ORAL ARGUMENT SCHEDULED FOR MARCH 24, 2016

Nos. 12-7139 & 12-7140

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ACT NOW TO STOP WAR AND END RACISM, *et al.*,
APPELLEES & CROSS-APPELLANTS,

v.

DISTRICT OF COLUMBIA,
APPELLANT & CROSS-APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cross-Appellants' Responsive Supplemental Brief Addressing the Impact of *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218, 2224 (2015)

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GLOSSARY

ANSWER	plaintiff Act Now to Stop War and End Racism
MASF	plaintiff Muslim American Society Freedom Foundation
NOVs	Notices of Violation

I. The District's Sign Regulation is Content-Based and Expressly Makes Distinctions Based on the Content or Message of a Sign

The District's regulations at 24 D.C. MUN. REGS. § 108 *et seq.* regulate signs based on what the signs say. This is content-based regulation.

District inspectors read the content of signs to decide based on that content, and applying unfettered discretion to interpret that content, whether to issue a fine and/or require that a sign containing political speech be removed from public view.

The only signs at issue here are noncommercial signs. The District's challenged regulations already prohibit signs the content of which relates "to the sale of goods or services" *id.* § 108.5.

The signs precipitating this litigation called to stop a war and for a march at the White House. (JA298.) MASF and ANSWER affixed the signs to lampposts until, unprecedented in the District's history and sparked by a politically hostile television report, an approximately 300 baseless NOVs issued, which chilled MASF from further postering. (JA31.)

The relevancy of political advocacy to stop a war, and the discussion it engenders, does not, as the District argues, "expire" upon the occurrence of a related march. *See* District's Supplemental Br. 6 (insisting regulatory restrictions apply "only long after the communicative content of the sign has expired").

The District admits "a law that 'on its face draws distinctions based on the message a speaker conveys' meets th[e] test" to be deemed content-based. District's Supplemental Br. 3-4 (citing *Reed*, 135 S. Ct. at 2227).

The District refuses to concede the obvious, that its regulations meet this test and are, therefore, content-based and subject to strict scrutiny.

The District conflates viewpoint and content-based discrimination in its effort to gloss over its regulations' evident content-based constitutional infirmity. The District contends that the regulations do not distinguish *within* the topic of event-related signs and should therefore be saved. District's Supplemental Br. 5, 7. If the regulations distinguished between types of events, they might be viewpoint based. The fact that regulations facially restrict all noncommercial signs if the content relates to an event renders it a content-based distinction.

II. The District Mischaracterizes the *Reed* Opinion and Oral Argument

A. Justice Alito's Concurrence Regarding One-Time Events Should Not Be Read to Encompass Signs Conveying a Political Message of Continuing Relevancy

Justice Alito, joined by two Justices, joined in the opinion of the Court (i.e., thereby assented to both outcome *and* rationale of the majority opinion) and wrote separately to identify certain factual circumstances, not then present before the Court, which the Justices believe would not be deemed content-based.

Justice Alito identified "[r]ules imposing time restrictions on signs advertising a one-time event." *Reed*, 135 S. Ct. at 2223.

At oral argument, Justice Alito asked petitioner's counsel "What if it's commercial and it related to a one-time event. For example, for a yard sale." (Tr. 8 (attached)) (omitted from the District's transcript presentation). Justice Alito's inquiry highlighted the different constitutional protections between the one-day commercial yard sale and constitutionally protected political speech. *Ibid*. ("If [the government] allow[s] election-related signs to be put up in the right-of-way, then anybody who has a yard sale has an equal right?"); *See also* MASF Principal Br. 51-52; ECF No. 64 3 - 6, 16 – 18 (distinguishing political speech from one-day yard sale). Justice Alito's reference to a one-day commercial yard sale is readily distinguishable from signage containing protected political expression.

