No. 18-1445

In The Supreme Court of the United States

THERESA SEEBERGER,

Petitioner,

v.

DAVENPORT CIVIL RIGHTS COMMISSION, AND MICHELLE SCHREURS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Iowa

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND RELATED CASES

The parties to the proceeding in this Court are listed in the petition for a writ of certiorari.

The following proceedings are directly related to this case:

- *Seeberger v. City of Davenport and Davenport Civil Rights Commission*, No. CVCV 295244, Iowa District Court for Scott County. Judgment entered December 24, 2015
- *Seeberger v. Davenport Civil Rights Commission and Schreurs*, No. CVCV 51252, Iowa District Court for Polk County. Judgment entered July 7, 2018
- *Seeberger v. Davenport Civil Rights Commission and Schreurs*, No. 16-1534, Court of Appeals of Iowa. Judgment entered April 18, 2018
- *Seeberger v. Davenport Civil Rights Commission and Schreurs*, No. 16-1534, Supreme Court of Iowa. Judgment entered Feb. 15, 2019

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INTRODUCTION

This is an as-applied First Amendment challenge to a claim under a municipal fair housing statute. In any as-applied constitutional dispute, it is essential to have a clear understanding of the actual circumstances to which the law at issue was applied. That is particularly true in this Court, which cannot hold evidentiary hearings to determine unresolved factual issues, and which usually avoids attempting to adjudicate such disputes on a cold record.

In the complex litigation that occurred in the courts and administrative agency below, petitioner at various times advanced several different contentions, including:

> (1) Seeberger did not make the statements alleged when she terminated Schreurs' tenancy. See *infra*, p. 11.
>
> (2) Seeberger made those statements, but they did not convey any discriminatory meaning with regard to familial status. See *infra*, pp. 12-13.
>
> (3) Seeberger made those statements, and they were facially discriminatory, but the statements were not her actual reasons for ending Schreurs' tenancy; Seeberger just wanted Schreurs and her daughter to leave so that Seeberger could move back into her own house. See *infra*, p. 14.
>
> (4) Seeberger made those statements, they were facially discriminatory, and they were

> the real reasons for ending Schreurs' tenancy, but the remarks articulated Seeberger's political, religious and philosophical views about parenting, birth control, and teenage pregnancy. See *infra*, pp. 14-15, 20-22.

The administrative law judge who heard this case did not resolve a number of issues, including why Seeberger decided to end Schreurs' tenancy.

The petition appears to advance the fourth account of what occurred. "Seeberger's statements explaining her reasons for terminating the lease were inextricably intertwined with speech expressing disapproval of Schreurs' parenting." Pet. 13. "Seeberger relayed she thought Schreurs was irresponsible when she permitted her teenage daughter to become pregnant." Pet. 5 (quoting App. 93). But the Seeberger statement expressing disapproval of Schreurs' parenting, and referred to in the quoted portion of the Appendix, was made in her testimony at the November 2015 administrative hearing, not in her remarks to Schreurs in September 2014 as the tenancy was being terminated. Seeberger's after-the-fact harsh comments about Schreurs' parenting skills, whether or not protected by the First Amendment, were not the basis on which liability was based.

It is difficult to foresee how petitioner might recast her account of the facts and issues if certiorari were granted. Assessment by this Court of the subsidiary circumstances would be complicated by the fact that the record of the administrative hearing was never transcribed, but instead was placed in the judicial

record in the form of a three-disc video recording.[1] Under these unusual circumstances, a grant of certiorari would entail an inordinate risk that, after the parties and the Court struggled to arrive at an agreed-upon understanding of what occurred, certiorari would be dismissed as improvidently granted.

STATEMENT

Factual Background

Theresa Seeberger is an attorney and part-time county magistrate in Iowa. In 2011, she purchased a three-bedroom house[2] in Davenport, Iowa, where she lived initially. In the fall of 2012, Seeberger married and moved into her spouse's home. She retained ownership of her house, and kept much of her clothing and many of her furnishings there. Seeberger owned four cats at this time, but her spouse was allergic to them; so Seeberger kept the cats at the house, and visited the house nearly every day to feed them. App. 26-29, 46.

After moving to her spouse's home, Seeberger rented rooms in her own house to tenants. In or about August 2013, Michelle Schreurs and her then-teenage daughter, Trinity Crews, moved into the house. At that time there were two other tenants. Each of the three tenants paid $300 a month in rent, which was equal in

[1] The account set out below of the events giving rise to this action is based only on the documentary materials.

[2] This is occasionally referred to as the "Ripley house" in the proceedings below.

total to the $900 monthly mortgage payment on the house.[3] While there were three tenants, they shared the cost of the utilities. Schreurs did not have a written lease.

Around the same time that Schreurs moved into the house, Seeberger separated from her spouse. Rather than move back into the house and end the tenancies, or share the house with one or more tenants, Seeberger initially decided to rent an apartment near her house.

In late 2013, one of the three tenants moved out, after a dispute with Seeberger. App. 78. Schreurs and the remaining tenant agreed to a rent increase to $450 each, although Seeberger was apparently to now pay the utilities. Seeberger agreed that Schreurs could pay her rent in two separate installments each month. In June 2014, the second tenant moved out, leaving Schreurs (and her daughter) as the only remaining tenants. App. 29. That meant that the rent Seeberger was receiving from Schreurs was only half the mortgage payment; Seeberger had to pay the other half of the mortgage, the utilities on the house occupied by Schreurs and her daughter, as well as the rent on Seeberger's own apartment. App. 47.

Seeberger concluded that this situation was not financially viable, and decided to vacate her apartment and move back into her house.[4] Seeberger testified that

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[3] Brief in Support of Petition for Review, 10 n.1.

[4] Seeberger Response to Complaint, December 10, 2014, 2:

in June 2014 she notified Schreurs that she would be moving back into her house, and that Schreurs would have to leave.[5] Seeberger gave her own landlord notice, and moved out of her rented apartment in August 2014.

