UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2018

(Argued: February 28, 2019 Decided: July 16, 2019)

Docket No. 18-807

VUGO, INC.,

Plaintiff-Appellee,

—v.—

CITY OF NEW YORK,

Defendant-Appellant.

Before:

KATZMANN, *Chief Judge*, LIVINGSTON and DRONEY, *Circuit Judges*.

Defendant-Appellant the City of New York (the "City") appeals from a February 22, 2018 opinion and order entered in the United States District Court for the Southern District of New York (Abrams, *J.*) denying the City's motion for summary judgment and granting Plaintiff-Appellee Vugo, Inc.'s motion for summary judgment. The district court concluded that the City's rules banning advertisements in for-hire passenger

vehicles, such as Ubers and Lyfts, violate the First Amendment, primarily because the City permits certain advertising in taxicabs. On appeal, the City argues that its ban survives First Amendment scrutiny, notwithstanding the limited taxicab exception, because it directly advances the government's interest in improving the passenger experience and is no more extensive than necessary to advance that interest. We agree. Accordingly, we **REVERSE**.

RONALD J. RICCIO (Steven J. Shanker, Eliott Berman, *on the brief*), McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York, NY, *for Plaintiff-Appellee*.

KATHY CHANG PARK (Richard Dearing, Claude S. Platton, *on the brief*), for Zachary W. Carter, Corporation Counsel of the City of New York, New York, NY, *for Defendant-Appellant*.

KATZMANN, *Chief Judge*:

This appeal concerns a First Amendment challenge to nearly twenty-year-old New York City rules that ban advertisements in for-hire vehicles ("FHVs") absent authorization from the Taxi and Limousine Commission (the "TLC" or the "City"). *See* 35 R.C.N.Y. §§ 59A-29(e)(1), 59B-29(e)(1). A similar rule has applied to yellow and green taxicabs (collectively, "taxicabs," "taxis," or "cabs") for over two decades. *See* 35 R.C.N.Y. § 58-32(f). The TLC originally enacted these bans because, as the record reflects, passengers find in-ride

advertisements—particularly, as relevant here, video advertisements—extremely annoying. However, in 2005, the TLC permitted a limited category of advertisements in taxis: those displayed on the screens of new equipment that the TLC required taxis to install ("Taxi TV"). This new equipment allows taxi riders, *inter alia*, to track the progress of their metered fare and pay by credit card. The TLC authorized advertising on Taxi TV to offset the cost to the taxi owners of installing the newly mandated equipment.

Plaintiff-Appellee Vugo, Inc. ("Vugo") has challenged the rules banning advertisements in FHVs because it wants to sell an advertising software platform it developed for certain FHVs, including Ubers and Lyfts. Vugo primarily argues that the ban is impermissibly underinclusive under the First Amendment because the City's interest in enacting the ban bears no relationship to the City's justification for exempting Taxi TV advertising.

The parties agree that the prohibition on advertising in FHVs is a content-based restriction on commercial speech and, as such, is subject to intermediate scrutiny. *See Central Hudson Gas & Elec. Corp. v. Public Servs. Comm'n*, 447 U.S. 557 (1980). Under *Central Hudson*, courts ask whether (1) the expression is protected by the First Amendment; (2) the asserted government interest is substantial; (3) the regulation directly advances the government interest asserted; and (4) the regulation is no more extensive than necessary to serve that interest. *Id.* at 566. The district court concluded that the ban fails the third prong of

this test because the City's justification for the Taxi TV exception (compensating taxi owners for the cost of new equipment) "bears no relationship whatsoever" to the City's asserted interest (protecting passengers from annoying advertisements). Special App. at 16. Considering the fourth prong in tandem with the third, the district court also concluded that the ban was more extensive than necessary to advance the City's interest.

We respectfully disagree. First, we think there is a sufficient nexus here between the ban and its exception because both advance the City's interest in improving the overall passenger experience. Second, the ban would be constitutional even if there were not such a relationship. The absence of a relationship between a government's interest in a ban and its basis for any exceptions may render a ban unconstitutionally underinclusive. Most notably, it may demonstrate that the ban was motivated by bias or remains incapable of achieving its stated aims. Here, however, on the uncontroverted record, the exception neither reflects discriminatory intent nor renders the ban ineffective at improving the in-ride experience for millions of New York City residents and visitors. The Taxi TV exception reflects the City's reasonable decision that the costs of permitting advertisements in taxicabs were outweighed by the benefits of compensating taxicab owners for the expense of installing new equipment that facilitated credit card payment and improved ride data collection. Vugo identifies no grounds for us to upset this policy judgment. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981) (plurality opinion).

Finally, we conclude that the City's ban is not substantially more restrictive than necessary to achieve the City's aims under the final prong of *Central Hudson*.

Accordingly, we **REVERSE** the judgment of the district court and direct the entry of judgment in favor of the City.

BACKGROUND

I. Factual History

The material facts are undisputed. "[T]ransporting passengers for hire by motor vehicle in the city of New York is affected with a public interest, is a vital and integral part of the transportation system of the city, and must therefore be supervised, regulated and controlled by the city." N.Y.C. Admin. Code § 19-501 (legislative findings). The New York City Council has tasked the TLC with regulating this critical component of the City's transportation system, which includes both taxis and FHVs. N.Y.C. Charter §§ 2300, 2303(a).

The term "taxicab" refers to yellow cabs and green cabs, which are the only vehicles the TLC allows to pick up passengers by street hail in New York City. *See* N.Y.C. Admin. Code § 19-504(1).[1] FHVs, by contrast, are vehicles "other than a taxicab" that "carr[y] passengers for hire in the city." N.Y.C. Admin. Code § 19-502(g).

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[1] Green cabs are formally classified as for-hire vehicles, but this opinion, following the lead of the district court and the parties, defines the term "taxicab" as including green cabs because green cabs are allowed to display advertisements on Taxi TV.

FHV rides are prearranged through businesses licensed by the TLC, such as limousine companies and, more common today, companies like Uber and Lyft. *See* N.Y.C. Admin. Code § 19-516(a) ("For-hire vehicles . . . may accept passengers only on the basis of telephone contract or prearrangement."). FHVs comprise a growing share of the passenger vehicle market. As of August 2016, the TLC regulated 94,000 vehicles. More than seventy-five percent of these were FHVs. Around that same time, riders took approximately 370,000 daily trips in yellow taxis and 213,000 daily trips in Uber and Lyft vehicles.

One of the TLC's statutory mandates is to "promot[e] and protect[] . . . public comfort and convenience." N.Y.C. Charter § 2300. Consistent with this mandate, the TLC sets comprehensive standards for driver licensing, vehicle equipment, and vehicle markings in both taxis and FHVs. For example, the TLC can deny an applicant a license if the applicant has assaulted a passenger or unlawfully denied a passenger service in the past two years, 35 R.C.N.Y. § 58-08(d); the TLC mandates that taxis be equipped with a partition, 35 R.C.NY. § 58-35(a); and the TLC requires taxi owners to "apply to the exterior of the Taxicab markings approved by the Commission," such as an emblem identifying the owner of the vehicle, while prohibiting the application of other emblems and markings on the exterior of taxicabs. *See* 35 R.C.N.Y. § 58-32(a). Similar regulations apply to FHVs. *See* 58 R.C.N.Y. § 59B-09(b)(5); 58 R.C.N.Y. § 59A-32(a); 58 R.C.N.Y. § 59A-29.

Also in furtherance of this mandate to promote passenger comfort, the TLC—for more than two decades—has prohibited any advertising inside taxicabs except as specifically authorized by the Commission. *See* App. at 288, 303-04 (original prohibition, March 1, 1996) ("An owner shall not display inside a taxicab any advertising or other notice not specifically authorized by these [taxicab owner] rules or the Commission's Marking Specifications for Taxicabs unless approved by the Commission."); 35 R.C.N.Y. § 58-32(f) (current prohibition) ("An Owner must not display inside a Taxicab any advertising or other notice not specifically authorized by these rules or the Commission's Marking Specifications for Taxicabs unless approved by the Commission.").

The TLC codified similar rules for FHVs in 1999, which are at issue in this case. 35 R.C.N.Y. §§ 59A-29(e)(1), 59B-29(e)(1).[2] Section 59A-29(e) provides that an "[o]wner must not display any advertising on the exterior or the interior of a For-Hire Vehicle unless the advertising has been authorized by the Commission." Section 59B-29(e)(1), which applies to owners of for-hire base stations—central facilities that manage, organize, and/or dispatch FHVs—contains essentially the same restriction. *See* 35 R.C.N.Y. § 59B-29(e)(1) ("A Vehicle must not display advertising on the outside or the inside unless the Commission has authorized the

[2] Sections 59A-29(e) and 59B-29(e) have been renumbered since their original passage. There have also been minor word revisions. None of those changes substantively altered the rule adopted by the TLC on August 5, 1999.

advertising and has given the Vehicle Owner a permit specifying that the advertising complies with the Administrative Code."). Violation of either section subjects the violator to a $50 fine. *See* 35 R.C.N.Y. §§ 59A-29(3), 59B-29(e)(1). The City's position throughout this litigation has been that "[t]he Challenged Rules govern advertising on posters, stickers, or any other format in which one could promote a product or service." City's Reply Mem. of Law in Support of Cross-Motion for Summary Judgment at 10, ECF No. 53, *Vugo, Inc. v. City of New York*, No. 1:15-cv-8253 (S.D.N.Y. Sept. 30, 2016).

The City's prohibition on in-ride advertising has only one exception: advertisements on Taxi TV. TLC authorized this limited form of interior advertising in taxis in May 2005 to allow taxi owners to offset the cost of a new technology system that TLC had recently required vehicle owners to purchase and install. *See* App. at 95 (deposition testimony of Ryan Wanttaja, Deputy General Counsel for the TLC) (the TLC permits interior advertising in yellow and green taxis "principally because of the—or solely because they offset the cost of these mandatory pieces of equipment that provide the additional functionality that the TLC requires").

This new hardware and software system, referred to as the Technology Passenger Enhancements Program ("TPEP") for yellow taxis and the Livery Passenger Enhancements Program ("LPEP") for green taxis, advances the TLC's mandate to innovate and experiment with new designs and modes of service. N.Y.C. Charter § 2303(b)(9). TPEP and LPEP benefit riders, drivers,

and the TLC. For example, the screen in these systems, known as the "passenger information monitor," shows passengers their fare as it accumulates, allows passengers to track their route, and accepts credit card payments. In a recent TLC survey, almost sixty percent of passengers chose the ability to pay by credit or debit card as the feature they liked most about taxis. The systems also assist with lost-property inquiries and enable the TLC to inform drivers about areas of high demand and to convey emergency notifications via text message. In addition, the systems produce detailed records—previously maintained by hand—of each taxi trip, including fares and pick-up and drop-off locations. *See* 35 R.C.N.Y. § 58-22. These detailed records allow for comprehensive statistical analysis that informs TLC policy and was not feasible under the prior, paper reporting system.

