No. 17-1152

In The Supreme Court of the United States

CONTEST PROMOTIONS, LLC,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

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

BRIEF *AMICUS CURIAE* OF GOLDWATER INSTITUTE AND MISSISSIPPI JUSTICE INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), this Court held that if a sign code enforcement officer must "read the sign" to determine if it is permitted or prohibited, then the sign-code provision is "content based on its face" and presumptively invalid. *Id.* at 2226–27.

In San Francisco, an enforcement officer must go much further. She must (1) read the sign, (2) investigate both the "primary" and "incidental" activities conducted on the premises, and (3) investigate property ownership in the vicinity of the sign—to determine whether a particular sign is freely allowed, permitted, or banned. This is because the San Francisco Planning Code draws a commercial–noncommercial, onsite–offsite distinction and further subcategorizes onsite signs into those relating to the primary or incidental activity conducted there. *See* Planning Code §§ 602, 611 (Pet. App. 96a, 123a–125a).

The question presented is whether these commercial–noncommercial, onsite–offsite, and primary–incidental activity distinctions offend the First and Fourteenth Amendments.

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INTEREST OF *AMICI CURIAE*[1]

The Goldwater Institute ("GI") was established in 1988 as a nonpartisan public policy and research foundation dedicated to advancing the principles of limited government, economic freedom, and individual responsibility through litigation, research, policy briefings and advocacy. Through its Scharf–Norton Center for Constitutional Litigation, GI litigates cases and files *amicus* briefs when its or its clients' objectives are directly implicated.

GI devotes substantial resources to defending the vital constitutional principle of free speech. Relevant here, GI attorneys successfully represented citizens challenging speech bans in *Reed v. Purcell*, No. CV10-2324-PHX-JAT, 2010 WL 4394289 (D. Ariz. Nov. 1, 2010), and *Wickberg v. Owens*, No. 3:10-cv-08177-JAT (D. Ariz. filed Sept. 20, 2010; resolved Apr. 12, 2011). GI has also litigated and won important victories for other aspects of free speech, including *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011); *Coleman v. City of Mesa*, 284 P.3d 863 (Ariz. 2012); *Protect My Check, Inc. v. Dilger*, 176 F. Supp. 3d 685 (E.D. Ky. 2016), and has appeared frequently as *amicus curiae* in this and other courts in free speech

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[1] Pursuant to S. Ct. R. 37(6), counsel for *amici curiae* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *amici*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief. The parties' counsel of record received timely notice of the intent to file the brief. Petitioner consents to and Respondent does not oppose the filing of this brief.

cases. *See, e.g.*, *Janus v. AFSCME* (No. 16-1466, pending); *Minnesota Voters Alliance v. Mansky* (No. 16-1435, pending); *Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 480 (2015).

GI's policy paper, *Heed* Reed,[2] has garnered much attention in Arizona and beyond. GI has litigated two lawsuits to protect First Amendment rights against city sign-code restrictions. *Covers Plus et al. v. City of Chandler*, No. CV2016-014097, Ariz. Super. Ct. (filed Aug. 15, 2016; resolved Sept. 12, 2017)[3]; *Shearer et al. v. City of Scottsdale*, No. 2:16-cv-04337-SPL, D. Ariz. (filed Oct. 5, 2016; resolved Aug. 1, 2017). The offsite versus onsite, and commercial versus noncommercial signs issues, central in this case, were also center stage in GI's sign-code cases.

The Mississippi Center for Public Policy ("MCPP") is an independent, nonprofit, public policy organization based in Jackson, Mississippi, that was founded in 1991 by a small group of concerned citizens who wanted to protect the families of Mississippi. Over time, the organization has grown to become a leading voice in Mississippi policy formation by informing the public to help them understand and defend their liberties. The Mississippi Justice Institute ("MJI") is the legal arm of MCPP and represents Mississippians whose state or federal constitutional rights have been

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[2] Jared Blanchard & Adi Dynar, *Heed* Reed: *Goldwater Institute's Guideposts for Amending City Sign Codes*, goo.gl/dY1Y4a.

