Nos. 16-1140, 16-1146, & 16-1153

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES *et al.*,

Petitioners,

v.

XAVIER BECERRA *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

LISA SORONEN
Executive Director
STATE & LOCAL LEGAL CENTER
444 North Capitol Street NW
Washington, DC 20001
(202) 434-4845
lsoronen@sso.org

JOHN M. BAKER
Counsel of Record
KATHERINE M. SWENSON
KARL C. PROCACCINI
HOLLEY C. HORRELL
VIRGINIA R. MCCALMONT
GREENE ESPEL PLLP
222 S. Ninth Street
Suite 2200
Minneapolis, MN 55402
(612) 373-0830
jbaker@greeneespel.com

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Amici are not-for-profit organizations whose missions are to advance the interests of cities, counties, and other local governments. They file this brief to address the dangers presented to their members—and to the most cherished forms of free speech—by positions espoused by Petitioners in this matter. Those positions would greatly expand the circumstances in which laws must satisfy strict scrutiny, and ultimately dilute the meaning of strict scrutiny. The brief is intended to highlight both the differences between Petitioners' approach and this Court's well-established First Amendment jurisprudence, and the consequences if the Court were to adopt Petitioners' approach.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,400 cities. Each city is represented in USCM by its chief elected official, the mayor.

The International City/County Management Association ("ICMA") is a non-profit professional and educational organization consisting of more than 11,000 appointed chief executives and assistants

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[1] Pursuant to Rule 37.6, these amici affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties have consented to this filing.

serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and State supreme and appellate courts.

SUMMARY OF THE ARGUMENT

Petitioners urge this Court to apply strict scrutiny to nearly any law regulating speech that is content-based as defined in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Pet'rs' Br. 28, 30-31. In their view, only laws regulating "rare 'historic and traditional categories' of expression recognized as criminal or dangerous" should be exempt from their proposed rule of law. Pet'rs' Br. 30 (quoting *United States v. Alvarez*, 567 U.S. 709, 717 (2012).[2] And they ask this Court to adopt

[2] Petitioners' brief is not entirely consistent on this point. Despite Petitioners' arguments for a broadly-applicable strict scrutiny requirement for all speech that is not dangerous or criminal in nature, *see* Pet'rs' Br. 30-31, they also refer to "[t]he intermediate scrutiny standard that governs restrictions on commercial speech," *id.* at 41. Amici construe this as urging that this Court adopt the former while acknowledging, perhaps

a *per se* rule that any law that treats different viewpoints differently should be *per se* unconstitutional, whether the regulated speech is commercial or not. *Id.* at 42, 57, 59 n.18. For the sake of local governments across the nation and those who freely express core speech, the Court should firmly reject Petitioners' approach.

Longstanding decisions of this Court apply intermediate scrutiny, not strict scrutiny, to certain categories of laws that would be considered content-based under *Reed*, without requiring regulators to show that the expression is recognized as criminal or dangerous. This Court's refusals to adopt such a broadly-applicable strict-scrutiny requirement reflect the practical danger that, over time, doing so would cause strict scrutiny to become less strict. *Reed* did not involve regulation of any of the established categories of protected expression for which intermediate scrutiny has applied for many decades. It did not mention, let alone overrule, any of this Court's precedents that applied intermediate scrutiny to laws that differentiated by certain subjects or topics. This Court should not construe *Reed* as having silently done so, nor explicitly do so here.

Petitioners also urge the adoption of another sweeping rule of law, under which all regulations of compelled speech would be subject to strict scrutiny. Pet'rs' Br. 22. Such a broad-brushed approach would have unintended consequences for unquestionably important and pervasive legal obligations, including familiar notification requirements of local laws and basic *informed*-consent requirements of state tort law.

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inadvertently, that the Court's current jurisprudence includes the latter.

The application of those state and local requirements should not be overshadowed by the prospect of a federal judge's de novo review of whether the disclosure required also would have furthered a compelling interest and was narrowly tailored toward that end. Instead, the Court should proceed cautiously, not polemically, with due regard for the potential implications of its own words.

ARGUMENT

I. THIS COURT HAS NOT TAKEN A "ONE SIZE FITS ALL" APPROACH GOVERNING ALL FREE SPEECH CASES.

Applying strict scrutiny to content-based laws is an important principle of this Court's modern First Amendment jurisprudence, but not an absolute principle. The Court has recognized that extending strict scrutiny to all content-based regulations would eventually decrease the degree of protection provided by strict scrutiny. Consistent with that anti-dilution principle, this Court has long recognized that certain categories of speech should be protected by intermediate scrutiny, even for regulations that differentiate by topic or subject, without insisting that the speech in question be dangerous or criminal in nature.

