No. 13-502

In The Supreme Court of the United States

PASTOR CLYDE REED and
GOOD NEWS COMMUNITY CHURCH,

Petitioners,

v.

TOWN OF GILBERT, ARIZONA, and
ADAM ADAMS, In His Official Capacity
As Code Compliance Manager,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CHRISTIAN LEGAL SOCIETY, THE ANGLICAN CHURCH IN NORTH AMERICA, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, CHRISTIAN MEDICAL ASSOCIATION, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS, THE LUTHERAN CHURCH – MISSOURI SYNOD, THE NATIONAL LEGAL FOUNDATION, AND THE QUEENS FEDERATION OF CHURCHES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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?

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INTEREST OF *AMICI CURIAE*[1]

The **Christian Legal Society** ("CLS") believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their beliefs, expression, and assembly. CLS is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. For nearly forty years, through its Center for Law and Religious Freedom, CLS has defended citizens' right to express their religious ideas and values in the public square, through advocacy in this Court and through legislation. For example, CLS was instrumental in the passage of the Equal Access Act of 1984, 20 U.S.C. §§ 4071 *et seq.* (2012), that protects the right of all students to meet for "religious, political, philosophical or other" speech on public secondary school campuses. *See, e.g.,* 128 Cong. Rec. 11784-85 (1982) (Sen. Hatfield statement).

The **Anglican Church in North America** ("ACNA") unites some 100,000 Anglicans in nearly 1,000 congregations across the United States and Canada into

[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* and their counsel, make a monetary contribution to the preparation or submission of this brief. Petitioners have filed with the Clerk a letter granting blanket consent to the filing of briefs *amicus curiae*. The Respondents' email granting consent to the filing of this brief is on file with the Clerk.

a single Church. It is a Province in the Global Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference (GAFCon) in June 2008 and formally recognized by the GAFCon Primates – leaders of Anglican Churches representing 70 percent of active Anglicans globally – in April 2009. The ACNA is quickly growing to rapidly catalyze the planting of Anglican congregations and communities of faith across North America. The ACNA is determined by the help of God to hold and maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them. The ACNA is also determined to defend the inalienable human rights to the free exercise of religion and freedom of speech as given by God and embodied in the First Amendment to the United States Constitution.

The **Association of Christian Schools International** (ACSI) is a nonprofit, non-denominational, religious association providing support services to 24,000 Christian schools in over 100 countries. ACSI serves 3,000 Christian preschools, elementary, and secondary schools and 90 post-secondary institutions in the United States. Member-schools educate some 5.5 million children around the world, including 825,000 in the U.S. ACSI accredits Protestant pre-K – 12 schools, provides professional development and teacher certification, and offers member-schools high-quality curricula, student testing and a wide range of student activities. ACSI members advance the common good by providing quality education and spiritual formation to their students. Our calling relies upon

a vibrant Christian faith that embraces every aspect of life. This gives ACSI an interest in ensuring expansive religious liberty with strong protection from government attempts to restrict it.

The **Christian Medical Association** ("CMA"), founded in 1931, provides a ministry and public voice for Christian healthcare professionals and students. With a current membership of approximately 16,000, CMA addresses policies on healthcare issues, conducts overseas medical evangelism projects, provides Third World missionary doctors with continuing education resources, and sponsors student ministries in medical and dental schools. CMA members provide charitable care for needy patients domestically and overseas, regardless of the patients' beliefs. Members fully integrate their personal faith and professional practice, not separating their motivation to care for the poor and needy from their commitment to practicing according to faith-based moral standards.

The **Ethics & Religious Liberty Commission** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 autonomous churches and nearly 15.8 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as the sanctity of human life, freedom of speech, religious freedom, marriage and family, and ethics. In order to fulfill our divine calling to make disciples, Southern Baptists engage in nearly one thousand new church starts across the nation every year. These

new churches are dependent on their ability to effectively communicate their presence in their communities through the use of adequate, temporary signage.

The **Evangelical Council for Financial Accountability** ("ECFA") provides accreditation to leading Christ-centered churches and ministries that faithfully demonstrate compliance with established standards for financial accountability, stewardship, and governance. For thirty-five years, one of ECFA's core principles has been the preservation of religious freedom through its standards of excellence and integrity, which help alleviate the need for burdensome government oversight of religious organizations. ECFA is committed to safeguarding the First Amendment rights of free exercise of religion and freedom of speech. Nearly 1,900 churches, Christian ministries, denominations, educational institutions, and other tax-exempt 501(c)(3) organizations are currently accredited by ECFA.

The **International Conference of Evangelical Chaplain Endorsers** ("ICECE") is a conference of evangelical organizations whose main function is to endorse chaplains to the military and other organizations requiring chaplains. Endorsement is the process by which a Department of Defense ("DOD")-recognized religious organization certifies that its clergy or religious leader has the required education, training, and experience necessary to: 1) provide religious ministry to the endorsing agents' military members; 2) facilitate the free exercise of other military personnel, dependents, and other authorized

DOD personnel; and 3) care for all service personnel. *See* DOD Instruction 1304.28 (describing endorsement process and criteria). ICECE was organized specifically to identify, define, and address issues of particular importance to Christian evangelical military chaplains and the military personnel they represent. ICECE's most important issue is the protection and advancement of religious liberty for chaplains and all military personnel. The issues in this case are of particular importance to ICECE because allowing government to regulate and restrict the basic freedoms the First Amendment protects absent a showing of intent, the ruling in the courts below, essentially eviscerates religious liberty and the Bill of Rights and reverses well-established Free Speech and Establishment Clause precedent.

