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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

The question presented is:

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

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petitioner.[1]

PLF was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts, and represents the views of thousands of supporters nationwide. In furtherance of PLF's continuing mission to defend individual and economic liberties, the Foundation operates its Free Enterprise Project, that seeks, among other things, to ensure that all speakers enjoy the full protection of the First Amendment to the United States Constitution. To that end, PLF has participated in several cases before this Court and others on matters affecting the public interest, including issues related to the First Amendment. *See, e.g.*, *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010); *Wine & Spirits Retailers, Inc. v. Rhode Island and Providence Plantations*, 552 U.S. 889 (2007); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003); and *Fed. Election*

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Comm'n v. Beaumont, 539 U.S. 146 (2003). PLF attorneys also have published on the commercial speech doctrine. *See, e.g.*, Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205 (2004); Timothy Sandefur, *The Right to Earn a Living* (2010).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Town of Gilbert's Sign Code categorizes temporary signs and then restricts their size, duration, location, and other characteristics depending on the category into which each sign is placed. *Reed v. Town of Gilbert, Arizona*, 707 F.3d 1057, 1061 (9th Cir. 2013). Depending on whether the town categorizes signs as Political, Ideological, promoting a "Qualifying Event," or conveying messages from "Homeowners Associations," or about Real Estate, the Sign Code imposes vastly different size, duration, number, location, and other requirements within each content-based category. Under the Sign Code, Good News Community Church's temporary signs promoting church services receive far worse treatment than temporary signs promoting political, ideological, and various other messages. *Id.* The signs in all of these categories equally impact the town's interests in safety and aesthetics.

Given the categorizations of different types of speech (depending both on the speaker and on the message conveyed), the Sign Code on its face is content-based. Content-based regulations prohibit or compel speech on certain subjects or views; whereas content-neutral regulations are unrelated to the content of speech. *Ward v. Rock Against Racism*, 491

U.S. 781, 791 (1989); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) ("[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."). Yet based on the town's mere assertion that the Sign Code was meant to further safety and aesthetic goals, the Ninth Circuit held that this innocuous motive meant the Sign Code was content neutral, *id.* at 1069, and upheld it under the First Amendment, in conflict with other circuit courts.

Courts should consider legislative motive only when the plain language of a legislative act is unclear, and then only in the cause of *protecting* civil rights; if consideration of the purity or maliciousness of legislative motive cuts against individual liberty, it should be disregarded. *See John Donnelly & Sons v. Campbell*, 639 F.2d 6, 8 (1st Cir. 1980) ("[W]hen First Amendment freedoms are on one side of the scale, the balance must be struck by the courts, not by the legislators."). The Ninth Circuit erred in accepting the government's assurances when those assurances were contradicted by the plain language of the challenged legislation. The Sign Code facially distinguishes among types of speech and regulates them based on how the town categorizes the speech. This content-based discrimination should be reviewed under strict scrutiny and struck down.

This Court should reverse the decision below, and hold that content-neutrality is determined objectively by the law's language, regardless of the government's asserted motivation.

ARGUMENT

I

JUST AS AN OTHERWISE CONSTITUTIONAL STATUTE CANNOT BE STRUCK DOWN ON THE BASIS OF AN ALLEGED ILLICIT LEGISLATIVE MOTIVE, NEITHER CAN AN ALLEGED PURE MOTIVE SAVE AN UNCONSTITUTIONAL STATUTE

A. A "Pure" Motive Cannot Save Facially Unconstitutional Legislation

Because the First Amendment protects the right to speak freely, courts are especially suspicious of regulations that allow the government "to discriminate on the basis of the content of the message." *Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984); *Citizens United*, 130 S. Ct. at 882 ("Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints.") (citing *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000) (striking down content-based restriction). In short, the government may not "pick and choose." *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 55 (1983). As detailed in the Petition for Writ of Certiorari, the lower courts have differing approaches to deciding whether a particular regulation is content based or content neutral. Pet. Cert. at 19-27.

