No. 17-____

In the Supreme Court of the United States

CONTEST PROMOTIONS, LLC,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL F. WRIGHT
10100 Santa Monica Blvd.
23rd Floor
Los Angeles, CA 90067

BENJAMIN J. HORWICH
JOSHUA PATASHNIK
Counsel of Record
MUNGER, TOLLES & OLSON LLP
560 Mission St.
27th Floor
San Francisco, CA 94105
(415) 512-4000
josh.patashnik@mto.com

QUESTION PRESENTED

Section 611 of the San Francisco Planning Code provides that "[n]o new general advertising signs shall be permitted at any location within the City [of San Francisco] as of March 5, 2002." This ban applies to any sign "which directs attention to a business, commodity, industry or other activity which is sold, offered or conducted elsewhere than on the premises upon which the Sign is located," and also to any sign advertising a product or service that is "only incidentally" offered on the premises. S.F. Planning Code § 602. The Ninth Circuit sustained the dismissal of petitioner's First Amendment challenge to this ordinance, holding that a total ban of this sort is permissible as a matter of law.

The question presented is:

Whether the First Amendment permits a municipality to ban all signs, of any kind, advertising off-premises commercial activity, without making any showing that the ban furthers a substantial government interest in a direct, material, and tailored way.

RULE 29.6 DISCLOSURE STATEMENT

Contest Promotions, LLC is a wholly owned subsidiary of Alchemy Media Holdings LLC, a Delaware limited liability company. No publicly held company owns 10 percent or more of the stock of Contest Promotions, LLC, either directly or indirectly.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Contest Promotions, LLC respectfully petitions for a writ of certiorari to review two judgments of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

This petition seeks review of two related judgments in cases that were consolidated and decided simultaneously by a single Ninth Circuit panel. See S. Ct. Rule 12.4. The decision of the Court of Appeals in case number 17-15909 (9th Cir.) (App., *infra*, 1a-15a) is reported at 874 F.3d 597. The relevant decision of the district court in that case (App., *infra*, 23a-37a) is unpublished but is available at 2017 WL 1493277. The decision of the Court of Appeals in case number 15-16682 (9th Cir.) (App., *infra*, 16a-22a) is unpublished, but is available at 2017 WL 3499800. The relevant decisions of the district court in that case (App., *infra*, 59a-85a, 38a-58a) are, respectively, published at 100 F. Supp. 3d 835, and unpublished but available at 2015 WL 4571564.

JURISDICTION

In case number 17-15909 (9th Cir.), the Court of Appeals entered judgment on August 16, 2017 and denied a timely petition for rehearing on October 23, 2017. App., *infra*, 1a-3a. In case number 15-16682 (9th Cir.), the Court of Appeals entered judgment on August 16, 2017 and denied a timely petition for rehearing on October 17, 2017. App., *infra*, 16a, 86a-87a. On December 27, 2017, Justice Kennedy extended the time to file a petition for a writ of certiorari in both cases to and including February 14, 2018.

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the U.S. Constitution, applicable to the City and County of San Francisco (the "City" or "San Francisco") by incorporation through the Fourteenth Amendment, provides that "Congress shall make no law … abridging the freedom of speech."

The relevant provisions of Article 6 of the San Francisco Planning Code (the "Ordinance") are reproduced at App., *infra*, 88a-125a.

INTRODUCTION

In San Francisco, a person who owns (for example) a laundromat and a convenience store may not hang a poster in the window of her laundromat advertising her convenience store. That is because the City's Planning Code bans all new signs on private property advertising any commercial activity that is not offered on the premises where the sign hangs (or that is offered "only incidentally" on the premises). §§ 602, 611(a). Petitioner Contest Promotions is a marketing company that maintains several such signs, and received citations from the City asserting that they are unlawful. The Planning Code provides for criminal penalties and civil fines of up to $2,500 per day per violation. §§ 176, 610(a)-(b).

San Francisco's Ordinance violates the First Amendment's protection of commercial speech. The

City contends that the Ordinance furthers the City's interests in promoting aesthetics and traffic safety. Even assuming those are substantial government interests, the Ordinance does not directly and materially advance those interests and is not narrowly tailored to do so.

The distinction San Francisco has drawn between signs advertising on-premises and off-premises commercial activity is completely untethered to its asserted interests in aesthetics and traffic safety. There is no reason to believe off-premises signs are uglier, or more distracting to motorists, than on-premises signs. As this Court recognized in *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), the government bears a heavy burden in justifying distinctions between commercial and *non-commercial* speech (a distinction San Francisco's Ordinance also draws) for aesthetic reasons. That burden can only be greater when a city would draw a content-based distinction between two different types of commercial signs for this same purpose. The City had ample means available to achieve its asserted interests through a content-neutral law regulating the amount and physical characteristics of signage, but it instead has chosen to target signs advertising off-premises commercial activity because it believes that form of speech is of little value.

Nevertheless, the Ninth Circuit held that San Francisco had carried its burden of justifying this restriction on commercial speech without offering any evidence that banning off-premises commercial signs actually serves its interests in aesthetics and traffic safety in a direct, material, and tailored way.

The district court granted San Francisco's motion to dismiss Petitioner's challenge based simply on the City's say-so, and the Court of Appeals affirmed that dismissal.

The upshot is that, throughout the Ninth Circuit, a municipality may ban all signs advertising off-premises commercial activity, simply by invoking a general interest in aesthetics and traffic safety, with no further inquiry. Indeed, because every municipality can claim to have an interest in aesthetics and traffic safety, under the Ninth Circuit's approach here, signs advertising off-premises commercial activity now effectively constitute a new category of speech unprotected by the First Amendment.

