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 OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Ninth Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. JFF has made numerous appearances in this Court as *amicus curiae* in cases involving the First Amendment. Co-counsel Deborah Dewart is the author of a book, *Death of a Christian Nation*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Content discrimination and viewpoint discrimination are distinct categories. They often overlap but are not identical. A facially content-based statute—such as Gilbert's Sign Code—may be viewpoint neutral. A facially content-neutral law may

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

mask viewpoint discrimination. The government may restrict a nonpublic forum to certain content and/or speakers but may not exclude an entire perspective or engage in viewpoint discrimination. The Ninth Circuit misses these nuances and collapses the two categories.

Where the government discriminates as to both content and viewpoint, the Ninth Circuit will reach the correct result. But where there is only content discrimination—as in this case—it will employ a lower level of scrutiny. The presence of content discrimination does not inevitably invalidate the statute, but it does require strict scrutiny. The Ninth Circuit mandates viewpoint discrimination in order to apply the higher standard. That is incorrect under longstanding precedent in this Court and even in the Ninth Circuit. This flawed approach fails to protect First Amendment rights against government censorship.

ARGUMENT

I. THE NINTH CIRCUIT ELIMINATES THE STRICT SCRUTINY REQUIRED FOR CONTENT-BASED STATUTES—EVEN THOSE THAT ARE VIEWPOINT NEUTRAL.

The Ninth Circuit misstates the argument and the underlying rationale:

> The thrust of Good News' challenge to the Sign Code is that its different restrictions for different types of noncommercial speech are inherently content-based *and thus unconstitutional*.

Reed v. Town of Gilbert, 707 F.3d 1057, 1069 (9th Cir. 2013) (emphasis added). The Court should have said "*and thus subject to strict scrutiny*." Content-based regulations are not necessarily unconstitutional—but they must jump a higher hurdle. The more lenient time-place-manner standard is not "the most that the First Amendment requires of government legislation which infringes on protected speech." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 518 n. 23 (1981). Content-based regulations are subject to a higher standard—even if they are viewpoint-neutral—to ensure protection for free speech.

A. Content-Based Laws Must Be Subject To Strict Scrutiny To Protect Against Government Censorship.

Facially content-based statutes risk censorship and thus are subject to strict scrutiny. Content regulation may be employed only where necessary to serve a compelling government interest. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 395-396 (1992); *Burson v. Freeman*, 504 U.S. 191, 199 (1992). Regulations unrelated to content are subject to intermediate scrutiny because they typically "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641-642 (1994); *see Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). It is the *risk* of viewpoint discrimination, not its *presence*, that warrants heightened scrutiny.

Content-based governmental burdens must satisfy the same rigorous scrutiny as content-based bans:

> When the purpose and design of a statute is to regulate speech by reason of its content, special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression.

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 826 (2000). Although the Sign Code is not a complete prohibition, it is subject to strict scrutiny. Moreover, "the usual presumption of constitutionality afforded congressional enactments is reversed... and the Government bears the burden to rebut that presumption." *Id.* at 817; *see also United States v. Alvarez*, 132 S. Ct. 2537, 2543-44 (2012), citing *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004).

Over the years, this Court has continued to apply strict scrutiny to content-based speech regulations. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) ("Act 80 is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted."); *United States v. Alvarez*, 132 S. Ct. at 2543 ("When content-based speech regulation is in question, exacting scrutiny is required.")

In *Alvarez*, this Court applied strict scrutiny to the Stolen Valor Act and found that even this narrow prohibition of false speech could not survive the test. *Id.* at 2551. In his lengthy dissent, Justice Alito did not dispute the standard of review—but rather discussed the government's compelling interest and inability to achieve it through narrower means. The Act's viewpoint neutrality was one factor that weighed in

favor of upholding the legislation. *Id*. at 2557 (Alito, J., dissenting). But for the majority, it was not enough to salvage the legislation.

