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

BRIEF FOR RESPONDENTS TOWN OF GILBERT, ARIZONA, AND ADAM ADAMS IN OPPOSITION

ROBERT GRASSO, JR.
Counsel of Record
KIM S. ALVARADO
JENNY J. WINKLER
GRASSO LAW FIRM, P.C.
2430 West Ray Road, Suite 3
Chandler, Arizona 85224
Telephone (480) 730-5553
rgrasso@grassolawfirm.com
kalvarado@grassolawfirm.com
jwinkler@grassolawfirm.com
Attorneys for Respondents Town of Gilbert, Arizona, and Adam Adams

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

RESTATEMENT OF QUESTION PRESENTED

This case concerns a superseded regulation of temporary directional signs – which are non-permanent signs directing traffic to an activity or use. Petitioners Clyde Reed and Good News Community Church ("Petitioners") are seeking this Court's review of a 2008 version of section 4.402(P) of the Town of Gilbert's ("Gilbert") Land Development Code, which subsequently was amended in 2011. The challenged section of the 2008 Code, § 4.402(P), allows nonprofit organizations to place off-site, unattended, temporary signs providing directions to an event, without obtaining a permit and subject to reasonable time, place, and manner regulations. Petitioners' challenge to the temporary directional sign regulation was "as applied" to their activities, which now are different than when the Ninth Circuit decided the second appeal. Yet, as applied to Petitioners' activities in the neighboring city of Chandler during the second appeal, Petitioners wanted free, permanent, off-site billboards in Gilbert – and were trying to misuse Gilbert's temporary, directional sign regulation to fit that inapposite goal. Petitioners' claims were rejected twice by the district court and twice by two different panels of the Ninth Circuit (2009 and 2013). Contrary to Petitioners' arguments, the Ninth Circuit's 2013 decision did not create new circuit law or adopt any purported "subjective, motive-based" test, but rather applied well-established constitutional precedents from this Court

RESTATEMENT OF QUESTION PRESENTED – Continued

and within the Ninth Circuit to the record evidence. Moreover, a purported "circuit split" on a so-called "subjective, motive-based test" does not exist.

The restatement of the question presented is:

Did the Ninth Circuit properly apply the law of the case, circuit precedent, and United States Supreme Court precedent in concluding that Gilbert's 2008 version of a temporary directional sign ordinance for qualifying events sponsored by nonprofit organizations, § 4.402(P), was constitutional as applied to Petitioners' activities?

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INTRODUCTION

The Court should deny certiorari review. Petitioners' numerous arguments on the merits have been rejected four times. Now, in an effort to attract this Court's attention, Petitioners have distorted beyond recognition the Ninth Circuit's holding in *Reed v. Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013), in a misplaced effort to manufacture a "circuit split" on a First Amendment issue. Contrary to the Petitioners' arguments, the Ninth Circuit has not and did not adopt a "subjective, motive-based" test to analyze the content neutrality of a sign ordinance. Nor has any other circuit, for that matter. Simply put, no so-called circuit split on the propriety of a "subjective, motive-based" test exists. Because this non-existent circuit split is the sole basis for Petitioners' request for the Court's review, the Petition should be denied.

Moreover, the circumstances of this case do not warrant this Court's review. The case below involved a narrow issue related to one section of the 2008 version of Gilbert's sign ordinance – a regulation of off-site, temporary directional signs – as applied to Petitioners' activities. Because both Gilbert's sign ordinance and Petitioners' activities have changed, this case does not represent a situation worthy of this Court's consideration.

STATEMENT OF THE CASE

A. Relevant Factual Background

In 2008, Gilbert adopted certain amendments to Chapter I of the Land Development Code ("Code"), including a provision on temporary directional signs to a qualifying event (§ 4.402(P)). Gilbert's 2008 amended ordinance did not ban protected speech based on content. Instead, the amended ordinance recognized that certain speech performed certain functions at certain times, places, and manners, and it regulated time, place, and manner accordingly. Off-site signs were more restricted than on-site signs. Numerous signs may be displayed without a permit, including the signs that Petitioners wanted to place – off-site, unattended, temporary directional signs to a qualifying event under § 4.402(P).

From the outset, Petitioners have argued that their off-site signs are "temporary directional signs" under § 4.402(P) (2008 version). A Temporary Sign is one "not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display." (Glossary of General Terms, Appx. 154a.) A Directional Sign is one "directing traffic to an activity or use." (Glossary of General Terms.) Put together, the Code defines a temporary directional sign as a non-permanent sign directing traffic to an activity or use.

Section 4.402(P) defines "temporary directional signs relating to a qualifying event" as follows:

> [A] temporary sign intended to direct pedestrians, motorists, and other passersby to a "qualifying event." A "qualifying event" is any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.

