No. 09-259

In The Supreme Court of the United States

METRO LIGHTS, L.L.C.,
a New York limited liability company,

Petitioner,

v.

CITY OF LOS ANGELES,
a California municipal corporation,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does this case, which involves facts virtually identical to those in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981), tread any new ground that justifies reexamining *Metromedia*?

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STATEMENT OF THE CASE

Factual Background

The City of Los Angeles has a long history of placing advertising signs on public bus benches. Formal agreements granting a private company the right to place such signs on bus benches in exchange for payment to the City began at least as early as 1987, and it would be reasonable to assume that the practice had been common for many decades before that, although formal records of it that early no longer exist. *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 902 (9th Cir. 2009).

In 2001, after a public bidding process, the City entered into the most recent of those agreements, the "Coordinated Street Furniture Agreement" with CBS (then known as Viacom Decaux LLC). Two dozen parties submitted bids through this process, but the plaintiff in this case, Metro Lights, was not among them. *Metro Lights, L.L.C. v. City of Los Angeles*, 488 F. Supp. 2d 927, 932 (C.D. Cal. 2006). Under that agreement, CBS was required to install new bus shelters and make annual payments to the City. The agreement gave CBS exclusive advertising rights on the new public facilities. *Metro Lights*, 551 F.3d at 902.

The City also has a long history of regulating billboards within its borders. For many years, the City had in place time, place and manner regulations for commercial signage in the City. Los Angeles Ordinance No. 173681 (Appendix, App. 1-6). This

regulatory scheme allowed private parties to apply for permits to erect billboards but restricted their size, height, and location.

Over time, it became apparent to the City that these time, place and manner regulations were not adequately controlling the proliferation of billboards in the City. Los Angeles Ordinance No. 173681 (Appendix, App. 1). To address that problem, in December of 2002, the City enacted a ban on all new billboards on private property in the City. Los Angeles Ordinance No. 174547 (Appendix, App. 8-15).

This case concerns a city's right to place advertising signs on its own bus shelters,[1] which are the modern version of bus benches. Metro Lights is alleging that by doing this the City of Los Angeles has undermined the effectiveness of its ban on new billboards[2] so that it violates the First Amendment.

Around December 2003, Metro Lights installed a number of signs on private property in violation of

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[1] The term "bus shelters" will be used in this brief to collectively refer to covered bus benches and other street furniture such as informational kiosks and automated public toilets.

[2] The term "billboard" will be used in this brief to refer to all "offsite commercial signs." Generally speaking, offsite commercial signs advertise goods and services available elsewhere than the site where the sign is located. By contrast, onsite commercial signs advertise goods and services available at the same site where the sign is located.

the ban, the City's response to which was to issue citations. *Id.*

On February 17, 2004, Metro Lights filed suit.

Opinions Below

On January 23, 2007, the district court below invalidated the City's ban on new billboards. That ruling was based on the district court's conclusion that a de facto exception for bus shelter advertising worked at "cross purposes" with the ban causing it to fail this Court's *Central Hudson*[3] test for regulation of commercial speech. *Metro Lights, L.L.C. v. City of Los Angeles*, 488 F. Supp. 2d 927 (C.D. Cal. 2006).

The district court alluded to an economic motive for the City to enact the ban but the district court made no finding that this was the City's true or sole motivation for enacting the ban. Nor did Metro Lights introduce evidence to this effect at the district court level so as to challenge the ban's stated purposes under the second element of the *Central Hudson* test.

On January 6, 2009, the Ninth Circuit reversed. *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 909 (9th Cir. 2009). The Ninth Circuit explained that in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981), this Court had upheld twelve express exceptions to a

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[3] *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

city-wide ban on new billboards, including an exception for "bus bench signs." After recognizing that this exception for bus bench signs was "virtually identical" to Los Angeles' de facto exception for bus shelter signs, under stare decisis the Ninth Circuit followed *Metromedia* and upheld Los Angeles' ban. *Metro Lights*, 551 F.3d at 908.