That approach cannot be squared either with this Court's case law or with the way other Circuits have addressed similar cases. As this Court has emphasized, "the Government bears the burden" of showing that a restriction on commercial speech comports with the First Amendment. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 183 (1999). To carry this burden, the government must, among other things, show that the restriction "directly and materially advances the asserted governmental interest" and "demonstrate narrow tailoring of the challenged regulation to the asserted interest." *Id.* at 188; see *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). That is especially so where the government seeks to draw "content-based" distinctions, like San Francisco's distinction between speech advertising on-premises and off-premises commercial activity. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011). Such re-

strictions on speech, even in the commercial realm, are subject to "heightened judicial scrutiny." *Id.*

Here, regardless of whether this form of heightened scrutiny or the ordinary *Central Hudson* test applies, San Francisco cannot establish that its complete ban on commercial signs directly and materially advances its interests in aesthetics and traffic safety, much less that it does so in a narrowly tailored way. And the Ninth Circuit wrongly excused it from having to make such a showing.

The Ninth Circuit reached that conclusion by placing dispositive weight on this Court's fractured ruling in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), which produced five separate opinions and no majority. The Courts of Appeals do not even agree on whether *Metromedia* created binding precedent—let alone (as the Ninth Circuit has held) precedent categorically permitting a total ban on signs advertising off-premises commercial activity. And case law in the Circuits that do not accord *Metromedia* binding precedential effect makes clear that they would not reach the result the Ninth Circuit did in this case.

Metromedia cannot sustain the judgments here. The *Metromedia* Court would not have countenanced a sweeping, content-based restriction on commercial signs like San Francisco's. And such an interpretation of *Metromedia* would place the case at odds with this Court's more recent First Amendment jurisprudence. At most, the reach of *Metromedia* should be limited to the specific type of signage at issue in that case—offsite commercial billboards—rather than ex-

tended to uphold the far broader ban San Francisco has enacted, which significantly restricts the speech of businesses throughout the City, including many small independent retailers. That ban extends to *all* types of signs (including, for instance, posters and banners) and restricts not just off-premises signs, but also signs advertising on-premises activity that is not the "primary" business conducted there. See Planning Code §§ 602, 611(a).

This Court should grant certiorari to clarify the reach of *Metromedia* and to establish that the normal First Amendment principles applicable to restrictions on commercial speech apply as well to laws regulating off-premises commercial signs. Under those principles, the Ninth Circuit's judgments must be reversed.

STATEMENT

1. In 2002, San Francisco amended Article 6 of its Planning Code to ban throughout the City all new "General Advertising Signs," defined as signs advertising a product or service not offered on the premises where the sign appears, or offered "only incidentally" on the premises. App., *infra*, 4a, 24a; see Planning Code § 602. The Code's broad definition of "sign" extends the ban to:

> "Any structure, part thereof, or device or inscription which is located upon, attached to, or painted, projected, or represented on any … building or structure …, or affixed to the glass on the outside or inside of a window so as to be seen from the outside of the building, and which displays or includes any numeral, letter, word,

> model, banner, emblem, insignia, symbol, … or other representation[.]"

Planning Code § 602.

The Ordinance also limits to one-third of the area of any sign any advertisement for goods or services that *are* offered on the premises but are not the "primary" business conducted there. *Id.* §§ 602, 611(a). Any person violating the Ordinance is guilty of a misdemeanor and subject to up to six months' imprisonment, and is liable for civil penalties of up to $2,500 per day per violation. *Id.* § 610(b)(2)(B).[1]

Section 611(f) of the Planning Code sets forth the City's purported rationale for its ban on signs advertising off-premises commercial activity. It states that such signs "can distract motorists and pedestrians traveling on the public right of way," that the signs "contribute to blight and visual clutter as well as the commercialization of public spaces in the City," that "[t]here is currently an ample supply of general advertising signs within the City," and that "San Francisco must protect the character and dignity of the City's distinctive appearance."

Contest Promotions is a marketing company that operates sweepstakes inside small independent retailers, utilizing existing signage to post displays regarding giveaways of movie tickets, music, and other products. See App., *infra*, 3a. In 2007, City officials

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[1] The Ordinance exempts signs inside stadiums, on city-owned transit shelters, on certain city kiosks and newsracks, and signs that predated the enactment of the Ordinance in 2002. See Planning Code §§ 602, 603(b)-(e), 611(a).

decided that even though Contest Promotions' signs advertised promotional contests occurring on the premises where the signs appeared, the signs nonetheless were prohibited "General Advertising Signs" because the prize is not awarded on-site. *Id.* at 24a.

Contest Promotions sued on First Amendment grounds seeking to enjoin enforcement of the ordinance. The district court issued a preliminary injunction, 2010 WL 1998780 (N.D. Cal. May 18, 2010), and the Court of Appeals affirmed, 429 F. App'x 669 (9th Cir. 2011). Contest Promotions and the City ultimately settled that case, with the City agreeing to recognize Contest Promotions' signs as lawful "Business Signs," provided that Contest Promotions apply for new sign permits. App., *infra*, 24a.

In July 2014, less than two weeks after the settlement between Contest Promotions and San Francisco took effect but before Contest Promotions could apply for new permits, the City amended Article 6 to specifically prohibit Contest Promotions' signs. Unlike the earlier version of the Ordinance, which had defined a lawful "Business Sign" as a sign directing attention to "*a*" business or service offered on the premises, the amended version limits two-thirds of the sign face to messages directing attention to "*the primary*" business or service offered on the premises, defined as "the use which occupies the greatest area on the premises." App., *infra*, 25a (emphases added); Planning Code § 602. Under this revised (and more sweeping) version of the ordinance, Contest Promotions' signs do not qualify as lawful business signs because the promotional contests they advertise are

not the "primary" service the host business offers. App., *infra*, 25a-26a.

2. In January 2015, Contest Promotions sued in federal district court, alleging that the Ordinance violated the First Amendment. The court granted the City's motion to dismiss. The court held that the "fate" of the Ordinance was "dictated by *Metromedia*, which upheld an outright ban on off-site advertising." App., *infra*, 69a. The court also noted that the Ninth Circuit, itself relying on *Metromedia*, had upheld a similar ordinance in *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898 (9th Cir. 2009). App., *infra*, 69a. The court also stated its view that the Ordinance's distinction between signs describing on-premises commercial activity and those describing off-premises commercial activity was "content-neutral." *Id.*

Contest Promotions filed an amended complaint in May 2015. The following month, this Court issued its decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), which held that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. Contest Promotions explained that, under *Reed*, the Ordinance's distinction between signs about on-premises activity and off-premises activity was a content-based distinction subjecting the Ordinance to heightened scrutiny. App., *infra*, 46a. The court rejected this argument and granted the City's renewed motion to dismiss, holding that "[b]ecause *Reed* does not abrogate prior case law holding that laws which distinguish between on-site and off-site

commercial speech survive intermediate scrutiny, the Court holds that its prior analysis continues to control the fate of plaintiff's First Amendment claim." *Id.* at 47a. Contest Promotions' appeal was docketed as No. 15-16682 (9th Cir.).

