No. 13-502

IN THE

Supreme Court of the United States

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 THE NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AMERICAN PLANNING ASSOCIATION, AND SCENIC AMERICA, INC. AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE [1]

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, other than amici curiae, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties have consented to this filing in letters on file with the clerk's office.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The American Planning Association (APA) is a non-profit, public interest research organization founded in 1978 to advance the art and science of land use, economic and social planning at the local, regional, state, and national levels. APA, based in Chicago, Illinois and Washington, D.C., and its professional institute, the American Institute of Certified Planners, represent more than 43,000 practicing planners, elected officials, and citizens in 46 regional chapters, working in the public and private sector to formulate and implement planning, land use, and zoning regulations, including the regulation of signs. APA has long educated the nation's planning professionals on the planning and legal principles that underlie effective sign regulation through publications[2] and training programs, as well as by filing numerous amicus curiae briefs in support of sign regulation in state and federal courts across the country.

Scenic America, Inc. is a national nonprofit conservation organization that is dedicated to preserving and enhancing the visual character of America's communities and countryside.

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[2] *See*, *e.g.*, DANIEL MANDELKER, ET AL., STREET GRAPHICS AND THE LAW (2004), https://www.planning.org/pas/reports/subscriber/archive/pdf/PAS_527.pdf; Christopher J. Duerkson & Matthew R. Goebel, *Billboards, Signs, and Newsboxes*, *in* AESTHETICS, COMMUNITY CHARACTER, AND THE LAW (2000).

INTRODUCTION

Amici are concerned that local governments will face a nearly impossible task in crafting constitutional sign regulations if they are unable to utilize a common sense classification of temporary signs based upon their functions. Signs are speech and thus can be categorized or differentiated only by what they say. This makes it impossible to overlook a sign's content or message in attempting to formulate regulations on signage or even make exceptions required by law. If the mere categorization of signs by function renders them "content-based," per Petitioners' absolutist approach, few sign regulations will meet the exacting strict scrutiny test.

Amici have joined in one brief to explain to this Court that the adoption of the absolutist approach to defining "content-neutrality" will prevent local governments from legislating common sense classifications for temporary and permanent signage, whether election signs, free expression signs, temporary directional signs, identification signs, for sale signs, construction signs, directory signs, grand opening signs, or the like. In this brief, amici hope to clarify the true nature of sign regulations and explain why application of strict scrutiny would wreak havoc.

SUMMARY OF ARGUMENT

Amici begin with an overview of how sign codes typically work in the United States. Although the exact terminology and standards vary, comprehensive sign codes typically regulate signs that impact traffic safety and a community's appearance, both of which are considered substantial or important government interests in sign law. Comprehensive sign regulations

do not censor speech, control viewpoint, or shape the subject of public debate.

Multiple categories of temporary signs, usually classified by the function they serve, are ubiquitous. Each category recognizes a sign type that serves a unique purpose, with its own set of time, place, and manner considerations. For example, in a geographically large jurisdiction with potentially tens of thousands of election signs on display at the time of an election, should the removal deadline be the same as the deadline for removing a handful of temporary directional signs for a special event? Regulating by function allows communities to balance the need to protect safety and property values with the need to inform. While signs might be categorized as "on-site" or "off–site," or permanent or temporary by reference to their content, that does not make sign code regulations "content-based" for First Amendment purposes.[3] And the fact that a temporary sign must be read to determine what kind of temporary sign it is does not render the regulation "content-based" and trigger strict scrutiny.

The three categories of temporary signs at issue in this case, Temporary Directional Signs, Political Signs, and Ideological Signs, are "content-neutral" on their face, meaning strict scrutiny should not apply. Even when these three categories of temporary signs are compared with each other, they are regulated by purpose, rather than by content. To preserve the ability of local governments to advance important

[3] Sign codes distinguish temporary and permanent signs by temporal dimension. They distinguish among permanent signs by content ("on-site" versus "off-site" among other distinctions) and among temporary signs by content ("for sale," "campaign," "going out of business," and "events," among others).

objectives such as aesthetics and safety, these temporary sign categories should be reviewed under intermediate scrutiny which properly balances the interests involved.

ARGUMENT

Amici agree with Respondents' criticism that the record does not support the formulation of the Question Presented as whether content-neutrality is a subjective or objective test.[4] *See* Resp't Br. 5-6, n.2. The Ninth Circuit did not apply a subjective test, and amici agree with Respondents that the test should be objective. This brief focuses on the actual issue which is whether Gilbert's regulation of temporary noncommercial signs is facially unconstitutional, merely because Gilbert has tailored the physical characteristics of each sign type to its function.

I. COMPREHENSIVE SIGN REGULATIONS IN GENERAL

This Court noted unanimously in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) that signs present special regulatory challenges not applicable to other forms of speech:

> While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct

[4] Petitioners phrase the Question Presented as: "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?" Pet'rs' Br. i.

