

No. 13-502

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**In the Supreme Court of the United States**

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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.*

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

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**BRIEF AMICUS CURIAE OF THE CHRISTIAN LIFE  
COMMISSION OF THE MISSOURI BAPTIST  
CONVENTION SUPPORTING PETITIONERS**

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MICHAEL K. WHITEHEAD  
WHITEHEAD LAW FIRM, LLC  
1100 Main Street  
Suite 2600  
Kansas City, MO 64105  
(816) 876-2600  
mike@thewhiteheadfirm.com

JONATHAN R. WHITEHEAD  
*Counsel of Record*  
229 SE Douglas Street  
Suite 210  
Lee's Summit, MO 64063  
(816) 398-8305  
jon@whiteheadlawllc.com

*Counsel for Amicus Curiae*

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**INTEREST OF AMICUS CURIAE<sup>1</sup>**

*Amicus curiae* Missouri Baptist Convention Christian Life Commission (“CLC”) is the public policy entity of the Missouri Baptist Convention (“MBC”).

MBC is one of forty-two state Baptist conventions affiliated with the Southern Baptist Convention (“SBC”). The SBC is the nation’s largest Protestant denomination, with about 16 million members in over 46,000 autonomous local churches and church-type missions. The MBC is comprised of nearly 2000 local churches with about a half million members.

The MBC Christian Life Commission exists to help churches apply Christian principles to moral and public policy issues; and to communicate with lawmakers and courts about religious liberty and other policy issues in cooperation with the churches and other MBC and SBC entities. Don Hinkle, Director of Public Policy for the MBC, is the liaison with the CLC, with offices in Jefferson City, MO.

Dr. John Yeats is the Executive Director of the Missouri Baptist Convention. For over 17 years, he has been one of five elected officers of the Southern Baptist Convention and serves on its Executive Committee, with offices in Nashville, TN.

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<sup>1</sup> No counsel of a party authored this brief in whole or in part; nor did any person or entity, other than amicus or its counsel, make a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief under Sup. Ct. R. 37.3. Petitioners have filed a blanket consent letter with the Clerk, July 9, 2014. Respondents have consented by letter to this Amicus, September 21, 2014.

Southern Baptists in Missouri and elsewhere care about starting new churches, sometimes called “church planting.” The MBC is cooperating with most other state conventions and the SBC North American Mission Board (NAMB) in a major new initiative called “Send North America,” which has prioritized the planting of new evangelistic churches, especially in the unreached and underserved areas outside the South. NAMB and its partners are investing in church plants in 50 large cities, including the Phoenix area, where Petitioners are located.

An SBC Resolution adopted by thousands of SBC messengers meeting in Baltimore in June, 2014, affirmed NAMB’s renewed focus on church planting and “re-planting” in North America.<sup>2</sup>

Southern Baptists in Missouri and elsewhere care about religious liberty for all people. A section in the SBC statement of faith says: “God alone is Lord of the conscience....Church and state should be separate....A free church in a free state is the Christian ideal....In providing for such freedom no ecclesiastical group or denomination should be favored by the state more than others.”<sup>3</sup>

Baptists believe that God grants Religious Freedom as a fundamental human right, which government

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<sup>2</sup> SBC Resolution, 2014, On a Call for Church Revitalization, at Appendix B.

<sup>3</sup> Baptist Faith and Message (BFM), 2000, Article XVII, at Appendix A.



should recognize, as in our First Amendment.<sup>4</sup> Local sign ordinances that discriminate against churches, or favor some churches over others, violate the First Amendment. Southern Baptists are deeply interested in and will be affected by the outcome of this case.

Each local church, state convention and national entity is independent and autonomous. No one entity speaks for all Southern Baptists, but your *Amicus* is positioned to apprise this Court of concerns of Southern Baptists in Missouri and elsewhere, regarding official motions and resolutions adopted at SBC and MBC annual meetings<sup>5</sup> Leaders like those named above attend the SBC annual meetings as messengers from local churches, and participate in the actions adopted by the convention, and referred to herein.

Your *Amicus* submits this brief in support of Petitioners, and urges this Court to reverse the Ninth Circuit Court of Appeals.

### **SUMMARY OF THE ARGUMENT**

Bad laws cannot be saved by good intentions.

The Town of Gilbert's Sign Code makes confusing classifications based on the content of speech on the signs. Political and ideological signs receive more

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<sup>4</sup> SBC Resolution, 2013, On Violations of Religious Freedom and Assembly in the United States, at Appendix B.

