Department of Housing and Urban Development has consistently found it appropriate to impose liability for discriminatory statements made during an otherwise lawful housing transaction, including where the landlord is exempt from li-

ability for the transaction. *See* Robert G. Schwemm, *Discriminatory Housing Statements and 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 Fordham Urb. L.J. 187, 231-41 (2001) (citing cases). As the state courts did in this case, HUD ALJs in those cases have imposed liability only for harm caused by the *statements*, not harm caused by *transactions* that the Fair Housing Act does not bar. *Id.* The Department's longstanding position recognizes that the harm caused by discriminatory statements is independent of that caused by discriminatory housing transactions. *See, e.g.*, *Dep't of Hous. and Urban Dev. v. Ro*, 1995 WL 326736 (HUD A.L.J. June 2, 1995) (discriminatory statement made against black social worker who was escorting white woman seeking housing).

Straining to find contrary authority, Petitioner points to *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008). *See* Pet. 9. In that case, the court stated in a sentence of dicta that forbidding truthful advertising of a lawful transaction would pose a First Amendment concern. The court's holding, however, was that the First Amendment did *not* preclude enforcement of the discriminatory-statement ban against Craigslist. 519 F.3d at 668. The court in that case had no occasion to consider the issue presented here. *See also id.* at 672 (holding that the Communications Decency Act's protections for online publishers precluded enforcement).

In short, the federal courts of appeals consistently have held—just as the Iowa courts did here—that discriminatory statements connected to commercial housing transactions are independently harmful acts, and that the government's interest in regulating

them satisfies First Amendment scrutiny, regardless of whether the government regulates the housing transaction itself.[3] At the same time, the Department of Housing and Urban Development has stressed—just as the Iowa courts found here—that harm caused by discriminatory statements must be carefully distinguished from harm caused by discriminatory evictions or other housing transactions in such situations. The decision below is entirely in keeping with this unbroken line of authority. Given the absence of disagreement among the lower courts—and the small number of cases in which related issues have been addressed over the 50-year history of the Fair Housing Act and analogous state and local laws—there is no need for this Court's intervention.

II. The decision below correctly stated and applied this Court's precedents.

The petition is at bottom a request for correction of a claimed error as to application of the long-accepted standard established by this Court for assessing regulations of commercial speech. The courts below, however, correctly stated and applied this Court's commercial-speech precedents. Petitioner's arguments to the contrary are wrong and, in large part, waived.

A. Petitioner waived the meritless argument that her speech was not commercial.

Petitioner waived any argument concerning the topic of the first section of her petition, which asks this Court to address the distinction between com-

---

[3] The Petition cites no state-court jurisprudence that arguably conflicts, and Respondent's research has not identified any.

mercial speech and non-commercial speech. Below, Petitioner *conceded* that her statements were related to a commercial transaction. Pet. App. 35. Thus, she has no basis for chiding the court below for failing to consider whether her speech was commercial. Pet. 12. She waived any argument that it was not. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (stating that "we are a court of review, not of first view"); *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001) (declining to address argument that advertising was government speech where that argument was not made before the court of appeals).

In any event, the speech at issue falls easily within the bounds of commercial speech, given its obvious nexus with a commercial housing transaction. *See Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 637 (1985) (speech "proposing a commercial transaction" generally should be considered commercial in nature); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (commercial speech "is 'linked inextricably' with the commercial arrangement that it proposes") (quoting *Friedman v. Rogers*, 440 U.S. 1, 10 (1979)); *see also Campbell v. Robb*, 162 F. App'x 460, 469 (6th Cir. 2006) (statement by a landlord to prospective tenant describing rental conditions was "part and parcel to a rental transaction" and constituted "core" commercial speech). Indeed, the discriminatory-statement provision by its terms applies only to statements or advertisements connected to a sale or rental transaction, and so it only can *ever* regulate commercial speech. *See, e.g.*, *Harris v. Itzhaki*, 183 F.3d 1043, 1055 (9th Cir. 1999) ("stray remark" disconnected from housing transaction would not be covered).

