No. _____

IN THE

Supreme Court of the United States

LEIBUNDGUTH STORAGE & VAN SERVICE, INC.,

PETITIONER,

V.

VILLAGE OF DOWNERS GROVE,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Jeffrey M. Schwab
Counsel of Record
Brian Kelsey
Reilly Stephens
LIBERTY JUSTICE CENTER
190 LaSalle St., Ste. 1500
Chicago, IL 60603
(312) 263-7668
jschwab@libertyjustice-center.org

Counsel for Petitioner

December 20, 2019

QUESTION PRESENTED

In *Reed v. Town of Gilbert*, this Court clarified that content-based restrictions are those that apply to particular speech because of the topic discussed or the idea or message expressed, and reaffirmed that content-based restrictions on speech require strict scrutiny review. Government restrictions on commercial speech that do not apply to non-commercial speech are content-based. Should strict scrutiny review apply in such a challenge?

RULE 29.6 STATEMENT

Petitioner Leibundguth Storage and Van Service, Inc. is an Illinois corporation, and does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

RELATED CASES

- *Robert Peterson and Leibundguth Storage & Van Service, Inc. v. Village of Downers Grove, Illinois*, No. 1:14-cv-09851, United States District Court for the Northern District of Illinois, Eastern Division, Judgment entered January 7, 2016.

- *Robert Peterson and Leibundguth Storage & Van Service, Inc. v. Village of Downers Grove, Illinois*, No. 1:14-cv-09851, United States District Court for the Northern District of Illinois, Eastern Division, Judgment entered June 29, 2016.

- *Leibundguth Storage & Van Service, Inc. v. Village of Downers Grove, Illinois*, No. 16-3055, United States Court of Appeals for the Seventh Circuit, Judgment entered September 24, 2019.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

INTRODUCTION

In *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015), this Court held that content-based restrictions on speech are those that apply to particular speech because of the topic discussed or the idea or message expressed. Content-based restrictions on speech are subject to strict scrutiny.

Regulations that restrict commercial speech, while permitting non-commercial speech, are content based under *Reed's* framework – they clearly apply to speech because of the topic discussed (commercial speech). Nonetheless, many lower courts have refused to apply strict scrutiny analysis to content-based laws and regulations that apply to commercial speech only. In part, this is because the Court's decision in *Central Hudson,* applying intermediate scrutiny to a law that restricted commercial speech, appears to be at odds with *Reed*. But the Seventh Circuit below noted that one appellate court, however, appears to have decided that *Reed* overturned *Central Hudson*.

In this case, the Village of Downers Grove's Sign Ordinance is content-based. It provides restrictions on the size and number of some signs while making exceptions for certain non-commercial signs. Further, it purports to ban painted signs, while allowing non-commercial painted murals and flags.

Because of the apparent confusion in the lower courts on the level of scrutiny to apply to content-based restrictions on commercial speech – and apparent split among the appellate courts – the Court should clarify that content-based restrictions on commercial speech

are subject to strict scrutiny review, just as any other content-based restrictions on speech are. Petitioner references a similar petition filed by Vugo, Inc. on December 18, 2019 asking this Court to resolve the same question. Counsel for Petitioner also represents Vugo. Petitioner requests that this Court grant this petition or the petition filed by Vugo.

OPINIONS BELOW

The opinion of the court of appeals is reported at 939 F.3d 859 and is reproduced at App. 1a-7a. The opinion of the district court is reported at 150 F. Supp. 3d 910 and is reproduced at App. 8a—53a. The opinion of the district court denying plaintiff's motion for rehearing is reported at 2016 U.S. Dist. LEXIS 84638 and reproduced at App. 56a—83a.

JURISDICTION

On September 24, 2019, the court of appeals affirmed the district court's judgment. App. 1a. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

The statutory provisions involved are reproduced at App. 84a—118a.

STATEMENT OF THE CASE

A. Leibundguth's Signs

Leibundguth Storage & Van Service, Inc. ("Leibundguth") is a moving and storage business located on Warren Avenue in Downers Grove, Illinois. App. 10a. For decades Leibundguth's building had a sign painted directly on its rear exterior wall, which runs parallel to the BNSF railroad tracks, advertising to train commuters riding Metra commuter trains to and from Chicago. App. 11a; a photo of this sign is reproduced in the Seventh Circuit opinion at App. 4a. At the time Leibundguth filed this lawsuit and until February 2016, the front of the building also bore three long-standing signs: a sign painted directly on the front exterior wall, a sign with red and white hand-painted block letters, and a sign advertising Leibundguth's relationship with its long-distance mover, Wheaton World Wide Moving. Photos of each of these signed are reproduced in the district court's opinion at App. 11a – 13a.

