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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

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 (hereinafter collectively "Good News" or "the Church"). Respondents are the Town of Gilbert, Arizona, and Adam Adams in his official capacity as the Town's Code Compliance Manager (hereinafter collectively "Gilbert").

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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 Pet. App. 85a-115a. The district court's unreported ruling denying Good News' second preliminary injunction motion is reprinted at Pet. App. 116a-140a.

STATEMENT OF JURISDICTION

The Court of Appeals rendered its decision on February 8, 2013, and denied the petition for rehearing en banc on July 24, 2013. The petition was filed on October 21, 2013, and granted on July 1, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCES

U.S. Const. amend. I & XIV are set out in pertinent part at Pet. App. 159a. Pertinent excerpts of Gilbert's Sign Code and Glossary, and the amendments thereto, are set forth at Joint Appendix ("App.") at 25-94.

INTRODUCTION

This case proves the truth of the old adage "a picture is worth a thousand words." Just a few images demonstrate that Gilbert's Sign Code regulates signs based on their content as well as any comprehensive recitation of the facts could.

Gilbert's Code freely allows political and several other categories of noncommercial, temporary signs. Thus, it is common for those driving through Gilbert to be bombarded with political signs, as depicted in the following picture:

Excerpts of Record 204, 9th Cir. Case No. 11-15588, Doc. 8 (hereinafter "ER"). Many additional pictures in the record show how the Code allows political signs to proliferate. *See* ER 87-120, 194-218.

Yet because of the severe limits Gilbert imposes on Petitioners' signs, drivers would almost certainly *not* come across one inviting them to Good News' church services:

ER 873.

This stark visual depiction of Gilbert's unequal treatment of similar signs captures the constitutional defect with Gilbert's Sign Code: it regulates noncommercial, temporary signs based on their content. Worse, the Code makes content-based distinctions among temporary signs even though they all raise the same safety and aesthetic concerns. Worse still, Gilbert grants highly favorable treatment to temporary political signs despite the fact that they pose the greatest threat to its interests because of their far greater number.

Simply put, to prevail in this case, Gilbert must explain why a 32 square foot sign displayed in the right-of-way virtually all year long is not a threat to safety and aesthetics if it bears a political message, but it *is* such a threat if it invites people to Good News' church services.[1] Gilbert has never provided a satisfactory explanation to this question because none exists.

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[1] The Code generally allows Political Signs (whether related to candidates or ballot issues) to be displayed 60 days before and 15 days after an election. App. 84. But candidates who prevail in a primary election may display their signs for the additional ten weeks between the primary and general elections, for a total of 5 months of uninterrupted display time. *Id.*; Ariz. Rev. Stat. § 16-201 (providing that primary elections occur ten weeks prior to general elections). With Arizona law permitting non-candidate (except vacancy or recall) elections to occur on four separate dates evenly spread throughout the year, A.R.S. § 16-204(B), (E), & (F), Political Signs may be displayed virtually all year long in Gilbert.

Gilbert officials grant themselves—through the favorable Political Sign provision—and other noncommercial sign placers broad access to communicate messages through signage. Good News, a small, financially-hamstrung, and frequently on the move Church that meets in temporary facilities, simply desires equal treatment. Gilbert has repeatedly stymied this eminently reasonable (and constitutionally required) request.

In fact, virtually nothing has changed since Good News commenced this lawsuit in 2007. At that time, Gilbert's Code imposed a near complete ban on the Church's signs through a provision directed at "Religious Assembly" signs while liberally allowing Political, Ideological, and other noncommercial signs, and subjected Pastor Reed to fines and possible jail time if he violated the Code. Today, after seven years of litigation and two amendments to the Code, Good News' religious signs are still heavily restricted in comparison to Political, Ideological, and other noncommercial signs, and Pastor Reed still risks fines and jail time if he violates the Code. This Court should rectify this longstanding violation of Good News' constitutional rights.

It should also resolve the deeply entrenched circuit conflict over the role of governmental motive or purpose in judging whether a sign code is content neutral. Just a few weeks ago, the Sixth Circuit issued an opinion that highlighted this conflict and reaffirmed that for it and several other circuits "'content based' is a term of art that refers to a distinction based on content *because of an impermissible purpose*." *Wagner v. City of Garfield*

Heights, Ohio, No. 13-3474, 2014 WL 4067171, at *6 (6th Cir. Aug. 19, 2014) (emphasis added).

These courts—all of which require a free speech litigant to show that a law facially regulates speech *and* was enacted with an illicit purpose to prevail—ignore yet another (slightly modified) adage that this case also proves true: "The pathway to content-based discrimination is paved with good intentions." Indeed, the government nearly always defends laws that discriminate based on content by arguing that it lacks an illicit, or has a benign, motive for the regulation. To excuse content-based discrimination whenever the government has a "good motive"—or is careful enough to mask an illicit motive—would grant the government nearly *carte blanche* authority to drive certain ideas or viewpoints from the marketplace.

This Court should settle the circuit conflict over this paramount question of First Amendment law by reaffirming that (1) once facial content discrimination is found, nothing more is necessary to conclude that a law is content based; (2) a content-based purpose is sufficient but not necessary to prove content-based discrimination, and (3) good regulatory motives cannot exonerate a law that facially regulates speech based on content.[2]

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[2] As discussed in § I.A., *infra*, while proof of illicit motive is not necessary to prevail on a free speech claim, an illicit motive or purpose can invalidate a law whose text is neutral. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 645 (1994) ("Our cases have recognized that even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys."); *cf. Church*

STATEMENT OF THE CASE

A. Statement of Facts

1. Petitioners' Church Invitation Signs

Petitioner Clyde Reed is the Pastor of Good News Community Church. Pet. App. 54a. Good News exists to bring together like-minded Christians who desire to propagate the Christian faith. App. 98-99 ¶ 14. The Church holds services on Sundays, where attendees worship and fellowship together, learn biblical lessons, sing religious songs, pray for their community, and encourage others whenever possible. *Id*. at 99, 104 ¶¶ 15, 42.

Good News' religious convictions mandate that it reach as many people as possible with its religious message. App. 104 ¶ 45. It follows the Great Commission, which is Jesus' command that Christians "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." Pet. App. 4a-5a; App. 104 ¶¶ 43-44. Good News follows this "directive by displaying signs announcing their services as an invitation for those in the community to attend." App. 104 ¶ 47; Pet. App. 5a.

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of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993) ("Apart from the text, the effect of a law in its real operation is strong evidence of its object."). Also, motive or purpose is highly relevant in determining whether the government interest satisfies the applicable level of scrutiny.

The district court correctly ruled that Good News' "signs communicate a religious message" and that they therefore "fall within the category of protected speech." Pet. App. 128a & n.3. Gilbert also admitted that "[Good News'] signs are speech that is protected by the First Amendment." App. 111 ¶ 84; App. 151 ¶ 84. 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 provide directions. Pet. App. 88a; App. 165.

The Church is very small, averaging between 25-30 adults and 4-10 children per week, Pet. App. 54a, has limited financial means, App. 105 ¶ 50, and has met at various temporary facilities throughout this litigation. At the time Good News filed this case, it met at an elementary school in Gilbert. Pet. App. 87a. In 2008, it moved to a high school just across the Gilbert border in Chandler, Arizona. *Id*. n.1; ER 495 at 6:8-9:10. It currently meets at a senior living center in Gilbert. *See* Good News' website, http://www.goodnewspres.com/location.htm ("We worship at Sunrise Senior Living … 580 S. Gilbert Road / Gilbert, AZ 85296").

Good News' signs are an essential means by which it invites the public to its services. Pet. App. 54a; App. 105 ¶¶ 50-51. They are inexpensive, require little manpower, and play a critical role in ensuring people know where to find a Church that periodically moves. *Id*. Pastor Reed finds the church invitation signs "very, very effective" based on his "experience over ten years" using them in Gilbert. ER 505 at 47:17-22.