For similar reasons, the courts below correctly rejected Petitioner's argument that her commercial speech was inextricably intertwined with protected non-commercial speech, because her discriminatory statements were focused on ending Schreurs' tenancy: "The exchange between them … cements the conclusion that all of Seeberger's remarks were in the context of their relationship as landlord and tenant." Pet. App. 36. Thus, although Seeberger sought to frame her statements as expressing her "non-commercial" opinion that "she was disappointed with Schreurs for her irresponsibility in allowing her young daughter to become pregnant," *id.*, the court below correctly found that her speech was offered solely as an explanation of why her tenants had to leave the apartment. Accordingly, the court held that "Seeberger's statements, on their face, do not indicate that her speech was non-commercial in nature or was otherwise based on a matter of religion, ideology, or philosophy, or on a position concerning responsible parenting." *Id.*

Indeed, by the terms of the ordinance and other laws like it, Petitioner *can* be properly held liable only for expressing a discriminatory "preference" or "limitation" based on family status, not for speech about the issue of teenage pregnancy generally. While Petitioner now claims that her discriminatory statements merely expressed "disapproval of Schreurs' parenting," Pet. 13, any potential liability would be based not on such disapproval, but on publicizing a discriminatory preference with respect to commercial tenancy. "[N]othing in the nature of things requires [her views on parenting] to be combined with commercial messages." *Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 474 (1989),

and so noncommercial expression is not "inextricably intertwined" with the commercial speech that the ordinance regulates.

B. The courts below properly applied the well-settled test for regulation of commercial speech.

Petitioner wrongly claims that the lower court erred in applying commercial-speech doctrine to her statements. Her arguments rely on a misunderstanding of the important purposes underlying the discriminatory statements and advertisements restriction. Contrary to Petitioner's assertions, the restriction does not exist merely to suppress offensive speech, but to support several interlocking components of the Davenport fair housing law, which collectively are designed to create a fair and integrated commercial housing market.

Because Petitioner did not argue that her speech was not commercial, the court of appeals applied the test for First Amendment scrutiny of commercial speech regulation that this Court set forth in *Central Hudson*. The court began by assuming the correctness of Petitioner's argument that her speech concerned lawful conduct, and it agreed with Petitioner that the Davenport regulation is content-based. Pet. App. 37-38. The court nonetheless found that this application of the ordinance passes muster, because it serves a substantial government purpose and does so without regulating substantially more speech than necessary.

As the court of appeals found, in accord with every court to consider the question, the government has a substantial interest in regulating discriminatory statements connected to housing, regardless of

whether the government *also* chooses to regulate an underlying housing transaction. Pet. App. 38. The court found that, as applied here, the ordinance "prohibits landlords from subjecting prospective tenants to the stigmas associated with knowingly being discriminated against." *Id.* at 39. The government has an important interest in preventing such harm, not to suppress "offensive" ideas, but to effectuate the ordinance's larger purpose of fostering fair housing.

The Davenport Fair Housing Act is modeled on the federal Fair Housing Act, which similarly contains both provisions that regulate substantive housing transactions and provisions that regulate certain statements regarding housing transactions that Congress determined were likely to have discriminatory effects. Among the former provisions, the Act makes it unlawful to refuse to sell or rent a property, or otherwise make it unavailable, for discriminatory reasons. 42 U.S.C. § 3604(a). The Act also makes it unlawful to discriminate in the terms, conditions, or privileges of sale or rental, *id.* § 3604(b), and to interfere with others' exercise of their fair housing rights, *id.* § 3617.

In addition, the Act bars: (1) discriminatory notices, statements, and advertising, 42 U.S.C. § 3604(c); (2) discriminatory representations regarding the availability of housing, *e.g.*, falsely telling someone that no housing is available, *id.* § 3604(d); and (c) "blockbusting," *i.e.*, making representations regarding the "entry or prospective entry into a neighborhood" of people in protected classes in order to induce panic sales, *id.* § 3604(e).

The Act exempts from normal operation of its prohibition of discriminatory housing transactions—

but not from its regulation of discriminatory communications regarding such transactions—four types of transactions, including the rental of single-family houses by certain owners. 42 U.S.C. § 3603(b)(1). However, that exemption itself contains a proviso: even otherwise exempt sales or rentals may not involve the "publication, posting or mailing, after notice, of any advertisement or written notice in violation of" the statements provision. *Id.*

As Congress recognized, discriminatory advertisements and other public statements have ripple effects that damage free and fair commerce beyond the harm caused by a particular failed transaction. *See Katzenbach v. McClung*, 379 U.S. 294, 299 (1964) (expectation of discriminatory treatment in restaurants deters interstate travel and commerce more generally). Potential or actual exposure to overt discrimination can deter people from seeking housing, thus exacerbating segregated housing patterns and preventing people in certain protected classes from fully participating in the housing market in an equal manner. *See Hunter*, 459 F.2d at 213. Permitting explicitly discriminatory statements to be made with impunity can create "a public impression that housing segregation is legal, thus facilitating discrimination." *Spann v. Colonial Vill., Inc*, 899 F.2d 24, 30 (D.C. Cir. 1990). And Congress may permissibly regulate speech that, by creating this impression, predictably would undermine the fairness and integrity of the overall housing market. *Cf. Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1667-68 (2015) (states may regulate judicial campaign-contribution solicitations that would undermine confidence in independent judiciary).