A. As this Court has repeatedly recognized, applying strict scrutiny to all protected speech "could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to" core speech.

In five separate rulings, this Court has justified, for special categories of protected speech, standards that fall short of strict scrutiny, based on the danger that

subjecting too much protected expression to strict scrutiny will in the long run make strict scrutiny less than strict.

This reasoning first appeared in *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978), as this Court evaluated the effect of its recent extension of First Amendment protection to commercial speech on state regulation of attorney advertising. Writing for the Court, Justice Powell explained:

> **To require a parity of constitutional protection** for commercial and noncommercial speech alike **could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.** Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Id. (emphasis added). Two years later, when this Court articulated a four-element intermediate-scrutiny test for regulation of commercial speech, Justice Powell's opinion for the Court reiterated *Ohralik*'s anti-dilution rationale. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562 n.5 (1980). The anti-dilution principle was again reiterated the following term, when the Court analyzed the City of San Diego's billboard regulations in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). In a plurality opinion, Justice White reaffirmed that constitutional protection for commercial speech does not

require a parity of constitutional protection, in part so that protections for core speech are preserved and not diluted. *See id.* at 506.

Nearly a decade later, Justice Scalia again reiterated the anti-dilution principle when writing for the Court in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 481 (1989):

> Far from eroding the essential protections of the First Amendment, we think this disposition strengthens them. "To require a parity of constitutional protection for commercial and non-commercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech."

Id. (quoting *Ohralik*, 436 U.S. at 456). The Court has continued to express approval for the anti-dilution principle. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (O'Connor, J.); *cf. Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 484 (1988) (O'Connor, Rehnquist & Scalia, JJ., dissenting) (quoting *Ohralik*'s anti-dilution principle when noting that "the Court has consistently purported to review laws regulating commercial speech under a significantly more deferential standard of review").

Although the anti-dilution principle arises from this Court's commercial-speech decisions, the same reasoning has been applied to justify providing only intermediate scrutiny to other forms of speech, such as obscenity. "[T]o grant obscenity fully protected status is to risk unintended, disagreeable, and potentially far-reaching consequences by inviting the dilution of protections for clearly non-obscene speech." Mark Huppin & Neil Malamuth, *The Obscenity Conundrum,*

Contingent Harms, and Constitutional Consistency, 23 Stan. L. & Pol'y Rev. 31, 59 (2012).

B. For decades, this Court has recognized exceptions where intermediate scrutiny applies to laws even if they single out specific subject matter for differential treatment.

1. Commercial speech

Ever since this Court first held that commercial speech is constitutionally protected, it has applied an intermediate level of scrutiny—not strict scrutiny—to laws regulating commercial speech. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, this Court concluded that a state cannot "completely suppress the dissemination of concededly truthful information about entirely lawful activity." 425 U.S. 748, 773 (1976). Yet it did not thereby elevate truthful commercial speech to the same level of protection given to types of core speech that the First Amendment had protected for decades. *See id.* at 771. As this Court explained two years later in *Ohralik*, in *Virginia Pharmacy* it had been "careful not to hold that [commercial speech] is wholly undifferentiable from other forms of speech," 436 U.S. at 455 (quotations omitted), and confirmed that it would continue to differentiate "between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech," *id.* at 455–56.

Two years after *Ohralik*, this Court in *Central Hudson* created a four-part test to analyze regulations of commercial speech. The *Central Hudson* test, with its references to "substantial" interests that are

"directly advance[d]" by the regulation, embodies intermediate, not strict, scrutiny:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

The *Central Hudson* Court explained, consistent with the anti-dilution rationale articulated in *Ohralik*, why governments should receive greater leeway for content-based regulation of commercial speech:

> In most other contexts, the First Amendment prohibits regulation based on the content of the message. Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation.

Id. at 564 n.6 (quotations and citations omitted).