2. Gilbert's Content-Based Sign Code

Gilbert's Code defines "Sign" as "[a] communication device, structure, or fixture that incorporates graphics, symbols, written copy, and/or lighting," App. 58, and "Temporary Sign" as a "sign not permanently attached to the ground, a wall or building, and not designed or intended for permanent display," *id.* at 70. The Code mandates a permit for all signs, but then exempts certain signs from this requirement. *Id.* at 27-30.

Several of these exemptions define the exempted signs based on content. *Id.* It is through these content-based categories of signs that Gilbert regulates a sign's size, duration, number, location, whether it must relate to an event occurring within the town, and whether it requires a permit. *Id.* at 31-32, 38-39, 84, 89.

Among the Code's relevant categories, and their definitions, both of which are content-based, are the following:

- Political Sign - § 4.402(I): "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. 68.

- Ideological Sign - § 4.402(J): "[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. 66-67 (italics omitted).

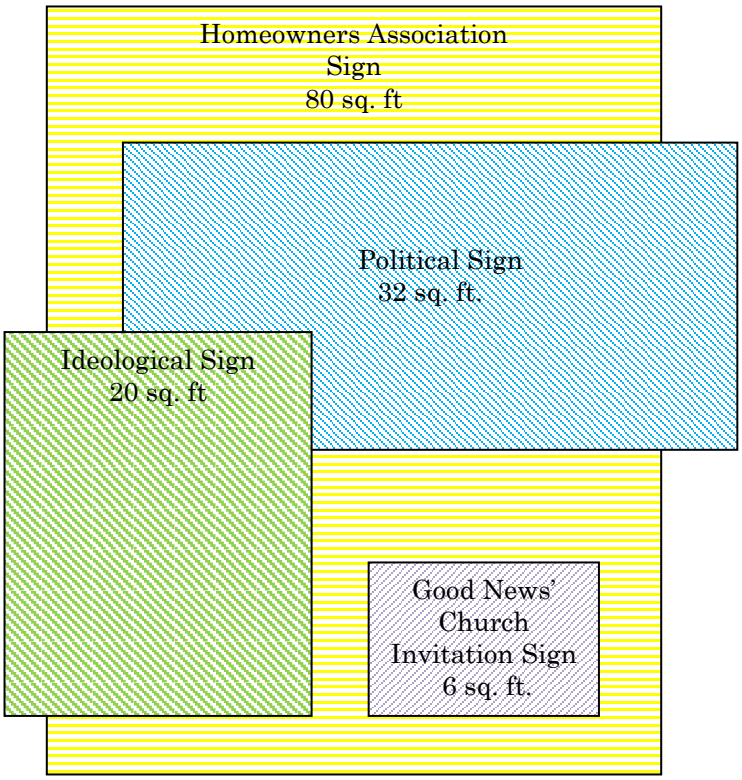
- Qualifying Event Sign - § 4.402(P): "[A] temporary sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.' A 'qualifying event' is any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." App. 70 (italics omitted).

- Homeowners Association ("HOA") Facilities Temporary Sign - § 4.406(C)(4): "Banners and Directional Signs … that display information concerning seasonal or temporary events occurring in the development." App. 54.

- Real Estate Sign - § 4.405(B)(2): "A temporary sign advertising the sale, transfer, lease, or exchange of real property." App. 69.

Since the very outset of this case, Gilbert has classified Petitioners' signs promoting their church services as temporary, Qualifying Event Signs and applied §4.402(P) of the Sign Code. App. 123 (Notice of Code violation); Pet. App. 117a.

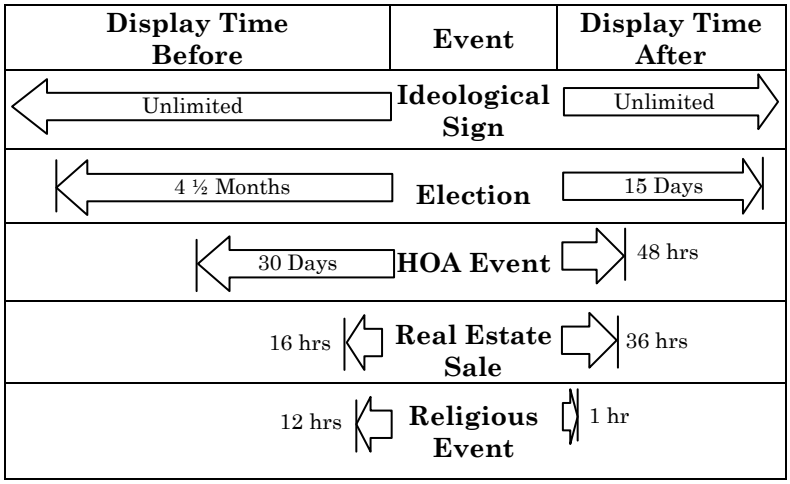
The Code applies different size limitations according to the content-based category into which a sign is placed. The following diagram, which is drawn to scale, depicts this differential treatment:



App. 31-32, 38, 54.

The Code also applies different duration limits according to the content-based category into which officials place a sign. Consider the following diagram, which demonstrates the Code's application to five signs that relate to Saturday events that begin at 8:00 a.m., each lasting 12 hours: (1) an ideological sign commenting on any of the events, (2) a polling station open for an election with a primary, (3) an HOA's community festival, (4) a weekend real estate sale, and (5) a religious event hosted by a church:

DURATION



App. 32, 38, 52, 54-55, 84, 93.

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

	Right of Way	*Gilbert Event Only*	*Number*	*Permit*
Political	Yes	No	Unlimited	No
Ideological	Yes	No	Unlimited	No
Qualifying Event	Yes, but Gilbert events only	Yes	Four per property	No
HOA	Yes	Yes (indirectly)	Up to 80 sq. ft. total	Yes
Real Estate	Yes	Yes (indirectly)	15	Yes

App. 31-32, 38-39, 52-55, 84, 89.

Gilbert asserts two interests to justify its differential treatment of temporary signs based on the content-based category into which officials place them: "safety and aesthetics." App. 100 ¶ 24; App. 139 ¶ 24.

There are severe repercussions for violating Gilbert's Code. The penalties "range from a notice of violation to substantial fines and time in jail." ER 169 ¶ 28; ER 156 ¶ 28. *See also* ER 305 at 20:12-21:1 (confirming penalties of fines and possible jail time).

3. Gilbert's Content-Based Regulation of Signs Has Persisted Throughout this Litigation

Gilbert's content-based regulation of Good News' church invitation signs began in 2005 and continues unabated. At that time, Good News placed its signs early on Saturday and removed them several hours after services on Sunday. App. 105 ¶ 54.

In July and September 2005, Gilbert enforced its Code against Good News' signs, both times citing the Church for exceeding the time limit for displaying its signs pursuant to § 4.402(P). Pet. App. 117a; App. 123-26. Gilbert officials confiscated one of Good News' signs, which Pastor Reed had to retrieve from the town offices. ER 514 at 82:24-83:11. After these enforcement actions, Good News reduced the number and duration of its signs to avoid further enforcement. App. 106 ¶ 58.

Because placing more signs for longer periods of time would allow Good News to invite more people to church, App. 106 ¶ 59, Pastor Reed contacted Gilbert's "Code Compliance Department to try to reach some sort of accommodation" in February 2007. Pet. App. 117a. But the "Code Compliance Manager told Good News 'that there is no leniency under the Code, and that the Church would be cited if it was determined that it had violated any of the applicable provisions in the Code.'" *Id*. at 90a.

