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

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND NINE OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Town of Gilbert's Sign Code categorizes temporary signs based on their content and then restricts their size, duration, location, and other characteristics depending on the category into which each sign is placed. Under the Sign Code, Good News Community Church's temporary signs promoting church services receive far worse treatment than temporary signs promoting political, ideological, and various other messages, even though they equally impact Gilbert's interests in safety and aesthetics.

The question presented is:

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

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INTEREST OF *AMICI CURIAE*

In *Reed v. Town of Gilbert*, 707 F. 3d 1057 (9th Cir. 2013), the Court of Appeals for the Ninth Circuit refused to apply strict scrutiny to a town's sign ordinance despite the fact that it facially discriminates against speech that discusses certain subjects. The Ninth Circuit acknowledged that the ordinance draws "distinctions between Temporary Directional Signs, Ideological Signs, and Political Signs," and requires at least some consideration of the "substance" of the sign. *Id.* at 1069. Nevertheless, observing that the town "did not adopt its regulation of speech because it disagreed with the message conveyed," the court found the statute to be "content-neutral" and subject to intermediate scrutiny. *Id.* at 1071–72.

Amici Curiae—the States of West Virginia, Georgia, Kansas, Michigan, Montana, Nebraska, Oklahoma, South Carolina, Texas, and Utah—have a two-fold interest in this case. *First*, the States seek to protect their citizens' freedom of speech from unconstitutional discriminatory treatment of the type the town enacted in this case. The approach adopted by the Ninth Circuit would give governments—including the Federal Government—the authority to systematically favor speech about certain subjects over speech about other subjects, in violation of long-standing First Amendment protections. *Second*, the States have an interest in ensuring that judicial doctrine—whether in the First Amendment context or otherwise—properly

delineates and respects the role of the legislature. In particular, courts should not attempt intrusive inquiries into a legislature's subjective motivations in order to save a facially content-based restriction on speech. If a law's plain text discriminates based upon the content of speech, courts should simply strike down the law, except in the extremely rare cases where the content-based restriction can survive strict scrutiny.

SUMMARY OF ARGUMENT

This Court has developed several robust doctrines for protecting the First Amendment right to free speech, including a strong limitation on laws that discriminate against speech on the basis of content. Content-based restrictions on speech are "presumptively invalid." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). The presumption can only be overcome by a showing that the discriminatory statute survives the demands of strict scrutiny. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

In order to give the First Amendment's broad terms sufficiently robust protection, this Court has consistently interpreted the concept of a "content-based" restriction broadly. As relevant in this case, this Court has repeatedly held that statutes are unlawfully content-based if they place greater burdens on the discussion of some "subject matter," as opposed to discussion of other "subject matter." *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Laws that discriminate on the basis of

subject matter, this Court has explained, impermissibly "presuppose[] that [public discussion of some issues is] more deserving of First Amendment protection than [public discussion] over other issues." *Carey v. Brown*, 447 U.S. 455, 466 (1980).

The sign code in the present case is a classic example of impermissible subject-matter discrimination on speech. The code allows more robust speech about political or ideological matters, while permitting far more limited speech about topics such as the timing and location of church meetings. As the dissenting judge below explained, the code's discriminatory regime is thus nothing more than an unlawful "determination that 'ideological' and 'political' speech is categorically more valuable, and therefore entitled to greater protection from regulation, than speech promoting events sponsored by non-profit organizations." *Reed v. Town of Gilbert*, 707 F. 3d 1057, 1080 (9th Cir. 2013) (Watford, J., dissenting).

The panel majority wrongly concluded that the sign code is content-neutral—notwithstanding its plain text—by relying upon the town's subjective and allegedly non-censorial motivations for enacting the code. The majority determined that "the differing restrictions between types of noncommercial speech [were] adequately justified without reference to the content of the regulated speech." *Id.* at 1069 (quotations omitted). Put another way, the majority found that the code was not content-based because

the town "did not adopt its regulation of speech because it disagreed with the message conveyed." *Id.* at 1071.

There are at least three problems with the notion that a government's motivation can turn a textually content-discriminatory law into a content-neutral one. *First*, it is foreclosed by this Court's caselaw, which holds that it does not matter to the First Amendment analysis that a citizen subject to a discriminatory law can show "no evidence of an improper censorial motive." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) (quotation omitted). *Second*, that approach to determining whether a law is content-based, and therefore subject to strict scrutiny, fails to give full meaning to the First Amendment's broad protections. *Third*, the Ninth Circuit's approach to content-based laws poses a threat to the integrity of the lawmaking process.

