

No. 17-1186

**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**

**OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI**

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QUESTION PRESENTED

Did the court of appeals err by upholding an ordinance that banned signs, banners and other similar items above an Interstate highway when there was both objective and non-empirical evidence of traffic safety problems caused by the display of such items?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iv
INTRODUCTION	1
STATEMENT OF THE CASE.....	2
I. Factual Background	2
II. Procedural History	4
REASONS FOR DENYING THE WRIT	5
I. The Ordinance Is Supported By Objective Evidence Of Traffic Safety Problems Caused By Overpass Protests And Signs	5
II. Time, Place, And Manner Restrictions On Speech Can Be Supported By Non-Empir- ical Evidence And The Common Sense Judgments Of Lawmakers.....	6
III. The Decision Does Not Conflict With Prior Rulings Of This Court Or Other Circuits....	8
A. The Decision Does Not Conflict With <i>Metromedia, Inc. v. City of San Diego</i> and <i>Reed v. Town of Gilbert</i>	8
B. The Decision Does Not Conflict With Rulings From Other Circuits	10
C. The Decision Does Not Conflict With Other Rulings From The Seventh Cir- cuit.....	12

TABLE OF CONTENTS – Continued

	Page
D. The Decision Is Entirely Consistent With Seventh Circuit Precedent	15
CONCLUSION.....	16

TABLE OF AUTHORITIES

	Page
CASES	
<i>Brown v. Cal. Dept. of Trans.</i> , 321 F.3d 1217 (9th Cir. 2003)	2, 6, 11, 12
<i>City of Los Angeles v. Alameda Books, Inc.</i> , 535 U.S. 425 (2002)	7
<i>Clark v. Community for Creative Non-Violence</i> , 468 U.S. 288 (1984)	7
<i>Const. & Gen. Laborers' Local Union No. 330 v. Town of Grand Chute</i> , 834 F.3d 745 (7th Cir. 2016)	13, 14
<i>Lorillard Tobacco Co. v. Reilly</i> , 533 U.S. 525 (2001)	7
<i>Metromedia, Inc. v. City of San Diego</i> , 453 U.S. 490 (1981)	1, 7, 9, 10
<i>Ovadal v. City of Madison</i> , 469 F.3d 625 (7th Cir. 2006)	15
<i>Reed v. Town of Gilbert</i> , 135 S. Ct. 2218 (2015)	2, 6, 8, 9
<i>Satawa v. Macomb County</i> , 689 F.3d 506 (6th Cir. 2012)	10, 11
<i>Ward v. Rock Against Racism</i> , 491 U.S. 781 (1989)	7
<i>Weinberg v. City of Chicago</i> , 310 F.3d 1029 (7th Cir. 2002)	2, 12, 13

TABLE OF AUTHORITIES – Continued

	Page
STATUTES	
42 U.S.C. § 1983	15
City of Madison, Wisconsin Ordinance 31.045(3)(j)	15

INTRODUCTION

This case is about a local government's ability to enact reasonable laws to prevent distracted driving and sudden braking on an Interstate. The Town of Campbell, Wisconsin (the "Town") enacted a *content-neutral* ordinance (the "Ordinance") that prohibits the display of *all* signs, banners and similar items from overpasses that were visible to vehicles traveling on Interstate 90. The Ordinance was enacted after several protests occurred in the Town during which various signs, banners and other items were displayed from an overpass directly above the Interstate where traffic merges and exits the highway. These protests had their desired effect as motorists honked their horns and stopped their vehicles on the shoulder of the Interstate to view the signs.

The Seventh Circuit's decision (the "Decision") upholding the Ordinance involved the routine application of established law to the facts of this case. Local governments are permitted to regulate speech in order to further significant government interests, such as traffic safety. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 511-12 (1981). As long as legislative judgment on the significance of the government's safety concerns is "not manifestly unreasonable . . . it should not be set aside." *Id.* at 508.

The Town presented evidence of traffic safety problems caused by the protests, such as cars illegally parked on the side of the Interstate with the occupants taking photographs of the overpass protests. This

evidence shows that the basis for the Ordinance was not manifestly unreasonable.

Moreover, local lawmakers are not required to hire an expert to conduct a study before enacting laws that further public safety. The Seventh Circuit correctly found that expert testimony and empirical studies are not needed to determine that the display of signs and banners above the Interstate may distract some drivers and cause them to suddenly brake.

