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 *AMICUS CURIAE* THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

Mark Goldfeder
CENTER FOR THE STUDY OF LAW AND RELIGION
EMORY UNIVERSITY SCHOOL OF LAW
Gambrell Hall, Suite 310
1301 Clifton Rd. NE
Atlanta, GA 30322
(404) 712-0213

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Jordan A. Sekulow
Colby M. May
Walter M. Weber
Geoffrey R. Surtees
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, D.C. 20002
(202) 546-8890
sekulow@aclj.org

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law.

The ACLJ often appears before this Court in support of First Amendment free speech claims. *E.g.*, *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Hill v. Colorado*, 530 U.S. 703 (2000); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003). It has also appeared before this Court resisting specious free speech claims. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

This case is important to the future protection of religious speech and other classic First Amendment activities and is therefore of special interest to the ACLJ.

SUMMARY OF THE ARGUMENT

It is well-established that religious speech is fully protected speech by the First Amendment, entitled to as much security and solicitude as political or ideological speech. The multi-purpose signs of Good News Community Church at issue here, which contain and further religious purposes, fall well within the

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[1] No counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae,* its members, or its counsel made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief. Petitioners' consent to the filing of all briefs is on file with the Clerk and Respondents' written consent accompanies this brief.

sanctuary afforded by the Free Speech Clause. While the Town of Gilbert—as is the case with any state or local government—is permitted to regulate certain characteristics and properties of signage within its community, neither the Constitution nor this Court's precedents permit it to discriminate against signs, such as those posted by Good News, based on their message. Gilbert's Sign Code does just that. It requires that signs containing different messages be treated differently. What is especially infirm about the Sign Code challenged here is that it treats various types of *noncommercial* speech—such as political and ideological expression, and the religious signs of Good News—with different degrees of favorability in terms of size, density, and duration.

Under First Amendment principles reaffirmed most recently by this Court in *McCullen v. Coakley*, 134 S. Ct. 2518 (2013), this Gilbert cannot do. *McCullen* makes clear that, in deciding whether a speech regulation is content-based or content-neutral, a reviewing court must begin with the text of the regulation itself: does it facially discriminate based on content? That is, must enforcement officials examine the content of speech to determine whether that speech complies with the regulation? Simply put, does application of the regulation depend on what one says? In the case of Gilbert's Sign Code, the answer is *yes*. The Code is content-based and must therefore satisfy the rigor of strict scrutiny.

Relying principally on this Court's opinion in *Hill v. Colorado*, however, the lower court held that because Gilbert did not adopt the Sign Code out of disagreement with any particular message, it is

content-neutral even though the Code requires town officials to inspect the content of signs to decide which restrictions apply. The underlying problem with the Ninth Circuit's analysis lies not so much with its application of *Hill*, but with *Hill* itself. While governmental disagreement with a message can render a restriction content-based, such disagreement is not a prerequisite for finding content discrimination, particularly where the text of the restriction is facially content-based. *Hill* has unfortunately led lower courts astray, leading some, like the court below here, to conclude that a facially content-based speech code can nevertheless be content-neutral, absent *additional* proof of a discriminatory governmental motive.

This Court should either formally eschew *Hill*'s "principal inquiry" test in this and future cases, or, at the very least, reconfigure it in light of more firmly established free speech precedents. It should clarify that a regulation of speech is content-based when it is *either* content-discriminatory on its face *or* content-discriminatory in its purpose.

ARGUMENT

I. Good News Community Church's Signs Are Religious Speech Warranting Full First Amendment Protection.

The law is well-settled that religious speech, *i.e.*, speech with religious content or a religious point of view, is protected under the First Amendment. *See, e.g.*, *Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 110 (2001); *Widmar v. Vincent,* 454 U.S. 263, 269 (1981). As this Court has observed: "[o]ur precedent establishes that private religious speech, far from being

a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (citations omitted). Indeed, the First Amendment protects "religious proselytizing" and "acts of worship." *Id.* at 760-61. The First Amendment "forbids" any local government from "regulat[ing] speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).

