No. 13-502

In The Supreme Court of the United States

CLYDE REED, ET AL.,

Petitioners,

v.

TOWN OF GILBERT, ARIZONA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF ROBERT WILSON, KELLY DICKINSON, JIM ROOS, KIM HOUGHTON, BILL MAIN, TONIA EDWARDS, CANDANCE KAGAN, MARY LACOSTE, JOYCELYN COLE, AND ANNETTE WATT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

The Institute for Justice is a nonprofit, public-interest law firm dedicated to defending the essential foundations of a free society, including freedom of speech and the free exchange of ideas. *Amici* are ten Institute for Justice clients who have challenged state and local laws that suppressed their speech under the First Amendment. Although four of these clients have challenged sign codes similar to the one at issue in this case – *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728 (8th Cir. 2011) (Jim Roos); *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359 (4th Cir. 2012) (Kim Houghton); *Central Radio Co. v. City of Norfolk*, No. 2:12-cv-00247, slip op. at 2, 10-11 (E.D. Va. May 15, 2013) (Robert Wilson and Kelly Dickinson) – all ten *amici* have had to litigate whether the laws restricting their speech should be viewed as content-based or content-neutral.[1]

Amici's experiences show how the Court's differing tests for whether a law is content-based have sown rampant confusion in lower courts. Under this Court's precedents, a law is content-based *either* (1) if it requires the government to look at the content of one's speech in determining whether or not it is subject to regulation, *or* (2) when the purpose behind

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[1] All parties have consented to the filing of this brief. *Amici* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

a facially neutral law is to disapprove or discourage messages on a certain subject matter or viewpoint. But in every case brought by *amici*, the government has argued that its facially discriminatory speech restriction was not content-based because it did not enact the law for censorial purposes. And when *amici*'s First Amendment challenges have failed, it is often because the reviewing court refrained from looking at the law's terms and instead focused only on the government's professed motives. It is *amici*'s hope that the breadth of their experiences will lead this Court to issue a comprehensive ruling that resolves this crucially important aspect of First Amendment doctrine.

SUMMARY OF ARGUMENT

"The distinction between content-based and content-neutral regulations of speech serves as the keystone of First Amendment law." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 443 (1996). But that distinction is now horribly muddled due to confusion caused by conflicting language in this Court's free-speech cases. Lower courts, in attempting to navigate that confusion, have profoundly weakened speech protections for a broad class of would-be speakers.

Traditionally, a law was content-based if officials had to inspect the actual message to determine how it could be regulated. *See, e.g.*, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95, 99 (1972) (holding law content-based because it required officials to scrutinize protest to determine if it involved a labor dispute); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (holding that sales-tax exemption for certain categories of publications was content-based despite "no evidence of an improper censorial motive"). But beginning with *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Court injected a second test that asked if the government enacted the law to squelch speech or to instead further some other non-speech related interest. The problem is that although legislative purpose is *one* way for courts to decide if a law is content-based, some lower courts began to treat it as the *only* way. As a result, those courts have held that facially discriminatory laws are subject to strict scrutiny only if they regulate speech for explicitly censorial reasons.

Amici are entrepreneurs and small business owners who have each challenged facially discriminatory speech restrictions. Government officials said that the murals and protest banners of *amici* Jim Roos, Kim Houghton, Bob Wilson, and Kelly Dickinson violated their jurisdictions' sign codes, although those codes would have allowed identically-sized signs that depicted something else. Although the Eighth Circuit held that the sign code in Roos' case was content-based, the Fourth Circuit held that a

functionally identical sign code used against Houghton was content-neutral because the government's professed purpose was maintaining traffic safety rather than suppressing speech.[2] Likewise, *amici* Tonia Edwards, Bill Main, Candance Kagan, Mary LaCoste, Joycelyn Cole, and Annette Watt are all tour guides who challenged laws that required them to get the government's permission to speak about their cities' historical landmarks, even though those laws would let them speak about other subjects with impunity. Although the D.C. Circuit struck down the law that Edwards and Main challenged, three weeks earlier the Fifth Circuit upheld a nearly identical New Orleans law after holding it was content-neutral since its purpose was to protect the city's tourism industry.

Amici's experiences show how some lower courts' exclusive focus on legislative purpose has gravely weakened First Amendment protections for a wide class of would-be speakers. Just as the problems caused by this exclusive focus have been manifestly broad, so too should be this Court's response. Rather than treating this case narrowly as one concerned only with "signs," the Court should take this

[2] The Eastern District of Virginia granted summary judgment to Norfolk against *amici* Wilson and Dickinson's challenge to the city's sign code, largely based on the Fourth Circuit's opinion in *amicus* Houghton's case. *Central Radio Co. v. City of Norfolk*, No. 2:12-cv-00247, slip op. at 2, 10-11 (E.D. Va. May 15, 2013). Their case is now on appeal to the Fourth Circuit.

opportunity to declare, in broad doctrinal terms, that a speech restriction is content-based if *either* its purpose is to suppress the communicative impact of one's speech *or* it requires officials to inspect a message's subject to decide how it should be regulated. By making clear that there are two tests to determine if a law is content-based, and that lower courts should apply them both whenever they analyze a speech restriction, this Court can ensure that the government cannot insulate itself from heightened scrutiny while picking and choosing what messages may be shared.

