No. 19-792

IN THE

Supreme Court of the United States

VUGO, INC.

Petitioner,

v.

CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

A regulation of the City of New York restricts advertising in for-hire vehicles booked in advance, such as those operated by Uber and Lyft. Petitioner seeks to place electronic advertisements on tablet computers located right in front of where passengers sit when they ride in for-hire vehicles. Petitioner challenged the City's restriction under the First Amendment, claiming that it failed the four-part test for commercial-speech regulations first articulated in *Central Hudson Gas & Electric Corp. v. Public Services Commission of New York*, 447 U.S. 557 (1980). Petitioner did not argue that strict scrutiny applied. The U.S Court of Appeals for the Second Circuit held that the restriction satisfied the *Central Hudson* test. The question presented is:

Should the Court overrule *Central Hudson* and hold that regulations of commercial speech are subject to strict scrutiny?

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INTRODUCTION

Petitioner Vugo Inc. asks the Court to grant certiorari to overrule its decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), and hold that any governmental regulation of commercial speech is subject to strict scrutiny.

Certiorari should be denied. Most importantly, this case does not properly raise the question presented. Throughout the litigation Vugo conceded that *Central Hudson* applied to its challenge to the regulation of advertising in for-hire vehicles and abandoned any argument for strict scrutiny. The petition fails even to note Vugo's consistent acceptance of the *Central Hudson* framework, and offers no justification for this Court to grant certiorari to review a question that was neither pressed nor passed on below. Moreover, before it could reach the question presented, the Court would have to consider whether the regulation is actually directed at commercial speech or instead limits both commercial and noncommercial advertising. That issue, too, was neither fully litigated nor resolved in the courts below.

The question presented also would not warrant review if it were properly raised here, as demonstrated by this Court's recent denial of a petition for certiorari presenting an identical question. Vugo principally argues that *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), requires

the application of strict scrutiny of commercial-speech regulations. But *Reed* did not mention *Central Hudson* or address commercial speech, and this Court has continued to apply its longstanding commercial-speech doctrine since *Reed*. The courts of appeals also consistently continue to apply *Central Hudson*. The petition's claim of a circuit split rests on one circuit's characterization of a single decision from another circuit—a characterization that is belied by the underlying decision itself. Accordingly, there would be no reason to grant review of the question presented now, even if this case actually raised it.

STATEMENT

A. New York City's restrictions on advertising in for-hire vehicles

New York City extensively regulates the transportation of passengers for hire, which is "a vital and integral part of the transportation system of the city." N.Y.C. Admin. Code § 19-501. The Taxi & Limousine Commission (TLC) is charged with regulating transportation of passengers in the City, both by taxicabs and for-hire vehicles (FHVs).

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

either booked in advance through limousine companies and similar businesses or procured through app-based systems such as Uber and Lyft. Although taxicabs once comprised the bulk of the passenger-vehicle market in the City, today FHVs make up a large and growing share of that market, accounting for approximately three quarters of daily trips. N.Y.C. Taxi & Limousine Commission, *Improving Efficiency and Managing Growth in New York's For-Hire Vehicle Sector* at 6 (June 2019), *available at* https://perma.cc/2J3P-LVRB.[1]

The City's Charter mandates that TLC promote and protect the "comfort and convenience" of passengers. N.Y.C. Charter § 2300. Over two decades ago, TLC adopted regulations prohibiting any advertising inside taxicabs except as specifically authorized by the Commission (Pet. 7a). TLC adopted similar rules for FHVs a few years later, providing that vehicles "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" (Pet. 7a–8a, 66a).

TLC has authorized advertising in taxis only once since the regulation came into force. In 2005, concurrent with the adoption of requirements that taxi owners install a new technology system to

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[1] The share of FHV trips has grown rapidly. The share reflected in the record during this litigation, as of 2016, was around one third (Pet. 6a).

show passengers their fare as it accumulates, allow passengers to track their route, and accept credit card payments, taxi owners were permitted to install Taxi TV, an interior TV system that carries advertisements (Pet. 8a–9a). The revenue from advertising on Taxi TV was expected to offset some of the cost to taxi owners of installing the new required systems (Pet. 9a).

