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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment permits a municipality to impose severe restrictions on the placement of advertising signs on private property when, in order to generate revenue, the municipality has auctioned off to the highest bidder the right to blanket its sidewalks with thousands of advertising signs, virtually all of which violate the advertising sign restrictions that apply to private property?

2. Whether this Court's fractured decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), constitutes binding precedent for any First Amendment principle, and, if so, whether *Metromedia* established that outdoor advertising restrictions are not subject to the significant scrutiny that this Court has applied to other media in subsequent commercial speech cases?

3. What quantum of evidence, if any, must a municipality proffer in order to meet its burden of justifying its decision to exempt its revenue-generating licensees from the advertising sign restrictions that apply to everyone else?

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Metro Fuel L.L.C. states that it is a wholly-owned subsidiary of Fuel Outdoor Holdings L.L.C. No publicly traded company owns more than ten percent of the stock of Metro Fuel L.L.C.

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INTRODUCTION

Nearly thirty years ago, this Court decided *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), a notoriously fractured decision that failed to yield a majority opinion and has bedeviled the lower courts ever since. Indeed, the web of competing and inconsistent views espoused by the five opinions in *Metromedia* is so perplexing that then-Justice Rehnquist lamented the "genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." *Id.* at 569 (Rehnquist, J., dissenting). Thirteen years later, then-Judge Alito echoed that sentiment, noting the doctrinal morass that *Metromedia* created, and expressing the hope that this Court would someday "provide[ ] further guidance concerning the constitutionality of sign laws." *Rappa v. New Castle County*, 18 F.3d 1043, 1080 (3d Cir. 1994) (Alito, J., concurring). Such guidance is long overdue. This case implicates two distinct circuit conflicts emanating from *Metromedia* and presents an ideal vehicle for resolving them.

Petitioner challenges the constitutionality of New York City's regulation of so-called "panel" advertising signs – small-format, poster-style ads that have become ubiquitous in, among many other places, bus stop shelters throughout the country. With only minor exceptions, New York City law purports to prohibit the placement of panel signs on private property anywhere in the City, ostensibly in order to safeguard "aesthetics" and "neighborhood character." Notwithstanding these restrictions, however, the City has entered into massive revenue-sharing contracts with various private advertising

companies, authorizing them to place tens of thousands of panel advertising signs on bus shelters, newsstands, and public telephones throughout the City in exchange for well over $1 billion in guaranteed cash payments. Virtually every one of these signs violates the very advertising sign restrictions that apply on private property just a few feet away, but the City ignores these restrictions so that it can collect the lucrative payments. The question in this case boils down to whether the First Amendment tolerates such glaring and unabashed underinclusiveness.

Since *Metromedia*, this Court has struck down a number of underinclusive commercial speech restrictions that were "pierced by exemptions and inconsistencies" that fatally undermined their purported rationale. *See Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 189-190, 195 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-89 (1995); *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 425 (1993). As the Court has explained, underinclusiveness – the tolerance of speech that should be as much of a concern as that which is prohibited – is problematic because it "diminish[es] the credibility of the government's rationale for restricting speech." *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994); *Florida Star v. B.J.F.*, 491 U.S. 524, 541-542 (1989) (Scalia, J., concurring) ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.") (quotation omitted).

In rejecting petitioner's First Amendment challenge, the Second Circuit gave short shrift to this Court's well-established commercial speech underinclusiveness jurisprudence, believing that its hands were tied by *Metromedia*. That view was rooted in the following two sentences in the *Metromedia* plurality opinion: "Each method of communicating ideas is a law unto itself and that law must reflect the differing natures, values, abuses and dangers of each method. We deal here with the law of billboards." 453 U.S. at 501 (plurality opinion) (quotations omitted). The Second Circuit read this language to mean that it was not bound by this Court's post-*Metromedia* underinclusiveness cases because, when it comes to "the law of billboards," *Metromedia* "is controlling." App. A-19, A-24; *see also* App. B-32, B-38 (district court opinion holding that *Metromedia* "is the flag-bearer for billboard-regulation cases" and "makes clear" that "the law of billboard regulation is distinct from other speech regulation").

In doing so, the Second Circuit deepened an already pronounced circuit conflict regarding whether *Metromedia* establishes any binding precedent. The federal courts of appeals are in open disagreement over what, if anything, *Metromedia* means, with some courts holding that *Metromedia* establishes no binding law at all, and other courts (like the court below) holding that *Metromedia* not only establishes binding law but gives governments virtual *carte blanche* to restrict commercial advertising signs selectively.

In addition, the decision below implicates a second, entirely distinct circuit conflict regarding the quantum of evidence that the government must adduce in order to meet its burden of justifying the restriction of commercial speech. The record in this case is devoid of *any* evidence justifying the City's differential treatment of petitioner's signs and the identical signs of its revenue-generating licensees. The Second Circuit was not troubled by this dearth of evidence, choosing to "defer to the City's judgment in controlling the placement of outdoor advertising" because "[i]t is not this Court's role to second guess the City's urban planning decisions." App. A-17, A-23. This remarkable degree of deference stands in sharp contrast to the decisions of numerous other courts of appeals that have required the government to make a significant showing, supported by concrete evidence, justifying the suppression of commercial speech. This conflict warrants this Court's attention as well.

