IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VUGO, INC., DONALD DEANS, DENISE JONES, GLOUSTER BROOKS, and PATRICIA PAGE, Plaintiffs, and MURRAY MEENTS, individually, and on behalf of all others similarly situated, Plaintiff-Intervenors, v. CITY OF CHICAGO, an Illinois municipal corporation, Defendant.	)	Case No. 17-cv-864 The Hon. Judge Elaine E. Bucklo

THE DRIVERS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF-INTERVENORS' COMPLAINT IN INTERVENTION

NOW COME the Plaintiff-Intervenors, Murray Meents, individually, and on behalf of all others similarly situated (collectively, the "Drivers"), by and through their attorneys, LEGALRIDESHARE LLC, for their Response in Opposition to Defendant's, City of Chicago (hereinafter the "Defendant"), Motion to Dismiss Plaintiff-Intervenor's Complaint in Intervention, and state as follows:

I. INTRODUCTION

Defendant filed the present motion to dismiss, arguing (1) the Drivers lack standing to challenge the constitutionality of Municipal Code of Chicago 9-115-130 (the "Ordinance"), (2) the Ordinance restricts commercial speech in a manner consistent with the First Amendment, and (3) Defendant has a rational basis for restricting commercial speech in rideshare vehicles.

Defendant's arguments fail, as the Drivers have standing as individuals who seek to display advertisements on/in their personal property and who wish to receive third parties' commercial speech. Furthermore, the Ordinance is subject to heightened judicial scrutiny, as it restricts a fundamental right. It cannot withstand strict, or, in the alternative intermediate, review.

II. FACTS

In May 2014, Defendant passed the Ordinance to regulate transportation network providers, transportation network vehicles, and transportation network drivers. In relevant part, the Ordinance bans commercial advertisements from being displayed on the exterior or in the interior of transportation network vehicles (rideshare cars). Transportation network drivers are subject to a fine of $500 – $1,000 for displaying advertisements in or on rideshare vehicles.

The Municipal Code of Chicago (MCC) defines various terms relevant to this action. In particular, it states: "Transportation network service" means a prearranged transportation service offered or provided for compensation using an Internet-enabled application or digital platform to connect potential passengers with transportation network drivers. "Transportation network driver" means an individual affiliated with a transportation network provider or with a person who is affiliated with a provider to transport passengers for compensation using a transportation network vehicle. "Transportation network vehicle" means any vehicle used to provide a transportation network service. Chi. Mun. Code 9-115-010 – Definitions.

Defendant permits taxicab licensees to display commercial advertisements on and in their vehicles. Chi. Mun. Code 9-112-410(b). The MCC states: Taxicab licensees may apply for permits to install and/or display an advertising sign or device on the exterior and interior of the vehicle. Chi. Mun. Code 9-112-410(b).

Pursuant to MCC § 9-112-410, Defendant has issued permits to taxicab licensees to display advertisements on and in their vehicles. Taxicab advertisements are ubiquitous throughout Chicago. Furthermore, Defendant does not prohibit commercial advertisements on or in ordinary passenger vehicles.

Despite having no objection to commercial speech on or in taxicabs and ordinary passenger vehicles, Defendant claims advertisements on or in rideshare vehicles would impede its "substantial government interests" in traffic safety, aesthetics, and passenger comfort. (Defendant's Motion to Dismiss, Document #27, p. 1).

The Drivers are "transportation network drivers." The Drivers wish to display commercial advertisements on and in their "transportation network vehicles" while they engage in "transportation network services." The Drivers wish to display commercial advertisements on and in their personal property for profit. The Drivers further wish to receive the commercial speech messages from third parties and would benefit from receiving such messages.

The Drivers allege in their Complaint in Intervention that, under the Ordinance, it is virtually impossible to engage in commercial speech.

III. LEGAL STANDARD

Rule 12(b)(1) permits a court to dismiss an action for lack of subject matter jurisdiction. FED. R. CIV. P. 12(b)(1). Subject matter jurisdiction refers to the tribunal's power to hear a case. *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67 (2009).

