No.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should resolve a circuit conflict on the precedential effect, if any, and meaning of its fractured decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), with respect to First Amendment constraints on governmental regulation of commercial signs.

2. Whether Los Angeles' selective and underinclusive ban on commercial signs violates the First Amendment.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Metro Lights, L.L.C. states that substantially all of its assets, including this lawsuit, were purchased by a privately held Delaware limited liability corporation, Metro Fuel, L.L.C., in August 2006. No publicly held corporation owns 10% or more of petitioner's stock.

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INTRODUCTION

There are few areas of this Court's First Amendment jurisprudence in greater need of clarification than the analysis applicable to governmental regulation of commercial speech in general, and governmental regulation of commercial signs in particular. When this Court last visited this area of the law almost thirty years ago in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), it was unable to produce a majority opinion. Since then, the Court's commercial speech jurisprudence has evolved significantly, and subsequent cases have firmly embraced the tenet that underinclusive regulations violate the First Amendment because they undercut the justification for restricting speech in the first place.

In this case, however, the Ninth Circuit insisted that *Metromedia* establishes binding law in the specific context of commercial sign regulations, and interpreted that case effectively to immunize selective bans of commercial signs from underinclusivity analysis. As the Ninth Circuit delicately put it, while this Court's subsequent cases "may seem to be in some tension" with *Metromedia*, "we are bound to follow the Supreme Court precedent most directly on point." Accordingly, the Ninth Circuit held that *Metromedia* foreclosed the First Amendment challenge to the commercial sign regulations at issue here as a matter of law.

This petition gives this Court an opportunity to clarify its commercial speech jurisprudence as it relates to the recurring and much-litigated issue of governmental regulation of commercial signs. The root of the problem lies in *Metromedia* itself. For

almost thirty years, the question of how to interpret and apply that splintered decision has bedeviled the lower courts, and the problem has only grown more acute as this Court's commercial speech jurisprudence has continued to evolve. The federal courts of appeals are in open and notorious 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 or ban commercial signs.

By declaring that its hands were tied by *Metromedia*, and that only this Court could revisit that decision, the Ninth Circuit invited this Court to do just that. Petitioner now respectfully asks this Court to accept that invitation, to dispel the confusion into which *Metromedia* has plunged the lower courts, governmental regulators, and regulated entities, and to reverse the Ninth Circuit's conclusion that the selective and underinclusive ban on commercial signs at issue here passes First Amendment muster.

OPINIONS BELOW

The Ninth Circuit's decision is reported at 551 F.3d 898 and reprinted in the Appendix ("App.") at 1-34a. The district court's decision is reported at 488 F. Supp. 2d 927 and reprinted at App. 37-90a.

JURISDICTION

The Ninth Circuit rendered its decision on January 6, 2009, App. 1a, and denied a timely petition for panel rehearing and rehearing *en banc*

on April 16, 2009, App. 35a. On June 29, 2009, Justice Kennedy granted petitioner's application to extend the time within which to petition for certiorari until August 31, 2009. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT MUNICIPAL CODE PROVISIONS[1]

Los Angeles Municipal Code § 91.6205.11 (now codified as Los Angeles Municipal Code § 14.4.4(B)(11)) provides in pertinent part:

> **Prohibited Signs.** Signs are prohibited if they: ... [a]re off-site signs, ... except when off-site signs are specifically permitted ....

Los Angeles Municipal Code § 91.6203 (now codified as Los Angeles Municipal Code § 14.4.2) defines an "Off-Site Sign" as:

> A sign that displays any message directing attention to a business, product, service, profession, commodity, activity, event, person, institution or any other commercial message, which is generally conducted, sold, manufactured, produced, offered or occurs elsewhere than on the premises where the sign is located.

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[1] While this case was pending in the Ninth Circuit, the Los Angeles City Council moved the Sign Ordinance from one part of the Municipal Code to another. This change had no substantive effect on the provisions at issue here. For ease of reference, this petition continues to refer to those provisions by the Municipal Code section numbers used by both the Ninth Circuit and the district court.

Los Angeles Municipal Code § 91.101.4 provides in pertinent part:

> The provisions of this Code shall apply to the construction, alteration, moving, demolition, repair, maintenance and use of any building or structure within this jurisdiction, except work located primarily in a public way ....

