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, et. al.

Respondents.

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

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Brief of Amici Liberty Counsel and National Hispanic Christian Leadership Council In Support of Petitioners Seeking Reversal

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INTEREST OF AMICI CURIAE[1]

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Liberty Counsel has offices in Florida, Virginia, California and Washington, D.C., and has hundreds of affiliate attorneys in all fifty states. A significant part of Liberty Counsel's work involves representing individuals and organizations whose First Amendment rights are threatened by or have been infringed by governmental agencies or individuals who disagree with their message.

The Ninth Circuit's use of lack of impermissible legislative motive to transform a content-based ordinance into a content-neutral regulation poses a significant threat to bedrock First Amendment freedoms. If the Ninth

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. Petitioners have filed consents to the filing of Amicus Briefs on behalf of either party or no party. Respondents' consent to the filing is being filed with this brief.

Circuit's use of legislative motive is permitted to stand, then governmental regulators will use legislative motive as a tool to disguise content-based restrictions under a veil of content neutrality.

Liberty Counsel has witnessed how legislative motive can be used to justify content and even viewpoint-based restrictions on First Amendment activity, and thereby complicate what should be a simple matter of finding that regulations aimed at restricting the content of speech are unconstitutional. Liberty Counsel has developed a body of research that will assist the Court in assessing not only the constitutionality of the Respondents' sign ordinance, but also the wide-ranging consequences of leaving the Ninth Circuit's ruling intact.

The National Hispanic Christian Leadership Conference ("NHCLC") was founded in 1995 by Reverend Samuel Rodriquez and has grown to more than 40,000 member congregations consisting of 12 to 16 million people throughout the United States. It is America's largest Hispanic Christian evangelical organization. On May 1, 2014, NHCLC merged with Conela, a Latin America-based organization that serves more than 487,000 Latin churches globally, to become NHCLC/Conela, representing more than 500,000 churches throughout the world. NHCLC's members, like the Petitioner here,

have witnessed firsthand how governmental authorities can chill churches' free speech rights under the guise of sign ordinances and similar regulations. NHCLC is concerned that the Ninth Circuit's misapplication of legislative motive to validate a content-based restriction on speech jeopardizes the free speech rights of its members and other religious organizations throughout the country. NHCLC believes that it is critical that this Court have a thorough understanding of the ramifications of the Ninth Circuit's decision.

Based upon the foregoing, Liberty Counsel and NHCLC respectfully submit this Amicus Curiae brief for the Court's consideration.

SUMMARY OF ARGUMENT

This Court has long confirmed that legislative "motive" has no place in analyzing a governmental regulation that affects free speech rights. When, as the Ninth Circuit did in this case, that tenet is violated, government officials take full advantage of the opportunity to chill free speech activities that are controversial or potentially offensive to certain community sensibilities. When it used a lack of impermissible motive to transform a content-based into a content-neutral sign ordinance, the Ninth Circuit violated centuries of precedent which holds that legislative motive has no place in free speech analysis. In so doing, it provided

governmental agencies with a potentially powerful new tool to control free speech, *i.e.* assertion of a neutral motivation.

That tool has already been in use for many years in Establishment Clause cases, with disastrous results. After decades of using legislative motive or "purpose" as an element in Establishment Clause analysis, this Court's jurisprudence remains inconsistent and confusing, leaving legislators and judges at a loss as to how to conduct governmental business without running afoul of the Establishment Clause. Indeed, this Court's Establishment Clause jurisprudence has been called "purgatory" and a "minefield."

That will be the fate of free speech jurisprudence if the Ninth Circuit's decision is upheld. Affirming the Ninth Circuit's use of legislative motive would signal to local governments that they can regulate unpopular speech so long as they can construct a sufficient veil of permissible motivation. This Court should not permit the confusion of Establishment Clause analysis to invade the free speech arena.

LEGAL ARGUMENT

I. SINCE THE EARLY DAYS OF THE REPUBLIC, THIS COURT HAS ESTABLISHED THAT LEGISLATIVE MOTIVE CANNOT BE A FACTOR IN JUDICIAL REVIEW OF LEGISLATIVE ENACTMENTS.