In *Metromedia*, this Court again declined to grant equivalent protection to commercial and noncommercial speech. There, seven justices explicitly concluded that cities could prohibit billboards, and a majority indicated that cities could do so without also banning on-premise commercial signs. *See Metromedia*, 453 U.S. at 512 (White, J., for plurality) ("Thus, offsite commercial billboards may be prohibited while onsite commercial billboards [signs] are permitted."); *id.* at 553 (Stevens, J., dissenting in part) (stating that "a wholly impartial total ban on billboards would be permissible"); *id.* at 560–61 (Burger, J., dissenting) ("[A] legislative body reasonably can conclude that every large billboard adversely affects the environment, for each destroys a unique perspective on the landscape and adds to the visual pollution of the city."); *id.* at 570 (Rehnquist, J., dissenting) ("In my view, aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community . . . .").

Although this Court has held that cities cannot arbitrarily prohibit commercial speech yet permit noncommercial speech where the effects of both types are identical, *see City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425 (1993), it has never overruled the part of *Metromedia* that rejected the notion that a distinction between on-premise and off-premise commercial signs is subject to strict scrutiny. Nor did the majority in *Discovery Network* apply strict scrutiny to the Cincinnati ordinance after concluding that it was content-based—this Court applied the *Central Hudson* test because commercial speech was at issue. 507 U.S. at 416 (concluding that it was proper for the district court and court of appeals to apply *Central Hudson*).

In the following decades, this Court continued to apply the *Central Hudson* test to regulations affecting commercial speech. *See, e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367–68 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553–55 (2001); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507–08 (1996); *Florida Bar*, 515 U.S. at 623–24 (1995); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481–82 (1995).

In *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011), this Court struck down a Vermont law that restricted the sale, disclosure and use of pharmacy records that reveal the prescribing practices of individual doctors. However, in reaching that conclusion, the Court reiterated that "commercial speech can be subject to greater governmental regulation than noncommercial speech," *id.* at 579 (quoting *Discovery Network*, 507 U.S. at 426), and plainly did not apply strict scrutiny, despite its recognition that the restrictions were both content- and speaker-based, *id.* at 563–64.

Notably, after *Sorrell* this Court has reiterated that *Central Hudson* is the appropriate standard to apply to regulations of commercial speech. In *Matal v. Tam*, Justice Alito, writing for a plurality in Part IV, analyzed "whether trademarks are commercial speech and are thus subject **to the relaxed scrutiny outlined in *Central Hudson***." 137 S. Ct. 1744, 1763 (2017) (emphasis added).

2. Sexually oriented businesses

For more than forty years, this Court has also applied an intermediate level of scrutiny to laws regulating sexually oriented businesses. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 52, 63 (1976), the Court held that municipal zoning ordinances that

"differentiate[d] between motion picture theaters which exhibit sexually explicit 'adult' movies and those which do not" did not violate the First Amendment. The Court focused on the government's interest in regulating the "secondary effect[s]" of such businesses, giving rise to the so-called "secondary effects" doctrine. *See id.* at 71 n.34. Similarly, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 43, 54–55 (1986), the Court held that a zoning ordinance that "prohibit[ed] adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school" did not violate the First Amendment. Applying intermediate scrutiny, the Court concluded that such an ordinance would pass constitutional muster where it is "designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Id.* at 50.

In *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 429 (2002), the Court again used the intermediate scrutiny framework to assess a municipal ordinance that prohibited more than one "adult entertainment business" from occupying the same building. The Court concluded that the city had produced evidence that "its ordinance is designed to serve a substantial government interest," *id.* at 441, and that the district court's grant of summary judgment to the plaintiff businesses was therefore improper, *id.* at 443.

The Court has applied intermediate scrutiny to regulations like those at issue in *Young*, *Renton*, and *Alameda Books* even where those ordinances are not, strictly speaking, content neutral. *See Alameda Books*, 535 U.S. at 448 (Kennedy, J., concurring in the judgment) (observing that categorizing such statutes "content neutral" is "something of a fiction"). As

Justice Kennedy has observed, "whether a statute is content neutral or content based is something that can be determined on the face of it," and by singling out sexually oriented businesses for differential treatment, the regulations at issue in *Young*, *Renton*, and *Alameda Books* plainly contained content-based restrictions. *See id.* Nonetheless, this Court and lower courts have routinely applied intermediate scrutiny to regulations of sexually oriented businesses as an exception to the general rule that content-based restrictions on speech are subject to strict scrutiny. *See id.* This exception is warranted because regulations of sexually oriented businesses "have a prima facie legitimate purpose" that is itself unrelated to the content of the speech being regulated. *Id.* at 449.

