NO. _

IN THE

Supreme Court of the United States

PASTOR CLYDE REED; AND GOOD NEWS COMMUNITY CHURCH,

Petitioners,

v.

TOWN OF GILBERT, ARIZONA; AND ADAM ADAMS, IN HIS OFFICIAL CAPACITY AS CODE COMPLIANCE MANAGER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Town of Gilbert's Sign Code categorizes temporary signs based on their content and then restricts their size, duration, location, and other characteristics depending on the category into which each sign is placed. Under the Sign Code, Good News Community Church's temporary signs promoting church services receive far worse treatment than temporary signs promoting political, ideological, and various other messages, even though they equally impact Gilbert's interests in safety and aesthetics. By finding the Sign Code content neutral and upholding it under the First Amendment, the Ninth Circuit deepened a three-way conflict among eight Courts of Appeals.

The question presented is:

Does Gilbert's mere assertion of a lack of discriminatory motive render its facially content-based sign code content-neutral and justify the code's differential treatment of Petitioners' religious signs?

PARTIES TO THE PROCEEDING

Petitioners are Good News Community Church and its pastor, Clyde Reed. Respondents are the Town of Gilbert, Arizona, and Adam Adams in his official capacity as the Town's Code Compliance Manager.

CORPORATE DISCLOSURE STATEMENT

Good News Community Church does not have any parent companies, and no entity has any ownership interest in it.

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INTRODUCTION

The Town of Gilbert's Sign Code severely restricts Petitioners' church invitation signs, purportedly in the name of safety and aesthetics. Yet the Code broadly permits the proliferation of political, ideological, and several other types of temporary signs that impact Gilbert's interests in exactly the same way.

Gilbert's Code severely restricts this:

Excerpts of R. 873, 9th Cir. Case No. 11-15588, ECF No. 8 (hereinafter "ER").

But broadly permits this:

ER 204.

This striking differential impact on similar signs results from the Sign Code being content-based on its face. It establishes categories for temporary signs, such as Political Signs, Ideological Signs, Qualifying Event Signs, Homeowners Association Signs, Real Estate Signs, and more. The Code then imposes vastly different size, duration, number, location, and other requirements within each content-based category.

Gilbert has enforced §4.402P of the Sign Code, which regulates signs promoting the events, meetings, or activities of certain non-profit groups, against Petitioners. These Qualifying Event Signs

receive far worse treatment than other temporary signs. For example, Political Signs can be up to 32 square feet, placed in rights-of-way (regardless of whether they relate to a Gilbert event), displayed for five months if there is a primary election and over two months if there is no primary, and are unlimited in number. In contrast, Petitioners' signs can be a mere 6 square feet, may be placed in rights-of-way (only if they relate to a Gilbert event), may be displayed for just 14 hours, and are limited to 4 per property.

Despite the clear, content-based nature of Gilbert's Sign Code, the Ninth Circuit ruled (over a strong dissent by Judge Watford) that it is content-neutral. In so doing, it landed on the wrong side of a long-standing, three-way conflict involving at least eight Courts of Appeals regarding the proper test for judging the content-neutrality of a sign ordinance. The Ninth Circuit joined the Fourth and Sixth Circuits in employing a subjective "motive-based test" that excuses facial content-based discrimination so long as the government professes a lack of discriminatory motive or a content-neutral justification. The Third Circuit utilizes a multi-factor balancing test designed to determine when the value of certain speech in a particular location justifies a content-based exemption from a sign regulation. These tests directly conflict with the objective standard this Court and the First, Second, Eighth, and Eleventh Circuits employ. Under it, a speech regulation is content-based if it makes content-based distinctions on its face, regardless of governmental purpose or motive.

The need for this Court's intervention is great. It should grant review and resolve the circuit conflict in favor of this Court's objective content-neutrality standard established in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), which has been repeatedly reaffirmed. As Justice Brennan aptly observed, this standard "provides clear guidance," allowing governments to "ascertain the scope of impermissible regulation" and individuals to "ascertain the scope of their constitutional protection." *Boos v. Barry* 485 U.S. 312, 336 (1988) (Brennan, J., concurring). In stark contrast, a motive-based test, like that employed by the Fourth, Sixth, and Ninth Circuits, "plunges courts into the morass of legislative motive, a notoriously hazardous and indeterminate inquiry," *id.*, which scarcely provides the clarity and predictability so dearly needed to protect fundamental free speech rights.

A motive-based test also gives regulators a road map on how to establish legal cover for laws that "suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion," *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994), the very risks this Court's content-neutrality test is designed to prevent.

DECISIONS BELOW

Lower courts have entered four pertinent opinions in this matter. The district court's unreported ruling denying the Petitioners' second motion for preliminary injunction is reprinted in the Appendix (App.) at 116a-140a. The Ninth Circuit

opinion affirming in part and remanding in part the district court's preliminary injunction order is reported at 587 F.3d 966 and reprinted at App. 85a-115a.

The district court's unreported ruling granting Respondents' motion for summary judgment, and denying that of Petitioners, is available at No. CV 07–522–PHX–SRB, 2011 WL 5924381 (D. Ariz. Feb. 11, 2011) and reprinted at App. 53a-84a. The Ninth Circuit panel opinion affirming the district court's summary judgment ruling is reported at 707 F.3d 1057 and reprinted at App. 1a-52a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its decision on February 8, 2013. The Ninth Circuit denied the petition for rehearing en banc on July 24, 2013. App. 141a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND THE TOWN'S SIGN CODE

The text of the First and Fourteenth Amendments to the United States Constitution is found at App. 159a. Gilbert's Sign Code, and the most recent amendments to it, are set forth at App. 142a-158a.

