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

VUGO, INC., et al. Plaintiffs, and MURRAY MEENTS, individually, and on behalf of all others similarly situated, Plaintiff-Intervenor, v. CITY OF CHICAGO, Defendant.	)	Case No. 17-cv-864 Hon. Elaine E. Bucklo

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS

This Court should deny Defendant City of Chicago's motion to dismiss[1] because:

1. *Plaintiffs have standing*. The City claims that Plaintiffs lack standing because they do not seek to advertise their own product or service on or in their rideshare vehicles. But a person with a "commercial interest" in speech may challenge the facial validity of a statute on First Amendment grounds even based on the speech interests of others.

2. *The Ordinance is content based and subject to strict scrutiny*. The proper test in evaluating the ban on commercial advertisements (but not noncommercial speech) in or on rideshare vehicles (but not taxis or personal vehicles) is strict scrutiny because the ban makes a content-based distinction between commercial and noncommercial speech.

3. *Alternatively, Plaintiffs have stated a proper claim under intermediate First Amendment scrutiny*. It is the City's burden to justify its ban with evidence, but it is not appropriate to decide a motion to dismiss on evidence or facts outside the complaint. And the City's arguments do not satisfy its burden to justify its ban on commercial advertising under the First Amendment.

4. *Plaintiffs have stated a proper Equal Protection claim*. For the same reasons why the Plaintiffs' First Amendment claims should not be dismissed, the City's attempt to dismiss Count II must fail.

Motion to Dismiss Standard

In considering a motion to dismiss under either Rule 12(b)(6) or 12(b)(1), a court must construe all well-pleaded allegations of the complaint as true and draw all reasonable inferences in favor of the plaintiff. *Savory v. Lyons*, 469 F.3d 667, 670 (7th Cir. 2006). A motion to dismiss will not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in

[1] The City's motion seeks to dismiss Plaintiffs' Amended Complaint and Plaintiff-Intervenor's Complaint, which presents substantially identical claims.

support of his claims which would entitle him to relief. *Veazey v. Communications & Cable, Inc.*, 194 F.3d 850, 854 (7th Cir. 1999).

Argument

I. Plaintiffs have standing to challenge the City's commercial advertising ban.

Plaintiffs have standing to challenge the ban on all "[c]ommercial advertisements . . . on the exterior or in the interior of a transportation network vehicle" in City of Chicago Ordinance No. O2014-1367 (the "Ordinance"), Chi. Mun. Code 9-115-130.

The City argues that Plaintiffs lack standing because they seek to display the commercial messages of others, rather than messages about "their own product or service." (Memo. at 5.) The City asserts that, because the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), "justified its [First Amendment] protection of commercial speech on grounds that consumers would benefit from the dissemination of knowledge that the creators of commercial speech have about their own products" (Memo. at 5-6), the First Amendment only protects commercial speakers who wish to express a commercial message about their own product or service. (Memo. at 5-6.)

But the Supreme Court has never – in *Central Hudson*[2] or any other case – limited the protection of the First Amendment to commercial speakers who express a commercial message about their own product or service. Indeed, the Court has explicitly held that commercial speakers *do* have standing to challenge restrictions on commercial speech even if the message is about a product or service that is not the speaker's. As the Court stated in *Metromedia, Inc. v. City of San Diego*, "we have never held that one with a 'commercial interest' in speech also

[2] The *Central Hudson* Court held that the basis for First Amendment protection of commercial speech is the informational function of advertising, 447 U.S. at 563, and did not qualify this justification to the "dissemination of knowledge that the creators of commercial speech have about their own products," as the City suggests. (Memo. at 5-6.)

cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others. Were it otherwise, newspapers, radio stations, movie theaters and producers – often those with the highest interest and the largest stake in a First Amendment controversy – would not be able to challenge government limitations on speech as substantially overbroad." 453 U.S. 490, 504 n.11 (1981) (holding that owners of billboards that placed commercial advertisements of third parties on their billboards in exchange for a fee had standing). Indeed, the principle that a plaintiff that places ads for third parties has standing to bring a First Amendment challenge is so well established that often the standing of such a plaintiff is not even challenged. *See, e.g.*, *Lavey v. City of Two Rivers*, 171 F.3d 1110 (7th Cir. 1999).

