No. 11-616

In The Supreme Court of the United States

CITY OF ST. LOUIS, MISSOURI, ET AL.,

Petitioners,

v.

NEIGHBORHOOD ENTERPRISES, INC., ET AL.,

Respondents.

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

BRIEF OF RESPONDENTS SUPPORTING GRANT OF WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Like most municipalities, St. Louis has comprehensive regulations governing the display of signs within its borders. They include, among other things, a permit requirement and restrictions on the size and location of signs. These provisions, however, do not apply to all signs. The text of the city's sign code exempts certain categories of commercial and non-commercial signs, defined by their subject matter, from the size, location, and permit restrictions. Some commercial and non-commercial signs – again, based on their subject matter – are exempted from *all* regulation. Consequently, non-exempted signs, including Respondents' mural protesting the City's eminent domain practices, are treated less favorably than the exempted commercial and non-commercial signs.

Petitioners maintain that such differential treatment is content-neutral because their "justification" for the regulations – traffic safety and aesthetics – is content-neutral and the regulations were adopted without censorial motive. Respondents maintain, and the Eighth Circuit held, that such differential treatment is content-based, notwithstanding the government's asserted justification and any absence of a censorial motive.

COUNTERSTATEMENT OF QUESTIONS PRESENTED – Continued

Question Presented

When the text of a sign ordinance treats certain non-commercial signs less favorably than other non-commercial and commercial signs based on the signs' subject matter, is the regulation content-based, and therefore subject to strict scrutiny, regardless of the government's "justification" for the ordinance and regardless of the presence or absence of a censorial motive in its adoption?

PARTIES TO THE PROCEEDING

The Petition incorrectly identifies Missouri Eminent Domain Abuse Coalition as a party to this proceeding. It was not a party below and is not presently a party.

Neighborhood Enterprises, Inc., Sanctuary In The Ordinary, and Jim Roos are the Respondents and were the appellants in the U.S. Court of Appeals for the Eighth Circuit. The City of St. Louis, Missouri, and the St. Louis Board of Adjustment are the Petitioners and were the appellees below.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Neighborhood Enterprises, Inc., has no parent company and there is no publicly held company that has a 10% or greater ownership interest in Neighborhood Enterprises, Inc.

Sanctuary In The Ordinary has no parent company and there is no publicly held company that has a 10% or greater ownership interest in Sanctuary In The Ordinary.

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The decision of the U.S. Court of Appeals for the Eighth Circuit is reported at 644 F.3d 728 and appears in Petitioners' Appendix ("Pet'rs' App.") at Pet'rs' App. 1a-31a. The decision of the U.S. District Court for the Eastern District of Missouri is reported at 718 F. Supp. 2d 1025 and appears at Pet'rs' App. 32a-58a. The decision of the St. Louis Board of Adjustment is not reported and appears in Respondents' Appendix ("Resp'ts' App.") at Resp'ts' App. 1a-7a.

JURISDICTION

The court of appeals' judgment was entered on July 13, 2011. A timely petition for panel rehearing or rehearing *en banc* was denied on August 18, 2011 (Pet'rs' App. 59a-60a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech. . . ." Relevant portions of the St. Louis City Revised Code's "Comprehensive Sign Control Regulations," St. Louis, Mo., Rev. Code §§ 26.68.010-.180, are reproduced at Resp'ts' App. 8a-16a.

STATEMENT

This case raises an important, recurring question concerning one of "the central organizing concept[s] of First Amendment doctrine": "the distinction between content-based regulations and content-neutral ones." Mark Tushnet, *The Supreme Court and its First Amendment Constituency*, 44 Hastings L.J. 881, 882 (1993). Specifically, this case asks whether a municipal sign ordinance that affords preferential treatment to certain signs based on subject matter is content-based, regardless of the governmental motive and proffered justification for the ordinance.

That question has confounded the lower courts ever since this Court's sharply fractured decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), failed to yield an answer. The confusion has been compounded by seemingly conflicting language in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), which looked to the government's motive and proffered justification for evidence of content-based discrimination, and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), which looked to the text of the ordinance.

Faced with five separate opinions in *Metromedia*, none of which garnered a majority, and the seemingly at-loggerheads approaches of *Ward* and *Discovery Network*, the courts of appeals have struggled to derive a uniform test for assessing the content-based or -neutral nature of municipal sign ordinances. A sharp conflict has resulted. In this case, the Eighth

Circuit adopted the approach followed by the First, Second, and Eleventh Circuits, which treat a sign ordinance as content-based and, therefore, presumptively unconstitutional if its text discriminates based on subject matter. Under the approach of the Fourth, Sixth, and Seventh Circuits, however, a sign ordinance – even one that draws distinctions based on subject matter – is content-neutral and ordinarily upheld so long as the municipality proffers a content-neutral "justification" for the ordinance (*e.g.*, traffic safety or aesthetics) and does not act with censorial motive in adopting it. The Third and Ninth Circuits, meanwhile, have adopted their own *sui generis* approaches. Under the Third Circuit's "context sensitive" approach, preferential treatment for signs with certain subject matter is generally tolerated if there is a significant relationship between the subject matter and the specific location where the sign is located. In the Ninth Circuit, subject-matter preferences are generally tolerated if they are event- or speaker-based.

Then-Judge Alito, in an opinion concurring in the judgment that established the Third Circuit's distinct approach, noted the confusion on this issue and the need for "the Supreme Court [to] provide[ ] further guidance concerning the constitutionality of sign laws." *Rappa v. New Castle County*, 18 F.3d 1043, 1080 (3d Cir. 1994) (Alito, J., concurring). Then-Professor Kagan similarly observed that this issue is "calling for acknowledgment by the Court and an effort to devise a uniform approach." *See* Elena

Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 Sup. Ct. Rev. 29, 77 (1992).

They were certainly correct: The current disparity of approaches among the circuits has resulted in widely varying degrees of judicial scrutiny for municipal sign ordinances and, concomitantly, widely varying degrees of protection for the free speech rights of citizens in those municipalities. This case presents the Court with the perfect opportunity to provide the guidance and uniform approach that Justices Alito and Kagan urged. Thus, while Respondents believe the Eighth Circuit's decision below was correct, they agree with Petitioners that a writ of certiorari is appropriate because a decision by this Court would bring much needed clarity to First Amendment law in this area.

A. The St. Louis Sign Code

Like most municipalities, the City of St. Louis has extensive regulations governing the display of signs within its borders. These include a permit requirement and restrictions on, among other things, the size and location of signs. Also like other municipalities, the City exempts certain categories, defined by subject matter, from some or all of these regulations.

