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 FOR RESPONDENTS

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STATEMENT OF THE CASE

The Town of Gilbert, Arizona enacted a comprehensive ordinance that addresses all manner of signs that are allowed within the town's limits. While many of the signs require permits, Section 4.402(D) exempts various categories of signs from a permit requirement. (Joint Appendix (hereinafter, "App.") 27-30.) At issue in this case is whether Gilbert's differentiation among noncommercial signs that are exempted from the permit requirement is presumptively unconstitutional and subjected to the highest degree of judicial scrutiny that is reserved for laws that directly infringe core First Amendment protections.

Specifically, Petitioners are a church and its pastor who challenge the limitations in the ordinance for providing directional signs to church services. As Petitioners admitted in the proceedings below, their signs fall within the terms of Section 4.402(P), which is entitled "Temporary Directional Signs Relating to a Qualifying Event." (Ninth Circuit, No. 11-15588, Doc. 6 at 13; App. 38-39.) This provision regulates temporary signs "intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.' A 'qualifying event' is any assembly, gathering, activity, or meeting sponsored, arranged or promoted by a religious, charitable, community service, education, or other similar non-profit organization." (App. 70.)

(Respondents will refer to these signs as "Temporary Directional Signs.")[1]

Temporary Directional Signs may be up to 6 feet in height and 6 square feet in area; can be displayed from 12 hours before the event until 1 hour afterwards; "may be located off-site and shall be at grade level"; and cannot be placed in the right of way. (App. 38-39.) Petitioners contrast this provision with regulations for Ideological Signs and Political Signs, each of which are also exempt from a permit requirement, but with different time, place and manner provisions. (Pet'rs' Br. 25.)

An Ideological Sign is defined as "a sign communicating a message or ideas for non-commercial purposes" that is not otherwise defined under the ordinance or "owned or required by a governmental agency." (App. 66-67.) Ideological Signs "are permitted in all zoning districts" and "shall be no greater than 20 square feet in area and 6 feet in height." (App. 32.) A Political Sign is "[a] temporary sign which supports candidates for office or urges action

[1] When Petitioners filed their complaint in 2007, Section 4.402(P) was called "Religious Assembly Temporary Directional Signs," and served to exempt off-site directional signs to religious assemblies only from the permit requirement. (App. 75, 123.) Other types of events did not qualify for the exemption. After Gilbert broadened the exemption in 2008 and renamed it "Temporary Directional Signs Relating to a Qualifying Event," Petitioners then amended their complaint to contend that the 2008 provision remained unconstitutional. (App. 73-79, 95-122.) At issue in this proceeding is the 2008 version of the ordinance.

on any other matter on the ballot of primary, general and special elections relating to any national, state or local election." (App. 68.) These signs are allowed as follows:

> Political Signs up to 16 square feet are permitted on property zoned for residential use. Political Signs up to 32 square feet are permitted on property zoned for nonresidential use, undeveloped Town property, and Town rights-of-way. Political Signs shall be removed no later than 10 days following the election, unless otherwise set forth in this article. Political Signs shall not exceed 6 feet in height.

(App. 31.)

Before addressing the proceedings below, it is noteworthy that Petitioners heretofore described their Temporary Directional Signs as simply "signs" or "religious signs." (*See, e.g.*, United States District Court for District of Arizona, No. 2:07-CV-0052-SRB, Doc. 100, at 1-2, 8-9; *id*. at Doc. 109, at 6; Ninth Circuit, No. 08-17384, Doc. 9, at 3-4, 6-8, 16-17, 27, 33 n.7, 55; *id*. at Doc. 18, at 1, 4, 7, 16-17, 25-27; Ninth Circuit, No. 11-15588, Doc. 6, at 2, 4, 6, 9, 13, 15, 23, 25, 42-44, 47-49; *id*. at Doc. 17, at 1, 4-5, 9; *id*. at Doc. 34, at 7, 10-11, 17-18.) Upon reaching this Court, Petitioners renamed their signs as "invitations" that "typically state the Church's name and the phrase, 'Your Community Church,' provide the Church's website address, phone number, location, and service time, and provide directions." (Pet'rs' Br. 8.)

Except for the directional component, the information Petitioners claim they wish to include could be placed on an Ideological Sign, defined as "a sign communicating a message or ideas for non-commercial purposes." (App. 66-67.) Ideological Signs do not have durational limits and are regulated separately from Temporary Directional Signs that pertain to a time-limited "qualifying event." (App. 70.) The material issue, therefore, is whether Gilbert's regulation of Petitioners' directional signs under the Temporary Directional Signs provision is constitutional.

After reviewing the ordinance and the arguments presented, the district court denied Petitioners' motion for a preliminary injunction, finding the Temporary Directional Signs provision is "content-neutral" and satisfies the "intermediate" level of review. (Petition Appendix (hereinafter, ("Pet. App.") 116a-40a.) The Ninth Circuit affirmed that finding on a direct appeal, but remanded for the district court to consider whether Gilbert "impermissibly discriminates among certain forms of noncommercial speech," under the authority of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). (Pet. App. 115a.)

After both sides cross-moved on remand, the district court entered summary judgment for Respondents after which Petitioners once again appealed. (Pet. App. 53a-84a.) The Ninth Circuit found that the distinctions among Temporary Directional Signs, Ideological Signs and Political Signs are not based on content and are narrowly-tailored to meet significant governmental interests: "[E]ach classification

and its restrictions are based on objective factors relevant to Gilbert's creation of the specific exemption from the permit requirement and do not consider the substance of the sign." (Pet. App. 25a-26a.)

Petitioners then sought a writ of *certiorari* from this Court, contending that the Ninth Circuit improperly applied a subjective test to conclude that Gilbert's absence of a discriminatory intent rendered the law constitutional. Petitioners contended that the Ninth Circuit's approach was contrary to the objective standard applied in other circuits, justifying review by this Court. Under the heading "Reasons for Granting the Writ," Petitioners summarized the sole issue as "the proper test for judging whether a sign ordinance is content-neutral." (Pet. 18.) Petitioners then urged this Court to accept review so as to "restore an objective standard for gauging sign codes' content neutrality, a recurring free speech issue with broad ramifications for the First Amendment." (*Id*. at 19.) Accordingly, Petitioners fashioned the Question Presented as follows: "Does Gilbert's mere assertion of a lack of discriminatory motive render its facially content-based sign code content-neutral and justify the code's differential treatment of Petitioners' religious signs?" (*Id*. at i.)

The phrasing of the Question Presented ignores that the Ninth Circuit expressly *disavowed* a subjective test. In reviewing the denial of the preliminary injunction, the Ninth Circuit wrote: "Nothing in the regulation suggests any intention by Gilbert to suppress certain ideas through the Sign Code, nor does Good News claim that Gilbert had any illicit motive

in adopting the ordinance. . . . *Gilbert's unimpeached intentions, however, do not satisfy our inquiry*." (Pet. App. 96a) (emphasis added). The phrasing of the Question Presented assumes nevertheless that (1) the ordinance is "facially content-based"; (2) the Ninth Circuit found it was content-neutral based on the "mere assertion, of lack of discriminatory motive"; and (3) Petitioners' signs are treated differently based on a "religious" message. In their brief on the merits, Petitioners then contend that the ordinance is content-based and should be invalidated under the strict scrutiny level of review.

As explained *infra*, the assumptions embedded in the Question Presented are not supported by the record. More to the point, the Ninth Circuit did not find the ordinance was content-neutral because Gilbert lacked a discriminatory motive, nor does Gilbert defend the ordinance on that basis.[2] The *only* issue before the Court on the merits is whether the

[2] Given the phrasing of the Question Presented by Petitioners, several amici curiae – including some of the States – have joined Petitioners to respond in the negative to the biased phrasing of the Question Presented. Each of these *amici* misunderstand the actual issue, which is whether strict scrutiny applies to the provisions of the ordinance that are at issue. Gilbert, in fact, agrees that a government's lack of a discriminatory intent cannot render lawful what would otherwise be an unconstitutional infringement of speech.

ordinance is subject to strict scrutiny.[3] It is to that question that Respondents now turn.