Petitioner, Good News Community Church ("Good News"), is a small religious community located in Gilbert, Arizona. The congregation of Good News does not have a permanent location, and relies on strategically-placed signs to spread the Gospel of Jesus Christ and invite people to worship. For Good News, inviting others to worship is as much an expression of religious duty as studying the Bible and praying. *See* Pet. Br. 7-8.

While signs might "pose distinctive problems that are subject to municipalities' police powers," they "are a form of expression protected by the Free Speech Clause." *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994). Indeed, outdoor signs are "a well-established medium of communication, used to convey a broad range of different kinds of messages." *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion); *see also id*. ("The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or 'broadside' to the billboard, outdoor signs have played a prominent role throughout

American history, rallying support for political and social causes.") (citation omitted).

As Justice Brennan explained, in an observation highly relevant to the case at bar:

> In deciding this First Amendment question, the critical importance of the posting of signs as a means of communication must not be overlooked. Use of this medium of communication is particularly valuable in part because it entails a relatively small expense in reaching a wide audience, allows flexibility in accommodating various formats, typographies, and graphics, and conveys its message in a manner that is easily read and understood by its reader or viewer.

Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 819 (1984) (Brennan, J., dissenting).

There can be no serious dispute that Good News's signs constitute protected speech under the First Amendment. Pursuant to its religious beliefs, the church not only holds worship services, it seeks to invite members of the public to join the church in those services. Publicly sharing a religious message with others by inviting them to visit, attend, or join a religious body is intrinsic to how many religious groups practice their faith. For a small church like Good News, committed to the "Great Commission" of the Gospel,[2] a

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[2] "Go therefore and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, teaching them to observe all that I have commanded you." *Matthew*, 28:19-20 (ESV).

critical way of carrying out this religious-based mission is through the posting of signs that—like political or ideological signs—can communicate the church's message and invitation to a wide audience.

The signs display the church's seal—a sunrise and the Cross rising out of an open book—symbolizing various components of the church's core beliefs.[3] The signs also direct viewers to Good News's website, "www.goodnewspres.com," in addition to providing the location and time of church services. The signs declare to the people of Gilbert that Good News Community Church is "Your Community Church."

The website referred to on Good News's signs provides more information about the church and its beliefs. The site explains that Good News has "Joyful, God-centered worship," and "Reformed, Bible-based expository preaching." Good News is a "welcoming congregation," which is "Christian First, Presbyterian Second." The church's stated goals on the site are: "introducing people to Jesus Christ and preparing them for eternity, being a place of prayer, getting people excited about studying and obeying God's Word, [and] building Christ-centered families."[4]

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[3] A photograph of the church's sign is reproduced in the Parties' Joint Appendix ("J.A.") at p. 165.

[4] Additionally, the website provides the Apostles Creed, a link to the Westminster Confession of Faith, links and citations to 76 passages of the Bible, and other religiously-oriented statements.

In short, it is beyond dispute that Good News's signs, and the website they highlight, constitute religious speech that must be afforded full protection under the First Amendment.

While the court below noted that Good News "concedes" that its "signs are Temporary Directional Signs," *Reed v. Town of Gilbert*, 707 F.3d 1057, 1061 (9th Cir. 2013), this "concession" does not impede the church's constitutional challenge to the city's Sign Code. The church has never conceded that its signs are *only* directional in nature, and it has never conceded that the Sign Code is content-neutral. To the contrary, the church's signs are *multi-purpose* (religious, ideological, and directional) and, as explained below, the Sign Code is content-based in treating the church's multi-purpose signs differently than ideological or political signs—to use two critical examples. This case is not about how properly to characterize the church's signs under the Sign Code, but whether the Sign Code itself passes constitutional muster.

II. The Town of Gilbert's Sign Code Is Facially Content-Based Because it Treats Signs Differently Based on Their Content.

The Town of Gilbert regulates the display of outdoor signs with Gilbert Land Development Code, Division 4, General Regulations, Article 4.4 ("Sign Code" or "Code"). *Reed*, 707 F.3d at 1061. The purpose of the Code is to further the interests of safety and aesthetics. J.A. 100 ¶ 24; 139 ¶ 24.