Thus, when this Court granted certiorari to review *Reed v. Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013), there were firmly-established categories of speech protected by the First Amendment as to which content-discrimination—however defined—triggered only intermediate scrutiny, as a way of preventing the dilution of protection for "core" forms of speech. In none of these cases was the government required, as a condition of avoiding strict scrutiny, to show that the speech was also dangerous or criminal in nature.

II. THIS COURT SHOULD FIRMLY REJECT THE NOTION THAT *REED V. TOWN OF GILBERT* SILENTLY OVERRULED ALL THIS COURT'S PRECEDENTS THAT APPLIED INTERMEDIATE SCRUTINY TO LAWS THAT WOULD BE CONTENT-BASED AS *REED* DEFINED IT.

A decision about differential treatment of a church's signs from election signs did not require or result in the near-extinction of intermediate scrutiny for certain

speech that, while protected, is not within the "core" of First Amendment protection. While this Court sometimes overrules one or more of its longstanding precedents, it does not do so in a case where none of them applied, and without even mentioning them.

A. *Reed* involved noncommercial, non-sexually-oriented speech.

In *Reed*, this Court held that a regulation of temporary speech in Gilbert, Arizona, which distinguished between ideological, political, and special-event signage, was content-based and thus unconstitutional. 135 S. Ct. at 2232. *Reed* did not involve commercial speech, sexually-oriented businesses, or any other category of speech for which this Court's modern decisions have accorded intermediate protection.

In essence, Petitioners and some (but not all) of their amici try to make something of the *Reed* majority's failure expressly to acknowledge established exceptions to the U.S. Supreme Court's general rules about content neutrality (in fields where content discrimination does not trigger strict scrutiny).[3] True, in *Reed*, the Court's opinion did not pause to acknowledge the continued vitality of its precedents involving categories of speech (not involved in the case) that receive intermediate protection. But this Court did not thereby abolish any of those exceptions.

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[3] For example, relying on the supposedly "unequivocal language" in *Reed*, the amicus brief of Human Coalition asserts that *Reed* "mandates that courts apply strict scrutiny when examining any content-based speech laws." Human Coalition Br. 23, 27. However, the amicus brief of Massachusetts Citizens for Life and others acknowledges that *Reed* does not apply where the regulated speech is commercial. Massachusetts Citizens for Life et al. Br. 2.

Notably, counsel for the Petitioners in *Reed* (who are also lead counsel for the petitioners in this case) did not seek to overrule any of this Court's prior rulings. In fact, during the *Reed* oral argument, in response to a question from Justice Alito about the relevance of commercial speech, Rev. Reed's attorney specifically distinguished the standard that he proposed from the rule that applies to commercial speech, acknowledging that "one of the important things" is that this Court's jurisprudence states that regulations on commercial speech "can be treated differently":

> JUSTICE ALITO: What if it's commercial and it relates to a one-time event. For example, for a yard sale.
>
> MR. CORTMAN: Right.
>
> JUSTICE ALITO: **If the State and the city allow election-related signs to be put up in the right-of-way, then anybody who has a yard sale has an equal right?**
>
> MR. CORTMAN: Well, I think—**I think commercial speech, under this Court's jurisprudence, can be treated differently, and that's one of the important things.** The category here is narrow because government speech—government can put up whatever signs that it would like. It doesn't trigger any problem under the First Amendment.
>
> We hear a lot in the other briefs about warning signs and other types of signs. The government is free to put up all the signs that it would like without triggering this problem.

Commercial speech is also in a different category, according to this Court.

Transcript of Oral Argument at 8–9, *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (January 12, 2015) (No. 13-502) (emphasis added).[4]

B. *Reed* did not expressly overrule any prior precedent, so the *Agostini* principle requires courts to continue to follow this Court's prior precedents in settings where they directly control.

Petitioners' interpretation of *Reed* is further undermined because the decision did not purport to overrule any prior precedent of this Court, including those which (unlike *Reed*) directly addressed and decided the constitutionality under the First Amendment of regulating speech that had not been proven to be dangerous or criminal in nature. The *Reed* decision did not cite, let alone diminish, any of this Court's precedents granting intermediate protection to commercial speech (such as *Central Hudson*, *Metromedia*, or *Ohralik*), or to speech involving adult businesses (such as *Young*, *Renton*, or *Alameda Books*), or to disclosure requirements (such as *Zauderer v. Office of Disciplinary Counsel of Supreme Ct. of Ohio*, 471 U.S. 626 (1985)), or to professional speech (such as *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992)).

