No. 07-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Christopher J. Pagan filed a civil action against The Village of Glendale, Ohio and its police chief challenging a municipal ordinance which prohibited Respondent from displaying a used car for sale on a public street in the Village. Respondent contended that the ordinance violated his First Amendment rights. The District Court granted Petitioner's motion for summary judgment concluding that the ordinance was not an unconstitutional invasion of Respondent's First Amendment rights. Respondent appealed and a panel of the Sixth Circuit Court of Appeals affirmed in *Pagan v. The Village of Glendale, Ohio*, 2006 U.S. App. LEXIS 12243 (6th Cir.2006) (App. 47a). After granting Respondent's request for a re-hearing on en banc, the Sixth Circuit Court of Appeals in an 8 - 7 decision reversed in *Pagan v. The Village of Glendale, Ohio*, 492 F.3d 766 (6th Cir.2006). (App. 1aa). The question presented is:

Whether the 6th Circuit decision in *Pagan v. The Village of Glendale, Ohio*, 492 F.3d 766 (6th Cir.2006) (App. 1a) is correct in holding a municipality's common sense legislative determination that allowing business to be conducted in the roadway presents certain traffic hazards or affects aesthetic interests must be supported by studies or other evidence because it has an incidental impact on commercial speech?

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The Village of Glendale, Ohio respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on June 29, 2007 in order to determine whether incidental restrictions on commercial speech to foster traffic safety and to promote aesthetic interests may be justified "solely on history, consensus and 'simply common sense'", *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995), or whether such restrictions must be justified with some artificial record evidence requirement. The Court is squarely presented with a holding that "even common sense judgments require some justification" and consequently, all legislative judgments impacting commercial speech, even those supported by simple common sense, must be supported by "some quantum of evidence, beyond its own belief and the necessity for the regulation, . . .". *Pagan v. Fruchey*, 492 F.3d 766, 771 (6th Cir. 2007). The Court should reverse the 6th Circuit's decision in this case.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the 6th Circuit was entered June 29, 2007 and is published at *Pagan v. Fruchey*, 492 F.3d 766 (6th Cir. 2006). (App. 1a). The panel opinion of the 6th Circuit originally was published as *Pagan v. Fruchey*, 453 F.3d 784 (6th Cir. 2006) and was later withdrawn from publication because of the re-hearing en banc. The order granting the summary judgment of Chief District Judge Sandra S. Beckwith, United States District Court for the Southern District of Ohio, is not published in the Federal Supplement, but is published at *Pagan v. Fruchey*, 2004 WL 5338455 (S.D. Ohio 2004) (App. 71a).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 29, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The civil action was filed under the Civil Rights Act, 42 U.S.C. § 1983 alleging the Village of Glendale's ordinance violated Respondent's First Amendment rights. The First Amendment provides: "Congress shall make no law ... abridging freedom of speech, or of the press ..." The Fourteenth Amendment makes this limitation applicable to the States, and to their political subdivisions. *City of Ladue v. Gilleo*, 514 U.S. 43, 45, fn. 1 (1994).

STATEMENT

a. Summary of Relevant Facts

Respondent Pagan is a resident of the Village of Glendale, Ohio. He owned an automobile that he wanted to sell. He parked the car in front of his house on a public street, and put a "For Sale" sign in the car window. A Glendale police officer saw the sign, told Respondent that the sign was illegal under a Village ordinance, and asked him to remove the sign. The ordinance states:

> It shall be unlawful for any person to stand or park any vehicle, motorized or towed, upon any public or private street, road, or highway within the

> village or upon any unimproved privately owned area within the village for purpose of:
>
> > (A) Displaying it for sale, except that a homeowner may display a motor vehicle, motorized or towed, for sale only when owned and titled to said homeowner and/ or a member of said household, and only when parked upon an improved driveway or apron upon the owner's private property
> >
> > (B) Washing, maintaining or repairing such vehicle except repairs necessitated by an emergency.
> >
> > (C) Any advertising.

Respondent sent an email to Glendale asking for a copy of the ordinance. Respondent's email also stated that he was a lawyer who litigates cases, and that he knew that "cities have been found liable in enforcing sign ordinances that prohibit commercial speech." The email was forwarded to Glendale Police Chief Matt Fruchey, who drove by Respondent's house, saw the car, and gave a copy of the ordinance to Respondent's wife. Chief Fruchey invited Respondent to call if he had further questions or concerns, but asked him to remove the sign.