B. Content-Based Exemptions Undercut The Rationale For A Regulation.

Gilbert's Sign Code is a maze of variations and exemptions, casting doubt on the safety and aesthetic purposes it cites. "If some groups are exempted from a prohibition on parades and pickets, the rationale for regulation is fatally impeached." *Carey v. Brown*, 447 U.S. 455, 465 (1980). The same is true for signage regulations. Exemptions applicable only to certain speech "create a risk of engaging in constitutionally forbidden content discrimination." *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 816 (1984).

Viewpoint neutral exemptions cannot save the scheme, contrary to the Third Circuit's unique approach: "[T]he state can exempt from a general ban speech having that content so long as the state did not make the distinction in an attempt to censor certain viewpoints or to control what issues are appropriate for public debate...." *Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1065 (3d Cir. 1994). This Circuit would subject viewpoint-neutral exemptions to intermediate scrutiny. *Id*. But that confuses two overlapping but distinct concepts—content and viewpoint. Viewpoint neutrality may ultimately support a finding that the exemption passes strict scrutiny, but it does not mandate that result.

C. Content-Based Statutes Are Presumptively Invalid—But Not Invariably Invalid.

"[P]resumptive invalidity does not mean invariable invalidity." *R.A.V. v. City of St. Paul*, 505 U.S. at 390 n. 6. A facially content-based statute is not automatically unconstitutional. It might pass strict scrutiny—or it might fit within a recognized exception such as nonpublic fora. *See, e.g., Lehman v. Shaker Heights*, 418 U.S. 298, 301-304 (1974); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985). Conversely, even a facially content-neutral law may be a facade that masks a discriminatory motive.

The analysis should begin with the text but it does not end there. Facial neutrality is a well-established minimum:

> To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face.

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533 (1993). The facially neutral ordinance in *Lukumi Babalu* obscured the city council's discriminatory motive in the context of religious liberty. The same problem may occur with speech regulations. "[E]ven a regulation neutral on its face may be content-based if its manifest purpose is to regulate speech because of the message it conveys." *Turner Broadcasting*, 512 U.S. at 645-646. Content hostility may also occur when particular media are used disproportionately for certain types of messages. *Taxpayers for Vincent,* 466 U.S. at 824 n. 5. Good

News, for example, is a small church that relies on inexpensive temporary signs to inform the community of its church services.

The Ninth Circuit concluded that Gilbert's Sign Code is *viewpoint* neutral and therefore also *content* neutral, collapsing two independent concepts and improperly placing motive—rather than text—at the forefront of the analysis. The Court cited *G.K. Limited Travel v. City of Lake Oswego*, 436 F.3d 1064, 1071-72 (9th Cir. 2006) for support ("plaintiffs offer no evidence suggesting illicit motive or bias on the part of the City or...a desire to stifle certain viewpoints"). But in *G.K. Limited*, it was not certain content but a manner of communication—pole signs—the city restricted. The Ninth Circuit's approach erroneously permits a facially content-based statute to be deemed content-neutral, contrary to this Court's precedent. *Turner Broadcasting*, 512 U.S. at 642-643 ("Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.") The result is that some facially content-based statutes are subject to a lower level of scrutiny than required by this Court.

The Town cites safety and aesthetics to justify its Sign Code. But "aesthetic judgments are necessarily subjective, defying objective evaluation, and for that reason must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose." *Metromedia,* 453 U.S. at 510 (striking down statute that allowed on-site commercial billboards but not non-commercial). Even regulations enacted to serve legitimate governmental purposes may unduly restrict First Amendment freedoms.

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592-593 (1983) ("We need not and do not impugn the motives of the Minnesota Legislature in passing the ink and paper tax. Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.")