SUMMARY OF THE ARGUMENT

The First Amendment protects against governments censoring speech or meddling in the marketplace of ideas. At the same time, governments may regulate the time, place and manner in which viewpoints and ideas are communicated, primarily in the interests of aesthetics and safety. To guard against governments overreaching in this context, this Court has constructed two levels of review: strict scrutiny, under which laws are deemed presumptively unconstitutional with the burden on the government to show that the regulation is "necessary to serve a compelling governmental interest"; and intermediate scrutiny, under which laws are upheld if they are

[3] At the tail end of their brief, Petitioners state in passing that the ordinance would not survive the intermediate level of scrutiny, but qualify immediately that "[i]ntermediate scrutiny only applies to speech regulations that are content neutral" and any argument to that effect "does not apply to Gilbert's content-based Code, but rather illustrates that Gilbert not only fails strict scrutiny but cannot even pass a lower level of scrutiny." (Pet'rs' Br. 51-53 & n.11.) Petitioners thereby confirm, as discussed *infra*, that the Petition raises the question whether strict scrutiny applies to the ordinance, and does not seek to review the Ninth Circuit's application of the intermediate scrutiny test.

"narrowly-tailored to meet a significant governmental interest."

As a guide to determine which standard applies, courts have examined whether the law restricts the "content" of the speech, which is shorthand for whether the government is infringing on speech based on the viewpoints or ideas expressed. "Content" is not always easy to apply in sign ordinance cases; because signs are forms of speech, differentiations among them can depend on their function and what they say. As such, a formulaic application of "content" to sign ordinances would subject virtually *all* sign regulations to strict scrutiny, which very few laws survive.

Respondents submit that strict scrutiny should be reserved for those regulations that favor certain viewpoints or ideas over others. If a sign code is neutral as to the viewpoints or ideas addressed, both on its face and in its application, a rigid application of "content" would be misplaced; instead, the intermediate level of scrutiny appropriately balances the interests of both the speaker and the general public. Intermediate scrutiny still restrains governments by requiring laws to be tailored narrowly to meet significant government interests, while at the same time allowing flexibility to adapt regulations suited to the needs and aesthetics of the particular jurisdiction. Conversely, the purpose of the strict scrutiny review is disserved where differentiations among types of signs based on their functions do not censor or favor particular viewpoints or ideas.

This approach is a direct outgrowth of *Metromedia*, a 1981 decision in which this Court reviewed a San Diego ordinance that prohibited all signs except for exempted categories such as on-site commercial messages, directional signs and temporary political signs. The plurality upheld the total ban on off-site advertising as a permissible regulation of commercial speech, but invalidated the ordinance nevertheless because it favored commercial speech over noncommercial speech. The plurality further found that the exempted categories impermissibly favored types of speech over others. The two justices who formed the majority, however, concluded that the exemptions were content-neutral, and the remaining three justices would have upheld the distinctions as permissible under the First Amendment. Thus, if *Metromedia* were decided with today's standards in mind, a majority likely would have reviewed the exempted categories in San Diego's ordinance – including directional signs – under the intermediate level of scrutiny.

For these reasons, this Court should respond to the Question Presented by affirming that the intermediate level of scrutiny applies to the provisions at issue. Petitioners did not seek review of the Ninth Circuit's articulation of that level of scrutiny, nor its application of the standard. Instead, they sought (and obtained) review solely on whether the ordinance should have been subjected to strict scrutiny. Consequently, the judgment below should be affirmed upon a finding that the intermediate level of review applies

to the Temporary Directional Signs provision in Gilbert's ordinance.

ARGUMENT

I. INTERMEDIATE SCRUTINY APPLIES TO SIGN ORDINANCES THAT DO NOT FAVOR OR CENSOR VIEWPOINTS OR IDEAS

The core principle underlying the Freedom of Speech clause of the First Amendment is the free expression of ideas. Within constitutional norms, however, the right to speak can (and sometimes, must) yield to government interests. In balancing these competing interests, the Court has devised levels of scrutiny depending on the extent to which legislation impedes one's right to speak. The proper balance can be particularly challenging in sign ordinance cases because signs are forms of speech. Respondents begin with a discussion of the values at stake in the First Amendment analysis before addressing the reasons the intermediate level of scrutiny applies to the Temporary Directional Signs provision in Gilbert's ordinance.

A. The Core Principle Of Freedom Of Speech Is The Expression Of Ideas

The First Amendment (through the Fourteenth Amendment) prohibits governments from enacting any law "abridging the freedom of speech." (Pet. App. 159a.) "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).

> Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions "raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace."

Id. at 641 (quoting *Simon & Schuster, Inc. v. Members of State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

This is so because "government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dep't. of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). "If the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.'" *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537-38 (1980) (quoting *Mosley*, 408 U.S. at 96.) Stated otherwise, the purpose of the First Amendment is "to preserve an uninhibited marketplace of ideas in

which truth will ultimately prevail." *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984) (internal quotation marks and citation omitted).

As with other Constitutional provisions, the "freedom to speak" is not an absolute right. In fact, some categories of speech (such as child pornography) are so utterly lacking in social value that they reside outside the protections of the First Amendment. *New York v. Ferber*, 458 U.S. 747, 763 (1982). Yelling "Fire!" in a crowded movie theater or engaging in so-called "fighting words" are means of expression but they can nevertheless be outlawed. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (equating unprotected speech with a noisy truck). Yet even expression that is *within* the ambit of the First Amendment can be subject to regulation upon a proper balancing of the right to speak with legitimate interests of the government in regulating discourse in a civilized society. *Metromedia*, 453 U.S. at 501 ("at times First Amendment values must yield to other societal interests.") The challenge is in developing and applying the appropriate test to delineate the constitutional line in discrete circumstances. Because signs are forms of speech, this challenge is ever-present when sign regulations are at issue.

B. The Importance Of *Metromedia* In Regulating Noncommercial Speech

This Court has upheld First Amendment protections most pressingly with respect to noncommercial

speech, as was evident in the 1981 decision in *Metromedia*. In that case, San Diego enacted an ordinance that generally prohibited all signs except on-site commercial messages and specific categories of both commercial and noncommercial speech. "Under this scheme, on-site commercial advertising is permitted, but other commercial advertising and noncommercial communications using fixed-structure signs are everywhere forbidden unless permitted by one of the specified exceptions." *Metromedia*, 453 U.S. at 495-96. After recognizing the importance of signs to convey all manner of messages, as well as the government's interest in controlling their proliferation, the plurality opinion (joined by four justices and authored by Justice White) determined that the ordinance's ban on off-site commercial advertising satisfied the applicable test formulated in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980) for regulating commercial interests.

The plurality found the ordinance was unconstitutional, however, because it gave greater protection to commercial speech by prohibiting off-site noncommercial speech where some commercial speech was allowed. Thus, the plurality invalidated the ordinance because, on its face, the ordinance allowed commercial speech in zones where noncommercial speech was

prohibited. *Id*. at 520-21.[4] Further, the plurality found that by allowing certain types of noncommercial signs, San Diego had impermissibly chosen subjects for public discourse. Justice White clarified that these "exceptions do not create the infringement, rather the general prohibition does." *Metromedia*, 453 U.S. at 520. "But the exceptions to the general prohibition are of great significance in assessing the strength of the city's interest in prohibiting billboards." *Id*.

