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 OF *AMICI CURIAE* GOLDWATER INSTITUTE AND CATO INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In *Reed v. Town of Gilbert*, this Court held that content-based restrictions are those that apply to particular speech because of the topic discussed or the idea or message expressed, and it reaffirmed that content-based restrictions on speech demand strict scrutiny. Government restrictions on commercial speech that do not apply to non-commercial speech are content-based. Should courts therefore subject such restrictions to strict scrutiny?

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases and files *amicus* briefs when its or its clients' objectives are directly implicated.

The Institute devotes substantial resources to defending the vital constitutional principle of freedom of speech. The Institute has litigated and won important victories for free speech, including *Arizona Free Enterprise Club's Freedom PAC v. Bennett*, 564 U.S. 721 (2011) (matching-funds provision violated First Amendment); *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012) (First Amendment protects tattoos as free speech); and *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016) (scheme imposing different limits on different classes of donors violated Equal Protection Clause). The Institute has appeared frequently as *amicus curiae* in free-speech cases before this Court and others. *See*, *e.g.*, *Janus. v. AFSCME*, 138 S. Ct. 2448

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received timely notice of *amici*'s intention to file this brief, and have consented. Pursuant to Supreme Court Rule 37.6, counsel for *amici* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *amici*, their members, or counsel, made a monetary contribution to fund its preparation or submission.

(2018); *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

The Cato Institute is a nonpartisan think tank dedicated to individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case interests *amici* because of their commitment to the Constitution's broad protections for the freedom of speech, including commercial speech.

SUMMARY OF ARGUMENT

This Court has long held that commercial speech is entitled to less First Amendment protection than non-commercial speech. While content-based restrictions on speech generally receive strict scrutiny, content-based restrictions on commercial speech receive only the lesser scrutiny prescribed by *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980).

But the Court has never sufficiently explained *why* commercial speech should receive inferior protection. Indeed, there are no good reasons.

There is no merit in the idea that commercial speech warrants inferior protection because the First

Amendment exists primarily or exclusively to protect political speech for the sake of democratic deliberation. The founders understood free speech to be an inherent right of the individual that must be protected against government intrusion *for the individual's sake*. And there is no reason to believe that this individual right ceases, or warrants less protection, when an individual wishes to propose a commercial transaction.

The potential for fraud cannot justify inferior protection for commercial speech because fraudulent speech is not entitled to First Amendment protection in any event. That means courts could easily uphold restrictions targeting fraudulent speech while subjecting restrictions on commercial speech in general to strict scrutiny, just as they uphold restrictions on unprotected non-commercial speech, such as defamation, while subjecting other restrictions to strict scrutiny.

The differing treatment also cannot be justified by two reasons the Court suggested in early commercial-speech cases: commercial speakers' supposed greater ability to verify the accuracy of their claims and commercial speakers' profit motive, which supposedly makes regulation less likely to chill their speech. These premises are doubtful, and even if they weren't, it is not apparent why they would warrant giving commercial speech less First Amendment protection than other speech.

This case illustrates the flaws in the Court's commercial speech doctrine and is an appropriate vehicle

for the Court to reconsider *Central Hudson* and extend full First Amendment protection to commercial speech.

ARGUMENT

I. There is no justification for providing commercial speech less protection than other forms of speech.

This Court has long recognized that the First Amendment protects commercial speech, but it has also maintained that commercial speech is entitled to less protection than other forms of protected speech, such as political speech. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) ("*Virginia Board*"). In general, content-based restrictions on speech are subject to strict scrutiny, under which the government must "prove that [a] restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015). Content-based restrictions on *commercial* speech, however, are uniquely subject to a form of lesser scrutiny that (in summary) only requires a reasonable fit between the regulation and a substantial government interest that it directly advances. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480–81 (1989); *Central Hudson*, 447 U.S. at 562–66.