Good News filed suit one month later, App. 1, challenging the Code, *inter alia*, as a content-based regulation of speech both "on its face and as applied" to the Church's signs. Verified Complaint 8 ¶ 67, Case No. 2:07-cv-00522-SRB, Doc. 1. At that time, § 4.402(P) of the Code applied solely to "Religious Assembly Temporary Directional Signs." *Id*. at 3-4 ¶ 21. But, it contained the same content-based categories (*i.e.*, Political Signs, Ideological Signs, HOA Signs, etc.) that exist on the face of the Code today. *Id*. ¶¶ 18-24. Also like the present Code, it treated signs placed in those categories far better in relation to their size, duration, location, and number, than Good News' church invitation signs. *Id*.

Shortly after this suit was filed, Gilbert stipulated to a preliminary injunction against § 4.402(P) and set out to amend its Code. App. 1-2. It passed an amendment in January 2008, App. 73-79, which left intact each content-based aspect of the Code Good News initially challenged. In sum, the amendment (1) slightly increased the height of Good News' signs to 6 feet but retained their 6 square foot area requirement, App. 76; (2) slightly increased the

duration limit on Good News' signs from 2 to 12 hours before an event, *id.*; and (3) changed § 4.402(P)'s name from "Religious Assembly Temporary Directional Signs" to "Temporary Directional Signs Relating To A Qualifying Event" and added a new definition to the Code's Glossary (which is set out above) for the latter signs. *Id.* at 75, 77-78. This change subjected some additional nonprofit groups' signs advertising meetings, events, and activities to § 4.402(P)'s onerous restrictions. *Id.*

Gilbert amended the Code yet again in 2011, while the case was on appeal to the Ninth Circuit. App. 80-94. This amendment not only left intact all of the content-based restrictions Good News initially challenged, but expanded upon them by exchanging the ban on Qualifying Event Signs being placed in the right of way for a requirement that they relate to events in Gilbert. App. 89. The "Gilbert-events-only" requirement only applies to Qualifying Event Signs. Thus, a church cannot place signs in rights-of-way advertising events occurring outside of Gilbert, but political and ideological signs that do not relate to Gilbert events may be placed freely within rights-of-way. App. 31-32. Gilbert conceded, for example, that Political Signs have no in-town "situs," Defs.' Ans. Br. 31, 9th Cir. Case No. 11-15588, Doc. 13, yet they are liberally permitted in rights-of-way.

Further, it is plain that Gilbert again targeted Good News with the Gilbert-events-only limitation. The Church had moved its services (several years before) a few blocks across the Gilbert border to a school located in Chandler, Arizona. Pet. App. 87a n.1. Thus, even though Gilbert removed the bar on

placing Qualifying Event Signs in rights-of-way, the Gilbert-events-only limitation prohibited Good News from placing *any* signs there. *Id*. at 20a (finding that the Gilbert-events-only requirement "bars Good News from erecting any [church] signs at all.").[3] This bar lasted from the time the 2011 amendment took effect until the Church's November 2013 move back to Gilbert. App. 89. Although the church currently meets in temporary facilities in Gilbert, there is a strong likelihood in the near future that it will move its meeting location just across Gilbert's border and be barred once again from placing signs in Gilbert.[4]

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[3] The Ninth Circuit stated that it was unwilling to rule on the Gilbert-events-only restriction based on its conclusion that it is "different in nature" from the content-based size, duration, number, and other limitations Good News challenges. Pet. App. 44a. But this is plainly incorrect. Gilbert imposed and enforces the Gilbert-events-only requirement through the same content-based mechanism it imposed and enforces the other limits Good News challenges: the Code's content-based categorization of temporary signs. It is thus not "different in nature," but more of the same content-based discrimination that has plagued the Code since the inception of this lawsuit.

[4] It is noteworthy that Gilbert also borders other large suburbs in the East Valley outside the Phoenix Metro area, such as Chandler and Mesa. *See* Defs.' Answering Br. 8, Case No. 11-15588, Doc. 13. As in many suburban communities across the country, the border between Gilbert and Chandler is porous. Nothing distinguishes when someone leaves one town and enters the other. Good News' facility-rental experience highlights this fact. Prior to moving to a school located in Chandler, Good News met at a school that was physically located in Gilbert but part of the Chandler Unified School District. Aff. of Pastor Clyde Reed 1 ¶ 5, attached to Appellants' Letter Br., Case No. 08-17384, Doc. 32.

B. Procedural Background

Good News filed this 42 U.S.C. § 1983 lawsuit against Gilbert in March 2007, seeking declaratory and injunctive relief and nominal damages. App. 1. Shortly after Gilbert amended its Code on January 8, 2008, *id*. at 73-79, Good News filed an amended verified complaint challenging Gilbert's original and amended Codes "facially and as applied," requesting injunctive and declaratory relief and nominal damages, *id*. at 1113 ¶ 97, 120. Good News also filed a second motion for preliminary injunction, *id*. at 3, which the district court denied, Pet. App. 140a.

The Ninth Circuit affirmed the lower court without reaching Good News' primary claim, *i.e.*, that Gilbert's Code impermissibly makes content-based distinctions among noncommercial signs. Pet. App. 45a-46a. It remanded for consideration of that question, *id*. at 115a, and 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," *id*. at 95a.

On remand, the parties agreed to resolve all remaining issues on summary judgment. Pet. App. 56a. After discovery, the parties filed cross-motions for summary judgment. App. 9-10. On February 11, 2011, the court entered an order granting Gilbert's motion, and denying Good News'. Pet. App. 83a-84a.

The Church timely appealed to the Ninth Circuit. App. 14. In a 2-1 opinion, the court affirmed the lower court's summary judgment decision in Gilbert's favor on Good News' free speech

claim. Pet. App. 44a-45a. The majority excused the Code's facial content-based distinctions among temporary signs based on its conclusion 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." *Id*. at 31a-32a. The majority also found that Gilbert's Code made permissible speaker- and event- based distinctions among noncommercial signs.

Notably, the majority also credited Gilbert's argument that political and ideological signs have more First Amendment value than Good News' church invitation signs. *Id*. at 24a-26a.

Judge Watford dissented. He concluded that "Gilbert's sign ordinance violates the First and Fourteenth Amendments by drawing content-based distinctions among different categories of non-commercial speech." Pet. 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 [Good News] seek[s] to display." *Id*.

Judge Watford noted that the only justification Gilbert offered for its unequal treatment of these similar signs is its "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." Pet. App. 51a. The First and Fourteenth Amendments,

Judge Watford stressed, forbid Gilbert from making that kind of "value judgment." *Id.*

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

SUMMARY OF ARGUMENT

Content neutrality is an objective test. Under that test, laws that facially classify speech based on content are content based. There is no need for a free speech litigant to also prove a content-based purpose to prevail. Moreover, the government cannot exonerate its content-based discrimination by the mere assertion of a content-neutral purpose.

Gilbert's Sign Code fails the objective content-neutrality test. It divides temporary signs into content-based categories and then regulates various aspects of those signs based on the category into which Gilbert officials place them. Similar speech regulations have been found content based, subjected to strict scrutiny, and struck down by this Court.

None of the explanations supplied by the lower court can save Gilbert's content-based regulation of signs. First, the Code is not speaker-based because it treats signs differently based on what they say, not on who is speaking. Further, speaker-based laws are constitutionally suspect, so even if the Code were speaker-based it would still violate the First Amendment.

Second, the Code is not event-based. It regulates signs through content, not event, classifications. Moreover, the Code's content-based classifications treat signs related to events differently based on what they say.

Third, the lower court's approach of determining whether signs are "related and competing" before applying First Amendment protections is fundamentally flawed. It expressly allows municipalities to classify speech into content-based categories based on the rationale that all competing views receive the same treatment. This improperly reduces concerns over content neutrality to a ban on viewpoint discrimination. Further, contrary to the lower court's finding, Qualifying Event, Political, and Ideological Signs *are* related and compete in relation to their primary purpose, *i.e.,* advertising, and Gilbert improperly distinguishes among these signs based on content.