In upholding the exception for bus shelter signs, the Ninth Circuit relied on the same two primary grounds on which the decision in *Metromedia* rests. The first is recognition that a ban on billboards will continue to satisfy the "direct advancement" element of the *Central Hudson*[4] test even where a city carves out an exception for certain signs, such as onsite signs or, here, for bus shelter signs. *Id.* at 511. Bus shelter signs, being inherently limited in number and size, pose no threat of undermining a ban on billboards

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[4] The *Central Hudson* test is an intermediate scrutiny test developed by this Court that strikes a careful balance between giving the government sufficient latitude to regulate commercial speech and adequately protecting commercial speech. Altering the *Central Hudson* test to provide even more protection to commercial speech will upset this careful balance and turn the test into strict scrutiny or something much closer to it. Such stricter scrutiny should be reserved for political and other noncommercial speech that occupies the highest rung of protection on the First Amendment hierarchy. This Court has already recognized that the great danger of doing this is that it will dilute the protection enjoyed by noncommercial speech. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978).

to the point that it no longer directly advances the government's goals.

The second ground in *Metromedia* that the Ninth Circuit relied on was deference to local land use decisions dealing with signage. *Metromedia* gives a generous amount of deference to cities to decide how to implement local bans on billboards, and an exception for bus shelter signs – which are part of a limited and coordinated public transportation system – qualifies for such deference. *Metro Lights*, 551 F.3d at 908.

The Ninth Circuit panel unanimously voted to deny Metro Lights' request for a rehearing. A request for en banc hearing was also denied.

REASONS FOR DENYING THE PETITION

The practice of this Court has been to allow certiorari only in limited circumstances. None of those circumstances is present in this case and therefore the petition should not be granted.

There is no conflict among the circuits on the legal issue in this case that would justify certiorari. Attempting to manufacture such a conflict, Metro Lights points out that a few circuit courts have questioned whether this Court issued any controlling opinions regarding the regulation of noncommercial speech in *Metromedia*. But Metro Lights fails to identify any controlling opinion made by the *Metromedia* Court over which the circuits are now split,

and which would now justify certiorari. Also, even if there were a conflict over a noncommercial speech issue, that would be irrelevant to the strictly commercial speech issue at play in the instant case. Thus, there is no conflict among the circuits on a legal issue that would justify certiorari.

Because stare decisis required the Ninth Circuit to follow *Metromedia*, Metro Lights' real beef is with that case. But a challenge to *Metromedia* through the instant case is unwarranted for many reasons. First, the instant case treads no new ground making it necessary to revisit *Metromedia*. Second, during the nearly thirty years since *Metromedia* was handed down, this Court has always declined to revisit the decision. Third, overturning *Metromedia* would undo three decades of jurisprudence that has carefully balanced the respective rights of sign companies, local government, and the public. Fourth, despite Metro Lights' claim that the *Metromedia* decision was so splintered that it gave no "binding decision," the truth is that a clear majority of the *Metromedia* Court (composed of a four-Justice plurality and Justice Steven's express joinder with the plurality's commercial speech ruling) did hand down a firm ruling upholding local bans of new billboards, which has been relied on by scores of courts, including the Ninth Circuit here in *Metro Lights*.

Metro Lights argues that this Court's application of the *Central Hudson* test in non-billboard arenas signals a sea change in this Court's application of the *Central Hudson* test that warrants overturning

Metromedia. It does not. The *Central Hudson* test has always been fluid – allowing courts the flexibility to determine whether in any given set of facts a specific regulatory scheme actually furthers the government's interests. Merely because this Court has seen fit to invalidate some regulatory schemes that are wholly futile, does not doom all regulation to the same fate.

Metro Lights also urges this Court to take the case because the economic incentive for the City to impose a ban has not been properly considered. Untrue. The district court made no finding that the City's true or sole motivation for enacting the ban was to generate revenue for the City's own bus shelter signs. Moreover, Metro Lights could have introduced evidence to this effect at the district court level and thereby challenged the ban's stated purposes under the second element of the *Central Hudson* test, but did not. Metro Lights having bypassed that opportunity, this Court should not now infer a motive of which there was no proof or finding below.

Finally, the distinction between public and private property provides an alternative basis for upholding the Ninth Circuit's decision.

For all these reasons, the petition should be denied.