The City defines a sign as "any object or device or part thereof situated outdoors which is used to advertise, identify, display, direct or attract attention to an object, person, institution, organization, business product, service, event, or location by any means including words, letters, figures, designs, symbols, fixtures, colors, motion illumination or projected images." St. Louis, Mo., Rev. Code § 26.68.020(17); Resp'ts' App. 8a. This definition, however, is followed by a number of exemptions that remove certain items, described by subject matter, from its purview:

> Signs do not include the following:
>
> a. Flags of nations, states and cities, fraternal, religious and civic organization[s];
>
> b. Merchandise, pictures of models of products or services incorporated in a window display;
>
> c. Time and temperature devices;
>
> d. National, state, religious, fraternal, professional and civic symbols or crests, or on site ground based measure display device used to show time and subject matter of religious services;
>
> e. Works of art which in no way identify a product.

Resp'ts' App. 8a-9a. By exempting these items from the definition of "sign," the sign code absolves them of all regulation.

Items that constitute "signs" require a permit and are subject to additional restrictions determined by the zoning district in which they are located. For each zoning district, the City has imposed regulations governing "Contents," "Sign Types," "Maximum Number," "Maximum Sign Area," "Maximum Height," "Location," "Illumination," and "Animation." *See, e.g.*, St. Louis, Mo., Rev. Code § 26.68.080 (governing "Signs in zone districts C, D, and E"); Resp'ts' App. 15a-16a.

However, the City exempts from the permit requirement some fourteen categories of signs, almost all defined by subject matter, and establishes size, quantity, durational, and/or other restrictions unique to each category. These categories include:

- "political signs" that are "election . . . related";
- "[t]emporary signs that . . . advertise or identify construction, remodeling, rebuilding, development, sale, lease or rental";
- "[s]igns giving parking or traffic directions";
- "cornerstones, commemorative tables and historical signs";
- signs displaying "the name and address of a subdivision or of a planned building group";
- "[s]igns of danger or a cautionary nature";
- signs that are "specifically authorized for a public purpose"; and

- "[s]igns in the nature of decorations, clearly incidental and customary and commonly associated with any national, local or religious holiday."

St. Louis, Mo., Rev. Code § 26.68.030; Resp'ts' App. 10a-14a.

As noted above, each of these categories has unique regulations that pertain to it. For example, national, local, and religious holiday decorations are subject to a 60-day durational restriction but "may be of any type, number, area, height, location, illumination or animation." St. Louis, Mo., Rev. Code § 26.68.030(E); Resp'ts' App. 11a. "Temporary signs that . . . advertise or identify construction, remodeling, rebuilding, development, sale, lease or rental" are subject to a six-month durational restriction but are otherwise unregulated – they may be of any type, number, area, height, or location. St. Louis, Mo., Rev. Code § 26.68.030(M); Resp'ts' App. 13a-14a. Political signs, on the other hand, "shall not be more than ten (10) feet square, shall not be more than six (6) feet in height; shall not flash, blink, fluctuate or be animated but may be illuminated; shall not be posted more than ninety (90) days prior to the election to which the sign is related and shall be removed within fifteen (15) days following the election to which the signs relate." St. Louis, Mo., Rev. Code § 26.68.030(H); Resp'ts' App. 12a.

Finally, in addition to the exemptions to the definition of "sign" and the fourteen other exemptions

listed in Section 26.68.030, the City provides a specific permit exemption for political signs located in zones F through K. Such signs are unlimited in location and area. St. Louis, Mo., Rev. Code § 26.68.050(C), (E); Resp'ts' App. 14a.

B. Sanctuary Paints A Mural Protesting The City's Abuse Of Its Eminent Domain Power

Respondent Sanctuary In The Ordinary is a non-profit, low-income housing provider for persons in need in the St. Louis area. Its properties are managed by Respondent Neighborhood Enterprises, Inc., a self-supporting housing ministry that manages rental properties in St. Louis. Respondent Jim Roos founded both Sanctuary In The Ordinary and Neighborhood Enterprises. Pet'rs' App. 3a.[1]

From 2000 to 2004, Petitioner City of St. Louis used eminent domain to acquire 24 buildings owned or managed by Sanctuary In The Ordinary or Neighborhood Enterprises. The buildings had housed 60 low-income apartments. The City took the buildings for private development. Joint Appendix (hereafter, "C.A. App.") 216-217.

Sanctuary and its tenants continue to face the threat of eminent domain for private development. Sanctuary In The Ordinary owns a residential building

[1] This brief refers to Respondents collectively as "Sanctuary."

at 1806-08 S. 13th Street. It is located within the "Near Southside Redevelopment Area," a 219-acre area that the City has declared "blighted" under Missouri's Land Clearance for Redevelopment Law. Pet'rs' App. 3a; *see also* C.A. App. 277-78, 289. This "blight" declaration authorizes the City to use eminent domain to acquire properties within the area for private redevelopment. *See* Mo. Rev. Stat. § 99.420(4); § 99.320(3), (10)(a); St. Louis, Mo., Ordinance 64831 § 8 & Ex. B § D(2) (Dec. 17, 1999). In early 2007, the City notified Sanctuary that it intended to acquire this building for redevelopment. C.A. App. 217, 220, 277-78.

In March 2007, to protest the City's eminent domain practices, Sanctuary commissioned a mural, with tenant[2] approval, for the building that the City sought to acquire. Pet'rs' App. 3a. The mural, which contains the words "End Eminent Domain Abuse" inside a red circle and slash, was funded by the Missouri Eminent Domain Abuse Coalition ("MEDAC"),[3] a civic organization concerned about abusive eminent domain practices. The mural's design reflects a design used by MEDAC in its literature, buttons, and materials. It is approximately 363 square feet in area and is visible from, among other areas, Interstates 44 and 55. Pet'rs' App. 3a-4a.

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[2] One of the tenants is Jackie Ingram, a Sanctuary resident displaced by one of the earlier 24 condemnations. C.A. App. 217.

[3] Respondent Jim Roos is a MEDAC member. Pet'rs' App. 3a.

C. The City Cites Sanctuary For Its "Illegal Sign"

Promptly after Sanctuary's protest mural was completed, the City issued a citation declaring it an "illegal sign." The citation insisted that "[p]ermits must be acquired for signs of this type" and provided instructions explaining how to obtain a permit. Consistent with the instructions, Sanctuary and Neighborhood Enterprises filed a permit application on May 14, 2007. Pet'rs' App. 4a.