Jurists and scholars have long observed that the Court has not adequately explained why content-based restrictions on commercial speech should receive less

First Amendment protection than restrictions on other forms of speech. *See*, *e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 628 (1990).[2] Explanations the Court and others have given, discussed below, fail to identify any important difference between commercial speech and other speech that could justify the differing treatment. The Court should therefore grant certiorari and hold that the First Amendment demands strict scrutiny of all content-based restrictions on protected speech as Petitioner urges. *See* Petition at 13–22.

A. Commercial speech is not inherently inferior to political speech under the First Amendment.

One ground commonly cited to justify inferior treatment of commercial speech is that commercial speech is not what the First Amendment exists to protect. Rather, the argument goes, the First Amendment is concerned primarily, if not entirely, with the protection of political speech—specifically, "public discourse" related to "participation in the process of democratic

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[2] This brief puts aside another problem for the current doctrine that scholars have noted: the difficulty of clearly defining "commercial speech" and separating it from non-commercial speech. *See* Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case. W. Res. L. Rev. 1205, 1217–18, 1228–36 (2004); Kozinski & Banner, *supra* at 638–48.

self-government." Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 3 (2000). That view, however, lacks much support.

As an initial matter, this position receives no support from the First Amendment's text, which protects "speech" without limitation. As Kozinski and Banner have observed, that isn't conclusive—there are, after all, other forms of "speech" not mentioned in the First Amendment that it indisputably does not protect—"but it shows that proponents of a commercial speech distinction must base their argument on some other source." Kozinski & Banner, *supra* at 631.

Proponents of the political-speech-only view of the First Amendment have no other source of support. True, in discussing freedom of speech, the founders emphasized political speech and the importance of free speech to self-government. *Id.* at 632. But freedom of commercial speech was hardly unheard of. "[C]ommercial messages played such a central role in public life prior to the founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print . . . an advertisement for voyages to Barbados." *44 Liquormart*, 517 U.S. at 495–96 (opinion of Stevens, J.) (citing Benjamin Franklin, *An Apology for Printers*, June 10, 1731, *in* 2 Writings of Benjamin Franklin 172 (1907)); *see also* Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 Yale J. on Reg. 85, 97–101 (1999) (describing how "development of a free press and of a commercial, advertising-driven press were inextricably linked" in colonial and early America).

More important is the founders' *reason* for protecting freedom of speech: because it is an inherent right of the individual, a critical facet of personal autonomy that must be secured against intrusion for the individual's sake. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J. 246, 264–87 (2017) (explaining the Founders' conception of free speech as an individual right); Troy, *supra* at 93–96 (discussing the Founders' concern for property rights, which encompass speech rights). The expression clauses were designed to protect "freedom of opinion" or, as Jefferson called it, "the rights of thinking, and publishing our thoughts by speaking or writing." Letter to David Humphreys (Mar. 18, 1789), *in* 7 The Writings of Thomas Jefferson 323 (Albert Ellery Bergh, ed. 1907). The Court later called this "freedom of mind." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). This is why even expressions without public political significance—such as a private poem, a Jackson Pollock painting, or an aesthetic judgment—receive the fullest First Amendment protection. *Cf. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) ("[the] painting of Jackson Pollock, music of Arnold Shöenberg, or Jabberwocky verse of Lewis Carroll" are "unquestionably shielded" by the First Amendment). This even includes—rightly—speech that many would consider to be extremely offensive and of extraordinarily low value. *See*, *e.g.*, *Snyder v. Phelps*, 562 U.S. 443 (2011) (anti-gay protest of soldier's funeral); *United States v. Stevens*, 559 U.S. 460 (2010) (videos depicting animal cruelty); *Ashcroft v.*

Free Speech Coalition, 535 U.S. 234 (2002) (virtual child pornography).

There is simply no reason why the "freedom of mind" the founders sought to protect should cease, or receive any less protection, when the subject is commerce, a topic of great importance to most individuals' everyday lives. The Court has recognized that a "particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia Board*, 425 U.S. at 763. Of course there is much more to life than commerce, but a person's day-to-day experience of life is greatly affected by the things he or she *buys*, from the food he or she eats, to the home he or she lives in, to the electronic devices he or she uses. The free communication of information about goods and services in the marketplace is therefore essential to allow individuals to pursue their own conception of a good life—that is, to *pursue happiness*.