While that appeal was pending, in November 2016, the City amended the Planning Code to exempt all noncommercial signs from the Ordinance. App., *infra*, 28a. That same day, Contest Promotions filed a new lawsuit in federal district court, arguing that the Ordinance's distinction between commercial and noncommercial signs was content-based and violated the First Amendment—particularly as interpreted in this Court's opinion in *Discovery Network*, 507 U.S. 410, which invalidated a municipal ordinance that banned commercial newsracks while allowing noncommercial newsracks. The district court rejected that argument and granted the City's motion to dismiss, holding that, unlike the ordinance in *Discovery Network*, which "banned all commercial news racks while permitting all non-commercial news racks," San Francisco's Ordinance "distinguishes between different forms of commercial speech." App., *infra*, 34a. Contest Promotions filed a second appeal, which was docketed as No. 17-15909 (9th Cir.).

3. Contest Promotions' two appeals were consolidated for decision by a single Ninth Circuit panel, which on the same day affirmed both judgments. Relying on *Metromedia* and its circuit progeny *Metro Lights*, the court held that "regulations distinguishing between on-site and off-site advertising signs directly advance government interests in safety and

aesthetics," and that the Ordinance was "not broader than necessary to achieve [the City's] interests" because it does not "'prohibit[] all billboards, but allows onsite advertising and some other specifically exempted signs.'" App., *infra*, 19a (quoting *Metromedia*, 453 U.S. at 508 (plurality opinion)).

The Court of Appeals also rejected Contest Promotions' argument that the Ordinance violated the First Amendment "because it exempts noncommercial signs for reasons unconnected to [the City's] asserted interests in safety and aesthetics. App., *infra*, 11a. The court held that *Discovery Network* was "materially distinguishable" because "the record" in that case "showed that the number of newsracks dispensing commercial handbills was minute compared with the total number" of newsracks, whereas here, San Francisco had "explain[ed]" in the text of its Ordinance that the City believed off-premises commercial signs were (among other things) "'creating a public safety hazard'" and contributing to the "'commercialization of public spaces'" in the City. *Id.* at 12a (quoting Planning Code § 611(f)).

Contest Promotions timely sought panel rehearing and rehearing en banc in both appeals, but the court denied both. App., *infra*, 2a-3a, 86a-87a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's judgments here conflict both with this Court's commercial speech case law and with decisions of other Courts of Appeals, which do not treat *Metromedia* as binding and which would not have reached the result the Ninth Circuit did

here. This case presents an excellent vehicle for the Court to confront the important question of whether the First Amendment allows the government to ban *all* off-premises commercial signs, based on nothing more than the government's assertion that it has an interest in doing so.

I. The Ninth Circuit's Decision Conflicts With This Court's Commercial Speech Case Law

The Ninth Circuit's decision flies in the face of this Court's commercial speech precedent, which requires the government to come forward with concrete evidence establishing, among other things, that its speech restriction furthers a substantial government interest in a direct and material way, and is narrowly tailored to doing so.

Here, the Ninth Circuit excused the City from those requirements—even though it is highly doubtful that San Francisco could show that its sweeping Ordinance directly and materially furthers the City's interests, much less in a narrowly tailored way. San Francisco bans new off-premises commercial signs entirely, and restricts to one-third of the sign face any advertisement for commercial activity that *is* offered on the premises but is not the "primary" business conducted there. Planning Code §§ 602, 611(a). The City has done so because of its content-based judgment that such speech is of little social value, not because these signs are particularly responsible for the aesthetic and safety-related harms the City claims to be combating.

A. The Ninth Circuit Has Effectively Eliminated Two Prongs of the *Central Hudson* Test in Cases Involving Restrictions on Off-Premises Commercial Signs

This Court's cases set forth a familiar standard for evaluating restrictions on commercial speech. If that speech "is neither misleading nor related to unlawful activity," the government "must assert a substantial interest" that its restriction serves. *Cent. Hudson*, 447 U.S. at 564. The government must also show that the restriction "directly advance[s] the state interest involved," and does so in a narrowly tailored way: "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Id.*; accord *Greater New Orleans*, 527 U.S. at 188 ("The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest.").

Here, the Ninth Circuit held that *all* restrictions on signs advertising off-premises commercial activity—up to and including a complete ban—both "directly advance governmental interests in safety and aesthetics" and are "not broader than necessary to achieve" these interests. App., *infra*, 19a. That holding is anathema to this Court's case law. Indeed, it functionally treats signs advertising off-premises commercial activity as unprotected speech, since it allows the government to ban such signs by simply invoking a generalized interest in aesthetics and traffic safety. *Cf. United States v. Stevens*, 559

U.S. 460, 472 (2010) (expressing skepticism about identifying "new categories" of "speech outside the scope of the First Amendment"). The Ninth Circuit's approach is not just wrong, but grievously so.

1. This Court has emphasized that the "requirement" that the government demonstrate that a commercial speech restriction "directly and materially advances the asserted governmental interests … is critical; otherwise, 'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.'" *Greater New Orleans*, 527 U.S. at 188 (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995)). Moreover, the government's "burden" of showing that its law directly and materially advances its asserted interests "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

The Ninth Circuit has flouted these principles. It upheld San Francisco's Ordinance at the pleading stage, without any care for actual "evidence" that the Ordinance served the City's asserted interests. *Id.* at 771.

