

No. _____

In the
Supreme Court of the United States

KEEPERS, INC.,

Petitioner,

v.

CITY OF MILFORD, CONNECTICUT,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court erred in refusing to grant Petitioner relief from summary judgment based on the Supreme Court's superseding decision in *Reed v. Town of Gilbert*, which requires lower courts to employ strict scrutiny in analyzing content-based restrictions on speech.

LIST OF DIRECTLY RELATED PROCEEDINGS

United States District Court for the District of Connecticut:

Keepers, Inc. v. City of Milford, No. 3:07cv1231 (AWT) (Sept. 5, 2018; Sept. 11, 2017; and March 30, 2013)

United States Court of Appeals for the Second Circuit:

Keepers, Inc. v. City of Milford, Nos. 14-1581-cv, 14-2113-cv (Nov. 20, 2015)

Keepers, Inc. v. City of Milford, No. 18-2965-cv (Sept. 10, 2019)

United States Supreme Court:

Keepers, Inc. v. City of Milford, No. 15-1487 (Oct. 3, 2016)

CORPORATE DISCLOSURE STATEMENT

Petitioner Keepers, Inc., by and through its counsel,
makes the following corporate disclosures:

There is no parent corporation of Keepers, Inc.,
and no publicly held corporation owns more than
10% of the stock of Keepers, Inc.

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Petitioner Keepers, Inc. (“Keepers”) respectfully prays that a Writ of Certiorari issue to review the judgment entry of the United States Court of Appeals for the Second Circuit entered on September 10, 2019.

OPINIONS BELOW

The summary opinion of the United States Court of Appeals for the Second Circuit, which is unpublished, is attached to the Petition at App. 1. The Second Circuit’s opinion is available at *Keepers, Inc. v. City of Milford*, 776 Fed. Appx. 734 (2d Cir. 2019). The decision of the United States District Court for the District of Connecticut denying Keepers’ Fed. R. Civ. P. 60(b) motion is also unpublished and is attached to the Petition at App. 5. The district court’s original summary judgment decision to which the Fed. R. Civ. P. 60(b) motion pertains is reported at *Keepers, Inc. v. City of Milford*, 944 F.Supp.2d 129 (D. Ct. 2013) and attached at App. 17.

JURISDICTIONAL STATEMENT

The decision of the Second Circuit was issued on September 20, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves Fed. R. Civ. P. 60(b)(6), which states in relevant part:

On motion and just terms, the court may relieve a party or its legal representative from a final

judgment, order, or proceeding for the following reasons:

6) any other reason that justifies relief.

STATEMENT OF THE CASE

In 2003, Keepers, Inc., which operates a cabaret-style nightclub featuring live exotic entertainment, filed suit challenging the constitutionality of the City of Milford, Connecticut's adult business regulatory ordinance. *See Keepers, Inc. v. City of Milford*, 807 F.3d 24, 28 (2d Cir. 2015). In 2007, the City substantially amended the ordinance, and Keepers again filed suit. *Id.* at 28-9. The district court consolidated the two actions, and both parties sought summary judgment. *Id.* at 30. In 2013, the district court granted the City's summary judgment motion as to all claims but one, involving the requirement that licenses bearing the names of the business owners be posted in a public location in the business. *Id.* at 30-1. It awarded summary judgment to Keepers on that narrow claim. *Id.*

One of the claims the district court resolved in the City's favor involved a challenge to the adult business ordinance on facial First Amendment grounds. App. 28. In its summary judgment decision, the district court contemplated whether the ordinance was content-based or content-neutral in determining the appropriate level of constitutional scrutiny to apply. App. 29-30. Observing that the purpose of the ordinance was strictly to reduce the secondary effects of adult businesses rather than to regulate their speech

based on its content, the court determined that the ordinance was content-neutral. App. 30. It therefore applied intermediate scrutiny and upheld the ordinance. *Id.*

Keepers appealed the portion of the court's summary judgment decision that was in the City's favor. *Keepers*, 807 F.3d at 34. The sole issue it raised on appeal was whether the district court erred in considering testimony of the City's attorney that conflicted with the sworn statements of the City's Rule 30(b)(6) deponent. *Id.* The City also cross-appealed as to the district court's decision that the public license posting requirement was unconstitutional. *Id.* at 38. The Second Circuit decided the appeal in the City's favor as to both issues on November 20, 2015. *Id.* at 24. This Court subsequently denied certiorari review. *See Keepers, Inc. v. City of Milford, Conn.*, 137 S.Ct. 277 (2016).

