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 THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the First Amendment's rule against content discrimination require plaintiffs to prove intentional discrimination or targeting?

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INTEREST OF THE AMICUS[1]

The Becket Fund for Religious Liberty is a non-profit, public-interest legal and educational institute that protects the free expression of all faiths. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. The Becket Fund believes that because the religious impulse is natural to human beings, public and private religious expression is natural to human culture.

The Becket Fund has long advocated for robust protections of religious speech in public discourse. For example, The Becket Fund has defended private religious speech by an elementary school student, *C.H. ex rel. Z.H.* v. *Oliva*, 226 F.3d 198 (3d Cir. 2000) (en banc), *cert. denied sub nom. Hood* v. *Medford Township Bd. of Educ.*, 533 U.S. 915 (2001); defended private religious speech in a municipal "buy-a-brick" program in a public park, *Tong* v. *Chicago Park District*, 316 F.Supp.2d 645 (N.D. Ill. 2004) (represented family whose brick was excluded from the park because it included religious language); defended a Turkish member of parliament's right to religious expression by wearing a *hijab* while serving in Parliament, *Kavakçı* v. *Turkey*, App. No. 71907/01 [ECtHR 2007 – Section III] (counsel to applicant); and defended private speech in a roadside public forum, *Utah Highway Patrol Ass'n* v. *American Atheists, Inc.*, 637 F.3d 1095 (10th Cir.

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[1] No party's counsel authored any part of this brief. No person other than the *Amicus Curiae* contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters indicating consent have been filed with the Clerk.

2010), *cert. denied*, 132 S. Ct. 12 (2011) (represented states of Colorado, Kansas, New Mexico, and Oklahoma in seeking to keep open public fora for private religious speech).

The Becket Fund is concerned that the Ninth Circuit, like some other courts of appeals, now requires plaintiffs to prove intentional discrimination or targeting in order to make out a free speech claim based on content discrimination. The Becket Fund believes that reading an intent requirement into the First Amendment rule against content discrimination would weaken that rule and harm religious minorities.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Intentional discrimination is hard to prove. As with any state of mind question, it requires a great deal of circumstantial evidence to be brought before a judge or jury for factfinding and cannot normally be decided on the pleadings.

Intentional discrimination is especially hard to prove when the government entity engaged in discrimination or targeting is careful to cover its tracks. That is why the Town of Gilbert, like other municipalities, has fought so hard to have intentional discrimination treated as an element of a content discrimination claim under the First Amendment. Unlike municipalities that openly and enthusiastically discriminated against African-Americans in the Southern states of the 1960s, few municipalities today would admit that they are intentionally discriminating against minority groups, even unpopular religious minorities. The Ninth Circuit's rule would make it very difficult for religious plaintiffs to prevail on a speech claim even

when intentional discrimination really is present. Indeed, in most cases a jury would have to decide that the municipal defendant intended to discriminate against the religious plaintiff.

But the First Amendment's rule against content discrimination does not require plaintiffs to prove intent to discriminate or the presence of animus. To be sure, intentional discrimination is often *sufficient* to prove a First Amendment violation. But it is hardly *necessary*. That is in part because the rule against content discrimination is a structural rule like the rule against prior restraints or the rule against unbridled discretion: Some categories of municipal policies are so prone to result in unequal treatment or conceal hidden discrimination that they are always constitutionally suspect. Indeed, this way of interpreting the rule against content discrimination comports with many other constitutional and statutory civil rights protections that do not require plaintiffs to prove intentional discrimination.

Unfortunately, lower courts have often held that content discrimination is permissible as long as the government has a good reason to discriminate. Given the confusion on this issue, both the lower courts and religious minorities would benefit from a clear holding that discriminatory intent is not necessary to prove a claim of content discrimination. Failing to adopt a clear rule would only result in more creative lawyering by municipalities and require the Court to revisit the issue again in the future. But a clear rule would ensure full protection of minority religious views.

ARGUMENT

I. The First Amendment's rule against content discrimination does not require plaintiffs to prove intentional discrimination or targeting.

The First Amendment does not require a plaintiff to prove intentional discrimination or targeting—or what the Ninth Circuit called "illicit motive," Pet. App.96a—in order to prevail upon a content discrimination claim.[2] This Court has repeatedly held that such proof is unnecessary.

