18-807-cv

IN THE
United States Court of Appeals
for the Second Circuit

VUGO, INC.,

Plaintiff-Appellee,

v.

CITY OF NEW YORK,

Defendant-Appellant.

On Appeal from the United States District Court
For the Southern District of New York

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR REHEARING OR REHEARING *EN BANC*

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1977, Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. WLF is well-known in First Amendment circles as the nonprofit that fought the Food and Drug Administration (FDA) and won—forcing the agency to stop violating the commercial free-speech rights of drug companies and their employees. *See Washington Legal Foundation v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998).

More recently, WLF briefed and argued all First Amendment issues in *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012), which overturned on First Amendment grounds a pharmaceutical sales representative's conviction for "off-label" promotion. WLF has also published many articles on commercial-speech rights, including one by outside experts highly critical of the panel's decision here. *See, e.g.*, Megan L. Brown & Boyd Garriott, *Second Circuit Performs Unwelcome*

[1] No party's counsel authored any part of this brief. No one, apart from Washington Legal Foundation and its counsel, contributed money intended to fund the brief's preparation or submission.

Throwback in Commercial Speech Doctrine, WLF Legal Pulse (July 29, 2019), <https://tinyurl.com/y3yxo5rt>.

INTRODUCTION & SUMMARY OF ARGUMENT

Manifesting its growing discomfort with the test it announced in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980), the Supreme Court's landmark decision in *Sorrell v. IMS Health*, 564 U.S. 552 (2011), revised the Court's approach to commercial speech regulation in a way far less deferential to government regulators. To be sure, where commercial speech is "likely to deceive the public," or is uttered to foment "illegal activity," the "government may ban [such] forms of communication." *Cent. Hudson*, 447 U.S. at 563-64. But when, as here, the regulation of truthful, non-misleading commercial speech is both speaker- and content-based, "heightened" judicial scrutiny applies. *Sorrell*, 564 U.S. at 571.

As the panel's opinion here confirms, Vugo has argued all along "that content-based restrictions on truthful commercial advertising are 'presumptively invalid' after *Sorrell*" so that "something more akin to strict scrutiny applies." Slip Op. 16. Though it devotes five pages to

addressing the proper level of scrutiny after *Sorrell*, the panel ultimately concludes that because "*Sorrell* leaves the *Central Hudson* regime in place," only *Central Hudson* applies. *Id.* at 16. But that analysis not only contravenes a plain reading of *Sorrell*, it renders that landmark decision incoherent.

In *Sorrell* the Supreme Court had no need to apply the requisite heightened scrutiny because *Central Hudson* provided an independent basis for overturning the challenged law. In stark contrast to *Sorrell*, the panel here concluded that the City's advertising ban survived *Central Hudson* but then abandoned any further constitutional inquiry by reversing the district court without applying heightened scrutiny. Despite the panel's one-way ratchet approach to the First Amendment, a law may survive intermediate scrutiny but fail to survive the requisite heightened scrutiny. Because the panel's approval of speaker- and content-based suppression of truthful speech cannot possibly be squared with *Sorrell*, *en banc* review is warranted.

ARGUMENT

THE PANEL'S OPINION CONFLICTS WITH THE SUPREME COURT'S DECISION IN *SORRELL*.

A. *Sorrell*'s Requisite Heightened Scrutiny Is *Not* the Intermediate Scrutiny of *Central Hudson*.

In *Sorrell*, the Court invalidated a speaker- and content-specific Vermont law that prohibited pharmaceutical manufacturers from harnessing physician-specific prescription information to target their marketing efforts and persuade physicians to prescribe their name-brand drugs instead of lower-cost alternatives. 564 U.S. at 564. Under the law, anyone else could use the same data to engage in targeted marketing efforts to persuade physicians to *decrease* their reliance on name-brand drugs. *Id.*

Sorrell recognized that "[i]n the ordinary case it is *all but dispositive* to conclude that a law is content-based and, in practice, viewpoint-discriminatory." *Id.* at 571 (emphasis added). Reasoning that the Vermont law was invalid regardless "whether a special commercial speech inquiry [*i.e.*, intermediate scrutiny] or a stricter form of judicial scrutiny is applied," *Sorrell* overturned the law as an unconstitutional

restriction on speech. *Id.* at 571, 579-80.

Contra the panel, *Sorrell*'s requisite "heightened scrutiny" for speaker- and content-based restrictions on truthful and non-misleading commercial speech is ***not*** the intermediate scrutiny of *Central Hudson*. While the Supreme Court declined in *Sorrell* to articulate precisely what "heightened scrutiny" entails, its statement that speaker- and content-based commercial-speech restrictions are "presumptively invalid," 564 U.S. at 571, belies any suggestion that the Court equates "heightened scrutiny" with the intermediate scrutiny of *Central Hudson*.

Though the Supreme Court ultimately determined that the Vermont speech restrictions at issue in *Sorrell* were unconstitutional even when analyzed under *Central Hudson* so that no separate "heightened scrutiny" analysis of those restrictions was needed, that holding cannot plausibly justify the panel's conclusion that the Court equates the two standards of review. On the contrary, by stating that "the outcome is the same *whether* a special commercial speech inquiry *or a stricter form of judicial scrutiny* is applied," *Sorrell* leaves no doubt that the Court views "heightened scrutiny" as a "stricter form of

scrutiny" than the *Central Hudson* standard traditionally applied to commercial-speech restrictions. 564 U.S. at 571 (emphasis added).

