No.

In the Supreme Court of the United States

MUSLIM AMERICAN SOCIETY FREEDOM FOUNDATION,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the void for vagueness doctrine, a law must supply "minimal guidelines to govern law enforcement," so that the law does not "permit a standardless sweep" allowing "'policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983).

The District of Columbia sign ordinance imposes special restrictions on non-commercial signs that are "related to" an event. D.C. Mun. Regs. tit. 24 § 108.6. The regulation provides that these restrictions apply if an event is "referenced on the poster itself *or* reasonably determined from all circumstances by the inspector." *Id*. § 108.13 (emphasis added). The District offers no objective criteria governing when a poster that does not itself reference an event is nonetheless "related to" it.

The D.C. Circuit held that this regulation is not vague. Although there are no objective criteria to guide the "related to" analysis, the court focused on the obligation that an inspector must act "reasonably." Other circuits, however, hold that laws may not delegate standardless enforcement discretion to officials, even if the officers are obligated to exercise that discretion reasonably.

The question presented is:

Whether the District's event-related sign ordinance, which lacks any objective criteria defining what renders a sign "related to" an event, is unconstitutionally vague.

RULE 14.1(B) STATEMENT

Petitioner is the Muslim American Society Freedom Foundation. Respondent is the District of Columbia. The Act Now To Stop War And End Racism Coalition was a party below, but it is not a party to this petition.

RULE 29.6 STATEMENT

The Muslim American Society Freedom Foundation has no parent company nor publicly held stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Muslim American Society Freedom Foundation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 846 F.3d 391. The opinion of the district court is published at 905 F. Supp. 2d 317.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2017. The court denied a timely petition for rehearing on March 24, 2017. On June 22, 2017, Chief Justice Roberts extended the time for the filing of this petition until August 21, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

REGULATIONS INVOLVED

D.C. Municipal Regulation, Title 24, Section 108 provides in relevant part:

> 108.1 No person shall affix a sign, advertisement, or poster to any public lamppost or appurtenances of a lamppost, except as provided in accordance with this section. * * *
>
> 108.5 A sign, advertisement, or poster shall be affixed for no more than one hundred eighty (180) days.
>
> 108.6 A sign, advertisement, or poster related to a specific event shall be removed no later than thirty (30) days following the event to which it is related. This subsection does not

> extend the time limit in subsection 108.5.
> * * *
>
> 108.13 For purposes of this section, the term "event" refers to an occurrence, happening, activity or series of activities, specific to an identifiable time and place, if referenced on the poster itself or reasonably determined from all circumstances by the inspector.

STATEMENT

The Due Process Clauses of the Fifth and Fourteenth Amendments "require the invalidation of laws that are impermissibly vague." *F.C.C.* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972).

Vague laws that restrict speech are scrutinized especially closely; "[t]he general test of vagueness applies with particular force in review of laws dealing with speech." *Hynes* v. *Mayor & Council of Oradell*, 425 U.S. 610, 620 (1976). To survive this review, a law must prescribe a governing "standard of conduct" (*Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971)) or provide some "objective criteria" for its application (*Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 526 (1994)).

At issue here is the District of Columbia's sign ordinance. The District generally allows citizens to post non-commercial signs on public lampposts; most signs may remain affixed to lampposts for 180 days. But, if the sign is "related to a specific event," it must

be removed no later than 30 days following the event. D.C. Mun. Regs. tit. 24 § 108.6. This restriction applies if the event is "referenced on the poster itself *or* reasonably determined from all circumstances by the inspector." *Id.* § 108.13 (emphasis added).

Because the regulation uses the disjunctive "or," some signs that do not "reference" an event "on the poster itself" are nonetheless "related to a specific event." See App., *infra*, 105a-107a.

The District has never articulated objective criteria that guide the determination whether a sign, which does not itself reference an event, is event-related. The District "admits that there exist no additional policies, rules, staff instructions, guidance or any documents or communications which * * * define what characteristics render a sign to be 'related to a specific event.'" App., *infra*, 104a-105a. Indeed, the District acknowledges that it has delegated this lawmaking authority to an inspector's ad hoc "reasoning and discretion." *Id.* at 108a.

