IN THE SUPREME COURT OF IOWA

NO. 16-1534

THERESA SEEBERGER,

Petitioner-Appellee/Cross-Appellant,
v.

DAVENPORT CIVIL RIGHTS COMMISSION,

Respondent-Appellant Cross-Appellee

MICHELLE SCHREURS,

Intervenor-Appellant/Cross-Appellee

On Appeal from the District Court for Polk County
The Honorable Michael D. Huppert

REPLY BRIEF OF THERESA SEEBERGER

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Introduction

In her opening brief, Seeberger argued that the First Amendment bars the Davenport Civil Rights Commission from prosecuting and punishing her for her speech. Seeberger made two arguments. *First*, that her speech receives full protection under the First Amendment because the commercial nature of it (i.e., the connection to the rental of the property) was inextricably intertwined with Seeberger's statements on parental responsibility and teenage pregnancy. *Second*, Seeberger argued that even if her statements are subject to the commercial-speech doctrine, the Davenport Civil Rights Commission has not shown that its speech prohibition survives constitutional scrutiny under *Central Hudson*.

In response, Schreurs and the Davenport Civil Rights Commission have raised several arguments. None of them justifies the restriction of Seeberger's speech. Indeed, some of them don't address Seeberger's arguments at all. We'll go through each one in turn.

I. This appeal is about whether Davenport's speech ordinance is constitutional as applied, not whether Seeberger violated that ordinance.

Both Schreurs and the Commission are under the impression that Seeberger is arguing, in this appeal, that she did not violate Davenport's speech prohibition, Davenport Municipal Code section 2.58.305(c). *See Schreurs Reply* 2-4, *Commission Reply* 14. That is incorrect. The Commission found that Seeberger had violated the statute by making a statement "with respect to the rental of a dwelling" that was "in connection with . . . familial status." *See* Davenport Municipal Code § 2.58.305(c). Although Seeberger does not agree with that finding, she is not challenging it on appeal. Her argument is that the application of the ordinance's speech prohibition to the facts of this case violates the First Amendment.

So when Schreurs says that "Seeberger's brief seeks to skip over the statute's plain prohibition on making discriminatory statements" (*Schreurs Reply Br.* 14), she is wrong. The terms of section 2.58.305(c) *do* make it illegal for landlords to make

statements concerning familial status, *even if* they can discriminate on that basis. That *is* the First Amendment problem.

II. Under either constitutional framework (strict scrutiny or *Central Hudson*) the burden is on the Commission.

The Commission and Schreurs argue that the burden is on Seeberger to prove that Davenport's speech prohibition is unconstitutional. *Commission Reply* 6-7; *Schreurs Reply* 5. That is exactly backwards, regardless of which level of constitutional scrutiny applies.

If strict scrutiny applies (because the commercial speech is inextricably intertwined with non-commercial speech) then the Commission "has the burden to show that the ordinance serves a compelling state interest and is the least restrictive means of attaining that interest." *Mitchell Cty. v. Zimmerman*, 810 N.W.2d 1, 16 (Iowa 2012) (setting out the test for a First Amendment claim based on free exercise of religion). If *Central Hudson* applies, the Commission "carries the burden of showing that the challenged regulation advances the Government's interest in a direct and material way." *Rubin v. Coors Brewing Co.*, 514 U.S.

476, 486–87 (1995) (internal quotation omitted). "That burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id* at 487. As the U.S. Supreme Court has cautioned, these standard are "critical" (*id*) to "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." *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011).

The Commission cites *State v. Senn*, 882 N.W.2d 1, 6 (Iowa 2016) for the proposition that Seeberger must prove the statute is unconstitutional "beyond a reasonable doubt" and that she has to "refute every reasonable basis upon which the statute could be found to be constitutional." *Commission Reply* 7. Schreurs cites *State v. Musser*, 721 N.W.2d 734, 741 (Iowa 2006) for the same proposition.

