No. 13-502

In the Supreme Court of the United States

CLYDE REED, ET AL., PETITIONERS

v.

TOWN OF GILBERT, ARIZONA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRUICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether respondents' sign ordinance, which imposes more stringent limitations on certain "temporary directional signs" than it imposes on "ideological" or "political" signs, violates the First Amendment.

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INTEREST OF THE UNITED STATES

This case presents the question whether a particular municipal sign ordinance, which differentiates between certain types of noncommercial signs, is consistent with the First Amendment. The United States has a substantial interest in the resolution of issues concerning the constitutional limits on sign regulation. The Department of Transportation, for example, implements the Highway Beautification Act of 1965, Pub. L. No. 89-285, § 101, 79 Stat. 1028 (23 U.S.C. 131), which encourages States to limit signs along certain major highways in the interest of promoting highway safety and preserving natural beauty. Although the ordinance at issue here differs in significant respects from that Act, the analysis that the

Court adopts in this case may have ramifications for that Act and other federal regulation.

STATEMENT

1. The display of signs has long been subject to regulation on the federal, state, and local levels. The Highway Beautification Act of 1965, Pub. L. No. 89-285, § 101, 79 Stat. 1028 (23 U.S.C. 131), for example, imposes certain limitations on signs near particular federally funded highways, in order "to protect the public investment in * * * highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. 131(a). The Act conditions ten percent of a State's federal highway funds on the State's "effective control of the erection and maintenance * * * of outdoor advertising signs, displays, and devices" in designated areas. 23 U.S.C. 131(b). In consultation with the federal Department of Transportation, every State has enacted sign controls that comply with the Act.

As a general matter, the Act addresses only signs visible from and within 660 feet of Interstate or "primary system" highways, with signs outside that area generally subject to regulation only if they are in nonurban areas and were "erected with the purpose of their message being read from [the] main traveled way." 23 U.S.C. 131(b); see 23 U.S.C. 131(t) (defining "primary system" highways). Thus, the Act does not provide for state regulation of very small signs or signs that are not visible from a regulated roadway. Within regulated areas that are not designated by the State as industrial or commercial, the Act limits signs to (1) "directional and official" signs; (2) signs "advertising the sale or lease of property upon which they are located"; (3) signs "advertising activities conduct-

ed on the property on which they are located"; (4) landmark signs, or signs of "historic or artistic significance the preservation of which would be consistent with the purposes of" the Act; and (5) signs "advertising the distribution by nonprofit organizations of free coffee." 23 U.S.C. 131(c); see 23 U.S.C. 131(d) (allowing States to enter into customized agreements with the federal government about sign regulation in industrial and commercial areas); see also 23 U.S.C. 131(s) (specialized restrictions for designated scenic byways). The Act additionally provides for the designation of fixed locations for signs "giving specific information in the interest of the traveling public." 23 U.S.C. 131(f); see 23 U.S.C. 131(*o*) (grandfather clause for certain signs that "provide directional information about goods and services in the interest of the traveling public").

2. This case concerns a municipal sign ordinance, enacted by the Town of Gilbert, Arizona, that is unrelated to the federal Highway Beautification Act and differs significantly from that Act in its scope, operation, and authorization for various types of signs.[*] The asserted purposes of the ordinance are to "assure proper and efficient expression through visual communications involving signs compatible with the character and environment of the Town; to eliminate confusing, distracting, and unsafe signs; and to enhance the visual environment of the Town." Pet. App. 142a

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[*] Although the Gilbert municipal ordinance was amended during the pendency of this appeal, the government agrees with the court of appeals that the 2008 version of the sign ordinance remains subject to judicial review. See Pet. App. 17a-20a. This brief will accordingly cite that version of the ordinance, although it will focus on provisions that have not meaningfully changed.

(Gilbert, Ariz., Land Development Code (GLDC) § 4.401 (2008)). The ordinance generally requires anyone who wishes to post a sign within town limits to obtain a permit. *Id.* at 144a (GLDC § 4.402(A)). The ordinance contains numerous exceptions to that permit requirement for specific types of signs, *id.* at 144a-147a (GLDC § 4.402(D)), three of which are particularly relevant here:

- "*Ideological Signs*." These are defined as signs "communicating a message or ideas for noncommercial purposes" that do not fall into one of several more specific categories. Pet. App. 153a-154a. The only restriction on such signs is that they "be no greater than 20 square feet in area and 6 feet in height." *Id.* at 145a (GLDC § 4.402(D)(8)), 148a (GLDC § 4.402(J)).
- "*Political Signs*." These are defined as signs that "support[] candidates for office or urge[] action on any other matter" on a national, state, or local ballot. Pet. App. 154a. Such signs may be up to 16 square feet (on residential property) or 32 square feet (on nonresidential property) in size; may be up to six feet in height; may remain in place for several days after the election; and are not generally limited in number. *Id.* at 145a (GLDC § 4.402(D)(7)), 147a (GLDC § 4.402(I)).
- "*Temporary Directional Signs Relating To a Qualifying Event.*" These are defined as signs "not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display," that are "intended to direct pedestrians, motorists, and other passersby" to "any assembly, gathering, activity, or meeting sponsored, arranged or promoted by a religious, chari-

table, community service, educational, or other similar non-profit organization." Pet. App. 154a. Such signs may be "no greater than 6 feet in height and 6 square feet in area"; no more than four such signs "may be displayed on a single property at any time"; and such signs may be displayed only "12 hours before, during, and 1 hour after" the event. *Id.* at 146a (GLDC § 4.402(D)(15)), 148a-149a (GLDC § 4.402(P)(1)-(3)).