The Constitution was not yet 25 years old when Chief Justice Marshall established that its provisions proscribe judicial analysis of legislative motive. *Fletcher v. Peck*, 10 U.S. 87, 130-31 (1810). While acknowledging that the incursion of impure motives into legislation is deplorable, Chief Justice Marshall also said that courts should not undertake a search for such motives. *Id.* at 130.

> If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.

Id. at 131. Chief Justice Marshall outlined the uncertainties surrounding such an undertaking and concluded that courts are ill-equipped to resolve those uncertainties, particularly since it would require analysis of legislators' thoughts. *Id.* at 130.

> It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice.

Id.

This Court has repeatedly confirmed that legislative motive cannot be a factor in analyzing the validity of legislation. In fact in *McCray v. United States*, the Court emphatically stated that "[i]t has never been the case since the founding of the Republic that the judiciary can invalidate a law because the judge believes that it was based upon an unwise or unjust motivation." 195 U.S. 27, 53-54 (1904). In fact, "[i]t is erroneous to assume that the motive of Congress can be taken into view." W*eber v. Freed*, 239 U.S. 325, 330 (1915). *See also, United States v. Doremus*, 249 U.S. 86, 93 (1919) ("The fact that other motives may impel the exercise of federal taxing power does

not authorize the courts to inquire into that subject."); *State of Arizona v. State of California*, 283 U.S. 423, 455-56 (1931) ("Into the motives which induced members of Congress to enact the Boulder Canyon Project Act, this court may not inquire."). As the Court said in *Tenney v. Brandhove,* "[t]he holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L.Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." 341 U.S. 367, 377-78 (1951).

The prohibition against inquiring into legislative motive extends to laws restricting First Amendment activities, such as the ordinance at issue in this case. *United States v. O'Brien*, 391 U.S. 367, 383 (1968). "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Id.* "'The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.'" *Id.* (citing *McCray,* 195 U.S. at 56). In keeping with that long history, the *O'Brien* court rejected the challenger's argument that a draft-card burning prohibition was based upon illicit legislative motive. *Id.* at 384.

Similarly, this Court rejected an argument that an ordinance banning nude dancing was aimed at suppressing free expression, and refused to divine legislative motive from a statement made by a governmental official regarding "legitimate" entertainment. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 292 (2000). "As we have said before, however, this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *Id.* (citing *O'Brien*, 391 U.S. at 382-83. As Justice O'Connor explained, "[i]n determining whether the government intends a moment of silence statute to convey a message of endorsement or disapproval of religion, a court has no license to psychoanalyze the legislators." *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring).

With the notable exception of the Ninth Circuit in this case, circuit courts have refused to engage in legislative psychoanalysis when determining whether a speech-restrictive enactment is constitutional. In analyzing a challenge to a picketing restriction, the Sixth Circuit cited *O'Brien* and refused the plaintiffs' request to invalidate a facially neutral statute because of a purported hidden illicit motive. *Bailey v. Callaghan*, 715 F.3d 956, 960 (6th Cir. 2013). "What the plaintiffs are left with, then, is an argument that we should look past the Act's facial neutrality as to viewpoint and

union identity, and conclude nonetheless that the Act's real purpose is to suppress speech by teachers' unions." *Id.* "But the law forecloses this kind of adventure." *Id.* Similarly, the Seventh Circuit rejected unions' requests to search for illicit motive in a facially neutral statute, citing *O'Brien* for the proposition that it could not engage in such a search. *Wisconsin Educ. Ass'n Council v. Walker*, 705 F.3d 640, 652 (7th Cir. 2013). The Tenth Circuit also rejected Planned Parenthood's request to strike down a facially neutral funding statute on the grounds that it was enacted because of hostility to the organization's pro-abortion views. *Planned Parenthood of Kansas & Mid-Missouri v. Moser*, 747 F.3d 814, 842 (10th Cir. 2014). "We reject the notion that Planned Parenthood can challenge §107(l) as an unconstitutional condition solely on the ground that its passage was motivated by a desire to penalize Planned Parenthood's protected speech and association." *Id.* at 843.