The TLC required vehicle owners to pay for the TPEP and LPEP systems. Because the TLC did not expect that the "significant" cost of installing these systems would be offset by any increase in business, App. at 297, the TLC authorized advertising on the passenger information monitors as a means of reducing the expense for vehicle owners.[3] *See* 35 R.C.N.Y. § 58-32(f) (exempting "[a]dvertising on the Technology System," subject to certain restrictions, from the general ban on

[3] Vehicle owners do not directly receive the advertising revenue. Instead, according to the TLC, TPEP and LPEP providers sell the systems at a discount—the TLC estimates for forty to sixty percent less—when the providers can profit from advertising displayed on the screens.

interior advertising); App. at 297 ("TLC authorized advertising in [taxis] simply as a means by which owners could offset the new cost."). The system allows limited advertising, known as "Taxi TV." 35 R.C.N.Y. § 58-32(f) (exempting "[a]dvertising on the Technology System," subject to certain restrictions, from the general ban on interior advertising).

In response to passenger dissatisfaction with Taxi TV, the TLC has sought to again entirely eliminate advertising from taxicabs. Approximately one-third of TLC survey respondents named Taxi TV as the one thing they disliked most about taxis. The commissioner of the TLC expressed the need to be "responsive" to passengers who found Taxi TV to be "somewhat of an invasion." App. at 453. The TLC recently completed a pilot program to test new technologies that could maintain the functionality of TPEP and LPEP without Taxi TV. The executive director of the taxi drivers' union reported that the drivers responded to the proposed change with "utter elation." App. at 458. After the pilot program concluded in June 2018, TLC eliminated its requirement that taxicab technology systems contain monitors to display advertisements. *See* 35 R.C.N.Y. § 66-24(c). Instead, taxi owners must install any technology system that provides certain core functions, including data collection, credit card payment, and communication between drivers and TLC, but that system need not have a monitor. *See id.*; 35 R.C.N.Y. § 58-40(a).

FHVs do not have technology akin to the TPEP and LPEP systems. Indeed, such technology is not

necessary in FHVs. FHV fares are usually set in advance (and not subject to the metered rates set for street-hail vehicles), so passengers do not need real-time information about their fare. In addition, FHV passengers less frequently need a device that accepts in-car payment since payment is usually made in advance via a credit card on file. Finally, the TLC does not need to communicate fare opportunities directly to FHV drivers because FHV drivers can only accept passengers that their companies assign to them.

Vugo, a Minnesota-based technology company, has developed a system for displaying video advertisements to FHV passengers. Under Vugo's business model, the vehicle driver purchases an internet-connected tablet and downloads the Vugo app. The driver mounts the tablet on the back of the front seat's headrest so that it faces the passenger seats at eye level. When the passenger's trip begins, the tablet automatically plays advertisements, mostly in video format. Passengers cannot turn off or mute the advertisements (unlike Taxi TV, which can be muted or turned off). Passengers can, however, use on-screen controls to reduce the volume to a "near-mute" level. App. at 180-81. Advertisers pay Vugo, and Vugo splits this ad revenue with drivers. When Vugo contacted the TLC about its plans to enter the New York City market, the TLC confirmed that it did not allow advertising in FHVs.

II. Procedural History

Vugo sued the City on October 20, 2015, alleging that the TLC's prohibition on interior advertising in FHVs violates the First Amendment and requesting that the court declare the rules unconstitutional and enjoin their enforcement. Both parties moved for summary judgment. The district court (Abrams, *J.*) granted summary judgment for Vugo.[4] The court concluded that, while the City had articulated a substantial interest in promoting passenger comfort, there was an insufficient fit between the ban on in-ride advertising and the City's asserted interest because the advertisements on Taxi TV are no less annoying than advertisements in FHVs would be. Moreover, the district court held, the City could have furthered its stated interest by less restrictive means, such as requiring advertising displays in FHVs to contain an on-off switch or mute button.

DISCUSSION

I. Standard of Review

We review a decision on cross-motions for summary judgment *de novo*, examining each motion "on its own merits." *Chandok v. Klessig*, 632 F.3d 803, 812 (2d Cir. 2011). Summary judgment is proper only when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We must

[4] The district court's judgment has been stayed pending this appeal.

"construe[] the evidence in the light most favorable to the non-moving party and draw[] all inferences in its favor." *Costello v. City of Burlington*, 632 F.3d 41, 45 (2d Cir. 2011); *see also Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001) (when considering cross-motions for summary judgment, "all reasonable inferences must be drawn against the party whose motion is under consideration"). It is the government's burden to justify its rules as consistent with the First Amendment. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571-72 (2011); *United States v. Caronia*, 703 F.3d 149, 164 (2d Cir. 2012).

II. The City's Prohibition on In-Ride Advertising Does Not Violate the First Amendment

The challenged rules affect only commercial advertising.[5] "The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation." *Central Hudson*, 447 U.S. at 561. Both parties assert that *Central Hudson*'s intermediate scrutiny test applies because the rules regulate commercial speech. We agree, and further conclude that the prohibition survives this test.

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[5] Although the advertising ban, on its face, also covers non-commercial advertising—and there is record evidence that the ban has, in fact, been applied to non-commercial advertising—the parties and the district court proceeded on the assumption that the ban applies only to commercial speech. Since the parties agree on appeal that the ban applies only to commercial advertising, we assume that is the case for purposes of this decision.

A. The Proper Level of Scrutiny

We must first briefly address what "intermediate scrutiny" under *Central Hudson* requires after *Sorrell*. Although Vugo expressly concedes that *Central Hudson*'s intermediate scrutiny test applies, Vugo also contends that content-based restrictions on truthful commercial advertising are "presumptively invalid" after *Sorrell*, Appellee Br. at 18, implying that something more akin to strict scrutiny applies.[6] We hold that the *Central Hudson* test still applies to commercial speech restrictions.

The Supreme Court has held that "commercial speech enjoys a limited measure of protection, commensurate

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[6] The City does not dispute that the ban, construed as applying only to commercial advertising, is content-based. We see no reason to conclude otherwise. "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." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). "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." *Id.* That said, regulations that apply generally to "advertising" (without regard for whether the advertisements are commercial) may not necessarily be content-based. *See Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1198-1200 (9th Cir. 2016) (holding that city ordinances regulating mobile billboard advertising displays were not content-based because "the word 'advertising' refers to the *activity* of displaying a message to the public, not to any particular content that may be displayed," and "[t]here ha[d] been no suggestion that the ordinances apply differently to . . . political endorsements than to . . . commercial promotional campaigns." (emphasis added)). We need not resolve that broader issue here because the City has stipulated that the ban applies only to commercial advertising and therefore is content-based.

with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression." *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 477 (1989) (internal alterations, citations, and quotation marks omitted). More recently, in *Sorrell*, the Court stated that "heightened judicial scrutiny" applied to a Vermont law regulating commercial speech because the law "impose[d] burdens that [we]re based on the content of speech and that [we]re aimed at a particular viewpoint." 564 U.S. at 565. However, the Court did not elaborate on what "heightened scrutiny" for content-based restrictions on commercial speech would entail or whether such scrutiny should apply to all commercial speech restrictions. Instead, the Court applied the "special commercial speech inquiry," *i.e.* the *Central Hudson* test, explaining that the outcome was the same whether that standard or "a stricter form of judicial scrutiny [was] applied." *Id.* at 571. And the Supreme Court subsequently has suggested that commercial speech restrictions remain "subject to the relaxed scrutiny outlined in *Central Hudson*." *Matal v. Tam*, 137 S. Ct. 1744, 1763-64 (2017).

Following *Sorrell*, this Court has continued to apply *Central Hudson*'s intermediate scrutiny test to commercial speech restrictions. *See Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 112-13 (2d Cir. 2017); *see also Poughkeepsie Supermarket Corp. v. Dutchess Cty., N.Y.*, 648 F. App'x 156, 157 (2d Cir. 2016) (summary order) ("Restrictions

on commercial speech are subject to intermediate scrutiny under *Central Hudson*."). Other Circuits have similarly concluded that the *Central Hudson* intermediate scrutiny test for commercial speech survives *Sorrell*. *See*, *e.g.*, *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 842 (9th Cir. 2017) (en banc) ("*Sorrell* did not modify the *Central Hudson* standard."); *1-800-411-Pain Referral Service, LLC v. Otto*, 744 F.3d 1045, 1055 (8th Cir. 2014) (the "upshot" of *Sorrell* is that "when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*"); *Missouri Broadcasters Ass'n v. Lacy*, 846 F.3d 295, 300 n.5 (8th Cir. 2017) (reaffirming that content- and speaker-based commercial speech restrictions are evaluated under *Central Hudson*); *In re Brunetti*, 877 F.3d 1330, 1350 (Fed. Cir. 2017) ("[P]urely commercial speech [is] reviewed according to the intermediate scrutiny framework established in *Central Hudson*."); *Flying Dog Brewery, LLLP v. Michigan Liquor Control Comm'n*, 597 F. App'x 342, 365 (6th Cir. 2015) ("[A]lthough *Sorrell* stated that 'heightened judicial scrutiny' applied, it reaffirmed the use of the *Central Hudson* test."). Other Circuits have avoided the question, noting that the Supreme Court did not resolve the issue in *Sorrell*. *See Educational Media Co. at Va. Tech, Inc. v. Inlsey* [sic], 731 F.3d 291, 298 n.4 (4th Cir. 2013) ("To be sure, the question of whether *Sorrell*'s 'heightened scrutiny' is, in fact, strict scrutiny remains unanswered."); *Express Oil Change, L.L.C. v. Miss. Bd. of Licensure for Prof'l Eng'rs & Surveyors*, 916 F.3d 483, 493 n.18 (5th Cir. 2019) ("We do not reach the issue of whether *Sorrell*

. . . altered the commercial speech analysis."); *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1235 n.7 (11th Cir. 2017) ("We need not wade into these troubled waters . . . because the State cannot survive *Central Hudson* scrutiny."). No Court of Appeals has concluded that *Sorrell* overturned *Central Hudson*.