3. Petitioners are a small church in Gilbert and its pastor. Pet. App. 3a-4a. In accordance with their religious belief that they should "reach[] out to the community to meet on a regular basis," petitioners displayed directional signs near their place of worship (an elementary school in Gilbert) advertising the time and location of their services. *Id.* at 5a. The town and its code compliance manager, respondents here, treated the signs as temporary directional signs under the town ordinance and sought to enforce the restrictions applicable to such signs. *Id.* at 5a-7a.

Petitioners filed suit challenging the ordinance on the ground, *inter alia*, that it unconstitutionally restricted speech. Pet. App. 8a. The district court denied a preliminary injunction. *Id.* at 117a-140a. It believed that a restriction on temporary directional signs was inherently a "content-neutral" regulation subject only to an "intermediate level of scrutiny," and that respondents' limitations on such signs were not excessive. *Id.* at 126a-140a; see *id.* at 135a-138a (reasoning that because signs with commercial messages were subject to greater restrictions than petitioners' signs, the ordinance did not impermissibly favor commercial over noncommercial speech).

The court of appeals affirmed in part and remanded in part. Pet. App. 85a-115a. It agreed that respondents' specific regulation of temporary directional signs "does not of itself violate the First Amendment." *Id.* at 87a; see *id.* at 102a-111a; see also *id.* at 111a-113a (finding no abuse of discretion in district court's conclusion that ordinance did not impermissibly distinguish between commercial and noncommercial speech). It reasoned that the regulation was not inherently content-based, because its application turned not on "any idea or viewpoint," but instead on "'who' is speaking and 'what event' is occurring." *Id.* at 102a-103a. And it found that the regulation's "restrictions on time, place, and manner * * * would indeed appear to 'actually advance' [respondents'] aesthetic and safety interests by limiting the size, duration, and proliferation of signs." *Id.* at 108a. The court remanded, however, for the district court to address petitioners' claim that "the ordinance unfairly discriminates among forms of noncommercial speech." *Id.* at 87a.

4. The district court subsequently granted summary judgment for respondents. Pet. App. 53a-84a. In addition to reaffirming the conclusions reached in its earlier ruling, *id.* at 62a-70a, it concluded that the ordinance did not unlawfully discriminate between different types of noncommercial speech, *id.* at 70a-74a.

The court of appeals affirmed. Pet. App. 1a-52a. Applying law-of-the-case doctrine, the court adhered to its previous determination that the restrictions on temporary directional signs were, in isolation, content-neutral and constitutional under intermediate scrutiny. *Id.* at 21a-22a. It then reasoned that be-

cause the various types of signs excepted from the permit requirement were "not in competition" with one another, the constitutionality of the ordinance's treatment of temporary directional signs was "not affected" by the ordinance's treatment of ideological and political signs. *Id.* at 33a. The court also reasoned that applying greater restrictions to temporary directional signs than to ideological and political signs was permissible because (1) the First Amendment required an exception to the permit requirement for political and ideological signs, but not temporary directional signs; (2) the time limits on displaying temporary directional signs were legitimately tied to the inherently impermanent purpose of such signs; and (3) the town deserved deference as to the reasonableness of its restrictions, *id.* at 37a-39a.

Judge Watford dissented. Pet. App. 45a-52a. He recognized that governmental regulation of "speech in a public forum" may permissibly "draw distinctions among different categories of non-commercial speech" so long as "those distinctions are justified by some non-communicative aspect of the speech involved." *Id.* at 47a (citing *Carey* v. *Brown*, 447 U.S. 455, 465 (1980); *Police Dep't* v. *Mosley*, 408 U.S. 92, 100 (1972)). He would have held, however, that the distinctions drawn by respondents' ordinance were not sufficiently connected to the town's asserted interests in safety and aesthetics. *Id.* at 51a.

SUMMARY OF ARGUMENT

The court of appeals erred in upholding respondents' sign ordinance, which would be unconstitutional regardless of whether strict or intermediate First Amendment scrutiny applies. To the extent it is necessary to determine the appropriate level of scrutiny,

the Court should hold that intermediate scrutiny applies in the particular context of a sign-regulation scheme premised solely on the government's substantial and content-neutral interests in safety and aesthetics. Those interests have long been understood as valid bases for limiting the proliferation of signs; they can justify not only general limitations on signs, but also exceptions for signs whose content promotes (or does not significantly detract from) safety and aesthetics; and the existence of such exceptions should not in itself trigger strict scrutiny. Even under intermediate scrutiny, however, respondents' ordinance—in contrast to the more carefully calibrated Highway Beautification Act—draws distinctions between different types of signs that are not sufficiently connected to safety and aesthetic rationales.

I. This Court has long viewed laws that "stifle[] speech on account of its message," *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 641 (1994), with more skepticism than laws "justified without reference to the content of the regulated speech," *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted). The former are typically labeled "content based" and subject to strict scrutiny, while the latter are typically labeled "content neutral" and subject to less-exacting "intermediate" scrutiny. But because the content-based and content-neutral labels, at bottom, reflect judgments about the degree to which a law risks infringing on the core protections of the First Amendment, laws are not always easy to place in one category or the other, and classification may require close analysis.