Some other circuits recognize the proper place of motive in the analysis. In both *Neighborhood Enterprises* and *Whitton*, the Eighth Circuit cited this Court's admonition that "even when a government supplies a content-neutral justification for the regulation, that justification is not given controlling weight without further inquiry." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-430 (1993); *see Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728, 737 (8th Cir. 2011), *Whitton v. City of Gladstone, Mo.*, 54 F.3d 1400, 1406 (8th Cir. 1995). Similarly, the Fifth Circuit opined that "[a] regulatory scheme that requires the government to examine the content of the message that is conveyed is content-based regardless of its motivating purpose." *Serv. Emp. Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010), citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987).

Other circuits eschew a consistent objective methodology that begins with the text. According to the Fourth Circuit, the government "cannot disguise a content-based restriction beneath a content-neutral justification." *Brown v. Town of Cary*, 706 F.3d 294, 303 (4th Cir. 2013). Quoting *Turner Broadcasting*, 512 U.S. at 642-43, this Circuit observes that assertion of a content-neutral purpose will not salvage a facially discriminatory statute. *Id*. at 304. The Court correctly

separates the issue of whether a law distinguishes content from whether it distinguishes *because of* content. *Id*. But the Fourth Circuit refuses to consistently apply strict scrutiny to facially content-based laws, complaining that "such an approach imputes a censorial purpose to every content distinction, and thereby applies the highest judicial scrutiny to laws that do not always imperil the preeminent First Amendment values that such scrutiny serves to safeguard." *Id.* at 302. Yet that is exactly what this Court requires—"the highest judicial scrutiny" and a presumption of invalidity—for facially content-based laws. Sometimes those laws serve a compelling government interest and pass the test. The Fourth Circuit's confusing approach would allow some facially discriminatory statutes to be deemed content neutral.

The Third Circuit acknowledges that "even if government is not intending to limit speech expressing a particular idea, content differentiation can still distort public debate." *Rappa v. New Castle Cnty.*, 18 F.3d at 1063 (striking down Delaware Code restrictions that prohibited campaign signs). Content discrimination does not hinge on viewpoint discrimination, and content distinctions on the face of a statute raises suspicions:

> Even when government asserts a motive to restrict speech other than antipathy towards particular content, a long history of governmental attempts to censor speech provides reason to suspect that a restriction that facially differentiates based on content is in fact often motivated by such antipathy.

Id. at 1062. Nevertheless, the Third Circuit adopted a "more flexible, context-specific approach" in *Rappa* that it later applied to content-based restrictions covering overlapping categories (advertising, business, and identification signs). The Circuit Court observed there was "no indication the City sought to 'censor certain viewpoints' when it articulated and applied these criteria." *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 390 (3d Cir. 2010), citing *Rappa v. New Castle Cnty.*, 18 F.3d at 1065. Introducing motive at this juncture muddies analysis of the statute's text.

Facial neutrality merely begins the analysis—it does not end there. Even a facially neutral statute may hide discriminatory purposes. But where the statute is overtly content-based—as Gilbert's Sign Code is—it must be subjected to strict scrutiny.

II. THE NINTH CIRCUIT ERASES THE DISTINCTION BETWEEN CONTENT DISCRIMINATION AND VIEWPOINT DISCRIMINATION.

The Ninth Circuit weakens the standard of scrutiny because of its fundamental error in confusing content discrimination with viewpoint discrimination:

> *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.

Reed v. Town of Gilbert, 707 F.3d at 1072 (emphasis added). This truncated analysis fails to consider other comparable signs of the same size. When the Circuit

Court does consider Temporary Directional Signs, Ideological Signs, and Political Signs, the same confusion is evident:

> Each exemption is based on objective criteria and none draws distinctions based on the particular content of the sign. It makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted.

Id. at 1069. The Ninth Circuit's confusion conflicts with decades of precedent in this Court.