The City's Zoning Administrator denied the permit on May 30, 2007, because it did not meet certain requirements of the City's Zoning Code.[4] A subsequent explanation of the basis for denial stated that "[t]he wall face of the building on which the sign has been painted does not have street frontage as defined in the Zoning Code, and is therefore not entitled to signage"; and that, "[i]n the 'D' zoning district[,] . . . [t]he maximum allowable square footage for any sign . . . is 30 sq.ft.; based on the diameter of the circular sign it is approximately 363 sq.ft. in area." Pet'rs' App. 4a-5a. The Zoning Administrator's letter advised Sanctuary that it could appeal the

[4] St. Louis's "Comprehensive Sign Control Regulations" are part of its Zoning Code. Sanctuary refers to these regulations collectively as the "sign code." Relevant portions are provided at Resp'ts' App. 8a-16a.

denial to the Board of Adjustment (hereafter, "Board"), which Sanctuary did. Pet'rs' App. 5a.[5]

Before Sanctuary's appeal was heard, however, Alderman Phyllis Young – who had introduced the ordinance declaring Sanctuary's property "blighted" and authorizing eminent domain – wrote a letter "urg[ing] the Board . . . to uphold the . . . denial." She argued, "If this sign is allowed to remain then anyone with property along any thoroughfare can paint signs indicating the opinion or current matter relevant to the owner to influence passsersby with no control by any City agency. The precedent should not be allowed." C.A. App. 209.

The Board heard Sanctuary's appeal on July 11, 2007. Pet'rs' App. 5a. Sanctuary argued that the City's sign code provisions were impermissibly content-based, in violation of the free speech protections of the United States and Missouri Constitutions. Sanctuary offered three examples of such content-based regulation:

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[5] The City's Land Clearance for Redevelopment Authority (LCRA) issued its own denial of Sanctuary's sign permit application. Sanctuary filed a separate action challenging that denial. The district court dismissed the action, but the Eighth Circuit reversed, holding "the LCRA had no authority to deny the plaintiffs' sign permit." *Neighborhood Enters., Inc. v. City of St. Louis*, 540 F.3d 882, 885 (8th Cir. 2008). On remand, the parties settled all matters related to the LCRA's denial.

- The sign code exempts from the definition of "sign" – and, thus, from the permit requirement and all other regulations pertaining to "signs" – numerous content-based categories, including "[n]ational, state, religious, fraternal, professional and civic symbols or crests" and "[w]orks of art." St. Louis, Mo., Rev. Code § 26.68.020(17); Resp'ts' App. 9a.
- The sign code lists some fourteen other, mostly content-based categories that, although considered "signs" under the code, are nonetheless exempt from the code's permit requirement. St. Louis, Mo., Rev. Code § 26.68.030; Resp'ts' App. 10a-14a.
- The sign code contains a "political sign" exemption for certain zoning districts (not including Sanctuary's), which removes the permit requirement and allows political signs to be of unlimited size and location. St. Louis, Mo., Rev. Code § 26.68.050; Resp'ts' App. 14a.

In the alternative, Sanctuary argued that the mural did not require a permit because, as a "[w]ork[ ] of art" or "civic symbol[ ] or crest[ ]," it was exempted from the sign code's definition of "sign." Pet'rs' App. 5a; St. Louis, Mo., Rev. Code § 26.68.020(17)(d) & (e); Resp'ts' App. 9a.

On July 25, 2007, the Board upheld the denial of a permit for Sanctuary's mural. After implicitly concluding that the mural was not an exempted "[w]ork[ ] of art" or "civic symbol[ ] or crest[ ]," and that it was therefore a "sign," the Board determined

that the "size and location of the sign were in violation of the Zoning Code." Specifically, the Board's "Conclusion of Law and Order" explained that the mural "is located in Zone D," "is substantially larger than the footage allowed by the Zoning Code," and "is located on the side of the building in contravention to the requirements of the Zoning Code." Pet'rs' App. 5a-6a. The Board was referring to St. Louis, Mo., Code § 26.68.080(E)(2), which provides that signs in Zone D "shall not exceed thirty (30) square feet," and § 26.68.080(D), which imposes a "Maximum Number" of "[o]ne (1) sign for each front line of the premises." Resp'ts' App. 15a-16a.

D. Sanctuary Challenges The City's Unconstitutional Sign Code Provisions

Sanctuary filed this action against the City and Board in state court, challenging the permit denial and the sign code provisions on which it was based. Sanctuary asserted federal and state constitutional claims pursuant to 42 U.S.C. § 1983 and the Missouri Declaratory Judgments Act, Mo. Rev. Stat. § 527.010. Specifically, Sanctuary asserted that: (1) the sign code provisions, facially and as applied, violate the First Amendment to the U.S. Constitution and Article I, section 8, of the Missouri Constitution; (2) the sign permit requirement effects an impermissible prior restraint in violation of the First Amendment and Article I, section 8; and (3) the sign code provisions discriminate based on geographic zone in violation of the Equal Protection Clause of the Fourteenth

Amendment. C.A. App. 18, 34-52. Pursuant to Mo. Rev. Stat. § 89.110, Sanctuary also petitioned for a writ of certiorari – the state-law mechanism for securing judicial review of "illegal" board of adjustment decisions – on the grounds that the Board's decision violated free speech and equal protection guarantees. C.A. App. 18, 25-34.

The City and Board removed the case to the U.S. District Court for the Eastern District of Missouri, which, under 28 U.S.C. § 1331, had federal question jurisdiction over Sanctuary's federal constitutional claims and, under 28 U.S.C. § 1367, had supplemental jurisdiction over Sanctuary's state-law claims. The City and Board then moved to dismiss everything except the state-law petition for writ of certiorari. The district court denied the motion.

Believing the case capable of resolution on summary judgment, the parties agreed to proceed on stipulated facts and the administrative record from the proceeding before the Board. The following are among the facts to which the parties stipulated:

- "Neither the City nor Board of Adjustment possesses any reports, studies, memoranda, or other documents underlying, concerning, or supporting the regulation of outdoor signs in Chapter 26.68 of the St. Louis Revised Code."
- "Neither the City nor the Board of Adjustment is aware of any studies, reports or memoranda conducted by any person regarding

whether the City's restrictions on outdoor signs affect traffic safety."

- "Neither the City nor Board of Adjustment is aware of any studies, reports or memoranda conducted by any person regarding whether the City's restrictions on outdoor signs affect the aesthetics of the City or surrounding neighborhood."

Resp'ts' App. 22a-23a; Pet'rs' App. 6a.[6]

E. The District Court Rules For The City And Board

The parties filed cross motions for summary judgment. On March 29, 2010, the district court denied Sanctuary's motion and granted the City and Board's. Pet'rs' App. 32a-58a.

