Court of Appeals Case No. 07-55179

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

METRO LIGHTS, L.L.C.,

Plaintiff/Appellee

v.

CITY OF LOS ANGELES,

Defendant/Appellant.

Appeal from the United States District Court for the Central District of California in Case No. CV 04-1037 (GAF) (Ex), Judge Gary A. Feess

BRIEF OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES AND CBS DECAUX LLC IN OPPOSITION TO APPELLEE METRO LIGHTS' PETITION FOR REHEARING OR REHEARING EN BANC

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INTEREST OF AMICI CURIAE

Amicus League of California Cities ("League") is an association of 480 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide – or nationwide – significance. The Committee has identified this case as being of such significance. Petitioner Metro Lights, L.L.C. ("Metro Lights") proposes a stark and inappropriate constitutional regime under which a city forfeits its power to regulate off-site advertising on private property if it establishes a program to enhance public transportation with bus shelters and other public amenities that display advertising, at limited and controlled locations along the public right-of-way. Such a rule of law would degrade the quality of city life throughout this Circuit. The League and its members have a strong interest in supporting the Panel's decision, which rejected such a sweeping constitutional ruling.

Amicus CBS Decaux LLC ("CBS Decaux") is a joint venture of two innovative outdoor advertising companies, CBS Outdoor Inc. and JCDecaux North America, Inc. In 2001, following an open and competitive bidding

process, CBS Decaux executed an agreement ("Street Furniture Agreement") with the City of Los Angeles ("City") for the installation of bus shelters and other amenities ("Street Furniture"). CBS Decaux has devoted extensive capital and creative resources to building and maintaining handsome Street Furniture on thoroughfares throughout the City. CBS Decaux has a strong interest in ensuring that this Court has a correct understanding of the Street Furniture Agreement and its benefits and in ensuring the viability of similar public-private collaborations.

The League and CBS Decaux were granted leave to submit an amicus brief and present oral argument before the Panel. Metro Lights and the City have consented to the filing of this amicus brief.

SUMMARY OF ARGUMENT

The unanimous Panel held that a municipal agreement to provide bus shelters and other public amenities within the public right of way does not render restrictions on off-site advertising on private property unconstitutional. This ruling does not warrant en banc review.

The Panel's decision is consistent with Ninth Circuit and Supreme Court precedents. In addition, a ruling in Metro Lights' favor would conflict squarely with the Supreme Court's decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), and stand in tension with several other decisions. *See* Section C, *infra*.

Metro Lights fails to address the many benefits of street furniture and relies on erroneous factual arguments regarding traffic safety. Further, Metro Lights fails to address the fact that the distinction between private property and the public right of way is content neutral, not content based, does not implicate the same concerns as content-based exceptions to speech restrictions, and is consistent with the long-established authority of cities.

ARGUMENT

A. The Street Furniture Agreement Advances The City's Interests In Traffic Safety And Aesthetics, And Metro Lights' Contrary Argument Distorts The Record.

Metro Lights argues that this case is similar to *Ballen v. City of Redmond*, 466 F.3d 736 (9th Cir. 2006), *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173 (1999), *Rubin v. Coors Brewing Co.*, 514, U.S. 476 (1995), and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), because CBS Decaux signs displayed on bus shelters within the public right of way are the same size as Metro Lights signs, and therefore, according to Metro Lights, the Street Furniture Agreement undermines the City's asserted rationale for restricting new signage on private property. Petition at 5. This argument ignores the myriad self-evident public benefits conferred by Street Furniture that have no parallel in private property signage.

Street Furniture includes bus shelters, information kiosks, automatic public toilets and other amenities along the public right-of-way. Such

structures perform a vital service in cities throughout this Circuit, including Los Angeles, which is renowned for traffic nightmares, deteriorated air quality, and daunting mobility problems for the poor and others without access to automobiles.[1] Promoting and supporting an attractive and visible mass transit system is of vital importance to Los Angeles. The Street Furniture program an important part of this effort, as it enhances the infrastructure for mass transit riders and makes the system more visible and attractive to riders and motorists. The program enhances traffic safety through, for example, the reduction in the use of single occupancy vehicles, improvements in traffic flow, placement of well-marked and safe locations for passengers to congregate in embarking and disembarking City busses, and the improved visibility of bus stops.