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[2] In this brief, *Amicus* uses the Court's term "content discrimination," see, *e.g.*, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995), rather than the terms "content-neutral" and "content-based," because the term "content-neutral" is ambiguous. As Justice Harlan noted in *Board of Education of Central School District No. 1* v. *Allen*, 392 U.S. 236 (1968), "[n]eutrality is * * * a coat of many colors." *Id.* at 249 (Harlan, J., concurring) (noting the many meanings of neutrality). See also Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 994 (1990) ("Those who think neutrality is meaningless have a point. We can agree on the principle of neutrality without having agreed on anything at all."). In the context of facial content discrimination, the term "content-neutral" leads some lower courts astray because they believe the command of neutrality concerns only factors other than the subject matter of the speech at issue, such as the identity of the speaker, particular viewpoints, or the intent of government officials in enacting or enforcing the challenged rule. See, *e.g.*, *Reed*, 707 F.3d at 1072 ("Because Gilbert's Sign Code places no restrictions on the particular viewpoints of any person or entity * * * it is content-neutral as that term has been defined by the Supreme Court.")

A. The First Amendment does not require a plaintiff to demonstrate intentional discrimination or targeting in order to prove content discrimination.

This Court has repeatedly held that a government policy constitutes content discrimination "if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether'" a violation [of the policy] has occurred." *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2531 (2014) (quoting *FCC* v. *League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)). A requirement that a municipal official look inside the four corners of the citizen's message in order to decide how to classify the speech is enough to trigger strict scrutiny. See, *e.g.*, *Sorrell* v. *IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011) (differential treatment of "educational communications" and "marketing" constituted content discrimination); *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 418, 420 (1993) ("categorical prohibition" on "commercial handbills" while allowing "newspapers" constituted content discrimination); *United States* v. *Alvarez*, 132 S. Ct. 2537, 2546-47 (2012) (categorical prohibition on "false speech" while allowing "analogous true speech" constituted content discrimination); see also Pet. Br. 22-25 (describing rule against content discrimination).

B. Intentional discrimination or targeting is sufficient but not necessary to prove content discrimination.

Although intentional discrimination is not *necessary* to prove content discrimination, it is often *sufficient* to do so. *Sorrell* is a prime example of this feature of speech jurisprudence. In *Sorrell*, Vermont enacted a

law that effectively prohibited the sale of prescriber-identifying information for "marketing" purposes, but allowed it for "educational communications" and other purposes. 131 S. Ct. at 2663. The challenged statute also distinguished among the purchasers of prescriber-identifying information, specifically forbidding sales of that information to pharmaceutical manufacturers.

Sorrell distinguished between the challenged law's purpose and its facial effects: "Formal legislative findings accompanying § 4631(d) confirm that the law's express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs. Just as the 'inevitable effect of a statute on its face may render it unconstitutional,' a statute's stated purposes may also be considered." *Ibid.* (quoting *United States* v. *O'Brien*, 391 U.S. 367, 384 (1968)). Thus "[g]iven the legislature's expressed statement of purpose, it is apparent that § 4631(d) imposes burdens that are based on the content of speech *and* that are aimed at a particular viewpoint." *Id.* at 2663-64 (emphasis added). The Court further concluded that the "statute disfavors specific speakers, namely pharmaceutical manufacturers." *Id.* at 2663.

The Court thus set out different ways that the same statute had violated the rule against content discrimination. On one hand, the legislature's expressed purpose indicated that it was engaged in intentional discrimination among categories of content, as well as viewpoint discrimination. But the "effect of a statute on its face" was a separate infirmity of the Vermont statute, as was the statute's discrimination among speakers. Thus, the Vermont statute triggered strict scrutiny in four independent ways: (1) intentional content discrimination (apparent from the express purpose); (2) viewpoint discrimination (also apparent from

the purpose); (3) facial content discrimination (apparent from the face of the statute); and (4) discrimination among speakers (apparent from the provision specially barring pharmaceutical manufacturers).