The court began its constitutional analysis by determining whether the sign code provisions at issue are content-based or content-neutral. In making that determination, the court was guided by this Court's statement in *Ward v. Rock Against Racism* that the "'principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of

[6] The parties also stipulated that the City and Board have no written policy to guide the determination of whether an alleged "sign" falls within the exemptions for "[w]orks of art" or "civic symbols or crests." *See* Resp'ts' App. 24a; Pet'rs' App. 7a.

disagreement with the message it conveys.'" Pet'rs' App. 51a (quoting *Ward*, 491 U.S. at 791). The court concluded that the City did not adopt the sign code provisions because it "favors or disfavors any message a citizen might want to convey" and that the exemptions present "no risk of censorship." Pet'rs' App. 51a, 53a. The City's "desire to promote traffic safety," the court continued, "is in no way tied to the content of the signs it seeks to regulate." Pet'rs' App. 53a. In this light, the Court held the sign code provisions content-neutral.

The court then applied intermediate scrutiny and upheld the provisions. Specifically, it determined that: (1) the City's asserted interests, traffic safety and aesthetics, are significant governmental interests; (2) the sign code provisions, notwithstanding their exemptions, are narrowly tailored to serve those interests; and (3) the sign code leaves "ample alternative channels" for Sanctuary "to communicate [its] political message." Specifically, the court suggested that Sanctuary could "secure a billboard in other zoned areas" or "distribute handbills . . . at City parks teeming with the masses during festive occasions." Pet'rs' App. 54a-55a.

The court also rejected Sanctuary's prior restraint, equal protection, and state-law claims. Pet'rs' App. 46a, 56a-57a. Accordingly, it entered judgment for the City and Board. Sanctuary appealed.

F. The Eighth Circuit Reverses And Holds The Challenged Provisions Impermissibly Content-Based

On July 13, 2011, the Eighth Circuit reversed the district court's judgment and held the sign code provisions – specifically, Sections 26.68.020(17) (definition of sign), 26.68.030 (exemptions from permit requirement), and 26.68.050 (exemption for political signs in Zones F through K) – unconstitutional in violation of the First Amendment. Pet'rs' App. 14a-21a.[7]

Unlike the district court, which relied on this Court's decision in *Ward v. Rock Against Racism* to conclude the sign code provisions are content-neutral, the Eighth Circuit relied on this Court's decision in *City of Cincinnati v. Discovery Network* to conclude they are content-based. They are content-based, the court explained, because "to determine whether a particular object qualifies as a 'sign' under

[7] Petitioners suggest the Eighth Circuit held only the "exemptions to the definition of sign," and only a portion of Section 26.68.030, unconstitutional. *See* Petition 7; *see also id.* at i. That is incorrect. The court held Sections 26.68.020(17) and 26.68.030, as well as Section 26.68.050, which Petitioners do not address, unconstitutional in their entirety. *See, e.g.,* Pet'rs' App. 16a ("Simply stated [§§ 26.68.020(17), 26.68.030, and 26.68.050] [are] content-based because [they] make[ ] impermissible distinctions based *solely* on the content or message conveyed by the sign." (alterations in original; internal quotation marks and citation omitted)).

§ 26.68.020(17) and is therefore subject to the regulations, or is instead a 'non-sign' under § 26.68.020(17)(a)-(e) or exempt from the sign regulations under §§ 26.68.030 or 26.68.050, one must look at the *content* of the object." Pet'rs' App. 16a. The court observed that "an object of the same dimensions as Sanctuary's 'End Eminent Domain Abuse' sign/mural would not be subject to regulation if it were a '[n]ational, state, religious, fraternal, professional and civic symbol[ ] or crest[ ], or on site ground based measure display device used to show time and subject matter of religious services.'" Pet'rs' App. 16a (quoting St. Louis, Mo., Rev. Code § 26.68.020(17)(d)). "Simply stated," the court explained, the sign code provisions "make[ ] impermissible distinctions based *solely* on the content or message conveyed by the sign. . . . The words on a sign define whether it is subject to [the sign regulations]." Pet'rs' App. 16a (alterations in original; internal quotation marks and citations omitted).

Before proceeding to apply strict scrutiny, however, the court specifically addressed the argument that, under *Ward*, a speech regulation "is content neutral so long as it is *justified* without reference to the content of the regulated speech." *Ward*, 491 U.S. at 791 (internal quotation marks and citation omitted). Citing *Discovery Network*, the court held that "[e]ven when a government supplies a content-neutral justification for the regulation, that justification is not given controlling weight without further inquiry." Pet'rs' App. 17a (internal quotation marks

and citations omitted). Thus, the court held that "even if we agree with the City . . . that its restriction is 'justified' by its interest in maintaining traffic safety and preserving aesthetic beauty, we still must ask whether the regulation *accomplishes* the stated purpose in a content-neutral manner." Pet'rs' App. 17a (omission in original; internal quotation marks and citation omitted). The court held it did not: "Although [the City's] justification for enacting [the sign regulations] was to curtail the traffic dangers . . . and to promote aesthetic beauty, [the City] has not seen fit to apply such restrictions to all signs of the same dimensions. The City has differentiat[ed] between speakers for reasons unrelated to the legitimate interests that prompted the regulation." Pet'rs' App. 17a (omission and alterations in original; internal quotation marks and citations omitted).

Noting "[t]he City conceded at oral argument that the challenged provisions of the sign code would not pass constitutional muster under strict scrutiny," the court "[n]evertheless . . . independently analyze[d] whether the challenged provisions satisfy strict scrutiny." Pet'rs' App. 17a n.7. It held they did not – first, because "a municipality's asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling"; and second, because the sign code "is not narrowly drawn to accomplish those ends." Pet'rs' App. 18a-19a (internal quotation marks and citations omitted). "Although the sign code's regulations may generally promote aesthetics and traffic safety," the court explained,

"the City has simply failed to demonstrate how these interests are served by the distinction it has drawn in the treatment of exempt and nonexempt categories of signs." Pet'rs' App. 19a (citation omitted).

Because the court determined that the challenged provisions violate the First Amendment, it did not reach Sanctuary's prior restraint, Equal Protection, and state-law claims. Pet'rs' App. 20a n.8. It reversed the judgment of the district court and remanded for a determination of the severability of the offending provisions from the remainder of the sign code. Pet'rs' App. 20a-21a.