The plurality of four justices was joined by a concurring opinion of two justices who invalidated the ordinance as being a total ban on speech, in practical terms. The two concurring justices considered the exceptions from the permitting requirement for types of signs to be "content-neutral prohibitions of particular media of communication." *Metromedia*, 453 U.S. at 526-27 (Brennan, J., concurring). The concurring justices nevertheless joined the plurality because they *rejected* the commercial/noncommercial distinction given the degree of discretion accorded the city in enforcing the appropriate line between the two categories. *Id.* at 538-39. The three dissenting justices agreed with the two concurring justices that the

[4] Gilbert's ordinance is constitutional under the plurality's reasoning in *Metromedia* by virtue of Section 4.402(V), which reads as follows: "*No Discrimination against Non-commercial Signs*. Any permitted sign may contain a non-commercial message." (App. 45) (italics in original). Substitution clauses ensure that an ordinance is neutral with respect to the treatment of commercial and noncommercial messages. *Clear Channel Outdoor, Inc. v. City of L.A.*, 340 F.3d 810, 814 (9th Cir. 2003).

distinctions in the exceptions were not based on content and that they should be upheld as permissible under the First Amendment. *Id*. at 542 (Stevens, J., dissenting); *id*. at 564 (Burger, C.J., dissenting); and *id*. at 569 (Rehnquist, J., dissenting).

None of the justices in *Metromedia* addressed directly what has come to be known as the appropriate level of scrutiny, perhaps because it was only the year before that "a principle of equal protection was transformed into one about the government's power to regulate the content of speech in a public forum." *Simon & Schuster*, 502 U.S. at 125 (Kennedy, J., concurring). Interestingly, though, the intermediate scrutiny test is foreshadowed in the plurality opinion's comment that the exceptions from the permit requirement were significant in "assessing the strength of the city's interest." *Metromedia*, 453 U.S. at 520. Chief Justice Burger came even closer to the current articulation of the standard by concluding that the exceptions in the ordinance "are narrowly tailored to peculiar public needs, and do not remotely endanger freedom of speech." *Id.* at 564.

Since then, this Court's jurisprudence has evolved to recognize that some restrictions of speech are more directly intrusive on First Amendment interests than others, giving rise to different levels of review that balance the interests of the government with the right to speak. Under the "strict scrutiny" level of review, a regulation that is deemed to be "content-based" is presumptively unconstitutional, with the government having the burden to show that

the infringement is "necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Simon & Schuster*, 502 U.S. at 118 (quoting *Ark. Writers' Project v. Ragland*, 481 U.S. 221, 231 (1987)). To survive this standard, the law must be "the least restrictive or least intrusive means" of meeting the government's interests. *McCullen v. Coakley*, 134 S. Ct. 2518, 2525 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)).

In contrast, content-neutral laws are reviewed under the so-called "intermediate level of scrutiny," which means the law is not presumptively unconstitutional and the restrictions are upheld provided "they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Under this test, the government cannot burden "substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 799.

Laws that are subject to strict scrutiny are unlikely to be found constitutional. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality) ("it is the rare case in which we have held that a law survives strict scrutiny."). That is appropriate because laws that either censor or restrain speech because of the ideas or viewpoints expressed are anathema to First Amendment ideals. While the intermediate level of scrutiny is less onerous, it by no means assures the law will be found constitutional. *See McCullen*, 134

S. Ct. at 2534-41 (invalidating a content-neutral law under the intermediate scrutiny test).

The intermediate test does, however, give governments flexibility to regulate vehicles of communication based on the interests of the particular jurisdiction while striking an appropriate balance with the fundamental right to speak. So long as the government does not restrict speech "because of its message, its ideas, its subject matter or its content," *Mosley*, 408 U.S. at 95, the First Amendment concern that justifies application of the strict scrutiny test is not implicated. Instead, the constitutionality of the regulation is suited for the less rigorous, yet still demanding, intermediate level of scrutiny.

C. The Content-Neutrality Standard Is An Aid In Identifying Restrictions That Are Subject To Strict Scrutiny

Given the significance of the level of review to the outcome of the inquiry, considerable litigation has arisen to determine whether a regulation is based on "content" and therefore subject to the most onerous and exacting scrutiny. As explained in *Ward*, "[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." 491 U.S. at 791.

> 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.

> Government regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech."

Id. (quoting *Clark*, 468 U.S. at 293) (emphasis omitted).

Although the test is stated clearly, "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task." *Turner*, 512 U.S. at 644. This is particularly true in sign cases; because signs are forms of speech, distinctions between types of signs could be branded as being based on "content," and subjected to strict scrutiny, without regard to the different functions involved. Especially when they are off-site and unattended, signs can present particular problems.

> Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs – just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.

City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994).

Consider as well that the content-neutrality test is a judicial construction to assist in interpreting the purposefully-broad language of the First Amendment. The word "content" is not in the First Amendment; it

is a term of art that has been employed to identify the types of regulations that should be subjected to strict scrutiny. Given that all signs are a form of speech, commonly-accepted distinctions can be considered based on content, such as regulations that differentiate between commercial and noncommercial speech, or between on-site and off-site signs. *Metromedia*, *supra*. Likewise, such designations as historical landmarks or commemorative plaques could be considered "content," under an absolutist construction of that term, without consideration of the purpose of the test in the first place. As the Ninth Circuit commented in the decision below, accepting Petitioners' view would mean that "every sign, except a blank sign, would be content based." (Pet. App. 105a.)

One court has summarized succinctly the difficulty in determining whether a sign ordinance is content-based or content-neutral as follows:

> What makes the content-based versus content-neutral distinction so difficult in cases involving sign ordinances is that, by their very nature, signs are speech and thus can only be categorized, or differentiated, by what they say. This makes it impossible to overlook a sign's "content" or message in attempting to formulate regulations of signage and make exceptions for distinctions required by law (i.e., for sale signs) or for those signs that are narrowly tailored to a significant government interest of safety (i.e., warning or construction signs). . . . In many

> cases, this classification raises the "red flag" of an impermissible content-based regulation.

Granite State Outdoor Advertising, Inc. v. City of Clearwater, 213 F. Supp. 2d 1312, 1333-34 (M.D. Fla. 2002), *rev'd in part on other grounds*, 351 F.3d 1112 (11th Cir. 2003), *cert. denied*, 543 U.S. 813 (2004). *See also Kennedy v. Avondale Estates*, 414 F. Supp. 2d 1184, 1198 (N.D. Ga. 2005) (rejecting as "catch-22 logic" that an ordinance is content-based if one must read the sign to determine if the regulation applies).

The lower courts have dealt with this conundrum in markedly different ways. On one end of the spectrum, some circuits have devised an easy-to-apply but rigid standard based on whether one needs to read the message to determine whether the restriction applies. *E.g.*, *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1266 (11th Cir. 2005) ("allow[ing] some types of messages to be displayed in a more prominent manner than others – for example, using flashing lights or moving parts – [the ordinance] constitutes content-based regulation of speech.").

Other circuits have rejected a formulaic approach that would deem most regulations to be based on content. *E.g.*, *Brown v. Town of Cary*, 706 F.3d 294, 302 (4th Cir. 2013) (rejecting *Solantic*'s analysis as "absolutist" because it "imputes a censorial purpose to every content distinction, and thereby applies the highest judicial scrutiny to laws that do not always

imperil the preeminent First Amendment values that such scrutiny serves to safeguard");[5] *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 622 (6th Cir. 2009) (finding differentiations between "advertising signs," "business signs," and "political signs" were not content-based because "[t]here is simply nothing in the record to indicate that the distinction between the various types of signs reflect a meaningful preference for one type of speech over another").

As Justice Kennedy has observed, "zoning regulations do not automatically raise the specter of impermissible content discrimination, *even if they are content based*, because they have a prima facie legitimate purpose: to limit the negative externalities of land use." *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 449 (2002) (Kennedy, J., concurring) (emphasis added). As he continued, "[t]he zoning context provides a built-in legitimate rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional. *For this reason, we*

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[5] Under the Fourth Circuit's test, a restriction is not content-based if:

> (1) the regulation is not a regulation of speech, but rather a regulation of the places where some speech may occur; (2) the regulation was not adopted because of disagreement with the message the speech conveys; or (3) the government's interests in the regulation are unrelated to the content of the affected speech.

Wag More Dogs, LLC v. Cozart, 680 F.3d 359, 366 (4th Cir. 2012) (citation omitted).

apply intermediate rather than strict scrutiny." *Id.* (emphasis added).