The **Lutheran Church – Missouri Synod** is a nonprofit corporation organized under the laws of the State of Missouri. The Synod is a mission-oriented, Bible-based, confessional Christian denomination headquartered in St. Louis, Missouri. Founded in 1847, the Synod has more than 2.3 million baptized members in some 6,200 congregations and more than 9,000 pastors. The Synod has a keen interest in protecting religious liberty generally, and in particular supporting full protection under the First Amendment.

The **National Legal Foundation** ("NLF") is a public interest law firm that has litigated a number of cases before this Court, including *Lefemine v. Wideman*, 133 S.Ct. 9 (2012) (per curiam); and *Board*

of Educ. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990). The NLF is dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF, and its donors and supporters, are vitally concerned with the outcome of this case because of the impact it will have on the Free Speech, Peaceable Assembly, and Free Exercise rights of churches and many other groups and individuals.

The **Queens Federation of Churches**, was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of an equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. The Queens Federation of Churches has appeared as *amicus curiae* previously in a variety of actions for the purpose of defending religious liberty.

SUMMARY OF ARGUMENT

In this case, the Town of Gilbert, Arizona ("Gilbert") has abridged the First Amendment rights of the Good News Community Church ("Good News") by placing onerous restrictions on Good News's ability to display

temporary signs in public places inviting others to its Sunday morning church services and informing them of the time and location. These restrictions, found in Gilbert's ordinance regulating signs, are far more severe than restrictions on signs promoting political candidates, measures on electoral ballots, and what the town calls "ideological" messages. Accordingly, the ordinance restricts speech on the basis of its content and thus is subject to (and fails) strict constitutional scrutiny. Even if the ordinance is deemed content-neutral, it is invalid because it leaves Good News with inadequate alternatives for informing passersby about its worship services.[2]

Gilbert's sign ordinance imposes widely varying restrictions on temporary, noncommercial signs depending on the subject matter of the message they seek to convey. "Political" signs – defined as signs supporting a candidate for office or urging action on a matter on an electoral ballot – can be up to 32 square feet in size and can be in place for 60 days before an election (often even longer), and 15 days after the election. "Ideological" signs – defined as those promoting a noncommercial message or idea – can be up

[2] We also agree with petitioners that the ordinance fails the requirement of "narrow tailoring" – whether under strict scrutiny as a content-based law, or under intermediate scrutiny as content-neutral – because it is highly underinclusive. It imposes far more onerous restrictions on signs like petitioners' than on other temporary signs, even though the latter likewise implicate the same asserted interests in safety and aesthetics. Pet'rs' Br. 50-53.

to 20 square feet in size and can remain posted indefinitely. Signs advertising a home owners' association (HOA) event may be up to 80 square feet and can be placed 30 days before the event. But "qualifying event" signs – the category in which the town placed Good News's signs – can only be up to six square feet in size, cannot be displayed until 12 hours before the event, and must be taken down within one hour after the event.

Gilbert's sign code restricts the size and duration of signs that promote non-political events far more than it restricts signs that promote political events and political or "ideological" messages. By so doing, Gilbert discriminates among noncommercial signs based on subject matter, which is a form of content discrimination subject to strict scrutiny. *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 100-01 (1972). The Court of Appeals erroneously held that the ordinance was content-neutral because it was not based on "disagreement with the message conveyed" – whereas this Court has made clear that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of New York v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980). On its face the ordinance favors (1) signs with messages concerning political candidates and electoral ballot measures and (2) signs that the town deems "ideological" over signs that announce events. The latter distinction is arbitrary, since signs that announce

events can also include ideological messages – as the church's signs do. But in any case, these facial distinctions are plainly content-based and trigger strict scrutiny. And it is irrelevant whether the town had any improper motive, such as "disagreement with the message being conveyed": this Court's decisions make clear that a facially content-based distinction is subject to strict scrutiny regardless of the government's motive for adopting it.

Moreover, in defending the distinctions in the ordinance, both Gilbert and the Court of Appeals proposed that signs advancing electoral causes or ideological messages are more valuable than signs announcing meetings – even where, as here, the meeting is a religious worship service. The lower court's argument confirms that the ordinance's distinctions are justified by reference to the content of speech and thus are content-based.

This discrimination against speech promoting events is presumptively impermissible for another reason: it is inconsistent with the distinct constitutional right of freedom of assembly. The right "peaceably to assemble" protects the ability of Good News and other non-profit organizations to communicate their messages about their gatherings, including gatherings that are not immediately political or ideological. Assemblies of people, and the communications publicizing such meetings, have repeatedly played an indispensable role in major American social movements.

Finally, even if the Gilbert ordinance is content-neutral, it still violates Good News' First Amendment rights. Even a content-neutral restriction must be narrowly tailored to serve a significant state interest and must leave open adequate alternative channels of communication. Gilbert's ordinance fails to leave adequate alternative channels of communication because it seriously restricts temporary signs, a crucial means by which a small, little known church like Good News makes its services known to passersby. Uncontroverted testimony states that the signs are highly effective. And because Good News has limited manpower (about 25 to 30 adults in the congregation) and limited financial resources and lacks a permanent worship space, temporary signs are an affordable – and thus important – channel for Good News to publicize its worship services.