The City and Board petitioned for panel rehearing or rehearing *en banc*. The Eighth Circuit denied rehearing on August 18, 2011. Pet'rs' App. 59a-60a.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided Over How To Assess The Content-Based Or Content-Neutral Character Of Municipal Sign Ordinances That Draw Distinctions Based On Subject Matter

A. There Is A Sharp Split Among The Circuits

There is a conflict among the courts of appeals over how to analyze a municipal sign ordinance for content discrimination. Specifically, the split concerns whether a sign ordinance that provides exemptions or

otherwise draws distinctions based on subject matter is content-based, regardless of the governmental motive and proffered "justification" for the ordinance.

In this case, the Eighth Circuit correctly joined the First, Second, and Eleventh Circuits, which hold such an ordinance content-based. *See* Pet'rs' App. 15a-17a; *Matthews v. Town of Needham*, 764 F.2d 58, 59-61 (1st Cir. 1985); *Nat'l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 556-57 (2d Cir. 1990); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1259-62 (11th Cir. 2005). In contrast, the Fourth, Sixth, and Seventh Circuits hold such an ordinance content-neutral, so long as it is not the product of censorial motive and so long as the government has proffered some content-neutral "justification," or purpose, for the ordinance. *See Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 432-35 (4th Cir. 2007); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 621-23 (6th Cir. 2009); *Scadron v. City of Des Plaines*, 734 F. Supp. 1437, 1445-46 (N.D. Ill. 1990), *aff'd*, 1993 WL 64838, at *2 (7th Cir. Mar. 8, 1993) (unreported).

The Third Circuit and Ninth Circuits have developed their own distinct approaches to this issue. The Third Circuit follows what it calls a "context sensitive" approach. It recognizes that exemptions based on subject matter are content-based, but it generally allows such exemptions if (1) there is a significant relationship between the subject matter of the signs allowed by the exemption and the specific location where the exemption applies; (2) the exemption is

substantially related to serving an interest that is at least as important as that served by the underlying sign regulation; and (3) the municipality did not include the exemption in order to censor certain viewpoints or control what issues are appropriate for public debate. *See Rappa v. New Castle County*, 18 F.3d 1043, 1062-66 (3d Cir. 1994).

The Ninth Circuit has made similar allowances for what it calls "speaker- or event-based" exemptions. Under its approach, a municipality may provide exemptions that allow signs for certain speakers (*e.g.*, religious, charitable, or other non-profit institutions) or during certain "triggering events" (*e.g.*, elections or home sales), so long as the exemption does not limit the substance of the signs it allows. *See Reed v. Town of Gilbert*, 587 F.3d 966, 974-79 (9th Cir. 2009).

B. The Circuit Split Is Attributable To Confusion Over This Court's Fractured Decision In *Metromedia* And Seemingly Conflicting Language In *Ward* And *Discovery Network*

This split among the circuits is attributable to two distinct sources: confusion over this Court's sharply fractured decision in *Metromedia, Inc. v. City of San Diego*; and seemingly contradictory statements regarding content neutrality in *Ward v. Rock Against Racism*, on one hand, and *City of Cincinnati v. Discovery Network*, on the other.

1. In *Metromedia* – which yielded no majority opinion, but rather a four-justice plurality, a two-justice concurrence, and three separate dissents – this Court addressed the constitutionality of a San Diego ordinance that imposed a general sign ban but exempted on-site advertising signs and twelve other categories of signs, commercial and non-commercial. *See Metromedia*, 453 U.S. at 493-96. Most of the exempted categories were defined by subject matter and largely mirrored the categories St. Louis has exempted from its sign regulations.[8] This Court invalidated the ordinance in its entirety but did so based on two very different lines of reasoning.[9]

The plurality opinion, authored by Justice White and joined by Justices Stewart, Marshall, and Powell, concluded that, in two ways, the ordinance unconstitutionally discriminated among signs based on content. First, by "limit[ing] the[ ] content" of on-site

[8] Among the exempted categories were "government signs; signs located at public bus stops; signs manufactured, transported, or stored within the city, if not used for advertising purposes; commemorative historical plaques; religious symbols; signs within shopping malls; for sale and for lease signs; signs on public and commercial vehicles; signs depicting time, temperature, and news; approved temporary, off-premises, subdivision directional signs; and '[t]emporary political campaign signs.'" *Metromedia*, 453 U.S. at 494-95 (alteration in original).

[9] A majority of justices did agree that a municipality may prohibit off-site commercial billboards while permitting on-site billboards. *See City of Ladue v. Gilleo*, 512 U.S. 43, 49 & n.8 (1994).

advertising signs to commercial messages, the ordinance impermissibly "afford[ed] a greater degree of protection to commercial than to noncommercial speech." *Id.* at 513 (plurality). Second, by exempting various non-commercial signs but not others, the ordinance impermissibly chose "the appropriate subjects" of non-commercial speech, thereby taking the ordinance "out of the domain" of a content-neutral time, place, or manner restriction. *Id.* at 515, 517 (plurality).

The concurring opinion, authored by Justice Brennan and joined by Justice Blackmun, declined to definitively resolve whether the exemptions were content-based or content-neutral, focusing instead on "the *practical* effect of the San Diego ordinance," which, according to Justice Brennan, was an absolute ban on billboards. *Id.* at 525-26 (Brennan, J., concurring). Because "[n]one of the exceptions provide[d] a practical alternative for the general commercial or noncommercial billboard advertiser," the "exceptions d[id] not alter the overall character of the ban." *Id.* at 526 (Brennan, J., concurring). Justice Brennan was thus able to treat the ban as content-neutral and "not decide the validity of the . . . exceptions." *Id.* at 526, 532 n.10 (Brennan, J., concurring). He did, however, add that when "exceptions rely on content-based distinctions, they must be scrutinized with special care." *Id.* at 532 n.10 (Brennan, J., concurring).

Each of the dissenting justices took a slightly different view of the ordinance. Justice Stevens concluded that although some of the exemptions were

"based . . . on the subject matter of the signs at issue," *id.* at 554 n.25 (Stevens, J., dissenting), they were nonetheless content-neutral because "there [wa]s not even a hint of bias or censorship in the city's actions," and there was "no suggestion on the face of the ordinance that San Diego [wa]s attempting to influence public opinion," "limit public debate on particular issues," or "impose its viewpoint on the public," *id.* at 552, 553, 554 (Stevens, J., dissenting). Chief Justice Burger suggested the ordinance was "essentially neutral," but opined that "[i]t [wa]s not really relevant whether the . . . ordinance [wa]s viewed as a regulation regarding time, place, and manner, or as a total prohibition on a medium with some exceptions defined, in part, by content." *Id.* at 557, 561 (Burger, C.J., dissenting). Although the exemptions "allowed some subjects while forbidding others," he considered the exemptions to be "few in number" and "essentially negligible," or "*de minimis*": the subjects allowed were "noncontroversial" and the city "ha[d] not preferred any viewpoint." *Id.* at 562, 564, 565 (Burger, C.J., dissenting). Finally, Justice Rehnquist did not squarely address the question of content neutrality but opined that the exemptions were not "the types which render this statute unconstitutional." *Id.* at 570 (Rehnquist, J., dissenting).