Myriad interpretative questions result from this murky regulation. Take, for example, a sign that says simply, "Scientists agree: Global warming is real." Does that sign "relate to" a previously-announced rally addressing climate change? Does it "relate to" a rally held by climate change skeptics? What if the event is announced *after* the sign was posted? Is the sign "related to" a rally held in Baltimore? Or in Paris? Does it "relate to" a screening of *An Inconvenient Sequel* or a book-signing of *An Appeal to Reason*?

Or, take a sign, posted during election season, that says nothing other than "GRAHAM!" If one of

the candidates for office was Jim Graham, would that sign have been "related to" an event?

The district court, Judge Lamberth, held that this regulation is unconstitutionally vague because it fails to provide any objective criteria to cabin what it means for a sign to be "related to" an event. As the district court saw it, delegating this question of legal interpretation to enforcement officials is precisely "the kind of administrative discretion that the Due Process Clause and First Amendment abhor." App., *infra*, 103a.

The court of appeals, however, held that the regulation's requirement that an officer act "reasonably" was sufficient to save it from invalidation. The court of appeals concluded, in other words, that a municipality *may* delegate ad hoc discretion to individual enforcement officers—so long as those officers are obligated to act reasonably.

The results of this holding are deeply troubling. Inspectors may establish ad hoc standards for declaring posters "related to" an event—thereby exercising their individual discretion to decide which posters to tear down early and who to fine. Because the fines reach $2,000 *per poster*, the net effect is the chill of self-censorship.

The decision below warrants review. It turns vagueness law on its head; it is irreconcilable with decisions of other circuits; and it is certain to chill speech rights in just the manner that this Court's precedents are meant to avoid.

A. Legal background.

"A fundamental principle in our legal system is that laws which regulate persons or entities must

give fair notice of conduct that is forbidden or required." *Fox*, 567 U.S. at 253. This "void for vagueness doctrine addresses" twin "due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Ibid.*

These concerns are magnified in the context of speech. "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Fox*, 567 U.S. at 253-254. Accordingly, "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). If a "law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Ibid.* This is because vague laws regulating speech "operate to inhibit the exercise of those freedoms;" these laws "inevitably lead citizens to steer far wider of the unlawful zone." *Grayned*, 408 U.S. at 109 (quotations and alterations omitted).

In addressing vagueness, the Court has been careful to distinguish complex factual determinations from unclear legal standards. "[A] regulation is not vague because it may at times be difficult to prove an incriminating fact" (*Fox*, 567 U.S. at 253) or because "it requires a person to conform his conduct to an imprecise but comprehensible normative standard" (*Coates*, 402 U.S. at 614). But it is unconstitutionally vague if the regulation "is unclear as to what fact must be proved" (*Fox*, 567 U.S. at 253) or if "no

standard of conduct is specified at all" (*Coates*, 402 U.S. at 614).

At bottom, a law must provide "minimal guidelines to govern law enforcement," lest it "permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983).

B. The event-related sign regulation.

The District regulates the posting of signs to public lampposts. See D.C. Mun. Regs. tit. 24 § 108. Relevant here, the District generally permits individuals and entities to affix non-commercial signs to public lampposts for a period of 180 days. *Id*. § 108.5. But "[a] sign, advertisement, or poster related to a specific event shall be removed no later than thirty (30) days following the event to which it is related." *Id*. § 108.6. The regulation provides further that "the term 'event' refers to an occurrence, happening, activity or series of activities, specific to an identifiable time and place, if referenced on the poster itself or reasonably determined from all circumstances by the inspector." *Id*. § 108.13.[1]

The District acknowledges that "there exist no additional policies, rules, staff instructions, guidance or any documents or communications which further * * * define what characteristics render a sign to be 'related to a specific event.'" App., *infra*, 104a-105a. In sum, "'[t]here are no limiting or interpretive materials beyond what appears * * * on the face of the regulation itself.'" *Id*. at 105a.