In a survey, about forty percent of respondents found Taxi TV to be an "annoyance" and, in another survey, about a third of respondents said that Taxi TV and its advertisements was the thing they most disliked about taxis (Pet. 10a, 21–22a). TLC has thus taken steps to reduce and potentially eliminate advertising in taxis (*see* Pet. 10a).

Because passenger rides in FHVs are pre-arranged, they do not need the same in-vehicle technology for fare calculation, route tracking, and credit-card payments (Pet. 10a–11a). As a result, they were not required to install it, and they were not permitted to advertise to offset the cost of installation (Pet. 11a).

B. The lower courts' application of *Central Hudson* to Vugo's challenge to the advertising restriction in for-hire vehicles

1. Vugo, Inc., developed an advertising software platform to display ads on a tablet placed on the front seatback in FHVs—immediately in front of where passengers typically sit (Pet. 11a). Its

devices do not allow passengers to turn them off or mute them (*id.*). Vugo seeks to deploy its technology in FHVs in New York City. Stymied by the advertising ban, Vugo filed suit against the City, alleging that the advertising restriction violates the First Amendment and seeking to enjoin its enforcement.

2. The United States District Court for the Southern District of New York (Abrams, J.) granted summary judgment for Vugo (Pet. 62a). Applying the test first articulated by this Court in *Central Hudson Gas & Electric Corp. v. Public Services Commission of New York*, 447 U.S. 557 (1980), 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, which the City permitted, are no less intrusive than advertisements in FHVs would be (Pet. 57a–58a). Moreover, the district court concluded that the City could have furthered its stated interest by less restrictive means (Pet. 58a–61a).

3. The Second Circuit unanimously reversed (Pet. 2a). The court initially noted that the "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" (Pet. 13a n.5). Nonetheless, the court accepted Vugo's framing of the case as a challenge to a regulation of

commercial speech. And, because Vugo had "expressly concede[d]" that *Central Hudson*'s intermediate-scrutiny test applied to the challenged regulation (Pet. 14a–17a), the court applied the *Central Hudson* test.

Under that analysis, the court first held that the City's interest in protecting the riding public "from the offensive sight and sound of advertisements—not their content—while they are traveling through the city by car" was "clearly substantial" (Pet. 19a). In particular, the City was justified in working to protect "unwilling viewers against intrusive advertising" in vehicles that now account for a substantial number of daily passenger trips (Pet. 20a (quotation marks omitted)). The court next held that the "harms [the City] recites are real" and that the regulation will "alleviate them to a material degree," rejecting Vugo's argument that the regulation was unconstitutionally under-inclusive (Pet. 21a–23a (quotation marks omitted)). It also held that the limited exception for Taxi TV did not undermine the City's asserted interest in protecting passengers from unwanted advertising (Pet. 24a–33a). Finally, the Court held that the regulation did not burden substantially more speech than necessary to further the government's legitimate interests (Pet. 33a–36a).

4. Vugo's petition for panel rehearing or rehearing en banc was denied.

REASONS TO DENY THE PETITION

A. Petitioner conceded the applicability of *Central Hudson* below and did not argue for strict scrutiny.

This case does not properly raise the question that petitioner asks the Court to review. Petitioner consistently accepted that *Central Hudson* supplied the appropriate framework for analyzing its challenge and failed to press the argument that *Reed* implicitly overruled the *Central Hudson* standard and required the application of strict scrutiny. In light of petitioner's framing of the case, moreover, the lower courts had no cause to decide whether the challenged regulation even is a restriction of commercial speech, rather than a content-neutral limitation on the location of all advertising within FHVs.

1. The Court "does not ordinarily decide questions that were not passed on below." *City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1773 (2015); *see also United States v. Williams*, 504 U.S. 36, 41 (1992) (explaining that the "traditional rule" precludes granting certiorari "when the question presented was not pressed or passed upon below" (quotation marks omitted)). The Court considers a question not pressed or passed on below only in "exceptional cases." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) (quotation marks omitted). This is not such a case.