In holding out *Reed* as implicitly overruling one or more of these exceptions to the strict scrutiny requirement, Petitioners overlook this Court's principle that

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[4] Transcript *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/13-502_2034.pdf

it does not overrule its own decisions by mere implication: "[I]f a precedent of [the] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions," lower courts "should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citation omitted).

The *Agostini* principle against overruling decisions by implication should apply even more forcefully to interpretations of *Reed*, where speech entitled to only intermediate protection was not before this Court, and even the prevailing party readily acknowledged to the Court at oral argument that the one category of such speech questioned about—commercial speech—should continue to be treated differently.

C. By "confronting" the question in *Matal v. Tam* of "whether trademarks are commercial speech and are thus subject to the relaxed scrutiny outlined in" *Central Hudson*, this Court demonstrated that *Reed* had not impliedly overruled *Central Hudson*.

Matal v. Tam presented an opportunity for this Court to demonstrate whether the intermediate scrutiny test of *Central Hudson* survived *Reed*. *Matal* involved "the content of trademarks that are registered by the PTO," 137 S. Ct. at 1758, and a "dispute between the parties on the question whether trademarks are commercial speech," *id.* at 1763. Recognizing that the Court "must confront" that dispute, the plurality opinion reaffirmed that commercial speech is "subject to the relaxed scrutiny outlined in" *Central Hudson*, *id.,* then concluded that the statute "cannot withstand even *Central Hudson* review," *id.* at 1764.

No other justice joined Justice Thomas's opinion in *Matal* that reiterated his view that "when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'" *Id.* at 1769 (Thomas, J., concurring in part and concurring in the judgment) (quoting *Lorillard Tobacco Co.*, 533 U.S. at 572 (Thomas, J., concurring in part and concurring in judgment)).

III. IF THIS COURT FINDS STRICT SCRUTINY APPLICABLE IN THIS CASE, IT SHOULD REFRAIN FROM ANY PRONOUNCEMENTS THAT HOLD OR SUGGEST THAT STRICT SCRUTINY IS A UNIVERSAL TEST FOR LAWS REGULATING PROTECTED SPEECH.

Petitioners are not simply trying to win their case, but seek to win their case through blanket declarations that would reduce much of First Amendment law to two or three often-unattainable standards. A broad range of justices with differing perspectives have warned of the dangers of writing too broadly when deciding First Amendment cases. *See, e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) ("We recognize that the D.C. Circuit spoke too broadly when it declared copyrights 'categorically immune from challenges under the First Amendment.'") (Ginsburg, J.); *Roth v. United States*, 354 U.S. 476, 496–500 (1957) (Harlan, J., concurring in part and dissenting in part) (criticizing the majority opinion because, in upholding convictions in consolidated obscenity cases, "the opinion paints with such a broad brush," and even though "in the nature of things every such suppression raises an individual constitutional problem," the "Court merely

assimilates the various tests into one indiscriminate potpourri"); *id.* at 494 (Warren, C.J., concurring in the result) (criticizing the majority's "broad language" in a case where "we are operating in a field of expression").

Here, there is a further reason for the Court to choose its words with special care. Since *Reed*, courts around the country have correctly continued to rely on the recognized exceptions noted above. Changing course now would upend not only existing Supreme Court precedent but the holdings of numerous lower courts around the country. It would also require local governments around the country to rewrite many of their ordinances that have relied on decades-old Supreme Court precedent.

A. Commercial speech

Intermediate and district federal courts have overwhelmingly recognized that *Reed* did not supplant the more deferential standards of review that have traditionally applied to commercial speech regulations. *See, e.g.*, *Dana's R.R. Supply v. Attorney Gen., Florida*, 807 F.3d 1235, 1246 (11th Cir. 2015) (acknowledging *Reed* but stating that "[c]ontent-based restrictions on certain categories of speech such as commercial and professional speech, though still protected under the First Amendment, are given more leeway" and are subject to intermediate scrutiny); *Boelter v. Hearst Commc'ns, Inc.*, 269 F. Supp. 3d 172, 196 & n.11 (S.D.N.Y. 2017) (reiterating and reapplying the district court's prior determination, *see* 192 F. Supp. 3d 427, 447 n.10 (S.D.N.Y. 2016), that "[a]bsent controlling precedent to the contrary, the [c]ourt continues to apply intermediate, rather than strict, scrutiny to content-based regulations targeting commercial speech"); *Vugo, Inc. v. City of Chicago*, 273 F. Supp. 3d 910, 915–16 (N.D. Ill. 2017) (holding that an ordinance

