No. 13-502

IN THE
Supreme Court of the United States

PASTOR CLYDE REED, *ET AL.*,
Petitioners,

v.

TOWN OF GILBERT, ARIZONA, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS IN SUPPORT OF PETITIONERS

TODD R. MCFARLAND
ASSOCIATE GENERAL COUNSEL
General Conference of Seventh-day Adventists
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 680-6321

GENE C. SCHAERR
Counsel of Record
Law Offices of Gene Schaerr
332 Constitution Ave. NE
Washington, DC 20002
(202) 361-1061
gschaerr@gmail.com

QUESTION PRESENTED

Does a government's mere assertion of a lack of discriminatory motive render neutral a speech regulation that is facially content-based?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

ORDINANCES

OTHER AUTHORITIES

INTRODUCTION AND INTERESTS OF *AMICUS*[1]

Amicus curiae is a religious organization that follows the "Great Commission," given by Jesus Christ to his followers, to go into all the world and "preach the Gospel." See Matthew 28:19-20; Mark 16:15. A principal method by which *amicus* follows this evangelistic mandate is through door-to-door visits with potential converts—during which church members share their testimonies, discuss religious issues, pray, distribute religious literature and solicit charitable contributions to sustain these missionary activities. These evangelistic efforts, traditionally known as "colporteur" ministries, have a long history in this country. And *amicus* sponsors and supports one of the nation's oldest and largest colporteur ministries. The Ninth Circuit decision under review here seriously threatens the viability of those ministries by effectively requiring an organization challenging a speech-suppressive statute to demonstrate that the issuing government *intended* to discriminate on the basis of content—that is, that it acted with a discriminatory purpose.

Amicus General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist church and represents nearly 59,000 congregations with more than eighteen million

---

[1] No one (including a party or its counsel) other than the *amicus curiae,* their members and counsel authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. All counsel of record received timely notice pursuant to Rule 37.2 of *amicus's* intent to file this brief, and all parties have consented to its filing in communications on file with the Clerk.

members worldwide. In the United States, the North American Division of the General Conference oversees the work of more than 5,000 congregations with more than one million members. The General Conference sponsors several missionary programs in which church members travel to various locations to evangelize local residents through door-to-door solicitation.

One of these is a student missionary effort known as the "Literature Evangelist" program. These student missionaries regularly encounter local speech-suppressive laws, which must be addressed through negotiation or litigation before these missionary activities may occur. A rule like that applied by the Ninth Circuit below—requiring an intent or purpose to discriminate based on content—would effectively foreclose pre-enforcement resolutions, and as a result would effectively eliminate this protected religious speech.

For these reasons, *amicus* is strongly interested in and concerned about both the outcome of this case and the analysis by which the Court reaches that outcome.

STATEMENT

In regulating the size, location, duration and quantity of signs posted in public, the Town of Gilbert treats such things as political and ideologically-based signs more favorably than others, including (as in this case) signs advertising regular church services. *See* Gilbert, AZ Land Development Code, Division 4, General Regulations, Art. 4.4; Pet. App. 25-55.

1. Although a permit is generally required for posted signs, certain types of signs, including political and ideological signs, are exempt from this require-

ment. *Id.* at 28-29. The sign ordinance allows temporary directional signs to be up to "6 feet in height and 6 square feet in area." *Id.* at 38. The ordinance also mandates that such signs "shall only be displayed up to 12 hours before, during, and 1 hour after the qualifying event ends." *Id.*

But political and ideological signs are treated more favorably. When posted on property zoned for nonresidential use, undeveloped Town property, and Town rights-of-way, political signs may be as large 32 square feet. *Id.* at 31. Also, political signs may be put up as much as 60 days before a primary election, and can remain up for as many as 15 days after a general election. *Id.* at 84. Ideological signs have no display duration restrictions, are permitted in all zoning districts, and may be up to "20 square feet in area and 6 feet in height." Id. at 32. Furthermore, while only four temporary event directional signs may be posted on a property, the number of political or ideological signs is not capped. *Id.* at 31-32, 38.