In *Edenfield*, for instance, Florida attempted to justify its "ban on personal solicitation" by CPAs based on the State's asserted interests in "protecting consumers from fraud or overreaching" and "to maintain both the fact and appearance of CPA inde-

pendence in auditing[.]" *Id.* at 768. This Court held that Florida had not carried its burden of showing that its law "advanced [these] interests in any direct and material way" because the State had presented no "studies," or even "anecdotal evidence … that validates the [State's] suppositions." *Id.* at 770-71. And the *Edenfield* Court reached that conclusion even though the record was *more* robust that the legislative findings ostensibly supporting San Francisco's Ordinance here. See Planning Code § 611(f). In *Edenfield*, there was at least an "affidavit" supporting the State's theory, although the Court determined that it amounted to "nothing more than a series of conclusory statements that add little if anything to the [State's] original statement of its justifications." 507 U.S. at 771.

Other cases are to similar effect. See *Discovery Network*, 507 U.S. at 425 (acknowledging that "some testimony" suggested that commercial newsracks were a greater aesthetic problem than noncommercial newsracks, but holding that such "evidence" was "exceedingly weak" and could not support the city's law); *Ibanez v. Fla. Dep't of Bus. & Prof. Regulation*, 512 U.S. 136, 148 (1994) (in the commercial speech context, "[w]e have never sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the Board relies here"); *Rubin*, 514 U.S. at 490 (invalidating ban on advertising of alcohol content where government offered only "anecdotal evidence and educated guesses" in support of the law).

If the scant evidentiary record was insufficient to carry the government's burden in these cases, then *a*

fortiori the lack of *any* evidentiary support for San Francisco's Ordinance compels the same result here.

Indeed, in the absence of contrary evidence, simple common sense dictates that discriminating among advertisements based on where the advertised commercial activity occurs does nothing to advance the City's asserted interests in aesthetics and traffic safety. There is no reason to believe that signs advertising off-premises commercial activity are either uglier or more distracting to motorists than on-premises signs, which the City allows.

Discovery Network underscores this point. This Court noted that "[t]he city has asserted an interest in esthetics, but respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on Cincinnati's sidewalks"; both sets of newsracks were "equally unattractive," and thus "the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted." 507 U.S. at 424-25 (emphasis in original).

Similarly, in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), this Court invalidated an ordinance banning charitable solicitations by any organization using less than 75 percent of receipts for charitable purposes. *Id.* at 622. The government cited its interests in "public safety [and] residential privacy," but the Court noted that "[t]here is no indication that organizations devoting more than one-quarter of their funds to salaries and administrative expenses are any more likely to employ solicitors who would be a threat to public safety than are other charitable organizations." *Id.*

at 638. And "householders are equally disturbed by solicitation on behalf of organizations satisfying the 75-percent requirement as they are by solicitation on behalf of other organizations." *Id.*

The same is true here. There is simply no connection between San Francisco's asserted interests in aesthetics and traffic safety and the distinction the City has drawn between on-premises and off-premises commercial signs.

2. The Ninth Circuit's approach to off-premises advertising also conflicts with this Court's commercial speech case law regarding "narrow tailoring of the challenged regulation to the asserted interest." *Greater New Orleans*, 527 U.S. at 188. The Court of Appeals determined that even a complete ban on signs advertising off-premises commercial activity categorically is narrowly tailored to further governmental interests in aesthetics and traffic safety. App., *infra*, 19a.

But under this Court's precedents, while the government need not show that the "restriction is absolutely the least severe that will achieve the desired end" or that it is "perfect[ly]" tailored to its objectives, the "fit" nonetheless must be "reasonable," and the "scope" of the restriction must be "in proportion to the interest served." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). "[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between the ends and means is reasonable." *Discovery Network*, 507 U.S. at 417 n.13.

That is the case here: San Francisco had ample alternative, constitutionally permissible means to achieve its asserted interests.

First, as with respect to the "directly advance" prong, the Ninth Circuit's approach erroneously excuses the government from its burden of coming forward with evidence establishing that the challenged law is narrowly tailored. For instance, in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), the Court invalidated Ohio's ban on the use of illustrations in attorney advertising, reasoning that "[t]he State's arguments amount to little more than unsupported assertions: nowhere does the State cite any evidence or authority of any kind" that the potential for fraud or manipulation resulting from illustrations in attorney ads "cannot be combated by any means short of a blanket ban." *Id.* at 648; see also, *e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) (invalidating advertising ban where "[t]he Government has not offered any reason" why less-restrictive alternatives would not suffice).

Moreover, in light of the "numerous and obvious" less-restrictive alternatives to San Francisco's ban on off-premises commercial signs, *Discovery Network*, 507 U.S. at 417 n.13, it is implausible that the City could carry its burden. In *Discovery Network*, for instance, the Court noted that Cincinnati could have "address[ed]" its "concern" about "visual blight" caused by newsracks "by regulating their size, shape, appearance, or number," instead of banning commercial newsracks entirely. *Id.* at 417; see also, *e.g.*, *Rubin*, 514 U.S. at 490-91 (holding that ban on

advertising alcohol content failed narrow tailoring because the government instead could have "directly limit[ed] the alcohol content of beers, prohibit[ed] marketing efforts emphasizing high alcohol strength, … or limiting the labeling ban only to malt liquors," which was the "segment of the market" of most concern).

The same is true here. Not only is the Ordinance not narrowly tailored—it is not tailored at all. San Francisco could have regulated the "size" or "appearance" of signs. *Discovery Network*, 507 U.S. at 417. It could have limited each establishment to a certain "number" of signs, *id.*, leaving it up to each proprietor to determine whether to use their allotted signage space to advertise on-premises business, off-premises business, or some mix of both. The City could have restricted the type of visual effects, such as flashing or blinking, that pose the greatest threat to aesthetics and traffic safety. Cf. *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1252 (11th Cir. 2005). It could have restricted signs within a certain distance of a major roadway. Cf. *Rappa v. New Castle County*, 18 F.3d 1043, 1051 (3d Cir. 1994). Indeed, San Francisco's Planning Code already contains some of these regulations, calling into question whether the blanket speech restrictions imposed by the Ordinance are needed. Planning Code § 607(e), (f) (prohibiting "[m]oving [p]arts" and "[i]llumination" on signs in certain zoning districts).

