No. _____

In the Supreme Court of the United States

THERESA SEEBERGER,

Petitioner,

v.

DAVENPORT CIVIL RIGHTS COMMISSION, and MICHELLE SCHREURS,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

RANDALL D. ARMENTROUT
NYEMASTER GOODE, P.C.
700 Walnut Street
Suite 1600
Des Moines, Iowa 50309
(515) 283-3100

MICHAEL E. ROSMAN
Counsel of Record
MICHELLE A. SCOTT
CENTER FOR INDIVIDUAL RIGHTS
1100 Connecticut Ave, NW
Suite 625
Washington, DC 20036
(202) 833-8400
rosman@cir-usa.org

Counsel for Petitioner

QUESTIONS PRESENTED

Petitioner was a small landlord in Davenport, Iowa who decided to terminate the at-will tenancy of a mother and her teenage daughter when she learned the unmarried daughter had become pregnant. The termination of the tenancy itself, allegedly on the basis of familial status, did not violate Davenport's municipal ordinance. But the local civil rights commission concluded that the landlord had violated local law by providing the truthful reason for the termination because it was a statement reflecting discrimination on the basis of familial status. The Iowa courts upheld this decision, concluding that it did not violate the First Amendment because "prohibiting discriminatory speech," even about the lawful termination of the tenancy, was a substantial governmental interest under the *Central Hudson* test.

1. Was the imposition of liability for the landlord's speech a violation of the First and Fourteenth Amendments to the United States Constitution?

2. Was the local law's prohibition of statements indicating discrimination based on familial status subject to strict or heightened scrutiny because it was content and/or viewpoint discriminatory?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Theresa Seeberger was the respondent before the Davenport Civil Rights Commission, the petitioner in the Iowa District Court, the petitioner-appellee/cross-appellant in the Iowa Court of Appeals, and the petitioner-appellee/cross-appellant in the Iowa Supreme Court.

Respondent Davenport Civil Rights Commission was the respondent in the Iowa District Court, the respondent-appelllant/cross-appellee in the Iowa Court of Appeals, and the appellant in the Iowa Supreme Court.

Respondent Michelle Schreurs was the complainant before the Davenport Civil Rights Commission, intervenor in the Iowa District Court, the intervenor-appellant/cross-appellee in the Iowa Court of Appeals, and the intervenor-appellant in the Iowa Supreme Court.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6

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JURISDICTION

The judgment of the Iowa Supreme Court was entered on February 15, 2019. This Court has jurisdiction under 28 U.S.C. § 1257.

PROVISIONS INVOLVED

The First Amendment to the Constitution provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech." U.S. Const. Amend. I.

Davenport Municipal Code § 2.58.305(C) provides that it is unlawful

> To make, print or publish, or cause to be made, printed or published any notice, statement or advertisement, with respect to the sale or rental of a dwelling

> that indicates any preference, limitation, or discrimination based on race, color, creed, religion, sex, national origin or ancestry, age, familial status, marital status, disability, gender identity, sexual orientation or an intention to make any such preference, limitation or discrimination.

Davenport Municipal Code § 2.58.310(A)(1) provides:

> A. Nothing in subsection 2.58.305 of this chapter other than subsection 2.58.305C shall apply to:
>
> 1. Any single-family house sold or rented by an owner provided that:
>
> a. The private individual owner does not own more than three such single-family houses at any one time; and
>
> b. In the sale of any single-family house, the private individual owner does not reside in, nor is the most recent resident of such house prior to such sale; the exemption granted by this subsection shall apply to only one such sale within a twenty-four month period; and
>
> c. The bona fide private individual owner does not own any interest in, nor is there owned or reserved on the owner's behalf, under express or voluntary agreement, title to, or any

right to all or a portion of the proceeds from the sale or rental of more than three such single-family houses at one time; and

d. There is no utilization in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, salesperson, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesperson or person; and

e. There is no publication, posting, or mailing, after notice of any advertisement or written notice in violation of Section 2.58.305C of this Fair Housing Provision. Nothing in this subsection prohibits the utilization of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title.