Under the Code, no person is allowed to erect a sign without obtaining a sign permit, unless the sign is exempted. *Id.* at 27-30. The Code outlines nineteen

types of signs that are exempt and thus allowed without a permit. Three exempted signs are "Political Signs," "Ideological Signs," and "Temporary Directional Signs Relating to a Qualifying Event." *Id.* To fall under the last of these sign categories, the sign must "intend [ ] to direct pedestrians, motorists, and other passersby to . . . any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." *Id.* at 70.

Temporary Directional Signs and Ideological Signs are mutually exclusive under the Code. An Ideological Sign is one that "communicat[es] a message or ideas for non-commercial purposes that is *not* a . . . Temporary Directional Sign Relating to a Qualifying Event." *Id.* at 66-67 (emphasis added). A Political Sign, on the other hand, is a "temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general and special elections relating to any national, state or local election." *Id.* at 68.

Under the Code, signs in Gilbert bearing different *content* are treated differently—some far more favorably than others. Regulations governing Ideological Signs and Political Signs, for example, are considerably less restrictive than regulations governing Temporary Directional Signs containing religious expression, such as Good News's signs. Ideological Signs and Political Signs are allowed to be significantly larger and placed in greater density. Moreover, Ideological Signs can be placed indefinitely, and Political Signs may remain in place for longer periods of time before and after the event—an election,

generally—that allows their placement in the first place. *See* Pet. Br. 10-12.

A simple example reveals the content-based nature of Gilbert's Sign Code and how its content-based regulation of speech unfavorably treats religious speech, such as Good News's. If a sign says "Stand Up and Vote for John Smith," it can be up to thirty-two square feet in size and may be placed sixty days before the election. J.A. 84. Most critically, the simple addition of an arrow on this sign ("Stand Up and Vote for John Smith *here* —>") would not change its status as a Political Sign.[5]

By way of contrast, a sign that reads, "Stand Up for Jesus and Worship Him *here* —>," would fall under the Sign Code's definition of a Temporary Directional Sign, and would thus be limited to a size of only six square feet, *less than a fifth* of the "Vote for John Smith" sign. *Id.* at 76. Moreover, while the political sign can be placed up to sixty days in advance of the election event, the religious sign can only be placed twelve hours in advance of the religious event. *Id.*

Thus, despite the fact that both signs are temporary and directional in nature, the *political* sign is treated far more favorably under the Sign Code than the

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[5] Voting in an election cannot be a "qualifying event," because the *state or local government* arranges the election, not a "religious, charitable, community service, educational, or other similar non-profit organization." J.A. 70. Moreover, unlike an Ideological Sign, a Political Sign is not conditioned on whether it is a Temporary Directional Sign Relating to a Qualifying Event. J.A. 66-68. *See*, *supra*, p.8.

religious one.[6] The only difference between these two signs is the *content* of each sign's message.[7] This is the epitome of content-based discrimination. As this Court has explained,

> [a]lthough the city may distinguish between the relative value of different categories of commercial speech, *the city does not have the same range of choice in the area of noncommercial speech* to evaluate the strength of, or distinguish between, various

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[6] The fact that the Sign Code does not ban Good News's religious signs, but only treats them less favorably than political signs, is irrelevant. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011) ("The Court has recognized that the distinction between laws burdening and laws banning speech is but a matter of degree and that the Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.") (citations and internal quotation marks omitted).

[7] A sign directing a person *away* from—instead of *to*—an assembly or gathering falls outside the Sign Code's definition of a Temporary Directional Sign. J.A. 70. Thus, Willis Cox's sign proclaiming that "Religion is a Snare and a Racket," *Cox v. New Hampshire*, 312 U.S. 569, 572 (1941), would not be a Temporary Directional Sign under the Code even if it included the message, "Don't waste your time at Good News Community Church, deceiving people at Coronado Elementary School, located *here* —>". An anti-religious sign like this, viewed as an Ideological Sign under the Code, would be treated more favorably in terms of size and duration than a pro-religious sign like Good News's. The Code is thus not only content-based, but viewpoint-based as well. The notion of posting signs to *dissuade* church attendance is not far-fetched. *E.g.*, Laurie Goodstein, "More Atheists Shout it from the Rooftops," NEW YORK TIMES (Apr. 26, 2009) (noting atheist billboards); Matt Coker, "Atheists, Skeptics and Freethinkers Protest Calvary Chapel Creation Conference Today!," OC WEEKLY BLOG (July 24, 2014).

