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*

## PETITIONERS' REPLY BRIEF

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## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Good News Community Church and its pastor, Clyde Reed (hereinafter collectively "Good News" or "the Church"). Respondents are the Town of Gilbert, Arizona, and Adam Adams in his official capacity as the Town's Code Compliance Manager (hereinafter collectively "Gilbert").

Good News Community Church does not have any parent companies, and no entity has any ownership interest in it.

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## INTRODUCTION

The circuit courts are in conflict about whether the government's lack of illicit motive, or content-neutral regulatory purpose, nullifies content-based discrimination on the face of a law. A majority follows the objective test laid down by this Court decades ago, under which a content-based motive or purpose is sufficient but not necessary to show content-based discrimination. The court below, and two other circuit courts, follows an "evolving," subjective test. This approach requires a free speech litigant to prove that a law facially regulates speech based on content *and* was enacted with an illicit motive or purpose to prevail.

Respondents prefer the latter test, asserting that a lack of discriminatory intent, or a content-neutral purpose, should result in the application of intermediate scrutiny, even if a law facially classifies speech based on content. Resp. Br. 17-18. They posit this new test is necessary to give them the "flexibility" to "balance" the "fundamental right to speak" with the "interests of [their] particular jurisdiction." Resp. Br. 17; *see also id*. at 8, 22, 37.

Contrary to Respondents' claims, applying this Court's objective test to sign codes does not impede the "flexibility" they claim they need. It permits them to regulate signs' location, placement, physical attributes, number, and much more, but requires they do so in a content-neutral manner. *See, e.g.,* Nat'l League of Cities *Amici* Br. in Supp. of Resp. (Nat'l League) 10, 13, 15 (explaining many content-neutral ways to regulate signs).

What Respondents' new test actually does is give them license to classify noncommercial speech based on content, which is forbidden by the First Amendment. Worse, Respondents candidly admit that their test allows them to more heavily regulate—even eliminate—noncommercial speech they view as less important. They explain that Political and Ideological Signs receive favorable treatment because they "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." Resp. Br. 48.

After Gilbert classifying Good News' signs for the past seven years as event directional signs, App. 123-126, Respondents for the first time in this Court assert that Good News' signs are ideological. Resp. Br. 4, 24. Yet Respondents contend that they can be "banned … altogether" because they also include directional content. Resp. Br. 31. But if the Church removed the directional content, they would be banned because Ideological Signs are prohibited on public property. Resp. Br. 48 n.15. Political Signs, however, are still liberally permitted in the right-of-way. Thus, even with their concession that the Church's signs are ideological, the Code is still plainly content based.

Respondents' claim that the Church's ideological signs somehow lose their constitutional protection because they also include directional content is unprecedented. A Political Sign that says "Vote Hillary, Register To Vote One Block Down" does not lose constitutional protection because it contains directional content. Nor does an Ideological Sign

that says "Don't Waste Your Time On Fairy Tales, Skip Good News' Services Sunday at Sunrise Senior Living." The same is true of Good News' signs, whose directional content is merely a component of its invitation for the public to come and hear the Gospel. App. 104. And even without this content the Church's sign would still be prohibited.

Respondents contend they place onerous duration limits on the Church's signs to "minimize visual clutter and confusion for people traveling to an event that has already concluded." Resp. Br. 48. But there are several problems with this contention. First, church services are weekly, so there is no "confusion" with a sign that includes the day, time and location. Second, allowing an unlimited number of political signs obviously does not reduce clutter. Third, why is there no confusion with other directional signs that are up for much longer? App. 54 (HOA events—30 days); App. 52 (builder weekend directional—64 hours). Fourth, Respondents' proposed "solution" of placing two signs (one directional and one ideological), Resp. Br. 4, directly conflicts with the interest in reducing clutter. Even more, these alleged concerns are not unique to signs containing directional content and Respondents may easily address them in a content-neutral way. For instance, they may require the removal of signs that actually cause a traffic hazard or motorist confusion.

Here, the Code's content-based classifications result in Pastor Reed being subjected to potential jail time and criminal fines simply because Gilbert officials place Good News' signs into a disfavored category. ER 156 & 169 ¶ 28.

