No. _____

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

PETITION FOR A WRIT OF CERTIORARI

Chad A. Snyder
RUBRIC LEGAL LLC
111 Third Avenue South
Suite 110
Minneapolis, MN 55401
612.465.0074
chad@rubriclegal.com

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@libertyjusticecenter.org

Counsel for Petitioners

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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 Vugo, Inc. is a corporation organized under the laws of Delaware, and does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

RELATED CASES

- *Vugo, Inc. v. City of New York*, No. 15-CV-8253, U.S. District Court for the Southern District of New York. Judgement entered February 22, 2018.
- *Vugo, Inc. v. City of New York*, No. 18-807, U.S. Court of Appeals for the Second Circuit. Judgement entered July 16, 2019.
- *Vugo, Inc. v. City of New York*, No. 18-807, U.S. Court of Appeals for the Second Circuit. Judgement entered September 30, 2019.

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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*. At least one appellate court, however, appears to have decided that *Reed* overturned *Central Hudson*.

In this case, the City of New York prevents commercial advertising inside For-Hire Vehicles, such as those rideshare vehicles using Uber or Lyft, but does not prevent non-commercial displays in the interior of such vehicles. Further, the City provides an exception for taxicabs, who may display commercial advertising on their passenger information monitors, commonly referred to as TaxiTV.

The district court declined to apply strict scrutiny under *Reed*, but nevertheless found the City's rules unconstitutional, applying the *Central Hudson* test. The Second Circuit acknowledged that the restriction

on commercial speech was content-based, but refused to apply strict scrutiny, reversing the district court, and finding that the rules satisfied the *Central Hudson* test.

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 – this case provides a good vehicle for the Court to clarify that content-based restrictions on commercial speech are subject to strict scrutiny review, just as any other content-based restrictions on speech are. Further, this Court should overturn *Central Hudson* since that case is at odds with *Reed's* content-based analysis. Petitioner respectfully asks this Court to grant its petition.

OPINIONS BELOW

The opinion of the court of appeals is reported at 931 F.3d 42 and reproduced at App. 1a – 36a. The opinion of the district court is reported at 309 F. Supp. 3d 139 and reproduced at App. 37a – 62a.

JURISDICTION

On July 16, 2019, the court of appeals reversed the district court's judgment. App. 1a. On September 23, 2019, the court of appeals denied Vugo, Inc.'s timely petition for panel rehearing or for rehearing *en banc*. The Court has jurisdiction under 28 U.S.C. § 1254(1). App. 63a.

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 challenged herein are Title 35, Section 59A-29(e) and 59B-29(e) of the Rules of New York City and are reproduced at App. 64a – 69a.

STATEMENT OF THE CASE

A. New York City's discriminatory regulation of advertising on for-hire vehicles and taxis.

The New York City Taxi and Limousine Commission (the "Commission") is responsible for the "regulation and supervision" of vehicles for hire in the City. App. 38a. In this capacity it oversees both medallion taxis ("yellow cabs") and for-hire vehicles, which include community-based liveries, black cars, luxury limousines, and street-hail liveries. App. 38a – 39a. Street-hail liveries, commonly known as "green" or "borough" taxis, are authorized to accept street hails in the Bronx, Brooklyn, Queens (with the exception of air-ports, Staten Island, and in certain parts of Manhattan). App. 39a. For-hire vehicles include ride-share vehicles, such as those driven by drivers using online applications like Uber and Lyft to connect with riders. App. 3a.

Currently, the Commission's rules state that "[a]n 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." 35 R.C.N.Y. § 59A-29(e)(1). App. 40a – 41a. 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." App. 41a.

Using this authority, the Commission allows only two types of regulated vehicles to display interior advertising: yellow and green taxis App. 39a, 41a. The espoused reason for this is that the Commission requires yellow and green cabs to install equipment that can accept credit and debit card payments, collect trip data, display route guidance and other important information to passengers via passenger information monitors ("PIMs"), and to allow driver receipt of text messages. App. 41a.

To offset the costs associated with this equipment, the Commission created an exception to its ban on interior advertising and allowed interior advertising on the PIMs of yellow and green cabs. App. 43a.