STATEMENT OF THE CASE

A. Factual Background

No material facts are disputed in this case. The face of Gilbert's Sign Code is permeated with content-based distinctions among signs. *See* App. 142a-158a.

1. Gilbert's Sign Code

Gilbert's Sign Code defines "signs" as "[a] communication device, structure, or fixture that incorporates graphics, symbols, written copy, and/or lighting . . . ." ER 620. Gilbert asserts two interests in regulating signs: "safety and aesthetics." ER 768 ¶ 24; ER 746 ¶ 24. Code violators are subject to penalties ranging from a notice of violation to substantial fees and jail time. ER 305 at 20:12-21:1.

Gilbert's restrictions on signs differ widely based on what they say. For example, here are just a few of the Code's content-based classifications of temporary signs:

- Political Sign: "A temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general and special elections relating to any national, state or local election." App. 154a.

- Ideological Sign: "[A] sign communicating a message or ideas for non-commercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying

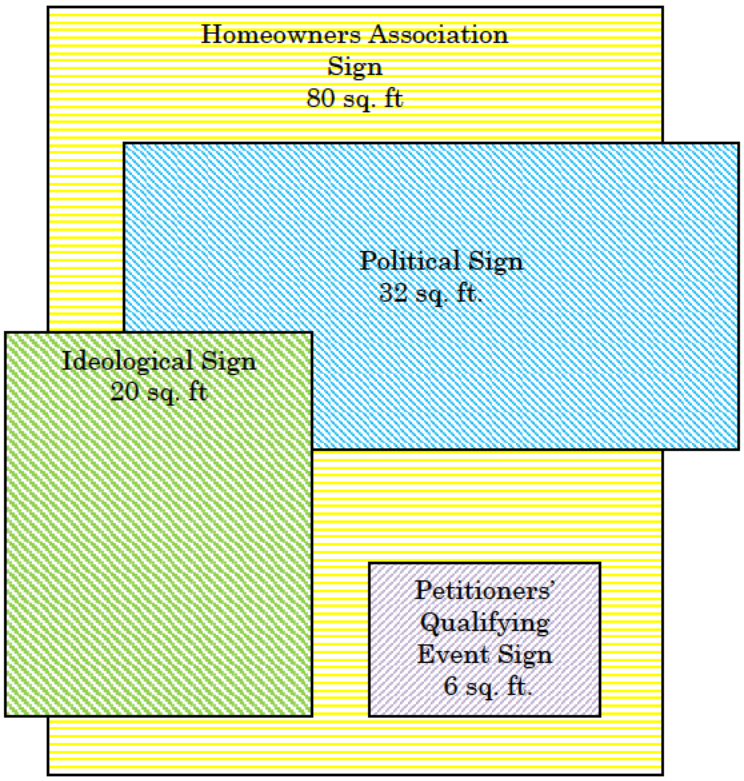
Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency." App. 153a-154a.

- Qualifying Event Sign: "[A] temporary sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.' A 'qualifying event' is any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." App. 154a.

- Homeowners Association Facilities Temporary Sign: "Banners and Directional Signs . . . that display information concerning seasonal or temporary events occurring in the development." App. 153a.

- Real Estate Sign: "A temporary sign advertising the sale, transfer, lease, or exchange of real property." App. 154a.

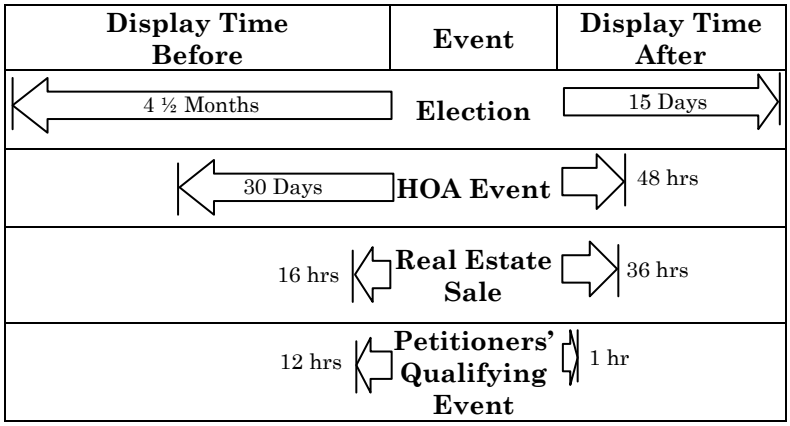
Under Gilbert's Sign Code, the content of a temporary sign determines its size, duration, number, location, whether it must relate to an event occurring within Gilbert, and whether it requires a permit. This pictorial representation (drawn to scale) shows how the Code regulates a sign's size based on its content:



App. 147a, 148a, 153a.

Gilbert's Code also regulates a sign's duration based on content. Consider, for example, the Code's application to four Saturday events that begin at 8:00 a.m., each lasting 12 hours: (1) a polling station open for an election with a primary, (2) a weekend real estate sale, (3) a HOA's community festival, and (4) a religious event hosted by a nonprofit organization (such as Petitioners' church). The chart below illustrates how long each sign could be displayed under the Code's content-based approach:

DURATION



App. 149a, 151a, 153a, 156a, 158a.[1] Moreover, an ideological sign expressing an individual's views about any of the above events could be displayed indefinitely. App. 148a.