> views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs—just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

While sign regulation has First Amendment implications, comprehensive sign regulations are principally concerned with aesthetics[5] and traffic safety.[6] Gilbert, similar to many local governments, includes beauty, community appearance, and safety among the purposes behind its comprehensive sign regulations. *See* GILBERT SIGN CODE § 4.401, J.A. 25-27. Regulating for aesthetics helps to preserve property values and enhance the beauty of a community, while regulating

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[5] The role of aesthetics in providing for the public welfare was recognized long ago in *Berman v. Parker*, 348 U.S. 26, 33 (1954), and it is well-established that a state may legitimately exercise its police powers to advance aesthetic values. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984); *Berman*, 348 U.S. at 32-33 (the public welfare includes aesthetic values).

[6] *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 444 (2002) (Kennedy, J., concurring) (noting that speech can cause secondary effects unrelated to the impact of the speech on its audience, for example, a "billboard may obstruct a view"). *See also Covenant Media of South Carolina, LLC v. Town of Surfside Beach*, 321 Fed. Appx. 251 (4th Cir. 2009) (promoting traffic safety and aesthetics are substantial governmental interests); *Arlington County Repub. Comm. v. Arlington County*, 983 F.2d 587, 594 (4th Cir. 1993) (aesthetics and traffic safety are substantial governmental goals).

for traffic safety helps to protect lives.[7] The aesthetic values of a community are enhanced when its design and development standards are coordinated to achieve desired characteristics. Deviations from those standards may detract from community appearance and from property values.[8]

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[7] In *Naser Jewelers, Inc. v. City of Concord*, 513 F.3d 27, 35 (1st Cir. 2008), the First Circuit considered traffic safety in deciding whether a city could ban Electronic Messaging Centers (EMC), electronic signs that flash constantly changing messages and opined:

> Concord's interests in traffic safety and community aesthetics would be achieved less effectively without the ordinance's prohibition on EMCs. We give some respect to "the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." *Metromedia*, 453 U.S. at 509 (plurality opinion). It is given that a billboard can constitute a traffic hazard. It follows that EMCs, which provide more visual stimuli than traditional signs, logically will be more distracting and more hazardous. *See Chapin Furniture Outlet, Inc. v. Town of Chapin*, 2006 U.S. Dist. LEXIS 72483, 2006 WL 2711851, at *4 (D. S.C. Sept. 20, 2006), *vacated on other grounds by Chapin Furniture Outlet, Inc. v. Town of Chapin*, 252 Fed. Appx. 566, 2007 U.S. App. LEXIS 25378, 2007 WL 3193854 (4th Cir. 2007) (holding, in the context of EMC regulations, that "the Town's judgment that flashing or scrolling signs constitute a traffic hazard . . . is not unreasonable"). Indeed, plaintiff's own witness stated that bypassers focus more on rapidly blinking electronic signs than static signs. This constitutes a greater hazard. Further, for drivers a flashing light is often a signal of hazard on the roadway, a signal which itself slows and disrupts the traffic flow.

[8] While aesthetics generally may be in the eye of the beholder, it is not difficult to imagine that turning a house into a billboard would detract from property values. *See* Ben Forer, *Get*

In many jurisdictions, sign regulations are classified as "land development" regulations. Comprehensive sign regulations are not speech-licensing or censorship schemes but are chiefly concerned with the form and appearance of the development of land in a variety of zoning settings (residential, mixed-use, commercial, industrial, agricultural, and the like). In summary, although the exact terminology may vary, most comprehensive sign regulations follow a traditional and well-established approach. They address traffic safety and aesthetics similar to the transformative regulations adopted in Clearwater, Florida, shown clearly in the before-and-after pictures below.[9]

Your Mortgage Paid by Turning Your House into a Billboard, ABC NEWS BUSINESS BLOG (Feb 29, 2012, 4:33 PM), http://abcnews.go.com/blogs/business/2012/02/get-your-mortgage-paid-for-by-turning-your-house-into-a-billboard/ ("'We're looking for homes to turn into billboards. In exchange, we'll pay your mortgage every month for as long as your house remains painted,' the firm's website reads."); Sue Pekarek, *Home Mortgage Assistance from Braniacs from Mars*, HOUSEKABOODLE (Oct. 26, 2012), http://www.housekaboodle.com/home-mortgage-assistance-from-brainiacs-from- mars/ ("Brainiacs From Mars marketing company will paint your house a broccoli green and sunrise orange and place ads for their company along with some social media ads and then . . . make your mortgage payment for up to a year.").

[9] Dkt. 47 (Affidavit of Ethel D. Hammer, ¶ 3, Vol. I, Section IV (Comparative Photographs) (September 1988 and March 2002), filed April 11, 2002, in *Granite State Outdoor Adv. Inc. v. City of Clearwater*, No. 8:01-cv-01663-JSM (M.D. Fla.).

GULF TO BAY BLVD.
CLEARWATER FLORIDA

A. Exemptions and Exceptions

When developing a sign code, a local governing body will first decide to what extent to exercise its police power to regulate signage based upon its community character. The regulatory approach to signage on the Las Vegas strip or Times Square is, and should be, fundamentally different than that used in a quaint New England town or a suburban Arizona town such as Gilbert.