Many content-based regulations are adopted because the government agrees or disagrees with the message it conveys. *Turner Broadcasting System, Inc.*

v. F.C.C., 512 U.S. 622, 642-43 (1994) (citing *Ward v. Rock Against Racism*, 491 U.S. at 791). But this is not the only reason for a content-based statute. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. at 2665, 2666 (government argued that statute preventing pharmaceutical company marketing was "mere commercial regulation" or involved only "conduct, not speech"). To determine the purpose or justification of a regulation, courts primarily look at the plain language of the statute. *See Carey v. Brown*, 447 U.S. 455, 460-61 (1980) ("On its face, the Act accords preferential treatment to the expression of views on one particular subject."); *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

To be constitutional, an ordinance that implicates free speech rights must be predominantly concerned with eradicating the undesirable secondary effects of the speech activity, rather than silencing the speech itself. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). In assessing the predominate concern, the "courts must look only to the face of the regulation and the identifiable interest advanced to justify the regulation." *Wall Distributors, Inc. v. City of Newport News, Va.*, 782 F.2d 1165, 1170 (4th Cir. 1986). A government's asserted purpose for regulating speech is of limited utility in determining the constitutionality of the regulation, however. A content-based purpose is not necessary, though it may be sufficient in certain circumstances, to show that a regulation is content based. *Turner*, 512 U.S. at 642 (citing *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) ("'[I]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment'") (citation omitted)).

More importantly for this case, "[n]or will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Id.* (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-32 (1987); *Carey*, 447 U.S. at 464-69).

The subjective motivation of legislators is irrelevant. "Motive may be inferred and judged from circumstances, but is not very well capable of direct proof; a mere assertion, or even an assertion sustained by affidavit amounts generally to no more than an opinion." *Adams v. Bd. of County Comm'rs of Douglas County*, 1 F. Cas. 106, 109-10 (D. Kan. 1868). To the extent that a statute's interpretation turns on legislative intent, the courts' examination of such intent should be limited to the official legislative history, which does not include post-enactment opinions from legislators. *See Weinberger v. Rossi*, 456 U.S. 25, 35 n.15 (1982) ("[T]he contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history.").[2]

This Court strongly disfavors inquiries into legislators' motives for enacting statutes, even where the statute is allegedly aimed at the content of the plaintiff's speech. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977)

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[2] *See also Michelle Hug, Henstock, Inc. v. City of Omaha*, 275 Neb. 820, 825 (2008) ("One member of a legislature which passes a law is not competent to testify regarding the intent of the legislature in passing that law.") (quotation omitted); *McDowell v. Watson*, 59 Cal. App. 4th 1155, 1161 n.3 (1997) ("Generally, the motive or understanding of an individual legislator is not properly received as evidence of [the legislature's] collective intent, even if that legislator was the author of the bill in question.").

(questioning legislative motivation represents "substantial [judicial] intrusion into the workings of other branches of government"); *McCray v. United States*, 195 U.S. 27, 56 (1904) ("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."); *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (An otherwise constitutional statute will not be struck down "on the basis of an alleged illicit legislative motive.").

As a constitutional matter, and in the service of protecting individual liberty, this reluctance to inquire as to legislative motives must cut both ways. If courts will not invoke legislative motives as a reason to strike down legislation, *Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971), *O'Brien*, 391 U.S. at 383, neither may legislators offer their motives as a reason to uphold otherwise flawed legislation.

B. The State "Speaks" Through Official Acts, Not Subjective Motivations of State Employees or Elected Officials

The government "speaks" on matters of public policy through official acts—legislation, executive orders, and the like.[3] Courts determine legislative

[3] The government speaks through other official communications as well, and is bound by the language of those communications rather than post-hoc explanations about what the communications "really meant." In *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1372-73 (2012), property owners challenged a compliance order that demanded they cease and desist filling an area of disputed wetlands, upon grave penalties if they failed to do so. The EPA (continued...)

intent primarily by looking to the language of the enactment, and where the language is "reasonably intelligible and plain, it must be accepted without modification by resort to construction or conjecture." *Thompson v. United States*, 246 U.S. 547, 551 (1918); *Bluewater Network v. E.P.A.*, 370 F.3d 1, 13 (D.C. Cir. 2004) ("We begin our interpretation of the provision with the 'assumption that legislative purpose is expressed by the ordinary meaning of the words used.' ") (citations omitted). For example, all states retain sovereign immunity unless the state expressly waives that immunity. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999). Similarly, Congress must speak explicitly when it intends remedies to be exclusive. *Leist v. Simplot*, 638 F.2d 283, 313 (2d Cir. 1980) ("When as here Congress adds a new remedy . . . where other remedies had been clearly recognized, it would be expected to say so if it meant the new remedy to be exclusive."), *aff'd sub nom., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982).