ARGUMENT

This case provides the Court with the opportunity to bring clarity to one of the most fundamental issues in First Amendment jurisprudence. The Court's traditional test for whether a law is content-based asks if the law's text treats speakers differently based on what they wish to say. *See, e.g.*, *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 536-37 (1980). But in language arising from the "secondary effects" doctrine – first developed to address regulations of adult-themed businesses – this Court has said that the "government's purpose [in enacting a speech regulation] is the controlling consideration." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). As a result, this Court has sometimes held that a law is content-neutral even if it explicitly treats certain subjects more harshly than others.

See, e.g., *Hill v. Colorado*, 530 U.S. 703, 720-25 (2000) (holding that law making it illegal to approach someone to engage in "protest, education, or counseling," but not to discuss other matters, is content-neutral).

Some lower courts have been confused by this Court's twin tests for determining whether a law is content-based. As a result, they have held that laws that facially discriminate based on what a would-be speaker wishes to say are content-neutral. This occurs not only when courts evaluate sign codes, as the Ninth Circuit Court of Appeals did in this case, but when courts analyze a vast range of restrictions on noncommercial speech, such as occupational-speech licensing, panhandling bans, and noise ordinances. The exclusive use of this purpose-based test often short-circuits the heavy scrutiny courts should employ in construing facially discriminatory speech restrictions. *See, e.g.*, *Brown v. Town of Cary*, 706 F.3d 294, 303 (4th Cir. 2013) (stating that "we have not hesitated to deem [a] regulation content neutral even if it facially differentiates between types of speech" in upholding sign code that restricted display of political protest sign but exempted "public art" from regulation).

Two years ago this Court reminded lower courts that it had two separate tests for whether a Fourth Amendment search had occurred. *United States v. Jones*, 132 S. Ct. 945, 950 (2012). This case provides the Court with an opportunity to do the same for the First Amendment. In Section I, *amici* explain the

history of this Court's First Amendment jurisprudence and how language from some of the Court's opinions has led some lower courts to view purpose as being the only touchstone for whether a law is content-based. In Section II, *amici* discuss the effect that the exclusive use of the purpose-based inquiry has had both in their own cases and throughout the First Amendment. Finally, in Section III, *amici* ask that the Court use this opportunity not just to correct an error in sign law, but to remind lower courts more generally that a law should be treated as content-based and therefore subject to strict scrutiny *either* (1) if it requires the government to look at the content of one's speech in determining whether or not it is subject to regulation, *or* (2) when the purpose behind a facially neutral law is to disapprove or discourage messages on a certain subject matter or viewpoint. Only this two-part inquiry will protect against the erosion of First Amendment rights that the exclusive invocation of *Ward*'s purpose-based inquiry has engendered.

I. The History Behind the Court's Fractured First Amendment Doctrine.

The Supreme Court's free-speech jurisprudence has shifted over the past century. Originally, the Court decided cases on an ad hoc basis, with the justices each making their own independent determinations about whether a speech restriction was constitutional. But over time, the Court crystallized

its analysis to make clear that a speech restriction is subject to strict scrutiny if it (1) requires the government to look at the content of one's speech in determining whether or not it is subject to regulation, or (2) has the manifest purpose of regulating speech for censorial reasons.

Until the middle of the twentieth century, the Supreme Court analyzed alleged free-speech violations on a case-by-case basis. In *Kovacs v. Cooper*, 336 U.S. 77, 78 (1949), for instance, the Court upheld a Trenton, New Jersey law that made it illegal "to play, use or operate . . . a sound truck, loud speaker or sound amplifier . . . which emits therefrom loud and raucous noises." The majority in *Kovacs* did not ask if Trenton's law was content-based or content-neutral; such terminology had not yet been developed. But the germ of the distinction was there: In upholding Trenton's law in *Kovacs*, the Court distinguished *Saia v. New York*, 334 U.S. 558 (1948), where it struck down a sound-truck ban that exempted "items of news and matters of public concern," out of concern that that law in *Saia* granted the government discretion to decide who may and may not speak. 336 U.S. at 82-83. *Kovacs* and *Saia* demonstrate that, even early on, the Court was concerned that laws exempting certain subject matters from an otherwise general prohibition give government officials power to decide

who can speak and are anathema to the First Amendment.[3]

But divining these themes through exegesis of this Court's decisions was imperfect at best. What was needed was for the Court to develop a cohesive rule of law, a theoretical framework to guide both lawmakers, would-be speakers, and inferior courts, which often struggled to apply the Court's free-speech decisions to new fact patterns. Thankfully, changes to the Court's First Amendment jurisprudence soon addressed these concerns.