A contrary reading would also render superfluous *Sorrell*'s careful analysis of whether Vermont's law was content- and speaker-based. If intermediate scrutiny applies equally to content- and speaker-based regulations and to those that are content-neutral, then no need exists for a court to first determine whether a law is content-neutral. Even the dissent in *Sorrell* recognized that the Court's decision announced "a standard yet stricter than *Central Hudson*." *Id.* at 588 (Breyer, J., dissenting).

In *Sorrell* the Supreme Court had no need to apply the requisite heightened scrutiny because *Central Hudson* sufficed as an independent basis for overturning the challenged law. In stark contrast, the panel here concluded that the City's advertising ban survived *Central Hudson* but then abandoned any further constitutional inquiry, reversing the district court without applying heightened scrutiny. Because the panel's approach to speaker- and content-based suppression of truthful speech clashes with *Sorrell*, *en banc* review is warranted.

While acknowledging *Sorrell*, the panel opines that "even if strict scrutiny applied to some commercial speech restrictions, we doubt it would apply to this one." Slip Op. 20 n.7. Because "the City's ban covers the full range of commercial advertising," the panel reasons, it does not target "a single category of speech by a single category of speaker." *Id.* But this attempt to distinguish *Sorrell* is belied by the record here.

First, the City concedes that its advertising ban is a content-based restriction. Slip Op. 3 ("The parties agree that the prohibition on advertising in FHVs is a content-based restriction on commercial speech."). And though the ban, on its face, covers some noncommercial speech (and has been applied to that speech), the City invited the district court to construe it as applying *only* to "commercial advertising." Slip Op. 15 n.5.[2] Indeed, it is hard to imagine a more glaring example of a "content-based" speech regulation than one aimed solely at something called "commercial advertising." After all, it is

[2] While the City tries to justify its content-based ban on advertisements based on its desire to limit "annoying" speech, Slip Op. 21, the ban presumably does not apply to noncommercial speech like a New York Yankees' broadcasts. Yet nothing is more likely to annoy an ardent New York Mets fan than a Yankees' broadcast.

impossible to know whether speech qualifies as a commercial advertisement without first scrutinizing its content.

Second, the City's ban is a classic speaker-based restriction. While it is true that the ban "covers the full range of commercial advertising," whether that ban applies at all turns solely on who the speaker—in this case, the driver—is. Simply put, the City allows taxi drivers to advertise to their customers while it prohibits for-hire vehicle drivers from advertising to theirs. A more flagrant example of a speaker-based restriction is difficult to fathom.

Because the City's ban disfavors speech with a particular content (advertising) when expressed by certain disfavored speakers (for-hire vehicle drivers), it unconstitutionally restricts speech.

B. This Court Should Provide the District Courts With Guidance on What Constitutes "Heightened Scrutiny" Under *Sorrell*.

This case is an ideal vehicle for *en banc* review to provide at least some minimal guidance on what constitutes "heightened" judicial scrutiny under *Sorrell*. One plausible approach is to apply the same strict scrutiny to speaker- and content-based restrictions on commercial speech that federal courts routinely apply in many other speech

settings. That approach would accord with *Sorrell*'s recognition that "[i]n the ordinary case it is *all but dispositive* to conclude that a law is content-based and, in practice, viewpoint-discriminatory." 564 U.S. at 571. This is "the ordinary case."

Applying strict scrutiny also fits with *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015), which holds that *any* effort to classify speech by reference to its content, or to burden speech that falls into a disfavored category, constitutes a content-based restriction subject to strict scrutiny. *Reed* expressly relied on *Sorrell* to conclude that a speech regulation is content-based "if a law applies to particular speech because of the topic discussed or message expressed." 135 S. Ct. at 2227, 2230 (citing *Sorrell*, 131 S. Ct. at 2663-64).

Though it involved a challenge to a sign ordinance restricting the number and size of "Temporary Directional" signs a church could display on its property, *Reed* draws no distinction between commercial and non-commercial speech. Above all, *Reed* holds that a content-based regulation of speech is subject to strict scrutiny "regardless of the government's benign motive, content neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.*

Alternatively and at the very least, the Court should not only require the City to make the three factual showings mandated by *Central Hudson*—that (1) the interest asserted by the government is substantial; (2) the challenged speech restriction directly advances the asserted interest; and (3) the restriction serves that interest in a narrowly tailored manner—but also require the City to satisfy its evidentiary burden on those points by *clear and convincing* evidence. This is the same quantum and quality of proof necessary to overcome free speech concerns in other First Amendment settings. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

So, for example, the "narrow tailoring" prong should, at a bare minimum, require the City to complete one or more empirical studies establishing with a high degree of certainty that the City could not possibly achieve its asserted interests without banning advertising in for-hire vehicles. The 2011 survey data the City relies on in the record here comes nowhere near meeting that heightened evidentiary standard.

CONCLUSION

The petition should be granted, and the panel's opinion vacated.

August 6, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

This brief complies with the type-volume limits of Fed. R. App. P. 29(b)(4) and Local Rule 29.1(c) because it contains 1,790 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced serif typeface using Microsoft Office Word 2010 in 14-point font.

August 6, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of August, 2019, a true and correct copy of the foregoing brief was filed and served on all registered counsel through the Court's CM/ECF system.

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