2. During the period relevant here, the Good News Community Church ("Good News") met in an elementary school for Sunday worship services. See *Reed* v. *Town of Gilbert (Reed II)*, 707 F.3d 1057, 1060 (9th Cir. 2013); Pet. App. 5a. Based on its understanding of Biblical scripture, Good News feels under commandment to invite the community to meet regularly with its congregation. *Id.* Accordingly, the church placed numerous signs around the elementary school early Saturday mornings advertising the worship service, and removed the signs following Sunday services. *Id.*

However, a city code compliance officer notified Good News via e-mail that it had violated the city's

ordinance regarding temporary directional signs for qualifying events. See *Reed* v. *Town of Gilbert (Reed I)*, 587 F.3d 966, 972 (9th Cir. 2009); Pet. App. 89a-90a. A few months later, a code compliance officer issued an advisory notice informing the Church that its signs violated the town's ordinance because they were posted outside of acceptable hours before and after an event, were placed in a public right of way, and did not have include an event date. Pet. App. 90a.

In response to the e-mail and advisory notice, Good News reduced the number of signs as well as the amount of time prior to the service that the signs were displayed. *Id.* It also mounted a facial and as-applied challenge to the city ordinance in Arizona federal court. *Id.*

3. In the ensuing litigation, Good News argued, among other things, that the sign restrictions violated the Free Speech and Equal Protection Clauses of the Constitution. *Id.* The district court denied Good News' motion for a preliminary injunction, finding that the city ordinance (1) was content-neutral, (2) passed the relevant intermediate level of scrutiny, (3) did not improperly favor commercial over noncommercial speech, and (4) did not violate equal protection because any disparate effects were unintentional. Pet. App. 93a.

On appeal, the Ninth Circuit unanimously affirmed the district court's denial of the preliminary injunction, finding the section of the ordinance dealing with temporary event signs (§ 4.402P) to be constitutional because it did not distinguish between types of qualifying events or sign content, and did not "impermissibly favor commercial speech over non-

commercial speech." Pet. App. 115a. However, the Ninth Circuit remanded for the district court to consider Good News' First and Fourteenth Amendment claims that the ordinance *as a whole* was not content neutral because it impermissibly distinguished between different types of noncommercial speech—allowing political and ideological signs to be larger, more numerous, and displayed longer than temporary event signs. *Id.*

On remand, the district court found the varying restrictions of the different types of signs to be permissible. See *Reed v. Town of Gilbert (Reed II DC)*, 832 F. Supp. 2d 1070, 1081 (D. Ariz. 2011); Pet. App. 72a-74a. The district court explained that under the Gilbert ordinance, to distinguish between signs a government officer "need only *skim* the sign to determine the speaker (e.g., is a non-profit speaking?) and the event at issue (e.g., does this relate to an election or a Qualifying Event?)," and not otherwise reach the content of the sign's message. Pet. App. 73a. On that basis the district court found the Town's regulatory scheme content-neutral, and that defendants were entitled to summary judgment on all issues. Pet. App. 83a.

On appeal a second time, a new panel affirmed the district court's grant of summary judgment. See Pet. App. 45a. Reiterating the district court's analysis, the *Reed II* majority found that the ordinance in question was content-neutral because the city "did not adopt its regulation of speech *because* it disagreed with the message conveyed." Pet. App. 31a (emphasis added). Thus, even though the ordinance required city officials to treat signs differently based on their content, because the court could find no explicit *intent* to discriminate in the sign code itself, the

code was considered content-neutral. Pet. App. 31a-32a. The majority also opined that ideological and political signs deserve greater constitutional protection than signs advertising public meetings—including the church services at issue here. Pet. App. 37a-38a, 40a.

SUMMARY OF ARGUMENT

Unfortunately, there is nothing in the logic or language of the Ninth Circuit's decision—especially its misguided analysis of content-neutrality—to keep its doctrinal contagion from spreading beyond the narrow realm of sign ordinances. Thus, the holding not only has ominous consequences for noncommercial speech in the context of signs, but it is also potentially harmful to the door-to-door proselytizing efforts of many religions. As demonstrated in Section I below, such proselytizing plays as important a role in the Nation's First Amendment history and traditions as the sign-based expression at issue here. Indeed, this Court has repeatedly held that, whether or not accompanied by literature sales and requests for contributions, such proselytizing is entitled to rigorous First Amendment protection. *E.g., Murdock* v. *Com. of Penn.,* 319 U.S. 105, 108 (1943); *Watchtower Bible and Tract Society of New York* v. *Village of Stratton*, 536 U.S. 150 (2002).