In particular, laws that affect different content in different ways, but whose rationales are not inherent-

ly tied to the communicative impact of speech, have sometimes been treated as content-neutral, and evaluated under intermediate scrutiny, in contexts where the connection between the rationales and the regulation is readily apparent and generally innocuous. Facially neutral laws with disproportionate impact on certain content, for example, are typically subject only to intermediate scrutiny. See *Rock Against Racism*, 491 U.S. at 791. Likewise, a law regulating the location of theaters only when they show adult films can properly be considered content-neutral (or at least evaluated under intermediate scrutiny) when the city's rationale for the law is based not on the content of the films, but the secondary effects of the theaters on the surrounding community. See *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986). And the Court has acknowledged that a law prohibiting newsracks only when they contain certain types of publications could be considered content-neutral if the distinction were based on neutral rationales. See *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 428-429 (1992).

Laws that regulate the display of signs are typically premised on the content-neutral rationales of promoting safety and aesthetics. In the specialized context of sign regulation, those substantial government interests can support not only an overall limitation on the visual clutter than signs can create, but also particularized exceptions for signs containing certain content. A municipality could legitimately conclude, for example, that a sign regulation's overall goal of safety would be enhanced by allowing privately displayed signs that warn drivers about potential safety hazards (*e.g.*, "Kids At Play") to have attention-

attracting features (such as bright colors) that are forbidden to other (non-safety-related) signs. The existence of such an exception, which itself has a safety-based rationale, should not change the overall content-neutral character of the scheme or the propriety of intermediate scrutiny.

A sign-regulation scheme that contains safety- and aesthetics-based exceptions typically does not give rise to any substantial concern that the government is attempting to shape public debate or that its interests are pretextual. Subjecting sign regulations to strict scrutiny whenever they draw distinctions defined by reference to a sign's content will have the perverse effect of discouraging sign-regulation provisions that could advance the legislature's goals equally well (or even better) while restricting less speech. Application of intermediate scrutiny, on the other hand, will promote speech by encouraging sensible exceptions to sign restrictions, while still allowing courts to identify exceptions that are not carefully drawn to advance content-neutral interests.

II. Respondents' sign ordinance cannot satisfy intermediate scrutiny. A temporary directional sign does not inherently create any more visual clutter than an ideological or political sign, and no safety or aesthetic rationale adequately supports allowing unlimited ideological or political signs of up to 32 square feet in size, while allowing only a limited number of temporary directional signs of only six square feet apiece. And while respondents have a legitimate safety- and aesthetic-related rationale for requiring that temporary directional signs be taken down following the conclusion of the event to which they relate (and have thus served their purpose), the stringent

time limitations here restrict considerably more speech than that rationale would support.

Although not at issue in this case, the more finely honed provisions of the federal Highway Beautification Act provide a useful contrast to respondents' less coherent restrictions. The federal Act applies to signs only in particular places near certain federally funded highways. And the exceptions for certain signs within those zones, which allow for safety- and aesthetic-promoting signs such as directional and landmark signs, are consistent with the overall neutral purposes of the scheme. The Court accordingly can and should hold respondents' ordinance unconstitutional without calling into question the constitutionality of the Highway Beautification Act.

ARGUMENT

Judicial consideration of whether a particular law violates the First Amendment's Free Speech Clause frequently requires a threshold determination of "the level of scrutiny applicable" to the challenged regulation. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994). Respondents' ordinance would be unconstitutional under either strict or intermediate scrutiny, and thus the Court need not decide which would apply. Should the Court address that question, however, it should hold that intermediate scrutiny is appropriate for a sign regulation when the government's rationales for the regulation are limited to its substantial interests in safety and aesthetics. Safety and aesthetics are long-accepted rationales for sign regulation. A legislature seeking to limit expressive activity no more than necessary to promote those goals might well except signs with certain content—say, signs that warn the public about safety hazards—from

restrictions applicable to other types of signs. So long as the contours of a particular sign regulation are adequately supported by reference the long-accepted rationales of safety and aesthetics, the regulation should be deemed constitutional. Even under that standard, however, respondent's ordinance, unlike the federal Highway Beautification Act, would be unconstitutional.

I. A SIGN REGULATION PREMISED SOLELY ON SAFETY AND AESTHETICS SHOULD BE SUBJECT TO INTERMEDIATE SCRUTINY

The level of scrutiny applicable to a particular law is generally determined by whether the law is labeled "content based" or "content neutral." See, *e.g.*, *Turner Broad. Sys.*, 512 U.S. at 641-643. The Court typically applies "strict scrutiny" to a law labeled content-based, upholding the law when it is "the least restrictive means of achieving a compelling state interest." *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2530 (2014). The Court applies "intermediate scrutiny" to a law labeled content-neutral, upholding the law so long as it "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 26-27 (2010) (citation omitted). Under this Court's pragmatic and context-dependent approach to content-neutrality, a comprehensive sign-regulation scheme, whether or not it contains content-specific exceptions, should be subject only to intermediate scrutiny when its rationales are limited to the substantial governmental interests in safety and aesthetics.

A. This Court Has Taken A Context-Dependent Approach In Determining Whether To Label A Law Content-Neutral And Apply Intermediate Scrutiny

1. The "content based" and "content neutral" labels are usually determinative of the level of scrutiny a law will receive, which, in turn, is often determinative of its constitutionality. Accordingly, the Court has not always applied those labels in a mechanical way. Instead, it has treated them essentially as shorthand for nuanced judgments about the manner in which a particular law implicates the First Amendment and the degree of judicial skepticism it warrants. See, *e.g.*, *City of L.A.* v. *Alameda Books, Inc.*, 535 U.S. 425, 448-449 (2002) (Kennedy, J., concurring in the judgment) (postulating that a prior decision had employed the content-neutral label to describe a situation in which a law, more literally considered content-based, should be subject to "intermediate rather than strict scrutiny" due to its "built-in legitimate rationale"). As a result, "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task." *Turner Broad. Sys.*, 512 U.S. at 642. The Court has refrained from adopting a one-size-fits-all rule that would dictate the standard of review, and it has sometimes labeled laws content-neutral even where they implicitly or explicitly have differential effects on various types of content.

