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 Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CITY AND COUNTY OF SAN FRANCISCO

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QUESTION PRESENTED

Whether the First Amendment permits a municipality, with an ample existing inventory of off-site signage providing a thriving and vibrant forum for off-site commercial advertising, to ban additional ***new*** off-site commercial signs, based on express legislative findings, as well as the decades of "accumulated common-sense judgments of local lawmakers and [] many reviewing courts" that the continued proliferation of off-site commercial advertising would undermine San Francisco's interests in traffic safety and aesthetics. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981).

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INTRODUCTION

Contest Promotions complains, as it did below, that San Francisco has failed to satisfy *Central Hudson*'s test for commercial speech regulations. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). Specifically, Contest Promotions asserts that San Francisco failed to make an adequate evidentiary showing that its sign regulations directly and materially advance the City's substantial interests in traffic safety and aesthetics, and are narrowly tailored to do so. Pet. at 2-3.

To the contrary, the Ninth Circuit applied uncontroversial, long-settled law when it upheld San Francisco's sign regulations. Thirty-seven years ago, in *Metromedia*, this Court approved San Diego's commercial sign regulations, which prohibited off-site commercial signs, but allowed on-site commercial signs.[1] The Court held there can be no "substantial doubt" that traffic safety and aesthetics are "substantial governmental goals." 453 U.S. at 507-08. The Court deferred to "the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Id.* at 509. The Court recognized it is "not speculative" that billboards cause aesthetic harm, "wherever located and however constructed." *Id.* at

[1] In *Metromedia*, five Justices expressly adopted this commercial sign analysis. *See* Part I.A., *infra*. In the end, the Court remanded the case back to the California Supreme Court, because San Diego's restrictions on ***non***commercial signs violated the First Amendment, and the state courts, in the first instance, were to rule on severability of the local ordinance.

510. Finally, the Court held that a municipality may properly favor on-site advertising while prohibiting off-site commercial advertising, without undermining its municipal interests. *Id.* at 511-12.

San Francisco's sign regulations are valid, for the exact same reasons. It is entirely proper and sufficient that San Francisco supported its commercial sign regulations with legislative findings and the judgments of courts and legislatures. The "accumulated, commonsense judgment" that this Court recognized thirty-eight years ago has only become more formidable over time.

"The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000). Because different quanta of evidence are required to support commercial speech regulations in different contexts, Contest Promotions cannot rely on cases that required more evidence in different, more novel contexts that lack the well-developed history and settled acceptance of commercial sign regulation. None of the cases that Contest Promotions relies on casts any doubt on the continuing vitality of *Metromedia*'s First Amendment analysis of commercial sign regulations. There is nothing speculative or unreasonable in San Francisco's legislative determination that off-site commercial signs posed a danger of proliferation and jeopardized both traffic safety and aesthetics. Furthermore, it does not undermine San Francisco's interests to allow on-site commercial signs or to exempt noncommercial signs.

Because the Ninth Circuit faithfully followed this Court's First Amendment precedents, and because there is no division among the circuits regarding First Amendment analysis of commercial sign regulations, this Court should deny review.

STATEMENT OF THE CASE

In 2002, San Francisco's voters approved Proposition G, a ban on new general advertising signs in San Francisco. Grandfathered off-site commercial signs – *i.e.*, those that already existed in 2002 – remain lawful, and these signs provide a forum for off-site advertising.

San Francisco's sign regulations distinguish between on-site "business signs," which draw attention to the business or activity conducted on the premises, and off-site "general advertising signs," which draw attention to items or services that are not offered at the location where the sign is posted. San Francisco, like many local jurisdictions, restricts off-site signs in order to enhance safety and aesthetics.[2]

When San Francisco prohibited new general advertising signs in 2002, it supported the action with detailed and specific legislative findings:

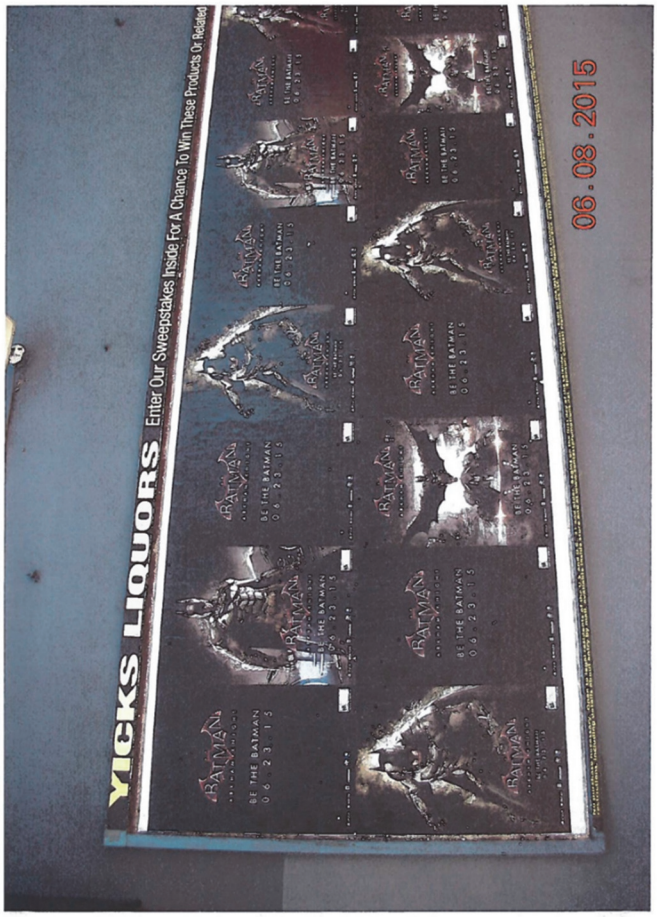
[2] Contest Promotions argues that San Francisco "restricts . . . signs advertising on-premises activity that is not the 'primary' business conducted there." Pet. at 6. San Francisco is not restricting on-site signage, but rather providing a definition for off-site signage, in order to make San Francisco's ordinance more precise and clearer to apply. *See infra* n.4.