The Ninth Circuit's use of legislative motive to transform a content-based restriction into a content-neutral restriction contradicts centuries of precedent. This Court should re-affirm that legislative motive has no place in First Amendment analysis by reversing the judgment below.

II. STRONG, ZEALOUSLY ENFORCED CONTENT-NEUTRALITY RULES FOR SPEECH-RESTRICTIVE ENACTMENTS PROVIDE BETTER PROTECTION FOR FREE SPEECH THAN DOES AN INQUIRY INTO LEGISLATIVE MOTIVE.

A. An Objective Standard Based Upon Whether The Government Enactment Restricts Speech Based On Its Content Provides Clearer Guidance To Courts And Litigants Than Does A Subjective Inquiry Into Motive.

This Court has rejected legislative motive inquiry in First Amendment challenges not only because such inquiries are subjective and uncertain, but also because the Court's traditional focus on content neutrality provides more clarity for legislators drafting statutes and courts analyzing them. *Boos v. Barry*, 485 U.S. 312, 335–36 (1988) (Brennan, J., concurring in part and concurring in judgment). "The traditional approach sets forth a bright-line rule: any restriction on speech, the application of which turns on the content of the speech, is a content-based restriction regardless

of the motivation that lies behind it." *Id.* "That, to my mind, has always been implicit in the fact that we term the test a 'content-based' test rather than a 'motivation-based' test." *Id.* at 336. "The traditional rule thus provides clear guidance. Governments can ascertain the scope of impermissible regulation. Individuals can ascertain the scope of their constitutional protection." *Id*. By contrast, analysis of purpose, "plunges courts into the morass of legislative motive, a notoriously hazardous and indeterminate inquiry." *Id.*

> Although an inquiry into motive is sometimes a useful supplement, the best protection against governmental attempts to squelch opposition has never lain in our ability to assess the purity of legislative motive but rather in the requirement that the government act through content-neutral means that restrict expression the government favors as well as expression it disfavors.

Id at 336-37.

In an earlier discussion of the centrality of content neutrality, Justice Brennan explained that:

> When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied. This general proscription against unnecessarily broad content-based regulation permeates First Amendment jurisprudence.

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 778–79 (1985) (Brennan, J., dissenting). The prohibition against content-based regulations is ubiquitous because, "[i]n its strong form, the doctrine functions to minimize interferences with free speech that reflect and establish pernicious habits of censorship and silence."[2] Content neutrality "frames the terms of engagement between the governed and the governors of the United States in ways that incline the 'general spirit of the people and of the government' to the protection of rights of free expression," as

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[2] Seth F. Kreimer, *Good Enough For Government Work: Two Cheers For Content Neutrality*, 16 JOURNAL OF CONSTITUTIONAL LAW 1261, 1303 (May 2014).

advocated by Alexander Hamilton.[3] "Strong content neutrality requirements better impart, cultivate, and enforce this inclination than the competing frameworks of either 'ferreting out' intolerant government motives or adjuring government to limit its censorship to 'proportionate' means."[4]

Unlike the uncertain footing provided by a search for illicit legislative motive, a strong content neutrality standard provides a firm foundation based upon "a system of norms which preserve the reality of free expression in American society."[5] When content neutrality is paired with prohibitions against vagueness and unbridled discretion, it creates a system of clear, broadly applicable ex ante rules. These rules help detach legislative decision making from circumstances that can lead to "intolerant suppression of speech."[6]

> The question of whether a particular rule is "content neutral" is not one that requires either a street level bureaucrat or a reviewing court to attend to the

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[3] *Id.* at 1264 (citing THE FEDERALIST No. 84, at 535 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

[4] *Id.* at 1277.

[5] *Id.* at 1276.

[6] *Id.* at 1317-18.