Los Angeles Municipal Code § 91.101.5 provides in pertinent part:

> The provisions of this Code shall not apply to any of the following: ...
>
> 8. Work in a public way ....

STATEMENT OF THE CASE

A. Factual Background

Petitioner Metro Lights, L.L.C. is a small advertising company that operates in several cities around the country, including respondent City of Los Angeles, California. App. 7a, 50-51a. Metro Lights posts commercial signs, typically four feet by six feet in size, on private property leased for that purpose. App. 50-51a.

In 2001, Los Angeles entered into a 20-year contract with a major advertising conglomerate, CBS (then known as Viacom Decaux LLC). App. 5a, 43-45a. Under that contract, the City gave CBS the exclusive right to post commercial signs on city-owned transit shelters along city streets (known as "Street Furniture") in exchange for payments amounting to at least $150 million. App. 45a. The commercial signs posted by CBS on the City's Street Furniture are similar in size and content to the commercial signs posted by Metro Lights. App. 52a,

69a, 78-79a (citing photographs reprinted at App. 91-92a).

Several months after entering into that lucrative agreement, Los Angeles amended its municipal Sign Ordinance to substantially restrict any other commercial signs within city limits. As amended, the Ordinance generally prohibits any new offsite commercial signs in the City. *See* L.A. Mun. Code § 91.6205.11 (now codified as L.A. Mun. Code § 14.4.4(B)(11)) (prohibiting "off-site signs, ... except when off-site signs are specifically permitted ...."). The Ordinance defines an "off-site sign" as "[a] sign that displays any message directing attention to a business, product, service, profession, commodity, activity, event, person, institution or any other commercial message, which is generally conducted, sold, manufactured, produced, offered or occurs elsewhere than on the premises where such sign is located." L.A. Mun. Code § 91.6203 (now codified as L.A. Mun. Code § 14.4.2)). Although the Ordinance purports to be based on traffic safety and aesthetic concerns, *see* L.A. Mun. Code § 91.6201.2 (now codified as L.A. Mun. Code § 14.4.1), it creates two substantial exemptions that have no conceivable relationship to either traffic safety or aesthetics. First, the Ordinance exempts "work located primarily in a public way," which includes Street Furniture. *See* L.A. Mun. Code §§ 91.101.4, 91.101.5. Second, the Ordinance by its terms exempts all non-commercial signs. *See* L.A. Mun. Code § 91.6203 (now codified as L.A. Mun. Code § 14.4.2).

The amended Ordinance essentially shut Metro Lights out of Los Angeles. Indeed, beginning around December 2003, the City issued Metro Lights

numerous citations for violating the Ordinance. App. 7a, 39a, 51a.

B. Procedural History

In February 2004, Metro Lights filed this lawsuit against Los Angeles under 42 U.S.C. § 1983, asserting that the Ordinance violated its First Amendment rights and seeking declaratory and injunctive relief and damages. App. 7a, 38-42a. While the lawsuit was pending, Metro Lights sought a preliminary injunction against enforcement of the Ordinance, which the district court (Feess, J., C.D. Cal.) granted. App. 7a.

After limited discovery, the parties filed cross-motions for summary judgment. The district court, as relevant here, granted Metro Lights' motion. In a lengthy opinion, the court analyzed the Ordinance under the legal standard governing regulations on commercial speech set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). App. 37-90a. The court concluded that the Ordinance was far too underinclusive to "directly advance" the City's asserted interests in traffic safety and aesthetics in a narrowly tailored way. App. 68-85a. "The City cannot, on the one hand, preclude [Metro Lights] from displaying messages on its off-site signs as a supposed legitimate exercise of its police powers while, on the other hand, authorizing its Street Furniture contractor to erect off-site signs in or near the public rights of way throughout the City of Los Angeles." App. 76a. The court noted that the City had "many alternatives" that were more speech-friendly to accomplish its asserted objectives, including "[m]ost obviously, ... impos[ing] the same requirements on other private

advertisers as it did on [CBS]," *i.e.*, "the City could require that any advertisements meet certain specifications—including size and location—to promote the City's goals with regard to traffic safety and aesthetics." App. 84a.