## ARGUMENT

### I. Respondents Favor A Subjective Test.

#### A. Respondents' Test Determines Content Neutrality Solely Based On The Government's Motive Or Purpose Rather Than A Law's Text.

Respondents effectively concede that the Code is content based. At times, they expressly claim the power to make distinctions based on content. Resp. Br. 8 (signs may be regulated based on "what they say"); *id*. at 37 (sign regulations may "distinguish between noncommercial signs").

Other times, they resort to synonyms for content-based discrimination. For example, they claim the Code does not regulate based on content, but rather on signs' different "functions." Resp. Br. 8, 18, 34, 40, 49, 52. But all signs serve the same "function"—conveying ideas and information to the public. Thus "function" is just a pseudonym for "content." *See Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985) ("[Preferring] the 'functions' of certain signs over those of other (*e.g.*, political) signs is really nothing more than a preference based on content.").

In fact, Respondents concede that "[e]xcept for the directional component, the information Petitioners claim they wish to include could be placed on an Ideological Sign.'" Resp. Br. 4. But everything on the Church's signs is ideological content, from its invitation to attend the Church's

services[1] to where it meets and how to get there. The directional content does not strip Good News' signs of First Amendment protection any more than an arrow pointing toward heaven or the address of a polling place on a Political Sign. And regulating Petitioners' signs differently than Ideological and Political Signs because they contain directional information is blatant content discrimination.

Further, removing the directional content would not solve the Church's dilemma because Respondents say Ideological Signs cannot be placed in the right-of-way and the Church owns no private property on which to place signs. Resp. Br. 48 n. 15. Importantly, other temporary signs, like Political Signs, are permitted in the right-of-way.

Despite the Code's content-based distinctions among noncommercial signs, Respondents claim it passes constitutional muster. Because under their novel test, so long as the government lacks a discriminatory motive, or asserts a content-neutral purpose/justification, intermediate scrutiny applies even if the face of the law regulates speech based on its content. Resp. Br. 16 (strict scrutiny only appropriate where laws "censor or restrain speech *because of* the ideas or viewpoints expressed") (emphasis added); *see also id.* at 17-18 (claiming that

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[1] Respondents erroneously claim that the Church began referring to its signs as "invitation signs" for the first time before this Court. Resp. Br. 3, 23-24, 53. But the Church has been referring to its signs as "invitations" since the outset of this litigation (App. 104 Compl. ¶ 46) (signs are "an *invitation* for those in the community to attend [its services]") (emphasis added).

intermediate scrutiny applies where the government asserts a content-neutral justification). *Amici* the United States and the National League of Cities proffer the same unprecedented test. United States *Amicus* Br. 12 (a sign regulation, "whether or not it contains content-specific exceptions, should be subject only to intermediate scrutiny when its rationales are limited to the substantial governmental interests in safety and aesthetics"); Nat'l League *Amicus* Br. 29-30 (lack of discriminatory intent or a content-neutral purpose triggers intermediate scrutiny).

Respondents' test directly conflicts with this Court's precedent, which states that "laws that *by their terms* distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994) (emphasis added); *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (finding no constitutional violation because the law at issue did "not draw content-based distinctions *on its face*") (emphasis added). Yet Respondents would treat the *terms* of a law as essentially irrelevant.

Moreover, their new test makes a lack of discriminatory intent or a content-neutral purpose the determinative factor in whether a law is content based. This Court has held exactly the opposite. *See Simon & Schuster v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (rejecting argument that "discriminatory … treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas");

*Cincinnati v. Discovery Network,* 507 U.S. 429 (1993) (rejecting city's argument that "the test for whether a regulation is content based turns on the 'justification' for the regulation" and instead relying on the text of the ordinance).

For these reasons, Respondents' agreement "that a government's lack of a discriminatory intent cannot render lawful what would otherwise be an unconstitutional infringement of speech" is meaningless. Resp. Br. 6 n.2. Their novel test yields the same result as requiring litigants to prove discriminatory intent. That is because the application of intermediate scrutiny in the vast majority of cases (except rare cases like this one where the code is wildly underinclusive) will cause content-based sign codes to be upheld rather than stricken by courts.

It is therefore Respondents, not Good News, who are "wrench[ing] … constitutional precepts from their moorings contrary to case law and common sense." Resp. Br. 30. Respondents' new test jettisons the rule that laws are "presumptively invalid" when they facially discriminate based on content in the sign context. *See R.A.V. v. City of St. Paul*, 505 U.S 377, 382 (1992). That represents a sea change in First Amendment law that cannot be limited to signs.