ARGUMENT

I. THE GILBERT SIGN ORDINANCE IS CONTENT-BASED AND THUS SUBJECT TO STRICT SCRUTINY UNDER THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

The Gilbert sign ordinance imposes widely varying restrictions on speech based on the content of the speech, and therefore under this Court's holdings, it is subject to strict scrutiny. A law is content-based if it "draw[s] content-based distinctions on its face," or relatedly, "if it require[s] 'enforcement authorities' to

'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (*quoting FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)). Moreover, even if a law does not refer to content on its face, it must also be "'justified without reference to the content of the regulated speech'" in order to avoid the strict scrutiny applied to content-based regulations. *Id.* (*quoting Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)).

The Gilbert sign ordinance flunks all three parts of the *McCullen* test. First, the Gilbert sign ordinance draws content-based distinctions on its face. Second, law enforcement officers in Gilbert must look at the content of the message conveyed on a sign to determine whether a violation of the ordinance has occurred. Third, contrary to the Ninth Circuit's claim, the justifications offered for the ordinance's distinctions make reference to the content of the speech regulated: they rest on the (erroneous) judgment that Good News's speech is less valuable than the speech the ordinance favors.

A. The Gilbert Sign Ordinance Discriminates Among Signs Based on Their Subject Matter.

Three of the main sign classifications under the Gilbert sign ordinance are political signs, ideological signs, and qualifying event signs. Pet. Cert. 6-9.

- A "political sign," under § 4.402(I) of the ordinance, is a "temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general and special elections." *Reed v. Town of Gilbert*, 707 F.3d 1057, 1061 (9th Cir. 2013); Pet. App. 7a. A political sign may be up to 32 square feet in size, may be erected 60 days before an election, and may stay up for 15 days after the election, and often longer. Pet. App. 156a.[3]

- An "ideological sign," under § 4.402(J), is defined as a "sign communicating a message or ideas for noncommercial purposes that is not a construction sign, directional sign, temporary directional sign, temporary directional sign relating to a qualified event, political sign, garage sale sign, or sign owned or required by a governmental agency." *Reed*, 707 F.3d at 1061; Pet. App. 7a. Ideological signs "are not limited in time" and can be "up to 20 square feet in size." *Id.*

- Even though petitioners' signs contain noncommercial "message[s] or ideas" – inviting readers to attend services at Good News, "Your Community Church" – the town excluded the signs from the "ideological" sign

[3] As petitioners note, even the 15-day limit does not apply to successful primary-election candidates, who "may display their signs for the additional ten weeks between the primary and general elections, for a total of 5 months of uninterrupted display time." Pet'rs' Br. 4 n.1.

> category because it classified them as "temporary directional signs relating to a qualifying event." *Id.* This category is defined, under § 4.402(P), as "a Temporary Sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event' "; and a "qualifying event" is considered to be "any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." Pet. App. 154a (italics omitted). Petitioners' speech was thus consigned to the most restricted category: qualifying event signs must "be no greater than 6 feet in height and 6 square feet in area" and may "only be displayed up to 12 hours before, during, and 1 hour after the qualifying event ends." *Id.* at 148a-49a.

The Court of Appeals held that these "distinctions between Temporary Directional Signs, Ideological Signs, and Political Signs are content-neutral" because "none draws distinctions based on the particular content of the sign": "It makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted." *Reed*, 707 F.3d at 1069; *see id.* at 1071 (finding that "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed"); *id.* at 1073 (finding that the ordinance "places no restrictions on the particular viewpoints of any person or entity").

In so holding, the Court of Appeals violated basic First Amendment principles. Most relevant here, the court reduced *content*-based discrimination to *viewpoint*-based discrimination: that is, to discrimination based on "which candidate is supported . . . or what ideological perspective is asserted." *Id.* at 1069.[4] In fact, content discrimination also includes discriminatory restriction of speech based on its subject matter. This Court has made clear that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of New York v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980). Likewise, in *Police Dept. v. Mosley,* 408 U.S. 92 (1972), this Court held that a law prohibiting peaceful picketing in front of schools except schools involved in a labor dispute was a content-based speech restriction:

> The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no

[4] The court's holding also violated basic First Amendment principles by reasoning that a law is not content-based unless it is motivated by disagreement with the speech in question. We discuss this error *infra* part I-A-3, pp. 22-27.

> power to restrict expression because of its message, its ideas, *its subject matter, or its content*.