All four of Leibundguth's signs are truthful and not misleading. App. 40a. The signs communicate only the name of the business, the telephone number of the business, and Leibundguth's relationship with Wheaton World Wide Moving. App. 10a-12a. All four signs advertise a lawful activity – moving and storage – for which Leibundguth is licensed. App. 42a.

B. The Village of Downers Grove Sign Ordinance

In May 2005, the Downers Grove Village Council adopted a major rewrite to its sign ordinance, requiring all existing signs to comply with the new restrictions by May 2014, unless the sign was located in one of several business zoning districts and was in place before January 1, 1965 or the owner obtained a variance. App. 11a, 13a-15a. Leibundguth's signs were subject to the Ordinance because Leibundguth's property is not located in one of the business zoning districts, and the Zoning Board of Appeal denied Leibundguth's request for a variance on November 19, 2014. App. 15a — 16a.

The Ordinance contains four provisions that affect Leibundguth's signs. First, Section 9.020(P) prohibits "any sign painted directly on a wall, roof, or fence." App. 15a. Thus, Leibundguth's painted wall signs on the front and back of its building violated Section 9.020(P)'s prohibition on painted signs. App. 16a. Second, Section 9.050(A) regulates a property's maximum total sign area, which may not exceed the lesser of 300 square feet or 1.5 square feet per linear foot of tenant frontage (or two square feet per linear foot for buildings set back more than 300 feet from the abutting street right-of-way), not including any signs the Ordinance expressly excludes from maximum sign area calculations (discussed below). App. 14a. Collectively, the wall signs on the front of Leibundguth's building violated Section 9.050(A)'s limitation on the total aggregate size of signs. App. 14a. Third, Section 9.050(C)(1) permits only one wall sign per tenant frontage along a public roadway or drivable right-of-way. App. 14a.

Thus, the wall signs on the front of Leibundguth's building violated Section 9.050(C)'s limit on the total number of wall signs per tenant frontage. App. 14a. Finally, Section 9.050(C) allows lots with frontage along the BNSF railroad right-of-way to have one additional wall sign displayed on the wall facing that right-of-way, but it limits such a sign to 1.5 square feet per lineal foot of tenant frontage along the right-of-way, with a maximum of 300 feet. App. 14a. At the time Leibundguth filed this lawsuit, the Ordinance did not allow any signs facing the BNSF railroad right-of-way unless such a sign was also along a roadway or driveable right-of-way. App. 14a. After discovery in this case had closed, the Village amended Section 9.050(C) to allow a single wall sign along the BNSF railroad right-of-way. App. 14a. But the size limits for such signs still rendered Leibundguth's sign on its back wall – the only such sign in Downers Grove at the time the Village amended Section 9.050(C) – illegal. App. 14a.

Section 9.080 of the Ordinance requires a property owner to obtain a permit for any sign, except those exempted elsewhere in the Ordinance. App. 22a. Section 9.030 allows certain signs to be erected in the Village without a permit, subject only to specific restrictions in that section. App. 15a.

The Ordinance and the Village have made numerous exceptions to the restrictions that apply to Leibundguth's signs. While the Ordinance purports to prohibit any signs painted directly on a wall, the Village itself has acknowledged that it allows certain signs to be painted on a wall. App. 24a, 73a.

The Ordinance does not count certain signs toward Section 9.050(A)'s limit on total aggregate sign size. App. 15a. Properties abutting the right-of-way of I-88 or I-355 are allowed an additional monument sign of 225 square feet or less, which does not count in calculating the lot's total sign area. (Section 9.050(B)(3).) A building of four stories or more is allowed one wall sign of 100 square feet or less on no more than three sides of the building, which is not counted against the maximum allowable sign area. (Section 9.050(C)(4).)

The Village also does not count a panel sign in a multi-tenant shopping center (Section 9.050(B)(2)), window signs (Section 9.050(H)), or menu boards (Section 9.050(D)) in calculating a lot's sign area.
In contrast with its treatment of wall signs, the Ordinance does not limit the number of window signs or shingle signs a property may have (Section 9.050(H), (B)(4)). In addition to a wall sign, the Ordinance allows a lot to display a shingle sign or a monument sign (Section 9.050(B)), a menu board (Section 9.050(D)), a projecting sign, (Section 9.050(E)), an awning sign, (Section 9.050(F)), and an under-canopy sign (Section 9.050(G)). App. 15a.