We agree with our sister circuits that have held that *Sorrell* leaves the *Central Hudson* regime in place, and accordingly we assess the constitutionality of the City's ban under the *Central Hudson* standard.[7]

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[7] In addition, even if strict scrutiny applied to *some* commercial speech restrictions after *Sorrell*, we doubt it would apply to this one. The statute in *Sorrell* was content- and speaker-based in that it targeted a single category of speech by a single category of speaker: marketing carried out by pharmaceutical manufacturers. *Sorrell*, 564 U.S. at 563-64. The Supreme Court had no doubt that the statute "impose[d] an aimed, content-based burden" on particular speakers. *Id.* at 564; *see id.* at 565 ("Formal legislative findings accompanying [the statute] confirm that the law's express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs.").

Here, by contrast, the City's ban covers the full range of commercial advertising. There is no suggestion that the City is trying to "quiet[ ]" truthful speech with a particular viewpoint that it "fear[s] . . . might persuade." *Id.* at 576. Vugo does not contend that the advertising displayed on its software platform would differ in content from the advertisements displayed on Taxi TV—nor is there any indication in the record that that is the case. Thus, to the extent strict scrutiny might apply to some commercial speech restrictions out of concern that the government is seeking to "keep[] would-be recipients of the speech in the dark," *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 523 (1996) (Thomas, *J.*, concurring), or otherwise prevent the public from receiving certain truthful information, that concern is not present here. *See also id.* at 503 (Stevens, *J.*, plurality opinion) (joined by Kennedy, *J.* and

B. The Prohibition Survives Scrutiny Under *Central Hudson*

Under *Central Hudson*, we must determine whether: (1) the speech restriction concerns lawful activity; (2) the City's asserted interest is substantial; (3) the prohibition "directly advances" that interest; and (4) the prohibition is no more extensive than necessary to serve that interest. 447 U.S. at 566; *see also Centro de la Comunidad Hispana*, 868 F.3d at 113. The parties agree that the first prong is satisfied. Accordingly, below we consider only the remaining three prongs.

1. Prong Two: The City's Asserted Interest

The district court held that the City's asserted interest—to protect passengers from the annoying sight and sound of in-ride advertisements—is substantial. We agree.

Vugo's argument to the contrary mistakes the relevant inquiry. Vugo argues that the City's ban was "designed" to suppress speech that "some people didn't like," and that the City cannot ban advertisements just because it "believes the content of advertising is 'uniquely annoying.'" Appellee Br. at 23 (quoting City's Mem. of Law in Support of Cross-Motion for Summary Judgment at 20, ECF No. 48, *Vugo, Inc. v. City of New York*, No. 1:15-cv-08253 (S.D.N.Y. Aug. 26, 2016)); *see*

Ginsburg, *J.*) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.").

also Tam, 137 S. Ct. at 1765 (articulating the "fundamental principle of the First Amendment that the government may not punish or suppress speech on disapproval of the ideas or perspectives the speech conveys").

The second prong of *Central Hudson*, however, asks us to evaluate the City's *asserted* goal in enacting the regulation. Here, the City's asserted goal is to protect its citizens from the offensive sight and sound of advertisements—not their content—while they are traveling through the city by car.[8] That interest is clearly substantial. City governments have a substantial interest in cultivating "esthetic values" and preventing "undue annoyance." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984); *Village of Schaumburg v. Citizens for a Better Envm't*, 444 U.S. 620, 632 (1980); *see also Metromedia*, 453 U.S. at 507-08 ("the appearance of the city" is a "substantial governmental" interest); *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (governments are empowered to protect "the quiet and tranquility so desirable for city dwellers"); *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 103-04 (2d Cir. 2010) ("protecting the aesthetic appearance of a city" is a substantial government goal that justifies regulating the display of advertisements). This is as true in publicly regulated transportation as it is anywhere else in the city. *See Taxpayers for Vincent*, 466 U.S. at 806

[8] In support of this argument, the City submitted evidence that passengers find the fact, not the content, of in-ride advertisements annoying.

("[T]he city was entitled to protect unwilling viewers against intrusive advertising that may interfere with the city's goal of making its buses 'rapid, convenient, pleasant, and inexpensive.'" (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974) (plurality opinion))). Thus, the City's asserted interest is substantial.

2. Prongs Three and Four: "Reasonable Fit"

"The last two steps in the [*Central Hudson*] analysis have been considered, somewhat in tandem, to determine if there is a sufficient 'fit between the regulator's ends and the means chosen to accomplish those ends.'" *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 98 (2d Cir. 1998) (quoting *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986)) (alterations omitted). "The burden to establish that 'reasonable fit' is on the government agency defending its regulation, though the fit need not satisfy a least-restrictive-means standard." *Id.* (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993)). That is, the fit need not be "perfect," but simply "reasonable." *Discovery Network*, 507 U.S. at 416 n.12 (quoting *Fox*, 492 U.S. at 480). *Central Hudson* requires "not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Fox*, 492 U.S. at 480 (internal citations and quotation marks omitted).

i. Prong Three

To satisfy the third prong of *Central Hudson*, the City must demonstrate that (1) "the harms it recites are real," and (2) "that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). Vugo argues, and the district court agreed, that the in-ride advertising ban fails at this third prong because the exception for advertising on Taxi TVs renders the ban unconstitutionally underinclusive. We disagree.

As an initial matter, we conclude that the City has substantiated the harm it seeks to prevent. The Supreme Court has "permitted litigants to justify speech restrictions by reference to studies and anecdotes," such as those submitted by the City. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (internal citation and quotation marks omitted). In this case, the City provided survey data indicating that passengers dislike Taxi TV. In response to a 2011 survey of taxi passengers, nearly one-third of respondents indicated that "Taxi TV is annoying." App. 313. Passengers have complained that the screens are difficult to turn off and cause motion sickness. They have singled out the advertisements on Taxi TV as especially irritating. Vugo points to only one contrary piece of evidence in the record: a November 2015 Quinnipiac University survey finding that forty-five percent of respondents found Taxi TV to be a "pleasant diversion" while forty-one percent deemed it an "annoyance." App. at 482, 487, 490. This single third-party survey does not provide a basis for us to second guess the City's conclusion that

in-ride advertisements are annoying to its citizens—a conclusion it reached based on its own survey results and firsthand experience receiving complaints from customers.[9]

Next, we must consider whether the City's prohibition on advertising in taxicabs and FHVs adequately alleviates these harms, despite the exception for Taxi TV. "Although a law's underinclusivity raises a red flag, the First Amendment imposes no freestanding 'underinclusiveness limitation.'" *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 387 (1992)); *see also Anderson v. Treadwell*, 294 F.3d 453, 463 (2d Cir. 2002) ("[U]nderinclusiveness will not necessarily defeat a claim that a state interest has been materially advanced." (citing *Metromedia*, 453 U.S. at 511 (plurality opinion))). Indeed, "[i]t is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech." *Williams-Yulee*, 135 S. Ct. at 1668. Underinclusiveness is problematic insofar as it, *inter alia*, "raise[s] doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint," or "reveal[s] that a law does not actually advance a compelling interest." *Id.*; *see also City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994) ("Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy" because of the "risks of viewpoint and

[9] Moreover, we see no reason why the City may not seek to alleviate a harm when the harm is experienced by forty-one percent of the population.

content discrimination" and because such exemptions "may diminish the credibility of the government's rationale for restricting speech in the first place."); *Clear Channel*, 594 F.3d at 106 ("A regulation may [] be deemed constitutionally problematic if it contains exceptions that 'undermine and counteract' the government's asserted interest." (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995))). The Supreme Court has also found impermissible regulations that draw distinctions between categories of speech that "bear[] no relationship *whatsoever* to the particular interests that the [government] has asserted." *Discovery Network*, 507 U.S. at 424; *see also Clear Channel*, 594 F.3d at 106.

The City's in-ride advertising ban is not unconstitutionally underinclusive. *First*, the ban materially advances the City's interest in reducing passenger annoyance, notwithstanding the Taxi TV exception.[10] *Second*, the City's justification for the Taxi TV exception is sufficiently related to its interest in enacting the ban because both are aimed at improving the overall in-ride experience, albeit in different ways: the Taxi TV exception facilitated the installation of equipment that (among other things) enabled passengers to pay for taxi rides by credit card, which is their decided preference, and the ban applicable to FHVs frees passengers from advertisements, which they find annoying. *Third*, the ban would survive intermediate scrutiny even if the exception and the ban were not related because

[10] Vugo does not contend that the government's real end is to discriminate on the basis of message.

such a relationship is not an independent requirement under the First Amendment. The "relationship test" is an analytical tool that in some circumstances indicates that a speech restriction is unconstitutional because it casts doubt on whether a regulation is "'part of a substantial effort to advance a valid state interest.'" *Clear Channel*, 594 F.3d at 108 (quoting *Bad Frog Brewery*, 134 F.3d at 100). That is not the case here.

a. The Taxi TV Exception Does Not Undermine the City's Asserted Interest

The exception for Taxi TV does not render the ban ineffective. This case is unlike *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) and *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173 (1999), on which Vugo relies. In *Rubin*, the government asserted that a prohibition on the disclosure of alcohol content on beer labels would combat the problem of beer companies competing for customers on the basis of alcohol content ("strength wars"). *Rubin*, 514 U.S. at 488. The Court explained that the scheme did not make "rational sense" because other provisions of the scheme left open ubiquitous avenues for strength wars—such as television advertising for beer—that "directly undermine[d] and counteract[ed] [the] effects" of the ban on such disclosure on labels. *Id.* at 488, 489. The "irrationality" of the "regulatory framework *ensure[d]* that the labeling ban w[ould] fail to achieve its end." *Id.* at 488 (emphasis added). Similarly, in *Greater New Orleans Broadcasting*, the Court found

that exceptions to a prohibition on advertisements about gambling—for, among other things, tribal gambling authorized by state compacts and government-operated casinos—swallowed the rule, since the regulation "merely channel[led] gamblers to one casino rather than another." 527 U.S. at 189. In this case, by contrast, the Taxi TV exception does not wholly undermine the effectiveness of the general restriction on in-ride advertising by allowing the proliferation of advertisements to the same degree through other avenues, as in *Rubin*, or by channeling riders to taxicabs where there are offensive in-ride advertisements, as in *Greater New Orleans*.