A. There is no conflict among the circuits justifying granting the petition.

A long standing ground for certiorari is the existence of a conflict among the circuits on a specific

legal issue. There is no such conflict among the circuits on the specific legal issue at the heart of the instant case, which is whether a de facto exception to a city's ban on billboards causes the ban to violate the First Amendment. The instant case is thus far the only circuit decision on this issue.

In an attempt to somehow show a conflict among the circuits, Metro Lights points to a few circuit cases where those courts have questioned what it is that this Court said in *Metromedia*.[5] But this questioning is just that, questioning. Metro Lights fails to identify a controlling opinion that was made by the *Metromedia* Court over which those circuits are now split.

Just as significantly, the cases cited by Metro Lights to support this point do not even deal with the commercial speech legal issue central to this case. Instead, these cases deal with *Metromedia's* ruling concerning regulation of noncommercial speech. *See Sotlantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1260 (11th Cir. 2005), "however, both the four-Justice plurality opinion written by Justice White and the two-Justice concurrence written by Justice Brennan concluded that the ordinance's regulation of noncommercial advertising was unconstitutional – although for wholly different reasons."); *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994);[6]

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[5] Petition at 11-16.

[6] Metro Lights notes that in *Rappa* the Third Circuit found the *Metromedia* Court's analysis wanting and for that reason

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Discovery Network, Inc. v. City of Cincinnati, 946 F.2d 464 (6th Cir. 1991) (speaking of both *Rappa* and *Discovery Network*, the *Sotlantic* court commented: "Indeed, at least two of our sister Circuits have applied Marks[7] analysis to Metromedia's noncommercial-speech holding and have found no controlling opinion." [the court then cited to *Rappa* and *Discovery Network* as the two "sister Circuits."]). Because these cases deal with noncommercial speech issues, they are irrelevant to the commercial speech issue in the instant case, and thus there is no conflict between those cases and the present one.

"crafted its own First Amendment analysis." (Petition at 12). However, it is telling that in the fifteen years since *Rappa* was handed down no other circuit has adopted the *Rappa* test while scores of courts have continued to follow *Metromedia*.

[7] To determine if a controlling opinion exists, the *O'Dell/ Marks* doctrine says that the holding of a majority of the Court can be viewed as that position that reflects the narrowest grounds for agreement among the five Justices that comprise the majority. If no grounds for agreement can be found, there is no majority opinion and no opinion of the Court. *O'Dell v. Netherland*, 521 U.S. 151, 160, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997); *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).

B. There is no reason to revisit *Metromedia v. City of San Diego*, which for the past thirty years has served as the bedrock for countless sign cases decided by the lower courts.

There is no valid reason for this Court to revisit *Metromedia*, which has been the leading case on the subject of a ban on billboards for nearly three decades. During that time, scores of lower courts have relied on the case and, by doing so, built a principled line of jurisprudence concerning the regulation of commercial signs. Overturning *Metromedia* is unnecessary and would lead to more, not less, chaos in this area of the law.

As explained above, all the Ninth Circuit did here was comply with stare decisis and follow *Metromedia*, in which this Court issued a directly-on-point ruling upholding a ban on new billboards in spite of an express exception for bus benches. The relevant facts in *Metromedia* and in *Metro Lights* are virtually identical. Both involve city-wide bans on new billboards, and both involve exceptions for advertising signs on city-owned bus benches or their modern equivalent. Because the cases are so similar, *Metro Lights* breaks no new ground and is just another example of a lower court following the well established law laid down in *Metromedia*. No other case has warranted revisiting *Metromedia* in nearly thirty years and this case is no different.

Not only has this Court declined to revisit *Metromedia* during nearly thirty years, this Court, in fact, expressly reaffirmed the case in 1984 in *Members of The City Council of The City of Los Angeles v. Taxpayers for Vincent,*[8] (which involved the defendant here, City of Los Angeles) and, again, in 1994, in *City of Ladue v. Gilleo.*[9] The continuing viability of *Metromedia* has also been recognized by the circuit courts, including the Ninth Circuit in *Ackerley v. Communications of the Northwest Inc. Krochalis*, 108 F.3d 1095 (9th Cir. 1997).