In short, *Metromedia* yielded no clear holding as to whether the exemptions at issue were content-based or content-neutral. As the Third Circuit later explained in an opinion joined by then-Judge Alito, "the plurality and the concurrence took such markedly

different approaches to the San Diego ordinance that there is no common denominator between them." *Rappa*, 18 F.3d at 1058. The confusion caused by the fractured outcome has been widely recognized:

> The main hindrance to the development of clear rules to govern the intersection of free speech and zoning power involved with signs and billboards is the decision in *Metromedia* itself: a badly fractured opinion that produced no majority. The justices failed to agree even on the framing of the issue, the standard of review, or the impact of the San Diego ordinance at issue. Because of the disunity among the Court, *Metromedia* yielded only limited definitive principles to guide lower courts and municipalities, especially with regard to restrictions on non-commercial speech.

Jason R. Burt, Comment, *Speech Interests Inherent in the Location of Billboards and Signs: A Method for Unweaving the Tangled Web of Metromedia, Inc. v. City of San Diego*, 2006 BYU L. Rev. 473, 475 (2006) (internal quotation marks and footnotes omitted); *see also* Mark Cordes, *Sign Regulation After Ladue: Examining the Evolving Limits of First Amendment Protection*, 74 Neb. L. Rev. 36, 40 (1995) ("In seeking to apply the limited principles of *Metromedia* and other cases to a vast array of possible regulations, courts have often reached conflicting results on similar issues. This is true regarding certain types of content-neutral restrictions and particularly any content-related regulation." (footnotes omitted));

James Lynch, Comment, *The Federal Highway Beautification Act After Metromedia*, 35 Emory L.J. 419, 420-22 (1986) (arguing that *Metromedia* "left many issues unsettled," "created as many problems as it purported to resolve," "cannot produce a workable formula for evaluating the[ ] conflicting values" of freedom of speech and aesthetics, and failed to provide clear guidance as to how "laws could be rewritten in order to conform with the Court's holding and avoid trammeling protected first amendment rights").

This Court had the opportunity to provide some clarity in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). Similar to the ordinance at issue in *Metromedia*, the ordinance in *Ladue* exempted some ten categories of signs, defined by subject matter.[10] The Court, however, declined to assess the content-neutral or content-based nature of the exemptions. Because the underlying ordinance imposed a "near-total prohibition of residential signs" that was constitutionally problematic with or without the exemptions, the Court "set to one side the content discrimination

[10] The exempted categories, many of which resembled the exemptions at issue in *Metromedia* and the present case, included: municipal signs; subdivision and residence identification signs; road signs and driveway signs for danger, direction, or identification; health inspection signs; signs for churches, religious institutions, and schools; identification signs for other not-for-profit organizations; signs identifying the location of public transportation stops; ground signs advertising the sale or rental of real property; commercial signs in commercially zoned or industrial zoned districts; and signs identifying safety hazards. *Ladue*, 512 U.S. at 46-47 & n.6.

question" and "assume[d], *arguendo*, . . . that the various exemptions" in the case were "free of impermissible content or viewpoint discrimination." *Id.* at 53. In her concurring opinion, Justice O'Connor noted that it was "unusual for [the Court], when faced with a regulation that on its face draws content distinctions, to 'assume, *arguendo*, . . . that the various exemptions are free of impermissible content or viewpoint discrimination." *Id.* at 59 (O'Connor, J., concurring). She "would have preferred to apply [the Court's] normal analytical structure," which might have led the Court "to confront some of the difficulties" in its jurisprudence. *Id.* at 60 (O'Connor, J., concurring).

The consequence of the fractured outcome in *Metromedia* and the Court's "set[ting] to one side the content discrimination question" in *Ladue* has been widespread confusion in the lower courts, which have struggled to determine whether sign ordinances like those in *Metromedia*, *Ladue*, and this case are content-based or content-neutral.

2. Unfortunately, *Metromedia* has not been the only source of confusion. Two seemingly conflicting lines of cases have developed in this Court's jurisprudence governing the examination of speech regulations for content discrimination. The apparently contradictory language in these cases has only compounded the confusion and conflict that arose among the circuits after *Metromedia*.

In one line of cases, this Court has suggested that the search for content discrimination should focus on the government's motive and justification for the speech regulation at issue. *Ward v. Rock Against Racism* provides the most commonly cited and succinct summation of this view:

> The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech."

Ward, 491 U.S. at 791 (citations omitted; quoting *Clark v. Commn'ty for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). In *Hill v. Colorado*, 530 U.S. 703 (2000), this Court cited this passage in applying what it called the *Ward* "test" for assessing content neutrality. *Id.* at 719-20 (internal quotation marks omitted).

The passage from *Ward,* particularly as interpreted in some circuits, is at loggerheads with another line of this Court's free speech cases, most notably *City of Cincinnati v. Discovery Network*. Unlike *Ward*,

Discovery Network focused the search for content-discrimination on the text of the ordinance. The Court held that "the *mens rea* of the [government]" is irrelevant when "the very basis for the regulation is the difference in content between" the permitted and restricted speech. *Discovery Network*, 507 U.S. at 429; *see also id.* ("[W]e [have] expressly rejected the argument that discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." (omission in original; internal quotation marks and citation omitted)). The Court further held that even if the government asserts a justification that is content-neutral in the abstract (*e.g.*, "safety and esthetics"), the regulation is still content-based if its applicability "is determined by the content of" the speech at issue. *Id.* Just sixth months ago, in *Sorrell v. IMS Health Inc.*, ___ U.S. ___, 131 S. Ct. 2653 (June 23, 2011), this Court reaffirmed the principle that a law may be content-based "on its face" because of its text. *Id.* at 2663.

In short, "[t]he Court's definition of content-based regulations has varied," Tushnet, *supra*, at 883 n.6, and, fairly or not, scholars have noted "the Court's apparent waffling on whether subject-matter regulations receive full content-discrimination scrutiny." Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. Pa. L. Rev. 615, 655 (1991); *see also* Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 Stanford L. Rev. 113, 116-17 (1981) ("Another ambiguity of the content

distinction concerns the degree to which it applies to subject matter categorizations," as opposed to the "classic content-based regulation . . . that prohibits the expression of a particular point of view." (footnotes omitted)).