Instead, San Francisco treats all post-2002 signs advertising off-premises commercial activity as equally grave threats to aesthetics and traffic safety, whether it be a modest poster hanging in a shop

window or a gigantic flashing neon billboard. It applies indiscriminately throughout the City, whether a sign hangs alongside a busy freeway or in a pedestrian shopping center. Indeed, the City treats a small, subdued off-premises sign as a more serious threat to aesthetics and traffic safety than a large and eye-catching sign advertising on-premises activity—of which there are many in San Francisco. That nonsensical approach runs roughshod over well-established First Amendment principles.

3. Although the Ninth Circuit's opinion in this case is plainly incorrect even under the ordinary *Central Hudson* commercial speech test, this Court's decision in *Sorrell*, 564 U.S. 552, underscores the error in the Court of Appeals' approach here. *Sorrell* emphasizes that "content-based" restrictions on commercial speech are subject to "heightened judicial scrutiny." *Id.* at 565. The Court in *Sorrell* declined to elaborate on what form this "heightened judicial scrutiny" should take, because in that case (as here), "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Id.* at 571.[2]

San Francisco's Ordinance is content-based because it treats different signs differently based on

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[2] The Courts of Appeals have recognized the uncertainty regarding the relationship between *Sorrell*'s "heightened judicial scrutiny" and the *Central Hudson* test. See, *e.g.*, *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1235 n.7 (11th Cir. 2017) (noting "question" as to whether *Sorrell* "alter[s] the *Central Hudson* framework," but concluding that "[w]e need not wade into these troubled waters … because the State cannot survive *Central Hudson* scrutiny").

their content: whether the subject matter advertised is on-premises or off-premises commercial activity. See *Discovery Network*, 507 U.S. at 429 (ban on commercial newsracks was "content based" because "the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech"); *Reed*, 135 S. Ct. at 2227 (noting the "commonsense meaning of the phrase 'content based'" as referring to regulation that "applies to particular speech because of the topic discussed or the idea or message expressed").

Certainly, the Ordinance does not discriminate based on viewpoint. But "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints." *Reed*, 135 S. Ct. at 2230. As one federal district court has recognized, *Reed* compels the conclusion that a municipal sign code's distinction between on-premises and off-premises signs is "facially content-based." *Thomas v. Schroer*, 116 F. Supp. 3d 869, 876 (W.D. Tenn. 2015) (invalidating ordinance because "[j]ust as in *Reed*, off-premise signs 'are no greater an eyesore' than on-premise signs").[3]

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[3] Justice Alito's concurring opinion in *Reed* suggested that regulations "distinguishing between on-premises and off-premises signs" would not be "content based." 135 S. Ct. at 2233. Commentators have noted that, unlike the other types of content-neutral distinctions mentioned in Justice Alito's concurring opinion, treating a distinction between on-premises and off-premises signs as content-neutral "seem[s] irreconcilable" with the majority opinion's "broad" definition of content-based regulations. Note, *Free Speech Doctrine After* Reed v. Town of Gilbert, 129 Harv. L. Rev. 1981, 1985 n.33 (2016). Regardless,

This case implicates the central reason why this Court has subjected content-based speech restrictions to heightened scrutiny: because "content-based speech restrictions are especially likely to be improper attempts to value some forms of speech over others." *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring). Here, San Francisco has targeted signs advertising off-premises commercial activity because it believes those signs are of comparatively little social value. Yet, remarkably, the Ninth Circuit considered that an appropriate *justification* for the Ordinance. App., *infra*, 19a ("a city is permitted to 'value one kind of commercial speech—onsite advertising—more than another kind of commercial speech—offsite advertising'" (quoting *Metromedia*, 453 U.S. at 512)).

That value judgment about the relative merit of different types of speech is exactly what calls for heightened scrutiny when the government uses it to restrict expression. That is true even in the realm of commercial speech:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.

Edenfield, 507 U.S. at 767.

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however, San Francisco's Ordinance fails even if analyzed under the ordinary *Central Hudson* test. *Supra* at 13-20.

B. This Court's Fractured Ruling in *Metromedia* Has No Precedential Force and Cannot Support the Ninth Circuit's Approach

The decision below rests on a single case: *Metromedia*. Only by treating *Metromedia* (and its circuit progeny *Metro Lights*) as controlling did the Court of Appeals reach the result it did here. If not for *Metromedia*, the ordinary commercial speech principles discussed above would have compelled a different outcome.

The Ninth Circuit has persistently misinterpreted *Metromedia*, and has erred by treating it as "control[ling]" in justifying all restrictions on off-premises commercial signs. *Metro Lights*, 551 F.3d at 911; see App., *infra*, 19a. As then-Justice Rehnquist observed at the time, the Court's five separate opinions in *Metromedia* are "a virtual Tower of Babel, from which no definitive principles can be clearly drawn." 453 U.S. at 569 (dissenting opinion). And even if that were not so, the restrictions on outdoor billboards at issue in *Metromedia* cannot support San Francisco's far broader ban on *all* signs advertising off-premises commercial activity (and significant restrictions on signs advertising non-primary on-premises activity) at issue here.

1. *Metromedia* addressed a San Diego ordinance that banned most "outdoor advertising display signs"—*i.e.*, billboards—which the city defined as including any "rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building." 453 U.S. at 493 (plu-

rality opinion). The law generally prohibited both commercial and noncommercial billboards, but exempted billboards advertising on-site commercial activity and a handful of other categories of billboards, such as historical plaques and religious symbols. *Id.* at 494.

This Court struck down the ordinance as "unconstitutional on its face," 453 U.S. at 521, but could not agree on a rationale. A four-Justice plurality would have held that because San Diego's ordinance permitted some commercial signs, its restrictions on *noncommercial* signs were impermissible. *Id.* at 515. But the plurality indicated it would have upheld the city's restrictions on off-premises commercial billboards standing alone, reasoning that "the city may distinguish between the relative value of different categories of commercial speech." *Id.* at 514. The plurality nonetheless concurred in the judgment reversing in full the judgment of the California Supreme Court (which had upheld the ordinance, see *id.* at 497), reasoning that the severability of the ordinance was a matter for the state courts on remand. *Id.* at 521 n.26.