ARGUMENT

I. A LAW THAT DISCRIMINATES AGAINST SPEECH BASED UPON THE SUBJECT MATTER THAT IS BEING DISCUSSED IS A PRESUMPTIVELY INVALID CONTENT-BASED RESTRICTION ON SPEECH

The First Amendment—which applies not only to Congress but also to States and their political

subdivisions[1]—prohibits laws that "abridg[e] the freedom of speech." U.S. Const. amend. I. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). "[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

To enforce this constitutional guarantee that citizens can speak about and listen to any message or idea, this Court has held that laws that place "differential burdens upon speech because of its content," *Turner Broad.*, 512 U.S. at 642, are "*presumptively invalid*," *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (emphasis added). A governmental entity defending a content-based restriction on speech must carry a heavy burden. Specifically, it must demonstrate that the differential treatment of speech based upon content is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Because this strict scrutiny standard is extremely demanding, "this Court has sustained content-based restrictions only in the most extraordinary circumstances." *Bolger v. Youngs*

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[1] *See Gitlow v. People of the State of New York*, 268 U.S. 652, 666 (1925); *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938).

Drug Prods. Corp., 463 U.S. 60, 65 (1983). After all, "any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Carey v. Brown*, 447 U.S. 455, 462–63 (1980) (quotation omitted).[2]

Furthermore, consistent with the First Amendment's sweeping terms, this Court has construed broadly what constitutes a "content-based" restriction on speech. The "content" of speech includes the "message," "ideas," and "subject matter" being discussed. *Mosley*, 408 U.S. at 95. To take just a few out of innumerable examples, this Court has held that restrictions on violent video games and depictions of animal cruelty constitute content-based restrictions on speech. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011); *United States v. Stevens*, 559 U.S. 460 (2010). It has held that ordinances prohibiting the posting of the words "For Sale" and "Sold" are content-based. *Linmark Assocs.,*

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[2] In contrast, this Court has not required a governmental entity to satisfy strict scrutiny where, for example, a law: (1) involves certain narrow "historically unprotected categories of speech," such as obscenity, *United States v. Stevens*, 559 U.S. 460, 470–71 (2010); (2) is directed at "secondary effects" of the speech, like the "neighborhood blight" created by adult theaters, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986) (quotation omitted); (3) governs the *mode* of speech, such as engaging in face-to-face discussions, *Hill v. Colorado*, 530 U.S. 703 (2000); or, (4) generally involves only a "time, place, and manner of expression," *Perry Educ.*, 460 U.S. at 45.

Inc. v. Twp. of Willingboro, 431 U.S. 85 (1977). And it has concluded that bans "engag[ing] in editorializing" in public broadcasting are content-based restrictions on speech. *FCC v. League of Women Voters of California*, 468 U.S. 364, 366, 383 (1984).

Most relevant here, this Court has repeatedly held that a law that disfavors speech based upon the subject matter being discussed is always a content-based restriction and therefore presumptively unconstitutional. For example, in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), a city enacted an ordinance prohibiting picketing near schools, but exempted labor protests from that ban. This Court held that placing a special burden on discussion of some topics (non-labor issues) but not others (labor issues) was unlawful because the ordinance "describes permissible picketing in terms of its subject matter." *Id.* at 95. Similarly, in *Carey v. Brown*, 447 U.S. 455 (1980), this Court invalidated as content-based a law forbidding picketing of all "residence or dwellings," but exempting labor protests. *Id.* at 457, 460–61. This Court explained the law was content-based because, *inter alia*, the law impermissibly "presupposes that labor picketing is more deserving of First Amendment protection than are public protests over other issues." *Id.* at 462, 466. In short, "the statute discriminates among pickets based on the subject matter." *Id.* at 471. Finally, in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), this Court held unlawful a statute imposing a higher tax on general interest

magazines than upon "religious, professional, trade, or sports periodical[s]," reasoning that the "tax status [of the magazine] depends entirely on its *content*." *Id.* at 226, 229 (emphasis in original). As one commentator has summarized, this Court's "cases reveal a stable rule that laws that facially regulate expression on the basis of subject matter . . . are content based." Leslie Kendrick, *Content Discrimination Revisited*, 98 Va. L. Rev. 231, 254 (2012).

