NO. 13-502

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This case presents the ideal opportunity for the Court to address a longstanding, entrenched, and well-acknowledged circuit conflict regarding the proper test for determining whether a sign code is content-neutral. The Ninth Circuit's decision below joins those of several other circuits that permit content-neutral motives to excuse content-based distinctions on the face of a sign code. This mode of analysis conflicts with that employed by the First, Second, Eighth, and Eleventh Circuits (and this Court), which categorize a sign code as content-based if it facially distinguishes based on content, regardless of governmental motive or purpose. Respondents conceded this conflict existed in their response to the petition for rehearing en banc in the court below.

Respondents charge Petitioners Good News Community Church and Pastor Reed (hereinafter the "Church") with distorting the decision below and the circuit conflict in an attempt to distract the Court from the clean vehicle the petition provides to resolve a critical question of First Amendment law. That effort is unfounded.

Respondents also claim that a minor 2011 amendment to their Sign Code somehow makes this case unworthy of review. But the 2011 amendment left all but one of the content-based limitations the Church initially challenged intact, and imposes yet another content-based limitation on its signs that is not applied to political, ideological, or other similar temporary signs. The slight modification made to

the Code in 2011 changes nothing. It continues to facially regulate signs based on their content and to treat political, ideological, and other temporary signs far better than the Church's temporary church-invitation signs.

ARGUMENT

I. The Content-Based Regulation of Temporary Signs Remains Intact.

Contrary to Respondents' assertions in their Opposition, Opp. 1, 15, neither the slight 2011 modification, nor an earlier amendment to their Sign Code, has resolved the content-based discrimination the Church complained of initially. Indeed, it persists to this day.

The Church's original complaint challenged Respondents' Code because it "discriminate[d] against religious assembly signs by requiring them to be smaller in size, less in number, placed in less favorable locations, and displayed for much less time than political signs, ideological signs, and many other comparable signs." ER 765, ¶ 1. A minor 2008 change to the Code left all of the content-based restrictions the Church initially challenged intact. It simply increased those subject to the restrictions by expanding § 4.402P so that it applied to signs advertising the assemblies, gatherings, activities, or meetings of some (but not all) nonprofit organizations, rather than just religious assemblies. This is now called the Qualifying Event Sign provision.

The minor 2011 amendment maintains all of the content-based restrictions the Church initially challenged except for one. And ironically, when it removed the restriction on placing Qualifying Event Signs in rights-of-way, it added yet another content-based limitation on the Church's signs: that they must relate to events in Gilbert. App. 17a. This new limitation was targeted at the Church, Pet. 15-16, and was not imposed on political, ideological, or other temporary signs. *See* Defs.' Ans. Br. 31, 9th Cir. Case No. 11-15588, ECF No. 13 (acknowledging that under the Code political signs have no in-town "situs" requirement).

The Church's November 2013 relocation of its church services back into Gilbert only strengthens its case. The Church has a continuing desire to place signs advertising its services. And Respondents' Code, both on its face and as-applied, continues to limit the size, duration, number, and other characteristics of the Church's religious signs far more severely than similar temporary signs that Respondents permit.

II. Respondents Inaccurately Describe the Church's Claims, the Issue Raised in the Petition, and Many Other Aspects of this Case.

Respondents assert that the Church has not pursued a facial challenge to the Code. Opp. 15. On the contrary, the record shows that the Church has consistently pursued facial and as-applied challenges throughout this litigation.

In its Amended Complaint, the Church repeatedly alleged that the Code is invalid on its face and as applied, ER 776 ¶ 97, 777 ¶ 105, 779 ¶ 121, 780 ¶ 138, and its Prayer for Relief sought an order striking down the Code "facially and as applied." ER 781. The first question presented in the Church's opening brief below also sought review of its facial claim. Appellants' Opening Br. 4, 9th Cir. Case No. 11-15588, ECF No. 6 (noting the many content-based problems with the code and asking "*[i]s the Code content-based on its face* and as applied to the Plaintiffs' religious signs in violation of the Free Speech Clause?") (emphasis added). It is plain that the Church's facial claim against Respondents' Code was pressed below and is squarely before the Court.