[3] goo.gl/nrYATS

threatened or violated. MJI also works to defend the principles of MCPP in the courts, with a particular aim toward protecting liberty. This work takes many forms, including direct litigation on behalf of individuals, intervention in cases of importance to public policy, participation in regulatory or rulemaking proceedings, and filing *amicus* briefs to give voice to the perspective of Mississippi families and individuals in significant legal matters pending in the courts.

Amici believe their litigation experience and policy expertise will aid this Court in consideration of this case.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

In *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), this Court made clear to the Ninth Circuit what should have been obvious: any restriction on speech that depends on the content of that speech is by definition a content-based speech restriction, and therefore presumptively invalid under the First Amendment. But in this case, the Ninth Circuit affirmed a content-based speech restriction on the theory that "*Reed* does not abrogate prior case law holding that laws which distinguish between on-site and off-site commercial speech survive intermediate scrutiny." Pet. App. 47a. The questions presented to this Court are: Is that true? Can that distinction survive after *Reed*?

Those questions remain important in communities across the country today, thanks in no small part

to the confused approach to speech categories created by this Court's commercial-speech jurisprudence. That confusion has reached a fever pitch as lower courts—and city councils—have struggled, as the Ninth Circuit did here, Pet. App. 7a, with the relationship between cases such as *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) and *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), which inherently approve of content-based speech restrictions, and cases such as *Reed, Humanitarian Law Project v. Holder*, 557 U.S. 966 (2009), and *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), which forbid the government from imposing laws that go into effect based on the content of the information communicated. Only this Court can resolve this important question of national importance on which lower courts are divided.

This case is a clean vehicle for addressing that important question. This case differs from *Reed* only in the fact that the San Francisco ordinance imposes different rules on signs based on their location *as well as* their content. In order to determine whether a particular sign is freely allowed, permitted, or banned by San Francisco's sign code ("Planning Code"), an enforcement officer must do the following: (1) read the sign, (2) investigate the primary and incidental activities conducted on the premises, and (3) investigate property ownership in the vicinity of the sign. This is because the Planning Code categorizes signs as commercial and noncommercial, and then further categorizes the signs as relating to onsite activity or offsite activity, and still further categorizes signs concerning

onsite activity into those relating to the *primary* onsite activity and those relating to *incidental* onsite activity.

Thus, the San Francisco Ordinance is inherently content-based after *Reed*. The basis for the Ninth Circuit's conclusion that *Reed* leaves such restrictions in place is the persistence of confusion resulting from the category of "commercial speech"—a category that is *itself* content-based. This Court should therefore grant certiorari to make clear that content-based restrictions, *including differentiating between commercial and noncommercial speech*, are subject to strict scrutiny in accordance with *Reed*.

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari because lower courts will continue to struggle with *Metromedia* and *Central Hudson*, which are irreconcilable with *Reed* and *Sorrell*.

A confused approach to speech categories has impeded clear thinking in courts' approach to speech regulations. *See* Tara Smith, *The Free Speech Vernacular: Conceptual Confusions in the Way We Speak About Speech*, 22 TEX. REV. L. & POL. 57 (2017). That confusion pervades the decision below. It results from the fact that this Court has not expressly disavowed the continued application of *Central Hudson*, 447 U.S. 557 and *Metromedia*, 453 U.S. 490, even though the

rationales for those cases have been gutted by *Reed*, *Sorrell*, and similar cases.

A plain resolution here would have been for the Ninth Circuit to adhere to *Reed*'s simple bright-line rule: If an enforcement officer must "read the sign" to determine if it is permitted or prohibited, then the provision is "content based on its face" and presumptively invalid. *Reed*, 135 S. Ct. at 2226–27. The Ninth Circuit, instead, offered a tortured reading of *Metromedia* and *Central Hudson* to provide an inadministrable—and unconstitutional—rule that continues to allow local governments to impose different rules on signs based on what they say. Pet. App. 7a–15a, 18a–22a.

