

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*

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The Town of Campbell's response wholeheartedly advocates, as the Seventh Circuit held, that it should be illegal to hold a flag or wear certain t-shirts on the public sidewalk adjacent to a highway. The Town of Campbell and the Seventh Circuit believe the presence of flags and t-shirts on the public sidewalk *ipso facto* creates a "safety hazard" and that such a finding is just "common-sense." This exactly why this Court needs to grant this petition.

The First Amendment requires a finding, based on objective evidence, that a restriction on free speech serves a significant governmental interest and is no more extensive than necessary. A time, place, and manner restriction should not hinge on the subjective opinion of town officials as to what equates common sense when restricting free speech. The legal standard employed by the Seventh Circuit panel yields uneven and absurd results, as seen here. The Seventh Circuit held that restricting private speech on the public sidewalk near highways—while freely allowing speech on billboards, traffic signs, license plates, on the sides of trucks, etc.—was permitted under the First Amendment because Respondents articulated a common-sense reason for enacting its Ordinance. (App. at 8-10). The Seventh Circuit panel held that an ordinance complies with the safeguards of the First Amendment if, when enacting the ordinance, the local legislature "attempts" to improve traffic safety. (App. at 10). This lax analysis under the First Amendment conflicts with prior opinions of this Court and creates an inter-circuit and intra-circuit split. Indeed, by eliminating the need for empirical evidence, the

Seventh Circuit panel ruled that any speech visible from the roadway can be banned simply by a municipality invoking a traffic or public safety justification, however unfounded. The panel's decision requires reversal from this Court and provides the ideal vehicle for clarifying the proper analysis for time, place, and manner restrictions.

Respondent asserts that this petition should not be granted because the Seventh Circuit's opinion rests on a question of fact and fails to conflict with other circuits and opinions of this Court. Respondent is wrong. This petition should be granted as it: 1) presents a pure legal question, 2) involves no controlling questions of fact, and 3) presents a square conflict among this Court and the circuit courts that should be clarified.

I. This Petition Presents a Purely Legal Question.

This Petition asks: 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. (Pet. at i). The Seventh Circuit ruled that, when restricting free speech, it is enough for a legislature to "attempt" to mediate a common-sense concern. (App. at 8-10). Petitioners assert that the First Amendment requires more.

In its effort to dissuade this Court from granting this Petition, the town endeavors to re-frame the question presented. The town argues, without justification, that Petitioners are instead presenting

the question of whether “the Seventh Circuit made erroneous factual findings.” (Resp. at 6). This is not Petitioners’ argument, nor is it the question posed to this Court. Petitioners present the purely legal question of whether a time, place, or manner restriction is an objective standard that requires evidence to establish that such a restriction is narrowly tailored.

II. This Petition, Based Purely on a Question of Law, Involves No Factual Question.

Respondent tries to manufacture a factual dispute. In truth, no factual dispute exists and no factual dispute would be relevant to this petition.

A. No Factual Dispute Exists.

As an initial matter, this case was decided on the Respondent’s motion for summary judgment. Fed. R. Civ. P. 56(c). As this Court has clarified, “[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Petitioners are the party opposing the motion, and therefore entitled to a favorable reading of the facts.

The town, in its response, argues that a dispute in the factual record should prevent this Court from granting certiorari. This Court, like the lower court, however, must view all facts in the light most favorable to Petitioners, the non-moving party.

The town asserts that a factual dispute exists because the discredited Chief of Police, Tim Kelemen,

was not the only officer to witness potential traffic safety issues. This fact is not in dispute, and the record supports Petitioners reading of the facts.

The record demonstrates: Respondent relied solely on the allegations presented by Kelemen to enact its Ordinance. (App. 28-29). After the ordinance was enacted, Officer Casper “observed a car pulled off the road to take pictures of signs on the overpass. The record contains a photograph of one car, pulled over, with occupants taking pictures.” (App. 6). And, most importantly here, the Seventh Circuit noted “*[t]he paucity of evidence from anyone other than Kelemen leads us to ask whether record evidence supporting time, place and manner restrictions is always essential.*” (App. 6) (emphasis added). The Seventh Circuit then held record evidence was not essential. In short, no factual dispute exists. This Petition presents a legal dispute.

B. No Factual Dispute Is Relevant to This Petition.

Furthermore, factual disputes whose resolution would not affect the outcome of the petition are irrelevant to the consideration of a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). This petition presents the legal issue of whether empirical evidence should be considered.

Respondent claims, “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.” (Resp. 1). To that effect, the Petitioners presented substantial evidence that the ordinance

furthering no valid traffic safety purpose. (App. 73-99). The record reflects that billboard advertisements and highway traffic signs off the highway are no less distracting than signs on the public sidewalk of the overpass.¹ (App. 87-95). The record includes the opinion of a traffic safety engineer stating that ***“viewing activity on the overpass does not require a driver diverting attention to a point where vital roadway information would be compromised.”*** (App. 87) (emphasis added). The Seventh Circuit opinion does not negate the truth of these facts, but states that such evidence is not important. The Seventh Circuit held that such empirical evidence is not necessary to uphold a speech restriction, and this petition is a challenge to that legal standard.