Respondent instead responded that he had found a case supporting his right to "engage in commercial speech" and that he intended to file an action in federal court seeking to have the law declared unconstitutional. Chief Fruchey referred Respondent's concerns about the legality of the ordinance to the village solicitor, but told Respondent to

remove the sign or he would be cited. At approximately 6:30 p.m. that same day, a Glendale officer drove past the car and saw that the sign had been removed. Respondent was never cited by the Village for any violation of the ordinance.

b. Decision of the District Court

On July 30, 2003, Respondent filed a complaint in the United States District Court for the Southern District of Ohio contending that the ordinance violated his rights under the First and Fourteenth Amendments of the federal Constitution and under 42 U.S.C. § 1983. Respondent sought both damages and declaratory relief.

On September 30, 2004, the District Court granted the Motion for Summary Judgment of Glendale and Chief Fruchey. The District Court applied the four-prong test of *Central Hudson Gas & Electric Corp. v. Public Svc. Comm.*, 447 U.S. 557 (1980). The Court found the ordinance did not have to be supported by extrinsic evidence such as a "legislative record", as the ordinance was directly related to traffic control and safety and advanced those interests by trying to keep people out of busy streets. The District Court stated that it was not its task to "second guess" the decisions of Glendale concerning traffic safety ordinances unless they were "palpably false" or "unreasonable". *Pagan v. Fruchey*, 2004 WL 5338455 (S.D. Ohio), *5. The Court also granted summary judgment in favor of Chief Fruchey on the grounds of qualified immunity.

c. Panel Decision of the Sixth Circuit

Subsequently, Respondent filed an appeal to the United States Court of Appeals for the Sixth Circuit challenging the District Court's grant of summary judgment. On appeal, Respondent abandoned his claims against Chief Fruchey. A panel of the 6th Circuit in a 2-1 vote affirmed the District Court's grant of summary judgment in favor of the Village holding that the ordinance directly and materially advanced the asserted governmental interests of traffic safety and aesthetics. The panel stated that "By eliminating an individual's ability to advertise, wash their car, or display a for-sale sign on a public street, the Ordinance directly promotes traffic safety." 2006 U.S. App. LEXIS 12243, *12. The panel rejected Respondent's contentions that the Village presented insufficient evidence to demonstrate that the ordinance promoted public safety. The panel held that the rationale of this Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) applied: "The Supreme Court has, however, previously made clear that '[i]f the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them.' ... It is self-evident that the same rationale applies to a for sale sign like the one at issue here." 2006 U.S. App. LEXIS 12243, *12.

d. En Banc Decision of the Sixth Circuit

The Respondents filed a timely petition for a re-hearing en banc which was granted by the Sixth Circuit. By an 8-7 vote, the Sixth Circuit's en banc decision reversed the District Court's grant of summary judgment and remanded the case for further proceedings. The majority held that:

"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." 492 F.3d at 771. The majority went on to state that "Thus, even common sense decisions require some justification." 492 F.3d at 777.

The dissent responded:

> To read into the First Amendment a requirement that governments go through pointless formalities before they enact such a commonsense rule is, in my view, to cheapen the grandeur of the First Amendment. To require a study, or testimony, or an affidavit, to demonstrate the obvious is to turn the law into formalistic legalism.

492 F.3d at 779. Concluding that the Glendale ordinance was a common sense judgment, the dissent stated: "Simply put, exhibiting cars for sale in the public road way may interfere with the dedication of such road ways to traffic and its necessary incidents. The ban on placing cars in the road way for sale undoubtedly directly advances the village's interest in traffic safety." 492 F.3d at 780. With reference to Glendale's aesthetic interests, the dissent stated that:

> . . . Glendale should not be required to come forward with studies to support its conclusion that city aesthetics would be improved by avoiding the transformation of public streets into used car lots or open air markets . . . Indeed insisting on a study regarding aesthetics would be particularly

> pointless given the essentially subjective nature of the topic.

492 F.3d at 784-85. The dissent cited a number of decisions of this Court that even in strict scrutiny cases, restrictions on speech may be justified "based solely on history, consensus and simple common sense." 492 F.3d at 781. *Florida Bar v. Went for It*, 515 U.S. 618, 628 (1995).