(Glossary of General Terms, Appx. 154a.) The function of the provision is simple – it provides an opportunity for nonprofit organizations, like Petitioners' church, to place off-site, temporary signs directing traffic to an event without having to first obtain a permit. (§ 4.402(D)(15), (P).) By definition, these signs are *not* intended to be permanent, but are placed to direct passersby to "qualifying events" (such as Petitioners' religious gatherings, a YMCA soccer tournament, or a school's festival). Moreover, the regulation does not distinguish between a nonprofit organization's events involving commercial transactions (such as a car wash or book sale) and events with noncommercial conduct (such as a meditation session or book study).

Temporary directional signs relating to a qualifying event may be posted in any zoning district, and up to four (4) such signs may be displayed on any single property. (§ 4.402(P)(2), (4).) The total number of signs and properties displaying such signs is unlimited. (§ 4.402(P).) Such signs may be up to six (6)

square feet in area and up to six (6) feet in height. (§ 4.402(P)(1).) Finally, because the purpose of such signs is to direct passersby to an assembly, gathering, activity, or meeting, the signs may be posted and left unattended twelve (12) hours *before* the event (when passersby may be looking for the event), *during* the entire event, and one (1) hour *after* the event – thus, serving the very purpose for which such signs are temporarily posted. (§ 4.402(P)(3).)

At the time Petitioners originally filed their lawsuit, they held Sunday church services in a facility leased from an elementary school in Gilbert.[1] In February 2009, Petitioners moved their meeting place to a different school in the neighboring city of Chandler. Petitioners conducted a service for one hour on Sunday mornings. On weekdays, the premises were used by the public school for school activities unrelated to Petitioners. Petitioners also held events at the school site at different times on Sunday mornings and on Sunday afternoons. Further, Petitioners conducted a weekly meeting at a residential house in another neighboring municipality (Queen Creek) on Wednesday evenings, lasting one and one-half hours. Thus, for most of the time that this case was pending,

[1] Gilbert's Cross-Motion for Summary Judgment and supporting Statement of Facts with exhibits, filed August 27, 2010, provided the district court with the evidence in the record that supports the factual assertions set forth in the following paragraphs of this section. *See* United States District Court (Arizona), Case No. 2:07-cv-00522-SRB, ECF Dkt. Nos. 97-99.

Petitioners conducted no events within Gilbert. No one from Gilbert had any involvement in deciding the type, length, number, day of week, or starting time for any of Petitioners' events.

Petitioners engaged in numerous promotional activities designed to increase attendance at their church activities. These activities included maintaining a website, advertising in the local newspaper and telephone book, distributing pamphlets, making unsolicited telephone calls, and encouraging their congregants to extend personal invitations to others.

Petitioners also engaged in other promotional activities, which were tied to the close proximity of their meeting location in Chandler. Pastor Reed and other congregants handed out flyers in neighborhoods surrounding the leased school property so that people living nearby would know the church was meeting there. Petitioners also hired an advertising company to distribute flyers in neighborhoods surrounding the school.

Petitioners acknowledged that the purpose and function of off-site, temporary directional signs was to provide passersby with directions to an event. Petitioners also agreed that the close proximity of off-site directional signs to the event was important to the effectiveness of the signs. Pastor Reed agreed that off-site signs are impersonal. He did not believe a directional sign placed in certain, neighboring cities would be effective in causing a "casual, nonchurched" person to attend his services in Chandler.

During the district court proceedings, Petitioners were placing numerous off-site signs in Chandler, even though they acknowledged that these signs were prohibited under Chandler's ordinance. These signs consisted of six 2.5-foot x 3.5-foot A-frame (or sandwich-board) signs, and four 1.5-foot x 2-foot "real estate"-type signs (that stick into the ground). The signs displayed the name of the church, the website address, 9:00 a.m., Sunday, Ryan Elementary, and a directional arrow. After receiving the property owner's permission, Petitioners also hung a 4-foot x 10-foot purple banner on a chain-link fence, about three to four feet above ground, on private property near the corner of an intersection in Chandler. Petitioners had off-site signs stolen, vandalized, and damaged by weather or roadway conditions.

Petitioners believed it was "common sense" that a temporary directional sign to a Sunday service did not need to be posted on a weekday, and they did not ask their lessor (a local school district) for permission to post such signs on school property. Petitioners did not place any temporary directional signs related to their Wednesday evening meeting, because that meeting was meant for "insiders' participation."

Even after relocating to Chandler in February 2009, Petitioners continued, for a time, to place temporary directional signs at one location within Gilbert. Petitioners did not receive any communication from Gilbert relating to the placement of these signs. Contrary to Petitioners' misstatement (Pet., p. 13), Gilbert never enforced amended § 4.402(P)

against them. *See Reed v. Town of Gilbert*, 587 F.3d 966, 972, 973 (9th Cir. 2009).