A. Viewpoint Discrimination Is An Egregious Form Of Content Discrimination.

When the government targets particular viewpoints, its constitutional violation is even more blatant than when it merely regulates content. "Viewpoint discrimination is...an egregious form of content discrimination." *Rosenberger v. Rector of the Univ. of Va*., 515 U.S. 819, 828-829 (1995). Viewpoint discrimination is "but a subset or particular instance of the more general phenomenon of content discrimination." *Id*. at 831; *see also R.A.V. v. City of St. Paul,* 505 U.S. at 391. The two concepts overlap but are not identical—as confirmed by years of consistent precedent in this Court.

The First Amendment is hostile to content-based regulation even where the regulation "does not favor either side of a political controversy." *Cons. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) (certain bill inserts were suppressed "precisely because they address[ed] controversial issues of public policy").

Id. This Court rejected the Commission's assertion "that a prohibition of all discussion, regardless of the viewpoint expressed" would not unconstitutionally suppress free speech. *Metromedia,* 453 U.S. at 518-519. The overlap—and distinction—was noted again in *Hill v. Colorado*, 530 U.S. 703, 722-723 (2000) ("Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation.")

In *Discovery Network*, this Court rejected the City's contention that the justification for its regulation of newsracks (safety and aesthetics) was content-neutral. *Discovery Network, Inc.*, 507 U.S. at 429. The Court explained that "the very basis for the regulation [was] the difference in content between ordinary newspapers and commercial speech," rejecting the City's argument that "discriminatory treatment is suspect...only when the legislature intends to suppress certain ideas." *Id.*, citing *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991). The same is true here—content is the very basis for the Town's differing signage restrictions. The regulations may be viewpoint neutral, but they are not content neutral. The statute itself—not merely the underlying legislature purpose—must be content neutral in order to qualify for the intermediate scrutiny applied to time-place-manner restrictions.

It is not enough for the government to declare—as the Town of Gilbert does—a content-neutral motive. "Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." *Turner Broadcasting*, 512 U.S. at 642-643); see also *Arkansas Writers'*

Project, 481 U.S. at 231-232; *Carey v. Brown*, 447 U.S. at 464-469. This Court has "consistently held that 'illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" *Simon & Schuster,* 502 U.S. at 117, quoting *Minneapolis Star & Tribune*, 460 U.S. at 592.

Sometimes other circuits affirm the clear distinction evident in this Court's precedent, while other rulings echo the Ninth Circuit's confusion. The Eighth Circuit follows this Court:

> [T]he argument that a restriction on speech is content-neutral because it is viewpoint-neutral has been repeatedly rejected by the Supreme Court.

Neighborhood Enterprises, 644 F.3d at 736 (sign code was content-based because content determined whether an exemption applied), quoting *Whitton,* 54 F.3d at 1405 (citing *Cons. Edison*, 447 U.S. at 537). The First and Second Circuits have found content-based sign laws facially unconstitutional, with no reference to viewpoint discrimination. *Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985); *Nat'l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 556-557 (2d Cir. 1990). The Fourth Circuit, on the other hand, follows the Ninth Circuit's erroneous pattern with its declaration that content neutrality bars only distinctions made with "censorial intent" to prefer certain speech over other speech. *Brown v. Town of Cary*, 706 F.3d at 301-302.

B. Viewpoint Discrimination And Content Discrimination Are Sharply Distinguished In Limited Public Fora.

When the government establishes a limited public forum, it may restrict content but viewpoint discrimination is prohibited. First Amendment rules in this context illuminate the difference between the two categories:

> [I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a *distinction* between, on the one hand, *content discrimination*, which may be permissible if it preserves the purposes of that limited forum, and...*viewpoint discrimination*, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Rosenberger, 515 U.S. at 829-830 (emphasis added) (exclusion of religious perspective was impermissible viewpoint discrimination). The government may reserve a forum for discussion of certain topics (i.e., content) or certain speakers but may not exclude an entire perspective. *Id*. at 829; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist*., 508 U.S. 384, 389-390 (1993). Access to a government-created forum need not always be content neutral, but must be viewpoint neutral. *See, e.g*., *Lehman v. Shaker Heights*, 418 U.S. 298 (City could restrict advertising on city buses, allowing commercial but not political ads); *Greer v. Spock*, 424 U.S. 828 (1976) (political candidates had no general right to distribute campaign literature on

military base, and regulations did not discriminate among candidates).