As this discussion shows, virtually all sign regulations could be subject to strict scrutiny if the term "content" is applied too rigidly. In turn, the regulation would be unconstitutional unless the government could show that the distinctions drawn are "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." Applying the word "content" to determine the level of review without regard for the purpose of the strict scrutiny test, in other words, is misplaced where the result would subject all manner of sign regulations (such as physical contours of signs) to a level of review that they "rarely" survive. Instead, "content" should be applied flexibly to reflect the First Amendment ideals that the levels of scrutiny are designed to safeguard in the first place: the protection of viewpoints and ideas from government censorship or favoritism. If a sign regulation does not censor or favor particular viewpoints or ideas, the constitutionality of distinctions between types of signs should be reviewed under the intermediate level of scrutiny.

II. BECAUSE GILBERT'S ORDINANCE DOES NOT RESTRICT VIEWPOINTS OR IDEAS, IT IS NOT SUBJECT TO STRICT SCRUTINY

Turning to the case at hand, Petitioners contend that the distinctions in the ordinance among types of

signs are based on content, and therefore should have been reviewed (and invalidated) under a strict scrutiny analysis. To assist them in that endeavor, Petitioners have relabeled their signs (in this Court) as "invitation" signs and contend they communicate a religious message because the signs contain the phrase "Your Community Church" along with the "website address, phone number, location, and service time, and provide directions." (Pet'rs' Br. 8; *see also id*. at 7, 13, 14, 18, 26, 33 n.8, 45, 46, 47.) They posit (without support) that the signs "are an essential means by which [the church] invites the public to its services" because temporary signs are inexpensive "and play a critical role ensuring people know where to find a Church that periodically moves." (*Id.* at 8.) They argue further that Gilbert has differentiated among types of signs based on the content of the expression such that the ordinance should have been reviewed under the strict scrutiny level of review.

A. The Temporary Directional Signs Provision Regulates "Directions" To Specified Events, Not "Invitations" To The Public

Petitioners' re-characterization of the signs at issue as "church invitation signs" in this Court is a transparent attempt to downplay the fact that (1) they admitted in the proceedings below that their signs qualify as Temporary Directional Signs under the sign code (Ninth Circuit, No. 11-15588, Doc. 6 at 13); and (2) Petitioners may display the messages

they desire to display (absent the directions) as Ideological Signs. By definition, Ideological Signs contain noncommercial messages that do not fall within the definitions of other types of signs *such as Temporary Directional Signs*. (App. 66-67.) The information that Petitioners claim they wish to include on their signs meet the definition of an Ideological Sign – except for Petitioners' choice to include directions to a "qualifying event." (App. 70.) Ideological Signs, in turn, "are permitted in all zoning districts"; can be up to "20 square feet in area and 6 feet in height"; and are not limited in duration or number. (App. 32.) Notably, Petitioners consider the Ideological Signs provision to be the "most favorable provision" in the ordinance. (Ninth Circuit, No. 08-17384, Doc. 18, at 18 n.10.)

Petitioners therefore are plainly wrong when they state that a sign saying "Learn Why Voting Matters, Visit Good News Community Church" can be only 6 square feet under the Temporary Directional Sign provision. (Pet'rs' Br. 28.) Likewise, they plainly misconceive the provisions when they state that "an atheist group could post a 20 square foot sign that says 'Don't Waste Your Time On Superstition, Skip Good News' Services Sunday' right next to Good News' 6 square foot church invitation sign that could only be displayed for a handful of hours." (*Id*. at 33 n.8.) If an atheist group were to do that, Petitioners could in turn post 20 square foot Ideological Signs, for infinite duration, saying (for example): "The Fool Says In His Heart, 'There Is No God.' Worship With Us at Good News Community Church." Petitioners

could then post a Temporary Directional Sign nearby directing travelers to its "qualifying event."

In addition, and also without a permit, Petitioners could utilize A-Frame Signs[6] or Sign Walkers, to publicize their mission and their weekly services apart from Ideological Signs and Temporary Directional Signs. (App. 29-30, 34-37, and 45-46.) Indeed, Good News has utilized *many* other outlets at its disposal to "invite" the public to its events, including its website, handbills, door-to-door visitations, newsletters, pamphlets and personal solicitations. (SER 69-71.) Good News has had a website since 2000, and has purchased advertising space in three local newspapers and the Yellow Pages of the telephone book to tell the world about its mission and the location of its weekly services. (Excerpts of Record, Ninth Circuit, No. 11-15588, Doc. 8 (hereinafter, "ER") at 655-56, 658-59.) Petitioner Reed makes unsolicited telephone calls and sends unsolicited emails, and Good News even hired an advertising company to distribute flyers "in neighborhoods surrounding" the location of the meeting place. (*Id*. at 665-66.) Petitioner Reed testified that personal solicitations are the most successful means of inviting members of the public to

[6] Good News in fact has *six* A-Frame signs that it has utilized. (Supplemental Excerpts of Record, Ninth Circuit, No. 11-15588, Doc. 16 (hereinafter, "SER") at 72.) Although the A-Frame Signs provision is intended for commercial purposes (App. 34-37), the code contains a non-discrimination provision under which "[a]ny permitted sign may contain a non-commercial message." (*Id*. at 45.)

church services (as opposed to Temporary Directional Signs). (SER 76.) Tellingly, even when Good News moved out of Gilbert, Petitioners limited the number of directional signs given their narrow effectiveness. (*Id*. at 81.)

The myriad ways in which Petitioners invite the public to church events shows the lack of support for their bold statement that Temporary Directional Signs are "essential" to invite the public to their events. (Pet'rs' Br. 8.) The only limitation imposed by the ordinance is to place off-site signs that, by definition, are intended to direct the attention of "pedestrians, motorists and other passersby" to aid flow for a limited period of time. (App. 70.) Petitioners do not (and could not) dispute that Gilbert can regulate directional signs in the interests of aesthetics and safety. Notably, the provision applies to signs for *temporary* events, which, if unrestricted, could proliferate and become a blight long after the events took place.

In sum, while Petitioners cannot include directions to "qualifying events" on an Ideological Sign, they can include "invitations" on Temporary Directional Signs provided they comply with the time, place and manner restrictions of the ordinance. The fact that Good News does not have a permanent location and occasionally relocates does not have significance constitutionally, as an "incidental effect on some speakers or messages but not others" does not subject a law to strict scrutiny. *Ward*, 491 U.S. at 791. Likewise, this Court should reject any contention by the *amici* that Gilbert has restricted Petitioners'

ability to practice their religion, because the religious aspect of the signs is not the basis for the regulation.[7] Instead, the only material issue is whether the regulation of off-site signs that contain directions for temporary events complies with constitutional norms.

B. The Temporary Directional Signs Provision Does Not Censor Or Favor Viewpoints Or Ideas

Substantively, the Temporary Directional Signs provision applies equally to all non-profit organizations – including Good News – without regard to who is sponsoring the temporary event or the subject matter of the event. Because the provision does not limit any noncommercial speaker from erecting Temporary Directional Signs, there is no concern about Gilbert either endorsing or suppressing "ideas or viewpoints," which lies at the heart of First Amendment considerations.

1. Laws that do not favor or censor views or ideas are subject to the intermediate level of scrutiny

Turner presents a prime example of a law subject to intermediate scrutiny. In that case, federal regulations required cable operators to carry certain broadcasts

[7] Moreover, the "free exercise" clause of the First Amendment was not part of the lower courts' rulings on the application of the level of scrutiny, nor is that clause included within the Question Presented.

out of a concern for the continued viability of local television stations. While acknowledging that the regulations "interfere with cable operators' editorial discretion," this Court reasoned that "the extent of the interference does not depend upon the content of the cable operators' programming." *Turner*, 512 U.S. at 643-44.

> It is true that the must-carry provisions distinguish between speakers in the television programming market. But they do so based only upon the manner in which speakers transmit messages to viewers, and not upon the messages they carry. . . . So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment.