> [I]n June 2014 ... I realized I need to move back into the Ripley Street house 100% because I knew Schreurs could not afford anywhere near what I needed to be able to make the mortgage payment and pay my rent. So I ended my lease with my landlord ... on August 2, 2014 and moved all of my stuff back into the Ripley Street house early August, 2014. Since Michelle and Trinity had gotten used to having use of most of the house, I didn't feel comfortable being in my own house. I was trying to figure out how best to deal with eventually giving them notice while being sensitive to their less than adequate financial situation. I slept at my girlfriend's since we didn't feel at home in my house .... I wanted my house back to myself.

Brief in Support of Petition for Review, 10 ("In June 2014, [the second tenant] moved out of the House. After [the second tenant] moved out, the monthly rent for Schreurs and Trinity was $450 per month. Knowing that Schreurs could not afford to pay rent on her own, Seeberger decided she would ask Schreurs to leave and move back into the house permanently.").

[5] Interview Report, January 6, 2015, 5 ("In June [the second tenant] moved out, I knew Michelle couldn't pay more than $450.00. I told Michelle I would be moving back in June 2014."); Motion for Summary Judgment, September 25, 2015, Addendum p. 2 ("[I]n June 2013 ... Respondent informed Schreurs that Respondent would completely move back into the Ripley House since she knew Schreurs could not afford much rent and Respondent couldn't afford the balance of the Ripley House mortgage and pay for rent at the apartment down the street."). At the administrative hearing Seeberger testified, to the contrary, that she did not tell Schreurs she had to move out until September 2014. App. 79; see App. 48.

Seeberger did not, however, move back to her house at that time. Instead, Seeberger moved in with her then girlfriend, Laura Bouwer, in the summer of 2014.[6] Not long thereafter, Bouwer unexpectedly agreed to take a job in Michigan, and by the end of August Bouwer had moved out. Bouwer's lease, however, lasted until October 1, so Seeberger was able to remain for a few more weeks in Bouwer's apartment. By the end of September, 2014, however, Seeberger was going to have to move somewhere else. Seeberger testified she began drafting a notice to terminate Schreurs' tenancy on September 15, the day before she saw the prenatal vitamins. App. 30, 80.[7]

On or about September 16, 2014, Seeberger, while visiting the house, noticed a bottle of prenatal vitamins on the kitchen counter. Seeberger took a photograph of the bottle, text messaged it to Schreurs, and asking, "Something I should know about?" App. 29. The next day, Seeberger again visited the house, and asked Schreurs if she had seen the text message. When Schreurs responded that she had not, Seeberger showed her the photograph of the prenatal vitamins. Schreurs indicated that her daughter Trinity, then fifteen years old, was pregnant. App. 29.

What ensued was a series of comments by Seeberger which her counsel characterized as a "confrontation." Brief of Theresa Seeberger, January 24,

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[6] Interview Report, 5; Seeberger Dep. 46-47.

[7] The notice subsequently provided to Schreurs was dated September 15. App. 48.

2017, p. 11. First, after contemplating the situation for a minute, Seeberger "angrily advised Schreurs, 'You guys will have to be out in thirty days.'" App. 30. Second, according to Seeberger, she objected "You don't even pay rent on time the way it is, and ... now you're going to bring another person into the mix." App. 79 (quoting Seeberger Dep. 65); see App. 30.[8] Third, referring to Trinity, Seeberger exclaimed "she's taking prenatal vitamins, ... obviously you're going to keep the baby." App. 30; App. 79. Schreurs and Seeberger agree that Schreurs asked why her tenancy was being ended, but they gave different accounts of Seeberger's response. According to Seeberger, her answer was the explanation, quoted above, which included both untimeliness of past rent payments and bringing "another person into the mix." App. 79. Schreurs, on the other hand, said that Seeberger's answer was just that Schreurs was not paying enough rent; the remark about the additional person was voiced separately.[9]

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[8] Schreurs described Seeberger as having objected, not to any tardiness in rent payments, but to the amount of rent being paid. Schreurs Dep., p. 25 ("You can't even afford the rent that I want, and you're going to bring another person into this house.").

[9] Schreurs Dep. 24:

> And she said, Is she pregnant? I said, Well, yeah, and I said, We were going to tell you, but we were going to go to the doctor first, ... just to make sure.
>
> She said, Well, obviously you're going to keep it if she is taking vitamins. I said, Well, she is not going to have an abortion. She has to decide whether she wants to keep it or have an adoption. She said, Well, this is your 30-day notice. I said, Why? She said, Well, you can't even pay me the rent that I want you to pay me, so you have to get out.

Although Schreurs and her daughter were legally entitled to remain in the house another 30 days, the confrontation had the effect of driving them out much sooner.

> Q. What did you do in terms of the house ... after being notified that your lease was going to terminate? ...
>
> A. I would spend time packing up, but I didn't stay there a lot because the tension was very high and my daughter didn't feel comfortable being there.
>
> Q. So after September 17th about how many nights do you think that you slept in the house ...
>
> A. Maybe five to six nights, not very many.

Schreurs Dep. 50; see State Sup. Ct. App. 91 ("My daughter did not feel safe living in that house at the end that is why we left."). "After the incident on September 17, 2014, Schreurs and [Trinity] slept at a friend's house...." App. 80. If the purpose of the confrontation was to get Schreurs and Trinity to leave before Seeberger moved back, it was successful. Seeberger moved back on or about September 26. App. 30.

But that was not the end of Seeberger's harassment of Schreurs, because Schreurs still had possessions in the house. When Seeberger initially gave Schreurs written notice of the end of her tenancy, she told Schreurs that she would not have to pay any further rent. App. 80. But on October 1, 2014, Seeberger sent Schreurs an email demanding rent for the full

month of October. Schreurs responded by noting that there was a verbal agreement that only half of a month's rent was due at the beginning of the month. Seeberger responded:

> What verbal agreement? I recall no such agreement. You guys are as bad as [a previous tenant] – amazing. First you want practically a free house.... It's a shame you have to use everyone. I asked Peter [King] if he was the father and he didn't deny it....