The Village has made at least one notable exemption from its sign rules for a business other than Leibundguth. On November 18, 2014, the Village Council approved a Planned Development Amendment to grant the Art Van Furniture store at 1021 Butterfield Drive three variations from sign regulations: to increase the total sign area from 300 square feet to 990 square feet; to permit a sign on the east façade of the building with no frontage where no sign is allowed; and to allow two signs each on the north, south, and

west façades of the building where only one sign each would otherwise be permitted. App. 48a.

C. Proceedings Below

On December 8, 2014, Leibundguth filed its complaint in this action in the U.S. District Court for the Northern District of Illinois, challenging the Ordinance's restrictions on its signs under the free-speech guarantees of the United States Constitution and the Illinois Constitution. App. 8a. The parties filed cross-motions for summary judgment, and on December 14, 2015, the district court issued its order granting the Village's motion for summary judgment and denying Leibundguth's motion for summary judgment. App. 8a – 53a.

First, the district court held that although *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) states that content-based restrictions must be subject to strict scrutiny, "it remains to be seen whether strict scrutiny applies to all content-based distinctions" such as commercial-based distinctions like those at issue in this case. App. 37a – 38a. According to the district court, the proper level of scrutiny was set forth in *Central Hudson Gas & Elec. Corp. v. Public Svc. Comm'n*, 447 U.S. 557 (1980). App. 39a.

The district court then held that the restrictions on the size and number of signs and the ban on painted signs met the *Central Hudson* test. App. 41a – 51a. Although the district court held that the Village failed to provide sufficient evidence that the challenged restrictions on signs directly advanced the Village's in-

terests in traffic safety, it did find that the Village provided sufficient evidence that the challenged restrictions directly advanced the Village's interests in aesthetics. App. 43a – 46a. This evidence consisted entirely on pictures the Village took of commercial signs in the Village and in surrounding communities. App. 45a – 46a. The district court also found that the restrictions were narrowly tailored to serve the Village's interest in aesthetics.

The district court rejected Leibundguth's argument that the exceptions to Section 9.050's restrictions on the size and number of signs found in Section 9.030 were subject to strict scrutiny because they were content-based. App. 44a – 45a. The district court found that Leibundguth was not entitled to invoke the overbreadth doctrine "because the parties agree that § 9.050 applies only to commercial speech." App. 49a – 51a.

Leibundguth filed a motion to alter or amend judgment with the District Court and on June 29, 2016, the district court entered an order denying Leibundguth's motion to alter or amend judgment. App. 56a – 83a.

Leibundguth filed a notice of appeal in this action on July 28, 2016. On September 24, 2019, the U.S. Court of Appeals for the Seventh Circuit affirmed the decision of the District Court. *Leibundguth Storage & Van Serv., Inc. v. Vill. of Downers Grove*, 939 F.3d 859 (7th Cir. 2019), App. 1a. The Seventh Circuit concluded that "whether or not *Reed* applies, this does not do Leibundguth any good because it is not affected by the problematic exceptions." App. 2a. The court, however, rejected the Village's (and the district court's)

contention that Section 9.050 of the sign ordiance applied only to commercial speech ("*This* ordinance is comprehensive") App. 3a (emphasis in original). Nonetheless, the Seventh Circuit found that because the exceptions for non-commercial speech in Section 9.030 did not apply to Leibundguth's signs, and therefore did not support Leibundguth's claims. ("Leibundguth's problems come from the ordinance's size and surface limits, not from any content distinctions.") App. 3a.

REASONS FOR GRANTING THE PETITION

I. Lower courts are split over whether content-based restrictions on commercial speech should be analyzed using strict scrutiny review.

In *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015), this Court held that a restriction on speech is content-based if it applies to particular speech because of the topic discussed or the idea or message expressed. To determine whether a restriction is content based a court must "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id*. (*citing Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564 (2011).) Both obvious facial distinctions, defining regulated speech by particular subject matter, and subtle facial distinctions, defining speech by its function or purpose, are drawn based on the message a speaker conveys, and are content-based restrictions on speech. *Id.*

Content-based restrictions on speech are subject to strict scrutiny. *Id*. Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve

that interest.'" *Reed*, 135 S.Ct. at 2231 (citation omitted). In applying strict scrutiny, *Reed* was not an aberration. This court has held on more than one occasion that "[c]ontent-based regulations are presumptively invalid," *R. A. V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), such that "[i]n the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint discriminatory." *Sorrell,* 564 U.S. at 571.