STATEMENT OF THE CASE

A. Facts

Theresa Seeberger owned a single family home in Davenport Iowa, as well as one other mixed-use building in West Branch, Iowa.

Towards the end of 2012, Seebergber moved out of the house and began renting rooms there to tenants. About seven months later, Michelle Schreurs and her

teenage daughter moved into the house, renting a room at the outset for $300 per month.

On September 16, 2014, Seeberger was at the house and noticed a bottle of prenatal vitamins on the kitchen counter. By that time, the other renters had moved out leaving only Schreurs and her daughter. Seeberger took a picture of the vitamins with her cellphone and texted it to Schreurs, asking: "Something I should know about?" Schreurs did not respond. App. 4

The next day, September 17, 2014, Seeberger went to the house and asked about the vitamins. Schreurs, who had not noticed the text, told Seeberger that her teenage daughter was pregnant. Upon hearing that Schreurs' daughter was pregnant, Seeberger told Schreurs, "You're going to have to leave." App. 4. Schreurs was upset and asked why she would have to leave. Seeberger responded, "You don't even pay rent on time the way it is . . . now you're going to bring another person into the mix." App. 4. Seeberger also remarked that "she is taking prenatal vitamins," so "obviously you're going to keep the baby." App. 4.

Schreurs and her daughter moved out three weeks later.

B. Procedural History

Schreurs filed a complaint with the Davenport Civil Rights Commission in November 2014 alleging that Seeberger made discriminatory statements to her with respect to housing on the basis of familial status in violation of Davenport Municipal Code section

2.58.305(C) and section 804(c) of the Fair Housing Act (42 U.S.C. § 3604(c)). App. 4-5. Following a hearing, the administrative law judge concluded that Seeberger had made discriminatory statements regarding familial status and made the following findings:

> 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 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.

The ALJ awarded $35,000 in emotional distress damages, noting that "Schreurs testified at hearing about the stress she experienced when Seeberger terminated her tenancy," and that she "had nowhere to go and had to move in with her parents." App. 94 -95. She also imposed a $10,000 civil penalty against Seeberger, the maximum permitted under law. App. 97. Schreurs then moved for attorney's fees and costs and the ALJ awarded her $23,200 in attorney's fees and $681.60 in costs. App. 6.

The ALJ found that Seeberger violated the Davenport Municipal Code but did not state whether the statements violated the Fair Housing Act. App. 97.

The full Commission affirmed the ALJ's determination except that it (without explanation) halved the emotional distress damages award (to $17,500). It also assessed all costs of the public hearing against Seeberger and retained jurisdiction to determine those costs. App. 73-74.

On judicial review, the Iowa District Court affirmed in part and reversed in part, rejecting Seeberger's First Amendment challenge. It acknowledged that section 2.58.305(C) was a "content-based restriction on speech" because "it is clear that the ordinance distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed." App. 59. (internal quotation marks omitted). It nonetheless rejected strict scrutiny because "[s]uch scrutiny is not required where, as here, commercial speech is being

restricted." *Id.* Applying the test from *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), it held that "[i]t is well-settled that discriminatory statements made in the context of housing are illegal," and therefore cannot meet the first part of the *Central Hudson* four-part test. App. 61.

On the other hand, the district court reversed the award of damages and attorney's fees, and the civil penalty (while affirming the award of costs). As to the damages and civil penalty, it held that "the petitioner is exempt from liability for the termination of the tenancy between herself and [Schreurs] based on familial status, and that any liability can only extend to discriminatory statements made by the petitioner on such a basis." App. 64. Accordingly, it held that any damages "can only causally relate to the discriminatory statements, not the termination of the tenancy." *Id.* Concluding that the ALJ had clearly tied emotional distress damages to the termination of the tenancy (and that the Commission had offered no rationale for its reduction of those damages), and that it was unclear whether the civil penalty may also have relied upon the termination of the tenancy, the district court reversed on both and remanded back to the Commission. App. 64-65

All parties appealed. The Iowa Supreme Court transferred the case to the Iowa Court of Appeals. App. 8.