And even if the City's argument based on *Central Hudson* was correct – which it is not – Plaintiffs would still have standing to bring their First Amendment claim on advertisers' behalf. "Where practical obstacles prevent a party from asserting rights on behalf of itself," the Court will recognize a third party's standing if that party has sufficient injury-in-fact and "it can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal." *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). If the City were correct that persons advertising their own product or service are the only parties that have standing – which it is not – then those advertisers would be faced with the practical obstacle of not owning a rideshare vehicle on which they can place ads. Plaintiffs have sufficient injury-in-fact – they are prevented from displaying commercial ads in and on their vehicles and also deprived of income derived from such ads – and Plaintiffs can reasonably be expected to properly frame the issues and present them with the necessary adversarial zeal.

Further, "[w]ithin the context of the First Amendment, the Court has enunciated other concerns that justify a lessening of prudential limitations on standing." *Id*. at 956-57. When there is a danger of chilling free speech, litigants are permitted to challenge a statute even if their own rights of free expression are not violated, because of a "'judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Id*. (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)). Here, the Ordinance's commercial advertising ban chills the speech of parties not before this Court: businesses that would otherwise wish to advertise their products or services on or in a rideshare vehicle will not attempt to contract directly with a rideshare driver or with an intermediary, such as Vugo, when they know that the ban on commercial ads in or on rideshare vehicles exists and that such a contract may violate the ban.

For these reasons, Plaintiffs have standing to challenge the City's commercial ad ban.

II. Plaintiffs have properly stated claims that the ban on commercial advertisements violates the First Amendment.

Plaintiffs have stated a First Amendment claim challenging the Ordinance's ban on commercial advertisements as a content-based restriction on speech subject to strict scrutiny. In the alternative, Plaintiffs have also stated a claim that the ban on commercial advertisements violates the First Amendment because it does not directly advance a substantial government interest in a narrowly tailored manner.

A. The commercial advertising ban is a content-based restriction on speech subject to strict scrutiny.

The City's ban on commercials advertisements in or on rideshare vehicles is a content-based restriction on speech.

A restriction on speech is content based if it applies to particular speech because of the topic discussed or the idea or message expressed. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015); *see also Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015) (explaining that, after *Reed*, "[a]ny law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification"). A law "defining regulated speech by its function or purpose" is content based. *Reed*, 135 S. Ct. at 2227.

The commercial ad ban imposes a content-based restriction because it applies to some speech because of the topic discussed, its meaning, or its function or purpose: if the purpose or function of speech displayed in or on a ridesharing vehicle is commercial, it is not allowed; if its function or purpose is not commercial, it is allowed. Indeed, the Court in *Reed* acknowledged that laws banning political signs but not commercial signs impose a content-based restriction on speech. *Reed*, 135 S. Ct. at 2232 (citing *Matthews v. Needham*, 764 F. 2d 58, 59-60 (1st Cir. 1985)). It logically follows from this that the converse is true and a ban on commercial speech, but not noncommercial speech, is likewise content based.

The Seventh Circuit has acknowledged that, after *Reed*, distinctions between commercial and noncommercial speech are content based. The Seventh Circuit recently rejected a plaintiff's argument that an exception for political speech should be carved from Indiana's anti-robocall statute because, as the Court stated, such an "exception if created, would be real content discrimination, and *Reed* then would prohibit the state from forbidding robocall *advertising* and other non-political speech." *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 305 (7th Cir. 2017) (emphasis added). In other words, the Seventh Circuit concluded that *Reed* would prohibit the state from discriminating against commercial speech in favor of certain noncommercial speech – which is precisely what the Ordinance does in this case.

When a law places content-based restrictions on speech, the Court applies strict scrutiny, "'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Reed*, 135 S.Ct. at 2231 (citation omitted).

There is no question that the Ordinance makes content-based distinctions on speech and that laws that make content-based distinctions on speech are subject to strict scrutiny. The City does not argue otherwise. Rather, the City says that *Central Hudson* provides the appropriate standard governing a regulation of commercial speech (Memo. at 4) and that Plaintiffs' (supposed) argument that *Central Hudson* is no longer good law in light of *Reed* is incorrect. (Memo. at 4-5 n. 2). But Plaintiffs do not, and need not, argue that *Reed* overturned *Central Hudson*. Indeed, the *Central Hudson* test is still the appropriate test to evaluate restrictions on commercial speech that do not discriminate based on the content of speech. But the Court in *Reed* clarified that the proper test for restrictions based on content of speech, like the Ordinance's commercial advertising ban, is strict scrutiny. *See also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011).