The Town would have these independent First Amendment violations subsumed into a single category. But this Court has never held that all forms of content discrimination can be collapsed into a single category of viewpoint discrimination. Rather, "[v]iewpoint discrimination is * * * an egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829; see also *id.* at 829-30 (noting distinction between content and viewpoint discrimination in the context of a limited public forum). It would stand First Amendment jurisprudence on its head to allow the narrower category of viewpoint discrimination to swallow the far broader category of content discrimination.

C. Similar constitutional and statutory protections do not require plaintiffs to demonstrate intent.

The First Amendment's rule against content discrimination is hardly unique in eschewing an intent requirement. Similar constitutional and statutory civil rights protections also do not include an intent element.

1. Other Bill of Rights protections such as Free Exercise and Due Process do not require plaintiffs to prove intentional discrimination or targeting.

A number of other constitutional protections also do not require a showing of intentional discrimination or targeting in order for a plaintiff to make out her

claim.[3] For example, the Free Exercise Clause does not focus on whether a government official had intent to discriminate, but whether the government laws or actions at issue were both "neutral" and "generally applicable." *Employment Div.* v. *Smith*, 494 U.S. 872, 880 (1990). Thus the courts of appeals have held that "[p]roof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus." *Shrum* v. *City of Coweta, Okla.*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.) (citing *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993); *Axson–Flynn* v. *Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004)). "[C]lose scrutiny of laws singling out a religious practice for special burdens is not limited to the context where such laws stem from animus, pure and simple. Instead, '[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.'" *Central Rabbinical Congress of the U.S. & Canada* v. *New York City Dep't of Health & Mental Hygiene*, --- F.3d

[3] There is also a similarity to several of the other protections subsumed under the First Amendment's Free Speech Clause. Like the rule against prior restraints and the rule against granting unbridled discretion to municipal officials, the rule against content discrimination can be thought of as a *structural* protection. Structural protections prohibit certain types of government regulation not because they suppress speech in every instance, but because their *structures* inherently lend themselves to abuse by government officials. Not only are such legal structures easily abused, they are also difficult to challenge in court after-the-fact. Cf. *Thornhill* v. *State of Ala.*, 310 U.S. 88, 97–98 (1940) (penal statute lacking objective criteria "readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure").

---, 2014 WL 3973156, at *11 (2d Cir. 2014) (quoting *Lukumi*, 508 U.S. at 546; alteration in original).

Similarly, the Due Process Clause of the Fifth Amendment "requires the invalidation of laws that are impermissibly vague[,]" regardless of whether those laws were enacted with the intent to discriminate or to target a particular group. *FCC* v. *Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Ibid.* (quoting *United States* v. *Williams*, 553 U.S. 285, 304 (2008)). The ills to be prevented are both arbitrary (*i.e.* unintentional) government action and discriminatory (*i.e.* intentional) government action: "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary *or* discriminatory way. *Ibid.* (emphasis added) (citing *Grayned* v. *City of Rockford*, 408 U.S. 104, 108–09 (1972)).

Content discrimination works in the same way. *Both* the intentional *and* the merely arbitrary (and thus unintentional) forms of government discrimination against specific categories of content trigger strict scrutiny. There is no reason content discrimination should be an anomaly.

2. Congress has frequently rejected an intent element in civil rights statutes.

Congress has frequently ensured that civil rights statutes cover not only intentional government discrimination, but also government actions that result in unequal treatment. For example, in *City of Mobile* v.

Bolden, 446 U.S. 55 (1980), this Court limited the original version of Section 2 of the Voting Rights Act to cases of intentional discrimination. *Id.* at 61-62. Congress responded by amending Section 2 to state that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color * * *." 52 U.S.C. § 10301(a) (emphasis added), amended by Pub. L. 97-205, § 3, June 29, 1982, 96 Stat. 134; see also H.R. Rep. No. 109-478, at 10 (2006) (Committee Statement on the Right to Vote and the Voting Rights Act of 1965) (recounting history of the 1982 amendments). As the Court later summarized: "The intent test was repudiated for three principal reasons—it is 'unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities,' it places an 'inordinately difficult' burden of proof on plaintiffs, and it 'asks the wrong question.'" *Thornburg* v. *Gingles*, 478 U.S. 30, 44 (1986) (quoting S. Rep. No. 97-417, at 36 (1982)). "The 'right' question * * * is whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'" *Ibid.* (quoting S. Rep. No. 97-417, at 28; other citation omitted). Congress thus decided that it was extremely important in protecting voting rights to focus not just on the presence of discriminatory intent, but also on the presence of unequal treatment.

