No. 14-1201

In the Supreme Court of the United States

CENTRAL RADIO COMPANY, INC.,
ROBERT WILSON, AND KELLY DICKINSON,
Petitioners,

v.

CITY OF NORFOLK, VIRGINIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF, AND BRIEF *AMICI CURIAE*, OF SIX LAW PROFESSORS AND THE PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE

Proposed *amici* respectfully move for leave to file an *amici curiae* brief in support of Petitioners, pursuant to Supreme Court Rule 37.2(b).

Professor Ashutosh A. Bhagwat is Professor of Law at UC Davis School of Law.

Professor Eric M. Freedman is the Siggi B. Wilzig Distinguished Professor of Constitutional Rights at Hofstra University School of Law.

Professor Richard Garnett is the Paul J. Schierl/ Fort Howard Corporation Professor at the University of Notre Dame School of Law.

Professor Seth F. Kreimer is the Kenneth W. Gemmill Professor of Law at the University of Pennsylvania Law School.

Professor Nadine Strossen is the John Marshall Harlan II Professor of Law at New York Law School and the former President of the American Civil Liberties Union, 1991-2008.

Professor James Weinstein is the Amelia Lewis Professor of Constitutional Law at Arizona State University's Sandra Day O'Connor School of Law.

The Pennsylvania Center for the First Amendment is a national First Amendment research center housed in the College of Communications at Penn State University. For more than 20 years, the Center has been a leader in education, research, and outreach on free expression. The Center has continuously provided educational programs, sponsored speakers, published books and articles in the popular and

academic press, and served as a media resource on a wide array of First Amendment topics.

Petitioner has consented to this filing, but respondent has not, necessitating this motion. Proposed *amici* believe that their perspective as scholars and an organization with no connection with either party can be of help to this Court in evaluating the Petition for Certiorari. Proposed *amici* therefore ask this Court for leave to file this brief *amici curiae*.

Respectfully submitted.

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QUESTIONS PRESENTED

Is a restriction on the size of signs content-based, when it contains exceptions for (1) "flag[s] or emblem[s]" of foreign and domestic governments and of "religious organizations," and (2) "works of art"?

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INTEREST OF THE *AMICI CURIAE*[1]

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The Pennsylvania Center for the First Amendment is a nonprofit national First Amendment re-

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, financially contribute to preparing or submitting this brief. The parties' counsel of record received timely notice of the intent to file the brief under Rule 37. Petitioner has consented to this filing, but respondent has not.

search center housed in the College of Communications at Penn State University. For more than 20 years, the Center has been a leader in education, research, and outreach on free expression. The Center has continuously provided educational programs, sponsored speakers, published books and articles in the popular and academic press, and served as a media resource on a wide array of First Amendment topics.

Amici submit this brief to provide the Court with information about how the Fourth Circuit decision below is out of step with other circuit court decisions, and with this Court's First Amendment precedents.

SUMMARY OF ARGUMENT

Like *Reed* v. *Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2012), *cert. granted*, 134 S. Ct. 2900 (2014), this should have been an easy case. A sign ordinance is content-based if it "distinguishes * * * between permissible and impermissible signs * * * by reference to their content." *Metromedia, Inc.* v. *City of San Diego,* 453 U.S. 490, 516 (1981) (plurality opinion). Norfolk's sign code imposes size restrictions on some signs, like Petitioner's, but exempts from regulation (1) "flag[s] or emblem[s]" of foreign and domestic governments and of "religious organizations," and (2) "works of art." Norfolk, Va., Code app. A, §§ 2-3; 16-5.2(a)(3), (a)(9).[2] Such distinctions are facially content-based.

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[2] The ordinance was amended in November 2014 to remove "or any religious organization" from the first exemption. Norfolk, Va., Ordinance 45,769 § 1 & Ex. A (Nov. 25, 2014). But

Norfolk's sign ordinance might not be motivated by disagreement with Petitioner's ideas or turn on the viewpoint of speech. But under this Court's precedent, such content classifications make a law content-based, even in the absence of improper legislative motive.

Nevertheless, the Fourth Circuit panel majority treated this facially content-based law as content-neutral—the exact opposite of the result reached by the Eighth Circuit in *Neighborhood Enterprises, Inc.* v. *City of St. Louis*, 644 F.3d 728 (8th Cir. 2011), and the Eleventh Circuit in *Solantic, LLC* v. *City of Neptune Beach*, 410 F.3d 1250, 1266 (11th Cir. 2005), which dealt with ordinances nearly identical to the Norfolk ordinance. Moreover, the Sixth and Ninth Circuits join the Fourth Circuit in treating similar facially content-based sign ordinances as content-neutral, while the First and Second Circuits join the Eighth and Eleventh Circuits in treating them as content-based.

This Court should grant certiorari, vacate the decision below, and remand (GVR) to resolve this split, and to reaffirm the importance of treating content-based speech restrictions as presumptively unconstitutional.

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when the petitioners' sign was ordered taken down, the ordinance contained the exemption for flags or emblems of religious organization—and the Fourth Circuit decision treats the ordinance as content-neutral even with the religious organization flag or emblem exemption.