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[1] The District has frequently amended these regulations; during the pendency of this litigation alone, the District amended the governing rules four separate times. See App., *infra*, 4a-8a.

The District's solid waste inspectors administer this statute. App., *infra,* 97a. Violations of this provision trigger graduated fines. *Ibid.* The fines reach $2,000 for the fourth and each subsequent violation, assessed on a per-sign basis, within a 60-day period. D.C. Mun. Regs. tit. 24 § 1380.3.

C. Proceedings below.

Petitioner Muslim American Society Freedom Foundation (MASF) is a nonprofit advocacy organization that posts signs with political messages. App., *infra,* 1a, 5a, 7a. Petitioner contends that the event-related sign regulation "delegates an impermissible degree of enforcement discretion to the District's inspectors in violation of due process." *Id.* at 2a.[2] Petitioner thus asserts that it is facially unconstitutional. *Id.* at 7a.

1. The district court, Chief Judge Lamberth, granted summary judgment in favor of petitioner, holding that the event-related sign regulation is unconstitutionally vague. See App., *infra*, 96a-111a.[3]

During discovery, petitioner took the deposition of four solid waste inspectors. The inspectors repeatedly asserted that the regulation left the task of substantive interpretation to their discretion,[4] they ad-

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[2] MASF and its co-plaintiff, Act Now To Stop War And End Racism Coalition, asserted additional claims not at issue here.

[3] The district court originally dismissed for lack of standing, but the court of appeals reversed. App., *infra*, 6a.

[4] See, *e.g.*, App., *infra*, 100a-101a n.10 ("Q. Where in the regulations does it suggest that you are constrained in any way? A. It doesn't constrain me in the regulations. It says I can use my judgment."); *ibid.* ("Q. And as you apply the regulations as an enforcement officer, what's the removal date appropriate for this sign? A. It would actually be—it would be my discretion be-

mitted that different inspectors may reach different conclusions about the same sign,[5] and they in fact disagreed about whether a sign that stated "GRAHAM!"—the name of a political candidate—would be related to an election. See App., *infra*, 35a. The district court recognized that this evidence "suggests problems with the guidance the law provides to enforcement officers." *Id.* at 100a-101a.

Turning to the text of the regulation (App., *infra*, 103a), the district court trained on the regulation's direction that a sign is related to an "event" if an event is "referenced on the poster itself or *reasonably determined from all circumstances by the inspector*." D.C. Mun. Regs. tit. 24 § 108.13 (emphasis added).

The court held that the latter clause "is a clear example of the kind of administrative discretion that the Due Process Clause and First Amendment abhor." App., *infra*, 103a. Indeed, "[t]elling an officer to act 'reasonably' does not provide objective criteria cabining his discretion" because "[r]easonable people frequently come to different conclusions." *Id.* at 103a-104a. This problem is compounded by the fact that the District has no policy or guidance that "define[s] what characteristics render a sign to be 'related to a specific event.'" *Id.* at 104a-105a. Rather, the District has acknowledged that enforcement decisions are delegated to the inspectors' "reasoning and discre-

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tween 108.5 and 108.6. * * * Q. And the rules leave it up to you because of the nature of the sign, as to which one you might reasonably apply; correct? A. Yes.").

[5] See, *e.g.*, App., *infra*, 100a n.10 ("Q. Someone else's exercise of discretion and judgment might lead them to another reasonable conclusion, that is, it's related to the general election; correct? A. Correct.").

tion." *Id.* at 108a. The district court therefore held that the regulation was vague.

The district court next concluded that there was no alternative construction of the regulation that would save its constitutionality. App., *infra*, 105a-107a. In particular, the court explained that the regulation necessarily authorizes inspectors to deem posters "related to" an "event" "even if that poster does not clearly list the time and place of the event." *Id.* at 107a.

