1992 WL 12012047 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

THE CITY OF **CINCINNATI**, Petitioner,

v.

DISCOVERY NETWORK, INC., et al., Respondents.

No. 91-1200.
October Term, 1991.
June 1, 1992.

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

Brief of the Institute for Justice as Amicus Curiae in Support of Respondents

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*1 INTEREST OF AMICUS CURIAE

The Institute for Justice submits this brief as amicus curiae in support of the respondents. The Institute has secured the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk.

The Institute for Justice is a non-profit, public interest legal foundation dedicated to securing full constitutional protection for economic liberty, private property rights, and the First Amendment. The Institute's commitment to guaranteeing constitutional protection for commercial speech and reinvigorating the founding principles of the ***2** First Amendment impels our involvement in the instant case.

This case provides the Court with the opportunity to determine the protections afforded commercial speech in a wide variety of contexts. Therefore, the case directly implicates an integral component of the Institute's mission. The Institute further believes that its views concerning commercial speech doctrine in constitutional jurisprudence will assist the Court in resolving the important legal issues involved in this case.

STATEMENT OF THE CASE

In 1990, the City of **Cincinnati** began to enforce an already-existing, but previously unenforced ordinance prohibiting the distribution of "commercial handbills" on public property. **Cincinnati** Municipal Code § 714-23. The ban applied to newspaper-style racks, holding commercial literature, located on public property. However, newspapers and other literature considered non-commercial by the City had unlimited access and distribution rights on public property in the City of **Cincinnati**. Respondents, **Discovery Network**, Inc. and Harmon Publishing Co., challenged this prohibition as an unconstitutional infringement of commercial speech.

During a hearing in the district court, the City stated that the commercial distribution racks posed aesthetic and safety problems for **Cincinnati**. The City, however, could not provide any reasoned distinction between commercial and non-commercial racks in this regard. The ***3** City Architect also stated that the City could easily alleviate any aesthetic and safety concerns by regulating the color and size of all distribution racks. Nevertheless, the City, citing concerns for the potential proliferation of racks on the streets of **Cincinnati**, chose to eliminate completely all distribution of commercial publications on public property.

The district court, applying the four-part test for commercial speech set forth by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980), declared the ban unconstitutional. Under *Central Hudson, id.*, a commercial speech regulation is constitutional if it (1) regulates commercial speech; (2) promotes a substantial governmental interest; (3) directly advances that interest; and (4) is not more extensive in its regulation of commercial speech than is necessary to serve that interest. In *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989), this Court held that the fourth prong of the *Central Hudson* test is met if there is a "reasonable" fit between the means chosen by the government and the ends directly advanced by the statute or ordinance. The district court in the instant case found that the **Cincinnati** ordinance did not constitute a "reasonable" fit between means and ends. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court and held **Cincinnati's** complete prohibition on the distribution of commercial literature on public property violative of the First Amendment to the United States Constitution.

*4 SUMMARY OF THE ARGUMENT

The First Amendment protects the free flow of political and commercial information. In addition to constitutional guarantees afforded commercial speech, commercial information and advertising are vital components of a market economy and necessary for informed economic decision-making by recipients of the information. Although the respondents publish materials deemed commercial, most publications today, as in the past, contain both commercial and non-commercial information. The symbiotic relationship between commercial and non-commercial publications and information makes it impossible for government officials to adopt workable and objective distinctions between supposedly separable forms of speech.

Petitioner alleges that the ruling below creates a split among various courts of appeals over interpretation of the test for commercial speech set forth by this Court. Cases alleged by petitioner to be in direct conflict with the ruling below involved instances of recognizable and proven harm created by the distribution of commercial information. Outright prohibitions on commercial speech, not justified by clear evidence establishing harm associated with the speech, have been consistently held unconstitutional. Petitioner relies on unfounded aesthetic and safety concerns to justify its prohibition on the distribution of commercial information while simultaneously permitting identical methods of distribution of non-commercial materials to flourish.