While this Court has repeatedly held that the lack of an illicit, or presence of a benign, motive cannot save a facially content-based law, the lower court nonetheless found that Gilbert lacked an illicit motive and thus concluded the Code was content neutral. This was plain error. In fact, lower courts' confusion over the role of motive in the content neutrality test led to the circuit conflict that prompted this Court to grant certiorari. This case presents an important opportunity for the Court to clarify this critical area of First Amendment jurisprudence by reaffirming that content neutrality is foremost an objective, not subjective, test.

Gilbert's Code is also content based because enforcement officials must examine what a temporary sign says before they can determine which provision of the Code to apply. Gilbert officials testified that they must categorize a sign to enforce the Code and that they do so by determining the sign's message. Moreover, the Code's content-based classifications invariably result in unbridled discretion problems, as officials may disagree about how to classify signs, sign placers do not know what speech the Code prohibits, and the Code restricts both far too little and too much speech than necessary to achieve its goals.

The lower court tried to sidestep these fatal flaws inherent in Gilbert's Code by claiming that it is not improper to look at the content of speech to determine whether *the manner* of communication is covered by a particular rule of law. But Gilbert's Code mandates examination of the content of the same manner of expression, signs. Thus, this rule has no application to this case.

Gilbert's content-based discrimination is evident in yet another way: the town candidly admits that it grants Political and Ideological Signs better treatment than Good News' signs because it views political and ideological speech as having more value than Good News' religious speech. Surprisingly, the lower court credited these arguments. Regulating speech based on these types of judgments concerning the relative value of different categories of noncommercial speech is forbidden by the First Amendment.

Gilbert's Sign Code is thus content based and subject to strict scrutiny, a standard it cannot satisfy. The Code's drastic underinclusiveness severely undercuts Gilbert's ability to demonstrate either a compelling interest or narrow tailoring. Indeed, the Code regulates signs in the name of safety and aesthetics, yet grants highly favorable treatment to several types of temporary signs, including political signs, which pose the greatest threat to its interests. Yet at the same time the Code is overinclusive in that it imposes strict limits on Good News' signs. Gilbert cannot claim its interests are compelling when it permits such wide ranging damage to them. Nor can it claim its Code is narrowly tailored, since the selective, content-based distinctions it makes among signs have no relation whatsoever to its asserted interests.

ARGUMENT

I. Content Neutrality Is Determined Based on a Regulation's Plain Text.

The standard for gauging a law's content neutrality is objective. Thus, if a law facially classifies speech based on content, that is sufficient to prove it is content based. The government's subjective purpose can help prove such a law is content based, but it is not necessary to such a showing. And, crucially, this Court has repeatedly rejected the idea that the government can save a facially discriminatory law by asserting a content-neutral motive or purpose.

Just last Term, this Court reaffirmed that "the guiding First Amendment principle" in judging content neutrality is that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (quoting *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994) ("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."). 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).

This has been the Court's consistent approach to determining content neutrality for decades. *See McCullen*, 134 S. Ct. at 2531 (finding law content neutral because it did "not draw content-based distinctions on its face"); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011) (law content based where "[o]n its face [it] enact[ed] content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information"); *United States v. Playboy Entm't Grp.,* 529 U.S. 803, 811 (2000) (law imposing additional burdens on cable television operators who provide channels primarily dedicated "to sexually explicit adult programming or other programming that is indecent" content based); *Burson v. Freeman,* 504 U.S. 191, 197 (1992) (law barring solicitation of votes

and display or distribution of campaign material within 100 feet of polling places content based); *Regan v. Time, Inc.,* 468 U.S. 641, 647-48 (1984) (law that imposed ban on photographic reproductions of American currency except for depictions that served a "philatelic, numismatic, educational, historical, or newsworthy purpose[]" content based); *Widmar v. Vincent*, 454 U.S. 263, 265 (1981) (university policy barring student groups from engaging in "religious worship or religious teaching" content based); *Carey v. Brown,* 447 U.S. 455, 458-59 (1980) (law that "on its face" exempted labor disputes from ban on residential picketing content based).

Importantly, once facial content discrimination is found, nothing more is required to conclude that a law is content based. There is no need to search for a content-based motive or purpose. *See Turner*, 512 U.S. at 642 ("[W]hile a content-based purpose may be *sufficient* in certain circumstances to show that a regulation is content based, it is not *necessary*") (emphasis added).

Further, and critically for deciding the question presented in this case, neither the lack of illicit motive, nor a professed altruistic motive, can save a law that is content based on its face. As this Court stated in *Turner*, 512 U.S. at 642-43, "the mere assertion of a content-neutral purpose" will not "be enough to save a law which, on its face, discriminates based on content."

Purpose or motive thus rarely play a role when this Court determines whether a law is content based on its face. And when it does, it is a one-way

ratchet: purpose can only condemn a law as content based, it generally cannot save one that facially regulates speech based on its content.

II. Gilbert's Code Fails the Content Neutrality Test.

A. Gilbert's Sign Code Draws Content-Based Distinctions on its Face and As-Applied Treats Good News' Signs Far Worse than Similar Signs.

1. Gilbert's content-based approach to regulating signs is evident from the face of its Sign Code. The Ninth Circuit put its thumb precisely on this constitutional defect (even though it wrongly concluded the Code was content neutral), observing that "Ideological Signs, Political Signs, and Qualifying Event Signs are all exempted from the Sign Code's permit requirement" yet "each category faces different restrictions and requirements." Pet. App. 115a.[5]

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[5] The Ninth Circuit oddly stated that Good News did not mount a facial challenge to Gilbert's Sign Code, that it made "basically" an as-applied challenge, Pet. App. 8a, and that Good News had "not really challenged" this errant conclusion, *id*. at 43a. But 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, App. 113 ¶ 97, 114 ¶ 105, 116 ¶ 121, 119 ¶ 138, and its Prayer for Relief sought an order striking down the Code "facially and as applied," App. 120. The questions presented in the Church's opening briefs both times the case was before the Ninth Circuit sought review of its facial and as-applied claims. Appellants' Opening Brief 2-3, 9th Cir. Case 08-17384, Doc. 10 (asking whether the Code is "content-based facially" and "as-applied" to

Indeed, the Code classifies temporary signs based on their content. *See* Statement of Facts § 2, *supra* (setting forth Code's definitions for Political, Ideological, Qualifying Event and other signs). After categorizing signs in this manner, the Code imposes widely different size, duration, location, number, and other requirements that correspond to the content-based category into which officials pigeonhole each sign. And Gilbert has placed Good News' church invitation signs in the Qualifying Event Sign category, which results in its signs receiving far worse treatment than similar, noncommercial signs.[6]

Good News' signs); Appellants' Opening Br. 4, 9th Cir. Case No. 11-15588, Doc. 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). And, of course, Good News dedicated much of the appellate briefing to its facial claim. Thus, there is no question that Good News' facial claim is squarely before this Court.

[6] Respondents claim that "Petitioners have argued that their off-site signs are 'temporary directional signs' under § 4.402P." Opp. 2. This is not the case. The record shows that Gilbert classified the Church's signs the very first time it enforced the Code. App. 123-126 (noting violations of "4.402 P"). Moreover, Good News has 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."). Good News has argued that all signs serve the overarching purpose of communicating a particular message or idea, and that signs serve multiple purposes. For example, Good News' signs communicate a religious message (an invitation to attend church), an ideological message (*i.e.*, "Your Community Church"), and provide some directional information.