App. 49; see App. 81. This accusation that Peter King (a former boyfriend of Schreurs) was the father of Trinity's baby was particularly vicious; Seeberger knew that Trinity had been molested by her father (Schreurs' by-then ex-husband), who was incarcerated for that offense. App. 50, 81-82.

"Schreurs became concerned about her belongings and went to the police department." App. 82.

> When trying to vacate the property I received threatening text messages from Ms. Seeberger about getting my stuff out or she was going to sell it, asking me about the father of my daughter's baby.... On th[e] night [of October 1] I went to the police station to report the harassment. I was advised to go to the home and take pictures of my belongings and make sure everything was ok.

State Sup. Ct. App. 91.

When Schreurs went to the house to check on her belongings, another confrontation occurred. Seeberger

again demanded to know if King was the father of Trinity's baby.[10]

> I entered my home with my ... boyfriend and went up to my room .... Ms. Seeberger came into my room uninvited and started in with questions about who is the father of my daughter's baby. (None of her business.) She asked me if the father was my ex-boyfriend Peter King. I became upset and started to cry. My daughter had been molested by her biological father and Ms. Seeberger knew that[.] This was a very low blow and not very professional if you ask me. My ... boyfriend asked her to stop spe[a]king that way.... Ms. Seeberger said [to the boyfriend] I don't know you get out of my house. I told her I had every right to have someone in my residen[ce]. Ms. Seeberger exited my room and called the police and told them she was being robbed.... About 7 police officers showed up. I was so upset. They knew as soon as they got there that I was already at the police station that night and told Ms. Seeberger I had every right to have someone with me.

State S. Ct. App. 91-92.[11] The police records indicate that Seeberger told the police she had "no idea who"

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[10] "[I]n the ensuing altercation ..., [Seeberger] asked intervenor once again, 'Is Peter the father of the baby?' " App. 50; see App. 82. "Seeberger, who was at the home, confronted Schreurs, repeating her inquiry." App. 30.

[11] See App. 82 ("Seeberger ... asked, 'Is Peter [King] the father of the baby?' ... [Schreurs' boyfriend responded, 'there is no reason to make comments like that.' ... Seeberger stated she did

the man in the house was, describing him as an "intruder." Police Department Narrative; see App. 82 ("[T]he police officer stated Seeberger had reported a burglary was taking place. Schreurs explained the situation to the officer. The officer agreed Schreurs had a right to be at the [house].").

Schreurs removed the last of her belongings from the house on October 5, two weeks before she was legally required to vacate the premises. After that Seeberger stopped text messaging Schreurs.

Seeberger's Characterizations of Her Actions and Motives

Over the course of the proceedings below, Seeberger offered a number of accounts of her actions and motives. The differences among these are significant.

In some instances, Seeberger denied having made the alleged discriminatory remarks. Motion for Summary Judgment, September 25, 2015, 3 ("respondent Seeberger disputes the content of these statements [about Schreurs bringing another person into the situation]"); Respondent's Brief, November 20, 2015, 3 ("[C]omplainant alleges that respondent stated 'if [she's] pregnant, [you and your] daughter [have] to vacate the property within 30 days.' .... [R]espondent *denies* she made this particular statement...."') (emphasis in original). Although Seeberger at one point indicated

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not know who the boyfriend] was. Schreurs replied, '[h]e's my guest.' Seeberger replied, 'I'm calling the cops.' ").

that she was "disappointed" that Schreurs had permitted Trinity to get pregnant, Seeberger denied that this view was the reason for terminating Schreurs' tenancy.

> Q. Why did you choose that moment [September 17, to end Schreurs' tenancy]?
>
> A. It was just time. It was just that I wanted my place back.
>
> Q. Was it because you were so disappointed in Michelle?
>
> A. It didn't have anything to do with being disappointed with her.
>
> Q. What did it have to do with?
>
> A. I wanted my house back.

Seeberger Dep. 65.

Seeberger's denial that she had made the allegedly discriminatory remarks was advanced only in pleadings. When deposed under oath, Seeberger admitted making the statements themselves, although (as noted above) there remain some differences about what was said. But, Seeberger argued, at times, that the remarks were not actually discriminatory. The statement about bringing another person into the mix, Seeberger insisted, was just an expression of concern that the expense of a baby would prevent Schreurs from paying the rent.

> Seeberger [told] Schreurs ... "You don't pay rent on time the way it is, and ... now you're going to bring another person into the mix."....

> Seeberger's expression of disdain that Schreurs would have more trouble paying the monthly rent is not an indication that the statement is discriminatory. Failure to pay rent timely is a legitimate reason to terminate a tenancy.... [The] ALJ ignored the common sense meaning of Seeberger's words....

Brief in Support of Petition for Judicial Review, p. 19.[12] The remark about keeping the baby, Seeberger contended in her deposition, was just part of a benign exchange in which she sought clarification of whether Trinity might have an abortion (she was not going to) or might put the baby up for adoption (she had not decided). Seeberger Dep. 67.

When asked why she had terminated Schreurs' tenancy, Seeberger offered a series of reasons not related to Trinity's pregnancy. "[T]hey were a little bit messy." Seeberger Dep. 48; see App. 83. "Trinity left the oven on two times." Seeberger Dep. 48; see App. 83. "[T]he rent was routinely late, and that gets old." Seeberger Dep. 51; see App. 83-84. "She [would have] paid so much more rent anywhere else. She didn't even offer to help with the utilities." Seeberger Dep. 51; see App. 84.