Any local government considering sign rules must first decide which visual communication devices

actually need regulation, and which should be left to private choice. The scope of a sign code is determined by the definition of the word "sign." Local governments routinely exclude from that definition many devices that ordinary citizens would not even consider to be signs, or at least devices not needing regulation. The common exclusions include grave markers, building cornerstones, search lights, and stained glass windows. The legislative choice not to regulate these devises does not favor any particular messages, messengers, or viewpoints. Rather, it prevents regulatory overreach by balancing limited government and protection of the public viewscape.

B. Prohibited Sign Types

A local government will exercise its police power to prohibit or limit certain permanent sign types based upon locational criteria (*e.g.*, off-site signs,[10] number of freestanding signs per lot, spacing, and setbacks), placement criteria (*e.g.*, roof signs, ground signs, wall signs, and projecting signs), physical attributes (*e.g.*, flashing signs, animated signs, revolving signs, and wind-activated sign-devices), and limit certain sign types by other physical or placement criteria (*e.g.*, sign height and size). Local governments also prohibit signs that mimic traffic control devices; for example, a

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[10] Off-site signs, commonly known as "billboards," are distinguished from on-site signs by function and location. Neither the prohibition of billboards nor the limitations on the physical characteristics of permanent off-site signs are impermissible "content-based" distinctions. *See Messer v. City of Douglasville*, 975 F.2d 1505, 1509 (11th Cir. 1992); *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 814-15 (9th Cir. 2003); *Wheeler v. Commissioner of Highways*, 822 F.2d 586, 591 (6th Cir. 1987), *cert. denied*, 484 U.S. 1007 (1988), *reh'g denied*, 485 U.S. 944 (1988).

business advertising sign that mimics a stop sign placed along a street.

The most common prohibited or restricted sign type (other than traffic control device mimic signs) is the permanent off-site (billboard) sign. This Court has recognized the unique problems that this sign type poses to local land use planners. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (White, J., plurality opinion). *See also Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-07 (1984) (summarizing *Metromedia*: "[t]here the Court considered the city's interest in avoiding visual clutter, and seven Justices explicitly concluded that this interest was sufficient to justify a prohibition on billboards"). Many communities prohibit permanent off-site signs altogether, while other communities allow them subject to height, size, and locational limitations.[11] *See also St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269, 274 (1919) (billboards properly may be put in a class by themselves). Censorship and viewpoint-control play no role in these policies.

C. Regulated Signs

After a local government decides what will be defined as a sign and what sign types will be

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[11] The American Planning Association and the American Society of Landscape Architects have adopted specific policies that address billboard controls given the interest in protecting and preserving the beauty, character, economic, and aesthetic value of land and improving visual quality. AMERICAN PLANNING ASSOCIATION, POLICY GUIDE ON BILLBOARD CONTROLS (Apr. 1997), http://www.planning.org/policy/guides/adopted/billboards.htm; AMERICAN SOCIETY OF LANDSCAPE ARCHITECTS, BILLBOARDS AND SIGNAGE (2010), http://www.asla.org/uploadedFiles/CMS/Government_Affairs/Public_Policies/Billboards.pdf.

prohibited, it must then determine the location, size, duration, and other attributes of the signs that it will regulate. These signs initially fall into two types defined by duration, which are then further categorized by function: (1) *temporary signs* and (2) *permanent signs*.

1. *Temporary Signs.* Temporary signs are categorized by the function they serve. Six of the most common sign types are: (a) temporary real estate signs (for sale, for lease, and for rent)[12]; (b) temporary construction signs (usually identifying a site with an active building permit and construction underway); (c) temporary grand opening signs for new businesses (identifying the existence and location of a new business for a short duration following its initial opening); (d) temporary campaign/election signs (sometimes broadly labeled political signs)[13] that identify support for or opposition to ballot issues or candidates for elected office during the period prior to the election; (e) free expression or ideological signs that allow for a noncommercial message on any topic (as distinguished from election signs),[14] and (f) temporary special event

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[12] Local governments must provide for this sign type in their sign regulations. *See Linmark Associates, Inc. v. Willingboro*, 431 U. S. 85 (1977).

[13] *See* Jules B. Gerard, *Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker: Part III: Zoning Aesthetics: Chapter 5: The Takings Clause and Signs: Election Signs and Time Limits*, 3 WASH. U. J.L. & POL'Y 379, 380 (2000).

[14] *See City of Ladue v. Gilleo*, 512 U.S. 43 (1994). The requirement to allow free expression through signage on all residential property was highlighted in *Ladue*. There the property owner had first sought to place a six square-foot ideological sign on her lawn with the message, *Say No to War in the Persian Gulf, Call Congress Now*, and then sought to place a one square-foot sign on the inside of a window with the message, *For Peace in the Gulf*.

or directional signs that identify or provide directions to an upcoming or current public or semi-public event (such as a homecoming celebration for a national guard unit, a county fair, or a seasonal, occasional, or periodic event). Numerous constitutional claims have been brought involving the latter two temporary sign-types, *temporary campaign/election signs* and *temporary special event or directional signs*, which have produced uneven outcomes. Gilbert's "content-neutral" exemption from permitting for temporary directional signs is at the heart of this case.