Other courts have doubted the continued validity of *Metromedia* and *Central Hudson*, which are irreconcilable with *Reed* and *Sorrell*, and have come up with different answers. Only this Court can definitively reaffirm or disavow *Metromedia* and *Central Hudson*—a question that this case squarely presents. *See, e.g., Reed*, 135 S. Ct. at 2235 (Breyer, J., concurring) (questioning how *Reed* and *Sorrell* can be reconciled with *Central Hudson*).

A recent decision by the Texas Court of Appeals is a good example: the Texas Highway Beautification Act drew a distinction between commercial and noncommercial signs, onsite and offsite signs, and speech related to onsite versus offsite activities, just as in this case. In *Auspro Enterprises, LP v. Texas Department of Transportation*, 506 S.W.3d 688, 699 (Tex. App. 2016), the court observed: "In *Reed*'s wake, our principal issue

here is not whether the Texas Highway Beautification Act's outdoor-advertising regulations violate the First Amendment, but to what extent." *Id*. at 691. The court held two subchapters of the Texas Highway Beautification Act to be unconstitutional content-based restrictions of speech. *Id*. at 707.

That was correct—but the court struggled with how *Central Hudson*'s intermediate-scrutiny commercial-speech test gels with *Reed*. *See id*. at 692 & n.10. While it acknowledged that *Central Hudson* described commercial speech as "expression related solely to the economic interests of the speaker and its audience" and held that content-based restrictions on commercial speech need only withstand intermediate scrutiny, *id*. at 703 n.109, it found that difficult to reconcile with this Court's pronouncement in *Sorrell* that regulation based on a speaker's "economic motive" is strictly scrutinized. *Sorrell*, 564 U.S. at 567.

That struggle is unsurprising. Categorizing speech as "commercial" or "noncommercial" in order to impose different constitutional standards on that speech (or on restrictions of that speech) is *itself* a content-based speech restriction, because it requires courts to read the content of the message being conveyed. Justice Brennan warned of just that in his concurrence in *Metromedia*: giving a code enforcement officer discretion to decide whether speech is commercial or noncommercial, he wrote, threatens "noncommercial speech in the guise of regulating commercial speech." 453 U.S. at 536–39 (Brennan, J., concurring).

In fact, *Metromedia*'s five separate opinions never coalesced or converged on any single rationale. Thus, long before *Reed*, that case has been eroded to the point of unworkability and has been viewed as "ha[ving] little precedential effect." *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1047 (3d Cir. 1994). *Reed*, however, ought to have made plain that *Metromedia* can no longer be good law. That case, like all commercial-speech cases, differentiated between "purely commercial advertisements of services or goods for sale" and other types of speech, 453 U.S. at 505—which is to say, it treated speech differently "because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227.

Even if *Metromedia* does remain relevant, the *Metromedia* plurality's first rationale[4]—"that a statute that allowed any commercial speech could not prohibit *any* non-commercial speech," *Rappa*, 18 F.3d at 1056 (emphasis in original)—is inapposite to the situation presented here: commercial speech relating to onsite incidental activity or offsite activity is prohibited but *noncommercial* speech relating thereto is not. In other words, the Ninth Circuit read exactly the *opposite* into

[4] *Metromedia*'s second rationale—"that distinctions within the category of non-commercial speech must be supported by a compelling state interest," *Rappa*, 18 F.3d at 1056—is simply inapplicable here. Noncommercial signs are not regulated under Article 6 of the Planning Code. In other words, this case is not about distinctions within the category of noncommercial signs. *See* Table 1, *infra*.

Metromedia's first rationale to shoehorn this case under it.

And *Metromedia*'s first rationale itself stems from an implicit and erroneous value judgement—endorsed by *Central Hudson*—that the First Amendment "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." 447 U.S. at 563. There is no basis, and never has been any, for that proposition. *See generally* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990); Deborah J. La Fetra, *Kick it up a Notch: First Amendment Protection for Commercial Speech*, 54 CASE W. RES. L. REV. 1205 (2004). The proposition that commercial speech enjoys no First Amendment protection was manufactured in *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942)—just as the idea that motion pictures enjoy no constitutional protection was erroneously created by fiat in *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230 (1915)—and both have been correctly repudiated.