Article III of the United States Constitution limits the role of the federal judiciary to resolving cases and controversies. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992). Standing is a core component of Article III and a requirement that must be established by

litigants before a court may exercise jurisdiction over their claims. *Id*. at 560, 112. The doctrine of standing requires (1) that Plaintiff must have suffered an injury-in-fact; (2) that there must be a causal connection between the injury and the conduct complained of; and (3) that it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id*. at 560-561.

General factual allegations of injury from a defendants' conduct are sufficient to establish standing at the pleadings stage. On a motion to dismiss, the court "presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Id.* at 561.

In ruling on a Rule 12(b)(6) motion, a court should assume the veracity of all well-pleaded facts and then determine whether they plausibly give rise to an entitlement to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must state a claim that is "plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The complaint must contain "allegations plausibly suggesting an entitlement to relief." *Twombly*, 550 U.S. at 557.

IV. ARGUMENT

A. The Drivers' free speech claims under the Federal and Illinois Constitutions must stand.

i. The Drivers have standing to challenge the constitutionality of the Ordinance.

Defendant's argument that the Drivers lack standing is inconsistent with both common sense and Supreme Court precedent.

The plain language of the Ordinance demonstrates the Drivers' First Amendment rights are at issue. The Ordinance explicitly names the Drivers and specifically curtails their right to

engage in speech activities in and on their vehicles. No other group is entirely barred from advertising. No other speaker's rights are limited. The question begs, if the Drivers' do not have standing to challenge the Ordinance, who does?

Furthermore, Supreme Court precedent demonstrates the Drivers' standing in the present action. Consider *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), in which billboard owners challenged a city government's ban of commercial billboards. The *Metromedia* plaintiffs regularly sold advertising space to convey third parties' messages. *Id.* at 496. The plaintiffs argued the billboard ban violated their First and Fourteenth Amendment rights. *Id.* at 497. In finding for the billboard owners, the Court held the billboard ban unconstitutional. *Id.* 521.

Metromedia demonstrates that those who sell advertising space have standing to challenge bans on the use of their advertising space. Here, the Drivers are in the same position as the *Metromedia* billboard owners. The Drivers' cars are akin to the *Metromedia* billboards. The *Metromedia* billboard ban limited the billboard owners' ability to sell advertising space on its property. Likewise, the Ordinance limits the Drivers' ability to sell advertising space in and on their personal vehicles. Under *Metromedia,* the Drivers' have standing to challenge an ordinance that prohibits or limits their right to engage in commercial speech.

In the alternative, the Drivers would have standing to challenge the Ordinance, even if they were deemed "mere" recipients of the commercial messages. Consider *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc. (Virginia Citizens),* 425 U.S. 748 (1976), in which consumers of prescription drugs brought suit against the Virginia State Board of Pharmacy challenging the validity of a Virginia statute declaring it "unprofessional conduct" for pharmacists to advertise prescription drug prices. *Id.*

The plaintiffs were an individual resident who regularly used prescription drugs and two nonprofit organizations. *Id.* They claimed the First and Fourteenth Amendments entitled users of prescription drugs to receive information that pharmacists wished to communicate through advertising, including drug costs. *Id.* at 753-54.

In considering the plaintiffs' standing, the Supreme Court noted: "The present [ ] attack on the statute is one made not by one directly subject to its prohibition, that is, a pharmacist, but by prescription drug consumers who claim that they would greatly benefit if the prohibition were lifted and advertising freely allowed." *Id.* at 753. The Court considered whether First Amendment protections attach to the recipients of the information, and not solely to the advertisers who seek to disseminate the information. *Id.* at 756. Answering the question in the affirmative, the Court stated, "If there is a right to advertise, there is a reciprocal right to receive the advertising." *Id.* at 757.

Under *Virginia Citizens*, the Drivers have a right to challenge the constitutionality of the Ordinance. Like the *Virginia Citizens* consumers, the Drivers seek to receive information that others are creating. The Drivers' Complaint at Law explicitly states that they are interested in receiving advertisements in rideshare vehicles. The Drivers, at minimum, are recipients of the advertisements they seek to display. Therefore, under *Virginia Citizens*, the Drivers have sufficient interest to challenge the Ordinance's constitutionality.

