

No. _____

In the Supreme Court of the United States

GREGORY LUCE and NICHOLAS NEWMAN,
Petitioners,

v.

TOWN OF CAMPBELL, WISCONSIN,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a time, place, and manner restriction forbidding speech on the public sidewalk of a highway overpass should be based on objective evidence, or does the First Amendment only require that a municipality offer a subjective basis for its speech restriction without evidentiary support.

PARTIES TO THE PROCEEDINGS

Petitioners, Greg Luce and Nicholas Newman, filed this 42 U.S.C. § 1983 lawsuit to vindicate their First Amendment rights and were the Plaintiffs below.

Respondent, Defendant below, is the Town of the Campbell, Wisconsin.

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PETITION FOR WRIT OF CERTIORARI

The Seventh Circuit misapplied this Court's decisions and departed from its own prior opinions and those of its sister circuits to find that an ordinance restricting speech on the public sidewalk need not be premised on objective evidence. The decision of the Seventh Circuit departs from at least three circuits. Those courts, having considered similar concerns to the public's safety, ruled that the First Amendment requires an objective showing, premised upon evidence. The Seventh Circuit, however, departed from these cases by relying on the subjective opinion of one of Respondent's employees as the reason for enacting the ordinance. But such an opinion, even if reflective of Respondent's belief, cannot determine the objective reasonableness of the speech restriction. And First Amendment restrictions must be premised on more than subjective feelings and opinions. The First Amendment, instead, requires an objective finding that the ordinance serves a significant governmental interest and is no more extensive than necessary. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). Therefore, this Court should grant the petition and reverse the Seventh Circuit's panel decision.

OPINIONS BELOW

The Seventh Circuit panel's opinion appears at 872 F.3d 512 (7th Cir. 2017). (App. 1-11). The order denying rehearing and rehearing en banc is not reported, but is available at App. 58-59. The district court's decision appears at 113 F. Supp. 3d 1002 (W.D. Wis. 2015), *aff'd in part, vacated in part sub nom, Luce v. Town of Campbell, Wisconsin*, 872 F.3d at 512. (App. 22-57).

STATEMENT OF JURISDICTION

The Seventh Circuit Court of Appeals issued its opinion on September 22, 2017. It denied the Petitioners' timely petition for rehearing and rehearing en banc on November 21, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution states in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble." U.S. Const. amend. I.

The Town of Campbell, Wisconsin Ordinance 9.12 states:

No person shall display, place, erect, post, maintain, install, affix, or carry any sign, flags, banners, pennants, streamers, balloons or any other similar item:

(1) on any portion of a vehicular or pedestrian bridge or overpass that passes over a freeway or expressway as defined in WIS. STAT. § 346.57, or a controlled access highway as defined in WIS. STAT. § 990.01, when such highway has a speed limit of more than 40 miles per hour, whether the highway is under the jurisdiction of the federal, state or local government, provided that such sign is visible from such freeway, expressway or controlled access highway.

(2) within one hundred (100) feet of any portion of a vehicular or pedestrian bridge or overpass that passes over a freeway or expressway as defined in WIS. STAT. § 346.57, or a controlled access highway as defined in WIS. STAT. § 990.01, when such highway has speed limit of more than 40 miles per hour, whether the highway is under the jurisdiction of the federal, state or local government, provided that such sign is visible from such freeway, expressway or controlled access highway.¹

Town of Campbell, Wisconsin Ordinance 9.12 (hereinafter “Ordinance”); (App. 31).

STATEMENT OF THE CASE

I. Facts.

The pedestrian overpass in the Town of Campbell, Wisconsin is a public sidewalk enclosed by chain link fencing that spans over the I-90 roadway, creating access to the two residential streets parallel to the interstate. (App. 76-81). Motorized vehicles are prohibited on the pedestrian overpass, and the fencing on each side of the public sidewalk protects pedestrians and stops objects from falling on the interstate. (App. 76-97). The pedestrian overpass has existed in the Town of Campbell since at least 1965, and Respondent never restricted speech on the overpass until passing its Ordinance on October 8, 2013. (App. 25).