A. The Traditional Approach: Laws That Turn on a Speaker's Message or Subject Matter Are Content-Based.

The unpredictability of this ad hoc approach led the Court to formalize its First Amendment jurisprudence. The Court's concern was that by enacting speech restrictions that exempted certain subjects or topics, government officials could interject themselves as censors. Thus, the Court's inquiry focused on whether a law's terms applied across the board or

[3] *See also Niemotko v. Maryland*, 340 U.S. 268 (1951) (invalidating disorderly-conduct convictions of Jehovah's Witness who spoke without first obtaining permit that official had discretion to approve or deny); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (reversing conviction of Jehovah's Witness for addressing a "religious meeting in any public park" where officials acknowledged allowing Catholics and Protestants to conduct religious services in park).

instead required officials to inspect speech to determine how it should be regulated. If a law treated some messages more harshly than others, the Court required a more probing review than for a law that did not differentiate based on subject matter.

The first major case to focus on subject-matter restrictions was *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), which concerned a Chicago ordinance that barred picketing within 150 feet of schools during the school day – except for picketing related to labor disputes. The Supreme Court found that the ordinance expressly "describes permissible picketing in terms of its subject matter" and therefore controlled the range of what could be discussed. *Id*. at 95. Content control, said the Court, was nothing more than "forbidden censorship" that, left unchecked, would "completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.'" *Id*. at 96 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Accordingly, the ordinance's content-based distinction could survive only if it was "tailored to serve a substantial government interest." *Id*. at 99.[4] Chicago had no

[4] Interestingly, the *Mosley* court's description of strict scrutiny comes from its equal-protection jurisprudence, which imposes different tiers of scrutiny based on whether the law accomplishes its objective by treating different racial or ethnic groups differently. Indeed, the Court's decision in *Mosley* technically rests upon the Equal Protection Clause. 408 U.S. at

(Continued on following page)

evidence that labor picketing was less likely to be disruptive than other forms of picketing, and the Court concluded that to accept such a claim based on broad generalities would leave "[f]reedom of expression . . . on a soft foundation indeed." *Id*. at 101. It therefore declared the city's content-based picketing ordinance unconstitutional. *Id*. at 102.

The Court refined this analysis in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), where it reviewed an ordinance banning nudity on drive-in theater screens. Distilling the lessons of *Mosley* and other cases, the Court explained that while the government may enact "reasonable time, place, and manner regulations applicable to all speech irrespective of content," the First Amendment strictly limits the government's power to act as a censor and shield "the public from some kinds of speech on the ground that they are more offensive than others." *Id*. at 209. The Court held that Jacksonville's law was content-based because it prevented "drive-in theaters from showing movies containing any nudity, however innocent or even educational." *Id*. at 211-12. Striking down the law, the Court concluded that while Jacksonville's purposes for the law were legitimate, even laudatory, *see id*. at 217, it could not pursue those legislative goals in a content-based manner. *Id*. at 212 (noting that Jacksonville's ban on nudity reached

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102 (holding that "under the Equal Protection Clause, [Chicago's picketing ordinance] may not stand").

farther than necessary to protect children and that adults could avoid nudity by averting their eyes).

Mosley, *Erznoznik*, and later cases make clear that content-based laws are constitutionally suspect and must survive heightened scrutiny (whether termed as "exacting," "careful," or "strict") even if the government's purpose in enacting the law was something other than censorship. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987), the Court said as much when it explained that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star*, 460 U.S. at 592. In both *Minneapolis Star* and *Arkansas Writers' Project*, this Court struck down use and sales taxes that applied only to certain publications based on their circulation or subject matter. No one claimed that the goal of the tax regimes was to silence certain disfavored speakers, but that did not matter, as the Court held that there was no need to adduce evidence of "an improper censorial motive." *Arkansas Writers' Project*, 481 U.S. at 228. All that mattered was that the laws burdened only certain speakers and, in the case of *Arkansas Writers' Project*, required government officials to "examine the content of the message that is conveyed" to decide if it could be taxed. *Id*. at 230 (internal citation omitted). That was enough for each law to be subject to strict scrutiny.

B. The *Renton* Approach: Laws That Are Adopted for Censorial Ends Are Content-Based.

At the same time that this Court formalized its traditional test for whether a law is content-based, it began to review First Amendment challenges to local zoning rules concerning adult businesses, including adult movie theaters and strip clubs. Under the traditional test laid out in *Mosley* and *Erznoznik*, these rules were clearly content-based in that they only applied to businesses that spoke on a particular subject.

But a plurality instead held that they were content-neutral under the newly developed "secondary effects" doctrine. In *Young v. American Mini Theatres*, 427 U.S. 50 (1976), the Court reviewed a Detroit ordinance prohibiting adult theaters from being within 1000 feet of any two other "regulated uses." *Id*. at 52. Whether a business was an adult theater turned on the types of films it showed. *Id*. at 53. Despite that, four justices held that the ordinance was not content-based. Rejecting *Mosley*'s statement that "[s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone," 408 U.S. at 95-96, the plurality said that "[t]his statement . . . read literally . . . would absolutely preclude any regulation of expressive activity predicated in whole or in part on the content of the communication." *Young*, 427 U.S. at 65. Because the four justices felt that the ordinance's purpose was to alleviate the secondary

effects that Detroit said surrounded adult theaters, rather than to suppress the theaters' speech, they held it to be constitutional. *Id*. at 70-71 & n.34.