### B. Respondents' New Test Authorizes The Government To Make Value Judgments About Speech.

Respondents claim that *United States v. Stevens,* 559 U.S. 460 (2010), and *Holder v. Humanitarian Law Project,* 561 U.S. 1 (2010), are distinguishable from this case because they involved speech that the government deemed "harmful." Resp. Br. 33. But the Code makes exactly the same type of subjective value judgments. And the Court's holding in both cases makes clear that the government's rationale or motive, even when altruistic, cannot save a law that is content discriminatory on its face.

Respondents simply make another plea for permission to regulate more heavily speech that it deems less important, a request the Court has repeatedly rejected. *See, e.g.*, *Stevens*, 559 U.S. at 470 (refusing to determine "[w]hether a given category of speech enjoys First Amendment protection [based] upon a categorical balancing of the value of the speech against its societal costs").

For example, they claim that "Ideological Signs and Political Signs … 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." Resp. Br. 48. Hence, the Code provides an unlimited duration for Ideological Signs and permits Political Signs virtually all year long. Yet the Code limits the display of the Church's signs to 14 hours, most of which occur at night. Why? Because Respondents think they lack value and could even be "banned …

altogether," simply because they contain directional content (and without such content the Church's signs are banned in the right of way regardless). Resp. Br. 31. The First Amendment forbids such value judgments.

Critically, Respondents conflictingly assert that the message on Good News' signs, except the directional content, is ideological speech. Resp. Br. 4.[2] Thus, they also "retain expressive value even if they pertain to a specific event." Resp. Br. 48. Moreover, directional content is also ideological speech. No sign, regardless of its content, loses all constitutional protection merely because it includes directional content.

## II. Respondents' Justifications For Their Novel Test Are Unavailing.

Respondents offer this Court several reasons why it should adopt their new test for judging content neutrality. None withstand scrutiny.

### A. That "Signs Are Speech" Is A Reason To Ensure First Amendment Compliance, Not Grant Government A License To Regulate At Its Whim.

Respondents heavily rely on a reversed Middle District of Florida decision opining that the

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[2] Although the Church has discussed the category into which Gilbert places its signs, App. 123-26, this is far from an admission that the signs belong in it. Resp. Br. 1. Nor would any such concession matter because the content-based categorization of signs is unconstitutional.

government needs more flexibility to regulate signs "because signs are forms of speech" and thus "can only be categorized, or differentiated, by what they say." Resp. Br. 19-20; *see also id*. at 8, 10, 12, 18, 54 (relying on "signs are forms of speech" refrain).

This is plainly not the case. Respondents fail to appreciate that while "the government has legitimate interests in controlling the noncommunicative aspects of [signs], … the First and Fourteenth Amendments foreclose a similar interest in controlling the communicative aspects." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 502 (1981). Accordingly, in *Discovery Network* this Court recognized the city's legitimate interest in reducing the overall number of newsracks because of their negative aesthetic impact, but barred it from pursuing that interest through selective, content-based restrictions. 507 U.S at 429-30.

In addition, the fact that "signs are speech" is a good reason for courts to carefully scrutinize sign regulations under the First Amendment, not provide the government with less oversight and greater authority to restrict speech based on its content. No one would argue that the government should have more leeway regulating handbills or books because they are inherently "forms of speech." This reasoning is just as wrong in the sign context.

Similarly, the fact that Respondents find sign regulation "difficult," Resp. Br. 19, makes the need for a clear and objective test for content neutrality even more important. This Court's longstanding text-based test satisfies that need, as even

Respondents concede that it is "easy-to-apply." Resp. Br. 20. This ease in application will restore much needed uniformity to the lower courts.

### B. The Objective Test Will Not Spell The Demise Of Sign Regulations.

Respondents claim that an objective content-neutrality test "would subject virtually *all* sign regulations to strict scrutiny." Resp. Br. 8, 22, 35. But the fact that this Court and a majority of lower courts already apply this Court's longstanding objective test to sign regulations, *see* Pet. 21-22, as well as other mediums of speech, belies any claim that the "sky is falling."

