No. 07-420

In The

Supreme Court of the United States

THE VILLAGE OF GLENDALE, OHIO,

Petitioner,

v.

CHRISTOPHER J. PAGAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

The en banc U.S. Court of Appeals for the Sixth Circuit struck down a municipal ordinance criminalizing certain car window "For Sale" signs because the Village of Glendale, Ohio, despite having an affirmative burden under *Edenfield v. Fane*, 507 U.S. 761 (1993), offered no evidence that its censorship of truthful commercial speech addressed any actual, as opposed to merely hypothetical, danger to the public.

The question thus presented is:

Whether, in the context of traffic safety and aesthetics, a previously unrecognized exception to *Edenfield* absolves the government of its burden to justify the censorship of truthful commercial speech with real evidence that the censored speech will cause real harm to the community?

RULE 29.6 DISCLOSURE STATEMENT

Respondent Christopher J. Pagan is not a corporation.

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STATEMENT

This case does not merit review because it involves neither an irreconcilable conflict with this Court or the Circuit Courts of Appeal nor a First Amendment question of exceptional national importance. The Sixth Circuit, sitting en banc, is the only federal appellate court to have addressed the constitutionality of outlawing car "For Sale" signs. Not only is there no federal appellate conflict, every other court in the country to have considered this specific fact-pattern also ruled in favor of the speaker.

In addition to this unanimous judicial consensus, there is also no pressing need for the Court to intervene because municipalities can easily advance their interest in traffic safety and aesthetics by prohibiting parking for the purpose of selling a car rather than, as Glendale unwisely did, ignore the act of parking and focus instead on harmless speech.

The Respondent therefore respectfully urges this Court to deny the petition.

A. The Facts

The facts are simple. In 2003, Christopher Pagan (Pagan), an attorney who lives in the Village of Glendale, Ohio (Glendale or Village), took out a classified ad to sell a 1970 Mercury Cougar he accepted from a client in lieu of fees. The ad drew only a few inquiries so Pagan did what people have done since the advent of the automobile – he put a small 8.5 x 11 inch "For

Sale" sign in the window of his car while it was legally parked on the street in front of his home. This turned out to be a great idea because his phone rang off the hook.

This also turned out to be a terrible idea because it made him a criminal. In July 2003, Glendale Police Chief Matt Fruchey (Chief Fruchey) told Pagan that the "For Sale" sign was illegal under section 76.06 of the Glendale Traffic Code, which outlaws, *inter alia*, displaying a vehicle for sale. Because Pagan received a parking ticket the prior year, he faced a $250 fine and 30 days in jail.[1] Chief Fruchey instructed Pagan to remove the sign, which he did and was never cited.[2]

Contrary to the Village's gloss, Pet. at i, Chief Fruchey's enforcement of section 76.06 imposed a *direct*, not incidental, burden on Pagan's speech. Chief Fruchey enforced section 76.06 solely against the content of Pagan's sign. Glendale has never disputed that his sign would have been legal had it borne different words such as "Vote Obama" or "Go Buckeyes." Nor has Glendale ever disputed that Pagan fully obeyed the law just by taking his sign down. The Village has always maintained that the specific words on Pagan's sign, and not the sign itself or the presence of his car in the street, constituted the

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[1] Under section 70.99 of the Glendale Traffic Code, putting up a "For Sale" sign is a fourth class misdemeanor if the offender, like Pagan, received a parking ticket in the prior year.

[2] A claim for damages remains.

violation of section 76.06. *Pagan v. Fruchey*, 492 F.3d 766, 772 (6th Cir. 2007) (en banc). This case has thus always been about Glendale's direct and intentional regulation of the specific words on Pagan's sign, not about the regulation of something else that just happened to have an incidental effect on his speech.

B. The Decision of the District Court

Pagan filed suit in the Southern District of Ohio under the free speech clause of the First Amendment. The parties filed cross-motions for summary judgment, agreeing that the applicable standard is the intermediate scrutiny of the four-part test for restrictions on commercial speech from *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). To regulate commercial speech under *Central Hudson*, the government must establish: (1) the speech is truthful and not misleading; (2) the government has a substantial regulatory interest; (3) the law materially advances that interest; (4) and the law is no more extensive than necessary to satisfy the regulatory interest.