Those cases are not applicable to Seeberger's as-applied[1] First Amendment challenge—nor are they applicable in a host of challenges based upon the U.S. Constitution. The language from *Senn* and *Musser* traces back to older cases that address void–for–vagueness arguments. *See e.g., Saadiq v. State*, 387 N.W.2d 315, 320 (Iowa 1986)). To be sure, *Musser* was a First Amendment case, and it does state that the burden is on the challenger in constitutional cases. 721 N.W.2d at 741. But on the First Amendment issue, this Court did not apply that standard; it applied strict scrutiny, which—by definition—places the burden on the government. *Id.* at 744.

In any event, the U.S. Supreme Court has been clear on where the burden falls in First Amendment cases, even those involving commercial speech. *See Sorrell*, 564 U.S. at 571-72 ("Under a commercial speech inquiry, it is the State's burden to

[1] Schreurs and the Commission often treat Seeberger's claim as a facial challenge to Davenport Municipal Code 2.58.305(c). It is not.

justify its content-based law as consistent with the First Amendment").[2]

III. There is no "hate speech" exception to the First Amendment.

Schreurs argues that the Commission can punish Seeberger for expressing her views (that Schreurs was an irresponsible parent) because "courts have a long history of rejecting the idea that the free speech principles apply to bigotry and other hateful speech." *Schreurs Reply* 5. Schreurs does not provide legal authority for that proposition—because there is none. To quote leading First Amendment scholar Eugene Volokh: "No, there's no 'hate speech' exception to the First Amendment."[3] The "most basic" principle of the First Amendment is that "as a general

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[2] *See also Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004) ("[T]he Constitution demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality."); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.").

[3] Eugene Volokh, *No, There's No 'Hate Speech' Exception to the First Amendment*, The Washington Post (May 7, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/07/no-theres-no-hate-speech-exception-to-the-first-amendment/?utm_term=.e6aeedd0d0c5.

matter . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Entm't Merchants Ass'n,* 564 U.S. 786, 790-91 (2011) (alteration in original). Yes, there are *narrow* exceptions "in a few limited areas" like obscenity and fighting words, which are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction" *Virginia v. Black*, 538 U.S. 343, 358-59 (2003). But those exceptions are not applicable here (Seeberger's statements are not of the type that would incite violence from an ordinary citizen) and "new categories of unprotected speech may not be added to the list by a [government] that concludes certain speech is too harmful to be tolerated." *Brown,* 564 U.S. at 791.

Yet that is Schreurs's argument. She labels Seeberger's comments as "bigoted" and asks this Court to take them outside the First Amendment's scope because they have "no upside or value." *Schreurs Reply* 12. That argument—that the government can ban speech based upon its judgment of the value of certain

ideas and beliefs—is precarious one, and thankfully one that the Supreme Court has squarely rejected.

In *United States v. Stevens*, 559 U.S. 460, 469 (2010)—a case about a statutory ban on depictions of animal cruelty for commercial gain—the government argued that courts can create categorical exclusions from the First Amendment by using a balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." *United States v. Stevens*, 559 U.S. 460, 470 (2010). The Supreme Court described that test as "startling and dangerous." *Id.* "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Id.* Instead, the "First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs," and "[o]ur Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *Id.*

Schreurs and the Commission clearly disagree with Seeberger's statements and beliefs. But their value judgments are irrelevant for purposes of the First Amendment. Calling Seeberger's opinions "bigoted" again and again does not stave off a First Amendment challenge.

IV. There is no general "insult" or "emotional distress" exception to the First Amendment and, even if there were, this prohibition would be unconstitutional under *R.A.V. v. City of St. Paul.*

Schreurs and the Commission also argue that punishing Seeberger for her opinions about parental responsibility and family planning are not protected by the First Amendment because they caused Schreurs "insult and emotional distress." *Schreurs Reply* 12; *see Commission Reply* 12-13. Or as the Commission put it: Even though Seeberger's *actions* (terminating the lease based in part on familial status) were legal, "[t]he words still sting and still cause psychic injury." *Commission Reply* 13.

