NOT YET SCHEDULED FOR ORAL ARGUMENT

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

CARL L. MESSINEO
MARA VERHEYDEN-HILLIARD
THE PARTNERSHIP FOR CIVIL JUSTICE FUND
617 Florida Avenue, NW
Washington, DC 20001
T. (202) 232-1180; F. (202) 747-7747
cm@justiceonline.org
mvh@justiceonline.org

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[1] Authorities upon which we chiefly rely are marked with asterisks.

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GLOSSARY

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

I. Introduction

MASF, a civil rights petitioner, challenges, *inter alia,* the event-based distinction in the District of Columbia's regulation of non-commercial signs affixed to lampposts. The affixing of signs to lampposts is a long-standing tradition, as the District has opened up public space fora for the public to post relatively inexpensively created signs, placards and posters carrying political and other non-commercial messages to a mass audience.

The postering regulations promulgated by the District governing use of public fora restrict free speech including by imposing durational restrictions of a 180-day maximum.

A sign conveying any content deemed by an enforcement inspector as "related to a specific event" is subject to a potentially severely shortened posting duration. It is to be removed 30 days after any event that an inspector, in his or her discretion upon reading the content of the sign, deems the content of the sign to be related. The regulatory scheme imposes substantial penalties for violations.

MASF seeks to post political signs that, like many political signs, contain content that both carries political messages of persistent relevancy but could also be interpreted as having content related to an event. In such instances, MASF or others similarly situated could be subject to a barrage of substantial fines (as well

as removal of their messages) for leaving their political messaging intended to be affixed for the 180 days.

MASF challenges this regulatory scheme on multiple grounds, including that the regulations are unconstitutional content-based restrictions on speech. The regulatory scheme is constitutionally infirm not only as a content-based restriction, but because the regulations violate Due Process, lack definition of what constitutes a sign "relating to a specific event" and facially vest virtually unlimited discretion in enforcement agents to declare a sign to be event-related and, therefore, subject the sign to removal (i.e., loss of visibility and expression) and the responsible person/entity to substantial fines.

The potential for discriminatory enforcement of this regulatory scheme against disfavored speech or speakers looms large in this case, given that enforcement agents issued an unprecedented approximately 400 baseless Notices of Violation (NOVs) to the ANSWER Coalition, a partner in certain postering and political actions with MASF. The judge presiding over the administrative hearings on the NOVs found upon review of over 100 that *on their face* they were issued for merely posting *within* the regulations. J.A. 350 ("it is clear" that enforcement agents charged ANSWER for "posting signs on District of Columbia (public)

property, as opposed to violating one of the provisions that regulate how and when someone may post a sign . . .")[1]

This Court has requested supplemental briefing in light of the Supreme Court's opinion in *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218, 192 L. Ed. 2d 236, 2015 U.S. LEXIS 4061 (June 18, 2015) which clarified the content-based analysis in the First Amendment context.

The Supreme Court in *Reed* squarely rejects the arguments presented and relied upon in these proceedings by the District to support its inaccurate contention that the event-based distinction is content-neutral.

II. Under the Roadmap Provided by *Reed*, The District's Event-Based Distinction is Content-Based, Subject to Strict Scrutiny, and Unconstitutional

Reed provides a roadmap for analyzing the District's event/non-event regulatory distinction, which restricts speech on the basis of whether the content of the speech is related to an event. Under long-standing First Amendment jurisprudence, as relied upon by MASF in its presentation and as supplemented by *Reed*, the event-based speech distinction is content-based and subject to strict scrutiny.

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[1] *Every single one* of the 400 NOVs targeting ANSWER was voluntarily dismissed by the General Counsel of the Department of Public Works (J.A. 370-72) after Administrative Law Judge Jesse P. Goode issued his finding, which the District accepted and did not appeal. The District had used the prosecution of these NOVs to urge abstention upon the Court in these proceedings.