There was no dispute about the truthfulness of Pagan's "For Sale" sign nor that Glendale has a substantial interest in traffic safety and aesthetics. The case turned on whether Glendale established under the third-prong of *Central Hudson* that its prohibition on car "For Sale" signs materially advanced its regulatory interest by mitigating a real danger to the public. Under *Edenfield v. Fane*, 507

U.S. 761, 770-771 (1993), the third-prong of *Central Hudson* requires the government to prove with real evidence that the regulated speech poses a real danger to the public. Mere speculation never suffices.

Pagan argued that Glendale failed to satisfy its affirmative burden because all the Village submitted in support of its summary judgment motion was a meaningless affidavit from Chief Fruchey. In it, Chief Fruchey merely averred that the "primary purpose" of section 76.06 is to promote traffic safety by prohibiting "attractions or activities which will induce people to come into the roadway who are not part of normal vehicular or pedestrian traffic, such as . . . individuals who are looking over a motor vehicle which is displaying a for sale sign parked in the street." Chief Fruchey further noted, without elaboration, that "the Ordinance also addresses aesthetic objectives of the Village of Glendale." Pagan urged the District Court to grant his motion for summary judgment because, under *Edenfield*, Glendale's affirmative burden is never satisfied by a conjectural affidavit like that of Chief Fruchey that, to the extent it conveys anything, simply speculates about the possibility that without censorship something might happen one day that might be bad. 507 U.S. at 770-771.

The District Court nevertheless granted final summary judgment to Glendale. *Pagan v. Fruchey*, 2004 WL 5338455 (S.D. Ohio Sept. 30, 2004). Though purportedly applying the intermediate scrutiny of *Central Hudson*, the District Court concluded that it must defer to the legislative judgment of Glendale

absent compelling evidence from Pagan that this judgment is "palpably false." In elucidating this novel "palpably false" standard of First Amendment review, the District Court relied largely on *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), a rational basis equal protection case – mentioned in passing in the fractured plurality decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981) – that predated by 25 years this Court's extension of the First Amendment to commercial speech in *Bigelow v. Virginia*, 421 U.S. 809 (1975). Other than *Metromedia*, the District Court did not cite any of this Court's many commercial speech decisions, conspicuously overlooking *Edenfield* and its voluminous progeny.

C. The Panel Decision of the Sixth Circuit

A divided panel of the Sixth Circuit affirmed. *Pagan v. Fruchey*, 453 F.3d 785 (6th Cir. 2006). Like the District Court, the two-judge majority held that a municipality such as Glendale is entitled to broad, and indeed all but limitless, deference when regulating commercial speech in the name of traffic safety and aesthetics. Also like the District Court, the panel majority failed to cite, much less distinguish, *Edenfield* or any of this Court's germane commercial speech authority.

D. The En Banc Decision of the Sixth Circuit

The Sixth Circuit, sitting en banc, then reversed the District Court. Citing this Court's extensive commercial speech precedent, the en banc majority correctly stated that, in defending a restriction on commercial speech under the third-prong of *Central Hudson*, "the government must come forward with some quantum of evidence, beyond its own belief in the necessity for regulation, that the harms it seeks to remedy are concrete and that its regulatory regime advances the stated goals." *Pagan*, 492 F.3d at 771. The en banc majority concluded that Glendale failed to do this because the vacuous affidavit of Chief Fruchey, which merely purported to describe the purpose of Glendale's ordinance, was not evidence of anything. *Id.* at 773.

The Sixth Circuit also recognized that Glendale was never really trying to vindicate Chief Fruchey's affidavit at all. On the contrary, the "thrust of [Glendale's] argument is not that the Fruchey affidavit is the type of evidence required by *Edenfield* but rather that other Supreme Court authority relieves [the Village] from meeting the *Edenfield* requirements as to how a governmental entity must meet its burden under *Central Hudson*." *Id.* at 774. Glendale, in other words, argued below – and argues again before this Court – that the government in effect has no burden at all when regulating the content of speech in the name of traffic safety and aesthetics. Glendale contends instead that its censorship is susceptible to review only under the novel "palpably false" standard,

a position tantamount to saying that the First Amendment vanishes when government waves the talisman of traffic safety and aesthetics.