If New York City's scheme is constitutional, then something is seriously awry in this Court's commercial speech jurisprudence. Last term, this Court held that the government may selectively allow one private party to erect a monument in a public park but prohibit others from erecting their own monuments on the government's land. *Pleasant Grove City v. Summum*, 555 U.S. __, 129 S. Ct. 1125 (2009). Now imagine that the government purported to prohibit private parties from erecting monuments on their *own* land adjacent to a park – ostensibly to protect the park's "aesthetics" and "character" – but auctioned off to the highest bidder the exclusive right to erect monuments that would have the same

negative aesthetic impact. That is exactly what New York City has done here, as have the scores of other municipalities across the country (including Philadelphia, Miami, Detroit, Atlanta, Houston, Denver, Los Angeles, San Francisco, and Phoenix, to name a few) that have entered into large-scale revenue-sharing bus shelter advertising contracts.

Petitioner now respectfully asks this Court to dispel the widespread confusion into which *Metromedia* has plunged the lower courts, and to clarify that the selective and underinclusive ban on commercial advertising signs at issue violates core First Amendment principles.

OPINIONS BELOW

The opinion of the Second Circuit is reported at 594 F.3d 94 and reprinted in the Appendix at App. A-1 to A-36. The opinion of the district court is reported at 608 F. Supp. 2d 477 and is reprinted at App. B-1 to B-77.

JURISDICTION

The Second Circuit issued its opinion on February 3, 2010. On April 21, 2010, Justice Ginsburg granted petitioner's application to extend the time within which to petition for certiorari until July 6, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The New York City Zoning Resolution (the "Zoning Resolution" or "Z.R.") distinguishes between "advertising" signs and "accessory" signs. An "advertising" sign (also known as an "off-site" sign) is

"a sign that directs attention to a business, profession, commodity, service or entertainment conducted, sold, or offered elsewhere than upon the same zoning lot and is not accessory to a use located on the zoning lot." An "accessory" sign (also known as an "on-site" sign), in contrast, is one that directs attention to a business that is conducted on the premises where the sign is located.

The Zoning Resolution liberally permits on-site signs to be maintained anywhere in commercial and manufacturing districts, subject only to size, height, illumination, and projection limitations. Z.R. §§ 32-62 to 32-661, 42-52, 42-543. Contrary to its treatment of on-site signs, the Zoning Resolution places severe restrictions on the placement of off-site signs in commercial and manufacturing districts. Whereas on-site signs may be located in any type of district, off-site signs are permitted only in special entertainment districts (such as Times Square and Coney Island) and, subject to stringent illumination restrictions, in manufacturing and automobile services districts. Z.R. §§ 32-63, 42-52. Off-site signs are completely prohibited in residential districts. Z.R.§ 22-32.[1]

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[1] The relevant excerpts of the Zoning Resolution are reprinted at App. C-1 to C-10. The full text of the Zoning Resolution is available at http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Metro Fuel LLC is a small outdoor advertising company doing business in several cities, including in New York City. Petitioner operates so-called "panel" signs, which are illuminated, poster-style advertising signs measuring approximately four feet by six feet. Petitioner displays these panel signs on private property (principally in parking lots or garages in close proximity to and in view of the sidewalk) that it leases for that purpose. Until the City's voluntary stay of enforcement dissolved following the Second Circuit's decision below, petitioner operated approximately 440 panel signs in New York City.

The vast majority of petitioner's panel signs are prohibited by the New York City Zoning Resolution. The Zoning Resolution prohibits advertising signs in all residential districts and virtually all commercial districts (other than special entertainment districts such as Times Square and Coney Island). Z.R. §§ 22-32, 32-63, 42-52. The Zoning Resolution permits advertising signs in manufacturing districts, but only if they are not illuminated. Approximately 7% of petitioner's panel signs are located in permissible districts, and the remaining 93% are located in districts in which panel signs are prohibited.

Notwithstanding these restrictions on panel signs on private property, the City has entered into franchise agreements authorizing private companies to place thousands of illuminated panel advertising signs on sidewalks throughout the City. In 2006, the City entered into a 20-year franchise agreement with

Cemusa, Inc. ("Cemusa") requiring Cemusa to rebuild all of the City's bus shelters and newsstands and permitting Cemusa to place panel advertising signs on each and every one of them. The City entered into similar franchise agreements permitting a number of other private companies to place advertising signs on public telephones. All told, the City has authorized its private licensees to place approximately 20,000 advertising signs on sidewalk structures in residential, commercial, and manufacturing districts throughout the City. Virtually all of these advertising signs violate the very Zoning Resolution provisions that the City seeks to enforce against petitioner.