Id. at 646. This Court further found no suggestion that the "manifest purpose" of the facially-neutral regulation was "to regulate speech because of the message it conveys." *Id*.[8]

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[8] The Ninth Circuit found nothing in the record to suggest that Gilbert had an improper motive in enacting the Temporary Directional Signs provision. (Pet. App. 96a.) Petitioners contend nevertheless that by amending the provision in 2011 to apply to events in Gilbert only, Respondents "targeted Good News." (Pet'rs' Br. 15.) Because the courts below considered the constitutionality of the 2008 version, the record is not developed on the reasons for the Gilbert-only provision of the 2011 amendment. In addition, Petitioners would lack standing to raise it for the first time in this Court given that they are located in Gilbert. (*Id*. at 16.)

More recent decisions by this Court further compel the conclusion that Gilbert's Temporary Directional Sign provision is neutral as to viewpoints or ideas, for purposes of determining the level of scrutiny at issue. In *Hill v. Colorado*, 530 U.S. 703 (2000), a statute created a 100-foot zone around entrances to health care facilities, in which it was unlawful to approach within 8 feet of someone to engage in "protest, education or counseling." Relying on the test in *Ward*, a majority of justices concluded the regulation was content-neutral because it did not restrict "either a particular viewpoint or any subject matter that may be discussed by a speaker." *Id*. at 723 (2000).

> Instead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries. Each can attempt to educate unwilling listeners on any subject, but without consent may not approach within eight feet to do so.

Id. Similarly, the statute at issue in *McCullen* made it a criminal offense for anyone to remain within 35 feet of reproductive health facilities during business hours, other than certain exempt classes of people. Citing the test from *Ward*, a majority of justices found the statute was content-neutral, chiefly because (except for the exempt classes) one's mere presence violated the statute without regard to the content of the speech. *McCullen*, 134 S.Ct. at 2531.

If anything, the provision at issue in Gilbert's ordinance is *less* intrusive on speech than the statute in *Hill* that restricted "protest, education or counseling" in proximity to a healthcare facility, let alone the total ban in *McCullen*. The Temporary Directional Signs provision applies to all non-profit organizations, Good News and atheists alike, and nothing about its terms targets or favors any particular speech. To subject the ordinance to the highest level of scrutiny would wrench the constitutional precepts from their moorings contrary to case law and common sense, and in a manner never intended by the First Amendment.

Respondents acknowledge that several justices wrote opinions in both *Hill* and *McCullen* that disagreed with the content-neutrality analysis, premised on the fact that the statutes applied to entrances to facilities that perform abortions and therefore targeted, for practical purposes, those who oppose abortions. The authors of these opinions concluded that even if the statutes were neutral on their face, their purpose was to suppress disfavored speech based on viewpoints and ideas that criticized abortion. No similar consideration is at issue in this case as Gilbert did not enact the Temporary Directional Signs provision to suppress viewpoints or ideas, or the ability to direct the public to "qualifying events."

Likewise, any criticism that *Hill* was wrongly founded on a right to be protected from offensive speech (*McCullen*, 134 S.Ct. at 2545-46 (Scalia, J.,

dissenting)) would be misplaced here. There is no suggestion that Gilbert enacted the Temporary Directional Signs provision to protect anyone from offensive speech. Indeed, because the First Amendment does not require directional signs, Gilbert could have banned them altogether. Viewed in that light, Gilbert has *allowed* religious organizations such as Good News (and other non-profit associations) to post directions to "qualifying events" that would otherwise be prohibited. In any event, given that the provision is neutral as to viewpoints and ideas, the intermediate level of scrutiny was appropriate.

2. Gilbert's provisions are easily distinguishable from regulations that are subject to strict scrutiny

Petitioners nevertheless argue that the ordinance is content-based, by citing to four cases where the law at issue targeted particular viewpoints or ideas. (Pet'rs' Br. 27-28.) In *Mosley*, the city banned all picketing within 150 feet of school buildings, from a half hour before and after the school was in session, "except peaceful picketing of any school involved in a labor dispute." 408 U.S. at 93. Because it favored picketing regarding labor disputes at the particular school, and censored all other peaceful protests, the ordinance was based improperly "on content alone." *Id.* at 96. In contrast, Gilbert's Temporary Directional Signs provision applies equally to all non-profit organizations regardless of the event to which directions are provided.

Next, Petitioners cite *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), where the Court evaluated the constitutionality of a ban on newsracks that contained commercial handbills while allowing newsracks with "traditional newspapers." Finding that "[e]ach newsrack, whether containing 'newspapers' or 'commercial handbills,' is equally unattractive," *id.* at 425, this Court invalidated the ordinance under the *Central Hudson* test applicable to *commercial* speech that requires a "reasonable fit" between the regulation and the city's legitimate interests. By favoring "traditional newspapers" and censoring "commercial handbills," Cincinnati's legitimate interest in limiting the number of newsracks, in other words, had nothing to do with the content they were allowed to contain.

Unlike signs, newsracks do not in and of themselves convey a message, as their purpose is to allow the dissemination of ideas and speech. In further contrast from Gilbert's Temporary Directional Signs provision, newsracks are not intended to direct traffic through the physical environment. As explained in *Metromedia*, "[e]ach method of communicating ideas is 'a law unto itself' and [the] law must reflect the 'differing natures, values, abuses and dangers' of each method." 453 U.S. at 501. In addition, Gilbert's provision applies equally regardless of the sponsor of the "qualifying event" that is taking place, to which directions are provided. For these reasons, the facts and holding of *Discovery Network* are distinguishable from the case at bar.

Petitioners next rely on *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), which considered a statute that made it unlawful to support foreign terrorist organizations, and *United States v. Stevens*, 559 U.S. 460 (2010), which addressed a statute that banned depictions of animal cruelty for commercial gain. In both of these cases, the statutes targeted specific speech deemed harmful. There is nothing about Gilbert's Temporary Directional Signs provision that pertains remotely to the activities that the government aimed to censor in these cases. In contrast, laws that are subject to strict scrutiny target speech based on the viewpoints or the ideas expressed,[9]

[9] *See, e.g., Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (statute targeted sale or rental of violent video games to minors); *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011) (statute restricted use of pharmacy records that reveal prescribing practices of individual doctors for marketing purposes); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000) (statute targeted sexually explicit television programming); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (statute targeted speech that insults or provokes violence "on the basis of race, color, creed, religion, or gender"); *Simon & Schuster, Inc. v. Members of State Crime Victims Bd.*, 502 U.S. 105 (1991) (statute targeted artistic works describing one's crimes); *Texas v. Johnson*, 491 U.S. 397 (1989) (statute criminalized desecration of American flag); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (statute exempted certain types of periodicals from sales tax); *Regan v. Time, Inc.*, 468 U.S. 641 (1984) (statute banned depictions of currency except for "educational" or "newsworthy" purposes); *Boos v. Barry*, 485 U.S. 312 (1988) (statute banned displays critical of foreign governments within 500 feet of an embassy or consulate); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (statute banned editorializing by noncommercial education broadcasting stations); *Consol.*

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including "core political speech,"[10] that is at the heart of First Amendment protections.

3. A sign ordinance is not subject to strict scrutiny simply because a sign must be read to determine compliance

Essentially, Petitioners are advocating that this Court adopt the "absolutist" rule that Gilbert's ordinance is "content-based" (and therefore subject to strict scrutiny) because the provisions differentiate between types of signs that perform different functions. The absurdity of this reasoning is perhaps most evident in the final paragraph of Petitioners' brief, where the only suggestion they offer to steer clear of content-based distinctions is for governments to "treat[ ] all temporary signs the same." (Pet'rs' Br. 52.) This logic echoes their argument that an ordinance "is content based because enforcement officials must determine what a sign says to decide what limitations apply." (*Id*. at. 38.) For support, Petitioners cite to a

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Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n, 447 U.S. 530 (1980) (regulation banned utility bills from including "opinions or viewpoints on controversial issues of public policy"); *Carey v. Brown*, 447 U.S. 455 (1980) (statute exempted labor disputes from a ban on picketing).