> (1) The increased size and number of general advertising signs in the City can distract motorists and pedestrians traveling on the public right of way creating a public safety hazard.
>
> (2) General advertising signs contribute to blight and visual clutter as well as the commercialization of public spaces within the City.
>
> (3) There is a proliferation of general advertising signs visible from, on, and near historically significant buildings and districts, public buildings and open spaces all over the City.
>
> (4) San Francisco must protect the character and dignity of the City's distinctive appearance, topography, street patterns, open spaces, thoroughfares, skyline and architectural features for both residents and visitors.
>
> (5) There is currently an ample supply of general advertising signs within the City.

S.F., Cal., Planning Code § 611(f); *see* App. 124a-125a.

Seeking to evade San Francisco's restrictions on new off-site commercial signs, Contest Promotions has developed a business model to blur the distinctions between on-site and off-site advertising. Contest Promotions rents the right to erect and hang signs outside local businesses and then sells that sign space to national advertisers. The signs have nothing to do with the on-site business. In an attempt to transmute its off-site advertising into a legal on-site business

sign, Contest Promotions inserts an inconspicuous notice on the frame of the sign inviting passers-by to go inside to "win these products or related items."[3]



[3] Contest Promotions asserts that it uses "existing signage" to post its displays. Pet. at 7. To the contrary, as the sign photograph demonstrates, Contest Promotions posts its displays on purpose-built frames that Contest Promotions erects and typically attaches to the exterior wall of the store.

In February 2007, San Francisco Planning officials informed Contest Promotions that its signs in San Francisco were prohibited general advertising signs and violated the Planning Code. In December 2007, San Francisco issued a Notice of Violation ("NOV") for one of Contest Promotions' signs, asserting that the sign was a prohibited general advertising sign. Additional NOVs followed on the same grounds. App. 39a-40a.

On September 22, 2009, Contest Promotions sued San Francisco in federal District Court, "challenging the constitutionality of [San Francisco's] ban on off-site signage." The parties reached a negotiated settlement in February 2013, which San Francisco's Board of Supervisors approved in July 2014. The parties' Settlement Agreement requires Contest Promotions to submit new permit applications for its entire existing inventory of signs. The Settlement Agreement expressly requires Contest Promotions' signs to comply with all applicable laws "in effect at the time the permit for the subject sign is issued [] including, without limitation, applicable provisions of the Planning Code. . . ." App. 40a-41a. Thus, the parties' Settlement Agreement did not "recognize Contest Promotions' signs as lawful 'Business Signs,'" notwithstanding Contest Promotions' contrary assertion. *See* Pet. at 8.

On July 29, 2014, the Board of Supervisors passed Resolution No. 319-14, imposing interim zoning controls to amend the Planning Code's definition of "business sign" as follows:

> **Business Sign.** A sign which directs attention to ~~a~~ *the primary* business, commodity, service, industry or other activity which is sold, offered, or conducted~~, *other than incidentally*~~, on the premises upon which such sign is located, or to which it is affixed. Where a number of *businesses, services, industries, or other activities are conducted on the premises, or a number of* commodities*, ~~with different brand names or symbols~~* are sold on the premises, up to 1/3 of the area of a business sign, or 25 square feet of sign area, whichever is the lesser, may be devoted to the advertising of one or more of those *businesses*, commodities*, services, industries, or other activities* by brand name or symbol as an accessory function of the business sign, provided that such advertising is integrated with the remainder of the business sign, and provided also that any limits which may be imposed by this Code on the area of individual signs and the area of all signs on the property are not exceeded. *The primary business, commodity, service, industry, or other activity on the premises shall mean the use which occupies the greatest area on the premises upon which the business sign is located, or to which it is affixed.*

App. 25a.[4]

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[4] San Francisco did not "amend[ ] Article 6 to specifically prohibit Contest Promotions' signs," as Contest Promotions asserts. Pet. at 8. To the contrary, the two-thirds/one-third requirement appeared in both the original and amended versions of the ordinance. The 2014 amendments addressed a potential constitutional infirmity in the original version of section 602.3 that the

San Francisco rejected Contest Promotions' permit applications for a portion of its existing sign inventory. Contest Promotions then commenced its Second Federal Action, asserting among other claims that the amended section 602.3 violated the First Amendment because its distinction between on-site commercial signs and off-site commercial signs was unjustified. The District Court dismissed Contest Promotions' federal claims with prejudice and the Ninth Circuit affirmed (Case No. 15-16682).

