No. 17-1152

In the
Supreme Court of the United States

CONTEST PROMOTIONS, LLC,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA,
Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CATO INSTITUTE, IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015), this Court established the following categorical rule for speech regulations: "A law that is content based on its face 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." (Citations omitted.)

The question presented is whether this categorical rule applies to commercial speech.

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INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation was founded in 1973 and is widely recognized as the largest and most experienced non-profit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation has participated in several cases before this Court on matters affecting the public interest, including issues related to the First Amendment and commercial speech. *See, e.g.*, *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015); *Spirit Airlines, Inc. v. Dep't of Transp.*, 133 S. Ct. 1723 (2013); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

The Cato Institute is a non-partisan public-policy research foundation established in 1977 and dedicated to advancing individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

studies, conducts conferences, and produces the annual Cato Supreme Court Review.

This case concerns *amici* because the lower courts' uncertain and unpredictable protection of commercial speech rights presents important questions as to the scope and application of the First Amendment that should be resolved by this Court.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

San Francisco bans the use of "off-site" signage, known as General Advertising Signs, but permits "on-site" signage, known as Business Signs. San Francisco Planning Code art. 6, § 602. The distinction between the two types of signage is entirely based on what they are advertising: a Business Sign advertises the primary business in the building to which it is affixed, while a General Advertising Sign advertises anything else. This means that for any sign affixed to a business, the only way the city can determine whether the sign is permissible is to look to the *content* of the message, namely the particular business or product advertised. A sign affixed to a Barnes & Noble, for example, would be permissible if it displayed the message "Buy the latest bestseller at Barnes & Noble" but impermissible if it displayed the message "Buy out-of-print books through our friends at RareBooks.com." Because the legality of these two signs turns solely on the message they express, San Francisco's sign code is content based. *See Reed*, 135 S. Ct. at 2231 ("[A] speech regulation is content based if the law applies to particular speech because of the topic discussed *or the idea or message expressed*.") (emphasis added).

Petitioner urges the Court to resolve the deep circuit split over what precedential weight, if any, should be given to this Court's fractured opinion in *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981). There is another—even more important—reason that justifies this Court's intervention: resolving the uncertainty over whether this Court's decision in *Reed v. Town of Gilbert* applies to regulations of "commercial speech" such as the advertisements at issue here.

In *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980), this Court held that restrictions on commercial speech must satisfy intermediate scrutiny. *Id.* at 566. In *Reed*, however, this Court held that a law must be subject to strict judicial scrutiny if "'on its face' [the law] draws distinctions based on the message a speaker conveys." *Reed*, 135 S. Ct. at 2227. Yet even though the law at issue here does exactly that, both the Northern District of California and the Ninth Circuit eschewed strict scrutiny in favor of the more lenient analysis articulated by this Court in *Central Hudson*.

This Court should dispense with *Central Hudson*'s vision of a bifurcated First Amendment and treat commercial speech as on par with all other forms of expression. *See, e.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 526–28 (1996) (Thomas, J., concurring) (noting the indeterminacy of the *Central Hudson* test). Or, short of taking this case to overrule *Central Hudson*, the Court should grant certiorari to ensure that lower courts follow *Reed* and apply strict scrutiny to content-based restrictions on commercial speech. Review is proper because lower courts have felt compelled to cabin *Reed*'s holding to non-

commercial speech, even though there is no meaningful distinction that would make *Reed*'s reasoning any less applicable to commercial speech. A circuit split is unlikely to develop on the question presented, because this Court has not formally abrogated *Central Hudson*. Further percolation would thus provide no additional benefit. Instead, the Court should grant certiorari in this case to clarify that *all* content-based speech restrictions must be subject to strict judicial scrutiny.

REASONS FOR GRANTING THE PETITION

I.

