

No. 19-808

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*

REPLY IN SUPPORT 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
REPLY BRIEF	1
ARGUMENT.....	2
I. The Village’s arguments for denying the petition fail to refute Leibundguth’s reasons for granting the petition.	2
A. Lower courts have acknowledged the tension between <i>Reed</i> and <i>Central Hudson</i> when considering what level of scrutiny applies to challenges to content-based restrictions on commercial speech.....	3
B. The application of <i>Central Hudson</i> is inconsistent and unpredictable and cannot be squared with the original intent of the Framers.	6
II. Respondent’s adoption of a substitution clause in its Sign Ordinance is irrelevant to Petitioner’s claims but highlights the inconsistency in the Court’s treatment of commercial speech.....	8
CONCLUSION	9

TABLE OF AUTHORITIES**Cases**

<i>Central Hudson Gas & Elec. Corp. v. Public Svc. Comm'n</i> , 447 U.S. 557 (1980)	1
<i>Reed v. Town of Gilbert</i> , 135 S. Ct. 2218, 2227 (2015)	1, 2
<i>Thomas v. Bright</i> , 937 F.3d 721 (6th Cir. 2019).....	4

REPLY BRIEF

In this case, Petitioner Leibundguth Moving & Van Service, Inc. brought a First Amendment challenge to several provisions of Respondent Village of Downers Grove's Sign Ordinance that treat non-commercial signs more favorably than commercial signs. Specifically, the Ordinance provides restrictions on the size and number of some signs while making exceptions for certain non-commercial signs. And it purports to ban painted signs, while allowing non-commercial painted murals and flags.

In its petition for writ of certiorari, Petitioner provided two reasons why this Court should grant its petition:

First, the Court should grant the petition because of the tension between two of this Court's cases: In *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) this Court affirmed that content-based restrictions on speech are subject to strict scrutiny. But in *Central Hudson Gas & Elec. Corp. v. Public Svc. Comm'n*, 447 U.S. 557 (1980), this Court held that laws that target commercial speech are subject to intermediate scrutiny. Pet. 9-10. The tension arises over what level of scrutiny is appropriate when a content-based restriction on commercial speech treats non-commercial speech more favorably. *Id.* The Court should grant the petition to resolve this dilemma.

Second, the Court should grant the petition because it should overturn the holding in *Central Hudson*, which provides lesser protection to commercial

speech than to non-commercial speech. 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. Pet. 18. And the application of *Central Hudson* to restrictions on commercial speech by the lower courts has been inconsistent and unpredictable. *Id.*

The argument provided by Respondent in its Brief in Opposition for denying the petition not only fails to refute the reasons Petitioner gives, but actually supports the Petitioner's reasons why this Court should grant the petition.

ARGUMENT

I. The Village's arguments for denying the petition fail to refute Leibundguth's reasons for granting the petition.

Respondent does not dispute that its Sign Ordinance treats non-commercial signs more favorably than commercial signs. Br. in Opp. 12. Yet Respondent refuses to acknowledge that such differential treatment of commercial signs compared with non-commercial signs is content-based under this Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Br. in Opp. 13.

In *Reed*, 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. There can be no dispute that regulations that restrict commercial signs, while permitting non-commercial signs, are content based under

Reed's framework – they clearly apply to speech because of the topic discussed (commercial speech).

Respondent's refusal to acknowledge that treating commercial speech less favorably than non-commercial speech is a content-based restriction on speech undermines the reasons it gives why this Court should not grant Leibundguth's petition.

A. Lower courts have acknowledged the tension between *Reed* and *Central Hudson* when considering what level of scrutiny applies to challenges to content-based restrictions on commercial speech.

Respondent refuses to acknowledge that lower courts have addressed the tension between *Reed* and *Central Hudson* on whether strict scrutiny or intermediate scrutiny analysis should apply in cases challenging content-based restrictions to commercial speech. Respondent asserts that it is “not aware of any decision that even questions whether *Reed* somehow converts a municipal sign ordinance into a content-based ordinance requiring strict scrutiny simply because the non-commercial sign regulations are different than more restrictive commercial regulations.” Br. in Opp. 10.