The Code also regulates number, location, permit requirements, and whether a sign must relate to a Gilbert event based on a sign's content, as the following table sets out:

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[1] Under the Code, candidates who prevail in a primary may display their signs for *the additional ten weeks* between the primary and general elections. App. 156a; Ariz. Rev. Stat. § 16-201 (providing that primary elections occur ten weeks prior to general elections). Moreover, under Arizona law, elections may occur on the second Tuesday in March, the third Tuesday in May, the tenth Tuesday before the first Tuesday after the first Monday in November (primary elections), and the first Tuesday after the first Monday in November. A.R.S. § 16-204(B), (E), & (F). With four election days spread out evenly over a year, and the generous duration the Code provides Political Signs, such signs are permitted to be on display every day of the year in Gilbert.

Sign Type	Number	Right-of-Way	Permit
Political	Unlimited	Yes	No
Ideological	Unlimited	Yes	No
Qualifying Event	4 per property, only if the event occurs within the Town.	Yes, only if the event occurs within the Town.	No
HOA	As many as desired, up to 80 sq. ft. aggregate.	Yes	Yes
Real Estate	15	Yes	Yes

App. 145a-148a, 150a, 152a, 153a, 157a.

Gilbert has classified Petitioners' signs promoting their church services as temporary, Qualifying Event Signs and applied §4.402P of the Sign Code. App. 117a. Under this provision, Petitioners' signs receive far worse treatment in relation to size, duration, location, and other characteristics than similar temporary signs, including political, ideological, HOA and real estate signs, as demonstrated above.

The content-based features of the Sign Code do not end there. It exempts over twenty categories of signs from its permit requirement. App. 6a & n.1, 144a-147a. Many of these exemptions describe the exempted signs based on content. *Id*.

The Code further treats some commercial speech better than noncommercial speech by granting signs advertising weekend home sales significantly more leeway than the Qualifying Event Signs of certain

nonprofit organizations.[2] For example, Gilbert allows sellers of real estate to fill out a one-page form, pay a nominal fee, and obtain a year-long, easily-renewable, rubber-stamp permit to place fifteen signs, in rights-of-way, promoting home sale events every weekend of the year from Friday at 4:00 p.m. until Monday at 8:00 a.m. ER 328 (permit application); ER 341 (specifying $115 fee); App. 150a-152a, 158a. Petitioners testified that they would gladly do the same to receive more favorable treatment under the Sign Code than what the Qualifying Event Sign provision provides. ER 185-86 ¶ 48.[3]

2. Petitioners' Signs Inviting People to their Church Services.

Petitioner Clyde Reed is the Pastor of Good News Community Church. App. 54a. The Church is a group of like-minded Christians who have joined together to pursue common religious beliefs and purposes. ER 767 ¶ 14. The Church meets on Sundays to learn biblical lessons, sing religious songs, pray for their community, and encourage others whenever possible. *Id*. ¶ 15.

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[2] The Code does not treat all nonprofit speech the same. For example, political nonprofits posting signs about candidates or ballot issues receive far more favorable treatment under the Code's Political Signs provision than do Petitioners under the Qualifying Event Sign provision.

[3] Of course, to pass muster under the First Amendment, *all* temporary signs—political, ideological, etc.—would have to be regulated in the same manner.

Petitioners follow the Great Commission from the Book of Matthew, in which Jesus exhorts Christians to "go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you." App. 4a-5a; ER 771 ¶¶ 43-44. Petitioners discharge this religious duty by reaching out to people in their community and inviting them to attend their Church. App. 5a; ER 771 ¶¶ 45-46.

Petitioners' signs "announc[e] their services as an invitation for those in the community to attend." App. 5a. The district court correctly ruled that "[i]t is beyond dispute that [Petitioners'] signs communicate a religious message" and that they therefore "fall within the category of protected speech." App. 128a & n.3. The Town concedes this. ER 173 ¶ 56; ER 165 ¶ 56 (admitting that "[Petitioners'] signs are speech that is protected by the First Amendment"). Petitioners' signs typically state the Church's name and the phrase "Your Community Church," provide the Church's website address, phone number, location, and service time, and direct people to the service. App. 88a.

The Church rents space for its Sunday worship services from local school districts. App. 87a; ER 772 ¶ 52; ER 495 at 6:8-9:10. The Church has a small congregation, averaging between 25-30 adults and 4-10 children per week, App. 54a, and very limited financial means, ER 771 ¶ 50. Due to the Church's temporary facilities, restricted finances, and limited manpower, posting signs is an essential means by

which Petitioners make others aware of their Church services. App. 54a; ER 771 ¶¶ 50-51.

Gilbert has enforced its Sign Code against Petitioners multiple times. Town officials twice cited them for violating a previous version of the Qualifying Event Signs provision, §4.402P. App. 117a. A town official also warned Pastor Reed that the Sign Code would be enforced against Petitioners if they placed signs that violated its terms. *Id.*

Petitioners are suppressing their religious speech to avoid having the Code enforced against them, including associated fines and potential jail time. ER 774 ¶¶ 77-78. Petitioners' desire to immediately place signs on equal terms with those Gilbert has assigned a different content-based category and accorded more favorable treatment. *Id.*

B. Procedural Background

Petitioners filed this 42 U.S.C. § 1983 lawsuit against the Respondents in March 2007, seeking declaratory and injunctive relief and nominal damages. App. 117a. Shortly thereafter, Petitioners moved for a preliminary injunction enjoining enforcement of §4.402P against their signs. *Id.* At the time, §4.402P applied only to signs placed by a "religious assembly." ER 769 ¶ 30. The district court granted an injunction to which Respondents stipulated. App. 117a-118a.