The Iowa Court of Appeals affirmed the district court's holding with regard to the First Amendment.

The Court of Appeals held that Seeberger's speech was commercial because "the statements made to Schreurs were plainly directed at telling Schreurs her tenancy was being terminated because of her familial status," holding that it was not "inextricably intertwined with any form of fully-protected speech." App. 6. Thus, the court applied the lower scrutiny accorded pure commercial speech cases under *Central Hudson*. Unlike the district court, though, the Court of Appeals "assume[d] without deciding that her statements concerned a lawful activity," and thus passed muster under the first prong of the *Central Hudson* test. App. 37-38. It nonetheless held that the Davenport ordinance passed the *Central Hudson* test. As to the existence of a "substantial governmental interest," it held that "preventing discriminatory statements in housing" qualified as such an interest. App. 38. It held that the ordinance advanced the interest of prohibiting discriminatory statements in housing because it "merely prohibits landlords from subjecting prospective tenants to the stigmas associated with knowingly being discriminated against." App. 39.

The Iowa Supreme Court granted Seeberger's application for further review. The court vacated a portion of the Court of Appeals decision awarding attorneys' fees and affirmed the court of appeals decision on all remaining issues without specifically addressing Seeberger's First Amendment claim. App. 3.

It did acknowledge, though, that "[a]s a small landlord, Seeberger was only liable for the alleged discriminatory *statements* she made in violation of section

2.58.305(C). Seeberger was exempt from liability under the remaining subsections of section 2.58.305, including any liability for terminating Schreurs' tenancy." App. 5 (emphasis in original).

REASONS FOR GRANTING THE PETITION

Davenport Municipal Code section 2.58.305(C) prohibits making certain statements with respect to the sale or rental of a dwelling regardless of whether the sale or rental is subject to any substantive anti-discrimination law. As the ALJ noted, its language is a mirror image of the language in the Fair Housing Act, 42 U.S.C. § 3604(c). App. 85. Accordingly, the constitutional issues raised by this case are the same as those implicated by the Fair Housing Act. As the Seventh Circuit noted quite some time ago, those constitutional issues are substantial. *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008) (Easterbrook, J.) (noting that, while exemptions for single-family homes do not apply to the Fair Housing Act's prohibition of discriminatory advertisements, "any rule that forbids truthful advertising of a transaction that would be substantively lawful encounters serious problems under the first amendment.").

This case presents an *a fortiori* situation to the one identified by the Seventh Circuit. Here, petitioner was not *advertising* a discriminatory preference, but providing a truthful *explanation* for a discriminatory (but legal) housing decision. Even if the underlying transaction had not been legal, there is no plausible

justification for punishing such speech. Discriminatory advertisements related to unlawful transactions are unprotected by the First Amendment because they may lead to undetectable violations of the substantive rule against discrimination and/or facilitate violations of that underlying norm; an employment or housing advertisement that says "Whites Only" may deter minorities from even applying. *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 365 (1977). A discriminatory *explanation* presents no such danger. If the underlying conduct is illegal, it is simply evidence (an admission against interest). An employer who says "I did not hire you because you are Muslim, and I do not like Muslims" can be charged with the underlying act of employment discrimination. He should not, consistent with the First Amendment, be separately liable for the truthful explanation, even if that truthful explanation offends. To do so is akin to adding on punishment because the perpetrator confessed.

Here, though, the underlying termination of the tenancy was exempt from Davenport's fair housing law. Because of this, the courts below were reduced to relying on the fact that petitioner's underlying speech was "discriminatory," as if there were some magical exception to the First Amendment for such speech. Indeed, the Iowa courts' apparent conclusion that the end of "prohibiting speech" can be the legitimate government interest on *any* means/ends test is obviously circular and would render First Amendment analysis superfluous wherever it applied.

Speech–even commercial speech–cannot be prohibited just because it offends. While the Court so ruled in *Matal v. Tam*, 137 S. Ct. 1744 (2017), there was a split as to the standard under which such laws should be scrutinized. This case presents an excellent opportunity for the Court to clarify the standards to be applied to "discriminatory speech" laws not related to discriminatory advertising or any illegal transaction of any kind.