THIS COURT SHOULD CLARIFY THE CONFUSION IN THE LOWER COURTS CONCERNING WHETHER *REED* APPLIES TO CASES INVOLVING COMMERCIAL SPEECH

Three years ago, this Court established a bright-line rule: "A law that is content based on its face 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." *Reed*, 135 S. Ct. at 2228 (citations omitted). Since that decision, several lower courts have been confronted with an inevitable question: does *Reed*'s bright-line rule apply with equal force to commercial speech?

The lower courts here held that it does not. Neither the Northern District of California nor the Ninth Circuit rejected Petitioner's premise that San Francisco's sign ordinance is content based. Despite that holding, neither court applied *Reed*'s strict scrutiny test. Instead, both courts found that despite

the categorical nature of *Reed*'s holding, there is a category of speech wholly exempt from *Reed*'s logic: commercial speech. *See* Pet. App. 46a ("*Reed* does not concern commercial speech, and therefore does not disturb the framework which holds that commercial speech is subject only to intermediate scrutiny as defined by the *Central Hudson* test."); Pet. App. 18a ("*Central Hudson* continues to set the standard for assessing restrictions on commercial speech.") (quotations and citations ommitted).

These cases are the latest in what has already developed as a clear pattern. As one commentator summed up the flurry of litigation that has occurred in just the last three years, "courts have already shown considerable hesitance in applying *Reed* to commercial speech, but have yet to articulate a satisfying doctrinal defense." Lee Mason, Comment, *Content Neutrality and Commercial Speech Doctrine After* Reed v. Town of Gilbert, 84 U. Chi. L. Rev. 955, 958 (2017); *see also* Daniel D. Bracciano, Comment, *Commercial Speech Doctrine and Virginia's 'Thirsty Thursday' Ban*, 27 Geo. Mason U. Civ. Rts. L.J. 207, 227–28 (2017) (observing that since "*Reed* was not a commercial speech case . . . lower courts have been hesitant to apply the standard broadly").

The result is that content-based regulations in several cities across the country have similarly survived judicial review in the wake of *Reed*, insulated from strict scrutiny solely because the speech at issue happened to be commercial. The Northern District of Illinois, for example, upheld a sign code that exempts "Real Estate Signs" from the size and quantity limitations imposed on other commercial signs, opening the very real possibility that municipalities

could use sign codes to pick favored and disfavored commercial activities. *See Peterson v. Village of Downers Grove*, 150 F. Supp. 3d 910, 917, 927 (N.D. Ill. 2015) (noting that *Reed*'s "reach is not yet clear" and that "it remains to be seen whether strict scrutiny applies to *all* content-based distinctions . . . [including] *commercial*-based distinctions" while ultimately holding that *Central Hudson* remains binding), *appeal filed*, July 28, 2016. The Southern District of Indiana upheld a sign code making a distinction between off-premises and on-premises signs similar to the one at issue here, thus opening the door to discrimination against businesses without physical locations. *See Geft Outdoor, LLC v. City of Indianapolis*, 187 F. Supp. 3d 1002, 1016 (S.D. Ind. 2016) (observing that the proper analysis for content-based restrictions on commercial speech "appears to be an open question following *Reed*" but ultimately applying *Central Hudson* on the grounds that when a precedent "'appears to rest on reasons rejected in some other line of decisions, the lower courts should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions'") (quoting *Agostini v. Felton*, 521 U.S. 203, 207 (1997) (alterations omitted)). And a Berkeley, California, ordinance compelling cell phone retailers to relay the city's preferred message about cellphone radiation was likewise exempted from strict scrutiny due to the commercial nature of the message, even though the city mandated the precise content of the compelled message. *See CTIA-The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1061 (N.D. Cal. 2015) ("The Supreme Court has clearly made a distinction between commercial speech and noncommercial speech . . . and nothing in its recent opinions,

including *Reed*, even comes close to suggesting that well-established distinction is no longer valid."), *aff'd*, 854 F.3d 1105 (9th Cir. 2017), *cert. pet. pending*, docket no. 17-796.