> communicative interests. With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse. . . . Because some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones.

Metromedia, Inc., 453 U.S. at 514-15 (plurality opinion) (internal citations omitted) (emphasis added).

III. The Town of Gilbert's Sign Code Is Content-Based Under This Court's Most Recent Decision Involving a Regulation of Speech: *McCullen v. Coakley.*

Just last term, this Court articulated the standard for determining whether a speech regulation is content-based. *McCullen v. Coakley*, 134 S. Ct. 2518 (2013). In deciding whether an abortion buffer zone law was a content-based restriction on speech, the Court began its analysis with whether the law "draw[s] content-based distinctions *on its face*." *Id*. at 2531 (emphasis added) (citing *Boos v. Barry*, 485 U.S. 312, 315 (1988), and *Carey v. Brown*, 447 U.S. 455, 465 (1980)). It indicated that the law would be content-based "if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *Id*. (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377, (1984)). In other words, the relevant inquiry is whether application of the law "depends . . . on what [speakers] say"? *Id*. (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010)).

Although local governments have wide "leeway" to regulate "features of speech unrelated to . . . content," *id.* at 2529, they have "no power to restrict expression because of its message, its ideas, its subject matter, *or its content*." *Id.* (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (emphasis added). These constitutional protections are heightened when the venue for speech is "public streets and sidewalks." *Id.* Such locations "have immemorially been held in trust for the use of the public" because, *inter alia*, "they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir." *Id.*

Application of the foregoing principles from *McCullen*, each of which rest upon longstanding precedents of this Court, yields one conclusion: Gilbert's Sign Code is content-based. Like the speech restrictions at issue in *Boos* and *Carey* and other decisions of this Court, the Sign Code facially discriminates based on content, as previously described. *See* Section II, *supra*. Indeed, whether a sign complies with the Code "depends" on what the signs "say," and town officials must necessarily "examine" the contents of a sign to determine its level of favorability under the Code. *McCullen*, 134 S. Ct. at 2531.

If a church posted a sign reading, "Jesus is Lord! Worship Him like we do at First Christian Church!," a Gilbert official would have to parse the contents of the sign to determine whether it is an Ideological Sign—it obviously communicates "a message or idea"—or a Temporary Directional Sign, because it could be construed as an invitation for "pedestrians, motorists,

and other passersby" to visit First Christian Church, even though no address or directions are provided. This investigation into the content of speech, to determine how favorably it should be treated under the Sign Code, reveals that Gilbert's sign regulations are not content-neutral, but content-based.[8]

This Court should hold that the Sign Code is facially content-based under the analysis set forth in *McCullen* and, applying strict scrutiny, rule it unconstitutional.

IV. This Court Should Disavow or Clarify the "Principal Inquiry" Test of *Hill* and *Ward*.

Despite the unassailable notion that the Sign Code is facially content-based, the court below held it to be content-neutral. The court supported its holding with this Court's opinion in *Hill v. Colorado*, and *Hill's* statement that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech ***because of disagreement with the message it conveys***." 530 U.S. at 719 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (emphasis added).

Based on *Hill*, the Ninth Circuit held that because Gilbert did not adopt the Sign Code out of disagreement with any particular message, it was content-neutral: "[b]ecause Gilbert's Sign Code *places no restrictions on the particular* ***viewpoints*** *of any*

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[8] Examples such as this one, where the Code provides insufficient clarity as to what regulatory category a signs falls into, require citizens and officials to play a guessing game, allowing for arbitrary or discriminatory enforcement. *See*, *e.g.*, *FCC v. Fox TV Stations*, 132 S. Ct. 2307, 2317 (2012).

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*, 707 F.3d at 1072 (citing *Hill*, 530 U.S. at 719-20) (emphasis added).