Id. at 95 (emphasis added). *See also Carey v. Brown*, 447 U.S. 455, 460 (1980) (striking down law prohibiting picketing of dwelling except for "peaceful picketing of a place of employment involved in a labor dispute"). In other words, this Court held that discriminatory regulation based on subject matter is content-based and presumptively invalid.[5] The reason is that "[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.'" *Consolidated Edison*, 447 U.S. at 537-38 (*quoting Mosley*, 408

[5] The government may exclude speech by subject matter "in narrow circumstances": that is, it "may bar from its facilities certain speech that would disrupt the legitimate governmental purpose for which the property has been dedicated." *Consolidated Edison*, 447 U.S. at 538-39 (*citing Greer v. Spock*, 424 U.S. 828, 838 (1976) (excluding partisan political speaker from military bases); *Lehman v. City of Shaker Heights*, 418 U.S. 294, 302 (1974) (plurality opinion) (excluding partisan political advertisements from city buses)); *see also, e.g., Good News Club v. Milford Central School*, 533 U.S. 98, 106-07 (2001) (public schools may reserve their classrooms "'for the discussion of certain topics'" but "must not discriminate against speech on the basis of viewpoint") (quotation omitted). These "narrow exceptions to the general prohibition against subject-matter distinctions" (*Consolidated Edison*, 447 U.S. at 539) provide no argument for Gilbert's ordinance, which regulates speech throughout the town, including in traditional public forums (parks and right-of-ways) and on the speaker's own property. In this case the broad prohibition on content discrimination, not just viewpoint discrimination, fully applies.

U.S. at 96); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 515 (1981) (plurality opinion) (*quoting Consolidated Edison* and adding that "[w]ith respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse."). *See also Carey*, 447 U.S. at 463 (*quoting Mosley*, 408 U.S. at 95-96) ("[Government] may not select which issues are worth discussing or debating in public facilities.").

1. The Ordinance Facially Discriminates In Favor of Signs Promoting Election-Related Events Over Signs Promoting Non-Election-Related Events.

As already noted, the Gilbert ordinance gives far more favorable treatment, on both the size and the permissible duration of display, to a "political" sign, defined as one that "supports candidates for office or urges action on any other matter on [an election] ballot." Pet. App. 154a. This provision unquestionably favors election-related speech over speech with other content – indeed it favors signs advertising election-related events over signs concerning events on other subjects. A sign inviting readers to attend a rally supporting a candidate for public office may be 32 feet in size and may stand for several months; a sign inviting readers to attend other events, including a church service, may only be six square feet and may only stand for 12 hours before the event and an hour afterward.

That this discrimination in the ordinance is content-based is dictated by this Court's holding in *Burson v. Freeman*, 504 U.S. 191 (1992). In *Burson*, this Court held that a Tennessee law prohibiting political speech on election day within 100 feet of a polling place was a content-based restriction because it applied only to political speech. *See id*. at 197-98; *id*. at 214 (Scalia, J, concurring in the judgment). The plurality opinion, for four justices, stated that the law "is not a facially content-neutral time, place, or manner restriction," since "[w]hether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign." *Id.* at 197. Justice Scalia agreed that the law was "content-based." *Id*. at 214 (Scalia, J., concurring in the judgment). The plurality also reaffirmed the principle noted above (*see supra* p. 14): "the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic." *Id*. at 197. The majority upheld the law only because of specific considerations related precisely to the problems of election-day speech at polling places. *See id*. at 206 (plurality opinion) (finding the law "necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud"); *id*. at 214 (Scalia, J.) (concluding that streets and sidewalks around polling places on election day are not public forums).

Like the Tennessee law in *Burson*, the Gilbert sign ordinance singles out speech for differential treatment solely because it is election-related. In this case, election-related signs receive favored, rather than disfavored, treatment. But the criterion is still content-based, and it is plain "on [the ordinance's] face," *McCullen*, 134 S. Ct. at 2531. Imagine a sign announcing and providing directions to a campaign rally in Gilbert in support of Senator Jeff Flake's campaign for re-election. The Gilbert ordinance characterizes this as a "political" sign, allowing it to be far larger, and stand for far longer, than a sign announcing Good News's religious services. This provision also requires an official enforcing the ordinance to "examine the content of the message" (*id.*) – indeed, perhaps quite closely. Compare, for example, two signs announcing different rallies: one supporting a pending ballot measure to reduce property taxes, the other in support of a more general non-ballot call to reduce the size of government (but which might include some discussion of the ballot measure). The second sign might well be treated significantly worse than the first on the ground that it qualifies as only an "ideological" sign, or a "qualifying event" sign, not a "political" sign. For the sign to qualify as a political sign, officials might have to examine the language closely – or perhaps even other material concerning the event – to see whether it made sufficient reference to the ballot proposal, the key criterion in determining whether the sign is "political." In any case, the provision unquestionably makes distinctions based on the content of different signs.

2. The Ordinance Facially Makes a Content-Based Distinction – and an Arbitrary and Inconsistent Distinction – Between Signs That Promote Political or Ideological Messages and Signs That Announce or Promote Events.

The Gilbert sign ordinance draws another distinction based on subject matter: between signs promoting what the ordinance calls "ideological" messages and signs promoting events. In particular, the meaning of the ordinance – as shown by its application here – seems to be that even if a sign communicates ideas, it may lose the protection given to so-called "ideological" signs if it also announces and gives directions to an event. Here, for example, the Good News signs were relegated to the minimal protections offered to event signs – even though the signs contain other messages besides the event announcement, such as the statement that Good News is "Your Community Church."

Consider three signs and their treatment under the ordinance. The first sign says "Pray, Hope, and Don't Worry." The second sign says "Church service on Sunday at 9:15 AM" and lists the Church's address, phone number, and Sunday service times. The third sign includes both messages from the first two signs. Under the Gilbert sign ordinance, as interpreted by the town, the first sign is an "ideological" sign because it communicates an idea and is not "a directional sign relating to a qualifying event."

See supra p. 12. But the second sign would be considered a "qualifying event" sign – and thus subject to far more severe restrictions – because it promotes an event (one that is not "political").