The district court distinguished *Metromedia* as establishing only that an exemption for onsite commercial signs (*i.e.*, signs related to goods or services provided at the premises where the signs are located) did not render a general ban on offsite commercial signs unconstitutionally underinclusive. App. 82-84a. The Ordinance at issue here, the court explained, "goes well beyond the scheme addressed in *Metromedia*," because the Ordinance "purports to ban all off-site signs on private property," but through the exemption for Street Furniture "not only permits but appears to encourage their display on public property throughout Los Angeles." App. 83a (emphasis added); *see also id.* (noting that "the City's Sign Ordinance purports to, but does not, accomplish a complete ban and is instead pierced with a colossal exception"). Because the underinclusivity analysis in *Metromedia* was limited to the exemption for onsite commercial signs, the court declared, "*Metromedia* ... provides no support for the City's position in this case." App. 84a.

Los Angeles appealed, and the Ninth Circuit not only reversed the grant of summary judgment in Metro Lights' favor, but directed the entry of judgment in the City's favor as a matter of law. *See* App. 1-34a. According to the Ninth Circuit, *Metromedia* squarely foreclosed Metro Lights' First Amendment challenge to the Los Angeles Ordinance. *See* App. 16-33a. Unlike the district court, the Ninth

Circuit did not read *Metromedia* as limited to the question whether an exemption for onsite commercial signs renders a ban on offsite commercial signs unconstitutionally underinclusive. Rather, the Ninth Circuit read *Metromedia* far more broadly as effectively rejecting *any* underinclusivity challenge to a ban on offsite commercial signs. App. 18-27a.

In particular, the Ninth Circuit declared, "[t]he Court in *Metromedia* squarely faced an underinclusivity challenge to San Diego's law and rejected it." App. 24a; *see also* App. 20a ("*Metromedia* explicitly addressed an underinclusivity challenge."). While the panel acknowledged that "such challenge focused on the exclusion of onsite signs," the panel emphasized that "the [*Metromedia*] Court did note [an] exception for 'other specified signs' at the start of its substantive discussion," and "[m]ore importantly, nothing in its analysis, which exudes deference for a municipality's reasonably graduated response to different aspects of a problem, binds its holding inextricably to the particular onsite-offsite distinction." App. 24a; *see also id.* at 25-26a ("[M]ost importantly, *Metromedia*'s ... emphasis on deference to legislative judgment, resounds quite clearly in this case. ... The *Metromedia* Court declined to overrule a legislative judgment [that a selective ban on commercial signs is effective] and so do we.").

By holding that *Metromedia* "compels" the conclusion that the Los Angeles Sign Ordinance passes First Amendment muster, App. 33a, the Ninth Circuit dismissed Metro Lights' case-specific underinclusivity arguments. Similarly, the court dismissed any efforts to square *Metromedia* with this

Court's subsequent caselaw. According to the Ninth Circuit, any "tension" or "inconsistency" between *Metromedia* and such subsequent commercial speech cases as *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), and *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999), is immaterial. App. 19a, 27a. *Metromedia* "controls the outcome" here, the Ninth Circuit declared, App. 27a, because this case, like *Metromedia*, involves commercial signs. "[W]e are bound to follow the Supreme Court precedent most directly on point, ... 'leaving to the Supreme Court the prerogative of overruling its own decisions.'" *Id.* (citing and quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); brackets omitted).

This petition follows.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve A Circuit Conflict On The Precedential Effect, If Any, And Meaning Of *Metromedia* With Respect To First Amendment Constraints On Governmental Regulation Of Commercial Signs.

This Court should grant certiorari to resolve pervasive uncertainty over the meaning and scope of its splintered decision in *Metromedia*, and to clarify that governmental regulation of commercial signs, like governmental regulation of other forms of commercial speech, is subject to underinclusivity analysis under the First Amendment. As the district court noted, the Sign Ordinance at issue here is subject to a "colossal exception" for commercial signs from which the City itself stands to profit, App. 83a (referring to L.A. Mun. Code § 91.101.5)—not to

mention an equally sweeping exception for noncommercial signs, *see* L.A. Mun. Code § 91.6203. By holding that *Metromedia* forecloses Metro Lights' First Amendment challenge as a matter of law, the Ninth Circuit erred, and deepened a festering circuit conflict over the binding effect, if any, and meaning of that case.