The Court's approach reflects the reality that some types of governmental regulation endanger core First Amendment values more than others. "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys.*, 512 U.S. at 641. A

law that "stifles speech on account of its message * * * contravenes this essential right" and "'rais[es] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *Ibid.* (quoting *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)). Such a law accordingly receives "the most exacting scrutiny." *Id.* at 642. "In contrast, regulations that are unrelated to the content of speech * * * in most cases pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Ibid.* They thus receive a more deferential form of review. *Ibid.*; see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 443-456 (1996) (*Private Speech*) (explaining that the content-based and content-neutral labels can be seen to reflect different default levels of skepticism about the underlying motives of the enacting legislature).

2. The Court has explained that the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys." *Turner Broad. Sys.*, 512 U.S. at 642 (brackets omitted) (quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989)). In most cases, the terms of a law make clear whether it should be labeled content-based or content-neutral. The determination of content-neutrality, is not, strictly speaking, a purely textual inquiry; the Court has repeatedly stressed that "[g]overnment regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regu-

lated speech.'" *Rock Against Racism*, 491 U.S. at 791 (quoting *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). But "[t]he purpose, or justification, of a regulation will often be evident on its face." *Turner Broad. Sys.*, 512 U.S. at 642.

Accordingly, "[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views expressed are content based." *Turner Broad. Sys.*, 512 U.S. at 643. The rationales for a law that draws facial distinctions based on the content of speech are typically themselves content-focused. See, *e.g.*, *Republican Party* v. *White*, 536 U.S. 765, 768, 775 (2002) (rationales advanced for prohibition on judicial candidates' announcement of views on certain issues included having judges appear impartial); *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 336, 348 (1995) (rationales advanced for ban on distributing anonymous campaign literature included "providing the electorate with relevant information"); see, *e.g.*, *Consolidated Edison Co. of N.Y., Inc.* v. *Public Serv. Comm'n*, 447 U.S. 530, 532, 537 (1980) (rationale advanced for ban on utility-bill inserts that discussed certain issues was that "consumers will benefit from receiving 'useful' information, but not from the prohibited information").

By the same token, "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Turner Broad. Sys.*, 512 U.S. at 643. Where the law on its face regulates evenhandedly, the rationales for the law (even if not sufficient to sustain the law's constitutionality) typically are not premised on favoritism of one type of speech over another. See,

e.g., *Bartnicki* v. *Vopper*, 532 U.S. 514, 517, 529 (2001) (rationales advanced for statute prohibiting knowing disclosure of illegally intercepted communications were "removing an incentive for parties to intercept private conversations" and "minimizing the harm to persons whose conversations have been illegally intercepted"); *Frisby* v. *Schultz*, 487 U.S. 474, 476, 484 (1988) (rationale advanced for ban on picketing "'before or about' any residence" was "protect[ing] residential privacy"); *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 643, 651 (1981) (rationale advanced for rule limiting "'sale or distribution of any merchandise, including printed or written material'" to preassigned booths on fair grounds was "interest in the orderly movement of a large crowd and in avoiding congestion") (brackets omitted).

3. Some situations, however, require a deeper inquiry into whether the challenged law should be labeled content-based or content-neutral. Of particular relevance here, the Court has taken a context-sensitive approach to ascertaining the appropriate level of scrutiny for a law that implicitly or explicitly has varying impacts on different types of content, but has content-neutral rationales.

The Court has made clear that "the mere assertion of a content-neutral purpose" will not in itself preclude the application of strict scrutiny to a law that "on its face, discriminates based on content." *Turner Broad. Sys.*, 512 U.S. at 642-643 (emphasis added). In *Carey* v. *Brown*, 447 U.S. 455 (1980), for example, the Court applied strict scrutiny to a law that banned all non-labor-related picketing in certain areas, notwithstanding an asserted content-neutral rationale of

protecting residential privacy. *Id.* at 464-465. And in *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987), the Court applied strict scrutiny to a law that taxed magazines on some topics but not others, notwithstanding the law's asserted content-neutral rationales of raising revenue, promoting fledgling publications, and fostering communication. *Id.* at 228-234. In both cases, the Court observed that the asserted rationales for the laws did not meaningfully explain the distinctions the laws drew. *Id.* at 231-232; *Carey*, 447 U.S. at 465.

Those decisions do not, however, demonstrate that laws imposing differential restrictions on particular types of content *invariably* receive strict scrutiny. "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." See *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 501 (1980) (plurality opinion) (quoting *Kovacs* v. *Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)). The Court has accordingly recognized that in certain limited contexts, where content-specific regulations have evident and sensible content-neutral rationales, less judicial skepticism is warranted. In particular, the Court has recognized that a law's content-neutral rationale may be the overriding factor in at least three distinct situations.

First, the Court has typically classified a facially neutral law with disproportionate impacts on certain types of content as content-neutral, so long as the law's rationale does not take content into account. In *Ward* v. *Rock Against Racism*, *supra*, for example, the Court explained 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." 491 U.S. at 791; see *Christian Legal Soc'y Chapter* v. *Martinez*, 130 S. Ct. 2971, 2994 (2010) (same); *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 294-295 (2000) (plurality opinion) (similar); see also *McCullen*, 134 S. Ct. at 2531 ("[A] facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics.").

