

No. 13-502

IN THE
Supreme Court of the United States

PASTOR CLYDE REED AND GOOD NEWS
COMMUNITY CHURCH,
Petitioners,

v.

TOWN OF GILBERT, ARIZONA AND ADAM ADAMS,
IN HIS OFFICIAL CAPACITY AS CODE COMPLIANCE
MANAGER,
Respondents.

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

**BRIEF *AMICUS CURIAE* OF FAMILY RESEARCH
COUNCIL IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Does a city ordinance that on its face distinguishes signs based on the types of messages they bear—ideological, political, or directional—and applies different restrictions on signs based on the type of message a sign bears regulate speech based on its content?

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae Family Research Council is a non-profit organization located in Washington, D.C., that exists to develop and analyze government policies for consistency with traditional religious values and believes in protecting all people's rights to adhere to and pursue their religious beliefs. Integral to such pursuit of religion is the ability to gather and assemble in congregations for worship. Consequently, FRC has a strong interest in ensuring that religious congregations have the freedom to adequately communicate when and where they will meet—issues this case directly implicates.

SUMMARY OF THE ARGUMENT

A law that categorizes speech by its content and imposes different restrictions on speech based on which category that speech's content falls into regulates speech based on content. The Gilbert, Arizona, sign ordinance does precisely that. The ordinance on its face categorizes signs by the types of messages they bear—ideological, political, or directional—and applies different restrictions on signs based on the type of message a sign bears.

¹ Petitioners have lodged a blanket consent with the Court. Respondents' counsel have consented to the filing of this brief. A copy of Respondents' written consent has been enclosed with copies of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

Which restrictions apply to a sign thus depends entirely on the sign's message. Under this Court's precedents, the Gilbert ordinance regulates speech based on its content and can stand only if it survives strict scrutiny.

That Gilbert might have been attempting by its sign ordinance to further what it saw as a benign end—whether that be to promote ideological and political speech or to alleviate aesthetic and safety concerns—does not, as the Ninth Circuit panel majority thought, make the sign ordinance content-neutral. There is no “good intentions” exception to the requirement of content-neutrality. Asserting a benign or content-neutral purpose will not save from strict scrutiny a law that on its face regulates speech based on content. In any event, it is doubtful, to say the least, that signs bearing directional messages cause greater aesthetic or safety problems than signs bearing ideological or political messages. Moreover, government may not promote favored messages (or favored categories of messages) by imposing more onerous burdens on other messages.

It also does not matter, as the Ninth Circuit panel majority seemed to think, that the Gilbert ordinance treats equally signs *within* each of the categories of signs the ordinance regulates. That the ordinance treats all ideological signs alike, all political signs alike, and all directional signs alike does not mean that the ordinance is content-neutral; it means only that all signs bearing directional messages are treated less favorably than all signs bearing political or ideological messages. The equal treatment of signs within the different categories

thus does not support the Ninth Circuit panel majority's conclusion that the ordinance does not discriminate based on content. The Gilbert ordinance does discriminate based on content, and this Court should so hold.

ARGUMENT

I. BEAUSE THE GILBERT SIGN ORDINANCE ON ITS FACE IMPOSES DIFFERENT RESTRICTIONS ON SIGNS BASED ON THE MESSAGES THAT THOSE SIGNS BEAR, THE ORDINANCE IS A CONTENT-BASED REGULATION OF SPEECH

A bedrock principle of this Court's free speech jurisprudence is that government may not impose restrictions on speech based on the speech's content. As the Court stated in *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 641 (1994), “[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.” Therefore, the First Amendment “generally does not countenance government control over the content of messages expressed by individuals,” and this Court thus applies “the most exacting scrutiny to regulations that suppress, *disadvantage*, or *impose differential burdens* upon speech because of its content.” *Id.* at 642 (emphasis added).