The Petition should also be denied because the Decision is not contrary to the decisions of this Court and other circuit courts. No other court has found a content-neutral overpass sign ordinance to be unconstitutional. The decisions relied on by Petitioners are entirely distinguishable from this case as they involve content-based restrictions on speech that are subject to strict scrutiny, *see Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); *Brown v. Cal. Dept. of Trans.*, 321 F.3d 1217 (9th Cir. 2003), or anti-peddling ordinances addressing much different risks than that posed by sudden braking on an Interstate highway, *see Weinberg v. City of Chicago*, 310 F.3d 1029 (7th Cir. 2002).



STATEMENT OF THE CASE

I. Factual Background

Interstate 90 passes through the Town near the Mississippi River and the Minnesota-Wisconsin border. (Pet. App. 26.) There are two vehicular overpasses

and one pedestrian overpass above Interstate 90 in Campbell. (*Id.*) The pedestrian overpass connects Bainbridge Street and stretches over Interstate 90. (*Id.*) Both vehicular overpasses and the pedestrian overpass are located in areas where traffic is merging onto or exiting Interstate 90. (*Id.*)

In the summer and fall of 2013, several protests occurred on the Bainbridge Street pedestrian overpass that included a number of different banners and signs of various sizes displayed directly above the Interstate. (Pet. App. 27-28.) The record contains objective evidence of traffic safety problems caused by these signs and protests, such as photographs of vehicles pulled over on the side of the Interstate with the occupants taking photographs of the overpass signs and displays. (Pet. App. 6.) On another occasion, Officer Nathan Casper confronted a vehicle pulled over on the side of the road to take photographs of the protestors on the pedestrian overpass. (*Id.*) The videos of the protests also depict numerous vehicles honking their horns on the Interstate in response to the signs and protests. (Pet. App. 28.) The Town chairperson, Scott Johnson, has driven this portion of Interstate 90 for decades and considers it a dangerous area given prior accidents and the lanes of merging and exiting traffic. (Pet. App. 29-30.)

The Town Board discussed passage of the Ordinance at meetings in September and October 2013 and eventually enacted the Ordinance on October 8, 2013. (Pet. App. 30.) The Town Board voted 4 to 1 to enact the Ordinance. (*Id.*) The Ordinance applies to any type of

sign regardless of content that is displayed from the overpass or within 100 feet of the overpass and visible to vehicles traveling on the Interstate. (Pet. App. 30-31.) Petitioners were subsequently cited for violating the Ordinance when they displayed signs and flags from the overpass. (Pet. App. 32.)

II. Procedural History

The district court entered summary judgment in favor of the Town on June 16, 2015 finding that the Ordinance was a constitutional time, place and manner restriction on speech. (Pet. App. 56.) The district court found that there was ample evidence to support the Town's concerns for traffic safety and the Ordinance was narrowly tailored to achieve that interest. (Pet. App. 37-45.)

In a unanimous opinion, the Seventh Circuit largely affirmed¹ the district court's finding that the Ordinance was a constitutional time, place and manner restriction on speech (the "Decision"). (Pet. App. 1.) The Seventh Circuit relied on longstanding precedent that refutes Petitioners' contention that local lawmakers must conduct a formal traffic safety study or hire an expert prior to enacting a law intended to prevent traffic accidents and distracted driving. (Pet. App. 6-9.) The Seventh Circuit recognized there was some

¹ The Court remanded to the district court for further proceedings on whether the portion of the Ordinance restricting signs from a 100-foot radius of the overpass is warranted based on traffic safety concerns.

objective evidence of traffic safety concerns but also found sufficient non-empirical evidence to support the Ordinance, including the common-sense judgment that some vehicles may slow down and suddenly brake in response to protests on an overpass directly above the Interstate. The Seventh Circuit denied Petitioners' request for rehearing. (*Id.*)



REASONS FOR DENYING THE WRIT

I. The Ordinance Is Supported By Objective Evidence Of Traffic Safety Problems Caused By Overpass Protests And Signs.

In phrasing the issue before the Court, Petitioners entirely disregard the Town's evidence of traffic safety problems caused by the overpass protests. The record contains photographs of vehicles pulled over on the side of the Interstate with the occupants taking photographs of the overpass signs and displays. (Pet. App. 6, 28.) On another occasion, Officer Nathan Casper confronted a vehicle pulled over on the side of the road to take photographs of the protestors on the pedestrian overpass. (*Id.*) The videos of the protests also depict numerous vehicles honking their horns on the Interstate in response to the signs and protests. (Pet. App. 28.) All of this evidence came from witnesses other than the Town's former police chief, Tim Kelemen, whose credibility was called into question by the Seventh Circuit.