Lastly, no authority supports Defendant's assertion that plaintiffs must allege their desire to advertise their own products or services. The dissemination of information is protected by the First Amendment. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011). In *Sorrell*, quoting prior Supreme Court opinions, Justice Anthony Kennedy wrote, "If the acts of 'disclosing' and

'publishing' information does not constitute speech, it is hard to imagine what does fall within that category[.]" *Id*.

For all the reasons stated above, the Drivers have standing. The Drivers respectfully ask this Court to deny Defendant's Motion to Dismiss.

ii. The Ordinance's advertising ban is subject to heighted scrutiny as a content- and speaker-based restriction on speech.

The Ordinance is a content-based, speaker-based restriction on protected expression. Therefore, regardless of whether the speech is considered "pure" or "commercial," the ban must be judged under the strict scrutiny standard.

Content-based restrictions of speech are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *R.A.V. v. St. Paul,* 505 U.S. 377, 395 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 115 (1991). The First Amendment requires heightened scrutiny whenever a government creates "a regulation of speech because of disagreement with the message it conveys." *Sorrell,* 564 U.S. at 566, quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). Commercial speech is no exception. *Id.*; see also *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429-30 (1993).

The Supreme Court has recognized that even some facially content-neutral laws must be considered content-based regulations: laws that cannot be "justified without reference to the content of the regulated speech," or that were adopted by the government "because of disagreement with the message [the speech] conveys," *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). Such laws, like those that are content-based on their face, must also satisfy strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226–27 (2015).

Heightened "First Amendment scrutiny" is warranted where speech restrictions are directed at certain content and aimed at particular speakers. *Sorrell*, 564 U.S. at 567. When a government imposes speaker- and content-based burdens on protected expression, heightened scrutiny is justified. *Id.*at 571. Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 340 (2010), "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Turner,* 512 U.S. 622, 658 (1994). For instance, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker-based. *Reed*, 135 S. Ct. at 2230. Likewise, a content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers. See *Citizens United, 558 U.S.* at 340–341.

In the present matter, the Ordinance is a content-based restriction on speech. It explicitly and completely bans commercial speech. The Ordinance's restriction is also speaker-based, in that it is directed at Transportation Network Provider drivers. Because the Ordinance is content-based and speaker-based, strict scrutiny is warranted. *Sorrell*, 564 U.S. at 567. That the restricted speech is commercial is inconsequential. *Id.* at 566.

The facts of the present case are analogous to the facts of *Sorrell v. IMS Health Inc.* In *Sorrell*, a data mining company and pharmaceutical manufacturers brought suit challenging Vermont's "Prescription Confidentiality Law," which prohibited records containing a doctor's prescribing practices from being sold or used for marketing purposes without the doctor's consent. *Id.*at 557

A brief explanation of pharmaceutical marketing is helpful in understanding the facts of *Sorrell*. Pharmaceutical manufacturers promote their drugs to doctors through a process called "detailing." *Id.*at 557-58. Pharmacies receive "prescriber-identifying information" when processing prescriptions, often indicating the specific drugs a doctor regularly prescribes. *Id.* at 558. The pharmacies can then sell that data to "data miners" who produce reports for pharmaceutical companies. *Id.* Those reports are then used by pharmaceutical companies to refine their marketing tactics and increase sales to doctors. *Id.*

Vermont's law prohibited pharmacies, health insurers, and similar entities from selling prescriber-identifying information without a doctor's consent. *Id.* at 559. The provision barred pharmaceutical manufacturers and marketers from using the prescriber-identifying information without a doctor's consent. *Id.* Under the law, "marketing" was defined as "advertising, promotion, or any activity" that is "used to influence sales or the market share of a prescription drug." *Id.*

Vermont argued that the law promoted the state goals of safety in medicine and physician confidentiality. *Id.* at 560-61. The plaintiffs contended Vermont's law violated their First Amendment rights. *Id.* at 561.