In this case, the Town of Gilbert, Arizona, on the face of its ordinance regulating signs, has imposed differential burdens that disadvantage

certain speakers because of their speech's content. On its face, the ordinance distinguishes between signs bearing ideological messages—for example, “Stop the War” (“Ideological Signs”)—signs bearing messages seeking to persuade voters to cast their election ballots in a certain way—for example, “Vote for Jones” (“Political Signs”)—and messages announcing and directing people to events sponsored by non-profit organizations (“Temporary Directional Signs”). *See Reed v. Town of Gilbert*, 707 F.3d 1057, 1061 (9th Cir. 2013); *see id.* at 1079 (Watford, J., dissenting). The ordinance, on its face, enacts different requirements regarding size, placement, duration, and number for Ideological Signs, Political Signs, and Temporary Directional Signs that are more restrictive for Temporary Directional Signs. Those signs must be smaller than Ideological and Political signs, may be displayed only for a shorter period of time than Ideological and Political signs, may be placed in fewer places than Ideological and Political signs, and are subject to a limit on their number that Ideological and Political signs are not subject to. *See id.* at 1061.

Under the Gilbert ordinance, as written, determining how large a sign can be, where a sign can be placed, how long a sign may be placed, and how many signs can be placed on a particular piece of property requires knowing the message the sign bears, for which restrictions apply depends entirely on whether a sign's message is political, ideological, or directional. Thus, to say that the Gilbert sign ordinance regulates speech based on its content is really to state a tautology, akin to stating that a duck is a duck: An ordinance that imposes

restrictions on speech that depend on the speech's content regulates speech based on its content. It follows that as a content-based speech regulation, the ordinance is subject to "the most exacting scrutiny." *Turner Broadcasting*, 512 U.S. at 642. That exacting scrutiny requires that Gilbert demonstrate that the difference in restrictions placed on the various signs is the least restrictive means of serving a compelling government interest. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). Given Gilbert's asserted interests in aesthetics and safety, and given that it is difficult to imagine, for example, why a 20-square-foot sign bearing an ideological message causes less harm to those interests than a 20-square-foot sign bearing a directional message, it is doubtful Gilbert could meet that burden. *See Reed*, 707 F.3d at 1080 (Watford, J., dissenting).

The Ninth Circuit panel majority in this case, however, did not apply the strict scrutiny that this Court's cases require for content-based speech restrictions. Rather, the majority found that the sign ordinance—despite the fact that the ordinance imposed its various restrictions based entirely on the content of a sign's message—was content-neutral. *See Reed*, 707 F.3d at 1067-73. The majority apparently found insufficiently "nuanced" the straightforward conclusion that a city regulates speech based on its content when it imposes restrictions on speech that depend on the speech's content. *See id.* at 1068 (stating that the Ninth Circuit has "fashioned a more nuanced standard" to determine whether a speech restriction is content-based). Two reasons in particular underlie the

majority's conclusion: First, the majority concluded that this Court has adopted an understanding of content-neutrality that allows a court to analyze the justification and motive for a speech regulation and to find the regulation content-neutral if the justification and motive are content-neutral, even when the regulation on its face applies the restriction based on content. *See id.* at 1069, 1071 (“Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed”), 1072 (“Gilbert’s interests in regulating temporary signs are unrelated to the content of the sign”). Second, the majority found it significant that the ordinance’s restrictions on Political Signs, Ideological Signs, and Temporary Directional Signs apply equally to all signs within each category without regard to the particular content or viewpoint that those who seek to erect such signs wish to express. *See id.* at 1069, 1071, 1072. In the majority’s view, this made the ordinance content-neutral despite the difference in restrictions between the three categories of signs. As the next section will demonstrate, neither of these reasons justifies the Ninth Circuit majority’s decision.

II. THE NINTH CIRCUIT MAJORITY’S REASONING DOES NOT SUPPORT ITS CONCLUSION THAT THE SIGN ORDINANCE IS CONTENT- NEUTRAL

The Ninth Circuit panel majority’s reasons for resisting the conclusion that an ordinance that imposes restrictions on speech that depend on the speech’s content is content-based are either legally unsound, logically unsound, or both. The majority’s

analysis fails to apply properly this Court's longstanding precedent and relies on a *non sequitur* to convert an obviously content-based speech regulation into a content-neutral regulation.

A. Under this Court's precedent, a law that on its face regulates speech based on its content is a content-based regulation regardless of the government's motive or justification.