¹ For this petition, Petitioners solely challenge part (1) of the Ordinance, as part (2) is currently being litigated on remand to the district court.

Before the passage of the Ordinance, in August of 2013, Petitioners Nick Newman and Greg Luce, with other individuals and small groups, engaged in political and religious demonstrations on the pedestrian overpass. (App. 28). Then Chief of Police for the Town of Campbell, Tim Kelemen, alleged that he received some complaints regarding the demonstrations, but those complaints expressed disagreement with Petitioners' political and religious viewpoints. (App. 28, fn. 5).

Tim Kelemen served as Chief of Police of the Town of Campbell during the enactment of the Ordinance and was the sole subjective opinion that the Town relied on to pass the Ordinance. (App. 2, 28-29). Respondent relied solely on the allegations presented by Kelemen to enact its Ordinance. (App. 28-29). During the pendency of this case, Kelemen pled to criminal charges for harassing Petitioner Greg Luce by unlawfully using a computer. (App. 3). Kelemen resigned from the police force. (App. 3). The Seventh Circuit panel noted that "Kelemen's behavior . . . undermin[es] his credibility" and "***Given Kelemen's misconduct, it is not possible . . . to accept his statements as truthful.***" (App. 4-5) (emphasis added).

On October 8, 2013, the Town of Campbell's Board, with the sole help and guidance of Kelemen, enacted the Ordinance with the specific purpose of prohibiting Petitioners' overpass demonstrations. (App. 25). The Ordinance prohibits any person from displaying, posting, or carrying "any sign, flags, banners, pennants, streamers, balloons or any other similar item" on any portion of a vehicular or pedestrian bridge

or overpass that passes over a highway with a speed limit greater than 40 miles per hour where the sign is visible from the roadway.

The ordinance applies to any group size, even an individual standing on the public sidewalk alone. The ordinance provides no specificity as to what constitutes “a sign, flags, banners, pennants, streamers, balloons or any other similar item,” and establishes a complete ban regardless of size.² It is undisputed that Petitioners’ free speech demonstrations have never caused a vehicular accidents or traffic congestion. (App. 84-86).

This case concerns three events in which Respondent enforced the ordinance against the Petitioners:

First, on October 24, 2013, Petitioner Greg Luce and four friends wore yellow t-shirts with individual letters, together spelling the words “IMPEACH” on the front and “OBAMA”³ on the back, while on the sidewalk of the pedestrian overpass. (App. 31-32). The t-shirts did

² There are two parts to the ordinance. The first restricts signs on the overpass. The second part restricts signs within 100 feet of the overpass. The Seventh Circuit panel had no problem remanding the second part of the ordinance (the 100-foot rule) because the Respondent provided *no* justification for its free speech restriction. (App. 10). Respondent similarly relied on the credibility of Kelemen, and Kelemen only, for the part of the ordinance that bans all signs on the overpass that is the subject of this petition.

³ Today, such an ordinance could be used by a municipality to ban an individual or a small group of individuals with “IMPEACH TRUMP” t-shirts because the shirt or shirts constitute a sign according to the broad language of the Ordinance.

not cause any accidents, near accidents, or any other unsafe conditions. (App. 84-86). But, despite the lack of any demonstrated traffic safety concern, a Town of Campbell police officer, under the supervision of Kelemen, instructed Petitioner Greg Luce that he violated the ordinance and immediately needed to leave the overpass.⁴

Second, on October 27, 2013, Petitioner Nicholas Newman carried a rolled up, standard sized American flag to the overpass, wanting to display the flag as a political expression. (App. 32). Petitioner Newman unfurled the American flag while on the sidewalk of the pedestrian overpass and was cited by the Town of Campbell for violating the ordinance.