Under current First Amendment jurisprudence, the ruling below adopts the proper test for commercial ***5** speech restrictions. If the ruling below is overturned by this Court, constitutional protection for commercial speech will be seriously undermined. Recent decisions by this Court have signaled a drift away from landmark commercial speech decisions guaranteeing First Amendment protection to the dissemination of commercial information. This Court should reaffirm the central constitutional foundation of commercial speech and reject the plurality language of *Metromedia Inc. v. City of San Diego*.

ARGUMENT

I. PETITIONER'S COMPLETE BAN ON THE DISTRIBUTION OF COMMERCIAL PUBLICATIONS ON PUBLIC PROPERTY CONFLICTS WITH CORE FIRST AMENDMENT VALUES THAT PROVIDE VIGILANT PROTECTION TO THE FREE FLOW OF COMMERCIAL INFORMATION NECESSARY FOR THE FUNCTIONING OF A FREE ECONOMY

Were the City of **Cincinnati** to ban all non-commercial newspaper distribution on public property, such a regulation would be declared a violation of the First Amendment. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (finding city newspaper licensing ordinance unconstitutionally vested discretion in city official); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991); *see also*, *Miami Herald Pub. Co. v. City of Hallandale*, 734 F.2d 666, 673 (11th Cir. 1984). **Cincinnati** has attempted, however, to adopt such a blanket prohibition on all commercial materials. The City conceded that it could not distinguish commercial from non-commercial ***6** newsracks. Instead, the petitioner offers the supposed lesser protection afforded to commercial speech under the First Amendment as a justification for the prohibition. Petition for Writ of Certiorari at 11.

Contrary to the City's assertions about the place of commercial speech in constitutional jurisprudence, this Court has granted First Amendment protection to commercial speech in many instances. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Furthermore, this Court has recognized the importance of commercial speech to not only the producers of such information, but also to the recipients of the commercial message. *Virginia Citizens* noted that the "consumer's interest in the free flow of commercial information ... may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia Citizens*, 425 U.S. at 763.

The respondents in the instant case publish materials that advertise "learning programs, recreational opportunities, ... social events for adults ... [and] residential real estate for sale or rent." ***Discovery Network***, *Inc. v. City of* ***Cincinnati***, 946 F.2d 464, 465-66 (6th Cir. 1991). The information provided by these publications, and other commercial publishers, to the citizens of **Cincinnati** has a significantly more direct impact on the every-day lives of those citizens than the reporting of the important, yet distant, events in Bosnia or the Commonwealth of Independent States contained in non-commercial and fully protected publications.

***7** Commercial information and advertising are also vital components of a free enterprise economy:

> advertising is a characteristic of competition - a means of entry into markets, a vehicle for price reduction, and a benefit to consumers. In this role it is part and parcel of a rivalrous competitive process with profound implications for the functioning of a market economy.

Ekelund and Saurman, *Advertising and the Market Process* 127 (1988). By prohibiting the distribution of commercial literature, the City is depriving individuals of a vital source of information necessary for rational economic decision-making.

The appeals court noted the traditional delineation between commercial and non-commercial speech made by this Court. ***Discovery Network***, 946 F.2d at 467 n.4. Nevertheless, the appeals court also found it "somewhat anomalous," especially in the context of the instant case, "to denominate as non-commercial institutions such as the *New York Times* and Gannett (publisher of the ***Cincinnati*** *Post*), each of which has assets and revenues in the billions of dollars, and profits in the many millions of dollars." *Id*. Furthermore, newspapers today, as in the past, contain both commercial and non-commercial information. There is no consistent or objective line that separates the commercial from the non-commercial purpose of the newspaper. Stories reporting the latest political imbroglio appear amidst various commercial advertisements as they have since the colonial days of this country. J. Emord, *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, Pol'y Analysis, Cato Inst., Sept. 23, 1991, at 9-10. (noting that the ***8** "colonial press printed advertisements of personal

wants, announcements of rewards for the return of runaway slaves, and information on the scheduled sailing of ships"); *See*, Emord, *Freedom, Technology, and the First Amendment* (1991). Commenting on the interconnectedness in this country between commercial and non-commercial publications, Alexis de Tocqueville observed:

> In France, the space allotted to commercial advertisements is very limited; ... the essential part of the journal is the discussion of the politics of the day. In America, three quarters of the enormous sheet are filled with advertisements, and the remainder is frequently occupied by political intelligence or trivial anecdotes....