B. Vugo, Inc. seeks to display ads in For-Hire Vehicles, but is prevented from doing so by the Commission's Rules.

Vugo is a technology start-up company based in Minneapolis, Minnesota, launched in May 2015. App. 43a. It places digital content, including advertising about itself and others, in For-Hire Vehicles affiliated with such companies as Uber and Lyft. Drivers mount an internet-connected tablet computer in their cars,

download the Vugo app to an electronic tablet and to their phone, and are then able to stream Vugo's content on the electronic tablet for their passengers. App. 44a.

Vugo earns its revenue from advertisers, who pay Vugo "to distribute their content through [its] platform." App. 44a. Vugo carries advertisements for itself and other commercial businesses, as well as non-commercial public service announcements from the Ad Council. These advertisers pay Vugo to display their content during passenger trips. Vugo splits the ad revenue with its driver partners. App. 44a.

C. Proceedings Below.

On October 20, 2015, Vugo filed a complaint alleging that the Commission's ban on advertising in For-Hire Vehicles violates the First Amendment. App. 45a. The parties filed cross motions for summary judgment and on February 22, 2018, the district court issued an order granting Vugo's motion and denying the City's motion. App. 37a-62a.

While acknowledging that the regulations at issue are content-based, the district court declined to decide whether strict scrutiny was appropriate or whether intermediate scrutiny as set forth in *Central Hudson Gas & Elec. Corp. v. Public Svc. Comm'n*, 447 U.S. 557 (1980) was appropriate. App. 47a-50a. Because it found that the regulations could not pass constitutional muster under either standard, the district court simply applied the *Central Hudson* test. App. 50a.

In applying the *Central Hudson* test, the district court determined the fit between the ends sought by the City and its chosen means is unreasonable. App. 52a. The district court found the regulations are both under-inclusive in that large swaths of vehicles regulated by the Commission are permitted to display advertisements and unnecessarily restrictive because passengers in non-exempt vehicles could be protected by the dangers of "annoying advertising" identified by the City by means less severe than a complete prohibition on advertising – such as volume controls or an on-off button. App. 52a – 53a.

The district court held the City's justification for the exemption on the ban for yellow and green taxis – to allow owners of those vehicles to offset the costs of required equipment – bore no relationship whatsoever to the interest articulated by the City of protecting citizens from messages they might find annoying. App. 57a (*citing City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). The district court found no basis for the assertion that advertisements in the exempted vehicles are less annoying or that those passengers are less vulnerable. App. 57a – 58a. The rationale for exempting yellow and green taxis – the costs associated with installing and maintaining required equipment – exists only because the City mandated that those vehicles install such systems and allowed drivers to recouple the resulting costs by displaying advertisements. App. 58a. The district court warned that if the City were permitted to justify the under-inclusiveness of the ban on this basis, the reasonable fit prong of the *Central Hudson* test would lose much of its force. App. 58a.

On March 23, 2018, the City appealed the district court's judgment. On July 16, 2019, the U.S Court of Appeals for the Second Circuit reversed the decision of the district court. App. 1a – 36a. While the Second Circuit acknowledged that the ban is content-based, it nevertheless applied intermediate scrutiny under *Central Hudson* because the rule applies to commercial advertising. App. 13a – 17a.

The Second Circuit found there was a sufficient nexus between the ban and its exception because both advance the City's interest in improving the overall passenger experience. App. 4a. Further, the Second Circuit found that the ban would be constitutional even if there were no such relationship. App. 4a. According to the appellate court, since the exception for yellow and green taxis neither evidences discriminatory intent nor renders the ban ineffective at improving the in-ride experience, the ban is not unconstitutionally under-inclusive. App. 4a. Rather, the appellate court found that the exception for taxis improved the overall in-ride experience by facilitating the installation of equipment that enables passengers to pay for taxi rides by credit card. App. 23a.

On July 31, 2019, Vugo filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. That motion was denied on September 23, 2019. App. 63a.

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.

