No. 09-259

In the
# Supreme Court of the United States

METRO LIGHTS, L.L.C.,

*Petitioner,*

– v. –

CITY OF LOS ANGELES,

*Respondent.*

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

## BRIEF OF *AMICI CURIAE* ATLANTIC OUTDOOR ADVERTISING, INC. and WILLOW MEDIA, LLC

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## Interest of *Amici Curiae* [1]

*Amici*, Atlantic Outdoor Advertising Inc. and Willow Media, LLC, are engaged in the business of placing and maintaining commercial signs on private property. The signs provide consumers with accurate information about their economic options. Despite the conceded importance of the flow of commercial information to a free market economy, *amici* operate in a highly unstable legal environment, reflecting massive confusion over the legal effect of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

In recent years, moreover, the regulatory climate affecting *amici* has been further confused by an increasing tendency on the part of municipal governments to view the regulation of commercial signage as a revenue-producing activity. For example, in this case, the City of Los Angeles has entered into a $150 million multi-year exclusive agreement with CBS-Decaux LLC ("CBS"), to place and maintain "Street Furniture," an Orwellian name for commercial signage, on Los Angeles bus shelters, and has used its ill-defined regulatory powers under

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[1] This brief *amicus curiae* in support of petitioner's application is filed in accordance with Rule 37.2(a). Written consents by all parties to the filing of this brief have been lodged with the Clerk of the Court. Petitioner's application for a writ of *certiorari* was filed on August 31, 2009. Notice of intent to file this brief was mailed the parties on September 15, 2009. No counsel for a party authored this brief in whole or in part; nor did any person other than *amici* make a monetary contribution to the preparation or submission of this brief.

*Metromedia* to ban virtually identical commercial signs on private property that would compete with CBS's monopoly.

In view of the importance of the free flow of commercial speech, *amici* urge the Court to grant petitioner's application for a writ of *certiorari* in order to: (1) clarify the power of municipalities to regulate off-site commercial signage under *Metromedia;* and (2) limit the power of municipal governments to bestow commercial speech monopolies on favored speakers in return for a cut of the profits.

## Statement of the Case

The narrative facts of this case are fully set forth in petitioner's application for a writ of *certiorari*, and in the thorough opinion of the District Court annexed to petitioner's application. It is, however, worth emphasizing that the Los Angeles ordinance before the Court is blatantly and discriminatorily under-inclusive. In the name of aesthetics and traffic safety, the ordinance flatly prohibits all off-site commercial signage abutting the public streets, while licensing a favored commercial speaker to display essentially identical commercial signs on Los Angeles bus shelters.

The blatantly discriminatory nature of the Los Angeles ordinance is neither inadvertent, nor the result of a flawed regulatory process. It reflects an agreement between the City of Los Angeles and its hand-picked franchisee that guarantees the City at

least $150 million (and perhaps a great deal more, depending on advertising revenue), in return for maximizing the economic value of the franchisee's signs at the expense of potential competitors. Indeed, not only has the City exempted its franchisee's revenue-generating bus shelter signs from the advertising ban that applies to everybody else, but the City allows its franchisee to construct scores of free-standing three-sided advertising "kiosks" that are not in any way connected to bus shelters.

## ARGUMENT

## I. THE ISSUES POSED BY PETITIONER WARRANT SUPREME COURT REVIEW

### A.

### Clarification of *Metromedia* is Long Overdue

In the 33 years since this Court formally recognized that commercial speech is protected by the First Amendment, the Court has repeatedly stressed the importance to a market economy of the free flow of accurate commercial information. *Virginia Pharmacy Board of Examiners v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Central Hudson Gas & Elec. Co. v. Public Service Comm'n*, 447 U.S. 557 (1980); *44 Liquormart,, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

Most importantly in the context of this case, the Court has repeatedly recognized that, under the four-part test enunciated in *Central Hudson*, government's assertion of a constitutionally sufficient interest in censoring the free flow of commercial information is undercut when the regulation fails, in fact, to advance the asserted governmental interest, or is more extensive than reasonably necessary. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1983); *Edenfield v.*

*Fane*, 507 U.S. 761 (1993); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173 (1999); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

On the other hand, all agree that some regulation of the "time, place or manner" of off-site commercial signage is permissible in order to advance government interests ranging from aesthetics to traffic safety.