As a threshold matter, it is important to underscore a point not disputed in this litigation, because it has been settled for at least a generation: commercial signs, like other forms of advertising, 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 *Central Hudson*, 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." 447 U.S. at 566.

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 onsite commercial signs. *See* 453 U.S. at 493-94 & nn.1, 2. This Court 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 no fewer than five separate opinions. A four-Justice 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 offsite commercial signs despite 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 separately 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 lamented in his dissent 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).

Suffice it to say that this lament proved prophetic, and the lower courts have struggled mightily 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 analysis for sign regulations, starting from first principles—including consideration of underinclusivity. *See* 18 F.3d at 1065; *see also id.* at 1080 (Alito, J., concurring) ("Until the Supreme Court provides further guidance concerning the constitutionality of sign laws, I endorse the test set out in the court's opinion.") (citations omitted).

In sharp contrast, however, other lower courts—including the Fourth, Eighth, Ninth, and Tenth Circuits—have held that *Metromedia* establishes

binding law, and interpret that decision to give governments virtual *carte blanche* to restrict or ban offsite commercial billboards and signs. *See, e.g.*, *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 905 (9th Cir. 2007) ("*Metromedia* allows a city to completely ban off-site commercial billboards."); *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"); *Ackerley Commc'ns of N.W. Inc. v. Krochalis*, 108 F.3d 1095, 1099 (9th Cir. 1997) ("[W]e hold that *Metromedia* continues to control the regulation of billboards."); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 610-11 (9th Cir. 1993) ("*Metromedia* remains the leading decision in the field, holding that a city, consistent with the *Central Hudson* test, may ban all offsite 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); *National Adver. Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988) (holding, based on *Metromedia*, that a city "may prohibit [commercial] billboards entirely in the interests of traffic safety and aesthetics"); *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.").

The upshot of these dueling lines of cases is that the federal 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 multiple circuits) in a fog. The lower courts should not be condemned in perpetuity to trying to figure out 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); *Outdoor Sys.*, 997 F.2d at 610-12 (same); *Ackerly*, 108 F.3d at 1099 & n.5 (concluding that *Metromedia* establishes binding law because "seven Justices agreed" that the challenged ordinance was not unconstitutionally underinclusive with respect to commercial signs); App. 16-17a n.9 (asserting that "[a] majority of the [*Metromedia*] Court *upheld* the constitutionality of the ban to the extent that it only prohibited commercial advertising") (emphasis added).

With all respect, those courts—like the Ninth Circuit—that 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 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 imbue the views of the dissenting Justices in *Metromedia* with binding force. 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 to fester.

And this case presents an especially good vehicle for addressing that issue, because the Ninth Circuit not only attributed binding force to the views of the *Metromedia* dissenters, but then proceeded to attribute a remarkably (and untenably) aggressive "holding" to the *Metromedia* "majority." App. 16-17a n.9, 17a, 18a, 21a, 22a, 24a. According to the Ninth Circuit, *Metromedia* rejected not only the argument that San Diego's ban on offsite commercial signs was underinclusive because it exempted onsite commercial signs, but also the argument that San Diego's ban on offsite commercial signs was underinclusive because it exempted twelve other categories of signs (including signs at public transit stops). App. 17a, 20-22a.

The Ninth Circuit acknowledged, with some understatement, that the underinclusivity challenge in *Metromedia* "*focused* on the exclusion of onsite signs," but insisted that "the Court did note the exception for 'other unspecified signs' at the start of its substantive discussion." App. 24a (emphasis added; quoting *Metromedia*, 453 U.S. at 511 (plurality opinion)). "More importantly," the Ninth Circuit then asserted, "nothing in [*Metromedia*'s] analysis, which exudes deference for a municipality's reasonably graduated response to different aspects of

a problem, binds its holding inextricably to the particular onsite-offsite distinction." *Id.* Accordingly, the Ninth Circuit held that *Metromedia* foreclosed Metro Lights' underinclusivity challenge to Los Angeles' Sign Ordinance *as a matter of law*. App. 20-33a; *see also Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 816 (9th Cir. 2003) (holding that, under *Metromedia*, "it should not matter that [a restriction on commercial signs] is underinclusive").