Reed no more overturned *Central Hudson* than it overturned *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), which provides a test for "time, place, and manner" restrictions on speech. Rather, *Reed* simply clarified that the *Clark* test – like the *Central Hudson* test – does not apply when a restriction on speech is content based. Indeed, the similarities between the *Clark* and *Central Hudson* tests – which the City acknowledges (Memo. at 5 n. 3.) – show that the government generally has no justification for treating commercial speech less favorably than noncommercial speech. The only difference between the *Clark* and *Central Hudson* tests is that *Central Hudson* requires that the commercial speech concern a lawful activity and not be false or misleading. 447 U.S. at 566. The only legitimate reason, then, that the government could have to treat commercial speech less favorably than noncommercial

speech is preventing commercial speech that concerns an unlawful activity or is false or misleading. In other words, when the government makes content-based distinctions between commercial speech and noncommercial speech, it must satisfy strict scrutiny and show that the distinction is narrowly tailored to serve a compelling government interest And when it comes to commercial speech, the government has a compelling interest in preventing commercial speech that concerns and unlawful activity or is false or misleading. For example, the government could remove commercial advertisements that make untrue or misleading claims, even though the government could not remove noncommercial messages that may be untrue or misleading. *See United States v. Alvarez*, 567 U.S. 709, 718 (2012). But the City does not assert that the commercial speech in this case concerns an unlawful activity or is false or misleading, and even if it did, its ban on commercial advertisements in or on rideshare vehicles would not be narrowly tailored to serve that interest, since it allows taxis and personal vehicles to display commercial advertisements.

Because the City's assumption that strict scrutiny does not apply to content-based restrictions on commercial speech is wrong, and the City provides no additional argument, the City's motion to dismiss Count I of the Amended Complaint should be dismissed.

B. In the alternative, Plaintiffs have stated a claim that the Ordinance does not satisfy the *Central Hudson* test.

In the alternative, Plaintiffs have properly stated a claim that the Ordinance's advertising ban violates the First Amendment because it fails the *Central Hudson* test.

In evaluating challenges to restrictions on commercial speech under *Central Hudson,* courts consider whether: (1) the commercial speech concerns a lawful activity and is not false or misleading; (2) the asserted governmental interest is substantial; (3) the regulation directly advances the governmental interest asserted; and (4) the restriction is no more extensive than

necessary to serve that interest. 447 U.S. at 566. The fourth prong requires "a means narrowly tailored to achieve the desired objective." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). The City has the burden to prove that its ban on commercial ads on or in rideshare vehicles directly advances its interests in a narrowly tailored manner. *Id*. The City cannot satisfy this burden with "mere speculation or conjecture" but rather "must demonstrate," with evidence, "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

Because the City must meet its burden under the *Central Hudson* test with evidence – and any such evidence would include facts and material outside of the Amended Complaint – the City cannot prevail on a Rule 12(b)(6) motion. *See* Fed. R. Civ. P. 12(d)[3]; *Savory v. Lyons*, 469 F.3d 667, 670 (7th Cir. 2006). The City could only prevail on its motion to dismiss under *Central Hudson* if it could show that there is no set of facts Plaintiffs could prove that would entitle them to relief. *Veazey*, 194 F.3d at 854. But the City has not made that showing here.

Further, even if the City's arguments that that its ban passes the *Central Hudson* test were appropriate on a motion to dismiss – which they are not – they still would fail on their merits.

The City does not challenge the first factor of *Central Hudson* and it cannot reasonably be disputed. Plaintiffs' proposed commercial speech is not false or misleading, nor does it advertise unlawful activity.

As to the second *Central Hudson* factor, Plaintiffs concede that two interests the City has cited to justify the ban, traffic safety and aesthetics, are substantial. (Memo. Mot. Dismiss 6.) But no court has ever found that a government has a substantial interest in the City's third purported

[3] Because the City is required to rely on evidence outside of the complaint, but, as explained below, has actually failed to do so in its motion to dismiss, it would be inappropriate to treat the City's motion as a motion for summary judgment under Fed. R. Civ. P. 12(d).

interest: passenger comfort. The case the City cites to claim that this is a substantial interest, *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984), does not actually support the City's assertion because the government's purported interest in that case was aesthetics. And although that case acknowledged that the government might have an interest in restricting certain *methods* of expression that "may legitimately be deemed a public nuisance" – such as "loud and raucous sound trucks" – it did not condone discrimination against particular *messages* based on their content. *See id.* (*citing Kovacs v. Cooper*, 336 U.S. 77 (1949)). Here, the Ordinance's advertising ban does not regulate a method of expression (such as communication through the signs or tablet screens on which commercial advertisements might be displayed), nor does it address any public nuisance; it just regulates the expression of certain speech based on its content.