The plurality's views, however, did not garner a fifth vote. Justice Brennan, joined by Justice Blackmun, concurred in the judgment, but on entirely different grounds. The concurrence would have invalidated the ordinance's restrictions on both commercial and noncommercial billboards, reasoning that San Diego had "failed to provide adequate justification for its substantial restriction on protected activity." 453 U.S. at 528.

Chief Justice Burger and Justices Stevens and Rehnquist each dissented. Each would have upheld San Diego's ordinance on the theory that a city may ban billboards—both commercial and noncommercial—in their entirety. 453 U.S. at 542 (Stevens, J., dissenting); *id.* at 557 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

2. *Metromedia* made no binding law relevant here because there is no common ground between the plurality opinion and Justice Brennan's concurrence in the judgment. "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.'" *Marks v. United States*, 430 U.S. 188, 193 (1977).[4]

In *Metromedia*, while the four-Justice plurality apparently would have upheld a hypothetical ordinance banning "offsite commercial billboards" while permitting "onsite commercial billboards," 453 U.S. at 512, Justice Brennan's concurring opinion disavowed that approach: "I cannot agree with the plurality's view that an ordinance totally banning commercial billboards but allowing noncommercial billboards would be constitutional," *id.* at 536. Justice Brennan concluded that "the city has failed to come forward with evidence demonstrating that billboards actually impair traffic safety in San Diego" and that

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[4] This Court has set oral argument for March 27, 2018, in *Hughes v. United States*, No. 17-155, which also involves questions regarding the proper application of the *Marks* inquiry.

"the city has failed to show that its asserted interest in aesthetics is sufficiently substantial in the commercial and industrial areas of San Diego." *Id.* at 528, 530.

As for the votes of the dissenting Justices, even assuming dissents may sometimes count toward a *Marks* majority (but see, *e.g.*, *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc)), *Metromedia* was not a case in which the reasoning of the dissenting Justices overlapped with that of the plurality. The three dissents focused on the ability of a municipality to ban a particular *form* of communication—billboards—without regard to any content-based distinction between on-premises and off-premises commercial speech. See *Metromedia*, 453 U.S. at 542 (Stevens, J., dissenting) ("Unlike the plurality, I do not believe that this case requires us to decide any question concerning the kind of signs a property owner may display on his own premises."); *id.* at 557 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

This Court itself recognized as much in distinguishing *Metromedia* in *Discovery Network*, noting that the dissenting Justices "did not say … that San Diego could *distinguish* between commercial and noncommercial offsite billboards that cause the same esthetic and safety concerns." 507 U.S at 425 n.20. Especially in light of the Court's increasing scrutiny of content-based restrictions on commercial speech reflected in cases such as *Discovery Network* and *Sorrell*, see *supra* at 20-22, it would be unwarranted to impute to the *Metromedia* dissenters support for such a restriction. Cf. *Metro Lights*, 551 F.3d at 911

(Ninth Circuit noting argument that *Metromedia* may be "inconsistent with cases like *Discovery Network*" but deeming itself "bound to follow" *Metromedia* until this Court overrules it or clarifies its reach).

3. Even if *Metromedia* had precedential force, its reach would be limited to regulation of commercial signs the San Diego ordinance targeted: offsite billboards, defined as "rigidly assembled" and "permanent[]" "outdoor advertising display[s]." 453 U.S. at 493 (plurality opinion).

San Francisco's Ordinance is far broader, in two different respects. First, it reaches all manner of signs not covered by the San Diego ordinance, such as posters, banners, placards, picket signs, and temporary displays. *Supra* at 6-7; Planning Code § 602. The *Metromedia* plurality emphasized that "billboard[s] … create[] a unique set of problems" from the standpoint of aesthetics and traffic safety. 453 U.S. at 502. But the same is not true of many of the types of signs San Francisco's Ordinance reaches, which common sense suggests are far less likely to have such effects.

Second, San Francisco not only bans signs advertising off-premise commercial activity; it also bans signs advertising goods or services the City determines are offered "only incidentally" on the premises, and restricts to one-third of any sign any advertisement for goods or services that *are* offered on the premises but that the City determines are not the "primary" business conducted there. *Supra* at 8; Planning Code § 602. These additional restrictions

on speech raise the very concern Justice Brennan identified in his *Metromedia* concurrence: that the restrictions would give "wide discretion to city officials to control the free exercise of First Amendment rights." 453 U.S. at 537.

In other words, San Francisco has gone at least two steps beyond even the outer limit of what the fractured *Metromedia* judgment might be read to allow. Thus, even if *Metromedia* were deemed to establish a rule that *offsite commercial billboards* may be banned entirely, such a rule—which would be a speech-restrictive anomaly in this Court's case law, see *supra* at 13-22—should not be extended to uphold San Francisco's much broader Ordinance. Instead, ordinary First Amendment commercial speech principles should govern, particularly in light of the Court's development of those principles over the nearly four decades since *Metromedia*.

II. The Courts of Appeals Are in Conflict Regarding the Question Presented

The Courts of Appeals have reached conflicting conclusions regarding whether *Metromedia* is binding precedent, and commentators have noted this uncertainty and confusion. See, *e.g.*, J. 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 (noting that *Metromedia* "produced no majority opinion and consisted of five separate opinions that each suggested different lines of reasoning," leaving "courts and governments … fac[ing] a difficult constitutional quandary"); M.R. Calo, *Scyl-*

la or Charybdis: Navigating the Jurisprudence of Visual Clutter, 103 Mich. L. Rev. 1877, 1878 (2005) (noting that this area of law "is in a state of disarray"). Indeed, the widespread and persistent discord the fractured ruling in *Metromedia* has generated would be reason alone for this Court's review. See *Nichols v. United States*, 511 U.S. 738, 745-46 (1994) ("Th[e] degree of confusion following a splintered decision [of the Supreme Court] is itself a reason for reexamining that decision.").

A. The Courts of Appeals Have Reached Divergent Conclusions Regarding the Precedential Effect of *Metromedia*

At least three Circuits—the Third, Sixth, and Eleventh—have held that *Metromedia* established no binding law.