Public policy is expressed through legislation. *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 357 (1931) ("Primarily it is for the lawmakers to determine the public policy of the state."). Public policy is not to be ascertained from general judicial considerations of supposed public interests; rather, "there must be found definite indications in the law of the sovereignty to justify the invalidation of a contract

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[3] (...continued)
argued that the letter was merely an invitation to engage in informal negotiations, but this Court held that the compliance order's language was firm and clear, and therefore final for the purpose of challenging it in court. *Id.*

as contrary to that policy." *Muschany v. United States*, 324 U.S. 49, 66 (1945); *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757, 766 (1983) (Public policy must be "explicit," "well defined," and "dominant."). *See also Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (declining to interpret the Age Discrimination in Employment Act of 1967 as covering state judges, and explaining that Congress will not be understood to have intruded upon "a decision of the most fundamental sort for a sovereign entity," implicating "the structure of [state] government," unless Congress says so in unmistakably clear language); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981) ("Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds.").

Once the Gilbert Town Council established its public policy in the form of the Sign Code (amended twice since the onset of this litigation to reflect the town's continuing goals to regulate speech), reviewing courts should have been limited to identifying that policy and whether the stated means of pursuing it comport with constitutional requirements.

II

IN OTHER CONSTITUTIONAL CONTEXTS, GOVERNMENT CANNOT DEMONSTRATE A COMPELLING STATE INTEREST UPON MERE ASSERTION OF A PURE OR INNOCENT MOTIVE

Beyond the First Amendment context, this Court and others have considered the role of government

motive in cases where plaintiffs assert constitutional rights that generally are reviewed with strict or heightened scrutiny. The Court here should require an objective assessment of the government's actions, as it does in the many other contexts described below, rather than simply giving the government the benefit of the doubt based on its self-interested say-so.

A. Due Process

Courts reviewing procedural due process claims are unwilling to consider subjective motivations as a reason to permit government action that results in a deprivation without notice and a hearing. For example, in *In re Houts*, 7 Wash. App. 476, 484 (1972), the state permanently took away the Houts' children after a hearing that included few safeguards for the Houts' constitutional rights. Among other things, the trial court hearing and meetings in chambers were held without the presence of Mr. and Mrs. Houts, *id.* at 480, their own attorney did not insist on a competency hearing, thus admitting that they were incompetent, *id.* at 483-84, and they were denied the opportunity to confront the witnesses against them. *Id.* at 480. The court acknowledged that it had "no doubt" that everyone involved in the process was "well motivated in following the procedure," but the court was emphatic that "good motives do not excuse the violation of the parents' constitutional right to a hearing when parents are sought to be permanently deprived of their children." *Id.* at 484. On an objective basis, the court held that "the hearing did not conform to due process requirements." *Id.*

Cases arising when prisoners allege unconstitutional treatment also demand objective evidence of the government's actions, and disregard

prison officials' subjective motivations, even when those motivations are benign (*e.g.*, quelling violence among inmates). *See Howard v. Grinage*, 82 F.3d 1343, 1352 (6th Cir. 1996) (finding, in the context of a deliberate indifference claim under § 1983, that "A prison official's motivation, or lack thereof, is simply irrelevant in a post-deprivation procedural due process case. If the conduct resulting in the deprivation [meets the objective standard for deliberate indifference, then] a constitutional violation results even if the decision to deprive was made with the best of motives"); *Franco v. Moreland*, 805 F.2d 798, 801 (8th Cir. 1986) (where prisoner challenged "administrative segregation," court rejected a jury instruction that permitted the segregation without a hearing if the corrections officer's actions were "laudable" or "justified," holding that "[n]either justification nor good motive is a defense when a liberty interest gives one a right to notice of charges and an opportunity to explain").