During the litigation in the district court, Petitioners claimed they wished to place temporary directional signs near certain intersections within Gilbert, some three miles east of their meeting location, because it would be "possible" that some people would follow the directional signs for three miles to the school/church. Petitioners did not talk to any of the property owners at these locations to determine whether the owners would consent to the desired sign placement. In the past, Petitioners asked for and received permission from various property owners located within Gilbert to place their temporary directional signs on the owners' properties abutting roadways in Gilbert.

Petitioners acknowledged that other methods of advertising their services existed, but believed they were too inconvenient. For example, Petitioners could have congregants carry signs on sidewalks; however, they believed that leaving an unattended sign by the roadway was more convenient to their congregants. Petitioners also did not ask congregants to place signs on their own personal property, and Pastor Reed did not place any such signs on his own personal property. Pastor Reed's personal residence was a 30-minute drive from the church's Chandler meeting place, and he believed this distance was too far to make a directional sign effective.

Petitioners challenged § 4.402(P) (amended 2008) because they wanted to place their off-site, unattended, temporary directional signs concerning their Sunday morning services, which were taking place in Chandler, within Gilbert's public rights-of-way indefinitely. Petitioners also claimed that they wanted the "same treatment" as political signs, which could be displayed continuously, but only during an election season. Yet Petitioners acknowledged that a regulation that allowed them to post off-site, directional signs continuously, but only during a four-month period every two years, would not fit the purpose and function of directing passersby to Petitioners' services, which occur weekly for approximately one hour.

In their Petition, Petitioners disclosed for the first time that Petitioners moved their meeting location yet again, this time to a location back in Gilbert. (Pet., p. 16.) This fact was not before the district court or appellate court.

B. Relevant Procedural Background

In March 2007, Petitioners filed a Complaint against Gilbert, alleging that § 4.402(P) of the Code was unconstitutional on its face and as applied to Petitioners' activities. Petitioners asserted four claims based on speech, equal protection, and free exercise rights. Petitioners' Complaint asked for declaratory relief, a permanent injunction, and damages.

In February 2008, Petitioners filed a First Amended Complaint for Declaratory and Injunctive

Relief, alleging that § 4.402(P) (amended 2008) violated the First and Fourteenth Amendments and Arizona's Free Exercise of Religion Act (AzFERA), A.R.S. § 41-1493.01. (United States District Court (Arizona), Case No. 2:07-cv-00522-SRB, ECF Dkt. No. 32.) The First Amended Complaint sought a declaration that § 4.402(P), both in its original form and as amended in 2008, was unconstitutional on its face and as applied to Petitioners, and an injunction restraining enforcement of § 4.402(P) (amended 2008). Contrary to Petitioners' misstatements throughout their Petition, they did not seek any relief as to the entire Code. Petitioners also filed a Second Motion for Preliminary Injunction directed to amended § 4.402(P) but related only to the Free Speech and Equal Protection claims. (*Id.* at Dkt. No. 26.) The district court denied Petitioners' Second Motion for Preliminary Injunction, finding that Petitioners had failed to show a substantial likelihood of success on the merits of these claims. (*Id.* at Dkt. No. 43.) Petitioners appealed the district court's order. The Ninth Circuit unanimously affirmed in *Reed v. Town of Gilbert*, 587 F.3d 966 (9th Cir. 2009) (hereinafter, "*Reed I*"). As a threshold matter, *Reed I* expressly limited its analysis to an as-applied challenge. *Id.* at 974. The court found that Petitioners had not demonstrated that their facial challenge to § 4.402(P) warranted separate review. *Id.*

Concerning Petitioners' arguments, the court made several holdings. First, *Reed I* held that § 4.402(P) was not a content-based regulation. *Id.* at

979. The focus was "whether the ordinance targets certain content; whether the ordinance or exemption is based on identification of a speaker or event instead of on content; and whether an enforcement officer would need to distinguish content to determine applicability of the ordinance." *Id.* at 976. *Reed I* determined that § 4.402(P) satisfied this test. "A directional sign does not contain a message such that regulating directional signs would inherently 'distinguish favored speech from disfavored speech on the basis of the ideas or views expressed.'" *Id.* at 977 (citing and quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643, 114 S.Ct. 2445, 2459, 129 L.Ed.2d 497 (1994)). The definition of a Qualifying Event sign "d[id] not mention any idea or viewpoint, let alone single one out for differential treatment," but "merely encompasse[d] the elements of 'who' is speaking and 'what event' is occurring." *Id.* at 977. These speaker-based and event-based characteristics previously were held constitutionally permissible under Ninth Circuit case law. *See id.* at 977-78 (citing and discussing *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006), *cert. denied*, 549 U.S. 822 (2006)). *Reed I* soundly rejected Petitioners' repeated argument that any organization of sign regulations by speaker and event somehow transformed the ordinance into an unconstitutional restriction of content:

> Surely, however, this regulation is a good example that the "officer must read it" test is not always determinative of whether a regulation is content based or content neutral.