Nor is the Ninth Circuit alone in allowing an ordinance to discriminate facially based on content if the ordinance lacks an overt discriminatory purpose. Four other circuits have reached the same conclusion.[2] These circuits are in conflict with five sister

[2] See *Melrose, Inc.* v. *City of Pittsburgh,* 613 F.3d 380, 389 (3rd Cir. 2010); *Wag More Dogs, Ltd. Liab. Corp.* v. *Cozart*, 680 F.3d

circuits that have held that any facially discriminatory ordinance is constitutionally defective.[3] For reasons well explained by petitioners, the latter holdings are correct, and the holdings of the Ninth Circuit and its allied sister circuits are wrong.

This brief offers an additional, powerful reason for reaching that same conclusion: By allowing local governments to determine subjectively, based on the content of the message, which category of protection and regulation the speech activity receives, the Ninth Circuit's approach would increase exponentially the likelihood of abuse by bureaucrats against unpopular religions—or all religions. Specifically, as shown in Section II, the Ninth Circuit's approach would enable local governments, hostile to a particular faith or all faiths, to hide behind the claim that their ordinance does not have a discriminatory purpose. And that approach would place nearly insurmountable obstacles in the paths of itinerant missionaries engaging in the longstanding American tradition of canvassing for converts.

359, 365 (4th Cir. 2012); *H.D.V.-Greektown, LLC* v. *City of Detroit*, 568 F.3d 609, 621-22 (6th Cir. 2009); *ACLU* v. *Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012).

[3] See *Matthews* v. *Town of Needham,* 764 F.2d 58, 59-60 (1st Cir. 1985); *Nat'l Adver. Co.* v. *Town of Babylon*, 900 F.2d 551, 557 (2nd Cir. 1990); *Service Employees International Union, Local 5* v. *City of Houston,* 595 F.3d 588, 596 (5th Cir. 2010); *Neighborhood Enters., Inc.* v. *City of St. Louis,* 644 F.3d 728, 736 (8th Cir. 2011); *Solantic, LLC* v. *City of Neptune Beach*, 410 F.3d 1250, 1259-62 (11th Cir. 2005).

ARGUMENT

I. Door-to-Door Proselytizing Plays As Important A Role In The Nation's First Amendment Tradition As The Sign-Based Expression At Issue Here.

Religious proselytizing through face-to-face meetings with potential converts, accompanied by distribution of religious literature, has a history at least as long as that of the Nation itself. As this Court has recognized, such missionaries have been a "potent force in various religious movements down through the years." *Murdock* v. *Com. of Penn.,* 319 U.S. 105, 108 (1943). The same religious dissenters and nonconformists who fled England, with its Act of Uniformity, 14 Car. 2 c. 4 (1662), and its Licensing of the Press Act, 14 Car. 2 c. 33 (1662), later proposed, debated and eventually approved the Bill of Rights, with its strong protections for religion and religious speech. U.S. Const., Amend. 1. The result in this country has been a uniquely vibrant development and dissemination of religious views. See generally Frank S. Mead & Samuel S. Hill, HANDBOOK OF DENOMINATIONS IN THE UNITED STATES (Abington Press 8th ed. 1987) (cataloguing more than 225 American denominations).

A. Missionary proselytization through door-to-door literature distribution and solicitation has a long tradition in the United States.

The overall tradition of missionary proselytization predates the founding of our country by millennia, dating at least to the "Great Commission" given by Jesus Christ to his followers to go into all the world and "preach the Gospel." See Matthew 28:19-20; Mark 16:15. The particular form of evangelism involving the distribution of printed literature arose in

the mid-Fifteenth Century, shortly after Johannes Gutenberg's introduction of movable type for printing. Cf. *Murdock* v*. Com. of Penn.,* 319 U.S. 105, 108 n. 6 (1943) (collecting examples of this method of evangelism).