The fact that Schreurs felt insulted or even sad does not give the Commission the authority to punish Seeberger for expressing her opinions. As Judge Posner has explained: "[P]eople do not have a legal right to prevent criticism of their beliefs or for that

matter their way of life." *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 672 (7th Cir. 2008). He wrote that in a case where a school district attempted to ban a student from wearing a shirt that made a negative comment about homosexuality ("Be Happy, Not Gay"). The school district argued that students have a right not to have "derogatory comments" directed to them; the Seventh Circuit, disagreed and ruled that the ban violated the First Amendment. *Id.*

That case isn't an anomaly. "[W]here adults are concerned the Supreme Court has never used a vulnerable listener/captive audience rationale to uphold speaker-focused and content-based restrictions on speech." *Wollschlaeger v. Governor, Florida*, -- F.3d --, 2017 WL 632740, at *13 (11th Cir. Feb. 16, 2017). Indeed, as the Supreme Court said in its recent commercial-speech case: "Many are those who must endure speech they do not like, but that is a necessary cost of freedom." *Sorrell*, 564 U.S. at 575.

But even if we assume that the government can ban expression of opinions that cause emotional distress, the Davenport speech ordinance would violate the First Amendment.

In *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 380 (1992) the Supreme Court struck down a statute that banned fighting words (which fall outside the protection of the First Amendment) because the ban did not apply to *all* fighting words, meaning that it did not apply to *all* face-to-face statements that would objectively incite violence. Instead, the ordinance banned only those fighting words that cause "resentment in others on the basis of race, color, creed, religion or gender." *Id.* "Those who wish[ed] to use 'fighting words' in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality"—were free to do so. *Id.* At 391. By doing that—by identifying some fighting words as illegal and based upon their content—the city had violated the First Amendment. *Id.* at 386. "The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed." *Id.* at 386.

But that is what Davenport has done. Even assuming that the city could ban all speech that causes emotional distress or injury, section 2.58.305 does not do that. It only prohibits

landlords from making statements "that indicate any preference, limitation, or discrimination based on race, color, creed, religion, sex, national origin or ancestry, age, familial status, marital status, disability, gender identity, or sexual orientation." Davenport Municipal Ordinance § 2.58.305(c). If a landlord tells a tenant that he won't rent to her because she is "too fat," the landlord will not face liability under the ordinance—even if his statements caused emotional distress.

So even if speech that caused emotional distress fell outside the First Amendment, this ordinance would still be violate the First Amendment because it discriminates based upon content. But, in any event, there is no exception to the First Amendment for hurt feelings. If there were, the First Amendment would be a meaningless one.

V. The private/public speech concept is not applicable here.

The Commission argues, based upon the Eighth Circuit's decision in *Richardson v. Sugg*, 448 F.3d 1046 (8th Cir. 2006), that Seeberger's comments don't deserve protection because they are a

matter of private, rather than public, concern. That's not how the private-concern doctrine works.

"The 'public concern' test was formulated by the Supreme Court in addressing speech restrictions placed by governmental entities on their own public employees." *Eichenlaub v. Twp. of Ind.*, 385 F.3d 274, 283 (3d Cir. 2004). That's what was at issue in *Richardson*; it's not relevant here.

Indeed, "except for certain narrow categories deemed unworthy of full First Amendment protection—such as obscenity, 'fighting words' and libel—all speech is protected by the First Amendment," including "private expression not related to matters of public concern." *Eichenlaub*, 385 F.3d at 282–83 , "The rationale for a public/private concern distinction that applies to public employees simply does not apply to citizens outside the employment context." *Id.* at 284; *see also See Van Deelen v. Johnson*, 497 F.3d 1151, 1156–57 (10th Cir. 2007) (Gorsuch, J.) ("[A]ny attempt to apply [the public/private distention] to the broader context of speech by private citizens would quite

mistakenly 'curtail a significant body of free expression that has traditionally been fully protected under the First Amendment.'").

Even if the public/private dichotomy had some relevance in this context, under *R.A.V.* the government cannot pick and choose which types of private conversations to censor (i.e., those about race, family status, gender, etc.). Imagine if it could: Our private conversations would be limited, based upon who is in power and what kinds of messages they find offensive.