Second, the Court has classified a law as content-neutral, even when it draws *express* distinctions between different types of content, so long as the law's rationale is focused on the "secondary effects" of the speech. In *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986), for example, the Court applied intermediate scrutiny to a municipal ordinance prohibiting "adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school." *Id.* at 43; see *id.* at 50; see also *Alameda Books*, 535 U.S. at 433-442 (plurality opinion) (applying *Playtime Theatres* to another regulation on the location of adult businesses). Although the ordinance "treat[ed] theaters that specialize in adult films differently from other kinds of theaters," the Court attached controlling weight to the fact that the ordinance was "*aimed* not at the content of the films shown at 'adult motion picture theatres,' but rather at the secondary effects of such theaters on the surrounding community." *Playtime Theatres*, 475 U.S. at 47 (emphasis added; emphases omitted).

Observing that the ordinance furthered the city's "zoning interests" in "prevent[ing] crime, protect[ing] the city's retail trade, maintain[ing] property values,

and generally protect[ing] and preserv[ing] the quality of the city's neighborhood, commercial districts and the quality of urban life," the Court found it to be "completely consistent with [the] definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'" *Playtime Theatres*, 475 U.S. at 48 (quoting *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)). The Court emphasized that the ordinance did "not contravene the fundamental principle that underlies [the] concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.'" *Id.* at 48-49 (quoting *Police Dep't* v. *Mosley*, 408 U.S. 92, 95-96 (1972)); see *Alameda Books*, 535 U.S. at 448-449 (Kennedy, J., concurring in the judgment) (suggesting that *Playtime Theatres* is an example of a content-based restriction that should nevertheless be subject only to intermediate scrutiny).

Third, the Court has recognized that, even outside the context of the "secondary effects" doctrine at issue in *Playtime Theatres*, a law drawing express distinctions between different types of content may be treated as content-neutral, when the distinctions are adequately supported by content-neutral rationales such as safety and aesthetics. In *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410 (1992), a city had banned "newsracks dispensing 'commercial handbills,'" but allowed newsracks dispensing other types of publications. *Id.* at 418. The city argued that the ban should be viewed as content-neutral because it

served legitimate interests in "safety and esthetics" that were "entirely unrelated to the content of respondents' publications." *Id.* at 428-429. Although the Court rejected that argument on the ground that the city had "no justification for [its] particular regulation other than [its] naked assertion that commercial speech has 'low value,'" *id.* at 429, it accepted the general principle that content-neutral rationales might warrant labeling even a law that distinguishes between different publications as content-neutral. *Id.* at 429-430; see *id.* at 430 (separately discussing the "secondary effects" doctrine of *Playtime Theatres*). In particular, the Court made clear that if the city had indeed advanced "a neutral justification for its selective ban on newsracks," it could have "defend[ed] its newsrack policy as content neutral." *Id.* at 429-430; see *id.* at 424 (noting that the distinction between commercial and noncommercial publications "bears no relationship *whatsoever* to" safety and aesthetics).

B. Intermediate Scrutiny Is Appropriate When The Rationales Advanced For A Sign-Regulation Scheme Are Limited To Safety And Aesthetics

The foregoing considerations make intermediate scrutiny appropriate in the particular context of certain sign regulations. The substantial and content-neutral interests in safety and aesthetics that typically underlie regulation of signs can also lead legislatures to craft exceptions to a generalized sign regulation for signs that either enhance or do not unduly infringe upon those interests. Accordingly, where the rationales advanced for a sign-regulation scheme, including any exceptions it may contain, are limited to safety and aesthetics, the scheme should be subject to intermediate scrutiny.

1. As this Court has recognized, the government's substantial interests in enhancing safety and aesthetics can support at least some restrictions on signs. In *Metromedia, Inc.* v. *City of San Diego*, *supra*, for example, "[t]he Court concluded that [a] city's interest in traffic safety and its esthetic interest in preventing 'visual clutter' could justify a prohibition of off-site commercial billboards even though similar on-site signs were allowed." *City of Ladue* v. *Gilleo*, 512 U.S. 43, 49 (1994); see *Metromedia*, 453 U.S. at 509 (plurality opinion) ("We * * * hesitate to disagree with the accumulated, common-sense judgment of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety."). Similarly, in *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789 (1983), the Court "reaffirmed" that the "interest in avoiding visual clutter" recognized in *Metromedia* was substantial, *id.* at 805-808, and found that interest sufficient to support a city's prohibition on posting signs on public property. *Id.* at 805-808, 817; see *id.* at 807 (recognizing that a "visual assault * * * presented by an accumulation of signs" can be "a significant substantive evil"); see also *Gilleo*, 512 U.S. at 50. And in *City of Ladue* v. *Gilleo*, *supra*, the Court unanimously recognized that "signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." 512 U.S. at 48.

A legislature undertaking sign regulation for the enhancement of safety and aesthetics may have strong reasons for differentiating between signs containing certain types of content. In the absence of such distinctions, the regulation would not only be "subject to

attack on the ground that [it] simply prohibit[s] too much protected speech," *Gilleo*, 512 U.S. at 51, but could affirmatively *disserve* the interests that the legislature is legitimately seeking to advance. In the context of the Highway Beautification Act, for example, a prohibition so sweeping as to ban even roadside directional signs would *reduce* traffic safety by eliminating a vital navigation aid for drivers. Similarly, a prohibition against brightly colored signs (likely to be particularly distracting and aesthetically displeasing) might legitimately contain an exception for signs providing important safety-related information (which will be more effective if they attract attention), such as a sign at a private school warning motorists of the presence of children. Or a regulation prohibiting signs that obstruct scenic views might contain an exception for signs that enhance appreciation of the landscape, such as signs that call visitors' attention to particularly impressive natural features or that mark historically significant sites.