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[12] This account was in some tension with what Seeberger had told a Commission interviewer a year earlier. Interview Report, January 6, 2015, p. 8 ("Were you concerned about her being able to pay rent with a baby coming?" No. Because that wouldn't have changed. I mean there is food and diapers.... That wasn't a thought in my mind.").

Among the proffered reasons not related to Trinity's pregnancy, the most important was that Seeberger wanted and needed to move back into her house, and did not want to share it with any tenants.[13] "Seeberger ... asserted she terminated the tenancy because she wanted her house back to herself." App. 30. "Seeberger testified she terminated Schreurs' tenancy 'primarily' because she wanted her house back to herself.... Seeberger admitted [that] in her answers to interrogatories she [had] stated she terminated Schreurs tenancy because she wanted to live alone...." App. 83; see Seeberger Dep. 49 ("I didn't want to live with anyone. I wanted my house back to myself.... I'm going to be back there, and I wanted my place back to myself"; moving back to the house was "the primary reason" for ending Schreurs' tenancy).[14]

After Seeberger had offered this litany of reasons unrelated to family status for ending Schreurs' tenancy, Seeberger was again asked "Anything else?" Seeberger Dep. 52. Seeberger responded that she also

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[13] "[Seeberger] did not want to move into the property with her tenants, as she had lived alone for many years previously." App. 47. "Seeberger had lived alone for many years and did not want to move into the [house] with her tenants." App. 78.

[14] See Respondent's Answers to Complainant Schreurs' Discovery Requests, Interrogatory No. 2:

> "Give each and every reason for your decision to terminate the tenancy of Michelle Schreurs and Trinity Crews."
>
> "Generally, for paying only 1/3 of the market rent, I was paying utilities, and I was moving back in (I was already residing at the house at the time). Also, see documents in Commission's notebook."

felt that Schreurs had taken advantage of her (*id*. at 52-53) or disappointed her (*id*. at 54-55), because "a responsible mother would have taken steps to protect her daughter from [getting pregnant]." *Id*. at 53.

Proceedings Below

(1) Schreurs filed a complaint with respondent Davenport Civil Rights Commission asserting that Seeberger's statements violated the provision of city's fair housing ordinance forbidding discriminatory advertisements or statements. App. 50. Schreurs did not challenge Seeberger's decision to end the tenancy, because the provisions of the ordinance banning discrimination in housing on the basis of familial status did not apply to certain landlords, including Seeberger, who owned only a few rental properties. Schreurs' claim was tried before an administrative law judge. The administrative record included a substantial number of documents, including depositions; the hearing itself, however, was not transcribed, although there is a video recording, which was subsequently made part of the judicial record.

The administrative law judge (ALJ) concluded, inter alia, that Seeberger's statements on September 17, 2014 violated the city ordinance. App. 91-93. The ALJ did not, however, rely on Seeberger's statements on October 1, 2014, reasoning that they were outside the scope of the prohibition because by then Schreurs' tenancy had been terminated. App. 93. The ALJ rejected as not credible several portions of Seeberger's

testimony, commenting that "Seeberger's lack of candor during the investigation and hearing is disconcerting." App. 97.

The ALJ noted that "Seeberger has provided varying reasons why she terminated Schreurs's tenancy." App. 83. The ALJ then listed five reasons that had been advanced by Seeberger, none of which were related to Trinity's pregnancy. App. 83-84. Although Seeberger had testified at the November 2015 hearing that she was disappointed in Schreurs' parenting (App. 79-80), the ALJ did not list that as among the reasons Seeberger was offering for her decision in September 2014 to terminate Schreurs' tenancy.

The ALJ's opinion summarized in one paragraph both what Seeberger had said to Schreurs in September 2014, and what Seeberger testified to in the subsequent November 2015 hearing. The first two sentences describe the September 2014 statements; the third to sixth sentences describe the later testimony.

> Seeberger's *statements* on September 16 and 17, 2014, related to Schreurs's rental of the Subject Property. Seeberger immediately terminated Schreurs's tenancy after finding out that her teenage daughter was pregnant. Seeberger testified she was disappointed with Schreurs and believed Schreurs had taken advantage of her. Seeberger relayed she thought Schreurs was irresponsible when she permitted her teenage daughter to become pregnant. During the hearing Seeberger testified adding a third person to the family was no different

> than if Schreurs had purchased a new Cadillac. Seeberger testified she would not take a vacation she could not pay for in advance. An ordinary listener listening to Seeberger's *statements* would find her statements discriminatory on the basis of familial status. Seeberger engaged in a discriminatory housing practice by making the *statements*.

App. 93 (emphasis added). The term "statements" is used only to refer to what Seeberger said to Schreurs in September, 2014, not to Seeberger's subsequent testimony. The criticism of Schreurs' parenting described in the fourth sentence was in the hearing testimony.

In light of the issues raised by the certiorari petition, it is important to note three things that the ALJ did not (and was not asked to) decide. First, the ALJ did not determine what Seeberger's subjective motive was in making the September 2014 statements. "In determining whether a statement ... is discriminatory, the courts apply the objective ordinary ... listener standard.... The subjective intent of the person making the statement ... is not controlling." App. 91 (footnotes omitted). Second, the ALJ did not determine why Seeberger decided to terminate Schreurs' tenancy, a question that was not relevant to the application of the ordinance.[15] Third, the ALJ did not decide whether

[15] The District Court stated that the administrative law judge had "rejected [Seeberger's] argument that she terminated [Schreurs'] tenancy because" of various reasons not related to Trinity's pregnancy. App. 54. That is incorrect. The ALJ merely described those reasons. App. 83-84.

either of the discriminatory statements at issue were made in response to a question from Schreurs.

Seeberger appealed the ALJ's decision to the Davenport Civil Rights Commission. In January 2016, the Commission affirmed the finding of liability, but reduced the amount of damages awarded to Schreurs from $35,000 to $17,500. App. 73.