The court concluded that "[a] legislature cannot explicitly delegate ambiguous cases to the rudderless 'reasonable' judgment of individual enforcement officers." App., *infra*, 70a. But that is precisely the effect of the event-related sign regulation: "By delegating some cases to the 'reasonable determination' of individual inspectors, the District fails to assure potential speakers that it will enforce the sign regulations in an objective, predictable manner." *Id.* at 96a.

2. The court of appeals reversed. See App., *infra*, 29a-35a.

To begin with, the court agreed that petitioner had properly framed its claim as "a facial vagueness challenge." App., *infra*, 30a. Because of the danger of "[s]elf-censorship," "only a facial challenge can effectively test the statute." *Id.* at 31a (quotations omitted).

Regarding the merits of the vagueness challenge, the court of appeals concluded that "the fact targeted by the 'event-related' limitation is clear." App., *infra*, 33a. In particular, "[t]o relate to an 'event,' a sign must relate to 'an occurrence, happening, activity or series of activities, specific to an identifiable time and place.'" *Ibid.* Focusing on the meaning of the

term "event," which is defined by the regulation, the court reasoned that this "is not a vague standard." *Ibid.*

The court recognized that "[i]nspectors confirmed that they had some leeway to assess event-relatedness." App., *infra*, 35a. Inspectors could not agree, for example, "whether a 2012 poster stating simply 'GRAHAM!' pertained to the reelection campaign of City Council member Jim Graham and was event-related." *Ibid.* The court took this evidence to show that the regulation "might be misapplied in certain cases," not that it "lacks criteria to cabin enforcement discretion." *Ibid.* The court did not, however, explain whether a "GRAHAM!" poster is properly considered event-related or not, according to the standards it held to be "clear."

In holding that the regulation is clear and not vague, the court rested its analysis principally on the regulation's requirement that inspectors act reasonably. "To the extent enforcement agents draw on surrounding circumstances to *un*reasonably infer that a sign is event related in accordance with the District's rule, the event-relatedness restriction would not apply." App., *infra*, 34a-35a. But, "[s]o long as their inferences are reasonable, * * * the rule's open-endedness about the evidence that may be used to meet that standard does not convert its otherwise clear limitation into an impermissibly vague one." *Id.* at 34a. On that basis, the court of appeals reversed the district court's grant of summary judgment. *Id.* at 35a.

REASONS FOR GRANTING THE PETITION

The District's special restrictions on non-commercial, event-related signs apply not only to signs that expressly "reference[]" an event on the "poster itself," but also to those signs that, despite *not* expressly referencing an event, are "reasonably determined from all circumstances by the inspector" to be related to one. D.C. Mun. Regs. tit. 24 § 108.13.

No objective standard guides the determination whether a sign that does not directly reference an event is nonetheless "related to" it. *Id.* § 108.6. The court of appeals did not actually identify any criteria that "cabin enforcement discretion." App., *infra*, 35a. To the contrary, the court acknowledged that the regulation provides inspectors "some leeway to assess event-relatedness." *Ibid.* Because that holding conflicts with decisions of other courts of appeals and turns this Court's First Amendment vagueness precedents upside down, further review is warranted.

First, the fundamental touchstone of due process requires objective criteria that limit official discretion. That is especially so where, as here, the law regulates speech. Here, however, there is no objective standard whatsoever; rather, whether a sign "relates to" an event is delegated to the discretion of individual inspectors. In materially similar circumstances, the Ninth Circuit has invalidated a law that delegates essentially standardless discretion to enforcement officials.

Second, in an attempt to work around the lack of any objective standard, the court of appeals focused on the regulation's requirement that inspectors must "reasonably determine" whether a sign is event-related. This was enough, the court held, to save the

statute from vagueness. That holding is incompatible with this Court's longstanding vagueness doctrine. Officials are *always* obligated to act reasonably; that is no basis to delegate to them lawmaking authority. It also creates a conflict with the Sixth Circuit, which has expressly rejected a law that delegates legal interpretation to an official's reasonable determination.