> attractive or repellant qualities of the speech in question. Studies show tolerance is more difficult to maintain under pressure; ex ante decision making is less likely to take place under conditions of threat and anxiety. Likewise "sober second thoughts" can dilute intolerance generated by outrage, and the requirement of adopting ex ante general rules that potentially impact a range of cases has a tendency to induce such a mindset.[7]

In other words, for citizens, legislators and courts, "it is more straightforward and robust to discern whether a rule distinguishes on the basis of content" than to try to determine whether a regulation is based upon illicit motives.[8] The Ninth Circuit's circumvention of the ubiquitous and effective content neutrality doctrine contradicts precedent and, if permitted to stand, will create the kind of environment that can lead to suppression of speech.

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7 *Id.* at 1319.

8 *Id.* at 1320.

B. This Court's Doctrines Distinguishing Between Content-Neutral and Content- and Viewpoint-Based Restrictions More Effectively "Flush Out" Improper Motives Than Do Direct, Subjective Inquiries Into Legislative Motive.

This Court's content neutrality doctrine not only provides legislators, citizens and courts with bright-line *ex ante* rules for legislative analysis, but also provides a more effective mechanism for ferreting out impermissible bias than does an inquiry into legislative motivation. As Justice (then-Professor) Kagan explained, "the distinction between content-based and content-neutral action–more specifically, the distinction among viewpoint-based, other content-based, and content-neutral action–facilitates the effort to flush out improper purposes" by separating out, "roughly but readily, actions with varying probabilities of arising from illicit motives."[9]

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[9] Elena Kagan, *Private Speech, Public Purpose: The Role Of Governmental Motive In First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 451 (1996).

For example, an ordinance restricting all signs regardless of content is unlikely to be based upon illicit motives or ideological biases.[10] Since the restriction applies to all ideas, a legislator's affirmative vote will probably not be based upon hostility or sympathy to particular messages.[11] By contrast, if an ordinance applies differential restrictions based upon the content of the sign–such as is the case here–"a legislator's view as to the merits of particular ideas–the idea restricted and its competitors–will intrude, whether consciously or not, on the decision whether the harms caused by the speech justify the regulation."[12] In other words, a statute that is found to be content- or viewpoint-based will likely be infected with an improper purpose.[13]

Consequently, distinctions between viewpoint-based, content-based and content-neutral laws create "a set of presumptive conclusions about when improper motive has tainted a restriction on speech."[14] Legislators might on occasion be able to mask improper motive in content-neutrality or convince a court that viewpoint-based laws are not founded on improper motives. However, the occasional

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10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 452-53.

mistakes that might arise from the objective content-neutrality analysis are preferable to more frequent errors, and the collateral damage to constitutional principles (see below) that would arise from a subjective inquiry into legislative motive.[15] "If the facial markers we use are not perfect, they are better than what they replace."[16]

This Court's cases show that the chances of a legislature convincing the Court that a viewpoint-based restriction is based upon a permissible state interest are very slim. In *United States v. Stevens,* 559 U.S. 460, 468 (2010), the Court rejected the state's argument that the law was constitutional because it prohibited a form of expression that, like obscenity, should be excluded from First Amendment protection. *Id.* In *City of Cincinnati v. Discovery Network*, the city's aesthetic justification for banning newsracks for commercial handbills did not render content neutral a policy which on its face distinguished commercial publications from other publications. 507 U.S. 410, 429 (1993). This Court also found that New York's "Son of Sam law" requiring that revenues from criminals' chronicles of their crimes be set aside for victims was not rendered content neutral by the government's justification that criminals

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15 *Id.* at 453.

16 *Id.*

should not profit by their own wrongs. *Simon & Schuster v. Members of New York State Crime Victims Board*, 502 U.S. 105, 116, 119 (1991). Similarly, this Court rejected Chicago's arguably neutral rationale for exempting labor pickets from restrictions, *i.e.,* that they were less likely to be violent and require city oversight. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 99 (1972). This Court struck down the picketing restrictions as impermissibly content-based. *Id*. In each of these cases, the governmental agencies attempted to use absence of impermissible legislative motive to justify a non-neutral law, just as the Town of Gilbert is doing here. In each case, this Court refused to substitute its objective content-neutrality test for a subjective inquiry into legislative motive, showing the effectiveness of relying upon existing content neutrality standards to ferret out impermissible motives.