Moreover, during those thirty years, numerous lower federal courts have relied on *Metromedia's* holding dealing with commercial billboards, a sampling of which is: *Clear Channel Outdoor, Inc. v. City*

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[8] 466 U.S. 789, 807, 104 S. Ct. 2118, 2130, 80 L. Ed. 2d 772 (1984) ("We reaffirm the conclusion of the majority in *Metromedia*. The problem addressed by this ordinance – the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property – constitutes a significant substantive evil within the City's power to prohibit. '[The] city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect.' ").

[9] 512 U.S. 43, 49, 114 S. Ct. 2038, 2042, 129 L. Ed. 2d 36, 43 (1994) ("In *Metromedia*, we reviewed an ordinance imposing substantial prohibitions on outdoor advertising displays within the city of San Diego in the interest of traffic safety and esthetics. The ordinance generally banned all except those advertising 'on-site' activities. The Court concluded that the city's interest in traffic safety and its esthetic interest in preventing 'visual clutter' could justify a prohibition of offsite commercial billboards even though similar on-site signs were allowed.") (notes omitted).

of L.A., 340 F.3d 810 (9th Cir. 2003); *Onsite Adver. Servs. LLC v. City of Seattle*, 36 Fed. Appx. 332 (2002); *One World One Family Now v. City & County of Honolulu*, 76 F.3d 1009 (9th Cir. 1996); *Ackerley Communications*, 108 F.3d 1095); *Advanced Outdoor v. County of San Diego*, 64 F.3d 666 (9th Cir. 1995); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993); *National Adver. Co. v. Orange*, 861 F.2d 246 (9th Cir. 1988).

The state courts too have relied on *Metromedia*, including: *Ex parte Walter*, 829 So. 2d 186 (Ala. 2002); *City of Salinas v. Ryan Outdoor Adver., Inc.*, 189 Cal. App. 3d 416 (Cal. 1987); *Burns v. Barrett*, 561 A.2d 1378 (Conn. 1989); *City of Sunrise v. D.C.A. Homes, Inc.*, 421 So. 2d 1084 (Fla. Dist. Ct. App. 1982); *City of Lake Wales v. Lamar Adver. Ass'n*, 414 So. 2d 1030 (Fla. 1982); *Cafe Erotica v. Florida Dep't of Transp.*, 830 So. 2d 181 (Fla. Dist. Ct. App. 2002); *Dep't of Transp. v. Shiflett*, 310 S.E.2d 509 (Ga. 1984); *National Adver. Co. v. Vill. of Downers Grove*, 561 N.E.2d 1300 (Ill. App. Ct. 1990); *Immaculate Conception Corp. v. Iowa Dep't of Transp.*, 656 N.W.2d 513 (Iowa 2003); *Maurice Callahan & Sons, Inc. v. Outdoor Adver. Bd.*, 427 N.E.2d 25 (Mass. App. Ct. 1981); *State v. Hopf*, 323 N.W.2d 746 (Minn. 1982); *City of Cottage Grove v. Ott*, 395 N.W.2d 111 (Minn. Ct. App. 1986); *Gannett Outdoor Co. of Michigan v. City of Troy*, 409 N.W.2d 719 (Mich. Ct. App. 1986); *City of Rochester Hills v. Schulz*, 592 N.W.2d 69 (Mich. 1999); *Town of Carmel v. Suburban Outdoor Adver. Co.*, 514 N.Y.S.2d 387 (App. Div. 1987); *Penn Adver.*,

Inc. v. City of Buffalo, 613 N.Y.S.2d 84, 86 (App. Div. 1994); *R. O. Givens, Inc. v. Town of Nags Head*, 294 S.E.2d 388 (N.C. Ct. App. 1982); *Genesis Outdoor Inc. v. Vill. of Cuyahoga Heights*, 2002 Ohio 2141 (Ct. App. 2002); *Atlantic Ref. and Mktg. Corp. v. Bd. of Comm'rs of York Tw.*, 608 A.2d 592 (Pa. Commw. Ct. 1992); *Kasha v. Dep't of Transp.*, 782 A.2d 15 (Pa. Commw. Ct. 2001); *City of Brentwood v. Metro. Bd. of Zoning Appeals*, 149 S.W.3d 49 (Tenn. Ct. App. 2004); *Eller Media Co. v. City of Houston*, 101 S.W.3d 668 (Tex. App. 2003); *Town of New Mkt. v. Battlefield Enters., Inc.*, 8 Va. Cir. 96 (Va. Cir. Ct. 1984).