This is clear-cut content-based discrimination. In *Mosley*, for example, the city banned all picketing within 150 feet of schools in session, yet exempted pickets involving school labor disputes. 408 U.S. at 93. The Court held that the "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. Put simply, the ordinance was content based because it regulated protected expression "by classifications formulated in terms of [its] subject [matter]." *Id.* Gilbert's Code regulates protected expression in precisely the same way by classifying temporary signs based on their subject matter.

City of Cincinnati v. Discovery Network, 507 U.S. 410 (1993), also illustrates why Gilbert's Code is content based. There, the city adopted a ban on newsracks that contained "'commercial handbills', but not 'newspapers.'" *Id.* at 429. This Court quickly dispensed with the city's argument that the ordinance was content neutral: "Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is 'content based.'" *Id.*

That Gilbert's Code is content based is just as apparent. In *Discovery Network*, the content of a publication determined whether it could be distributed via newsracks. Under Gilbert's Code, the content of a sign determines its permissible size, duration, location, and other aspects. For instance,

if a sign says "Vote for McCain," it can be 32 square feet, if it says "McCain Should End the War in Afghanistan," it can be 20 square feet, if it says "HOA voting drive this Saturday," it can be 80 square feet, but if it says "Learn Why Voting Matters, Visit Good News Community Church," it can be only 6 square feet. If this does not qualify as content-based discrimination, it is difficult to conceive of something that would.

Indeed, the classifications contained on the face of Gilbert's Code are indistinguishable from many additional laws this Court has struck down as facially content based. *See* § I, *supra*. For example, Vermont's regulation of pharmaceutical speech was content based because "on its face, [it] enact[ed] content- … based restrictions on the sale, disclosure, and use of prescriber-identifying information." *Sorrell*, 131 S. Ct. at 2663. The federal statute in *Holder v. Humanitarian Law Project,* 561 U.S. 1, 27 (2010), was content based because whether the plaintiffs could speak "depend[ed] on what they sa[id]." If their speech "impart[ed] a 'specific skill' or communicate[d] advice derived from 'specialized knowledge' … then it [was] barred." *Id.* But if their speech "impart[ed] only general or unspecialized knowledge" it was permitted. *Id.* And in *United States v. Stevens,* 559 U.S. 460, 468 (2010), the Court found that the statute "explicitly regulate[d] expression based on content" because it restricted "photographs, videos, or sound recordings depending on whether they depict[ed] conduct in which a living animal is intentionally harmed."

Like these laws, Gilbert's Code "by [its] terms distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed" and thus is "content based." *Turner*, 512 U.S. at 643. It is therefore "presumptively invalid" under the First Amendment and triggers strict scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S 377, 382 (1992).

2. The Ninth Circuit dismissed the content-based classifications that appear on the face of Gilbert's Code by characterizing them as speaker- and event- based exemptions, which the court deemed content neutral. Pet. App. 24a-26a. But the Code is neither speaker- nor event- based; nor would it suffice to save the Code if it were.

A law is speaker-based if it treats a speaker's message the same no matter what the speaker says. That is plainly not how Gilbert's Code operates. For example, a sign supporting a ballot proposition displayed by Good News would ostensibly be governed by the Political Sign provision, while Gilbert has stated that a sign inviting community members to Good News' church services is governed by the Qualifying Event Sign provision. If the Code was speaker-based, both signs would receive the same treatment regardless of what they said.

Furthermore, speaker-based laws are also constitutionally suspect. "Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles." *Playboy Entm't Grp.,* 529 U.S. at 812; *see also Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n,* 447 U.S. 530, 533 (1980) (rejecting speaker-

based rationale for restriction because "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."). The First Amendment thus prohibits "restrictions distinguishing among different speakers…. As instruments to censor, these categories are interrelated: *Speech restrictions based on the identity of the speaker are all too often simply a means to control content*." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (citations omitted and emphasis added). Gilbert's Code is not speaker-based, but if it were it would still violate the First Amendment.

Gilbert's Code also is not event-based. The Code accords different treatment to signs depending on whether they "support[] candidates for office" (Political Sign), promote an "assembly, gathering, activity, or meeting" of certain non-profit organizations (Qualifying Event Sign), advertise an HOA's "seasonal or temporary events" (HOA Sign), or "communicat[e] a message or ideas for non-commercial purposes" so long as the message does not, *inter alia*, support a candidate or promote a non-profit event (Ideological Sign). These are content-based, not "event-based," classifications.

Nonetheless, wrongly interpreting the Code as "event-based" does not render it content neutral because the Code makes content-based distinctions among signs that relate to events. For example, the district court found that "[b]oth Political Signs and Qualifying Event Signs relate … to events—an

election or a specified event fitting the definition in the Sign Code." Pet. App. 73a; *see also* Defs.' Ans. Br. 40, 9th Cir. Case No. 11-15588, Doc. 13 (asserting that "[t]emporary signs relating to a political candidate or ballot measure are tied to the *event of a public election*.") (emphasis added). Yet these "event-based" signs receive vastly different treatment under the Code solely because of what they say. In fact, both sign types relate to one-day events—political signs to an election and the Church's signs to their Sunday worship service—yet political signs are treated far better than Good News' signs in relation to their size, duration, and several other aspects.[7] The same holds true for HOA signs. They typically relate to one day events (for example, a summer block party) yet they can be far larger and displayed far longer than Good News' church service signs.

Because the "operative distinction" the Code makes between event-based signs is "the message" that appears on them, recasting the Code as event-based does not save it. *Mosley*, 408 U.S. at 95. Rather, it further illustrates just how deeply content-based discrimination is embedded within Gilbert's Code.

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[7] For this reason, even standing alone § 4.402(P) is not content neutral, despite the Ninth Circuit's holding to the contrary. Political nonprofits posting signs about candidate elections or ballot issues receive far more favorable treatment under the Code's Political Signs provision than do Good News and other non-political (and thus disfavored) nonprofits under the Qualifying Event Sign provision.

Gilbert's Code is neither speaker-based nor event-based. Here, those labels are just euphemisms for content-based discrimination.

3. The Ninth Circuit also opined that Gilbert's Code does not regulate Qualifying Event, Political, and Ideological Signs based on their content because it concluded that these signs are "not in competition" and are "unrelated." Pet. App. 33a-34a.

There are numerous problems with this conclusion, two of which are highlighted here. First, the court cited no authority that allows courts to determine whether speech is "in competition" or "related" before applying First Amendment protections.

It is not the province of municipalities to determine when noncommercial speech is "related" or "competing." Such an approach would inexorably lead to speech being arbitrarily classified into narrowly defined subjects. Indeed, here the Ninth Circuit applied its novel "related and competing" rule and found no constitutional problem with Gilbert regulating Political and Ideological Signs more favorably than Qualifying Event Signs because all signs placed *within* these content-based categories receive the same treatment regardless of their viewpoint. Pet. App. 26a (observing that "it makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted"). The Ninth Circuit's approach thus improperly relegates content neutrality to a concern over viewpoint discrimination alone. *See Consol. Edison Co.*, 447 U.S. at 537 ("The

First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to" regulations that "restrict expression because of its message, its ideas, its subject matter, or its content.").[8]

Second, the Ninth Circuit's determination that Political, Ideological, and Qualifying Event Signs are unrelated and do not compete is simply inaccurate. These signs (and all other noncommercial signs permitted under the Code) compete and are related because they all *advertise*. The purpose of all signs is to advertise. "Advertise" means "to make the public aware of something" and "to make a public announcement … about something that is wanted or available." *Merriam-Webster Unabridged Dictionary Online*, *available at* http://www.merriam-webster.com/dictionary/advertise (last visited September 11, 2014).