The City has profited handsomely from its willingness to allow private companies to place advertising signs on its sidewalk structures. In addition to financing the cost of building and maintaining new bus shelters and newsstands, Cemusa is obligated to pay the City half of the gross advertising revenue that its panel signs generate, and has guaranteed the City a minimum of $1 billion in cash (plus another $400 million in "in kind" benefits) over the twenty-year contract term. The City reaps an additional $14 million per year from its public telephone advertising sign contracts.

The City claims that the Zoning Resolution's restrictions on panel advertising signs are necessary to protect "aesthetics" and "neighborhood character." It is plain, however, that the many thousands of panel advertising signs that the City has allowed to be placed on its sidewalks implicate aesthetic and neighborhood character concerns at least as much as petitioner's signs do. It is undisputed that the City's

panel signs are at least as large and bright as petitioner's signs and that, due to their placement on the sidewalks, the City's signs are even more visible to passing pedestrians and motorists. Moreover, whereas petitioner's signs display only static printed advertising copy, many of the City's panel signs contain scrolling and/or electronic advertising copy – including dozens of high-definition video advertising signs – which the City has labeled the "wave of the future."

Photographs of typical examples of petitioner's signs and the City's bus shelter signs (which are part of the record in this case) appear at App. D-2 to D-3 (petitioner's signs) and App. D-4 to D-7 (the City's licensees' signs).

Prior to authorizing the street furniture advertising franchise, the New York City Planning Commission engaged in a land use impact study. The Commission's final report concluded that the proposed advertising program would have a considerable adverse impact on aesthetics and neighborhood character, stating that the Commission "share[d] [the] concern" that "was expressed during the public review process that the [proposal] allows too much advertising on Franchise structures." The Commission nonetheless approved the plan, concluding that tolerating "revenue-generating advertising" was necessary to induce a franchisee to finance the cost of building the new bus shelters and newsstands that the City desired.

During the subsequent bidding process, the City chose Cemusa – whose street furniture design the City found to be by far the *least* attractive – because

Cemusa's financial proposal guaranteed the City by far the most revenue of any of the other bidders. The City convened a "Design Advisory Committee" (comprised of representatives of City agencies and civic organizations with experience in architecture and urban design) to evaluate each of the street furniture design proposals. The Design Advisory Committee specifically recommended *rejecting* Cemusa's proposal, finding that from a design perspective, Cemusa was "a poor choice." The Committee concluded that the designs proposed by two of the other bidders (NBC/Decaux and Van Wagner) were rated "*significantly* higher" than Cemusa (emphasis in original). The Committee "felt strongly that NBC/Decaux's proposal . . . was by far the strongest," that Van Wagner's was "a close second," and that those were "the only two acceptable options."

Despite Cemusa's inferior design scores, Cemusa was willing to guarantee the City far more advertising revenue ($1 billion over twenty years) than its competitors. Accordingly, the City rejected the Design Advisory Committee's recommendation and awarded the franchise to Cemusa. As one City official affirmed under oath in a different proceeding, it was "the compensation promised to the City in its proposal [that] put Cemusa ahead of the other proposers."

B. Proceedings Below

Petitioner commenced this action in the Southern District of New York in September 2007, asserting that the First Amendment prohibits the City from enforcing against petitioner advertising sign restrictions that it does not enforce against its

revenue-generating licensees. Petitioner informed the City that it intended to move for a preliminary injunction, and the City agreed to stay enforcement of the restrictions at issue during the pendency of the district court proceedings.

During discovery, the City steadfastly denied that it entered into the street furniture advertising contracts in order to generate revenue. Instead, the City insisted that its goal was merely to induce a private company to build attractive new bus shelters and newsstands at no cost to the City – notwithstanding the undisputed fact that Cemusa had by far the lowest design scores, but guaranteed by far the most revenue, of any of the bidders.

The parties then cross-moved for summary judgment. Because it is undisputed that petitioner's panel signs are in all material respects identical to those of the City's franchisees – they are the same size, the same brightness, and often contain the very same advertising copy – the City faced the formidable burden of justifying its markedly differential treatment of essentially identical signage.

In attempting to meet this burden, the City did not proffer *any* evidence explaining its policymakers' decision to prohibit petitioner's signs but permit its revenue-generating licensees' identical signs. Instead, the City relied exclusively on its urban design "expert," Douglas Woodward. Mr. Woodward opined that panel advertising signs harm aesthetics and neighborhood character when they are placed on private property, but that street furniture advertising signs are, by virtue of their placement on

the sidewalk, inherently incapable of adversely impacting aesthetics or neighborhood character. Mr. Woodward therefore concluded that *none* of the thousands of street furniture advertising signs in New York City adversely affects aesthetics or neighborhood character – not even high-definition video ads, ads near parks, ads in purely residential neighborhoods, ads in historic districts, or ads placed in front of landmark buildings – but that *all* of petitioner's otherwise identical signs do.