Respondents also inaccurately frame the issue raised in the petition. They claim that *Reed II* involved a "narrow issue related to one section of the 2008 version of Gilbert's sign ordinance – [§ 4.402P] – as applied to Petitioners' activities." Opp. 1; *see also* Opp. 15. But *Reed I* decided the narrow issue of the constitutionality of § 4.402P standing on its own, not *Reed II*. Indeed, *Reed I remanded* the issue raised in the petition, App. 87a, as Judge Watford recognized in his *Reed II* dissent:

> What we did not decide in *Reed I* is whether § 4.402(P) is impermissibly content-based when viewed in relation to the other provisions of Gilbert's sign ordinance. In particular, we noted that the district court had not addressed plaintiffs' argument that "the ordinance unfairly discriminates among forms of noncommercial speech," by granting

> more favorable treatment to signs that Gilbert categorizes as "political" and "ideological." We therefore remanded the case for resolution of plaintiffs' "First Amendment and Equal Protection claims that the Sign Code is unconstitutional in favoring some noncommercial speech over other noncommercial speech."

App. 46a (internal citations omitted).[1]

The issue Judge Watford identified is not an "extremely limited" issue. Opp. 15. Rather, it is the mainstay of the Church's case. *Reed II* finally evaluated Respondents' Code as a whole and ruled—incorrectly and employing an errant test—that it is content-neutral. Thus, questions related to the proper test for determining content-neutrality and whether Respondents' Code satisfies that test are squarely presented in this case.

Respondents also state that after remand the Church's "only remaining claims … were for declaratory and injunctive relief." Opp. 12. But the Church has always maintained a nominal damages claim. ER 781 (praying that the "Court award nominal … damages"); Pls' Mot. for Summ. Judg. 1, Case No. 2:07-cv-00522-SRB, ECF No. 100 (moving the lower court to enjoin Respondents' Code, declare

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[1] Thus, Respondents are quite wrong to suggest that the arguments the Church raised in its petition have been "rejected twice by the district court and twice by two different panels of the Ninth Circuit." Opp. i. Rather, the first district and appellate opinions in this case did not even address the issue.

it unconstitutional, and "*award nominal damages to the Plaintiffs*") (emphasis added).

Respondents also claim that "[f]rom the outset, Petitioners have argued that their off-site signs are 'temporary directional signs' under § 4.402P." Opp. 2. Rather, the Church consistently asserted that its signs are religious speech entitled to full First Amendment protection. *See* Pet. 12*; see also* App. 128a & n.3 ("It is beyond dispute that [the Church's] signs communicate a religious message" and that they therefore "fall within the category of protected speech."). It is Respondents that classify signs based on content and place the Church's signs in the "Qualifying Event" sign category.

Respondents further state that they "never enforced amended § 4.402P against [the Church]." Opp. 6-7. But the threat of enforcement is plainly ongoing since Respondents twice cited the Church for violating the original version of § 4.402P and their Code Compliance Department "told [the Church] that [it] would continue to be cited if [it] posted signs in violation of § 4.402P." App. 117a.

Moreover, Respondents allege that political signs are only permitted "during a four-month period every two years." Opp. 8. The Code proves otherwise. *See* Pet. 9 & n.1 (noting that candidates that win primaries may display their signs for five months total and that Arizona law specifies four days evenly spread throughout the year for elections

to occur, thus permitting political signage year round).[2]

III. The Decision Below Exacerbates a Longstanding, Entrenched, and Well-Acknowledged Circuit Conflict.

Respondents say the circuit conflict identified in the petition is "non-existent" and "manufacture[d]." Opp. 1. But Respondents conceded its existence in the court below. Specifically, they stated the following:

> The so-called "circuit split" that Plaintiffs try to identify is among those circuits that apply "an absolutist reading of content neutrality" . . . , *see e.g., Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728, 736-37 (8th Cir. 2011) and *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1263-66 (11th Cir. 2005), with the majority of circuits that employ "a more practical test for assessing content neutrality" as counseled by the Supreme Court in *Hill*. *See Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 556 (4th Cir. 2013); *Brown v. Town of Cary*, 706 F.3d 294, 302 (4th Cir. 2013) (citing *G.K. Ltd*. and *Reed I*); *Asgeirsson v. Abbott*, 696 F.3d 454, 460 (5th Cir. 2012); *ACLU v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012); *Melrose, Inc. v.*

[2] Respondents also provide a laundry list of other methods the Church could use to advertise its services. Opp. 5-7. But these alternative methods are equally available to political, ideological, and other temporary sign placers, yet they receive far more favorable treatment for their signs than the Church.

> *City of Pittsburgh*, 613 F.3d 380, 389 (3d Cir. 2010); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 622 (6th Cir. 2009). The Ninth Circuit is part of the majority of circuits that follows the latter approach, as the panel explained, and has been part of this majority since *G.K. Ltd*.

Defs.' Resp. to Pet. for Reh'g En Banc 9, 9th Cir. Case No. 11-15588, ECF No. 36. While the Church disagrees with Respondents' framing of the tests that make up the conflict and which test is followed by the majority of courts, Respondents have plainly conceded the conflict exists and that the Ninth Circuit's opinion below falls on one side of it.

Respondents' concession is well-taken, considering that courts, commentators, and the prominent First Amendment scholars who filed an *amicus curiae* brief in support of the Church all agree that the conflict exists and urgently needs resolution. Indeed, *Brown*, which Respondents rely upon to claim the conflict is manufactured, plainly cuts the other way. That case highlights the circuit conflict over the proper test for evaluating content-neutrality. 706 F.3d at 302. It explained that the test employed by the Fifth, Eighth, and Eleventh Circuits conflicts with the test employed by it and several other circuits, including the Ninth Circuit. *Id*.[3] Respondents' assertion that the Church has concocted a circuit conflict is thus rejected by their

[3] While the Fourth Circuit decided *Brown* before *Reed II*, the court nonetheless recognized the Ninth Circuit's shift to a motive-sensitive test was already underway. After *Reed II*, that shift is now complete.

own authority. *See also H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 622-23 (6th Cir. 2009) (noting the Sixth Circuit's conflict with the Eleventh Circuit over the proper content-neutrality test).

Moreover, the circuit conflict identified in the petition has been highlighted in academic journals. Brian Connolly rightly observes that "[t]here 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." Environmental Aesthetics and Free Speech: Toward a Consistent Content Neutrality Standard for Outdoor Sign Regulation, 2 Mich. J. Envtl. & Admin. L. 185, 189 (2012).

The article explains that the First, Eighth, and Eleventh circuits follow the former approach, while the Third, Sixth, and Seventh circuits follow the latter. *Id.* at 197-98 & n. 74-75. The article also notes that the Ninth Circuit previously "adhered to the stricter approach to determining content-neutrality," but that its more recent decisions have moved away from that standard. *Id.* at 198 n. 75. The Ninth Circuit's decision below emphatically rejected the strict approach that court previously employed and placed it firmly on the other (and wrong) side of this critical circuit conflict.

The ideologically-diverse First Amendment scholars who filed an amicus brief in support of the Church also recognize that the decision below magnifies an entrenched circuit conflict. The

scholars observed that the Ninth Circuit found an "indubitably content-based" ordinance content-neutral and in the process

> exacerbated a three-way split among eight circuits. Some circuit court decisions, including the decision below, seem to be focusing on occasional remarks in this Court's cases about the importance of whether speech was restricted because of legislative hostility to its message. But those decisions are ignoring the many precedents from this Court striking down content-based laws regardless of the absence of any such hostility. This Court ought to grant certiorari to resolve this split, and to reaffirm the importance of treating content-based speech restrictions as presumptively unconstitutional.

