No. 10-79

In the
Supreme Court of the United States

METRO FUEL L.L.C.,

Petitioner,

– v. –

CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE*

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Interest of *Amici Curiae*[1]

Amici Atlantic Outdoor Advertising Inc. and Willow Media, LLC are engaged in the business of placing and maintaining commercial signs on private property. The signs provide consumers with accurate information about their economic options. Despite the conceded importance of the flow of commercial information to a free market economy, *amici* operate in a highly unstable legal environment, reflecting massive confusion over the legal effect of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). In recent years, moreover, the regulatory climate affecting the free flow of commercial information in many urban settings has been further confused by an increasing tendency on the part of municipal governments to view commercial signage as an important source of municipal revenue. For example, in this case, the City of New York has entered into an exclusive 20 year contract with Cemusa involving the payment to New York City of more than $1 billion in royalties authorizing Cemusa to place and maintain "Street Furniture," an Orwellian name for commercial signage, on bus shelters and other forms of public property. In order to enhance the economic value of Cemusa's exclusive

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[1] This brief *amicus curiae* in support of petitioner's application is filed in accordance with Rule 37.2(a). Written consents by all parties to the filing of this brief have been lodged with the Clerk of the Court. Petitioner's application for a writ of *certiorari* was filed on July 6, 2010 and docketed on July 14, 2010. Notice of intent to file this brief was provided to the parties on July 28, 2010. No counsel for a party authored this brief in whole or in part; nor did any person other than *amici curiae* make a monetary contribution to the preparation or submission of this brief.

right to sell advertising on bus shelters and other public property (and to enhance the royalties payable to New York City), New York has invoked its ill-defined regulatory powers under *Metromedia* to ban virtually identical commercial signs on private property that would compete with Cemusa's monopoly.

The stark issue raised by this appeal is whether New York may seek to maximize its economic return on the flow of commercial speech on public property by censoring virtually identical competing commercial speech on private property.

At a minimum, *amici* believe that the deferential standard of review announced by this Court in *Metromedia* and *Central Hudson Gas & Elec. Co. v. Public Service Comm'n*, 447 U.S. 557 (1980), does not govern in commercial speech settings where the neutrality of a city's regulatory process is called into question by massive economic self-interest. In view of the importance of the free flow of commercial speech, *amici* urge the Court to grant petitioner's application for a writ of *certiorari* in order to: (1) clarify the power of municipalities to regulate off-site commercial signage under *Metromedia*; and (2) limit the power of municipal governments to favor one commercial speaker by censoring the competition in return for a cut of the profits.

Statement of the Case

The narrative facts of this case are fully set forth in petitioner's application for a writ of *certiorari*, and in the thorough opinions of the lower courts annexed to petitioner's application. It is, however, worth emphasizing that the New York City restrictions on commercial signage before the Court are blatantly and discriminatorily under-inclusive. In the ostensible name of aesthetics and traffic safety, New York City has banned off-site commercial signage on private property abutting the public streets, while charging a hefty fee to license a monopoly speaker to display essentially identical commercial signs on public property. The blatantly discriminatory nature of the New York City regulation is neither inadvertent nor the result of a flawed regulatory process. It reflects an agreement between the City and its hand-picked franchisee to maximize the economic value of the franchisee's commercial signs at the expense of competing speakers in the private sector.

ARGUMENT

THE ISSUES POSED BY PETITIONER WARRANT SUPREME COURT REVIEW

A.

Clarification of *Metromedia* is Long-Overdue

In the 34 years since this Court formally recognized that commercial speech is protected by

the First Amendment, the Court has repeatedly stressed the importance to a market economy of the free flow of accurate commercial information. *Virginia Pharmacy Board of Examiners v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Central Hudson Gas & Elec. Co. v. Public Service Comm'n*, 447 U.S. 557 (1980); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). Most importantly in the context of this case, the Court has repeatedly recognized that, under the four-part test enunciated in *Central Hudson*, government's assertion of a constitutionally sufficient interest in censoring the free flow of commercial information is undercut when the regulation fails, in fact, to advance the asserted governmental interest, or is more extensive than reasonably necessary. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1983); *Edenfield v. Fane*, 507 U.S. 761 (1993); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173 (1999); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

Metromedia sought to establish ground rules governing municipal regulation of off-site commercial signage that would harmonize the importance of the free flow of commercial information with concerns over aesthetics and traffic safety. Unfortunately, the case, decided almost 30 years ago during the infancy

of the commercial speech doctrine, failed to generate either a majority opinion, or a coherent rationale. The result has been almost three decades of chaos in the lower courts concerning the legal status of off-site commercial signage. The wide disparity in the lower courts' understanding of *Metromedia* sounds a plea for additional guidance that should be heeded by the Court.

B.

Economically Self-Interested Regulation of Commercial Speech Should Trigger the Most Exacting Judicial Scrutiny

This Court has recognized that, ordinarily, when government acts as a *neutral* regulator, its regulatory judgments are entitled to substantial judicial deference. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). The Court has further recognized that when government acts as a *neutral* regulator of the flow of commercial information, a degree of deference should be accorded to legitimate exercises of regulatory authority. *Central Hudson Gas & Elec. Co. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). When, however, as here, government acquires a massive and direct economic stake in censoring otherwise protected commercial speech, government abdicates all pretence of regulatory neutrality. Such a financially self-interested exercise in censorship should be subjected to the most exacting level of judicial scrutiny.

New York City may well have the power to enter into an exclusive contract for commercial signage on its bus shelters. But, in the absence of the most compelling justification, New York City may not act to maximize the economic value of the bus shelter contract by using its regulatory power to stamp out competing commercial speakers operating on nearby private property. The First Amendment is not for sale, even in a commercial context.

This Court has long recognized the distinction between a "market regulator" and a "market participant." Compare *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), with *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). In the Commerce Clause area, the distinction has tended to increase the power of local government by permitting a "market participant" to behave in ways that would be denied to a "market regulator." This case is the obverse of the Commerce Clause "market participant" cases. Whatever power New York City might enjoy as a neutral "market regulator" under *Metromedia*, once New York becomes a "market participant" by acquiring a massive economic stake in the outcome, New York may not use its regulatory powers to censor competing speakers.

It is, of course, an axiom that no person should be a judge in his or her own case. This principle applies to commercial speech regulators. This Court has ruled that the Due Process Clause forbids a judge or an administrative official from presiding over an adjudicatory proceeding when the adjudicator has a substantial financial interest in the outcome. E.g.,

Tumey v. Ohio, 273 U.S. 510 (1927) (criminal proceeding); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (criminal proceeding); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (administrative proceeding); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (civil proceeding).[2]

When, as here, economic self interest is transposed from an adjudicatory to a regulatory setting, the economically self-interested nature of the regulator should trigger searching judicial inquiry into the adequacy of the purported regulatory justifications. Moreover, when, as here, the economically self-interested regulation discriminates between and among identically-situated commercial speakers, the regulatory decision should be subject to the most exacting judicial scrutiny.

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[2] All nine Justices in *Caperton v. A.H. Massey Coal Co., Inc.*, __ U.S. __, 129 S. Ct. 2252 (2009), agreed that a direct financial interest in the outcome of an adjudication would preclude a financially interested judge from presiding.

CONCLUSION

For the above-stated reasons, a writ of *certiorari* should issue to review the decision of the Second Circuit panel below.

Dated: August 13, 2010
New York, New York

Respectfully submitted,

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