> The district court indeed recognized that we have not applied the "officer must read it test" so strictly that a law must be invalidated any time it forces an officer's eyes to venture within the four corners of the sign. . . . This case also highlights the absurdity of construing the "officer must read it" test as a bellwether of content. If applied without common sense, this principle would mean that every sign, except a blank sign, would be content based.

Reed I, 587 F.3d at 978 (internal citations and quotations omitted).

Second, *Reed I* concluded that the sign regulation was narrowly tailored to serve Gilbert's significant interests and left Petitioners with ample, alternative channels for communication. *Id.* at 979-81. Considering that a temporary directional sign to a qualifying event, by definition, is connected to a time, location, and event, § 4.402(P)'s regulation of time, place, and manner were reasonable.

Third, *Reed I* held that the Code did not impermissibly favor commercial speech over noncommercial speech. *Id.* at 981-82. The court considered and rejected Petitioners' inapposite comparisons to other parts of the Code.

Finally, *Reed I* concluded that the district court did not analyze Petitioners' argument that the Code impermissibly discriminated among certain forms of noncommercial speech, and remanded with instructions to consider this issue. *Id.* at 982-83.

Importantly, Petitioners did not seek this Court's review of *Reed I*.

In further district court proceedings after remand, the parties stipulated that Petitioners would not pursue any claims or relief related to Gilbert's original Code. (United States District Court (Arizona), Case No. 2:07-cv-00522-SRB, ECF Dkt. No. 91.) Petitioners also did not pursue any claim for actual damages. Thus, Petitioners' only remaining claims before the district court were for declaratory and injunctive relief related to Gilbert's amended § 4.402(P) (2008 version) as applied to Petitioners' directional signs concerning Sunday morning services. As to these remaining claims, the parties filed cross-motions for summary judgment. (*Id.* at Dkt. Nos. 97, 100.) The district court issued an order denying Petitioners' motion for summary judgment and granting Gilbert's cross-motion for summary judgment. (*Id.* at Dkt. No. 117.)

Petitioners appealed again. The briefing on appeal was completed by October 6, 2011. On November 21, 2011, Gilbert filed a Motion to Dismiss Appeal, arguing that amendments to § 4.402(P), effective November 6, 2011, mooted the appeal. (United States Court of Appeals for the Ninth Circuit, Case No. 11-15588, ECF Dkt. No. 22.) The 2011 amendments allowed temporary directional signs to qualifying events held within Gilbert to be placed within public

rights-of-way without a permit.[2] (Appx. 157a.) In a response and reply, the parties briefed only the legal question of whether the 2011 amendments mooted the pending appeal. (*Id.* at Dkt. Nos. 23, 24.) Thus, contrary to Petitioners' misstatement (Pet., p. 16), the constitutionality of the 2011 amendments to § 4.402(P) was not briefed for the Ninth Circuit's consideration.

A different panel of the Ninth Circuit affirmed the district court's order in *Reed v. Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013) (hereinafter, "*Reed II*"). The appellate court properly refused to revisit *Reed I* and took the time to carefully analyze and describe the ground that it was not going to cover again. *See Reed II*, 707 F.3d at 1062-64. The two issues decided in *Reed I*, which the *Reed II* court expressly found had been "establishe[d]" for the court's remaining analysis, were (1) "§ 4.402(P) is not a content-based regulation," and (2) "the Sign Code generally is a reasonable (i.e., not unconstitutional) time, place and manner restriction." *See Reed II*, 707 F.3d at 1067 (quoting and citing *Reed I*, 587 F.3d at 979, 980). The court stated that the "primary substantive issue . . . now on appeal" was "whether the Sign Code improperly discriminates between different forms of non-commercial speech." *Id.* Resolving this limited issue

[2] In the 2008 version of § 4.402(P), there was no limitation that temporary directional signs to a qualifying event relate to events held in Gilbert, and such signs could not be placed in the public right-of-way.

in favor of Gilbert, the *Reed II* court affirmed the district court's order dismissing all four of Petitioners' causes of action.[3]

REASONS FOR DENYING THE WRIT

The issue presented to and decided by the Ninth Circuit in *Reed II* is extremely limited, does not have nationwide application, and thus does not warrant this Court's consideration. Moreover, the only bases for review presented in the Petition are Petitioners' arguments that (1) *Reed II* purportedly adopts a subjective, motive-based test to determine the content neutrality of a sign ordinance, and (2) such a test purportedly "magnifies" a three-way split among the circuit courts. Both arguments are incorrect and represent a gross distortion of the holdings of the cited circuit cases.