Contrary to Petitioners' assertions, this is not a case where the municipality had no objective evidence

of traffic safety problems or a risk of harm to the public. Petitioners ask this Court to decide whether the court of appeals properly allowed the Town to support the Ordinance solely on a “subjective basis . . . without evidentiary support.” (Pet. at i.) But this case does not present that question. Rather, Petitioners are claiming that the Seventh Circuit made erroneous factual findings. That argument rarely supports the grant of a writ of certiorari and this case is no exception.

II. Time, Place, And Manner Restrictions On Speech Can Be Supported By Non-Empirical Evidence And The Common Sense Judgments Of Lawmakers.

The thrust of Petitioners’ argument is that local lawmakers can never rely on their common sense or non-empirical evidence to support laws intended to promote public safety. In doing so, Petitioners overlook decades of Supreme Court precedent that permits local municipalities to rely on non-empirical data and common sense judgments to support time, place, and manner restrictions on speech. Here, there is no dispute that the Ordinance is content-neutral and the proper constitutional test is intermediate scrutiny. Petitioners’ reliance on cases involving content-based regulations should be disregarded because those regulations are subject to strict scrutiny. *See Reed*, 135 S. Ct. 2218 (2015) and *Brown*, 321 F.3d 1217 (9th Cir. 2003).

As long as legislative judgment on the significance of the government’s safety concerns is “not manifestly

unreasonable . . . it should not be set aside.” *Metromedia, Inc.*, 453 U.S. at 508. A municipality is allowed to “rely on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest.” *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001). (“[W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even . . . to justify restrictions based solely on history, consensus, and simple common sense.”).

Over the years, the Supreme Court has issued a number of decisions upholding time, place, and manner restrictions on speech without requiring empirical data or record evidence of harm. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding regulating limiting loud speech or music without requiring record evidence that high decibel levels affect people subjected to noise); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (upholding ban on sleeping in park areas such as the mall in Washington, D.C. because the Justices thought the regulation would reduce congestion and wear and tear on park properties.)

It does not require expert testimony to know that at least some drivers will slow down in order to read the signs and banners displayed from an overpass above the Interstate. Stopping on the shoulder of the highway is just one example of a driver slowing down

and being distracted by the overhead signs. Complicating the problem is the fact that each overpass is located directly above where traffic is merging onto and exiting the Interstate. Local lawmakers cannot be thought to be acting irrationally and without support when they enact legislation that attempts to reduce the incidence of sudden braking on an Interstate where traffic is merging and exiting the highway. Based on the foregoing, the Decision is squarely in line with precedent from this Court and there is no reason to grant review.

III. The Decision Does Not Conflict With Prior Rulings Of This Court Or Other Circuits.

As shown below, the Decision was entirely consistent with prior holdings of this Court. Further, Petitioners attempt to manufacture a circuit split where none exists. Indeed, no other circuit court has addressed the constitutionality of an overpass sign ordinance, such as the one enacted by the Town. The cases relied on by Petitioners are factually distinguishable and/or involve entirely different ordinances or safety issues.

A. The Decision Does Not Conflict With *Metromedia, Inc. v. City of San Diego* and *Reed v. Town of Gilbert*.

Reed also involved a sign ordinance but that is where the similarities with this case begin and end. 135 S. Ct. 2218 (2015). The issue in *Reed* was whether a sign ordinance was content based – and therefore

subject to strict scrutiny – because it imposed more stringent restrictions on certain types of signs, such as directional signs and ideological signs. *Id.* at 2221. While the Town of Gilbert had innocent motives in enacting the Ordinance, the Supreme Court nevertheless held that the Ordinance was content-based because the restrictions “depend entirely on the communicative content of the sign.” *Id.* at 2227. The Supreme Court went on to find the sign ordinance “underinclusive” because it allowed certain types of signs that were “no greater an eye sore” than other types of signs. *Id.* As a result, the Town of Gilbert’s ordinance failed strict scrutiny and was held unconstitutional.