Ten years later, the Court in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) embraced *Young* and the secondary-effects doctrine. Renton claimed that it passed its ordinance not to squelch speech, but to ameliorate certain undesirable side effects of that speech, and the Court concluded that it was content-neutral because it was "*justified* without reference to the content of the regulated speech." *Id*. at 48 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)). *Renton* was deeply divisive, both within the Court and with First Amendment scholars. In dissent, Justice Brennan argued that although theaters' secondary effects might be a reason to regulate them, a regulation's stated purpose cannot turn a content-based law into a content-neutral one. *Id*. at 56-57 (Brennan, J., dissenting). Brennan consoled himself that the doctrine had only been applied in the adult-zoning context, but commentators feared that if the secondary-effects doctrine spread, it potentially could redraw the Court's entire content-based/content-neutral framework and "gravely erode the First Amendment's protections." Laurence H. Tribe, *American Constitutional Law* § 12-19, at 952 (2d ed. 1988); *see also* Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 116 (1987) (stating that the secondary-effects doctrine "threatens to undermine

the very foundation of the content-based/content-neutral distinction").

The commentators' fears were well-founded. Barely two years after the Court decided *Renton*, the secondary-effects doctrine arose in a case having nothing to do with adult entertainment. In *Boos v. Barry*, 485 U.S. 312 (1988), for instance, a plurality cited *Renton* in implicitly accepting the validity of the secondary-effects doctrine outside the adult-entertainment context. In ruling against the District of Columbia, though, the plurality distinguished *Renton* on the grounds that the District said the law's purpose was "to shield diplomats from speech that offends their dignity," *id*. at 320, which focused upon the "direct impact that speech has on its listeners." *Id*. at 321. Although agreeing with the plurality's holding, Justice Brennan chided them for their attempt to divine legislative motive, noting that "future litigants are unlikely to be so bold or so forthright" as the District. *Id.* at 335 (Brennan, J., concurring in the judgment).

Two years later, in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Court inadvertently exacerbated the issue. By all accounts, the challenged rule in *Ward* – which required the use of city-provided sound equipment at concerts in Central Park – was content-neutral under *Mosley*'s traditional inquiry, as it applied regardless of what was being performed. *See* 491 U.S. at 792. But rather than apply that traditional test, the Court instead focused on legislative purpose, holding that "[t]he principal inquiry in

determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The *government's purpose* is the controlling consideration." *Id.* at 791 (internal citations omitted and emphasis added). *Ward* then cited *Renton* for the idea that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id*. Because the rule's purpose was to protect the tranquility of adjoining areas, the Court determined it was content-neutral. *Id*. at 792.

As Justice Marshall noted, *Ward* was "the first time [that] a majority of the Court applie[d] *Renton* analysis to a category of speech far afield from that decision's original limited focus." *Id*. at 804 n.1 (Marshall, J., dissenting). The dissenters in *Ward* feared that focusing on legislative purpose rather than a statute's plain language might "encourage widespread official censorship" by causing many facially discriminatory laws to be viewed as content-neutral. *Id*. Furthermore, some commentators noted that having two separate tests can cause confusion in lower courts, which increases the risk that courts will reach differing results in factually indistinguishable cases. *See* R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. Miami L. Rev. 333, 339 (2006) (noting that lower courts "have made little progress in sorting out the respective roles of an

examination of the text of the speech regulation and of broader-ranging attempts to ascertain legislative intent in distinguishing between [content-based] and [content-neutral] regulations") (footnotes omitted). As *amici* show below, this is more than a risk: this Court's fractured approach to content neutrality has led some lower courts to believe that only legislative purpose matters, and that facially discriminatory laws can be scrutinized as content-neutral so long as the courts believe they were enacted for non-censorial reasons. The result has been to create deep splits in many different areas of First Amendment law.

II. Exclusive Use of the *Renton* Approach by Some Lower Courts Has Led to Confusion and Deep Splits in a Wide Variety of First Amendment Areas.

Due to the doctrinal confusion that *Renton*, *Ward*, and later cases like *Hill v. Colorado*, 530 U.S. 703 (2000), have engendered, lower courts have been left without any clear guidance on how they should determine whether any particular law is content-based. Some courts now view legislative purpose as not just one way to determine if a law is content-based, but the *only* way. The Ninth Circuit's opinion in this case is just one example of this blinkered view of First Amendment jurisprudence; *amici* have lived through several others. This long-existing circuit split has had real world consequences on *amici*'s and others ability to protest government abuse, support themselves, and express their values.

A. As This Case Demonstrates, Federal and State Courts Are Split on Whether Sign Ordinances That Draw Subject-Matter Distinctions Are Content-Based.