This case—complete with its facial myriad of content-based distinctions on speech—demonstrates that this Court should either set aside the *Hill* / *Ward* "principal inquiry" rubric as a misstatement or, in the alternative, make it clear to the lower courts that, though governmental disagreement with a message might be a *proper* inquiry, "it is not the *only* inquiry." *Hill*, 530 U.S. at 746 (Scalia, J., dissenting) (emphasis in original).

The essential problem with the *Hill* / *Ward* language is that it invites lower courts to do what the Ninth Circuit did here: bless a facially content-based regulation as content-neutral because the government did not (at least publicly) articulate a discriminatory motive for the regulation. *See*, *e.g.*, *Thayer v. City of Worcester*, 755 F.3d 60, 68 (1st Cir. 2014) (citing *Hill* for rule that "[e]ven a statute that restricts only some expressive messages and not others may be considered content-neutral when the distinctions it draws are justified by a legitimate, non-censorial motive"); *Brown v. Town of Cary*, 706 F.3d 294, 302, 304 (4th Cir. 2013) (rejecting argument that a sign code is necessarily content-based where "a searching inquiry into the content of a particular sign is required," and stating, in light of *Hill*, "we focus our attention on whether the restriction was adopted because of a disagreement with the message conveyed"); *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 366 (4th Cir. 2012) (relying on

Hill in stating that "we have not hesitated to deem a regulation content neutral even if it facially differentiates between types of speech"); *Asgeirsson v. Abbott*, 696 F.3d 454, 459-60, n. 6 (5th Cir. 2012) (citing *Ward* and *Hill* for the proposition that "[a] regulation is not content-based . . . merely because the applicability of the regulation depends on the content of the speech. . . . Content-neutrality has continued to be defined by the justification of the law or regulation"); *Palmer v. Waxahachie Indep. Sch. Dist*., 579 F.3d 502, 509-10 (5th Cir. 2009) (citing *Hill* and *Ward* in holding that school's content-neutral purpose rendered exception for certain messages content-neutral); *Wagner v. City of Garfield Heights*, No. 13-3474, 2014 U.S. App. LEXIS 15984, *16 (6th Cir. Aug. 19, 2014) ("'content based' is a term of art that refers to a distinction based on content because of an impermissible purpose").

This Court has long recognized a difference between viewpoint-based and content-based restrictions on speech. *See Pleasant Grove City*, 555 U.S. at 469 ("[A]ny restriction based on the *content* of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest, and restrictions based on *viewpoint* are prohibited.") (citations omitted) (emphasis added); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination.").[9] And, with this distinction in mind,

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[9] Stated simply, "[v]iewpoint discrimination is a subset of content discrimination; all viewpoint discrimination is first content discrimination, but not all content discrimination is viewpoint

this Court has made it clear that a regulation of speech can be viewpoint-neutral but nonetheless content-based. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) ("Even though this provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech."); *Boos*, 485 U.S. at 319-20 (noting that though a speech restriction might be *viewpoint*-neutral that "does not render [it] *content*-neutral.") (emphasis added). Thus, this Court has "time and again rejected the argument that viewpoint-neutrality equals content-neutrality." *Capital Area Right to Life, Inc. v. Downtown Frankfort, Inc.*, 511 U.S. 1135 (1994) (O'Connor, J., dissenting from denial of certiorari) (citations omitted).

However, due to the *Hill* / *Ward* "principal inquiry" language, lower courts, such as the Ninth Circuit here, are confusing content-based restrictions on speech with viewpoint-based restrictions, requiring a party challenging a facially content-based law to demonstrate a viewpoint-based purpose behind it.[10] Parties challenging speech regulations under the First Amendment should not have to carry this burden. *See*,

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discrimination." 1 Rodney A. Smolla, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 3:9 (1998).