C. Lower Courts Have Struggled To Apply *Metromedia*, *Ward*, And *Discovery Network*

The lower courts have struggled to make sense of *Metromedia* and to reconcile the seemingly contradictory passages in *Ward* and *Discovery Network*. That struggle is on display in this case: the district court, following *Ward*, concluded the sign code provisions are content-neutral, while the Eighth Circuit, following *Discovery Network*, concluded they are content-based. The fact is, courts "have made little progress in sorting out the respective roles of an examination of the text of the speech regulation and of broader-ranging attempts to ascertain legislative intent in distinguishing between [content-based] and [content-neutral] regulations." R. George Wright, *Content-Based and Confidential-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. Miami L. Rev. 333, 339 (2006) (footnotes omitted).

As noted above, a clear circuit split has resulted. The approach each circuit adopts depends largely on which *Metromedia* opinion the circuit chooses to credit and which line of cases – *Ward* or *Discovery Network* – the circuit finds more persuasive.

In this case, the Eighth Circuit joined the First, Second, and Eleventh Circuits in holding that a sign ordinance with subject-matter exemptions is content-based, regardless of governmental motive and proffered justification. Relying on *Discovery Network*, the court held that a sign restriction is content-based if "the message conveyed determines whether the speech is subject to the restriction" – that is, if it makes "distinctions based *solely* on the content or message conveyed by the sign." Pet'rs' App. 16a (internal quotation marks and citations omitted). The court acknowledged the language from the *Ward* line of cases that a regulation is content-neutral "so long as it is justified without reference to the content of the regulated speech," but the court held that "we still must ask whether the regulation *accomplishes* the stated purpose in a content-neutral manner." Pet'rs' App. 15a, 17a (internal quotation marks and citation omitted). Applying these principles, the court held the St. Louis regulations content-based (and impermissibly so).

The other circuits following this approach have employed similar reasoning. For example, in *Solantic*, the Eleventh Circuit cited *Discovery Network* for the proposition that this Court has "receded from [the *Ward*] formulation, returning to its focus on the law's own terms, rather than its justification." 410 F.3d at 1259 n.8. *Solantic* also discussed *Metromedia* and, recognizing there was "no controlling opinion" on the relevant issues, expressly adopted the approach of the plurality opinion, which it deemed "the prevailing

approach among other circuits." *Id*. at 1261-62 & nn.10, 11. The First and Second Circuits had already done the same. *See Matthews*, 764 F.2d at 60-61; *Nat'l Adver. Co. v. Town of Niagara*, 942 F.2d at 147.[11]

The Fourth, Sixth, and Seventh Circuits, on the other hand, have placed heavy emphasis on either the *Ward/Hill* line of cases or the *Metromedia* concurrence and dissents. For example, after discussing *Ward* and *Hill* extensively in *Covenant Media of South Carolina*, the Fourth Circuit held the sign code at issue there was content-neutral because it was "not [adopted] to stymie any particular message" and the city's "interests in regulating signs were completely unrelated to the messages displayed." 493 F.3d at 434. The court "recognize[d] that distinguishing between different types of signs and where those signs may be located may also in effect distinguish where certain content may be displayed," but it dismissed that concern by invoking *Ward*'s statement that a "'regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'" *Id.* (quoting *Ward*, 491 U.S. at 791).

The Sixth Circuit placed similarly heavy emphasis on *Ward* and *Hill* in *H.D.V.-Greektown,* 568 F.3d at

[11] The Eighth Circuit expressly adopted the *Metromedia* plurality in *City of Ladue v. Gilleo*, 986 F.2d 1180, 1182 (8th Cir. 1993), but, as noted above, this Court affirmed on other grounds.

621-23. Recognizing the conflict between the approach it adopted and that employed by the Eleventh Circuit in *Solantic*, the court criticized the Eleventh Circuit's approach as "inconsistent with *Hill*" and "an overly narrow conception of the definition of content-neutral speech." *Id.* at 622, 623. *See also Scadron*, 734 F. Supp. at 1445-46 (purporting to adopt *Metromedia* concurrence and dissents), *aff'd*, 1993 WL 64838, at *2 (7th Cir. Mar. 8, 1993) (unreported).

In forging its own *sui generis* approach, the Ninth Circuit followed the *Metromedia* plurality insofar as it prohibits "a municipality . . . from favoring commercial over noncommercial speech," or "favor[ing] certain noncommercial speech over other noncommercial speech without facing stricter review." *Reed*, 587 F.3d at 982. But the court then made special allowances for "speaker-based" or "event-based" exemptions. *Id.* at 976. According to the court, such exemptions do not "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed," nor do they "limit the substance of . . . speech in any way." *Id.* at 977 (internal quotation marks and citations omitted). They "merely encompass[ ] the elements of 'who' is speaking and 'what event' is occurring, . . . without regard for the actual substance of the message." *Id.* at 977-78.

Finally, in *Rappa*, the Third Circuit embarked on what is perhaps the most ambitious effort to synthesize the various *Metromedia* opinions and seemingly conflicting guidance from this Court. It reviewed a statute that "indisputably distinguishe[d] between,

and allow[ed] the posting of certain signs based on the subject matter the sign conveys." 18 F.3d at 1054. The court recognized that under the *Metromedia* plurality, the statute was content-based, *id.* at 1054, 1056, but it "[n]onetheless . . . [found] this is a hard case, because the concurrence and dissents in *Metromedia* call into question whether the specific reasoning of the plurality is the governing law with respect to First Amendment analysis of sign prohibitions." *Id.* at 1056-57. After concluding it was "unable to derive a governing standard from the splintered opinions in *Metromedia*," *id.* at 1061, the court conceived its own test, drawing from various aspects of the different *Metromedia* opinions:

> [W]hen there is a significant relationship between the content of particular speech and a specific location or its use, the state can exempt from a general ban speech having that content so long as the state did not make the distinction in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate and so long as . . . the exception is substantially related to advancing an important state interest that is at least as important as the interests advanced by the underlying regulation, . . . the exception is no broader than necessary to advance the special goal, and . . . the exception is narrowly drawn so as to impinge as little as possible on the overall goal.

Id. at 1065.