2. The Court has previously acknowledged, but has not resolved, the analytical difficulty presented by sign regulations that draw such distinctions. The billboard ordinance at issue in *Metromedia*, in addition to (permissibly) distinguishing between certain types of commercial speech, also distinguished between certain types of noncommercial speech, including by excepting certain types of signs from the ordinance's more general restrictions. 453 U.S. at 494-495 & n.3 (plurality opinion). Not all of those exceptions could have been supported by reference to safety and aesthetics, see *ibid.*, and the plurality opinion was skeptical of them, see, *e.g.*, *id.* at 512-517. A majority of the Court, however, would have allowed at least some types of

exceptions to a general scheme of sign regulation. See *id.* at 532 n.10 (Brennan, J., concurring in the judgment) (suggesting that such exceptions, no matter what their rationale, should be evaluated under a form of intermediate scrutiny, "with special care" given to "content-based exceptions"); *id.* at 554 (Stevens, J., dissenting in part) (reasoning that the "neutral exceptions in the * * * ordinance do not present [the] danger" of the government "shaping the agenda for public debate"); *id.* at 566 (Burger, C.J., dissenting) (reasoning that the city's "recognition of the need for certain exceptions permitting limited forms of communication, purely factual in nature and neutral as to the speaker" did not undermine its neutral objectives); *id.* at 570 (Rehnquist, J., dissenting) (reasoning that the ordinance's "limited exceptions" were not "the types which render this statute unconstitutional").

In *Gilleo*, the Court again addressed a municipal sign ordinance that excepted certain types of signs, including signs identifying safety hazards, from an otherwise-broad prohibition. 512 U.S. at 46-47 & n.6. The Court found the statute unconstitutional not because of the exceptions, but because *notwithstanding* the exceptions, the city's "near-total prohibition of residential signs" effectively "closed off" an "important medium" and thus prohibited too much speech. *Id.* at 53, 56; see *id.* at 51-59. Recognizing that sign ordinances present difficult analytical problems, because they are subject to attack as both overinclusive (if they do not contain exceptions) and underinclusive (if they do), the Court was willing to assume that "the various exemptions [were] free of impermissible content or viewpoint discrimination." *Id.* at

53; see *id.* at 51; see also *Taxpayers for Vincent*, 466 U.S. at 815-816 (discussing over- and underinclusivity problems in sign regulation). And it declined to dismiss out of hand the city's argument that the "mix of prohibitions and exemptions in the ordinance * * * reflect[ed] legitimate differences among the side effects of various kinds of signs, * * * only adventitiously connected with content" and that such differences "suppli[ed] a sufficient justification, unrelated to the City's approval or disapproval of specific messages, for carving out specified categories from the general ban." *Gilleo*, 512 U.S. at 52.

3. Should the Court reach the level-of-scrutiny question in this case, it should hold that a comprehensive sign regulation of the kind here is subject to intermediate scrutiny so long as the government's rationales for the regulation are limited to its substantial interests in safety and aesthetics. Even where a sign regulation contains exceptions for signs with certain content, the regulation remains "*justified* without reference to the content of the regulated speech," *Rock Against Racism*, 491 U.S. at 791 (citation omitted), when the rationales for the exceptions are based on safety or aesthetics. Exceptions that are crafted for safety and aesthetic purposes do not reflect a generalized favoritism for speech on certain topics, but instead ensure that the sign regulation does not sweep so broadly as to preclude expressive activity that advances (or, at least, does not undermine) the scheme's overall goals. Particularly in light of this Court's suggestion that the First Amendment might affirmatively *require* exceptions to a general sign ordinance for signs whose regulation does not promote the government's "traffic control and safety

interests" or "interests in esthetics," *Taxpayers for Vincent*, 466 U.S. at 816, it makes little sense to subject a sign ordinance to strict scrutiny simply because a legislature has itself paid close attention to the scope of regulation necessary to advance those interests.

A sign-regulation scheme with exceptions that rest solely on safety and aesthetic rationales does not intrude upon core First Amendment's values in the same way or to the same degree as the sort of content-based regulation traditionally subject to strict scrutiny. Cf. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992) ("When the basis for content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."). Exceptions with safety and aesthetic rationales are unlikely to "represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" *Gilleo*, 512 U.S. at 51 (quoting *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 785 (1978)). Similarly, "the combined operation of a general speech restriction and its exemptions" is unlikely to reflect a governmental effort to "select the 'permissible subjects for public debate' and thereby to 'control . . . the search for political truth,'" *ibid.* (quoting *Consolidated Edison*, 447 U.S. at 538), when any exceptions defined by reference to content must be supported by the content-neutral interests that underlie the scheme as a whole. And precisely because the exceptions are tied to the rationales for the scheme itself, they do not "diminish the credibility of the government's rationale for restricting speech in the first place." *Id.* at 52 (citing *Discovery Network*, 507 U.S. at 424-426).