Those who maintain that the First Amendment is only or primarily concerned with political speech commonly hold a conception of free speech under which speech is protected, not for the individual's sake, but to facilitate democratic self-governance. *See* Post, *supra* at 3; Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 G. Wash. L. Rev. 429, 434–36 (1971) (summarizing Alexander Meiklejohn's influential view that "the importance of protecting free communication of information and opinion is not to protect the right of the speaker, but rather to guard 'the freedom of those

activities of thought and communication by which we 'govern'' "). As discussed above, that was not the founders' conception of free speech. It also is not the view of this Court, which has held that speech need not have any political message to receive full First Amendment protection, *Hurley*, 515 U.S. at 569, and has repeatedly recognized that the First Amendment protects individual rights *against* government efforts to optimize democratic deliberation. *See*, *e.g., McCutcheon v. FEC*, 572 U.S. 185, 207 (2014) (plurality opinion) (First Amendment protects individuals against government efforts, "no matter how well intentioned," "to fine-tune the electoral process" for the purpose of "level[ing] the playing field, . . . level[ing] electoral opportunities, or . . . equaliz[ing] the financial resources of candidates") (internal marks omitted); *Bennett*, 564 U.S. at 750 ("The First Amendment embodies our choice as a Nation that, when it comes to [campaign] speech, the guiding principle is freedom—the 'unfettered interchange of ideas'—not whatever the State may view as fair.").

B. The potential for fraud or misleading speech cannot justify inferior protection for commercial speech.

One reason to believe the government should have greater leeway to restrict commercial speech is to prevent fraud. But fraud prevention does not require courts to subject *all* restrictions on commercial speech to reduced First Amendment scrutiny. It merely requires courts to exclude *fraudulent* speech from the

First Amendment's protection—just as they already do.

Fraudulent speech, like other criminal or tortious speech is already not entitled to any First Amendment protection, and all this exclusion is hardly controversial. *See Virginia Board*, 425 U.S. at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 49 & n.10 (1961) (noting that the First Amendment does not bar laws against "libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like").

Therefore, the potential for commercial speech to be fraudulent is irrelevant to the level of protection that commercial speech in general should receive. Just as the Court's application of strict scrutiny to content-based restrictions on non-commercial speech has not threatened laws that prohibit certain types of non-commercial speech, such as defamation, so the application of strict scrutiny to content-based restrictions on commercial speech in general would not threaten laws that prohibit fraudulent commercial speech. *See* Lee Mason, *Content Neutrality and Commercial Speech Doctrine After* Reed v. Town of Gilbert, 84 U. Chi. L. Rev. 955, 994–95 (2017) (noting that *Reed* likely does not apply to "traditionally unprotected low-value . . . categories of speech" such as obscenity and defamation and therefore, if extended to commercial speech, would also "not reach . . . factually false or misleading speech"); Martin H. Redish, *Commercial Speech and the Values*

of Free Expression at 10 (Cato Policy Analysis No. 813, June 19, 2017) ("Knowingly false statements about commercial products amount to fraud, and there is no reason to believe that the First Amendment protects such activity. It follows only that false commercial speech receive the same protection as false and defamatory political speech. . . ."); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 Sup. Ct. Rev. 123, 153 (1996) ("False statements of fact about products that will cause people to injure themselves would . . . appear to be readily proscribable without any special consideration of their commercial context.").

True, the First Amendment's general exception for fraud would not necessarily allow the government to restrict commercial speech that is not false but merely misleading. *See* Sullivan*, supra* at 153. But restrictions narrowly targeting misleading speech that would have "catastrophic consequences"—a prominent constitutional scholar suggests this could include misleading speech about a "product [that] might kill or seriously injure you"—might survive strict scrutiny. *See id.* at 155.