The commercial–noncommercial speech distinction, let alone the onsite–offsite distinction involved here, has proven almost impossible to administer, and chills speech in a manner that has been described as "abhorrent." *Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1247 (11th Cir. 2015). These untenable premises, of course, have been uprooted by *Sorrell*, *Reed*, and other cases, discussed below. These cases clean up the confused approach to speech categories that *Metromedia* and *Central Hudson* left us with. What remains to be fleshed out—a question squarely

presented here and on which certiorari should be granted—is "to what extent" this Court intended that clean-up to go. *Auspro*, 506 S.W.3d at 691.

II. San Francisco's speech categories drawing onsite–offsite, commercial–noncommercial, and primary–incidental activity distinctions present a recurring question of national importance.

A. *Metromedia* and *Central Hudson* adopt inherently content-based speech categories and therefore are irreconcilable with *Reed* and similar cases.

Justice Brennan voiced his "fear" that the *Metromedia* decision would generate "ordinances providing the grist for future additions to" "a long line of cases" that have "consistently troubled this Court," because that decision "creates discretion where none previously existed." 453 U.S. at 538 (Brennan, J., concurring). The end product of that "discretion" is exactly what we see in San Francisco's Planning Code at issue here. Its labyrinth of sign categories leads to a pervasive chilling effect on speech. But it is not unique in this. Sign categories like San Francisco's are now found in hundreds of cities and have generated immense confusion—and litigation—across the United States.

Take the text of the Planning Code:

> "A Sign, . . . which directs attention to a business, commodity, industry or other activity which is sold, offered or conducted elsewhere

> than on the premises upon which the Sign is located, or to which it is affixed, and which is sold, offered or conducted on such premises only incidentally if at all," Planning Code § 602(c), Pet. App. 98a, "shall [not] be permitted at any location within the City." Planning Code § 611(a), Pet. App. 123a.

The court below discussed how the relevant provisions of the sign ordinance work. There are three distinctions relevant here:

(1) there is an onsite versus "offsite" distinction, Pet. App. 4a–5a;

(2) within the category of onsite signs, there is a distinction drawn between signs directing attention to the "primary" activity conducted on site and those that direct attention to "incidental[]" activities conducted on site, Pet. App. 17a, Planning Code § 602, Pet. App. 97a–98a[5]; and

(3) a distinction between "commercial and noncommercial signs." Pet. App. 4a–5a.[6]

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[5] As written, the primary or incidental "*activity*" conducted onsite or offsite need not be commercial. Planning Code § 602, Pet. App. 97a–98a (emphasis supplied) (defining "Business Sign" and "General Advertising Sign"). But the signs themselves have to display a commercial message to fall under Article 6. Pet. App. 5a (explaining that Article 6 of the Planning Code does not apply to "noncommercial signs").

[6] The Planning Code does not define "commercial sign"; or "noncommercial" "except by reference to a nonexhaustive list that includes official public notices, governmental signs, temporary display posters, flags, emblems, insignia, and posters of any

An overview of the Planning Code, thus, looks like this:

Table 1	Onsite primary activity	Onsite incidental activity	Offsite activity
Commercial message	Permitted	Not permitted	Not permitted
Noncommercial message	Permitted	Permitted	Permitted

In other words, only (1) a sign that displays a *commercial message* that calls the reader's attention to an *offsite activity* (commercial or noncommercial), or (2) a sign that displays a *commercial message* that calls the reader's attention to an *onsite activity* (commercial or noncommercial) that is *incidental*, are prohibited under the Planning Code.