The District has never in this long-running litigation claimed the distinction to be narrowly tailored to advance a compelling interest. At no point, including in these appellate proceedings, has the District claimed any compelling interest, or proffered any argument or evidence to meet its burden under a strict scrutiny standard, even though that standard has been argued by MASF. The District has effectively conceded that it cannot meet its burden.

A. The Court Must First Evaluate Whether the Law Is Content-Based on Its Face, Disregarding Government Claims of Content-Neutral Justifications, or Benign Motivation, or Lack of Animus

"[T]he crucial first step in the content-neutrality analysis" is to "determin[e] whether the law is content neutral on its face. That is why we have repeatedly considered whether a law is content-neutral on its face before turning to the law's justification or purpose." *Reed*, 135 S. Ct. at 2228.

> A law that is content-based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained in the regulated speech." *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429, 113 S. Ct. 1595, 123 L. Ed. 2d 99 (1993). We have thus made clear that "'[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,'" and a party opposing the government "need adduce 'no evidence of an improper censorial motive.'" *Simon & Schuster,* [502 U.S. 105] at 117, 112 S. Ct. 501, 116 L. Ed. 2d 476. Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). [A]n innocuous justification cannot transform a facially content-based law into one that is content-neutral.

Reed, 135 S. Ct. at 2228.

B. *Reed* Clarifies That a Content-Based Distinction is Any Regulatory Distinction Drawn Based on the Message a Speaker or Sign Conveys

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *See Reed*, 135 S. Ct. at 2227 (multiple citations omitted); *See also McCullen v. Coakley*, 134 S. Ct. 2518, 2531, 189 L. Ed. 2d 502 (2014) (quoting *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 383, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984)) (A law "would be content based if it required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred.").

> This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. [citation omitted]. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys and, therefore, are subject to strict scrutiny.

Reed, 135 S. Ct. at 2227.

C. The District's Event-Based Regulation, Which Draws Distinctions Based on the Message a Sign Conveys, i.e., Whether Sign Content is "Related to a Specific Event," is Content-Based

Applying *Reed's* "crucial" first step, the District's event-based distinction is content-based because the regulations distinguish how speech will be treated based on whether the content of that speech is related to a specific event. 24 D.C. MUN.

REGS. §§ 108.5, 108.6, 108.13; *ANSWER Coal. v. D.C.*, 798 F. Supp. 2d 135, 146 (D.D.C. 2011) (District Court finds the event/non-event distinction imposes "substantially different treatment to two posters that are identical in every aspect except that one contains content related to an event while the other does not").

The distinction and restrictions in the District's sign regulation depend entirely on the communicative content of the sign and whether such content relates to an event. *See Reed*, 135 S. Ct. at 2227.

The regulation singles out specific subject matter - - that deemed "related to a specific event" - - for differential treatment. *See Reed*, 135 S. Ct. at 2230.

Applying *Reed*, the District's event-based distinction is "content-based."

There is no exception to the broad and common-sense definition of "content-based" for event-based distinctions.

> [T]he fact that a distinction is event based does not render it content neutral. The Court of Appeals cited no precedent from this Court supporting its novel theory of an exception from the content-neutrality requirement for event-based laws. . . . [A] speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed [internal citation omitted]. A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea. This type of ordinance may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content-neutrality is an essential means of protecting the freedom of speech, even if laws that might seem "entirely reasonable" will sometimes be "struck down because of their content-based nature." *City of Ladue v. Gilleo*, 512 U.S. 43, 60, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994) (O'Connor, J., concurring).

Reed, 135 S. Ct. at 2230.[2]

D. The District's Arguments That Its Event-Based Distinction Should Be Treated as Content-Neutral Rely on a Misapplication of *Ward v. Rock Against Racism* and Reiterate Arguments Soundly Rejected by the Supreme Court in *Reed*

The District has relied on arguing in these proceedings that its event-based and content-based distinction should be recast or redefined as "content-neutral." Each of its arguments was emphatically rejected by the Supreme Court in *Reed* as violative of long-standing speech-protective precedent.