The District's argument regarding the "narrowest grounds" is inapplicable, pertaining solely to the treatment of a plurality opinion, i.e., when at least five Justices agree on the result but no single opinion garners five votes. District's Supplemental Br. 9 (citing *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 176 n.22 (D.C. Cir. 2015) discussing application of *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2556, 183 L. Ed. 2d 450 (2012) (plurality opinion)). There is no clearly established rule for affording such a simple concurrence precedential value or to treat it as a limitation on the Court's majority

opinion. *See* Igor Kirman, Note, *Standing Apart To Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 Colum. L. Rev. 2083 (1995).

B. At Oral Argument Justice Alito Disputed the Contention, Advanced by the District, that an Event Distinction Was Not Content-Based

The District argues its event-based distinction is not content-based, identifying selective portions of the argument transcript in *Reed*. Contrary to the District's presentation, Justice Alito challenged the argument that an event-based distinction was not content-based, and pointed to the fact that one would have to read the content of the sign. The District cuts off its transcript presented to the Court as this discussion continues onto page 18. (Tr. 17-18.)

C. The District Misrepresents its Own Regulations in the Context of *Reed*

The District further miscasts the import of the oral argument on the regulations at issue, promoting the *Reed* Petitioner's ostensible reference to the D.C. regulations. The *Reed* Petitioner misstated the District's regulations to the Court, evidently unfamiliar with their details. The Petitioner showed confusion over whether inspectors regulated based on the date of the event that was part of the content of the sign or by the date the sign was posted. (Tr. 18.)

The Petitioner further confused the District's regulations as similarly governing lawn signs as in *Reed*. The District does not regulate lawn signs in public space which proliferate to such a blighted extreme that the current Attorney General, who signed the District's brief, himself used thousands of lawn signs

staked in public space, including dozens per block near polling stations, during his electoral campaign to win the office he now holds (further belying aesthetic interest arguments as underinclusive, s*ee Reed*, 135 S. Ct. at 2231).

D. The Event-Based Regulation Can Be Wielded to Prematurely Truncate Political Speech of Continuing Relevancy

The District argues that "the [event-based] regulation applies only long after the communicative content of the sign has expired. The District's regulation thus poses no danger that the government may 'wield [it] to suppress disfavored speech.'" District's Supplemental Br. 6. This premise, while perhaps applicable to a one-day commercial yard sale, does not hold true when applied to a sign with political relevancy or messaging.

Justice Kennedy at oral argument in *Reed* noted the distinction between a political event and a sports game. (Tr. 15.) ("a political campaign is a dynamic that goes on for some weeks that the signs initiate a discussion.")

The potential for the challenged event-based distinction to be wielded arbitrarily or to enhance favored speech or suppress disfavored speech is patent, and was evidenced in depositions by the District's inspectors. See, e.g. MASF Principal Brief 19 – 22.

The challenged regulations present all the risks of political abuse and abridgment of political speech against which the First Amendment establishes a clear and firm rule in the definition of content-based distinctions.

III. The Court Should Reject the District's Efforts to Reiterate Arguments and Reasoning Rejected by the Supreme Court in *Reed*

The District argues that *Hill v. Colorado*, 530 U.S. 703 (2000), which allowed restriction of expressive *activities* similar to picketing or demonstrating in a buffer zone, applies to permit the District's regulatory distinctions, which are drawn based on content.

The Supreme Court expressly reversed the underlying Ninth Circuit ruling in *Reed*, which erroneously relied on *Hill* as informing its definition of "content-neutral" distinctions. *See Reed*, 135 S. Ct. at 2226.

The District re-argues that which has been squarely addressed and resolved with finality by the Supreme Court in *Reed*.

The District re-argues that *Renton v. Playtime Theatres,* 475 U.S. 41 (1986), permits the District's regulation to evade strict scrutiny.

The dissent in *Reed* explicitly referenced *Renton. See Reed*, 135 S. Ct. at 2238. Informed by that dissent, the opinion of the Court reflects that a "clear and firm rule regarding content-neutrality is an essential means of protecting the freedom of speech," *Reed*, 135 S. Ct. at 2231. While the District derides the Supreme Court as "formalistic," its majority opinion in *Reed* is the law.