that "is a broad ban on commercial advertising that applies in a narrow medium: transportation network vehicles" should be analyzed under "the *Central Hudson* framework"); *RCP Publ'ns Inc. v. City of Chicago*, 204 F. Supp. 3d 1012, 1018 (N.D. Ill. 2016) (rejecting the argument that *Reed* "expressly modif[ied] or overrule[d]" *Central Hudson* and concluding that "*Central Hudson* and its progeny continue to control the propriety of restrictions on commercial speech"); *Geft Outdoor LLC v. Consol. City of Indianapolis*, 187 F. Supp. 3d 1002, 1014–16 (S.D. Ind. 2016) (first applying *Reed* to a later-amended ordinance that exempted noncommercial opinion signs from permit requirements that applied to commercial signs, and finding that the exemption violated the First Amendment, but in analyzing the amended ordinance, which applied an on-premise/off-premise distinction only to commercial speech, citing the *Agostini* principle to hold that the amended ordinance was "subject to intermediate rather than strict scrutiny" under *Metromedia*); *Mass. Ass'n of Private Career Sch. v. Healey*, 159 F. Supp. 3d 173, 192 (D. Mass. 2016) (applying intermediate scrutiny to regulation of commercial speech pursuant to *Central Hudson* and stating that "almost all" of the courts to have addressed the issue have "concluded that *Reed* does not disturb the Court's longstanding framework for commercial speech under *Central Hudson*"); *Peterson v. Village of Downers Grove*, 150 F. Supp. 3d 910, 928 (N.D. Ill. 2015) ("What is important for this case [involving regulation of a business's painted wall signs] is that, absent an express overruling of *Central Hudson*, which most certainly did not happen in *Reed*, lower courts must consider *Central Hudson* and its progeny—which are directly applicable to the

commercial-based distinctions at issue in this case—binding.").[5]

State courts have also taken this approach. *See Lamar Cent. Outdoor, LLC v. City of Los Angeles*, 199 Cal. Rptr. 3d 620, 625 (Ct. App. 2016) (stating, in rejecting a facial challenge to the city's stricter regulation of billboards over on-premise signage, that "*Reed* is of no help to plaintiff either" because "[l]ike *Sorrell*, it does not purport to eliminate the distinction between commercial and noncommercial speech," "does not involve commercial speech," and "does not even mention *Central Hudson*," nor cite, overrule or disapprove of *Metromedia*); *Expressview Dev., Inc. v. Town of Gates Zoning Bd. of Appeals*, 147 A.D.3d 1427, 1431 (N.Y. App. Div. 2017) (stating that *Reed* "did not overturn the prevailing intermediate scrutiny test for

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[5] *See also, e.g.*, *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 732 (9th Cir. 2017) (rejecting the argument that *Reed* "undermines both *Central Hudson* intermediate scrutiny and *Zauderer* rational basis review, and that all content-based restrictions (or compelled disclosures) of commercial speech are now subject to strict scrutiny"); *Airbnb, Inc. v. City of San Francisco*, 217 F. Supp. 3d 1066, 1078 (N.D. Cal. 2016) (stating that even after *Reed* and *Sorrell*, "commercial speech, even if content-based, need only withstand intermediate scrutiny under *Central Hudson*" (citing *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016)); *CTIA-The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1061 (N.D. Cal. 2015) (finding that "nothing in [the Supreme Court's] recent opinions, including *Reed*, even comes close to suggesting that" the "well-established distinction" between commercial and noncommercial speech "is no longer valid"); *Citizens for Free Speech, LLC v. County of Alameda*, 114 F. Supp. 3d 952, 969 (N.D. Cal. 2015) (explaining that "*Reed* was specifically concerned with a sign code's application of different restrictions . . . to permitted signs based on their content" and instead applying *Central Hudson* to regulation of billboards).

restrictions on commercial speech set forth in *Central Hudson*"); *Auspro Enters., LP v. Tex. Dep't of Transp.*, 506 S.W.3d 688, 703 (Tex. App. 2016) (stating that *Reed* "is necessarily limited to government regulation of noncommercial speech").