Yet in this very case, the District Court acknowledged that the restrictions Leibundguth is challenging are content-based and questioned whether *Reed* required the application of strict scrutiny to all content-based restrictions on speech. Even though the District

Court ultimately concluded that it must apply *Central Hudson* intermediate scrutiny because – although it acknowledged the tension between *Reed* and *Central Hudson* – it concluded that absent an express overruling of *Central Hudson*, lower courts must continue to apply *Central Hudson* to content-based restrictions on commercial speech. Pet. App. 37a-39a.

Indeed, the petition provided a litany of lower court decisions acknowledging that restrictions that apply only to commercial speech are content-based and the tension between *Reed*'s holding that content-based restrictions on speech are subject to strict scrutiny and *Central Hudson*'s holding that restrictions on commercial speech are subject to intermediate scrutiny. Pet. 10-12. Although these courts ultimately apply *Central Hudson* intermediate scrutiny, the fact that these cases all acknowledge the tension between *Reed* and *Central Hudson* is exactly the reason this Court should grant Leibundguth's petition and clarify the appropriate standard.

Further, in support of its argument that there is no confusion in the lower courts on the proper level of scrutiny to apply to content-based restrictions on commercial speech, Respondent asserts that the Seventh Circuit's opinion in this case mistakenly read *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019) as holding that *Reed* supersedes or overturns *Central Hudson*. Br. in Opp. 10. The Seventh Circuit in this case stated that “[o]ne circuit recently held that *Reed* supersedes *Central Hudson*.” Pet. App. 3a (citing *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019)). Respondent points out that the court in *Bright* limited its analysis to the non-commercial speech elements involved and specifically

refused to address the commercial speech doctrine. Br. in Opp. 11.

Petitioner does not necessarily dispute this analysis (though the Sixth Circuit did acknowledge that under its reading of the statute at issue, it applied only to commercial speech before admitting that defendant in that case was enforcing the statute against plaintiff's non-commercial speech). Contrary to Respondent's assertion, Petitioner does not claim that the Sixth Circuit held that *Reed* supersedes *Central Hudson*; rather it simply pointed out that that's what the Seventh Circuit's opinion below stated.

But even if Respondent is correct that the Seventh's Circuit's understanding of the Sixth Circuit's holding is *Thomas v. Bright* is incorrect, that simply reinforces Petitioner's claim that there is confusion in the lower courts over whether strict scrutiny applies to content-based restrictions on commercial speech.

In any event, Respondent simply ignores numerous lower courts who have acknowledged that *Reed* introduces confusion over whether strict or intermediate scrutiny applies to content-based restrictions on commercial speech, even though those courts have stated that they will continue to apply intermediate scrutiny until this Court acts to clarify whether *Reed* requires strict scrutiny in such cases. The Court should grant the petition to provide such clarity.

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

Respondent's second reason for denying the petition – that commercial speech and non-commercial speech have historically been treated differently – similarly supports granting the petition, rather than opposing it. Br. in Opp. 12. Indeed, the petition plainly acknowledges that this Court has treated commercial and non-commercial speech differently historically, but points out that not only is this treatment inconsistent with *Reed*, but that 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. Pet. 18. Further, the application of *Central Hudson* to restrictions on commercial speech by the lower courts has been inconsistent and unpredictable. *Id.* These are important reasons why the Court should grant the petition that Respondent fails to address.