Upholding the Ninth Circuit would unwind precedents like *Rosenberger* and *Lamb's Chapel*. These cases show how the exclusion of an entire category of speech (e.g., religious) is viewpoint discriminatory. The Town does not ban a whole category, but it does impose differential burdens which it claims are not only viewpoint neutral – but content neutral. If the government can impose different burdens on certain categories of speech merely by alleging an innocent motive, it could easily take the next logical step and eliminate an entire category.

C. Viewpoint Discrimination Did Not Merge With Content Discrimination As A Result Of *Ward's* Language Concerning The Government's Disagreement With A Message.

In framing the rules for content-neutral time-place-manner restrictions, this Court described the "principal inquiry" as "whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). *Ward* involved a noise ordinance unrelated to content. This Court observed that a regulation is still valid even though it may incidentally impact some speakers more than others. *Id*. This language has been quoted so as to obscure the distinction between content and viewpoint discrimination.

The absence of viewpoint discrimination is not equivalent to content neutrality but may support a

court's finding of such neutrality in cases where a statute is *not* content-based on its face—unlike Gilbert's facially content-based Sign Code. In *Hill v. Colorado*, this Court found the statute at issue was not adopted "because of disagreement with the message it conveys." *Hill v. Colorado*, 530 U.S. at 719, quoting *Ward*, 491 U.S. at 791. This conclusion was supported by the Colorado court's holding that it applied "equally to all demonstrators, regardless of viewpoint." *Id*. Viewpoint neutrality is one factor a court may consider—where the statute is facially neutral. In this case it is not.

As the Eleventh Circuit observed several years ago, this Court has "return[ed] to its focus on the law's own terms, rather than its justification, in *City of Cincinnati v. Discovery Network,* 507 U.S. 410 (1993)." *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1259 n. 8 (11th Cir. 2005). In *Discovery Network*, this Court struck down a city ordinance that allowed noncommercial newspapers in news racks but banned commercial handbills, noting that "the very basis for the regulation is the difference in content." The absence of viewpoint discrimination did not change the result:

> True, there is no evidence that the city has acted with animus toward the ideas contained in respondents' publications, but just last Term we expressly rejected the argument that discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.

Discovery Network, 507 U.S. at 429 (citation omitted). This Court expressly noted that *Ward* did not "compel a different conclusion." *Id*. at 429.

In addition to *Ward*, some courts look to a passage in *Hill v. Colorado* to minimize the need to examine a statute's content. But the context in *Hill* is critical:

> It is common in the law to examine the content of a communication to determine the speaker's purpose. Whether a particular statement constitutes a *threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods* often depends on the precise content of the statement. We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.

Hill v. Colorado, 530 U.S. at 721 (emphasis added). Each italicized example involves a specific "rule of law" where content is uniquely relevant to legal rights and/or liability. This quote is not a free pass for content-based regulation of protected speech—as *Hill* acknowledges: "The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id*. at 723 n. 31 (citations omitted).

Circuit courts have gone astray quoting *Ward's* "disagreement with the message" language. The Fourth Circuit would uphold even a facially content-based statute if it was not adopted because of disagreement with the message. *Brown v. Town of*

Cary, 706 F.3d at 302; *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 366 (4th Cir. 2012). The Sixth Circuit, examining a city's differential treatment of advertising, business, political, and identification signs, skirts the distinction between content and viewpoint discrimination with a similar reference to *Ward*—criticizing the Eleventh Circuit *Solantic* decision for its "overly narrow conception of the definition of content-neutral speech." *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 621-622 (6th Cir. 2009).