<sup>5</sup> See Appendix A, Baptist Faith and Message, 2000, Articles VIII, XI and XVII; and Appendix B, SBC Resolutions, for the biblical basis and policy statements which, in part, guide MBC CLC communications to lawmakers and courts about the relevant public policies in this case.

favorable treatment than religious meeting signs.<sup>6</sup> An amended Code cosmetically reclassified religious assemblies as as mere “Qualifying event[s] by non-profits,”<sup>7</sup> and then proceeded to impose greater restrictions on them for sign display.

Qualifying event signs—such as church meeting signs-- are more limited in size, time of display, and number, even compared to other, noncommercial signs.<sup>8</sup> The Ninth Circuit would allow the disparate treatment, saying such religious meeting/non-profit event signs are not “core [free] speech.”<sup>9</sup> Further, since the court believed that such restrictions were not motivated by hostility or viewpoint bias, the sign code was deemed content-neutral.

Under this Court’s clear doctrine, the First Amendment requires government sign regulations to be objectively, facially content neutral, or else face strict scrutiny, regardless of good intentions by lawmakers. Bad laws cannot be saved by good intentions. And bad laws cannot be made better by increasing the number of persons being treated badly.

The Court below rests its analysis on the First Amendment’s Free Speech Clause, especially cases

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<sup>6</sup> *Reed v. Town of Gilbert, Az.*, 707 F.3d 1057, 1076 (2013). Hereafter, “*Reed II*”, to distinguish from the Ninth Circuit’s prior decision at 587 F.3d 966 (9th Cir. 2009 (“*Reed I*”).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1069.

concerning speech and commerce. Other First Amendment concerns are also implicated by a distorted definition of content neutrality. The objective test for content neutrality urged by Petitioners will have the added advantage of safeguarding the other First Amendment freedoms in the Free Exercise, Establishment and Assembly Clauses of concern to your Amicus.

### ARGUMENT

People communicating important messages often use signs. People directing others to important meetings often use signs. People regulating what they consider “sign clutter” are often tempted to regulate sign content as well.

The Town of Gilbert, AZ, has failed to resist this temptation. The 9th Circuit, in its first opinion below, said: “In an effort to promote a safe, harmonious and pleasant environment—and presumably to insulate itself from challenges under the First Amendment—Gilbert has adopted a sign ordinance that makes one’s head spin to figure out the bounds of its restrictions and exemptions.”<sup>10</sup>

Your Amicus, on behalf of many Southern Baptists, is tempted to shout: “Amen.”

Yet, in spite of this criticism of the confusing code, the Ninth Circuit panel majority makes other heads spin by declaring this content-based law to be content-neutral.

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<sup>10</sup> *Reed v. Town of Gilbert, Az.*, 587 F.3d 966 (9th Cir. 2009 (“*Reed I*”).

**I. The Ninth Circuit’s Test for Content Neutrality conflicts with this Court’s Free Speech precedents.**

The Town of Gilbert’s sign code expressly discriminates based on the content of signs, with three categories of speech:

1. “temporary sign[s] which support[] candidates for office or urge[s] action on any other matter on the ballot,” which can be up to 32 square feet in size,

2. “sign[s] communicating a message or ideas for noncommercial purposes” that are not related to a “qualifying event,” which can be up to 20 square feet in size, and

3. noncommercial signs that do relate to a “qualifying event” by a non-profit, which can only be up to 6 square feet in size.<sup>11</sup>

On its face, the Code is content-based, as this Court’s precedents have defined the concept, as Petitioners’ Brief well documents. See Pet. Op. Br. 22-43.<sup>12</sup>

Straining to save a bad law, the panel majority points to the Town’s good intentions. Surely the Town did not intend to discriminate against certain ideas, so the law must be content-neutral. Surely the Town did

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<sup>11</sup> Gilbert Land Development Code, Division 4, Article 4.4.

<sup>12</sup> Your Amicus fully endorses the legal arguments lodged by Petitioners in their briefs before this Court. We do not repeat them here, but focus on issues and arguments that specially concern Southern Baptists in Missouri and elsewhere.

not favor one viewpoint over another about religious / non-profit events, so the law must be viewpoint neutral. By incorporating good intentions into the test for content neutrality, the Ninth Circuit departs dangerously from this Court's precedents regarding Free Speech.

The Ninth Circuit panel majority has embraced a new definition of content neutrality which has split eight circuit courts of appeals in the ways set out in Petitioners' Pet. for Cert. 18.

This Court's doctrine, however, holds that content-based laws are presumptively unconstitutional, regardless of good intentions or viewpoint neutrality. Bad laws cannot be saved by good intentions.