In fact, many of the regulations Respondents claim would be stricken under the objective test are entirely permissible. For instance, Respondents assert that regulations concerning the physical contours of signs and distinctions between permanent and temporary signs would fail. Resp. Br. 22, 35. Not true: the government may permissibly regulate the physical contours of signs, so long as they do not grant certain signs a larger surface area based on what they say, as the Code does here. *See* Pet. Br. 11 (graph showing Gilbert's content-based regulation of sign size).

The government may also permissibly distinguish between temporary and permanent signs. In fact, Respondents' definition of "temporary sign," which is "[a] sign not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display," App. 70, passes the

objective content neutrality test with flying colors. The problem is that Respondents categorize temporary signs based on content and impose different restrictions based on the category into which town officials place each sign.

Respondents also overstate this Court's previous admonitions that a law is content based if it requires enforcement officials to examine the content of speech to enforce it, calling it a "simplistic if-you-have-to-read-it-it-is-content-based" approach. Resp. Br. 35. *See, e.g., McCullen*, 134 S. Ct. at 2531 (a speech regulation is "content based if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred."). But under this test a sign code is not content based merely because it requires officials to look at a sign. Rather, the question is whether a sign's differential treatment is determined based on what the sign says, and that is clearly how Gilbert's Sign Code operates. *See* Pet. Br. 38-40.

Even while decrying the objective content-neutrality test as "game, set, and match for the Nation's sign regulations," Nat'l League *Amicus* Br. 31, the League lists numerous ways in which a city can regulate signs in a content-neutral manner. These methods include: "locational criteria (*e.g.*, off-site signs, number of freestanding signs per lot, spacing, and setbacks), placement criteria (*e.g.*, roof signs, ground signs, wall signs, and projecting signs), physical attributes (*e.g.*, flashing signs, animated signs, revolving signs, and wind-activated sign-

devices), and … physical or placement criteria (*e.g.*, sign height and size)." *Id.* at 10.

In practice, it is the new test proffered by Respondents that poses the real danger. Respondents assure this Court that "[g]overnments would still not be able to meddle in the marketplace of ideas" under their test, Resp. Br. 37, but the facts of this case amply demonstrate that is not true. *See* Pet. Br. 11-12 (graphs showing Gilbert's preference for Political and other Ideological Signs over Good News' in relation to size and duration).

Merely requiring governments to assert neutral justifications for their laws is no test at all. They always can. For instance, laws regulating signs "are typically premised on the content-neutral rationales of promoting safety and aesthetics." United States *Amicus* Br. 9. What Respondents propose is a test they will meet by default and which provides no meaningful protection of free speech in the sign context. And this test also places other forms of speech at risk because the content-neutrality standard remains the same regardless of whether books, signs, or pamphlets are at issue.

### C. Secondary Effects Caselaw Is Inapposite.

Respondents invoke the secondary effects doctrine, and their new test is essentially a radical expansion of that doctrine. Resp. Br. 18, 21, 40 n.12.

The secondary effects doctrine arose in the context of zoning regulations concerning sexually

oriented businesses. *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). It permits the government to regulate adult businesses differently because of the *unique* secondary effects of their speech, such as increased crime and lower property values. *See id.* at 48; *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 430 (2002).

The secondary effects doctrine is inapplicable here for the same reason it was rejected in *Discovery Network*: "there [were] no effects attributable to respondent publishers' newsracks that distinguish[ed] them from the newsracks Cincinnati permit[ted] to remain on its sidewalks." 507 U.S. at 430. Similarly, all temporary signs, whether they are Political, Ideological, Qualifying Event, HOA, etc., impact Respondents' interests in safety and aesthetics equally. Hence, Respondents' reliance on the secondary effects doctrine is misplaced.

### D. Respondents Misread *Metromedia*.

In support of their new test, Respondents offer an interpretation of *Metromedia* that cannot be squared with the opinions in that case.

*Metromedia* involved a free speech challenge to a San Diego ordinance that provided various exceptions to a general ban on outdoor billboard advertising. 453 U.S. at 493. The exceptions included, among others, onsite signs, for sale and for lease signs, commemorative historical plaques, religious symbols, certain directional signs, and political campaign signs. *Id.* at 494-95.