The facts of the present case demonstrate the wisdom of this Court's long-standing rule that the First Amendment requires close scrutiny of laws favoring speech on some subjects over speech on other subjects. The Town of Gilbert's sign code permits ideological and political signs to be substantial larger, placed at more places, and hung longer than signs conveying the time and location of events such as religious services. As Judge Watford explained in dissent below, the Town's sign ordinance is thus based upon the "apparent determination that 'ideological' and 'political' speech is categorically more valuable, and therefore entitled to greater protection from regulation, than speech promoting events sponsored by non-profit organizations." *Reed v. Town of Gilbert*, 707 F. 3d 1057, 1080 (9th Cir. 2013) (Watford, J., dissenting). This subject-matter discrimination impermissibly "presupposes that [public discussion of some issues] is more deserving of First Amendment protection than are [public discussion] over other issues." *Carey*, 447 U.S. at 466. There are, after all, valid

reasons to think that a sign directing the public to a meeting at which spiritual matters will be discussed is at least equally valuable to both speakers and listeners than a sign containing only a candidate's name and prospective office. The First Amendment prohibits a government from making the contrary value judgment by favoring some subjects of speech—be it labor (*Mosley*, *Casey*), sports (*Arkansas Writers*), or politics (this case)—over other subjects. Such discrimination, this Court has held, is plainly content-based and therefore presumptively unconstitutional.

II. WHEN A LAW'S PLAIN TEXT DISCRIMINATES AGAINST SPEECH BASED UPON ITS CONTENT, THE GOVERNMENT'S ALLEGEDLY BENIGN MOTIVE FOR ENACTING THE LAW IS LEGALLY IRRELEVANT

The Ninth Circuit acknowledged that the sign code required "consider[ing] the substance of [each] sign" to distinguish between the three subject-matter categories (Temporary Directional Signs, Ideological Signs, and Political Signs), but nevertheless concluded that the law was content-neutral. *Reed*, 707 F. 3d at 1069. The court determined to follow "a more nuanced standard" involving an inquiry into the government's "justifi[cations]" for the law. *Id.* at 1068 (quotations omitted). Applying that test, the court found the sign code was not content-based because the town "did not adopt its regulation of

speech because it disagreed with the message conveyed." *Id.* at 1071.

A. The Ninth Circuit's reliance on a government's subjective motivation to save a facially content-based law cannot be squared with this Court's precedent. This Court has long articulated the "commonsense understanding" that a law that is content-based on its text cannot be salvaged by either a legislature's allegedly non-censorial motivation or a government's proffer of "*justification* for the regulation [that] is content neutral." *City of Cincinnati v. Discovery Network*, Inc., 507 U.S. 410, 429 (1993) (emphasis in original). Put another way, "whether 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." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (noting that a statute is "content based if it require[s] enforcement authorities to examine the content of the message that is conveyed" (quotations omitted)).

All three of this Court's subject-matter discrimination cases, discussed above, reflect this understanding. In *Mosley*, the city claimed that its regulation of non-labor picketing was motivated not by "improper content censorship," but rather by a desire to preserve public order near its schools. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 99 (1972). This Court rejected the relevance of that assertion, noting that upholding laws merely because

the government claims a non-censorial motivation would place "[f]reedom of expression . . . on a soft foundation indeed." *Id.* at 101. In *Carey*, this Court similarly turned aside the government's claim that its ban on non-labor picketing near residences was justified by the non-discriminatory purpose of protecting residential privacy. *Carey v. Brown*, 447 U.S. 455, 465 (1980). And in *Arkansas Writers*, this Court held that it does not matter to the First Amendment analysis that a citizen subject to a discriminatory law can show "no evidence of an improper censorial motive." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987).

Other cases of this Court have articulated the same principle, holding that an allegedly benign motive does not render an otherwise content-based restriction content-neutral. *See, e.g.*, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983) ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment."); *Discovery Network*, 507 U.S. at 429 ("True, there is no evidence that the city has acted with animus toward the ideas contained within 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.'" (quoting *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991))).

B. The Ninth Circuit's approach to determining whether a law is content-based, and therefore subject to strict scrutiny, also fails to give full meaning to the First Amendment's broad protections. The Ninth Circuit's reasoning—and that of other courts of appeals that have adopted a similar approach—is grounded in the narrow conception that the First Amendment protects only against *viewpoint* discrimination and censorial motives. Thus, in *Brown v. Town of Cary*, 706 F.3d 294 (4th Cir. 2013), the Fourth Circuit refused to apply strict scrutiny to every content-based restriction on speech because it believed such scrutiny should be reserved for laws with "a censorial purpose." *Id.* at 302. Or, as the Ninth Circuit explained here, strict scrutiny was not appropriate since the town "did not adopt its regulation of speech because it disagreed with the message conveyed." *Reed*, 707 F.3d at 1071.