In *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), this Court struck down speech restrictions that discriminated based on the content of publications. The government asserted its good intentions related to safety and aesthetics. *Id.* at 412-14. The Court noted there was no evidence that the city acted with any bad motive toward particular ideas in the newspapers, but nonetheless rejected the view that "discriminatory treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." *Id.* See also *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987), striking down a content-based sales tax exemption for "religious" and other journals, in spite of the lack of any evidence of bad intentions by state lawmakers. *Id.* at 228.

Justice Brennan noted in *McDaniel v. Paty*, 435 U.S. 618, 629 (1977), that the First Amendment does not “place religious discussion, association, or political participation in a status less preferred than rights of discussion, association, and political participation generally.... Of course, churches as much as secular bodies and private citizens have that right.”<sup>13</sup> *McDaniel*, of course, dealt with an attempt to separate religious occupations from political occupations, a folly similar to separating religious and political signage.

For all the reasons argued by the Petitioners in their Opening Brief, this Court should reverse the decision by the panel majority of the Ninth Circuit Court of Appeals.

But there are other concerns raised by this case which are also important to your Amicus. Without diverting attention from the threshold Free Speech issues above, your Amicus wishes to invite the Court’s attention to additional First Amendment concerns which would also be remedied by reversal of the Ninth Circuit decision. The objective test urged by Petitioners would also safeguard the other First Amendment freedoms of the Free Exercise, Establishment, and Assembly Clauses, as discussed below.

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<sup>13</sup> Emphasis added.

**II. The Ninth Circuit’s Test endangers Free Exercise rights by permitting discriminatory burdens to be imposed on “religious / non-profit event” signs.**

In the two opinions below, the Ninth Circuit gave short shrift to Petitioners’ arguments under the First Amendment’s Religion Clauses. The lower court noted a Free Exercise claim (and connected it to the Arizona Free Exercise of Religion Act),<sup>14</sup> but the lower court quickly concluded that Section 4.402(P) is “generally applicable,” and does not constitute a substantial burden on religious practice, *id.*, citing *Employment Div. Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-79, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990).

The lower Court failed to look at the ordinance at the correct levels of generality. Taking a step back, comparing Section 4.402(P) to sections of the same ordinance, one finds the Code raises Free Exercise concerns by burdening religious practice with more restrictions than are imposed on signs about “ideology” or “politics.”

Taking another step back, Gilbert’s entire Temporary Sign scheme raises Establishment Clause concerns about favoring certain kinds of religious groups over others. The Ninth Circuit erred when it concluded Gilbert met its burden to show the scheme was permissible under the Free Exercise and Establishment Clauses.

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<sup>14</sup> *Reed II*, 707 F.3d at 1076.

**A. Gilbert’s Code Words discriminate against religious assemblies.**

The Ninth Circuit decided that the Town of Gilbert’s Code posed no Free Exercise concerns on two grounds: first, it decided the language was generally applicable.<sup>15</sup> Second, it held that “Good News’s members may be obligated to spread their message and advertise their events, but there is no suggestion that Good News’s tenets require that they do so in any particular way.”<sup>16</sup> This analysis was faulty in both premises.

**1. Code Words were not generally applicable initially.**

First, the legislative history shows that the Code was not a generally applicable law. The Code was originally intended to apply *only* to religious assemblies. The Code words were “Religious Assembly Temporary Directional Signs.”<sup>17</sup> After Petitioners complained about the obvious intentional discrimination against religious groups, the Town changed the Code words in Section 4.402(P) to “noncommercial events” by religious and other non-profit organizations.<sup>18</sup> There is no evidence the intentions changed.

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<sup>15</sup> *Reed II*, 707 F.3d at 1076

<sup>16</sup> *Id.*

<sup>17</sup> *Reed I*, 587 F.3d at 966 n.3.

<sup>18</sup> *See id.*



Under the guidance of *Walz v. Tax Comm'n of the City of New York*<sup>19</sup> and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*<sup>20</sup>, it is insufficient to say that some other groups have now been included in a law which has formerly targeted religious worship practices. When considering laws like Gilbert's ordinance, "the Free Exercise Clause protects against governmental hostility which is masked, as well as overt. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz, supra*.

Like the ordinances targeting the Church of the Lukumi Babalu Aye,<sup>21</sup> Gilbert's Section 4.402(P) was admittedly created to target a particular religious practice.<sup>22</sup> Gilbert changed the Code words to include more noncommercial signs than just church signs, but church signs were still included. Unlike the tax law approved in *Walz*, Section 4.402(P) is not a broad, catch-all definition of noncommercial speech.<sup>23</sup>

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<sup>19</sup> *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 696, 90 S. Ct. 1409, 1425 (1970).

<sup>20</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 113 S. Ct. 2217, 2227 (1993).