1. In early Nineteenth Century America, "the organization of individual evangelical activity was [seen as] the universally recognized panacea for the ills and sins of the world." Elizabeth Twaddell, *The American Tract Society, 1814-1860*, CHURCH HISTORY, Vol. 15, No. 2 (Cambridge UP Jun. 1946) pp. 116-132, at p. 116 (available at http://www.jstor.org/stable/3160400) (last viewed on Sept. 20, 2014). As a result, numerous evangelistic associations began missionary activity through the distribution of religious literature.

The American Tract Society was instituted in Boston for this purpose in 1814. In 1816, the American Bible Society was established in New York to distribute Bibles and study aids. See American Bible Society, History of American Bible Society (available at http://www.americanbible.org/about/history) (last visited on Sept. 20, 2014). Both organizations have remained active in the distribution of religious literature.

Organized in 1830, the Church of Jesus Christ of Latter-day Saints began missionary activities almost immediately thereafter. *See* Mead & Hill, HANDBOOK OF DENOMINATIONS, at pp. 134-141; History of Mormonism, New York Period (available at http:// historyofmormonism.com/mormon-history/new-york-period) (last visited on Sept. 20, 2014). These missionary activities have long included the distribution of religious literature. Cf. Truman State University,

Pickler Memorial Library, Pamphlets in America, (available at http://library.truman.edu/microforms/pamphlets_in_american_history.asp) (last visited Sept. 20, 2014) (catalogue of pamphlets).

During the Civil War era, chaplains and others often distributed Bibles and tracts. John William Jones, CHRIST IN THE CAMP: OR, RELIGION IN LEE'S ARMY (1887) (available at https://archive.org/details/christincamporr00jonegoog) (last visited on Sept. 20, 2014).

At approximately the same time, the Seventh-day Adventist Church was recognized and began sponsoring what were then called "colporteur" ministries. *See* Mead & Hill, HANDBOOK OF DENOMINATIONS, at 19-25. Early Adventist Church founder Ellen G. White called for "message-filled books, magazines and tracts to be scattered everywhere like the leaves of autumn." Ellen G. White, THE PUBLISHING MINISTRY 5 (1983). Taking this counsel to heart, the Adventist Church continues to use several methods of missionary activity that involve the distribution of religious literature through face-to-face meetings and door-to-door canvassing. These ministries have been active and continue to this day, cf. *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109 n. 7 (1943) (noting these missionary efforts), though they are now known as "Literature Evangelism," with those participating in them referred to as "Literature Evangelists."

These ministries were joined in the 1870s when the denomination now known as Jehovah's Witnesses emerged. *See* Mead & Hill, HANDBOOK OF DENOMINATIONS, at 124-27. Jehovah's Witnesses have long focused upon distribution of the written word as part of their evangelistic mission, and almost

immediately began distributing *Watchtower* magazine. *See, e.g.,* Jehovah's Witnesses, Zion's Watch Tower and Herald of Christ's Presence Reprints (available at http://www.mostholyfaith.com/bible/ Reprints) (last visited Sept. 20, 2014) (collection of back issues starting July 1879). To this day, Jehovah's Witnesses sponsor active missionary efforts of this type. Their missionaries are now known as "pioneers," and may serve anywhere from 30 hours a month to full-time. *See,* Jehovah's Witnesses, What is a Pioneer? (available at http://www.jw.org/en/ publications/books/jehovahs-will/what-is-a-pioneer) (last visited Sept. 20, 2014).

A similar organization arose in 1894 when American evangelist Dwight L. Moody founded the "Bible Institute Colportage Association" in Chicago to distribute evangelical Protestant religious tracts and books. Now known as Moody Publishers, it continues to publish and distribute religious materials. See Moody Publishers, About Moody Collective (available at http://moodycollective.com/about-moody-collective) (last visited on Sept. 20, 2014).

As these examples show, American religious groups have a long history of seeking converts though personal appeals coupled with the distribution of religious literature. This practice, which is at the heart of the speech protected by the First Amendment, has long been integral to the vitality of American religious life.