Lower courts have applied *Reed's* content-based analysis; some even overturning previous decisions finding no content-based restrictions on speech. *See, e.g., Am. Ass'n of Political Consultants, Inc. v. FCC*,

923 F.3d 159, 166 (4th Cir. 2019) (finding an exemption for debt collection to an automated call ban to be content-based); *Wagner v. City of Garfield Heights*, 675 F. App'x 599, 607 (6th Cir. 2017) (finding that a sign ordinance that limited political signs to six square feet but permitting other kinds of temporary signs to be twice that size was content-based and subject to strict scrutiny, and reversing its prior decision before *Reed* finding the restriction content-neutral); *Norton v. City of Springfield*, 806 F.3d 411, 412, 612 F. App'x 386, 386 (7th Cir. 2015) (finding that a panhandling ordinance that banned the oral request for money, but permitted signs requesting money, to be content-based, and reversing its prior decision before *Reed* finding the restriction content-neutral); *Willson v. City of Bel-Nor*, 924 F.3d 995, 1000 (8th Cir. 2019) (finding an exemption to a restriction on the number of signs to be content-based because its distinguished between "flags" and "signs" based on their content); *In re Nat'l Sec. Letter v. Sessions*, 863 F.3d 1110, 1123 (9th Cir. 2017) (finding an FBI requirement preventing a recipient of a national security letter from disclosing the fact that it has received such a request to be content-based, but ultimately upholding a requirement as satisfying strict scrutiny); *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).

However, even where a court finds that a restriction on speech is content-based, the lower courts are split on whether to apply strict scrutiny when that

restriction applies to commercial speech. Many lower Courts, like the Second Circuit below, hold that *Central Hudson* continues to apply. App. 14a; *see Wollschlaeger*, 848 F.3d at 1307 (finding content-based restrictions on the speech of doctors and medical professionals unconstitutional, but applying intermediate scrutiny); *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."); *Peterson v. Vill. of Downers Grove*, 150 F. Supp. 3d 910, 928 (N.D. Ill. 2015) (noting that absent an express overruling of *Central Hudson*, lower courts must continue to apply *Central Hudson* to content-based restrictions on commercial speech); *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 expressly recognizes, this trend is in tension with the view of the Sixth Circuit, which applied *Reed* to invalidate a content-based regulation on billboard advertising. *See Leibundguth Storage & Van Serv., Inc. v. Vill. of Downers Grove*, 939 F.3d 859, 860 (7th Cir. 2019) (Easterbrook, J.) ("One circuit recently held that *Reed* supersedes *Central Hudson*. *See Thomas v. Bright*, 937 F.3d 721, 2019 U.S. App. LEXIS 27364 (6th Cir. Sept. 11, 2019)"). The Sixth Circuit 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.").

In this case, the Second Circuit Court of Appeals held that the challenged regulation was a content-based restriction on speech, but nevertheless applied the *Central Hudson* standard, rather than strict scrutiny. App. 14a,*Vugo, Inc. v. City of N.Y.*, 931 F.3d 42, 50 (2d Cir. 2019).

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.

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*.

Like this case, *Reed* concerned local restrictions on a form of advertising. The Petitioner in that case challenged the town's Sign Code, which contained varied exceptions for 23 categories of signs, including "Ideological Signs," "Political Signs," and "Temporary Directional Signs" related to local events. *Reed*, 135 S. Ct. at 2224-2225. The Petitioner was a pastor who sought to advertise the time and locations of his church services (the church was without a permanent building and so changed venues often). *Id*. at 2225. The temporary signs the church put up for this purpose brought it into conflict with the town, and so the church and pastor sued claiming the Sign Code was a content-based restriction on speech. *Id*. at 2226.

The Court found the Sign Code's distinctions between who could and could not advertise were content-based and therefore subject to strict scrutiny, rather than applying some lower standard based in the commercial or non-commercial nature of the signs at issue. *Id*. at 2227. Since the particular sign at issue

was for a church service rather than a "commercial" transaction, it did not directly address the application of this standard to commercial speech.

Prior to *Reed*, this court did address 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.

Unfortunately, lower courts, such as the Second Circuit in this case, have taken this language from *Sorrell* to mean that the Court should apply the lesser-scrutiny *Central Hudson* test in cases where a content-based regulation restricts commercial speech. App. 15a, *Vugo*, 931 F.3d at 49.

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).

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 *Sorrell* and *Reed*.