<sup>21</sup> *Id.*

<sup>22</sup> *Reed I*, 587 F.3d at 966 n.3.

<sup>23</sup> *See Walz*, 397 U. S. at 697 ("the statute, by its terms, grants this exemption in furtherance of moral and intellectual diversity, and would appear not to omit any organization that could be reasonably thought to contribute to that goal.")

Further, *Lukumi* said that Free Exercise principles of general applicability are informed by equal protection cases.<sup>24</sup> “[T]he specific series of events leading to the enactment or official policy in question” is “relevant evidence” to Free Exercise claims.<sup>25</sup> Yet the Ninth Circuit waved away Good News’s hybrid Free Exercise / Equal Protection claim, calling it “basically a revision of its argument that Gilbert cannot treat different types of noncommercial speech differently....”<sup>26</sup>

**2. Initial Code Words show bad intentions to target religious assemblies.**

On the face of this record, a key Free Exercise / Equal Protection issue is that Gilbert’s initial targeting of religious services should deprive the ordinance of “rational basis” approval on summary judgment – even if the Town had later included some additional forms of non-commercial speech in Sec. 4.402(P). Gilbert’s ordinance cannot become generally applicable at Gilbert’s mere inclusion of more victims, even under the most lax reading of *Smith*.

Hence, the maxim: **Bad laws cannot be saved by good intentions.** And the corrolary: **Bad laws are not made better by increasing the number of people who are treated badly.**

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<sup>24</sup> *Lukumi*, 508 U.S. at 540, 113 S. Ct. at 2231 (1993).

<sup>25</sup> *Id.*

<sup>26</sup> *Reed II*, 707 F.3d at 1076-77.

**3. Current Code Words disfavor some religious worship events in practice.**

Gilbert's Qualifying Event Directional Signs are distinguished in the Code from "ideological" signs, merely by saying that ideological signs are those not tied to an event. Under Gilbert's scheme, "ideological" signs are less restricted in time and number.<sup>27</sup> However, the history of the case is that even signs without event time information were treated by Gilbert as event signs that fell under Section 4.402(P).<sup>28</sup>

Apart from whether the new Code words can be called "generally applicable," the Ninth Circuit's Free Exercise analysis fails to grapple with the fact that the Code, in effect, "disfavor[s] [Petitioners'] religion because of the religious ceremonies it commands...."<sup>29</sup> Where a scheme burdens a religious ceremony compared to other "ideological" activity, even *Smith* calls for further analysis of the government's interests and tailoring.<sup>30</sup>

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<sup>27</sup> *Reed II*, 707 F.3d at 1076-77.

<sup>28</sup> *Reed I*, 587 F.3d at 972 ("...a Code Compliance officer ... stat[ed] that signs were displayed outside of the hours allowed and did not include a date for the religious service. ... the Code Compliance Manager told Good News that there is no leniency under the Code...." [internal quotations omitted]).

<sup>29</sup> *Lukumi*, 508 U.S. at 532, 113 S. Ct. at 2226 (1993).

<sup>30</sup> *Employment Div. Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-79, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990).

The lower court tacitly questioned whether Good News’s interest in directing the public to a Sunday service through signs is really all that important to its religion. “Good News’s members may be obligated to spread their message and advertise their events, [but] there is no suggestion that Good News’s tenets require that they do so in any particular way.”<sup>31</sup>

Elsewhere, the lower court describes election speech on signs as “core” protected activity and individual “ideological” speech as core protected activity.<sup>32</sup> In other words, the court assumes that Good News’s act of directing the public to a religious meeting is not, at root, a religious expression, ideological speech, or a political act. Telling the public to “worship with us at the Senior Center on Sundays at 9 a.m.” is not, in this view, core First Amendment activity in the way that “Vote for Smith” is core political activity, or “Imagine there’s no Heaven” is core ideological speech. The act of directing the public is viewed as mere advertising or publicity of an event, not the core of religious worship.

**4. Worship Gathering is core to Christian faith, just as animal sacrifice was core to Likumi Church.**

The leading precedent concerning ordinances that restrict religious ceremony is, of course, the animal sacrifice ceremony of the *Church of Lukumi Babalu*

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<sup>31</sup> *Reed II*, 707 F.3d at 1076.

<sup>32</sup> *Id.*

*Aye*.<sup>33</sup> There, “neutral” language masked an ordinance that effectively stopped religious ceremonies of a particular group.