Here, each category of sign seeks "to make the public aware of something" and "to make a public announcement … about something that is wanted or available." *See* ER 307 at 28:24-29:5 (admitting that "the purpose" of every sign "is to communicate a message or idea"). Political Signs, such as "Hilary

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[8] Like the law in *R.A.V. v. City of St. Paul*, 505 U.S 377, 391 (1992), Gilbert's Code "goes even beyond mere content discrimination, to actual viewpoint discrimination." Indeed, an atheist group could indefinitely post a 20 square foot sign that says "Don't Waste Your Time On Superstition, Skip Good News' Services This Sunday" right next to Good News' 6 square foot church invitation sign that could only be displayed for a handful of hours. This opposing viewpoint would receive far better treatment under the Ideological Sign provision.

for President," promote the named candidate. An Ideological Sign, like "Stop Illegal Immigration," calls public attention to an ideological position. And HOA Signs promote "seasonal or temporary events," like a weekend festival or a Christmas party. Similarly, Good News' signs "make the public aware of" its church services.

Gilbert's sole basis for distinguishing among these signs—all of which are related and competing for public notice—is their content. This is a distinction that the First Amendment forbids Gilbert from making.

B. Lack of Illicit Motive Cannot Save a Content-Based Regulation.

This Court has consistently rejected the argument that a lack of illicit motive, or an alleged pure motive, can save a facially content-based law. In *Discovery Network*, the city claimed that its regulation permitting newsracks holding newspapers, but barring those containing commercial publications, was content neutral because its justification for the regulation—concerns over 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, it 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*. And, critically, it flatly refused to consider the city's alleged motive in deciding the content neutrality

question: "True, there is no evidence that the city has acted with animus toward the ideas contained within [commercial publications], but 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 v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 117 (1991)).

This Court has repeatedly reaffirmed this principle. *See* § I, *supra*; *see also Ark. Writers' Project v. Ragland,* 481 U.S. 221, 228 (1987) (content-based "discrimination can be established even where … there is no evidence of an improper censorial motive."); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983) ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment."); *NAACP v. Button*, 371 U.S. 415, 438-39 (1963) ("[I]t is no answer to the constitutional claims asserted by petitioner to say … that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression.").[9]

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[9] Gilbert has advanced the argument throughout this litigation that Good News must prove illicit motive. Defs.' Resp. to Pls.' Second Mot. for Prelim. Inj. 6, Case No. 2:07-cv-00522, Doc. 30 (asserting that "one must show evidence of an illicit motive or desire to stifle certain viewpoints to support a content-based challenge"); Defs.' Answering Br. 15, Case No. 08-17384, Doc. 13 (arguing that Good News must offer "evidence suggesting illicit motive by [Gilbert] in enacting" the Qualifying Event Sign provision to prevail).

Despite this Court's precedent, the Ninth Circuit took motive into account, finding that "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed." Pet. App. 31a. It also observed that "Gilbert's interests in regulat[ing] temporary signs are unrelated to the content of the sign." *Id.* at 32a. These irrelevant (and inaccurate[10]) assertions played a pivotal role in the court's errant conclusion that Gilbert's Code is content neutral.

This same error has led some courts of appeals to find facially content-based sign codes content neutral. *See*, *e.g.*, *Brown v. Town of Cary*, 706 F.3d 294, 301 (4th Cir. 2013) (content-based numeric and size limitations excused based on finding that the government "may distinguish speech based on its content so long as its reasons for doing so are not based on the message conveyed."); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 621

[10] This is one of the rare cases where the one-way ratchet of government intent, *see* § I, *supra*, *confirms* the content-based discrimination that appears on the face of Gilbert's Code. Gilbert has been targeting the Church's signs for discriminatory treatment since before this lawsuit commenced and has perpetuated that discrimination through its amendments to the Sign Code. *See* Statement of Facts § 3, *supra*. As Petitioners argued in the court below, the 2011 amendment "target[s] Good News for disfavored treatment by proposing yet another restriction on Good News' signs—that they must promote events within the Town—that it does not impose on Political, Ideological, and other signs." *See* Appellants' Reply Br. 9 n.3, Case No. 11-15588, Doc. 17. Moreover, Gilbert candidly admits that it treats certain noncommercial, temporary signs better than Good News' church signs because it views those signs as having more value than Good News' signs. *See* § I.D., *infra*.

(6th Cir. 2009) (content-based height regulations excused based on finding that they were "not adopted because of disagreement with the message the speech conveys").

Yet other courts follow this Court's objective content neutrality test and have arrived at the opposite conclusion concerning similar sign codes. *See*, *e.g.*, *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1255-58 (11th Cir. 2005) (content-based exemptions from permit requirement found content based despite benign motive defense); *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 737 (8th Cir. 2011) (content-based exemptions from limitations imposed on signs found content based because the code made "impermissible distinctions based *solely* on the content or message conveyed by the sign.").

This circuit conflict encapsulates the issue in this case. At the certiorari stage, several First Amendment scholars identified "occasional remarks" about message hostility in *Hill v. Colorado*, 530 U.S. 703 (2000), and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)), as the source of this conflict in the sign code context. Professor's Br. 10. *See, e.g., Hill*, 530 U.S. at 719 ("[T]he principal inquiry in determining content neutrality … is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.") (quoting *Ward*, 491 U.S. at 791). The Professors observed that courts of appeals are mistakenly relying on these infrequent comments to "call[] content-neutral that which is indubitably content-based." Professors' Br. 10. Indeed, the

lower court erred when it relied on precisely these statements from *Hill* and *Ward* to find Gilbert's indubitably content-based Code content neutral. Pet. App. 29a-30a.

This case thus presents an important opportunity for this Court to clarify *Hill* and *Ward* and to reaffirm the essential First Amendment principle that a free speech litigant need not prove illicit motive to prevail against a law that facially regulates speech.

C. Gilbert's Code Is Content Based Because Enforcement Officials Must Determine What a Sign Says to Decide What Limitations Apply.

1. Just last term, this Court reaffirmed that a regulation of speech is "content based if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen*, 134 S. Ct. at 2531. That principle has long been recognized in First Amendment law. *See F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 383 (1984) (holding a ban on editorials related to "controversial issues of public importance" content based because "enforcement authorities must necessarily examine the content of the message that is conveyed to determine whether the views expressed" are banned).

In *McCullen*, a majority of this Court held that the buffer zone statute passed this test because whether persons violated it did not depend on "'what

they say,' but simply on where they say it." 134 S. Ct. at 2531 (citation omitted). In fact, a person could have violated the statute "without displaying a sign or uttering a word." *Id.* But here, the content-based classifications on the face of Gilbert's Code make determining what a sign says essential to its enforcement.

Mike Milillo, Gilbert's senior planner and zoning administrator, whose job responsibilities include interpreting the Sign Code, confirmed this. He testified that Code enforcers have to "figure out how to categorize [each sign]" to determine "which regulations apply." ER 258 at 23:6-7. Code enforcers perform this function by "review[ing] … each individual sign that comes before [them] to see what the elements are, *what is the message*." ER 257 at 21:21-24 (emphasis added). For example, when asked about the difference between a political and an ideological sign, Mr. Milillo testified that "the definition of the political sign is it's a temporary sign that supports candidates or urges action on different matters that are on the ballot. Ideological signs are … more general because they can just be messages of ideas for non-commercial purposes." ER 258-59 at 25:21-26:1. In other words, the Code differentiates between Political and Ideological Signs based on what they say. Such distinctions are a natural and necessary result of a Code that regulates signs based on the content-based categories into which officials place them.

Gilbert candidly admits that its Code "treats many different kinds of temporary signs differently." App. 131. The text of Gilbert's Code and its

enforcement official's undisputed testimony confirms that what makes a temporary sign "different" under Gilbert's Code is *what it says*. Consider, for instance, the Code's duration limits. If a sign supports securing the border, it can be displayed indefinitely. App. 32. If a sign supports a candidate who wins a primary, it can be displayed for at least 5 months. *Id*. at 84. If a sign promotes an HOA event, it can be displayed for over 1 month. *Id*. at 54-55. But if a sign invites people to a church's services, it can be displayed for just 14 hours. *Id*. at 38. The only way for an enforcement official to determine whether a sign violates the Code for being displayed too long is to determine what it says. This is content-based discrimination plain and simple.