Renton is a zoning case regarding where adult theaters may be located. This case at bar is not about zoning authority nor does not it challenge the District's

restriction of certain signs, placards and posters to the location of lampposts and appurtenances. *Renton* is not, as the District contends, directly applicable to the sign and speech regulations under consideration. To the extent there is any conflict or tension between the cases, the *Reed* majority opinion governs.

IV. The District's Belated Attempt to Relitigate its Case When it Failed to Meet its Burden of Proof, Despite Being on Notice, Should Be Denied

To the extent the District claims *Reed* establishes a "new" standard of strict scrutiny, MASF has always presented strict scrutiny as the established standard, relying on cases ultimately relied upon by the *Reed* Court. *See e.g.*, ECF No 64 at 23 – 30.

The District was obligated and had every opportunity to submit evidence to meet a strict scrutiny standard and at no point in this litigation has ever proffered any evidence to support, or even claimed, a compelling interest. *See also ANSWER Coal. v. D.C.*, 798 F. Supp. 2d 134, 145 n.2 (D.D.C. 2011) (Court observes "the District does not suggest it can" meet the strict scrutiny standard applicable to content-based regulations); (*See also* JA 317) (uncontroverted material fact that the District disclaims or fails to claim any compelling interest). It may not manufacture such a claim now.

The District Court found that the District failed to meet even the lesser intermediate scrutiny standard it claimed was applicable.

The District was afforded full opportunity in discovery to submit evidence of its interests and how the regulations advanced said interests or avoided purported harms. *ANSWER Coal. v. D.C.*, 798 F. Supp. 2d at 155 (discovery for such purposes).

The District rested on its position that "the government need not produce affirmative evidence. . .". ECF No. 59 at 11. *See* MASF's Opening Br. 45 – 49.

The District refused to respond to discovery seeking disclosure of its asserted interests and any evidence of how challenged regulations advanced interests, presumably because it was incapable of doing so. *ANSWER Coal. v. D.C.*, 905 F. Supp. 2d at 344 n.8. MASF Opening Br. 48.

The *Reed* opinion changes nothing to justify the failure and inability to present evidence, and if such existed it was incumbent on the District to so present. Post-*Reed*, the submission of no record evidence is still nothing. *See Ibid.* at 341 ("After a half-year discovery period, and sufficient time to prepare complete summary judgment motions" the District rested its case relying solely on counsel's argument).

After more than eight years of proceedings, given multiple constitutional bases which invalidate the challenged law, and the refusal of the District to issue across-the-board regulations that apply regardless of viewpoint or content, the District's futile request for delay in final resolution must be rejected.

January 7, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of January 2016, an electronic copy of the foregoing brief was served through the Court's CM/ECF system to:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation in the Court's October 30, 2015, Order because the brief contains 1,816 words, excluding the parts of the brief exempted. This brief complies with the typeface and style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14-point.

January 7, 2016

/s/ Carl Messineo
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ATTACHMENT

IN THE SUPREME COURT OF THE UNITED STATES

- x

CLYDE REED, ET AL., :

Petitioners :

v. : No. 13-502.

TOWN OF GILBERT, ARIZONA, :

ET AL. :

- x

Washington, D.C.

Monday, January 12, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

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ERIC J. FEIGIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting neither party.

PHILIP W. SAVRIN, ESQ., Atlanta, Ga.; on behalf of Respondents

C O N T E N T S

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 13-502, Reed v. Town of Gilbert.

Mr. Cortman.

ORAL ARGUMENT OF DAVID CORTMAN

ON BEHALF OF THE PETITIONERS

MR. CORTMAN: Mr. Chief Justice, and may it please the Court:

The town's code discriminates on its face by treating certain signs differently based solely on what they say. For example, political signs may be 32 square feet, may be unlimited in number, and may be placed in the right-of-way of the entire town for five months before the election; but the church's signs can only be one-fifth of that side -- size, only placed in the dark of night, the night before the church service.