In its Third Federal Action, Contest Promotions argued that San Francisco's exemption of noncommercial signs from its sign regulations improperly discriminated against commercial messages. Contest Promotions appealed the District Court's denial of its preliminary injunction motion and the District Court's ultimate dismissal with prejudice, and the Ninth Circuit affirmed (Case No. 17-15909).

District Court had identified in Contest Promotions' 2009 federal action. In the 2009 action, the District Court had denied San Francisco's motion for judgment on the pleadings, identifying the "other than incidentally" language in the original version of section 602.3 as vulnerable to a vagueness challenge. *See* App. 40a-41a. Accordingly, after settling the 2009 lawsuit, San Francisco removed the constitutionally vulnerable language from its ordinance. In its place, San Francisco now requires that an on-site sign direct attention to the "primary business" on the site, and San Francisco has provided a definition for "primary business" to overcome any vagueness argument.

On February 10, 2015, the Board of Supervisors passed Ordinance No. 20-15, which made permanent, in substantially identical form, the interim controls enacted through Resolution No. 319-14.

With its Petition for Certiorari, Contest Promotions now seeks review of the Ninth Circuit opinions affirming the dismissal of its Second and Third Federal Actions.

REASONS FOR DENYING THE PETITION

Contest Promotions asks this Court to decide whether municipalities may "ban all signs, of any kind, advertising off-premises commercial activity." Pet. at i. First, as explained above, San Francisco does not ban "all" commercial off-site signs. To the contrary, all signs that existed in 2002 remain. San Francisco merely put an end to the continued unrestrained proliferation of these off-site commercial signs.

In any event, Contest Promotions acknowledges there is no division among the circuits on the issue. Pet. at 5, 32 (predicting other circuits "would" reach a different result). Rather, the Ninth Circuit and other Courts of Appeals have applied this Court's settled commercial speech law to recognize municipalities' authority to distinguish between on-site and off-site commercial advertising.

I. The Ninth Circuit's Decision Follows This Court's First Amendment Teachings.

When analyzing San Francisco's sign regulations, the Ninth Circuit expressly followed *Central Hudson* and *Metromedia*. Further, the Ninth Circuit's opinions

are fully consistent with this Court's subsequent commercial speech cases, including *Discovery Network*, *Sorrell*, and *Reed*. Notwithstanding Contest Promotions' contrary assertions, the Ninth Circuit's decisions do ***not*** "f1[y] in the face of this Court's commercial speech precedent." *See* Pet. at 12.

A. The Ninth Circuit Followed *Metromedia* When It Deferred to San Francisco's Legislative Judgment that Commercial Signs Impact Safety and Aesthetics.

Contest Promotions asserts that the Ninth Circuit "effectively" eliminated the final two prongs of the *Central Hudson* inquiry and ignored the requirement that San Francisco establish the requisite "fit" between its substantial government interests and its commercial sign regulations. Pet. at 12-22. To the contrary, the Ninth Circuit simply applied *Metromedia*'s deference to San Francisco's legislative judgments, based on the "accumulated, common sense judgment" that commercial signs jeopardize public safety, and *Metromedia*'s recognition that commercial signs' aesthetic harms are "not speculative."

In *Metromedia*, this Court provided clear guidance and recognized three principles that together establish the constitutionality of San Francisco's commercial sign regulations.

1. Courts must defer to legislative determinations that billboards have a negative impact on traffic safety and aesthetics.

2. Cities may regulate commercial billboards to promote their substantial government interests in traffic safety and aesthetics.

3. A city may properly decide that its substantial interest in safety and aesthetics will yield to on-site commercial signs, but not off-site commercial signs.

In *Metromedia*, seven Justices agreed, on the record before the Court, that San Diego could ban off-site commercial billboards. Five Justices expressly held that courts should not second-guess "the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981) (plurality) and 541 (Stevens, J., dissenting in part; "I [ ] join Parts I through IV of Justice White's opinion.").

Likewise, five Justices expressly "recognize[d] that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'" *Id.* at 510, 541. And five Justices expressly approved the regulatory distinction between on-site commercial advertising and off-site commercial advertising. *Id.* at 511-12; 541.[5]

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[5] The analysis of these five Justices reflects the narrowest rationale among the seven Justices who held that San Diego's regulation of on-site and off-site commercial signs satisfied *Central Hudson*. Justices Burger and Rehnquist would have deferred even more broadly to local legislative determinations and would have upheld San Diego's regulation of noncommercial signs as well. *Id*. at 555-70.