That sweeping interpretation of *Metromedia* is untenable based not only on *Metromedia* itself but also on this Court's subsequent decisions. While it is certainly true that the San Diego ordinance at issue in *Metromedia* included several exemptions beyond the one for onsite commercial signs, *see* 453 U.S. at 495 n.3 (plurality opinion), the plurality opinion never addressed those additional exemptions in assessing whether the ordinance was unconstitutionally underinclusive. To the contrary, the plurality focused its underinclusivity analysis *solely* on the exemption for onsite commercial signs. *See id.* at 510-12 (plurality opinion). Given that the *Metromedia* plurality never addressed the underinclusivity implications of the other exemptions, it cannot be deemed to have resolved the matter one way or another. *See, e.g.*, *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents"); *see also Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (same).

And if there were any room for doubt on this score, it should have been dispelled by this Court's subsequent decision in *Discovery Network*. The Court there specifically rejected the argument that *Metromedia* foreclosed underinclusivity challenges in the context of commercial speech. *See Discovery Network*, 507 U.S. at 425 n.20. Rather, the Court explained, a majority of the Justices in *Metromedia* had simply rejected the argument that a general ban on commercial signs was unconstitutionally underinclusive because it exempted onsite commercial signs. *See id.* Nothing in *Metromedia*, the *Discovery Network* Court emphasized, forecloses any and all *other* underinclusivity challenges to restrictions on commercial speech. *See id.* Thus, the *Discovery Network* Court itself proceeded to invalidate a restriction on commercial speech as underinclusive—there, a ban limited to commercial (as opposed to non-commercial) newsracks. *See id.* at 424-31; *see also Greater New Orleans*, 527 U.S. at 190-95 (invalidating a restriction on commercial speech as underinclusive).

Indeed, *Discovery Network* raised the possibility that the *Metromedia* plurality had erred by applying the *Central Hudson* analysis in the first place to a restriction on commercial speech that is not justified by reference to the commercial nature of the speech. "[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 safety or aesthetics). *See id.*; *see also id.* at 435-38 (Blackmun, J., concurring); *Discovery Network*, 946 F.2d at 468-72 & n.9, *aff'd*, 507 U.S. 410. While this Court declined to resolve that issue in *Discovery Network*, since the regulations at issue there did not pass First Amendment muster even under *Central Hudson*, *see* 507 U.S. at 416 n.11, *Discovery Network* obviously casts an even greater pall over *Metromedia*'s precedential value.

As noted above, the Ninth Circuit did not even try to deny the "tension" or "inconsistency" between its interpretation of *Metromedia* and this Court's subsequent commercial speech precedents, including *Discovery Network* and *Greater New Orleans*. App. 19a, 27a; *see also Outdoor Sys.*, 997 F.2d at 610 (interpreting *Metromedia* to foreclose an underinclusivity challenge but noting that "we are somewhat uneasy" in light of *Discovery Network*). Instead, the Ninth Circuit simply declared below that its hands were tied by *Metromedia*, which it characterized as "the Supreme Court precedent most directly on point" because it also involved commercial signs. App. 27a. But nothing in *Metromedia* (or logic) suggests that an entirely different First Amendment analysis applies to governmental

regulation of commercial signs than to governmental regulation of other media of commercial speech.[2]

Thus, even assuming that *Metromedia* establishes any binding law at all, it certainly does not establish the proposition that restrictions on commercial signs are immune from underinclusivity analysis under the First Amendment, or that courts must (as the Ninth Circuit declared below) "exude[] deference," App. 24a, to such restrictions. *See, e.g.*, *Lavey*, 171 F.3d at 1114-16 & nn.14, 16 (holding that *Metromedia* established binding law, but interpreting *Metromedia* to require a "fit" between a regulation on commercial signs and a city's safety and aesthetic goals, and thereby entertaining an underinclusivity challenge); *Denver*, 912 F.2d at 408-10 (same). Certainly a restriction on commercial signs should not be subject to judicial deference in Los Angeles, California, *see* App. 24-29a, but not in

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[2] 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 does not direct courts to apply an entirely different analytical framework to each and every medium. Indeed, the *Metromedia* plurality itself analyzed the sign restrictions at issue there under the very same *Central Hudson* test that this Court later applied in both *Discovery Network* and *Greater New Orleans*. *Compare Metromedia*, 453 U.S. at 507-08 (plurality opinion) *with Discovery Network*, 507 U.S. at 416 & n.11; *Greater New Orleans*, 527 U.S. at 183-84.