The District's analysis turns on a restrictive legal interpretation that redefines the term "content-based" away from its common-sense meaning, i.e., a distinction resolved based upon evaluation of the content of communication. *See Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993) (the "commonsense understanding of the term" content-based is whether a distinction "is determined by the content of the publication"); *See also Reed*, 135 S. Ct. at 2227.

The District's analysis is based in substantial part on a misapplication of *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) to the definition of content-based. District's Opening Br. 34 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *But see Reed*, 135 S. Ct. at 2228 ("*Ward* had nothing to

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[2] *See also Marin v. Town of Southeast*, 2015 U.S. Dist. LEXIS 133813 at *43 – 44 (quoting *Reed*, 135 S. Ct. at 2231) ("'[S]imply because an event (i.e., an election) is involved' does not allow restrictions that force a 'content-based inquiry' to 'evade strict scrutiny review'").

say about facially content-based restrictions because it involved a facially content-*neutral* ban . . .") (emphasis in original).

Since the issuance of *Ward*, some courts and many municipalities as well as the United States Government as *amicus curiae* in *Reed* have adopted this misapplication of *Ward*. *See Reed*, 135 S. Ct. at 2229; *See also BellSouth v. FCC*, 144 F.3d 58, 69 (D.C. Cir. 1998) (citing *Ward*, 491 U.S. at 791) ("to a large extent neutrality is now gauged by reference to a statute's justifications").

Reed issues final clarity and abrogates such applications. *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (The *Reed* "formulation conflicts with, and therefore, abrogates, our previous descriptions of content neutrality"); *See also Norton v. City of Springfield*, 612 Fed. Appx. 386, 387 (7th Cir. 2015) (reversing prior Circuit analysis that ordinance was content-neutral, in light of *Reed* holding "[a]ny law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification").

The proper First Amendment analysis, more speech-protective than urged by the District, reflects the judiciary's constitutional role in guarding against laws that lend themselves to be used to abridge freedom of speech, a right upon which many - - if not all other - - fundamental rights rest to establish the foundation for a constitutional democracy.

It is a bedrock principle of constitutional jurisprudence that the vice against which the First Amendment guards are laws with the potential to be used discriminatorily and censorially. "The vice of content-based legislation . . . is not that it is *always* used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Reed*, 135 S. Ct. at 2229 (italics added); *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-131 (1992) (A government regulation that allows arbitrary application is "inherently inconsistent with a valid [content-neutral] regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.").

Reed recognizes that even a benignly intended or reasoned law that regulates the precious right of speech - - which is so easily disturbed, often subtly - - can lend itself readily to suppress disfavored speech or speakers. The constitutional protection against laws that abridge speech is of such supreme, indeed paramount, value that some laws that may appear to be "reasoned" must be stricken as unconstitutional because they create authority that can be used to suppress free speech, the lifeblood of a democracy.

With respect to content-based distinctions, the First Amendment mandates a "clear and firm rule . . . [as] an essential means of protecting the freedom of speech." *Reed*, 135 S. Ct. at 2231.

In *Reed* the Supreme Court expressly rejects the analysis asserted in these proceedings by the District.

This Court, applying First Amendment precedent and *Reed*, must reject these same arguments where presented in this case by the District.

The District argues that

> By requiring all event-related signs to be removed within 30 days after the event regardless of the nature of the event, 24 D.C.M.R. § 108.6, this regulation applies "without reference to the message the speaker wishes to convey," *Mahoney* [*v. Doe*], 642 F.3d [1112] at 1118 [(D.C. Cir. 2011)]. MASF lacks any evidence that the District adopted this regulation "because of [agreement or] disagreement with the message" a speaker may communicate [*Mahoney*, 642 F.3d at 1118] (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994)). The challenged regulation is also content-neutral because it is "*justified* without reference to the content of the regulated speech." *Bellsouth Corp v. FCC*, 144 F.3d 58, 69 (D.C. Cir. 1998) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The District's justification here – neighborhood esthetics – does not depend at all on the poster's message.

