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

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* OF PROFESSORS ASHUTOSH BHAGWAT, ERIC FREEDMAN, RICHARD GARNETT, SETH KREIMER, NADINE STROSSEN, WILLIAM VAN ALSTYNE, AND JAMES WEINSTEIN IN SUPPORT OF PETITIONERS

EUGENE VOLOKH
Counsel of Record
UCLA SCHOOL OF LAW
FIRST AMENDMENT
AMICUS BRIEF CLINIC
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Counsel for Proposed Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

MOTION FOR LEAVE TO FILE

Professors Ashutosh A. Bhagwat, Eric M. Freedman, Richard Garnett, Seth F. Kreimer, Nadine Strossen, William W. Van Alstyne, and James Weinstein respectfully move for leave to file an *amici curiae* brief in support of Petitioners, pursuant to Supreme Court Rule 37.2(b).

Professor Ashutosh A. Bhagwat is Professor of Law at UC Davis School of Law.

Professor Eric M. Freedman is the Maurice A. Deane Distinguished Professor of Constitutional Law at Hofstra University School of Law.

Professor Richard Garnett is Professor of Law at the University of Notre Dame School of Law.

Professor Seth F. Kreimer is the Kenneth W. Gemmill Professor of Law at the University of Pennsylvania Law School.

Professor Nadine Strossen is Professor of Law at New York Law School and the former President of the American Civil Liberties Union, 1991-2008.

Professor William W. Van Alstyne is the Lee Professor of Law, Emeritus at William & Mary School of Law.

Professor James Weinstein is the Amelia Lewis Professor of Constitutional Law at Arizona State University's Sandra Day O'Connor School of Law.

All of the *amici* have written extensively on the First Amendment. All are concerned that the decision below, and other circuit decisions identified in the Petition for Certiorari, sharply deviate from this Court's precedents and risk eroding the critical distinction between content-based speech restrictions and content-neutral ones. Proposed *amici* believe that their perspective as scholars who have no connection with

either party can be of help to this Court in evaluating the Petition for Certiorari. Proposed *amici* therefore ask this Court for leave to file this brief *amicus curiae*.

Respectfully submitted.

EUGENE VOLOKH
Counsel of Record
UCLA SCHOOL OF LAW
FIRST AMENDMENT
AMICUS BRIEF CLINIC
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Counsel for Proposed Amici Curiae

QUESTION PRESENTED

Is a sign ordinance that regulates the size, location, and permissible duration of posting based on the message a sign conveys a content-based regulation under the first amendment?

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INTEREST OF THE *AMICI CURIAE*

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All of the *amici* have written extensively on the First Amendment. All are concerned that the decision below, and other circuit decisions identified in the Petition for Certiorari, sharply deviate from this Court's precedents and risk eroding the critical distinction between content-based speech restrictions and content-neutral ones.[1] *Amici* believe that their perspec-

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel,

tive as scholars who have no connection with either party can be of help to this Court in evaluating the Petition for Certiorari.

SUMMARY OF ARGUMENT

The speech restriction in this case, which distinguishes (1) signs "support[ing] candidates" or relating to "any other matter on the ballot," (2) "sign[s] communicating a message or ideas," and (3) signs related to noncommercial "event[s]," is facially content-based. It may well not turn on the viewpoint of speech, or be motivated by legislative disagreement with certain ideas. Yet many precedents from this Court have made clear that such content classifications make a law content-based, even in the absence of improper legislative motive.

Nonetheless, the Ninth Circuit panel majority in this case treated this content-based law as content-neutral, and in the process exacerbated a three-way split among eight circuits. Some circuit court decisions, including the decision below, seem to be focusing on occasional remarks in this Court's cases about the importance of whether speech was restricted because of legislative hostility to its message. But those decisions are ignoring the many precedents from this Court striking down content-based laws regardless of the absence of any such hostility. This Court ought to grant certiorari to resolve this split, and to reaffirm

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make a monetary contribution to the preparation or submission of this brief. The parties' counsel of record received timely notice of the intent to file the brief under Rule 37. Petitioners have consented to this filing, but respondents have not.

the importance of treating content-based speech restrictions as presumptively unconstitutional.

ARGUMENT

This should have been an easy case. The Town's sign code facially discriminates based on the content of signs, expressly distinguishing

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," which can only be up to 6 square feet in size.

Under this Court's precedents, the law is therefore content-based. Yet the Ninth Circuit panel majority concluded the law was content-neutral—and the three-way, eight-circuit split identified by the petition has led many other courts to make similar errors. See Pet. for Cert. 18.