Contrary to the express teaching of *Metromedia*, Contest Promotions would require municipalities to reinvent the wheel and would impose on municipalities the burden of assembling new facts and evidence every time a billboard company decides to bring another lawsuit challenging local regulation of off-site commercial advertising. None of this Court's precedents that Contest Promotions relies on support Contest Promotions' demand for new facts and new evidence each time a municipality undertakes to regulate commercial signs. It is Contest Promotions who ignores this Court's binding precedent and decades of accumulated judicial and legislative knowledge.

The cases on which Contest Promotions relies, which require different quanta of proof to justify commercial speech regulations in different contexts, cast no doubt on the continuing vitality of *Metromedia*'s analysis of commercial sign regulation. "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000). In view of the well-settled and established wisdom that commercial advertising significantly impacts safety and aesthetics, a lower quantum of evidence is required to justify commercial sign regulations than is required to justify commercial speech regulations in more novel contexts.

Based on the sliding scale principle articulated in *Nixon v. Shrink Missouri Government PAC*, each of the cases on which Contest Promotions relies is readily

distinguishable. In *Edenfield v. Fane*, 507 U.S. 761 (1993), this Court struck down a commercial speech regulation that was based solely on "mere speculation and conjecture." *Id.* at 770-71. In *Edenfield* there was no evidence that the ban on personal solicitation by certified public accountants in fact protected consumers from fraud or overreaching, and the assertion was not inherently plausible. By contrast, San Francisco's sign regulations are not based on "speculation and conjecture," but on decades of common-sense wisdom, recognized and approved in *Metromedia*, that billboards impair traffic safety and aesthetics.

Likewise, the commercial speech restrictions in *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); and *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), relied on speculation and conjecture and were inherently implausible, in contrast to the established wisdom of courts and legislatures recognizing the detrimental impacts of commercial signs. Accordingly, in *Ibanez*, the Court required Florida to demonstrate that in order to combat fraud and deception, it was necessary to prohibit an attorney from truthfully identifying herself in advertising as a certified public accountant and certified financial planner. In *Rubin*, the Court required the government to demonstrate that it was necessary to prohibit displays of alcohol content on beer labels in order to protect against "strength wars" among brewers who might compete based on the

potency of their beer. In *Zauderer*, the Court required Ohio to demonstrate that illustrations in attorney advertising would lead to fraud and manipulation. Finally, in *Thompson*, the Court required the FDA to demonstrate that it was necessary to prohibit pharmacies from advertising compounded drugs in order to preserve the FDA's new drug approval process and to protect public health.[6]

Nothing in this Court's commercial speech jurisprudence casts any doubt on the propriety of the Ninth Circuit's deference to San Francisco's detailed and specific legislative determinations that the "increased size and number of general advertising signs" in particular were "creating a public safety hazard," that such signs "contribute to blight and visual clutter as well as the commercialization of public spaces," that there was a "proliferation" of such signs in "open spaces all over the City," and that there was "currently an ample supply of general advertising signs within the City." S.F., Cal., Planning Code § 611(f). Such deference does not "fly in the face of this Court's commercial speech precedent," but rather, faithfully follows this Court's teachings.

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[6] *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), and *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), on which Contest Promotions relies, *see* Pet. at 16-17, 22, are irrelevant because these cases involve core First Amendment issue advocacy and political speech. In *Schaumburg*, the plaintiffs challenged local restrictions on door-to-door charitable solicitations. In *Ladue*, the plaintiff had erected a lawn sign imploring viewers to: "Say No to War in the Persian Gulf. Call Congress Now." 512 U.S. at 45.

B. Neither *Discovery Network*, *Sorrell*, nor *Reed* Undermines *Central Hudson*'s Framework for Evaluating Commercial Speech Regulations.

Both Contest Promotions and amici suggest that subsequent cases from this Court have made *Central Hudson*'s test more demanding for "content-based" commercial speech restrictions. Of course all commercial speech restrictions are "content-based," in the sense that they are directed, by definition, to commercial speech. But diligent reading of this Court's subsequent cases confirms that *Central Hudson* continues to provide the operative analysis for commercial speech regulations.

City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993), affirmatively refutes amici's suggestion that it modifies *Central Hudson*'s commercial speech analysis. Indeed, in *Discovery Network*, the Court characterized the commercial/noncommercial distinction in Cincinnati's ordinance as content-based. 507 U.S. at 429. Cincinnati had banned all newsracks distributing commercial publications. Yet, because Cincinnati's ordinance restricted only commercial speech, the Court applied *Central Hudson*'s intermediate scrutiny. *Id.* at 416. Cincinnati's ordinance failed intermediate scrutiny because its prohibition on commercial newsracks bore "no relationship ***whatsoever*** to the particular interests that the city has asserted." *Id.* at 424 (emphasis in original). Cincinnati's newsrack ordinance ran afoul of the First Amendment because it was irrational.