It is undisputed that Mr. Woodward's urban design "theory" was conceived after the fact, and that it had nothing whatsoever to do with the City's *actual* reasons for exempting its street furniture signs from its advertising sign restrictions. Indeed, it is undisputed that the City's actual decisionmakers *disagreed* with Mr. Woodward's *post hoc* rationalization. The City's actual decisionmakers "share[d] [the] concern" that there was "too much advertising on Franchise structures" but concluded that it was necessary to tolerate "revenue-generating advertising."[2]

The district court granted summary judgment in favor of the City. It concluded that it was bound by *Metromedia* – and not by subsequent commercial

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[2] Mr. Woodward has never written a word on the subject of urban design, and his "theory" is entirely novel. It is undisputed that no urban design academic or practitioner has *ever* suggested that it makes sense for a municipality to exempt bus shelters, newsstands, and public telephones from otherwise applicable advertising sign restrictions. Mr. Woodward even exaggerated his credentials (claiming falsely on his *curriculum vitae* that he has a "degree" in urban design; he subsequently admitted during his deposition that he does not).

speech cases such as *Greater New Orleans*, *Rubin*, and *Discovery Network* – because *Metromedia* "is the flag-bearer for billboard-regulation cases" and "makes clear" that "the law of billboard regulation is distinct from other speech regulation." App. B-32, B-38. The district court gave Mr. Woodward's novel urban design theory the most tepid of endorsements, concluding that he was "not wrong," and that Mr. Woodward's opinion that it is appropriate to treat otherwise identical signage on sidewalks and parking lots differently was "not fanciful." App. B-67. As the district court put it: "Streets and buildings are different; accordingly, different standards may be imposed." App. B-70. Acknowledging that the City had not offered any actual evidence supporting this differential treatment, the district court concluded that "[n]o study is required to prove what the eye can readily detect." App. B-71.

The City agreed to continue the stay of enforcement during the pendency of petitioner's appeal.

The Second Circuit affirmed. Like the district court, the Second Circuit concluded that it was not bound by post-*Metromedia* commercial speech cases because "[e]ach method of communicating ideas is a law unto itself" and when it comes to "the law of billboards," *Metromedia* "is controlling." App, A-29, A-24. And like the district court, the Second Circuit was not concerned that the City proffered no evidence supporting its naked assertion that its street furniture advertising signs are different from petitioner's signs. The Second Circuit chose to "defer to the City's judgment in controlling the placement of outdoor advertising" because "[i]t is not this Court's

role to second guess the City's urban planning decisions." App. A-17, A-23.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE A CIRCUIT CONFLICT REGARDING THE PRECEDENTIAL EFFECT, IF ANY, OF *METROMEDIA*, AND CLARIFY THE MEANING OF *METROMEDIA* IN LIGHT OF SUBSEQUENT COMMERCIAL SPEECH UNDERINCLUSIVENESS CASES

This Court should grant certiorari to resolve pervasive uncertainty over the meaning and scope of its splintered decision in *Metromedia*, and to clarify that outdoor advertising sign regulations are not immune from the close scrutiny that this Court has repeatedly applied, in the nearly thirty years since *Metromedia* was decided, to underinclusive commercial speech restrictions.

The Second Circuit held unequivocally that *Metromedia* "is controlling," App. A-19, and refused to apply any of this Court's post-*Metromedia* cases holding that restrictions on commercial speech violate the First Amendment when they are "pierced by exceptions and inconsistencies" that substantially undermine their purported rationale. *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 189-190, 195 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488-89 (1995); *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 425 (1993). By holding that *Metromedia* forecloses petitioner's First Amendment challenge as a matter of law, the Second Circuit erred, and deepened a

festering circuit conflict over the binding effect, if any, and meaning of that case.

As an initial matter, it is important to underscore a point not disputed in this litigation because it has been settled for at least a generation: commercial advertising signs are a form of speech protected by the First Amendment. While some early precedents of this Court suggested that commercial speech is not entitled to First Amendment protection, *see*, *e.g.*, *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), this Court decisively repudiated that view in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 758-70 (1976). Since then, this Court has applied a balancing test to analyze the constitutionality of governmental restrictions on commercial speech, considering [1] whether the speech is "lawful" and "not ... misleading," [2] whether the asserted governmental interest is "substantial," [3] whether the regulation "directly advances the governmental interest asserted," and [4] "whether it is not more extensive than is necessary to serve that interest." *Central Hudson Gas & Elec. v. Public Service Comm'n*, 447 U.S. 557, 566 (1980).

In *Metromedia*, this Court addressed a First Amendment challenge to a San Diego ordinance that generally prohibited both commercial and noncommercial signs throughout the city, but exempted on-site commercial signs. *See* 453 U.S. at 493-94 & nn.1, 2. This Court reversed the judgment of the California Supreme Court and struck down the entire ordinance as "unconstitutional on its face" under the First Amendment, *see id.* at 521 & n.26, but was unable to produce a majority opinion.