The Code's content-based classifications also invariably lead to enforcement officials disagreeing on how to categorize the same sign. For example, when asked which part of the Code governs a sign that contains both directions to a church and a political message, Milillo testified that he would treat the sign as a Qualifying Event Sign but that other officials may treat it as a Political Sign:

> [T]here's two different types of messages on it, but it's giving direction to the qualifying event. And so … if there's a political message on it as well … it's a judgment call. Now, maybe others on our staff would look at it differently and they might categorize it as political sign.

ER 260 at 30:9-15.

These "judgment calls" would be unnecessary if the Code was silent regarding the content of signs. But its content-based categories instead invite—indeed, necessitate—enforcement officials engaging in unbridled discretion. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763-64 (1988) ("[W]ithout standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker.").

Consider that an Ideological Sign is defined as a sign that "communicat[es] a message or ideas for non-commercial purposes," unless it is a Qualifying Event Sign, Political Sign, or several other types of signs. App. 66. Every noncommercial sign, including the Church's religious signs, "communicat[e] a message or ideas for non-commercial purposes," *see* ER 307 at 28:17-29:5 (admitting that "the purpose" of every sign "is to communicate a message or idea"), and thus qualifies as an Ideological Sign. Yet the Code requires enforcement officials to differentiate among Ideological Signs based on what they say pursuant to content-based definitions that Mr. Milillo conceded officials may disagree on how to enforce. Such unbridled discretion and vagueness is unacceptable when regulating speech protected by the First Amendment.

2. The Ninth Circuit tried to maneuver around the Code's clear content-based discrimination by relying on *Hill v. Colorado*, 530 U.S. 703, 721 (2000), citing its proposition that this Court has "never held, or suggested, that it is improper to look at the

content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." That is true as far as it goes, which is nowhere near as far as the Ninth Circuit would have it.

According to *Hill*, this examination of speech was limited to determining the manner in which speech was being conveyed—approaching within eight feet of another to engage in protest, counseling, education, or leafleting. *Id.* at 707. A "cursory examination" of speech for the narrow purpose of excluding "pure social or random conversation" from the manner of expression covered by the statute was permissible. *Id.* at 721-22. This examination, according to the Court, was focused on the means, not the subject matter, of the expression. *Id.*

But here, Gilbert's Code regulates the same means or manner of expression—speaking through temporary signage—based solely on content. Thus, unlike in *Hill*, code enforcers examine temporary signs to determine not the manner in which speech is being conveyed but the *subject matter* of the expression, because what signs say determines how they are treated. As Mr. Milillo testified, the purpose of the examination is to determine "the message" of the sign. *See supra.*

The Ninth Circuit's additional statements concerning *Hill* further reveal its confusion stemming from that decision. The court asserted that *Hill* "upheld a statute that clearly distinguished between types of noncommercial speech," Pet. App. 34a, and that it "indicated that not all types of

noncommercial speech need to be treated the same," *id*. at 44a. But *Hill* asserted the opposite, namely that the statute "place[d] no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker." 530 U.S. at 723.

Indeed, in *Hill*, this Court said that the content of the speech was irrelevant to enforcement of the statute. Whether that claim was right or wrong, it shows that *Hill* gives no shelter to the town here since, under Gilbert's Code, the content of signs is the *sine qua non* of enforcement.

D. Gilbert's Valuing of Political and Ideological Speech Over Good News' Religious Speech Further Demonstrates the Content-Based Nature of the Code.

Regardless of whether the government more favorably regulates speech it deems valuable, *see Carey*, 447 U.S. at 466; *Regan*, 468 U.S. at 648, or more heavily regulates speech it deems less important, *see Stevens*, 559 U.S. at 470; *Discovery Network,* 507 U.S. at 429, laws that facially distinguish among speech based on these kinds of value judgments are impermissibly content based.

In *Carey*, the State claimed that its interest in "providing special protection for labor protests" justified a law granting such protests a preferential exemption from a ban on residential picketing. 447 U.S. at 466. 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." *Id.* Similarly, in *Regan*, a federal statute banned photographic reproductions of U.S. currency but exempted depictions for "philatelic, numismatic, educational, historical, or newsworthy purposes." 468 U.S. at 647. This Court found the statute content based because "one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not." *Id.* at 648.

On the other hand, in *Stevens* the government argued that it could regulate depictions of animal cruelty because such speech is of low value. It proffered a test under which a court would determine "[w]hether a given category of speech enjoys First Amendment protection [based] upon a categorical balancing of *the value of the speech* against its societal costs." 559 U.S. at 470 (emphasis added). This Court called the government's proposition "startling and dangerous," and flatly refused to follow its "free-floating test for First Amendment coverage." *Id.* So too, in *Discovery Network*, this Court rejected the city's attempt to save an ordinance favoring newsracks holding newspapers over those containing commercial handbills on the basis that "commercial speech has 'low value.'" 507 U.S. at 429.

Gilbert makes the same arguments here. It repeatedly justified the Code's more favorable treatment of political and ideological speech based on its view that such messages are more important

than Good News' speech. Defs.' Ans. Br. 31, 9th Cir. Case No. 11-15588, Doc. 13 (political signs are "core speech concerning the public event of a campaign for public office"); Defs.' Resp. to Pls.' Mot. for Summ. J. 9, Case No. 2:07-cv-00522-SRB, Doc. 104 ("a public election is the very heart of representative government, and the Town has an interest in supporting these public events"); Defs.' Resp. to Pls.' Second Mot. for Prelim. Inj. 12-13, Case No. 2:07-cv-00522-SRB, Doc. 30 (Political Signs "involve core speech that is entitled to the highest form of protection by the Free Speech Clause" and Ideological Signs, "[l]ike political signs, … concern[] core speech").

The Ninth Circuit wrongly accepted these arguments. It found that the "Political Signs exemption responds to the need for communication about elections" and that the "Ideological Sign exemption recognizes that an individual's right to express his or her opinion is at the core of the First Amendment." Pet. App. 26a. It also observed that Political and Ideological Signs "raise different legal rights and interests that Gilbert has to respect," as compared to Good News' signs. *Id*. at 40a. And it asserted that Gilbert's more favorable treatment of Political and Ideological Signs, as compared to the Church's signs, "reflects a balance between Gilbert's interests and the constitutional interests of the type of sign covered." *Id*. at 38a.

Simply put, the Ninth Circuit deemed Good News' church invitation signs "low value" speech, and political and ideological signs "high value" speech, based on a constitutional-value versus

government-interest balancing test. But deploying these types of balancing tests to make judgments concerning the "value" of protected speech is forbidden under the First Amendment. *See Stevens*, *supra*; *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514 (1981) ("Although the city may distinguish between the relative value of different categories of commercial speech, *the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests*.") (emphasis added).

That is particularly true here, where the lower courts found, and Gilbert admitted, that Good News' church invitation signs are religious speech. App. 128a & n.3 ("It is beyond dispute that [Good News'] signs communicate a religious message" and thus "fall within the category of protected speech."); App. 5a (noting that Good News carries out its religious duty to propagate its faith by "display[ing] signs announcing [its] services as an invitation for those in the community to attend"); ER 173 ¶ 56; ER 165 ¶ 56 (admitting that "[Good News'] signs are speech that is protected by the First Amendment"). Because Good News' signs are "private religious speech," they are "as fully protected under the Free Speech Clause as secular private expression," *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995), like the Political and Ideological Signs that Gilbert accords notably more favorable treatment. *See Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (explaining that a sign stating "'Jesus Saves'" is just as worthy of "the fullest possible measure of

constitutional protection" as a sign stating "'Roland Vincent—City Council'").