Whether individuals can use signs to effectively protest or promote a worldview should not depend on their address. Yet the content-based confusion discussed above is most evident in sign-code litigation. The Ninth Circuit's opinion in this case exemplifies the deep split amongst federal and state courts on whether sign ordinances that provide exemptions or otherwise draw distinctions based on subject matter are content-based.[5] This has led to *amici* litigating

[5] On one side of the circuit split, the First, Second, Eighth, and Eleventh Circuits use this Court's traditional approach to the content-based inquiry. *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1263-64 (11th Cir. 2005); *Nat'l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 556-57 (2d Cir. 1990); *Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985). On the other side of the split are the Fourth, Sixth, and Seventh Circuits. They have held, based on this Court's statements in *Ward* and *Hill*, that an ordinance's exemptions for certain types of noncommercial signs will not render the sign code content-based so long as the government has proffered some content-neutral justification for the ordinance. *See, e.g.*, *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 623-25 (6th Cir. 2009); *Scadron v. City of Des Plaines*, 734 F. Supp. 1437, 1445-46 (N.D. Ill. 1990), *aff'd*, No. 91-1083, 1993 U.S. App. LEXIS 4694, at *4 (7th Cir. Mar. 8, 1993) (unreported). Meanwhile, the Third Circuit employs its own "significant relationship" test, which falls more in the *Ward* camp. *See, e.g.*, *Melrose, Inc. v. City of*

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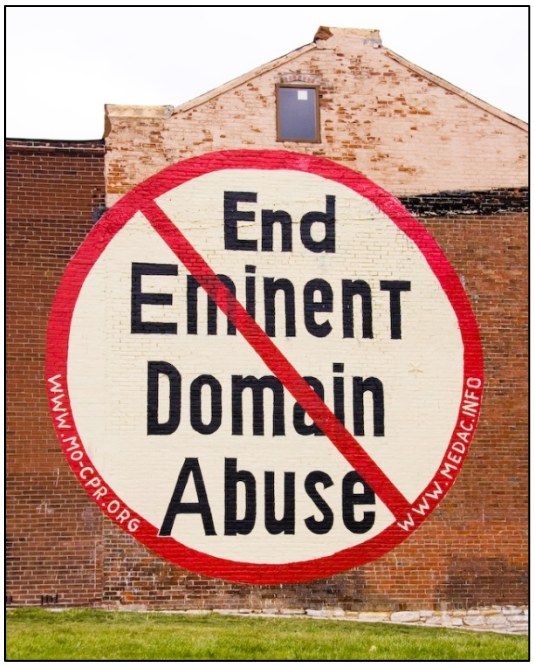
virtually identical sign-code disputes with vastly different results, depending on the jurisdiction.

Amicus Jim Roos was desperate to save his St. Louis-based non-profit, affordable housing organization, Sanctuary in the Ordinary, from eminent-domain abuse. The city had already seized several of Sanctuary's buildings for redevelopment, forcing dozens of Roos' needy clients out of their homes.[6] Now, it was coming for another one. Roos fought back by painting a prominent mural on the threatened building that said "End Eminent Domain Abuse."

Pittsburgh, 613 F.3d 380, 388-89 (3d Cir. 2010) (citing *Rappa v. New Castle Cnty.*, 18 F.3d 1083 (3d Cir. 1994)).

Not surprisingly, the fractured circuits have also affected the state courts. Courts in Georgia, Minnesota, New Jersey, Ohio, and Washington have followed the traditional approach. *Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc.*, 467 S.E.2d 875, 882 (Ga. 1996); *Goward v. City of Minneapolis*, 456 N.W.2d 460, 465 (Minn. Ct. App. 1990); *State v. DeAngelo*, 963 A.2d 1200, 1205-06 (N.J. 2009); *City of Tipp City v. Dakin*, 929 N.E.2d 484, 499 (Ohio Ct. App. 2010); *Collier v. City of Tacoma*, 854 P.2d 1046, 1053 (Wash. 1993). Courts in Michigan and Texas are on the opposing side. *Sackllah Invs., LLC v. Charter Twp. of Northville*, No. 293709, 2011 Mich. App. LEXIS 1452 (Mich. Ct. App. Aug. 9, 2011); *Tex. DOT v. Barber*, 111 S.W.3d 86, 94 (Tex. 2003).

[6] *See, e.g.*, Robert Patrick, *U.S. Supreme Court declines to review St. Louis eminent domain sign case*, St. Louis Post-Dispatch (Feb. 21, 2012), *available at* http://www.stltoday.com/news/local/metro/u-s-supreme-court-declines-to-review-st-louis-eminent/article_b14cd8e2-5ca7-11e1-9d22-001a4bcf6878.html.



Amicus Jim Roos' protest mural

The city immediately threatened Roos with fines, declaring the mural to be a "sign" under the law and then declaring that sign to be "illegal" because it lacked a permit and was too large under the zoning code. *Neighborhood Enterprises, Inc. v. City of St. Louis,* 644 F.3d 728, 731-32 (8th Cir. 2011). But had the mural instead depicted a "[n]ational, state, religious, fraternal, professional and civic symbol[ ] or crest[ ]," *id*. at 737 (internal citation omitted), the city would have exempted it from its definition of sign – and thus, from any regulation whatsoever. Roos argued that this disparate treatment rendered St. Louis' sign code content-based and, after years of litigation, he prevailed when the Eighth Circuit held

that the "zoning code's definition of 'sign' was impermissibly content-based because the message conveyed determines whether the speech is subject to the restriction." *Id.* (internal punctuation omitted).[7] Roos is still using his mural to fight the city's eminent-domain practices today.