As Professor Leslie Kendrick stated, "[s]ubject-matter and viewpoint classifications have such a high probability of concealing an illicit purpose that one may confidently infer such a purpose from the fact of the classification."[17] Furthermore, regardless of whether they strongly correlate with illicit motives, "such classifications are a wrong in

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[17] Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 274-75 (2012).

and of themselves" … and "do some sort of expressive harm by signaling that the government countenances the classification of speakers by their ideas."[18]

As Justice Kagan noted, this Court's established doctrine of treating as suspect seemingly content-neutral laws that 1) confer standard-less discretion on administrative officials; 2) turn on the communicative effect of speech and 3) attempt to "equalize" the speech market, "offers further protection against impermissible motive without having to engage in subjective inquiry into legislators' thoughts."[19]

The Ninth Circuit's conclusion that the city's facially content-based sign ordinance is constitutional because of the absence of impermissible motive departs from established precedent that legislative motive is irrelevant to the determination of whether an ordinance violates free speech. The decision should, therefore, be reversed.

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18 *Id.*

19 Kagan, *Private Speech,* at 453.

C. A Strong Content Neutrality Standard Instead Of Subjective Motive Inquiry Is Particularly Appropriate For Sign Regulations Such As The Ordinance At Issue Here.

Content-based ordinances such as the one at issue here are particularly suspect when they seek to regulate signs, offering further evidence that the Ninth Circuit has departed from established authority. Unlike oral communication such as picketing and leafleting, which require interaction with others, signs are entirely passive speech that do not require any action by the viewer. The Court might tolerate regulations that affect the content of oral communication when it believes it is necessary to protect the privacy rights of speech recipients. *See e.g., Hill v. Colorado*, 530 U.S. 703, 723-24 (2000) (upholding as content-neutral a statute banning pro-life speakers from approaching within eight feet of individuals receiving medical treatment, including abortions, outside abortion clinics.).

However, in the case of a sign, there are no speech recipients whose privacy rights would be affected by interaction with a

speaker.[20] "There is almost no conceivable situation in which a sign affixed to the ground and regulated by a municipal sign ordinance could possibly infringe upon an individual's privacy interest in a fashion similar to that of an oral protester who knowingly approaches within close range of another person."[21]

Instead of protecting a right of privacy for speech recipients, "the interest being protected counter to the sign owner's First Amendment right is a public interest in traffic safety and environmental aesthetics."[22] That being the case, regulation of the physical characteristics of signs "offer a much more definite and content-neutral basis on which an enforcement official can enforce the sign ordinance" to protect traffic and aesthetic interests.[23]

In a foundational case on sign regulations, this Court articulated the dangers posed by governmental discretion and the necessity of stringent content neutrality standards. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 515-17 (1981). In

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[20] *See* Brian J. Connolly, *Environmental Aesthetics And Free Speech: Toward A Consistent Content Neutrality Standard For Outdoor Sign Regulation, 2* MICH. J. ENVT'L. & ADMIN. L. 185, 213 (2012).

[21] *Id.* at 213-14.

[22] *Id.* at 214.

[23] *Id.*

Metromedia, this Court struck down a sign ordinance similar to the ordinance in this case as impermissibly content-based. *Id.* The Court stated that an ordinance which permitted some kinds of billboards could not be categorized as a reasonable time, place and manner restriction because it regulated on the basis of content. *Id.* at 515. The dangers inherent in such content-based restrictions are that they would grant government the power to choose permissible subjects for public debate and the control over the search for political truth, *i.e.*, it would permit the biases and motivations of governmental officials to be used to regulate speech. *See id.* at 515-16. Strict content-neutrality analysis, therefore, protects the state's asserted interest in safety and aesthetics in a manner that also shields speech regulations from illicit motives. *See id.*

Consequently, in a case such as this involving regulation of signs, the physical characteristics of the signs is the relevant factor and should be the only focus of the free speech analysis. Grafting legislative purpose into the analysis to try to "save" a content-based regulation, as the Ninth Circuit did here, is particularly inappropriate in the context of regulation of signs.