Several other lower courts have similarly exempted commercial speech from the protections announced in *Reed*.[2] But remarkably, none of these opinions has put forward a principled reason *why Reed*'s logic should not apply to commercial speech. Instead, each relied only on the happenstance that *Reed* itself did not concern a commercial speech regulation.

Unanimity among lower courts in following a questionable precedent "does not insulate a legal principle on which they relied from [Supreme Court] review to determine its continued vitality." *Agostini*,

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[2] *See, e.g.*, *RCP Publications Inc. v. City of Chi.*, 204 F. Supp. 3d 1012, 1017 (N.D. Ill. 2016) ("This Court . . . does not see *Reed* as overturning the Supreme Court's consistent jurisprudence subjecting commercial speech regulations to a lesser degree of judicial scrutiny."); *Mass. Ass'n of Private Career Schs. v. Healey*, 159 F. Supp. 3d 173, 192 (D. Mass. 2016) (holding that *Reed* "do[es] not appear to overrule, or diminish" prior commercial speech doctrine); *Citizens for Free Speech, LLC v. Cty. of Alameda*, 114 F. Supp. 3d 952, 968–69 (N.D. Cal. 2015) ("Because . . . [the sign code] only applies to commercial speech, the Court must examine that provision under intermediate scrutiny, not strict scrutiny."); *Cal. Outdoor Equity Partners v. City of Corona*, No. CV-15-03172MMM, 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015) ("*Reed* does not concern commercial speech . . . ."); *Chiropractors United for Research & Educ., LLC v. Conway*, No. 3:15-CV-00556-GNS, 2015 WL 5822721, at *5 (W.D. Ky. Oct. 1, 2015) ("Because the New Solicitation Statute constrains only commercial speech, the strict scrutiny analysis of *Reed* is inapposite."); *Auspro Enterprises, LP v. Texas Dep't of Transp.*, 506 S.W.3d 688, 703 n.109 (Tex. App. 2016).

521 U.S. at 237–38. Regardless of whether lower courts have been too cautious in refusing to give *Reed* its full effect, this Court "has not hesitated to overrule an earlier decision" when "the growth of judicial doctrine . . . [has] removed or weakened the conceptual underpinnings from the prior decision . . . ." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (citations omitted); *see also Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it."). That is precisely what has happened after *Reed*, and certiorari is therefore warranted so that this Court can resolve the conflict between *Reed* and *Central Hudson*.

This conflict between *Reed*'s straightforward application of First Amendment doctrine and the convoluted *Central Hudson* test that many lower courts have felt compelled to apply is not the only reason why certiorari is warranted. There is also tension *among* the lower courts. In contrast to the cases already noted, one lower court, in finding a strong likelihood of plaintiff's eventual success on the merits, found that *Reed* likely *does* apply to commercial speech. *Thomas v. Schroer*, 116 F. Supp. 3d 869, 876 (W.D. Tenn. 2015) (granting the plaintiff's request for a TRO and observing that even a sign code's regulation of signs concerning "the sale or lease of property on which they are located" may be subject to strict scrutiny under *Reed*); *cf.* Urja Mittal, *The "Supreme Board of Sign Review":* Reed *and Its Aftermath*, 125 Yale L.J. Forum 359, 367 (2016) ("The two courts [in *Contest Promotions* and *Schroer*] approached factually similar cases with different First

Amendment reasoning—one applying *Reed* and one avoiding *Reed*—and arrived at opposite outcomes.").