The Supreme Court held the Vermont law violated the plaintiffs' First Amendment rights, as it was a content- and speaker-based restriction of protected expression. *Id.* at 563-64. Justice Kennedy noted:

> On its face, Vermont's law enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information. The first forbids sale subject to exceptions based in large part on the content of the purchaser's speech. For example, those who wish to engage in education communications…may purchase the information. The measure then bars any disclosure when recipient speakers will use the information for marketing.
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> *Id.* at 563-64.

The Court continued, "The statute thus disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers." *Id.* at 564. Under the law, detailers could not obtain prescriber-identifying information, even though that information may be purchased or acquired by other speakers with diverse purposes and viewpoints. *Id.*

The Court was particularly troubled by the fact that detailers would have no means of acquiring, or using prescriber-identifying information, meaning the law "on its face burdens disfavored speech by disfavored speakers." *Id.* The law had the effect of preventing detailers and only detailers from communicating with physicians in an effective and informative manner. *Id.*

Because Vermont's law imposed a specific, content-based burden on protected expression, strict scrutiny was warranted. *Id.* That the content-based law touched only "commercial speech" was inconsequential. *Id.* at 566.

Vermont specifically argued that heightened judicial scrutiny was unjustified, as the law was a "mere commercial regulation." *Id.* The Court disagreed. *Id.* at 567. The Court further stated Vermont's law would not survive even it was reviewed with intermediate "commercial speech" scrutiny. *Id.* at 573. (The "commercial speech" analysis will be discussed below).

The facts of *Sorrell* are analogous to the facts of the present action. Therefore, the Ordinance must be judged under heightened judicial scrutiny. Like in *Sorrell*, the Ordinance disfavors marketing, or speech with a particular content. Like the *Sorrell* law, which prohibited data miners from using "prescriber-identifying information" for marketing purposes, the Ordinance prohibits the Drivers from using commercial advertisements in their vehicles. In *Sorrell*, detailers could not obtain prescriber-identifying information, even though that information could be purchased or acquired by other speakers with other purposes and

viewpoints. Likewise, the Drivers are prohibited from displaying commercial advertisements, while other speakers, like taxicab drivers, are explicitly permitted to display commercial advertisements. Like in *Sorrell*, in which the law prevented detailers – and only detailers – from communicating commercial messages, the Ordinance prevents the Drivers – and only the Drivers – from displaying commercial advertisements.

In sum, like the *Sorrell* law, the Ordinance disfavors a specific content of speech – marketing – and specific speakers – the Drivers. The Ordinance imposes a content- and speaker-based burden on protected expression. Therefore, under *Sorrell*, strict scrutiny is warranted.

Defendant argues that the Ordinance furthers its interests in traffic safety, aesthetics and passenger comfort. Even if we assume (although the Drivers do not concede) that those are "compelling interests," the law is most certainly not narrowly tailored to achieve those ends. The Ordinance bans an entire category of speech from an entire class of people. There are no caveats and no exceptions. The *Sorrell* court explained:

> Perhaps the State could have addressed physician confidentiality through a more coherent policy. For instance, the State might have advanced its asserted privacy interest by allowing the information's sale or disclosure in only a few narrow and well-justified circumstances. A statute of that type would present quite a different case than the one presented here. But the State did not enact a statute with that purpose or design. Instead, Vermont made prescriber-identifying information available to an almost limitless audience. The explicit structure of the statute allows the information to be studied and used by all but a narrow class of disfavored speakers. Given the information's widespread availability and many permissible uses, the States asserted interest in physician confidentiality does not justify the burden that [the law] places on protected expression.
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> *Sorrell*, 564 U.S. at 573.

Likewise, Defendant did not enact a statute with the purpose or design of promoting safety, aesthetics or passenger comfort. Instead, Defendant allows an almost limitless audience to display commercial advertisements in and on their vehicles and then restricts such speech from a narrow class of disfavored speakers, the Drivers. Because vehicle advertisements are widespread

and largely permitted throughout Chicago, Defendant's asserted interests do not justify the burden that the Ordinance places on the Drivers' protected expression. Under *Sorrell,* the Ordinance is unconstitutional.