[3] The court in *Reed II* also concluded that the 2011 amendments did not moot Petitioners' challenge to the 2008 version of § 4.402(P). *Id.* at 1065-67. The court did not consider any substantive arguments concerning the 2011 amendments, expressly holding that any challenge to the 2011 version of § 4.402(P) should be initially litigated in the district court. *Id.* at 1077.

I. The Issue Decided in *Reed II* Is Extremely Limited, and the Facts Have Changed Since *Reed II* Was Decided

Petitioners' current as-applied challenge is extremely limited. They are not seeking review of the dismissal of their Equal Protection, Free Exercise, or AzFERA claims. They are not challenging *Reed II*'s determination that § 4.402(P) is narrowly tailored to serve significant governmental interests and leaves open ample, alternative means of communication. They have not advanced a facial challenge to the entire Code.

Instead, they have asked this Court to review *Reed II*'s limited holding, which affirmed dismissal of Petitioners' requested remedies of declaratory and injunctive relief concerning the 2008 version of § 4.402(P)'s regulation of noncommercial speech as-applied to their activities. First, this regulation subsequently was amended in 2011. Second, Petitioners revealed in their Petition that their activities have changed since *Reed II* was decided, which significantly affects an as-applied challenge. The narrow, fact-specific issue presented in *Reed II* – especially in light of the changed factual circumstances – does not warrant this Court's consideration.

II. Petitioners' Characterization of the Holding of *Reed II* is a Gross Distortion of the Ninth Circuit's Actual Holding

The Court should deny the Petition for the simple reason that *Reed II* did not adopt a "subjective, motive-based test," which the Petition describes as the question for this Court's review. In fact, the Petition's mischaracterization of the issue for certiorari review distorts beyond recognition the actual holding of *Reed II*.

To start with, *Reed II* did not formulate any "new test" of content neutrality. Rather, *Reed II* accepted *Reed I*'s holding that § 4.402(P) was a content-neutral regulation as the "law of the case," thoughtfully analyzed that holding, and then applied that precedent (along with other Supreme Court and Ninth Circuit precedents) to the single legal issue on appeal related to the Free Speech claim. *See Reed II*, 707 F.3d at 1062-64, 1067 ("*Reed [I]* limits our consideration of Good News' challenges to the Sign Code. . . . Thus, our opinion in *Reed [I]* constitutes law of the case . . . and is binding on us.") (internal citations omitted). Simply put, *Reed II* did not create a new test concerning content neutrality.

Nor did *Reed I* adopt any "subjective, motive-based" test to determine the content neutrality of a sign ordinance. Indeed, the exact opposite is true. *Reed I* specifically noted that Gilbert's content-neutral motive to promote speech interests, such as Petitioners' advertisement of the time and location of

their church services, was not the sole, determinative factor in analyzing the content neutrality of the ordinance:

> Nothing in the regulation suggests any intention by Gilbert to suppress certain ideas through the Sign Code, nor does Good News claim that Gilbert had any illicit motive in adopting the ordinance. Gilbert asserts that the exemptions to the Sign Code were included to accommodate the speech interests of various members of the Gilbert community, and that, in particular, § 4.402(P) is intended to provide groups such as Good News the opportunity to spread the word about their events without the restriction of a permitting process. *Gilbert's unimpeached intentions, however, do not satisfy our inquiry*.

Reed I, 587 F.3d at 975 (citation omitted) (emphasis added). After analyzing other Ninth Circuit precedents, *Reed I* held that the determination of content-neutrality focused on "whether the ordinance targets certain content; whether the ordinance or exemption is based on identification of a speaker or event instead of on content; and whether an enforcement officer would need to distinguish content to determine applicability of the ordinance." *Id.* at 976. Applying this analysis, *Reed I* "conclude[d] that § 4.402(P) is not a content-based regulation: It does not single out certain content for differential treatment, and in enforcing the provision an officer must merely note the content-neutral elements of who is speaking through

the sign and whether and when an event is occurring." *Id*. at 979.

Reed II applied this analysis to the limited, Free Speech issue remaining on appeal. *See Reed II*, 707 F.3d at 1068. As to the regulation of noncommercial speech through stationary, unattended, off-site signs, *Reed II* concluded that speaker-based or event-based distinctions are "permissible where there is no discrimination among similar events or speakers." *Id.* at 1069 (citing and quoting *Reed I*, 587 F.3d at 979). Each exemption from the permitting process for Temporary Directional Signs relating to a Qualifying Event (§ 4.402(P)), Political Signs (§ 4.402(I)), and Ideological Signs (§ 4.402(J)) was "based on objective criteria and none draws distinctions based on the particular content of the sign." *Reed II*, 707 F.3d at 1069. Those objective criteria relate to the *function*, not message, of the sign. *See id.* Nothing about *Reed II*'s holding, applying the precedent of *Reed I* to the single issue on appeal, depended upon Gilbert's subjective motives. *See id*. at 1067-70.