(2) While the administrative claim was still pending, and shortly before the administrative hearing, Seeberger filed suit in state court, challenging that proceeding on a number of grounds. As relevant here, that state court suit, invoking the private cause of action in 42 U.S.C. § 1983, asserted that enforcement of the municipal ordinance under the circumstances of this case would violate Seeberger's First Amendment rights. Petition at Law, 9-10, *Seeberger v. City of Davenport, Iowa, et al.*, No. CVCV295244. Had that lawsuit been pursued, Seeberger could have sought a judicial determination of the factual issues not resolved in the administrative proceeding. That state court action was dismissed on December 14, 2015, prior to the decision of the Civil Rights Commission. Seeberger did not appeal that dismissal.

(3) In February 2016, following the commission decision, Seeberger filed in state district court a Petition for Judicial Review, contending, inter alia, that the Davenport ordinance was unconstitutional as applied to the circumstances of her case.

Several aspects of Seeberger's district court brief are relevant here. The ground asserted in that brief for

terminating Schreurs' tenancy was that Seeberger believed Schreurs could not afford to pay on her own the total rent that had been paid when there were several tenants. It noted that Seeberger had separated from her spouse in 2013, and by August 2014 – in contemplation of moving back to her house – had cancelled her lease on the nearby apartment. Brief in Support of Petition for Judicial Review, 9-10. The brief thus insisted that Seeberger had already decided to move back, and to ask Schreurs to leave, *before* Seeberger knew about Trinity's pregnancy. *Id.* at 19 ("Seeberger enjoyed the right to move back into her own House full time and request any of her tenants to move out for any reason. This was Seeberger's plan *prior to* Seeberger learning that Trinity had become pregnant.") (emphasis added). And the brief asserted that Seeberger's remark about "bringing another person into the mix" was only an expression of concern regarding Schreurs' ability to pay the rent. *Id*. at 19. The brief emphasized that the ALJ had declined to rely on Seeberger's statements of October 1, 2014, because they had been made after Schreurs' tenancy had been terminated. *Id*. at 14. That is important, in retrospect, because the brief necessarily recognized that the ALJ finding of liability was not based on Seeberger's even later November 2015 testimony.

The District Court concluded that Seeberger's statements were commercial speech (App. 59-60) and were not protected by the First Amendment. App. 58-60. It remanded the case to the Commission for a reassessment of the amount of damages. App. 64-65.

(4) On appeal, Seeberger took a new approach, offering an account of what had occurred quite different from that asserted in the district court.

Seeberger now insisted that when she terminated the tenancy she had told Schreurs that she was an irresponsible parent. Brief of Theresa Seeberger, 1 ("Seeberger believed that ... Schreurs was an irresponsible parent, and she told Schreurs as much."), 2 ("Seeberger told ... Schreurs, in the context of terminating her tenancy, that Schreurs was irresponsible for allowing her teenage daughter to become pregnant...."). To support the assertion that she had been held liable for criticizing Schreurs' parenting, Seeberger pointed to the sentence in the ALJ opinion which noted that "Seeberger relayed she thought Schreurs was irresponsible when she permitted her teenage daughter to become pregnant." *Id*. at 11-12, 17. But, as noted above, this sentence is a description of what Seeberger testified to at the 2015 hearing, not what she said to Schreurs in 2014. Seeberger's appellate brief deleted the observation, included in its district court brief, that the ALJ would not consider statements made by Seeberger after September 17, 2014.

To buttress this new approach, Seeberger now maintained that her disapproval of Schreurs' parenting, not her need to move back into her house, was the actual reason for terminating the tenancy. *Id*. at 19 ("Seeberger ... [is] being punished only because she spoke ... aloud [the reason for terminating the tenancy]"). But that could not have been the reason if, as

Seeberger had pointed out in her district court brief, she no longer had a place to live by October 1, 2014. So the appellate brief, after mentioning that Seeberger (once separated from her spouse) had rented an apartment, jumps to the September 2014 discovery of the prenatal vitamins (*id*. at 9-10), omitting the key fact – set out in the district court brief – that in August of 2014 Seeberger had cancelled her lease on that apartment.

Relying on this assertion that she was being punished for criticizing Schreurs' parenting skills, Seeberger argued on appeal that such fully protected speech was inextricably intertwined with any commercial aspect of the speech, so that Seeberger's statements as a whole could not be treated as commercial speech at all. *Id*. at 18; Reply Brief of Theresa Seeberger, 1, 14-15. The state court of appeals properly rejected this contention. The appellate court expressly based its "analysis ... on the words spoken to Schreurs in the course of Seeberger's termination of the tenancy, and not on Seeberger's later testimonial characterizations." App. 36 n.4. With regard to what Seeberger had actually said to Schreurs, the court correctly observed that "Seeberger's statements, on their face, do not indicate that her speech ... was ... based on a matter of religion, ideology, or philosophy, or on a position concerning responsible parenting." App. 36.

(5) Seeberger sought further review in the state Supreme Court, renewing her argument that she had been held liable because she had truthfully told Schreurs the tenancy was being cancelled because

Schreurs was an irresponsible parent. That supposed statement by Seeberger now was characterized as conveying "political, religious, and philosophical messages." Petitioner-Appellee/Cross-Appellant's Application for Further Review, 18. All of those messages, Seeberger argued, were contained in something she actually had said to Schreurs:

> Seeberger believed that Schreurs was an irresponsible parent, and she told Schreurs *as much*: "You don't even pay rent on time the way it is, and ... [n]ow you're going to bring another person into the mix."

Id. at 7 (emphasis added). This was the very same sentence which Seeberger had advised the district court was instead about her concern that Schreurs would be unable to pay the rent if she also had to deal with expenses of a baby. *Supra*, pp. 12-13, 19.

The Iowa Supreme Court overturned the award of counsel fees to Schreurs, but otherwise affirmed the decision of the court of appeals. App. 10-20.