In *Turner Broadcasting*, this Court noted that a content-based purpose or justification may be sufficient to show that a speech regulation is content-based. *See* 512 U.S. at 643. But a content-based purpose or justification, while perhaps sufficient, "is not necessary in all cases;" "illicit legislative intent is not a *sine qua non* of a violation of the First Amendment." *Id.* (quoting *Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (quoting in turn *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983))). And this Court made clear that a content-based purpose was unnecessary when a law on its face discriminates based on content: "the mere assertion of a content-neutral purpose [will not] be enough to save a law which, on its face, discriminates based on content." *Turner Broadcasting*, 512 U.S. at 642-43 (citation omitted). Thus, the Court in *Turner Broadcasting* went on to state the general rule that "laws that *by their terms* distinguish between favored and disfavored speech on the basis of ideas or views expressed are content-based." *Id.* at 643 (emphasis added).

The basic analysis for determining whether a speech regulation is content-based, as set forth in *Turner Broadcasting*, may be summed up as follows: First, a court must examine the regulation to determine whether on its face it regulates based on content. If it does, it is content-based, and a content-neutral justification does not change that. If (and only if) the regulation does not on its face regulate based on content, a court should go on to determine whether the regulation’s underlying purpose or justification is content-based. *See, e.g., Turner Broadcasting*, 512 U.S. at 644-652; *Carey v. Brown*, 447 U.S. 455, 460-61 (1980) (law prohibiting all picketing except peaceful labor picketing, despite asserted content-neutral justification, was content-based because “on its face, [i]t accord[ed] preferential treatment to the expression of views on one particular subject matter”); *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (“selective exclusions from a public forum may not be based on content alone and may not be justified by reference to content alone”); *see also Hill v. Colorado*, 530 U.S. 703, 747 (2000) (Scalia, J., dissenting) (“our very first use of the ‘justified by reference to content’ language made clear that it is a prohibition *in addition to*, rather than in place of, the prohibition of facially content-based restrictions”) (citing *Mosley*, 408 U.S. at 96).

The analytical framework for determining content-neutrality set forth in *Turner Broadcasting* and followed consistently by this Court does not allow government to pursue what it might consider benign ends by the means of differential regulation of speech based on its content. Thus, the fact that

Gilbert regulates signs for the stated purpose of alleviating aesthetic and safety concerns does not justify the content-based regulatory distinctions on the ordinance's face. Likewise, the Ninth Circuit panel majority also erred in its apparent conclusion that the different restrictions on Political Signs, Ideological Signs, and Temporary Directional Signs were justified because the ordinance provision governing Political Signs "responds to the need for communication about elections," *Reed*, 707 F.3d at 1069, and the provision governing Ideological Signs "recognized that an individual's right to express his or her opinion is at the core of the First Amendment." *Id.* These supposedly benign purposes in no way explain why Directional Signs must be smaller, fewer in number, and disadvantaged in terms of placement as opposed to Political Signs and Ideological Signs. On its face, the ordinance, by granting more favorable treatment to Political Signs and Ideological Signs, necessarily exhibits favoritism toward the messages on those signs. In *Turner Broadcasting's* words, the ordinance "*by its terms . . . distinguishes between favored and unfavored speech on the basis of ideas . . . expressed.*" 512 U.S. at 643 (emphasis added). Promoting political and ideological messages may be a good thing, but to favor political and ideological messages by imposing more onerous restrictions on other messages violates this Court's admonition that "[g]overnment may not regulate . . . based on hostility—or *favoritism*—towards the underlying message expressed." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (emphasis added); *see also Turner Broadcasting*, 512 U.S. at 677-78 (O'Connor, J., concurring in part and dissenting in part) (the First Amendment "generally

prohibits the government from excepting certain kinds of speech from regulation because it thinks that speech is exceptionally valuable”).

In short, there is no “good intentions” exception to the First Amendment’s requirement of content-neutrality in speech regulation, for as this Court has made clear, “even regulation aimed at proper governmental concerns can unduly restrict the exercise of rights protected by the First Amendment.” *Simon & Schuster*, 502 U.S. at 117 (quoting *Minneapolis Star*, 460 U.S. at 592). A good end (for example, promoting ideological or political speech, or alleviating traffic or safety concerns) does not justify the illicit (under the First Amendment) means of content-based speech regulation.