Throughout the litigation, Vugo accepted the validity of the *Central Hudson* framework. As the Second Circuit explained, "Vugo expressly concede[d] that *Central Hudson's* intermediate scrutiny test applies" (Pet. 14a). The district court likewise explained that "Vugo … does not object to the Court applying *Central Hudson*" (Pet. 49a–50a). The City took Vugo's concession and argued (correctly) that the regulation satisfied the *Central Hudson* standard. And both the district court and the Second Circuit evaluated the challenged regulation under *Central Hudson*'s framework (Pet. 18a–36a, 50a–62a).

In its petition, Vugo takes an entirely different tack, now arguing that strict scrutiny applies in light of *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Vugo thus asks the Court to review an issue that was not developed below and that neither the district court nor the court of appeals passed on. Vugo's "shift in posture" is not a valid basis for departing from this Court's general rule and reaching a question without the "benefit of any lower court review." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 108–09 (2001) (per curiam).

An exception is particularly unwarranted in light of the fact that only one circuit court has squarely passed on Vugo's argument that *Reed* supersedes *Central Hudson* (and rejected it—*see infra* at 12). Not only is there no split of authority, as Vugo incorrectly contends, but there is hardly any authority at all. The Court should at a

minimum stay its hand until the courts of appeals have had further opportunity to consider the issue.

2. Given Vugo's concession that the *Central Hudson* standard applied, the City and the lower courts accepted Vugo's framing of the case as a commercial-speech challenge to which *Central Hudson* applied. But, as both the City and the Second Circuit pointed out, it is not obvious that the regulation applies only to commercial speech. The Second Circuit explained that "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" (Pet. 13a n.5). The City also pointed out that, if the regulation were construed as applying to both commercial and noncommercial advertising, it would be a valid content-neutral time, place, and manner restriction (2d Cir. ECF No. 49 at 18 n.4).

If the Court were to grant certiorari, it would thus have to consider another question not pressed or passed on below—whether the regulation applies specifically to commercial speech. On its face the regulation applies to all "advertising," not just to commercial advertising (Pet. 66a, 69a). And, as the Second Circuit pointed out, "regulations that apply generally to 'advertising' … may not necessarily be content-based" (Pet. 14a n.6 (citing *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1198-1200 (9th Cir. 2016)). Viewed as a content-neutral restriction, the regulation would not

implicate the question that Vugo asks this Court to grant certiorari to resolve.[2]

B. There is no split of authority on the question presented in any event.

The question that Vugo asks the Court to decide would also not be certworthy on its own terms if it were presented here. Vugo's primary contention is that the *Central Hudson* test for regulations of commercial speech is "at odds" with certain of the Court's recent First Amendment decisions and the subject of a circuit split. These manufactured and illusory conflicts present no question warranting the Court's review.

1. Vugo focuses on *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), claiming that it implicitly overruled *Central Hudson*. That is incorrect.

In *Reed*, the Court considered a sign code that treated ideological signs, political signs, and temporary directional signs differently. 135 S. Ct. at 2224–25. The Court held that the code's facial discrimination between the types of messages conveyed by the three types of signs made the code

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[2] The case also might become moot before the Court could decide it. A New York City Councilmember has introduced a local law to amend the City's administrative code to advertising on electronic tablets in for-hire vehicles. *See* Advertising on the Interior of For-Hire Vehicles, N.Y.C. Council Int. No. 1866-2020, https://perma.cc/5Z7D-ZMX4.

"content based on its face," *id.* at 2227, and the town could provide no valid justification for treating the types of signs differently, *id.* at 2231–32. The case did not involve a regulation of commercial speech, so it is unsurprising that, as Vugo concedes, the opinion of the Court in *Reed* did not mention *Central Hudson* or the commercial-speech doctrine (Pet. 14); *see Reed*, 135 S. Ct. at 2224–33. The sole mention of *Central Hudson* in the case is in Justice Breyer's concurrence, which noted that the commercial-speech doctrine is an exception to the majority's application of strict scrutiny. *Id.* at 2235 (Breyer, J., concurring).