Similarly, at least one circuit court judge has also stated his belief that *Reed* applies without doctrinal carve-outs. *See Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1324 (11th Cir. 2017) (Wilson, J., concurring) ("[A]fter the Supreme Court's decision in *Reed* last year reiterated that content-based restrictions must be subjected to strict scrutiny, I am convinced that it is the only standard with which to review this law."). Two other courts, while not applying strict scrutiny to content-based regulations of commercial speech, found that *Reed* modified the *Central Hudson* analysis to some extent, putting those holdings in conflict with the lower courts here and in other cases. *See Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 128 F. Supp. 3d 597, 612–13 (E.D.N.Y. 2015); *Dana's R.R. Supply v. Attorney Gen.*, 807 F.3d 1235, 1246–48 (11th Cir. 2015).[3]

As these opinions show, lower courts and state governments currently find themselves in a position of deep uncertainty. *See* Frederick Schauer, *Not Just About License Plates:* Walker v. Sons of Confederate Veterans*, Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 Sup. Ct. Rev. 265, 281 n.47 ("The implications of *Reed* and the reach of its conclusion about the distinction between subject matter and viewpoint discrimination, especially in the

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[3] The two cases are also in tension with each other, as each incorporated content neutrality into a different stage of the *Central Hudson* analysis. *See* Mason, *supra*, at 987 ("One court incorporated content neutrality into *Central Hudson*'s fourth prong (tailoring), while the other treated it as a threshold question.").

context of commercial advertising, remain uncertain and contested."). Remarkably, even the City of San Francisco itself has, in the wake of *Reed*, repealed another content-based regulation of commercial speech under the assumption that it would fall afoul of *Reed*'s strict-scrutiny test. *See* Katherine Proctor, *San Francisco Dumps Part of Its Soda Ad Ban*, Courthouse News Service (Dec. 1, 2015), http://perma.cc/W4VJ-64N6 (San Francisco repealed a ban on soft drink advertisements on city property in the wake of *Reed*, with one supervisor conceding that after *Reed*, "the law has changed, so we're taking today's action.").

Only this Court's review can resolve the conflict between *Reed* and *Central Hudson* and eliminate this uncertainty.

II.

THERE IS NO MEANINGFUL DISTINCTION BETWEEN COMMERCIAL SPEECH AND NON-COMMERCIAL SPEECH THAT MAKES THE REASONING OF *REED* ANY LESS POWERFUL IN THE COMMERCIAL SPEECH CONTEXT

In *Reed*, this Court warned of "the danger of censorship presented by a facially content-based statute," since government officials may "wield such statutes to suppress disfavored speech." *Reed*, 135 S. Ct. at 2229. The Court explained that even seemingly innocuous distinctions drawn by the sign code could be used by "a Sign Code compliance manager who disliked [a] Church's substantive teachings . . . to make it more difficult for the Church to inform the public of the location of its services." *Id.*

Precisely the same concerns are present in the commercial context, as illustrated here. San Francisco's ordinance distinguishes on its face between businesses that operate from a physical location (such as a physical bookstore) and businesses that either have no physical place of business (such as an online bookstore) or have a physical place of business outside the City (such as a New York bookstore that ships to San Francisco). Only signs advertising the first of these comply with the law; signs advertising the others can never do so.

"Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute . . . ." *Reed*, 135 S. Ct. at 2229. Regardless of whether San Francisco intended to discriminate against non-resident speakers, it achieved that result, and any other city or state that wishes to do so could likewise discriminate with the same method.[4] This discrimination led this Court to draw a bright-line strict-scrutiny rule in *Reed*. Allowing San Francisco's law to stand would invite other cities to create supposedly innocuous distinctions that have the effect of suppressing the speech of disfavored businesses.