Rather, *Metromedia* spawned five separate opinions. A plurality (White, J., joined by Stewart, Marshall, and Powell, JJ.) concluded that the ordinance was invalid as applied to noncommercial signs, but valid as applied to off-site commercial signs notwithstanding the exemption for onsite commercial signs. *See id.* at 498-521. Justice Brennan, joined by Justice Blackmun, concurred in the judgment invalidating the ordinance, but concluded that the ordinance was invalid as applied to both noncommercial and commercial signs. *See id.* at 521-40. Justice Stevens, Chief Justice Burger, and then-Justice Rehnquist each dissented on the ground that the ordinance was valid as applied to both commercial and noncommercial signs. *See id.* at 540-55 (Stevens, J., dissenting in part); *id.* at 555-69 (Burger, C.J., dissenting); *id.* at 569-70 (Rehnquist, J., dissenting). Then-Justice Rehnquist expressed his discontent that "[i]n a case where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." *Id.* at 569 (dissenting opinion).

Justice Rehnquist's concern has proved prophetic, for the lower courts have struggled in vain to determine what lesson, if any, to derive from *Metromedia*. The Third, Sixth, and Eleventh Circuits have responded to this uncertainty by holding that *Metromedia* establishes no binding law at all because it did not yield a majority opinion or any ascertainable legal principle. *See, e.g.*, *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1261 (11th

Cir. 2005) ("Because the *Metromedia* plurality's constitutional rationale did not garner the support of a majority, it has no binding application."); *id.* at 1261 n.10 ("[T]here may be situations where [a fractured decision] does not yield any rule to be treated as binding in future cases. *Metromedia* presents just such a case.") (citations omitted); *Rappa v. New Castle County*, 18 F.3d 1043, 1054-61 (3d Cir. 1994) (holding that "*Metromedia* is . . . a case" in which "no particular standard constitutes the law of the land, because no single approach can be said to the support of a majority of the Court"); *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 470 n.9 (6th Cir. 1991) (noting that "[t]he [*Metromedia*] Court's judgment rested on the ground that San Diego's ordinance was an impermissible content-based restriction on non-commercial speech because it only permitted on-site signs with certain types of speech," and declining to interpret *Metromedia* as establishing binding law with respect to restrictions on commercial speech), *aff'd*, 507 U.S. 410. Indeed, the Third Circuit in *Rappa* proceeded to craft its own First Amendment advertising sign analysis from scratch, which then-Judge Alito found appropriate "[u]ntil the Supreme Court provides further guidance concerning the constitutionality of sign laws." 18 F.3d at 1080 (Alito, J., concurring).

In sharp contrast, however, other lower courts – including the Fourth, Eighth, Ninth, and Tenth Circuits, and now the Second as well – have held that *Metromedia* establishes binding law, and have interpreted that decision to give governments virtual *carte blanche* to restrict off-site commercial advertising signs. *See Metro Lights, L.L.C. v. City of*

Los Angeles, 551 F.3d 898, 911 (9th Cir. 2009) (declining to address whether "*Metromedia* is inconsistent with cases like *Discovery Network*" because "we are bound to follow the Supreme Court precedent most directly on point" and "leav[e] to [the Supreme] Court the prerogative of overruling its own decisions") (quoting *Rodriguez de Quijas v. Shearson/ Am. Express, Inc.*, 490 U.S. 477, 484 (1989)); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 802-03 (8th Cir. 2006) (relying on *Metromedia* to uphold "restrictions on off premises commercial signs"); *National Adver. Co. v. City & County of Denver*, 912 F.2d 405, 408-10 (10th Cir. 1990) (applying *Metromedia* to reject underinclusivity challenge to commercial billboard regulations); *Georgia Outdoor Adver., Inc. v. City of Waynesville*, 833 F.2d 43, 45 (4th Cir. 1987) (relying on *Metromedia* to reject a challenge to a complete ban on commercial billboards); *Major Media of the S.E., Inc. v. City of Raleigh*, 792 F.2d 1269, 1272 (4th Cir. 1986) ("The Supreme Court . . . determined in *Metromedia* . . . that a city may justifiably prohibit all off-premises signs or billboards for aesthetic and safety reasons.").

Thus, the courts of appeals are divided on the threshold question whether *Metromedia* establishes any binding law in the first place. This situation leaves governmental regulators and regulated entities (many of which, like petitioner, operate in different circuits) in a fog. The lower courts should not be condemned in perpetuity to trying to ascertain what binding law, if any, the fractured *Metromedia* decision establishes. *Compare Solantic*, 410 F.3d at 1261 & n.10 (analyzing *Metromedia* under the

analysis set forth in *Marks v. United States*, 430 U.S. 188, 193 (1977), and concluding that it establishes no binding law); *Rappa*, 18 F.3d at 1056-61 (same); *Discovery Network*, 946 F.2d at 470 n.9 (same) *with Lavey v. City of Two Rivers*, 171 F.3d 1110, 1114 n.14 (7th Cir. 1999) (concluding that *Metromedia* establishes binding law because Justice Stevens, although dissenting from the judgment, joined the discussion regarding commercial signs in the plurality opinion); *Ackerley Commc'ns of N.W. Inc. v. Krochalis*, 108 F.3d 1095, 1099 & n.5 (9th Cir. 1997) (concluding that *Metromedia* establishes binding law because "seven Justices agreed" that the challenged ordinance was not unconstitutionally underinclusive with respect to commercial signs).