Eight-hundred miles away, *amicus* Kim Houghton's mural did not share the same fate. Houghton is an entrepreneur who decided to leave her job at the Washington Post to open Wag More Dogs, a canine daycare, boarding, and grooming business in Arlington, Virginia. For Wag More Dogs' grand opening, Houghton painted the side of her building, which abutted the Shirlington dog park, with a whimsical mural of dogs, bones, and paw prints. But Arlington County considered the mural to be an oversized "sign," threatening Houghton with steep fines and prohibiting her from opening her business until she covered the mural with a tarp. Although the county's

[7] The Eighth Circuit's decision in *Neighborhood Enterprises* echoes earlier decisions from the First, Second, and Eleventh Circuits. *See Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985) (holding sign code to be content-based when it forbade political signs but permitted signs erected for charitable or religious causes); *Nat'l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 556-57 (2d Cir. 1990) (holding that ordinance's exemption for signs "identifying a grand opening, parade, festival, fund drive or similar occasion" rendered it content-based); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1263-64 (11th Cir. 2005) (concluding that sign code which exempted government flags and insignia of government, religious, charitable and fraternal organizations from regulation to be content-based).

sign code exempted "works of art" from the definition of sign – and thus, again, from any permitting requirement or size limits – the county zoning commissioner announced that the mural was not "art" because its subject matter was related to her business. *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 363, 368 (4th Cir. 2012). Houghton sued, arguing in part that the "work of art" and other exemptions in the county's code rendered it content-based.

The Eastern District of Virginia dismissed Houghton's case, and the Fourth Circuit affirmed that dismissal. In so ruling, the Fourth Circuit stated that "a regulation [must] do more than merely differentiate based on content to qualify as content based." *Id.* at 365. Because the purpose for the county's sign code was traffic safety and aesthetics, the court held that it was content-neutral despite treating murals differently depending on what they depicted. After her loss, Houghton painted over the playing dogs with colorful birds lounging under a sunset. Despite being the exact same size and in the same exact location as the original mural, the new mural is legal under the code's art exemption because it shows birds instead of dogs.

Amicus Kim Houghton's original mural (illegal)

Amicus Kim Houghton's current mural (legal)

On the other side of the state, *amici* Bob Wilson and Kelly Dickinson are still fighting for the right to use their own property to protest eminent-domain abuse. Wilson and Dickinson are owners and officers of Central Radio Company, Inc., an 80-year-old family business based in Norfolk that services the Navy and other government agencies. In almost identical facts to *Neighborhood Enterprises,* a Norfolk agency wanted to seize Central Radio's property via eminent domain in order to build retail shops near Old Dominion University. *Central Radio Co. v. City of Norfolk*, No. 2:12-cv-00247, slip op. at 2, 10-11 (E.D. Va. May 15, 2013).

Wilson and Dickinson fought the condemnation in state court and hung a protest banner to tell the public what the city was trying to do to them. The banner attracted intense support from the community – and the ire of the Old Dominion University's Real Estate Foundation, the party who would benefit from the taking. Only days after the banner was unveiled, a University official complained to the city,[8] and the

[8] The specter of selective enforcement is often present in sign disputes, as facially-discriminatory sign codes make it easier for government officials and politicians to try to silence opposition. In *Neighborhood Enterprises*, for example, the same alderman who introduced the ordinance authorizing eminent domain against Sanctuary's property wrote a letter to the Board of Adjustment urging it to uphold the denial of Sanctuary's sign permit for the protest mural. Brief of Plaintiffs for Summary Judgment at 3, *Neighborhood Enterprises, Inc. v. City of St. Louis*, No. 4:07-cv-01546 (E.D. Mo. Mar. 16, 2009). And in *Wagner v. City of Garfield Heights*, a city cited a homeowner's lawn sign

(Continued on following page)

city cited *amici* for the banner being too large under the sign code. *Id.* at 2-5. Facing thousands of dollars in fines, Wilson and Dickinson were forced to cover the banner, which silenced them at a critical time during their struggle in state court.[9] Had the banner instead depicted a work of art or the "flag or emblem of any national, organization of nations, state, city, or any religious organization," *id.* at 2, 10-11, however, it would have been exempt from regulation.

Amici Bob Wilson and Kelly Dickinson's protest banner, before Norfolk forced them to cover it with a tarp.

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that criticized a city councilmember after the councilmember complained to the mayor and the city's building commissioner. No. 13-3474, 2014 U.S. App. LEXIS 15984, at *4-5 (6th Cir. Aug. 19, 2014). Sign-code precedent is packed with such examples.

[9] The Virginia Supreme Court subsequently found that Norfolk's attempted taking of the property violated state law. *PKO Ventures, LLC v. Norfolk Redev. & Hous. Auth.*, 747 S.E.2d 826 (Va. 2013).