Gilbert subsequently adopted an amended Code on January 8, 2008. App 118a. The amendment applied §4.402P to signs promoting the meetings,

events, and activities of several different nonprofit organizations, App. 122a-123a, thereby broadening the number of sign placers subject to its onerous restrictions. Because the amended Code disadvantaged them "in the same fundamental way" as the original Code, *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 662 (1993), Petitioners filed an amended verified complaint challenging Gilbert's original and amended Codes both facially and as-applied and a second motion for preliminary injunction, App. 118a, which the court denied. App. 140a. The district court limited its ruling, however, to the constitutionality of §4.402P of the Code in isolation.

The Ninth Circuit affirmed the lower court's narrow ruling without reaching Petitioners' primary claim, *i.e.*, that Gilbert's Code impermissibly makes content-based distinctions among noncommercial signs. App. 45a-46a. It remanded for consideration of that question and stressed that Petitioners' claim could not be decided without comparing how the Code regulates other signs similar to theirs. App. 115a. Indeed, the court flagged the Code's differential treatment of noncommercial signs as a potential constitutional problem. *Id.* (noting that "Ideological Signs, Political Signs, and Qualifying Event Signs . . . face[] different restrictions and requirements" and remanding for the district court "to consider the First Amendment and Equal Protection claims that the Sign Code is unconstitutional in favoring some noncommercial speech over other noncommercial speech"). The court also observed that "Gilbert has adopted a sign

ordinance that makes one's head spin to figure out the bounds of its restrictions and exemptions." App. 95a.

On remand, the parties agreed to resolve all remaining issues on summary judgment. App. 56a. After discovery, the parties filed cross-motions for summary judgment. *Id.* On February 11, 2011, the court entered an order granting Gilbert's motion, and denying that of Petitioners. App. 83a-84a.

Petitioners timely appealed to the Ninth Circuit. While Petitioners' appeal was pending, Gilbert amended its code yet again. App. 17a. The amendment permitted Qualifying Event Signs within rights-of-way, which had previously been expressly prohibited. *Id.* It also added a new restriction that applied solely to Qualifying Event Signs, *i.e.*, that they must relate to events held within the town. *Id.* Gilbert's amendment was clearly targeted at Petitioners, as they had moved their Church services (several years before) to a school located a few blocks across the Gilbert border in Chandler, Arizona. App. 87a n.1. The amendment barred Petitioners from placing their church signs in Town rights-of-way because (at that time) their services occurred just outside of Gilbert, yet simultaneously permitted the placement of political, ideological, and additional temporary signs that do not relate to Gilbert events within rights-of-way. The Town conceded, for example, that Political Signs have no in-town "situs," Defs.' Ans. Br. 31, 9th Cir. Case No. 11-15588, ECF No. 13, yet they are liberally permitted within rights-of-way.

Importantly, the "Gilbert events only" amendment did not resolve but rather expanded upon the Code's existing content-based restrictions related to the size, duration, etc., of Petitioners' signs. The amendment left these restrictions intact, and added *yet another* content-based restriction on their speech. The Ninth Circuit thus rightly ruled that the amendment did not moot Petitioners' claims, stressing that it actually increased the barriers to their ability to erect church signs. App. 20a (noting that the amendment "bars [Petitioners] from erecting any [church] signs at all").[4]

The Ninth Circuit, in a 2-1 opinion, affirmed the lower court's summary judgment decision. App. 45a. Despite previously highlighting the Code's differential treatment of noncommercial signs, the majority excused these content-based distinctions

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[4] The Ninth Circuit did not specifically reach the constitutionality of the "Gilbert events only" amendment. This Court could address that issue since it was fully briefed and passed upon below, *Verizon Commc'ns., Inc. v. FCC*, 535 U.S. 467, 530 (2002) (recognizing that this Court may review "[a]ny issue 'pressed or passed upon' below by a federal court"), but it need not do so. The Ninth Circuit squarely ruled that the Code's numerous other content-based restrictions on Petitioners' signs related to size, duration, etc., are content-neutral. The amendment further restricting Qualifying Event signs to "Gilbert events only" is simply one more content-based limitation on Petitioners' speech.

Moreover, the Town's rightly rejected mootness argument is now itself moot, since beginning on November 3, 2013, Petitioners will once again be holding their Church services at a facility in Gilbert. Thus, Petitioners' signs will satisfy the "Gilbert events only" amendment. They will still be subject, however, to the other content-based limitations Gilbert's Code imposes on their signs.

based on its findings that "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed" and because "Gilbert's interests in regulat[ing] temporary signs are unrelated to the content of the sign." App. 31a-32a. The majority thus affirmed the district court's ruling in Gilbert's favor on Petitioners' free speech claim. App. 44a-45a. It also affirmed the court's rejection of their free exercise, equal protection, and vagueness and overbreadth claims. App. 45a.