The en banc majority properly struck down section 76.06 because there is no "traffic safety and aesthetics" exception to the First Amendment. Quite the opposite, an unbroken line of this Court's precedent – from *Central Hudson* through *Metromedia* and *Edenfield* to the present – categorically requires the government to defend its restrictions on commercial speech with real proof that the restrictions materially advance the government's regulatory interest by preventing a real harm to the community.[3]

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[3] This Court and every Circuit Court of Appeals routinely applies the *Edenfield* doctrine in a variety of contexts. The diversity of circumstances in which the appellate judiciary has applied *Edenfield* belies Glendale's claim, Pet. at 10, that *Edenfield* is narrow. *See, e.g.*, *Lorillard Tobacco Co. v. Reilley*, 533 U.S. 525, 555 (2001) (striking down state regulation of tobacco advertising); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (addressing FCC restrictions on gambling advertising); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995); *El Dia, Inc. v. P.R. Dep't of Consumer Affairs*, 413 F.3d 110, 111 (1st Cir. 2005) (no showing speech ban would diminish fraud); *Bad Frog Brewery v. N.Y. State Liquor Auth.*, 134 F.3d 87, 99-101 (2d Cir. 1998) (no showing speech ban would diminish vulgarity); *Pitt News v. Pappert*, 379 F.3d 96, 107 (3rd Cir. 2004) (no showing speech ban diminished underage drinking); *Psinet, Inc. v. Chapman*, 362 F.3d 227, 238 (4th Cir. 2004) (no showing speech ban would accomplish regulation's objective); *Bailey v. Morales*, 190 F.3d 320, 324 (5th Cir. 1999) (no showing business solicitation harms seniors); *Amelkin v. McClure*, 168 F.3d 893 (6th Cir. 1999) (no showing that speech restrictions would lead to stalkers pursuing

(Continued on following page)

THE PETITION SHOULD BE DENIED

I. THE COURT DOES NOT NEED TO REVIEW THIS CASE BECAUSE THE SIXTH CIRCUIT IS NOT IN DISAGREEMENT WITH ANY JURISDICTION IN THE UNITED STATES.

It is elementary that the Court should grant plenary review only when a petition establishes a decisive conflict with the decisions of this Court or the Circuit Courts of Appeal. Glendale's petition wholly fails on this score.

A. There Is Universal Judicial Agreement On The Unconstitutionality Of Prohibiting Car Window "For Sale" Signs.

There is no conflict on the question this case presents between the Sixth Circuit and any court of

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accident victims), *rev'd in part on other grounds*, 205 F.3d 293 (6th Cir. 2000); *Pearson v. Edgar*, 153 F.3d 397, 404 (7th Cir. 1998) (no showing speech ban was needed because the underlying harm did not exist); *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 654 (8th Cir. 2003) (upholding statute after government produced meaningful evidence of harm); *W. States Med. Ctr. v. Shalala*, 238 F.3d 1090, 1094 (9th Cir. 2001), *aff'd*, 535 U.S. 357 (2002) (no showing speech ban would reduce consumption of certain prescription drugs); *Pac. Frontier v. Pleasant Grove*, 414 F.3d 1221 (10th Cir. 2005) (no showing that speech ban would deter crime); *Mason v. Fla. Bar*, 208 F.3d 952, 958 (11th Cir. 2000) (no showing speech ban on attorney advertising protected the public); *Pearson v. Shalala*, 164 F.3d 650, 656 (D.C. Cir. 1999) (no showing speech ban would reduce consumer confusion).

any stature, including this Court and the Circuit Courts of Appeal. Each of the three courts besides the Sixth Circuit to have addressed the fact-pattern in this case struck down the car "For Sale" sign ban as a violation of the First Amendment. *Burkow v. City of Los Angeles*, 119 F. Supp.2d 1076 (C.D. Cal. 2000); *Milwaukee v. Blondis*, 460 N.W.2d 815 (Wis. Ct. App. 1990) (applying *Central Hudson*); *People v. Moon*, 152 Cal. Rptr. 704 (Cal. App. Dep't Super. Ct. 1978) (pre-*Central Hudson*).

Judicial unanimity of this sort, absent countervailing considerations not present here, should preclude the extraordinary remedy of certification.

B. The Sixth Circuit's Decision That Glendale Needed Real Evidence Of Real Harm To Prohibit Pagan's "For Sale" Sign In The Name Of Traffic Safety And Aesthetics Does Not Conflict With The Decisions Of This Or Any Other Court.