Nor is the exception so large that the rules fail to directly advance New York's interest in reducing the number of annoying ads passengers must endure. *See Discovery Network*, 507 U.S. at 417-18 (regulation did not substantially advance the city's interest because it eliminated only 4% of unsightly news racks); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73 (1983) (striking down prohibition that "provide[d] only the most limited incremental support for the interest asserted"); *Bad Frog Brewery*, 134 F.3d at 100 ("[A] state must demonstrate that its commercial speech limitation is part of a substantial effort to advance a valid state interest, not merely the removal of a few grains of offensive sand from a beach of vulgarity."). On the record before the district court, the FHVs covered by the challenged rules accounted for over one-third of daily TLC passenger trips in 2016. Special App. at 15; App. at

482-83.[11] As a result, over one-third of the TLC's ridership is spared advertisements during their rides. This reduction is substantial. *See United States v. Edge Broadcasting Co.*, 509 U.S. 418, 432-33 (1993) (a regulation that reduced the percentage of radio air time playing lottery ads from 49% to 38% "significan[tly]" advanced the government's interest). The government is not required to "make progress on every front before it can make progress on any front." *Id.* at 434.

b. The Justification for the Taxi TV Exception Is Not Too Attenuated from the Justification for the Commercial Advertising Ban

Vugo next argues that the ban is unconstitutional because the justification for the Taxi TV exception is unrelated to the justification for the commercial advertising ban. Appellee Br. at 30-33. Vugo relies on *Discovery Network*, in which the Supreme Court considered a ban enacted by the City of Cincinnati on newsracks dispensing commercial publications, but not newsracks dispensing newspapers. Cincinnati enacted the ban to "ensur[e] safe streets and regulat[e] visual blight." 507 U.S. at 415. Yet, the exempted newspaper newsracks were "equally unattractive" and

[11] The number of FHV rides relative to taxicab rides continues to grow. *See*, *e.g.*, Johana Bhuiyan, *Ride-hail apps like Uber and Lyft generated 65 percent more rides than taxis did in New York in 2017*, VOX (Mar. 15, 2018, 5:16 PM), https://www.vox.com/2018/3/15/17126058/uber-lyft-taxis-new-york-city-rides (in December 2017, FHVs made 65% more pickups than taxis).

"arguably the greater culprit because of their superior number." *Id.* at 425, 426. Cincinnati justified nevertheless excluding newspaper newsracks from the ban on the ground that "commercial speech has only a low value." *Id.* at 425-26, 418-19. The Court held that this justification for distinguishing between noncommercial and commercial publications was insufficient because the distinction had "absolutely no bearing on the interests [the City] ha[d] asserted." *Id.* at 428.

Vugo suggests that the "relationship test" set out in *Discovery Network* requires that the justification for the exception appeal to the *identical* interest asserted by the City in supporting the restriction. On that view, the only legitimate basis for exempting any advertisements from the City's ban would be that such advertisements are less annoying than others. *See* Special App. at 16-17. According to Vugo, because the City has not argued that advertisements on Taxi TV are any less annoying than advertisements on Vugo's platform would be, the exception is not sufficiently related to the City's asserted interest in passing the ban (*i.e.*, sparing riders from annoying advertisements).

But *Discovery Network* does not impose such a stringent standard. The Supreme Court held only that distinctions that bear "no relationship *whatsoever* to the particular interests that the city ha[d] asserted" are impermissible. *Discovery Network*, 507 U.S. at 424; *see also id.* at 428 ("[T]he distinction . . . has *absolutely no bearing* on the interests . . . asserted." (emphasis added)); *Clear Channel*, 594 F.3d at 106 (regulations that draw "arbitrary distinctions" are unconstitutional).

The relationship between Cincinnati's ban and its exception was truly arbitrary: there was no nexus between the allegedly "low value" of commercial speech and the aesthetic and safety interests Cincinnati sought to advance by banning newsracks. The Court suggested that had there been "some basis for distinguishing between 'newspapers' and 'commercial handbills' that [was] *relevant* to an interest asserted by the City," that would have been sufficient. *Discovery Network*, 507 U.S. at 428 (emphasis added).

Moreover, Vugo's interpretation of the "relationship" required under *Discovery Network* conflicts with the Supreme Court's "reject[ion of] 'the argument that a prohibition against the use of unattractive signs cannot be justified on [a]esthetic grounds if it fails to apply to all equally unattractive signs wherever they might be located.'" *Clear Channel*, 594 F.3d at 106 (quoting *Taxpayers for Vincent*, 466 U.S. at 810). If Vugo were right that a government can only distinguish between speech based on its tendency to produce the harm the government seeks to prevent through its prohibition, then a prohibition against the use of unattractive signs could *not* be justified if it failed to apply to all equally unattractive signs wherever they might be located, a position the Supreme Court has rejected.

Here, the City's basis for distinguishing between advertisements on Taxi TV and all other advertisements in taxis and FHVs is sufficiently related to the City's asserted interest. Both the restriction and the exception concern passenger comfort and convenience: passengers prefer not to see advertisements while

riding in cabs and FHVs, but they also prefer, for example, to be able to pay for their rides by credit card, which TPEP and LPEP enable. The City's ban seeks to balance these preferences, permitting advertisements exclusively on Taxi TV in order to offset the cost of the TPEP and LPEP systems to vehicle owners. Thus, the City's rules, as a whole, reflect a considered determination about how best to improve the overall experience of passengers riding in taxis and FHVs. *See id.* at 108 ("[T]here is clearly a relationship between the City's Zoning Resolution, which regulates the placement of outdoor commercial advertising, and its interest in aesthetics and traffic safety."); *see also Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 905 (9th Cir. 2009) ("*Central Hudson* requires a logical connection between the interest a law limiting commercial speech advances and the exceptions a law makes to its own application."). We also note that, unlike in *Discovery Network*, the City's distinction is well-founded and the regulations "go[] a long way," *Metro Lights*, 551 F.3d at 911, toward achieving the City's goal. *See Clear Channel*, 594 F.3d at 108 (finding a "clear" relationship between the distinctions drawn between speech in a zoning resolution and the City's interest in passing that resolution in part because the regulations, "as a whole," were "'part of a substantial effort to advance a valid state interest'" (quoting *Bad Frog Brewery*, 134 F.3d at 100)); *Metro Lights*, 551 F.3d at 911.

c. The "Relationship Test" in *Discovery Network* Is an Analytical Tool

Separately, even if there were not a sufficient nexus between the City's justifications for the rule and its exception, the City's ban would still pass muster because such a relationship is not an independent requirement under the First Amendment. Although Vugo insists that the First Amendment categorically requires a relationship between the basis for a ban on commercial speech and the justification for any exceptions to that ban, we find no support for that position in the Supreme Court's decisions addressing regulation of commercial speech, save for a few lines in *Discovery Network*. Placed in the context of *Central Hudson*'s third prong, the relationship between a government's interest in restricting speech and its justification for exempting some speech from that restriction is not a freestanding requirement but rather an analytical tool for assessing whether a regulation is "'part of a substantial effort to advance a valid state interest.'" *Clear Channel*, 594 F.3d at 108 (quoting *Bad Frog Brewery*, 134 F.3d at 100). The absence of a relationship supports—but does not compel—a conclusion that the ban is discriminatory, ineffective, or irrational such that it is unconstitutionally underinclusive.

Sometimes, a disconnect between the government's interest in a speech restriction and the government's justification for exempting certain speech from that restriction reveals that the government is disfavoring a particular speaker or that a law does not

actually advance a compelling state interest. That was true in *Discovery Network*, in which the Supreme Court concluded that the newspaper exception to Cincinnati's newsrack ban both reflected bias against commercial speech and rendered the ban ineffective. 507 U.S. at 419 (the city "seriously underestimate[d] the value of commercial speech"); *id.* at 426 (newspapers were "arguably the greater culprit [of blight] because of their superior number"). It was also true in *Sorrell*, in which the Supreme Court explained that the "exceptions based in large part on the content of a purchaser's speech" were such that "[t]he law on its face burdens disfavored speech by disfavored speakers." 564 U.S. at 564. And in *Rubin*, the Court found that the exceptions "directly undermine[d] and counteract[ed] [the] effects" of the ban. 514 U.S. at 489. In such cases, the exception renders the ban impermissibly underinclusive.

But that is not always the case. The absence of a relationship is not—in its own right—constitutionally fatal. Indeed, exceptions to speech restrictions can be justified on grounds not related to the government's interest in enacting the restriction, so long as the exceptions do not "compromise[]" the "validity" of the government's asserted interest. *Taxpayers for Vincent*, 466 U.S. at 811; *see also Nat'l Fed'n of the Blind v. F.T.C.*, 420 F.3d 331, 346 (4th Cir. 2005) ("A distinction among speakers is . . . not objectionable per se, but only because it renders implausible the government's claim that the regulation making this distinction is narrowly tailored to address a certain interest."). In *Taxpayers for Vincent*, for example, the Court found an exception

for signs on privately owned land justified in part by "[t]he private citizens' interest in controlling the use of his own property," which was not related to the "visual assault . . . presented by an accumulation of signs" that the City sought to stem through its regulation. 466 U.S. at 811, 807. In *Clear Channel*, we upheld a regulation banning billboard advertising near highways in New York City, except for signs on Transit Authority property, even though the city had identified no reason to think that signs on Transit Authority property were less dangerous or ugly than signs on other property. *See* 594 F.3d at 106. We explained that "[t]he fact that the City has chosen to value some types of commercial speech over others does not make the regulation irrational." *Id.* at 109 (internal citation omitted). And, in *Metromedia*, the plurality opinion accepted the city's judgment that commercial enterprises, as well as the public, had a greater interest in onsite advertising than offsite advertising and accordingly decided that "the city's interests in traffic safety and [a]esthetics . . . should yield" in the case of the former but not the latter. 453 U.S. at 512 (plurality opinion).

On the logic of these decisions, the First Amendment allows a government to carve out exceptions to a speech restriction for reasons unrelated to the government's basis for enacting the restriction in the first place. *See Nat'l Fed'n of the Blind*, 420 F.3d at 345 (the First Amendment requires only "a legitimate 'neutral justification' for" regulating some speakers but not others (quoting *Discovery Network*, 507 U.S. at 429-30)). Otherwise, a government could never address

competing concerns by crafting exceptions to speech restrictions. For example, a government could never pass a regulation reflecting its judgment that its interest in aesthetics were outweighed by some commercial interests (onsite advertising) but not others (offsite advertising). *See Metromedia*, 453 U.S. at 512 (plurality opinion). The First Amendment does not impose such stringent constraints on government decision-making.