Democracy in America 93 (R. Heffner, ed. 1956).

Describing the past and present contents of newspapers is not to say that "pure" speech and commercial speech in newspapers are "inextricably intertwined." *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 474 (1989). It is theoretically possible to separate commercial from non-commercial publications. However, the heavy commercial content of today's newspapers and the increasing politicalization of advertising (such as "Buy American" and "environment-friendly" ads) makes it impossible for city officials to make principled and constitutional distinctions between commercial and non-commercial publications.

***9 II. THE UNITED STATES COURTS OF APPEALS HAVE CONSISTENTLY APPLIED THE *CENTRAL HUDSON* TEST FOR COMMERCIAL SPEECH TO STRIKE DOWN BLANKET PROHIBITIONS ON SPEECH IN THE ABSENCE OF REASONED AND PROVEN JUSTIFICATIONS FOR THE RESTRICTIONS**

The City of **Cincinnati**, in its petition for certiorari, greatly exaggerates the alleged split between the Sixth Circuit and Eleventh and Seventh Circuits in their treatment of commercial speech in general and the fourth prong of the *Central Hudson* test in particular. The cases from the Eleventh and Seventh Circuits on which petitioners rely are distinguishable from the instant case on their facts and do not conflict with the Sixth Circuit's interpretation of the *Central Hudson* test. Indeed, the Eleventh Circuit has recently held that outright prohibitions on commercial speech, such as the one in the instant case, do not meet the "reasonable" fit requirements of the fourth prong of the *Central Hudson* and *Fox* tests. *Fane v. Edenfeld*, 945 F.2d 1514 (11th Cir. 1991), discussed *supra*.

The Eleventh Circuit case alleged to be in conflict with the Sixth Circuit's decision is *Don's Porta Signs v. City of Clearwater*, 829 F.2d 1051 (11th Cir. 1987). The appeals court in *Don's Porta Signs* upheld a city ordinance that effectively banned the use of portable signs. The city submitted evidence that the portable signs themselves posed unique safety and aesthetic problems and were particularly unattractive. *Id*. at 1053. The court concluded that prohibition of these types of signs satisfied the *Central Hudson* test. *Id*.

10** The instant case is readily distinguishable from the facts of *Don's Porta Signs*. Both the City Architect and Engineer for **Cincinnati** conceded at the district court level that the commercial and non-commercial racks in question were alike in all respects. Yet in *Don's Porta Signs*, it was the particular unattractive nature of the portable signs that led to their constitutional prohibition. Additionally, the City of Clearwater submitted evidence to the court on the aesthetically unappealing attributes of portable signs. **Cincinnati**, however, produced no evidence of any harmful qualities or effects unique to the commercial racks. In fact, the Sixth Circuit admitted that "[h]ad **Cincinnati** produced evidence that the types of newsracks distributing commercial speech caused effects distinct from newsracks distributing newspapers, ... the ordinance may have been constitutional." ***Discovery Network, 946 F.2d at 472 n.12. Unsupported legislative declarations that commercial racks pose particular dangers to safety and aesthetic concerns of the city do not pass constitutional muster. *See Erznoznick v. City of Jacksonville*, 422 U.S. 205 (1976). [1]

***11** Moreover, the Eleventh Circuit recently struck down a blanket prohibition on in-person solicitation by Certified Public Accountants (CPAs) as violative of the First Amendment. *Fane v. Edenfield*, 945 F.2d 1514 (11th Cir. 1991), *petition for cert.*

filed, No. 91-1594. The appeals court noted that "[b]lanket prohibitions on commercial speech are disfavored." *Id*. at 1517; *see also Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988). Like the Sixth Circuit's decision regarding commercial distribution racks in ***Discovery Network***, the Eleventh Circuit found the commercial speech restriction on CPAs to violate the fourth prong of the *Central Hudson* test. *Fane*, 945 F.2d at 1518.

