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

PETITIONER'S REPLY BRIEF

RANDALL D. ARMENTROUT
NYEMASTER GOODE, P.C.
700 Walnut Street
Suite 1600
Des Moines, Iowa 50309
(515) 283-3100

MICHAEL E. ROSMAN
Counsel of Record
MICHELLE A. SCOTT
CENTER FOR INDIVIDUAL RIGHTS
1100 Connecticut Ave, NW
Suite 625
Washington, DC 20036
(202) 833-8400
rosman@cir-usa.org

Counsel for Petitioner

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INTRODUCTION

Understandably, neither Respondent gives a full-throated defense of the Iowa courts' First Amendment analysis, or those courts' tautological conclusion that "preventing discriminatory statements" can be the governmental interest that justifies a law prohibiting those very statements.

Nor do Respondents much dispute the fact that the anti-statements provision of the Davenport fair housing law is a viewpoint discriminatory regulation of speech that here is unrelated to any other prohibited transaction. To the contrary, Respondent DCRC fully embraces that feature. A discriminatory housing statement, it argues, "conveys the overt, public message that certain people . . . will be unable to secure housing in non-discriminatory fashion because of that characteristic." Brief in Opposition of the Davenport Civil Rights Commission ("DCRC BIO"), 18. It contends that it is that very message that must be suppressed. *But see Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) ("The Justices [in *Matal v. Tam*, 137 S. Ct. 1744 (2017)] thus found common ground in a core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys."); *id.* at 2302-03 (Alito, J., concurring) ("Viewpoint discrimination is poison to a free society. . . At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination.").

The DCRC argues that this viewpoint discrimination is consistent with the First Amendment because it is needed to achieve the law's goal of "fostering fair housing." DCRC BIO 16. One fosters fair housing, apparently, by (1) permitting the discriminatory denial of housing in certain cases, and (2) making speech about those permissible transactions illegal. To state this illogical proposition is enough to show that it cannot meet any level of scrutiny, much less the strict scrutiny that should be applied. The DCRC certainly offers nothing to suggest that the City of Davenport had evidence that prohibiting such statements would foster fair housing. *Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686, 695 (6th Cir 1981) (noting that the City of Ann Arbor presented no evidence that the use of the name "Sambo's," despite its offensiveness, would interfere with the city's goals of racial harmony and equality).

Much of the rest of the DCRC's opposition relies upon claims that Petitioner has waived certain argument, that this Court might lack jurisdiction, or that the Petition is premature because Petitioner has not yet been found liable for a violation of Davenport's law. As shown below, these arguments are meritless.

For her part, Respondent Schreurs spends page after page of her brief in opposition trying to convince this Court of the factual complexity of this matter. She strews long excerpts of deposition testimony and interviews in her brief. *E.g.*, Brief in Opposition of Michelle Schreurs ("Schreurs BIO") 4-11. She claims that Petitioner has differed in her accounts of certain

matters. Schreurs BIO 11-15. (This appears to amount to no more than Petitioner's denying that she made precisely the statements alleged in the pleadings and her accepting adverse findings by various triers of fact and courts.) In a rather transparent effort to scare off the Court from granting the Petition, she claims that this Court would have to watch endless hours of video of state court administrative proceedings to resolve previously-unresolved factual issues. Schreurs BIO 24. (Assuming *arguendo* that this Court concluded that there were unresolved factual issues needing further analysis and video watching, it is unclear why Schreurs believes that this Court could not, say, remand and have the Iowa courts perform this task.)

Schreurs misleads. The facts needed to resolve the legal questions presented here are straightforward. (Respondent DCRC's factual recitation was one page in length. DCRC BIO 3.) First, on September 16, 2014, Petitioner saw a bottle of prenatal vitamins in the house that she leased to Schreurs, took a picture of it, and sent the picture along with a text message that said "Something I should know about?" Second, the next day, Petitioner was in the house and, after terminating the tenancy, said that Schreurs was "bringing another person into the mix" and that the prenatal vitamins suggested that her daughter was going to keep the baby. Third, the courts below found that these statements were discriminatory on the basis of familial status in violation of Davenport's provision prohibiting such statements, unprotected by the

First Amendment, and the rationale for Petitioner terminating the tenancy. Pet. App. 29-30, 36, 47-48.