In this case, although the City's reason for excluding Taxi TV from its in-ride advertisement ban is not directly related to the City's interests in enacting the ban, the exclusion is nevertheless rational.[12] *See Clear Channel*, 594 F.3d at 109. The rules "reflect[ ] a decision by the city that" its interest, and the public's interest, in the LPEP and TPEP systems "is stronger than the [C]ity's interests in . . . [a]esthetics." *Metromedia*, 453 U.S. at 512. We see no basis to upset the City's policy judgment.

ii. Prong Four

Finally, under *Central Hudson*'s fourth prong, the City must establish "that the regulation [does] not burden substantially more speech than is necessary to further the government's legitimate interests." *Clear Channel*, 594 F.3d at 104; *see also Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 265 (2d Cir. 2014)

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[12] As already noted, *supra* note 10, Vugo does not argue that the City was in fact motivated by a desire to restrict a particular category of speech, rather than its stated desire to improve the in-ride experience.

(assessing whether an ordinance was "more restrictive than necessary to effectuate the government's legitimate interests"). In other words, the government must "affirmatively establish" a reasonable fit between the regulation and its goal. *Fox*, 492 U.S. at 480. This prong does not require "that there be no conceivable alternative" to the government's approach, or that the government's regulation be the least restrictive means of advancing its asserted interests. *Id.* at 478; *see also Clear Channel*, 594 F.3d at 104. In addition, the City is afforded "considerable leeway in determining the appropriate means to further a legitimate government interest." *Clear Channel*, 594 F.3d at 105 (internal alterations and quotation marks omitted). We are "loath to second-guess the [g]overnment's judgment to that effect." *Fox*, 492 U.S. at 478; *see also id.* at 481 ("[W]e . . . provide the Legislative and Executive Branches needed leeway in a field . . . traditionally subject to governmental regulation." (internal quotation marks omitted)).

The City's determination here about how to regulate in-ride advertising is "reasonable." *Clear Channel*, 594 F.3d at 104. Vugo, in effect, contends that, instead of entirely banning advertising in FHVs, the City could carve out a Taxi TV-like exception for FHVs. Specifically, Vugo argues that the TLC could allow video advertising but require that the hardware include an on-off switch or mute button, and/or impose content-neutral limitations on the placement and size of the video advertisements. Appellee Br. at 34. We have before rejected a contention analogous to the one that

Vugo raises here. In *Clear Channel*, plaintiff argued that the city should have "adopted a 'size and spacing' regulatory regime" rather completely prohibiting the display of signs in certain locations. *Clear Channel*, 594 F.3d at 105. We disagreed, deferring to the city's judgment about "the appropriate means to further [its] legitimate governmental interest." *Id.* Similarly, in *Metromedia*, the Supreme Court explained that "[i]f the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." 453 U.S. at 508; *see also Taxpayers for Vincent*, 466 U.S. at 817; *Fox*, 492 U.S. at 480-81.

Here, too, we must defer to the City's judgment. The record shows that, notwithstanding the limitations the City places on Taxi TVs, passengers find the advertisements on Taxi TV annoying. Therefore, a restriction on the size of the devices on which FHV drivers would run Vugo's platform would not substantially further the interests the City's ban seeks to advance. In addition, the record supports the City's position that on-off or mute buttons would not eliminate the harms identified by passengers that the ban seeks to redress, given that passenger complaints about Taxi TV often include frustration with malfunctioning on-off switches and mute buttons—and with needing to navigate the on-screen interface in order to obtain peace and quiet in the first place. In other words, Vugo's suggested modifications to the regulatory scheme would replicate the precise system that has

already proved to hinder passenger comfort and convenience.

Thus, we conclude that the City's determination that banning ads altogether is the most effective approach was reasonable. Like the ban on billboards in *Taxpayers for Vincent*, *Metromedia*, and *Clear Channel*, the City's prohibition is the "most direct and perhaps the only effective approach" to prevent the harms of intrusive and annoying advertisements. *Taxpayers for Vincent*, 466 U.S. at 817 (internal quotation marks omitted).

CONCLUSION

The City's prohibition on advertising in FHVs does not violate the First Amendment under *Central Hudson*. The City's asserted interest is substantial, the prohibition "directly advances" that interest, and the prohibition is no more extensive than necessary to serve that interest. Accordingly, we REVERSE the judgment of the district court and direct the entry of judgment in favor of the City.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VUGO, INC., Plaintiff, v. CITY OF NEW YORK, Defendant.	No. 15-CV-8253 (RA) OPINION & ORDER (Filed Feb. 22, 2018)

RONNIE ABRAMS, United States District Judge:

Citing an interest in promoting and protecting passenger comfort, the New York City Taxi and Limousine Commission ("TLC") promulgated rules that prohibit the display of advertising in certain types of for-hire vehicles without prior authorization. Although the TLC's regulatory scheme permits advertising in medallion taxis and street-hail liveries, it is effectively banned in all other vehicles. Vugo, Inc., a Minnesota-based company that places digital content, including advertising, in rideshare vehicles such as those affiliated with Uber and Lyft across the country, has sought to expand its business into New York City. After the TLC refused Vugo authorization to do so, it brought this First Amendment challenge.

Both Vugo and the City now move for summary judgment. Because the City is unable to justify the challenged regulations, even under the relaxed judicial scrutiny applied to restrictions on commercial speech

first articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, Vugo's motion is granted and the City's motion is denied.

BACKGROUND

The following facts, which are based on the parties' Rule 56.1 statements and supporting materials, are undisputed unless otherwise noted.[1] The TLC, a City agency, is responsible for the "regulation and supervision" of vehicles for hire in the City. N.Y.C. Charter § 2303(a). In connection with its obligation to establish a comprehensive transportation policy, it is tasked with considering, among other things, "the promotion and protection of the public comfort." *Id.* § 2300. Its authority extends to "[t]he regulation and supervision of standards and conditions of service," *id.* § 2303(b)(2), and it is expressly empowered to establish "standards of . . . comfort . . . in the operation of vehicles and auxiliary equipment," *id.* § 2303(b)(6). As of August 2016, the TLC oversaw more than 94,000 vehicles, including medallion taxis and for-hire vehicles

[1] These include the following submissions made in connection with the parties' respective motions for summary judgment: Plaintiff's Rule 56.1 Statement ("Pl. 56.1"), Defendant's Rule 56.1 Statement ("Def. 56.1"), Defendant's Response to Plaintiff's Rule 56.1 Statement ("Def. Resp. to Pl. 56.1"), and the Declaration of Ryan Wanttaja in Support of Defendant's Motion for Summary Judgment ("Wanttaja Decl."). Where facts stated in a Rule 56.1 statement are supported by testimonial or documentary evidence, and denied solely by a conclusory statement by the other party without citation to conflicting testimonial or documentary evidence, the Court finds such facts to be true. *See* S.D.N.Y. Local Rule 56.1(c)-(d).

("FHVs").[2] Def. 56.1 ¶¶ 3-4, ECF No. 47. The following vehicles are considered FHVs: community-based liveries, black cars, luxury limousines, and street-hail liveries ("SHLs").[3] Def. 56.1 ¶ 5.

The TLC currently allows two types of regulated vehicles to display interior advertising: medallion taxis and SHLs. Pl. 56.1 ¶¶ 10, 12, 14, ECF No. 39. Medallion taxis are New York City's ubiquitous "yellow cabs." Pl. 56.1 ¶ 4. SHLs, which are commonly known as "green" or "borough" taxis, are a relatively new class of FHVs that are authorized to accept street hails in the Bronx, Brooklyn, Queens (with the exception of the airports), Staten Island, and in certain parts of Manhattan. Def. 56.1 ¶¶ 5, 30. In addition to being the only two types of regulated vehicles allowed to display interior advertising, medallion taxis and SHLs are also the only regulated vehicles that accept street hails. Def. 56.1 ¶ 31.

Before May 2005, no TLC-regulated vehicles were authorized to display interior advertising. *See* Def. 56.1 ¶ 13; Wanttaja Decl. ¶ 22, ECF No. 50. The rules being challenged in this action, which prohibit interior advertising in FHVs, were originally adopted as a single

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[2] The New York City Administrative Code defines "for-hire vehicle" as "a motor vehicle carrying passengers for hire in the city, with a seating capacity of twenty passengers or less, not including the driver, other than a taxicab, coach, wheelchair accessible van, commuter van or an authorized bus operating pursuant to application provisions of law." N.Y.C. Admin. Code § 19-502(g).

[3] Unless otherwise specified, all further references to "FHV" will not include SHLs and instead refer only to those FHVs that are not permitted to display advertisements: community-based liveries, black cars, and luxury limousines.

rule (the "Original Rule") on August 5, 1999. *See* Pl. 56.1 ¶ 3. The Original Rule provided, in relevant part, that "[a]n owner may not display any advertising, either on the exterior or the interior of a for-hire vehicle, unless such advertising has been authorized by the Commission." Wanttaja Decl. Ex. B, at NYC0263. It was adopted "to establish consistency between TLC's regulation of advertising in medallion taxicabs and FHVs." Wanttaja Decl. ¶ 20. The rule governing interior advertising in medallion taxis at the time prohibited taxicab owners from "display[ing] inside a taxicab any advertising or other notice not specifically authorized by [the Taxicab Owners Rules] or the Commission's Marking Specifications for Taxicabs unless approved by the Commission." Wanttaja Decl. Ex. A, at NYC0452.

The Original Rule was codified at 35 R.C.N.Y. § 6-12(f)(2). Wanttaja Decl. Ex. B, at NYC0263. In 2010, the Original Rule was re-codified as 35 R.C.N.Y. § 59A-29(e)(1) as part of a reorganization of the TLC's rulebooks. Wanttaja Decl. ¶ 21 n.7. The TLC also adopted a parallel provision that applies to FHV owners, which is codified at 35 R.C.N.Y. § 59B-29(e)(1). Pl. 56.1 ¶ 6. The language in these provisions differs somewhat from the Original Rule, but the parties agree that the differences are not "substantive." Pl. 56.1 ¶ 4; Wanttaja Decl. ¶ 21 n.7. In its current form, 35 R.C.N.Y. § 59A-29(e)(1) provides that "[a]n Owner must not display any advertising on the exterior or the interior of a [FHV] unless the advertising has been authorized by the Commission and a License has been issued to the Owner following the provisions of the

Administrative Code." Similarly, 35 R.C.N.Y. § 59B-29(e)(1) provides that "[a] Vehicle must not display advertising on the outside or the inside unless the Commission has authorized the advertising and has given the Vehicle Owner a permit specifying that the advertising complies with the Administrative Code."

The TLC disfavors interior advertising in all of the vehicles that it licenses and regulates. Wanttaja Decl. ¶¶ 25, 28, 52. "Because the Commission had authorized no form of interior advertising in taxicabs or FHVs prior to 1999, passage of the rule did not alter the fundamental fact that advertising was not authorized in either taxicabs or FHVs at that time. Rather, the rule was intended to make clear that interior advertising was not permitted and inform licensees that they could not display interior advertising without prior TLC authorization." Wanttaja Decl. ¶ 22.