Reviewing exceptions to a comprehensive sign regulation under strict scrutiny would undermine First Amendment interests by incentivizing legislatures to prohibit *more* speech, rather than less. As the Court has recognized, limitations on the scope of a sign regulation can "preserve[]" a "significant opportunity to communicate." *Taxpayers for Vincent*, 466 U.S. at 811. But if any customized exceptions defined by reference to content must be defended under strict scrutiny, then even an exception that enhances safety or aesthetics would render the ordinance vulnerable to invalidation. A legislature thus might well forgo such an exception, rather than risk a lawsuit by those seeking additional exceptions that might be inconsistent with safety and aesthetic goals. See *Gilleo*, 512 U.S. at 53 (noting that under a "content discrimination rationale," a city "might theoretically remove the defects in its ordinance by simply repealing all of the exemptions"). Under a rule effectively mandating that *every* type of sign be granted the same exception as *any* type of sign, exceptions will be rarer and more limited in scope. And sign-regulation schemes overall will be less precisely calibrated to restrict only as much expressive activity as necessary to promote the government's substantial content-neutral interests.

Reviewing such exceptions under intermediate scrutiny, on the other hand, would not invite legislative abuse. Because strict scrutiny would still apply when the government advances rationales *other* than safety and aesthetics to defend a regulatory distinction between noncommercial signs with different types of content, legislatures would not be able to make generalized value judgments about the relative utility of certain types of speech. See, *e.g.*, *Discovery*

Network, 507 U.S. at 428 (rejecting distinction based on "low value" of certain speech); see also *Linmark Assocs., Inc.* v. *Willingboro Twp.*, 431 U.S. 85, 86, 93-94, 98 (1977) (invalidating content-based sign restriction enacted "to stem what [the township] perceives as the flight of white homeowners from a racially integrated community"). And intermediate scrutiny is itself sufficiently robust to flush out cases in which asserted safety and aesthetic rationales for a particular exception are pretextual or insubstantial. See, *e.g.*, *McCullen*, 134 S. Ct. at 2534-2535 (observing that intermediate scrutiny "prevents the government from too readily 'sacrificing speech for efficiency'") (brackets omitted) (quoting *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)); *Private Speech*, 63 U. Chi. L. Rev. at 454 (noting that "flunking" intermediate scrutiny "demonstrates that a content-neutral law has an illegitimate basis").

Critically, in order to survive intermediate scrutiny, a government must show not only that an exception to a sign regulation is *in itself* "narrowly tailored to serve" safety and aesthetic interests, *McCullen*, 134 S. Ct. at 2534 (quoting *Rock Against Racism*, 491 U.S. at 796), but also that any *differential treatment* of various categories of signs is adequately supported. That requirement, which the court of appeals here did not apply, see Pet. App. 33a-41a, imposes significant constraints on legislatures and will lead courts to invalidate sign ordinances that lack appropriate precision.

II. RESPONDENTS' SIGN ORDINANCE FAILS INTERMEDIATE SCRUTINY, BUT THE HIGHWAY BEAUTIFICATION ACT WOULD NOT

Assuming that respondents' rationale for their sign ordinance is based solely on safety and aesthetics, and that the ordinance would thus be subject to intermediate scrutiny, the distinctions drawn by the ordinance would nevertheless be unconstitutional. See Pet. i (question presented encompassing both appropriate level of scrutiny and whether respondents' "differential treatment" of signs is "justif[ied]"). But a more limited and carefully crafted regulation, such as the Highway Beautification Act, would be consistent with the First Amendment.

A. Respondents' Differential Treatment Of Temporary Directional Signs Does Not Meaningfully Advance Interests In Safety And Aesthetics

1. To survive intermediate scrutiny, a regulation must exhibit a sufficiently "close fit between ends and means." *McCullen*, 134 S. Ct. at 2534. In this case, respondents have failed to adequately explain how the goals of improving safety and aesthetics are appropriately advanced by treating ideological and political signs much more favorably than temporary directional signs. Temporary directional signs "are no greater an eyesore," *Discovery Network*, 507 U.S. at 425, than ideological or political signs. And temporary directional signs, which will help some drivers find their destination, may actually improve traffic safety (or at least have safety benefits that offset the visual clutter they create) in ways that nondirectional ideological or political signs do not. Yet ideological and political signs may be three to five times larger than temporary directional signs, and they are not restricted in

number, as temporary directional signs are. Pet. App. 147a-148a (GLDC §§ 4.402(I), 4.402(J), (P)(1)-(2)).

Respondents' ordinance also imposes stringent time restrictions on temporary directional signs (which may only be displayed 12 hours before and one hour after an event) that it does not impose on ideological signs (which may be displayed indefinitely) or political signs (which may be displayed for extended periods). See Pet. App. 147a-149a (GLDC §§ 4.402(I), 4.402(J), (P)(3)). Safety and aesthetic rationales might in theory support somewhat stricter time limits on the display of temporary direction signs as opposed to other signs. Temporary directional signs relate to specific time-limited events; the expressive value of signs directing people to events that have already concluded (or will take place only far in the future) is limited; and respondents have an interest in eliminating the visual clutter caused by signs that are no longer (or are not yet) relevant. Indeed, out-of-date directional signs may be affirmatively unsafe, confusing motorists into driving around in search of events that are not actually occurring. Ideological and political signs present no such misdirection concerns and are considerably more likely to retain substantial expressive value as an indicator of ideological or political views even if they relate to an event (*e.g.*, the Vietnam War or the 2012 presidential election) that has long since passed.