Another civil rights statute, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), reflects a similar judgment on the part of

Congress. In RLUIPA, Congress enacted several provisions that protect the rights of prisoners to exercise their faith in prison, and the right of religious assemblies to use land for religious purposes, all without regard to the intent of the relevant government officials. In the prisoner provisions, Congress provided that "[n]o government shall impose a substantial burden on the religious exercise of [a prisoner]." 42 U.S.C. § 2000cc-1. There is no inquiry into the intent or motive of prison officials in making that determination.

Similarly, in RLUIPA's land use provisions, Congress included five separate protections: (1) a no-substantial-burden provision, 42 U.S.C. § 2000cc(a), which is similar to the prisoner provision; (2) an "equal terms" provision, 42 U.S.C. § 2000cc(b)(1), which prohibits municipal governments from treating religious assemblies "on less than equal terms" than non-religious assemblies; (3) a "non-discrimination" provision, 42 U.S.C. § 2000cc(b)(2), which prohibits municipalities from "discriminat[ing] against any assembly or institution on the basis of religion or religious denomination"; (4) a "total exclusion" provision, 42 U.S.C. § 2000cc(b)(3)(A), which prohibits municipalities from excluding all religious land uses from their jurisdiction; and (5) an "unreasonable limitations" provision, 42 U.S.C. § 2000cc(b)(3)(B), which prohibits unreasonable limitations on religious land use within a particular jurisdiction. Of these five separate protections, the only provision where intent is relevant is the "non-discrimination" protection, which governs unintentional as well as intentional discrimination. The other four—such as the "equal terms provision"—do not consider intent, but focus instead on unequal treatment.

Congress intentionally left intent out of RLUIPA. The reason was that, as with the Voting Rights Act,

discrimination is hard to prove. For example, "new, small, or unfamiliar churches * * * are frequently discriminated against" in zoning and land use decisions, but "the highly individualized and discretionary processes" of approvals and variances "make it difficult to prove discrimination in any individual case." 146 Cong. Rec. 16,698-16,699 (2000) (joint statement of Senator Hatch and Senator Kennedy). More often than not, "discrimination against small and unfamiliar denominations" is covert and "lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'" *Ibid.*; see also H.R. Rep. No. 106-219, at 24 (1999) ("Land use regulation has a disparate impact" on "[s]maller and less mainstream denominations," but "discrimination can be very difficult to prove.").

Of course the scope of constitutional rights does not necessarily track the scope of analogous civil rights statutes. Yet the distinction between intentional and unintentional discrimination that flows through these civil rights statutes does demonstrate a natural dividing line between intent-focused and intent-indifferent civil rights protections. The rule against content discrimination has variants that fall on both sides of that line.

II. Requiring plaintiffs to prove intentional discrimination or targeting would be especially harmful towards minority religious groups.

Perhaps ironically, imposing an intent requirement would be the most harmful to those who tend to be most frequent targets of intentional discrimination—disfavored minority groups, including minority religious groups. See, *e.g.*, *Murdock* v. *Commonwealth of Pennsylvania*, 319 U.S. 105, 876 (1943) (otherwise

neutral licensing requirements for door-to-door soliciting would constitute "a new device for the suppression of religious minorities"). Government officials who want to discriminate against certain categories of speech content typically know discrimination is prohibited and thus attempt to hide their discriminatory actions. It is in these situations that a rule requiring proof of intent is the most injurious, because it turns on facts not easily revealed in discovery or discerned by courts—namely, the mental state of government officials.

1. Government officials do not typically announce their intent to discriminate against certain categories of speech. Instead they try to hide discrimination behind seemingly neutral policies, and often offer post-hoc rationalizations for their behavior. This is why in a host of contexts where discrimination is covert, this Court has "instruct[ed] that 'benign' justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded." *United States* v. *Virginia*, 518 U.S. 515, 535-36 (1996); cf. *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1268 (10th Cir. 2008) (McConnell, J.) ("We cannot and will not uphold [government action] that abridges an enumerated constitutional right on the basis of a factitious governmental interest found nowhere but in the defendants' litigating papers.").