The TLC allows advertising in medallion taxicabs and SHLs for one reason: to offset the costs associated with the technology systems that must be installed in those vehicles. *See* Def. 56.1 ¶ 28; Wanttaja Decl. ¶ 47. In 2004, the TLC

> promulgated rules requiring [medallion] taxicabs . . . to install equipment capable of performing the following functions: (1) electronic receipt and collection of trip data; (2) acceptance of debit cards and credit cards for payment; (3) driver receipt of text messages; and (4) display of route guidance and other important information to passengers via passenger information monitors ["PIMs"].

Wanttaja Decl. ¶ 30. The new equipment was intended to serve a variety of policy objectives. The goal of the electronic receipt and collection of trip data was to establish "an efficient and accurate method of maintaining information regarding the date, time, and location of passenger pick-ups and drop-offs, duration of the trip, the number of passengers, and the metered fare paid by the passenger(s), among other data." Wanttaja Decl. ¶ 31. This electronic collection of data was intended to allow the TLC to "more efficiently synthesize and analyze this enormous volume of data so as to guide the agency in its day-to-day operations and larger policy decisions." Wanttaja Decl. ¶ 31. The acceptance of debit and credit cards was intended to provide a convenience for passengers and improve the safety of drivers, as they would presumably carry less cash. Wanttaja Decl. ¶ 32. The purpose behind the text messaging system was threefold: (1) "to communicate public service announcements and emergency notifications to taxicab drivers"; (2) "to assist in the recovery of lost property"; and (3) "to inform drivers of fare opportunities, which [would] improve[ ] overall customer service." Wanttaja Decl. ¶ 33. The PIM was intended "to display the total fare at the end of every trip, communicate public service announcements to passengers, allow passengers to track their route, and allow passengers to complete credit card payments." Wanttaja Decl. ¶ 34. The purpose of these features was to prevent customers from being overcharged by providing them with greater transparency with respect to their fare and route. Wanttaja Decl. ¶ 34.

The equipment contemplated by these rules came to be known as the Taxicab Passenger Enhancement Program ("TPEP"), which is now required to be installed in all medallion taxis. Def. 56.1 ¶¶ 8-9; Wanttaja Decl. ¶ 13. A similar system called the Street Hail Livery Technology System ("LPEP") must be installed in SHLs. Wanttaja Decl. ¶ 44. The TPEP and LPEP requirements "added a significant new cost to vehicle owners without any expectation of increased business." Wanttaja Decl. ¶ 47. "[A]s a means by which owners could offset the new costs," the TLC crafted an exception to its ban on interior advertising and promulgated new rules authorizing interior advertising on the PIMs of medallion taxis and SHLs. Wanttaja Decl. ¶ 47; *see also* Pl. 56.1 ¶¶ 10, 12-13.[4] Consequently, as of August 2016, interior advertising was permitted in about twenty-two percent of the vehicles licensed and regulated by the TLC. Def. 56.1 ¶ 27.[5]

Formed in 2015, Vugo is a media distribution company headquartered in Minneapolis, Minnesota that distributes advertisements, entertainment content, and public service announcements. Pl. 56.1 ¶¶ 16-17.

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[4] Although neither of the current LPEP providers offers a PIM-less system, LPEPs are not required to have a PIM. *See* Wanttaja Decl. ¶ 45 & n.13. Interior advertising is not permitted, however, in SHLs that have LPEPs without PIMs. Def. 56.1 ¶ 21; *see also* 35 R.C.N.Y. § 83-31(d)(4)(v).

[5] As of August 2016, there were 13,576 medallion taxis, 80,647 FHVs, 289 paratransit vehicles, and 471 commuter vans licensed by the TLC. Def, 56.1 ¶¶ 6-7. Of the 80,647 FHVs, 18,848 were liveries, 49,801 were black cars, 5,119 were luxury limousines, and 6,879 were SHLs. Def. 56.1 ¶ 7.

Vugo partners with rideshare drivers affiliated with companies such as Uber and Lyft. Pl. 56.1 ¶ 18. Drivers download Vugo's software onto tablets that are mounted in their vehicles in a manner that allows passengers to view and interact with the tablets. Pl. 56.1 ¶ 18. Approximately seventy-five percent of the screen displays primary content—typically video—while the remaining portion is a static display related to the main content, the Vugo logo, and volume controls. Pl. 56.1 ¶ 27. Passengers cannot turn off the display, but they can reduce the volume to a "near-mute" level. Pl. 56.1 ¶ 30. Advertisers pay Vugo to display their content and Vugo provides the drivers with sixty percent of the advertising revenue. Pl. 56.1 ¶ 32.

In the spring of 2015, Vugo launched its beta program, making the platform available to ride-share drivers across the country. Pl. 56.1 ¶ 33. During the beta period, a driver from New York City informed Vugo that TLC rules banned advertising in for-hire vehicles. Pl. 56.1 ¶ 34. Vugo contacted the TLC about entering the New York market and was informed that its product was prohibited because FHVs are not permitted to display advertisements. Pl. 56.1 ¶¶ 35-37.[6]

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[6] Although the challenged ordinances specify that the TLC may grant permits allowing the display of otherwise prohibited advertisements, the uncontroverted evidence is that the TLC does not—and has no intention to—issue such permits. *See* Pl. 56.1 ¶¶ 15, 36-37, 39; Def. Resp. to Pl. 56.1 ¶¶ 15, 36-37, 39.

II. PROCEDURAL HISTORY

On October 20, 2015, Vugo filed a Complaint alleging that the TLC's ban on advertising in FHVs violates the First Amendment. ECF No. 1. Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 38, 45.

STANDARD OF REVIEW

A party is entitled to summary judgment if it "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A fact is material if it might affect the outcome of the suit under the governing law, and a dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Baldwin v. EMI Feist Catalog, Inc.*, 805 F.3d 18, 25 (2d Cir. 2015) (citation and internal quotation marks omitted). "[T]he moving party bears the burden of demonstrating the absence of a material factual question, and in making this determination, the court must view all facts 'in the light most favorable' to the non-moving party." *VW Credit, Inc. v. Big Apple Volkswagen, LLC*, No. 11-CV-1950 (PAE), 2012 WL 5964393, at *2 (S.D.N.Y. Nov. 29, 2012) (quoting *Dickerson v. Napolitano*, 604 F.3d 732, 740 (2d Cir. 2010)).

"When cross motions for summary judgment are made, the standard is the same for that of individual motions." *JPMorgan Chase Bank, N.A. v. Freyberg*, 171 F. Supp. 3d 178, 184 (S.D.N.Y. 2016). "[N]either side is

barred from asserting that there are issues of fact, sufficient to prevent the entry of judgment, as a matter of law, against it." *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993). "[E]ach party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration." *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001).

Because there are no genuine disputes of material fact, whether either party is entitled to summary judgment will turn entirely upon the City's ability to satisfy its burden under the appropriate level of judicial scrutiny.

DISCUSSION

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech." U.S. CONST. AMEND. I. "Under that Clause, a government, including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (citation and internal quotation marks omitted). When a law is challenged under the First Amendment, the degree of scrutiny applied by courts is often dictated by whether the law restricts speech based on its substance: content-based laws generally receive strict scrutiny whereas content neutral laws are subject to less exacting forms of judicial review. *See id.* at 2232.

In *Reed v. Town of Gilbert*, the Supreme Court explained what it means for a law to be content based: "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." *Id.* at 2227. "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." *Id.* Moreover, "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" are similarly considered content-based. *Id.*

Here, the parties do not dispute that the regulations are content-based. The Court discerns no basis for concluding otherwise. The prohibition extends exclusively to advertising. To ascertain whether particular material is subject to the ban, a city official would need to review the content in order to assess if it constitutes "advertising." *See id.*; *see also Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 112 (2d Cir. 2017) (city ordinance was content based where it proscribed conduct done "for the purpose of soliciting employment").

Although content-based laws generally receive strict scrutiny, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Supreme Court carved out an exception for laws that target commercial speech—and therefore are necessarily content-based. *See* 447 U.S. 557, 565-66 (1980).

Commercial speech is defined as any "expression related solely to the commercial interest of the speaker and its audience." *Id.* at 561. Because "speech proposing a commercial transaction . . . occurs in an area traditionally subject to government regulation," *id.*, where a content-based regulation is aimed solely at commercial speech courts have traditionally applied the relaxed form of judicial scrutiny described in *Central Hudson, see Matal v. Tam*, 137 S. Ct. 1744, 1763-64 (2017). Although at first glance, the regulations here—which apply only to "advertising"—seem concerned exclusively with commercial speech, Vugo nonetheless makes two arguments as to why strict scrutiny should still apply.

First, Vugo contends that, without explicitly repudiating *Central Hudson*, the Supreme Court's "recent decisions demonstrate that to sustain a ban on speech enacted simply because that speech is commercial in nature, government bodies face the nearly insurmountable burden of strict scrutiny." Pl. MSJ, at 10, ECF No. 40. This position is not completely devoid of merit. In *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, for instance, the Supreme Court recognized both that it has applied *Central Hudson* "more strictly" in the years since it first formulated the test and that various commentators have urged for the test's repudiation in favor of a more "straightforward and stringent" standard, an invitation the Court declined to accept at that time. 527 U.S. 173, 182-84 (1999). More recently, Justice Thomas, writing for the majority in *Reed*, defined as "presumptively

unconstitutional" regulations that "appl[y] to particular speech because of the topic discussed or the idea or message expressed." 135 S. Ct. at 2222. Particularly in light of Justice Thomas' skepticism towards the *Central Hudson* standard, *see*, *e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring in part and concurring in the judgment), some have speculated that, following *Reed*, regulations targeting commercial speech may now be subject to strict scrutiny, *see*, *e.g.*, Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 Harv. L. Rev. 1981, 1990 (May 2016). Even Vugo acknowledges, however, that *Central Hudson* has not been explicitly overturned. Pl. MSJ, at 10. Consistent with other district courts in this Circuit, the Court thus declines to stray from such well-established doctrine absent an express holding from either the Supreme Court or the Court of Appeals for the Second Circuit. *See*, *e.g.*, *Boelter v. Hearst Commc'ns, Inc.*, 192 F. Supp. 3d 427, 447 n.10 (S.D.N.Y. 2016).