The manner in which these provisions are enforced is the *source* of the chilling effect on speech, and an understanding of how an enforcement officer could use or abuse her discretion in categorizing signs is essential to understand why the continuing validity of content-based categories of speech such as ratified by *Metromedia* and *Central Hudson* needs urgent resolution. And it demonstrates resolving the tension between *Reed* and *Sorrell* on one hand and *Metromedia*

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nation or political subdivision, and house numbers." Pet. App. 5a (cleaned up). *Central Hudson* defined speech that "propos[es] a commercial transaction" or "expression related solely to the economic interests of the speaker and its audience" as "commercial speech." 447 U.S. at 561–62.

and *Central Hudson* on the other is sorely needed given the chilling effect caused by the onsite–offsite and commercial–noncommercial distinctions found in the latter cases.[7]

Imagine how a Planning Code enforcement officer will go about enforcing the Planning Code with regard to the following hypothetical signs.

- "Veterans: Buy One Shirt Get One Free ←" portable sign on the sidewalk by a tailor shop ("Tailor Shop Sign")
- "I ♥ Planned Parenthood" decal on the door of an arts-and-crafts store ("Arts-and-Crafts Sign")
- "Ask Me How Guns Save Lives #Parkland-Strong" plaque displayed in the window of a bookstore ("Bookstore Sign")

Let us take each of these three signs in turn.

1. *"Veterans: Buy One Shirt Get One Free ←" portable sign on the sidewalk by a tailor shop*. A cursory reading of this sign suggests that it proposes a commercial transaction, and is therefore a commercial message. Check: Article 6 is applicable.[8] Note that the

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[7] These distinctions flunk even a straightforward application of *Central Hudson*'s intermediate security.

[8] But if the exact same sign is displayed by a local union chapter, it could be viewed as relating to a *noncommercial* message to which Article 6 is *not* applicable. Perhaps the speaker wants to raise money for the union, or raise awareness about veteran-union-member issues. Perhaps the union is a tailor's union and the discount is available at all tailor shops that have employees that this union represents.

enforcement officer has already "draw[n] distinctions based on the message a speaker conveys." *Reed*, 135 S. Ct. at 2227.

But the enforcement officer must also determine whether the sign calls attention to an *onsite* activity. Because the arrow points to a tailor shop, it therefore displays a commercial message purportedly relating to an onsite activity. Or does it? If the sign is ambiguously placed in such a way that it could point to either of two adjacent businesses (the tailor shop or the local union chapter), it would relate to an *offsite* activity.[9] That ambiguity can only be cleared after speaking with the adjacent shop owners.

The sign also says "Veterans." If the discount offer is directed only to veterans, does the sign relate to the *primary* activity or merely an *incidental* activity of the tailor shop or the union? Or, from a different angle, is offering discounts the primary or incidental activity of the tailor shop or the union? If the sign is read as applicable only to *veterans*, or only to *discounts*, then it refers to an incidental activity, which means it is prohibited by the Planning Code. But if the sign is read as relating to "shirts," then shirt-making or shirt-selling is the *primary* activity of the tailor shop (and the

[9] If it is a tailor's union, then selling shirts is probably an *offsite* activity conducted at union members' stores, and the seemingly *commercial* message is only an inducement for passersby to stop for the union to communicate its *noncommercial* message about the well-being of veteran union members.

tailor's union, but not any other union), which means that the sign is allowed under the Planning Code.[10]

Not so fast. The sign offers discounts to veterans. A sign conveying that the tailor takes the financial well-being of veterans seriously, or respects American veterans, is a *non*commercial message. In other words, the Tailor Shop Sign fits under all six boxes of Table 1—a puzzle that cannot be resolved *just* by reading the sign; the code enforcement officer also must speak with the tailor to determine the speaker's *motive* before she can resolve whether the shop owner can be allowed to engage in what is universally recognized as protected First Amendment speech. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (recognizing that commercial speech *is* protected by the First Amendment).