This Court recognized that, in operation, the ordinances “...disfavor [Petitioners’] religion because of the religious ceremonies it commands....”<sup>34</sup> The same pattern is present in Gilbert’s ordinances. Here, Gilbert’s exceptions allow ideological advertising about a group or position, so long as the advertising is not about a meeting or assembly. The Ninth Circuit blithely concludes that Good News’s directions to the worship assembly are nothing so core to its First Amendment religious expression as are the animal sacrifice ceremonies of Santeria.<sup>35</sup>

The Ninth Circuit misunderstands the role of public worship assemblies in the Christian faith. In a country where animal sacrifice is rare and strange, Sunday worship may seem too routine and normal to be central to the faith. But those services were an anomaly to an ancient world where animal sacrifice was the norm.

In fact, the writer of the New Testament book of Hebrews explicitly ties together sacrifice and worship services. Hebrews 8:1-10:18 is an extended discourse on the Christian gospel, the “good news” that Jesus Christ is a sacrifice for sin. It concludes in chapter 10, verse 18: “where [sins] have been forgiven, sacrifice for sin is no longer necessary.”

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<sup>33</sup> *Lukumi*, 508 U.S. at 532, 113 S. Ct. at 2226.

<sup>34</sup> *Id.*

<sup>35</sup> *Reed II*, 707 F.3d at 1076.

Starting in verse 19 of chapter 10, the writer suggests this gospel results in three responses by Christians: drawing near to God (v. 22), holding “unswervingly” to hope (v. 23), and corporate meetings to celebrate the good news: “let us consider how we may spur one another on toward love and good deeds, *not giving up meeting together, as some are in the habit of doing*, but encouraging one another...” (vv. 24-25) (emph. added).

The observance of services by Christians, then, is not just a “Qualifying Event” and not just a lecture. The acts of meeting and inviting are acts of religious worship.

#### **5. Baptists gather for worship on the Lord’s Day.**

Baptists, in particular, place great emphasis on this regular, corporate worship. The Southern Baptist Convention’s Statement of Faith, the “Baptist Faith and Message,” states in Article VIII, concerning the Lord’s Day: “The first day of the week is the Lord’s Day. It is a Christian institution for regular observance. It commemorates the resurrection of Christ from the dead and should include exercises of worship and spiritual devotion, both public and private. Activities on the Lord’s Day should be commensurate with the Christian’s conscience under the Lordship of Jesus Christ.” *See App. A.*

If some religions point to repeated, ongoing sacrifices as necessary for worship, such as Santeria, the Christian counterpoint is a regular weekly gathering to reflect on the sacrifice-to-end-all-

sacrifices.<sup>36</sup> The act of Christian corporate worship was (and is) a radical religious, political, and ideological expressive activity. Gilbert's restriction on invitation signs for worship services unequally burdens Good News's ability to freely exercise its religious faith, and thus is improper under the Free Exercise Clause.

**6. Baptists must invite  
“whosoever will” to gather for  
worship.**

Baptists, likewise, emphasize the duty to invite others to come hear the preaching of the Gospel. Baptist Faith and Message, Article XI, Evangelism and Missions, states: [i]t is the duty ... of every church of the Lord Jesus Christ to endeavor to make disciples of all nations.... It is the duty of every child of God to seek constantly to win the lost to Christ by verbal witness undergirded by a Christian lifestyle, and by other methods in harmony with the gospel of Christ.” See App. A.

Inviting “whosoever will” is not just advertising to join a club. It is a sacred duty, and an act of love, to use any and all means to invite others to come worship God through His Son, Jesus Christ.<sup>37</sup>

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<sup>36</sup> See Hebrews 10:10 (“By this will, we have been sanctified through the offering of the body of Jesus Christ once and for all.”)

<sup>37</sup> See Luke 14:23 (“And the lord said to the servant, ‘Go out into the highways and the hedges and compel them to come in, that my house may be filled.’”)

**7. Alternative methods of communication cannot justify or excuse content-based discrimination.**

The Ninth Circuit held that the Gilbert Sign Code was a content-neutral time, place and manner restriction on speech, and thus needed only to be narrowly tailored to advance a significant government interest while leaving ample alternate channels of communication.<sup>38</sup> This argument is reminiscent of the sole dissent in *Widmar v. Vincent*, 454 U.S. 263 (1981), which would have upheld a campus ban on a religious group’s worship meetings because there were alternative meeting places off-campus “about a block and a half” away.<sup>39</sup> Eight justices rejected the dissenting view, and found that the campus ban on religious worship was content-based, requiring strict scrutiny, and making unnecessary a review of alternatives off-campus. This Court should, similarly, reject any attempt to, *post hoc*, suggest that religious meetings have ample alternate channels for invitation and direction – a burden not imposed on other categories of sign users.