In his dissent, Judge Watford highlighted numerous flaws with the majority's analysis, including its inconsistency with this Court's precedent. Relying on *Mosley*, *Carey v. Brown,* 447 U.S. 455 (1980), and *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), Judge Watford found that "Gilbert's sign ordinance violates the First and Fourteenth Amendments by drawing content-based distinctions among different categories of non-commercial speech." App. 49a. He observed that "the most glaring illustration" of these content-based distinctions is "the ordinance's favorable treatment of 'political' and 'ideological' signs relative to the treatment accorded the non-commercial signs [Petitioners] seek to display." *Id.*

Judge Watford recognized that to sustain its content-based distinctions, Gilbert "must explain why (for example) a 20–square–foot sign displayed indefinitely at a particular location poses an acceptable threat to traffic safety and aesthetics if it bears an ideological message, but would pose an unacceptable threat if the sign's message instead invited people to attend Sunday church services."

App. 51a. He noted the absence of any such explanation, and his doubts that Gilbert could come up with one. *Id.*

Instead, Judge Watford noted that "[w]hat we are left with . . . is Gilbert's apparent determination that 'ideological' and 'political' speech is categorically more valuable, and therefore entitled to greater protection from regulation, than speech promoting events sponsored by non-profit organizations." *Id.* But as Judge Watford rightly observed, the First and Fourteenth Amendments forbid Gilbert from making that kind of value judgment. *Id.*

The Ninth Circuit denied a timely petition for rehearing en banc. App. 141a. This appeal followed.

REASONS FOR GRANTING THE WRIT

This Court's review is needed to resolve an important question of First Amendment law: the proper test for judging whether a sign ordinance is content-neutral. Eight Courts of Appeals are divided over this question, employing three separate tests. Several of these courts have expressly noted this entrenched circuit conflict.

Under the Fourth, Sixth, and Ninth Circuits' test, a content-based sign code is still deemed content-neutral if the government asserts a pure legislative motive, or a content-neutral justification. The Third Circuit follows a different test, which permits content-based exemptions from a sign regulation where the value of a particular message at a particular location overrides the interests

supporting the underlying regulation. These tests directly conflict with the standard established by this Court and followed by the First, Second, Eighth, and Eleventh Circuits, under which content-neutrality is judged by a law's terms, regardless of the government's regulatory motive or purpose.

This conflict is highly developed in the sign code context, yet it has tremendous significance for free speech rights generally. Indeed, the content-neutrality principle is a hallmark of this Court's First Amendment jurisprudence that applies to the regulation of signs and all other modes of expression. Absent this Court's intervention, the Third, Fourth, Sixth, and Ninth Circuits will continue applying the lenient time, place, and manner test to content-based laws deserving strict scrutiny review. Permitting these courts' errant tests to persist will jeopardize free speech rights in the sign code and all other contexts and exacerbate a circuit conflict long ripe for this Court's resolution.

This Court should intervene and restore an objective standard for gauging sign codes' content neutrality, a recurring free speech issue with broad ramifications for the First Amendment.

I. The Ninth Circuit's Decision Magnifies a Long-Standing, Three-Way Circuit Conflict Concerning the Proper Test for Determining Whether a Sign Ordinance Is Content-Neutral.

This case presents a circuit conflict involving eight Courts of Appeals that utilize at least three

different tests to decide a critical question of First Amendment law: whether a sign code is content-neutral. As set out below, these divergent tests have led to widely different outcomes when applied to sign codes that are facially content-based in similar ways.

Following a standard consistent with this Court's precedent, *see* § II, *infra*, the First, Second, Eighth, and Eleventh Circuits follow a "text-based test," under which content-neutrality is determined objectively based on the regulation's plain terms. The Fourth, Sixth, and Ninth Circuits follow a subjective "motive-based test," which permits content-based distinctions on the face of a code so long as the government asserts a neutral justification or lack of censorial motive for the regulation. The Third Circuit employs a "context-sensitive test," which permits content-based distinctions on the face of a code pursuant to a multi-part, convoluted balancing test that purports to determine instances where the value of certain speech in certain locations exceeds the government's overarching regulatory purpose.

Gilbert concedes the existence of this circuit conflict. It claims that the Ninth Circuit "is part of the majority of circuits that follows" what Gilbert calls "a more practical test for assessing content neutrality" and recognizes that this test conflicts with that of the Eighth and Eleventh Circuits. Defs.' Resp. to Pet. for Reh'g En Banc 9-10, 9th Cir. Case No. 11-15588, ECF No. 36. While Petitioners do not necessarily agree with Gilbert's framing of the conflict, it is noteworthy that Gilbert has conceded its existence.

A. The First, Second, Eighth, and Eleventh Circuits Use a Text-Based Test to Determine the Content-Neutrality of a Sign Ordinance.

The Eleventh Circuit's opinion in *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005), is illustrative of the text-based test. There, the city's sign code exempted certain signs from a permit requirement and other limitations. *Id.* at 1255-58. Because many of the exemptions were "based on the content . . . of the [signs'] message," the court held that the code "discriminates against certain types of speech based on content." *Id.* at 1258.

For example, the court found the exemption for flags and insignia of a "government, religious, charitable, fraternal, or other organization" content-based. This exemption was content-based because it resulted in a government or religious organization being able to fly its flag freely, "whereas an individual seeking to fly a flag bearing an emblem of his or her own choosing would have to apply for a permit to do so, and would have to abide by all of the [additional] restrictions enumerated" in the code. *Id.* at 1264. Importantly, relying on this Court's decisions in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), the court expressly refused to adopt a motive-based test. *Solantic*, 410 F.3d at 1259 n.8.