2. The Adventist Church's literature evangelism program is designed not only to place literature in the home, but also to offer a range of religious services, all designed to promote the Adventist Church's evangelistic message. Students routinely pray with will-

ing homeowners, offer personal religious testimonies and perform religious counseling.

Another integral feature of these missionary programs is the solicitation of donations to support both the program and the Christian education of the student missionaries. Student missionaries are trained to explain that the literature is offered on a purely voluntary donation basis. They suggest a donation range for any books in which a homeowner might be interested, and describe the manner in which donations are used. This description includes a statement that a portion of any donation will be used for the student missionary's Christian education.

Although money may be involved (if a donation is received), literature is not sold by the missionaries. Missionaries routinely give literature to interested homeowners who do not want or are unable to make a donation. Missionaries are trained to attempt to leave some material, even if only a pamphlet, at every house where someone is willing to accept it. Missionaries also receive donations from persons who do not want any literature but just want to help. A typical donation ranges from $10 to $20, although donations above and below the suggested range frequently occur.

Donations are solicited for reasons beyond the obvious need to support the program and increase its outreach. For example, the Church has learned over the years that people are more likely to read what they value. A book that is simply "forced upon" a person is less likely to be valued than one accompanied by a voluntary financial gift in return. A contemporaneous donation often creates value for the book in the recipient's mind, and therefore makes it

more likely to be read. In addition, a voluntary donation often creates an allegiance or affinity between the donor and the cause the donation supports. As a result, the simple act of making a donation is frequently the first step in the donor's religious conversion.

In short, *amicus's* missionary programs are paradigmatic examples of religious speech in the long tradition of "colporteur" ministries in which evangelists go door-to-door distributing literature and soliciting potential converts.

B. The religious speech of door-to-door missionaries has long been recognized to be at the core of First Amendment protection.

This Court recognized the practical importance of such ministries almost three quarters of a century ago, in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943):

> "The hand distribution of religious tracts is an age-old form of missionary evangelism ... [and] has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting."

Id. at 108-09. While the name of this ministry may have changed—"colporteurs" are now identified by terms such as missionaries or evangelists—the na-

ture of the speech, and the need to protect that speech, remain as important as ever.

This Court revisited the issue of door-to-door religious ministries in *Watchtower Bible and Tract Society of New York* v. *Village of Stratton*, 536 U.S. 150 (2002), which made clear that door-to-door witnessing could not be subjected to municipal licensing restrictions. In reaching that decision, the Court noted that some of the Court's "early cases" invalidating such speech-restrictive laws "also recognized the interests a town may have in some form of regulation, particularly when the solicitation of money is involved." 536 U.S. at 162. However, after this remark and a review of *Murdock* and similar cases, the Court made the following definitive statement:

> "The rhetoric used in the World War II-era opinions that repeatedly saved [missionaries] from petty prosecutions reflected the Court's evaluation of the First Amendment freedoms that are implicated in this case. The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack is unchanged. It motivates our decision today."

536 U.S. at 169. *Village of Stratton* thus reaffirmed the principle recognized in *Murdock,* namely, that door-to-door canvassing and distributing religious literature is protected First Amendment activity, even if money is involved.[4] Indeed, it is difficult to imagine

---

[4] This latter aspect of *Murdock* was not at issue in *Village of Stratton*, as it had been previously reaffirmed by the Court. See *Meyer v. Grant*, 486 U.S. 414, 422 n.5 (1988) ("charitable ap-

a more ringing endorsement of the "value judgment" embodied in *Murdock* than the Court's restatement of that judgment in *Village of Stratton*.

II. In Combination With Local Regulations, The Ninth Circuit's Analysis Would Severely Curtail The First Amendment Rights Of *Amicus* And Other Faith Groups That Practice Door-To-Door Proselyting.

While *Murdock* and *Village of Stratton*, properly understood, established that door-to-door missionary activities cannot be subjected to licensing requirements, most municipalities do not read those decisions that way. As a result, in many places door-to-door missionary activities remain subject to both licensing and other forms of regulation. And that is why, for *amicus,* the Ninth Circuit's approach is so troubling and, indeed, dangerous.