Third, review is imperative because the decision below will chill free speech rights. It lets stand an unconstitutionally vague law and, in so doing, encourages municipalities to enact similar, standardless ordinances. And this law is particularly troublesome. It licenses an inspector to develop an idiosyncratic, ad hoc standard to determine whether he or she believes a poster is "related to" an event—and then use that individualized judgment to tear down signs prematurely and assess substantial fines. Self-censorship is the inevitable result.

A. The event-related sign ordinance is unconstitutionally vague because it lacks objective standards.

1. For a law to comply with due process requirements, it must supply *objective* standards that govern its enforcement.

The Court has observed that "perhaps the most meaningful aspect of the vagueness doctrine" is "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974). A law with "standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* at 575. But "[l]egislatures may not so abdicate their responsibilities for setting the standards of the crimi-

nal law." *Ibid.*[6] See also *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 170 (1972) (When "there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law.").

A law must therefore specify the governing "standard of conduct." *Coates*, 402 U.S. at 614. There must be some "objective criteria" for applying the statute. *Posters 'N' Things, Ltd.*, 511 U.S. at 526. This requirement guards "against entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat.'" *Goguen*, 415 U.S. at 575.

This review is heightened when the law touches on First Amendment freedoms; "[t]he general test of vagueness applies with particular force in review of laws dealing with speech." *Hynes*, 425 US. at 620. Indeed, the Court has acknowledged that "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Estates*, 455 U.S. at 499. If a "law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Ibid.* Accordingly, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433 (1963). See also *id.* at 432 ("[S]tandards of permissible statutory vagueness are strict in the area of free expression.").

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[6] The District of Columbia's sign regulations constitute a penal statute. App., *infra,* 97a n.9 (citing *Washington* v. *D.C. Department of Public Works*, 954 A.2d 945, 948 (D.C. 2008)).

At the same time, the Court has explained, "a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved." *Fox*, 567 U.S. at 253.

Consistent with this framework, a law is unconstitutional if it requires "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings"—for example, whether conduct is "annoying" or "indecent." *United States* v. *Williams*, 553 U.S. 285, 306 (2008). Likewise vague is a law that regulates individuals with "no apparent purpose," a standard that is "inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene." *City of Chicago* v. *Morales*, 527 U.S. 41, 62 (1999).

2. The District's event-related sign ordinance flunks this essential test. It lacks any objective standard as to what makes a sign "related to a specific event," even when it says nothing on its face about an event. D.C. Mun. Regs. tit. 24 § 108.6.

Standing alone, the prepositional phrase "related to a specific event" (*ibid.*) provides no objective criteria. In a context where the term "relate to" governed the scope of a preemption statute, the Court observed that, "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere." *N.Y. State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (quotation and alteration omitted). When faced with such terms of relationship, courts must identify a "limiting principle consistent with the structure of the

statute and its other provisions." *Maracich* v. *Spears*, 133 S. Ct. 2191, 2200 (2013).

Here, "[t]he District admits that 'there exist no additional policies, rules, staff instructions, guidance or any documents or communications which further * * * define what characteristics render a sign to be 'related to a specific event.'" App., *infra*, 104a-105a. And, according to the District, "'[t]here are no limiting or interpretive materials beyond what appears * * * on the face of the regulation itself.'" *Id.* at 105a.

There are, accordingly, no "objective criteria" for determining whether a sign that does not reference an event nonetheless *relates to* it. *Posters 'N' Things, Ltd.*, 511 U.S. at 526. The interpretative questions that arise are easy to see.

Take, for example, the sign that says solely "Scientists agree: Global warming is real." Would such a sign relate to an environmental rally taking place the week after it was first posted? What about a rally for climate change skeptics? What if the rally is announced *after* the signs go up? And is the sign event-related if the rally is held in Baltimore? If it is held in Paris? Does it relate to a book signing or a movie screening about climate change?

Or consider a sign that says nothing other than "GRAHAM!" Is that sign related to an election if Jim Graham was running? If so, is it related to the primary election, the general election, or both?

These examples all turn on what "related to a specific event" means in this context. To answer these questions, one must know the breadth of relationship that "related to" permits within the legal meaning of the regulation. But the District has never attempted to supply any objective criteria or stand-

ard of any sort that guides what "related to" means here.