2. *Permanent Signs.* While temporary signs are generally tied to short-term events and provide important, yet ephemeral information, permanent signs are most often associated with the development of land and will have a long-lasting impact on a community's aesthetics. The character of the zoning district and/or the property use will impact the regulatory limits on the sign's characteristics, whether freestanding or attached to a building, such as (a) the height, (b) the size or area (dimensions or square-footage), (c) the type of freestanding sign (pole or monument, wall or roof), (d) its setback (distance from roadways and/or buildings), (e) the number of signs per lot/parcel, and (f) the spacing between freestanding signs.

The placement of *permanent* sign structures on land or on buildings impacts the aesthetic development of a community in material ways. Businesses and institutions in commercial or industrial districts require some on-site identification sign that identifies who, what, and where they are. Such signage needs

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An outright prohibition of this medium of speech was rejected as unconstitutional. Such a message may be a permanent sign type when it is not related to a time-bound event.

are usually accommodated by both freestanding signs (pole signs, monument/ground signs) and wall signs, and may also be accommodated in certain situations by other sign types such as canopy signs. Certain institutional or quasi-public uses, such as schools, religious institutions, and theaters, may require bulletin board signs that announce regular activities or events.

Permanent signs are very diverse. Restaurants may use drive-through lanes with menus displayed for vehicle occupants to place orders, so they need a sign regulation that accommodates drive-through menu signs. Gas stations use additional signage at self-service islands and pumps, some of which is legally mandated. Low-to-ground "enter," "exit" or "drive-through" signs may be needed to accommodate both vehicular and pedestrian safety concerns. Permanent sign regulations provide for height, size, number, and other qualifying standards to balance safety concerns with aesthetic concerns.

D. Warning Signs (Temporary and Permanent)

Warning signs alert of a danger or a hazard associated with a location and are common across both urban and rural landscapes.[15] *Permanent* warning signs are associated with buried underground cables, underground gas or electric lines, high voltage locations, railroad crossings, and the like. *Temporary*

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[15] Compare Gilbert's regulations, which have two sign types relevant to political speech: Political Signs, which provide additional temporary speech rights related to candidates and ballot issues prior to an election, and Ideological Signs, which allow both temporary and permanent expression of political and other ideas.

warning signs may be associated with "sidewalk closed," "detour," and the like. Warning signs serve an important function, are unique to the location or property on which they are displayed or posted, and can be described only by the function that they serve. *See Granite State Outdoor Advertising, Inc. v. City of Clearwater*, 213 F. Supp. 2d 1312, 1333 (M.D. Fla. 2002), *aff'd in part and rev'd in part on other grounds*, 351 F.3d 1112 (11th Cir. 2003), *cert. denied*, 543 U.S. 813 (2004).

E. Permitting for Allowed Sign Types

As noted above, sign types can be (i) exempt from regulation where the local government has decided not to extend its police power to regulate certain types of signs, (ii) prohibited within a jurisdiction, often because of their physical or locational characteristics, or (iii) allowed with or without express sign permitting. The need for a sign permit is ordinarily tied to the need for enforcement, safety, or other practical factors. Different permitting considerations apply based upon whether the signs are temporary or permanent:

1. *Permitting for temporary signs.* Generally, temporary signs do not require a permit because their presence is for a very brief duration or discrete election cycle. Also erecting temporary signs (depending on the structure and location of the sign) does not involve construction or alteration of a permanent structure requiring a building permit to assure safety and soundness. Requiring a permit for such temporary signage may also prove impractical because of limited government resources. Regulatory criteria will usually provide sufficient guidance *vis-a-vis* the height, size, setback, number, and the like. If those

criteria are not complied with, an enforcement mechanism can usually effectively address violations. On some occasions, a local government may require some form of permitting (with or without fees) for temporary "special event" signage that are likely to pose problems (such as sign removal after a large special event or planning for police to handle unusual traffic).

2. *Permitting for permanent signs.* In contrast to temporary signs, permanent signs may require permits due to their height and size, their number on a lot/parcel, their setback, and other characteristics that are not ephemeral. Usually, local governments will ensure that the proposed design of permanent signs meets criteria for their physical and locational characteristics *before* they are fabricated, constructed, and erected because they obstruct the public view. Permitting also ensures that money will not be wasted erecting and removing an illegal structure.

Certain smaller permanent sign types, however, do not pose the same threats, and are therefore often exempt from permitting: nameplates, street address signs, small warning signs (high voltage, buried gas line, *etc.*), low-profile enter/exit signs, or other *de minimis* sign types. While these exempted signs are classified by the function they serve, they are by no means a "content-based" scheme requiring strict scrutiny review.

To the extent that permanent sign structures in which messages will be displayed are allowed only by permit, the First Amendment is implicated. However, permanent signs are regulated by the functions they serve and the dangers that they or any incorporated components or devices (such as intermittent lights) might present. Permitting is not intended (a) to censor, (b) to regulate a particular viewpoint, or (c) to

control the subject matter of debate. In short, permitting requirements for permanent sign structures is not a regulatory censorship scheme or speech-licensing scheme just as categorizing temporary signs by function is not such a scheme.