[10] *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (statute burdened "core political speech" by banning anonymous leaflets designed to influence voters in an election); *Burson v. Freeman*, 504 U.S. 191 (1992) (statute banned political campaigning within 100 feet of entrance to polling place).

clause in *McCullen* while overlooking that the ban in *McCullen* contained exemptions for some individuals, which would require enforcement officials to determine the reason for their presence to determine if the limitations apply. This Court has "never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Hill*, 530 U.S. at 722.

Moreover, *McCullen* did not involve a sign regulation, which distinguishes signs by the speech at issue. Even under Petitioners' reasoning in the last paragraph of their brief, a regulation that applies to all "temporary signs" would require enforcement officers to examine the "content" of the sign to determine whether it is in fact a "temporary sign" as defined in Gilbert's regulation. (App. 70.) If a simplistic if-you-have-to-read-it-it-is-content-based test were adopted, virtually all distinctions in sign laws would be subject to strict scrutiny, thereby eviscerating sign regulations that have been repeatedly upheld under the First Amendment as serving important governmental interests such as safety and aesthetics.

Requiring sign regulations to serve "compelling governmental interests" would be misplaced and result in very few regulations surviving scrutiny. Instead, strict scrutiny should be reserved for sign regulations that *do* differentiate based on ideas or viewpoints. Because the strict scrutiny analysis is a searching inquiry intended to safeguard the preeminent First Amendment values, it simply does not

fit in the context of sign regulations that by definition apply to different forms of speech. Instead, the reasonableness of the limitations that do not censor or favor views or ideas should be reviewed under the intermediate level of scrutiny, which protects First Amendment concerns, while at the same time allowing governments to regulate signage in a reasonable manner tailored to the legitimate interests of the particular locale at issue.

4. Differences between Ideological Signs and Political Signs do not warrant strict scrutiny

In addition to contending that the Temporary Directional Signs category is based on content, Petitioners contend the Ninth Circuit should have applied strict scrutiny because Gilbert has differentiated between speech that falls within the categories of Ideological Signs and Political Signs. Petitioners do not question Gilbert's ability to regulate these types of signs, but contend the regulatory distinctions are based on the "content" of the sign, which in turn triggers a strict scrutiny standard. Essentially, Petitioners question whether Gilbert can justify the restrictions on Temporary Directional Signs based on legitimate governmental interests, given what they claim are more lax restrictions for other types of signs.

By this argument, Petitioners are essentially questioning whether Gilbert is being consistent in

advancing its legitimate interests in aesthetics and safety, and not whether legitimate interests are in fact being advanced. The consistency with which a government advances legitimate interests is not fodder for the most exacting scrutiny, which is reserved for restrictions on viewpoints and ideas.

Just as a rigid "content" definition would subject the neutral language of the Temporary Directional Signs provision to strict scrutiny standing on its own, so too would that approach be inequitable as applied to distinctions *among* various types of noncommercial signage that are defined in neutral terms. The better approach, as discussed herein, is to allow governments the flexibility to distinguish between noncommercial signs by applying the intermediate level of scrutiny to those distinctions, as long as they advance governmental interests and are neutral as to particular ideas or viewpoints expressed within the regulatory limitations. Governments would still not be able to meddle in the marketplace of ideas, and would still have to ensure reasonable consistency in advancing government interests across different sign types.

This approach has its roots in *Metromedia*, where, similar to Gilbert's code, San Diego's code exempted such signs as "approved, temporary, off-premises, subdivision directional signs" and "temporary political campaign signs." *Metromedia*, 453 U.S. at 495. Although the four justices in the plurality found the ordinance was unconstitutional, they did not do so because of the exceptions:

> The exceptions do not create the infringement, rather the general prohibition does. But the exceptions to the general prohibition are of great significance in assessing the strength of the city's interest in prohibiting billboards. We conclude that by allowing commercial establishments to use billboards to advertise the products and services they offer, the city necessarily has conceded that some communicative interests, *e.g.*, onsite commercial advertising, are stronger than its competing interests in esthetics and traffic safety. It has nevertheless banned all noncommercial signs except those specifically excepted.

Id. at 520. In essence, the plurality was applying an early formulation of the intermediate scrutiny standard to the exceptions in order to test the validity of the city's interests. To do so in today's parlance, the plurality would have had to deem the exceptions to be content-neutral.

In that respect, a careful review of the various opinions in *Metromedia* reveals that a majority of the justices viewed the exemptions from the ordinance as permissible from a constitutional perspective. Justices Brennan and Blackmun concurred in the judgment, but viewed the exceptions as "content-neutral." *Id*. at 526-27 (Brennan, J., concurring). In his dissent, Justice Stevens reasoned that the exceptions were "content-neutral" and, "[t]o the extent that the exceptions related to subject matter at all, I can find no suggestion on the face of the ordinance that San

Diego is attempting to influence public debate on particular issues." *Id*. at 554 (Stevens, J., dissenting).

Prophetically, Chief Justice Burger foreshadowed the current intermediate level of scrutiny in a separate dissent, writing that "[t]he exceptions San Diego has provided – the presence of which is the plurality's sole ground for invalidating the ordinance – are few in number, are narrowly tailored to peculiar public needs, and do not remotely endanger freedom of speech." *Metromedia*, 453 U.S. at 564 (Burger, C.J., dissenting). He continued: "The plurality today trivializes genuine First Amendment values by hinging its holding on the city's decision to allow some signs while preventing others that constitute the vast majority of the genre." *Id*. at 565. Finally, in his dissent, Justice Rehnquist agreed "substantially with the views expressed in the dissenting opinions of The Chief Justice and Justice Stevens," adding that in his view the exceptions in the San Diego ordinance provided reasonable outlets "for the free expression which the First and Fourteenth Amendments were designed to protect." *Id*. at 569-70 (Rehnquist, J., dissenting).

A close reading of the case thus shows that the justices who decided *Metromedia* would likely have reviewed the exceptions under the intermediate scrutiny test had the case been decided with today's standards in mind. As in the San Diego ordinance, the various categories of speech in Gilbert's ordinance

are based on objective factors that serve different functions.[11] Whether Gilbert has favored certain types of signs over others in the course of advancing permissible interests is a matter of consistency that the intermediate level of scrutiny is especially formulated to address. So long as the government does not interfere with the ability to speak on particular topics or to express different viewpoints, regulations concerning the time, place and manner of signs should *not* be subject to the highest level of scrutiny.[12] To hold

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[11] Petitioners contend the ordinance allows subjectivity in its application, claiming enforcement officers have discretion in determining the application of its provisions. In support, Petitioners cite to testimony provided in response to unrealistic hypothetical scenarios that are not related to Petitioners' signs. (Pet'rs' Br. 40-41.) A vagueness challenge is not before the Court, however, and an individual employee's response to unrealistic hypotheticals does not determine the proper level of scrutiny for First Amendment purposes. Moreover, the officials testified consistently that a noncommercial sign with a directional arrow would fall within the provision at issue in this case. (ER 260, 283, 308, 357.) When pressed further, one witness testified he would ask his supervisor. (*Id*. at 358.) "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward*, 491 U.S. at 794.

[12] This approach is consistent as well with the government's ability to restrict the secondary effects of adult entertainment, provided the restriction is not aimed at the content of the speech. While recognizing that adult entertainment can be protected "speech," regulations are "content-neutral" if they do not ban speech, but instead address the link between adult entertainment businesses and certain demonstrated secondary effects such as an increase in crime. In *Alameda Books*, for example, an ordinance was "deemed content-neutral" (and thus reviewable under the intermediate scrutiny test) because it was "aimed not at the content of the films shown at adult theaters,

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otherwise would trivialize First Amendment values by subjecting land use decisions to the most exacting review, virtually nullifying the discretion to pass laws regulating land use, which is a basic governmental function.