B. This case shows that the logic of *Central Hudson* is flawed and inconsistent with *Reed* and this Court's First Amendment framework.

There is no dispute in this case that the regulation in question is content-based – the City conceded as much below, and both the district and appellate court agreed. App. 14a. The Court of Appeals upheld the ordinance, however, because it concluded the discrimination between taxis and rideshare vehicles did not "reflect[] discriminatory intent." App. 5a. But as this Court explained in *Reed*, "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute . . ." 135 S. Ct. at 2229. Where the government is allowed to chose between speakers, that content discrimination represents an official use of government power to impose its preference on the marketplace of ideas. The imposition of such preferences deserves the highest form of scrutiny because it is not for the government to "prescribe what shall be orthodox." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

According to the City, the purpose of the ban on advertising is to shield people from messages – specifically advertising messages – they may not want to see because the City believes the content of advertising is "extremely annoying." App. 3a. But "[i]f 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 speech is, in the City's words, "annoying."

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).

The cases reveal the infirmity of the distinction between "commercial" and "non-commercial" speech.

Should door-to-door leafleting be constitutionally protected when engaged in by Jehovah's Witnesses, but not a local restaurant handing out menus? Contraception is a constitutionally protected right, but while advocacy for or against is non-commercial, at bottom contraception advocates propose the purchase of a product. Does that somehow lessen the First Amendment protection of advocates? Video games convey artistic expression, narrative, and may even espouse political or social views, but they are indisputably commercial products. *See, e.g.*, Gita Jackson, *Disco Elysium Developers Shout Out Marx And Engels In Game Awards Victory Speech*, KOTAKU, Dec. 12, 2019, https://kotaku.com/disco-elysium-developers-shout-out-marx-and-engels-1840403603; *Kasky v. Nike, Inc.*, 45 P.3d 243, 269 (Cal. 2002) (Brown, J., dissenting) ("the commercial speech doctrine, in its current form, fails to account for the realities of the modern world – a world in which personal, political, and commercial arenas no longer have sharply defined boundaries.")

In this case, the advertising ban applies only to commercial speech. App. 13a, n. 5. Thus, an interior display that says "Eat at Joe's" is prohibited while an interior display that says "Vote for Joe" is permitted. Such a restriction is content-based since these displays could be exactly identical save the specific content of the speech and the rule would ban one and allow another. Any justification for not applying *Reed* to content-based restrictions on commercial speech based on some financial benefit the speaker might receive is insufficient to justify such discriminatory treatment. Joe the restauranteur surely would benefit from your patronage, but Joe the politician surely would also benefit from your vote or your donation. And the Seventh Cir-

cuit had no problem striking down a content-based ordinance limiting one's ability to solicit charitable donations for oneself. *Norton*, 806 F.3d at 412. Thus, it cannot be the potential monetary interest of the speaker that justifies distinguishing commercial speech from other types of speech. *See also*, *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (refusing to exempt professional speech from the normal prohibition on content-based restrictions, even though this professional speech may be made by a professional in return for money).

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. *See, e.g., Peterson*, 150 F. Supp. at 932 (allowing an exception to the Village's sign ordinance restrictions on the number and size of signs for one politically-favored business).

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.

C. The inconsistent and unpredictable treatment of commercial speech and the original intent of the Framers are reasons this Court should not rely on *stare decisis* and should overrule *Central Hudson*.

In overturning *Central Hudson*'s application of intermediate scrutiny to commercial speech – even where such restriction is content based – this Court should not defer to the doctrine of *stare decisis*. The doctrine is at its weakest when interpreting the Constitution. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018). It is even weaker when interpreting

the First Amendment: "*stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." *Id.*; *see also Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it.").

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 Detra, *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 commercial speech barred by the Commission's advertising ban is likewise entitled to the protection of the First Amendment. The Court of Appeal's decision upholding this ban should be reversed because the government does not have a valid – much less a substantial – interest in banning that advertising just because it thinks some people find its content "annoying."

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

Chad A. Snyder
RUBRIC LEGAL LLC
111 Third Avenue South
Suite 110
Minneapolis, MN 55401
612.465.0074
chad@rubriclegal.com

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

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Counsel for Petitioners