No. 17-1152

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

REPLY BRIEF FOR PETITIONER

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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San Francisco's brief in opposition confirms that this case squarely presents the question whether signs advertising off-premises commercial activity are entitled to any meaningful First Amendment protection whatsoever. The City admits that its sweeping "ban" on new "off-site commercial advertising" (BIO 16) prohibits even a modest poster hanging in a convenience store window advertising a fellow small business. See BIO 29 n.11 ("It is true that San Francisco does not contemplate that the convenience store owner will promote her separate laundromat" in this manner, which "would give her an advertising advantage over owners of competing laundromats[.]"). And the Ninth Circuit held that the First Amendment permits a ban of this sort, on the bare say-so of City Hall.

San Francisco's palpable disdain for this form of commercial speech cannot obscure the reality that, under well-established precedent, the Ninth Circuit's approval of the City's sign ban cannot stand.

This Court's commercial speech cases require the government to come forward with concrete evidence demonstrating that a restriction on speech directly advances the government's stated purpose. Here, in affirming dismissal of petitioner's complaints at the pleading stage, the Ninth Circuit wrongly excused San Francisco from having to make such a showing—even though there is no particular reason to believe that its ban on off-premises commercial signs will improve aesthetics or traffic safety. This Court's commercial speech cases also require the government to demonstrate a reasonable fit between a speech-restrictive law and the governmental inter-

ests justifying it. Here, the Ninth Circuit deemed it unnecessary to consider the "numerous and obvious" less-restrictive alternatives to the City's sign ban, such as laws regulating the number, size, or physical appearance of signs each business may post. *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 417 & n.13 (1993).

In defense of this anomalous approach, San Francisco argues that signs advertising off-premises commercial activity constitute a special category of commercial speech to which the normal rules do not apply. In this unique realm, the City believes, the government may enact any speech restriction it desires—up to and including a complete ban—based solely on a generalized assertion that the restriction is necessary to further the government's interests in aesthetics and traffic safety. The City contends this Court's fractured opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), countenances such special treatment.

San Francisco is wrong. This Court has never held—in *Metromedia* or any other case—that the government may ban any category of commercial speech regarding lawful goods or services based simply on its own say-so that such a ban is needed. Laws restricting off-premises commercial signs should be evaluated according to the same rules the Court has laid down with respect to other types of commercial speech. Under those ordinary rules, it is highly doubtful whether the City will be able to sustain its Ordinance. But that is a question for the lower courts to resolve on remand. The question the petition presents here is whether the ordinary com-

mercial speech rules apply at all to restrictions on off-premises commercial signs. This Court should grant certiorari and hold that they do.

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

1. As petitioner explained (Pet. 13-20), the First Amendment requires the government to show that a restriction on commercial speech both "directly and materially advances the asserted governmental interest," and "is not more extensive than necessary to serve the interests that support it." *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999). "On the whole … the challenged regulation should indicate that its proponent 'carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition.'" *Id.* (quoting *Discovery Network*, 507 U.S. at 417).

There is nothing "carefully calculated" about San Francisco's Ordinance, and the City hardly bothers to pretend otherwise. Indeed, San Francisco does not argue that its law could survive the sort of analysis called for by the commercial speech cases cited by petitioner. See BIO 13-14. Instead, the City cites what it terms a "sliding scale principle," under which "different quanta of proof" are required in "different contexts." BIO 12. Under this principle, the City argues, the Ninth Circuit properly exhibited "deference" to San Francisco's supposedly "detailed and specific" legislative findings regarding off-premises commercial signs—such as that the signs "'contribute to blight and visual clutter as well as the com-

mercialization of public spaces.'" BIO 14 (quoting S.F. Planning Code § 611(f)).