After reaching its holding that Gilbert's sign ordinance did not impose an impermissible, content-based restriction on forms of noncommercial speech, the *Reed II* court included a lengthy discussion of this Court's precedent in *Hill v. Colorado*, 530 U.S. 703 (2000). *See id.* at 1070-72 ("[O]ur approach is in accord with the Supreme Court's opinion in *Hill v. Colorado*[ ].") *Hill* quoted from and relied upon *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), to begin its

content-neutrality analysis: "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." *Hill*, 530 U.S. at 719 (quoting *Ward*, 491 U.S. at 791) (emphasis added). In other words, although evidence of government animus toward an idea and an intent to disparage or suppress that message may prove that a regulation is content-based, *see Hill*, 530 U.S. at 719, the opposite is not true. Evidence that the government had a content-neutral or innocuous motive does not prove that a regulation is content-neutral. *See Turner Broad. Sys.,* 512 U.S. at 642-43, 114 S.Ct. at 2459. In the former situation (evidence of government animus toward a specific viewpoint), strict scrutiny will apply; in the latter situation (evidence of a content-neutral motive), further analysis is required.

Ward explained further that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791 (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S.Ct. 925, 929-30, 89 L.Ed.2d 29 (1986)). "Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Id.* at 791-92 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984)) (emphasis

added in *Ward*). *Ward* determined that the city's principal justification for the challenged ordinance was its desire to control noise levels at certain events and to limit noise in residential areas, which had nothing to do with content. *See id.* at 792 (citing and quoting *Boos v. Barry*, 485 U.S. 312, 320, 108 S.Ct. 1157, 1163, 99 L.Ed.2d 333 (1988)).

Hill distilled *Ward*'s "principal inquiry" into three independent reasons for determining that a regulation is content-neutral. *See Hill*, 530 U.S. at 719, 120 S.Ct. at 2491. First, a regulation of the places where some speech may occur is not a regulation of speech. *See id.* Second, after considering the ordinance's legislative history, the regulation was not adopted because of disagreement with the message being conveyed. Rather, the restrictions were viewpoint-neutral. *See id.* In *Hill*, this consideration was met even though the legislative history clearly showed that the primary motivation for the ordinance's enactment were activities in the vicinity of abortion clinics. *See id.* at 715, 725, 120 S.Ct. at 2489, 2494 at 725 (citing *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988)). Third, the State's justifications are unrelated to the content of speech. *See id.* at 719-20, 120 S.Ct. at 2491.

Hill squarely addressed and rejected the petitioners' argument – nearly identical to the argument repeatedly advanced by Petitioners from the outset of this case – that merely examining the content of speech to determine whether the conduct was covered by the statute automatically made the law

content-based. *See id.* at 720, 120 S.Ct. at 2491 (construing *Carey v. Brown*, 447 U.S. 455, 462, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980)). The *Hill* Court stated:

> It is common in the law to examine the content of a communication to determine the speaker's purpose. . . . We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct.

Id. at 721, 120 S.Ct. at 2492.[4] *Hill* further concluded that a "cursory examination" of the particular speech to determine if it was covered or excluded from the regulation was not "problematic." *Id.* at 722, 120 S.Ct. at 2492.[5] After considering the "principal inquiry" described in *Ward* and applying the three reasons discussed above, the *Hill* Court affirmed the state court's conclusion that the challenged ordinance was content-neutral. *See id.* at 725, 120 S.Ct. at 2494.

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[4] *Reed I* cited this portion of *Hill* to support its conclusion that "[i]dentifying a triggering event under § 4.402(P) does not entail making a content-based determination." *Reed I*, 587 F.3d at 978.

[5] A four-Justice concurrence emphasized that the validity of a speech regulation does not depend on showing that the particular mode of delivery has no association with a particular subject or opinion. *See Hill*, 530 U.S. at 735, 120 S.Ct. at 2500 (Souter, J., concurring). Simply put, concern that the government will suppress discussion of a subject or viewpoint is not raised when the law addresses the circumstances of the delivery of speech. *Id.* (Souter, J., concurring).