The Board of Accountancy in *Fane* produced no "evidence of any link between in-person solicitation and the likelihood that a CPA will be more likely, or even willing, to engage in dishonest or oppressive conduct during such solicitation." *Id*. The ban on solicitation therefore failed the "reasonable" fit test as mandated by *Central Hudson* because the statute "bans far more speech than is necessary in light of the justification offered for its restraint." *Id*. Likewise, the Sixth Circuit determined that **Cincinnati's** complete prohibition on commercial newsracks bans far more speech than necessary given the lack of justification provided by the city and thereby fails under the *Central Hudson* calculus. According to both the Eleventh and Sixth Circuits, government officials can employ legitimate police powers to combat potential aesthetic and safety problems but they cannot use their "interest in foreclosing harm to justify broad-scale restraints on speech." *Fane*, 945 F.2d at 1518.

The City of **Cincinnati** also cites the Seventh Circuit's decision in ***12** *Chicago Observer, Inc. v. City of Chicago*, 929 F.2d 325 (7th Cir. 1991), as another indication of the supposed split among circuits arising from ***Discovery Network***. Petition for Writ of Certiorari at 7. In *Chicago Observer*, *id.*, the appeals court upheld an ordinance regulating the size of advertisements on newsracks. The ordinance was directed at eliminating particularly offensive and distracting "AD BOXes" attached to standard newspaper racks. Similar to the portable signs described in *Don's Porta Signs*, 829 F.2d 1051 (11th Cir. 1987), the "AD BOX" posed particular aesthetic and safety concerns for the City of Chicago.

In petitioner's attempt to characterize *Chicago Observer* as conflicting with ***Discovery Network***, its precendential sleight of hand becomes apparent. As the petition for certiorari concedes, Petition for Writ of Certiorari at 8, the ordinance adopted by Chicago "significantly" banned "off-premises" ads. The Seventh Circuit hastened to point out, however, that the "government must leave [open] ample channels for communication," and that standard was met because "Chicago teems with ads and with publications that do not need 'AD BOXes' for distribution." *Chicago Observer*, 929 F.2d at 328. Of course, **Cincinnati** has prohibited all means of distributing commercial information on public property even though the commercial distribution racks in **Cincinnati** posed none of the problems associated with the commercial advertisements in either *Don's Porta Signs* or *Chicago Observer*.

***13 III. THIS COURT SHOULD REAFFIRM THE CENTRAL CONSTITUTIONAL FOUNDATION FOR COMMERCIAL SPEECH JURISPRUDENCE BY REJECTING THE PLURALITY LANGUAGE OF *METROMEDIA* AND HALTING THE DILUTION OF CONSTITUTIONAL PROTECTION FOR COMMERCIAL SPEECH

Since the supposed circuit court split alleged by petitioners is in fact illusory, the remaining basis for this Court to reverse the judgment of the appeals court is to transform the plurality language in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), into a majority rule. A transformation of the plurality holding in *Metromedia* to a majority rule would amount to a serious assault on the constitutional protections afforded commercial speech and cast the future of First Amendment protection for commercial speech into doubt.

In *Metromedia*, *id.*, a plurality of this Court, in striking down a ban on off-site, outdoor signs carrying non-commercial advertising, stated that the ban would be permissible as it applied to commercial speech. The appeals court in the instant case admitted that had a majority of this Court upheld "San Diego's statute as a permissible regulation of commercial speech, we would be compelled to reverse the district court." ***Discovery Network***, 946 F.2d at 470, n.9. *Amicus* urges this Court to repudiate the plurality holding in *Metromedia* by adopting the test for commercial speech restrictions set forth by this Court and adhered to by the appeals court in ***Discovery Network***.