Glendale, Ohio, *see, e.g.*, *Pagan v. Fruchey*, 492 F.3d 766, 774-78 (6th Cir. 2007) (*en banc*).

By holding that *Metromedia* compels the entry of judgment in Los Angeles' favor here as a matter of law, the Ninth Circuit inflated that "fractured, plurality opinion of dubious precedential value," *Tanner Adver. Group, L.L.C. v. Fayette County, Ga.*, 451 F.3d 777, 794 (11th Cir. 2006), beyond all bounds of principle and precedent. Certainly, this Court's other commercial speech cases in the years since *Metromedia* cannot be said to have "exude[d] deference" to governmental restrictions on commercial speech—to the contrary, those decisions have not hesitated to invalidate restrictions lacking the requisite "fit" to the governmental interests at stake. *See, e.g.*, *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371-77 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561-67 (2001); *Greater New Orleans*, 527 U.S. at 188-95; *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-91 (1995); *Discovery Network*, 507 U.S. at 424-30.

Indeed, it is hard to see how a court could ever perform a meaningful underinclusivity analysis while "exud[ing] deference," App. 24a, to a governmental restriction on speech. The whole point of an underinclusivity challenge is to test the validity of the lines drawn by a speech regulator. To test those lines while at the same time "exud[ing] deference" to those very same lines is a contradiction in terms. *See* App. 19a (acknowledging that "the deference *Metromedia* shows may seem to be in some tension with other underinclusivity cases such as *Discovery Network and Greater New Orleans*").

In sum, the decision below deepened a circuit conflict on whether *Metromedia* establishes any binding law at all, gave that decision an extraordinarily aggressive reading that places it on a collision course with this Court's other commercial speech precedents, and then concluded by declaring that only this Court can clean up the mess. App. 27a ("*Metromedia* ... controls the outcome" of this case, and "we are bound to follow the Supreme Court precedent most directly on point.") (citing *Rodriguez de Quijas*, 490 U.S. at 484). If ever there were a red flag that the time has come for this Court to revisit one of its precedents, this is it.

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. Los Angeles' Selective And Underinclusive Ban On Commercial Signs Violates The First Amendment.

Had the Ninth Circuit actually grappled with Metro Lights' First Amendment challenge to the Los Angeles Sign Ordinance at issue here, rather than holding that *Metromedia* forecloses that challenge as a matter of law, it would have been constrained to affirm the district court's judgment sustaining that challenge. As noted above, the Ordinance purports to be based on traffic safety and aesthetic concerns. *See* L.A. Mun. Code § 91.6201.2. But the Ordinance carves out a "colossal exception" that undercuts its constitutionality, App. 83a: it does not apply to the Street Furniture from which Los Angeles derives substantial revenues, *see* L.A. Mun. Code § 91.101.5, or for that matter to noncommercial signs, *see* L.A. Mun. Code § 91.6203.

Accordingly, the district court had little difficulty holding that the Ordinance violates the First Amendment. App. 68-85a. The Street Furniture program, as the court explained, undermines Los Angeles' asserted interest in traffic safety "since many of the Street Furniture advertisements, which are placed at street level, are designed precisely to attract the attention of all who pass by, including those driving automobiles whose attention would be better directed toward the operation of their motor vehicles." App. 69a; *see also id.* ("[T]he Street Furniture Program cannot be squared with the Sign Ordinance's stated purpose of promoting traffic

safety."). Thus, the court concluded that "the Sign Ordinance, viewed in context of the City's Street Furniture Program, does not directly advance the City's stated interest in traffic safety," App. 76a, much less in a narrowly tailored way, App. 82-84a.