A mere nine days after this Court's denial of certiorari, Keepers filed a Rule 60(b)(6) motion seeking relief from the district court's summary judgment order. App. 5. The basis of the motion was this Court's June 18, 2015 decision in *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015), which altered the test by which the federal courts assess the constitutionality of content-based restrictions on speech. App. 15. Keepers argued that the court's content-neutrality finding and resulting intermediate scrutiny analysis were no longer valid in light of the *Reed* decision. *Id.*

On September 11, 2017, the district court denied Keepers' Rule 60(b) motion. App. 14. Rather than considering the merits of the argument that *Reed*

requires stricter scrutiny than the court had initially employed, the district court instead treated the motion as a Rule 60(b)(1) motion to correct a mistake in its judgment. App. 15. Because Rule 60(b)(1) motions must be filed within one year of the decision in question, and because Keepers' Rule 60(b) motion was filed more than one year after the court's summary judgment order, the lower court denied the motion. *Id.*

Keepers then sought a timely amendment of the district court's decision and requested a ruling as to the merits of its argument that *Reed* requires a new analysis of the facial constitutionality of the City's adult use ordinance. App. 5-6. Once again, the district court denied the motion. *Id.* As a result, the district court has never considered whether *Reed* in fact requires strict scrutiny analysis in this case.

Keepers appealed the district court's denial of relief from judgment to the Second Circuit, which summarily denied the appeal. App. 2-4. This request for certiorari follows.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted Because The Second Circuit’s Summary Decision Denying Rule 60(b) Relief Conflicts With The Court’s Content-Based Strict Scrutiny Analysis In *Reed v. Town of Gilbert*.

A. The Second Circuit Erred in Denying Keepers’ Rule 60(b) Motion, Because this Court’s Decision in *Reed v. Town of Gilbert* Altered the Analysis for Assessing the Constitutionality of Content-Based Restrictions on Speech.

Pursuant to Fed. R. Civ. P. 60(b)(6), courts may relieve a party from the effect of its judgment for “any [] reason that justifies relief.” This Court has held that the rule grants “wide discretion” in lower courts. *See Buck v. Davis*, 137 S.Ct. 759, 777 (2017). One such court – the Second Circuit – has interpreted this provision to constitute “a grand reservoir of equitable power to do justice in a particular case.” *See United States v. Cirami*, 563 F.2d 26, 32 (2d Cir. 1977). In determining a Rule 60(b)(6) motion, courts may consider a variety of factors, including “the risk of injustice to the parties” and “the risk of undermining the public’s confidence in the judicial process.” *Buck*, 137 at 778 (citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863–64 (1988)).

Regarding fundamental First Amendment rights, the Court has dramatically changed the way that the courts must approach strict scrutiny in the wake of *Reed*, 135 S.Ct. 2218. In *Reed*, the Court struck down

a sign ordinance which included various exceptions and variable standards depending on whether the sign was political, elections-oriented, or bore some other non-commercial message. *Id.* at 2224-5. The Court found that the ordinance was content-based and subject to strict scrutiny. *Id.* at 2224. The Court cited a commercial case - *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) - for the principle that heightened scrutiny was required when content-based discriminations are found in a law that targets expression. *Reed*, 135 S.Ct. at 2227.