However, the lower courts are split on whether to apply strict scrutiny when a content-based restriction applies only to commercial speech but not non-commercial speech. Many lower courts, like the district court and Seventh Circuit below, hold that *Central Hudson* continues to apply. App. 2a, 37a-39a (noting that absent an express overruling of *Central Hudson*, lower courts must continue to apply *Central Hudson* to content-based restrictions on commercial speech); *see Wollschlaeger*, *v. Governor*, 848 F.3d 1293, 1307 (11th Cir. 2017) (finding that an Act preventing doctors and medical professionals from recording information about a patient's firearm ownership, asking a patient about firearm ownership, and unnecessarily harassing a patient about firearm ownership during an examination were content-based restrictions on speech, but applying intermediate scrutiny); *Vugo, Inc. v. City of N.Y.*, 931 F.3d 42, 50 (2d Cir. 2019) (holding that a regulation on advertising was content-based but applying the *Central Hudson* test); *Lone Star Sec. & Video, Inc. v. City of L.A.*, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016) ("although laws that restrict only commercial speech are content based . . . such restrictions need only withstand intermediate scrutiny" (citation omitted)); *CTIA - The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1061 (N.D. Cal. 2015) (refusing to apply strict

scrutiny to content-based restriction on commercial speech); *Cal. Outdoor Equity Partners v. City of Corona*, No. CV 15-03172 MMM (AGRx), 2015 U.S. Dist. LEXIS 89454, at *26-27 (C.D. Cal. July 9, 2015) (finding that *Reed* does not apply to commercial speech); *Citizens for Free Speech, LLC v. Cty. of Alameda*, 114 F. Supp. 3d 952, 969 (N.D. Cal. 2015) (failing to apply *Reed* where a restriction applied to commercial speech only); *Chiropractors United for Research & Educ., LLC v. Conway*, 2015 U.S. Dist. LEXIS 133559, 2015 WL 5822721, at *5 (W.D. Ky. Oct. 1, 2015) ("Because the [challenged] [s]tatute constrains only commercial speech, the strict scrutiny analysis of *Reed* is inapposite."); *Mass. Ass'n of Private Career Sch. v. Healey*, 159 F. Supp. 3d 173, 192-93 (D. Mass. 2016) (holding that *Reed* does not apply to commercial speech); *Reagan Nat'l Advert. of Austin, Inc. v. City of Cedar*, 387 F. Supp. 3d 703, 712-13 (W.D. Tex. 2019) ("*Reed* does not require the application of strict scrutiny to content-based regulations of commercial speech."); *Vugo, Inc. v. City of Chi.*, 273 F. Supp. 3d 910, 914-15 (N.D. Ill. 2017) (noting that this "Court continues to follow the *Central Hudson* framework and to apply its intermediate scrutiny standard in commercial speech cases, even where they involve content-based restrictions."); *RCP Publ'ns Inc. v. City of Chi.*, 204 F. Supp. 3d 1012, 1018 (N.D. Ill. 2016) (finding "that *Central Hudson* and its progeny continue to control the propriety of restrictions on commercial speech."); *De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 128 F. Supp. 3d 597, 613 (E.D.N.Y. 2015) (finding the restriction to be content-based, but applying the *Central Hudson* test to find the restriction unconstitutional); *see also*, Daniel D. Bracciano, Comment, *Commercial Speech Doctrine and Virginia's*

'Thirsty Thursday' Ban, 27 Geo. Mason U. Civ. Rts. L.J. 207, 227–28 (2017) (explaining that since "*Reed* was not a commercial speech case . . . lower courts have been hesitant to apply the standard broadly").

However, as the Seventh Circuit below expressly recognized, its opinion was tension with the view of the Sixth Circuit, which applied *Reed* to invalidate a content-based regulation on billboard advertising. App. 3a ("One circuit recently held that Reed supersedes Central Hudson.") (citing *Thomas v. Bright*, 937 F.3d 721, 2019 U.S. App. LEXIS 27364 (6th Cir. Sept. 11, 2019)). The Sixth Circuit in *Thomas* observed that it read the Tennessee law at issue to "apply to only commercial speech, namely, advertising," but declined to sever those commercial applications of the law from the non-commercial, striking down the entire law as content-based under *Reed*. *Thomas,* 937 F.3d at 726; *see also Wollschlaeger*, 848 F.3d at 1324 (Wilson, J., concurring) ("[A]fter the Supreme Court's decision in *Reed* last year reiterated that content-based restrictions must be subjected to strict scrutiny, I am convinced that it is the only standard with which to review this law.").