If, despite these indications, *Reed* overruled *Central Hudson*, this Court has passed up multiple opportunities to say so. The Court instead has continued to rely on *Central Hudson*'s commercial-speech doctrine. In *Matal v. Tam*, the plurality considered whether "trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in" *Central Hudson*, or instead receive more searching scrutiny—ultimately not deciding the question because the trademark restrictions could not meet even the less stringent standard. 137 S. Ct. 1744, 1763–64 (2017) (plurality op.). Likewise, in *Janus v. AFSCME*, *Council 31*, the Court cited *Central Hudson* and explained that "the government has traditionally enjoyed greater-than-usual power to regulate speech" in the context of commercial speech. 138 S. Ct. 2448, 2465, 2477 (2018). And in *Expressions Hair Design v. Schneiderman*, the Court remanded the case for the

court of appeals to consider whether the statute at issue was "a valid commercial speech regulation under *Central Hudson*." 137 S. Ct. 1144, 1151 (2017).

The Court has also declined a recent invitation to hold that *Reed* overruled *Central Hudson*. Less than three weeks before this filing, this Court denied a petition for certiorari advancing nearly verbatim arguments and proposing an *identical* question presented. *Leibundguth Storage & Van Serv. v. Vill. of Downers Grove*, — S. Ct. —, 2020 U.S. LEXIS 1492 (Mar. 2, 2020). And there, unlike here, the question had been squarely presented to the circuit court.

2. Vugo contends that, despite this Court's consistent signals that the doctrine is unchanged, "the lower courts are split" on whether to apply strict scrutiny to restrictions on commercial speech (Pet. 9–10). The commercial-speech cases decided by the courts of appeals after *Reed*, however, demonstrate that those courts have continued to apply *Central Hudson* just as they had done for the 35 years before *Reed* was decided.

The only court of appeals to explicitly address an argument that *Reed* impliedly overturned *Central Hudson* "rejected the notion that *Reed* altered *Central Hudson*'s longstanding intermediate scrutiny framework." *Contest Promotions, LLC v. City & Cnty. of San Francisco*, 874 F.3d 597, 601 (9th Cir. 2017); *see Retail Digital*

Network, LLC v. Prieto, 861 F.3d 839, 846 (9th Cir. 2017) (en banc) (holding that the court "continue[s] to follow the *Central Hudson* framework"). Meanwhile, all of the other circuits that have decided commercial-speech cases post-*Reed*—the Third, Fifth, Sixth, Eight, Eleventh, D.C., and Federal Circuits—continued to apply *Central Hudson* without addressing whether *Reed* impliedly overturned it. *See Greater Phila. Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116, 137–38 (3d Cir. 2020); *Mo. Broadcasters Ass'n v. Schmitt*, 946 F.3d 453, 460 (8th Cir. 2020); *Nicopure Labs, LLC v. FDA*, 944 F.3d 267, 284 (D.C. Cir. 2019); *Bevan & Assocs., LPA v. Yost*, 929 F.3d 366, 377 (6th Cir. 2019); *In re Brunetti*, 877 F.3d 1330, 1350 (Fed. Cir. 2017); *Am. Acad. of Implant Dentistry v. Parker*, 860 F.3d 300, 306 (5th Cir. 2017); *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1234 (11th Cir. 2017).

Vugo's lone counterexample comes from the Seventh Circuit's unsupported characterization of a Sixth Circuit case (Pet. 11–12). The Seventh Circuit stated, in passing, that "[o]ne circuit recently held that *Reed* supersedes *Central Hudson*." *Leibundguth Storage & Van Serv., Inc. v. Vill. of Downers Grove*, 939 F.3d 859, 860, (7th Cir. 2019) *cert. denied* — S. Ct. —, 2020 U.S. LEXIS 1492 (Mar. 2, 2020) (citing *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019)). The basis for that statement is unclear. The Sixth Circuit in *Thomas* was careful to note that, despite the fact that the challenged statute "was intended to, and routinely does, apply

to only commercial speech," in that case "Tennessee applied the Act to restrict … non-commercial speech that was not advertising nor commercial in any way." *Thomas*, 937 F.3d at 726 (quotation marks omitted).[3] Consistent with its characterization of the dispute, the court determined that it would confine its analysis "to non-commercial speech and *need not consider the commercial-speech doctrine*." *Id.* at 729 (emphasis added). Indeed, the court did not even cite *Central Hudson*. Thus, Vugo not only identifies the shallowest of purported splits, but even that limited claim is mistaken.[4]