[1] In 2001, the year the City and CBS Decaux executed the Street Furniture Agreement, Southern California Association of Governments ("SCAG") recognized that "[r]eliable and safe transit service is essential for many residents to be able to participate in the economic, cultural, and social life of Southern California. Use of public transit decreases traffic congestion and air pollution." SCAG State of the Region 2001 at 87, available at www.scag.ca.gov/publications/sotr01/sortofc.html (visited March 6, 2009). "Public investment in transit infrastructure results in substantial benefits to residents, including mobility for those lacking a vehicle or unable to drive, energy efficiency compared to automobile use on a per-person basis, and economic and environmental benefits." *Id.* at 88. *See also* SCAG Regional Vision 1, 1 (Winter 2001), available at www.scag.ca.gov/publications/pdf/vision_1202.pdf (visited March 6, 2009) (forecasting increase in Southern California population of 7 million by 2025, the equivalent of adding two cities the size of Chicago, and ranking the need for transportation investments "at an all-time high while the funding for those projects is steadily decreasing."); *see also* State of the Air: 2008 Report by the American Lung Association, available at http://www.stateoftheair.org/2008/most-polluted (visited March 6, 2009) (grading Los Angeles "F" on all air quality measures and ranking City as most polluted in the nation in two of three air quality measures).

The City of Los Angeles is one of many cities that promote mass transit through advertising-funded Street Furniture programs.[2] The City's Street Furniture program was implemented in 2001 following a competitive bidding process in which the City Board of Public Works unanimously selected CBS Decaux's proposal, ranking it "superior" on every relevant criteria. Excerpts of Record ("ER"), 243-317, at 247 (Street Furniture Agreement ("SFA") at 1). Metro Lights did not submit any proposal, even though the process was open to all qualified bidders. *Metro Lights, L.L.C. v. City of Los Angeles*, 488 F. Supp. 2d 927, 933 (C.D. Cal. 2006).

The Street Furniture Agreement embodies a "municipal services program" that CBS Decaux operates "on behalf of and for the benefit of the CITY and residents and visitors of the CITY." ER at 268 (SFA § 6.3(a)); 933 F. Supp. 2d at 933. Under the Street Furniture Agreement, CBS Decaux is required to "provide, install, operate and maintain, on the Public Rights-of-Ways, Street Furniture, other related amenities, and Ad Panels." ER at 252 (SFA § 2.1). The Agreement includes extensive permitting requirements and processes for public participation in the placement and types of Street Furniture to be erected, including the right of adjacent

[2] Cities throughout the Ninth Circuit, including in metropolitan Las Vegas, Sacramento, San Diego, the San Francisco Bay Area, and Phoenix, have street furniture programs. In Southern California alone, CBS Decaux and member CBS Outdoor Inc. operate street furniture programs in Anaheim, Beverly Hills, Lomita, Riverside, Torrance, El Segundo, Inglewood, Temple City, Pasadena, Alhambra, South Gate, Burbank, West Hollywood, Glendale, and San Diego County. August 6, 2007 Amicus Brief of League of California Cities and CBS Decaux LLC at 27-28.

property owners to file objections. ER at 255-56 (SFA § 4.2). The Agreement also gives the City the right to require CBS Decaux to provide additional public amenities, such as the integration of third-party telephones or emergency phones, litter or recycling bins, information terminals, maps and public service announcements on a significant portion of the Street Furniture installed under the agreement. ER 253-254 (SFA § 2.4). To compensate CBS Decaux for performing these services, the Street Furniture Agreement grants CBS Decaux the exclusive right to display advertising "in Public Rights-of-Ways in a format between 15 and 55 square feet." ER 253 (SFA § 2.3.1). The City receives compensation from CBS Decaux under the Street Furniture Agreement. ER 264-265 (SFA § 4.5). Such compensation has no impact on the ability of CBS Decaux, Metro Lights, or anyone else to communicate any message. The record contains no evidence that any message that is displayed on City Street Furniture cannot also be displayed on the thousands of off-site signs on private property, or that the City has refused to display any message proposed by Metro Lights.[3]

[3] Based on arguments put forth by Metro Lights, the district court repeatedly referred to the City's sign code as providing the City with a "monopoly" on off-site advertising. *See, e.g.*, 488 F. Supp. 2d at 930. In fact, by the start of this decade, the number of off-site signs on private property, according to City estimates, had reached approximately **10,000**. *Clear Channel Outdoor, Inc. v. City of Los* Angeles, 234 F. Supp. 2d 1127, 1129 (C.D. Cal. 2002), *rev'd on other grounds*, 340 F.3d 810 (9th Cir. 2003). The City's passage of L.A.M.C. § 91.6205.11 (now § 14.4.4.B.11), did not eliminate rights in existing signs. *See* L.A.M.C. § 91.6216 (existing sign rights). Metro Lights, accordingly, has abandoned the argument that the City has created a monopoly. Moreover, Metro Lights has pointed to nothing in the record remotely suggesting that the City enacted restrictions on new off-site signs on private property for the purpose of enhancing the