The First, Second, and Eighth Circuits follow the same approach as the Eleventh Circuit. For

example, in *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728 (8th Cir. 2011), the city's code set out a "sign" definition, but then exempted several content-based categories of signs from its scope, including national, state, religious, fraternal, professional and civic symbols or crests. *Id.* at 736-37, 739. It also exempted fourteen categories of signs, several of which were described based on content, from its permit requirement. *Id.* at 740-42. The Eighth Circuit found the code content-based, notwithstanding the city's assertion of a content-neutral justification for its code, because it made "impermissible distinctions based *solely* on the content or message conveyed by the sign." *Id.* at 737 (citation omitted). *See also Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985) (sign code found content-based where it facially banned political signs but permitted for sale, professional office, and religious and charitable cause signs); *Nat'l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 557 (2d Cir. 1990) (sign code found content-based because it facially exempted political signs and signs identifying a grand opening, parade, festival, fund drive or similar occasion from a general sign ban).

B. The Fourth, Sixth, and Ninth Circuits Use a Motive-Based Test to Determine the Content-Neutrality of a Sign Ordinance.

In conflict with the First, Second, Eighth, and Eleventh Circuits, the Fourth, Sixth, and Ninth Circuits follow a "motive-based test." The Fourth Circuit's decision in *Brown v. Town of Cary*, 706 F.3d 294 (4th Cir. 2013), exemplifies this approach.

There, the court held that a sign code "may distinguish speech based on its content so long as its reasons for doing so are not based on the message conveyed." *Id.* at 301. Under this approach, "[c]ontent neutrality bars only one particular sort of distinction—those made with a censorial intent." *Id.*

Although *Brown* involved a sign code that exempted "holiday decorations," "public art," and six other categories of signs from numeric and size limitations, *id.* at 298 & n.1, the Fourth Circuit found the code content-neutral because it was not "adopted because of a disagreement with the message conveyed," *id.* at 304. It also excused the code's content-based distinctions based on its finding that they had "a reasonable relation" to the town's asserted neutral justifications for enacting the code —traffic safety and aesthetics. *Id.* at 306. It excused the code's content-based discrimination despite recognizing that the exempted signs likely posed the same threat to the town's interests as those subject to the code's regulations. *Id.* at 304.

The Sixth Circuit likewise follows the motive-based test. *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609 (6th Cir. 2009), involved a Detroit sign code that contained separate definitions for advertising signs, business signs, and political signs and imposed varying height restrictions depending on the content-based category into which a sign was placed. *Id.* at 622. Embracing the motive-based test, the court stated that "an ordinance is not a content-based regulation of speech if," among other things, "the regulation was not adopted because of disagreement with the message

the speech conveys." *Id.* at 621. Applying this test, the court found the code content-neutral, despite its facially content-based provisions, because there was "nothing in the record to indicate that the distinctions between the various types of signs reflect a meaningful preference for one type of speech over another." *Id.*

The Ninth Circuit's opinion below adopts the motive-based test. The court noted that the "critical issue" before it was "whether the Sign Code improperly regulates noncommercial temporary signs based on their content." App. 23a. And it had previously observed that Gilbert's Code defines "Ideological Signs, Political Signs, and Qualifying Event Signs" differently, subjecting each to "different restrictions and requirements." App. 115a. On its face, the Code plainly makes content-based distinctions among temporary signs, and as-applied treats Petitioners' church signs far worse than political, ideological and other signs placed by both for-profit and non-profit groups. Nonetheless, the Ninth Circuit held that Gilbert's Code is content-neutral based on its findings that (1) "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed," and (2) "Gilbert's interests in regulat[ing] temporary signs are unrelated to the[ir] content." App. 31a-32a. This holding epitomizes the motive-based test for determining content-neutrality. By adopting this test, the Ninth Circuit exacerbated the already well-developed circuit conflict.

C. The Third Circuit Uses a Context-Sensitive Test to Determine the Content-Neutrality of a Sign Ordinance.

The Third Circuit created a distinct path for determining whether a sign code is content-neutral. The court describes this approach as the "context-sensitive" test. *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 389 (3d Cir. 2010).

Under that test, content-based distinctions among signs are upheld where the following conditions are met: (1) the government exempts a sign from general sign regulations where "there is a significant relationship between the content of particular speech and a specific location or its use," (2) the exemption was not made "in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate," (3) "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," (4) "the exception is no broader than necessary to advance the special goal," and (5) "the exception is narrowly drawn so as to impinge as little as possible on the overall goal." *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1065 (3d Cir. 1994).

Applying this test in *Rappa*, the court ruled that "a 'For Sale' sign is entitled to greater protection under the First Amendment than a 'Rappa for Congress' sign, merely because of the coincidence of location." *Id.* at 1087 (Garth, J., dissenting). As the dissenting Judge rightly observed, the context-

sensitive test "turns the First Amendment on its head." *Id.*

D. The Circuit Conflict Is Mature, Entrenched, and Acknowledged.

This eight court, three-way circuit conflict is squarely presented here. Courts have acknowledged it. *Brown*, 706 F.3d at 302 (noting the test employed by the Fourth and Sixth Circuits for judging the content-neutrality of a sign code conflicts with the test used by the Eighth and Eleventh Circuits);[5] *H.D.V.-Greektown*, 568 F.3d at 622-23 (noting that its approach to judging content-neutrality directly conflicted with that of the Eleventh Circuit in *Solantic* but explicitly declining to "rely on its rationale").

Commentators have highlighted it. Brian J. Connolly, Environmental Aesthetics and Free Speech: Toward a Consistent Content Neutrality Standard for Outdoor Sign Regulation, 2 Mich. J. Envtl. & Admin. L. 185, 189 (2012) ("There has been a divergence in the judicial treatment of sign regulations, with some courts applying strict prohibitions against regulations that distinguish among signs based on content, and other courts using a more relaxed standard").