3. Petitioner also asserts that *Central Hudson* conflicts with *Sorrell v. IMS Health Inc.,* 564 U.S. 552 (2011) (Pet. 14). But *Sorrell*, despite suggesting that a different analysis might properly apply to the unusual statute at issue, ultimately applied the

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[3] Contrary to Vugo's characterization, the court did not "decline[] to sever" the statute's commercial applications from noncommercial applications, but rather did not reach the issue because "Tennessee did not raise severability here, in either its briefing or during oral argument." *Thomas*, 937 F.3d at 729.

[4] The narrowness of the Sixth Circuit's holding in *Thomas* is reinforced by the fact that other Sixth Circuit panels continued to straightforwardly apply *Central Hudson* after *Reed* was decided. *See Bevan & Associates,* 929 F.3d at 377; *ECM Biofilms v. FTC*, 851 F.3d 599, 615 (6th Cir. 2017); *Kiser v. Kamdar*, 831 F.3d 784, 788 (6th Cir. 2016).

Central Hudson test and cast no doubt on the test's continued vitality in general.

The statute in *Sorrell* sought to discourage the prescribing of brand-name drugs by imposing "content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information" by pharmaceutical manufacturers and marketers, but not others. *Sorrell*, 54 U.S. at 563–65. The Court suggested that this patent content- and viewpoint-based discrimination might warrant "a stricter form of judicial scrutiny" than commercial speech receives. *Id.* at 571. But the Court nonetheless applied the *Central Hudson* test because "the outcome [was] the same" either way. *Id*. Thus, far from rejecting *Central Hudson*'s test for commercial-speech regulations, the Court confirmed that it applies—except, perhaps, to regulations that have the discriminatory features of the particular statute at issue in *Sorrell*.

Vugo's attempt to distill a general rejection of *Central Hudson* from this holding is therefore unavailing. For that reason, as the Second Circuit explained, "[n]o Court of Appeals has concluded

that *Sorrell* overturned *Central Hudson*" (Pet. 17a).[5]

C. Petitioner's additional objections to *Central Hudson* do not merit this Court's review.

1. Vugo argues that this case illustrates purported flaws in *Central Hudson* that the Court should grant certiorari to remedy (Pet. 16–20). Curiously, however, in arguing that *Central Hudson* is irredeemably flawed, Vugo cites no cases that apply the *Central Hudson* framework. Instead, Vugo relies on a rhetorical sleight of hand, arguing that the City has attempted to regulate advertising based on a judgment that "the content of advertising" is annoying (Pet. 16). Vugo then cites various cases for the proposition that the government may not base speech regulations on whether the idea expressed is offensive or disagreeable (*id.* at 16–17).

But, as the Second Circuit explained, the goal of the in-vehicle advertising restriction is to shield

[5] Indeed, every circuit to consider the question has adhered to the *Central Hudson* test in light of *Sorrell*. *See Greater Phila. Chamber of Commerce*, 949 F.3d 139–40; *In re Brunetti*, 877 F.3d at 1350; *Retail Dig. Network LLC*, 861 F.3d at 846 (en banc); *Ocheesee Creamery*, 851 F.3d at 1234 n.7; *Mo. Broadcasters Ass'n v. Lacy*, 846 F.3d 295, 300 n.5 (8th Cir. 2017); *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1055 (8th Cir. 2014).

passengers in FHVs from "the offensive sight and sound of advertisements—not their content—while they are traveling through the city by car" (Pet. 19a). The court relied on evidence "that passengers find the fact, not the content, of in-ride advertisements annoying" (*id.* 19a n.8). And this annoyance is understandable, given that passengers are a captive audience, sitting a mere arm's length from a device mounted on the front seatback that they cannot fully disable.