[10] As one scholar observed, describing the language from *Ward* as used in *Hill*, "[t]he Court says in sloppy language that the question of content neutrality has to do with whether the government is suppressing speech because of disagreement with its message. But that turns content neutrality into viewpoint neutrality. . . . The Court simply elided the difference between content and viewpoint and pretended that this was a statute which was content-neutral." Michael W. McConnell, *Colloquium*, *Professor Michael W. McConnell's Response*, 28 PEPP. L. REV. 747, 749 (2001).

e.g., *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (rejecting argument that discriminatory treatment "is suspect under the First Amendment only when the [government] intends to suppress certain ideas"); *Minneapolis Star & Tribune Co. v. Minn. 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. We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.") (citations omitted).

The principal danger in the *Hill*/*Ward* line of reasoning is that governments can mask their hostility to certain forms of noncommercial speech with professions of benignity. But speech remains a fundamental right, regardless of whether the government is hostile, patronizing, or indifferent toward that speech. That is why facially content-based regulations trigger strict scrutiny irrespective of governmental purpose. *See Turner Broadcasting System v. FCC*, 512 U.S. 622, 642-43 (1994) ("[W]hile a content-based purpose may be sufficient . . . to show that a regulation is content-based, it is not necessary to such a showing in all cases. . . . Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content").[11] Applying strict scrutiny to facially content-

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[11] *See also Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993) ("Regardless of the *mens rea* of the city, it has enacted a sweeping ban on the use of newsracks that distribute 'commercial handbills,' but not 'newspapers.' Under the city's newsrack policy, whether any particular newsrack falls within the ban is

based restrictions on speech effectively addresses those cases where governments successfully hide their discriminatory motives; a "purpose" test would fail to catch such cases.

Whether this Court should set aside, or at least cabin, the *Hill*/*Ward* "principal inquiry" test is answered *sub silentio* by this Court's *McCullen* decision. Despite the factual and legal similarities between the abortion buffer zone law at issue in *McCullen* and the buffer zone law in *Hill*, the Court in *McCullen* nowhere mentions *Hill*, let alone its "principal inquiry" language, in its legal analysis. And while the Court invoked *Ward* elsewhere in its opinion, *McCullen*, 134 S. Ct. at 2529, 2531, it nowhere mentions or applies the "principal inquiry" language that *Hill* borrowed from *Ward*.[12]

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determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is 'content based.'"). *Cf. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (explaining that the Court "must begin with [the law's] text, for the minimum requirement of neutrality [under the Free Exercise Clause] is that a law not discriminate on its face"); *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (under Title VII, "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect").

[12] In *Ward*, there was no facial content discrimination, so *in context*, the only issue in that case was discriminatory purpose. The problem is that *Hill* essentially took *Ward* out of context and used it to deem content-neutral what was in fact a facially content-based restriction. In so doing, *Hill* distorted the *Ward* test, changing it from being the standard for the *facially neutral subset*

The Court should affirmatively say here what it implicitly said in *McCullen*: government disagreement with a message, under the *Hill / Ward* rubric, is not the "principal inquiry," much less a required element, for a determination that a speech regulation is content-based. Rather, this Court should hold—in fact, reaffirm—that, for purposes of the First Amendment, a regulation on speech is content-based when it is *either* content-discriminatory on its face[13] *or* content-hostile (or just content-discriminatory, even if benign) in its purpose. *See Bartnicki v. Vopper*, 532 U.S. 514, 528 & n.9 (2001). Thus, a content-based text *or* purpose will trigger strict scrutiny.

This Court should revisit the "principal inquiry" rationale of *Hill / Ward* and either formally eschew it in this and future cases, or reconfigure it in light of this Court's more firmly established precedents.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

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of cases to being the governing standard for content-neutrality *in all cases*.

[13] *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment) ("[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.").

Respectfully submitted,

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Jordan A. Sekulow
Colby M. May
Walter M. Weber
Geoffrey R. Surtees
AMERICAN CENTER FOR LAW
& JUSTICE
201 Maryland Ave., N.E.
Washington, D.C. 20002
(202) 546-8890
sekulow@aclj.org

Mark Goldfeder
CENTER FOR THE STUDY OF LAW
AND RELIGION
EMORY UNIVERSITY SCHOOL OF LAW
Gambrell Hall, Suite 310
1301 Clifton Rd. NE
Atlanta, GA 30322
(404) 712-0213

Counsel for Amicus Curiae

SEPTEMBER 22, 2014