In *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464 (6th Cir. 1991), *aff'd*, 507 U.S. 410, the Sixth Circuit unequivocally rejected the principle the Ninth Circuit relied upon in this case—that *Metromedia* is binding law as it relates to regulations of commercial speech. The court stated that "if the majority of the Court [in *Metromedia*] had upheld San Diego's statute as a permissible regulation of commercial speech, we would be compelled" to uphold the Cincinnati ordinance banning commercial newsracks at issue in the case. 946 F.2d at 470 n.9. But the Sixth Circuit recognized that in *Metromedia* "only a plurality of the Court found that the San Diego ordinance constitutionally regulated commercial speech," and the "concurrence specifically—and ve-

hemently—disagreed." *Id.* Thus, the Sixth Circuit concluded, the "plurality dicta" regarding commercial speech is not "controlling." *Id.*; see also *Pagan v. Fruchey*, 492 F.3d 766, 774 (6th Cir. 2007) (en banc) (invalidating ordinance restricting "For Sale" signs on parked cars, noting that *Metromedia* was not a majority opinion and "does not control the outcome of this case").

In *Solantic*, 410 F.3d 1250, the Eleventh Circuit cited and endorsed the reasoning of the Sixth Circuit in *Discovery Network*. The court concluded that "[b]ecause the *Metromedia* plurality's constitutional rationale did not garner the support of a majority, it has no binding application." *Id.* at 1261. The court also noted that "no subsequent majority of the Supreme Court has ever explicitly adopted or rejected the reasoning of any of the *Metromedia* opinions." *Id.* at 1261 n.10; see also *Tanner Advertising Grp., L.L.C. v. Fayette County*, 451 F.3d 777, 794 (11th Cir. 2006) (en banc) (Birch, J., specially concurring) (rejecting reliance on *Metromedia* because it "is a fractured, plurality opinion of dubious precedential value," citing *Solantic*).

The Third Circuit also has held that *Metromedia* is not binding. In *Rappa*, 18 F.3d 1043, the court confronted a Delaware statute that was "very similar" to the San Diego ordinance at issue in *Metromedia*. *Id.* at 1054. The court nonetheless concluded that this Court's "badly splintered" ruling was not controlling because "the plurality and the concurrence took such markedly different approaches to the San Diego ordinance that there is no common denominator between them." *Id.* at 1047, 1058. The

Third Circuit also recognized that *Metromedia* "has arguably been undermined by the recent decision in … *Discovery Network*[.]" *Rappa*, 18 F.3d at 1047; see *supra* at 26.

Indeed, the members of the *Rappa* panel, including then-Judge Alito, urged this Court to "clarify and rectify the problems created by its splintered opinion in *Metromedia*." 18 F.3d at 1061 n.28; 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.").

By contrast, at least three Circuits—the Fourth, Fifth, and Ninth—have held that *Metromedia* establishes a binding rule, "holding that a city, consistent with the *Central Hudson* test, may ban all offsite commercial signs, even if the city simultaneously allows onsite commercial signs." *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 610 (9th Cir. 1993). The Ninth Circuit in particular has reaffirmed this holding multiple times, including in *Metro Lights* and in this case. See *Metro Lights*, 551 F.3d at 911-12 (holding that "*Metromedia* … controls the outcome" and supports a "complete prohibition" on off-premises commercial signs); App., *infra*, 19a (applying *Metromedia* and *Metro Lights* to reach same conclusion here). See also *RTM Media, L.L.C. v. City of Houston*, 584 F.3d 220, 225 (5th Cir. 2009) ("*Metromedia* established" that a city "may permit on-premise commercial advertisement while banning off-premise commercial advertisement"); *Major Media of the Se., Inc. v. City of Raleigh*, 792 F.2d 1269, 1272 (4th Cir. 1986) ("The Supreme Court … deter-

mined in *Metromedia* that a city may justifiably prohibit all off-premise [commercial] signs for aesthetic and safety reasons[.]"). The Ninth Circuit's approach here rests squarely on that view.

B. The Courts of Appeals that Do Not Treat *Metromedia* as Controlling Would Have Reached a Different Outcome Here

This division of authority regarding the precedential effect of *Metromedia* has significant real-world consequences. Case law in the Circuits that do not treat *Metromedia* as binding makes clear that those Circuits would reach a different outcome than the Ninth Circuit reached here.

For instance, in *Pagan*, 492 F.3d 766, the en banc Sixth Circuit invalidated a commercial sign ordinance banning significantly *less* speech than San Francisco's Ordinance. The *Pagan* ordinance prohibited posting "For Sale" signs on parked cars. *Id.* at 769. The city, like San Francisco, argued that the ordinance furthered the city's interests in "traffic/pedestrian safety and aesthetic[s]." *Id.* at 771. The city argued that *Metromedia* required "defer[ence]" to these "legislative judgments," "even in the absence of evidence of concrete harm." *Id.* at 774. And, indeed, the dissenting opinion would have *upheld* the ordinance in reliance on *Metromedia*. *Id.* at 779 (Rogers, J.).

But the Sixth Circuit majority disagreed, holding that the government had failed to show that the ordinance furthered its interests "in a direct and material way." *Pagan*, 492 F.3d at 771-72 (opinion of the

court). The court emphasized that *Metromedia* was not "control[ling]," *id.* at 774, and concluded that the city's "evidence" was "insufficient to satisfy [its] burden under *Central Hudson*," *id.* at 772. The court characterized the evidence upon which the city relied—a declaration from the town's police chief asserting—as "nothing more tha[n] a conclusory articulation of governmental interests," and held that the "absence of any evidence of the need for [the] regulation" was "fatal" to the ordinance. *Id.* at 773. The court thus invalidated the ordinance based on the city's failure to show that the ordinance directly advanced its stated goals, and the court also noted that the ordinance very likely would fail narrow tailoring for the same reason. *Id.* at 778.