Second, as Vugo correctly notes, there is undisputed evidence in the record that the TLC regulations have also prohibited the display of speech that is not commercial in nature, such as public service announcements, Pl. 56.1 ¶ 26, and political advertisements, Tr. 8:8-18, July 27, 2017, ECF No. 60. Both parties agree, however, that at its core this case is about commercial speech. *See* Tr. 25:21-26:1, July 27, 2017. Indeed, the City invites the Court to construe the regulations so as to apply *only* to commercial speech, Def. Supp. Br., at 8, ECF No. 59, thereby ensuring that the TLC's regulations are not subject to strict scrutiny. And Vugo, in

spite of advancing the arguments above, does not object to the Court applying *Central Hudson*. *See* Tr. 27:5-9, July 27, 2017. Ultimately, the Court need not adjudicate the precise level of scrutiny required because the regulations at issue cannot pass constitutional muster under either standard. Accordingly, following the example set by the Supreme Court and the Second Circuit, this Court will assess the merits of Vugo's challenge under the less demanding *Central Hudson* standard. *See*, *e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (declining to assess whether the regulation at issue reached non-commercial speech and applying *Central Hudson* because "[a]s in previous cases[ ] . . . the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied"); *Centro*, 868 F.3d at 112 n.2.

I. The *Central Hudson* Standard

Under *Central Hudson*, the constitutionality of a statute regulating commercial speech is determined by a four-part test. The first two prongs are threshold inquiries: (1) "the speech in question must not be misleading and must concern lawful activity" and (2) "the asserted government interest [justifying the restriction] must be substantial." *United States v. Caronia*, 703 F.3d 149, 164 (2d Cir. 2012). "If both inquiries yield positive answers," *Central Hudson*, 447 U.S. at 566, then the Court proceeds to the final two prongs: (3) "the regulation must directly advance the governmental interest asserted . . . to a material degree"; and (4) "the regulation must be narrowly drawn, and may not be

more extensive than necessary to serve the interest," *Caronia*, 703 F.3d at 164 (citation and internal quotation marks omitted).

A. The Threshold Inquiries

Here, the first two prongs of *Central Hudson* are satisfied. The parties do not dispute that the regulations target speech that is not unlawful or misleading. The Court discerns no basis for concluding otherwise. *See Centro*, 868 F.3d at 113-14 ("In sum, the First Amendment offers no protection to speech that proposes a commercial transaction if consummation of that transaction would *necessarily* constitute an illegal act." (emphasis in original)).

The City has also articulated a substantial interest. In assessing the government interest, the Court "must identify with care the interests the State itself asserts. Unlike rational-basis review, the *Central Hudson* standard does not permit us to supplant the precise interests put forward by the State with other suppositions." *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). The City has consistently justified the advertisement ban on the basis that advertisements annoy passengers. It is well-settled that government entities have a "substantial" interest in protecting the aesthetic appearance of cities, *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984), and in protecting the public from "undue annoyance," *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636 (1980). Moreover, the

Supreme Court has upheld the refusal by a municipality to display political ads on public buses in order [sic] "minimize . . . the risk of imposing upon a captive audience." *Lehman v. Shaker Heights*, 418 U.S. 298, 304 (1974). Because the Court answers both of the first prongs in the affirmative, the analysis now turns to the final two elements.

B. The Fit Between the Ends and the Means

"The last two steps in the [*Central Hudson*] analysis have been considered, somewhat in tandem, to determine if there is a sufficient fit between the regulator's ends and the means chosen to accomplish those ends." *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 98 (2d Cir. 1998) (citation and internal quotation marks omitted). "The burden to establish that 'reasonable fit' is on the governmental agency defending its regulation, though the fit need not satisfy a least-restrictive-means standard." *Id.* (citation omitted).

It is here that the City is unable to satisfy its burden under *Central Hudson* and Vugo is therefore entitled to judgment as a matter of law. The fit between the ends sought by the City and the chosen means is, simply put, an unreasonable one. In short, the City's regulations are both under-inclusive in that large swaths of the vehicles regulated by the TLC, *i.e.*, taxis and SHLs, are permitted to display advertisements and unnecessarily restrictive because passengers in non-exempt vehicles could be protected from the

dangers identified by the City by means less severe than a complete prohibition on advertising. This combination persuades the Court that the City has failed to craft a policy with a "sufficient fit" to the ends it seeks.

1. Material Advancement of the Government Interest

To satisfy the third prong of *Central Hudson*, the City must demonstrate that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 771. In substantiating the harm, the City is not required to produce "empirical data . . . accompanied by a surfeit of background information." *Lorillard*, 533 U.S. at 555 (citation and internal quotation marks omitted). Instead, the Supreme Court has "permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether[ ]. . . ." *Id.* (citation and internal quotation marks omitted). A restriction will fail this third prong of *Central Hudson* if it "provides only ineffective or remote support for the government's purpose." *Bad Frog Brewery*, 134 F.3d at 98 (citation and internal quotation marks omitted). Moreover, "[t]he Supreme Court has made it clear in the commercial speech context that under[-] inclusiveness of regulation will not necessarily defeat a claim that a state interest has been materially advanced." *Id.* In assessing whether under-inclusiveness precludes a policy from materially advancing the government interest, courts consider both the degree to

which the regulation is under-inclusive, *see City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417-18 (1993), and the government's rationale for crafting such a policy, *see id.* at 424.

Contrary to Vugo's argument, the City has substantiated the harm it seeks to remedy, in particular by providing survey data. In response to a 2011 survey of taxi passengers nearly one-third of respondents indicated that "Taxi TV is annoying." Wanttaja Decl. Ex. C, at NYC0482. Passengers have further complained about the following aspects of TPEP: the blinking screen causes motion sickness; the buttons to lower the volume and turn off the PIM often do not work; and the content is repetitive and boring. *See generally* Wanttaja Decl. Exs. D, K. Passengers have also singled out advertisements as especially irritating. *See* Wanttaja Decl. Ex. K, at NYC0438.

Vugo further contends that the under-inclusive nature of the regulations precludes the City from satisfying its burden under the third prong of *Central Hudson*. Specifically, Vugo argues that, as was the case in *City of Cincinnati v. Discovery Network, Inc.*, where the Supreme Court struck down a policy requiring the removal of news racks distributing commercial handbills—only 62 of the 1,500-2,000 news racks in the city, 507 U.S. at 417-18—the TLC's regulations are "selective" due to the exemption of taxis and SHLs, Pl. MSJ, at 15. The City counters that its policy contains a far lesser proportion of exemptions than the regulation challenged in *City of Cincinnati*. In particular, the City notes that if the TLC's regulations are invalidated,

interior advertising would be permissible in 73,768 additional vehicles, a potential 450% increase. Def. 56.1 ¶ 24. The City, however, exaggerates the degree to which the ban materially advances the stated interest, for two reasons. First, although taxis do comprise a minority of the vehicles regulated by the TLC, as of June 25, 2016 taxis accounted for 371,257 daily trips while Uber and Lyft, respectively, provided 179,647 and 33,401 daily trips. *See* Bellefeuille Decl. ¶ 4, ECF No. 52. Second, there is no guarantee that, absent the ban, all, or even a majority of, FHV owners would even elect to display advertisements.

The more compelling factor, in any event, is the City's failure to provide a sufficient rationale for exempting taxis and SHLs. In *City of Cincinnati*, for instance, the fact that such a large number of news racks were exempt from the policy was not dispositive. Instead, the Supreme Court's analysis turned on the municipality's justification for the exemption: prohibiting news racks distributing commercial handbills while allowing those that distributed non-commercial publications "b[ore] no relationship *whatsoever* to the particular interests that the city ha[d] asserted"—aesthetics and safety. 507 U.S. at 424-26 (emphasis in original).

Here, the City attempts to justify the exemptions to the ban on the basis that taxis and SHLs are, respectively, required to have TPEPs and LPEPs. Def.'s 56.1 ¶¶ 8-9, 15; Wanttaja Decl. ¶¶ 13, 44, 47. The TPEP and LPEP requirements "add[ ] a significant new cost to vehicle owners without any expectation of increased

business." Wanttaja Decl. ¶ 47. These costs persuaded the TLC to allow an exception to its general rule against interior advertising. Wanttaja Decl. ¶ 47; *see also* Pl. 56.1 ¶¶ 10, 12-13. The problem, however, is that this rationale for exempting taxis and SHLS from the advertising ban "bears no relationship whatsoever" to the interest articulated by the City of protecting citizens from annoyances. *See City of Cincinnati*, 507 U.S. at 424.

Even the primary authorities upon which the City relies—*Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent* and *Metromedia, Inc. v. City of San Diego*—belie its argument. In both cases, signs were prohibited in certain contexts and not in others, but in each instance the rationale underlying the under-inclusive policy bore a direct relationship to the municipality's interest in regulating the speech at issue. In *Taxpayers for Vincent*, for example, the regulatory scheme at issue banned the posting of signs for aesthetics purposes, but exempted private landowners, in part due to owners' interest in their land, which would most likely keep their posting of signs "within reasonable bounds." 466 U.S. at 811.[7] Similarly, in *Metromedia*, the Court concluded that, because the regulation pertained to commercial speech, it was reasonable to exempt onsite advertising from the ban at

[7] The regulation at issue in *Taxpayers for Vincent* was content neutral and the Supreme Court thus did not apply the *Central Hudson* test. *See* 466 U.S. at 789-90. The Supreme Court's analysis regarding under-inclusiveness, however, is still relevant, particularly given the degree to which the City relies upon it.

issue, in part because "offsite advertising, with its periodically changing content, [may] present[ ] a more acute problem [aesthetically] than does onsite advertising." 453 U.S. 490, 511 (1981).

The Supreme Court has also looked to the relationship between the articulated state interest and the rationale for crafting an under-inclusive policy in assessing other challenges to restrictions on commercial speech. In *Rubin v. Coors Brewing Co.*, for instance, the Court invalidated a regulation prohibiting the specification of alcoholic content on beer labels—intended to prevent advertising "strength wars"—in part because (1) the practical effect of the regulatory regime was to allow such statements in beer *advertisements* and (2) labels on bottles of other types of alcoholic beverages were not subject to the ban. 514 U.S. 476, 488 (1999 [sic]). The Court of Appeals for the Second Circuit has employed similar logic, *See*, *e.g.*, *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 108 (2d Cir. 2010) (upholding a regulation, partially on the basis that the court "defer[red] to the City's judgment that unregulated signage and billboards are a greater eyesore than coordinated street furniture bearing advertisements," which were exempt).