This Court's precedent in *Central Hudson Gas & Elec. Corp. v. Public Svc. Comm'n*, 447 U.S. 557 (1980) provides that laws that target commercial speech are subject to intermediate scrutiny. This Court provided a four-part test that considers whether: (1) the commercial speech concerns a lawful activity and is not false or misleading; (2) the asserted governmental interest is substantial; (3) the regulation directly advances the governmental interest asserted; and (4) the restriction is no more extensive than necessary to serve that interest. *Id.* at 566.

Central Hudson itself never addressed the question of content discrimination. The case struck down a regulation, motivated by the energy crisis of the 1970s, that prevented public utilities from promoting the use of electricity. 447 U.S. at 558. The phrase "content-based" appears only in Justice Blackmun's concurrence, in reference to *Carey v. Population Services International*, 431 U.S. 678, 700-702 (1977), where the Court invalidated a ban on the advertising of contraceptives. 447 U.S. at 577 (Blackmun, J., concurring in the judgment). The Court's failure to even address the issue – perhaps because the total ban on a particular advertisement was so far afield that the Court need not reach such questions – suggests it did not consider the important principles later affirmed in *Reed*. *Reed*'s broad mandate that restrictions on the content of speech are subject to strict scrutiny is at odds with *Central Hudson's* holding that restrictions on commercial speech are subject only to intermediate scrutiny. The Court should grant the petition to clarify this inconstancy in First Amendment doctrine.

II. The Court should clarify that content-based speech restrictions are subject to heightened scrutiny, even where the restriction applies only to commercial speech.

This Court should grant the petition to clarify that *Central Hudson* should not be read to license content-based restrictions, and that *Reed* establishes that where a speech regulation embraces content-based distinctions it is subject to the highest judicial scrutiny.

A. *Reed* and this Court's recent cases on the First Amendment are at odds with *Central Hudson*

This Court set the framework for *Reed's* application to commercial speech when it addressed content-based commercial speech restrictions in *Sorrell*. The Petitioners in that case were pharmaceutical makers who wished to purchase pharmacy records to better target the advertising of their products. *Sorrell*, 564 U.S. at 557. Vermont banned them from accessing this information, instead using the information itself as part of a state funded educational initiative to encourage the use of cheaper generic drugs. *Id*. at 560. The Court found that it was a content-based regulation that sought to favor some speech over others: speech that promoted the use of expensive brand name drugs was curtailed, while speech promoting cheaper alternatives was encouraged. *Id*. at 564. The Court rejected the idea that the "commercial" nature of the discrimination at issue absolved it from constitutional scrutiny. *Id*. at 571. Instead the court applied the heightened scrutiny appropriate to a content-based discrimination. *Id*. at 565.

The Court explained that the First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message the speech conveys or justifies a regulation by referencing the content of speech. *Id*. at 566. Even where a restriction appears to be neutral on its face as to content and speaker, its purpose could be to suppress speech. *Id*. The Court found that "[c]ommercial speech is no exception" to this rule of applying heightened scrutiny to content-based restrictions on speech." *Id*. Nonetheless, in applying the content-

based restriction in *Sorrell*, the Court held that "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Id*. at 571.

Sorrell and *Reed* stand for the proposition that content-based distinctions require more searching review than the *Central Hudson* framework provides. But because of a lack of guidance from this Court, in the years since "courts have already shown considerable hesitance in applying *Reed* to commercial speech, but have yet to articulate a satisfying doctrinal defense." Lee Mason, Comment, *Content Neutrality and Commercial Speech Doctrine After Reed v. Town of Gilbert*, 84 U. Chi. L. Rev. 955, 958 (2017).

Allowing governments to discriminate against commercial speech in favor of non-commercial speech is inconsistent with First Amendment principles expressed by this Court. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). A government cannot ban speech simply because it thinks that commercial speech is more offensive or annoying than non-commercial speech.