Glendale tries to manufacture a conflict between the Sixth Circuit and this Court by, *pace* the District Court and two-judge panel majority, relying heavily on errant dicta in the four-Justice plurality opinion in *Metromedia*, 453 U.S. at 509, suggesting that reviewing courts should not second-guess the judgment of local lawmakers concerning the traffic safety and aesthetic implications of billboards unless the plaintiff

proves this judgment to be "palpably false."[4] As the en banc majority recognized, Glendale is arguing that the various opinions in *Metromedia* collectively stand for the proposition that commercial speech restrictions in the name of traffic safety and aesthetics get First Amendment protection in name only and the *real* standard of review is actually the rational basis test.

As the en banc majority held, Glendale's conclusion is wrong. *Metromedia* is an ordinary *Central Hudson* case in which the Justices in their various opinions applied intermediate scrutiny. Significantly, the City of San Diego did not, as Glendale does here, assert that the First Amendment is in effect inapplicable when the government restricts speech in the name of traffic safety and aesthetics. Instead, San Diego pointed to a nationwide legislative and judicial consensus at all levels as compelling evidence that billboards, which are deliberately designed to distract people, pose a threat to traffic safety and undermine

[4] The "palpably false" language upon which Glendale focuses so much attention originates, as mentioned earlier, in *Railway Express*, a 1949 equal protection case that this Court decided a generation before extending the First Amendment to commercial speech. As this Court acknowledged several years after *Metromedia*, the *Metromedia* plurality's citation of the "palpably false" passage from *Railway Express* should be disregarded as errant dicta and irrelevant to the First Amendment because *Railway Express* concerned the "rational basis test used in Fourteenth Amendment equal protection analysis." *Bd. of Tr. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (internal quotation marks and citation omitted).

a community's aesthetic continuity. The en banc majority concluded that the evidentiary weight of this legislative and judicial consensus is the precise equivalent of the proof this Court, as expressed most forcefully in *Edenfield*, has always required under the third-prong of *Central Hudson* to ensure that government never arbitrarily suppresses free speech. *Pagan*, 492 F.3d at 774-775.

Thus the crux of the en banc decision is not, as Glendale mischaracterizes it, Pet. at 1, that municipalities have to produce costly studies or otherwise amass vast extrinsic evidence to defend even a mundane ordinance. On the contrary, the Sixth Circuit simply applied the uncontroversial principle, evident in *Metromedia*, that government censors have an affirmative burden under the First Amendment.

Here, however, Glendale pointed to no legislative and judicial consensus on this question at any level, much less one as comprehensive as that in *Metromedia*. The en banc majority was therefore constrained by longstanding precedent of this Court to strike down an ordinance that – had Glendale enforced and defended it differently – would likely still be on the books.

Glendale thus believes that the en banc decision conflicts with *Metromedia* only because Glendale continues to mistakenly believe that *Metromedia*, as a practical matter, stripped commercial speech of First Amendment protection whenever the government invokes traffic safety and aesthetics. Because,

however, *Metromedia* is firmly situated in the mainstream of this Court's commercial speech doctrine, particularly as it was later elaborated in landmark cases like *Edenfield* and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503-504 (1996), the conflict Glendale posits is illusory. Glendale's petition should therefore be denied.

C. There Is Also No Conflict Between The Sixth Circuit And This Court Or The Circuit Courts Of Appeal Because Metromedia And The Other Billboard Authority Glendale Cites Are Distinguishable On Their Facts.

The Sixth Circuit's en banc decision does not conflict with *Metromedia* or any other billboard precedent for the further reason that the cases are distinguishable on their facts.[5]

First, *Metromedia* is about billboards and billboards alone because, as the four-Justice plurality emphasized and the en banc majority echoed, each

[5] Five of the cases Glendale cites to establish a conflict among the Circuit Courts of Appeal are actually billboard cases that are distinguishable on their facts for the same reasons as *Metromedia*. *See Lavey v. The Lakeland Group, Inc.*, 171 F.3d 1110 (7th Cir. 1999); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793 (8th Cir. 2006); *Ackerly Communications of the Northwest, Inc. v. Krochalis*, 108 F.3d 1095 (9th Cir. 1997); *Ctr. for Bio-Ethical Reform, Inc. v. Cunningham*, 455 F.3d 910 (9th Cir. 2006); *Nat'l Adver. Co. v. The City and County of Denver*, 912 F.2d 405 (10th Cir. 1990).