F. Sign Codes Vary

While most sign codes in the United States follow the general approach described above, some of the specifics vary. This is primarily because aesthetic concerns often vary based on the following differences (i) urban and rural environments, (ii) large cities and small cities, (iii) communities with no bodies of water or coastlines and those with waterfronts and coastlines, of (iv) different regions of a state, and (v) mountainous areas with short lines of sight. The drafting land development regulations often involves public input to address safety concerns and issues pertaining to community character on both macro and micro levels. For these reasons, all sign codes are somewhat idiosyncratic within the widely accepted general framework.

G. Role of Content in Sign Regulations

Content plays a role in sign regulations. For example, a sign's message will categorize it as an election sign, a time-and-temperature sign, a historic marker, a drive-thru menu sign, an ideological sign, a traffic sign, and the like. And on-site and off-site signs must be read and compared to their location to determine which category they belong to. But for First Amendment purposes, these classifications are by no means a "content-based" censorial scheme requiring strict scrutiny review. They are merely separate

categories based on common sense functional differences.

II. READING A SIGN TO DETERMINE ITS CATEGORY DOES NOT MAKE THE REGULATION "CONTENT-BASED"

Petitioners argue that if a city official has to read the content of a temporary sign to determine what kind of temporary sign it is, then its regulation is "content-based" and subject to strict scrutiny. In *Granite State Outdoor Advertising, Inc. v. City of Clearwater*, 213 F. Supp. 2d at 1333-34, the district court succinctly describes how this issue arises:

> What makes the content-based versus content-neutral distinction so difficult in cases involving sign ordinances is that, by their very nature, signs are speech and thus can only be categorized, or differentiated, by what they say. This makes it impossible to overlook a sign's "content" or message in attempting to formulate regulations on signage and make exceptions for distinctions required by law (*i.e.*, for sale signs) or for those signs that are narrowly tailored to a significant government interest of safety (*i.e.*, warning or construction signs). For example, there is simply no other way to make an exemption or classify a for sale sign as a for sale sign without reading the words "For Sale" on the sign, or classifying a sign as a warning sign without reading the words "Warning Bad Dog" on the sign. In many cases, this classification raises the "red flag" of an impermissible "content-based" regulation. *See Metromedia*, 453 U.S. at 565, 101 S. Ct. 2882

> (Burger, J. dissenting) (referring to differentiating among topics and "noncontroversial things" and "conventional" signs such as time-and-temperature signs, historical markers, and for sale signs).

This Court should reject the argument that reading a sign to determine how it is classified renders the regulation "content-based," for the same pragmatic reason the Fourth Circuit rejected it in *Wag More Dogs v. Cozart*, 680 F.3d 359, 365 (4th Cir. Va. 2012)—signs *must* be read to determine if they are compliant with the governing sign regulations.

> Wag More Dogs advances a syllogistic argument to support its claim that the Sign Ordinance is unconstitutional on its face as a content-based restriction on speech: Any regulation that differentiates between types of speech is content based. The Sign Ordinance imposes different requirements on different types of speech. Therefore, the Sign Ordinance is content based. But Wag More Dogs would have us hew to a Euclidean commitment to wooden logic, where the law instead demands a more pragmatic judgment. Viewing the Sign Ordinance with reference to precedent that applies a practical analysis of content neutrality, requiring that a regulation do more than merely differentiate based on content to qualify as content based, we conclude that the Sign Ordinance is content neutral and satisfies intermediate scrutiny.

Other courts have similarly observed that the proper inquiry is not whether a sign must be read, but whether the distinctions made in sign codes impermissibly regulate speech. As the court stated in

National Advertising Co. v. City of Miami, Florida, 287 F. Supp. 2d 1349, 1376 (S.D. Fla. 2003), *rev'd on other grounds*, 402 F.3d 1329 (11th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006):

> There is no question that First Amendment precedent, including *Metromedia*, clearly establishes the general rule that the government cannot "regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Taxpayers for Vincent*, 466 U.S. at 804, 104 S.Ct. 2118. However, this general rule is not applicable in cases where "there is not even a hint of bias or censorship in the [c]ity's enactment or enforcement of [the] ordinance." *Id.* This is particularly true where "[t]he text of the ordinance is neutral-indeed it is silent-concerning any speaker's point of view. . . ." *Id.*

If the fact that a sign must be read makes it "content-based," then sign codes making logical, non-viewpoint based distinctions that advance important governmental objectives will be subjected to unnecessarily high constitutional scrutiny and the courts will be called upon to act as "super" regulatory agencies. *See Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) (citations omitted) ("The Courts of Appeals were not created to be 'the Grand Mufti of local zoning boards.'").