San Francisco's argument is unavailing. As this Court has emphasized, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Sable Comm'cns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989). "Were it otherwise, the scope of freedom of speech … would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Landmark Comm'cns, Inc. v. Virginia*, 435 U.S. 829, 844 (1978). Tellingly, the City cannot cite *any* case in which this Court has *ever* upheld a speech restriction based solely on the government's own legislative findings, as the Ninth Circuit did here. Indeed, in *Metromedia*, "[a]fter extensive discovery, the parties filed a stipulation of facts" that the Court referenced throughout its opinion. 453 U.S. at 497 (plurality opinion).

The only case San Francisco cites in support of its so-called "sliding scale principle," *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (BIO 12), is inapposite: it reaffirmed that restrictions on large campaign contributions may sometimes serve to advance the government's interest in preventing corruption. *Id.* at 391 (citing *Buckley v. Valeo*, 424 U.S. 1, 27 & n.28 (1976) (per curiam)). Nothing in the Court's opinion remotely suggests the government may ban a category of protected speech entirely based on legislative findings. On the contrary, the Court emphasized the "evidentiary showing" the government had made in *Buckley*, noting that "[t]he evidence … described public revelations by the par-

ties in question more than sufficient to show why voters would tend to identify a big donation with a corrupt purpose." *Id.*

No doubt, as the Court observed in *Nixon*, the strength of the evidentiary showing needed to sustain restrictions on speech will vary by case. But San Francisco has not made *any* evidentiary showing. "We have *never* sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the [government] relies here." *Ibanez v. Fla. Dep't of Bus. & Prof. Regulation*, 512 U.S. 136, 148 (1994) (emphasis added). The Ninth Circuit upheld San Francisco's speech-restrictive Ordinance based on even less.

The City seeks to distinguish the cases on which petitioner relied as involving governmental "speculation and conjecture" in defense of "implausible" justifications for restrictions on speech. BIO 13-14. But that is equally true here. Are off-premises commercial signs really uglier than on-premises signs? Are they really more distracting to motorists? Or did the City ban them just because it dislikes them, or because the speakers lack political power—as when the City amended its Ordinance to prohibit petitioner's signs two weeks after settling a prior round of litigation, following a federal court injunction of the earlier version of its Ordinance? Pet. 8; Pet. App. 24a-25a. There is no factual record in this case, and thus no way to know. The First Amendment demands careful judicial scrutiny of bare governmental assertions like the City's—particularly when, as here, they are facially dubious. Instead, the Ninth Circuit took them at face value.

San Francisco also suggests that its Ordinance is permissible because, although it operates as a ban on *new* off-premises commercial signs, pre-2002 signs remain in place. BIO 9. But the exception for pre-2002 signs played no role in the Ninth Circuit's analysis, which upheld the Ordinance as a complete ban on off-premises commercial signs. Pet. App. 19a. And the City cites no authority for the remarkable proposition that it may ban certain parties from engaging in speech merely because *other* (earlier) speakers are not silenced. On the contrary, the First Amendment "[p]rohibit[s] … restrictions" that "allow[] speech by some but not others." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

The government could not prohibit newly established cable television channels from running ads simply because it believes there are already enough commercials on ESPN and CNN. Yet that is the rationale underlying San Francisco's latest attempt to defend the Ordinance. Indeed, the exception for pre-2002 signs makes the Ordinance *more* constitutionally problematic, not less: the City prohibits a modest new poster in a shop window on a quiet street, but allows massive, eye-catching, pre-2002 billboards along Interstate 80 (of which there are many). Such "[u]nderinclusiveness raises serious doubts about whether the [City] is in fact pursuing" its asserted interests in aesthetics and traffic safety. *Brown v. Ent'mt Merchants Ass'n*, 564 U.S. 786, 802 (2011).[1]

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[1] Likewise, the Ordinance's exception for off-premises signs on city-owned bus shelters, see S.F. Planning Code § 603(c), raises similar underinclusiveness concerns.