I. THE COURT SHOULD GRANT THE PETITION IN ORDER TO CLARIFY THE LINE BETWEEN COMMERCIAL AND NONCOMMERCIAL SPEECH.

In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), this Court laid out several non-exclusive factors for determining whether speech is "commercial." There, this Court stated that speech that merely proposes a commercial transaction is "core" commercial speech. *Id.* at 66. In determining whether speech that does more than that is properly characterized as commercial, this Court considered whether the speech was an advertisement, referred to a specific product, or had an economic motivation; although each such (non-exclusive) factor was separately inadequate, they could, when considered together, be sufficient to characterize speech as commercial.

The *Bolger* factors have not been applied with great consistency. In *Dex Media West, Inc. v. City of Seattle*,

696 F.3d 952 (9th Cir. 2012), for example, the Ninth Circuit held that a yellow pages publication was not commercial speech under the *Bolger* factors despite the fact that the publication contained many advertisements and that the publisher had an economic motivation. *Id.* at 959-60. In contrast, the Iowa courts below concluded that Seeberger's speech was commercial simply because it related to the termination of a tenancy. However, it failed to apply the factors set out in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), and those factors do not support the proposition that her speech was commercial. Petitioner was not advertising any product or service, and the courts, to the extent they mentioned a motive at all, referred to her moral disapproval.

Moreover, this Court's rationales for affording commercial speech less protection do not apply to Petitioner's statements. This Court has permitted government to restrict commercial speech to protect the public from "commercial harms," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011) (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)), or to lessen the risk of fraud. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388–89 (1992) (noting that a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud is greater there). But here, neither concern is implicated. The "commercial harm" here was the termination of the tenancy, and that did not violate Davenport's ordinance.

Nor were Seebergers's statements fraudulent. On the contrary, the ordinance prohibits Seeberger from telling the truth.

And even if Seeberger's comments about the reasons for terminating Schreurs' month-to-month lease are characterized as commercial speech they are entitled to full protection under the First Amendment as they are inextricably intertwined with fully protected expression. *E.g.*, *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796 (1988) (holding that charity solicitations were fully protected under the First Amendment because, even if "speech in the abstract is indeed merely 'commercial,' we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech" and that where the "component parts of a single speech are inextricably intertwined," courts cannot "parcel out the speech, applying one test to one phrase and another test to another phrase."). Here, Seeberger's statements explaining her reasons for terminating the lease were inextricably intertwined with the speech expressing disapproval of Schreurs' parenting.

II. THE COURT SHOULD GRANT THE PETITION IN ORDER TO CLARIFY THE STANDARD OF REVIEW FOR VIEWPOINT DISCRIMINATORY REGULATIONS OF COMMERCIAL SPEECH.

Assuming *arguendo* that Petitioner's speech was commercial, it would still not resolve the level of scrutiny under which the Davenport ordinance should be assessed under the First Amendment. Davenport Municipal Code § 2.58.305(C) prohibits Seeberger from giving *certain* reasons for terminating Schreurs' tenancy, but not others. It is clearly content and viewpoint based. Indeed, that was common ground in the Iowa courts. App. 59 ("There appears to be no dispute . . . that the ordinance distinguish[es] favored speech on the basis of the ideas or views expressed.'") (brackets in original, internal citation omitted). If Petitioner had expressed joy over the pregnancy of her tenant's unmarried teenage daughter, no liability would have attached to her speech. The ordinance treats speech that indicates discrimination on the basis of familial status differently from speech that does not. *See also, e.g.*, *Saxe v. State College Area School Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.) ("[W]hen anti-discrimination laws are 'applied to . . . harassment claims founded solely on verbal insults, pictorial or literary matter, the statute[s] impose[] content-based, viewpoint-discriminatory restrictions on speech'") (quoting *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir. 1995)) (ellipsis and brackets as in *Saxe*); *id.* at 206 n.6 ("Most

commentators . . . agree that federal anti-discrimination law regulates speech on the basis of content and viewpoint.").