B. Sexually oriented businesses

Many courts have likewise concluded that *Reed* did not implicitly overrule 40 years of this Court's precedent related to regulations of sexually oriented businesses. In *BBL, Inc. v. City of Angola*, 809 F.3d 317, 326 n.1 (7th Cir. 2015), the court of appeals noted that Reed clarified the concept of "content based laws," but concluded: "We don't think *Reed* upends established doctrine for evaluating regulation of businesses that offer sexually explicit entertainment, a category the Court has said occupies the outer fringes of First Amendment protection." Similarly, in *Flanigan's Enters., Inc. of Georgia v. City of Sandy Springs*, 703 F. App'x 929, 935 (11th Cir. 2017), the court concluded that because *Reed* had not addressed the secondary effects doctrine—and the resulting application of intermediate scrutiny on regulation of sexually oriented businesses—it would continue to follow the rationale set forth in *Young*, *Renton*, and *Alameda Books*. Numerous district courts deciding cases after *Reed* have also reached the same conclusion. *See, e.g.*, *"Q"-Lungian Enters., Inc. v. Town of Windsor Locks*, 272 F. Supp. 3d 289, 29 (D. Conn. 2017); *Cinema Pub, LLC v. Petilos*, No. 2:16-CV-00318-DN, 2017 WL 3836049, at *10 (D. Utah Aug. 31, 2017); *Phantom Ventures LLC v. DePriest*, 240 F. Supp. 3d 239, 252 (D. Mass. 2017).

IV. THIS COURT SHOULD NOT SUBJECT DISCLOSURE REQUIREMENTS TO STRICT SCRUTINY.

This case directly challenges the constitutionality of a disclosure requirement. Many laws that impose disclosure requirements are aimed at commercial speech, because they require the inclusion of disclosures when companies propose a commercial transaction. *See Virginia Pharmacy*, 425 U.S. at 771 n.24. For the reasons set forth above, those kinds of disclosure requirements should not be subject to strict scrutiny in any scenario. *See, e.g., Zauderer*, 471 U.S. at 637–38; *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (referring to *Zauderer* as providing for "less exacting scrutiny").

Local governments adopt (or are involved in enforcing) many important disclosure requirements that would be considered content-based under Petitioners' interpretation of *Reed*, and that do not likely fall within the scope of this Court's definition of commercial speech. Agreeing with Petitioners that all compelled speech must be subject to strict scrutiny would create a wake large enough to swamp these types of important and familiar laws:

- Ordinances and statutes that require restaurants to post signs explaining how to provide first aid to choking patrons. *See, e.g.*, Ky. Rev. Stat. Ann. § 217.285 (2017); N.H. Rev. Stat. Ann. § 155:43 (2018); Cincinnati, Ohio, Code of Ordinances § 601-33 (2018); *see also Parra v. Tarasco, Inc.*, 595 N.E.2d 1186, 1188-89 (Ill. Ct. App. 1992) (collecting states with similar statutes).

- Ordinances and laws in most states that require landlords to post or otherwise disclose the name and address of the managing agent or owner of residential rental buildings. *See, e.g.*, Ind. Code Ann. § 32-31-3-18(a) (2017); New York, N.Y., Health Code § 131.11 (2018).
- Laws that require restaurants to provide written notice to their patrons to use clean tableware for second portions at salad bars and buffets. *See, e.g.*, 25 Tex. Admin. Code Ann. § 228.68(f)(2) (2018).
- Ordinances requiring applicants for land-use approvals to post signs on the site that identify the approval sought and persons to contact to participate in the approval process. *See, e.g.*, Edina, Minn., Code of Ordinances § 36-194(a) (2018).
- Ordinances and laws that require businesses selling food to post signs directing employees to wash their hands. *See, e.g.*, New York, N.Y., Health Code § 81.21(c) (2018).
- Ordinances (including those based on a broadly-adopted standard building code) that require a sign of a particular size and typeface identifying the street address, so that first responders can find it without difficulty. *See, e.g.*, Margate, Fla., Code of Ordinances art. XXXIX, § 39.4(C) (2018); *see also* Int'l Prop. Maint. Code § 304.3 (2015) (adopted by reference in cities such as Rockford, Ill., Code of Ordinances § 105-197 (2017), and Allendale Township, Mich., Ordinance No. 2017-6).
- Ordinances and statutes that require holders of swimming pool permits to post safety information,

> such as state-imposed rules for water slides and rules against underwater breath-holding contests. *See, e.g.*, Nev. Admin. Code § 444.1974 (2015) (requiring disclosure of fourteen water-slide use rules); New York, N.Y., Rules tit. 24, § 1-02 (2018) (requiring signage warning swimmers of the dangers of breath-holding contests).