The First Amendment's guarantee of "freedom of speech" grew out of the abuse by the monarch and Parliament in 16th- and 17th- Century England to license speech flowing from the printing press of that era. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 320 (2002). The stifling of free expression where speech may be favored or disfavored based upon its

content through the exercise of censorship is clearly the harm the First Amendment seeks to protect against. *See id.* at 323. The government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972), and the government must not choose which issues are worth discussing or debating. *See id.* at 96. Keeping open the "marketplace" of ideas or viewpoints is central to this Court's teachings. *See id.*; *see also Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537-38 (1980) (quoting *Mosley*, 408 U.S. at 96); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984); *Simon & Schuster, Inc. v. Members of State Crime Victims Bd.*, 502 U.S. 105, 116 (1991); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

It is well settled that the state may legitimately exercise its police powers to advance aesthetic values. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984). In *Vincent*, this Court observed that there was not even a hint of bias or censorship in the City's enactment or enforcement of an ordinance pertaining to posting signs on public property, no claim that the ordinance was designed to suppress certain ideas that the City found distasteful, or had been applied based on viewpoint. *See id.* at 506. Most significantly, as to the facial challenge against the ordinance, this Court observed that, "[the] text [of the ordinance] is neutral—indeed it is silent—concerning any speaker's point of view . . . ." *Id.* And in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) this Court stated that the principal inquiry in determining "content-neutrality," in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a

regulation of speech because of disagreement with the message it conveys.

In summary, simply because a sign must be read to determine how it is categorized indicates no agreement or disagreement with the sign's message and does not render it "content-based" for First Amendment purposes.

III. GILBERT'S PROVISION FOR TEMPORARY DIRECTIONAL SIGNS IS "CONTENT-NEUTRAL" ON ITS FACE

Gilbert's regulation of Temporary Directional Signs Relating to a Qualifying Event is "content-neutral" *on its face*.[16] A Qualifying Event is defined broadly as any

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[16] GILBERT SIGN CODE § 4.402.P reads: ***Temporary Directional Signs Relating to a Qualifying Event.*** Temporary Directional Signs Relating to a Qualifying Event shall be permitted subject to the following regulations:

1. *Size.* Signs shall be no greater than 6 feet in height and 6 square feet in area.
2. *Number.* No more than 4 signs shall be displayed on a single property at any time.
3. *Display.* Signs shall only be displayed up to 12 hours before, during, and 1 hour after the Qualifying Event ends. The person who installed the signs shall be responsible for removal. If the person installing the signs is unknown, the property owner shall be responsible.
4. *Location.* Temporary Directional Signs Relating to a Qualifying Event may be located off-site and shall be placed at grade level. Signs shall be placed only with the permission of the owner of the property on which they are placed.
5. *Prohibited Locations.* Temporary Directional Signs Relating to a Qualifying Event shall not be located:

assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization. J.A. 70. Qualifying Event Temporary Directional Signs are "content-neutral" because any religious organization, charity, or non-profit, no matter what its viewpoint or subject matter, may put up a sign related to an event under this provision.

Temporary directional sign provisions similar to Gilbert's are common among sign ordinances throughout the United States. Their function is to aid persons in finding an event that is ephemeral, while the purpose of the vast majority of sign types is to identify a permanent structure or fixed physical location. They represent a balancing of interests in limiting sign clutter, while at the same time allowing an avenue of communication, among the many others available, to provide the public directions to an event, whether it be one-time or recurring.

Petitioners and their amici argue that Petitioners' Temporary Directional Signs, inviting and directing people to the location of Petitioners' church services, are disadvantaged in relation to Political Signs and temporary or permanent Ideological Signs. Rather

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6. *Construction.* Signs shall be:

a. In the public right-of-way.

b. On fences, boulders, planters, other signs, vehicles, utility facilities, or any structure.

a. Constructed of durable and weather-resistant materials.

b. Anchored or weighted down to avoid being displaced in windy conditions, or otherwise to be a safety hazard to the public.

J.A. 38-39, 75-76, 88.

than forcing event directional messages into another sign type, where they don't logically belong, Gilbert has reasonably chosen to provide them their own category. This separate sign type is constitutionally permissible because event-oriented signs, which are not designed for core ideological speech, may be subject to different time, place, and manner requirements than election or ideological signs, which always contain core ideological speech, and are subject to heightened First Amendment protection. As Respondents explain, Gilbert allows organizations such as churches to have both directional and informational signs, instead of limiting their options to one or the other; they just cannot combine the two in a manner not contemplated by the Code. Resp't Br. 24-25.

Gilbert's regulation of Temporary Directional Signs are appropriately tailored to their function of directing traffic to an event. On its face nothing in the Gilbert Sign Code suggests that its temporary directional signage provision disadvantages the free-speech rights of one side of a public debate or ideological divide. And nothing prevents Petitioners from posting Ideological Signs if their goal is to spread a religious message, as discussed further below.

Finally, Petitioners and their amici argue that it is improper for Gilbert to require their sign to conform to one defined sign type, and that it is unclear how Gilbert's regulation applies to hypothetical combinations of messages not at issue in this case. The Ninth Circuit properly refused to provide an advisory opinion on this issue over which there is no case or controversy. *See Reed v. Gilbert*, 707 F.3d 1057, 1065 n.6 (9th Cir. 2013).