Third, on December 7, 2013, Kelemen cited Petitioner Greg Luce for peacefully holding a historical American flag on the public sidewalk of the pedestrian overpass. (App. 32).

Petitioners commissioned Dr. Dorothy, a Ph.D. in Civil Engineering, with over 20 years of experience in highway design, maintenance of traffic, and roadway and roadside safety, to complete a visual and photographic survey of the Respondent's pedestrian overpass and to provide an opinion regarding the Respondent's purported public safety concerns. (App. 76-97). Specifically, Dr. Dorothy was asked to evaluate the pedestrian overpass "to determine the

⁴ The Seventh Circuit panel references a "Honk to Impeach Obama" sign in its opinion; however, ***no such sign serves as the basis for any of Petitioners' claims.*** (App. 2, 8). Petitioners' speech never included a request for motorists to honk. See (App. 32).

potential safety impacts of protestors holding signs, flags, banners, or similar items, while standing on the pedestrian overpass or within 100 feet of the overpass.” (App. 76). He also reviewed all pleadings filed in this lawsuit and all traffic and crash data relevant to the Town’s ordinance. (App. 79-80).⁵ He concluded that Respondent’s “[c]laims that permitting the display of signage on the overpass will result in the public being forced to ‘sit in long traffic back-ups with their safety at risk’ are simply not borne out by the conditions found at the subject location.” (App. 78, 96). Significantly, Dr. Dorothy concluded that free speech demonstrations on the pedestrian overpass did *not* adversely affect public safety: “[v]iewing the activity on the overpass does not require a driver diverting attention to a point where vital roadway information would be compromised.” (App. 78, 87) (emphasis added).

Dr. Dorothy noted that Respondent allowed commercial speech on I-90 that was visibly far more distracting than the Petitioners’ t-shirt or small flags. Dr. Dorothy noted “The Days Inn sign located in the southwest quadrant of the pedestrian overpass, a large lighted structure with one permanent and one temporary supplemental sign attached, is 101.5’ from the overpass” was highly visible from the highway. (App. 96). He further found that “[w]ith changes to billboard design, including both crawler messaging and full-motion video, and the location of said billboards being as much as 150’ from the edge of the traveled

⁵ The Seventh Circuit panel wrongly asserted that Dr. Dorothy never considered the traffic collision or crash implications of signage or other free speech demonstrations on the public sidewalk of the pedestrian overpass. *See* (App. 77, 80, 85).

way requiring motorists to turn their head from the direction of travel to process complicated messaging, these ***‘regulated billboards’ are a substantially greater risk to motorist safety.***” (App. 78, 90) (emphasis added). Dr. Dorothy concluded, after extensive study of the pedestrian overpass and the I-90 corridor, that banning speech on and near the pedestrian overpass, while allowing commercial billboards and other signs, was arbitrary. (App. 76-97).

A year after Respondent passed its Ordinance, the State of Wisconsin erected an overpass in the Town of Campbell, Wisconsin bearing the permanent signs “Welcome to Wisconsin” and “Thanks for Visiting.” (App. 65-66, 68, 70, 72). Respondent has taken no action to remove these signs, and the signs have caused no public safety issues.

II. Opinion of the Seventh Circuit Court of Appeals.

The Seventh Circuit panel found that Respondent provided only a “paucity of evidence” to justify its Ordinance. (App. 6). The panel, however, still found Respondent’s Ordinance constitutional, holding that Respondent need not supply evidence, but only a subjective reason for enacting its free speech restriction. (App. 8-10). The panel found “[i]t is enough to say that a state or local legislature that attempts to reduce the incidence of sudden braking on a superhighway cannot be thought to be acting irrationally or trying to suppress speech for no good reason. This is enough to support the district court’s rejection of Petitioners’ challenge to the no-signs-on-overpasses rule.” (App. 10).