2. *"I ♥ Planned Parenthood" decal on the door of an arts-and-crafts store*. Our enforcement officer next comes across the Arts-and-Crafts Sign. On first *reading the content of the sign*, she may conclude that it is an onsite, noncommercial sign which is not regulated under Article 6 of the Planning Code: (1) it is a decal on the door, not a portable sign on the sidewalk, and

[10] What's more, the confusion will persist *even after* further investigation because the sign does propose a commercial transaction and can thus be classified either as a commercial sign relating to onsite *incidental* activity as well as *offsite* activity if displayed by the tailor's union. Both of these sign categories are prohibited under the Planning Code.

(2) it does not seem to propose a commercial transaction.

Not so if the arts-and-crafts store sells printed pillows, T-shirts, mugs, etc., with the "I ♥ Planned Parenthood" message. Then the sign transforms into a commercial message relating to an onsite primary activity (which is allowed), or relating to an onsite incidental activity (which is prohibited).

Or, it could be a truly noncommercial message that the store's owner feels strongly about and which is not regulated by Article 6 of the Planning Code. Or the store owner may have wanted to monetize the value of her storefront by renting out window space to advertise a message she feels deeply about. Or she may have given that space to another speaker for free for any number of reasons: she may personally identify with the message, she may think it enhances the value of the products or services offered for sale, or she may want to be personally identified with a particular message even if such association harms her business.

Again, the Arts-and-Crafts Sign could fall under any of the six boxes of Table 1—a situation that can be cleared up *only* by reading the *message conveyed* and interviewing the store owner or representative to determine the speaker's *motive*.

3. *"Ask Me How Guns Save Lives #Parkland Strong" plaque displayed in the window of a bookstore*. At first blush, this may appear to be a noncommercial sign. But it could also be an inducement for people to enter the shop to voice approval or disapproval. The

bookstore owner could view this as good for business.[11] In this case, the sign could be viewed as "expression related solely to the economic interests of the speaker," and thus within the commercial-speech definition of *Central Hudson*. 447 U.S. at 562. Or, it could be a sign relating to an offsite activity, say, if the bookstore owner or her family member also owns a gun range where they provide education and training about gun safety. Again, the sign fits any of the six boxes of Table 1 and is either permitted or prohibited based on how the enforcement officer chooses to classify it, based on implicit or assumed value judgments.

As this discussion shows, the risk of erroneous or arbitrary classification—and the resulting proscription of protected First Amendment speech—is high if an enforcement officer must read the sign and conduct further investigations as to the speaker's motive. *This* is what Justice Brennan feared would happen under *Metromedia*.

And there is nothing that comes close to an objective, bright-line rule that would prevent an enforcement officer who has a personal vendetta against a particular business or viewpoint from arbitrarily categorizing signs in the two boxes that the Planning Code makes illegal—with attendant *criminal* penalties that follow. Planning Code § 610(b)(2)(B), Pet. 7 (misdemeanor subjecting violator to six months in jail

[11] Bookstores often do this. Book People in Austin, Texas, for example, displays a mural in which it explains the purpose of the store's founders: to create a place for community discussion of important social and personal issues.

and civil penalty of $2,500 per day per violation). This is precisely the type of enforcement experience that has become all too common across hundreds of American cities, and it is precisely this risk of arbitrary, content-, speaker- and motive-based enforcement that is the crux of the First and Fourteenth Amendments' protections.

B. The persistence of *Metromedia* and *Central Hudson* has allowed content-based speech restrictions to persist nationwide, leading to a chilling effect of self-censorship.

Not only does the Planning Code violate *Reed*'s bright-line rule that sign-code provisions are content-based and, therefore, presumptively invalid if an enforcement officer must read the sign to determine if it is permitted or prohibited, 135 S. Ct. at 2226–27, but it also chills speech by subjecting commercial and non-commercial messages to review by government agents who are often prepared to inquire into all manner of dealings and motives of the speaker.