2. The Ninth Circuit's ruling plainly is incorrect even under ordinary *Central Hudson* scrutiny. But if there were any doubt about that, the Court should grant certiorari to assure the Ninth Circuit that this Court meant what it said in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011), that "content-based" restrictions on commercial speech are subject to "heightened judicial scrutiny." Pet. 20-22.

San Francisco misreads *Sorrell*. The City suggests that the Court would have applied heightened scrutiny only if it had found that the Vermont law at issue reached noncommercial speech as well as commercial speech. BIO 17. Not so. This Court's opinion in *Sorrell* emphasized repeatedly that "heightened judicial scrutiny" applied *even if* the law burdened only commercial speech. 564 U.S. at 557, 563, 565, 566, 568, 570. The Court declined to spell out the precise nature of that "stricter form of judicial scrutiny," because Vermont's law failed even *Central Hudson* scrutiny. *Id.* at 571. But the Court unquestionably determined that heightened judicial scrutiny applied—as even the dissent understood. *See id.* at 588 (opinion of Breyer, J.) ("The Court (suggesting a standard yet stricter than *Central Hudson*) says that we must give *content-based* restrictions that burden speech 'heightened' scrutiny.")

Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015), confirms that San Francisco's law is content-based. *Id.* at 2227; see Pet. 21 & n.3. San Francisco responds that *Reed* was "not a commercial speech case." BIO 18. That is true, but there is no reason to believe the definition of "content-based" set forth in *Reed* is any different in the commercial speech

context—particularly since *Reed* cited *Sorrell*, a commercial speech case, on that point. See 135 S. Ct. at 2227 (citing 564 U.S. at 564-65).

As with other content-based restrictions, San Francisco has singled out and banned off-premises commercial signs because it believes they are of less social value than on-premises or noncommercial signs. That type of reasoning is anathema to First Amendment values, and warrants much closer scrutiny than the Ninth Circuit applied. Even in the context of commercial speech, "the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993); see Pet. 22.

3. Ultimately, the City's case, and the Ninth Circuit's approach, rest entirely on *Metromedia*. See BIO 9-12, 20-21. But *Metromedia* cannot bear the immense weight the City would place upon it. The time has come for this Court to revisit *Metromedia* and clarify its reach (or discard it entirely).

Metromedia was a case about a specific type of sign: billboards. The San Diego ordinance at issue covered any "rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure." 453 U.S. at 493 (plurality opinion). A divided Court invalidated the ordinance in its entirety. *See id.* at 521; *id.* at 528 (Brennan, J., concurring in the judgment). Three dissenting Justices would have held that the government may ban *all* billboards, both commercial and noncommercial. See Pet. 25.

The City seeks to pair Justice Stevens' dissenting vote with the votes of the Justices in the plurality to uphold a categorical ban on off-premises commercial signs. BIO 11. But that only highlights the perils of relying on dissents for purposes of establishing precedent. Like Chief Justice Burger and Justice Rehnquist, Justice Stevens perceived that the "principal question presented" in the case is whether a city may "prohibit" all "billboards." 453 U.S. at 540-41 (dissenting opinion). Justice Stevens's "affirmative answer to that question [led him] to the conclusion that the San Diego ordinance should be upheld." *Id.* at 542. "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.* To the extent Justice Stevens nonetheless opined on that issue, it was unnecessary to his resolution of the case, and should be afforded limited weight at best.[2]

The City's reliance on *Metromedia* is misplaced for other reasons as well. At most, *Metromedia*'s reasoning would extend only to anti-billboard laws, not to far broader anti-sign laws like San Francisco's. Pet. 27-28. Moreover, *Metromedia* must be understood in light of this Court's more recent commercial speech cases, which have correctly engaged in a more searching review of restrictions on commercial speech.

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[2] Because the Ninth Circuit's ruling in this case was controlled by prior circuit precedent, Pet. App. 19a, a potential vacatur and remand on this issue in light of *Hughes v. United States*, No. 17-155, would serve no useful purpose, and petitioner does not seek such a disposition. Cf. BIO 23.