Stated otherwise, if a government asserts a “public safety” reason for banning speech on the public sidewalk, such as reducing traffic congestion, the ban need not be supported by evidence or serve a legitimate purpose. (App. 10). According to the panel, if a town merely asserts that it has a “public safety” interest in banning speech, a court should deem it a substantial interest that outweighs a person’s rights protected by the First Amendment.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to clarify First Amendment standards governing when the government may enact a time, place, and manner restriction on free speech that bans speech on the public sidewalk of a highway overpass.

The Seventh Circuit panel ruled that time, place, and manner restrictions need not be based on objective evidence, nor be narrowly tailored to serve a significant government interest. Instead, the panel held that the government may restrict free speech as it wishes upon claiming its restrictions improve “public safety.” The panel below imposed no burden on the government to show that its basis for restricting free speech be legitimate or narrowly tailored. In rendering its decision, the panel misapplied this Court’s precedent and created a conflict within the Seventh Circuit and with its sister circuits. This Court should reverse the Seventh Circuit.

I. The Seventh Circuit’s Holding Allows the Government to Impose Time, Place, and Manner Restrictions Without Objective Evidence That the Restriction Is Narrowly Tailored to Serve a Significant Government Interest.

Petitioners’ free speech activity—communicating and assembling to express political or religious views—is protected expression under the First Amendment. *United States v. Grace*, 461 U.S. 171, 176 (1983). Petitioners’ manner of expression, to communicate their messages through wearing t-shirts and holding flags, lives within the heart of the First Amendment. *See, e.g., Texas v. Johnson*, 418 U.S. 397, 410-11 (1989). And the forum in which Petitioners speak—on the public sidewalk of the pedestrian overpass—is a traditional public forum. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014).

The ability of the government to limit peaceful First Amendment expression in a traditional public forum is “very limited.” *Grace*, 461 U.S. at 177. Therefore, when the government bans speech on the public sidewalk, as Respondent has done here, it is *Respondent’s burden* to prove that its time, place, or manner restriction (1) is content-neutral, (2) is narrowly-tailored to serve a significant government interest, and (3) leaves open ample alternative channels of communication. *McCullen*, 134 S. Ct. at 2522 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). It is not enough for a respondent to argue the reason for its speech restriction forwards “public safety” without satisfying these three requirements. *Id.* Yet, the panel’s decision allows just that.

The Seventh Circuit panel eliminated the requirement that the government supply objective evidence to establish that its speech restriction is narrowly tailored to serve a significant government interest. Instead, the panel equated reading signs on the highway to texting while driving, and generally stated, “Reading an overhead banner requires some of each driver’s attention, and diverting attention—whether to banners or to cell phones and texting—increases the risk of accidents.” (App. 9). The panel then held: “It is enough to say that a state or local legislature that attempts to reduce the incidence of sudden braking on a superhighway cannot be thought to be acting irrationally or trying to suppress speech for no good reason. This is enough to support the district court’s rejection of plaintiffs’ challenge to the no-signs-on-overpasses rule.” (App. 10). By this standard, any speech that is visible from the roadway can be banned simply by a municipality invoking a traffic or public safety justification, however unfounded. This all but eviscerates the principle that public sidewalks have been held from time immemorial as places of robust free speech. The panel’s decision requires reversal from this Court as its reasoning can be used to suppress a great breadth of constitutionally protected speech.

II. The Seventh Circuit's Holding Misapplies This Court's Precedent and Creates a Conflict within the Circuit Courts.

A. The Panel Misconstrues This Court's Decisions in *Metromedia, Inc. v. City of San Diego* and *Reed v. Town of Gilbert*.