San Francisco's legislative findings supporting its sign regulations contrast with the complete absence of evidence in *Discovery Network* that Cincinnati's ban on commercial newsracks would promote its aesthetic interest in removing sidewalk clutter. In *Discovery Network*, Cincinnati had expressly renounced any concern that commercial newsracks had any particular propensity to proliferate. 507 U.S. at 425-26. By contrast, San Francisco expressly found that a ban on additional off-site commercial advertising was necessary because general advertising signs did indeed have a unique propensity to proliferate. S.F., Cal., Planning Code § 611(f)(3); App. 124a. Furthermore, San Francisco has in fact done what the Court suggested in *Discovery Network*. San Francisco has regulated the "size, shape, appearance [and] number" of off-site commercial signs, by prohibiting new ones and allowing the existing inventory of off-site general advertising signs to survive. *See* Pet. at 18-20 (*citing Discovery Network*).

Contest Promotions next asserts that *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), modified *Central Hudson*'s commercial speech analysis and imposed a "stricter form of judicial scrutiny." Pet. at 20. Contest Promotions misreads *Sorrell*. The Court explained in *Sorrell* that "[i]n the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory." *Id.* at 571. That is because, of course, in the noncommercial context, a content-based restriction on speech is subject to strict scrutiny and therefore "presumptively invalid." *Id*. The

Court, however, accepted Vermont's argument that "a different analysis applies here because [the Vermont law] burdens only commercial speech." *Id*. And just like the *Discovery Network* Court before it, the Court in *Sorrell* applied *Central Hudson*'s intermediate scrutiny.

Because the Court in *Sorrell* determined that the Vermont law failed *Central Hudson*'s intermediate scrutiny, "there [was] no need to determine whether all speech hampered by [the Vermont law] is commercial," or whether, on the other hand, Vermont's law reached noncommercial speech too. *Id*. at 571. The "stricter form of judicial scrutiny" referenced in *Sorrell* would apply only in the event that the Court determined (which it did not) that Vermont's law reached noncommercial speech in addition to commercial speech.

Last year, the Ninth Circuit addressed this exact question and concluded that "*Sorrell* did not modify the *Central Hudson* standard." *Retail Digital Network v. Prieto*, 861 F.3d 839, 846 (9th Cir. 2017) (en banc). No party sought this Court's review of *Prieto*. No circuit has held to the contrary or cast doubt on the Ninth Circuit's analysis in *Prieto*. To the contrary, courts assessing commercial speech restrictions after *Sorrell* have continued to apply *Central Hudson*. *See*, *e.g.*, *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1055 (8th Cir. 2014) ("The upshot is that when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*."); *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 515-16 (7th Cir.

2014) ("Whatever the justification, the Court has not strayed from its commercial-speech jurisprudence despite calls for it to do so."); *United States v. Caronia*, 703 F.3d 149, 164 (2d Cir. 2012) ("The [*Sorrell*] Court did not decide the level of heightened scrutiny to be applied, that is, strict, intermediate, or some other form. . . ", and concluding that the government failed to justify a criminal prosecution "even under *Central Hudson*'s less rigorous intermediate test"); *Nicopure Labs, LLC v. Food & Drug Admin.*, 266 F. Supp. 3d 360, 411-12 (D.D.C. 2017) (expressly following *Prieto*); *Vugo, Inc. v. City of Chicago*, 273 F. Supp. 3d 910, 915 (N.D. Ill. 2017) ("the [Supreme] Court continues to follow the *Central Hudson* framework and to apply its intermediate scrutiny standard in commercial speech cases, even where they involve content-based restrictions.").

Contest Promotions' reliance on *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015), is similarly misplaced. *See* Pet. at 21. *Reed* is not a commercial speech case at all. *Reed*'s majority opinion does not mention *Central Hudson*. In *Metromedia*, seven Justices expressly agreed that a local legislature could properly decide that it favors on-site commercial advertising over off-site commercial advertising – to allow the former and forbid the latter. In *Reed*, Justice Alito's concurrence, joined by Justices Kennedy and Sotomayor, agreed. The concurrence specified that "[r]ules distinguishing between on-premises and off-premises," are not content-based and not subject to heightened scrutiny. *Id.* at 2233 (Alito, J., concurring). And the three remaining Justices who concurred in the *Reed* judgment, Justices

Kagan, Ginsberg, and Breyer, rejected the automatic application of strict scrutiny to subject-matter exemptions in sign ordinances. *Id.* at 2234-39.[7]

The lower courts are unanimous that *Reed* did not alter *Central Hudson*'s commercial speech analysis. In *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1234-35 (11th Cir. 2017), on which Contest Promotions relies, *see* Pet. at 20 n.2, the Eleventh Circuit held "[c]hallenges to restrictions on commercial speech are evaluated according to the rubric set forth by the Court in *Central Hudson*. . . ."; *Accord*, *e.g.*, *Kimberly-Clark Corp. v. District of Columbia*, 286 F. Supp. 3d 128 (D.D.C. 2017) (*citing Reed* for the proposition that "content-based regulations of noncommercial speech are subject to strict scrutiny"); *Boelter v. Hearst Communications, Inc.*, 269 F. Supp. 3d 172, 196 n.11 (S.D.N.Y. 2017) ("Absent controlling precedent to the contrary, the Court continues to apply intermediate, rather than strict, scrutiny to content-based regulations targeting commercial speech."); *RCP Publications Inc. v. City of Chicago*, 204 F. Supp. 3d 1012, 1017 (N.D. Ill. 2016) ("This Court, however, does not see

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[7] Amici Goldwater Institute and Pacific Legal Foundation assert that *Reed* overruled *Central Hudson* and requires strict scrutiny for commercial sign regulations. Contest Promotions does not make that bold argument. *See* Pet. at 6 (asserting that "normal" First Amendment commercial speech principles apply to commercial sign regulations). As explained above, a fair reading of *Reed* repudiates amici, and lower courts have not adopted amici's position. Indeed, amicus Pacific Legal Foundation acknowledges that a circuit split on the issue is "unlikely to develop."