See Professors Br. 2-3, 10.

Respondents further argue that the decision below did not employ a motive-based test, so it cannot magnify the above circuit conflict. Opp. 16. But the Ninth Circuit held that the code was content-neutral because "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed." App. 31a. Amici First Amendment scholars too observed that the court's finding of a lack of discriminatory motive was crucial to its content-neutrality ruling: "The panel majority's reasoning apparently rested on the conclusions that the Town was not motivated by a desire to 'suppress certain ideas,' by 'disagreement

with the message [the speech] conveys,' or by any other 'illicit motive.'" Professors Br. 3 & n. 2.

Respondents' view also appears to be that the Ninth Circuit employs a motive-plus test, *i.e.*, if the government asserts "a content-neutral motive," "further analysis is required" to determine whether the Code is content-based. Opp. 19. Respondents thus concede that legislative motive plays a pivotal role in the Ninth Circuit's analysis. Moreover, even their description of the court's test puts it into direct conflict with the objective test employed by the First, Second, Eighth, and Eleventh Circuits, under which a sign code is content-based if it makes content-based distinctions on its face, regardless of governmental motive.

The simple truth is this: Respondents' Sign Code would be stricken as a content-based speech regulation in some circuits, yet was upheld as a content-neutral regulation in the Ninth Circuit—and would be in some other circuits as well. For example, in *National Advertising Company v. Town of Babylon*, 900 F.2d 551 (2d Cir. 1990), the preferential treatment of political (and a few other) noncommercial signs over other noncommercial signs resulted in a sign code being stricken as a content-based regulation. *Id.* at 557 (code "impermissibly discriminate[d] between types of noncommercial speech" by exempting "political signs and ... signs identifying a grand opening, parade, festival, fund drive or other similar occasion" from a general sign ban). Yet here, the Ninth Circuit held that Respondents' preferential treatment of temporary political, ideological (and other)

noncommercial signs over the Church's signs is a permissible content-neutral regulation.

Lower courts are in conflict over the proper test for evaluating content-neutrality, which is resulting in different outcomes regarding materially similar sign codes. This Court's review is needed to resolve this circuit conflict, which concerns a crucial First Amendment question.

IV. The Ninth Circuit's Decision Conflicts With This Court's Precedent.

The circuit conflict described in the petition and above clearly warrants this Court's attention. Yet this conflict is not "the sole basis for Petitioners' request for the Court's review." Opp. 1. The court below also decided an important constitutional question in a way that directly conflicts with this Court's precedent. Pet. 27-36; *see* S. Ct. Rule 10(c).

That the Ninth Circuit decided an important constitutional question cannot be gainsaid. The First Amendment scholars stress this in their amicus brief: "The distinction between content-based and content-neutral restrictions has emerged as one of the most important rules of First Amendment law . . . . [T]his Court has repeatedly stressed to lower courts the significance of this distinction." Professors Br. 9-10.

Respondents claim that the Ninth Circuit's opinion is consistent with *Hill v. Colorado*, 530 U.S. 703 (2000), but fail to address the numerous decisions of this Court with which it directly

conflicts. *See* Pet. 27-34 (discussing cases); Professors Br. 3-10 (discussing additional cases). What is more, *Hill* does not support the decision below. The statute in *Hill* was found to be content-neutral because it regulated a particular mode of expression without regard to the subject of a speaker's message. *Id*. at 723 (noting that the statute "places no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker").

Here, Respondents' Code makes content-based distinctions within the same mode of expression—temporary signage. Respondents also remark that in *Hill* the "cursory examination" of particular speech did not render the law content-based. But that was only because the examination's sole purpose was to determine if the speech was conveyed through a particular mode of expression. In stark contrast, Respondents' Code requires an examination of *the subject matter* of a temporary sign because what it says determines how it is treated. That is classic content-based discrimination.

CONCLUSION

For the foregoing reasons, the Church respectfully requests that this Court grant review.

Respectfully submitted,

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March 5, 2014