And as noted above, Gilbert concedes its existence.

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[5] *Brown* claimed that the Third Circuit belongs on its side of the conflict, but, as explained *supra*, the Third Circuit has set out yet a third test for judging the content-neutrality of sign codes.

This Court should resolve the mature, entrenched, and well-recognized conflict presented by this petition. And it should resolve it in favor of this Court's objective standard for judging content-neutrality that focuses on a law's language, rather than the alleged motive of those who enacted it.

II. The Ninth Circuit's Test for Content-Neutrality Conflicts with this Court's Free Speech Precedent.

A. This Court Determines Content-Neutrality Based on the Regulation's Plain Text.

Under this Court's free speech precedent, a speech regulation that contains content-based distinctions on its face is subject to strict scrutiny, regardless of the government's motive or purpose. In *Mosley*, for example, the Court evaluated an ordinance that banned picketing within 150 feet of schools, except when it involved school labor disputes. 408 U.S. at 93.[6] The Court held that the

[6] This Court decided *Mosley* and *Carey* on equal protection grounds, yet in both cases this Court explicitly grounded the content-neutrality test in the First Amendment as well. *Mosley*, 408 U.S. at 95 ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views"); *Carey*, 447 U.S. at 462 n.6 ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic") (citation omitted). This Court has also oft-cited *Mosley* and *Carey* when addressing the content-neutrality test

"central problem" with the ordinance was that it "describe[d] permissible picketing in terms of its subject matter," and that it made the "operative distinction" between lawful and unlawful picketing "the message on a picket sign." *Id.* at 95. The ordinance thus violated a cardinal rule of the First Amendment: "that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.*

This Court has repeatedly reaffirmed, in a wide variety of contexts, that content-neutrality is judged by a law's terms. *Turner*, 512 U.S. at 643 ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based"); *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011) (law deemed content-based because "[o]n its face [it] enact[ed] content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information"); *Discovery Network*, 507 U.S. at 429 (ordinance that banned newsracks containing "commercial handbills" but permitted those with "newspapers" was content-based because the ban's application depended on "the content of the publication resting inside that newsrack"); *Members of City Council of City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804 (1984) (reaffirming that government may not "regulate speech in ways that favor some viewpoints

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in free speech cases. *See, e.g., R.A.V. v. City of St. Paul, Minn.,* 505 U.S. 377, 382 (1992) (citing, *inter alia*, *Mosley* for the proposition that "[c]ontent-based regulations are presumptively invalid" under the First Amendment).

or ideas at the expense of others" and finding that a sign ordinance was content-neutral because its "text [was] neutral—indeed . . . silent—concerning any speaker's point of view"); *Carey,* 447 U.S. at 460-61 (picketing ordinance content-based because "on its face, the Act accords preferential treatment to the expression of views on one particular subject").

Succinctly put: "[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring).

Gilbert's Sign Code contravenes this rule in multiple ways. On its face, the Code regulates a particular mode of expression, temporary signs, in a manner this Court has expressly deemed content-based: "by classifications formulated in terms of the[ir] subject [matter]." *Mosley*, 408 U.S. at 95. It then imposes widely different size, duration, location, number, and other requirements that correspond to the content-based category into which a sign is placed. In short, the Code's regulations concerning the size, duration, and other aspects of temporary signs fail the content-neutrality test because they are not "applicable to all speech irrespective of content." *Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 536 (1980) (citation omitted). Regulating these aspects of signs differently based solely on what they say is patently content-based discrimination. The Ninth Circuit's holding that it is not squarely contradicts this Court's precedent.

This Court has also repeatedly held that regulations that make arbitrary distinctions among speech predicated on judgments concerning its relative value are not content-neutral. For example, in *Carey*, the State proffered its interest in "providing special protection for labor protests" to justify a law granting preferential treatment to such protests. This Court rejected the State's justification because it "forthrightly presupposes that labor picketing is more deserving of First Amendment protection than are public protests over other issues." 447 U.S. at 466. Similarly, in *Discovery Network* the city attempted to save its content-based regulation of newsracks by claiming that "commercial speech has 'low value.'" 507 U.S. at 429. This Court rejected that this "naked assertion" concerning the value of certain forms of speech could transmute the city's plainly content-based regulation into a content-neutral law. *Id.*

The Ninth Circuit's opinion runs headlong into these precedents. The court explicitly accepted Gilbert's arguments that it justifiably treated political and ideological signs more favorably than Petitioners' religious signs because (1) the "Political Signs exemption responds to the need for communication about elections" and (2) the "Ideological Sign exemption recognizes that an individual's right to express his or her opinion is at the core of the First Amendment." App. 26a. As Judge Watford observed in his dissent below, these are "precisely the value judgment[s] that the First and Fourteenth Amendments forbid Gilbert to make." App. 51a.

Moreover, Gilbert's Code is content-based because it grants over twenty exemptions from its permit requirement, many times based on the exempted sign's content. Such content-based exemptions from general rules plainly run afoul of the First Amendment's content-neutrality rule. *See Sorrell*, 131 S. Ct. at 2663 (striking down law regulating prescriber-identifying information because it "forbids sale subject to exceptions based in large part on the content of the purchaser's speech"); *Metromedia*, 453 U.S. at 514 (content-based exemptions of certain noncommercial signs from general ban on billboards rendered ordinance content-based).