This Court has routinely confirmed that cities and states have a substantial interest in the aesthetics of their locales that support regulations governing the display of advertisements. *See Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (affirming that a city is "entitled to protect unwilling viewers against intrusive advertising"); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–08 (1981) (plurality op.) (explaining that "the appearance of the city" is a "substantial governmental" interest); *Lehman v. Shaker Heights*, 418 U.S. 298, 304 (1974) (holding that a municipality could refuse to display political ads on buses to "minimize . . . the risk of imposing upon a captive audience").

Vugo relies on entirely inapposite cases, none of which resemble this case or implicate *Central Hudson* (Pet. 16–17). For example, *Snyder v. Phelps* considered the limits the First Amendment places on state tort claims for intentional infliction

of emotional distress predicated on offensive speech and expressive conduct. 562 U.S. 443, 452 (2011).

And in the other cases Vugo cites, the relevant speech was regulated on the basis of the particular subject matter or viewpoint espoused, not because it was commercial in character. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 794 (2011) ("California … wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children."); *Erznoznik v. Jacksonville*, 422 U.S. 205, 208 (1975) ("Jacksonville's ordinance … does not protect citizens from all movies that might offend; rather it singles out films containing nudity."). Indeed, in *Carey v. Population Services, Inc.*, this Court explicitly disclaimed any ruling on "the time, place, or manner of … commercial advertising" for contraceptives. 431 U.S. 678, 702 n.29 (1977). Finally, in *Martin v. Struthers*, which predates *Central Hudson* by more than 35 years, the Court invalidated a complete ban on leafletting, explaining that it was not a reasonable "regulation of time and manner of distribution." 319 U.S. 141, 147 (1943).

2. Vugo and its amici also argue that *Central Hudson* should be overturned as unworkable because courts supposedly have struggled to distinguish between commercial and noncommercial speech (Pet. 17–18; Br. of Amicus Curiae Pacific Legal Foundation 5–13). They greatly overstate the point. The *Central Hudson*

test applies only to "speech that *proposes* a commercial transaction." *Bd. of Trs. v. Fox*, 492 U.S. 469, 482 (1989) (emphasis in original). In applying this limitation, the Court has consistently erred on the side of providing more protection for speech that approaches the boundary line.

For that reason, many of the examples Vugo and its amici rely on as edge cases do not propose a commercial transaction and would fall outside of the doctrine in any event. For example, Vugo notes that video games "convey artistic expression, narrative, and may even espouse political or social views" (Pet. 18), and there is no dispute that the expressive content within a video game is absolutely protected by the First Amendment. *See Brown*, 564 U.S. at 790. But Vugo's next step is faulty—it assumes that because video games are "indisputably commercial *products*" all speech within or about them must be commercial *speech* (Pet. 18 (emphasis added)). That cannot be the case, just as it cannot be the case that the content of every book in a bookshop is commercial speech simply because the books are for sale. The commercial-speech doctrine applies only when the particular speech at issue proposes a commercial transaction, and not when the speech merely has a commercial motivation. *Fox*, 492 U.S. at 482.

3. The fact that commercial and noncommercial speech are often intertwined is likewise not a new issue or an insurmountable problem, as Vugo and its amici claim (Pet. 17–19; Br. of Amicus Curiae

Pacific Legal Foundation 5–13). The Court has long limited the commercial-speech doctrine to reflect this reality. The Court has held that commercial speech does not retain its "commercial character when it is inextricably intertwined with otherwise fully protected speech." *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). Where commercial speech is so intertwined with other speech, courts apply the "test for fully protected expression." *Id.* Likewise, applying this Court's decision in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the lower courts routinely accord heightened protection to hybrid commercial and noncommercial speech even where it does not meet the "inextricably intertwined" test. *See Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 960–61 (9th Cir. 2012) (collecting cases).

These doctrines resolve potentially difficult fact patterns in the most speech-protective manner while simultaneously preserving the essential character of the commercial-speech doctrine, thereby undercutting concerns raised by Vugo and its amici about difficult hybrid-speech cases. The petition's generalized workability argument is thus no sounder than its claim that this case implicates a split in authority—or its unfounded assumption that the case even properly raises the question that it asks the Court to review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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