The point is further emphasized in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), in which the Court struck down a Rhode Island law that banned the advertisement of retail liquor prices. The ban was categorical, banning the "advertising [of retail liquor prices] in any manner whatsoever." *Id.* at 490. The plaintiffs argued the statute violated their First Amendment right to free of speech. *Id.* at 492. Rhode Island argued, among other things, that the statute advanced its interest in reducing alcohol consumption. *Id.* at 493-94.

In striking the ban, the Supreme Court stated, "[S]pecial concerns arise from 'regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. [citations omitted]. In those circumstances, 'a ban on speech could screen from public view the underlying government policy." *Id.* at 500. Furthermore, "'special care' should attend the review of such blanket bans." *Id.*

The Court specifically addressed the fact that Rhode Island's ban related only to commercial speech, as opposed to "pure speech." The Court explained, "The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them." *Id.* at 501. If the state is acting to protect consumers from misleading, deceptive or aggressive sales practices, the Court will apply a less-than-strict review." *Id.* 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." *Id.* The Court reasoned that bans of truthful, nonmisleading

commercial messages rarely protect consumers and, rather, serve only to obscure an "underlying government policy" that could be implemented without regulating speech. *Id.* at 502-503. Therefore, such speech prohibitions rarely survive constitutional review. *Id.* at 504.

Specifically addressing Rhode Island's law, the Court found the advertising ban was a blanket prohibition against truthful, nonmisleading speech. *Id.* Therefore, the state had the burden of showing the law not only advanced its interests but would do so "to a material degree" and that the restrictions on speech were "no more extensive than necessary." *Id.* at 505, 507. The Court held Rhode Island's ban could not survive the heightened scrutiny.

The facts of the present case are analogous to the facts of *44 Liquormart, Inc.* Similar to how the Rhode Island law constituted a categorical ban of liquor price advertisements, the Ordnance constitutes a total ban on advertisements in rideshare vehicles. Like in *44 Liquormart, Inc.*, Defendant makes no claim or argument that its total advertising ban is meant to protect consumers from misleading, deceptive or aggressive sales tactics. Similar to Rhode Island's nonspeech-related policy of reducing alcohol consumption, Defendant justifies the Ordinance as furthering nonspeech-related policies of traffic safety, aesthetics and comfort.

Under *44 Liquormart, Inc.*, the Court is to analyze such bans with heightened scrutiny. Because the Ordinance allegedly advances only nonspeech-related policies, Defendant bears the burden of demonstrating that the prohibition is "no more extensive than necessary" and will advance its interests to a "material degree." As with the law in *44 Liquormart, Inc.*, the Ordinance is broad, sweeping, and completely restricts the Drivers right to engage in commercial speech. The Ordinance does not effectuate the Defendant's goals, as the Defendant already allows taxicab drivers and passenger vehicles to advertise. The Ordinance is neither narrowly

tailored nor verifiably effective. As such, under *44 Liquormart, Inc.*, it must be stricken as an unconstitutional barrier to free speech.

For all the reasons stated above, the Driver's Complaint in Intervention states a claim that is "plausible on its face." Therefore, the Drivers respectfully ask this Court to deny Defendant's Motion to Dismiss their Complaint in Intervention.

iii. In the alternative, the Ordinance does not survive intermediate scrutiny.

Defendant argues the Court should apply intermediate scrutiny when reviewing the Ordinance, as described in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). However, even if the Court applies the lesser standard, the Driver's Complaint in Intervention states a claim that is, most certainly, "plausible on its face."

In *Central Hudson*, the Court reviewed a New York law that completely banned the plaintiff utility company from all promotional advertising. *Id*. 558-59. The ban was based on a finding that the state did not have sufficient resources to continue furnishing consumer demands for electricity. *Id.* at 559. Three years later, the electricity shortage had eased, yet the advertising ban was extended. *Id.* The utility company filed suit alleging the ban violated its First and Fourteenth Amendment rights. *Id*. at 560.