Under current law, commercial speech can be regulated only when the regulations address speech believed ***14** to be inherently false or misleading, [2] or deal with the distinctive effects the content of the speech will produce. [3] In the instant case, the City is "attempting to place a burden on a particular type of speech because of the harms caused by the *manner* of delivering that speech." ***Discovery Network***, 946 F.2d at 471 (emphasis in original). In the absence of efforts to alleviate particular harms caused by the actual content of a commercial publication, this Court reviews "with special care regulations that entirely suppress commercial speech in order to pursue a non-speech related policy." *Central Hudson*, 447 U.S. at 566 n.9. An adoption of the plurality language in *Metromedia* would sanction the pursuit of government policy objectives at the expense of fundamental First Amendment rights.

Transforming *Metromedia* into a majority ruling would seriously erode the constitutional protection granted to commercial speech and significantly undermine this Court's ruling in *Virginia Citizens*. This Court recognized in *Virginia Citizens* not only the constitutional imperative that commercial speech be granted protection, but also the individual and societal benefits that flow from accessible commercial information. *Virginia Citizens*, 425 U.S. at 763-64. As this Court noted:

> ***15** Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable.

Id. at 765.

This Court should reaffirm the central and landmark holding of *Virginia Citizens* that commercial speech is unquestionably protected by the First Amendment. Two recent decisions of this Court [4] called into question the continued vitality of *Virginia Citizens* and the strength of constitutional protections for commercial speech. In both cases, this Court weakened the test set forth in *Central Hudson. See* Kurland, *Posadas de Puerto Rico Associates v. Tourism Company: 'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful*, 1986 Supreme Court Law Review 1; McGowan, *A Critical Analysis of Commercial Speech*, 78 Calif. L. Rev. 359 (1990).

In *Posadas*, this court upheld a statutory ban by Puerto Rico on casino advertising to Puerto Rican citizens. The effect of the majority decision is to grant broad powers to legislative bodies in determining the means/ ***16** end fit in commercial speech regulation. One commentator noted that under *Posadas*:

> there is no advertising that is not subject to government censorship. Truthful [commercial speech concerning a lawful activity] may thus be made illegal at the discretion of any bureaucrat with legislative license drawn as in broad terms as that given in ... *Posadas*.

Kurland, *supra*, at 1, 13.

In *Fox*, 492 U.S. 469 (1989), this Court held that the fourth prong of the *Central Hudson* test only requires that there be a "reasonable" fit between the substantial governmental interest and the means chosen to advance that interest (as opposed to the government having to choose the "least restrictive means"). While *amicus* believes that the **Cincinnati** ordinance fails even under the relaxed standard of *Fox*, an adoption of the *Metromedia* language would dilute judicial review of commercial speech ordinances to virtually a rational basis standard. If **Cincinnati's** ban on commercial speech, completely lacking in any reasoned justification, is upheld, virtually any regulation of commercial speech could pass constitutional muster.

We urge this Court to halt this alarming drift by rejecting the plurality holding in *Metromedia* and affirming the judgment of the appeals court in the instant case. The constitutional arguments are too strong and the individual and societal interests too great to relegate commercial speech to negligible constitutional protection.

*17 CONCLUSION

For the foregoing reasons, *amicus curiae* Institute for Justice respectfully requests that this honorable Court affirm the opinion below.
Respectfully submitted,

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Footnotes

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1 As this Court noted in *Erznoznick*, 422 U.S. at 216 n.13, municipalities can reasonably exercise their police power, in a manner that does not trample First Amendment rights, in order to regulate any harmful effects posed by constitutionally protected expression. In ***Discovery Network***, 946 F.2d at 472, the appeals court noted a number of options **Cincinnati** could pursue to "control the perceived ill effects of newsracks apart from banning those dispensing commercial speech." The city could mandate fastening racks to sidewalks to alleviate safety concerns and establish color and design limitations upon all newsracks to satisfy aesthetic concerns. While it is within the legislative domain to determine the most reasonable alternatives, courts must gurantee that the legislature does not make unconstitutional content-based determinations.

2 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Konigsberg v. State Bar*, 366 U.S. 36 (1961).

3 *Renton v. Playtime Theaters*, 475 U.S. 41 (1986); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976); *California v. LaRue*, 409 U.S. 109 (1972).

4 *Fox*, 492 U.S. 469 (1989); *Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986).

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