Reed II simply applied the *Hill* analysis to further support its holding. *Reed II* cited *Hill* and *Ward* for the "principal inquiry in determining content neutrality" and also cited the three independent, content-neutral reasons specified by *Hill*. *See Reed II*, 707 F.3d at 1071. *Reed II* then examined the evidence in the record and determined that § 4.402(P) (2008 version) satisfied the *Ward/Hill* "principal inquiry" and met each of the *Hill* factors: Gilbert did not adopt the regulation because it disagreed with Petitioners' message;[6] the ordinance regulates the places where some speech may occur; the justifications for the regulation are unrelated to a sign's content; and the ordinance places no restriction on particular viewpoints and had uniform application. *See id.* at 1071-72. In short, § 4.402(P) (2008 version) was "reasonable in relationship to its purpose – providing direction to temporary events." *Id.* at 1072. Therefore, applying the Supreme Court's analysis from *Hill*, the Ninth Circuit determined that § 4.402(P) (2008 version) "is content-neutral as that term has been defined by the Supreme Court." *Id.*

Reed II did not create or adopt a "subjective, motive-based" test, as argued by Petitioners. Therefore, even if this Court wishes to review the propriety of a so-called "subjective, motive-based" test of a sign ordinance, review of *Reed II* is not the appropriate

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[6] On the other hand, as noted in *Reed I*, the record evidence that Gilbert adopted § 4.402(P) for content-neutral reasons was not case-dispositive. *See* 587 F.3d at 975.

vehicle for doing so. That purported test simply did not form *Reed II*'s limited holding on Petitioners' Free Speech claim.

III. Petitioners' Characterization of Other Circuits' Purported Adoption of a "Subjective, Motive-Based Test" is a Gross Distortion of These Other Holdings

In an obvious effort to attract this Court's attention, Petitioners argue that *Reed II* "magnifies" a purported circuit split on the propriety of a so-called "subjective, motive-based" test. Petitioners dramatically changed the substance of this argument from when they first attempted to attract rehearing en banc in the Ninth Circuit in February 2013. (United States Court of Appeals for the Ninth Circuit, Case No. 11-15588, ECF Dkt. No. 34.) The argument lacked merit then, and it continues to lack any merit now.

When Petitioners filed their Petition for Rehearing En Banc with the Ninth Circuit in February 2013, they advanced six (6) substantive arguments related to the Free Speech claim. As one part of their sixth and last-ditch argument, Petitioners argued, in one paragraph, that *Reed II* "implicates" a circuit split on whether a plaintiff "must establish" an improper, suppressive government motivation when challenging a speech regulation. (*Id.* at p. 15.) Petitioners argued that the Eighth and Eleventh Circuits properly analyzed the issue, citing *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728 (8th Cir. 2011) and *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250

(11th Cir. 2005), while the Fourth, Fifth, Sixth, and Ninth Circuits did not, citing *Brown v. Town of Cary*, 706 F.3d 294 (4th Cir. 2013), *Asgeirsson v. Abbott*, 696 F.3d 454 (5th Cir. 2012), *cert. denied*, 133 S.Ct. 1634, 185 L.Ed.2d 616 (2013), *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 622 (6th Cir. 2009), and *Reed II*. (United States Court of Appeals for the Ninth Circuit, Case No. 11-15588, ECF Dkt. No. 34, pp. 15-16.)

In Response, Gilbert noted that Petitioners had failed to argue that any circuit split actually existed that could be resolved by the Ninth Circuit en banc. (*Id.* at Dkt. No. 36, p. 9.) Gilbert noted that two circuits (Eighth and Eleventh) seemed to strictly apply the "officer must read it" test, while the majority of circuits (Third, Fourth, Fifth, Sixth, Seventh, and Ninth) employed a more practical test of examining elements of the speech as described by the Supreme Court in *Hill*. The government's content-neutral motives as the sole, determining factor, with no further analysis required, was *not* the holding in any of these cases. Thus, contrary to Petitioners' misstatement (Pet., pp. 20, 26), Gilbert never "conceded" or even addressed the issue of a so-called circuit split on a "subjective, motive-based" test – because such a test was not at issue in the cases cited by Petitioners.

Now, in their Petition to this Court (filed in October 2013), Petitioners have dramatically changed what they contend to be the parameters of a so-called circuit split, while intentionally but erroneously

placing the Ninth Circuit in the minority of that purported split. First, the Fourth and Sixth Circuits have not adopted a subjective, motive-based test, as argued by Petitioners. In the case cited by Petitioners, the Fourth Circuit relied upon *Hill* and Fourth Circuit precedent to reiterate its three-part operative test for content neutrality. *See Brown*, 706 F.3d at 302-03.[7] The Fourth Circuit expressly rejected any argument that a government's content-neutral motives, standing alone, would save a content-based restriction. *See id.* at 303-04 (citing and quoting *Turner Broad. Sys.*, 512 U.S. at 642-43, 114 S.Ct. at 2459). The Sixth Circuit cited *Ward* and *Hill* for the same three-part analysis. *See H.D.V.-Greektown*, 568 F.3d at 621-24. Second, the Third Circuit has long followed the same rationale. *See Rappa v. New Castle Cty.*, 18 F.3d 1043, 1065 (3d Cir. 1994) (concluding that state may exempt from a general ban such speech having content with a significant relationship to a specific location or its use, so long as the state did not make the distinction in an attempt to censor certain viewpoints); *see also Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 390-92 (3d Cir. 2010)

[7] The independent factors are: whether "(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." *Id.* (quoting *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 366 (4th Cir. 2012) (internal citation omitted)). These are the same, independent factors discussed in *Hill*.