ARGUMENT

I. This Case Is Not An Appropriate Vehicle for Resolving An As-Applied First Amendment Claim

Resolution of an as-applied First Amendment claim requires a clear understanding of the circumstances to which the law at issue was applied. As the

complex history of this case illustrates, those circumstances are increasingly in dispute. This problem is illustrated by the assertion, on the very first page of the petition, that "[p]etitioner was a small landlord ... who decided to terminate the at-will tenancy of a mother and her teenage daughter *when she learned* the unmarried daughter had become pregnant." Pet. i (emphasis added). In her sworn deposition, Seeberger insisted that she had decided to terminate the tenancy in June 2014, three months *before* learning of the pregnancy (*supra*, p. 14), and in the district court Seeberger's counsel insisted that the decision predated that knowledge. *Supra*, p. 19.

The petition asserts that Seeberger was held liable because she truthfully told Schreurs that her tenancy was being terminated because Seeberger believed Schreurs was an irresponsible parent. That assertion implicates a number of unresolved factual issues.

Seeberger argued in the state appellate courts that she told Schreurs in so many words that she believed Schreurs was an irresponsible parent, a contention that the petition appears to advance. But the testimony of Seeberger and Schreurs about the events of September 17, 2014, mention no such statement, and the citations in Seeberger's briefs are to Seeberger's comments about Schreurs at the 2015 hearing. For that reason, if certiorari were granted, petitioner might not renew this assertion. Seeberger's appellate briefs intimated that the ALJ (and thus the Commission) held Seeberger liable because she made discriminatory remarks at the hearing itself.

Petitioner might advance that argument at the merits stage, although both the ALJ and the state court of appeals disavowed reliance on statements made by Seeberger after September 17, 2014.

In the state Supreme Court, counsel for Seeberger argued that her September 17 remark about adding another person to the mix was an accusation that Schreurs was an irresponsible parent. Perhaps petitioner will offer that account at the merits stage. But if petitioner did, this Court would have to decide, nisi prius, whether that was the correct characterization of the remark. Doing so would, in turn, require the Court to decide whether for First Amendment purposes the relevant issue is the objective meaning of the remark, or Seeberger's subjective intent, or perhaps both. An assessment of Seeberger's subjective intent would presumably require the Court to watch the video recording of the administrative hearing. And the resolution of this issue would have to consider the fact that in the state district court Seeberger insisted this remark was actually about whether Schreurs could pay the rent once there was a baby to care for.

A final decision as to whether imposition of liability in this case would violate the First Amendment could also require a determination (albeit not by this Court) the unresolved dispute about the legal significance of Seeberger's October 1 statements. The ALJ believed those statements were outside the scope of the ordinance because they were made after Seeberger announced she was ending the tenancy. But Schreurs continued to assert those statements too, violated the

ordinance, and expressly preserved this issue, relying on the October 1 events in her briefs in the district court and on appeal.[16] It is unclear if the Commission itself decided this issue; it approved the decision of the ALJ, but Schreurs (who had won before the ALJ all the relief she had requested) had no reason to appeal the ALJ decision. If the Commission were to address this issue (or were to hold that it did so before), either party could challenge its decision in state court. So even if this Court were to hold that the September 17 statements alone were not a constitutionally sufficient basis for the imposition of liability, the case would have to be remanded for further proceedings regarding the October 1 statements.

A determination that Seeberger's statement (whatever it may have been) was a *truthful* explanation of the decision to end Schreurs' tenancy – the linchpin of the petition's First Amendment argument – would require a decision by this Court as to why (and when) Seeberger made that decision. The ALJ did not decide that issue. If Seeberger made the decision in June 2014, of course, then any explanation based on the pregnancy could not have been true. Seeberger offered highly specific testimony explaining that she would have had no place to stay as of October 1, 2014, needed to move back to her house, and did not want to

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[16] Final Brief for Appellant Intervenor Michelle Schreurs, pp. 6-7 (paragraph beginning "Ms. Seeberger's discriminatory statements did not stop after she terminated the tenancy in mid-September"); Schreurs' Brief Opposing Petition for Judicial Review, 3-4 (same).

share the house with any tenant (pregnant or otherwise). If that is true, then any explanation given to Schreurs referring to the pregnancy would have been pretextual, just an after-the-fact excuse to justify a decision actually made months earlier. Petitioner does not argue that the First Amendment protects false statements in a commercial context. Maybe, having been through difficult circumstances over the course of the previous year, Seeberger was simply exasperated on September 17, and just voiced whatever abusive remark came to mind. Perhaps petitioner will in this Court offer some new account suggesting that there were multiple reasons at work, possibly independently sufficient to have led Seeberger to end the tendency, or possibly sufficient only in some particular combination; but no such intricate account was offered in the courts below. Conceivably, counsel for petitioner will assert that Seeberger's testimony about having to move back into the house by October 1 was a fabrication, but that would be an unusual foundation for an argument that truthful statements should always enjoy constitutional protection.[17]

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[17] The court of appeals apparently thought it knew why Seeberger terminated the tenancy. But that is because, in the court of appeals, Seeberger abandoned all of her earlier non-pregnancy-related explanations, and now insisted, for the reasons described above, that the pregnancy (or, what it showed about Schreurs' inadequate parenting skills) was the reason for the termination. Under Iowa law, the courts hearing a petition for review are limited to deciding whether the agency's findings are supported by substantial evidence, and cannot make new findings of their own.

In sum, there are conflicting accounts of what statements by Seeberger were or could be the basis of liability, differing explanations of Seeberger's reason for ending the tenancy, and uncertainty about what position petitioner's counsel would take on these issues if certiorari were granted, or perhaps in the reply brief at the certiorari stage. Under those circumstances, there is an unacceptable risk that, if certiorari were granted, the petition would ultimately be dismissed as improvidently granted.

II. There Is No Circuit Conflict Regarding The Line Between Commercial and Noncommercial Speech

Petitioner urges the Court to "grant the petition in order to clarify the line between commercial and noncommercial speech." Pet. 11 (bold and capitalization omitted). Nothing in the petition suggests a justification for granting review regarding such a vaguely described issue.