A. Door-to-door missionaries, including those sponsored by *amicus*, frequently encounter local regulations that unconstitutionally suppress this protected religious speech.

Unfortunately, many localities throughout the country have failed to heed the "value judgment" embodied in *Murdock* and *Village of Stratton*. Occasionally a municipality will ban *all* door-to-door activ-

---

peals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes" and is fully protected speech) (quoting *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980); accord *Riley v. National Fed'n of the Blind,* 487 U.S. 781, 788-89 (1988) (reaffirming that charitable solicitation is protected speech).

ity—which has long been recognized as unconstitutional. See *Martin* v. *City of Struthers,* 319 U.S. 141, 146-147 (1943). But most municipalities have interpreted the Court's observation in *Village of Stratton* that "a town may have [interests] in some form of regulation, particularly when the solicitation of money is involved, 536 U.S. at 162, 164-65, as *carte blanche* authority, not to ban such activity, but to apply their local licensing ordinances to all door-to-door missionary activities. These cities often require permits, frequently with an onerous application process, and permit fees—sometimes running into thousands of dollars–before student missionaries may engage in this protected speech. These cities also typically enforce these ordinances against *amicus's* missionaries through criminal prosecutions. Such ordinances therefore impose significant burdens upon *amicus's* ability to exercise its core First Amendment right of religious speech.[5]

Aside from blanket bans, these ordinances fall into two general categories. First, many municipalities attempt to regulate door-to-door activity any time money is involved—both when sales are made and when donations are solicited. Second, at least as frequently, a city will regulate only sales, and will exclude charitable solicitation. Under either scenario, these regulations often suffer from one or more of the following constitutional infirmities:

---

[5] Indeed, these ordinances are sometimes blatantly unconstitutional prior restraints under existing precedents of this Court. A prior restraint exists when public officials exercise "the power to deny use of a forum in advance of actual expression." *Southeastern Promotions v. Conrad*, 420 U.S. 546, 553 (1975); see also *Carroll v. President of Princess Anne*, 393 U.S. 175, 181 (1968).

- As discussed in more detail below (at 19-21), they often exempt from their coverage certain speakers, viewpoints and/or messages, creating content and viewpoint discrimination, see *Consolidated Edison Co. of New York, Inc.* v. *Public Service Comm'n of New York*, 447 U.S. 530, 537 (1980); *Police Dept. of City of Chicago* v. *Mosley*, 408 U.S. 92, 97-99 (1972); *Larson* v. *Valente*, 456 U.S. 228 (1982).

- They often give the issuing authority unfettered discretion to grant or deny the permit, discretion that is often enhanced by provisions allowing regulators unbound authority to require information beyond that specified in the law, see *City of Lakewood* v. *Plain Dealer Pub. Co.,* 486 U.S. 750, 757-58 (1988); *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 131, 133 n.10 (1992).

- They often sweep too broadly, are not narrowly drawn, and are not the only reasonable alternative which has the least impact on First Amendment freedoms, see *Southeastern Promotions* v. *Conrad*, 420 U.S. 546, 559-60 (1975); *Freedman* v. *Maryland*, 380 U.S. 51, 58-59 (1965).

- They often fail to include required procedural safeguards to reduce the danger of prohibiting constitutionally protected speech, see *Southeastern Promotions* v. *Conrad*, 420 U.S. 546, 559-60 (1975); *Freedman* v. *Maryland*, 380 U.S. 51, 58-59 (1965).

- They often contain no time frame in which the permit must be granted or denied, see *FW/PBS* v. *City of Dallas*, 493 U.S. 215, 227-29 (1990).

- They often impose significant license fees, *Murdock*, 319 U.S. at 113-15.