Substantive due process claims similarly must rest on objective government interests—not bare declarations of such interests. The government's mere assertion that a legitimate interest motivated its actions does not necessarily void an otherwise properly pleaded due process claim. For example, in *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998), this Court considered whether a high-speed police chase that resulted in the death of a passenger on the pursued vehicle violated the passenger's substantive due process rights. Despite the county's assertion that the pursuing officer was entitled to immunity, the passenger's survivors argued that the high-speed chase amounted to a constitutional violation because the officer's actions "were an abuse of executive power so clearly unjustified by any legitimate objective of law

enforcement." *Id.* at 840. In his concurring opinion, Justice Kennedy (joined by Justice O'Connor), emphasized the "objective character of our substantive due process analysis." *Id.* at 856. Justice Kennedy lamented that the phrase "shocks the conscience" has "the unfortunate connotation of a standard laden with subjective assessments," because " the test can be used to mark the beginning point in asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning." *Id.* at 857. And on the flip side, the Court must consider "an objective assessment of the necessities of law enforcement." *Id. See also id.* at 865 (Scalia, J., and Thomas, J., concurring in the judgment) (finding no violation, not because the county's actions were subjectively shocking, but because "respondents offer no textual or historical support for their alleged due process right.").

B. Race-based Decisionmaking

Race-based decisionmaking by the government is presumed unconstitutional, and may be permitted only in limited circumstances. This Court demands objective evidence of such needs. In *Ricci v. DeStefano*, 557 U.S. 557, 592 (2009), white firefighters who should have been promoted on the basis of their test scores sued the city of New Haven, Connecticut, under Title VII because the City promoted firefighters on racially discriminatory grounds. The city said it had to engage in the discriminatory treatment because it feared disparate impact liability lawsuits if it promoted based on test scores. This Court rejected the city's subjective fear, however, finding no objective evidence to support it. *Id.*

Although *Ricci* was a Title VII case, race-discrimination cases brought under the Fifth or Fourteenth Amendments command a similarly objective approach. The Constitution does not permit race-based government decisionmaking simply because a school district claims a remedial purpose and proceeds in good faith with arguably pure motives. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 741 (2007) ("Our cases clearly reject the argument that motives affect the strict scrutiny analysis."); *see also id.* at 751 (Thomas, J., concurring) ("The constitutional problems with government race-based decisionmaking are not diminished in the slightest by the presence or absence of an intent to oppress any race or by the real or asserted well-meaning motives for the race-based decisionmaking."). The *PICS* court relied on "clear" reasons for rejecting a motives test, namely, that the courts have a poor track record in identifying motives, and whether those motives are in fact benign. *Id.* at 742 (citing *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 609-10 (1990) (O'Connor, J., dissenting) (" '[B]enign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable."), and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) ("'[I]t may not always be clear that a so-called preference is in fact benign'" (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.)). *See also Grutter v. Bollinger*, 539 U.S. 306, 371 (2003) (Thomas, J., concurring in part and dissenting in part) (citation omitted).

In *Patrolmen's Benevolent Ass'n of City of New York v. City of New York*, 310 F.3d 43 (2d Cir. 2002), the Second Circuit reviewed the forced transfer of black police officers into a precinct for the purpose of quelling potential racial violence stemming from white officers' horrific assault on a black Haitian immigrant, Abner Louima. *Id.* at 48-49. The transferred officers claimed that their assignment was based on race, violating the Fourteenth Amendment. *Id.* at 52. The city's sole justification was that the transfers were required for "effective law enforcement." *Id.* The court held that the assignment of police officers to certain neighborhoods or tasks because of their race has been rightly held to run afoul of the Fourteenth Amendment. *Id.* (citing *Baker v. City of St. Petersburg*, 400 F.2d 294, 300 (5th Cir. 1968)). Thus, "[t]he mere assertion of an 'operational need' to make race-conscious employment decisions does not, however, give a police department *carte blanche* to dole out work assignments based on race" if it cannot establish an objective justification. *Id.*