If no enforcement of the ban on discriminatory advertising and other statements were possible in the absence of a completed or attempted housing transaction regulated by the Act, achievement of the Act's goals would be greatly hobbled. Petitioner wrongly posits that the regulation of discriminatory statements about the availability of housing simply operates in aid of enforcement of the Act's substantive provisions. Petitioner misunderstands the Fair Housing Act.

Discriminatory statements are not, as Petitioner asserts, "simply evidence (an admission against interest)" that a housing transaction was carried out in a discriminatory manner. Pet. 10. While statements often serve as evidence of unlawful conduct, a discriminatory statement can be made in circumstances where no substantive discriminatory act is even possible. For example, a discriminatory statement can be directed against someone not currently seeking housing, or to a much broader audience than those currently seeking housing. *See Rodriguez v. Village Green Realty, Inc.*, 788 F.3d 31, 53 (2d Cir. 2015) ("a statement implicating subsection 3604(c) need not be targeted at a single, identifiable individual at all").

Nor is the problem that a discriminatory housing statement "offends," Pet. 11. Rather, a discriminatory housing statement conveys the overt, public message that certain people—including the person or people on the receiving end, and also those who share the protected characteristic—will be unable to secure housing in non-discriminatory fashion because of that characteristic. Speech offering a discriminatory reason for an eviction or refusal to sell or rent is not simply offensive speech, but part and parcel of a discriminatory act—and such an overt statement of in-

vidious intent often results in far more harm to a person, to the fairness of the housing market, and to society more broadly than would the unexplained denial of a discrete housing opportunity. Accordingly, the government has a substantial interest in regulating that component of a housing transaction in a focused and narrow way. *See Linmark Assocs., Inc. v. Tp. of Willingboro*, 431 U.S. 85, 94-95 (1977) (finding "[t]here can be no question about the importance of" governmental objective of promoting integrated housing, though Court struck down law that was unnecessary to achieve that purpose); *cf. Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 111 (1979) (conduct that threatened interest in integrated housing harmed municipality sufficiently to confer Article III standing to challenge it).

The governmental interest here is in ensuring free and fair housing, not simply "prohibiting speech," as Petitioner would have it, and so it is not "circular" to rely on that interest as a basis for regulating commercial speech, Pet. 10. *See Ragin v. New York Times Co.*, 923 F.2d 995, 1002-03 (2d Cir. 1991) (rejecting similar argument). Tellingly, Petitioner must rely on caselaw regarding generically "offensive" or "upsetting" speech—as well as on caselaw entirely outside the commercial sphere—to suggest that the government has no substantial interest in regulating discriminatory speech even when it threatens the free and fair commercial market for housing. Pet. at 19-20. But the courts here (and elsewhere) have appropriately required claimants and litigants to demonstrate that discriminatory statements do not merely "offend," but cause real, discriminatory harm. This law thus is nothing like the Lanham Act's trademark disparagement clause

at issue in *Matal v. Tam*, 137 S. Ct. 1744 (2017), which this Court found violated the First Amendment precisely because it was *not* narrowly drawn "to drive out trademarks that support invidious discrimination." *Id.* at 1765 (stating that "it is not an anti-discrimination clause; it is a happy-talk clause").

To the extent that Petitioner maintains that the facts of her case do not demonstrate that her statements caused such harm, she has a forum for proving as much on remand to the Commission. No tribunal has yet considered the extent to which Petitioner's discriminatory statements (as opposed to the termination of housing) harmed the Schreurs. It is therefore too soon to know whether or not the Commission, applying the Davenport ordinance, will find Petitioner liable for damages at all.

III. This case is not a suitable vehicle for exploring the larger questions regarding commercial speech jurisprudence that Petitioner raises.