III. APPLICATION OF THE INTERMEDIATE LEVEL OF SCRUTINY IS NOT BEFORE THE COURT

In their petition for a writ of certiorari, Petitioners asked this Court to resolve whether the content-neutrality test should be based on an objective standard, claiming the circuits were split, with some applying a subjective standard. Neither the petition nor the Question Presented that Petitioners drafted raises the Ninth Circuit's articulation or application of the intermediate scrutiny test for review. Likewise, in their merits brief, Petitioners argue that the strict scrutiny test should have been applied to the ordinance. The only reference to intermediate scrutiny is in two paragraphs at the tail end of their merits brief, neither of which applies the intermediate scrutiny test. The first paragraph recites the standard for *commercial* speech from *Discovery Network* – which Petitioners concede "is comparable to intermediate

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but rather at the secondary effects of such theaters on the surrounding community, namely, crime rates, property values and the quality of the city's neighborhoods." 535 U.S. at 434 (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49 (1986)).

scrutiny" – and the second paragraph merely states, in conclusory form, that the distinctions in the ordinance bear no reference to Gilbert's interests. (Pet'rs' Br. 52-53.) Petitioners qualify that short blip with a footnote reiterating that they are mentioning the intermediate test solely to support their contention that the ordinance does not pass the strict scrutiny test. (*Id*. at 52 & n.11.)

Supreme Court Rule 14.1(a) limits a grant of *certiorari* to "the questions set out in the petition, or fairly included therein." In kind, Supreme Court Rule 24.1(a) makes plain that a party "may not raise additional questions or change the substance" of the questions presented in the petition for writ of *certiorari*. Because Petitioners did not raise application of the intermediate scrutiny test in their petition, and that test is not included within the strict scrutiny determination, the Court's inquiry is at its end if it concludes that strict scrutiny does not apply.

Respondents do note that the United States has filed an amicus brief agreeing with Respondents that strict scrutiny does not apply, but going further and arguing that the intermediate level of scrutiny should be applied in such a manner that would uphold analogous provisions in the federal Highway Beautification Act. Tellingly, to address the application of the intermediate level test, the United States had to rewrite and broaden the Question Presented ***in its entirety***, replacing it to read as follows: "Whether respondents' sign ordinance, which imposes more stringent limitations on certain 'temporary directional

signs' than it imposes on 'ideological' or 'political' signs, violates the First Amendment." (United States' Amicus Br. (I).) The United States' replacement of the Question Presented runs afoul of Supreme Court Rules 14.1(a) and 24.1(a) quoted above. As such, the United States has overreached by going beyond the scope of the issues before the Court for merits review, in a blatant attempt to address the constitutionality of a federal statute that is likewise not before the Court for review.

These rules are not simply technical, as they are central to delineating this Court's grant of discretionary jurisdiction and are founded on a notion of fairness to the litigants and the process. "These principles help to maintain the integrity of the process of certiorari. The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before us to alter these questions or to devise additional questions at the last minute would thwart this system." *Taylor v. Freeland & Krontz*, 503 U.S. 638, 646 (1992) (internal citation omitted); *see also Chandris, Inc. v. Latsis*, 515 U.S. 347, 353 n.* (1995) ("Because petitioners did not raise the issue in the petition for certiorari, we will not consider any argument they may have . . . concerning the effect of respondent's failure to object to the seaman status jury instructions in their entirety.").

Along these lines, Respondents will be unfairly prejudiced if Petitioners are allowed to interject the application of the intermediate level of scrutiny into

the case at this juncture. Directly to that point, Petitioners have not presented arguments in their opening brief to which Respondents can respond so that the Court can have full and complete written arguments for consideration. As a matter of fundamental fairness, and court procedures, Petitioners should be held to have "meant what they said and said what they meant" in presenting grounds for review in their petition.

Had Petitioners intended to seek review of the Ninth Circuit's application of the intermediate level of scrutiny, it behooved them to include that issue as part of the Question Presented and within the petition itself seeking review. In due course, this Court could have then determined whether that separate issue warranted plenary review along with the question actually presented, which is whether the strict scrutiny test should have been applied. Even a cursory review of the petition in this case confirms that Petitioners sought review based on a contention that the circuits were split on whether strict scrutiny applied to ordinances such as the one at issue in this case.

Notably, a split in the circuits is one of the "compelling reasons" provided for granting review under Supreme Court Rule 10. In contrast, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*; *see also Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring) ("error correction . . . is outside

the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari") (alteration in original) (quoting S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* § 5.12(c)(3) (10th ed. 2013)).

Here, no contention has been made that the Ninth Circuit erred in articulating the intermediate level test that has been established by this Court, and no advocacy is made to adopt a new or different articulation of the standard. Instead, the United States simply urges this Court to apply the intermediate scrutiny test which would (in a future case, presumably) result in the Highway Beautification Act being upheld as permissible under the First Amendment. In an abundance of caution, Respondents address the United States' arguments *infra*, including its mischaracterization of the operation of the ordinance as favoring one type of speech over another. As a matter of fundamental fairness and Supreme Court procedure, however, this Court's inquiry should rightly be limited to a determination of whether the ordinance is subject to strict scrutiny. Because it is not (as argued herein), the judgment below should be affirmed on that question.

IV. GILBERT'S CODE SATISFIES THE INTERMEDIATE SCRUTINY TEST

If the Court reaches the application of the intermediate scrutiny test, the ordinance should be upheld.

Under that test, an ordinance is upheld if it is "narrowly tailored to serve a significant governmental interest" and "leaves open ample alternative channels of communication." *McCullen*, 134 S. Ct. at 2534, 2540 n.9 (internal quotation marks omitted). An ordinance is narrowly tailored "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (alteration in original).

Petitioners' *sole* reference to the application of the intermediate scrutiny test is a conclusion that distinctions among temporary signs in the ordinance "bear no relation whatsoever" to Gilbert's interests. They posit that Gilbert should treat "all temporary signs the same." (Pet'rs' Br. 53.) In support, they cite *Discovery Network*, where Cincinnati had sought to ban commercial handbills from newsracks in favor of "traditional newspapers." As discussed *supra*, this Court applied the *Central Hudson* test to conclude that Cincinnati's interest in limiting the number of newsracks was not justified by regulating the content of the publications. *Discovery Network*, 507 U.S. at 428. The instant case is a far cry from the restriction in *Discovery Network*. Because newsracks themselves are not speech, regulation of their content necessarily favors views and ideas. In contrast, Gilbert regulates Temporary Directional Signs without regard to views and ideas, as explained in the preceding portions of this brief.

The remainder of Petitioners' scrutiny arguments are under the rubric of the strict scrutiny test, where they contend that: (1) Gilbert cannot distinguish its interests in regulating Temporary Directional Signs differently from Ideological Signs and Political Signs; and (2) Gilbert gives more favorable treatment to directions permitted under the provisions for Homeowners Association Facilities Temporary Signs under Section 4.406(C)(4) (App. 54) ("HOA Signs") and Weekend Directional Signs under Section 4.405(B)(2) (App. 51-54).[13] (Pet'rs' Br. 47-52.) These conclusions lack factual support under any scrutiny analysis.

Petitioners do not (and could not) deny the legitimacy of Gilbert's interest in avoiding the proliferation of signs that adversely affect the quality of life, safety of citizens, and property values. *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984).[14] *See also Bd. of Trs. of State Univ. of N.Y.*, 492 U.S. 469, 478 (1989) (noting that courts are "loath to second guess the Government's judgment" that a regulation is necessary to further its legitimate interests). Nevertheless, and while not articulated by Petitioners, their comparative analysis suggests that Gilbert has (paradoxically) not banned *enough* speech. In fact, the Town's treatment of signs supports the distinctions in the ordinance.

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[13] Because Section 4.405(B)(2) applies to new residential construction only (App. 52), Respondents will refer to them as "Builder Weekend Directional Signs."

[14] Gilbert's interests are enumerated in Section 4.401 of the ordinance. (App. 25-27.)