District's Opening Br. 34 (emphasis in original).

In *Reed,* the Town of Gilbert argued, and the Ninth Circuit found, that Gilbert's sign code was content-neutral because the Town "'did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed,' and its justifications for regulating temporary directional signs were 'unrelated to the content of the sign.'" *Reed*, 135 S. Ct. at 2227. The United States in its *amicus curiae* brief citing *Ward v. Rock Against Racism*, "contend[ed] that a sign regulation is content neutral - - even if it expressly draws distinctions based on the

sign's communicative content - - if those distinctions can be 'justified without reference to the content of the regulated speech.'" *Reed*, 135 S. Ct. at 2228.

The Town of Gilbert argued similarly, that "content-based" is a term of art to be applied flexibly to protect "viewpoints and ideas from government censorship or favoritism." *Reed*, 135 S. Ct. at 2229 (citing Brief for Respondents 22). Therefore, the Town argued, a sign regulation that "does not censor or favor particular viewpoints or ideas" cannot be content-based. *Ibid.*

The Supreme Court rejected these narrowing interpretations, explaining "[t]his analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech[,]" i.e., viewpoint-based and content-based discrimination. "Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Reed*, 135 S. Ct. at 2229-30; *See also* MASF Response Br. 43 at n.8 (the District's analysis "conflates content-based distinctions with viewpoint-based distinctions, which are even more obnoxious to the Constitution.") (citation omitted).

The Supreme Court expressly rejected reliance on *Ward v. Rock Against Racism* - - as urged by the District of Columbia - - as authorizing content-based speech restrictions.

> The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is

> relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a content-*neutral* [restriction].

Reed, 135 S. Ct. at 2228 (italics in original).

III. The Regulations Fail Narrow Tailoring and Are Underinclusive

It is the District's burden to demonstrate that its regulations' differential treatment among non-commercial, political signs based on whether the content of a sign relates to an event or whether a sign contains no content related to an event furthers a compelling government interest and is narrowly tailored. See *Reed*, 135 S. Ct. at 2231. It fails to do so.

As the lower court noted repeatedly throughout its opinion, the District fails to present "any admissible evidence explaining how its regulations further any content-neutral purposes." *ANSWER Coal. v. D.C.,* 905 F. Supp. 2d 317, 332 (D.D.C. 2012). The court found that the District provided "no admissible evidence" about how the law accomplishes even the District's "inadmissible *ipse dixit*" claim of interest in aesthetics and litter control. *Ibid*. The lower court found that the District failed even intermediate scrutiny. *Ibid*.

A. The Sign Regulation Scheme is Inconsistent, if Not Incoherent

While the City imposes potentially severe durational restrictions on the posting of non-commercial and political signs deemed (within the unfettered discretion of enforcement agents) to be event-related, the regulations permit huge event-related and seasonal banners that downtown Business Improvement Districts

(BIDs) may affix to lampposts and string across the full width of streets and avenues for up to 180 days. 24 D.C. MUN. REGS. § 107.8, Appellees' App. 20. The District prohibits these lamppost-affixed banners from conveying "[d]irect calls to action" and encourages content to "focus on . . . events as much as possible." Appellees' Add. 21 – 22. *See Lusk v. Village of Cold Spring*, 418 F. Supp. 2d 314, 324 (S.D.N.Y. 2005) (restrictions justified by aesthetics and traffic safety unconstitutional, given that "[a]esthetics can be just as compromised, and motorists can be just as distracted by displays" of one type of favored signage as by that of a disfavored type).

The District allows signs containing content that advertises commercial tour busses to be affixed to streetlight poles on public space without any durational restriction. 24 D.C. MUN. REGS. § 3306.4. Appellees' Add. 23.

One need only drive down any avenue in the District to observe the proliferation of electronic commercial signs - - large video or slideshow screens - - that face traffic and are hardwired into the District's bus shelters. Yet these permanent flashing sign installations are permitted to proliferate on the public space without time restriction.