In any event, if the courts were to treat commercial speech like other speech, society could address the problem of misleading commercial speech the same way it addresses misleading, and even false, noncommercial speech: with *more speech* to counter the misleading speech rather than government paternalism. *See United States v. Alvarez*, 567 U.S. 709, 727 (2012) (plurality opinion) ("The remedy for speech that

is false is speech that is true. This is the ordinary course in a free society."); *Virginia Board*, 425 U.S. at 770 (noting that the "best means" to ensure that consumers are well informed is not "paternalis[m]" but "open . . . channels of communication" so consumers may evaluate competing claims). There is no apparent reason why the free exchange of ideas cannot be trusted to lead to the truth in commercial matters any less than we trust it to do so in political and other non-commercial matters. As a classic law review article on First Amendment protection of commercial speech put it:

> The marketplace of ideas philosophy so often urged as supporting the first amendment is premised on the notion that good ideas will drive out bad ones, that the common weal is served by permitting interested parties to speak and letting the public choose whom to believe. We don't, for example, silence white supremacists out of fear that the gullible public might be misled by their beliefs; on the contrary, we provide police protection for their parades. Why should we be more paternalistic when the speaker is the egg industry?

Kozinski & Banner, *supra* at 644 (footnote omitted).

There are strong reasons to expect that misleading commercial speech will typically be countered and defeated in the marketplace of ideas. For one, businesses have a strong incentive to inform consumers of misleading statements in their competitors' advertising. Also, consumers have a strong incentive to seek

reliable information on whether advertisers' claims are accurate. Indeed, individuals are less likely to be misled in the commercial context than in the political context because a consumer who relies on false or misleading speech will typically bear the full cost of his or her error. A voter, in contrast, pays no personal price for relying on a politician's false or misleading statements—his or her vote doesn't determine the outcome of an election anyway—which is why economists consider it rational for voters to remain ignorant of political issues. *See* Ilya Somin, Democracy and Political Ignorance 121 (2013). Further, while it may have been somewhat costly or difficult for consumers in earlier times to fact-check advertisers' claims, it is extremely easy for them to do so now by using their phones to consult online reviews of merchants and products before making purchases.

Finally, there is no reason to believe that misleading (but non-fraudulent) commercial speech threatens to cause a type or amount of harm that is so much worse than the potential harm resulting from false or misleading non-commercial speech as to warrant a lower level of scrutiny for *all* commercial speech. Indeed, false or misleading political speech can cause much greater harm than nearly any commercial speech, as it may harm not only the individual who relies on it but also society as a whole. Yet the government rightly may not restrict false political speech at all (apart from malicious defamation) because of the likelihood that this would chill truthful speech. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 268–83 (1964). And

false or misleading statements made in the context of interpersonal relationships can have consequences far more devastating to an individual than would a disappointing commercial transaction. Yet these statements are mostly beyond the government's power to regulate, and properly so. Thus, the potential for harm cannot justify singling out commercial speech for inferior First Amendment protection.

C. Commercial speech's supposed verifiability and durability cannot justify giving commercial speech inferior First Amendment protection.

In early cases on commercial speech, the Court suggested two "commonsense" reasons why commercial speech should receive inferior protection: (1) because commercial speakers are in a position to more easily verify the accuracy of their claims than other speakers and (2) because advertising is driven by the profit motive and therefore is "more durable" than other speech—i.e., less likely to be chilled by regulation. *Virginia Board*, 425 U.S. at 771 n.24; *see also Central Hudson*, 447 U.S. at 564 n.6. Neither rationale withstands scrutiny.

First, it simply is not true that commercial speech is inherently more verifiable than other types of speech. While some commercial speech is objective and subject to verification (e.g., claims about the sugar content of a particular brand of soda), much commercial speech makes claims that are subjective (e.g., claims

about whether a diet soda tastes just as good as the regular version) or otherwise not susceptible of objective verification. *See* Kozinski & Banner, *supra* at 635. Indeed, some commercial speech makes no explicit claims about a product but instead tries to create a favorable impression of a product by associating it with a particular image or lifestyle. *See id.*; Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 Tex. L. Rev. 777, 795–800 (1993). On the other hand, plenty of non-commercial speech that receives full First Amendment protection is verifiable—for example, a politician's claims about his or her own background and actions, and claims about products made in a non-commercial context such as *Consumer Reports* magazine. *See* Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. Ky. L. Rev. 553, 568–69 (1997).