This Court is now presented with the opportunity to reverse the Sixth Circuit's opinion that in every case involving the regulation of commercial speech, legislative bodies cannot justify a regulation based upon history, consensus and common sense, but must always support their judgments – even though those based on common sense – with extrinsic evidence.

REASONS FOR GRANTING THE PETITION

A. This Court should clearly state that *Metromedia's* application of *Central Hudson*'s third prong to signs is still good law: common-sense judgments of local lawmakers can establish that an ordinance directly advances substantial governmental interests in traffic safety and aesthetics unless they are unreasonable. The Sixth Circuit's decision impermissibly modifies prior decisions of this Court.

> ". . . common sense often makes good law."

Peak v. United States, 353 U.S. 43, 46 (1957).

The majority opinion below found that this Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) contained no majority opinion and was confined

to billboards. However, as the dissent pointed out, "a strong majority of the court" found that the city's ban on offsite advertising was constitutional to the extent that it regulated commercial speech and that it met each element of the *Central Hudson* test. In discussing the third criteria, i.e., whether the ordinance directly advanced the identified interests, the dissent stated that a majority of the Supreme Court in *Metromedia* held that San Diego could constitutionally ban commercial speech billboards, hesitating "to disagree with the accumulated, commonsense judgments of *lawmakers* and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." (Emphasis added). The majority in *Metromedia* concluded:

> There is nothing here to suggest that these judgments are unreasonable. As we said in a different context:
>
> > 'We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false.'

Id. 453 U.S. at 509.

The opinion in *Metromedia* is widely relied upon by lower federal courts. Mandelker, *Sign Regulation and the First Amendment, in Land Use Institute Planning, Regulation, Litigation, Eminent Domain and Compensation,*

69, 72 (ALI-ABA 2000). This Court, in a later opinion, expressly noted that seven justices in *Metromedia* had concluded that the City's interests in avoiding visual clutter was sufficient to justify regulation of signs posted on public property. *City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-07 (1984).

This Court in a number of subsequent cases has recognized that even in cases applying strict scrutiny, restrictions on speech may be justified "based solely on history, consensus and 'simple common sense'". *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995), citing *Burson v. Freeman*, 504 U.S. 191, 211 (1992). See, also, *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993) (deferring to Congress' "common sense judgment" in finding that the restriction on commercial speech satisfied *Central Hudson's* third prong). See, also, *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173 (the third prong of *Central Hudson* may be satisfied by studies, anecdotes or "simply common sense").

Finally, this Court in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), in discussing the government's burden to show that the speech restriction directly and materially advances the asserted governmental interest stated:

> [We] have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales all together, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus and simply common-sense.

533 U.S. at 555.

This Court should affirm that the third prong of the *Central Hudson* test, as applied to signs and billboards in *Metromedia*, is unchanged. The parties agree the speech at issue in this case is protected commercial speech. Respondent agrees with the substantiality of Petitioner's asserted regulatory interests: traffic safety and aesthetics. The issue in this case is whether the ordinance satisfied the third prong of *Central Hudson*, i.e., whether it advanced the Village's substantial interests in a direct and material way. The majority below relied almost exclusively on this Court's opinion in *Edenfield v. Fane*, 507 U.S. 761 (1993). That case involved a Florida rule that prevented public accountants from engaging in direct, uninvited solicitation of potential clients. This Court concluded that there was not sufficient evidence that the restriction on speech advanced substantial governmental interests of fraud prevention and professional ethics. The majority below rejected Petitioner's common sense argument stating: "[T]he standard established by the Supreme Court depends neither on obviousness nor common sense. *Edenfield* requires *some* evidence to establish that a speech regulation addresses actual harms on some basis in fact."

The majority below went astray and ignored this Court's view that each commercial speech case is different, relying upon *Edenfield* and other cases where the government banned a specific, legal, commercial message to further a "paternalistic" social goal by keeping information from the public. *Ibanez v. Florida Dept. Of Business and Professional Regulation*, 512 U.S. 136 (1994); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

The majority's opinion below in essence holds these cases supercede the *Central Hudson* analysis in *Metromedia*

as applied to signs and billboards. However, this Court continues to apply *Central Hudson* as before, and the heightened scrutiny seized perceived by the majority below from this Court's cases after *Central Hudson* is unfounded. The Court's heightened scrutiny in *Edenfield* and similar cases is a reflection of this Court's longstanding suspicion of the need to keep people in the dark for paternalistic government reasons. Glendale's ordinance is not of the same character. It is not aimed at suppressing consumerism by banning speech about professional services, gambling, or alcoholic beverages. The ordinance is intended to do exactly what it states: regulate signs for aesthetic and safety purposes. The Court's reasoning in *Metromedia* demonstrates that the regulations materially advance these purposes.