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<sup>38</sup> *Reed I*, 587 F.3d at 979, 980. Among the options listed by the court were: “distributing leaflets, sending email messages or mail advertisements, walking the sidewalks with signs advertising the church services, posting signs carrying religious messages on their own property, and advertising in the newspaper, phonebook or other print media.” *Id.*

<sup>39</sup> *Widmar v. Vincent*, 454 U.S. 263, 288, 102 S. Ct. 269, 284 (1981)(White, J., dissenting)



**B. Gilbert's Sign Code raises Establishment Clause concerns as it appears to favor larger religious groups.**

As noted above, when compared to other portions of the sign code, Gilbert's scheme raises Free Exercise Clause concerns. Taking an additional step back, the facts in this case raise concerns about whether the Town of Gilbert may have *preferred* certain religious groups or activities. Both lower courts failed to consider at all whether Gilbert's special restrictions operated to prefer well-established, affluent, and popular religious groups at the expense of small, new, or minority religious assemblies, of whatever faith.

**1. Congressional hearings found discrimination is well-disguised.**

The legislative history of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq.*, identifies an all-too-common form of religious discrimination by local government:

Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes .... Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or "not consistent with the city's land

use plan.” Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don’t generate enough traffic.... The hearing record contains much evidence that these forms of discrimination are very widespread.<sup>40</sup>

Gilbert’s sign code is not, *per se*, a “zoning ordinance,” or “land use” regulation. But from an Establishment Clause perspective, Gilbert’s Code attempts to zone Good News out of the Public Square, using a method of religious discrimination that Congress found to be commonplace. Good News is a small church, without a permanent facility; Good News is clearly not the church of Gilbert’s affluent elite. Gilbert’s justifications for its sign code include the same vague language about “traffic” or “aesthetics” that often masks a preference for a certain kind of religious group.

## **2. Southern Baptist small churches need signs for ministry.**

Southern Baptist churches are, predominately, small congregations. Of approximately 46,000 churches, over half the local congregations contain less than 300 members. While about 2% of SBC churches reach “megachurch” size of over 2000 members, most

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<sup>40</sup> 146 CONG. REC. S7774-5 (daily ed. July 27, 2000) (Joint Statement of Sen. Orrin Hatch and Sen. Edward Kennedy, *citing* Rep. of the House Committee on the Judiciary, H.R. REP. NO. 106-219, at 18-24). *See also* Douglas Laycock, *State RFRA’s and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 769-83 (1999).

congregations are small. Together, these big and small churches pool resources through the “Cooperative Program” budget, to coordinate ministry. This coordinated ministry includes disaster relief, education, and international missions, but also substantial efforts to “plant” new churches in the U.S. These church plants often start as small groups, without permanent facilities, focused on including people and places that are sometimes excluded elsewhere.

Some of these church planters report that signs are sometimes the best and only way to communicate with local marginalized groups. Mass-market advertising is often focused on the economically successful. The Gospel arrived with “good tidings of great joy, which shall be unto all people.” Luke 2:10. Thus, Baptists are sensitive to efforts by local government to exclude congregations that are new, small, or made up of the poor or powerless.

### **3. Town may have had bad intentions to disfavor small churches.**

Gilbert’s conduct suggests a possible *purpose* of burdening small, new, non-traditional religious groups. First, the original ordinance was directed solely at “Religious Assembly Temporary Directional Signs.”<sup>41</sup> This shows some preference for *permanent* signs, of the kind available to religious groups with land and money. Second, more recent revisions of the code show Gilbert trying to exclude Good News as an “out of town” group, as the location for services had moved just outside the

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<sup>41</sup> *Reed I*, 707 F.3d at 1076.

Gilbert city limits.<sup>42</sup> But right-of-way aesthetics and the safety of drivers travelling to services have *nothing* to do with whether Good News’s services are in the Town of Gilbert or merely nearby. The language and history of this Town’s ordinance would lead a reasonable observer to question whether the Town is, in fact, intentionally favoring a particular *kind* of religious group.

Obviously, it would be an impermissible violation of the Establishment Clause to prefer one kind of religious group over another. *Lukumi* says: “In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general.”<sup>43</sup> The Ninth Circuit’s most recent opinion purports to address the “First Amendment” concerns with Gilbert’s sign ordinance, but skips any establishment concerns.<sup>44</sup> In addressing the First Amendment concerns related to Gilbert’s sign ordinance scheme, the Ninth Circuit compounded its error by failing to consider whether the Code was an effort to prefer certain kinds of churches over others, in violation of the Establishment Clause.

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<sup>42</sup> *Id.* at 1081 n.2 (Watford, J., dissenting).

<sup>43</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 113 S. Ct. 2217, 2226 (1993).

<sup>44</sup> *Reed II*, 707 F.3d 1057, 1064 (9th Cir. 2013).