Second, even if commercial speech did tend to be more readily verifiable than non-commercial speech, it would not follow that it should receive less First Amendment protection. If anything, a claim's verifiability might be a reason to provide it *more* protection because its falsity is more susceptible to exposure by competitors or consumer fact-checking. *See* Kozinski & Banner, *supra* at 636–37.

Third, there is no reason to believe that commercial speech is generally more "durable" than other speech simply because of advertisers' profit motive. Commercial speech is not the only speech motivated by

its speaker's pursuit of profit or other personal benefit. For example, politicians seek to improve their electoral fortunes through political speech; businesses pursue profit by lobbying governments; and media outlets pursue profit by publishing non-commercial speech. Also, it is not obvious that pecuniary self-interest is a uniquely strong motive. "History teaches that speech backed by religious feeling," for example, "can persist in extraordinarily hostile climates; sacred texts survive in places where dire consequences attend their possession, consequences that would easily overcome a mere profit motive." *Id.* at 637. Thus, "it is not at all clear that greed is more effective than idealism in motivating people to risk government sanctions." Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 Nw. U. L. Rev 372, 386 (1979).

Finally, commercial speech's supposed verifiability and durability are irrelevant when considering laws that simply prohibit commercial speech. They might arguably be reasons to believe that laws restricting false commercial speech do not chill truthful speech to the same extent as would laws restricting false non-commercial speech. *See Virginia Board*, 425 U.S. at 771 n.24. But, however that may be, these cannot be reasons to apply a lower level of First Amendment scrutiny to restrictions on commercial speech *generally*. *See* Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction*, *supra* at 568.

II. This case is an appropriate vehicle for the Court to extend full First Amendment protection to commercial speech.

This case illustrates the flaws in the Court's commercial speech doctrine and is a good vehicle for the Court to use to extend full First Amendment protection to commercial speech.

Petitioner challenges a content-based restriction on commercial speech: New York City prohibits commercial advertising, but not non-commercial advertising, in ride-share vehicles, but it allows commercial advertising on video screens in taxicabs. Petition 3–4, App. 13a–14a. The City's purported goal in enacting this restriction was to protect passengers "from the offensive sight and sound of advertisements—not their content [sic]—while they are traveling through the city by car." App. 19a. Applying the *Central Hudson* test, the Second Circuit concluded that there is a reasonable fit between the rule and the City's substantial interest in "cultivating 'esthetic values' and preventing 'undue annoyance.'" *Id.*

The City's stated goal has nothing to do with the reasons that have been proposed for affording commercial speech less protection than other speech. It has nothing to do with preventing advertisers from defrauding or misleading consumers, nor does it have anything to do with commercial speech's supposed verifiable, durable nature. Rather, it is simply a matter of the City imposing its own judgment about the value of

a particular type of speech on rideshare providers and passengers.[3]

This case therefore directly raises an important constitutional question: why should the government be allowed to ban commercial speech *just because some people don't like it*, even though government discrimination against unpopular or officially disfavored speech is precisely what the Founders designed the First Amendment to prevent? As Petitioner has explained, the question is an urgent one because the line of commercial-speech cases that led the Second Circuit to uphold this discrimination directly conflicts with this Court's decision in *Reed*, and as a result courts are both confused and insufficiently protecting fundamental First Amendment rights.

[3] A leading scholar has observed that, in the absence of any other justification, the real basis for giving commercial speech inferior protection appears to be "ideologically based distaste for, or rejection of, the value of the commercial promotion of a product or service." Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction*, *supra* at 575. This is "blatantly and fundamentally inconsistent with the basic premises of both a system of free expression and the democratic structure of which it is a central element" and "thus wholly unacceptable." *Id.* at 576.

CONCLUSION

Because it's high time to end commercial speech's second-class First Amendment protection, and also for the reasons stated by Petitioner, the petition should be granted.

Respectfully submitted,

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