Respondents' primary (and mistaken) claim is 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." Resp. Br. 39. That is demonstrably not the case.

First, Respondents claim that the four-member plurality, who held the ordinance unconstitutional, "did not do so because of the exceptions." Resp. Br. 37. To the contrary, the plurality clearly viewed the billboard exceptions as impermissibly content based. Recognizing that the exceptions "distinguishe[d] in several ways between permissible and impermissible signs at a particular location by reference to their content," the plurality held that "[b]ecause some noncommercial messages may be conveyed on billboards throughout the commercial and industrial zones, San Diego must similarly allow billboards conveying other noncommercial messages throughout those zones." *Metromedia*, 453 U.S. at 515-16.

Respondents also err in their claim that the two concurring justices viewed the ordinance's exceptions to be "content-neutral prohibitions of particular media of communication." Resp. Br. 14 (quoting *Metromedia*, 453 U.S. at 526-27). That quote is actually a description of the concurring justices' interpretation of the ordinance as "a total ban of a medium of communication." *Id.* at 526. In fact, the concurring justices indicated that they were not "decid[ing] … whether the exceptions to the total ban constitute[d] independent grounds for invalidating the regulation" because they found that the total ban

failed intermediate scrutiny. *Id*. at 532 n.10. They did, however, recognize quite clearly that "[t]o the extent that exceptions rel[ied] on content-based distinctions, they must be scrutinized with special care." *Id*.

In short, *Metromedia* supports the Church's argument that the Code is content based and deserving of strict scrutiny.

### E. Respondents Fail to Distinguish This Court's Many Cases Striking Down Regulations That Were Content-Based On Their Face.

To justify upholding the Code under the First Amendment, Respondents either reinvent or eschew this Court's precedent. Indeed, Respondents virtually ignore the vast body of this Court's caselaw demonstrating that the plain text of a law is sufficient to render it content based, relegating most of those decisions to a footnote with no substantive discussion. Resp. Br. 33-34 n.9. And they fail to distinguish the few cases they do discuss.

For example, Respondents claim that the city's restriction on newsracks in *Discovery Network* "had nothing to do with the content they were allowed to contain." Resp. Br. 32. To the contrary, this Court specifically rejected the city's argument that its newsrack regulation was content neutral, holding instead that "whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the

ban in this case is 'content based.'" *Discovery Network*, 507 U.S. at 429.

Respondents also attempt to distinguish temporary signs from the newsracks in *Discovery Network*, claiming that the latter "do not in and of themselves convey a message, as their purpose is to allow the dissemination of ideas and speech." Resp. Br. 32. But this is no distinction at all. Temporary signs, like newracks, do not in and of themselves convey a message. They are both modes of disseminating ideas. It is the content of the publications in a newsrack, or the words and symbols on a sign, that convey a message. And signs, unlike newsracks, have a venerable First Amendment history. *See Metromedia*, 453 U.S. at 501 (outdoor signs are "a venerable medium for expressing political, social and commercial ideas [which] have played a prominent role throughout American history, rallying support for political and social causes.") (citation omitted).

Respondents further endeavor to distinguish *Discovery Network*, and *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972), on the basis that the Qualifying Event provision of Gilbert's Code "applies equally to all non-profit organizations regardless of the event to which directions are provided." Resp. Br. 31, 32. There are numerous problems with this argument, many of which are addressed in Petitioners' prior briefing. *See* Pet. Br. 30-33.

Respondents' argument also errs in assuming, as did the Court below, that each content-based

category in the Code should be analyzed in isolation. This approach not only allows Respondents to continue favoring certain arbitrary content-based categories of speech over others, but also treats a restriction on speech as content neutral if it is viewpoint neutral. *See* Pet. Br. 32-33.[3] But "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to" regulations that "restrict expression because of its message, its ideas, its subject matter, or its content." *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n,* 447 U.S. 530, 537 (1980). Accordingly, the proper analysis, and the only test that ensures the government is not favoring certain speech over others, is to compare how the Code treats all private temporary signs.

Further, this Court's precedent makes clear that the concepts of "content" and "viewpoint" discrimination are distinct, although they overlap. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830-31 (1995) ("[D]iscrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination."). Yet Respondents conflate these concepts, repeatedly stating that the Code is content neutral because it does not discriminate on the basis of "the viewpoints or ideas expressed." Resp. Br. 8, 10, 22, 27. While Respondents use the word "ideas" when describing their test, which seemingly refers to content-based discrimination, they wholly fail to explain how the

[3] Of course, the Code violates the viewpoint neutrality rule as well. *See* Pet. Br. 33 n.8.