Nor has *Metromedia* been overruled by the various non-billboard *Central Hudson* cases relied upon by Metro Lights.[10] (Petition at 18-21). *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161 (1999),[11] is distinguishable because it dealt with a

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[10] The Ninth Circuit correctly recognized that those other Supreme Court underinclusivity cases do not deal with the "law of billboards" which remains the exclusive province of *Metromedia*. *Metro Lights*, 551 F.3d at 911. Metro Lights argues that the Ninth Circuit applied an "entirely different analytical framework" than those other underinclusivity cases. (Petition at 20 n.2). Untrue. All of the cases, including *Metromedia* and *Metro Lights*, use the same analytical framework consisting of the four-part *Central Hudson* test.

[11] The *Greater New Orleans* decision was cast in the mold of an earlier case, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995) that involved a federal law that prohibited beer labels from showing alcohol content but allowed advertisements for beer to show such information and

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statutory scheme that had virtually no chance of furthering the government's objective of reducing the number of compulsive gamblers – in the Court's view the government's simultaneous encouragement of advertising for Indian casinos while banning advertising for private casinos simply canceled each other out and re-directed gamblers from one venue to the other. By contrast, here the de facto exception for bus shelter signs does *not* cause a ban to lose virtually all effectiveness in furthering the goals of improving aesthetics and traffic safety. *Metro Lights,* 551 F.3d at 905-06.

City of Cincinnati v. Discovery Network, 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993), is distinguishable because there this Court found that the key feature of the statutory scheme, which was a distinction between commercial and noncommercial newsracks, lacked any logical connection to furthering Cincinnati's interest in aesthetics and sidewalk safety, and thus the statutory scheme failed the *Central Hudson* test. By contrast, here, the perceived exception is a limited and controlled series of transit furniture signs limited to public rights-of-way that will not undermine the ban's furtherance of Los Angeles' goals and for that reason Los Angeles'

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allowed wine labels to include it. That law worked at such cross purposes that, like the law in *Greater New Orleans*, it had little or no chance of furthering the government's objectives behind the law, and on that basis can also be distinguished from Los Angeles' ban.

statutory scheme satisfies the *Central Hudson* test. *Metro Lights,* 551 F.3d at 905.[12] *See also Ackerley Communications of the Northwest Inc. v. Krochalis*, 108 F.3d 1095, 1099 (9th Cir. 1997) (pointing out that this Court has never said that *Central Hudson* cases outside of the billboard arena have undermined *Metromedia* and that this Court has continued to rely on *Metromedia*.).

Metro Lights suggests that the Ninth Circuit's naked observation that there "may seem to be some tension" between this Court's more recent cases applying the *Central Hudson* test and *Metromedia* is an open invitation to this Court to revisit that case. (Petition at 19); *id.* at 908. Not so. The Ninth Circuit's observation should not be taken for more than it is. The observation simply recognizes that the ultimate holdings in *Metromedia* and those other cases differed. The analysis under the third part of the *Central Hudson* test has always been fluid, fact-specific, and dependent on degree. Just because this Court has seen fit to strike down a few regulatory

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[12] Metro Lights also argues, based on discussion in *Discovery Network*, that where governmental regulation does not relate to the commercial nature of commercial speech the regulation should be subject to review under standards applicable to "fully protected speech." (Petition at 18-19). This argument lacks merit because there is no practical way to make this distinction. Any regulation imposed on a sign structure used to display commercial messages necessarily affects the commercial content of those messages. Therefore, the standard of review for regulations of commercial speech should continue to apply.

schemes as ultimately ineffectual does not indicate abandonment of a nuanced analysis that allows courts to in some cases uphold regulations of commercial speech and in other cases strike it down.