The District's own solid waste inspectors are of the view—correctly so—that no objective criteria guides their decision-making. App., *infra*, 100a n.10. As one inspector said, "[i]t doesn't constrain me in the regulations. It says I can use my judgment." *Ibid.* And, when faced with a sign like "GRAHAM!", an inspector testified that "it would be my discretion between 108.5 and 108.6." *Ibid.*

For its part, the court of appeals identified no objective criteria governing what it means for a sign to be "related to a specific event." It acknowledged that inspectors have "some leeway to assess event-relatedness." App., *infra*, 35a. And, when evaluating the "GRAHAM!" example, the court never determined whether such a sign *is* event-related or how one would even go about making that determination. *Ibid.*

The District's event-related sign ordinance does precisely what due process prohibits—it "abdicate[s] * * * responsibilities for setting the standards of the criminal law" from the legislature to the enforcement officer (*Goguen*, 415 U.S. at 575), rendering enforcement discretion "ad hoc and subjective" (*Grayned*, 408 U.S. at 109). As the district court rightly held, "[t]his is a clear example of the kind of administrative discretion that the Due Process Clause and First Amendment abhor." App., *infra*, 103a.

3. The Ninth Circuit has rejected a materially similar ordinance as unconstitutionally vague. This case would have been decided differently under that circuit's precedent.

In *Hunt* v. *City of Los Angeles*, 638 F.3d 703 (9th Cir. 2011), the court considered a law allowing permit holders to sell only "merchandise constituting, carrying or making a religious, political, philosophical or ideological message or statement which is inextricably intertwined with the merchandise" on a city boardwalk. *Id.* at 707 (quoting L.A. Mun. Code § 42.15(C) (2004)) (quotation omitted).

The court held that the statute "fails to explain when merchandise has a message that is 'inextricably intertwined' with it." *Hunt*, 638 F.3d at 711. Indeed, the law "leav[es] unanswered whether the product itself must carry and display the message, or whether it is sufficient for the vendor to explain the product's message." *Ibid*. The phrase "inextricably intertwined" (similar in kind to "related to") could be read either way. *Ibid*.

Given the lack of "clear guidance" from the statute, "such determinations would necessarily be left to the subjective judgment of the officer." *Hunt*, 638 F.3d at 712. The effect is a significant risk of chilling: "this lack of clarity may operate to inhibit the exercise of freedom of expression because individuals will not know whether the ordinance allows their conduct, and may choose not to exercise their rights for fear of being criminally punished." *Id*. at 713.

The court ultimately held that the law "clearly fail[ed] to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited," and, moreover, "given that the line between allowable and prohibited sales of merchandise is so murky, enforcement of the ordinance poses a danger of arbitrary and discriminatory application." *Hunt*, 638 F.3d at 712.

The phrase "related to" is of the same basic character as the phrase "inextricably intertwined." Both concern the relatedness of speech with some other object or event. And neither phrase, standing alone, provides the clarity that due process and the First Amendment demand.[7]

B. The "reasonably determined" requirement does not cure the vagueness defect.

1. To work around the lack of any standard for what "related to" means in this context, the court of appeals turned to the regulation's requirement that officials make *reasonable* determinations. As the

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[7] The courts of appeals broadly acknowledge that laws lacking objective criteria to cabin enforcement are unconstitutionally vague. See, *e.g.*, *Wollschlaeger* v. *Governor, Florida*, 848 F.3d 1293, 1322 (11th Cir. 2017) (holding that the statutory phrase "unnecessary harassment" was constitutionally vague; "a definition" of what conduct qualifies as "unnecessary harassment" is "markedly absent from the pages of the Florida Statutes"); *McCormack* v. *Herzog*, 788 F.3d 1017, 1030-1033 (9th Cir. 2015) (holding unconstitutionally vague a statute that required "properly staffed" medical offices and "satisfactory" arrangements with hospitals because the "terms 'properly' and 'satisfactory' are * * * subjective and open to multiple interpretations"); *Bell* v. *Keating*, 697 F.3d 445, 462-463 (7th Cir. 2012) (holding that "serious inconvenience" and "annoyance" permit "unbridled discretion at odds with the Fourteenth Amendment," "impermissibly delegat[ing] to law enforcement the authority to arrest and prosecute on 'an ad hoc and subjective basis'"); *Tucson Woman's Clinic* v. *Eden,* 379 F.3d 531, 554-555 (9th Cir. 2004) (invalidating a statute requiring physicians to treat patients "with consideration, respect, and full recognition of the patient's dignity and individuality" as void for vagueness because it "subjected physicians to sanctions based not on their own objective behavior, but on the subjective viewpoint of others"). The same kind of defect is implicated here.