B. *Reed* Supports a Finding that the Regulations are Not Narrowly Tailored and Are Underinclusive

The *Reed* Court found an absence of narrow tailoring and underinclusiveness stating that, "the Town cannot claim that placing strict limits on

temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem," and further that "[t]he Town similarly has not shown that limiting directional temporary signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not." *Reed*, 135 S. Ct. at 2231, 2232 (rejecting aesthetics and traffic safety as justification for content-based restrictions because the distinctions "fail as hopelessly underinclusive").

Assuming *arguendo*, that the District had met its burden of presenting an interest in aesthetics, which the lower court found it did not, the District has still pointed to no basis to find aesthetics impaired, or a political sign to be "greater an eyesore" if it happens to convey content that can be deemed (in the unfettered discretion of its agents) related to an event. *See Reed*, 135 S. Ct. at 2231.

There is no reason at all to believe that political signs, the content of which relates in some, or any, way to an event, pose a greater threat to aesthetics than other permitted signs that are not deemed to be event related. The credibility of the motivations of the District is called into question by its willingness to simultaneously authorize BIDs and others to affix massive event-related banners to lampposts to sweep across broad avenues. If anything, the call to attention of such banners or of the hyperactive flashing electronic screens on sidewalk bus shelters is a far greater impediment to aesthetic calm.

The City's regulations impose a restriction on political signage that is costly and imposes appreciable damage to political speech, at the core of the First Amendment's protections, while allowing similar or greater threats to aesthetics posed by other permitted signs to proliferate. Even were one to assume aesthetics to be a compelling interest, which it is not nor has the District ever argued it to be, the challenged regulation fails strict scrutiny.

IV. Conclusion

Even before issuance of the *Reed* opinion, the District was on notice in this litigation as to a simple way to remedy this particular constitutional failing.

Chief Judge Royce C. Lambert repeatedly implored the District to "revise the regulations to include a single, across the board durational restriction that applie[s] equally to all viewpoints and subject matters." *ANSWER*, 798 F. Supp. 2d at 155.

The District simply became more entrenched in its unconstitutional posture and instead has engaged in lengthy, vindictive and resource-consuming litigation.

Because the challenged event/non-event distinction does not pass muster under strict scrutiny as required by *Reed*, it must be declared unconstitutional.

The judgment of the district court should be affirmed where it finds the regulations to be unconstitutional, including on the basis of the *Reed* ruling, and the District be ordered to remove the unconstitutional regulation from its books,

where it continues to misinform enforcement agents and fails to provide legally required notice to those who wish to engage in free speech postering activities as to constitutional standards for posting on public space.

December 7, 2015

Respectfully submitted,

/s/ Carl Messineo
Carl Messineo (#450033)
cm@justiceonline.org
Mara Verheyden-Hilliard (#450031)
mvh@justiceonline.org
PARTNERSHIP FOR CIVIL JUSTICE FUND
617 Florida Avenue, NW
Washington, D.C. 20001
T. (202) 232-1180; F. (202) 747-7747
Attorneys for Appellees and Cross-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December 2015, an electronic copy of the foregoing brief was served through the Court's CM/ECF system to:

Carl J. Schifferle
Assistant Attorney General
Office of the Solicitor General
Office of the Attorney General
441 4th Street, NW, Suite 600S
Washington, D.C. 20001
carl.schifferle@dc.gov

Todd S. Kim
Solicitor General
Office of the Attorney General
One Judiciary Square
441 4th Street, NW, Suite 600S
Washington, D.C. 20001
todd.kim@dc.gov

Loren L. AliKhan
Deputy Solicitor General
Office of the Attorney General
One Judiciary Square
441 4th Street, NW, Suite 600S
Washington, D.C. 20001
Loren.AliKhan@dc.gov

/s/ Carl Messineo
Carl Messineo
Attorney for Appellees and Cross-Appellants

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 3,711 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.

December 7, 2015

/s/ Carl Messineo
Carl Messineo
Attorney for Appellees and Cross-Appellants