Petitioner's second question presented asks this Court to consider, or reconsider, larger questions of commercial-speech doctrine, such as the standard of review that applies to speech regulation that discriminates based on viewpoint. *See* Pet. at 14-18. But this case provides no occasion for addressing those issues.

To begin with, Petitioner did not argue below that strict scrutiny applies to all commercial-speech regulations. Rather, she agreed that *Central Hudson* set forth the relevant framework for scrutiny of the regulation of commercial speech. *See* Pet. for Judicial Re-

view 23-26. The second question presented in the petition therefore has been waived.[4]

Moreover, Petitioner's suggestion that the Davenport ordinance bars truthful speech merely because the speech is offensive is incorrect. The Davenport ordinance, like the Fair Housing Act, restricts discriminatory statements because of their effect on the fair housing market, not simply because they are, standing alone, offensive. As explained above, the discriminatory-statement provision is one of several interlocking parts of a comprehensive statutory scheme for achieving fair housing. *See supra* at 17-19. Accordingly, whatever the need for review of laws that function in the manner Petitioner describes, this case does not involve such a law.

Finally, as described above, it remains unclear whether any of this will matter at all to Petitioner's liability. As this case stands, Petitioner has not been subjected to liability for her discriminatory speech. The Commission still must determine on remand whether Petitioner's discriminatory statements warrant any form of monetary liability, and she faces no possibility that the Commission will award attorney's fees. Pet. App. 20. This Court should decline to render a constitutional opinion that may prove unneces-

---

[4] Petitioner's only argument that strict scrutiny should apply was based, instead, on the assertion that her commercial speech was inextricably intertwined with non-commercial speech, an argument that the state courts correctly rejected for the reasons described above.

sary depending on the resolution of state administrative proceedings.[5]

Moreover, Petitioner failed to argue before the Commission (and thus did not preserve the argument before the Iowa courts) that key terms in the ordinance should be construed narrowly so as not to cover her conduct. *See* Pet. App. 56-58; Pet. for Judicial Review 16-20 (arguing for first time on judicial review that ordinance does not apply to this situation). Similarly, she declined to challenge in court any of the Commission's factual findings regarding her conduct. Pet. App. 46. Accordingly, while resolution of the questions Petitioner poses could have important implications for the federal Fair Housing Act (on which the Davenport ordinance is modeled), this Court would have no ability to avoid unnecessary constitutional adjudication through its own narrow-

---

[5] Indeed, should it nonetheless grant review, this Court would have to first assure itself of its jurisdiction to review a state-court order remanding for further agency proceedings. *See* 28 U.S.C. § 1257 (granting the Court jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had"). While Respondent is aware of no precedent of this Court regarding whether a remand for further state agency proceedings is a final judgment within the meaning of 28 U.S.C. § 1257, caselaw under 28 U.S.C. § 1291 suggests it may not be. *See Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1075 (9th Cir. 2010) (under 28 U.S.C. § 1291, "generally, a remand order may be deemed a final order only where the agency appeals the remand"); *accord Izaak Walton League of Am., Inc. v. Kimbell*, 558 F.3d 751, 762 (8th Cir. 2009); *Occidental Petroleum Corp. v. S.E.C.*, 873 F.2d 325, 330 (D.C. Cir. 1989) (stating that "the courts have generally pointed out that a party claiming to be aggrieved by final agency action can appeal, if still aggrieved, at the conclusion of the administrative proceedings on remand").

ing construction to exclude Petitioner's specific conduct from application of the law, as it could if the Fair Housing Act itself were at issue. *Cf. Matal*, 137 S. Ct. at 1755-56 (taking up federal statutory question that might obviate need for First Amendment analysis although it was not part of the question presented); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trade Council*, 485 U.S. 568, 575 (1988) (Court has obligation to adopt narrowing construction to avoid constitutional issue if possible); *Miami Valley Fair Hous. Ctr., Inc. v. Connor Group*, 725 F.3d 571, 578 (6th Cir. 2013) (construing the scope of FHA statements claim to avoid constitutional concerns). This alone is reason to deny review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALLISON M. ZIEVE
SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th St. NW
Washington, DC
20009

SASHA SAMBERG-CHAMPION
Counsel of Record
SARA PRATT
MICHAEL G. ALLEN
RELMAN, DANE, & COLFAX PLLC
1225 19th St. NW, Suite 600
Washington, DC 20036
(202) 728-1888
ssamberg-champion@
relmanlaw.com

Attorneys for respondent
Davenport Civil Rights Commission

July 19, 2019