Those courts that, like the Second Circuit below, have concluded that *Metromedia* establishes binding law regarding commercial signs have over-read that case. When this Court produces a fractured decision, the binding law, if any, is set forth in "the narrowest grounds of decision *among the Justices whose votes were necessary to the judgment*." *O'Dell v. Netherland*, 521 U.S. 151, 160 (1997) (emphasis added) (citing *Marks*, 430 U.S. at 193); *see also Marks*, 430 U.S. at 193 ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken *by those Members who concurred in the judgments* on the narrowest grounds.") (emphasis added; internal quotation omitted). Because, as noted above, the judgment in *Metromedia* was to reverse the California Supreme Court and invalidate the challenged ordinance in its entirety, the votes of the

dissenting Justices (who would have upheld the ordinance in its entirety) do not establish binding law. That is why, although Justice Stevens joined the plurality's discussion of certain issues, *see* 453 U.S. at 541 (Stevens, J., dissenting in part), there is no opinion for the Court in *Metromedia* either in whole or in part.

In short, under *O'Dell* and *Marks*, the views of the dissenting Justices in *Metromedia* do not give that fractured decision any binding force. That is not to say, of course, that the views of the dissenting Justices in *Metromedia* necessarily lack persuasive force. To the contrary, this Court has looked to the views of the *Metromedia* dissenters in subsequent cases. *See, e.g.*, *Ladue v. Gilleo*, 512 U.S. 43, 49-50 (1994); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-07 (1984). But those references do not magically render the views of the dissenting Justices in *Metromedia* binding. To the contrary, the *Ladue* Court confirmed that "the Court's *judgment* in *Metromedia*, supported by two different lines of reasoning [*i.e.*, the plurality opinion and the opinion of Justice Brennan concurring in the judgment], invalidated the San Diego ordinance in its entirety." 512 U.S. at 49 (emphasis added). At the very least, there is no good reason to allow the circuit conflict on *Metromedia*'s binding effect on the lower courts, if any, to continue.

Given the direction that this Court's commercial speech jurisprudence took following *Metromedia*, the question whether *Metromedia* has binding force is no mere technicality. Following *Metromedia*, this Court has held on at least three occasions that a scheme restricting commercial speech violates the third and

fourth *Central Hudson* prongs if it is pierced with exceptions and inconsistencies that substantially undermine its stated objectives.

In *Greater New Orleans*, this Court struck down a federal ban on radio and television advertisements for privately operated commercial casino gambling. The "fundamental" flaw in the regulatory scheme was that it was "so pierced by exemptions and inconsistencies that the Government [could not] hope to exonerate it." 527 U.S. at 190. Whereas broadcasters were barred from carrying any advertising for privately operated casino gambling, advertisements for tribal casino gambling sanctioned by federal law were exempted from the ban, as were various other government-operated commercial casinos. *Id.* The Court emphasized the hypocrisy of the government's patchwork scheme, refusing to "ignore Congress's simultaneous encouragement of tribal casino gambling," which was "growing at a rate exceeding any increase in gambling . . . that private casino advertising could produce." *Id.* at 189. The regulations failed the *Central Hudson* test because they "distinguishe[d] among the indistinct, permitting a variety of speech that pose[d] the same risks the Government purports to fear." *Id.* at 195.

Similarly, in *Rubin*, this Court struck down a federal law prohibiting beer labels from displaying alcohol content, which the government contended was necessary to curtail so-called "strength wars." Applying *Central Hudson*, the Court concluded that the scheme did not directly or materially advance the government's asserted interest because beer manufacturers were permitted to advertise the alcohol content of their beer – just not on the labels

themselves – and because the labeling restriction applied only to beer but not to wine or spirits. 514 U.S. at 488. The Court observed that "[t]he failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the Government's true aim is to suppress strength wars," and that "[i]f combating strength wars were the goal, we would assume that Congress would regulate alcohol content for the strongest beverages as well as for the weakest ones." *Id.* These "exceptions and inconsistencies" were constitutionally fatal because they "undermine[d] and counteract[ed]" the government's proffered justification for regulating. *Id.* at 489.

And in *Discovery Network*, this Court struck down a selective ban on sidewalk newsracks because "respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks." 507 U.S. at 425.[3]

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[3] Indeed, *Discovery Network* raised the possibility that the *Metromedia* plurality erred in applying *Central Hudson* in the first place. "[I]f commercial speech is entitled to 'lesser protection' only when the regulation is aimed at either the content of the speech or the particular adverse effects stemming from that content, it would seem to follow that a regulation that is not so directed should be evaluated under the standards applicable to regulations on fully protected speech, not the more lenient standards by which we judge regulations on commercial speech." 507 U.S. at 416 n.11. In other words, commercial speech is subject to greater governmental regulation than non-commercial speech only insofar as such regulation relates to the commercial nature of the speech, and not when such regulation has nothing to do with the commercial nature of the speech (*e.g.*, regulations based on aesthetics). *See also id.* at 435-38 (Blackmun, J., concurring); *Discovery Network,* 946 F.2d at 468-