Further, where a regulation draws content-based distinctions purely as a line-drawing mechanism to reduce the overall *quantity* of signs (as San Francisco alleges was its purpose here), this Court in *Reed* reached the reasonable conclusion that

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[4] Discrimination against non-residents unfortunately has a long history in this country. *See, e.g.*, *Hicklin v. Orbeck*, 437 U.S. 518, 524–26 (1978) (recounting the long history of "state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State").

content-based distinctions are the *last* place a municipality should turn, not the first. *See Reed*, 135 S. Ct. at 2227. Nothing in *Reed* suggests that this commonsense principle is any less true when the speech at issue is commercial. That is why one scholar noted that *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), which struck down a law distinguishing between commercial and non-commercial speech on the grounds that it had no relation to aesthetic concerns, "foreshadows the Court's 2015 decision in *Reed v. Town of Gilbert*." Clay Calvert, *Underinclusivity and the First Amendment: The Legislative Right to Nibble at Problems After* Williams-Yulee, 48 Ariz. St. L.J. 525, 542 (2016). Yet now, lower courts find themselves in the illogical position of being forced to rule as if *Reed*, which built on the reasoning of a decision involving commercial speech, is not *itself* applicable to commercial speech.

Finally, the *solutions* to avoiding content-based distinctions that this Court suggested in *Reed* and that many cities have already implemented are equally available in the realm of commercial speech. Atlanta, for example, amended its sign ordinance to comply with this Court's decision in *Reed*. Karen Zagrodny Consalo, *With the Best of Intentions: First Amendment Pitfalls for Government Regulation of Signage and Noise*, 46 Stetson L. Rev. 533, 544–45 (2017) (citing Atlanta, Ga., Mun. Land Dev. Code § 16-28A). Rather than limiting the type of speech advanced by signs, Atlanta's sign code regulates the size, lighting, materials, proliferation, and aspects of signage based primarily upon the size and shape of the sign. *Id.*

The same solutions are available here. Yet instead of choosing to regulate signs by their size or shape, San Francisco enacted a rule that makes Petitioner's sign illegal solely because it advertises Petitioner's own sweepstakes rather than a brick-and-mortar San Francisco business.

III.

THIS COURT SHOULD RESOLVE THIS IMPORTANT ISSUE NOW, RATHER THAN WAITING FOR A CIRCUIT SPLIT THAT IS UNLIKELY TO DEVELOP

Because lower courts uniformly feel bound to apply the *Central Hudson* test, a circuit split on the question presented is unlikely to develop. As noted above, lower courts remain mindful of this Court's admonishment that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini*, 521 U.S. at 237 (citations and quotations omitted). But hand-in-hand with that admonishment came an important statement of this Court's mission to review such decisions, even when no circuit split *can* develop: "Adherence to this teaching by the District Court and Court of Appeals in this litigation does not insulate a legal principle on which they relied from our review to determine its continued vitality." *Id.* at 237–38. In *Agostini* and other cases, this Court has recognized that a conflict between two decisions of this Court is itself sufficient to warrant review, and that delay in resolving that conflict is unnecessary and counterproductive.

The history leading to the *Agostini* decision provides a close historical analogy to the current situation. In the companion cases of *Aguilar v. Felton*, 473 U.S. 402 (1985), and *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), this Court held that state programs sending public school teachers to private—and in many cases religious—schools to provide remedial education violated the Establishment Clause. In both cases, the Court held that such programs had the impermissible effect of advancing religion, based on the assumption that "any public employee who works on the premises of a religious school is presumed to inculcate religion in her work." *Agostini*, 521 U.S. at 222.

Eight years later, however, in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993), the Court stated that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school" and that such a rule "smack[s] of antiquated notions of 'taint.'" This holding clearly undermined the reasoning of both *Aguilar* and *Ball*, but did not explicitly overrule them.

Lower courts thus felt bound to continue applying those earlier precedents. *See, e.g.*, *Felton v. Secretary, U.S. Dep't of Educ.*, 101 F.3d 1394 (2d Cir. 1996), *rev'd sub nom. Agostini v. Felton*, 521 U.S. 203 (1997). Rather than waiting for a circuit split that was unlikely to develop, this Court granted certiorari less than four years after *Zobrest* to announce that those two cases were officially overruled. *See Agostini*, 521 U.S. at 235–37.