The third sign above, combining both messages, could be considered an "ideological" sign, but the inclusion of the event information – the worship times and location – apparently degrades it to a "qualifying event" sign, with far less protection. *See supra* p. 12 (quoting provision defining an ideological sign as one that is not a temporary qualifying-event sign). Thus, in this case the Good News signs were classified as "event" signs rather than the "ideological" signs, even though the signs also communicate that the church offers "[g]ood [n]ews" (by its very name) and is "Your Community Church." It is arbitrary to strip protection from the messages in a sign simply because some of those messages give information about an event such as a worship service.[6]

At any rate, these distinctions plainly depend on the content of the sign: the fact that it gives invitations and directions to an event. Moreover, an official

[6] The ordinance, of course, does not even make a consistent distinction between messages inviting people to events and messages with other ideas in them. The ordinance gives far greater protection to signs announcing election-related ("political") events and home owners' association events. *See* Pet'rs' Br. 11-12. The home owners' association exception adds to the arbitrariness of the town's classifications. But in any case, all of them are content-based and constitutionally suspect.

must examine the signs' messages to determine how seriously each is restricted (*see McCullen*, 134 S. Ct. at 2531). The record confirms that officers categorize a sign by "review[ing] [it] to see what the elements are, *what is the message*." Pet'rs' Br. 39 (record citation omitted).

The content-based nature of the ordinance also becomes apparent through a hypothetical variation on the facts of *McCullen v. Coakley*, *supra*. In *McCullen* this Court narrowly held that a Massachusetts law establishing a 30-foot no-speech zone in front of abortion clinics was content neutral, 134 S. Ct. at 2531-32 (although the law was ultimately held unconstitutional). The Court reasoned that "[w]hether petitioners violate the Act depends not on what they say but simply on where they say it." *Id*. at 2531 (quotation marks and citation omitted). Imagine, however, that Massachusetts enacted a buffer-zone law permitting persons who wished to present "ideological messages" to stand within 15 feet of an abortion clinic, but required persons who wished to "direct others to noncommercial events" to stand 30 feet away. Such a law would allow people communicating explicit criticism of abortion to stand close to the clinic, but it would severely restrict the sidewalk counselors in *McCullen*, if they sought simply to invite women to come to a meeting about abortion alternatives at a building down the street. It would be undeniable that such a distinction between ideological messages and meeting invitations was based on the content of speech – and undeniable that officials

would have to "examine the content of the message that is conveyed" (*id.* (*quoting League of Women Voters*, 468 U.S. at 383)) to determine where the particular speaker would be permitted to stand. Gilbert's ordinance makes the very same distinction between ideological messages and meeting announcements, and it is just as plainly content based.

3. Both the Favoritism for "Political" Signs and the Favoritism for "Ideological" Messages Over Good News's Signs are Impermissibly "Justified by Reference to the Content of the Speech."

Because the Gilbert ordinance is content-based on its face, there is no need to proceed to the last ground for finding content discrimination, that is, whether the law is "justified without reference to the content of the regulated speech" (*McCullen*, 134 S. Ct. at 2531 (*quoting Renton*, 475 U.S. at 48)). The Court of Appeals therefore erred when it deemed the ordinance content-neutral on the ground that it was not adopted "because of any disagreement with the message it conveys." *Reed*, 707 F.3d at 1072; Pet. App. 32a. As petitioners show, numerous decisions of this Court hold that a law that is content-based on its face is subject to strict scrutiny even without any showing that the government acted on the basis of an illicit motive such as animus toward, or disagreement with, the speech in question. *See* Pet'rs' Br. 34-38.

To put it differently, a challenger to a law needs to show a speech-related rationale for its enactment only when the law in question is content-neutral on its face. Identifying a content-based rationale for the law is an additional method of showing that a law is content-based, not a necessary step. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994) ("[W]hile a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary").

Decisions of this Court cited by the Court of Appeals (Pet. App. 24a) in no way support the proposition that a law must be motivated by the content of speech, or justified with reference to it, in order to be content-based. Those decisions involved laws that on their face were neutral with respect to the content of noncommercial speech. For instance, in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the government prohibited demonstrators from sleeping in Lafayette Park and the National Mall based on a regulation prohibiting "the use of park land for living accommodation purposes" unless the land had been designated for camping. *Id.* at 290-91. The regulation on its face said nothing about the content of any message conveyed by illegal campers. This Court concluded that the regulation "is content-neutral *and* is not being applied because of any disagreement with the message presented." *Id.* at 295 (emphasis added). As the use of "and" shows, the Court did not reduce content-discrimination down to "disagreement with the message presented," as the

Court of Appeals did here. Likewise, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), involved New York City guidelines requiring that concert productions in Central Park use City sound equipment and technicians who would limit the volume level. *Id.* at 786-87 & n.2. The guidelines on their face involved no reference to the content of the performance – only to its volume – and the Court noted that they were "not content based in explicit terms." *Id.* at 793. It therefore made sense for the Court to treat the guidelines as a "time, place, and manner" restriction that would be content-based if it were justified by reference to content or based on disagreement with the message conveyed. *Id.* at 791.