Respondent argues that “photographs of vehicles pulled over on the side of the Interstate with the occupants taking photographs of the overpass signs and displays” is objective evidence supporting Petitioners’ challenge to the constitutionality of the ordinance and supporting the prosecution of the Petitioners for holding flags and wearing t-shirts on the sidewalk.² (Resp. 3). This contention does not support

¹ The State of Wisconsin displays “Welcome to Wisconsin” and “Thanks for visiting” signs on the front and back of the highway overpasses. (App. 65-72).

² There is no dispute that when Respondent cited Petitioner Nick Newman for violating the ordinance, Nick Newman was alone on the bridge and simply unfurled a standard sized American flag on the sidewalk. (App. 32). Further, the record does not support Respondent’s contention that “vehicles” pulled over on the highway. As the Seventh Circuit stated in its opinion, the record only shows ***one*** vehicle ever pulled over on the highway. (App. 6).

the restriction of Petitioners' free speech on the sidewalk. Instead, the photograph of a vehicle pulled over on the highway would only speak to the secondary effect speech might have. *See, e.g., Ctr. For Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff's Dep't*, 533 F.3d 780, 790 (9th Cir. 2008); *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (opinion of O'Connor, J.). Free speech cannot and should not be silenced due to the secondary effect it may have. *Lewis v. Wilson*, 253 F.3d 1077, 1082 (8th Cir. 2001) ("The [F]irst [A]mendment knows no heckler's veto."). And here, the answer is simply for law enforcement to enforce existing traffic safety laws to hold drivers accountable for their driving decisions, instead of silencing speech protected by the First Amendment. The potential response of a driver to disobey traffic safety laws is not a valid reason to silence free speech. Therefore, evidence of a driver parking on the side of the roadway is irrelevant to Petitioners' free speech claim.

III. There is a Square Conflict Between the Seventh Circuit Panel's Holding and Prior Holdings from this Court and the Circuit Courts.

Respondent argues that the cases cited by Petitioners are factually distinguishable from this case presented in their Petition. (Resp. 10). Respondent erroneously tries to skew the focus of the Court away

It seems that Respondent argues this one vehicle pulled over as a response to a sign display on the overpass. However, that was never investigated or confirmed.

from the legal analysis employed in the cases presented by the Petitioners.

In truth, the Seventh Circuit’s opinion below, that ignores the need for empirical evidence, is a vast departure from its prior opinions that “First Amendment rights demand more than mere facial assertions.” *Weinberg v. City of Chicago*, 310 F.3d 1029, 1038-40 (7th Cir. 2002) (striking down an ordinance premised on general traffic safety where “[t]he City offered no empirical studies, no police records, no reported injuries, nor evidence of any lawsuits filed.”).

The Seventh Circuit panel’s decision conflicts with the controlling legal analysis in the Fifth, Sixth, and Ninth Circuits. In the Sixth Circuit, the legal standard when adjudicating a time, place, and manner restriction requires evidence establishing that the restriction actually serves a significant government interest and is narrowly tailored to achieve that significant government interest—regardless of the factual distinctions each case may pose. *Satawa v. Macomb County Rd. Comm’n*, 689 F.3d 506, 525-26, 532 (6th Cir. 2012). And that same legal analysis, based upon evidentiary and empirical evidence, is employed by the Fifth and Ninth Circuits. *Knowles v. City of Waco, Tex.*, 462 F.3d 430 (5th Cir. 2006); *Brown v. Cal. Dept. of Trans.*, 321 F.3d 1217 (9th Cir. 2003).

Further, Respondent all but ignores that its ordinance prosecutes speech taking place on the public sidewalk, a public forum that has been guarded from time immemorial as a place of robust free speech. See e.g., *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014). And Respondent fails to justify why Petitioners’ flags

and t-shirts should be prosecuted, while commercial billboards, traffic signs, and other speech on and adjacent to the highway is allowable. Respondent's ordinance, like the speech restriction in *Metromedia, Inc.*, "reaches too far into the realm of protected speech" and is "unconstitutional on its face." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 521 (1981). Furthermore, Respondent's ordinance is "underinclusive" pursuant to this Court's analysis in *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015).

The Seventh Circuit's opinion creates a split between the circuits and this Court's precedent. Respondent cannot ban flags and t-shirts on the public sidewalk of its overpasses, while readily allowing other speech along its highway corridor. This Court should grant this Petition, which poses a purely legal question and seeks to clarify an important aspect of First Amendment law.

CONCLUSION

For the foregoing reasons and those stated in the Petition, certiorari should be granted.

Respectfully submitted,

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