Similarly, this Court has twice in the last three terms granted certiorari on the question of whether

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) should be overruled in light of *Harris v. Quinn*, 134 S. Ct. 2618 (2014). Just as with *Agostini*, this Court did not—indeed could not—wait for a circuit split to develop after *Harris*, since lower courts still considered themselves bound to follow *Abood*'s binding precedent. *See, e.g.*, *Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31*, 851 F.3d 746, 749 (7th Cir.) ("Janus's claim was also properly dismissed . . . [because] neither the district court nor this court can overrule *Abood*, and it is *Abood* that stands in the way of his claim."), *cert. granted*, 138 S. Ct. 54 (2017); *Friedrichs v. Cal. Teachers Ass'n*, No. 13-57095, 2014 WL 10076847, at *1 (9th Cir. Nov. 18, 2014) ("[T]he questions presented in this appeal are so insubstantial as not to require further argument, because they are governed by controlling Supreme Court and Ninth Circuit precedent."), *aff'd by equally divided court*, 136 S. Ct. 1083 (2016). Certiorari was first granted only a year after *Harris*, less time than has already elapsed since this Court's decision in *Reed*.

Just as *Zobrest* and *Harris* rejected principles on which prior cases had relied without explicitly overruling them, so has *Reed*. Applying the lenient *Central Hudson* test to San Francisco's sign code relies on the premise that some supposedly "innocuous" content-based regulations need not trigger strict scrutiny. That is a premise that this Court squarely rejected in *Reed*, thus undermining the reasoning of *Central Hudson* as it relates to content-based distinctions.

As the timing of the grants in *Agostini*, *Friedrichs*, and *Janus* show, there is nothing

meaningful to be gained by waiting for future developments in the lower courts. Quite the opposite, delay in resolving the conflict between *Reed* and *Central Hudson* will only lead lower courts to waste judicial resources without any possibility of reconciling those two cases. In addition to those cases that have already reached the opinion stage since *Reed*, several more are already in various stages of litigation.[5] Thus, lower courts will continue to be confronted with this question for the foreseeable future, making this Court's timely clarification all the more important.

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[5] *See* Mason, *supra*, at 981–82 (noting that in addition to those cases concerning *Reed*'s application to commercial speech which have already been decided, "a number of pending cases raise the same question") (citing Complaint for Declaratory and Injunctive Relief, *Vugo, Inc. v. City of N.Y.*, No. 1:15-cv-08253, 2015 WL 6164852, at *7–8 (S.D.N.Y. Oct. 20, 2015); Motion to Dismiss Plaintiff's First Amended Complaint, *Brickman v. Facebook, Inc.*, No. 3:16-cv-00751-TEH, 2016 WL 6196205, at *17–23 (N.D. Cal. Aug. 9, 2016); Complaint for Declaratory and Injunctive Relief, *Am. Beverage Ass'n v. City and Cty. of S.F.*, No. 15-03415, 2015 WL 4550250, at *25 (N.D. Cal. July 24, 2015)); *see also* Andrew T. Fede, *Sign and Billboard Law: Hijacking the First Amendment or Balancing Freedom of Expression and Government Control*, 305-APR N.J. Law 78, 80 (2017) ("It also is not clear whether the *Reed* decision will have any impact on commercial sign regulations. . . . This issue's resolution will be crucial for the continued validity of two New Jersey Supreme Court decisions . . . .").

CONCLUSION

San Francisco's sign ordinance forbids Petitioner's sign solely because of what Petitioner wants to say. Because the ordinance is clearly content-based on its face, the only reason the lower courts could not apply *Reed* was because of the uncertainty over whether *Reed* applies to commercial expression. Because both courts ultimately upheld the ordinance, this doctrinal question was almost certainly outcome determinative. For these reasons, this case is an excellent vehicle to clarify that *Reed* holds that content-based speech regulations must be subject to strict scrutiny regardless of the nature of the expression at issue. The Petition should be granted.

DATED: March, 2018.

Respectfully submitted,

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