The panel majority's reasoning apparently rested on the conclusions that the Town was not motivated by a desire "to suppress certain ideas," by "disagreement with the message [the speech] conveys," or by any other "illicit motive," and that the law was *view-*

point-neutral.[2] Yet this Court has repeatedly made clear that laws distinguishing speech based on content—specifically including laws distinguishing campaign-related speech from other speech—are content-based even if they are viewpoint-neutral and not prompted by any motive to suppress particular ideas.

Thus, for example, in *McIntyre* v. *Ohio Elec. Comm'n*, 514 U.S. 334 (1995), this Court held that a law requiring campaign literature to be signed was content-based. Part of the reason was that "the category of covered documents is defined by their content—only those publications containing speech designed to influence the voters in an election need bear the required markings." *Id.* at 345. This was so "even though [the] provision applie[d] evenhandedly to advocates of differing viewpoints." *Id.* And because of this content discrimination, the law was subject not to intermediate scrutiny, but to "exacting scrutiny."

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[2] *See Reed* v. *Town of Gilbert*, 587 F.3d 966, 975 (9th Cir. 2009) ("Nothing in the regulation suggests any intention by Gilbert to suppress certain ideas through the Sign Code, nor does Good News claim that Gilbert had any illicit motive in adopting the ordinance."); Pet. 2a (treating the 2009 decision as law of the case); Pet. 65a (viewing the proper test as turning on "whether the government has adopted a regulation of speech because of disagreement with the message it conveys" (quotation marks and citations omitted)); Pet. 29a ("Gilbert's Sign Code places no restrictions on the particular viewpoints of any person or entity that seeks to erect a Temporary Directional Sign"); Pet. 32a ("Because Gilbert's Sign Code places no restrictions on the particular viewpoints of any person or entity that seeks to erect a Temporary Directional Sign and the exemption applies to all, it is content-neutral as that term has been defined by the Supreme Court.").

Id. at 346 (internal quotation marks omitted). Likewise, in this case the category of specially treated signs "is defined by their content"—"only those [signs] containing speech designed to influence the voters in an election" may be over 20 square feet in area.

Similarly, in *Burson* v. *Freeman*, 504 U.S. 191 (1992), this Court treated a restriction on electioneering within 100 feet of a polling place as content-based:

> "Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign. * * * This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic."

Id. at 197 (plurality opinion); see also *id.* at 214 (Scalia, J., concurring in the judgment) (agreeing that the law was "content based"); *id.* at 217 (Stevens, J., dissenting) (stating that the law "regulates expression based on its content").[3]

Likewise, in this case, "whether individuals may exercise their free speech rights [using large signs]

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[3] Though the law was ultimately upheld by this Court, all the Justices agreed it was content-based. The plurality and the dissent agreed the proper test was strict scrutiny, because the law was based on the content of speech. 504 U.S. at 214, 217. Justice Scalia's concurrence treated the law as a permissible regulation of speech in a nonpublic forum, but agreed that it was content-based. *Id.* at 214.

depends entirely on whether their speech is related to a political campaign," and "whether individuals may exercise their free speech rights [using medium-sized signs] depends entirely on whether their speech is related to [a specific event]." Yet "the First Amendment's hostility to content-based regulation extends [beyond] restriction[s] on a particular viewpoint," and includes regulation based on whether speech relates to an election, to ideology generally, or to a "qualifying event."

Similarly, *Consolidated Edison Co. of N.Y.* v. *Public Service Comm'n of N.Y.*, 447 U.S. 530, 539 (1980), and *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 60 (1983), made clear that an exclusion of all political advertising from a city-owned bus system was content-based. This Court had upheld such an exclusion in *Lehman* v. *Shaker Heights*, 418 U.S. 298 (1974), based on the city's power as a proprietor of a nonpublic forum. *Id.* at 302 (plurality opinion); *id.* at 306 (Douglas, J., concurring in the judgment). But *Consolidated Edison* and *Perry* make clear that the exclusion was upheld *in spite* of being content-based, solely because of this extra government power over nonpublic fora (a power that is not implicated in this case).

To be sure, the restrictions in *McIntyre*, *Burson*, and *Lehman* treated election-related speech or political speech worse than speech with other content, and the restriction in *Reed* treats election-related speech better. But the analytical question whether the restriction is content-based must be the same whether the restriction favors a category of speech or disfavors it. See also *Buckley* v. *Am. Constitutional Law Found.*, 525 U.S. 182, 209 (1999) (Thomas, J., concur-

ring in the judgment) (treating a law as content-based because "the category of burdened speech is defined by its content—Colorado's badge requirement does not apply to those who circulate candidate petitions, only to those who circulate initiative or referendum proposals").