The majority opinion in *Reed* noted that there had been some slippage in First Amendment doctrine, whereby the lower courts have improperly upheld laws unless the content-based distinctions at issue directly reflected an intent to regulate based on issue or speaker. *Id.* at 2228-30. In fact, the circuit court in *Reed* had taken just that approach:

As the court [of appeals] explained, “Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed” and its “interests in regulat[ing] temporary signs are unrelated to the content of the sign.” Accordingly, the court [of appeals] believed that the Code was “content-neutral as that term [has been] defined by the Supreme Court.” In light of that determination, it applied a lower level of scrutiny to the Sign Code and concluded that the law did not violate the First Amendment.

Reed, 135 S.Ct. at 2226 (internal citations omitted).

The Court rejected this approach, adopting instead a more formalistic analysis. Under *Reed*, a law will be declared content-based if it adopts categories, exclusions, or exclusions defined in terms of what is said regardless of the governmental motive underlying the regulation:

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E.g.*, *Sorrell v. IMS Health, Inc.*, 564 U.S. __, __, 131 S.Ct. 2653, 2663–2664, 180 L.Ed.2d 544 (2011); *Carey v. Brown*, 447 U.S. 455, 462, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); *Mosley, supra*, at 95, 92 S.Ct. 2286. This commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. *Sorrell, supra*, at __, 131 S.Ct., at 2664. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Reed, 135 S.Ct. at 2227.

In addition to laws which explicitly regulate in terms of what is said, the Court also held that laws which are content-neutral on their face will be treated as content-based if their justification relies on distinctions between the message or the messenger:

Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be “justified without reference to the content of the regulated speech,” “or that were adopted by the government “because of disagreement with the message [the speech] conveys,” *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

Reed, 135 S.Ct. at 2227.

In the wake of *Reed*, the lower courts have faithfully applied the Court’s content-based analysis, noting that laws which create distinctions based on categories of speech are constitutionally invalid. *See, e.g., FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290 (11th Cir. 2017) (invalidating advertising ban in the Miami Beach historic district for lack of content neutrality); *Norton v. City of Springfield, Ill.*, 806 F.3d 411, 412-13 (7th Cir. 2015) (invalidating content-based panhandling restriction by applying strict scrutiny under *Reed*); *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015) (invalidating state statute prohibiting unsolicited marketing and politically related calls as content based and unconstitutional under the First Amendment); *GJJM, Inc. v. City of Atlantic City*, 352 F.Supp.3d 402 (D. N.J. 2018) (invalidating restriction on BYOB advertising under *Reed* strict scrutiny); *Gresham v. Rutledge*, 198 F.Supp.3d 965 (E.D. Ark. 2016); *Browne*

v. City of Grand Junction, 136 F.Supp.3d 1276 (D. Colo. 2015) (employing *Reed* analysis in finding panhandling restriction unconstitutional); *Thomas v. Schroer*, 127 F.Supp.3d 864 (W.D. Tenn. 2015).

Moreover, following *Reed*, this Court subsequently vacated and remanded appellate decisions similar to *Reed* that were issued in three other circuits: the First, Fourth, and Sixth. See *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014); *Central Radio Co., Inc. v. City of Norfolk, Virginia*, 776 F.3d 229 (4th Cir. 2015); *Wagner v. City of Garfield Heights, Ohio*, 577 Fed.Appx. 488 (6th Cir. 2014). Those circuits had uniformly declined -- predicated upon prior decisions of this Court that the lower courts felt to be settled law -- to impose strict scrutiny when analyzing the constitutionality of various sign ordinances.

In fact, at least one federal court has explicitly held that regulation of sexually-oriented speech, traditionally a marginalized speech category, is content-based and therefore subject to strict scrutiny under *Reed*. See *Free Speech Coalition, Inc. v. Atty. Gen. of the United States*, 825 F.3d 149, 160-64 (3d Cir. 2016). Thus, *Reed* requires strict scrutiny in any instance where a government regulation singles out speech for disparate treatment based upon its content or message.¹

¹ In addition, legal scholars have also emphasized the impact of *Reed*, characterizing it as “sea change” in First Amendment jurisprudence and noting that *Reed*’s “redefinition of content discrimination... revolutionize[d]” free speech doctrine. See Anthony Lauriello, *Panhandling Regulation After Reed v. Town of Gilbert*, 116 Colum. L. Rev. 1105, 1105 (May 2016); Urja Mittal, *The “Supreme Board of Sign Review:” Reed and Its Aftermath*, 125 Yale L.J.F. 359, 359 (2016).