III. ENGAGING IN AN INQUIRY REGARDING THE MOTIVES OF A LEGISLATIVE BODY POSES THREATS TO FOUNDATIONAL CONSTITUTIONAL PRINCIPLES.

A. A Subjective Inquiry Into Legislative Motive Would Violate Separation Of Powers As The Court Would Be Exceeding Its Role Of Objectively Analyzing The Validity of Legislation.

Under Article III of the Constitution, "the judicial department of the government is charged with the solemn duty of enforcing the Constitution." *McCray v. United States*, 195 U.S. 27, 53 (1904). That duty requires, in some cases, that the court determine whether the legislature or executive branch has exceeded its enumerated powers. *Id.* at 54. However, "no instance is afforded from the foundation of the government where an act which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust." *Id.* "To announce such a principle would amount to declaring that, in our constitutional system, the judiciary was not only charged with the duty of upholding the

Constitution, but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority." *Id.* That, it turn, would be an act of judicial usurpation that would overthrow "the entire distinction between the legislative, judicial, and executive departments of the government, upon which our system is founded." *Id.*

Furthermore, curing the abuse of power by one branch of government through the abuse of power of another branch "would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions." *Id.* at 54-55. "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *Id.* at 55. *See also, Weber v. Freed*, 239 U.S. 325, 330 (1915) ("The proposition plainly is wanting in merit, since it rests upon the erroneous assumption that the motive of Congress in exerting its plenary power may be taken into view for the purpose of refusing to give effect to such power when exercised."); *United States v. Doremus*, 249 U.S. 86, 93 (1919)(from an early

day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject); *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province."); *Atchison, Topeka & Santa Fe R. R. Co. v. Matthews*, 174 U.S. 96, 102-103 (1899)("[A]s a court, we may not interpose our personal views as to the wisdom or policy of either form of legislation.").

Trying to discern legislative motive is not only a threat to separation of powers, but is also a virtually impossible task. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558-59 (1993) (Scalia J., concurring in part and concurring in the judgment); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J. dissenting). As Justice Scalia explained, the number of possible motivations is not binary or even finite. *Edwards,* 482 U.S. at 636. "To look for the sole purpose of even a single legislator is probably to look for something that does not exist." *Id.* at 637. Even if the Court were to undertake the task, "where ought we to look for the individual legislator's purpose?" *Id.*

> We cannot of course assume that every member present (if, as is unlikely, we know who or even how

> many they were) agreed with the motivation expressed in a particular legislator's pre-enactment floor or committee statement. Quite obviously, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien*, 391 U.S. 367, 384, 88 S.Ct. 1673, 1683, 20 L.Ed.2d 672 (1968). Can we assume, then, that they all agree with the motivation expressed in the staff-prepared committee reports they might have read–even though we are unwilling to assume that they agreed with the motivation expressed in the very statute that they voted for? Should we consider post-enactment floor statements? Or post-enactment testimony from legislators, obtained expressly for the lawsuit? Should we consider media reports on the realities of the legislative bargaining?

Id. at 637-38. "All of these sources, of course, are eminently manipulable." *Id.* at 638. "Legislative histories can be contrived and sanitized, favorable media coverage orchestrated, and post-enactment recollections

conveniently distorted." *Id.* "Perhaps most valuable of all would be more objective indications–for example, evidence regarding the individual legislators' religious affiliations. And if that, why not evidence regarding the fervor or tepidity of their beliefs?" *Id.*

Even if the Court were able to assess what individual legislators intended, it would still have to wrestle with the question of "how many of them must have the invalidating intent." *Id.* at 638.

> If a state senate approves a bill by vote of 26 to 25, and only one of the 26 intended solely to advance religion, is the law unconstitutional? What if 13 of the 26 had that intent? What if 3 of the 26 had the impermissible intent, but 3 of the 25 voting against the bill were motivated by religious hostility or were simply attempting to "balance" the votes of their impermissibly motivated colleagues? Or is it possible that the intent of the bill's sponsor is alone enough to invalidate it—on a theory, perhaps, that even though everyone else's intent was pure, what they produced was the fruit of a forbidden tree?