Unlike the camping ban in *Clark* and the sound equipment guidelines in *Ward*, the Town of Gilbert's sign ordinance is facially content-based because it treats different classes of noncommercial signs differently based on the sort of message conveyed on the sign. "Political" signs are treated differently by the ordinance than "ideological" signs and "qualifying event" signs based on the category of message the sign seeks to convey. Because the sign ordinance is facially content-based, there is no need to examine the government's rationale for enacting the law.

In any event, the asserted reasons for the distinctions between "political," "ideological," and "event" signs unquestionably do make reference to content. The town repeatedly argued in the lower courts that it could treat "political" and "ideological" speech more favorably because they were " 'core speech' " under the

First Amendment and under the system of "'representative government.'" *See* Pet'rs' Br. 44-45 (*quoting* Gilbert's filings in courts below). Similarly, although the Court of Appeals asserted that the ordinance reflected no favoritism for one message over another, the court betrayed precisely such favoritism in the justifications it offered for the distinctions. It too reasoned that the "Political Signs exemption responds to the need for communication about elections" and that the "Ideological Sign exemption recognizes that an individual's right to express his or her opinion is at the core of the First Amendment." *Reed*, 707 F.3d at 1069; Pet. App. 26a. It later added:

> [U]nlike political, ideological and religious speech which are clearly entitled to First Amendment protection, there does not appear to be a constitutional right to an exemption for Temporary Directional Signs. If Good News has no constitutional right to erect Temporary Directional Signs, how can it suffer a cognizable harm when Gilbert creates an exemption facilitating the display of such signs?

Id. at 1074; Pet. App. 38a. The court thus defended the distinctions by asserting that election-related messages and ideological messages are more valuable as a constitutional matter than messages about events, because the former are "clearly entitled to First Amendment protection" and the latter are less clearly, or perhaps not at all, entitled. *See Reed,* 707 F.3d at 1080 (Watford, J., dissenting) ("Gilbert's apparent determination that 'ideological' and 'political'

speech is categorically more valuable, and therefore entitled to greater protection from regulation, than speech promoting events sponsored by non-profit organizations . . . is precisely the value judgment that the First and Fourteenth Amendments forbid Gilbert to make."); Pet. App. 51a. There is no other way of characterizing that distinction than as one based on the content of the messages in the respective signs.

Thus the Gilbert ordinance, as shown in the court's own defense of it, violates the core principle underlying this Court's rules concerning content-based regulation: "governments must not be allowed to choose 'which issues are worth discussing or debating.'" *Consolidated Edison*, 447 U.S. at 537-38 (*quoting Mosley*, 408 U.S. at 96); *accord Carey*, 447 U.S. at 463. Gilbert severely restricts the size and duration of petitioners' signs compared with the categories it deems more valuable for public discussion.

The distortion of public discussion in this case is particularly unwarranted for two reasons. First, it is strange indeed to deem "political" and "ideological" signs more valuable in First Amendment terms than petitioners' invitations to worship services. After all, religious speech as well is clearly "core speech" under the First Amendment. *See, e.g., Saia v. People of New York*, 334 U.S. 558, 561 (1948), and cases cited therein (protecting religious speakers on the ground that free speech and free exercise of religion are both rights "preferred" by the First Amendment); *Widmar v. Vincent*, 454 U.S. 263, 269 (1981) ("religious worship and discussion . . . are forms of speech and

association protected by the First Amendment").[7] Moreover, petitioners' signs contain messages that are ideological in the common-sense meaning of the term – advertising the church as "Your Community Church" and as offering "[g]ood [n]ews" – yet Gilbert's ordinance removes the signs from the "ideological" category, subjecting them to much more severe restriction, because they also announce and give directions to a religious event. In this case, and in many others, it makes no sense to separate an "ideological" message from an invitation to an expressive event.

Even assuming, however, that the categories of "ideological" messages and event announcements could coherently be separated, the distinction remains content-based and subject to strict scrutiny. Moreover, as we will now show, the disfavoring of speech giving information about events is deeply inconsistent not just with freedom of speech, but with another First Amendment freedom.

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[7] Religious messages and speakers have played such a role in the development of free-speech principles, in this Court's decisions and our tradition, broadly, that "a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

B. Communicating Information About Events is Not Second-Class Speech, but Important Speech Critical to the Distinct First Amendment Protection of Freedom of Assembly.

Another First Amendment value confirms that the ordinance's treatment of event signs is unconstitutional content discrimination. The Court of Appeals' holding that speech announcing events has little or no constitutional protection is gravely detrimental to the distinct First Amendment right of freedom of assembly. Because the people have the right not just to speak, but "peaceably to assemble," U.S. Const. amend. I, messages announcing events and directing people to them cannot be relegated to inferior constitutional status. Substantial restrictions on meeting announcements and directions can severely hamper the practical ability of groups to assemble.

This Court has made clear that the "right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937). The Court has included freedom of assembly among "the great, the indispensable democratic freedoms secured by the First Amendment" and occupying a "preferred place . . . in our [constitutional] scheme." *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *see also, e.g., Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939). "[O]ur tradition . . . allow[s] the widest room for discussion, the narrowest range for its restriction, *particularly when this right is exercised in conjunction with peaceable*

assembly." *Thomas*, 323 U.S. at 530 (emphasis added). The rights of speech and assembly, "though not identical, are inseparable." *Id*. Accordingly, the interpretation of free speech principles must give weight to the distinct but related right of assembly. As we will show, the Gilbert ordinance, by severely disfavoring signs announcing meetings and events, utterly fails to give assembly that weight.