Schreurs resists this last finding, concerning the rationale for Petitioner terminating the tenancy, claiming that the Iowa Court of Appeals should not have made it because Petitioner gave conflicting testimony concerning her subjective motivation. Schreurs BIO 26 n.17. *See also id.* 17 n.15 (arguing that the District Court's similar conclusion misinterpreted the ALJ's findings). Of course, the conclusion that the statements were "with respect to the sale or rental of a dwelling" was a requirement of finding liability under the statute, and so the conclusion was more than just a finding of fact. Moreover, the Iowa courts did not rely on Petitioner's subjective motivation but an objective interpretation of the context of her statements. *See* Pet. App. 36 ("*[T]he context* makes clear Schreurs's changing familial status was the basis for the termination of the tenancy.") (emphasis added). *Id*. 93 (concluding that Petitioner "immediately" terminated the tenancy after finding out that Schreurs's teenage daughter was pregnant). The actual trier of fact here (the DCRC) agrees. DCRC BIO 14 ("the court below *correctly* found that [Petitioner's] speech was offered solely as an explanation of why her tenants had to leave the apartment.") (emphasis added). Indeed, until her brief in opposition, Schreurs herself agreed.[1] She never objected to the Court of Appeals'

[1] Schreurs repeatedly asserted the following in her factual recitations in the Iowa courts: "*According to Ms. Seeberger's own testimony*, the pregnancy was part of the reason she terminated

finding in the Iowa Supreme Court, and has waived any objection to this allegedly improper fact-finding.

Regardless, the opinion of the Iowa court stands as written and constitutes precedent. There, truthful statements about the reason for lawfully terminating a tenancy are not protected by the First Amendment and a statute whose effect is to suppress truthful speech about lawful transactions is constitutional. Schreurs's many factual issues were either resolved or deemed irrelevant. So, too, with her new and belated "actual purpose" argument. Schreurs had to move out regardless and does not claim to have relied on any particular reason, and she does not explain what difference it makes if the statements relied upon to hold Petitioner liable were the reason for her terminating Schreurs's tenancy or just the independent expression of an opinion about responsible parenting, teenage pregnancy, or household economics.

ARGUMENT

Respondents claim that the petition should be denied because there is no circuit split to resolve, because the law plainly supports the decisions of the

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tenancy." *E.g.*, Schreurs' Brief Opposing Petition for Judicial Review 2; Final Brief for Appellant-Intervenor Michelle Schreurs in Iowa Supreme Court 5-6 (emphasis added). In context -- particularly Schreurs never presenting any contrary evidence or challenging Petitioner's testimony -- the italicized phrase was intended to convey that the underlying fact could not be disputed.

courts below, and because various technical obstacles stand in the way. These arguments are meritless.

1. While there may be no circuit split as to local housing laws that prohibit speech related to legal transactions, nothing requires a split on so granular a level. The Iowa courts in this case applied the lower level of scrutiny required by *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980) to a viewpoint-discriminatory regulation of (what it deemed to be) commercial speech unrelated to any prohibited transaction. That is plainly inconsistent with the Second Circuit's application of heightened scrutiny to such regulations in *Wandering Dago, Inc. v. Destito*, 879 F.3d 20 (2d Cir. 2018), as well as this Court's application of heightened scrutiny as recently as *Iancu v. Brunetti*.

In any event, this Court may grant the petition for reasons other than a circuit split. Sup. Ct. R. 10(c) (identifying cases where "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court" as a characteristic militating in favor of granting a petition). *See also, e.g.*, *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (granting petition, and vacating judgment of Supreme Judicial Court of Massachusetts because "the explanation the Massachusetts court offered for upholding the law contradicts this Court's precedent.").