Id. "Because there are no good answers to these questions," this Court has recognized from *Fletcher v. Peck*, 10 U.S. at 130 to *United States v. O'Brien,* 391 U.S. at 383–84, "that determining the subjective intent of legislators is a perilous enterprise." *Id.*

Indeed Chief Justice Marshall enumerated the perils of a subjective inquiry into motive more than 100 years before Justice Scalia:

> Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment? If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned.

Fletcher v. Peck, 10 U.S. at 130. Similarly in *O'Brien*, the Court said:

> What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.

O'Brien, 391 U.S at 384.

As Justice Scalia stated, the perils of trying to discern and apply legislative motivation affect not only judges who might reach the wrong conclusion, but also legislators. *Edwards*, 482 U.S. at 638-39. Lawmakers would "find that they must assess the validity of proposed legislation—and risk the condemnation of having voted for an unconstitutional measure—not on the basis of what the legislation contains, nor even on the basis of what they themselves intend, but on the basis of what others have in mind." *Id.* at 639. This is precisely the kind of legislative psychoanalysis that this Court has cautioned against. *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring).

The Ninth Circuit improperly embarked on the perilous journey of discerning legislative motive. This Court should halt that excursion and return it to the path of objective content neutrality.

B. Establishment Clause Precedent Shows That Relying Upon Motive Leads To Inconsistent Rulings And Leave Those Seeking To Follow The Law Without Reliable And Credible Direction On What Is Permitted.

The perils of utilizing legislative motive in free speech analysis are cogently illustrated in several Establishment Clause decisions where attempts to discern impermissible religious motives led to contradictory rulings that left legislators and judges hopelessly entangled in a web of confusion. Of particular note are cases addressing displays of the Ten Commandments in which identical historical document displays featuring the Decalogue were found to be both constitutional and unconstitutional within the same circuit, based upon a perception of impermissible legislative motive. *Compare ACLU of Ky. v. Grayson County*, 591 F.3d 837 (6th Cir. 2010) (upholding a Foundations of American Law and

Government display including the Decalogue), *ACLU of Ky v. Mercer County*, 432 F.3d 624 (6th Cir. 2005) (same), *ACLU of Ky. v. Rowan County*, 513 F. Supp. 2d 889, 897 (E.D. Ky. 2007) (same), *ACLU v. Garrard County* 517 F. Supp. 2d 925 (ED Ky 2007) (finding disputed facts regarding the purpose and effect of the Foundations Display), *ACLU v. Rutherford County,* 2006 WL 2645198 (M.D. Tenn. 2006) (denying a permanent injunction against the Foundations Display) *with ACLU of Ky. v. McCreary County*, 607 F.3d 439, 449 (6th Cir. 2010) (finding the identical display unconstitutional). Other circuit courts analyzing the identical display likewise reached conflicting conclusions. *See e.g., Books v. County of Elkhart,* 401 F.3d 857, 866 (7th Cir. 2005) (upholding a Foundations display).

The inconsistent rulings followed this Court's determination in *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 873-74 (2005), that a county's past decision to post a framed copy of the Decalogue in the courthouse evinced an improper religious motive that continued to "taint" the later integrated "Foundations" display. The Court eschewed a "once tainted always tainted" approach, stating that integrated historical displays which include the Ten Commandments can withstand Establishment Clause challenges. *Id.* at 874. However, the Court did not provide objective standards to determine when impermissible

religious motives would become irrelevant. *Id.* Absent those standards, the Sixth Circuit on remand concluded that the religious "taint" remained even after the passage of more than 10 years, a complete change in county personnel and new legislative resolutions affirming the historical purpose of the displays. *ACLU v. McCreary County*, 607 F.3d 439, 449 (6th Cir. 2010). However, other panels of the same circuit reviewing identical displays concluded that impermissible religious motivation was not present and the displays were constitutional. *Grayson County*, 591 F.3d at 853; *Mercer County*, 432 F.3d at 630. Similarly, the Seventh Circuit did not find impermissible religious motivation and concluded that an identical display in Indiana was constitutional. *Books*, 401 F.3d at 866.