IV. GILBERT'S PROVISION FOR POLITICAL SIGNS (TEMPORARY ELECTION SIGNS) IS "CONTENT-NEUTRAL" ON ITS FACE

Gilbert, similar to local governments throughout the United States, categorizes and regulates temporary election signs differently from other temporary signs. Such signs express core ideological speech related to an election, which only has meaning within a specific time period. Such signs do not provide directions to campaign offices or polling places. Gilbert's Political Sign regulation is "content-neutral" because any idea related to a candidate or issue in an election may be supported or opposed.

Temporary election signs have long been considered distinct from and accorded more deference than temporary off-site directional signs, which do not communicate ideological speech and simply provide vehicular or pedestrian traffic directions to an event. The First Amendment accords special significance to political speech during a campaign for public office.[17] In fact, limitations placed upon temporary election signs have frequently been struck down due to the significance given to core political speech, especially during an election cycle.[18]

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[17] *See Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971); *Burson v. Freeman*, 504 U.S. 191, 196-97 (1992). *See also Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 898 (2010).

[18] *See, e.g., Dimas v. City of Warren*, 939 F. Supp. 554 (E.D. Mich. 1996) (durational limit of 45 days before an election unconstitutional); *Arlington County Repub. Comm. v. Arlington County*, 983 F.2d 587, 594 (4th Cir. 1993) (limiting election signs

Gilbert allows Political Signs, with dimensions that vary between property zoned for residential use (16 square feet) and nonresidential use (32 square feet), without a permit during the period before an election. Political Signs must be removed within a short durational period (10 days) after the election is held. *See* GILBERT SIGN CODE § 4.402.I. Gilbert is more than 70 square miles and has a population that exceeds 200,000 people.[19] Such a time period for removing temporary election signs after an election cycle is not uncommon in large localities.[20]

Recently, the Arizona State Legislature passed legislation that extended protection to temporary election signs in the public right-of-way before an election. *See* ARIZ. REV. STAT. § 16-1019 (2011). While this is not as common elsewhere in the United States, affording greater protection to political speech during the election cycle is consistent with the significance accorded to political speech. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Burson v. Freeman*, 504 U.S 919 (1992).

V. GILBERT'S PROVISION FOR IDEOLOGICAL SIGNS (FREE EXPRESSION SIGNS) IS "CONTENT-NEUTRAL" ON ITS FACE

Gilbert, again similar to many local governments throughout the United States, allows free expression

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to two per parcel was unconstitutional given the core ideological nature of the speech that such signs contain).

[19] *See Gilbert, Arizona*, WIKIPEDIA, http://en.wikipedia.org/wiki/Gilbert,_Arizona (last visited Nov. 11, 2014).

[20] *See, e.g., Arlington County Republican Committee v. Arlington County, Va*, 983 F.2d 587, 594 n.8 (4th Cir. 1993) (court noted with approval election sign regulation limiting posting from 70 days prior to the election to 10 days after the election).

signs, defined at GILBERT SIGN CODE § 4.402.J as Ideological Signs,[21] in all zoning districts in Gilbert. Whether a parcel is residential or nonresidential, an Ideological Sign up to 20 square feet in area and up to six feet in height may be displayed. Political Signs and Ideological Signs serve unique and different functions in the political process. Similar to Political Signs, Ideological Signs provide an opportunity for any ideological message (political or not) to appear on any parcel in any zoning district in Gilbert. While the right-of-way is not expressly included as a permissible location, Ideological Signs can be displayed at any time, for any length of time, and the message can be freely substituted at will.[22] Ideological Signs are "content-neutral" because any non-commercial message may be expressed.

Gilbert's Ideological Sign Code category is not unusual; many cities allow ideological (sometimes called free expression or opinion) signs year–round,

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[21] An Ideological Sign is a category distinct from both a Political Sign (Election Sign) and a Temporary Directional Sign Relating to a Qualifying Event. The Glossary of General Terms to Gilbert's Land Development Code provides:

> *Ideological Sign*. Ideological Sign means a sign communicating a message or ideas for non-commercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a government agency.

J.A. 66-67, 77.

[22] *Compare Herson v. San Carlos*, 714 F. Supp. 2d 1018, 1021 (N.D. Cal. 2010), *aff'd*, 433 Fed. Appx. 569 (9th Cir. 2011) (sign regulation providing for substitution of speech, to avoid the favoring of commercial speech over non-commercial speech, or of some kinds of non-commercial speech over other kinds of non-commercial speech).

with additional temporary speech rights provided through Political Signs during election season.[23] Nothing precludes Petitioners from having an Ideological Sign proclaiming their faith and mission on parcels throughout Gilbert—as long as they obtain the express or implied permission of the property owner. Significantly for purposes of First Amendment considerations, Gilbert does not require Petitioners to obtain a permit to post such signs.

Gilbert's Sign Code recognizes that limitations on size, location, and duration of Ideological Signs fall within the ambit of reasonable time, place, and manner regulatory authority. So while it allows for Ideological Signs with the same message as that expressed in *Brown v. Town of Cary*, 706 F.3d 294 (4th Cir. 2013), ("Screwed by the Town of Cary") it would not allow a homeowner to turn his or her house into that sign, just as the Town of Cary's regulations did not allow a sign to exceed the size limitation for a residential wall sign. *See Brown*, 706 F.3d at 298, 305 (size, color, and positioning restrictions).