But the strict time restrictions that respondents' ordinance imposes on temporary directional signs "burden substantially more speech than is necessary to further [respondents'] legitimate interests." *Rock Against Racism*, 491 U.S. at 799. The restrictions cover signs that clearly state the time and date of the

relevant events (and are thus substantially less likely to confuse drivers) as well as those that do not; they apply equally to recurring (and thus continuously relevant) events, such as daily prayer meetings, in the same way that they apply to one-time events; and they limit publicity for morning events like petitioners' largely to nighttime hours, during which the signs may be nearly impossible to see, see Pet. App. 49a (Watford, J., dissenting). Although a legislature deserves leeway as to the precise manner in which it addresses visual clutter from irrelevant signs, see *Rock Against Racism*, 491 U.S. at 800, the particular regulation here goes further than is reasonable to advance that legitimate objective.

2. The court of appeals suggested (Pet. App. 37a-38a) that ideological and political signs could be singled out for especially favorable treatment because imposing too many restrictions on such signs might itself create constitutional problems. See *Gilleo*, 512 U.S. at 54-59 (invalidating sign ordinance that "almost completely foreclosed" all signs and "totally foreclosed" signs containing "political, religious, or personal messages"). But this Court's decisions prohibit respondents from abstractly weighing the value, constitutional or otherwise, of different kinds of noncommercial speech and deciding that political and ideological signs are important enough to warrant the creation of visual clutter while temporary directional signs (like petitioners' religion-related signs) are not. See, *e.g.*, *Brown*, 447 U.S. at 460-471 (concluding that exemption from antipicketing law for labor-related picketing violated Equal Protection Clause); *Mosley*, 408 U.S. at 97-102 (same); see also *Taxpayers for Vincent*, 466 U.S. at 816 (suggesting that more favorable

treatment for signs on political topics might be unconstitutional). Such a value-driven approach, which would differentiate between types of signs that are "equally responsible" for "safety concerns and visual blight," *Discovery Network*, 507 U.S. at 426-427, would be explicitly content-based and would lack any sort of compelling justification sufficient to survive strict scrutiny.

If requiring a permit for ideological or political signs would in fact create a constitutional problem, see *Gilleo*, 512 U.S. at 58 n.17 (noting open question of constitutionality of sign regulations "short of a ban"), then respondents must address that problem in a more generalized way. Respondents could, for example, allow residents to display a small number of signs of any type, while requiring a permit for additional signs. Or they could generally allow only smaller signs but require a permit for larger ones. But they cannot create specialized exceptions that single out ideological and political signs for favorable treatment.

B. The Highway Beautification Act Is An Example Of A Constitutional Scheme Of Sign Regulation

In contrast to respondents' ordinance, the federal Highway Beautification Act is appropriately tailored to advance the government's substantial interests in safety and aesthetics without burdening substantially more speech than necessary. While this case does not call for the Court to express a view on the meaning or validity of that Act—see, *e.g.*, *Metromedia*, 453 U.S. at 515 n.20 (plurality opinion) (declining to address the Highway Beautification Act); *id.* at 534 n.11 (Brennan, J., concurring in the judgment) (same)—the Act's measured approach may be useful for purposes of comparison with respondents' less calibrated scheme.

As a threshold matter, the federal Act is more limited in scope than respondents' ordinance. While respondents' ordinance applies throughout the town, the relevant provisions of the Highway Beautification Act apply only within certain distances of particular federally funded highways. 23 U.S.C. 131(c)-(d). The Act is thus much more analogous to the sorts of zoning laws that this Court has analyzed under intermediate scrutiny. See *Playtime Theatres*, 475 U.S. at 48. In particular, the Act does not raise a concern, as respondents' ordinance might, of effectively "foreclos[ing] a venerable means of communication" for an entire community, *Gilleo*, 512 U.S. at 54.

Although the Highway Beautification Act contains certain narrow exceptions to the restrictions it encourages States to impose in particular areas, see 23 U.S.C. 131(c), those exceptions are closely tied to the safety and aesthetic rationales for the Act as a whole, see 23 U.S.C. 131(a). The exception for "directional and official" signs, including signs "pertaining to natural wonders" and "scenic and historic attractions," 23 U.S.C. 131(c)(1), enhances safety by ensuring that drivers receive important information that will aid in travel and navigation, and it enhances aesthetics by ensuring that drivers are informed of important features of the locale. See also 23 U.S.C. 131(f) and (*o*) (allowing certain other informational signs). The exceptions for for-sale and for-lease signs, as well as for signs (both commercial and noncommercial) relating to activities occurring on the property where the sign is displayed, 23 U.S.C. 131(c)(2)-(3), enhance safety by helping drivers locate relevant businesses and activities, and they have only a marginal impact on aesthetics, because they are integrated with the

use to which the land is already being put. See *Discovery Network*, 507 U.S. at 425 n.20 (discussing *Metromedia* and noting that signs about onsite activities can "guid[e] potential visitors to their intended destinations" and that signs about offsite activities may be more problematic because their content may change more frequently). The exception for landmark, historic, and artistic signs, 23 U.S.C. 131(c)(4), increases appreciation of an area's historical and aesthetic properties. And the exception for free coffee, 23 U.S.C. 131(c)(5), enhances safety by informing tired drivers about the availability of a pick-me-up.

All of these exceptions have the salutary effect of allowing more, rather than less, speech. None of them reflects the sort of value-laden judgments inherent in respondents' distinctions between, *inter alia*, ideologicial and political signs and other kinds of signs. And none of them "rais[es] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace," *Turner Broad. Sys.*, 512 U.S. at 641 (citation omitted). The Court should therefore hold that respondents' ordinance violates the First Amendment without suggesting that the Highway Beautification Act contains similar constitutional infirmities.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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