2. The DCRC's authorities (DCRC BIO 9-10) hardly support its claim that the constitutionality of laws like the one at issue here is well-settled. To the extent

they concern an anti-statements provision at all, they involved advertising, not after-the-fact explanations. Moreover, the DCRC cites several cases from the early 1970's, only one of which, *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972), involved the federal analogue (42 U.S.C. § 3604(c)) to Davenport Municipal Code § 2.58.305(C). (The other early 1970's case, from the Fifth Circuit, involved a different provision of the Fair Housing Act, one which is limited to statements made "[f]or profit." 42 U.S.C. § 3604(e).) As the DCRC's sole academic authority notes, *Hunter* was decided at a time when this Court gave no First Amendment protection to commercial speech from any regulation, viewpoint-discriminatory or otherwise. 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, 271 (2001) ("In the years following *Hunter*, however, the Supreme Court issued a series of decisions greatly expanding the degree of First Amendment protection afforded commercial speech.").[2]

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[2] The DCRC also cites a later unreported opinion from the Fourth Circuit, that did no more than blithely follow *Hunter*, and a 2005 opinion of the Second Circuit, whose sole First Amendment analysis was whether Section 3604(c) could apply to a housing information vender. The housing information vender did claim to work only with small owners exempt from the Fair Housing Act, but the government disputed that claim. In that regard, the Second Circuit held only that the exemption was an affirmative defense and that evidence outside the complaint should not have been considered on an initial motion to dismiss. *United States v. Space Hunters, Inc.*, 429 F.3d 416, 426-27 (2d Cir. 2005)

The DCRC also cites to a different part of Professor Schwemm's article that describes various opinions of Administrative Law Judges in the Department of Housing and Urban Development. DCRC BIO 10-12. These descriptions primarily show that ALJs in HUD do not do much (or any) First Amendment analysis. Professor Schwemm does, but the DCRC does not cite it. Presumably, that is because Professor Schwemm concludes that Section 3604(c) does violate the First Amendment when it prohibits statements, even advertisements, related to permissible transactions. Schwemm, *supra*, at 278-82.

For her part, Schreurs points to "hostile environment" harassment cases to counter Petitioner's arguments, arguing that there is no dispute that the "abusive" conduct prohibited by such laws is not protected by the First Amendment. Schreurs BIO 33-36. Of course, as the Petition points out (at 14-15), the First Amendment analysis of harassment cases is not as simple as Schreurs would have it. *See also, e.g.*, *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 593 (5th Cir. 1995) (noting that the issues of the sufficiency of evidence of creating a hostile atmosphere and the First Amendment free speech rights of the author of the articles that allegedly created that atmosphere "must be discussed together"); *id.*at 596 ("Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary

matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech."); Schwemm, *supra*, at 292 ("[W]hether Title VII trumps First Amendment concerns in harassment cases is far from certain.").

In any event, the Respondents did not charge Petitioner with creating a hostile atmosphere, and the basis of liability for violation of the Davenport Municipal Code are the question "something I should know about?" and the statements "you're going to bring another person into the mix" and "you're going to keep the baby." No one could, with a straight face, claim that such isolated offhand comments are so severe and pervasive as to create a hostile environment on the basis of familial status, and it is only conduct that reaches that level that creates the change in the terms and conditions of a workplace or other environment that could reconcile harassment law with the First Amendment. *Id.* ("Title VII harassment cases are not analogous with §3604(c) claims."). Schreurs tosses in snippets from briefs and testimony, and tries to shoehorn her case against Petitioner into a hostile environment one (*see* Schreurs BIO 8-11, 26, 30-31 & nn.20-21, 33, 35-36), but the effort is futile. It is the actual judgment of the Iowa courts on which Petitioner seeks review, not some hypothetical judgment Schreurs wants to create after the fact.