**III. The Ninth Circuit’s Test for Content Neutrality endangers Assembly Clause rights by protecting discrimination against certain meetings.**

The Ninth Circuit’s opinion also fails to mention the effect of the Code on the constitutionally protected activity of *assembly*.

Like speech and religion, the First Amendment guarantees the right to “peaceably assemble,” sometimes encompassed within the right to “associate.” While the legal analysis of assembly is similar to that of other First Amendment rights, it should have been an additional factor in the Ninth Circuit’s analysis that should have prevented “relaxed scrutiny” of the Code.<sup>45</sup>

Good News’s right to peaceably assemble is burdened by the Code. Good News says that when it reduces the number of its signs (due to Gilbert’s Code), the church observes a drop in attendance.<sup>46</sup> The purpose of directional signs, of course, cannot be separated from their role in coordinating the actual meeting; for example, a person aware of the church, but relying on a series of signs, may not be able to find the service. A restriction on directional signs is, in effect, a restriction on the ability of the group to assemble to operate its meeting.

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<sup>45</sup> *Id.*

<sup>46</sup> *Lukumi*, 508 U.S. at 532, 113 S. Ct. at 2226.

**CONCLUSION**

Bad laws cannot be saved by good intentions. For the foregoing reasons, your Amicus asks this Court to reverse the decision of the Ninth Circuit, to hold that the regulatory classifications Gilbert has drawn among different categories of non-commercial speech by non-profits are unconstitutional, and to remand the case to the district court for further proceedings consistent with this Court's decision.

Respectfully submitted,

JONATHAN R. WHITEHEAD

*Counsel of Record*

229 SE Douglas Street, Suite 210

Lee's Summit, Missouri 64063

(816) 398-8305

jon@whiteheadlawllc.com

MICHAEL K. WHITEHEAD

Whitehead Law Firm, LLC

1100 Main Street, Suite 2600

Kansas City, Missouri 64105

(816) 876-2600

mike@thewhiteheadfirm.com

Counsel for Amicus Curiae

MISSOURI BAPTIST CONVENTION

CHRISTIAN LIFE COMMISSION

## **APPENDIX**

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**APPENDIX A**

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**BAPTIST FAITH AND MESSAGE (2000)**

Article VIII. The Lord's Day

The first day of the week is the Lord's Day. **It is a Christian institution for regular observance.** It commemorates the resurrection of Christ from the dead and should include exercises of worship and spiritual devotion, both public and private. Activities on the Lord's Day should be commensurate with the Christian's conscience under the Lordship of Jesus Christ.

Exodus 20:8-11; Matthew 12:1-12; 28:1ff.; Mark 2:27-28; 16:1-7; Luke 24:1-3,33-36; John 4:21-24; 20:1,19-28; Acts 20:7; Romans 14:5-10; I Corinthians 16:1-2; Colossians 2:16; 3:16; Revelation 1:10.

Article XI. Evangelism and Missions

It is the duty and privilege of every follower of Christ and of every church of the Lord Jesus Christ to endeavor to make disciples of all nations. The new birth of man's spirit by God's Holy Spirit means the birth of love for others. Missionary effort on the part of all rests thus upon a spiritual necessity of the regenerate life, and is expressly and repeatedly commanded in the teachings of Christ. The Lord Jesus Christ has commanded the preaching of the gospel to all nations. It is the duty of every child of God to seek constantly to win the lost to Christ by verbal witness undergirded by a Christian lifestyle, and by other methods in harmony with the gospel of Christ.

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Genesis 12:1-3; Exodus 19:5-6; Isaiah 6:1-8; Matthew 9:37-38; 10:5-15; 13:18-30, 37-43; 16:19; 22:9-10; 24:14; 28:18-20; Luke 10:1-18; 24:46-53; John 14:11-12; 15:7-8,16; 17:15; 20:21; Acts 1:8; 2; 8:26-40; 10:42-48; 13:2-3; Romans 10:13-15; Ephesians 3:1-11; 1 Thessalonians 1:8; 2 Timothy 4:5; Hebrews 2:1-3; 11:39-12:2; 1 Peter 2:4-10; Revelation 22:17.

### Article XVII Religious Liberty

**God alone is Lord of the conscience**, and He has left it free from the doctrines and commandments of men which are contrary to His Word or not contained in it. **Church and state should be separate**. The state owes to every church protection and full freedom in the pursuit of its spiritual ends. **In providing for such freedom no ecclesiastical group or denomination should be favored by the state more than others**. Civil government being ordained of God, it is the duty of Christians to render loyal obedience thereto in all things not contrary to the revealed will of God. The church should not resort to the civil power to carry on its work. The gospel of Christ contemplates spiritual means alone for the pursuit of its ends. The state has no right to impose penalties for religious opinions of any kind. The state has no right to impose taxes for the support of any form of religion. A free church in a free state is the Christian ideal, and this implies the right of free and unhindered access to God on the part of all men, and the right to form and propagate opinions in the sphere of religion without interference by the civil power.