Nothing in *Metromedia* remotely suggests that this underinclusiveness doctrine applies with any less force in the context of outdoor advertising. To the contrary, *Metromedia* expressly reaffirmed that advertising signs are entitled to robust First Amendment protection: "Billboards are a well-established medium of communication, used to convey a broad range of different kinds of messages." *Id.* at 501 (plurality opinion); *see also id.* at 524 (Brennan, J., concurring) (observing that "[m]any businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive"). As the plurality emphasized, outdoor advertising "is a venerable medium for expressing political, social and commercial ideas," and has "played a prominent role throughout American history, rallying support for political and social causes." *Id.* at 501 (plurality opinion) (quotation omitted).

To be sure, the *Metromedia* plurality would have upheld one particular type of underinclusiveness: San Diego's decision to allow on-site advertising (*i.e.*, a sign for Joe's Diner placed on Joe's Diner) even though it banned off-site advertising (*i.e.*, a sign for American Airlines placed on Joe's Diner). The plurality explained that the rationale behind San Diego's differential treatment of off-site and on-site signage was eminently reasonable:

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72 & n.9, *aff'd*, 507 U.S. 410. Although this Court declined to resolve that issue in *Discovery Network* because the regulations at issue did not pass First Amendment muster even under *Central Hudson*, *see* 507 U.S. at 416 n.11, *Discovery Network* created further doubt about *Metromedia*'s precedential value.

> As we see it, the city could reasonably conclude that a commercial enterprise – as well as the interested public – has a stronger interest in identifying a place of business and advertising the products or services available there than it has in using or leasing its available space for the purpose of advertising commercial enterprises located elsewhere.

453 U.S. at 512. In other words, San Diego's interest in enabling the public to identify and locate local businesses was distinct from and stronger than its interest in traffic safety and aesthetics. There thus was nothing at all eyebrow-raising about San Diego's decision to allow on-site signage while simultaneously prohibiting off-site signage.

By sanctioning *that* specific type of underinclusiveness, the *Metromedia* plurality plainly did not suggest that the underinclusiveness doctrine has no application in the outdoor advertising context. To the contrary, the plurality emphasized that every speech-restricting scheme must be independently scrutinized, and that courts must engage in "a particularized inquiry into the nature of the conflicting interests at stake." *Id.* at 503; *see also Discovery Network*, 507 U.S. at 425 n.20 (limiting the applicability of *Metromedia* to the on-site/off-site distinction). Here, the "particularized inquiry" that *Metromedia* requires demonstrates that the City's decision to ignore its rules when it comes to its own revenue-generating panel signs cannot stand. Unlike in *Metromedia*, the City is not treating different signs differently, for the street furniture signs that the City has authorized are essentially identical to petitioner's signs.

To be sure, the *Metromedia* plurality observed that "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method," and that "[w]e deal here with the law of billboards." 453 U.S. at 501 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949)). But that observation simply reminds courts to be sensitive to the differences among media in applying generally applicable First Amendment principles. It certainly does not direct courts to apply an entirely different analytical framework to each and every medium, let alone to ignore this Court's post-*Metromedia* underinclusiveness cases in any challenge to advertising sign restrictions.

In sum, the decision below deepened an already palpable circuit conflict regarding whether *Metromedia* establishes any binding law at all, and gave that decision an extraordinarily aggressive reading that cannot be reconciled with this Court's other commercial speech precedents. This Court can and should now revisit *Metromedia* to resolve the confusion that its splintered decision in that case has spawned over the past generation. *See, e.g.*, *Rappa*, 18 F.3d at 1061 n.28 (Becker, C.J., joined by Alito, J.) (expressing the "hope" that this Court will "clarify and rectify the problems created by its splintered opinion in *Metromedia*"); Jason R. Burt, *Speech Interests Inherent in the Location of Billboards and Signs: A Method for Unweaving the Tangled Web of Metromedia, Inc. v. City of San Diego*, 2006 B.Y.U. L. Rev. 473, 475 (2006) (noting that *Metromedia* "produced no majority opinion and consisted of five separate opinions that each suggested different lines

of reasoning," thereby leaving "courts and governments seeking a clear rule to apply to billboard regulations [to] face a difficult constitutional quandary"); M. Ryan Calo, Note, *Scylla or Charybdis: Navigating the Jurisprudence of Visual Clutter*, 103 Mich. L. Rev. 1877, 1878 (2005) (noting that "[t]he jurisprudence of visual clutter is in a state of disarray," and that "[t]he synergy of *Metromedia* and *Discovery Network* yields a dangerous path for any government actor seeking to reduce, but not completely eliminate, outdoor signs").