A recent, extensive scholarly study of the right of assembly emphasizes its importance both to American history and to the proper relation between the people and the government:

> The freedom of assembly has been at the heart of some of the most important social movements in American history: antebellum abolitionism, women's suffrage in the nineteenth and twentieth centuries, the labor movement in the Progressive Era and the New Deal, and the Civil Rights Movement. . . .
>
> [Freedom of assembly] provides a buffer between the individual and the state that facilitates a check against centralized power. It acknowledges the importance of groups to the shaping and forming of identity. And it facilitates a kind of flourishing that recognizes the good and the beautiful sometimes grow out of the unfamiliar and the mundane.

John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 1, 5 (2012).

The history of freedom of assembly reveals several reasons why messages that announce and give directions to meetings merit equal First Amendment protection. First, announcing and directing people to meetings is as crucial to First Amendment activity as are the actual expressions of "ideological" messages that Gilbert's ordinance treats so much more favorably. To take one example, meetings were an important ingredient in the success of the women's suffrage movement. At the close of the nineteenth century, the movement re-emerged when "'hundreds of thousands'" of women joined clubs united under two main national women's organizations. Inazu, *supra*, at 44 (quotation omitted). The heart of the women's suffrage movement was in these local clubs, which grew through "local networking and personal connections," as well as gatherings such as "banner meetings, balls, swimming races, potato sack races, baby shows, meals, pageants, and teatimes," and which helped grow the movement and increase its visibility. *Id*. at 45.

Second, many of these meetings – from athletic races to baby shows to "meals, pageants, and teatimes" (*id*.) – would not be described as overtly "political" or "ideological." *See id.* at 45 (noting that with such events the movement went beyond "traditional deliberative meetings"). Nevertheless, they were important to the development of the movement, attracting new members, evoking emotions among participants, and building the "larger institutional structures" that the movement needed to operate on a national political level. *Id*. The suffrage movement and other

movements teach, in Professor Inazu's words, that "practices of assembly have themselves been forms of expression – parades, strikes, and meetings, but also more creative means of engagement like pageants, religious worship, and the sharing of meals." *Id.* at 21. "Indeed, almost every important social movement in our nation's history began not as an organized political party but as an informal group that formed as much around ordinary social activity as extraordinary political activity." *Id.* at 5.[8]

Accordingly, when Good News notifies people about worship events and provides directions to them, it is engaged in important First Amendment activity: speech that is also crucial to the distinct but interwoven right of assembly.

Finally, signs notifying people of events constitute a crucial component of the activities of speech and assembly. As this Court has noted, outdoor signs "are a well-established medium of communication, used to convey a broad range of different kinds of messages." *Metromedia*, 453 U.S. at 501 (plurality opinion); *see id.* ("The outdoor sign . . . is a venerable

[8] For reasons Professor Inazu explores in detail, the right "peaceably to assemble" is not limited to the purpose of "petition[ing] the government for a redress of grievances." *See* Inazu, *supra*, at 23, 25 (noting that the comma in the phrasing "peaceably to assemble, and to petition" "relates back to a distinction [in drafts] between a right to peaceable assembly and a right to petition," and that the broader, independent notion of assembly "is consistently displayed in practices of the people who have gathered throughout American history").

medium for expressing political, social and commercial ideas. From the poster or "broadside" to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes.") (*quoting Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 888, 610 P.2d 407, 430-31 (Cal. 1980) (Clark, J., dissenting)). Without signs, it is hard to imagine the women's suffrage movement, labor movement, and civil rights movement succeeding to the extent they did. Imagine the women's suffrage movement without the availability of meeting signs: no signs marking the locations of special events or women's suffrage club meetings, no signs advertising about the new club to women.

Signs would have been important to the growth of other major movements as well. In the labor movement, basic signs would have played a prominent role in communicating to workers about meetings and signup drives and the dates and times of strikes. Finally, the civil rights movement also depended in part upon signs informing people of the times and locations of meetings and rallies – many of which, of course, took the form of religious, indeed revivalistic, worship services. *See* David L. Chappell, *A Stone of Hope: Prophetic Religion and the Death of Jim Crow* 102 (2004) ("It is hard to imagine such faith [in mass protests against segregationist oppression] being sustained without emotional mass rituals – without something extreme and extraordinary to link the masses' spirits. It is impossible to ignore how

often the participants carried their movement out in prophetic, ecstatic biblical tones.").

Just as communications giving notice of meetings historically have been important to the success of several great social movements, they remain so today. The Court of Appeals fundamentally erred by dismissing this as low-value First Amendment activity.

II. EVEN IF THE GILBERT SIGN ORDINANCE IS CONTENT-NEUTRAL, IT STILL VIOLATES GOOD NEWS'S FREEDOM OF SPEECH.

Even if a law is found to be content-neutral, that of course does not dispose of all First Amendment challenges. Such a law still "must be 'narrowly tailored to serve a significant governmental interest.'" *McCullen*, 134 S. Ct. at 2534 (*quoting Ward v. Rock Against Racism*, 491 U.S. at 796). And it must "leave open ample alternative channels of communication." *Ward*, 491 U.S. at 802. Even assuming *arguendo* that the Gilbert sign ordinance is content-neutral, it is still unconstitutional because – among other things – it does not leave adequate alternative channels open for Good News and other similarly situated nonprofit organizations. The severe restrictions on "directional event" signs leave a small church like Good News, limited in its resources, with inadequate alternatives to publicize its church services to potential congregants passing through the neighborhood.