Despite the fact that advertising-funded Street Furniture serves a different function than off-site advertising on private property, Metro Lights argues that City's agreement to permit advertising in connection with a Street Furniture program undermines the City's interests in safety and aesthetics. Even setting aside the myriad ways in which bus shelters promote mass transit and benefit traffic safety, this claim is false. Metro Lights contends, based on a declaration of a so-called traffic expert, that the signs erected on Street Furniture are "located closer to the curb line, where they are more visible to passing motorists than the banned Metro Lights signs and thus pose a greater threat to traffic safety than Metro Lights' signs supposedly do." Petition for Rehearing at 5. This statement distorts the record. Metro Lights' expert did not opine that Street Furniture signs pose a greater threat to traffic safety. He stated only that the bus shelter signs in his study "were ***more visible*** and more of a ***potential distraction*** than any of the outdoor media signs included in my study." Supp. Excerpts of Record 541-42 (Kunzman Decl. ¶ 8) (emphasis added). He did not opine that greater

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profitability of the Street Furniture Agreement. Indeed, the Street Furniture Agreement is administered by the Department of Public Works, ER 114 (Declaration of Lance Oishi), while private property sign regulations are within the jurisdiction of the Departments of Building & Safety and City Planning, L.A.M.C. § 12.26 *et seq.*; L.A.M.C. § 12.32 *et seq.*

Rather than purchasing an existing sign structure or purchasing space for its own advertising on an existing structure, beginning in 2003, Metro Lights began a campaign to erect hundreds of fixed, permanent structures for off-site advertising on private property throughout the City without obtaining City permits or subjecting itself to City safety inspections and other content-neutral regulations. *Metro Lights LLC v. City of Los Angeles*, 488 F. Supp. 2d at 936, 938. ER at 446 (Order filed Nov. 3, 2006, at 2).

visibility created a "greater threat to traffic safety" or even that greater visibility created any threat at all.

Metro Lights' continued reliance on this expert to suggest that Street Furniture poses a threat to traffic safety is not candid. Metro Lights has been on notice since before the Panel argument that their expert gave no opinion that Street Furniture signs are unsafe. In December 2007, Metro Lights' expert, Mr. Kunzman, wrote a letter to Mr. Paul Fisher, who is counsel for Metro Lights here, in connection with another case in which Mr. Kunzman had been retained as an expert on traffic safety and outdoor advertising. In that letter, Mr. Kunzman made clear that he has unique personal definition for the word "distraction," – the very word he used in his declaration in this case – and to Mr. Kunzman, the label "distraction" does not correlate with traffic safety: "To merely label something as a 'distraction' is not meaningful," he told Mr. Fisher.[4] "Anything that a driver might look at while driving, other than the road ahead, is a distraction." *Id.* at 2 (Kunzman

[4] Mr. Fisher filed Mr. Kunzman's December 2007 letter in another action on May 5, 2008. *See* Document No. 69-3 in *World Wide Rush v. City of Los Angeles*, Central District of California, Case No. 2:07-cv-00238-ABC-JWJ. Mr. Fisher failed to bring the matter to the attention of the Panel during oral argument on June 4, 2008, despite Metro Lights' substantial reliance on Mr. Kunzman's declaration in brief. Opp. to Pet. for Rehearing at 9-10, 23; *see also id.* at 30 (relying on Mr. Kunzman and describing bus shelter sign as "a greater traffic hazard than any Metro Lights sign"). The Panel granted CBS Decaux's Motion for Leave to file a Supplemental Brief on August 28, 2008 to address Metro Lights' failure to bring this issue to the Court's attention despite its ongoing reliance on the opinion of this expert. August 12, 2008 Supplemental Brief Amicus Curiae CBS Decaux LLC, Declaration of Laura Brill Ex. A at 10 (Kunzman letter at 9); *see also* Motion Of *Amicus Curiae* CBS Decaux LLC, For Leave To File Supplemental Brief To Remedy Misleading Statements By Metro Lights, Ex. B (Transcript of Deposition of William Kunzman).

letter at 1). Instead, "[t]he distinction needs to be made between a typical distraction and a significant distraction," and street-level billboards are not a "significant distraction" that would lead to traffic accidents. *Id.* at 10 (Kunzman letter at 9). This Court's resources are precious and should not be squandered on en banc review of a well reasoned Panel opinion, especially based on dubious "expert" testimony.