Regulations that directly advance their purposes based upon "common sense", still satisfy the *Central Hudson* test. The majority below demands that Glendale present "actual evidence of harm". As the dissent pointed out, the majority confused sufficiency with necessity of evidence. Simply put, record evidence is not necessary in every case.

Perhaps, sensing the obvious common sense basis of Glendale's ordinance, the majority below required that even common sense be supported by some record evidence, stating: "Thus, even common sense decisions require some justification." The majority missed the point entirely. Neither common sense nor the accumulated wisdom of reasonable legislative judgments require record evidence. To underscore Respondent's point, the majority below stated: "While our task is not to suggest what sort of evidence might suffice in other cases, we observe that there are many types of evidence other than expensive or burdensome studies that would likely demonstrate that a restriction responds to a real, existing

problem rather than a hypothetical one." 492 F.3d at 773, fn 5. The majority failed to identify even a single example of the type of evidence it was requiring. The majority below's justification for requiring record evidence of common sense was that without such "evidence" it could not conclude whether Glendale's legislative decision "was animated by reasoned judgment and not hostility toward particular speech". 492 F.3d at 777. There was neither any evidence nor any argument by Respondent of any improper motive on the part of Glendale.

It is clear from this Court's decisions that it will accept reasonable inferences, anecdotal evidence and common sense. In *Central Hudson*, this Court accepted a reasonable inference from the actions of the affected utility company as sufficient evidence of "an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales." *Central Hudson*, 447 U.S. at 569. In *Edenfield*, when the Court found there were no studies, the Court searched for "any anecdotal evidence, either from Florida or another state, that validates the Board's suppositions" or "even Fane's own conduct." *Edenfield*, 507 U.S. at 771. Such evidence is still sufficient. *Florida Bar*, 515 U.S. at 626. In that case, this Court stated "consensus and simply common sense" were sufficient to support legislation reviewed under strict scrutiny. 515 U.S. at 628. "[V]alidity of restrictions on commercial speech should not be judged by standards more stringent than those applied to expressive conduct entitled to full First Amendment protection or to relevant time, place or manner restrictions." *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 429 (1993).

The connection between the ordinance and the advancement of traffic safety and aesthetics is clear on the face of the ordinance. Glendale not only wanted to prevent people from being in the street viewing cars for sale, but it also prohibited other conduct in the street related to motor vehicles such as cleaning or repairing the vehicles. Further, Glendale's interest in aesthetic values was equally clear on the face of the ordinance, and the majority's requirement of "evidence" to establish aesthetic values is puzzling to say the least. Certainly, Glendale, a National Historic Landmark, is concerned about the use of its roadways as used car lots or open air markets, just as it would be concerned about the proverbial car on blocks in a driveway or a broken refrigerator on the porch. As the dissent below noted, insisting on a study regarding aesthetics is particularly "pointless" given the essential subjective nature of aesthetics. See, 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. Law Rev. 473, 496, fn.112.

Contrary to the suggestion of the majority opinion below, the more recent commercial speech cases in this Court involving signs or billboards have not created a new standard for evaluating the government's evidence. None of this Court's recent decisions require detailed proof or expert testimony or studies where common sense and experience supply the necessary connection. A reasonable legislative judgment based on history, consensus or simple common sense satisfies the third prong of *Central Hudson.* As the dissent pointed out, there are more than 200 similar ordinances just within the four states comprising the Sixth Circuit.

The Sixth Circuit's decision impermissibly modifies this Court's holdings that common sense can justify the government's burden to show that an ordinance regulating commercial speech directly advances a substantial governmental interest. Any modification of this Court's holdings must be done by this Court.

B. By holding that record evidence is required to support common sense legislative judgments, the Sixth Circuit's decision is in conflict with the other federal circuit courts of appeal.

Respondent's counsel is unaware of any other circuit requiring record evidence of common sense, particularly in the application of the third prong of *Central Hudson* to the regulation of signs or billboards.