Then-Judge Alito concurred but noted that he "would, if sitting alone, employ a method of analysis somewhat different from that used by the court." *Id.* at 1079 (Alito, J., concurring). He briefly set forth his "preferred method of analysis," under which some of the exemptions at issue would have "survive[d] the test for a content-based restriction on speech" and others would have been deemed "truly *de minimis*" and, therefore, "insignificant." *Id.* at 1079-80 (Alito, J., concurring). But two specific exemptions – "for sale" signs and signs relating to on-site activities – proved especially troubling, and the "question remain[ed]" whether they were content-based. *Id.* at 1080 (Alito, J., concurring). Judge Alito concluded: "There is no easy answer to this question. Until the Supreme Court provides further guidance concerning the constitutionality of sign laws, I endorse the test set out in the court's opinion." *Id.* (citations omitted).

The consequence of these varying approaches is well illustrated by the vastly differing ways in which the circuits have treated virtually identical subject-matter-based sign ordinance provisions – for example, exemptions for real estate signs. The First and Eighth Circuits, which have either expressly adopted the *Metromedia* plurality or placed heavy emphasis on *Discovery Networks*, have held such provisions content-based and unconstitutional. *See Matthews*, 764 F.2d at 59, 60; Pet'rs' App. 16a, 30a.[12] The Sixth

[12] The Second Circuit, which falls in the same category, has held such provisions content-based but constitutional, reasoning

(Continued on following page)

and Seventh Circuits, which have either expressly rejected the *Metromedia* plurality or placed heavy emphasis on *Ward*, have held such provisions content-neutral and constitutional. *See H.D.V.-Greektown*, 568 F.3d at 622; *Scadron*, 734 F. Supp. at 1440 & n.6, 1446-47, *aff'd*, 1993 WL 64838, at *2 (unreported). The Third Circuit, which has adopted its own unique approach, has held such provisions content-based but "probably . . . constitutional." *Rappa*, 18 F.3d at 1068. And the Ninth Circuit, which likewise follows a *sui generis* approach, has held that, although an exemption for real estate signs is content-based and unconstitutional, *Foti v. City of Menlo Park*, 146 F.3d 629, 636-37 (9th Cir. 1998), an exemption for temporary signs posted during the time a piece of property is for sale is content-neutral and constitutional, so long as the exemption does not restrict the words on the temporary sign – that is, so long as it does not require the temporary sign to actually advertise the property for sale. *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1077-78, 1081 (9th Cir. 2006).

This Court should accept review of this case in order to end such disparity and ensure a uniform approach to assessing the constitutionality of sign ordinances.

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that this Court's decision in *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977), which struck down restrictions upon the posting of "for sale" or "sold" signs, requires an exemption for such signs. *See Town of Babylon*, 900 F.2d at 557.

II. The Issue Presented Is Recurring And Of Great Public Importance, And This Case Presents An Ideal Opportunity To Resolve It

The issue in this case is one of great public importance. Because of the conflict in the lower courts concerning the nature of subject-matter-based sign ordinance provisions, virtually identical provisions are receiving wildly varying scrutiny, and meeting wildly different fates, depending solely on the judicial circuit in which the municipality happens to lay. The flip – and more troubling – side of this fact is that the free speech rights of the citizens of those municipalities are also meeting wildly different fates. In light of the Eighth Circuit's decision in this case, for example, St. Louis may no longer restrict display of the Gadsen flag, or a flag with the "Occupy" fist symbol, when it allows the free display of its own flag or that of the United States. But a municipality in the Sixth Circuit may do exactly that. *Compare* Pet'rs' App. 16a-17a, 23a, *with H.D.V.-Greektown*, 568 F.3d at 622-23. Such disparity in free speech protections is not acceptable and should be resolved.

Municipalities would presumably welcome clarification, for litigation over this issue is frequently recurring. Even before *Metromedia* was decided, constitutional litigation over municipal sign ordinances was common, as Justice Rehnquist noted in his *Metromedia* dissent. *See Metromedia*, 453 U.S. at 569 (Rehnquist, J., dissenting) ("[C]ity planning commissions and zoning boards must regularly

confront constitutional claims of this sort . . . ."). After *Metromedia* – and largely because of it – litigation in this area exploded:

> In recent years there have been a large number of state and federal decisions attempting to sort out the parameters of permissible regulation. This significant amount of litigation is due not only to the uncertainty surrounding Supreme Court decisions, but also because of the numerous regulatory approaches a municipality might use to balance the communicative and aesthetic concerns inevitably involved in billboard and sign regulation. In seeking to apply the limited principles of *Metromedia* and other cases to a vast array of possible regulations, courts have often reached conflicting results on similar issues. This is true regarding certain types of content-neutral restrictions and particularly any content-related regulation.

Cordes, *supra*, at 39-40 (footnotes omitted).

This case presents the perfect vehicle for providing much needed guidance to citizens, municipalities, and the lower courts. Petitioners and Respondents both agree that a writ of certiorari is appropriate. The case was litigated on stipulated facts and a very slender administrative record. Moreover, there are no thorny evidentiary issues – in fact, the City and Board have conceded they have no "reports, studies, memoranda, or other documents underlying, concerning, or supporting the regulation of outdoor

signs in Chapter 26.68." Resp'ts' App. 22a; Pet'rs' App. 6a.

This case also brings in to sharp focus the trouble with subject-matter distinctions in municipal sign codes. As the Eighth Circuit noted, "an object of the same dimensions as Sanctuary's 'End Eminent Domain Abuse' sign/mural would not be subject to regulation if it were a '[n]ational, state, religious, fraternal, professional and civic symbol[ ] or crest[ ], or on site ground based measure display device used to show time and subject matter of religious services.'" Pet'rs' App. 16a. In other words, Sanctuary's mural would have been perfectly permissible if, rather than protesting governmental policy, it depicted a governmental crest – or, for that matter, the Masonic crest, Papal coat of arms, American Bar Association symbol, or a "work of art." Resp'ts' App. 9a.

Finally, the speech involved in this case is core political speech on a matter of great public importance: the propriety of using eminent domain for private development. Although this Court's decision in *Kelo v. New London*, 545 U.S. 469 (2005), upheld such use of the eminent domain power, it also recognized that the necessity and wisdom of the practice are "matters of legitimate public debate." *Id.* at 489. With their mural, Respondents have simply attempted to participate in that debate. Their right to engage in such speech on terms equal to those applicable to speech regarding other subjects should be firmly and uniformly established once and for all.

CONCLUSION

For these reasons, Respondents respectfully request that this Court issue a writ of certiorari.[13]

Respectfully submitted,

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[13] Sanctuary believes the Eighth Circuit was correct in holding that the sign code provisions are content-based and fail strict scrutiny. In the event this Court accepts review and determines the provisions are content-neutral, Sanctuary wishes to preserve the argument, advanced in the court of appeals, that they also fail intermediate scrutiny.