VI. As applied to Seeberger's statements, the ordinance's speech restriction is subject to strict scrutiny.

Seeberger argued in her opening brief that strict scrutiny applies because her commercial speech (statements concerning the rental of the house) were "inextricably intertwined" with her philosophical or ideological message about parental responsibility and teenage pregnancy (which are fully protected). *See Riley v. Nat'l Federation of the Blind of N. C., Inc.,* 487 U.S. 781, 795–96 (1988). The Commission disagrees. Relying on *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 471 (1989), it argues that Seeberger's statements about parental responsibility and teenage pregnancy are severable from Seeberger's discussion

about the termination of the lease (the commercial aspect of the speech). According to the Commission, Seeberger's "diatribes" on parental responsibility and teenage pregnancy were "wholly unrelated to the substantive situation at hand: a landlord and a tenant's business arrangements." *Commission Reply* 18.

We're not sure what the Commission is getting at with that argument. If Seeberger's statements concerning parental responsibility were not connected to the rental of the house, then by definition she did not violate Davenport's speech ordinance, which only bans discriminatory statements "with respect to the sale or rental of a dwelling." Davenport Mun. Ordinance § 2.58.305(c).

So Seeberger's statements about parental responsibility were either severable from the commercial transaction (and thus they did not violate the statute) or they were inextricably intertwined with the termination of the lease and thus strict scrutiny applies.

The Commission does not contend that the application of the ordinance to Seeberger's speech can withstand strict scrutiny; it

doesn't even attempt to meet that burden. As a result, the as-applied challenge must be sustained.

VII. As applied to Seeberger's statements, Davenport's speech ordinance is unconstitutional under *Central Hudson*.

Under the *Central Hudson* test, the Court must first determine that the speech concerns lawful activity and is not misleading. *Central Hudson Gas & Elec. Corp. v. Pub Serv. Comm'n of N.Y.,* 447 U.S. 557, 566 (1980). That's true here (Seeberger's underlying conduct was legal under the Davenport ordinance and she expressed her truthful opinion) so the Commission must point to a substantial government interest and "demonstrate that the challenged regulation advances [that] interest in a direct and material way." *Florida Bar v. Went For it, Inc.*, 515 U.S. 618, 625 (1995). It has not done that, so the inquiry ends there. We address those elements in more detail below.

If the Commission had shown that the ban directly and materially advances a significant government interest, it would still need to show that the regulation is "not more extensive than necessary to serve that interest." *Central Hudson*, 447 U.S. at 566.

It can't do that either: A speech ban that does not directly and materially advance a government interest is, by definition, more extensive than necessary.

A. Seeberger's underlying conduct (terminating the lease based on familial status) was lawful.

Schreurs and the Commission continue to argue that Seeberger's constitutional challenge fails at step one of the *Central Hudson* test because Seeberger's *speech* (as opposed to her conduct) was unlawful. Schreurs, for instance, says that the district court "correctly found that Seeberger's discriminatory *speech* was not legal and thus dismissed the need to engage in the remainder of the analysis." *Schreurs Reply* 7. The Commission says essentially the same thing. *See Commission Reply* 12.

That argument misunderstands *Central Hudson*; indeed, it misunderstands First Amendment claims generally. Every free-speech claim is, by nature, a challenge to a law that outlaws speech—meaning that *every* commercial-speech case deals with *illegal* speech. When *Central Hudson* says that commercial speech "must concern lawful activity" to be protected, it is referring to the underlying conduct. If the government bans ads

for prostitution, for instance, a court could uphold a First Amendment challenge under *Central Hudson* because prostitution is illegal.

Under the Davenport Civil Rights Ordinance, Seeberger was free to terminate Schreurs's tenancy for any reason, including for reasons related to familial status. That means Seeberger's underlying conduct was legal, and thus (even if strict scrutiny does not apply) the Commission must show; 1) that it has a substantial interest in prohibiting Seeberger from telling Schreurs why she was terminating the lease; and 2) that the restriction on speech directly advances that interest. *See Central Hudson*, 447 U.S. at 566.

B. The speech ban does not advance a significant government interest in a direct and material way.

The Commission says that it can punish Seeberger for her statements about familial status (and expressing displeasure at Schreurs' parenting) because it prevents discrimination and emotional distress.