This conclusion makes perfect sense in light of the purposes the content-neutrality requirement serves. Where speech regulation may be necessary to (or at least appropriate for) achieving a legitimate government end (for example, alleviating concerns about visual clutter and safety associated with signs), the requirement that the regulation be content-neutral “spreads the pain” of the regulation rather than allowing this burden to fall disproportionately or even entirely on disfavored speakers. This generality of regulation thus “creates a substantial political check that prevents [regulation] from being unduly burdensome.” *Turner Broadcasting*, 512 U.S. at 676 (O’Connor, J., concurring in part and dissenting in part). A person who knows that the messages he favors will be subject to the same regulation as messages he disfavors or does not care about is less likely to

support more burdensome regulation than is really necessary to achieve the end sought.

Moreover, the requirement of content-neutrality ensures that all speakers' messages will have equal standing (as far as the government is concerned) in the marketplace of ideas. Just as important, the requirement of content-neutrality also ensures that speakers will enter that marketplace knowing that the messages they wish to express will have equal standing. Despite whatever subjective "benign" purpose government may have for content-based speech restrictions, the speaker who—like Pastor Reed—is hamstrung by these restrictions will likely only see the government playing favorites; he will see that he cannot express his desired message in the same way and with the same force as others. He will be deprived, at least to some extent, of his equal standing in the marketplace of ideas and of his understanding that he has equal standing. To allow content-based speech regulation for supposedly benign purposes thus subverts the reasons for insisting on content-neutral speech regulation.

This Court's decision in *Hill v. Colorado*, 530 U.S. 703 (2000), on which the Ninth Circuit majority heavily relied, *see* 707 F.3d at 1070-72, 1073, did not change the basic analytical framework set out in *Turner Broadcasting* for determining whether a speech regulation is content-based. As Judge Watford noted in his dissent, the majority in *Hill* found that the Colorado statute at issue (at least purportedly) did not on its face draw any subject matter distinctions because it merely "prohibited all

non-commercial speech expressed through a particular mode of communication.” *See Reed*, 709 3d at 1079 (Watford, J., dissenting) (citing *Hill*, 530 U.S. at 720-24).²

This Court’s precedent is clear—laws that on their face restrict speech based on content are content-based restrictions and therefore subject to strict scrutiny. The Ninth Circuit panel majority’s contrary decision is inconsistent with this precedent and subverts the purposes that the content-neutrality requirement serves.

² This is not to say that this *amicus* agrees with the decision in *Hill*. For the reasons stated in Justice Scalia’s and Justice Kennedy’s dissents, the *Hill* majority was wrong to treat “protest, education, [and] counseling,” the activities forbidden by the Colorado statute in *Hill*, merely as modes of speech rather than as distinct subjects of messages. *See Hill*, 530 U.S. at 766-70 (Scalia, J., dissenting); *id.* at 743-49 (Kennedy, J., dissenting). But if one takes the *Hill* majority’s characterization of protest, education, and counseling as correct, then the *Hill* majority’s finding of facial content-neutrality is unexceptional and is not inconsistent with finding that the Gilbert ordinance discriminates on its face based on content. Of course, that the *Hill* majority’s analysis would lead a federal court of appeals to conclude that the Gilbert ordinance—an ordinance that on its face differentiates expression by content and imposes different restrictions based solely on content—is somehow content-neutral is one more reason, in addition to those expressed in Justice Scalia’s and Justice Kennedy’s dissents, to overrule *Hill*.

- B. That the Gilbert ordinance does not draw distinctions based on content or viewpoint *within* the categories of Political Signs, Ideological Signs, and Temporary Directional Signs does not logically lead to the conclusion that the distinctions the ordinance draws *between* those broader subjects are content-neutral.

The Ninth Circuit majority found it significant that the Gilbert ordinance does not distinguish among signs based on content or viewpoint within the different categories of signs the ordinance regulates. *See* 707 F.3d at 1069, 1071, 1072.³ In other words, the provision governing Ideological Signs does not distinguish between signs bearing the messages “Stop the War” and “Support Cancer Research” or “Stop the War” and “Support the War;” the provision governing Political Signs does not distinguish between signs bearing the messages

³ 707 F.3d at 1069 (“It makes no difference which candidate is supported, who sponsors the event, or what ideological idea is asserted;” the content-neutrality within categories means that “the different types of exemptions for different types of noncommercial speech” are constitutional); 1071 (“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”); 1072 (noting that because the ordinance does not regulate Temporary Directional Signs’ content or viewpoint, the sign ordinance is “content-neutral as defined by the Supreme Court”); 1072 (“As long as the Temporary Directional Sign exemption . . . is content-neutral . . . its constitutionality is not affected by” the different exemptions for Political or Ideological Signs).