Reed as overturning the Supreme Court's consistent jurisprudence subjecting commercial speech regulations to a lesser degree of judicial scrutiny. The case says nothing of the kind, indeed, it does not even address the commercial-noncommercial distinction.").[8]

This Court has declined prior invitations to "clarify" commercial speech standards after *Reed*. *See Chiropractors United for Res. & Educ. v. Beshear*, 137 S.Ct. 1133 (2017) (*cert. denied*); *Fanning v. FTC*, 137 S.Ct. 627 (2017) (*cert. denied*).

C. *Marks* Does Not Suggest That the Court Should Ignore *Metromedia*'s Analysis of Commercial Sign Regulations.

Contest Promotions asserts that the Ninth Circuit erred in this case when it relied on *Metromedia* as controlling precedent. Pet. at 23-28.

Metromedia provides clear guidance on constitutional limits to regulation of commercial advertising. Justice White's partial dissent, expressly joining Parts I-IV of the plurality, added a fifth vote to the plurality's *Central Hudson* analysis of commercial signs. And the five-justice analysis of commercial sign regulations reflects the narrowest rationale among the seven

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[8] *Thomas v. Schroer*, 116 F. Supp. 3d 869 (W.D. Tenn. 2015), on which Contest Promotions relies, *see* Pet. at 21, is not to the contrary. *Thomas* involved only noncommercial speech. The " 'billboard was displaying exclusively on-premise, noncommercial content.' " *Id.* at 874 (*quoting* amended complaint).

Justices who approved of San Diego's commercial sign regulations.

Indeed, this Court has treated *Metromedia*'s analysis of commercial signs as binding precedent. For example, in *Board of Trustees v. Fox*, 492 U.S. 469 (1989), the Court expressly relied on its reasoning in *Metromedia*. "[I]n *Metromedia, Inc. v. San Diego*, where we upheld San Diego's complete ban of off-site billboard advertising, we did not inquire whether any less restrictive measure (for example, controlling the size and appearance of the signs) would suffice to meet the city's concerns for traffic safety and esthetics." *Id.* at 479.

By contrast, *Metromedia* does not provide a single rationale that garnered five votes with respect to constitutional limits on noncommercial sign regulations. The four-Justice plurality and the two-Justice concurrence agreed on the outcome with respect to noncommercial signs, but not the rationale. The concurrence applied "a First Amendment analysis quite different from the plurality's." *Metromedia*, 453 U.S. at 526 (Brennan, J., concurring). Because San Francisco exempts noncommercial signs from its sign regulations, *Metromedia*'s discussion of noncommercial sign regulations is irrelevant to this case.

To the extent lower federal courts characterize *Metromedia* as lacking a clear precedential effect, the observation is accurate with respect to the analysis of noncommercial signs, not *Metromedia*'s analysis of on-site and off-site commercial signs. For example, the

Delaware laws challenged in *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994), banned all outdoor signs in the public right of way, including noncommercial signs, with certain content-based exceptions. The plaintiff was a political candidate who sued because his roadside campaign signs had been removed. Since the *Rappa* case involved core political speech (not commercial speech), the Third Circuit accurately determined that *Metromedia* lacked controlling guidance. The Third Circuit recognized that Justice Stevens joined the *Metromedia* "plurality's decision as to the regulation of commercial speech." *Id.* at 1055 n.18. Accordingly, the Third Circuit's treatment of *Metromedia* is entirely consistent with the Ninth Circuit's here.

In *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005), the Eleventh Circuit presents the identical nuanced analysis of *Metromedia*, distinguishing between commercial and noncommercial signs. Citing Justice Stevens' partial dissent, the Eleventh Circuit recognized that "[a] majority of the Court [in *Metromedia*] agreed that the ordinance was constitutional insofar as it banned offsite commercial advertising while continuing to allow onsite commercial advertising, since the city could permissibly distinguish between types of ***commercial*** speech." *Id.* at 1260 (emphasis in original). And like the Third Circuit in *Rappa*, the Eleventh Circuit recognized that *Metromedia* provides no binding rule as to noncommercial speech. "[A]t least two of our sister Circuits have applied *Marks* analysis to *Metromedia*'s noncommercial-speech holding and have found no controlling opinion."