This Court has previously addressed the distinction between commercial and noncommercial speech, in a series of decisions beginning with *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). Petitioner does not assert that there is any circuit conflict regarding the standards in these cases. Petitioner only suggests, without elaboration, that "[t]he *Bolger* factors have not been applied with great consistency." Pet. 11-12. Petitioner does not identify any specific doctrinal issue regarding which the courts of appeals are

divided; nor does petitioner identify cases in other circuits which, although factually indistinguishable from the instant case, held that the statements at issue were noncommercial speech.

With regard to the standard established by *Bolger* and its progeny, the petition refers to only a single court of appeals decision, *Dex Media West, Inc. v. City of Seattle*, 696 F.3d 952 (9th Cir. 2012). Pet. 11-12. Petitioner does not suggest that the legal standard applied by the Ninth Circuit in *Dex Media* was in any way different than the standard applied by the courts below. The facts at issue in *Dex Media* bear no conceivable resemblance to the circumstances of this case. *Dex Media* involved a telephone directory, and the Ninth Circuit held that the directory, like a newspaper, did not constitute commercial speech merely because it included advertisements. 696 F.3d at 957-965.

> [W]e do not see a principled reason to treat telephone directories differently from newspapers, magazines, television programs, radio shows, and similar media .... A profit motive and the inclusion or creation of noncommercial content in order to reach a broader audience and attract more advertising is present across all of them.

696 F.3d at 965. Nothing about that Ninth Circuit analysis conflicts with the state court decisions in the instant case.

The petition does not identify what specific legal issue petitioner intends to ask this Court to decide regarding the distinction between commercial and non-commercial speech if certiorari were granted. In the district court, petitioner argued that her speech was not commercial in nature because on September 17, 2014, she was already living in the house, and thus was Schreurs' roommate, not her landlord. The district court rejected that argument because the ALJ had found that Seeberger was not yet living in the house on that date,[18] a finding clearly supported by substantial evidence.[19] Petitioner did not renew this argument in the state appellate courts. In those appellate courts, petitioner instead argued that her speech was not commercial because it consisted of, or was intertwined with, criticism of Schreurs as an irresponsible mother. But, as we have explained, no such criticism was voiced by Seeberger on September 17, 2014, when she ended the tenancy. If certiorari were granted, petitioner

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[18] App. 59-60 ("[Seeberger's] claim that her statements are non-commercial presupposes a factual scenario expressly rejected by the [Commission] – namely, that she lived in the house with [Schreurs] and was a roommate rather than a landlord."); see App. 54 ("[The administrative law judge] rejected as not credible [Seeberger's] testimony that she had completely moved back into the property by the time of the discussion of the pregnancy and was sleeping [there].").

[19] App. 80-81 ("Seeberger testified she had completely moved into the [house] at the time of the prenatal vitamin incident and was sleeping [there].... Based on other evidence presented at hearing, Seeberger's statements are not credible. On September 23, 2014, Seeberger sent a text message to Schreurs which contradicts her testimony: '... [S]tarting Friday night I will be staying at [the house].' ").

probably would not rely on this ground in arguing that her speech was noncommercial. At this juncture, it is difficult to anticipate what specific issue the Court would be asked to decide regarding the line between commercial and noncommercial speech.

Petitioner objects that the courts below erred in their application of this Court's precedents. "[T]he Iowa courts ... failed to apply the factors set out in *Bolger* ... and those factors do not support the proposition that her speech was commercial.... [T]his court's rationales for affording commercial speech less protection do not apply to Petitioner's statements." Pet. 12. The state courts correctly concluded that Seeberger's statements were commercial speech. Those statements were expressly about Seeberger's commercial relationship with Schreurs, and the abusive nature of those remarks exploited Seeberger's commercial position. Seeberger knew that Schreurs, at risk of reprisal by her landlord, would be unlikely to vociferously object to anything Seeberger said,[20] and Seeberger as

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[20] See Reply Brief for Appellant/Cross-Appellee Davenport Civil Rights Commission, 14:

> Seeberger claims that her speech is permissible because under her framework, she could have lawfully and without misleading Ms. Schreurs, said to her "I'm ending your lease because of the pregnancy." However, ... her statements went far beyond that. Seeberger sent a text with a picture of prenatal vitamins to Schreurs' stating "something I should know about?" This inquiry highlights the power imbalance between the parties. There are no circumstances where Seeberger had a right to know about any private medical information from Schreurs or her daughter. Seeberger further

landlord was able to confront Schreurs in Schreurs' own home and within earshot of her daughter.[21] Even if the Iowa courts' analysis of this issue was incorrect, this Court does not grant review to resolve the myriad disputes that arise regarding whether lower courts have misapplied settled law.

III. There Is No Circuit Conflict Regarding The Standard of Review for Commercial Speech

Petitioner urges the Court to grant the petition "in order to clarify the standard of review for viewpoint discriminatory regulations of commercial speech." Pet. 14 (bold and capitalization omitted). Nothing in the

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insinuated that if Schreurs' daughter had an abortion they would be able to stay....

[21] Seeberger had a history of misusing her access as landlord.

> On several occasions my personal belongings would be missing. I would ask Ms. Seeberger about it and she would say "oh I borrowed that" without asking permission.... On one occasion ... she entered my bedroom [when I was not there]. Why was she in my bedroom when I was not there.... [Seeberger] le[ft] the back/front door wide open (so her cats could enter and exit as they see fit and letting in all the bugs) on several occasions as she left the property to attend [to] other things.... My belonging[s] were in the house as well anyone could come in and [have] taken anything. Or hid out and hurt us as we came home.... Ms. Seeberger made it very difficult to live in our own space by coming into our rooms without our permission, taking things that didn't belong to her. Eating our food at times when we were gone.