ARGUMENT

I. The Petition Should Be Granted Because the Decision Below Creates Conflict and Confusion in the Lower Courts

Are sign ordinances that allow some signs based on subject matter, while restricting others, content-based? This question has generated inconsistent holdings among the circuits, even in cases with almost identical fact patterns.

The Sixth and Ninth Circuits have used reasoning similar to the Fourth Circuit in this case. The Ninth Circuit's decision, *Reed* v. *Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013), is now being reviewed by this Court, 134 S. Ct. 2900 (2014) (granting certiorari). The Sixth Circuit in *Wagner* v. *City of Garfield Heights, Ohio*, 577 F. App'x 488 (6th Cir. 2014), *petition for cert. docketed*, No. 14-783 (Jan. 6, 2015), took a similar view to the Ninth Circuit in *Reed*, and held that an ordinance was content-neutral even though it imposed size requirements on political signs and not others.

But the Eighth Circuit in *Neighborhood Enterprises, Inc.* v. *City of St. Louis*, held that a sign code's definition of "sign" was content-based, even though that definition was nearly identical to the one in this case: the St. Louis Code applied to signs generally, but exempted "[n]ational, state, religious, fraternal, professional and civic symbols or crest[s]." 644 F.3d 728, 736-37 (8th Cir. 2011). Like the ordinance in Norfolk, the City of St. Louis ordinance also exempt-

ed "work[s] of art," *id.* at 733, though the Eighth Circuit had no occasion to reach that exemption.

Indeed, the Eighth Circuit took the view that, whenever "'the message conveyed determines whether the speech is subject to the restriction,'" the restriction is content-based. *Id.* at 736 (quoting *Whitton* v. *City of Gladstone, Mo.*, 54 F.3d 1400, 1403-1404 (8th Cir. 1995)). To determine whether a sign qualified for these exemptions, the Eighth Circuit noted, one had to "look at the *content*" of the sign, *id.* at 736 (emphasis in original), because "the words on the sign define whether it is subject" to the ordinance. *Id.* at 737 (internal quotation marks and citation omitted). Distinguishing between "[n]ational, state, religious, fraternal, professional and civic symbols or crest[s]" and any other type of speech thus makes an ordinance content-based. *Id.* This reasoning is flatly inconsistent with the reasoning the Fourth Circuit used in this case.

Likewise, in *Solantic, LLC* v. *City of Neptune Beach*, the Eleventh Circuit held that the city's sign code was "undeniably a content-based restriction on speech" because the regulation was "based on the nature of the messages [the signs] seek to convey." 410 F.3d 1250, 1266 (11th Cir. 2005). The court found "plainly content based" the code's exemption for flags and insignia for a "government, religious, charitable, fraternal, or other organization." As the court noted, while one of the enumerated organizations could freely "fly its flag," "an individual seeking to fly a flag bearing an emblem of his or her own choosing" would be subject to the code's restrictions. *Id.* at 1264.

In *Matthews* v. *Town of Needham*, the First Circuit similarly held that a town bylaw was content-based because it allowed "'For Sale' signs, professional office signs, contractors' advertisements, and signs erected for charitable or religious causes" but not "political signs." 764 F.2d 58, 59-60 (1st Cir. 1985). The court held that "the bylaw is concerned with the content, as opposed to the time, place, or manner, of the speech." *Id.*

And the Second Circuit followed an analogous approach in *Nat'l Advertising Co.* v. *Town of Babylon*, 900 F.2d 551, 556-67 (2d Cir. 1990), holding that exemptions for "temporary political signs and signs 'identifying a grand opening, parade, festival, fund drive or other similar occasion'" "impermissibly discriminate between types of noncommercial speech based on content." *Id*. at 554.

This Court is doubtless well aware of many aspects of this split, precisely because it is also implicated in *Reed* v. *Town of Gilbert*. It therefore seems likely that the best disposition of this case would be a GVR in light of *Reed* v. *Town of Gilbert*. But if *Reed* is decided so narrowly that a GVR is inappropriate, the Court should grant certiorari and decide this case on the merits to resolve the circuit split.

II. The Petition Should Be Granted Because the Decision Below Is Inconsistent with This Court's Precedent

A. The Exception for "Flag[s] or Emblem[s]" of Governments and Religious Organizations Is Content-Based

The Fourth Circuit's decision is also inconsistent with this Court's precedents. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broad. System, Inc.* v. *FCC*, 512 U.S. 622, 643 (1994). In particular, a sign ordinance is content-based if it "distinguishes * * * between permissible and impermissible signs * * * by reference to their content." *Metromedia, Inc.* v. *City of San Diego,* 453 U.S. 490, 516 (1981) (plurality opinion).