Applying *Reed* and its progeny, the lower court's summary judgment ruling that the City of Milford's adult business ordinances are content-neutral is no longer valid. App. 30. One thing is clear: the ordinances apply solely to speech that is sexually oriented and therefore create categorical distinctions based upon the message of the speech at issue. App. 19-23 (describing nature and scope of sexually oriented business ordinances). As a result, under *Reed*, strict scrutiny, rather than the intermediate scrutiny used by the lower court, should apply.

The district court upheld the constitutionality of the City's adult business ordinance based solely upon a purportedly speech-neutral motivation for the enactment of the law. App. 30. But under *Reed*, the government's motive is irrelevant if the law itself imposes distinctions based on content. *Reed*, 135 S.Ct. at 1227. By segregating speech that is sexually oriented from other forms of expression, the City's ordinance is clearly content-based and should have been analyzed as such. As a result, the Court should grant certiorari to review this critical conflict in *Reed*'s application, should reverse the Second Circuit's denial of Keepers' Rule 60(b) motion, and should remand the case for the application of strict scrutiny to the City's adult business ordinance.

B. The Circuit Court Abused its Discretion in Denying Keepers' Rule 60(b) Motion on the Grounds that It was Untimely.

The Second Circuit erroneously denied Keepers' Rule 60(b)(6) motion on the grounds that it should be filed within the one-year limitations period found in Rule 60(b)(1). App. 3. As the district court rightly pointed out, motions made under Rule 60(b)(1) must be filed within one year of the judgment itself. *See* Fed. R. Civ. P. 60(c); App. 15. However, Keepers' motion was brought under Rule 60(b)(6), not Rule 60(b)(1), and as a matter of law could not be considered under Rule 60(b)(1).

Changes in controlling case law that occur after a judgment is issued fall within the Rule 60(b)(6) catchall provision and not the other grounds for relief from judgment set forth in Rule 60(b). *See, e.g., Agostini v. Felton*, 521 U.S. 203, 239 (1997) (observing that the impact of changes in law on the prospective application of civil judgments should be assessed under Rule 60(b)(6)). Moreover, Rule 60(b)(1)'s focus on mistake or neglect references conditions in existence at the time of the judgment but unknown to the parties or the court, rather than a subsequent change in the legal landscape that did not exist when the judgment was rendered. *See, e.g., United Airlines, Inc. v. Brien*, 588 F.3d 158, 176 (2d Cir. 2009) (categorizing inconsistent judgments as falling under Rule 60(b)(6)'s catchall and not Rule 60(b)(1)'s mistake provision). As such, the Second Circuit's reliance upon the Rule 60(b)(1) time limit to deny Keepers' motion was legally incorrect.

Moreover, as a practical matter, the district court's ruling imposes upon Keepers the impossible task of seeking relief from judgment before this Court issues superseding authority. The district court's original summary judgment opinion was issued on March 30, 2013, but *Reed v. Town of Gilbert* was not decided by this Court until June 18, 2015, over two years later. App. 17; *Reed*, 135 S.Ct. 2218. Under the lower court's logic, Keepers would have been required to file its motion for relief from judgment by March 30, 2014, a full 14 months before the intervening change in case law occurred. The law obviously does not impose such an absurd result.

Because it was premised upon a post-judgment shift in the applicable legal standard, Keepers' Rule 60(b) motion fell under the catchall provision of Rule 60(b)(6), which contains no express time limitation. The district court therefore erred in denying the motion based on untimeliness rather than considering the merits of Keepers' position. The Court should grant certiorari to rectify this procedural error as well.

CONCLUSION

For the foregoing reasons, the Court should grant Keepers' petition and issue a writ of certiorari to review the Second Circuit's decision.

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