This case is an opportunity for this Court to bring needed clarity to its prior jurisprudence in *Ward*, *Discovery Network*, and *Hill*.

D. Viewpoint Discrimination Is Prohibited Even Within A Category of Proscribable Speech—But Content Discrimination Is Not.

Certain rare speech categories may be regulated "because of their constitutionally proscribable content"—e.g., obscenity, defamation, fighting words. *R.A.V.*, 505 U.S. at 383-384. Generally, these areas are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id*., quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Moreover, there is little danger of viewpoint discrimination "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech is proscribable." *R.A.V.*, 505 U.S. at 388.

But even in this context, the ability to discriminate has limits. Obscenity may be prohibited—but not "only that obscenity which includes offensive *political* messages." *Id*. at 388. The same is true of libel—the government "may not make the further content discrimination of proscribing *only* libel critical of the government." *Id.* at 384. Such further discrimination quickly morphs into viewpoint discrimination, "rais[ing] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Id*. at 387, quoting *Simon & Schuster,* 502 U.S. at 116. And it is precisely because of this danger that even seemingly benign content discrimination must be subjected to strict judicial scrutiny.

III. THE NINTH CIRCUIT EVADES ITS OWN PRECEDENT.

In *Reed*, the Ninth Circuit abandoned its own case law as well as this Court's precedent. Earlier cases distinguish between content and viewpoint discrimination, apply strict scrutiny, and analyze statutes facially before considering hidden motives.

Content v. Viewpoint Discrimination. Viewpoint neutral statutes—like those in the Town of Gilbert—may nevertheless be content-based. The two concepts are distinct:

> Even if the regulations could be deemed neutral with respect to their burden on viewpoint, they may still be found to "interfere" with the exercise of plaintiffs' free speech interests if they improperly discriminate between exercises of

> protected speech on the basis of content (citations omitted).

Bullfrog Films, Inc. v. Wick, 847 F.2d 502, 510 (9th Cir. 1988). This is hardly an isolated ruling. The Ninth Circuit continued to understand that content-based regulations present constitutional problems: *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996) (city violated First Amendment because it regulated noncommercial speech on the basis of content).

Indeed, the Ninth Circuit cited "the *difference* between content discrimination and viewpoint discrimination" to sharply distinguish nonpublic forum cases such as *Lehman v. Shaker Heights,* 418 U.S. 298—where content discrimination is permissible (all political ads were prohibited, not merely ads supporting Lehman). *Metro Display Adver. v. City of Victorville*, 143 F.3d 1191, 1194 (9th Cir. 1998) (emphasis added). Viewpoint discrimination is prohibited even in a nonpublic forum. In *Metro Display*, an advertising company built bus shelters for the City in exchange for the right to sell advertising space on the shelters. When a local supermarket chain complained about a labor union's hostile ads, the City asked the company to remove them. This demand was based entirely on the pro-union viewpoint of the ads—impermissible even if the bus shelters were considered a nonpublic forum.

More recently, the Ninth Circuit noted that "discrimination against speech because of its message is presumed to be unconstitutional." *Cogswell v. City of Seattle*, 347 F.3d 809, 814 (9th Cir. 2003), citing *Rosenberger*, 515 U.S. at 828. *Cogswell* involved a

nonpublic forum where subject matter was properly restricted (candidate self-discussion) but there was no evidence of viewpoint discrimination. The Court explained that "[t]he line between an acceptable subject matter limitation and unconstitutional viewpoint discrimination is not a bright one." *Id.* at 815. But whether bright or blurry—there *is* a line—a line the Ninth Circuit erases in *Reed*.

The Ninth Circuit has forgotten its own statement that "[a] regulation is content-based if...the regulation, by its very terms, singles out particular content for differential treatment." *Berger v. City of Seattle,* 569 F.3d 1029, 1051 (9th Cir. 2009) (en banc). Citing this case, the Court found an "epitome of a content-based speech restriction" where the City of Oakland distinguished speech that facilitates access to clinics from speech that discourages it. *Hoye v. City of Oakland*, 653 F.3d 835, 851 (9th Cir. 2011).