mode of speech is unique. 453 U.S. at 501 (White, J. 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.*") (emphasis added) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949)). The plurality thus expressly foreclosed what Glendale is trying to do here: indiscriminately apply reasoning about gigantic highway billboards to non-analogous contexts like tiny car window "For Sale" signs. *Pagan*, 492 at 774. *See also, e.g.*, *Ballen v. City of Redmond*, 466 F.3d 736, 744 (9th Cir. 2006) (explaining that *Metromedia* only applies to billboards and is not a general license to ban commercial signs). This factual distinction alone establishes that the Sixth Circuit's en banc decision does not conflict with *Metromedia*.

The Sixth Circuit's en banc decision and *Metromedia* are further distinguishable on their facts because their respective traffic safety and aesthetic considerations are fundamentally different.

Beginning with traffic safety, the City of San Diego in *Metromedia* wanted to regulate the physical characteristics of billboards, up to and including prohibiting them, because they are designed to distract people. Glendale, on the other hand, has never argued that tiny car window "For Sale" signs distract anyone. Indeed, Glendale conceded at oral argument that car "For Sale" signs are permissible in cars on private property and in moving vehicles, and that car

window signs are permissible everywhere as long as they do not read "For Sale."

Glendale instead wants to outlaw car "For Sale" signs from cars parked on the street because the Village is apparently worried that people might read the sign and then decide to walk heedlessly into traffic to look at the car rather than look at it from the sidewalk or when there are no cars coming.[6] Thus, in contrast to San Diego, which wanted to regulate the physical characteristics of billboards because they elicit an involuntary reaction, Glendale wants to regulate the specific content of car window signs because it believes without any evidence that, in the context of a car parked on a public street, citizens cannot be trusted with the harmless idea "this car is for sale."[7]

To put it more broadly, San Diego's regulation of the physical characteristics of billboards for traffic

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[6] It is actually difficult to surmise what Glendale thinks might happen if people put "For Sale" signs in their car windows because, as the en banc majority found, Chief Fruchey's vacant affidavit did nothing but vaguely convey his opinion that the purpose of section 76.06 is to keep "attractions" out of the roadway.

[7] Glendale is simply not being candid with the Court when the Village represents in its petition at page 12 that Pagan never argued that Glendale had an improper motive. As discussed in detail below, *infra*. § I.D, Glendale's enforcement of section 76.06 is predicated at least in part on the infantilizing assumption that people cannot be trusted to look at a car advertised for sale without getting run over.

safety was substantially akin to a content-neutral reasonable time, place and manner restriction, whereas Glendale's prohibition on car "For Sale" signs resembles actual censorship.[8] This distinction strongly recommends leaving the Sixth Circuit's en banc decision undisturbed because this Court, even in the context of commercial speech regulation, has always emphatically condemned suppressing speech to protect the listener from what the government believes is a dangerous idea. *See, e.g., 44 Liquormart*, 517 U.S. at 503-504 (stating that speech restrictions designed "to keep people in the dark for what the government perceives to be their own good . . . rarely survive constitutional review."); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 769-770 (1976).[9]

The aesthetic considerations in *Metromedia* were also different because San Diego sought to diminish the aesthetic impact of the city's ubiquitous gigantic

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[8] There was a controversy in *Metromedia* over the challenged ordinance's preference for commercial over non-commercial speech, but that aspect of the case is not relevant here and does not alter the essentially content-neutral character of San Diego's law.

[9] The *Metromedia* plurality also made it clear that the government's legitimate interest in traffic safety and aesthetics only permits content-neutral regulation. 453 U.S. at 502 (White, J. Plurality Opinion) ("the government has a legitimate interest in controlling the noncommunicative aspects of [billboards] . . . but the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects.") (citation omitted).

billboards. Thus, once again, San Diego's aesthetic regulation was in essence a content-neutral reasonable time, place and manner restriction that focused on the physical characteristics of billboards.