Gilbert's Code also regulates based on content by favoring some commercial signs over Petitioners' (and some other nonprofits') noncommercial signs. As noted *supra*, signs promoting weekend home sales receive more favorable treatment than the signs of nonprofit organizations, like Petitioners, promoting their events and activities. Gilbert's preference for commercial over noncommercial signs violates the general rule that the government "may not conclude that the communication of commercial information . . . is of greater value than the communication of noncommercial messages." *Metromedia*, 453 U.S. at 513.

B. This Court Has Expressly Rejected that a Lack of Discriminatory Motive or a Content-Neutral Purpose Can Save a Content-Based Code.

Despite the clear content-based nature of Gilbert's Code, the Ninth Circuit held that it was content-neutral based on its findings that (1) Gilbert was not motivated by disagreement with Petitioners' message and (2) Gilbert's justification for regulating signs was content-neutral. App. 31a-32a.

The Ninth Circuit's reliance on Gilbert's allegedly pure motives to save a plainly content-based code simply cannot be squared with this Court's repeated admonitions that motive is irrelevant to determining content-neutrality. For example, in *Discovery Network*, the city asserted that its regulation favoring newsracks holding newspapers over those containing commercial handbills was content-neutral because "there [was] no evidence that . . . [it] ha[d] acted with animus toward" the latter. 507 U.S. at 429. This Court responded that "just last Term we expressly rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *Id.* (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991)). Similarly, in *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 592 (1983), this Court held that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment."

The Ninth Circuit's notion that an alleged content-neutral justification can overcome a multitude of content-based sins also conflicts with this Court's case law. In *Turner*, this Court expressly held that "the mere assertion of a content-neutral purpose" cannot "save a law which, on its face, discriminates based on content." 512 U.S at 642-43. Moreover, in *Discovery Network* the city argued that its ordinance was content-neutral because "the *justification* for the regulation," ensuring safety and aesthetics, was "content-neutral." 507 U.S. at 429. But this Court rejected the city's argument that "the test for whether a regulation is content based turns on the 'justification' for the regulation." *Id*. Rather, the Court stressed the ordinance's plain text, noting that "the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech." *Id*. Although the city's interests may have justified limiting the total number of newsracks, this Court recognized that they did not justify selective, content-based regulation of newsracks. *Id*. at 429. This was especially true where all newsracks impacted the city's asserted interests in precisely the same way regardless of the content of the publications contained therein. *Id*.

Similarly, in *Mosley* the city argued that its "ordinance [was] not improper content censorship" because it was adopted to serve a content-neutral purpose: preventing school disruptions. 408 U.S. at 99. Observing that all picketing posed the same risks to the city's purported interest, the Court found it illegitimate for the city to pick and choose which

picketers were allowed to impair its interest based on the content of their expression. *Id.* at 100-102. This Court rejected a comparable argument in *Carey*, concluding that the state's interest in ensuring the privacy of the home did not render a facially content-based regulation of picketing near residences content-neutral. 447 U.S. at 464-65. Again, the Court noted that the content-based treatment of picketing was especially problematic considering all picketing impacted the state's interest in the same manner. *Id.*

In stark contrast, the Ninth Circuit held that Gilbert's alleged content-neutral justification transforms its content-based regulation of temporary signs into a content-neutral regulation of speech. App. 31a-32a. In fact, the court accepted the very justifications this Court rejected in *Discovery Network*—safety and aesthetics. Further, it accepted these justifications even though the mode of communication (here, temporary signs) impacts Gilbert's asserted interests in exactly the same way *regardless of their content*. There is simply no way to reconcile the Ninth Circuit's holding with this Court's longstanding precedent.

III. The Question Presented Is Extremely Important and Squarely Presented through a Clean Vehicle.

The question presented by this petition has wide-ranging national impact. First Amendment challenges to sign regulations are legion. Between 2001 and 2006 sign placers filed *over 100 cases* nation-wide challenging municipal sign ordinances

that restricted their right to place signs, and "these challenges have continued unabated since that time." Connolly, *supra*, at 188. Resolving this entrenched conflict in favor of the bright-line rule adopted by this Court would provide much needed clarity and uniform rules to sign regulators and placers alike. This increased predictability would also likely decrease litigation in this contentious area.

The conflict has broader implications as well. Indeed, the principle of content-neutrality is constant regardless of whether the government is regulating signs, billboards, *Metromedia*, picketing, *Mosley*, newsracks, *Discovery Network*, prescriber-identifying information, *Sorrell*, cable broadcasting signals, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), or video games, *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011). If left intact, the errant tests employed by the Third, Fourth, Sixth, and Ninth Circuits will jeopardize free speech rights in the above contexts and more because courts will apply, as the Ninth Circuit did below, the lenient time, place, and manner test—rather than strict scrutiny—to content-based regulations of speech. The risk of this occurring is particularly high considering that the government nearly always asserts a lack of discriminatory intent, or a content-neutral purpose, or both (as it did in each case cited above), when litigants claim speech regulations are content-based.

Moreover, this case presents an ideal vehicle for resolving the question presented. The relevant facts

are not in dispute. And the Court can resolve the question presented based simply on the face of Gilbert's Sign Code. The critical issue of First Amendment law raised by this petition is thus squarely presented.

Further, all aspects of Petitioners' free speech claim were thoroughly briefed and argued below and the Ninth Circuit definitively resolved that claim in favor of Gilbert. There is nothing left for any lower court to do.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant review.

Respectfully submitted,

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