Because the "operational need" defense to race-based employment actions is obviously susceptible to abuse, courts recognizing the defense require the government to demonstrate that it is "motivated by a truly powerful and worthy concern and that the racial measure . . . adopted is a plainly apt response to that concern." *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996); *Patrolmen's Benevolent Ass'n*, 310 F.3d at 52. The justification must be substantiated *by objective evidence*—mere speculation or conjecture is insufficient. *Id.* at 918-19. For example, in *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 213-14 (4th Cir. 1993), the Fourth Circuit rejected

the police chief's "opinion" based on significant experience and his "genuine desire" to help the police department "perform up to its highest potential" because "the dangers of relying on subjective evidence to support utilization of racial classifications in employment promotion decisions are apparent." Specifically, reliance on subjective evidence to permit "benign" race-conscious policies would allow others to "use this same rationale for a much less benign purpose." *Id.* at 214. *See also Hayworth v. City of Oakland*, 129 Cal. App. 3d 723, 732 (1982) (although the City may have complied with the trial court's order in good faith, and without discriminatory motivation, as a matter of law its actions discriminated generally against white firefighters in violation of their constitutional and statutory rights).

On a related note, allegations of race-based peremptory challenges to jurors must be based on objective evidence, rather than subjective motivations. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986), established the three-step framework for determining the constitutionality of these challenges: First, a defendant must establish a prima facie case of purposeful discrimination in the jury selection. To meet this requirement, he must show that (a) he is a member of a cognizable racial group; (b) the prosecutor exercised peremptory challenges to remove members of that racial group from the venire panel; and (c) all the relevant circumstances raise an inference that the prosecutor exercised the challenges on account of race. *Id*. Relevant circumstances may include a pattern of strikes against members of the racial group, as well as the types of questions the prosecutor asks in his or her *voir dire* examination. *Id*. at 97. The defendant also may rely on the fact that peremptory challenges

"constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *Id.* at 96 (quoting *Avery v. State of Georgia*, 345 U.S. 559, 562 (1953)). Second, if the defendant establishes a prima facie case, the burden shifts to the state to provide a race-neutral explanation for challenging the jurors in question. The explanation *must be more than the mere assertion of a nondiscriminatory motive*. *Batson*, 476 U.S. at 97-98 ("[T]he prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race."). Then, if the state provides an objectively plausible explanation, the court will decide whether the state engaged in purposeful discrimination. *Id.* at 98. *See also Miller-El v. Dretke*, 545 U.S. 231, 252 (2005) ("A *Batson* challenge does not call for a mere exercise in thinking up any rational basis.").

C. Search and Seizure.

Under the Fourth Amendment, a search or seizure without a warrant is presumed unreasonable and unconstitutional. *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (citation omitted). An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, "as long as the circumstances viewed objectively justify [the] action." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006) (citing *Scott v. United States*, 436 U.S. 128, 138 (1978) (emphasis added)).

The officer's subjective motivation is irrelevant. *See Bond v. United States*, 529 U.S. 334, 338 n.2 (2000)

("The parties properly agree that the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment . . . ; the issue is not his state of mind, but the objective effect of his actions."). Thus, in *Brigham City*, when police officers viewed a fight in progress inside a house, with one person having already sustained an injury and bleeding, that was objective evidence of the officers' response to provide "emergency aid" sufficient to justify the warrantless entry. The respondents' claim that the police were more motivated by making arrests than preventing further violence was irrelevant. 547 U.S. at 404-05. *See also Michigan v. Fisher*, 558 U.S. 45, 49 (2009) (reaffirming objective test). *Cf. U.S. v. Timmann*, 741 F.3d 1170, 1180-81 (11th Cir. 2013) (Court refused to invoke "emergency aid" exemption to warrant requirement where it was not *objectively* reasonable for the officers to believe anyone inside the apartment was in need of immediate aid.).

CONCLUSION

The Town of Gilbert's Sign Code facially categorizes an array of speech, allowing signs with favored speech greater visibility and duration than signs with less-favored speech. There was no need for any court to inquire as to legislative intent given the content-based discrimination evident from the plain language of the ordinance.

> [T]he judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the

> Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 844 (1978). Beyond just looking at intent in this case, though, the court below established a constitutional test based on the subjective motivations of legislators and then used that test to justify the infringement of the Petitioners' free speech rights.

The judgment of the Ninth Circuit should be reversed.

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Respectfully submitted,

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