In particular, the City's view of *Metromedia* is irreconcilable with *Discovery Network*, in which this Court invalidated Cincinnati's restrictions on commercial newsracks for aesthetic reasons, rejecting the city's argument that *Metromedia* supported its approach. 507 U.S. at 425 & n.20. The Court carefully scrutinized the record to determine whether commercial newsracks were any "greater an eyesore" than noncommercial newsracks, and deemed Cincinnati's "evidence" on that score "exceedingly weak," *id.* at 425—just as the record very likely will show here on remand.

San Francisco's alternative reading of *Discovery Network* is implausible. The City argues that Cincinnati's ordinance failed because Cincinnati had "renounced any concern that commercial newsracks had any particular propensity to proliferate," whereas San Francisco has adopted a legislative finding to the contrary with respect to off-premises commercial signs. BIO 16. But it strains credulity to suggest, as the City does, that the outcome in *Discovery Network* would have been different had Cincinnati simply inserted legislative findings into its ordinance like San Francisco has done. On the contrary, the outcome turned on whether the actual evidence in the record supported the city's speech restriction, which it did not. 507 U.S. at 425. Again, the Ninth Circuit here undertook no such inquiry.

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

San Francisco does not seriously dispute that the Ninth Circuit's view of *Metromedia* is in conflict with

that of the Sixth Circuit, which has explicitly rejected the notion that *Metromedia* is binding precedent regarding commercial speech. *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 470 n.9 (6th Cir. 1991), *aff'd*, 507 U.S. 410; see Pet. 29-30. The City would disregard the Sixth Circuit's opinion in *Discovery Network* because, in its view, the Supreme Court resolved the case on different grounds. BIO 25 n.10. But the case remains binding circuit precedent, and the en banc Sixth Circuit invalidated a far narrower restriction on commercial speech involving "For Sale" signs on parked cars in *Pagan v. Fruchey*, 492 F.3d 766 (6th Cir. 2007). See Pet. 32-33. It is nonsensical to suggest, as San Francisco does (BIO 25), that the Sixth Circuit prohibits a municipality from banning this limited category of signs for reasons of aesthetics and traffic safety, but would uphold a far broader ban on *all* off-premises commercial signs based on the same asserted interests with no evidentiary showing.

The City disputes whether the approaches adopted by the Third and Eleventh Circuits conflict with the Ninth Circuit's approach here. BIO 26. True, these courts have yet to confront the precise question at issue in this case—few cities outside the Ninth Circuit would dare adopt a ban as sweeping as San Francisco has. But the relevant feature is the inconsistency between these courts' approaches—which require the government to adduce concrete evidence that restrictions on commercial speech actually further the government's asserted interests in aesthetics and traffic safety—and the Ninth Circuit's ruling here. See Pet. 33-35.

III. This Case Is a Good Vehicle

Finally, San Francisco offers two arguments why, in its view, this case is a poor vehicle for the question presented. Both are meritless. There is no doubt that the question presented is squarely before this Court.

First, the City again notes that San Francisco allows pre-2002 off-premises commercial signs to remain in place. BIO 28-29. But the Ninth Circuit's ruling in no way rested on that exception; rather, that court held that *Metromedia* permits a *complete* ban on such signs. Pet. App. 19a. And at any rate, the exception for pre-2002 signs undermines, rather than advances, the City's position. See *supra* at 5-6.

Second, the City acknowledges that its Ordinance covers all types of signs, not just the billboards at issue in *Metromedia*, but asserts (without any citation) that petitioner's signs *are* billboards. BIO 29. That is not a vehicle problem either. The Ninth Circuit did not even mention that consideration, much less depend on it. Pet. App. 3a, 19a. And any such reliance would have been improper, since this case is at the pleading stage. Whether all, some, or none of petitioner's signs are "billboards" within the meaning of *Metromedia* is a question for the lower courts to resolve, if need be, on remand after discovery.

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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