This Court has likewise treated as content-based many other restrictions that seem highly unlikely to have been motivated by a desire to suppress particular ideas. For example, in *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984), this Court struck down a statutory provision that limited photographic reproductions of United States currency, but exempted reproductions "for philatelic, numismatic, educational, historical, or newsworthy purposes to content that was educational or newsworthy." *Id.* at 644. This Court held that the law was content-based, because "[a] determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers." *Id.* at 648.

The statutory exemption was likely not prompted by hostility to any particular views, or even to any particular subjects. Yet this Court treated the law as content-based. Likewise, just as in *Regan* v. *Time, Inc.*, the determination of whether a sign in Gilbert can be up to 30 square feet or at most 24 or even just 6 square feet "cannot help but be based on the content" of the message the sign delivers.

Even where signs concern commercial speech, this Court has struck down speech restrictions that discriminate based on the content of the sign. In *City of Cincinnati* v. *Discovery Network*, 507 U.S. 410

(1993), the government, motivated by safety and aesthetic concerns, barred the distribution of commercial publications through freestanding newsracks on public sidewalks. *Id.* at 412-14. In striking down this ordinance, this Court noted that there was no evidence that the city acted with any animus toward the ideas in respondents' publications. *Id.* at 429. But the decision nonetheless rejected the view that "discriminatory treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." *Id.*

As in *Discovery Network*, the town of Gilbert might not have had illicit motives in enacting the Sign Ordinance. But that should be just as irrelevant here as in that case. And if the regulation in *Discovery Network* was content-based even as to commercial speech, surely Gilbert's Sign Code must be content-based when it discriminates based on content among noncommercial speech.

Similarly, in *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987), this Court struck down as unconstitutionally content-based a state sales tax exemption for "religious, professional, trade, and sports journals." There was no evidence of any improper censorial motive. *Id.* at 228. Still, this Court held that, because Arkansas "enforcement authorities must necessarily examine the content of the message that is conveyed" to determine a magazine's tax status, the basis on which Arkansas differentiates between magazines is "particularly repugnant to First Amendment principles." *Id.* at 228-29.

To give just two more examples, in *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972),

and *Carey* v. *Brown*, 447 U.S. 455 (1980), this Court viewed as content-based restrictions that banned all picketing in certain places (near schools and residences, respectively), but exempted labor picketing. Those restrictions were doubtless not motivated by hostility to all non-labor-picketing views. Nonetheless, because they distinguished speech based on content, they were treated as content-based. 408 U.S. at 99; 447 U.S. at 460.

To be sure, this Court has at times treated as content-neutral laws that are seen as focusing on the "secondary effects" of speech. See *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425, 445-47 (2002) (Kennedy, J., concurring in the judgment) (discussing this doctrine). But political signs, ideological signs, and event signs are no different in any of their possible "secondary effects."

In this respect, this case is just like *Discovery Network* (though involving fully protected speech, not just commercial speech). In *Discovery Network*, this Court noted that, "[i]n contrast to the speech at issue in [*City of Renton* v. *Playtime Theatres, Inc.*], there are no secondary effects attributable to respondent publishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks." *Discovery Network*, 507 U.S. at 430. Likewise, there are no secondary effects attributable to Reed's signs promoting religious events that distinguish them from the political signs that the Town of Gilbert allows to be much larger.

The distinction between content-based and content-neutral restrictions has emerged as one of the most important rules of First Amendment law.

See, *e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 443 (1996); Leslie Kendrick, *Content Discrimination Revisited*, 98 Va. L. Rev. 231, 237 (2012); Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337499 (University of Pennsylvania Law School working paper); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189 (1983); James Weinstein, *How Theory Matters: A Commentary on Robert Sedler's "The 'Law of the First Amendment' Revisited,"* 58 Wayne L. Rev. 1105, 1139 (2013). And this Court has repeatedly stressed to lower courts the significance of this distinction.

Yet the decision below, alongside many other circuit court opinions, calls content-neutral that which is indubitably content-based. See Pet. 50a (Watford, J., dissenting). Those circuit courts have picked up on some remarks in this Court's jurisprudence that might seem to call for an inquiry into legislative motivation. *See, e.g.*, Pet. 30a (focusing on "whether the government has adopted a regulation of speech because of disagreement with the message it conveys") (citing *Hill* v. *Colorado*, 530 U.S. 703, 719 (2000), and *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)). But those courts have failed to apply the many precedents from this Court cited above, precedents that *Hill* and *Ward* were obviously not seeking to overturn. This Court should grant certiorari in this case, to clarify the content discrimination standard both for sign cases and for free speech cases more broadly.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari, and resolve the three-way, eight-circuit split identified in the petition.

Respectfully submitted.

EUGENE VOLOKH
Counsel of Record
UCLA SCHOOL OF LAW
FIRST AMENDMENT
AMICUS BRIEF CLINIC
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Counsel for Amici Curiae