Despite that, the district court ruled against Wilson and Dickinson and upheld the sign code. Citing to *Ward* and *Hill*, the court held that the sign code was not content-based because "the general purpose of the Sign Code is to promote traffic safety and aesthetics" and its preference for government and religious flags reasonably related to those purposes because the court felt that flags, emblems, and artwork were more aesthetically pleasing and were less likely to distract drivers. *Id.* at 8, 10-11. The case is now on appeal before the Fourth Circuit.

B. The Misapplication of Established First Amendment Doctrine Has Created Confusion in Other Areas.

The content-based confusion affects more than just sign codes. It has bled into several other areas under the First Amendment, including new topics like occupational speech and long-litigated areas like bans on panhandling and noise ordinances.

1. Occupational Speech

Although occupational speech is a cutting-edge area under the First Amendment, it is already suffering from the same problems that sign-code litigation has been suffering from for years. This Court has held that "[g]enerally, speakers need not obtain a license to speak," *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 802 (1988), but many jurisdictions impose licensing requirements on occupations that consist

largely of speaking, such as interior designers, dieticians, therapists, instructors, and tour guides. These licensing requirements are often triggered solely by speech of a particular content, which under this Court's traditional test should make them content-based. *See, e.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (holding that ban on providing legal advice to designated foreign terrorists on how to address their grievances non-violently "regulates speech on the basis of its content"). Nevertheless, in part due to the confusion caused by this Court's differing tests for determining whether a law is content-based or content-neutral, lower courts have struggled to determine what level of First Amendment scrutiny such laws should receive.

Amici Candance Kagan and Mary Lacoste have been caught up in this struggle. Both retired, these women spend their time giving history and ghost tours of New Orleans – but every time they do so, they risk five months in jail. That is because the city requires that anyone describing city history or points of interest for compensation must be licensed, which requires applicants to pass a history exam, drug test, and a criminal background check every two years. *Kagan v. City of New Orleans*, 753 F.3d 560, 561 (5th Cir. 2014). *Amici* object to this license requirement, and their case has already spent years and dozens of pages arguing whether the city's facially discriminatory law should be construed as content-based.

Despite the fact that the law burdens only speech on certain topics, both the district court and the Fifth

Circuit held the license requirement was a valid content-neutral restriction. Yet they could not agree on a reason: The district court was in lock-step with the *Ward* camp, finding that "while the licensing scheme does, in operation, 'refer[ ] to the content of expression' . . . it clearly was not enacted to suppress 'expression due to a disagreement with the message conveyed or a concern over the message's direct effect on those who are exposed to it.'" *Kagan v. City of New Orleans*, 957 F. Supp. 2d 774, 778 (E.D. La. 2013) (internal citation omitted). The Fifth Circuit affirmed that the license requirement was content-neutral, but merely reasoned that once a license was obtained, "[t]hose who have the license can speak as they please." *Kagan*, 753 F.3d at 562.

Amici Tonia Edwards and Bill Main challenged an almost identical license requirement for tour guides in D.C. Three weeks after the Fifth Circuit opinion, the D.C. Circuit found the license requirement was unconstitutional. *Edwards v. District of Columbia*, 755 F.3d 996, 1001-02 (D.C. Cir. 2014). After extensive briefing on whether the district's tour-guide licensing law was content-based, the D.C. Circuit avoided taking sides on this thorny issue, instead deciding that the regulation could not survive even intermediate scrutiny because the District had provided no evidence that licensing tour guides furthered any of its goals. *Id.* at 1009.

2. Panhandling Bans

Meanwhile, federal and state courts are all over the map on whether laws banning begging are content-based. The Seventh Circuit discussed this confusion at length before rejecting a challenge to an Indianapolis ordinance severely limiting begging in public places, but allowing all other forms of public solicitation. *Gresham v. Peterson*, 225 F.3d 899, 901 (7th Cir. 2000). The Seventh Circuit went out of its way to point out that "[c]olorable arguments could be made both for and against" the ordinance being content-neutral. *Id*. at 905. On the one hand, this Court's decision in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), suggested that the law was content-based under this Court's traditional approach because "[o]nly by determining the specific content of a solicitor's speech could authorities determine whether they violated the ordinance." *Id.* But on the other hand, the Seventh Circuit recognized that the purpose-based test derived from *Ward* and *Hill* suggested that the ordinance was content-neutral because the government had a neutral justification for the restriction. *Id*. at 905-06. Rather than correctly applying both tests, the Seventh Circuit avoided the topic entirely by relying on the fact that the parties had (oddly) conceded the ordinance was content-neutral. *Id.* at 906; *see also State v. Boehler*, 262 P.3d 637, 642-43 (Ariz. Ct. App. 2011) (outlining circuit split on this issue, where at least four courts have found similar ordinances content-based while two have found them to be content-neutral).

3. Noise Ordinances

Case law regarding noise ordinances is also a victim of the split. Many jurisdictions limit the amount of noise that can emanate from various fixed and mobile sources, including vehicles. Although blanket restrictions would be content-neutral, *see Kovacs v. Cooper*, 336 U.S. 77 (1949), some jurisdictions exempt certain noises from regulation depending on either their message or who is speaking.