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) does not countenance arbitrary, wide sweeping speech restrictions formulated without evidentiary support—rather, it forbids it. In *Metromedia, Inc.*, this Court held that, despite the government's claim that its ordinance barring speech along the highway was narrowly tailored based upon aesthetic and traffic considerations, the ordinance “reache[d] too far into the realm of protected speech” and was “unconstitutional on its face.” *Id.* at 521. This Court held that the City's prohibition on billboards was not narrowly tailored because the City allowed some signs and advertisements on the highway, while prohibiting others, and failed to leave open alternative channels of communication. *Id.* at 515-520 (“We conclude that by allowing commercial establishments to use billboards to advertise the products and services they offer, the city necessarily has conceded that some communicative interests, *e.g.*, onsite commercial advertising, are stronger than its competing interests in esthetics and traffic safety.”).⁶ Contrary to the panel's representations, *see* (App. 7), the holding in

⁶ Here, the appellate record shows that Respondent allows many signs on its highway, including “Welcome to Wisconsin” and “Thank you for Visiting” signs on their overpasses, billboards, traffic signs, and large commercial signs. (App. 65-72, 76-97).

Metromedia, Inc. actually supports why Respondent's Ordinance fails as a matter of law. Rather than excusing the need to justify its ban on free speech, *Metromedia, Inc.* clarifies that if there is insufficient reason to ban free speech, the ban will be found unconstitutional.

The Seventh Circuit panel's decision also misapplied this Court's holding in *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015). In *Reed*, this Court specifically stated that, even if the government has shown a compelling interest in traffic safety, the government's exceptions to its ordinance must not be "underinclusive." *Id.* at 2223. Instructively, this Court stated that a government "cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town when other types of signs create the same problem. Nor has it shown that temporary directional signs pose a greater threat to public safety than ideological or political signs." *Id.* at 2231-32. Respondent's Ordinance fails by the same logic. Respondent cannot ban all American flags and t-shirts donning letters on the public sidewalk of their overpasses, but readily allow other speech along its highway corridor such as billboards, commercial advertisements, words of welcome engraved on the overpasses, traffic signs, construction signs, etc. The speech on the overpass poses no greater safety risk, and Respondent has not provided any justification for this distinction. The panel's decision is not only incorrect under *Metromedia, Inc.* and *Reed*, but also breeds inconsistency in the law.

B. The Seventh Circuit's Holding Conflicts With Rulings From the Sixth, Fifth, and Ninth Circuits, Creating a Circuit Split.

The panel's decision conflicts with Sixth Circuit Precedent. In *Satawa v. Macomb County Rd. Comm'n*, 689 F.3d 506 (6th Cir. 2012), the Sixth Circuit reversed a district court's ban on speech based upon hypothetical traffic concerns. The plaintiff in *Satawa* sought a permit from the government to place a Christmas display next to an eight-lane road with a 50 mph speed limit. *Id.* at 521-22. The district court acknowledged that the "traffic safety" justification provided by the government was weak, but found that "the potential for even one tragic accident at a busy intersection clearly constitutes a compelling interest which the State must address." *Id.* at 516.

The Sixth Circuit, in reversing the district court, stated that to deny the plaintiff's permit, the City's Board "would have to show that it did no more than enforce compliance with a reasonable, content-neutral time, place, and manner restriction, narrowly tailored to serve a significant government interest, [which left] open ample alternative channels of communication." *Id.* at 532 (internal citations and quotations omitted). The defendant would have to prove that *its* policy satisfied these requirements. *Id.* The court in its analysis found that defendant failed to provide the factual and evidentiary basis to support its restriction on free speech. *Id.* at 525-26. The court held that the government's "traffic concern," based on the evidence of the case, only amounted to "[a] hypothetical traffic-safety concern resting on aberrant behavior." *Id.* at 525. The Sixth Circuit also held that the defendant's

restriction on speech was broader than necessary, as the government did not tailor its restriction at all, but banned all of the plaintiff's speech near the roadway. *Id.* at 526.

For similarly reasons, the panel decision conflicts with Fifth and Ninth Circuit precedent. In *Knowles v. City of Waco, Tex.*, 462 F.3d 430 (5th Cir. 2006), the Fifth Circuit struck down an ordinance requiring a permit for street activity on the city's public roads because it was not narrowly tailored, in that the exceptions were not consistent with the ordinance's goal of promoting traffic safety.