The City's "passenger comfort" justification really amounts to an argument that the City may "protect" passengers from speech they might not like. But the City has no legitimate interest – much less a substantial one – in protecting people from hearing certain messages based on their content. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71-72 (1983) (the fact that protected speech may be offensive to some does not justify its suppression); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976) (dissemination of commercial advertising, "however tasteless and excessive it sometimes may seem," is a matter of public interest).

Further, in any event, the City has not established through its motion to dismiss that the Ordinance will necessarily survive the third and fourth factors of *Central Hudson*. The City cannot show, at this stage of the proceedings, that commercial advertising ban directly advances

its putative interests in traffic safety, aesthetics, and passenger comfort, let alone that it is narrowly tailored to do so.

It is the City's burden to prove with evidence that commercial advertisements on the inside and outside of rideshare vehicles would affect traffic safety *more than other things* visible to drivers that the City has not banned, including other kinds of speech. The City has presented no evidence – and can present no evidence on a motion to dismiss – to meet that burden. Indeed, the City provides no basis or evidence to conclude that commercial advertisements on the interior or exterior of rideshare vehicles are any more of a threat to traffic safety than noncommercial messages on the interior or exterior of rideshare vehicles. The City claims that commercial ads are intended to attract attention and this could affect traffic safety (Memo. at 7), but that does not explain the City's rule singling out, and banning, commercial advertisements in and on ridesharing vehicles: presumably the many commercial advertisements in and on taxis and other vehicles, and in other places visible to motorists, are likewise designed to attract attention, but the City has not banned them.

Moreover the City has not established that the commercial advertising ban directly advances an interest in aesthetics at all. Aesthetics is about *how something looks*, but the Ordinance regulates *what something says*. The Ordinance would prohibit an advertisement that says "Eat at Joe's" but would allow an advertisement that says "Vote for Joe," even if the two signs were identical in every aesthetic respect. The Ordinance does not regulate advertisements' size, number, or physical structure – the qualities of signs governments typically may regulate (subject to First Amendment limitations) to serve an aesthetic interest. *Cf. Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981).

The City also has not established that the commercial ban directly advances its supposed interest in passenger comfort. The City has presented no evidence that commercial advertisements would make many, most, or all passengers less comfortable. The City claims that its ban on commercial advertisements in rideshare vehicles is justified because rideshare customers are supposedly a "captive audience." But the cases that the City cites for this proposition (Memo. Mot. Dismiss 7-8) all involved speech on government property, not in private vehicles. *See Lehman v. Shaker Heights*, 418 U.S. 298, 304 (1974) (finding that buses were not a First Amendment forum, and thus upholding a restriction on political advertising on city buses); *Anderson v. Milwaukee Cnty.*, 433 F.3d 975, 980 (7th Cir. 2006) (also involving public buses); *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988) (involving speech on government property); *Hill v. Colorado*, 530 U.S. 703, 718 (2000) (same). The government's interest in maintaining *public* property for the enjoyment of everyone is not present in this case, in which the government is restricting speech in *private* vehicles. Customers of rideshare vehicles are not a "captive audience." They do not have to ride in a particular rideshare vehicle or use a particular rideshare service. And, in any event, the City's "captive audience" argument does not explain the City's discrimination against ridesharing drivers: if rideshare passengers are a "captive audience," then so are taxi passengers, who can be and are subjected to advertising, including advertising presented on video screens.

The City has also not met its burden to show that its ban on commercial advertisements, but not other speech in or on rideshare vehicles, is narrowly tailored to serve its supposed interest in passenger comfort. While the Ordinance would prevent a rideshare driver from displaying an advertisement for something popular that is unlikely to offend anyone, such as the musical *Hamilton*, it would allow a rideshare driver to display a sign advocating for politically unpopular

or even offensive public policies, such as a restriction or ban on certain people entering the United States based on their religion. As a result, the Ordinance is so underinclusive as to render the City's purported justification in passenger comfort incredible. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (exemptions from restrictions on speech can "diminish the credibility of the government's rationale for restricting speech in the first place" and demonstrate that restrictions are not narrowly tailored to serve a sufficiently important governmental interest); *see also Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 742 (9th Cir. 2011) (restriction on speech can be underinclusive, and therefore invalid, when exceptions undermine and counteract the interest the government claims the restriction furthers).