This anti-censorial view of the First Amendment gives an unduly miserly construction to the Amendment's protections. On its face, the First Amendment's protection of speech is far broader: it generally safeguards an individual from burdens on the right to speak freely. And when a legislature limits the right to speak because speakers have decided to discuss a particular subject, the burden on First Amendment rights is the same regardless of whether the legislature has a subjective, censorial motivation. The method of determining if a law is content-based should not focus, therefore, on whether there are ostensibly-benign motives for that law.

This Court has rightly rejected the "distinction between content and viewpoint restrictions" in deciding whether restrictions on certain subjects of speech are constitutional. *Arkansas Writers*, 481 U.S. at 230. Instead, this Court has held that the First Amendment requires a government to treat all subjects that individuals want to discuss equally. The government may not enact restrictions based upon the theory that some topics are "more deserving of First Amendment protection," even where the government has no censorial purpose in terms of favoring any particular viewpoint on any particular topic. *Carey*, 447 U.S. at 466. And if the government thereafter wishes to defend its actions by asserting a non-discriminatory justification, that reason must be tested under strict scrutiny. It must prove objectively—not subjectively—that the content-based discrimination is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *see, e.g.*, *Arkansas Writers*, 481 U.S. at 231.

C. Finally, the Ninth Circuit's approach to content-based laws poses a threat to the integrity of the lawmaking process. Lawmaking in this country ordinarily culminates in the text voted upon by the lawmaking body, and it is the text that becomes binding law after all legally required prerequisites are satisfied. Legislatures and city councils create laws not through debates and speculation but through voting on specific words with specific meanings. That is why courts "do not inquire what

the legislature meant; [they] ask only what the statute means." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899). As this Court has long held, "[i]nquiries into [legislative] motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *accord Fletcher v. Peck*, 10 U.S. 87, 6 Cranch 87, 130 (1810).

The Ninth Circuit's methodology would encourage a disconnect between the deliberative process and the laws ultimately passed. The Ninth Circuit would require courts to "plunge[] . . . into the morass of legislative motive, a notoriously hazardous and indeterminate inquiry," any time a law is content-discriminatory on its face. *Boos v. Barry*, 485 U.S. 312, 336 (Brennan, J., concurring). Recognizing this, savvy lawmakers could use legislative records to paper over and push through all manner of onerous and discriminatory speech-burdening laws that might not pass if judged by their text alone.[3]

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[3] Whether the same concerns apply to the opposite rule—under which proof of an improper legislative purpose would invalidate a textually content-neutral law—is not presented here. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) ("A government bent on frustrating an impending demonstration might pass a law demanding two years' notice before the issuance of parade permits. Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional.").

What is more, the Ninth Circuit has extended this same flawed reasoning beyond the First Amendment context. For example, that court has also held that under the Dormant Commerce Clause, state laws that discriminate by their plain text against interstate commerce are nevertheless not subject to strict scrutiny if the state had "good and non-discriminatory reason[s]" for enacting the laws. *See Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1107 (9th Cir. 2013). In that context, as here, the Ninth Circuit's view is at odds with longstanding precedent of this Court. *See Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 100 (1994) (the "purpose of, or justification for, a law has no bearing on whether it is facially discriminatory").

It would thus be beneficial for this Court to make clear that the assertion of a subjectively non-discriminatory reason can never save from invalidation any statute that is discriminatory on its text, in any area of constitutional law. In general, such a discriminatory statute can only be salvaged by a showing of objective justifications and sufficient fit, under the level of scrutiny that this Court has held applies to the discriminatory treatment at issue. In the First Amendment context, the proper analysis is to evaluate the law on its text to decide whether the law is a content-based regulation of speech. If that law is content-based by its text, the law is "presumptively invalid," *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992), and can only survive review if the State demonstrates through objective evidence and argumentation that the law is

"necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ.*, 460 U.S. at 45. This straightforward approach "provides clear guidance" about "the scope of impermissible regulation" and individuals' "constitutional protection." *Boos*, 485 U.S. at 336 (Brennan, J., concurring).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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