There is nothing in *Reed* addressing the issue raised by Petitioners: what evidence or support is needed to justify a content-neutral law enacted to promote traffic safety. Further, nothing in *Reed* supports Petitioners’ claim that a municipality must engage in some empirical study or hire a safety expert before enacting a law meant to promote traffic safety. Therefore, the Decision is entirely consistent with *Reed* and does not justify review by this Court.

Petitioners’ reliance on *Metromedia*, 453 U.S. 490 (1981) is also misplaced. The primary holding in *Metromedia* is that municipalities cannot treat onsite advertising signs more favorably than non-commercial signs by imposing more stringent regulations on non-commercial signs. Again, the issue in this case is not whether the Ordinance is content-neutral but whether the Town had sufficient justification to enact the Ordinance. *Metromedia* supports the Decision because it

held that banning signs and billboards from streets and highways is reasonably related to the goal of promoting traffic safety. *Id.* at 508. As long as the decision is not “manifestly unreasonable”, the decision of local lawmakers should not be set aside. *Id.* Because the goal of traffic safety was reasonably related to the ban on signs and billboards, the Supreme Court found sufficient support for San Diego’s ordinance.² Here, the Ordinance was based on common sense and evidence of traffic safety issues. Based on the foregoing, the decision aligns squarely with the holding in *Metromedia* and review by this Court is not necessary.

B. The Decision Does Not Conflict With Rulings From Other Circuits.

None of the cases cited by Petitioners from other circuits involved an overpass sign ordinance or held that local lawmakers cannot rely on non-empirical data and their common sense judgments to enact laws that further public safety. As a result, there is no circuit split and no need for this Court to grant review.

Satawa v. Macomb County, 689 F.3d 506 (6th Cir. 2012) involved a permit to display a nativity scene in the median of a local roadway with a speed limit of 30 miles per hour. The county road commission denied the permit claiming that the nativity scene clearly

² In the end, a plurality of the *Metromedia* Court found the ordinance unconstitutional because it allowed commercial billboards while forbidding others. As explained above, that concern is not present in this case.

displayed a religious message and would risk the county violating the establishment clause of the First Amendment. *Id.* at 514. During litigation, however, the county completely changed course and stated that traffic safety concerns were the real reason why the permit for the nativity scene was denied. *Id.* at 523. The Sixth Circuit placed a heavy emphasis on this change of course finding that “before this lawsuit was filed, there was no indication that safety concerns played *any* role in the Board’s decision.” *Id.* (emphasis in original). Based on this inconsistency, the Sixth Circuit found that traffic safety did not justify the county’s decision to deny the permit. *Id.*

In contrast to *Satawa*, the Town never flip-flopped on the reason for the Ordinance. At all times, the Town expressed a concern for traffic safety caused by the protests and signs displayed from the overpass. Moreover, the roadway at issue in *Satawa* did not involve an overpass directly above an Interstate highway where traffic is merging and exiting. There was also no pronouncement by the *Satawa* court that a municipality cannot rely on non-empirical data and common sense to enact traffic safety laws. For all of these reasons, the Decision is not in conflict with prior decisions from the Sixth Circuit.

Next, in *Brown*, 321 F.3d 1217 (9th Cir. 2003), the court held that the California Department of Transportation violated the First Amendment because it permitted flags to be displayed from overpasses but did not permit expressive banners. The Ninth Circuit found that it was unreasonable for the Department of

Transportation to treat flags differently from expressive banners. *Id.* at 1222. Here, the Ordinance does not treat banners or displays differently based on the content of the message. Indeed, the plain language of the Ordinance shows that the prohibition applies to any banner, display or *flag*. Therefore, no conflict exists with the Ninth Circuit. Indeed, the *Brown* decision actually supports the constitutionality of the Ordinance as it recognized that the display of signs from overpasses poses traffic safety concerns: “overpass fences are not ‘compatible’ with expressive activity because messages displayed invariably distract drivers, thereby posing safety risks.” *Id.* at 1222.