Code is neutral as to a sign's "message, its ideas, its subject matter, or its content." *See McCullen*, 134 S. Ct. at 2529. Instead, they baldly state that the Code does not target "ideas or viewpoints," and perfunctorily assert that this is enough. But more is required to uphold the Code under the First Amendment than *ipse dixit*.

Simply put, accepting Respondents' arguments would effectively eliminate the content neutrality test by allowing the government to satisfy it by showing viewpoint neutrality alone. That standard would wreak havoc not only in the sign context but in other areas of First Amendment jurisprudence as well, including time, place, manner regulations and government speech forums—a serious consequence Respondents fail to address.

## III. Respondents' Code Cannot Withstand Any Level Of Scrutiny.

### A. Strict Scrutiny Applies To Respondents' Sign Code.

Because the Code is content based on its face, it must satisfy strict scrutiny. *See Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011) (strict scrutiny applies to regulations that "impose[] a restriction on the content of protected speech"); Pet. Br. 9-13 (discussing the content-based nature of the Code). It must therefore be justified by a compelling interest and narrowly tailored to serve that interest. *Brown*, 131 S. Ct. at 2738.

Respondents effectively concede that the Code cannot survive this test. They never argue that it serves a compelling interest or is narrowly tailored to such an interest. Consequently, the Court should apply, and find that the Code fails, strict scrutiny. *See* Pet. Br. 47-53 (demonstrating the Code fails strict scrutiny).

### B. Respondents' Sign Code Fails Even Intermediate Scrutiny.

Respondents oddly claim that they will be prejudiced if this Court decides whether the Code passes intermediate scrutiny. Resp. Br. 43. Yet that standard is the linchpin of Respondents' defense and their *entire brief* argues that the Code satisfies it. In fact, Respondents have made intermediate scrutiny the cornerstone of their defense in every court below. Consequently, prejudice is not a factor here. Moreover, because Respondents pressed intermediate scrutiny below and the lower courts ruled upon it, this Court may do likewise. *Verizon Commc'ns, Inc. v. F.C.C.*, 535 U.S. 467, 530 (2002) (explaining this Court may review "[a]ny issue 'pressed or passed upon below' by a federal court.") (citation omitted).

Respondents also wrongly claim that the Question Presented does not fairly include whether the Code passes intermediate scrutiny. Resp. Br. 7, 41-42. In fact, Petitioners' Question Presented asks whether the Town's mere assertion of a lack of discriminatory motive "justif[ies] the code's differential treatment of [their] religious signs"

regardless of what level of scrutiny applies. Pet. Br. i.

Under intermediate scrutiny, the Code must be content neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). But Respondents' Code stumbles right out of the gate because it is content based on its face, and also fails several other prongs of the test.

### 1. The Code Is Not Narrowly Tailored.

Respondents contend that "by limiting the number, size and location of signs, [the Code] directly addresses the source of the 'evil' created by a proliferation of signs—visual blight, safety and deterioration of real estate values." Resp. Br. 49. Governments may, of course, regulate sign size, location, and number, in a content-neutral manner. But the Code plays favorites among temporary signs based on their content. Further, far from "target[ing] and eliminat[ing] no more than the exact source of the 'evil' it seeks to remedy," *Frisby v. Schultz*, 487 U.S. 474, 485 (1988), the Code allows one of the main sources of that "evil" (*i.e.*, political signs) to proliferate virtually year round. ER 87-120, 194-218 (pictures of Political Signs).

Respondents complain that state law requires them to permit political signs for extended periods of time surrounding elections. Resp. Br. 49. But prior to this state law's enactment, the Code applied an even more favorable duration limit to the Political

Sign category than the new law—*i.e.*, *no duration limit at all* prior to an election. App. 31-32. Respondents also complain that they should not have to provide other signs the same time frame as state law allows political signs, but the First Amendment and the Supremacy Clause mandate that all other temporary, noncommercial signs be accorded the same treatment.