Due to the muddled nature of the content-neutral/content-based jurisprudence, courts addressing challenges to these exemptions cannot agree whether they are content-based. *Compare State v. Catalano*, 104 So. 3d 1069 (Fla. 2012) (concluding law forbidding vehicles from emitting sounds that could be heard 25 feet away, but which exempted motor vehicles used for business or political purposes, was content-based), *and People v. Jones*, 721 N.E.2d 546, 552 (Ill. 1999) (concluding state sound amplification statute was content-based when it exempted advertising and thus "expressly prohibits some speech and allows other speech based upon the nature of the message being broadcast"), *with State v. Brownfield*, No. CA2012-03-065, 2013-Ohio-1947 (Ohio Ct. App. May 13, 2013) (holding sound ordinance content-neutral despite exempting ice-cream trucks because exemption's purpose was for safety, not message suppression).

III. To End This Widespread Confusion, the Court Should Make Clear That There Are Two Tests for Determining Whether a Law Is Content-Based and That Courts Must Apply Them Both When Analyzing Speech Restrictions.

The conflicts that *amici* have identified have arisen because lower courts mistakenly believe that *Ward*'s purpose-based inquiry is in fact the only inquiry they must undertake. But recent precedents make clear that this Court continues to categorize laws that turn on the content of one's speech as content-based irrespective of whether they were passed for censorial reasons. *Humanitarian Law Project*, 561 U.S. at 27; *United States v. Stevens*, 559 U.S. 460, 468 (2010) (holding that law's terms rendered it content-based). This Court should remind lower courts of its statement in *Turner Broadcasting System, Inc. v. FCC* that "while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content-based, it is not necessary to such a showing in all cases. Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." 512 U.S. 622, 642-43 (1994) (citations omitted).

Two years ago, this Court in *United States v. Jones*, 132 S. Ct. 945 (2012), resolved a similar problem with respect to Fourth Amendment precedent. Traditionally, the government committed a search for

Fourth Amendment purposes when it trespassed to gather information. *See Kyllo v. United States*, 533 U.S. 27, 31 (2001) (discussing property-rights focus of early Fourth Amendment case law). But as technology improved, so did the government's ability to conduct surveillance without physically intruding on one's property. In response, the Court in *Katz v. United States* explained that even when the government committed no trespass, it conducted a search for Fourth Amendment purposes if it infringed on one's "reasonable expectation of privacy." 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

The *Katz* reasonable expectation of privacy test quickly became the centerpiece of Fourth Amendment jurisprudence, but it was not without its faults. Most importantly, to the extent a person lacked a reasonable expectation of privacy, *Katz* permitted the government to search without constitutional consequence. *See United States v. Knotts*, 460 U.S. 276, 281-82 (1983) (holding that monitoring vehicle's movements on public roads was not a search). This was particularly problematic when construing the warrantless placement of GPS tracking devices, which allowed police to know the constant whereabouts of a vehicle for an extended period of time. Some lower courts invoked a modified version of *Katz* that looked at the overall "mosaic" that long-term GPS monitoring painted, *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), but most held that no Fourth Amendment search had occurred. *See, e.g.*,

United States v. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010).

The majority in *Jones* resolved this problem by reminding lower courts that *Katz* was not the sole test for whether a search had occurred. 132 S. Ct. at 952. Stating that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test," *id*., the Court explained that the government committed a search for Fourth Amendment purposes either when it (1) physically invaded one's property for the purpose of acquiring information, *id*. at 949, or (2) infringed on one's reasonable expectation of privacy. *Id*. at 950. Finding that the former had occurred in Jones' case, the Court held that admitting the evidence that the government had collected violated the Fourth Amendment. *Id*. at 954.

This Court should do for the First Amendment what it did in *Jones* for the Fourth Amendment. *Ward*'s inquiry into legislative purpose was "added to, not substituted for" this Court's traditional test, and speech restrictions are content-based *either* when (1) the law requires the government to look at the content of one's speech in determining whether or not it is subject to regulation, *or* (2) it is motivated by antipathy toward a particular subject matter or viewpoint. By reminding lower courts that both tests are valid and that they should employ them both whenever scrutinizing a speech restriction, this Court

can protect First Amendment rights and ensure that laws that turn on the content of one's speech are judged under the proper standard.

CONCLUSION

More than twenty years ago, this Court added to its traditional test for whether a law is content-based when it said that the government's purpose also matters and that a facially neutral law is subject to strict scrutiny if "the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. But many lower courts now erringly view *Ward* as the sole test for content neutrality, and subject facially discriminatory laws only to the relatively lax standards meant for time, place, and manner restrictions. As *amici* have demonstrated, this has occurred not only in the sign context, but throughout the First Amendment, and it has led to speakers not receiving the full speech protections they are due. To correct this legal misstep, the Court should take this opportunity to make clear that a law should be treated as content-based and therefore subject to strict scrutiny *either* (1) if it requires the government to look at the content of one's speech in determining whether or not it is subject to regulation, *or* (2) when its purpose is to censor messages with certain subject matters or viewpoints. Only by consistently employing both of these tests can the courts protect against the erosion

of First Amendment rights that the exclusive invocation of *Ward*'s purpose-based inquiry has engendered.

Respectfully submitted,

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