C. The Decision Does Not Conflict With Other Rulings From The Seventh Circuit.

There is no conflict between the Decision and *Weinberg v. City of Chicago*, 310 F.3d 1029 (7th Cir. 2002) because the ordinance struck down in that case is much different than the Ordinance at issue here. In *Weinberg*, the Seventh Circuit struck down a City of Chicago ordinance prohibiting peddling of merchandise within 1,000 feet of a sports stadium on the basis of pedestrian safety and to prevent traffic congestion. Important to the court’s decision was a video taken at the request of the district court showing plaintiff selling his books outside of the United Center. *Id.* at 1038. The video showed absolutely no interference with pedestrian traffic and directly contradicted the City’s claims of congestion. *Id.* The court also found that the ordinance was inconsistent because it left open other,

similar activities such as leafleting, newspaper sales, street performances and charitable solicitations. *Id.* at 1039. According to the court, the City could not assert that plaintiff's First Amendment activity could be restricted because of traffic congestion, while at the same time ignoring other, very similar conduct. *Id.*

Unlike the ordinance at issue in *Weinberg*, the Ordinance bans all signs or similar displays from highway overpasses and does not allow other groups or persons to use overpasses to communicate their message. Petitioners cannot point to other groups that are permitted to use the overpass to display signs or other banners while their conduct is banned. Additionally, the issue of pedestrian congestion outside of a sporting venue is far different from the potential harm posed by signs and other displays to motorists traveling at least 55 miles per hour in a high traffic area with merging and exiting lanes of traffic. Indeed, many courts have already determined that highway safety is a significant and legitimate concern, whereas no court has determined that pedestrian congestion outside of a sports stadium poses a significant safety problem.

Petitioners' last basis for review is a dissenting opinion authored by Judge Posner in *Const. & Gen. Laborers' Local Union No. 330 v. Town of Grand Chute*, 834 F.3d 745, 750 (7th Cir. 2016) (Posner, J., concurring in part and dissenting in part).³ As a threshold matter,

³ Petitioners incorrectly claim that Justice Posner's concurring opinion in *Grand Chute* creates a conflict with the Decision. (Petition at 18.) However, the language relied on by Petitioners comes from Judge Posner's dissenting opinion.

Judge Posner's dissenting opinion cannot create precedent in the Seventh Circuit upon which a conflict in law can arise.

More to the point, however, the primary issue addressed by the Court in *Grand Chute* was whether the Town was engaging in content discrimination by only enforcing a sign ordinance against union protestors who were displaying a large inflatable rat near an intersection. There was no discussion by the majority of whether the ordinance was justified to promote public safety. Rather, the court remanded for further proceedings to allow the district court to decide if the Town was treating other speakers more favorably than the union members.

Finally, the risk posed by an inflatable rat placed away from traffic is significantly different than the risk posed by displaying signs from an overpass directly above an Interstate where traffic is merging and exiting. The dissenting opinion in *Grand Chute* focused on the fact that the "rat was not located on bustling College Avenue; it was roughly 70 feet from it and not near an intersection either." *Id.* at 755. Because the rat was 70 feet from the intersection, Judge Posner found that it was unlike a billboard, which obstructs drivers' views. *Id.* In contrast, the ordinance is directed at signs directly above a busy Interstate highway. In *Grand Chute*, Judge Posner also criticized the Town for failing to enforce the ordinance against anyone other than the union protestors. *Id.* at 758. In this case, there was no evidence or claim that the Town was permitting other groups to display signs from the overpasses.

D. The Decision Is Entirely Consistent With Seventh Circuit Precedent.

In *Ovadal v. City of Madison*, 469 F.3d 625 (7th Cir. 2006), a protestor brought a 42 U.S.C. § 1983 action against the City of Madison for violating his constitutional right of free speech and freedom of religion after he was arrested for organizing two small demonstrations on overpasses above the Madison Beltline freeway. *Id.* at 627. One of the issues was whether the removal of the plaintiff from the overpass for traffic safety concerns violated his constitutional right to free speech. *Id.* at 628. The Court noted that “if Madison had a policy that prohibited not just Ovadal’s, but all protests and signs on all Beltline overpasses, the restriction would be clearly content neutral.” *Id.* at 629. Even without considering a later enacted Madison ordinance that banned all signs from overpasses, the Seventh Circuit found that the removal of the plaintiff from the overpass was not a content-based prohibition on plaintiff’s speech and that plaintiff was not chilled or deterred from exercising his First Amendment rights. *Id.* at 631. Accordingly, the court affirmed dismissal of plaintiff’s First Amendment claims.

Following, the *Ovadal* decision, the City of Madison enacted such an ordinance and that ordinance is still on the books today at sec. 31.045(3)(j). The City of Madison ordinance is very similar to that enacted by the Town and provides further support that the Decision is consistent with prior case law.



CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted this 22nd day of March,
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