II. THIS COURT SHOULD RESOLVE A CIRCUIT CONFLICT REGARDING THE QUANTUM OF EVIDENCE THAT IS REQUIRED FOR THE GOVERNMENT TO JUSTIFY THE SUPPRESSION OF COMMERCIAL SPEECH

A. The Excessive Deference Afforded By the Second Circuit Squarely Conflicts with the Decisions of Numerous Other Circuits

It is well established that the government bears the burden of proving that all four prongs of the *Central Hudson* test have been satisfied. *Greater New Orleans*, 527 U.S. at 183; *Discovery Network*, 507 U.S. at 420. This Court has also made clear that the government's 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." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). "Unlike rational basis

review, the *Central Hudson* standard does not permit [courts] to supplant the precise interests put forward by the State with other suppositions." *Id.* at 768.

In the wake of this Court's statements in *Edenfield*, the lower courts have struggled to determine *how much* evidence the government must adduce in order to discharge its burden of justifying a commercial speech restriction. This elementary issue has split the circuits into two distinct camps.

On the one hand, the First, Sixth, and Eleventh Circuits have held that a significant quantum of concrete evidence is required for the government to meet its burden under *Central Hudson*. In *Pagan v. Fruchey*, 492 F.3d 766, 773-74 (6th Cir. 2007), the court held that an affidavit containing "a conclusory articulation of governmental interests" was insufficient to justify the suppression of commercial speech, and rejected the government's argument that "obviousness" or "common sense" suffice. Similarly, in *El Dia v. Puerto Rico Dep't of Consumer Affairs*, 413 F.3d 110, 115-16 (1st Cir. 2005), the court held that the government "failed to provide any evidence, other than conclusory assertions" justifying its favoring one commercial speaker over another. And in *Mason v. Florida Bar*, 208 F.3d 952, 956-58 (11th Cir. 2000), the court held that the government's "rote invocation of the words 'potentially misleading'" were insufficient to justify its suppression of commercial speech.

These cases stand in stark relief to the approach espoused by the Second Circuit. Unlike its sister circuits, the Second Circuit did not require the City to identify any evidence at all justifying its decision

to exempt its licensees' revenue-generating panel signs from the restrictions that apply to petitioner's identical signs. Instead, the Second Circuit held that "[i]t is not this Court's role to second guess the City's urban planning decisions," and that it would "defer to the City's judgment in controlling the placement of outdoor advertising." App. A-17, A-23.

The law in the Ninth Circuit is, if anything, even more extreme. In *Metro Lights*, a case that is factually similar to this case, the Ninth Circuit held that *Metromedia* requires courts to "*exude*[ ] deference" to local judgments about the wisdom of suppressing commercial speech. 551 F.3d at 910 (emphasis added). Although Los Angeles, like New York, had proffered no actual evidence explaining its differential treatment of identical signs on private property and the sidewalks, the Ninth Circuit conjured its *own* "plausible explanation": that the differential treatment "allowed [Los Angeles] to supervise a more concentrated supply of off-site signage, which plausibly contributes to its interest in visual coherence as a part of aesthetic quality." *Id.* at 912. The Ninth Circuit so held despite its acknowledgement that "the deference *Metromedia* shows may seem to be in some tension with other underinclusivity cases such as *Discovery Network* and *Greater New Orleans*." *Id.* at 908.

This case provides an ideal vehicle for resolving this conflict because the record here contains *no* evidence supporting the City's haphazard regulation of panel advertising signs. The City relied exclusively on Mr. Woodward's "expert" opinion that, as a matter of urban design theory, it makes perfect sense to blanket the City's sidewalks with panel advertising

signs but prohibit their placement on private property just a few feet away. Leaving aside the dubious merits of Mr. Woodward's theory, the City's reliance on it is fatally flawed because he admittedly had nothing whatsoever to do with the City's decision to exempt its street furniture licensees from the rules that apply to everyone else. Indeed, the City policymakers who *did* make that decision generated a lengthy report detailing their reasoning, and that report (which is part of the record in this case) makes clear that they concluded that street furniture advertising signs *do* adversely affect aesthetics and neighborhood character, but that it was necessary for the City to make this aesthetic sacrifice in order to generate desired revenue.

B. The First Amendment Forbids the Government From Auctioning Off Exemptions to Speech Restrictions In Order to Generate Revenue

Revenue is the proverbial elephant in the room in this case. It could not be more obvious that the City believes that panel advertising signs should be prohibited for aesthetic and neighborhood character reasons, but that it determined that it could not pass on the opportunity to raise over $1 billion for its coffers through street furniture advertising. The City has strained to deny that it was motivated by the money, and with good reason: it is well established that the government may not sell an exemption to a speech restriction in order to generate revenue. As Justice Scalia has explained:

> [Suppose that a] law forbade shouting fire in a crowded theater, but granted dispensations to

> those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one [*i.e.*, raising revenue] which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster."

Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987); *see also Greater New Orleans*, 527 U.S. at 191 (rejecting the argument that exceptions to speech restrictions were justifiable because they generated revenue for the government).

There is nothing wrong with the City leveraging its assets to generate revenue. But once it is revealed that the City sacrificed its supposedly lofty interest in safeguarding aesthetics and neighborhood character by auctioning off the right to erect panel signs to the highest bidder, its justification for restricting petitioner's speech simply collapses.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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