The first justification (preventing discrimination) is significant, but it is not achieved in any material way (directly or indirectly) by banning Seeberger's speech. As Seeberger noted in her opening brief, the U.S. Supreme Court has ruled that the government cannot regulate conduct simply by regulating speech. If Davenport believes that it is important to prohibit small landlords from discriminating based upon familial status, then it needs to ban the discrimination itself. It can't just ban the speech. At least not in this situation.

Consider what Seeberger's conversation with Schreurs would have been like if Seeberger had complied with the speech ban. Seeberger was telling Schreurs, in person, that she was terminating her tenancy. Any person in Schreurs's position would ask "why?" and Schreurs did indeed ask why. App. 6 (Schreurs Depo. 24). So what was Seeberger supposed to say? Something like this?

> **Schreurs**: Trinity is pregnant. "She is not going to have an abortion." App. 6 (Schreurs Depo. 24)
>
> **Seeberger**: This is your 30-day notice. (*Id.*).
>
> **Schreurs**: Why? (*Id.*)

Seeberger: I can't tell you.

Schreurs: What do you mean? Is it because Trinity is pregnant?

Seeberger: The Davenport Civil Rights Ordinance forbids me from saying.

Schreurs: What? Is it because I've been behind on the rent?

Seeberger: Partially. But the law forbids me from saying more.

Schreurs: What do you mean? Why can't you tell me?

Seeberger: All I can tell you is that the law forbids me from telling you why I'm terminating the lease.

Schreurs: What!?

Given the context, Schreurs would have assumed (correctly) Seeberger was terminating the tenancy because of Trinity's pregnancy. So why is it so important to the government that Seeberger remain silent? What purpose does it serve? None we can think of. Indeed, the author of the law review article that the Commission and Schreurs rely on doesn't agree with their position. "Even if the governmental interest is considered substantial," the author thinks that "it would still be difficult to satisfy the latter two parts of the *Central Hudson* test" in cases

like this where the local ordinance allows the landlord to discriminate. Robert G. Schwemm, *Discriminatory Housing Statements and S 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 Fordham Urb. L.J. 187, 280 (2001).

The Commission argues that it's prosecution of Seeberger is justified under this Court's decision in *Baker v. City of Iowa City*, 867 N.W.2d 44, 53 (Iowa 2015). That's not true; the ordinance in *Baker* prohibited the *act* of discrimination; it did not attempt to prevent discrimination merely by regulating speech.

There is no post-*Central Hudson* decision in which any state or federal court has addressed this situation: where a landlord lawfully terminated a lease but was punished for telling the tenant the reason. Judge Easterbrook and his Seventh Circuit colleagues believed that such a speech restriction would "encounter[] serious problems under the first amendment." *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008).

It seems to us that the problems are fatal. As applied to this case, the Davenport speech ordinance does not directly advance

any significant government interest. It does not prevent discrimination, at least not in any material way. And while it may have prevented Schreurs from hearing Seeberger's opinions, the government does not have an interest in preventing hurt feelings based on speech. *See* Section VI, *infra*. As a result, the Commission's charges against Seeberger violate the First Amendment.

Conclusion

The First Amendment states that the government shall make no law "abridging the freedom of speech." There is no set of regulations to tell us what that means, so we rely on dozens and dozens of cases that create multi-factor tests, exceptions, and exceptions to the exceptions. For that reason, it can be easy to lose the forest through the trees—to get bogged down in one test or another, and to dissect sentences of Supreme Court opinions as if they were discrete statutory commands. To get perspective, sometimes it's best to take a step back from those cases. To think: Why is the government banning this speech? And should it be able to?

Of all the complicated First Amendment issues, this should not be one of them. Seeberger lawfully terminated Schreurs lease, Schreurs asked "Why?" and Seeberger told her. Schreurs didn't like the answer; and that's understandable. But does the government really need to prevent her from hearing it? Is that okay under the First Amendment? Should the government be able punish a landlord because she truthfully answered her tenant's question?

If the answer is *yes*, then where is the line? How far can the government go to prevent hurt feelings? Pretty far, it seems. Which is why the answer must be *no*.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 3,904 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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I hereby certify that on March 10, 2017, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel of record.

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