Utilizing subjective review of legislative motive has yielded equally inconsistent results in Establishment Clause challenges of public Christmas displays, stand-alone Decalogue monuments and similar government acknowledgements of religion. Trying to discern whether such public displays are "tainted" with improper religious motives has led to fractured and inconsistent decisions. *Compare, Lynch v. Donnelly*, 465 U.S. 668 (1984) (finding a display of a crèche along with a Christmas tree, Santa house and other objects was constitutional), *with County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (a public display of a menorah and

Christmas tree outside a courthouse was constitutional, but a display of a crèche inside was not).

The confusion caused by subjective inquiry into legislative motive is perhaps best illustrated by the fact that on the same day that it declared an integrated historical display containing the Decalogue unconstitutional, this Court concluded that a stand-alone granite Ten Commandments monument was not infused with impermissible motive and therefore did not violate the Establishment Clause. *Van Orden v. Perry*, 545 U.S. 677 (2005). Circuit courts have found similar stand-alone monuments both constitutional and unconstitutional based upon differential views of the underlying legislative motive. *Compare ACLU Nebraska Foundation v. City of Plattsmouth*. 419 F.3d 772 (8th Cir. 2005) (en banc) (finding no impermissible motive), *Red River Freethinkers v. City of Fargo*, 2014 WL 4178341 at *3 (8th Cir. 2014) (Ten Commandments monument placed on City-owned land did not evince impermissible motive to violate Establishment Clause), *Card v. City of Everett*, 520 F.3d 1009 (9th Cir. 2008) (same) *with Green v. Haskell County Bd of Comm'rs,* 568 F.3d 784, (10th Cir. 2009), *reh'g en banc denied*, 574 F.3d 1235 (10th Cir. 2009) (finding a concrete Ten Commandments monument was infused with impermissible motive and thus unconstitutional). *See also,*

Twombly v. City of Fargo, 388 F.Supp. 2d 983, 986-990 (D. ND 2005) (applying *Van Orden* to validate a concrete Ten Commandments monument).

Public acknowledgements of religion, such as symbols on roadsides or on municipal property, have similarly been alternatively declared constitutional or unconstitutional depending upon the courts' determination regarding the presence of impermissible motive. *Compare Weinbaum v. City of Las Cruces*, 541 F. 3d 1017, 1033-1034 (10th Cir. 2008) (finding that the pictograph of three crosses, including one cross that was larger than the others on a city seal did not evince a "predominant religious purpose" because it related to the name of the city, Las Cruces, meaning, the crosses, which in turn, was reflective of secular historical events) *with Am. Atheists, Inc. v. Davenport,* 637 F.3d 1095 (10th Cir. 2010) (finding that roadside memorial crosses had effect of endorsing Christianity in violation of the Establishment Clause). As Justice Scalia has observed, the infusion of legislative motive into analysis of Establishment Clause challenges has led to "invited chaos" and created a "minefield" for legislatures trying to craft constitutionally valid statutes. *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 768 n.3 (1995). One Circuit Court judge has called the motive-laden Establishment Clause

jurisprudence "purgatory." *Mercer County* 432 F.3d at 636.

The Ninth Circuit's use of legislative motive (or absence thereof) to determine content neutrality threatens to create a similar minefield for free speech regulations. This Court should not let the "chaos" caused by the subjective inquiry into legislative motive in Establishment Clause jurisprudence to take hold in the free speech arena. This Court should overturn the Ninth Circuit's decision, and should confirm that the objective content neutrality analysis which has been in place since the founding of the Republic remains the standard for free speech challenges.

CONCLUSION

The Ninth Circuit's use of legislative motive to transform a content-based regulation into a content-neutral ordinance contradicts established precedent. It also opens a virtual Pandora's Box of confusion and chaos as exemplified in the fractured and inconsistent Establishment Clause rulings.

This Court should reject the Ninth Circuit's attempt to graft subjective inquiry into legislative motive on the objective content-

neutrality analysis utilized for free speech challenges.

September 2014.

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