This Court has never held that shielding people from messages that might annoy them is a substantial – or even a legitimate – governmental interest. Rather, it has repeatedly held that it is unconstitutional for the "government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975). Any

number of cases stand for the proposition that the constitution does not permit the banning of speech simply because it might be bothersome, offensive, or irritating. A ban on door-to-door leafleting was struck down in *Martin v. City of Struthers*, even though the Court recognized that "[c]onstant callers, whether selling pots or distributing leaflets, may lessen the peaceful enjoyment of a home." 319 U.S. 141, 144 (1943). In *Carey v. Population Services*, the government argued that advertisements of contraceptive products would be offensive and embarrassing to those exposed to them. But the Court declared the restriction unconstitutional, noting "we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression." 431 U.S. at 701. Likewise, the Court held that a California law restricting the sale of video games to minors could not withstand constitutional scrutiny because "disgust is not a valid basis for restricting expression." *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 798 (2011).

In *Reed*, this Court warned of "the danger of censorship presented by a facially content-based statute," since government officials may "wield such statutes to suppress disfavored speech." *Reed*, 135 S. Ct. at 2229. Even seemingly innocuous distinctions drawn by the Sign Code could be used by "a Sign Code compliance manager who disliked [a] Church's substantive teachings . . . to make it more difficult for the Church to inform the public of the location of its services." *Id.* The same concerns are present in the commercial context. A government official who dislikes a commercial business could make it more difficult for it to inform the public of its business, or could give favorable treatment to one business over another. This case exempli-

fies that exact problem. Here, although the sign ordinance provides strict size and number limits on signs, the Village has exempted a politically-favored business, by allowing it significantly more and larger signs. App. 48a.

Petitioner submits that the commercial v. non-commercial enquiry is therefore unhelpful in determining First Amendment rights. When faced with a content-based distinction, the Court should follow *Reed's* teaching that for the government to make such distinctions is a grave matter, and must pass muster under a higher standard of scrutiny. As one commentator has suggested in a related area, when a court assesses economically motivated speech, "it first should have to inquire whether the regulation of the same assertion, made to the same audience by an individual lacking a profit motive, would be upheld. . . the answer generally should not vary on the basis of the presence or absence of the profit motive." Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 Vand. L. Rev. 1433, 1438 (1990). This is particularly true since a profit motive can come in so many forms – Pastor Reed was presumably sincere in his desire to preach his faith, but the case shouldn't have come out differently if he also desired to increase the tithes that paid his salary. The inconsistent manner in which this Court has applied the commercial speech doctrine suggests that its application, at least where content-based distinctions are present, is a hinderance to the proper adjudication of First Amendment rights.

B. The application of *Central Hudson* is inconsistent and unpredictable and cannot be squared with the original intent of the Framers.

There is no basis to hold that commercial speech fits in a historic or traditional category of speech where content-based restrictions on speech have been permitted. *See United States v. Alvarez*, 567 U.S. 709, 717, 132 S. Ct. 2537, 2544 (2012) (Kennedy, J., plurality opinion) (explaining that content-based restrictions on speech have been permitted only for a "few historic and traditional categories" of speech, including incitement, obscenity, defamation, speech integral to criminal conduct, so-called "fighting words," child pornography, fraud, true threats, and "speech presenting some grave and imminent threat the government has the power to prevent"). Indeed, historical material and the understanding of the Framers' intent suggests that they intended that commercial speech receive the same amount of protection as other types of speech. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 522-23 (1996) (Thomas, J. concurring) (citing authorities).

The application of *Central Hudson* to restrictions on commercial speech by the lower courts has been inconsistent and unpredictable. Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205, 1215-17 (2004) (noting the difficulty lower courts have had in applying *Central Hudson* and the growing consensus to reform the commercial speech doctrine); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1 (explaining that *Central Hudson's* lack of jurisprudential foundation has led to divergent and inconsistent approaches); Alex Kozinski

and Stuart Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627, 628 ("the commercial/non-commercial distinction makes no sense").

The sign ordinance's discriminatory treatment of commercial speech by placing size and number restrictions on commercial signs and banning commercial painted signs, while allowing exceptions to the size and number of sign limit and to the painting ban for non-commercial speech is entitled to the protection of the First Amendment. The Court of Appeal's decision upholding the sign ordinance should be reversed because the government does not have a valid – much less a substantial – interest in treating commercial speech differently than non-commercial speech.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

Jeffrey M. Schwab
Counsel of Record
Brian Kelsey
Reilly Stephens
LIBERTY JUSTICE CENTER
190 LaSalle St., Ste. 1500
Chicago, IL 60603
(312) 263-7668
jschwab@libertyjustice-center.org
Counsel for Petitioner

December 20, 2019