This is what happened in the City of Chandler, Arizona. *See Covers Plus, et al. v. City of Chandler*, No. CV2016-014097, Ariz. Super. Ct. (filed Aug. 15, 2016).[12] That city's sign code contained a separate set of regulations for "on-site," Compl. ¶ 38,[13] as opposed to offsite signs, which, in relevant respects, were identical to San

[12] goo.gl/nrYATS

[13] goo.gl/nrYATS

Francisco's regulations at issue here. Chandler's sign code further separately regulated *eleven distinct content-based and speaker-based sign categories*, including subdivision signs, subdivision direction signs, contractor signs, development signs, grand opening signs, political signs, and so forth. Compl. ¶ 63. Commercial signs were also treated differently from noncommercial signs: while unlimited noncommercial signs were freely permitted, the ability to convey commercial messages was severely proscribed. Compl. ¶¶ 36–71.

But content neutrality and narrow tailoring can be readily achieved. Justice Alito explained as much in his *Reed* concurrence when he wrote that the decision does "not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives." 135 S. Ct. at 2233–34 (Alito, J., concurring).

But the court below fashioned a hybrid rule out of *Metromedia* and *Central Hudson* that cannot be reconciled with *Reed* and *Sorrell* and that confuses this matter considerably. Cities need guidance as to the degree to which they can impose content-based speech restrictions (answer: rarely). This Court should therefore grant certiorari to definitively review *Metromedia* and *Central Hudson* in light of three broad principles:

1. *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011). *Sorrell* struck down a Vermont law that "impose[d] a burden based on the content of speech and the identity of the speaker." *Id.* at 567. Sign codes such as San Francisco's frequently impose burdens based on the

content of speech (commercial speech relating to onsite incidental activity), and the identity of the speaker (someone else's commercial speech relating to an offsite activity a store owner chooses to associate with). *See* Table 1, *supra*.

2. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). *Reed* offers a straightforward test—a test this Court should reaffirm by disavowing *Metromedia* and *Central Hudson*. *Reed* provided a "commonsense" definition of "content based": "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." 135 S. Ct. at 2227. This rule makes sense, because inquiring into the *government's* motive in regulation, just as inquiring into a *speaker's* motive in speaking, is and should be irrelevant in "determining whether the law is content neutral on its face." *Id.* at 2228.

In other words, if San Francisco wishes to address blight and visual clutter, it must adopt provisions that restrict the *size* of signs, or their materials, or whether they flash lights, etc.—rules calibrated to address visual clutter in a content-neutral fashion.

3. Property-rights approach. The onsite versus offsite distinction found in the Planning Code is also resolved—not with reference to *Metromedia* or *Central Hudson*, but to ordinary property-law principles. If our bookstore owner, or arts-and-crafts store owner, wishes to rent out or provide for free her storefront window space for someone else's signs, that is their right. And

if such private property owners do not want to open up their property for someone else's speech, that is their right, too. That is what a truly content-neutral provision looks like—it leaves people free to convey their own or someone else's commercial or noncommercial messages. The marketplace of ideas, and the ensuing reputational gain or harm to the speaker (as the discussion of "Ask Me Why Guns Save Lives #ParklandStrong" and "I ♥ Planned Parenthood" signs demonstrates), are adequate checks. *Cf. Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring) ("whenever government disfavors one kind of speech, it . . . interfer[es] with the free marketplace of ideas and . . . an individual's ability to express thoughts [that] help shape . . . society").

This Court's decision in *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), confirms the continued validity of the property-rights approach, which many state courts have adopted. In *Fiesta Mall Venture v. Mecham Recall Committee*, 767 P.2d 719 (Ariz. App. 1989) (collecting cases), for example, the court followed that approach to conclude that a mall owner has the right to exclude a recall committee from soliciting signatures on private property. The converse is also true: nothing *precludes* such an owner from opening up her private property for someone else's speech. That rule would readily resolve the onsite–offsite issue presented here.

CONCLUSION

This case presents an issue of national importance that cities across the nation have grappled with. The court below fashioned a hybrid rule that tried to reconcile four irreconcilable cases. This case is an ideal vehicle with which to address the tension between *Reed* and *Sorrell* on one hand and *Metromedia* and *Central Hudson* on the other.

The petition for writ of certiorari should be *granted*.

Respectfully submitted,

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