B. There is No Tension Between The Panel Decision And *Ballen v. City of Redmond*

Metro Lights contends that rehearing is warranted because the Panel ignored Supreme Court and Ninth Circuit commercial speech "underinclusivity" precedents. Petition 1-2. Quite to the contrary, the Panel rendered a decision and crafted an opinion that is entirely consistent with these precedents. Indeed, for the Court to invalidate the City's sign code on account of Street Furniture advertising would introduce legal inconsistency and far greater confusion.

In analyzing the Supreme Court underinclusivity precedents, the Panel correctly observed that there are *two* rules of decision dealing with "exceptions" from speech restrictions: "First, if the exception 'ensures that the [regulation] will fail to achieve [its] end,' it does not materially advance its aim." 466 F.3d at 898. 906) (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1990) and citing *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 190 (1999)). "Second, exceptions that make distinctions among different kinds of speech must relate to the interest

the government seeks to advance." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418-419 (1993).

This Court's decision to strike down a municipal ban on portable signs in *Ballen v. City of Redmond*, 466 F.3d 736 (9th Cir. 2006), is properly considered within this second category. In *Ballen*, "[t]he exceptions to the city's portable sign Ordinance are all content based. Different signs are treated differently under the Ordinance based entirely on a sign's content." *Id.* at 743. The content-based nature of the exceptions was central to the Court's conclusion that the portable sign ban could not pass muster under *Central Hudson Gas & Electric Corp. v. Public Services Commission of New York*, 477 U.S. 557 (1980). As the Court explained with regard to an exemption for signs advertising real estate: "Here, the City has protected outdoor signage displayed by a the powerful real estate industry from an Ordinance that unfairly restricts the First Amendment rights of, among others, a lone bagel shop owner." *Id.* at 743. Moreover, it was exactly along these lines that the Court in *Ballen* distinguished the case from *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). *Id.* at 744 ("In *Metromedia* the distinction that was challenged and upheld was between onsite and offsite billboards. It was a content-neutral distinction. The categorical nature of the ordinance in Metromedia precludes its application here.").

This case, in turn, is distinguishable from *Ballen*. To the extent that the Street Furniture Agreement constitutes an "exception" to the City's

restrictions on new off-site signs, it is a content-neutral exception. Nothing in the Street Furniture Agreement or the distinction between private property and the public right of way refers to or turns on the on-site/off-site distinction. The goal of the Street Furniture Agreement is unrelated to encouraging or discouraging on-site or off-site activities. The Agreement neither compels nor burdens any speech on private property. It is simply a public services contract entered into for purposes different from those governing the City's interests in regulating signage on private property.

Nor need the Court be concerned, as it was in *Ballen*, that the City's regulatory scheme favors the speech rights of one group over another, such as the "powerful real estate industry," *Ballen*, 466 F.3d 743. *See* Petition at 15. "Metro Lights has shown no evidence that the City or CBS discriminate among advertisers in the sale of advertising space. Nor is Metro Lights challenging the bidding process by which the City chose CBS as its counter-party to the [Street Furniture Agreement]." 466 F.3d at 912.

In addition, as any brief drive down the City's commercial and industrial thoroughfares reveals, CBS Decaux is far from the "sole vendor" of off-site advertising in the City. As noted above, the City estimates that there are approximately 10,000 off-site signs in the City. The advertising copy on these signs may be changed at will, without the need for the owner to apply for a new permit. L.A.M.C. § 91.6201.2. Unlike the bagel shop

owner in *Ballen*, Metro Lights has pointed to no message that either it or its advertisers cannot display on a large number of signs throughout the City.

C. The Panel Decision Comports With Historical Practice And Does Not Conflict With Decisions Of The Supreme Court.

The Panel decision is consistent with historical practice of cities subjecting speech on different types of property to different regulation. Thus, virtually all cities have different regulations for signage on residential property on the one hand and commercial and industrial property on the other. The signs that are allowed on commercial and industrial property are not properly seen as exemptions from sign restrictions that operate on residential property. A contrary rule could lead to a result in which a city, by allowing local businesses to identify themselves to the public, would forfeit the right to restrict signage in residential communities. A city's historical ability to distinguish between the public right of way and private commercial and industrial property is no different.