Similarly, the district court held that the Street Furniture program undermines the City's asserted interest in aesthetics because "[t]he Sign Ordinance purports to protect the visual environment by eliminating all off-site signs from the City's public rights of way, while the Street Furniture Program simultaneously authorizes thousands of such signs to be posted throughout the City by [CBS]." App. 78a; *see also* App. 79a. ("[W]hat the City, through its Sign Ordinance, takes away from most commercial enterprises (for the stated purpose of protecting the visual environment), the City grants back to a single advertiser under the Street Furniture Program thereby perpetuating, rather than eliminating, off-site signage throughout the City."). Indeed, Metro Lights "present[ed] graphic evidence of this point in a photograph which compares a Metro Lights sign with a City bus shelter sign with exactly the same dimensions and the same advertising copy." App. 78-79a (citing photographs reprinted at App. 91-92a). "Though the signs themselves are indistinguishable, one sign falls within the ban while the other does not." App. 79a. The court thus concluded that "the Sign Ordinance, viewed in context of the City's Street Furniture Program, does not directly advance the City's stated interest in protecting the City's visual environment," App. 80a, much less in a narrowly tailored way, App. 82-84a.

At the end of the day, as the district court recognized, "'the operation of ... [the] regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.'" App. 72a (quoting *Greater New Orleans*, 527 U.S. at 190). "[T]he City's agreement with [CBS] tends to negate the very benefits—traffic safety and protection of the visual environment—that the Ordinance was designed to promote." App. 41a; *see also id.* (holding that the City cannot "use *Central Hudson* as a shield to defeat constitutional challenges to its Sign Ordinance while collecting revenue from a different media company engaged in conduct that appears, on its face, to violate the express terms and purposes of the Ordinance").

Notwithstanding the Ninth Circuit's suggestion to the contrary, the application of an underinclusivity analysis to billboard and sign regulations would in no way undermine the "deference" to which local governments are due on matters of traffic safety and aesthetics. Local governments are free to define their own safety and aesthetic interests. When they invoke those interests to justify a restriction on commercial speech, however, they must at a minimum be able to show that the restriction "directly advances" those interests, and "is not more extensive than is necessary" to serve those interests. *Central Hudson*, 447 U.S. at 566. Restrictions on speech that merely have "some impact" on the problem the government seeks to address do not satisfy this standard, *Greater New Orleans*, 527 U.S. at 189, especially where (as here) the government itself provides "simultaneous encouragement," *id.*, to those very problems.

In short, where a selective ban on commercial speech is grossly underinclusive, there is reason to be suspicious of the ban—especially where, as here, the government itself stands to profit financially by creating a valuable monopoly on commercial speech. The government cannot restrict speech in order to raise money, or abridge the First Amendment rights of some to enhance the value of others. Thus, while a city can certainly impose neutral and reasonable time, place, and manner restrictions on commercial signs, like other forms of speech (and indeed Los Angeles itself imposed just such restrictions until 2002), it cannot impose a selective and underinclusive ban on commercial speech. Indeed, as *Discovery Network* suggests, it is far from clear that restrictions on commercial speech are entitled to any greater deference than restrictions on noncommercial speech where, as here, they are justified not by reference to the commercial nature of the speech but instead by reference to other governmental interests like traffic safety and aesthetics. *See* 507 U.S. at 416 n.11.

"Deference," in other words, is not a code word for abdicating the judicial role in protecting free speech. *See, e.g.*, *Pagan*, 492 F.3d at 774-78 (rejecting city's argument, based on *Metromedia*, that court should uphold restriction on commercial speech by "defer[ring] to legislative judgments on matters of traffic safety and aesthetics"). Again, this point is hardly novel: it is the key lesson of such cases as *Discovery Network* 507 U.S. at 424-28, and *Greater New Orleans*, 527 U.S. at 188-95. The Ninth Circuit erred by refusing to apply that lesson here, and instead holding that *Metromedia* effectively carves out a "sign exception" to the First Amendment.

Neither that holding nor the Sign Ordinance at issue here should be allowed to stand.

CONCLUSION

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

Respectfully submitted,

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