In *Hoye*, the Ninth Circuit adopted the very approach it now rejects—examining the face of a statute to determine whether it "draws distinctions among *subjects* of discussion, not among *means or types* of communication." *Id.* at 847. Gilbert's Sign Code "draws distinctions" on the basis of content and then sets different standards depending on that content. But as in *Hoye*, the text should be analyzed first, even though there is no evidence of viewpoint discrimination:

> Hoye does not contend that the statute was enacted because of substantive disagreement with the message of the speech it regulates, nor does the record contain any evidence that it was. *We must therefore examine whether the*

> *Ordinance's substantive terms make facial distinctions between categories of speech based on content*.

Hoye v. City of Oakland, 653 F.3d 835, 846 (9th Cir. 2011) (emphasis added).

Exemptions. In prior cases, the Ninth Circuit admits that content-based exemptions may be constitutionally flawed:

- *Foti v. City of Menlo Park*, 146 F.3d 629, 636-637 (9th Cir. 1998) (ordinance banned all signs on all public property, but exemptions for "open house" real estate signs and safety, traffic, and public informational signs were content-based and therefore facially unconstitutional);
- *National Advertising Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988) (exemptions for offsite noncommercial signs turned on whether they conveyed messages approved by the ordinance);
- *G.K. Limited Travel*, 436 F.3d at 1070 (City did not appeal District Court's ruling that exemptions for danger signs, official notices, "no solicitation" signs, and temporary signs for charitable fundraising events were content-based).

Government Motive. The Ninth Circuit repeatedly affirms that content neutrality is determined objectively by examining the face of a statute—without the need to consider the government's intent to restrict viewpoint:

- *Menotti v. City of Seattle*, 409 F.3d 1113, 1129 (9th Cir. 2005) (emergency order established a restricted zone to curb violence around the World Trade Conference) ("In assessing whether a restraint on speech is content neutral, we do not make a searching inquiry of hidden motive; rather, we look at the literal command of the restraint.");

- *Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1164 (9th Cir. 2003) (same—facially content-based statute restricted hours for sexually oriented businesses to combat secondary effects);

- *G.K. Limited Travel*, 436 F.3d at 1071, quoting *Menotti*, 409 F.3d at 1129 (citing *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.")

In *G.K. Limited*, the Ninth Circuit considered the relevant factors in the proper order. First, the Court noted that "[t]he Code restricts all pole signs across the City's general commercial zones without creating exceptions for preferred content." *G.K. Limited Travel*, 436 F.3d at 1071. Thus the law was facially content-neutral. Second, the Court observed that "plaintiffs offer no evidence suggesting illicit motive or bias on the part of the City or that the City banned pole signs in general, or their pole sign in particular, because of a desire to stifle certain viewpoints." *Id*. at 1072. Three

years later, the Ninth Circuit was even more explicit about the standard it now rejects:

> A law is content-based rather than content-neutral if "the main purpose in enacting it was to suppress or exalt speech of a certain content, *or it differentiates based on the content of speech on its face*." *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 794 (9th Cir. 2006). Though "an improper censorial motive" is sufficient, such a motive is not necessary to render a regulation content-based. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991).

Long Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011, 1024 (9th Cir. 2009) (emphasis added). Viewpoint discrimination—if it is known, and particularly if it appears in the text—is sufficient. But it is not essential. Facially content-based laws may be enacted for legitimate reasons with no illicit motive, but they are still subject to strict scrutiny to preserve First Amendment values.