In the medical setting as well, the fundamental requirement that physicians obtain informed consent from patients goes beyond commercial speech, because the duty does not cease once the financial arrangements are agreed upon. "The cases demonstrate that the physician is under an obligation to communicate specific information to the patient when the exigencies of reasonable care call for it. Due care may require a physician perceiving symptoms of bodily abnormality to alert the patient to the condition." *Canterbury v. Spence*, 464 F.2d 772, 781 (D.C. Cir. 1972) (footnotes omitted).

As a practical matter, informed-consent requirements are *necessarily* "content-based" as Petitioners would interpret *Reed*, because they do not simply require physicians to speak with patients on a topic of the physician's own choice, but require that they speak with patients about a particular subject—most often the risks and consequences of a potential medical procedure, and of foregoing the procedure.[6] "Just as

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[6] Contrary to the suggestion in the amicus brief of Texas and other states, under tort law informed consent is not simply "required specifically so that the patient can assess the risks and consequences of a procedure *that a doctor is seeking to perform*." State of Texas et al. Br. 14 (emphasis added). The doctrine can also require a healthcare provider to disclose the likely consequences of deciding *not to undergo* a procedure such as a vaccination, and alternative methods of protection. *See, e.g.*,

plainly, due care normally demands that the physician warn the patient of any risks to his well-being which contemplated therapy may involve." *Id.* As this Court held in *Casey*: "Our prior decisions establish that *as with any medical procedure*, the State may require a woman to give her written *informed* consent to an abortion." 505 U.S. at 881 (emphasis added).

Although requiring such disclosures often advances a fundamental interest in personal autonomy, *Canterbury*, 464 F.2d at 781, the Court should not interpret that as a reflection that informed-consent requirements are constitutional only because they would satisfy strict scrutiny. Strict scrutiny under the First Amendment of the application of informed-consent requirements would subject countless individualized communications to de novo judicial review. First Amendment strict scrutiny of such disclosure requirements would also add a substantial federal question into many ordinary malpractice cases, perhaps making a petition for certiorari the new final

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Unthank v. United States, 732 F.2d 1517, 1521 (10th Cir. 1984) ("We believe that encompassed in the duty to inform a patient of all material information, substantial and significant risks is the duty to inform not only of risks that might occur from the particular treatment in question, *but also, any alternative treatments and the risk of no treatment at all.*" (emphasis added)); *Matthies v. Mastromonaco*, 733 A.2d 456, 461 (N.J. 1999) ("Physicians thus remain obligated to inform patients of *medically reasonable treatment alternatives* and their attendant probable risks and outcomes. Otherwise, the patient, in selecting one alternative rather than another, cannot make a decision that is informed." (emphasis added)). Upholding laws that require disclosures before a *recommended* procedure is undertaken, but mandating First Amendment strict scrutiny of a disclosure requirement because it applies to those (like Petitioners) who recommend *against* that procedure, would render important and established state tort law doctrines presumptively unconstitutional.

phase for such matters. "[T]he Court has admonished that federal courts are not the repository for regulation of the practice of medicine." *Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 579 (5th Cir. 2012) (citing *Gonzales v. Carhart*, 550 U.S. 124, 157–58 (2007)).

In light of these real-world examples, and the inherently content-based character of disclosure requirements, the Court should exempt disclosure requirements from the general rule that content-based requirements are presumptively unconstitutional.

CONCLUSION

The Court should affirm the judgment below, or in any case be cautious not to imply that *Reed* overruled longstanding exceptions to the application of strict scrutiny.

Respectfully submitted,

LISA SORONEN
Executive Director
STATE & LOCAL
LEGAL CENTER
444 North Capitol Street NW
Washington, DC 20001
(202) 434-4845
lsoronen@sso.org

JOHN M. BAKER
Counsel of Record
KATHERINE M. SWENSON
KARL C. PROCACCINI
HOLLEY C. HORRELL
VIRGINIA R. MCCALMONT
GREENE ESPEL PLLP
222 S. Ninth Street
Suite 2200
Minneapolis, MN 55402
(612) 373-0830
jbaker@greeneespel.com

Counsel for Amici Curiae

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