Generally, the First Amendment prohibits "governmental control over the content of messages expressed by private individuals." *Turner Broadcasting Systems v. Fed. Comm. Comm'n*, 512 U.S. 622, 641 (1994). Normally, the "most exacting scrutiny" applies to "regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." *Id.* at 642. Likewise, when the government targets "particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). "Viewpoint discrimination is thus an egregious form of content discrimination." *Id.* at 829.

In *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) this Court pointed out that its cases "use the term 'viewpoint' discrimination in a broad sense" and "[g]iving offense is a viewpoint." Thus, an "'expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'" *Id.* (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)). Justice Kennedy further emphasized that "[t]he Government may not insulate a law from charges of viewpoint discrimination by tying censorship to the reaction of the speaker's audience." *Id.* at 1766 (Kennedy J., concurring). *See also, e.g.*, *Saxe v. State College Area School Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (Alito, J.) ("[T]here is . . . no question that the free

speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs.").

No exception has been created to the rule requiring exacting scrutiny for content- or viewpoint-discriminatory regulations that is dependent upon the kind of speech to which the regulation applied. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) ("The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys . . . Commercial speech is no exception.") (internal quotation marks omitted). Indeed, this Court applied what appeared to be strict scrutiny to a content- and viewpoint-discriminatory statute that applied only to fighting words–entirely *unprotected* speech. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 395-96 (1992) (holding that a statute that prohibited the placing on property of a symbol or graffiti that would arouse anger on the basis of race was not narrowly-tailored to meet a compelling governmental interest).

But this Court has not unambiguously ruled that a viewpoint-discriminatory regulation of commercial speech should be analyzed under *strict* scrutiny. In *Matal v. Tam*, 137 S. Ct. 1744 (2017), the Court unanimously (8-0) concluded that a provision of the Lanham Act that precluded the registration of a disparaging trade name (The Slants) violated the First Amendment, but no opinion garnered a majority of

the Justices. Justice Alito's plurality opinion assumed without deciding, that *Central Hudson* applied because, even under its relaxed scrutiny, the statute lacked a substantial interest and was not narrowly drawn. Justice Kennedy's concurrence concluded that "[c]ommercial speech is no exception . . . to the principle that the First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys." *Id.* at 1767 (quoting *Sorrell v. IMS Health, Inc.,* 564 U.S. 552, 566 (2011) (internal quotation marks omitted)). Justice Kennedy explained that "[u]nlike content based discrimination, discrimination based on viewpoint, including a regulation that targets speech for its offensiveness, remains of serious concern in the commercial context." *Id.* citing *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 65, 71-72 (1983).

But even Justice Kennedy's concurrence left open the question whether this "heightened scrutiny" is strict scrutiny or something else. Thus, recently in *Wandering Dago, Inc. v. Destito*, 879 F.3d 20 (2d Cir. 2018), the Second Circuit applied "heightened scrutiny" to (and found unconstitutional) a state's decision to deny permission to a food truck to participate in a state-sponsored lunch program because of its name (and the name of some of the products it sold). Yet the Second Circuit also expressed some doubt as to whether this heightened scrutiny was the same as that applied to viewpoint discrimination in the non-commercial speech context. *Id.* at 39 ("It is possible

that this 'heightened scrutiny' of viewpoint discrimination in the commercial speech context is less exacting than the scrutiny applicable to viewpoint discrimination outside that context. But *Matal* instructs that viewpoint discrimination is scrutinized closely whether or not it occurs in the commercial speech context").

III. THE COURT SHOULD GRANT THE PETITION IN ORDER TO ADDRESS THE IMPORTANT QUESTION OF WHETHER, UNDER *CENTRAL HUDSON*, "PREVENTING DISCRIMINATORY STATEMENTS" CAN BE THE SUBSTANTIAL GOVERNMENTAL INTEREST.

Even if the *Central Hudson* test is appropriate here, the Iowa courts' application of that test deserves review. The second part of the test (after concluding the speech involves lawful activity and is not misleading), assesses whether the governmental interest is "substantial." The Iowa Court of Appeals concluded that "preventing discriminatory statements in housing" was a sufficiently substantial interest, and the Iowa Supreme Court allowed that ruling to stand.