- They often require applicants to provide a litany of personal information (including social security numbers in violation of the Privacy Act, Pub. L. 93-579, § 7, *as codified at* 5 U.S.C. § 552a), as well as detailed information regarding the sponsoring organization, *Village of Stratton*, 536 U.S. at 166-67; *McIntyre* v. *Ohio Elec. Comm'n,* 514 U.S. 334, 341-45 (1995); *Buckley* v. *American Const. Law Found., Inc.,* 525 U.S. 182, 198-99 (1999); *Talley* v. *California*, 362 U.S. 60, 63-65 (1960); *Schultz* v. *City of Cumberland*, 228 F.3d 831, 852 (7th Cir. 2000).
- They often are impermissibly vague, see *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Marks* v. *United States*, 430 U.S. 188, 196 (1977).

In short, while these ordinances are as diverse as the municipalities that pass them, like the sign ordinance in this case they frequently violate the First Amendment. Moreover, given the functional and doctrinal similarities between that ordinance and the solicitation ordinances applicable to door-to-door missionaries, *amicus* respectfully suggests that the latter should be closely considered as the Court formulates its conclusions and opinion in this case.

B. Applied in the context of door-to-door evangelism, the Ninth Circuit's approach would facilitate widespread First Amendment violations.

Indeed, if applied to regulation of door-to-door missionary activity, the Ninth Circuit's approach would lead to widespread violations of the First Amendment rights of *amicus* and similarly situated faith groups.

1. Municipalities often seek to skirt the First Amendment through content-based restrictions on

door-to-door religious proselytizing under the cloak of regulating peddling and solicitation.

One ploy is writing into their ordinances extensive exemptions that have the effect of discriminating on the basis of content. For instance, until challenged in litigation, the town of Alabaster, Alabama exempted from its charitable donations ordinance what it calls Civil Rights Organizations; the Boy and Girl Scouts of America; Parent Teacher Organizations, Parent Teacher Associations, and sports and band boosters of any private or public school in the county; any youth sports, band, or arts organization administered through the city, a private school in the city, or a public school in the county; and religious organizations *not* requesting donations or contributions when sharing a religious message. Ordinance No. 12-008, Art. IV, § 18(e). Thus, the Boy Scouts could stand at someone's doorway and ask for money without a permit, but the Pathfinders (the Seventh-day Adventists' equivalent) could not—much less adult Adventist missionaries. Discriminating based on speaker identity is just a sophisticated way of discriminating based on content, as a city official in Alabaster must first look to determine if the speech is a solicitation or a sale (which are treated differently), and then look at the speech's content and speaker to see if the speech is exempt.

Similarly, Benthalto, Illinois exempts "[a]ll *resident* charitable, non-profit organizations in this municipality which have been in existence for six (6) months or longer" from having to obtain a solicitation certificate. Benthalto, IL, Business Code § 7-2-2 (emphasis added). Similar exemptions are not available to non-residents. By discriminating on the basis of the speaker, the ordinance also discriminates on the

basis of content—given that different speakers will invariable value and embrace different messages.

Clinton, Tennessee has a similar scheme: It exempts from its peddling and solicitation ordinance "newsboys delivering newspaper subscriptions…persons selling agricultural goods, who, in fact, themselves produced the products being sold, [and] religious, charitable and civic organizations *of [the county]* that solicit no more than four (4) times per year." Clinton, TN Ordinance 9-102 (emphasis added); see also Warner Robins, GA, Ordinance 10-125 (outside religious solicitors must obtain a local sponsor to apply for a permit). A church outside the city or county will not likely have the same message as one inside the county, and thus identity-based discrimination is just content-based discrimination by another name.

Another common scheme for content discrimination is to distinguish peddling and selling from simple solicitation based on whether a good or service is exchanged. This allows a religion soliciting charitable donations—with the donor receiving nothing in return—to have fewer restrictions (i.e., no need to get a permit, or pay a fee) than a religion that offers religious material, such as a book, and/or invites someone to make a charitable donation in return. See, *e.g.,* Alabaster, AL Ordinance No. 12-008, Art. II, § 3. This in turn leads to discrimination on the basis of the content of the message—i.e., based on the extent to which a particular religious group emphasizes reading literature as a means of spiritual enlightenment, as opposed to financial sacrifice.