State Sup. Ct. App. 90-91.

petition suggests a justification for granting review to address that issue.

The gravamen of this aspect of the petition is that in *Matal v. Tam*, 137 S.Ct. 1744 (2017), there was no majority opinion regarding certain First Amendment issues. Petitioner contrasts parts III-B, III-C and IV of Justice Alito's opinion with the different approach in the opinion of Justice Kennedy and three other members of this Court. Pet. 16-17. The petition suggests that the Court grant review in the instant case to clear things up.

But, petitioner does not suggest that in the two years since the *Matal* decision a circuit conflict has arisen regarding any differences between the opinions in that decision. The best that petitioner has to suggest is a comment that in one Second Circuit opinion the court of appeals "expressed some doubt" as to whether the heightened scrutiny standard in commercial speech cases might be different from the heightened scrutiny standard in noncommercial speech cases. Pet. 17 (quoting *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 39 (2d Cir. 2018)). Until and unless "doubt[s]" about that question ripen into conflicting opinions among the courts of appeals, review by this Court is not warranted.

The issue in *Wandering Dago* was whether a food truck could be excluded from a public plaza outside state office buildings, a classic public forum, because it sold food under the "Wandering Dago" brand. The Second Circuit in *Wandering Dago* left unresolved the

issue of what standard of scrutiny would apply to restrictions in other situations.

> In other contexts, ... ethnic slurs might cause negative effects of a different sort – that is, not mere "offense" – that the government could target without engaging in viewpoint discrimination. A hostile work environment claim under antidiscrimination law is one example.... Those laws, while perhaps causing "viewpoint disparity" in workplaces, are generally not considered viewpoint discriminatory.... Nothing in *Matal* or this opinion changes that.

879 F.3d at 32 (footnote omitted). There is no circuit conflict regarding whether supervisors or co-workers have a constitutional right to engage in sexual, racial, or religious harassment of employees, a practice forbidden in certain circumstances by Title VII and by many state and local laws.

Similarly, there is no circuit conflict regarding whether similar abusive conduct by a landlord toward a tenant is protected by the First Amendment. In the courts below, petitioner acknowledged that the type of situation at issue here rarely if ever arises under federal, state and local fair housing laws.

> This case falls squarely into the small subset of [fair housing act] cases where the statements made are entitled to First Amendment protection. Petitioner is not aware of a single instance where any court in the country has addressed the First Amendment implications of prosecuting a small landlord ... only for

> making statements ..., when the landlord is exempt from prosecution under [fair housing acts] for discrimination in the sale or rental of housing.

Petitioner's Reply Brief in Support of Petition for Judicial Review, 13; see *id*. ("Seeberger's case is unique from other FHA cases evaluating First Amendment challenges because she falls within a narrow subset where she could not otherwise be held liable ... in connection with discriminating in the actual sale or rental of her home."). Far from asserting that the court of appeals' opinion conflicted with any other decision, petitioner advised the state Supreme Court that "[n]o federal or state court in the nation has addressed the constitutionality of this law." Petitioner-Appellee/Cross-Appellant's Application for Further Review, 8.

Over the course of this litigation, petitioner has offered evolving accounts of her actions and motives in 2014. What has not changed is petitioner's continuing inability to articulate any limiting principle to the sweeping constitutional arguments which she is advancing. Abusive remarks, she insists, are always constitutionally protected, unless they are untruthful or relate to some separate, independently unlawful conduct. "Prohibiting truthful speech should *never* be the goal of any statute consistent with the First Amendment." Pet. 21 (emphasis added). "[*A*]*ny* regulation of commercial speech must not penalize truthful communications (or encourage misleading evasion or silence.)." *Id*. (emphasis added).

> Nor does it matter if the speech is offensive or stigmatizing to the listener, because eliminating "offensive" has *never* been held to be an adequate governmental interest.... It is a staple of First Amendment jurisprudence that speech cannot be banned for the sole purpose of preventing listeners from being offended or stigmatized.

Id. at 19 (emphasis added).

It is impossible to reconcile these sweeping statements with the federal, state, and local laws that ban workplace harassment that creates a hostile work environment. Almost all cases of racial, religious, and national origin harassment, and most instances of sexual harassment,[22] involve entirely verbal harassment, and most do not involve other claims of discrimination, such as in wages or job assignments. Sexual harassment forbidden by federal law includes "[u]nwelcome sexual advances, requests for sexual favors, and other verbal ... conduct of a sexual nature." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. § 1604.11(a) (1985)). Discriminatory, misogynistic or lewd remarks, or unwanted sexual propositions, can create

> [a] discriminatorily abusive work environment ... that ... can and often will detract from employees' job performance, discourage

[22] "[I]n most male-female sexual harassment situations, ... the challenged conduct involves explicit or implicit proposals of sexual activity." *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75, 80 (1998).

> employees from remaining on the job or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.

Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993).

If petitioner's unqualified assertions of First Amendment principles were correct, sexual harassment of working women would be the constitutional right of every supervisor and co-worker, one which could be exercised every day in every plant and office in the country, so long as the lewd or misogynistic remarks, or unwanted explicit sexual propositions, were a truthful reflection of the harasser's beliefs. Similarly, under the sweeping standard set out in the petition, the First Amendment would bar the federal, state, and local governments from doing anything to protect minority workers forced to run a daily gauntlet of racial or ethnic slurs, so long as the bigotry was genuine. Muslim workers could have no legal recourse if they were subjected to incessant virulent denunciations of their faith, embellished with baseless but sincere accusations that all Muslims are terrorists and support Al Qaeda or the Islamic State. Federal, state and local officials would be powerless to protect even their own subordinates from such treatment.

It seems unlikely that petitioner intends to ask the Court to constitutionalize such abuses, but she has

yet to articulate a constitutional standard that would not have that extraordinary consequence.

CONCLUSION

For the above reasons, the petition should be denied

Respectfully submitted,

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