And in *Brown v. Cal. Dept. of Trans*, 321 F.3d 1217 (9th Cir. 2003), the Ninth Circuit upheld a preliminary injunction granted on First Amendment grounds enjoining a restriction on "expressive banners" on highway overpasses.⁷ In *Brown*, the plaintiffs sought to hang an anti-war banner next to a flag that had been privately hung on an overpass. *Id.* at 1220. Defending its policy only allowing flags, the California Department of Transportation ("CDOT") claimed that the sign was more distracting than the flag and further claimed that distinguishing between the sign and the flag was reasonable. *Id.* at 1222-23. The Ninth Circuit found CDOT's argument that, as a matter of law, flags are less distracting than signs to be "patently

⁷ The panel's decision also conflicts with Ninth Circuit precedent holding that a government "is not free to foreclose expressive activity in public areas on mere speculation about danger." *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 (9th Cir. 1990). Respondent has never provided any evidence that the Ordinance alleviates any public safety harms in a direct or material way.

unreasonable”. *Id.* at 1223 (citing the failure to do any fact finding).

In *Brown*, the Ninth Circuit held the fence of the overpass to be a nonpublic forum. *Id.* at 1222. *A fortiori*, in a public forum, as here where Petitioners’ speech occurs on the public sidewalk, a selective restriction on allegedly distracting signs likewise cannot be a reasonable time, place, and manner restriction. The Ninth Circuit concluded that the CDOT’s policy of prohibiting or requiring permits for all banners and signs to be displayed on highway overpass fences, except for American flags, was not reasonably related to safety and transportation purposes of overpass fences and would support a determination that the policy violated free speech rights, in that, although CDOT alleged that the posting of signs and banners posed potential safety risks and distracted motorists, there was no evidence that the flags were any less distracting or any safer than other signs or banners allowed near the highway.

C. The Panel’s Holding Conflicts With Precedent Within the Seventh Circuit.

The panel’s decision also conflicts with *Weinberg v. City of Chicago*, 310 F.3d 1029, 1038-40 (7th Cir. 2002). In *Weinberg*, the defendants’ ordinance aimed to curtail heavy traffic around the United Center in Chicago. That is, the government provided a “safety” reason for its ordinance, a reason that the court described as “hard to dispute.” *Id.* at 1038. But, “First Amendment rights demand more than mere facial assertions.” *Id.* Even where a city relies on its own “real-world experience” to enact regulations, “the City cannot

blindly invoke safety and congestion concerns without more.” *Id.*⁸

Unlike the panel’s holding here (that the government should be taken at its word if armed with a subjective “safety” justification for banning free speech), the Court in *Weinberg* demanded more.⁹ The court noted that the city had “provided no objective evidence” that its ordinance would actually affect traffic flow or safety: “[t]he City offered no empirical studies, no police records, no reported injuries, nor evidence of any lawsuits filed.” *Id.* In no unclear terms, the court held that ***“[u]sing a speech restrictive blanket with little or no factual justification flies in the face of preserving one of***

⁸ The court in *Weinberg* referenced evidence refuting the City’s “safety” justification, pointing out that the City relied on “self-serving witnesses.” *Weinberg, supra*. The Court certainly did *not* simply find that “[i]t is enough to say that a state or local legislature that attempts to reduce” potential congestion or accidents “cannot be thought to be acting irrationally or trying to suppress speech for no good reason” and “[t]his is enough,” as did the panel in this case. (App. 10).