2. The urge to conceal true motivations is no less present in cases involving religious speech. For example, in *Satawa* v. *Macomb County Road Commission*, 689 F.3d. 506 (6th Cir. 2012), the Sixth Circuit confronted a municipality's efforts to keep a private crèche from being displayed on the median of a highway. The

municipality told the courts that the reason was safety, but "there was no indication that safety concerns played *any* role in the Board's decision. Quite the contrary. Even though Satawa's permit application specifically claimed that the crèche did not obstruct traffic or pose 'any other safety concerns,' [the Chairperson's] letter denying the permit only addressed religion." *Id.* at 523 (emphasis in original). "[T]he district court should have * * * drawn the reasonable inference that the Board's self-serving (but still questionable) litigation documents were designed to conceal its real reason for denying the permit: the crèche's religious content." *Id.* at 524.

Other examples where municipalities have attempted to mask discrimination against disfavored religious minorities—particularly from the context of religious land use litigation—abound. For example, in *Moxley* v. *Town of Walkersville*, 601 F. Supp. 2d 648 (D. Md. 2009), a group of Ahmadi Muslims announced that they planned to purchase land in an agricultural zone in a rural part of Maryland. The county commissioners not long after passed an ordinance excluding all houses of worship from the agricultural zone, not even allowing for special exceptions—an ostensibly neutral rule. *Id.* at 653. One of the commissioners who was to rule on the Muslims' application "advised [mosque opponents] about how to approach the public hearings on the [mosque's] petition, including refraining from using 'terms like Muslim, those individuals, religion etc.,' and how many people should testify." *Id.* at 654.

Similarly, in *Reaching Hearts International, Inc.* v. *Prince George's County*, 584 F. Supp. 2d 766 (D. Md. 2008), *aff'd*, 368 Fed. Appx. 370 (3d Cir. 2010), the County enacted a bill that made it impossible for the

church to build on its land: "The restriction contained in the bill was just large enough to encompass all of [the Church's] property and, even the drafter of the bill testified that he did not know of any other property in that district (*i.e.* Councilman Dernoga's district) that would have been impacted by the bill other than the property of [the Church]." *Id.* at 783. The district court concluded that "it is clear that Defendant engaged [the Church] in a fruitless three-year-long shadowboxing match that was doomed from the start." *Id.* at 784. This type of "shadowboxing" is typical of cases where there is hidden discrimination. See also *Sts. Constantine and Helen Greek Orthodox Church, Inc.* v. *City of New Berlin*, 396 F.3d 895, 899, 901 (7th Cir. 2005) (Posner, J.) ("The repeated legal errors [in processing Church's land use application] by the City's officials casts doubt on their good faith"; rejecting new trial due to "whiff of bad faith" on the part of the defendant city.).[4]

3. The factual history of this case involves a similar attempt by the government to discriminate against a disfavored group while masking its intent in neutral-sounding language. Pet. Br. 13-16 (describing the history of the sign ordinance). Although the Town made several changes to the ordinance, and the ostensible rationales varied from change to change, the one constant was that the Church's signs were treated on less than equal terms with signs containing non-religious ideology. *Ibid.* When the only constant variable is unequal treatment—particularly after a complaint has

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[4] A number of other examples of hidden discrimination in religious land use cases are collected in Roman P. Storzer and Blair Lazarus Storzer, *Christian Parking, Hindu Parking: Applying Established Civil Rights Principles to RLUIPA's Nondiscrimination Provision*, 16 Rich. J.L. & Pub. Int. 295 (2013).

been raised—this gives rise to an inference of intentional discrimination. See Pet. Br. at 36 n.10 (describing intentional discrimination).

Yet it is precisely the fact that an inference must be made—and made by the finder of fact—that a requirement of intentional discrimination is so troubling in the context of a content discrimination claim. If every content discrimination claim required proof of discriminatory intent, the rule against content discrimination would have little practical force.

III. Lower court errors will continue unless this Court clearly states that intent is not required to prove content discrimination.

This case presents an important opportunity for the Court to clarify the law governing claims of content discrimination. The lower courts would benefit immensely from a clear statement that content discrimination—with or without intentional discrimination—merits strict scrutiny.