While the church's signs with directional content are only allowed up for 14 hours, other signs with directional content are allowed up for much longer. For example, builders' directional signs to home sales events are allowed up to be the entire -- are allowed up the entire weekend, and homeowners' association event signs are allowed to be up for 30 days.

residential signs except for -- in fact, it was the reverse. It banned for sale signs and allowed some residential signs that were exceptions.

But this Court said exactly that, that the town shouldn't value different types of speech, especially on private property when you have homeowners' rights that also comes in play in addition to speech rights.

JUSTICE ALITO: What if it's commercial and it relates to a one-time event. For example, for a yard sale.

MR. CORTMAN: Right.

JUSTICE ALITO: If the State and the city allow election-related signs to be put up in the right-of-way, then anybody who has a yard sale has an equal right?

MR. CORTMAN: Well, I think -- I think commercial speech, under this Court's jurisprudence, can be treated differently, and that's one of the important things. The category here is narrow because government speech -- government can put up whatever signs that it would like. It doesn't trigger any problem under the First Amendment.

We hear a lot in the other briefs about warning signs and other types of signs. The government

signs to be up for one single event for five months, certainly there should be some way to say, well, if we have a recurring event as we do here, certainly the sign should be allowed up at least equal to the same time, and --

JUSTICE KENNEDY: Well, I mean, to say that an election is a single event in the same way as a football game, a cookout, a basketball championship, it's -- it seems to me is a very difficult thing for this Court to have to decide. It's just not -- a political campaign is a dynamic that goes on for some weeks that the signs initiate a discussion. I can see where you can say the religious sign does or at least should initiate the same discussion of -- on issues that are certainly of the same importance, if not more.

MR. CORTMAN: Certainly --

JUSTICE KENNEDY: But it seems to me you are forcing us into making a very wooden distinction that could result in a proliferation of signs for birthday parties or for every conceivable event that could be up for five months.

MR. CORTMAN: But I think the problem is there -- there already is that here, because we have an unlimited number of political signs. And so if the streets are already littered in an unlimited number of

And what it says is all temporary signs should be treated the same, period. You can put -- you have to put your date on the sign for when you put it up. Every temporary sign can be up for 180 days. If it's tied to an event, after the event is over, it needs to be down 30 days after the event.

I think -- our opinion is the reason that is content-neutral is whenever something is over, if your store is closed, the event is done, then the sign can be removed. But the important part is every sign can be up for the same amount of time, even if it is that event that's over now. And I think that's the way you deal with these -- these single event --

JUSTICE ALITO: I thought you said the way you distinguish between temporary signs and permanent signs is based on the -- the nature of the sign, not what it says.

MR. CORTMAN: Right.

JUSTICE ALITO: So that gets you over the problem Justice Sotomayor mentioned about having to read the sign.

MR. CORTMAN: Right.

JUSTICE ALITO: But if this -- if there's a rule that says the sign has to be down within a certain period of time after the date of the event, which is on

the sign, I don't see how you get around to reading the sign.

MR. CORTMAN: Well, what you would be reading is the date, and -- and the code requires the date to be placed on the sign both for when the sign is placed and -- and for -- you know, for what the event is. But I think that --

JUSTICE ALITO: So if somebody puts up a sign for a yard sale two days before the yard sale, then they can -- that can stay up for 48 days after the yard sale? It has 50 days or whatever the period of time is?

MR. CORTMAN: Yes, according to -- according to the code. But what is interesting, that time period can be anything the town desires. It -- it doesn't need to be -- and we're not looking for signs all year long.

The town can say, for example, temporary signs can be up for seven days, they can be a certain size. Like Washington, D.C., does, you can only have three signs per block, have to be spaced out. And -- and that's part of our point.

And I think one of the things to take a -- to take look at is the amici brief that's been filed on behalf of the town by the National League of Cities, and the reason that brief is important, for example, on page 10 and 13, it lists dozens and --