Pagan cannot be reconciled with the Ninth Circuit's approach. The Ninth Circuit here did not require even the sort of "conclusory" affidavit that the Sixth Circuit in *Pagan* deemed insufficient to support the city's asserted interests in aesthetics and traffic safety. 492 F.3d at 773. Instead, the Ninth Circuit, in affirming the district court's dismissals at the pleading stage, required *literally no* evidence that San Francisco's ordinance furthers its asserted goals, or does so in a narrowly tailored way. Only by treating *Metromedia* (and its circuit progeny *Metro Lights*) as controlling was the Ninth Circuit able to dispense with the sort of analysis the Sixth Circuit performed in *Pagan*—which merely followed the normal practice of requiring the government to carry its burden under *Central Hudson*.

The Eleventh Circuit likewise has required the government to make a significant evidentiary show-

ing in support of its asserted interest in aesthetics, and has invalidated restrictions on commercial speech for failing to do so. In *FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290 (11th Cir. 2017), the court struck down an ordinance prohibiting greeters from soliciting pedestrians with advertising handbills. The court agreed that the ordinance advanced a "substantial" government interest in preventing "annoyance and aesthetic harm." *Id.* at 1299.

The Eleventh Circuit nonetheless held that the city had failed to carry its "burden of demonstrating" that the ordinance was "appropriately tailored" to further the city's aesthetic interests. *Id.* The court carefully examined the evidence in the "preliminary record" to determine whether the ordinance was "narrowly tailored," and concluded that the record was "replete with numerous and obvious less-burdensome options," such as "regulat[ing]" the "volume" of advertising solicitations instead of an outright ban, or regulating the size of their displays. *Id.* at 1301. Yet "[t]he City offered no explanation why it did not even consider these less-restrictive alternatives … or why these alternatives could not also be used to regulate commercial solicitation." *Id.*

That careful inspection of evidence at the narrow-tailoring stage—which this Court has also required in its own commercial speech cases, *see supra* at 18—contrasts starkly with the Ninth Circuit's opinion here. Even though the same "numerous and obvious less-burdensome options" cited by the Eleventh Circuit in *FF Cosmetics*, 866 F.3d at 1301—such as evenhandedly regulating the size, appearance, or

number of off-premises commercial signs, instead of banning them entirely—were available to San Francisco in this case, the Ninth Circuit upheld the City's ordinance without any discussion of such less-burdensome options. App., *infra*, 19a.

The Third Circuit's case law also is inconsistent with the Ninth Circuit's approach here. In *Interstate Outdoor Advertising, L.P. v. Zoning Board*, 706 F.3d 527 (3d Cir. 2013), the court upheld a prohibition on fixed "outdoor advertising displays"—i.e., "billboards"—but only after reviewing "extensive evidence," including "expert reports and deposition testimony"—demonstrating that the prohibition on billboards "directly advances the [government's] goals of traffic safety and aesthetics." *Id.* at 528-29, 530-31. This approach, too, is irreconcilable with the Ninth Circuit's holding that no evidentiary support is required—even in support of San Francisco's far broader ordinance banning *all* new off-premises commercial signs (and many on-premises signs), rather than just the fixed outdoor billboards at issue in *Interstate Outdoor Advertising*.

III. This Case Is an Ideal Vehicle for Resolving the Important Question of Law Presented

1. The Ninth Circuit's opinion here rests unmistakably on the principle that an individual's right to post a sign advertising off-premises commercial activity categorically must yield to a municipality's asserted interests in aesthetics and traffic safety. See App., *infra*, 19a. If such signs are entitled to any meaningful First Amendment protection whatsoever,

this case affords the Court the opportunity to say so. No better vehicle will come along.

The law of off-premises commercial signage in the Ninth Circuit has hit rock bottom: that court does not even trouble municipalities to adduce evidence showing that a complete ban on such signs directly advances their interests in aesthetics and traffic safety and does so in a narrowly tailored way. Unless and until this Court intervenes, governments will be emboldened to enact "complete prohibition[s]" on offsite commercial signs, *Metro Lights*, 551 F.3d at 912, and indeed to enact content-based restrictions on some types of *onsite* commercial signs, as San Francisco has done, *supra* at 27-28. Moreover, municipalities may do so based on nothing more than their untested—and uncontestable—assertions that such bans further their interests, and despite the existence of numerous and obvious less-burdensome alternatives.

2. San Francisco's Ordinance restricts a significant amount of important commercial speech. The types of signs the City bans play a critical role in informing the public about goods or services they may be interested in. As this Court has observed:

> "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions.

> It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable."

Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

Signs advertising off-premises commercial activity play an important role in the advertising landscape. They inform passersby about new and attractive products and services. That is especially true for small businesses and new enterprises, which face the daunting task of building a clientele in a short period of time and often on a tight budget.

Of course, like all forms of commercial speech, off-premises commercial signs may be subject to reasonable regulations. But San Francisco's Ordinance is qualitatively different. It singles out and bans all off-premises commercial signs, and a significant number of on-premises signs, ostensibly in the service of aesthetic and safety interests that bear no relationship to the on-premises/off-premises distinction. In so doing, it places an impermissibly heavy burden on the speech of businesses throughout the City, particularly small independent retailers that increasingly struggle to compete with companies like Amazon.com.

A business owner who wishes to hang a modest poster in her window informing passersby about a new store in an adjacent neighborhood reasonably may determine that such a sign is far *more* valuable—to her and to her customers—than a sign advertising products offered on the premises. San Fran-

cisco allows the latter sign but prohibits the former, simply because of its own competing value judgment about the relative merit of the two signs' content. The City, in enacting its Ordinance, and the Ninth Circuit, in upholding it, disregarded this Court's admonition that, even in the realm of commercial speech, "the speaker and the audience, not the government, assess the value of the information presented." *Edenfield*, 507 U.S. at 767. That significant error warrants this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL F. WRIGHT
10100 Santa Monica Blvd.
23rd Floor
Los Angeles, CA 90067

BENJAMIN J. HORWICH
JOSHUA PATASHNIK
Counsel of Record
MUNGER, TOLLES & OLSON LLP
560 Mission St.
27th Floor
San Francisco, CA 94105
(415) 512-4000
josh.patashnik@mto.com

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