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July 29, 2019

Second Circuit Performs Unwelcome Throwback in Commercial Speech Doctrine

by Megan Brown and Boyd Garriott

Recently, the Second Circuit upheld a New York City ban on advertising in "for-hire vehicles"—com panies like Uber and Lyft—against a First Amendment challenge in *Vugo v. New York*. In doing so, the court applied an outdated, severely watered-down version of *Central Hudson's* intermediate scrutiny and opened the door to restrictive government speech regulations moving forward.

In *Vugo*, New York City banned all advertisements in for-hire vehicles. At the same time, New York City *also* banned advertisements in taxicabs with one exception: taxicabs are allowed to run advertisements on "Taxi TV." Taxi TV is a screen that (1) displays passenger information, such as their route and fare as it accumulates; (2) allows payment via credit cards; and (3) runs ads to help taxi owners cover the costs of installing the Taxi TV system.

Vugo—a technology company—runs a business wherein it sells Internet-connected tablets to for-hire vehicle drivers, who then mount the tablet on the front seat's headrest and have it run ads. Advertisers pay Vugo, which splits the proceeds with the for-hire vehicle drivers. Passengers are unable to turn off the ads, but they would be able to use on-screen controls to reduce the volume to a "near-mute" level. Because Vugo's business is illegal under New York's advertising ban, it brought a First Amendment challenge.

Vugo prevailed in the U.S. District Court for the Southern District of New York, and the City appealed.

Vugo argued that New York City's law was unconstitutional under *Central Hudson v. Public Service Commission of New York*.[1] The seminal Supreme Court case holds that government restrictions on commercial speech may be upheld only where:

1. the speech at issue is lawful and non-misleading;
2. the government asserts a "substantial" interest;
3. the speech restriction "directly advances the governmental interest asserted"; and
4. the speech restriction is no "more extensive than is necessary to serve that interest."

[1] The court rejected an argument that *Sorrell v. IMS Health Inc.* rendered restrictions on commercial advertising "presumptively invalid," instead finding that *Sorrell* had no impact on *Central Hudson's* intermediate scrutiny test.

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The Second Circuit rejected arguments concerning the second through fourth prongs. On the second prong, it held that the government has a substantial interest in "protect[ing] passengers from the annoying sight and sound of in-ride advertisements." On the third prong, it rejected Vugo's argument that the ban was constitutionally underinclusive because it excepted ads for Taxi TV, thereby undermining its purported rationale. The court found that the exception was rationally related to funding the pro-consumer services of Taxi TV and thus permissible under the third prong. Finally, on the fourth prong, the court found that the ban on advertising was no "more extensive than is necessary" to serve the government's interest because the city's decision as to how in-vehicle ads should be regulated was "reasonable."

While there are a number of problems with this decision, the fourth prong analysis is the most troubling. The court, in no uncertain terms, held that it "must defer to the City's judgment" when it comes to restricting commercial speech. To get that proposition, it relied heavily on three Supreme Court cases: *Metromedia, Inc. v. City of San Diego* (1981); *Board of Trustees of State University of New York v. Fox* (1989); and *Members of the City Council of Los Angeles v. Taxpayers for Vincent* (1984). In other words, the most recent Supreme Court case the Second Circuit relied upon was decided before the fall of the Berlin Wall.

While these cases do provide *some* support for the Second Circuit's reasoning,[2] the Supreme Court explicitly rejected deferring to the government under *Central Hudson* after those cases were decided, in *44 Liquormart, Inc. v. Rhode Island*:

> [*Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*] clearly erred in concluding that it was "up to the legislature" to choose suppression over a less speech-restrictive policy. The *Posadas* majority's conclusion on that point cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available. [¶] *[W]e decline to give force to [Posadas'] highly deferential approach.*

And, post-*44 Liquormart*, the Court has continued to apply the stricter non-deferential approach to *Central Hudson's* fourth prong. Most recently, in *Matal v. Tam*, the Supreme Court found that a speech restriction was not "narrowly drawn" because it went "much further than necessary to serve the interest asserted."

Applying the correct test, it is clear that New York's complete ban on all advertising in private vehicles cannot stand. There are clear and obvious alternatives to a complete ban that make a complete ban more intrusive than necessary.

As Vugo explained in its brief, New York could just mandate the inclusion of an off-switch for devices that run video ads. The Second Circuit rejected this argument, finding that Taxi TV had this feature, but consumers complained about "frustration with malfunctioning on-off switches and mute buttons—and with needing to navigate the on-screen interface in the first place." This argument is easily answered: the city could just mandate an *external* off button (no need to navigate through any screens) and impose fines on drivers whose device's on-off switches are not function-

[2] While these decisions refer to "reasonable fit" and disclaim that *Central Hudson* requires the "least restrictive means," they still note that the government's means must be "narrowly tailored to achieve the desired objective." (*Board of Trustees of State University of New York v. Fox*). Narrow tailoring may not require the least restrictive means, but it does not imply deference.

ing. Or—even more to the point—the city could just require all advertisements be muted and mandate that in-vehicle advertising devices contain an external flap that could be pulled over the screen. This rule would eliminate the prospects of mechanical failure and on-screen navigation completely. But the Second Circuit did not entertain these possibilities, finding that a complete advertising ban was "reasonable" and thus constitutional.

Going forward, this doctrine of putting the fox in charge of the henhouse—that is, giving the government deference on restricting speech that it does not like—could have unintended consequences. If a total ban on speech is reasonable when there are numerous obvious alternatives, it seems likely that a lot more speech will be banned. The Supreme Court should intervene to ensure that *Central Hudson* does not become a rational basis rubber stamp for government speech restrictions.