To bolster its request to revisit *Metromedia*, Metro Lights portrays the case as failing to produce any binding law to guide subsequent courts. (Petition at 11, 15). This portrayal is flawed. The *Metromedia* Court *did* produce binding law. Pertinent to this litigation, a majority of that Court, comprised of the four-Justice plurality and Justice Stevens's dissent, expressly ruled that a city may impose a city-wide ban on all new offsite commercial signs, and that such a ban may exempt onsite and other specified types of signs, all without violating the First Amendment.[13] It was this ruling that the Ninth Circuit panel relied on in *Metro Lights*.

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[13] *Id.* at 512: "Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted. . . . In sum, insofar as it regulates commercial speech the San Diego ordinance meets the constitutional requirements of Central Hudson, supra." (plurality opinion by Justice White and joined by Justices Stewart, Marshall, and Powell); *id.* at 541: "The plurality first holds that a total prohibition of the use of 'outdoor advertising display signs' for commercial messages, other than those identifying or promoting a business located on the same premises as the sign, is permissible. I agree with the conclusion that the constitutionality of this prohibition is not undercut by the distinction San Diego has drawn between onsite and offsite commercial signs . . . and I therefore join Parts I through IV of JUSTICE WHITE'S opinion." (Stevens, J., dissenting). While Chief Justice Burger and Justice Rehnquist, who each dissented,

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To divert this Court's attention from the central issue in this case – which is whether Los Angeles' ban on offsite signs satisfies *Central Hudson's* direct advancement element – Metro Lights asserts that the economic motive for the City has not been properly considered by this Court (Petition at 26) and amicus joins the fray. (Brief of Amici Curiae Atlantic Outdoor Advertising, Inc. and Willow Media, LLC at 9).

This is untrue. The existing standard, the *Central Hudson* test, already protects against such potential self-interest. If a sign company suspects that the true and sole purpose of a ban is to benefit the city's economic interests, and not to improve aesthetics and traffic safety, the sign company is always free to argue that the second element of the *Central Hudson* test (which requires that there be a substantial governmental purpose behind the ban) has not been satisfied and submit supporting evidence to that effect.

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did not expressly join in Part VI of the plurality's opinion as did Justice Stevens, they did not disagree with it, thereby impliedly agreeing with it. *City of Ladue v. Gilleo*, 512 U.S. 43, 49 n.8, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994) ("Five Members of the Court joined Part IV of Justice White's opinion, which approved of the city's decision to prohibit off-site commercial billboards while permitting on-site billboards. None of the three dissenters disagreed with Part IV. *See* 453 U.S. at 541 (Stevens, J., dissenting in part) (expressly joining Part IV); *id.* at 564-565 (Burger, C. J., dissenting); *id.* at 570 (Rehnquist, J., dissenting)").

As explained in the earlier "Opinions Below" section, Metro Lights never submitted evidence showing that the sole motivation for the City's enactment of the ban was economic, nor did the district court make a finding to this effect.

Amicus also tries to analogize the City's ban to case law where courts, on due process grounds, have kept adjudicatory bodies from deciding matters in which they have a financial stake. (Amicus brief at 8-9). This comparison is inapt. The due process clause, which provides protection against the government depriving an individual of its property rights, does not apply to legislative action, the reason being that legislation applies broadly to all future cases and does not single out any one person's property rights. *Horn v. County of Ventura*, 24 Cal. 3d 605, 616, 156 Cal. Rptr. 718 (1979). For that reason, the due process bias cases cited by amicus have no application to the City's ban, which is a pure legislative act.

For all these reasons, there is no need to revisit or overturn *Metromedia.*

C. The fact that the ban, as a matter of law, does not apply to signs on public property provides an alternative rationale for the Ninth Circuit's decision.

Another reason for denying the petition is the availability of an alternative ground to uphold the

Ninth Circuit's ruling.[14] *See Sanson Hosiery Mills v. NLRB*, 344 U.S. 863, 735 S. Ct. 103, 97 L. Ed. 669 (1952). This alternative rationale relies on the inherent distinction between public and private property, and the different roles government plays with respect to each.