Genesis 1:27; 2:7; Matthew 6:67, 24; 16:26; 22:21; John 8:36; Acts 4:19-20; Romans 6:1-2; 13:17; Galatians

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5:1, 13; Philippians 3:20; 1 Timothy 2:1-2; James 4:12;  
1 Peter 2:12-17; 3:11-17; 4:12-19.

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**APPENDIX B**

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**RESOLUTIONS BY THE  
SOUTHERN BAPTIST CONVENTION**

SBC Resolution: On a Call for Church Revitalization,  
Baltimore, MD – 2014

[Complete resolution at: <http://www.sbc.net/resolutions/2243/on-a-call-for-church-revitalization>]

WHEREAS, The Southern Baptist Convention has adopted a focus of planting churches to impact the darkness in our world (Matthew 5:16; 28:18–20); and

WHEREAS, The North American Mission Board has reported that 70 to 75 percent of cooperating churches in the SBC have plateaued or are in decline; and

\* \* \*

NOW, THEREFORE, BE IT RESOLVED, That the messengers to the Southern Baptist Convention meeting in Baltimore, Maryland, June 10–11, 2014, recognize and affirm the mission of the North American Mission Board and all of our other SBC entities, working in cooperation with state conventions and local associations, to assist cooperating churches in church planting and church revitalization; ...

\* \* \*

App. 5

SBC Resolution: On Violations of Religious Freedom and Assembly in the United States, Houston, TX – 2013 (excerpts)

[Complete resolution at: <http://www.sbc.net/resolutions/1237/on-violations-of-religious-freedom-and-assembly-in-the-united-states>]

WHEREAS, God has granted religious freedom to humanity, even in matters of eternal significance (Genesis 2:16–17; Luke 13:34; Acts 4:19–21; 5:29; 17:16–34); and

WHEREAS, Religious freedom is an indispensable human right and an essential component of a free society; and

WHEREAS, Religious freedom by definition includes the freedom of the individual to live in accordance with his or her religiously-informed values and beliefs ... ; and

\* \* \*

WHEREAS, Religious freedom must include the freedom of assembly based on religiously-informed beliefs and is guaranteed by the First Amendment of the United States Constitution; and

WHEREAS, In deciding *NAACP v. Alabama*, 357 U.S. 449 (1958) the United States Supreme Court declared, “It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech”; and

## App. 6

WHEREAS, In order to retain their official standing as a campus organization, Christian and other religious groups on some prominent college and university campuses are being required to allow into membership and leadership individuals who do not affirm the moral and religious convictions of the organizations; and

WHEREAS, Some people of faith are being denied the right to operate their businesses in a manner consistent with their religiously-informed beliefs, especially with regard to their convictions about homosexuality, resulting in loss of status, income, and livelihood; and

WHEREAS, Some officials and municipalities have discriminated against constitutionally-protected religious activities in public housing, public schools, and other tax-supported spaces; and

WHEREAS, Despite the long and honorable tradition of respect for religious freedom within the ranks of the United States armed services, many members of the United States military are experiencing heightened levels of animosity and hostility because of their faith; and

WHEREAS, Chaplains in the United States military are growing increasingly concerned about their freedom to minister to America's servicemen and women according to the dictates of their faith without fear of reprisal or intimidation; and

WHEREAS, The federal government is denying the right of its citizens to exercise their religious freedom by its insistence that they provide in their employee healthcare plans for contraceptives and abortion-causing drugs and devices; now, therefore, be it

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RESOLVED, That the messengers to the Southern Baptist Convention meeting in Houston, Texas, June 11–12, 2013, express our gratitude for our God-granted religious freedom; and be it further

RESOLVED, That we call on college administrators to respect the right of students to freedom of association and stop requiring religious student groups to accept as members or select as leaders those who do not share their core religiously-informed beliefs; and be it further

\* \* \*

RESOLVED, That we call on the current administration to uphold the constitutional protections accorded people of faith to provide healthcare for their employees that is consistent with their core religious beliefs; and be it further

\* \* \*

RESOLVED, That we urge The Ethics and Religious Liberty Commission of the Southern Baptist Convention to continue its faithful defense and advocacy of the God-given and constitutionally-guaranteed rights of freedom of religion and assembly; ...

\* \* \*