Id. at 1261 n.10 (*citing Rappa* and *Discovery Networks*).[9]

Contest Promotions asserts that according any precedential effect to *Metromedia* violates the rule in *Marks v. United States*, 430 U.S. 188 (1977), for extracting a rule of decision from a fractured Supreme Court opinion. *See* Pet. at 25-26. As explained above, the Ninth Circuit's reliance on *Metromedia* in this case complied fully with the *Marks* rule and is entirely consistent with the other circuits. To the extent the *Marks* rule requires any further clarification, this Court will have the opportunity to do that in *Hughes v. United States*, 138 S.Ct. 542 (2017) (*cert. granted*). It would be duplicative to accept review of this case too for that purpose.

In any event, to the extent *Metromedia*'s analysis of commercial sign regulations may not be controlling, the Ninth Circuit has adopted it as persuasive and has applied that analysis consistently for decades. *See*, *e.g.*, *Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 738 (9th Cir. 2011); *World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d 676 (9th Cir. 2010); *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898 (9th Cir.), *cert. denied*, 558 U.S. 1091 (2009); *Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810 (9th

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[9] *Tanner Advertising Grp., L.L.C. v. Fayette County*, 451 F.3d 777 (11th Cir. 2006) (en banc), on which Contest Promotions relies, *see* Pet. at 30, is not relevant here. Judge Birch, in his concurrence, correctly states that the *Metromedia* plurality's analysis of the scope of standing for an overbreadth claim did not receive five votes. *Id.* at 794 (Birch, J., concurring). Standing is not an issue in Contest Promotions' petition.

Cir. 2003), *abrogated on other grounds by Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008); *Ackerley Communications of the Northwest Inc. v. Krochalis*, 108 F.3d 1095 (9th Cir. 1997); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993); *National Advertising Co. v. City of Orange*, 861 F.2d 246 (9th Cir. 1988). This Court already denied review of this issue in *Metro Lights*. And, as explained below in Part II, there is no conflict among the circuits in applying *Metromedia*'s First Amendment analysis to on-site and off-site commercial signs.

II. There Is No Division Among the Circuits on the Question Presented.

Contest Promotions acknowledges there is no current conflict among the circuits on the question presented. Contest Promotions merely predicts a future conflict. *See* Pet. at 32 (other circuits "would reach a different outcome than the Ninth Circuit reached here"). Contest Promotions' mere prediction that the circuits may disagree in the future is perhaps the most compelling reason to deny review. But even Contest Promotions' prediction is ill-founded, because the prediction is based on a fundamental misreading of the cases.

The appellate decisions that Contest Promotions relies on do not in fact reflect conflicting approaches to *Metromedia*. As explained above, the federal courts uniformly recognize that *Metromedia* continues to provide the controlling First Amendment analysis for

on-site and off-site commercial signs. Some of the cases that Contest Promotions relies on involve noncommercial speech, and therefore properly apply more searching scrutiny. And the non-sign commercial speech cases simply illustrate the principle, articulated in *Nixon v. Shrink Missouri Government PAC*, *supra*, that different quanta of proof apply to heightened scrutiny in different factual contexts.

Contest Promotions asserts that the Sixth Circuit's decision in *Pagan v. Fruchey*, 492 F.3d 766 (6th Cir.) (en banc), *cert. denied*, 552 U.S. 1062 (2007), "cannot be reconciled" with the Ninth Circuit's reasoning in this case. *See* Pet. at 32-33. To the contrary, the Sixth Circuit in *Pagan* expressly acknowledged the rule articulated in *Metromedia* that legislative findings are sufficient to support a regulatory distinction between on-site and off-site commercial signs. *Id*. at 774-75. The respondent in *Pagan* made exactly that point in his brief in opposition, and this Court denied review of *Pagan*. It was the novelty and implausibility of its asserted justifications that defeated Glendale's ban on "for sale" signs on parked cars, not a departure from *Metromedia*.[10]

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[10] Since the en banc Sixth Circuit acknowledged and distinguished *Metromedia* in *Pagan*, and since this Court affirmed the Sixth Circuit's panel decision in *Discovery Network* on the ground that Cincinnati's prohibition against commercial newsracks was irrational, the Sixth Circuit panel's discussion of *Metromedia* in footnote 9 of its *Discovery Network* opinion does not constitute a circuit break from the overwhelming consensus that *Metromedia* continues to provide the governing analysis for on-site and off-site commercial advertising. *See* Pet. at 29-30.

Likewise, *FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290 (11th Cir. 2017), involved a prohibition against commercial solicitations in the public right-of-way and distribution of commercial handbills to pedestrians. *See* Pet. at 33-35. The Eleventh Circuit upheld the district court's preliminary injunction because the ordinance was not narrowly tailored. "[T]he City failed to consider numerous and obvious less burdensome alternatives." *Id.* at 1301. The Eleventh Circuit in no way repudiated *Metromedia*'s analysis of fixed on-site and off-site commercial signs.

Contest Promotions asserts that the Third Circuit's decision in *Interstate Outdoor Advertising, L.P. v. Zoning Board*, 706 F.3d 527 (3d Cir. 2013), is "inconsistent" with the Ninth Circuit's reliance on *Metromedia*. Pet. at 35. To the contrary, the Third Circuit in *Interstate Outdoor* expressly adopted *Metromedia*'s deference to the municipality's determination that its sign regulation would promote its substantial interests in safety and aesthetics. "The force of the deference the Court [in *Metromedia*] afforded San Diego's judgments regarding aesthetics and safety is controlling here." *Id.* at 532.

