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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does this case, which involves facts virtually identical to those in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 902 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1014, 175 L. Ed. 2d 618 (Dec. 20, 2009), present any new issues that justify reexamining *Metromedia*?

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STATEMENT OF FACTS

A. Factual Background

The City of New York has long recognized the negative impact billboards and advertising signs have on aesthetics and neighborhood preservation. In 1940, the New York City Planning Commission found that "[b]illboards and signs not only dominate our business streets . . . but they take advantage of every opportunity to crowd in upon public places, established and maintained by public funds, including civic centers, parks, and especially express highways and bridge approaches."

As a result, the City enacted a series of regulations to control the placement of advertising signs throughout the City. These regulations, which have remained in place in substantially similar form since 1940, remain an integral component of the zoning framework designed to preserve neighborhood character and an aesthetically pleasing landscape and protect the public health, safety and welfare. Specifically, advertising signs are prohibited in residential and low-density commercial zoning districts, and permitted, subject to certain size, placement and lighting restrictions, in high-density commercial and manufacturing zoning districts. See Z.R. §§ 22-32, 32-62, 32-63 and 42-52.

Metro Fuel, LLC ("Fuel") entered the outdoor advertising market in New York City in 2006. Its website encourages clients to "saturate a neighborhood with [their] message or 'road block' key areas to reach commuters twice daily." While

Fuel operates many different types of outdoor advertising signs in the City, its challenge in this lawsuit centered on what it describes as its "panel sign business." Fuel describes its panel signs as measuring approximately 69 inches tall by approximately 48 inches wide, or 23 square feet in total. As of the date it filed its complaint, Fuel operated approximately 360 panel signs in the City; however by July 28, 2008, this number had increased to 440. Fuel's panel signs are displayed in a variety of ways, including affixed to the facades of buildings and on free-standing poles. Fuel claims that 93% of its panel signs are located in zoning district which prohibit internally illuminated advertising signs.

Bus shelters were first introduced as a public amenity on City streets in the early 1970s but they quickly deteriorated due to poor maintenance. Beginning in 1975, bus shelters were installed throughout the City by private companies and advertising was permitted on the shelters both to encourage private involvement and to offset the cost of installation, maintenance and repair. Over time, various other types of street furniture were also constructed on City sidewalks, however, the regulation, construction, and maintenance of this furniture occurred in different ways with varying levels of coordination and consistency.

In the 1990s, the Mayor's Streetscape Task Force was created to, among other things, design a proposal to provide a harmonized, coordinated, and well-maintained appearance to the City's street furniture, while reducing clutter on City sidewalks. After a competitive bidding process, Cemusa was awarded the franchise. In May 2006, the City

entered into a 20-year contract with Cemusa. Under the contract, Cemusa is required to build and/or replace approximately 3,500 bus shelters, 330 newsstands and 20 self-cleaning automatic pay toilets ("APTs"). Cemusa is responsible for the design, construction, installation, and maintenance of the street furniture.

The agreement grants Cemusa the exclusive right to place limited and controlled advertising on bus stop shelters, newsstands, and APT's located outside of parks. On bus stop shelters, advertising is limited to the two end panels, and to the exterior of newsstands and public toilets. In addition, there are maximum area and height restrictions. The City receives a percentage of the gross advertising revenue.

B. Opinions Below

In a decision and order dated March 31, 2009, the District Court for the Southern District of New York denied Fuel's motion for summary judgment and granted the City's cross-motion for summary judgment. App. B. 1-77.

On February 3, 2010, the United States Court of Appeals for the Second Circuit affirmed the District Court's decision. With respect to plaintiff's underinclusivity challenge, the Second Circuit found this Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) controlling. The Second Circuit rejected plaintiff's argument that the City violated the protections afforded commercial speech because it treats similar signs differently. Citing *Metromedia*, the Court found that despite its exceptions, New York City's Zoning Resolution directly advanced its

interest in traffic safety and aesthetics. Similarly, in *Metromedia*, this Court made explicit reference to the exceptions to the ban of offsite advertising, but did not find the exemptions constitutionally problematic. App. A-21.

Moreover, citing the Ninth Circuit's decision in *Metro Lights, LLC v. City of Los Angeles*, 551 F.3d 898 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1014, 175 L. Ed. 2d 618 (2009), the Second Circuit found that the controlled advertising permitted under its contract with Cemusa is sufficiently distinct from Fuel's advertising, advertising that is subject to the zoning restrictions. App. A-23.