The Supreme Court held that an ordinance that similarly discriminated against commercial speech was not narrowly tailored to serve an aesthetic interest in *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993). In that case, Cincinnati prohibited publications that were principally commercial from using newsracks on public property but permitted newspapers to be sold at such newsracks. The Court struck the law down, finding that the ordinance's distinction between commercial and noncommercial speech bore no relationship to the particular interests that the city asserted. Although the city might have a legitimate interest in aesthetics, newsracks with commercial publications would be "no greater an eyesore than the newsracks [with newspapers] permitted to remain on Cincinnati's sidewalks." *Id*. at 424. The same is true here. The distinction between commercial ads (prohibited) and noncommercial speech (not prohibited) in rideshare vehicles bears no relationship to the interests asserted by the City. The City "has not asserted an interest in preventing commercial harms by [prohibiting commercial ads in rideshare vehicles], which is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech." *Id*. at 426.

The City asserts that it can treat rideshare vehicles worse than taxis or personal vehicles because restricting commercial ads in and on ridesharing vehicle at least eliminates some of traffic safety or aesthetics problems caused by commercial advertising. (Memo. at 10.) But the Ordinance specifically prohibits *only* rideshare vehicles from placing commercial ads on their interior and exterior. This diminishes the City's claim that it is actually concerned about traffic safety and aesthetics and makes it look more like the City is targeting rideshare drivers for some other reason. *See Gilleo*, 512 U.S. at 52.

The City asserts commercial advertisements in and on rideshare vehicles might not present the same potential harm as commercial advertisements in and on taxis and other vehicles. (Memo. at 10.) But that is "mere speculation or conjecture," which the City has not supported – and, at this stage of the proceedings, cannot support – with any evidence, so it cannot provide a basis for dismissing Plaintiffs' First Amendment claim. *Edenfield*, 507 U.S. at 770.

The City also suggests that it may allow taxis, but not rideshare vehicles, to place commercial ads on and in their vehicles because the City's "traffic and visual blight concerns may yield" to its (supposed) interest in allowing taxis to make extra money. (Memo. at 11.) But providing economic benefits to select businesses is not a substantial government interest under the *Central Hudson* test. By raising this improper purpose for the rule, the City further undermines its assertion that its commercial ad ban on rideshare vehicles serves an interest in traffic safety and aesthetics. *See Gilleo*, 512 U.S. at 52.

The City also argues that allowing taxis to have exterior commercial advertisements gives them a distinct appearance that separates them from other vehicles on the road. (Memo. at 12.) But of course not all taxis have advertisements, and all taxis manage to distinguish themselves from other vehicles on the road in other ways. Besides, the City allows other types of vehicles to

have commercial advertisements, so advertising does not actually distinguish taxis from all other vehicles on the road.

Because the City has not established – and, on a motion to dismiss, cannot establish – that its prohibition on commercial advertisements in rideshare vehicles advances any substantial governmental interest in a narrowly tailored manner, its motion to dismiss must be denied.

II. The Ordinance violates the Equal Protection Clause.

Because the Ordinance restricts some speech more than other speech, the Court may analyze it not only under the First Amendment but also under the Equal Protection Clause of the Fourteenth Amendment. *See Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 94-95 (1972). The Ordinance does this in two ways: (1) it only bans commercial advertising, not others kinds of speech; and (2) it only bans commercial advertising on or in rideshare vehicles, not on any other vehicles. Under the Equal Protection Clause, when differential treatment involves expressive conduct that is protected by the First Amendment, the differential treatment of speech must be narrowly tailored to serve a substantial government interest. *Id*. at 101. Because this analysis is substantially the same as the *Central Hudson* analysis, the Ordinance violates the Equal Protection Clause for the same reasons, discussed above, that it fails the *Central Hudson* test. Thus, the motion to dismiss Count II of the Amended Complaint should be denied.

Conclusion

For all the reasons stated herein, the Court should deny the City's motion to dismiss.

Dated: June 16, 2017

Respectfully submitted,

By: /s/ Jeffrey M. Schwab_____

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CERTIFICATE OF SERVICE

I, Jeffrey M. Schwab, an attorney, certify that on June 16, 2017, I served Plaintiffs' Response to Defendant's Motion to Dismiss on all counsel of record by filing it through the Court's electronic case filing system.

/s/ Jeffrey M. Schwab