Respondents also make the remarkable claim that placing *more* signs is the answer to Petitioner's complaints. Indeed, they assert that "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." Resp. Br. 50.

Common sense dictates that permitting *more* signs does not serve to reduce sign proliferation, prevent confusion, increase safety, and improve aesthetics. Resp. Br. 26, 48-50. Further, Respondents "more signs" solution, along with their highly favorable treatment of Political and other Ideological Signs which substantially impact their interests in the same way, demonstrates that they are not serious about pursuing these interests. Moreover, Respondents' "more signs" argument means no signs for the Church because they claim Ideological Signs are barred within the right-of-way and the Church owns no property on which to place signs.

Respondents also contend that placing onerous durational restrictions on the Church's signs "serve[s] to minimize visual clutter and confusion for people traveling to an event that has already concluded." Resp. Br. 48. But this concern is not unique to signs containing directional content and can easily be regulated in a content-neutral manner. The Code already regulates signs that impact traffic concerns, like signs with moving parts, flashing, blinking, or animated signs, and signs incorporating inflatable objects, in a content-neutral manner. App. 39-42, §4.402(R). Respondents could easily add a content-neutral provision to this section that addresses their visual clutter and confusion concerns. But instead, they pursue this interest through selective, content-based regulations.

In addition, no valid concern exists that the Church's signs will confuse the public because they relate to a finished event. The Church's services occur *every Sunday*. Respondents' confusion and clutter concerns also cannot be taken seriously given that the Code allows other *single* event signs to stand for a month or more, including HOA signs and Political Signs.

Finally, Respondents argue that they do not favor HOA and Builder Weekend Directional Signs over the Church's signs because these signs require a permit. But the record shows that these permits come cheap. ER 310 at 38:20-39:4; ER 328. And permits for Builder Signs containing commercial speech are rubber-stamped, year-long, and easily-renewable. ER 372-491; App. 52. If the option were available, Petitioners would readily apply for a

permit in exchange for this preferable treatment. ER 185-86 at ¶ 48.

Respondents also claim that HOA Signs are treated worse in relation to size and location. Resp. Br. 51. But HOA Signs can be up to 80 square feet, as compared to the Church's 6 sq. ft. signs. And although HOAs are "limited" to 80 sq. ft. "within the limits of the residential community," App. 54, the "Placement" provision of the HOA section of the Code contains no "residential community" limit at all, App. 55. As to Builder Signs, they may advertise a weekend event for 64 hours while the Church gets a mere 14 hours. App. 38, 52, 93.

In the end, Respondents' arguments about HOA and Builder Signs do not show the Code is narrowly tailored, but rather illustrate its intractably content-based nature.

### 2. Ample Alternative Channels for Communication Do Not Exist.

Respondents repeatedly claim that Good News can use the internet, personal solicitations, pamphlets, telephone calls, emails, and newspaper ads to advertise its services. Resp. Br. 25, 52. But this Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." *Consol. Edison*, 447 U.S. at 541 n.10. Moreover, Respondents do not ask Political or other favored Ideological speakers to use these alternative methods in place of their signs.

Respondents also proffer that the Church can use A-Frame Signs and Sign Walkers to advertise its services. But the A-Frame provision of the Code is limited to commercial businesses. App. 34. Indeed, the Code provision that allows any permitted sign to contain a noncommercial message only allows a commercial business to include a noncommercial message. It does not allow the Church to use A-Frame signs. Further, both of these sign types may only be displayed during business hours, App. 35, 47, which for the Church is the one hour during which it conducts services.

Contrary to Respondents' suggestion, Good News has always claimed that "alternatives [to signage] are inadequate." Resp. Br. 52. Indeed, the Church provided thorough discovery responses explaining their inadequacy. ER 647-60. *Cf. City of Ladue v. Gilleo*, 512 U.S. 43, 57, (1994) ("Residential signs are an unusually cheap and convenient form of communication."); *Linmark Associates, Inc. v. Willingboro Twp.,* 431 U.S. 85, 93 (1977) (alternatives to for sale signs "involve more cost and less autonomy" and thus "are far from satisfactory"). Pastor Reed also testified that signs are an essential means to invite people to the Church's services, and that the Church had more visitors when it was allowed to place more signs. ER 505 at 47:17-22; ER 882 ¶¶ 9-10.

## CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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