Here, however, there is no basis for concluding that advertisements in the exempted vehicles are somehow less annoying or that those passengers are any less vulnerable. Rather, the rationale for exempting taxis and SHLs, *i.e.*, the costs associated with TPEP and LPEP, exists only because the City has mandated that those vehicles install such systems and

subsequently allowed drivers to recoup the resulting costs specifically by displaying advertisements. Were the City permitted to justify the under-inclusiveness of the ban on this basis, the reasonable fit prong of *Central Hudson* would lose much of its force. Municipalities would be able to selectively restrict commercial speech on nearly any basis. It is true that the TPEP and LPEP requirements allegedly derive from the primary functional difference between the exempted vehicles and FHVs: taxis and SHLs accept street hails while FHVs do not. This difference, however, similarly bears no relationship to the protection of citizens from advertisements. The regulations thus fail to directly advance the City's stated interest to a material degree. *See Caronia*, 703 F.3d at 164.

2. Narrowly Drawn

The *Central Hudson* test does not require the municipality to employ the "least restrictive means." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989). Rather, the means must only be "narrowly drawn and no more extensive than reasonably necessary to further substantial interests." *Id.* (citation and internal quotation marks omitted). "[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech" that weighs against the conclusion that the fit between the ends and means is reasonable. *City of Cincinnati*, 507 U.S. at 417 n.13. As the Supreme Court has noted, "[n]one of our cases invalidating the regulation of commercial speech involved a provision that went only marginally

beyond what would adequately have served the governmental interest. To the contrary, almost all of the restrictions disallowed under *Central Hudson*'s fourth prong have been substantially excessive, disregarding far less restrictive and more precise means." *Fox*, 492 U.S. at 479; *see also Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 476 (1988) (complete prohibition on allowing attorneys to solicit legal business for pecuniary gain by sending truthful, non-deceptive letters to potential clients violated the First Amendment because "[t]he state can regulate such abuses and minimize mistakes through far less restrictive and more precise means, the most obvious of which is to require the lawyer to file any solicitation letter with a state agency"); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 648-49 (1985) (complete ban on illustrations in attorney advertisements violated the First Amendment, in part because the state failed to demonstrate that "potential abuses associated with the use of illustrations in attorneys' advertising cannot be combated by any means short of a blanket ban"); *Centro*, 868 F.3d at 116-18 (statute not narrowly drawn where, allegedly in furtherance of ensuring pedestrian and traffic safety, regulation prohibited all roadside solicitation of employment, in part because there were a number of ways to promote the asserted interest "while limiting the impact on constitutionally protected speech"); *cf. Long Island Bd. of Realtors, Inc. v. Inc. Vill. of Massapequa Park*, 277 F.3d 622, 628 (2d Cir. 2002) ("[T]he restrictions on the number, size, and location of signs, the duration for which signs may remain on residential property, and the presence of

off-site commercial advertising [were constitutional because they] further[ed] the Village's interest in aesthetics and safety while permitting the Board to display signs to inform people of the availability of a home.").

Whether the City has satisfied its burden with respect to the fourth prong is a closer question. The Court is sensitive to the fact that the City is not obligated to employ the least restrictive means. Indeed, it is acceptable in certain situations for a municipality to forbid commercial speech in its entirety in certain locations. *See Clear Channel*, 594 F.3d at 108. But when the third and fourth elements of *Central Hudson* are considered in tandem, this final portion of the test does not weigh sufficiently in favor of the City so as to render the fit between the means and ends reasonable.

The City may have had a stronger argument with respect to overall fit if, rather than prohibiting all advertisements, the regulations limited their placement, size, or some other manner in which they are presented. *See*, *e.g.*, *Long Island Bd. of Realtors*, 277 F.3d at 628. Any devices displaying advertisements could, for instance, be required to be outfitted with a properly functioning on-off switch or a mute button. This would effectively leave the decision to be faced with such advertisements to the passenger, preventing any citizen from becoming a captive audience subjected to unwanted noise and imagery. The City rightfully points out that such limitations could result in a substantial burden on city officials to monitor compliance. These examples, however, are by no means an exhaustive set

of alternatives, but are meant simply to illustrate the number of options, short of a complete ban on advertising, by which the city could pursue its articulated interest. Accordingly, the unnecessarily restrictive nature of the regulations buttresses the Court's conclusion that the means employed by the regulations do not justify the ends sought by the City under *Central Hudson*.

II. Remedy[8]

Vugo has made the requisite showing for the Court to grant an injunction prohibiting the City from enforcing 35 R.C.N.Y. §§ 59A-29(E) and 59B-29(E). *See Ognibene v. Parkes*, 671 F.3d 174, 182 (2d Cir. 2011) ("The party requesting permanent injunctive relief must demonstrate (1) irreparable harm (here, a constitutional violation) and (2) actual success on the merits."); *see also Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67,

[8] Vugo asserts both facial and as-applied challenges. The distinction between the two "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). "Although facial challenges are generally disfavored, they are more readily accepted in the First Amendment context." *Beal v. Stern*, 184 F.3d 117, 125 (2d Cir. 1999). In this case, because Vugo's "constitutional argument is a general one" that "does not rest on factual assumptions that can be evaluated only in the context of an as-applied challenge," *see United States v. Stevens*, 559 U.S. 460, 473 n.3 (2010) (citations and internal quotation marks omitted), "it makes no difference of any substance whether this case is resolved by invalidating the statute on its face or as applied to [Vugo]," *Citizens United*, 558 U.S. at 376 (Roberts, C.J., concurring).

71 (2d Cir. 1996) ("It is established that 'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))).

CONCLUSION

For the foregoing reasons, Vugo's motion for summary judgment is granted and the City's motion for summary judgment is denied. The Clerk of Court is respectfully directed to terminate the motions pending at docket entries thirty-eight and forty-five.

SO ORDERED.

Dated: February 22, 2018
New York, New York

/s/ Ronnie Abrams
Ronnie Abrams
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of September, two thousand nineteen.

Vugo, Inc.,

Plaintiff - Appellee,

v.

City of New York,

Defendant - Appellant.

ORDER

Docket No: 18-807

Appellee, Vugo, Inc., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

NYC Rules

§ Section 59A-29: Vehicles – Markings & Advertising.

(a) *Valid License Decals.*

(1) Three Valid Commission License Decals must be plainly visible and affixed to the Vehicle in the following locations:

(i) One Decal must be on the lower front right side of the windshield

(ii) One Decal must be on the lower rear corner of each of the two rear quarter windows; if there are no rear quarter windows, the Decals must be on the lower rear window just above the rear door.

(iii) The Decals must be affixed by Commission staff.

(2) New Decals must be placed on the Vehicle by the Commission Safety and Emissions Division:

(i) When the License is renewed;

(ii) If the Vehicle is replaced, changes affiliation, or changes its license plates.

(3) *Exception for Luxury Limousines.* Any For-Hire Vehicle that is a Luxury Limousine will only be required to have a single Commission Decal affixed to the lower right side of the front windshield.

§59A-29(a)	Failure to have proper Decal(s): $500 for the first offense in 12 months $1,000 for the second and subsequent offenses within a 12-month period and suspension of the For-Hire Vehicle License until compliance.	Appearance NOT Required

(b) *Valid Registration Sticker*. A Valid registration sticker from an authorized state motor vehicle department must be affixed to the left front windshield so as to be plainly visible.

§59A-29(b)	Fine: $100	Appearance NOT Required

(c) *Inspection Sticker*. A Valid New York State DMV inspection sticker that has no fewer than eight months left before the sticker expires must be plainly visible on the front left side of the front windshield.

§59A-29(c)	Vehicle Owner Fine: $100 and suspension of the Vehicle Owner License until any defect found is corrected Penalty Points: 1.	Appearance Required

(d) *Taxicab Yellow Prohibited.* No For-Hire Vehicle can be, in whole or in part, any shade of Taxicab yellow.

§59A-29(d)	Fine: $350 for the first violation; $500 for the second violation in 24 months; revocation for the third violation in 36 months	Appearance Required

(e) *Prohibited Advertising.*

(1) An Owner must not display any advertising on the exterior or the interior of a For-Hire Vehicle unless the advertising has been authorized by the Commission and a License has been issued to the Owner following the provisions of the Administrative Code.

(2) The Commission will not approve any advertising for the exterior of a For-Hire Vehicle that consists, in whole or in part, of roof top advertising.

§59A-29(e)	Fine: $50	Appearance NOT Required

* * *

§ Section 59B-29: Vehicles – Marking & Advertising.

A Base Owner must not dispatch a Vehicle from its Base unless the Vehicle complies with the following requirements.

(a) *Valid License Decals.*

(1) Three Valid Commission License Decals must be plainly visible and affixed to the Vehicle in the following locations:

(i) One Decal must be on the lower front right side of the windshield.

(ii) One Decal must be on the lower rear corner of each of the two rear quarter windows; if there are no rear quarter windows, the Decals must be on the lower rear window just above the rear door.

(iii) The Decals must be affixed by Commission staff.

(2) When the Vehicle License is renewed or when the Vehicle is replaced, changes affiliation, or changes its license plates, the Vehicle must be brought to the Commission Safety and Emissions Division to have new Decals placed on the Vehicle.

(3) Exception for Luxury Limousines. Any For-Hire Vehicle that is a Luxury Limousine will only be required to have a single Commission Decal affixed to the lower right side of the front windshield.

§59B-29(a)	Failure to have proper Decals: $500 for the first offense in 12 months; $1,000 for the second and subsequent offenses within a 12-month period.	Appearance NOT Required

(b) *Valid Registration Sticker*. A valid registration sticker from an authorized state motor Vehicle department must be affixed to the left front windshield so as to be plainly visible.

§59B-29(b)	Fine: $100	Appearance NOT Required

(c) *Inspection Sticker*. A Valid New York State DMV inspection sticker that has at least eight months left before the sticker expires must be clearly visible on the left side of the front windshield.

§59B-29(c)	Base Owner Fine: $350	Appearance NOT Required

(d) *Taxicab Yellow Prohibited*. No part of a For-Hire Vehicle can be painted any shade of Taxicab yellow.

§59B-29(d)	Fine: $350 for the first violation; $500 for the second violation in 24 months; Revocation for the third violation in 36 months	Appearance Required

(e) *Prohibited Advertising.*

(1) A Vehicle must not display advertising on the outside or the inside unless the Commission has authorized the advertising and has given the Vehicle Owner a permit specifying that the advertising complies with the Administrative Code.

(2) The Commission will not approve any roof top advertising for For-Hire Vehicles, except for Street Hail Liveries.

(3) *Street Hail Liveries: Optional Rooftop Advertising Fixture.*

(i) A Street Hail Livery Licensee may equip a Taxicab with an authorized Rooftop Advertising Fixture in accordance with Rule 82-63.

§59B-29(e)	Fine: $50	Appearance NOT Required

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