This cannot be. The government cannot rely solely on eliminating the disfavored speech as the governmental interest or the *Central Hudson* test (after its first part) would become meaningless. Government could declare that "eliminating alcohol-related

speech" was the governmental interest supporting a regulation precluding the advertising of retail liquor prices, and its regulation prohibiting that speech would automatically pass muster under *Central Hudson*. *But cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (holding that a Rhode Island statute prohibiting the advertisement of retail liquor prices, except price tags at the point of sale, violated the First Amendment).

Nor does it matter if the speech is offensive or stigmatizing to the listener, because eliminating "offense" has never been held to be an adequate governmental interest under the second part of the *Central Hudson* test. 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. *See Matal*, 137 S. Ct. at 1764 (rejecting the notion that "[t]he Government has an interest in preventing speech expressing ideas that offend"); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("[S]peech cannot be restricted simply because it is upsetting."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 701 (1977) (rejecting contention that statute prohibiting advertising of contraceptives was permissible because advertisements would be "offensive and embarrassing to those ex-

posed to them" because it was "classically not [a] justification[] validating the suppression of expression protected by the First Amendment."); *Roth v. United States*, 354 U.S. 476, 513 (1957) (Douglas, J., dissenting) (It is well established that expression "should not be suppressed merely because it offends the moral code of the censor."). As this Court noted in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976), much commercial speech can be "tasteless and excessive," yet those characteristics alone cannot justify suppressing it.

Likewise, lower federal courts have recognized that preventing offense to an audience is not a legitimate basis upon which to ban speech that uses terms that some would find racially-derogatory. *See Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 31-32 (2d Cir. 2018) (holding that state's refusal to issue a permit to a food truck on the basis that its branding consisted of ethnic slurs that were "offensive" and "not family friendly" constituted unconstitutional viewpoint discrimination); *Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686 (6th Cir 1981) (holding that offensive restaurant name was protected commercial speech and city could not ban it solely to protect citizens from having to hear it); *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1235 (E.D.N.Y. 1993) (granting summary judgment to company selling Crazy Horse beer on challenge to law requiring agency to withhold approval to that beer; "If the only interest asserted by the government were its desire to abate or avert the perceived offensiveness of the

Crazy Horse name, it would not constitute a substantial interest under the *Central Hudson* test.").

Here, preventing offense is the only possible rationale for the ordinance. Seeberger is exempt from all of the Davenport fair housing law except the ban on discriminatory statements. Respondents below did not even try to put forth a rationale that the ordinance advances any goal of preventing actual discrimination in housing, nor could they. So the ban serves only to protect listeners from hearing something truthful albeit offensive.

IV. THE COURT SHOULD GRANT THE PETITION TO ADDRESS THE QUESTION OF WHETHER REGULATIONS THAT PENALIZE TRUTHFUL SPEECH AND REQUIRE MISLEADING SPEECH OR SILENCE PASS MUSTER UNDER THE FIRST AMENDMENT.

Under *Central Hudson*, the threshold test is whether the speech at issue concerns lawful activity and is not misleading. Analogously, any *regulation* of commercial speech must not penalize truthful communications (or encourage misleading evasion or silence). Here, the Davenport ordinance does precisely that. While Seeberger was legally permitted to terminate Schreurs' tenancy, she was precluded from truthfully answering the logical question, "Why?" Prohibiting truthful speech should never be the goal of any statute consistent with the First Amendment.

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (plurality op.):

> When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

CONCLUSION

This Court should grant this petition for writ of certiorari.

Respectfully Submitted,

MICHAEL E. ROSMAN
Counsel of Record
MICHELLE A. SCOTT
CENTER FOR INDIVIDUAL
RIGHTS
1100 Connecticut Ave, NW
Suite 625
Washington, DC 20036
(202) 833-8400
rosman@cir-usa.org

RANDALL D. ARMENTROUT
NYEMASTER GOODE, P.C.
700 Walnut Street
Suite 1600
Des Moines, Iowa 50309
(515) 283-3100