A. The Distinctions Are Narrowly Tailored To Advance Significant Governmental Interests

The provision for Temporary Directional Signs is intended to guide motorists and pedestrians to a specific location for a time-limited event. The durational restrictions serve to minimize visual clutter and confusion for people traveling to an event that has already concluded. The expressive features of Petitioners' signs, meanwhile, can be communicated through Ideological Signs, which Petitioners consider to have the most favorable treatment.[15] Ideological Signs and Political Signs, moreover, retain expressive value even if they pertain to a specific event because of the identity of the speaker as a supporter of a political perspective or a specific ideology. These signs do not have the same potential to confuse travelers,

[15] Respondents note that although the Ninth Circuit assumed that Ideological Signs are allowed in the right of way, the district court did not resolve that issue (Pet. App. 74a) and, indeed, Section 4.402(R)(7) provides otherwise. (App. 41.) Among other things, the 2008 ordinance provides setback requirements for signs that are allowed in the right of way (*e.g.*, App. 32, 36, 45-46, 53-54), whereas no such provision applies to Ideological Signs. Moreover, under the 2011 amendment, Temporary Directional Signs are now permitted in the right of way. (App. 80, 88-89.) For these reasons, if the location of signs in the right of way is relevant to the Court's analysis, a remand may be warranted for the proper application to be resolved by the lower court. A remand would be warranted as well if a severability question arises. (App. 78; *see Virginia v. Hicks*, 539 U.S. 113, 121 (2003) (severability presents a question of state law.)

because the messages are not coupled with guidance to a specific location for a time-sensitive event.

In addition, Gilbert does not fully control the regulation of signs within its borders. For example, Arizona law *requires* that towns such as Gilbert allow certain types of political signs to be posted in Gilbert's rights of way during certain periods of time prior to a primary election. Ariz. Rev. Stat. § 16-1019. Another example is *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), which affords constitutional protection to signs advertising the sale of real estate. The fact that Gilbert must comply with these external obligations should not logically require Gilbert to allow identical exceptions for all manner of speech.

Instead, by limiting the number, size and location of signs, Gilbert's ordinance directly addresses the source of the "evil" created by a proliferation of signs – visual blight, safety and deterioration of real estate values. *Ward*, 491 U.S. at 800; *Vincent*, 466 U.S. at 808. Without the ordinance, Gilbert's important governmental interests would be substantially impaired and would "be achieved less effectively." *Ward*, 491 U.S. at 799. The validity of the ordinance "depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Id*. at 801. The distinctions are justified with respect to the function of the signs, all of which are furthered by Gilbert's comprehensive sign regulations.

The United States' arguments addressing the issue of the differing treatment of Petitioners' Temporary Directional Signs and Political and Ideological Signs (United States Amicus Br. 28-31) is no more persuasive than Petitioners'. First, the United States adopts the same fallacy that Petitioners do in implying that Petitioners' Temporary Directional Signs are the only medium available to advertise Petitioners' church services. To the contrary, under the ordinance, Petitioners are free to advertise their events through Ideological Signs. What they cannot do through Ideological Signs is include information that is intended to guide drivers to the location of the church service or event. Those additional limited-purpose signs must comply with the regulations of Temporary Directional Signs.

The United States also misses the mark by contending that the Temporary Directional Signs provision does not serve the purposes for which the ordinance was adopted. To the contrary, allowing additional signs to guide travelers to a specific event improves traffic flow and reduces congestion. Limiting the signs to reasonable hours of travel to Petitioners' location, and requiring them to be smaller and less obtrusive than Ideological Signs, serves the legitimate interests of preventing confusion by travelers, reducing the proliferation of signs, and improving aesthetics, along with the corresponding benefits to the community that result. Properly understood, the interests served by the limitations are functional and no more "value laden" than analogous provisions in other sign laws.

B. Gilbert Does Not Favor HOA Signs Or Builder Weekend Directional Signs Over Temporary Directional Signs

Petitioners' contention that Gilbert favors HOA Signs and Builder Weekend Directional Signs is wholly misplaced for multiple reasons. First, both of these types of signs require permits whereas Temporary Directional Signs do not. (App. 27-30, 51-52.) The requirement of a permit sets these signs apart from the treatment of Temporary Directional Signs that do not require a permit. Second, while there is no limit on the total number of Temporary Directional Signs (other than the placement of four per property), HOA Signs are limited to an aggregate of 80 square feet and Builder Weekend Directional Signs to a total of 15 signs with no more than 5 signs within 500 feet of each other on the same side of the street. (App. 38, 51-54.)

Third, Temporary Directional Signs are not limited as to location, yet HOA Signs are allowed only "within the limits of the residential community," and Builder Weekend Directional Signs must be within a two-mile radius of the property. (*Id*. at 38-39, 51-52, 54.) Fourth, Builder Weekend Directional Signs can be erected on weekends and holidays only, whereas Temporary Directional Signs have no such limitation. (App. 38-39, 51-52.) Fifth, Temporary Directional Signs can be 6 feet high and 6 feet in area, but Builder Weekend Directional Signs are limited to 4 feet high and 3 square feet in area. (App. 38, 51-52.) Sixth, because HOA Signs must be within the residential

community, there is less congestion and potential confusion than Temporary Directional Signs which do not have a geographic restriction.

In sum, the fact that HOA Signs and Builder Weekend Directional Signs require permits, and contain more restrictions than Temporary Directional Signs, belies Petitioners' claim of less favorable treatment. Instead, the regulation is tailored to the function of each sign type, in a manner that accommodates the desired speech while protecting the Town's legitimate governmental interests.

C. Petitioners Have Adequate Alternative Modes Of Communication

The final prong of the intermediate scrutiny analysis is that there exist adequate alternative modes of communications. *Vincent*, 466 U.S. at 812. Petitioners do not claim the alternatives are inadequate, nor is there evidence in the record that *any* person could not find a Good News service because of a lack of signage.

As in *Vincent*, this Court should find that adequate alternatives to Temporary Directional Signs exist for Petitioners. First and foremost, Petitioners are free to use Ideological Signs that Petitioners themselves admit offer *more* opportunities to convey messages. Indeed, Petitioners have utilized a whole host of avenues to spread the word about their mission and location, including the internet, print advertising, personal solicitations, pamphlets, telephone calls

and emails. (ER 655-56, 658-59, 665-66; SER 67-68, 71-72, 75.) Likewise, the ordinance permits Petitioners to utilize on-site A-Frame Signs and off-site Sign Walkers, neither of which require a permit. (App. 29-30, 45-46.) Accordingly, Petitioners have *more* than ample alternative modes of communication apart from Temporary Directional Signs under the ordinance.

CONCLUSION

When Petitioners' arguments are reduced to their essentials, they contend that Gilbert abridged their freedom of speech by regulating the ability to post off-site directional signs for temporary events differently from other types of signs. To make this argument within the framework of the case law, Petitioners rephrase their signs as "invitations" to religious events, without which they cannot fulfill their mission to spread their message. Based on that premise, Petitioners contend that the distinctions in the ordinance for Temporary Directional Signs are based on content that should have been reviewed under the strict scrutiny standard.

Petitioners' arguments go too far. First, the Temporary Directional Sign provision does not foreclose Petitioners' ability to invite the public to church events. It simply (and solely) applies to limit their ability to erect off-site signs intended to direct passersby to temporary events. Second, the "content-neutrality" test has been devised as a tool to guide

the courts to the appropriate level of scrutiny. The strict scrutiny test, in turn, is the most searching inquiry, intended to prevent governments from censoring or favoring viewpoints or ideas within the realm of noncommercial speech.

Because all signs are forms of speech, any distinctions among them could be based on their content, depending on the rigidity with which that term is construed. At the same time, sign ordinances are necessary to advance legitimate governmental interests such as aesthetics, safety and maintaining property values. Particularly in the area of sign ordinances, therefore, the content-neutrality test should be applied flexibly with special consideration given to whether the ordinance censors or favors either viewpoints or ideas. The strict scrutiny test is misplaced here because the Temporary Directional Sign provision, along with other exceptions from the permitting requirement, does not discriminate as to viewpoints or ideas.

Petitioners have not sought review of the Ninth Circuit's *application* of the intermediate scrutiny test, but solely whether the lower court should have applied that test at all. If the Court agrees that intermediate scrutiny applies, its inquiry is therefore at an end. Should the Court revisit the Ninth Circuit's application of that test, it should likewise affirm for the reasons provided herein.

WHEREFORE, the judgment below should be AFFIRMED.

Respectfully submitted,

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