This Court just recently made clear, in *McCullen v. Coakley*, *supra*, that even content-neutrality analysis significantly limits the state in restricting speech. The Court held that the Massachusetts buffer zone law significantly burdened the pro-life sidewalk counselors in their attempts to reach out to the people walking into abortion clinics. 134 S. Ct. at 2535-36. In assessing the degree of burden, the Court took a practical approach based on the particular situation of the speakers and the message they wished to convey. The Court therefore found it "no answer" to say that the pro-life counselors could "engag[e] in various forms of 'protest' . . . outside the buffer zones." *Id.* at 2536-37. Eleanor McCullen testified that she was unable to tell passersby from persons heading to the abortion clinic "in time to initiate a conversation before they enter the buffer zone." *Id*. at 2535. Moreover, McCullen said she abruptly had to end conversations she managed to start with persons heading to the clinic when they got to the buffer zone, which made her "appear 'untrustworthy'." *Id.* Thus, McCullen was "often reduced to raising her voice at patients from outside the zone," a method "sharply at odds with the compassionate message she wishes to convey" as a sidewalk counselor seeking to bring love, hope and healing to women contemplating abortion. *Id.* As noted above, the Court recognized the commonsense point that "[i]f all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners' message." *Id.* at 2537.

By contrast, in *Ward v. Rock Against Racism,* the Court held that rock concert organizers burdened by New York City's sound regulations had ample alternative channels of communication left open; the regulations "continue[d] to permit expressive activity in the bandshell and ha[d] no effect on the quantity or content of that expression beyond regulating the extent of amplification." *Ward*, 491 U.S. at 802.

Like the sidewalk counselors in *McCullen* and unlike the rock concert organizers in *Ward*, Good News has been severely restricted in its use of an important channel of communications to attract new congregants to its church services. Gilbert has applied its ordinance to forbid Good News from displaying its signs concerning church services until 12 hours before the services begin. For Sunday morning services, therefore, the signs cannot be displayed until the nighttime beforehand. As a matter of common sense, this seriously decreases their capacity to reach passersby, whether motorists or pedestrians, who might be attracted to the services.

Signs are also crucial to Good News's ability to invite others to its services. As discussed above, this Court has recognized signs as a "venerable medium" for "convey[ing] a broad range of different kinds of messages." *Metromedia*, 453 U.S. at 501 (quotation omitted); *see supra* p. 31. But temporary signs are particularly crucial for a congregation like Good News. As petitioners explain, "The Church has a small congregation, averaging between 25-30 adults

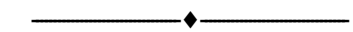
and 4-10 children per week, and very limited financial means. Due to the Church's temporary facilities, restricted finances, and limited manpower, posting signs is an essential means by which Petitioners make others aware of their Church services." Pet. Cert. 12-13 (record citations omitted). Lacking real estate of its own, and renting worship space in a public school building, Good News obviously cannot erect a permanent sign; it must depend on the temporary directional signs that Gilbert singles out for regulation. In uncontroverted testimony, the church's pastor, Clyde Reed, stated that the signs had been "'very, very effective' based on his 'experience over ten years' using them in Gilbert." Pet'rs' Br. 8 (record citations omitted).

Good News's reliance on such signs is by no means unusual for a church with limited finances and manpower. As one consultant to churches emphasizes, a group of signs "can reach more people for a lot less money. It's less expensive and more effective than ongoing space ads in newspapers and magazine or radio and TV ads." Steve Kroenig, *The Five Most Powerful Marketing Tools For Any Church*, CHURCHWORLD DIRECT, http://www.churchworlddirect.com/articles/2011/02/07/the-5-most-powerful-marketing-tools-for-any-church (last visited September 11, 2014).

Likewise, online methods of communication have limited value for a little known church like Good News. In *Mitchell v. City of New Haven*, 854 F. Supp.2d 238 (D. Conn. 2012), the city argued that Facebook, Twitter, and the Occupy New Haven

website constituted adequate alternative channels of communication for the Occupy New Haven movement to communicate its message to the citizens of New Haven. The court acknowledged that these channels were available but expressed "doubt that [they] alone would be sufficient under *Clark*" – primarily because, as the court put it, they are "forms of communication that are only seen when someone seeks them out." *Id.* at 253. As a tiny, little known church, Good News must get people to recognize its name in the first place before they will go online and seek out its messages about its meetings or its beliefs.

For small congregations, the restrictions on the less expensive and more effective medium of signs do not simply cause inefficiencies or raise costs; they may seriously hamper First Amendment activity. In *Martin v. City of Struthers*, 319 U.S. 141 (1943), this Court struck down a ban on door-to-door distribution of literature. Even though the law only restricted that method of expression, the Court noted that leafleting "is one of the most accepted techniques of seeking popular support" and added – in a famous phrase – that the technique "is essential to the poorly financed causes of little people." *Id.* at 146. Similarly, placing lawn signs in 2014 "is one of the most accepted techniques of seeking popular support" and is "essential to the poorly financed causes" of many small organizations, especially congregations like Good News.



CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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