Glendale's purported aesthetic concern is different, and incoherent, precisely because the Village does not care about the physical characteristics of car window signs, just their content. As noted earlier, Glendale never objected to Pagan's car being in the street or his sign *per se*, merely that the sign said "For Sale" instead of, for example, "Vote Clinton" or "I Love Glendale." It would require a vast and illogical expansion of *Metromedia* to enable the government – simply by invoking what Glendale and the en banc dissent concede is just subjective aesthetic caprice – to regulate the specific content, rather than only the appearance, of signs. *Cf. City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (invalidating petty commercial speech restriction justified by aesthetics because the ordinance had only a *de minimis* impact).

The Respondent therefore respectfully asks the Court to deny Glendale's petition because the billboard precedent such as *Metromedia* upon which the Village so heavily relies is factually inapposite.[10]

[10] The other sign cases Glendale cites to depict an ostensible conflict among the Circuit Courts of Appeal are not only also distinguishable, but actually bad law in some instances. *Long Island Bd. of Realtors, Inc. v. Incorporated Village of Massapequa*

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D. There Is No Conflict Between The Sixth Circuit And Any Other Court On The Use Of Common Sense Because Glendale's Definition Of Common Sense, Not That Of The Sixth Circuit, Is Unsupported In The Case Law.

The overarching theme of Glendale's petition is that the Sixth Circuit, because of an irrational fidelity to form over substance, refused to consider "common sense" in rendering its decision. The Village argues that in doing so the en banc majority supposedly created a conflict with free speech decisions such as *Metromedia*, *Burson v. Freeman*, 504 U.S. 191, 211

Park, 277 F.3d 622 (2d Cir. 2002), which involved a content-neutral sign regulation for residential homes, did not address what *Edenfield* meant for sign regulations of that specific type. *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995), which is actually helpful to Pagan, involved the citation to four substantial studies in defending an advertising restriction on alcohol, but *Anheuser-Busch* is nevertheless likely bad law, as noted by *Pitt News v. Pappert*, 379 F.3d 96, 108 (3rd Cir. 2004), because *Anheuser-Busch* was decided before *Lorillard Tobacco Co. v. Reilley*, 533 U.S. 525 (2001), which invalidated an anti-tobacco law under the third-prong of *Central Hudson* that was similar to the one in *Anheuser-Busch*. *Lindsay v. City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987), is a pre-*Edenfield* case that concerned content-neutral restrictions on portable signs. Finally, *South Suburban Housing Ctr. v. Greater South Suburban Bd. of Realtors*, 935 F.2d 868 (7th Cir. 1991), involved a multi-faceted statutory and constitutional challenge to ordinances regulating a local real estate market that, as stated in *Pearson v. Edgar*, 153 F.3d 397, 402 (7th Cir. 1998), is no longer good law at least on the First Amendment front after *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

(1992) and *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993), in which this Court mentioned common sense at least in passing.

Yet whatever the supplementary role of common sense in First Amendment adjudication, Glendale has never understood what was obvious to the en banc majority: simply calling something "common sense" does not make it so. *Pagan*, 492 F.3d at 774 n. 6. There is nothing commonsense about government infantilizing people to the degree that they cannot be trusted to read a "For Sale" sign. Nor is there anything remotely commonsense about banning the words "For Sale" from a sign, but not any other words, to promote aesthetics. Indeed, as illustrated by the Village's insistence on sweeping deference, all Glendale really means by "common sense" is something like "because the government wants to."

The en banc majority recognized, however, that whatever "common sense" means to the First Amendment, it means more than "because the government wants to." *See, e.g., Pearson v. Edgar*, 153 F.3d 397, 402 (7th Cir. 1998). Indeed, as with *Metromedia*, both *Burson* and *Edge* show that Glendale's perverse definition of common sense – a legislative intuition unsupported by any evidence – has no place in the First Amendment, where restrictions on speech are presumptively invalid and subject to searching review.

In *Burson*, this Court upheld a statute regulating political candidate speech in close proximity to polling

places because a sweeping historical, legislative and judicial consensus – extensive evidence of which was part of the record – suggested that tiny buffer zones are necessary to prevent voter intimidation. Justice Blackmun used the locution "common sense" as part of the literary flourish with which he embellished the last substantive line of his opinion. It is absurd to suppose that *Burson*, a contentious strict scrutiny case from 1992 about balancing the fundamental rights of political speech and voting, means that this Court's 1993 commercial speech decision in *Edenfield* was a nullity.[11]

Edge is also inapposite. In *Edge*, this Court was presented with the peculiar issue of a federal statute, enforced by the Federal Communications Commission, that forbade lottery advertisers in lottery states from broadcasting their lottery ads into non-lottery states. Ultimately, this Court concluded that, under principles of federalism, it is properly the prerogative of Congress to reconcile the competing legitimate interests of states within an interstate broadcasting system subject to comprehensive federal regulation.