With respect to publicly-owned streets and sidewalks, the government acts in the roles of owner and caretaker, and in those roles must carefully balance a number of competing interests, including use of the streets for travel and free speech. *See, e.g., Sanctity of Human Life Network v. Cal. Highway Patrol*, 105 Cal. App. 4th 858, 870, 129 Cal. Rptr. 2d 708, 716 (2003) (state can restrict citizens from holding signs

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[14] There is another alternative ground for upholding the Ninth Circuit's ruling, but based on an equal protection rather than First Amendment analysis. In situations such as this that involve both free speech and differential treatment among classes of speakers, some courts have concluded that the more appropriate analysis is under equal protection rather than the First Amendment. *See, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94-95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972). Under facts analogous to those here, equal protection principles have been applied where a city-wide ban on billboards exempted advertising signs on a city-owned sports stadium. The court applied a rational basis equal protection test after noting that there was no fundamental free speech right involved, which may have been because the speech was purely commercial in nature. After concluding that the regulatory scheme passed the rational basis test because the exemption for the signs on the sports stadium was discrete and reasonable under the circumstances, the court upheld the ban. *MBC Realty, LLC v. Mayor and City Council of Baltimore*, 351 F. Supp. 2d 420, 425 (D. Md. 2005).

over freeway overpasses during rush hour in order to preserve "free flow of traffic"). With respect to private property, the government acts as regulator under authority of its police power. *See, e.g., G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006).

These different roles have led to two lines of First Amendment jurisprudence. Where government is acting in its role as owner of public property, the case law focuses on whether the public property is a public forum or not. Bus shelters are not. *See, e.g., Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275, 1278-79 (11th Cir. 2003). Further, it is a long standing principle that when government acts as a proprietor to manage its internal operations, as opposed to exercising its power as regulator, those proprietary actions are subject to a lower level of First Amendment scrutiny. *United States v. Kokinda*, 497 U.S. 720, 725, 110 S. Ct. 3115, 3119, 111 L. Ed. 2d 571, 580 (1990); *Children of the Rosary v. City of Phoenix*, 526 U.S. 1131, 119 S. Ct. 1804, 143 L. Ed. 2d 1008 (1999). By contrast, where government is acting in its role as regulator of private property, the government's actions are subject to a higher level of scrutiny. This review takes into account such factors as whether or not the restrictions are content-based and whether the restrictions are limited to time, place and manner considerations. *See, e.g., Metromedia*, 453 U.S. 490 (1981).

Because these different lines of First Amendment jurisprudence arise out of the fundamental distinction

between public and private property, that distinction cannot be ignored. The significance of this distinction has been most recently affirmed by this Court in *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009). In that case, this Court found that a city that was already displaying a monument to the Ten Commandments in a city park had no obligation under the First Amendment to provide space for other groups' religious monuments. In so finding, the Court explained that the government's own expressive activity is not subject to the First Amendment, and that only the government's regulation of private speech is. *Id.* at 1130 ("*The Free Speech Clause* restricts government regulation of private speech; it does not regulate government speech.").

Applying this doctrine here[15] means that Los Angeles' own bus shelter signs, which are governmental speech, will not be subject to the First Amendment. In fact, this is already reflected in the fact that signs in the public right-of-way are expressly outside the scope of Los Angeles' ban.[16] Therefore, the bus

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[15] There is even greater reason to apply the doctrine here than in *Summum* because, unlike in that case, the facts here deal exclusively with commercial speech, which this Court has deemed not deserving of as high a level of protection as political and other noncommercial speech. *See, e.g., Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 779-80, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

[16] This fact is reflected in LAMC § 91.101.4 (Building Code, of which Sign Ordinance is a part, applies only to private

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shelter signs should not be considered at all when analyzing the constitutionality of the ban.

Viewed in this light, the ban is a flat ban because it applies equally to all billboards on private property. A flat ban easily satisfies the *Central Hudson* test and, in particular, the third element of that test that requires that the regulation "directly advance" the government's stated objectives. *Metro Lights*, 551 F.3d at 909 ("Indeed, its counsel, at oral argument, conceded that *Metromedia* 'probably would' control without the SFA [Street Furniture Agreement].").

This alternative rationale thus amply supports the Ninth Circuit's decision, making it unnecessary for this Court to reach the legal issues raised by the petition.

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property and expressly excludes structures in public right-of-way). (Appendix, App. 17).

CONCLUSION

For all these reasons, the Court should deny the petition.

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Respectfully submitted,

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