court put it, "[t]o the extent enforcement agents draw on surrounding circumstances to *un*reasonably infer that a sign is event related in accordance with the District's rule, the event-relatedness restriction would not apply." App., *infra*, 34a.

But, as the district court observed, "[t]elling an officer to act 'reasonably' does not provide objective criteria cabining his discretion" beyond what is required under any and every law. App., *infra*, 103a. Under this regulation, if the public "posts signs throughout the District, several different Solid Waste Inspectors will see the signs," and, "[a]s the depositions indicate, different Inspectors may come to different conclusions about the same signs." *Id.* at 119a. The point of reasonableness is that "[r]easonable people frequently come to different conclusions." *Id.* at 103a. Put another way, a reasonableness standard, without more, does not furnish the regulated public with the clarity needed to determine ex ante what is lawful under the regulation.

For just that reason, this Court routinely rejects delegating interpretative discretion to officers, even though they are obligated to act reasonably. That was the nub of the statutory defect in *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921). There, a statute rendered it unlawful to "make any unjust or unreasonable rate or charge" in certain contexts. *Id.* at 86. To determine whether a rate is "unreasonable" or not, an enforcement official had to make a "reasonable" judgment. But that was not sufficient basis to save the statute from constitutional infirmity. Instead, it failed to establish an "ascertainable standard of guilt." *Id.* at 89. This conclusion so "clearly results" so "as to render elaboration on the subject wholly unnecessary." *Ibid.*

So too in *Morales*, where the statute defined loitering as "to remain in any one place with no apparent purpose." 527 U.S. at 61. That failed to provide "minimal guidelines to govern law enforcement." *Id*. at 60. According to the court of appeals' reasoning in this case, the statute would have been saved if it had said, instead, "to remain in any one place with no apparent purpose *as reasonably determined by an officer*." But that makes no sense. Because all officers must act reasonably, it would have been the very same statute; spelling out the reasonableness requirement does nothing to provide the objective criteria necessary to cabin enforcement discretion or to give notice to the public of what is and isn't lawful. See *id*. at 60-64.

The requirement of reasonableness is no different than a pledge that the government will act responsibly. In a related context, the Court has explained that "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *United States* v. *Stevens*, 559 U.S. 460, 480 (2010). The Court "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Ibid*. No matter how reasonable an inspector may promise his lawmaking will be, the delegation of ad hoc authority is unconstitutional all the same.

To be sure, reasonableness is often an integral component of an *objective* legal standard. An officer with "reasonable suspicion," for example, can stop and detain an individual. *Terry* v. *Ohio*, 392 U.S. 1 (1968). A law may turn on the exercise of "reasonable medical judgment." *Karlin* v. *Foust*, 188 F.3d 446, 464 (7th Cir. 1999). But this uses reasonableness as an objective tool for making a factual determina-

tion—such as a reasonable person standard. This does not authorize officers to decide what facts govern—that is, to make subjectively reasonable *legal* judgments, establishing ad hoc standards for themselves. See *Fox*, 567 U.S. at 253 ("[A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved.").

2. Contrary to the result reached below, the Sixth Circuit has held that a facially standardless law remains unconstitutionally vague, even when it restricts an official to *reasonable* determinations. This case would have been decided differently in that circuit, too.