Finally, the Second Circuit found that underinclusivity cases cited by plaintiff's, *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), and *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999), dictate the same result as *Metromedia*. App. A-23-28. The Court found the instant case distinguishable from the above cases, stating:

> [t]he distinctions drawn by the Zoning Resolution between permissible and impermissible locations for outdoor commercial advertising are meaningful and do not defeat the purpose of the City's regulatory scheme. The City's scheme may legitimately allow limited and controlled advertising on street furniture, while also reducing clutter on City sidewalks. Allowing some signs does not constitutionally require a city to allow all similar signs. The

> zoning scheme does not result in a mere channeling effect. The City's interest in aesthetics, preservation of neighborhood character, and traffic safety continue to be advanced, even though limited and controlled advertising is permitted on street furniture.

App. A-28.

REASONS FOR DENYING THE PETITION

This instant petition should be denied. This Court recently denied certiorari in *Metro Lights LLC v. City of Los Angeles*, 551 F.3d 898 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1014, 175 L. Ed. 2d 618 (2009), a case which presented a virtually identical issue and where petitioner's also argued that *Metromedia v. City of Los Angles*, 453 U.S. 490 (1981), should be revisited. Nothing has occurred in the last nine months to suggest that a different outcome is appropriate here.

A. There is no conflict among the circuits that would justify granting the petition.

As Metro Lights also attempted to do, Fuel goes to great lengths to manufacture a conflict among the circuits. However, no conflict exists on a legal issue that would justify certiorari. While a few circuits have questioned whether this Court issued any controlling opinions in *Metromedia*, the circuits' application of *Metromedia* with respect to the legal issues presented here has been consistent. Indeed, Fuel fails to point to any relevant legal principal in *Metromedia* over which the circuits are now split.

In advancing its argument, Fuel misrepresents the Second Circuit's decision. The Second Circuit did not "refuse[] to apply any of this Court's post-*Metromedia* cases." Cert Pet. 14. Nor did it hold that "*Metromedia* forecloses petitioner's First Amendment challenge as a matter of law." Cert Pet. 14. The Second Circuit, as the Ninth Circuit also did in *Metro Lights*, undertook an exhaustive analysis of both *Metromedia* and the *Greater New Orleans* line of cases and found that these cases dictate the same result as *Metromedia*. App. A-23-28.

This Court declined to revisit *Metromedia*, when it denied certiorari in *Metro Lights* on December 14, 2009. There is nothing new or novel in this instant case. Rather, the Second Circuit applied this Court's holding in *Metromedia* in a manner wholly consistent with the Ninth Circuit's application in *Metro Lights*. Consequently, there continues to be no reason to revisit *Metromedia*.

B. There is no conflict among the circuits on the evidence required to support a commercial speech restriction.

Next, Fuel attempts to invent a conflict among the circuits with respect to the "quantum of evidence that is required for the government to justify the suppression of commercial speech." Cert. Pet 26-29. Fuel argues that the Second Circuit departed from other circuits when it deferred to the City's judgment in the placement of outdoor advertising. While couched in slightly different terms, Metro Lights presented a similar argument in its petition for certiorari.

Fuel cites three cases in which it claims a "significant quantum of concrete evidence is required for the government to meet its burden under *Central Hudson*." Cert. Pet. 27 (citing *Pagan v. Fruchey*, 492 F.3d 766, 772 (6th Cir. 2007); *El Dia, Inc. v. Puerto Rico Department of Consumer Affairs*, 413 F.3d 110, 116 (1st Cir. 2005); *Mason v. Florida Bar*, 208 F.3d 952, 957-58 (11th Cir. 2000)). Fuel's reliance on these cases is misplaced.

In each of these three cases, a content-based commercial speech restriction was struck down because the government failed to provide *any* evidence - statistical, anecdotal, or otherwise - to suggest that the speech at issue posed any threat of concrete harm to the governmental interest the restrictions were designed to protect. *Pagan*, 492 F.3d at 772; *El Dia*, 413 F.3d at 116; *Mason*, 208 F.3d at 957-58. Thus the requisite connection between the speech and the harm was missing, as well as any evidence that the commercial speech restriction would substantially alleviate the harm. This is not the case here.