In reviewing the constitutionality of the New York law, the Court stated, "The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulations." *Id.* at 563. So long as the commercial expression is not misleading and furthers lawful activity, it is entitled to protection. *Id*. at 564. Should a government wish to restrict that speech, it must assert a substantial interest. *Id.* Further, the restriction must "directly advance the state interest involved" and it must be "designed

carefully to achieve the state's goal." *Id.* If the governmental interest could be served well by a more limited restriction on commercial speech, the excessive restrictions cannot survive. *Id.*

In applying the four-part test, the *Central Hudson* Court held: (1) There was no claim the advertising was either inaccurate or in furtherance of unlawful activity. *Id.* at 568. (2) The state's concerns that electric rates be fair and efficient were "substantial." *Id.* at 569. (3) The link between advertising prohibition and energy efficiency and rates was "at best tenuous." *Id.* (4) The complete ban of advertising was more restrictive than necessary. *Id.* at 569-70.

Calling the fourth element the "critical inquiry," the Court found the total ban on advertising reached all promotional advertising, regardless of whether it related to the State's stated interests. As such, the ban was more extensive than necessary and could not withstand intermediate scrutiny. *Id.*

The facts of *Central Hudson* are analogous to the facts of the present matter, as Defendant's complete ban on rideshare vehicle advertisements is far more restrictive than necessary to achieve Defendant's asserted interests. Like in *Central Hudson*, there is no claim that the Drivers seek to display false, misleading or illegal advertisements. Even if one assumes that Defendant has a substantial interest in traffic safety, aesthetics and passenger comfort (which the Drivers do not concede) and that the Ordinance would help achieve those goals (which the Drivers do not concede), the Ordinance is too expansive to withstand judicial scrutiny.

Under *Central Hudson*, a restriction on commercial speech must not be any more expansive than is necessary to achieve governmental goals. Like the *Central Hudson* law, the Ordinance is a blanket prohibition on commercial speech. Instead of regulating, for instance, the size, volume, colors, duration, technology, hours of operation, or any other element of the display and function of commercial advertisements, Defendant opted to quash the speech

entirely. That the Defendant chose the most restrictive option dooms the Ordinance, per the *Central Hudson* test and holding.

The *Central Hudson* standard was also addressed in *Sorrell* (facts addressed in detail above). The *Sorrell* Court explained the Vermont law prohibiting data miners from using "prescriber-identifying information" would have been stricken under both strict and intermediate scrutiny. 564 U.S. at 571.

In *Sorrell,* the Court explained that, under the intermediate "commercial speech inquiry," it is the State's burden to justify its content-based law as consistent with the First Amendment. *Id.* at 572. To sustain a targeted, content-based burden on protected expression, "There must be a 'fit between the legislature's ends and the means chosen to accomplish those ends. As in other contexts, these standards ensure not only that the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message." *Id.* [internal citations omitted].

In holding Vermont's law could not survive intermediate scrutiny, the Court reasoned, "Perhaps the State could have addressed [its interests] through a 'more coherent policy." *Id.* at 573. The Court explained, "If Vermont's statute provided that prescriber-identifying information could not be sold or disclosed except in narrow circumstances then the State might have a stronger position." *Id.* at 580. However, "Given the information's widespread availability and many permissible uses, the State's asserted interest in physician confidentiality does not justify the burden that [the law] places on protected expression." *Id.* at 573. Because the law created a greater burden on speech than necessary, it was stricken. *Id.* 580.

In the present case, the Ordinance is defective like the *Sorrell* statute. Here, Defendant's advertising ban is not tailored in any manner whatsoever; it is a blanket ban on commercial

speech in rideshare vehicles. Like in *Sorrell*, advertising on other vehicles is widespread and largely permissible in Chicago. It is only in rideshare cars that advertising is banned. Therefore, Defendant's asserted interests in safety, aesthetics and comfort do not justify the burden that the Ordinance places on protected expression. Like in *Sorrell*, a more tailored law could have equally satisfied the Defendant's objectives.

Defendant erroneously cites *Metromedia,* 453 U.S. 490 as a case supportive of its argument. In *Metromedia*, the city of San Diego banned most outdoor advertising display signs with the stated objective of improving the city's appearance and preventing distractions to motorists. Only "onsite" billboards with messages relating to the specific property were permitted. The Court found that certain government objectives, like safety and aesthetics, could be deemed "substantial interests" in First Amendment analyses. *Id.* at 508. However, the Court struck the ordinance as unconstitutional because it inappropriately distinguished between commercial and noncommercial speech. *Id.* at 513-14. The Court reasoned that the city could not explain how or why noncommercial billboards located in places where commercial billboards were allowed would be more threatening or distasteful. *Id.* at 513. The Court held the ordinance was too far reaching and therefore unconstitutional on its face. *Id.* at 521.