Faced with a lower court ruling that Cary's decision to disallow the wall sign while allowing holiday decorations amounted to a "content-based" sign regulation, the Fourth Circuit concluded:

> [W]e reject any absolutist reading of content neutrality, and instead orient our inquiry toward why—not whether—the Town has distinguished content in its regulation.

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[23] *See, e.g., Brayton v. City of New Brighton*, 519 N.W.2d 243 (Minn. Ct. App. 1994), *cert. denied*, 514 U.S. 1036 (1995) (holding that sign ordinance allowing only one year-round non-commercial opinion sign, with additional signs during the election season, was constitutional).

> Viewed in that light, we are satisfied that the Sign Ordinance is content neutral. Applying the intermediate scrutiny required for content neutral restrictions on speech, we hold that the Sign Ordinance does not violate the First Amendment.

Id. at 301.

VI. GILBERT'S SIGN REGULATIONS FOR TEMPORARY DIRECTIONAL SIGNS RELATING TO A QUALIFYING EVENT REMAIN "CONTENT-NEUTRAL" WHEN COMPARED WITH POLITICAL SIGNS AND IDEOLOGICAL SIGNS

This Court should not adopt a constitutional mandate that these different sign types must be subject to *identical* regulations. Communities should decide through a planning process the dimensional criteria, height, number, setback, and the like for temporary sign types. Identical rules simply do not make sense for all temporary sign types, which is why local governments have not adopted them.

Rather than take the absolutist approach,[24] Amici urge this Court to adopt the rule stated in *Brown*, 706 F.3d 294, and its antecedents,[25] because it offers

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[24] *See Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011); *Serv. Emps. Int'l Union, Local 5 v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1263–66 (11th Cir. 2005).

[25] *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 620-25 (6th Cir. 2009). *See also Scadron v. City of Des Plaines*, 734 F. Supp. 1437, 1445-47 (N.D. Ill. 1990), *aff'd*, 989 F.2d 502 (Table) (7th Cir. 1993) (adopting "the analysis contained in the excellent opinion by the district court"; the district court analyzed the opinions in *Metromedia* as they bear on the question presented

significant protections to First Amendment free speech while protecting community interests in reasonable sign regulation. That rule provides:

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

Brown, 706 F.3d at 17-18.

Local governments may not be able to prove a "compelling interest" in the different temporary sign type categories. If the absolutist approach is adopted, sign regulations nationwide will be upended as unconstitutional. When rewritten to meet the absolutist standard, they will defy common sense, lack effectiveness, and in many cases are likely to even restrict speech more than if common sense functional exceptions and exemptions were allowed. The

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here); *Giovani Carandola Ltd v. Bason*, 303 F.3d 507, 512-13 (4th Cir. 2002); *Clearwater*, 213 F. Supp. 2d 1312 (M.D. Fla. 2002), *aff'd in part and rev'd in part on other grounds*, 351 F.3d 1112 (11th Cir. 2003), *Granite State Outdoor Advertising, Inc. v. City of St. Petersburg, Fla.*, No. 8:01–cv–2250–T–30MSS2, 2002 WL 34558956, *7, 11 (M.D. Fla. Oct. 18, 2002), *aff'd in part and rev'd in part*, 348 F.3d 1278 (11th Cir. 2003), *cert. denied*, 541 U.S. 1086 (2004); *G.K. Ltd. Travel v. Lake Oswego*, 436 F.3d 1064, 1071-84 (9th Cir. 2006), *cert. denied*, 549 U.S. 822 (2006); *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 431-35 (2007), *cert. denied*, 552 U.S. 1100 (2008); *Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 389 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 1008 (2011).

absolutist approach is game, set, and match for the Nation's sign regulations despite the fact that they do not run afoul of the standards set forth in *Mosley*, 408 U.S. 92, *Metromedia*, 453 U.S. 490, *Vincent*, 466 U.S. 789, *Ward*, 491 U.S. 781, or the more recent decisions in the context of buffer zones in *Hill v. Colorado*, 530 U.S. 703, 719-21 (2000), and *McCullen v. Coakley*, 134 S. Ct. 2518, 2528-34 (2014).[26]

* * *

This case provides an opportunity for this Court to clearly articulate the legal standards applicable to our Nation's sign regulations, to reject the notion that a sign regulation is "content-based" because a sign must be read to be categorized, and to eschew applying strict scrutiny to categories of sign regulations that—for functional reasons—have different time, place, and manner provisions. Petitioners are clearly not victims of any effort to censor speech, control viewpoint, or shape public debate by the government based upon the face of Gilbert's regulations. Their First Amendment rights have not been violated.

[26] Amici are aware of the Court's split over whether the laws establishing buffer zones at abortion clinics favor or disfavor the viewpoint of one side or the other of a public debate. Viewpoint discrimination is not present in this case.

CONCLUSION

For all of these reasons, the Court should affirm the judgment below.

Respectfully submitted,

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