As explained above, the Third, Sixth and Eleventh Circuits have in fact adopted and accepted *Metromedia*'s analysis of commercial signs, notwithstanding Contest Promotions' misreading of those cases. Contest Promotions acknowledges that the Fourth and Fifth Circuits, in addition to the Ninth Circuit, apply *Metromedia*'s analysis to commercial signs. Pet. at 31-32 (*citing RTM Media, L.L.C. v. City of Houston*, 584

F.3d 220, 225 (5th Cir. 2009), *cert. denied*, 559 U.S. 974 (2010); and *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269, 1272 (4th Cir. 1986), *cert. denied*, 479 U.S. 1102 (1987)). The remaining circuits that have considered the question do the same.

In *Lavey v. City of Two Rivers*, 171 F.3d 1110 (7th Cir. 1999), the Seventh Circuit upheld a sign ordinance that is substantively similar to San Francisco's. The Court recognized that on the issue of the on-site/off-site distinction for commercial advertising, Justice Stevens joined the *Metromedia* plurality. "Therefore, the lead opinion represented a five-Justice majority of the Court on these issues." *Id.* at 1114 n.14. *Accord*, *e.g.*, *Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 106-07 (2d Cir.), *cert. denied*, 562 U.S. 981 (2010) ("*Metromedia* governs plaintiffs' challenge"); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 803 (8th Cir. 2006) ("*Metromedia* itself upheld restrictions on off premises commercial signs similar to the restrictions on non accessory signs here. [citation omitted] Advantage's First Amendment right to engage in commercial speech was not violated."); *Ackerley Communications of Massachusetts, Inc. v. City of Somerville*, 878 F.2d 513, 517 (1st Cir. 1989) ("A majority [in *Metromedia*] saw no First Amendment problem in distinguishing between onsite and offsite commercial speech.").

This Court declined review of *Metro Lights*, *cert. denied*, 558 U.S. 1091 (2009); *Clear Channel*, *cert. denied*, 562 U.S. 981 (2010); *RTM Media*, *cert. denied*, 559 U.S. 974 (2010); and *Major Media*, *cert. denied*, 479 U.S.

1102 (1987). There is no compelling reason to revisit the question in this case. Whether or not *Metromedia*'s analysis of on-site and off-site commercial sign regulation is binding or merely persuasive, Contest Promotions has failed to demonstrate any division among the circuits applying *Metromedia* to commercial sign regulations.

III. This Case Is Not an Appropriate Vehicle for the Question Presented.

Even if there were a division among the circuits (and there is not), this case would not be an appropriate vehicle for addressing whether a complete municipal ban on off-site commercial advertising complies with the First Amendment.

San Francisco does not in fact "ban all signs . . . advertising off-premises commercial activity," as Contest Promotions has framed its question presented. Rather, San Francisco has preserved the inventory of general advertising signs that existed in 2002. *See* S.F., Cal., Planning Code § 611; Pet. at 6 (acknowledging that San Francisco's 2002 legislation banned "all ***new*** 'General Advertising Signs.'" (emphasis supplied)). Accordingly, this case is not the proper vehicle to consider the question presented. This case in fact presents a mundane question: may a municipality, which offers a well-functioning forum for off-site commercial advertising, rely on express legislative findings, as well as decades of "accumulated common-sense judgments of local lawmakers and [] many reviewing

courts," to support a moratorium on ***new*** off-site commercial advertising sites.

Contest Promotions complains that San Francisco's sign regulations affect "***all*** types of signs," not just billboards, and is therefore broader than San Diego's commercial sign regulations in *Metromedia*. Pet. at 5-6, 27 (emphasis in original). Contest Promotions' signs fall squarely in the category of "outdoor advertising display signs" at issue in *Metromedia*. Contest Promotions' signs are "rigidly assembled sign[s] . . . permanently attached to a building . . . used for the display of, a commercial or other advertisement to the public." 453 U.S. at 493. Contest Promotions, therefore, is not a suitable plaintiff to complain that San Francisco's ordinance may reach some sign structures (*e.g.*, a picket sign or yard sign) that San Diego did not. *See id.* at 494 n.2.[11]

[11] As for the fictional convenience store owner that Contest Promotions describes, *see* Pet. at 2, 37-38, a future case may test that hypothetical as-applied challenge to San Francisco's sign regulations. It is true that San Francisco does not contemplate that the convenience store owner will promote her separate laundromat with off-site general advertising signs hanging outside her convenience store and visible to passers-by and motorists (and which would give her an advertising advantage over owners of competing laundromats in the neighborhood). Nothing, however, prevents her from promoting her laundromat within her convenience store, with, for example, flyers or discount coupons at the cash register – or at the laundry detergent display. And nothing prevents her from including as an integrated message on 1/3 of the area or 25 square feet (whichever is less) of her business sign an invitation to enter the store for discount coupons to her nearby laundromat. *See* S.F., Cal., Planning Code § 602.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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