Likewise, cities often distinguish between those who merely speak and those who solicit charitable

donations, thus providing preferential treatment to someone knocking on peoples' doors to encourage, say, recycling, over someone distributing religious material and willing to accept an optional donation in return. See, *e.g.,* Warner Robins, GA, Ordinance 10-125. Or, local governments will create an arbitrary amount, such as $10.00, as the threshold at which a religious organization's missionary will be reclassified as a peddler and thus subject to greater restrictions. See Lenoir City, TN Code § 9-101 (2-4). Both types of regulations effectively discriminate on the basis of content—for example, based on the extent to which a speaker's message emphasizes financial contributions over other kinds of contributions.

All of these legal sleights-of-hand are content-based speech restrictions. Under each of them, the city official determining whether a permit is required, or the type of registration needed, has to look to the speech of the religious solicitor—and on that basis may treat different messages differently based on content. Hence, a missionary who comes to one's door to share a message of how to get to Heaven, leaves religious literature, and indicates she is open to receiving a charitable donation of any amount, will be more heavily regulated than someone trailing that missionary and delivering a message that accepting the same literature will be a ticket to Hell.[6]

---

[6] To make matters worse, how speech is classified is often left to the unfettered discretion of local officials. For example, Benthalto, Illinois allows the Chief of Police to "investigate the business and moral character of the applicant" and deny a permit "[i]f the facts show the applicant unfit to receive the license," with no published standards as to what makes one "unfit." Benthalto, IL Ordinance § 7-3-4. Warner Robins, Georgia gives the

2. If the Ninth Circuit's analysis stands, minority faiths—particularly those that are poorly represented in the community—will be hard pressed to fight ordinances like those described above.

First, the Ninth Circuit's approach permits local governments to discriminate based on the content of speech as long as a discriminatory purpose is not overt—which few municipalities will be foolish enough to reveal. In *Reed* the court found that the ordinance in question was content-neutral because the city "did not adopt its regulation of speech *because* it disagreed with the message conveyed." Pet. App. 31a (emphasis added). Thus, even though the ordinance required city officials to treat signs differently based on their content, because the court could find no explicit intent to discriminate in the sign code itself, the code was considered content-neutral. Pet. App. 31a-32a.

Second, the Ninth Circuit's approach allows the subjective judgment of local bureaucrats—who are likely to come under pressure from neighbors, family, friends, and voters—to dictate how speech is classified and what regulations apply, and thus what rights speakers have. Thus, municipalities will more easily be able to discriminate in favor of local churches, local charitable organizations, and local peddlers—and whatever messages they wish to convey—

---

city clerk discretion, without any published standards, to deny a permit as he or she sees fit, and a permit can be revoked at any time "if good moral conduct is not displayed while soliciting"—without any indication what that means. Warner Robins Ordinance 10-125.

and against a message that an out-of-town group wishes to share.

Third, even on its own terms, the Ninth Circuit's approach improperly favors some speech over other speech. The majority below upheld the Gilbert sign ordinance in part on the ground that ideological and political signs deserve greater constitutional protection than signs advertising church services. Pet. App. 37a-38a, 40a. As petitioners have explained (at Pet. Brief 43-47), speech about religious services is entitled to as much First Amendment protection as any other kind of speech. And under *Murdock* and *Village of Stratton,* the same is true of door-to-door evangelism.

CONCLUSION

The Ninth Circuit's decision should be reversed, not only for the reasons articulated by petitioners, but also because it would allow municipalities to defend other unconstitutional statutes on the specious grounds that the speech they burden isn't as valuable as other speech, and that a government can discriminate on the basis of content as long as the discrimination isn't overt. The Ninth Circuit's approach would thus give a green light to municipalities already sorely tempted to violate the First Amendment rights of religious bodies engaging in literature evangelism. That approach should be rejected, and the decision below reversed.

Respectfully submitted.

TODD R. MCFARLAND
ASSOCIATE GENERAL COUNSEL
General Conference of Seventh-day Adventists
12501 Old Columbia Pike
Silver Spring, MD 20904
(301) 680-6321

GENE C. SCHAERR
Counsel of Record
Law Offices of Gene Schaerr
332 Constitution Ave. NE
Washington, DC 20002
(202) 361-1061
gschaerr@gmail.com

SEPTEMBER 22, 2014