The Second Circuit did not simply defer to the City's judgment in the absence of any evidence of a "concrete harm," as Fuel asserts. The record contains ample evidence that there has been a dramatic increase of illegal advertising signs throughout the City on and adjacent to buildings. Courts have accepted and endorsed the common legislative judgment that the proliferation of advertising signs constitutes a visual assault on citizens and negatively impacts aesthetics. *See Metromedia*, 453 U.S. at 507-08, 510; *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Young v. American*

Mini Theatres, Inc., 427 U.S. 50, 71 (1976) (plurality opinion) ("[The] city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect").

Moreover, the record demonstrates that the City's zoning regulations will significantly alleviate the negative impact on aesthetics and neighborhood preservation by removing the offending signs from the impacted areas. Consequently, the City met its burden of demonstrating both a concrete harm and that the commercial speech restriction will alleviate the harm to a material degree.

In addition, ample evidence was introduced supporting the City's position that the limited and controlled advertising permitted on street furniture under its contract with Cemusa does not create the same aesthetic harm as uncontrolled advertising on buildings. Buildings define the character and uniqueness of a neighborhood and determine the type of zoning district – commercial, manufacturing, residential etc. In contrast, streets and sidewalks are in large part uniform throughout the City.

Douglas Woodward, the City's expert, explained that the proliferation of advertising signs on buildings directly and negatively impacts aesthetics and neighborhood character. Meanwhile, the new, uniform, well-maintained street furniture aesthetically improves the overall streetscape, even though limited and controlled advertising is permitted on the street furniture. While Fuel disputes Woodward's conclusions and

maligns his qualifications, he has over twenty years of experience as a planner and urban designer. Moreover, nothing he states is outside the realm of common knowledge. Anyone can walk down sidewalks in the City's many and varied neighborhoods and reach the same conclusion.

Thus the Second Circuit properly credited the reasonable legislative judgment that allowing a limited amount of advertising on street furniture located on the sidewalk and, in most instances, near the curb, would not negatively impact aesthetics and, that any minimal aesthetic impact as a result of the limited advertising is far outweighed by the new street furniture which dramatically improves the overall streetscape. App. A-28.

The Second Circuit's approach is identical to the approach taken in the cases cited by Fuel. Consequently, no conflict exists among the circuits.

Equally without merit is Fuel's suggestion that the City's economic motive for allowing limited advertising on street furniture was not fully explored and that the City, in essence, sold an exemption to a speech restriction to generate revenue. Although the City's sign restrictions date back to the 1940s, they never applied to City sidewalks. Consequently, Fuel's assertion that the City intentionally carved out an exception for street furniture located on City sidewalks solely for revenue raising is refuted by the actual facts.

Fuel's quotation from this Court's decision in *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 837 (1987), is misplaced. Yelling fire in a

crowded movie theatre identically threatens public safety whether you have contributed $100 to the state treasury or not. However, the same analysis would not apply if the $100 contribution allowed you to yell fire in an empty movie theatre, something that was never prohibited in the first place, the more apt comparison. The record demonstrates that the advertising on street furniture does not negatively impact aesthetics or neighborhood preservation. Consequently, unlike Justice Scalia's example above, street furniture advertising is not an exception to the harm the zoning regulations were designed to address.

Finally, the amici adds their own spin to the economic argument, analogizing the City's regulations to case law where courts, on due process grounds, have kept adjudicatory bodies from deciding matters in which they have a financial stake. (Brief of Amici Curiae Atlantic Outdoor Advertising, Inc. and Willow Media, LLC, at 5-7).

As a preliminary matter, no due process claims were raised below. However, even if this issue was preserved for review, the amicus brief does not present a ground to revisit *Metromedia*. The due process bias cases cited by amici have no application to the City's zoning regulations, a pure legislative act. To uphold the legislative choice, a court need only find some "reasonably conceivable state of facts that could provide a rational basis" for the legislative action. *Heller v. Doe*, 509 U.S. 312, 320 (1993). This was certainly established here.

This Court had the opportunity to consider this identical argument when it was raised by these

same amici in the amicus brief they submitted in support of Metro Light's petition for a writ of certiorari. Nothing in this area of the law has evolved in the past nine months that would warrant this Court's review.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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