(considering lack of evidence that zoning board sought to censor certain viewpoints in denying sign applications as one part of analysis, and then considering other factors), *cert. denied*, 131 S.Ct. 1008, 178 L.Ed.2d 828 (2011). Moreover, although Petitioners ignored the Fifth and Seventh Circuits, published decisions from these circuits likewise are in accord. *See Asgeirsson*, 696 F.3d at 460 ("A regulation is not content-based, however, merely because the applicability of the regulation depends on the content of the speech."), at n. 6 (citing *Ward*, 491 U.S. at 791), and at n. 7 (collecting Fifth Circuit cases dating back to 1999); *A.C.L.U. of Illinois v. Alvarez*, 679 F.3d 583, 603 (7th Cir. 2012) (citing *Ward*, 491 U.S. at 791, and *Hill*, 530 U.S. at 721, for support that a law is not content-based simply because a court must look at the content of a statement to determine whether a rule of law applies), *cert. denied*, 133 S.Ct. 651, 184 L.Ed.2d 459 (2012).

Petitioners now argue that the First and Second Circuits are on the other side of a purported split on a subjective, motive-based test, but the cited cases do not support their argument. In the 1985 case from the First Circuit, the court invalidated a town bylaw that banned all outdoor signs on private property, including political signs – "a form of speech generally accorded great protection" – but excepted commercial signs related to the premises. *See Matthews v. Town of Needham*, 764 F.2d 58, 60-61 (1st Cir. 1985). The court did not base its holding on the government's content-neutral motives, but rather found the bylaw

unconstitutional because it prohibited almost all forms of noncommercial speech on private property. *See id.* at 61. Similarly, the 1990 case from the Second Circuit cited by Petitioners concerned the differences between commercial and noncommercial speech. *See Nat'l Adv. Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir. 1990). In that case, the court invalidated one portion of a sign code for the reason that the record contained no evidence of the particular governmental interests sought to be advanced by a wholesale ban on all commercial speech. *See id.* at 556.

Even the Eighth Circuit case cited by Petitioners does not support their argument that the Eighth Circuit falls on what Petitioners describe as the "correct" side of a so-called "subjective, motive-based" test. In *Neighborhood Enterprises*, the Eighth Circuit noted that "a content-neutral justification for the regulation . . . is not given controlling weight without further inquiry." *See* 644 F.3d at 737 (internal quotations and citations omitted). This analysis is consistent with *Ward* and *Hill*. The Eighth Circuit further stated that a city's content-neutral justification for a speech regulation must accomplish that purpose in a content-neutral manner, and a city cannot differentiate between speakers for reasons unrelated to the legitimate interests that prompted the regulation. *Id.* Therefore, contrary to Petitioners' argument, the Eighth Circuit examines the government's motivation for the speech regulation as one part of the entire analysis.

This leaves Petitioners with just the Eleventh Circuit's decision in *Solantic*, decided in 2005. In that case, the Eleventh Circuit noted there was no evidence in the record that the city had acted with animus toward the ideas contained in the plaintiffs' publications. *See* 410 F.3d at 1259, n. 8. However, the *lack* of such evidence was not case-dispositive – *i.e.*, the lack of discriminatory animus did not render a law content-neutral. Therefore, even the Eleventh Circuit does not fall on what Petitioners describe as the "correct" side of a so-called "subjective, motive-based" test.

Instead, as discussed above, the Eighth and Eleventh Circuits have applied absolute interpretations of an "officer must read it" test. Such an interpretation has been rejected by the majority of courts, *see Brown*, 706 F.3d at 302 (collecting numerous cases), and is inconsistent with *Hill*. However, that issue is *not* the question presented in the Petition. None of the circuit cases cited in the Petition hold that a city's "mere assertion" of a lack of discriminatory motive renders a law content-neutral, with no further analysis required. (Petition's "question presented," p. i.) Simply put, a review of the cases cited by Petitioners as representing either side of a so-called circuit split on a "subjective, motive-based" test reveals that no such split exists.

Because the Ninth Circuit in *Reed II* did *not* create or adopt a "subjective, motive-based" test and

because a circuit split over such a test does *not* exist, the Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny review.

Respectfully submitted,

ROBERT GRASSO, JR.
Counsel of Record
KIM S. ALVARADO
JENNY J. WINKLER
GRASSO LAW FIRM, P.C.
2430 West Ray Road, Suite 3
Chandler, Arizona 85224
Telephone (480) 730-5553
rgrasso@grassolawfirm.com
kalvarado@grassolawfirm.com
jwinkler@grassolawfirm.com
Attorneys for Respondents Town of Gilbert, Arizona, and Adam Adams

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