A. The Court's secondary effects cases are the source of the Ninth Circuit's ruling that content discrimination includes an intent element.

The ultimate source of the split before the Court in this appeal is the line of cases that began with the Court's "secondary effects" decision in *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986).[5] In *Renton*, the Court held that because the defendant city's

[5] A detailed analysis of this decades-long doctrinal drift is set forth in Mark Rienzi and Stuart Buck, *Neutral No More: Secondary Effects Analysis and the Quiet Demise of the Content-Neutrality Test*, 82 Fordham L. Rev. 1187 (2013).

"'*predominate* concerns' were with the *secondary effects* of adult theaters, and not with the content of adult films themselves[,]" the city's regulation of adult theaters was content-neutral. *Id.* at 47 (second emphasis added). The Court went on to hold that the city's reliance on secondary effects meant that the rule was "justified without reference" to the content of the adult theaters' films. *Id.* at 48. This approach marked a significant deviation from the Court's typical content-neutrality approach. By subtly shifting the focus of the neutrality inquiry from the challenged regulation (and whether it relied on the content of messages) to whether the defendant was pursuing a neutral purpose, *Renton* muddied the waters of content discrimination law considerably.

Three years later, the Court expanded *Renton*'s twisting of the content discrimination test. In *Ward* v. *Rock Against Racism*, the Court held:

> The principal inquiry in determining content-neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

491 U.S. 781 (1989) (internal citations omitted). This phrasing elevated the purpose inquiry far beyond any role it had played in traditional content-neutrality analysis. See Rienzi & Buck, 82 Fordham L. Rev. at 1211-15 (explaining differences).

Since *Ward* was decided, this Court has decided four cases in which it relied on *Ward*'s "principal inquiry" paragraph set out above—at least in part—as an authoritative statement of the content-neutrality test. See *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622 (1994); *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753 (1994); *Hill* v. *Colorado*, 530 U.S. 703 (2000); *McCullen*, 134 S. Ct. at 2531. These cases all concerned speech that was not sexually explicit and that did not concern secondary effects. Yet each took their consideration of content discrimination—at least in part—from the *Renton*/*Ward* analysis. See Rienzi and Buck, 82 Fordham L. Rev. at 1216-23.

B. The Court can eliminate doctrinal drift by clearly holding that intent is not required to prove content discrimination.

Unfortunately, many lower courts, including the Ninth Circuit here, have aggressively interpreted cases like *Renton*, *Ward*, and *Hill* to mean that content discrimination is permissible so long as the government has a good reason to discriminate. See *id.* at 1225-33. Given the confusion of the lower courts on this issue, religious minorities nationwide would benefit from a clear statement by this Court that content discrimination warrants strict scrutiny, period. If a government has an allegedly good reason to discriminate, that reason should be considered in determining whether the government can pass strict scrutiny, not in determining whether the law is content discriminatory. Without such a clear rule, municipal lawyers will have the ability and an incentive to cherry-pick from among prior precedents—both this Court's and the lower courts'—in order to justify outright content discrimination.

Just as importantly, where the law is unclear, liability insurance carriers are much more likely to defend and indemnify municipalities sued for content discrimination, making it far easier for municipal officials to act with impunity. Clear violations of the Constitution or civil rights statutes generally fall within liability insurance policy exclusions; but where the law is unclear insurers are much more likely to have duties to defend and to indemnify. See, *e.g.*, *Ohio Gov't Risk Management Plan* v. *Harrison*, 874 N.E.2d 1155, 1160 (Ohio 2007) ("an insurer need not defend any action or claims within the complaint when all the claims are clearly and indisputably outside the contracted coverage").

The Ninth Circuit's decision in this case is an example of how lower courts often treat this Court's speech precedents. The Ninth Circuit did not even mention the Court's two most recent content discrimination cases—*Sorrell* and *Brown* v. *Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011). The panel relied instead on older cases such as *Hill* and *Ward*. Pet. App. 28a-36a. Without specific guidance from this Court about how to relate each of these cases to one another, municipalities and lower courts will remain free to experiment with the boundaries of content discrimination to the severe detriment of minority religious views.

CONCLUSION

The Court should reverse the decision below. In doing so, the Court should state clearly that intentional discrimination or targeting is not an element of a content discrimination claim.

Respectfully submitted.

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