Metromedia actually supports the Drivers' position. Like in *Metromedia*, the Defendant cannot explain why advertisements in and on rideshare vehicles would be more distracting or distasteful than those already allowed on taxicabs. The Ordinance also improperly distinguishes between commercial and noncommercial speech, as the law did in *Metromedia.* Under the Ordinance, the Drivers could display non-commercial messages on and in their cars. Such classification is improper. Therefore, under *Metromedia,* the Ordinance must be stricken.

Lastly, Defendant argues that the Drivers' Complaint alleges the Ordinance is "under-inclusive." Defendant misses the point. The Drivers' argue that the Ordinance is an improper content-based ban on a specific group, not that taxicab drivers' rights should be restricted too.

For all the reasons stated above, the Driver's Complaint in Intervention states a claim that is "plausible on its face." The Drivers respectfully ask this Court to deny Defendant's Motion to Dismiss their Complaint in Intervention.

B. The Drivers' Equal Protection claims under the Federal and Illinois Constitutions must stand.

i. Heightened judicial scrutiny of the Ordinance is warranted under the Federal and State Equal Protection clauses.

Defendant's argument is based on a misapplication of constitutional law. Defendant incorrectly characterizes the Drivers' claims as challenges to an "economic regulation." (Doc. #27, p. 14). In actuality, the Drivers' Equal Protection challenge is based on the Ordinance's improper restrictions of their fundamental right to free speech.

Defendant correctly states: Only where a law "jeopardize exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic" does an equal protection challenge face higher scrutiny. (Document #27, p. 14). Where Defendant falters, however, is in arguing that speech is not a fundamental right.

The Supreme Court has addressed this issue on many occasions. Consider:

> When dealing with the Constitution of the United States, and more particularly with the great safeguards of the Bill of Rights, we are dealing with principles of liberty and justice 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'—something without which 'a fair and enlightened system of justice would be impossible'. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 652 (1943).
>
> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. *Id.* at 638.

> Freedom of speech and of the press are among the fundamental personal rights and liberties protected by the Fourteenth Amendment from impairment by the States.' *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965).
>
> Freedom of speech and of the press are fundamental rights which are safeguarded by the Fourteenth Amendment of the Federal Constitution. *De Jonge v. State of Oregon*, 299 U.S. 353, 364 (1937), citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Stromberg v. California*, 283 U.S. 359, 368 (1931); *Near v. Minnesota*, 283 U.S. 697, 707 (1931); *Grosjean v. American Press Co*., 297 U.S. 233, 243 (1936).

Because speech is a fundamental right, the Ordinance is subject to heightened scrutiny. In the previous section, the Drivers thoroughly addressed methods in which the Ordinance could have been more narrowly drawn to achieve Defendant's stated interests. Defendant, instead, instituted a blanket ban on the Drivers' fundamental right to free speech, while simultaneously permitting others to engage in such expression/practice. For these reasons, the Driver's Complaint in Intervention states a claim that is "plausible on its face." The Drivers respectfully ask this Court to deny Defendant's Motion to Dismiss their Complaint in Intervention.

WHEREFORE, Murray Meents, individually, and on behalf of all others similarly situated (the "Drivers"), respectfully request that the Court deny the Defendant's Motion to Dismiss Plaintiff-Intervenor's Complaint in Intervention.

Dated: **June 15, 2017**

Respectfully submitted,
THE DRIVERS

By: /s/ Bryant M. Greening

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CERTIFICATE OF SERVICE

I, Bryant M. Greening, an attorney, certify that on June 15, 2017, I served The Drivers' Response in Opposition to The City's Motion to Dismiss Plaintiff-Intervenor's Complaints on all counsel of record by filing it through the Court's electronic case filing system.

Respectfully submitted,

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