3. The DCRC's other reasons for denying the Petition are entirely meritless.

The DCRC claims that Petitioner waived her arguments that her speech was not commercial speech and

that viewpoint-discriminatory regulations of commercial speech must meet strict scrutiny. DCRC BIO i, 2, 8, 12-13, 20-21. The glaring flaw in this contention is that this Court has made clear that litigants can make any argument, even those not raised in state court, supporting a *claim* of unconstitutionality raised there. *E.g.*, *Yee v. City of Escondido*, 503 U.S. 519 (1992) (holding that, while it was unclear whether petitioners made a regulatory taking argument in the state courts, or just a physical taking argument, they could still make a regulatory taking argument in this Court); *id.* at 534:

> Petitioners unquestionably raised a taking claim in the state courts. . . . Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. . . . Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are, rather separate *arguments* in support of a single claim – that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here. (emphasis in original)

Here, Petitioner has consistently asserted that the application of Davenport's ordinance violates her

First Amendment rights. She can make any argument in support of that claim.

And even if that were not the case, the DCRC's arguments that "Petitioner agreed [that commercial speech analysis] was applicable" (DCRC BIO 1), that Petitioner's current argument that her statements "were not commercial speech . . . directly contradicts the position she took below" (*id.*2), and that "Petitioner did not argue that her speech was not commercial" (*id.* 15) are wrong. Petitioner argued that her statements "are noncommercial speech protected by the First Amendment" and "did not relate to the 'sale or rental' of a dwelling." Brief in Support of Jud. Review 23.[3]

The DCRC suggests that this Court may be without jurisdiction and, in an extended footnote, asserts that it "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. . . ." DCRC BIO 22 n.5. One need not try very hard to find one. *E.g.*, *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469, 485 (1975) (holding that a judgment of the Georgia Supreme Court rejecting a First Amendment challenge to a right of privacy cause of action and remanding back to the trial court for a trial on the cause was a final judgment under Section

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[3] Both respondents argue that any speech connected at all to a commercial transaction or relationship is necessarily "commercial speech." DCRC BIO 13; Schreurs BIO 30. Suffice it to note that this Court has adopted a more nuanced approach. Petition 11-12.

1257(2)); *id.* at 480-81 (citing older cases to the same effect where further proceedings will not affect the federal issue).

Relatedly, the DCRC argues that it may be premature for this Court's review because "[a]s this case stands, Petitioner has not been subjected to liability for her discriminatory speech." DCRC BIO 21. *See also id.* at 2 ("it remains uncertain whether and to what extent Petitioner herself will ultimately be aggrieved in any concrete way"), 20 (arguing that it is "too soon to know" whether the Commission will find Petitioner liable for damages). Again, this is just wrong. Petitioner *already* has been "subjected to liability" for a violation of the Davenport Municipal Code and *already* has had costs assessed against her. Pet. 6-7; Pet. App. 6, 67, 74. The finding of liability has adverse consequences for Petitioner should she ever be found to have violated the Davenport fair housing ordinance in the future. Davenport Municipal Code § 2.58.360(B)(6)(a)(3) (maximum civil penalty doubles after first offense). That the precise amount of money she ultimately will owe has not been finally determined is no reason to deny the Petition. Further, given that the ALJ concluded that Schreurs's emotional distress warranted $35,000 in damages when it included the distress from the termination of the tenancy as well as the distress from the discriminatory statements, and that Petitioner's "intentional discrimination" deserved a $10,000 civil fine, it seems highly unlikely that the DCRC will conclude that no damages or fine at all is warranted on remand.

CONCLUSION

For the reasons set forth here and in the Petition, this Court should grant the Petition for writ of certiorari.

Respectfully Submitted,

MICHAEL E. ROSMAN
Counsel of Record
MICHELLE A. SCOTT
CENTER FOR INDIVIDUAL RIGHTS
1100 Connecticut Ave, NW
Suite 625
Washington, DC 20036
(202) 833-8400
rosman@cir-usa.org

RANDALL D. ARMENTROUT
NYEMASTER GOODE, P.C.
700 Walnut Street
Suite 1600
Des Moines, Iowa 50309
(515) 283-3100