In *Belle Maer Harbor* v. *Charter Township of Harrison*, 170 F.3d 553 (6th Cir. 1999), the court addressed an ordinance establishing safety requirements for "bubbling devices" that protect boats and other structures from ice. 170 F.3d at 555. The ordinance authorized an operator to maintain an area of open water around a protected structure "not to exceed five (5) feet, or as determined by the inspecting officer to be a reasonable radius." *Id.* at 555 n.4. The court sought to "discern whether the reasonableness standard in the Ordinance bounds the inspection officer's enforcement decisions sufficiently to prevent ad hoc, discriminatory enforcement of the open water restriction." *Id.* at 558.

As in this case, what it means to be "reasonable" was neither defined in the ordinance nor had a commonly accepted meaning that "would provide an inspection officer with guidance in interpreting the Ordinance and in executing his or her enforcement duties with any uniformity." 170 F.3d at 558. While recognizing that "many" ordinances "requir[e] use of

an officer's discretionary judgment in their enforcement," the court concluded that the ordinance was vague, observing that "neither the enforcement officer nor the bubbler operator can ascertain by examining the language of the Ordinance alone whether criminal sanctions will result from one foot or ten feet of open water." 170 F.3d at 559. There was, in other words, no legal standard to guide an officer as to what factual findings actually needed to be made or, in turn, to notify the public of what is and is not permitted under the law. *Ibid*.

The court rejected the municipality's contention that the otherwise standardless regulation was permissible because "decisions to prosecute would be constrained by the reasonableness standard in relation to the stated purpose of the Ordinance." 170 F.3d at 559. The lack of any standard, apart from the requirement to act reasonably, created a "level of imprecision" that "cannot withstand a due process challenge on vagueness grounds." *Ibid*.

The analogous requirement in this regulation—that an inspector must "reasonably determine[]" that a sign is related to an event (D.C. Mun. Regs. tit. 24 § 108.13)—similarly does not cure the due process defect.

C. Because the decision below chills protected speech, review is imperative.

While the lack of objective standards renders any law vague, that is especially so here, where the law at issue regulates speech.

Laws restricting speech "operate to inhibit the exercise of those freedoms," which "inevitably lead[s] citizens to steer far wider of the unlawful zone." *Grayned*, 408 U.S. at 109 (quotations and alterations

omitted). Thus, "[w]hen speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Fox*, 567 U.S. at 253-254.

The Court entertains facial challenges to vague statutes precisely because vagueness creates the risk of "[s]elf-censorship." *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 757-758 (1988) ("Self-censorship is immune to an 'as applied' challenge, for it derives from the individual's own actions, not an abuse of government power."). Thus, "[o]nly standards limiting the [official]'s discretion will eliminate this danger by adding an element of certainty fatal to self-censorship." *Ibid.* See also *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 36 (1963) ("[I]n cases arising under the First Amendment * * * we are concerned with the vagueness of the statute 'on its face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct.").

Unless this Court intervenes, free speech will be chilled in the District. Because the standards an official may use to judge whether a sign is event-related are ad hoc and entirely unknowable, the public is very likely to engage in self-censorship to avoid the draconian $2,000 *per poster* fines.

The event-related sign regulation at issue here has unique implications given that the District is the Nation's seat of government. Events of all stripes occur on a daily basis in the District, and rallies emerge with little warning or planning. Meanwhile, individuals and groups from across the country hang their posters in the District, often addressing issues of pressing political concern. Postering—a core exercise of democratic free speech—is woven deep into

the District's fabric. Yet the decision below authorizes District officials to apply idiosyncratic interpretations of what makes a sign "related to" an event—and then impose punishment on those who unwittingly violate that ad hoc standard.

The holding below also authorizes the District to enact other laws that confer wide-ranging discretion on enforcement officers, so long as the law spells out the obligation to act "reasonably." Review by this Court is imperative to clarify for the citizens of the District—and of the Nation—whether a law may delegate legal interpretation to enforcement officers, so long as the officers are constrained to exercise their lawmaking authority "reasonably."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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