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[11] In discussing the history of polling place laws in detail, Justice Blackmun also noted that legislators used common sense in recognizing that protecting a voter's interest in anonymity with a secret ballot would be undermined if candidates could hover around polling booths to harangue voters. 504 U.S. at 207-208. But, as explained in footnote 10, Justice Blackmun was actually using the term "common sense" as a synonym for "logical connection," which is altogether different from the definition Glendale urges this Court to accept.

The salient question in *Edge*, therefore, was not so much whether the federal statute addressed a material harm under the third-prong of *Central Hudson*, but rather whether Congress could take federalism concerns into account in trying to cope with incommensurable state policies on gambling. Nothing in *Edge* even slightly altered the affirmative burden set forth in *Edenfield*, and at best the case stands for the proposition that Congress deserves modest regulatory latitude when struggling under exotic facts with a predicament rooted in American federalism. That is scarcely the situation here.

In disparaging the Sixth Circuit for declining to credit legislative "common sense," Glendale has lost sight of the First Amendment's great virtue: the political majority does not get to freely decide what can be said. It may seem *obvious* to Glendale officials that "For Sale" signs are ugly and attract stupid people. But everyone, even in a National Historic Landmark town, has rights under the First Amendment that cannot be abridged merely because the town fathers think certain speech is tacky and a threat to fools. And contrary to the elitist view of the dissent, the "grandeur of the First Amendment" is enlarged, not "cheapened," when the vast power of government is deemed not enough to silence even a few simple words from just one man. *Pagan*, 492 F.3d at 779 (Rogers, J., dissenting).

Glendale's petition should thus be denied because *its* conception of common sense, not that of the Sixth

Circuit, is the one in conflict with the longstanding precedent of this Court.

II. THERE IS NO QUESTION OF EXTRAORDINARY PUBLIC SIGNIFICANCE AT ISSUE IN THIS CASE BECAUSE GLENDALE CAN ADDRESS ITS INTEREST IN TRAFFIC SAFETY AND AESTHETICS BY REGULATING PARKING INSTEAD OF SPEECH.

This entire case is the result of Glendale's continuing failure to understand that it should have enforced its ordinance against Pagan's parking, not his speech. In its petition for certiorari, Glendale asserts that, unless the Sixth Circuit is reversed, the Village will not be able to prevent people from conducting business in the public roadways.

There is, however, a simple and obvious solution to Glendale's "problem." All Glendale needs to do is enact an ordinance that prohibits parking in a public street for the primary purpose of selling a car. Indeed, this is what Section 76.06 appeared to do.

This case unnecessarily took on constitutional proportions when Chief Fruchey and the City Attorney made the mistake of enforcing Section 76.06 exclusively against Pagan's speech. Chief Fruchey should instead have simply asked Pagan to move his car, regardless of whether it had a "For Sale" sign, so long as Pagan's only purpose in parking on the public street in front of his home was to make his car available for potential buyers. Had Chief Fruchey asked

Pagan to remove his car, the effect on the latter's speech would truly have been incidental.

Glendale then made a bad situation worse. Rather than simply acknowledge that Chief Fruchey should not have directed his enforcement against Pagan's speech and settled the case, Glendale argued before the District Court and then on appeal that the Village was free to regulate the content of Pagan's sign without any evidence of its harm because, as a practical matter, the First Amendment does not apply to speech restrictions in the name of traffic safety and aesthetics. As described in the preceding sections, Glendale argues for a novel standard of First Amendment review in which the burden is on *the speaker* to prove that the judgment underlying the speech restriction is "palpably false."

Requiring the speaker to justify his or her speech to government officials is, however, anathema to the First Amendment, which is why the en banc majority was forced to intervene.

The Respondent respectfully suggests that the petition should be denied because the en banc decision of the Sixth Circuit affected the traditional police power of neither Glendale, nor any other municipality in the nation, to regulate parking on its public streets.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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