Moreover, Respondent claims that it is *required* to treat non-commercial signs *more favorably* than commercial signs in its Sign Ordinance under this Court's precedent. Br. in Opp. 13 (asserting that the Sign Ordinance "does exactly what it is supposed to do -- favor non-commercial speech by imposing restrictions on commercial speech that do not apply to non-commercial speech.") This disturbing admission by Respondent is another aspect of the brief in opposition that actually supports granting the petition. Respondent apparently believes that it is *required* to impose content-

based restrictions on commercial speech in its Sign Ordinance under *Reed*. Thus, the Village mistakenly believes that Petitioner's claim that *Reed* required content-based restrictions on commercial speech be subject to strict scrutiny would create a Catch-22:

Should Leibundguth's version of the *Reed* framework be adopted, the First Amendment would obligate the Village to adopt sign regulations that afford greater protection to non-commercial speech over commercial speech. But in writing those differing regulations for commercial and non-commercial signs, the same First Amendment would render the sign ordinance *per se* content-based and presumptively invalid. This Catch-22 is untenable and cannot be the embraced outgrowth of *Reed*.

Br. in Opp. 14. Respondent is fundamentally wrong about two important points. First, it is wrong that *Reed* somehow requires that it enact sign regulations that *favor* non-commercial speech over commercial speech. Respondent fails to cite the basis for this mistaken belief, but it is clear that this Court's decision in *Reed* applying strict scrutiny to restrictions on speech that are content-based does not require municipalities to *favor* certain signs over others. Indeed, it does the opposite. Second, Respondent mistakenly believes that restrictions that favor non-commercial speech over commercial speech are *not* content-based. Even the lower courts that apply *Central Hudson* intermediate scrutiny to restrictions on speech that favor non-commercial speech over commercial speech, such as the

District Court in this case, acknowledge that such restrictions are content-based.

Thus, if this Court does not grant the petition, not only will there continue to be tension about whether strict scrutiny or intermediate scrutiny should apply to content-based restrictions on commercial speech, but at least one municipality, the Village of Downers Grove, Illinois will enforce content-based restrictions under the mistaken belief that it is *required* by *Reed* to do so.

II. Respondent's adoption of a substitution clause in its Sign Ordinance is irrelevant to Petitioner's claims but highlights the inconsistency in the Court's treatment of commercial speech.

While Respondent refuses to acknowledge that restrictions on signs that favor non-commercial speech over commercial speech are content-based, it does acknowledge that restrictions on signs that favor commercial speech over non-commercial speech are content-based. Indeed, Respondent explains that it has taken precautions against this kind of content-based discrimination by adopting a substitution clause in its Sign Ordinance. Br. in Opp. 15. As the Village explains, the substitution clause permits “the owner of any sign allowed under the sign ordinance to substitute any non-commercial message for any other message of either permitted noncommercial or commercial copy.” *Id.*

But the Village's inclusion of a substitution clause provides no reason to deny the petition. The substitution clause protects against situations where the Sign Ordinance might treat commercial speech more favorably than non-commercial speech by allowing an owner to substitute a non-commercial message for a permitted commercial message. But the substitution clause only works one way: It does not allow commercial copy to replace existing permitted non-commercial copy. The substitution clause does not apply to this case at all, where the owner of commercial signs alleges that the Sign Ordinance treats non-commercial signs more favorably than commercial signs. Thus, the inclusion of the substitution clause provides no reason to deny the petition.

If anything, the substitution clause is a reminder of a reason why this Court should grant Leibundguth's petition – the inconsistency of applying strict scrutiny to content-based restrictions on non-commercial speech that favor commercial speech, while applying intermediate scrutiny to content-based restrictions on commercial speech that favor non-commercial speech. This inconsistent approach is precisely how the lower courts have been applying this Court's decision in *Reed*. Petitioner requests that this Court grant its petition to end this disparity.

CONCLUSION

Rather than providing reasons why this Court should deny the petition, Respondent not only reinforcing the reasons that Petitioner provides for granting the petition, but also, in its mistaken conclusion that *Reed* requires it to treat non-commercial speech more

favorably than commercial speech, Respondent provides an additional reason that this Court should grant the petition. Petitioner, therefore, asks this Court to grant its 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

February 11, 2020

Counsel for Petitioner