In *Ackerley Communications of the Northwest, Inc. v. Krochalis,* 108 F.3d 1095 (9th Cir. 1997), the plaintiff, and outdoor advertising business, sued the City of Seattle alleging that its ordinance limiting construction and relocation of billboards impermissibly restricted commercial speech under the First Amendment. The District Court held that no trial was necessary on whether the ordinance satisfied Central Hudson, rejecting plaintiff's argument that decisions of this court subsequent to *Metromedia* imposed a greater evidentiary burden on a municipality to justify a restriction on commercial speech. The Court of Appeals agreed with the District Court and specifically stated that *Metromedia* remains good law. The 9th Circuit rejected Plaintiff's argument that there must be record evidence to support the ordinance holding: "As a matter of law, Seattle's ordinance enacted to further the city's interests in esthetics and safety, is a constitutional restriction of commercial speech without

detailed proof that the billboard regulation will in fact advance the city's interests." 105 F.3d at 1099-1100. See, also, *Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu*, 455 F.3d 910 (9th Cir. 2006).

The 2nd Circuit in *Long Island Bd. Of Realtors, Inc. v. Village of Massapequa Park*, 277 F.3d 622 (2nd Cir. 2002), reviewed the *Central Hudson* test with reference to the Village's ordinance regulating the display of signs in residential districts. The Village advanced governmental interests of aesthetics and safety in support of the ordinance. Dealing with the third and fourth prongs of *Central Hudson* together, the Court of Appeals found that the Village had satisfied its burden of proof finding that: "On their face, such regulations directly advanced the Village's interests in esthetics and safety.", citing, *Metromedia* 453 U.S. at 508-12. The Court went on to observe that municipalities have "considerable leeway ... in determining the appropriate means to further a legitimate governmental interest, even when enactments incidently limit commercial speech.", citing *South-Suburban Hous. Ctr. v. Greater South-Suburban Bd. Of Realtors*, 935 F.2d 868, 897 (7th Cir. 1991).

Petitioners would also direct the Court's attention to the 4th Circuit's decision in *Anheuser -Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995). At issue was the City of Baltimore's ordinance prohibiting the placement of stationary outdoor advertising of alcoholic beverages in certain areas of the City. The City's substantial governmental interest in promoting the welfare and temperance of minors was conceded to be a substantial one. In discussing the application of the third prong of *Central Hudson*, the Court stated that its inquiry "seeks to elicit whether it was reasonable for the legislative body to conclude that its goal would be advanced

in some material respect by the regulation." 63 F.3d at 1313, citing *United States v. Edge Broadcasting Co.*, 509 U.S. 418. The 4th Circuit observed that this Court in *Edge* upheld Congress' "common sense judgment". The 4th Circuit also cited to *Metromedia* and notes this Court's approach to the third prong of *Central Hudson* that: ". . . the reviewing court may be satisfied with a legislative judgment is 'not unreasonable.'" 63 F.3d at 1314, citing *Metromedia*, 453 U.S. at 509.

See, also, *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1110 (5th Cir. 1987) ("deference" should be accorded "to the judgment of the body charged with the responsibility of making determinations about esthetics."); *Lavey v. City of Two Rivers*, 171 F.3d 1110, 1115 (7th Cir. 1999) (the language and structure of the ordinance was designed to directly achieve the government's interests); *Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006) (municipalities have "weighty" aesthetic interests regarding roadside signs and such signs "could" pose a danger to motorists and pedestrians); *National Advertising Co. v. City of Denver*, 912 F.2d 405, 409 (10th Cir. 1990).

The 6th Circuit's decision stands alone in requiring a municipality to provide record evidence of common sense when dealing the regulation of signs and billboards for purposes of traffic safety and aesthetics.

CONCLUSION

In his en banc brief below, Respondent urged the Sixth Circuit to recognize the "legacy of *Central Hudson*" is ". . . that speakers and listeners cannot be trusted to be left alone when they discuss conduct that is legal but happens to be commercial" and is a "blight on the First Amendment." Respondent asked the Sixth Circuit to ". . . urge the Supreme Court to recognize that the commercial speech doctrine undermines one of the First Amendment's core values." Although the Sixth Circuit did not go as far as urged by Respondent, it nonetheless eroded the principles set forth by this Court in *Metromedia* and *Central Hudson*, i.e., the common sense judgments of local lawmakers can establish that a law directly advances substantial governmental interests in traffic safety and aesthetics. The Sixth Circuit has separated itself from the other Circuits, as well as this Court, in holding that ". . . Even common sense decisions require some justification."

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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