Level of Scrutiny. Finally, past Ninth Circuit cases correctly apply strict scrutiny to content-based statutes:

- *National Advertising Co. v. City of Orange*, 861 F.2d at 249 (exceptions to noncommercial speech restrictions on billboards are unconstitutional unless narrowly tailored to serve a compelling state interest);
- *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d at 820 (same—content-based sign restrictions);

- *Foti v. City of Menlo Park*, 146 F.3d at 635 (same—sign restrictions);
- *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d at 1024 (content-based regulations subject to strict scrutiny—event permits);
- *Hoye v. City of Oakland*, 653 F.3d at 853 (content-based regulations are presumptively invalid—must serve compelling state interest in least restrictive manner).

In short, the Ninth Circuit either has amnesia or has deliberately cast aside years of its own precedent.

IV. THE NINTH CIRCUIT ERODES FIRST AMENDMENT PROTECTION IN OTHER CONTEXTS.

The First Amendment demands that courts maintain a high standard of review for all content-based statutes. "[O]ur people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (striking down law that permitted peaceful picketing only for labor disputes). Under the First Amendment, the government "has no power to restrict expression because of its message, its ideas, its subject matter, *or its content*." *Id*. at 95 (emphasis added). Content-based regulations, even when they appear to be viewpoint neutral, open the door for government to choose the "permissible subjects for public debate" and thereby "control...the search for political truth." *Cons. Edison Co.,* 447 U.S. at 538. When an even-handed law contains content-based

exemptions, the risk remains—the government is positioned to favor one side of a public debate. *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 785-786 (1978).

This Court's decision in *R.A.V.* illustrates the hazards of the Ninth Circuit's approach. The ordinance at issue was facially content-based because it applied only to "fighting words" that insulted or provoked violence "on the basis of race, color, creed, religion or gender." *R.A.V.*, 505 U.S. at 391. Other equally vicious "fighting words"—not addressed to one of these subjects—were not prohibited. *Id*. Apparent viewpoint neutrality could not salvage the flawed ordinance: "Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views." *Id*. at 392. This Court explained that "[i]n practical operation" the ordinance went "beyond mere content discrimination, to actual viewpoint discrimination." *Id*. For example, the ordinance apparently did not prohibit "fighting words" in favor of racial tolerance, but would silence opponents. *Id*. However innocent or even laudable the government's motives, the First Amendment requires that courts dig deeper and strictly scrutinize content-based laws.

The government cannot render value judgments based on content. In *Regan v. Time, Inc*., 468 U.S. 641 (1984), the government had enacted a statute during the Civil War that prohibited all photographic reproductions of currency. Initially this was to curb the printing of counterfeit currency but decades later the Treasury Department began to grant exceptions for educational and newsworthy purposes, e.g., in books,

magazines, journals. There was no hint of viewpoint discrimination, but this Court found the statutory scheme unconstitutional, explaining that "[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. However legitimate the government's purpose—maintaining the integrity of our currency—it would be dangerous to allow government to control content based on "newsworthiness" or "educational value." Such power risks stifling public debate in other contexts.

One of those other contexts is commercial speech, where consumers have an interest in the free flow of information. *Bates v. State Bar of Ariz*., 433 U.S. 350, 364 (1977). For example, "[t]hat reality has great relevance in the fields of medicine and public health, where information can save lives." *Sorrell v. IMS Health Inc*., 131 S. Ct. at 2664. In *Sorrell*, this Court struck down facially content-based regulations that disfavored pharmaceutical manufacturers by denying them access to certain prescriber-identifying information that was readily available to others. Commercial speech is typically subject to greater regulation than noncommercial speech, but even there, this Court applied heightened scrutiny.

In confusing content discrimination with viewpoint discrimination, the Ninth Circuit facilitates an end-run around the Constitution. The two concepts are distinct, but even seemingly innocuous content-based laws can too easily cross the threshold into viewpoint discrimination. Such laws "pose the inherent risk that the Government seeks not to advance a legitimate

regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broadcasting*, 512 U.S. at 641.

CONCLUSION

This Court should reverse the Ninth Circuit decision.

Respectfully submitted,

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