That Gilbert treats Good News' church invitation signs differently than Ideological Signs yet again drives home the problem with Gilbert's content-based categorization of signs. Good News' signs are religious speech and also meet the Code's definition of an Ideological Sign, *i.e.*, "a sign[] [that] communicat[es] a message or idea for noncommercial purposes." App. 66-67. Yet Gilbert has determined that Good News' Signs are not "Ideological Signs" and on that basis alone accords them far less favorable treatment. This highlights the irrationality of the Code's content-based distinctions, which result in speech equally entitled to full First Amendment protection receiving drastically different treatment.

III. Gilbert's Code Does Not Survive Strict Scrutiny.

Because Gilbert's Code regulates speech based on its content, "it is invalid unless [Gilbert] can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011). Strict scrutiny is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), and Gilbert's Code utterly fails it.

One crucial stumbling block that prevents Gilbert from satisfying either prong of that test is

the Code's wild underinclusiveness, along with its overinclusiveness. Gilbert severely clamps down on Good News' temporary signs in the name of safety and aesthetics, yet simultaneously grants highly favorable treatment to the temporary signs that are the chief threat to its interests—political signs. And it grants more favorable treatment to other temporary signs that affect its interests to the same extent as Good News' signs. This complete lack of fit between Gilbert's interests and its selective, content-based treatment of signs renders the Code unlawful no matter what level of scrutiny applied.

A. Gilbert's Interests Are Not Compelling.

Gilbert admits that its twin interests in regulating signs are safety and aesthetics. App. 100 ¶ 24; App. 139 ¶ 24. But courts that have addressed these oft-asserted interests have rejected assertions that they are compelling in nature and thus sufficient to justify content-based discrimination among signs. *Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988) (interests in "traffic safety and aesthetics" are "substantial" but not "compelling"); *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995) ("[A] municipality's asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling"); *Solantic,* 410 F.3d at 1267 ("aesthetics and traffic safety" are not compelling interests).

Moreover, this Court has often held that laws like Gilbert's, that permit "appreciable damage to th[e] supposedly vital interest" they allegedly serve, cannot be regarded as serving compelling interests.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (quotation and alteration omitted). Or, put differently, an interest is not compelling when the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Id.* at 546–47.

Entertainment Merchants Association illustrates this principle. California claimed that its content-based law targeting the sale of violent video games to children served its compelling interest in preventing harmful effects on minors. 131 S. Ct. at 2738-39. But it had not restricted other violent materials that risked exposing minors to the same harmful effects, like violent cartoons on television, games rated "appropriate for all ages," and "pictures of guns." *Id.* at 2739-40. This underinclusiveness torpedoed California's argument that its interest was compelling:

> The consequence is that [California's] regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.

Id. at 2740.

Underinclusiveness also toppled the state's proffered interest in *Carey*. There, the state argued

that an exemption of labor picketing from its ban on residential picketing served its interest in protecting residential privacy. 447 U.S. at 465. But the state did not offer any explanation, and there was none, for why labor picketing impacted its privacy interest any less than non-labor picketing, thereby justifying its exclusion from the ban. *Id.* The statute's underinclusiveness demonstrated that the government's proffered interest "[wa]s not a transcendent objective." *Id.*

As in the above cases, it is impossible for Gilbert to credibly claim that its Code serves compelling interests given its vast underinclusiveness. Gilbert permits Political Signs—which are rightly regarded as posing the greatest threat to a municipality's interests in safety and aesthetics—to proliferate by granting them highly favorable treatment under the Code. Gilbert does further damage to its compelling-interest argument by granting favorable treatment to other temporary signs, including Ideological, HOA, and Weekend Real Estate Sale Signs. Hence, Gilbert's compelling interest claim is a thin reed that collapses under the weight of the many temporary signs it liberally allows, especially when one considers that those signs implicate its interests to the same extent as, and in some instances far more than, Good News' signs.

B. Gilbert's Code Cannot Satisfy Narrow Tailoring Under Strict or Intermediate Scrutiny.

Gilbert's Code regulates temporary signs that pose identical concerns regarding safety and

aesthetics in vastly different ways based solely on their content. What the Code lacks is any fit whatsoever between its alleged interests and the content-based restrictions it creates. This complete and utter lack of tailoring would fail even intermediate, let alone strict, scrutiny.

This Court has found that laws similar to Gilbert's lacked the necessary tailoring to pass constitutional scrutiny. In *Carey*, the Court held that the state's interest in residential privacy could not justify its exemption of labor picketing from a ban on residential picketing "for the simple reason that nothing in the content-based labor-nonlabor distinction *has any bearing whatsoever on privacy*." 447 U.S. at 465 (emphasis added). All picketing is equally disruptive of residential privacy, *id*., yet the state permitted some pickets to impair its interests and not others based on content. Similarly, in *Mosley*, the city asserted that its picketing ordinance was justified by its interest in preventing school disruptions. 408 U.S. at 99. The Court found the ordinance, which permitted some picketers to impair its interest and not others based solely on content, was "far from being tailored" because all picketing posed the same risks to the city's purported interest. *Id*. at 100-102.

Gilbert's Code also fails narrow tailoring because it is overinclusive. Indeed, it "abridges the First Amendment rights" of Good News and many other sign placers in pursuit of interests that it allows appreciable damage to from similar signs. *Brown*, 131 S. Ct. at 2742; *see also Carey*, 447 U.S. at 455 (statute barring all picketing except labor picketing

in residential areas overinclusive because it prohibited far more speech than necessary to achieve its purpose). Gilbert's Code severely restricts far more protected speech than necessary to achieve its goal, and thus is impermissibly overinclsive.

The extreme underinclusiveness of Gilbert's Code would fail even the intermediate scrutiny test that applies to content-neutral time, place, and manner regulations.[11] *Discovery Network*, where the Court applied the commercial speech test, which is comparable to intermediate scrutiny, illustrates this fact. The Court found that the city's content-based distinction between commercial and noncommercial newsracks "ha[d] absolutely no bearing" on its asserted interests in safety and aesthetics. *Id*. at 428. Commercial and noncommercial newsracks were "equally unattractive" and "equally responsible for [the safety] problems" the city sought to regulate, yet the city banned one and not the other. *Id*. at 425, 427. For that reason, the city "ha[d] not established the 'fit' between its goals and its chosen means that is required" under even intermediate scrutiny. *Id*. at 428.

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[11] Intermediate scrutiny only applies to speech regulations that are content neutral. *Consol. Edison Co.*, 447 U.S. at 536 (intermediate scrutiny did not apply to regulation banning bill inserts about controversial issues of public policy because "time, place, and manner regulations must be 'applicable to all speech irrespective of content'" (citation omitted)). Thus, it does not apply to Gilbert's content-based Code, but rather illustrates that Gilbert not only fails strict scrutiny but cannot even pass a lower level of scrutiny.

Gilbert's Code suffers from the exact same lack of tailoring that doomed each of the laws above. All temporary signs equally affect its interests, yet the town picks and chooses which signs are permitted, and which are not, based on content. Like the ordinance in *Discovery Network*, Gilbert's content-based "distinction[s] bear[] no relationship *whatsoever* to the particular interests that the [town] has asserted. It is therefore an impermissible means of responding to [Gilbert's] … interests." *Id*. at 424.

Gilbert is by no means powerless to regulate noncommercial signage. Indeed, it has broad authority to regulate the physical characteristics of signs in a content-neutral manner, including, for example, treating all temporary signs the same. But Gilbert has failed to steer clear of what the First Amendment says it must avoid: unjustifiably distinguishing among noncommercial signs based on their content.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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