*Metromedia* sought to establish enduring ground rules governing municipal regulation of off-site commercial signage that would harmonize the importance of the free flow of commercial information with concerns over aesthetics and traffic safety. Unfortunately, the case, decided 28 years ago during the infancy of the commercial speech doctrine, failed to generate either a majority opinion, or a coherent rationale. The result has been almost three decades of chaos in the lower courts concerning the legal status of off-site commercial signage. The confused analysis of the Ninth Circuit panel, reversing a thoughtful District Court opinion, illustrates the current wide disparity in the lower courts' understanding of *Metromedia*. It sounds a plea for guidance that should be heeded by the Court.

## B.

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

When government acts as a *neutral* regulator of the economy, it is entitled to judicial deference. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

When government acts as a *neutral* regulator of the flow of commercial information, while a degree of heightened judicial scrutiny is appropriate to protect commercial free speech from unjustified or improperly motivated, censorship, due deference should be accorded to legitimate exercises of regulatory authority. *Central Hudson Gas & Elec. Co. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

When, however, as here, government abdicates all pretense of regulatory neutrality by acquiring a direct economic stake in the outcome of the regulatory process by granting an exclusive commercial speech concession to a favored speaker (who has paid at least $150 million for the privilege), and then using its regulatory power to eliminate potential competitors, such an economically self-interested exercise of regulatory power is not worthy of deference. To the contrary, such a financially self-interested exercise in censorship should be subjected to the most exacting level of judicial scrutiny.

Los Angeles may well have the power to enter into an exclusive contract for commercial signage on its rights of way. But, in the absence of the most compelling justification, Los Angeles may not act to maximize the economic value of the bus shelter contract by using its regulatory power to stamp out competing commercial speakers operating on nearby private property. It bears emphasis that Los Angeles enacted the advertising sign ban at issue in this case in April 2002, just four months after it entered into its $150 exclusive franchise with CBS. The First Amendment is not for sale, even in a commercial context.

This Court has long recognized the distinction between a "market regulator" and a "market participant." Compare *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), with *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). In the Commerce Clause area, the distinction has tended to increase the power of local government by permitting a "market participant" to behave in ways that would be denied to a "market regulator."

This case is the obverse of the Commerce Clause "market participant" cases. Whatever power Los Angeles might enjoy as a neutral "market regulator" under *Metromedia* to pick and choose among identically situated commercial speakers, surely, once Los Angeles becomes a "market participant" by acquiring a massive economic stake in the outcome, it may not deploy its regulatory powers to favor a commercial speaker who has purchased favorable regulatory treatment.

It is an axiom that no person should be a judge in his or her own case. The principle applies to regulators, as well. This Court has ruled that the Due Process Clause forbids a judge or an administrative adjudicator from presiding over an adjudicatory proceeding when the adjudicator has a substantial financial interest in the outcome. E.g., *Tumey v. Ohio*, 273 U.S. 510 (1927) (criminal proceeding); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (criminal proceeding); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (administrative proceeding); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (civil proceeding).[2]

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

It is undeniable that Los Angeles acquired a significant economic interest in the outcome of the regulatory process before this Court. Indeed, the

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

extraordinary $150 million fee paid by CBS to Los Angeles can be explained only by Los Angeles' willingness to use its regulatory power under *Metromedia* to eliminate CBS's competition.

The Los Angeles commercial speech ban before the Court cannot survive any form of heightened judicial scrutiny. The under-inclusive reach of the ordinance leaves CBS free to display massive amounts of commercial signage on the City's rights of way, while banning competitors from displaying identical signs on nearby private property, thereby undercutting the City's reliance on aesthetics and traffic safety. Moreover, the flat ban on commercial signs on private property is far more Draconian than necessary to achieve any plausible regulatory end.

## CONCLUSION

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

Dated: October 1, 2009
New York, New York

Respectfully submitted,

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