“Smith for Mayor” and “Jones for Mayor;” and the provision governing Temporary Directional Signs does not distinguish between signs bearing the messages “Young Communists Meeting Today” and “John Birch Society Meeting Today.” All this is true, but beside the point; this equal treatment *within* the various categories of signs does not, as the Ninth Circuit panel majority thought, support the conclusion that the distinctions the ordinance draws *between* Ideological Signs, Political Signs, and Temporary Directional Signs are not content-based.

A hypothetical will help explain why the majority’s conclusion does not follow. Imagine an ordinance that regulates sound trucks and allows messages about football to be broadcast for four hours each day at 85 decibels but allows messages about baseball to be broadcast for only two hours each day at 80 decibels. With regard only to messages about football, the ordinance is entirely content and viewpoint-neutral; one can broadcast messages promoting games, discussing strategy and tactics, calling for the abolition of football because too many players suffer head injuries, or any other message regarding football. So also with baseball; one can broadcast messages promoting games, extolling or lamenting the designated hitter rule, discussing who should be the most valuable player, or any other message about baseball.

It is difficult to imagine that any court would find the hypothetical sound truck ordinance content-neutral. If the ordinance’s stated purpose is to regulate noise, the distinction between baseball and football messages makes no sense in relation to that

purpose; 85-decibel messages about baseball are no more noisy than 85-decibel messages about football. And if the purpose is to promote football, not only the ordinance's face, but also its purpose, are content-based and impermissibly favor messages about football. *Cf. R.A.V.*, 505 U.S. at 396 (“the government may not regulate use [of a sound truck] based on hostility—or favoritism—towards the underlying message”); *id.* (“the power to proscribe particular speech on the basis of a non-content element (e.g., noise) does not entail the power to proscribe the same speech on the basis of a content element”).

The hypothetical sound truck ordinance is not meaningfully distinguishable from the Gilbert sign ordinance. Both distinguish between different subjects and impose different restrictions based on those distinctions. If the sound truck ordinance is content-based because it imposes different restrictions on messages about baseball than it does on messages about football—even though it treats all messages about baseball alike and all messages about football alike—the Gilbert ordinance is content-based because it imposes different restrictions on signs bearing ideological messages, signs promoting political campaigns, and signs directing people to events—even though it treats all messages within each category alike.

This is so because just as the larger subject of baseball can be broken down into smaller subjects and different perspectives on those subjects (for example, the designated hitter rule and its pros and cons, the MVP race and who should win), so the

larger subject matter of directions to events can be broken down into smaller subjects often reflecting different perspectives (for example, directions to worship services, directions to the atheist society meeting). A law that differentiates between speech about baseball and speech about football and places greater restrictions on speech about baseball is a content-based restriction even though it does not single out specific messages within the broader subject of baseball for different treatment. Likewise, a law like the Gilbert ordinance that differentiates between ideological speech, political campaign speech, and speech directing people to events is content-based even though it does not single out specific messages within the broader subject of directional messages for different treatment. That the Gilbert ordinance treats all Political Signs alike, all Ideological Signs alike, and all Directional Signs alike does not mean that the ordinance is content-neutral when it treats Directional Signs less favorably; it means only that all signs bearing directional messages (content) are treated less favorably than all signs bearing ideological and political campaign messages. The Ninth Circuit panel majority's apparent conclusion that because the Gilbert ordinance treats all signs within each category the same, the ordinance does not discriminate based on content by treating Directional Signs *as a category* less favorably is a *non-sequitur*. That *non-sequitur* does not support the majority's ultimate conclusion that the Gilbert ordinance is content-neutral.

CONCLUSION

The Gilbert sign ordinance, on its face, distinguishes between and imposes different restrictions on signs based on the content of the messages the signs display. The ordinance is therefore content-based and is constitutional only if it survives strict scrutiny. The Ninth Circuit panel majority erred in finding otherwise. Therefore, this Court should reverse the Ninth Circuit's decision and remand this case to that court to determine if Gilbert can show that the ordinance's differential content-based treatment of different signs is the least restrictive means of advancing a compelling government interest.

Respectfully submitted this 22nd, day of September, 2014.

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