⁹ Citing its own precedent of *Watseka v. Illinois Public Action Council*, 796 F.2d 1547 (7th Cir. 1986), *aff’d*, 479 U.S. 1048 (1987), the *Weinberg* court noted that it had previously struck down an ordinance that had restricted solicitation for, among other reasons, lack of evidence supporting the city’s substantial interest. There, it was because the city had failed to offer, other than testimony from its mayor, any substantive evidence that the ordinance prevented the fraud that it alleged it was trying to prevent. *Id.* at 1039. The Court noted “such a conclusory assertion by an interested party, particularly when unsupported by any statistics or firsthand knowledge of any actual crimes [that were intended to be impacted], lends little if any support to the city’s claim.” *Id.*

our most cherished rights.” *Id.* (emphasis added).¹⁰ The Court then held that “[w]e do not find that the City has no substantial interest in maintaining safety around the United Center,” but that “[w]e do, however, find that the City has not appropriately demonstrated that Weinberg or any other peddler creates the problems the City asserts they cause.” *Id.* at 1040. Thus, unlike the panel below, the *Weinberg* court held that it was *not sufficient* to merely state some interest to justify the ordinance. In fact, it is not even sufficient to state a substantial interest. But that substantial interest must actually be forwarded by the ordinance.

The panel’s decision also conflicts with *Constr. & Gen. Laborers’ Local Union No. 330 v. Town of Grand Chute*, 834 F.3d 745 (7th Cir. 2016), causing further internal conflict within the Seventh Circuit. In *Town of Grand Chute*, the defendants’ ordinance, in its effect, banned the Labor Union from using a large rat to protest in the “median of the highway” or close to a “busy street.” *Id.* at 747, 752. The majority of the panel vacated the district court’s decision to uphold the ordinance and remanded the case, but Judge Posner penned a concurrence in support of full reversal. Explaining why the ordinance violated the First Amendment, Judge Posner stated:

¹⁰ In words that could have just as easily been spoken about the instant case, the *Weinberg* court noted that “a thorough examination of the record . . . reveals not only that there is little basis for the City’s concerns, but also that the City’s concerns are not justified at all.” *Id.*

The only conceivable justifications for banning the rat are to prevent congestion and (relatedly) traffic accidents; *the City argues (without any evidence) that drivers on College Avenue would be distracted by the rat, resulting in congestion (“gapers’ delay”) and even traffic accidents. That’s pure conjecture, and implausible to boot. There is no evidence of rat-caused congestion or rat-induced traffic accidents in Grand Chute (or anywhere else, for that matter). None. And that is no surprise. All sorts of what might be considered “attractive nuisances” line the streets and highways of America. Think of the enormous number and variety of billboards, some displaying pictures of scantily clad beauties. Billboards invite drivers, and not just their passengers (often there are no passengers), to glance at each billboard as they drive by. The entire purpose of a billboard is to induce drivers to glance away from the road and at the billboard. Yet while billboards are often thought unsightly, especially by the fastidious, they are not seen as dangerous.*

Id. at 745-44 (Posner, J., concurring) (emphasis added). Judge Posner critiqued, “*the town has failed to back its alleged aesthetic and safety concerns with evidence [A] City cannot blindly invoke safety [] concerns. Especially when they are nonexistent.*” *Id.* (emphasis added).

By omitting the requirement that a time, place, and manner restriction be supported by objective evidence, the panel has created conflict with the Sixth, Fifth, and Ninth Circuits and within its own circuit.¹¹

CONCLUSION

The Court should grant the Petition.

¹¹ The panel also misapplied *Ovadal v. City of Madison*, 416 F.3d 531 (7th Cir. 2005) (“*Ovadal I*”) and *Ovadal v. City of Madison*, 469 F.3d 625 (7th Cir. 2006) (“*Ovadal II*”). In *Ovadal II*, the panel only decided whether the plaintiff’s claim, challenging an unwritten city policy, was moot due to the enactment of a subsequent ordinance. *Id.* at 629. The constitutionality of the ordinance itself was not before the court. *Id.* In *Ovadal I*, the court was not faced with the constitutional application of an ordinance, but a city’s unwritten policy to disallow protests on the overpass that created traffic concerns. *Ovadal*, 416 F.3d at 536-37. The Seventh Circuit remanded that case for furthering fact-finding to determine whether the city’s policy imposed a content-based restriction on free speech. *Id.* at 537-38.

Respectfully submitted,

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