Central Hudson and its progeny are concerned with a very different type of speech exemption, i.e., content-based exemptions that have the effect of undermining the interests purportedly served by a speech restriction, *see Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173 (1999) (tribal casinos exempted from general ban on casino advertising); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (labeling relating to wine and spirits exempted from ban on beer alcohol content labeling); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993)

(newsracks containing non-commercial handbills exempted from ban on commercial handbill newsracks). Because the distinction between private property and the public right of way is content-neutral, not content-based, there is no inconsistency between the panel decision here and the Supreme Court cases on which Metro Lights relies.

In contrast, a ruling in Metro Lights' favor would be inconsistent with the Supreme Court's decision in *Metromedia*, for the reasons amply discussed by the Panel as well as with other Supreme Court decisions. When the Supreme Court has had occasion to consider speech restrictions that operate on only certain types of property, and especially in addressing sensitive uses of government-managed property, the Court has been careful to confine analysis to the interests affecting the particular property that is subject to regulation. In *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), for example, the Supreme Court upheld restrictions on solicitation inside airport terminals notwithstanding the fact that such solicitation was permitted on sidewalks outside the terminal building. The Court recognized that the government regulation must be regarded with sensitivity to factors specific to air terminals, such as the concern for traveler safety, congestion, efficient passenger transfer, the provision of travel-related services and concessions, and the availability of a mechanism to respond to traveler complaints. *Id.* at 682-684. Because of such forum-specific factors, it was inappropriate to regulate speech as it is

regulated on the public sidewalks outside the terminal or to agglomerate airports with other "transportation nodes" like bus and train stations. *Id.* at 682 ; *see also Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) ("public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place, you would have to know the history of the particular place.") (citation and internal quotation marks omitted); *id*. at 302-03 ("the nature of the forum and the conflicting interests involved have remained important in determining the degree of [First Amendment] … protection to the speech in question."); *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993) (federal law prohibiting broadcast advertising for lotteries, but exempting state-run lottery advertising if the broadcast station was licensed in a state that ran such a lottery survived scrutiny).

The Supreme Court's recent decision in *Pleasant Grove City, Utah v. Summum*, bolsters this conclusion. 2009 WL 454299 (Feb. 25, 2009). There, the Court held that a city could reject a donated monument in its park, because monuments "monopolize the use of the land on which they stand and interfere permanently with other uses of public space." *Id.* at *11. If parks were prohibited from selecting among monuments, the practical result would be that most parks would have to refuse all monuments, "[a]nd where the application of forum analysis would lead almost inexorably to closing the forum, it is obvious that forum analysis is out of place." *Id.* at *17-18.

The Panel of this Court anticipated *Summum* in the context of commercial speech underinclusivity precedents when it recognized that just because "the government cannot silence one speaker but not another because the latter has paid a tax … doesn't mean the City cannot silence speakers in general but permit them to bid for the right to speak on City-owned land, assuming that the speakers on City-owned land do not undermine the goal of the City's general prohibition."[5] 55 F.3d at 914. The Street Furniture Agreement does not undermine the purpose of the ban: "[a]lthough the SFA permits some advertising, a regime that combines the Sign Ordinance and the SFA still arrests the uncontrolled proliferation of signage and thereby goes a long way toward cleaning up the clutter, which the City believed to be a worthy legislative goal." *Id.* at 911.

CONCLUSION

For the foregoing reasons, the Court should deny Metro Lights' Petition for Rehearing Or Rehearing En Banc.

Dated: March 9, 2009

IRELL & MANELLA LLP

By: s/ Laura W. Brill
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[5] As the Panel explained in rejecting Metro Lights' analogy to selling an indulgence to shout "Fire!" in a crowded theater, "[i]t is not as if CBS, by paying the City money and building handsome street furniture, is allowed to sell offsite advertisements wherever it wants, like the man who pays for the privilege of shouting fire in a crowded theater." 551 F.3d at 913.

CERTIFICATE OF FORMATTING COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points and contains 4,055 words according to the word count feature of the word processing program used in its creation.

Dated: March 9, 2009 IRELL & MANELLA LLP

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CERTIFICATE OF SERVICE

WHEN ALL CASE PARTICIPANTS ARE REGISTERED FOR THE APPELLATE CM/ECF SYSTEM

I hereby certify that on March 9, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 9, 2009 IRELL & MANELLA LLP

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