Contrary to this Court's rulings, the Fourth Circuit incorrectly characterized the sign code as content-neutral. In determining whether a restriction is content-based, the Fourth Circuit reasoned, "'[t]he government's purpose is the controlling consideration.'" *Central Radio Co., Inc.* v. *City of Norfolk, Va.*, 776 F.3d 229, 235 (4th Cir. 2015) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)), and the court concluded that Norfolk did not pass the ordinance out of "censorial intent." *Id.*

But as the Eleventh Circuit rightly observed, "the Court [since *Ward*] has receded from this [purpose-focused] formulation, returning to its focus on the law's own terms, rather than its justification." *Solantic*, 410 F.3d at 1259 n.8. Most recently, this

Court has stated that a law is content-based "if it require[s] enforcement authorities to examine the content of the message that is conveyed in order to determine whether a violation has occurred." *McCullen* v. *Coakley*, 134 S. Ct. 2518, 2531 (2014) (internal quotation marks and citation omitted).

Indeed, this Court has expressly rejected the claim that "discriminatory * * * treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas." *City of Cincinnati* v. *Discovery Network, Inc.,* 507 U.S. 410, 429 (1993). An "illicit legislative intent is not the *sine qua non*" of a First Amendment violation. *Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); see also *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 228 (1987) (holding that strict scrutiny applies even when there is "no evidence of an improper censorial motive").

As Justice Scalia has recognized, while "whether the government has adopted a regulation of speech because of disagreement with the message it conveys * * * is the *principal* inquiry" in determining if a speech restriction is content-based—because "suppression of uncongenial ideas is the worst offense against the First Amendment"—"it is not the *only* inquiry." *Hill* v. *Colorado*, 530 U.S. 703, 746-47 (2000) (Scalia, J., dissenting) (emphases in original) (internal citation and quotation marks omitted). Rather, the First Amendment presumptively "prohibit[s] * * * facially content-based restrictions" as well as ones

that are "justified by reference to content." *Id.* at 747 (Scalia, J., dissenting).

This Court's current approach to content neutrality is explained in *Discovery Network*. In that case, this Court struck down an ordinance that banned newsracks containing commercial handbills while permitting newsracks containing noncommercial newspapers. *Discovery Network*, 507 U.S. at 429. Because "the very basis for the regulation" was "the difference in content" between the two types of newsracks, the Court found the ordinance to be content-based. *Id.*

The Court rejected the city's claim that the ordinance's challengers needed to prove the city harbored "animus toward the ideas contained in [the challengers'] publications." *Id.* Rather, the Court ruled that because "whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack," the ban was content-based "by any commonsense understanding of the term." *Id.* (internal quotation marks omitted).

In this case, Norfolk has drawn a similar content-based distinction, between governmental and religious emblems and all other signs. Norfolk, Va., Code app. A, §§ 2-3; 16-5.2(a)(3), (a)(9). To determine if an object meets the flag or emblem exemption, one must look at the content of what that object says (or symbolically communicates). An object of the same size and in the same location might be permitted if it consists of the American flag or a foreign country's emblem, but forbidden if it contains a statement protesting American foreign policy or the policy of a foreign

country. "By any commonsense understanding," such a scheme is content-based. *Discovery Network*, 507 U.S. at 429.

And this Court's precedents treat content-based exceptions from facially content-neutral speech restrictions the same way as they do other content-based restrictions. For instance, in *Arkansas Writers' Project*, this Court struck down as unconstitutionally content-based a state sales tax exemption for "religious, professional, trade, and sports journals." There was no evidence of any improper censorial motive. 481 U.S. at 228. But this Court held that the law was content-based, because Arkansas "enforcement authorities must necessarily examine the content of the message that is conveyed" to determine a magazine's tax status. *Id.* at 228-29.

Likewise, in *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 99 (1972), and *Carey* v. *Brown*, 447 U.S. 455, 460 (1980), this Court treated restrictions that banned all picketing in certain places (near schools and residences, respectively), but exempted labor picketing, as content-based. And in *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984), this Court struck down a statutory provision that limited photographic reproductions of United States currency, but exempted reproductions "for philatelic, numismatic, educational, historical, or newsworthy purposes to content that was educational or newsworthy." *Id.* at 644. This Court held that the law was content-based, because "[a] determination concerning the newsworthiness or educational value of a photograph cannot

help but be based on the content of the photograph and the message it delivers." *Id.* at 648.

B. The Exception for "Works of Art" Is Content-Based

The "works of art" exemption is also necessarily content-based. The ordinance provides no standard for distinguishing art from other speech. But even if such a standard existed, and even if the City's officials were qualified to draw the line between art and other speech, the standard would have to be applied in a content-based way. To determine if an object is a work of art, officials must "look at the content of the object." *Neighborhood Enterprises*, 644 F.3d at 736.

Picasso's "Guernica," to give an example of a very large painting, is identifiable as art not because it is painted on a canvas, but because it contains content that people view as artistic. Moreover, many objects that are undeniably "works of art" consist substantially or even primarily of text. John Baldessari's *Tips for Artists Who Want to Sell* consists of black text on a plain yellow background. *See* art21, http://www.art21.org/images/john-baldessari/tips-for-artists-who-want-to-sell-1966-68. Indeed, Central Radio's sign contains more graphical features than Baldessari's work of art does. See Petn. 5.

Jenny Holzer's *Die Fast and Quiet When They Interrogate You or Live So Long That They Are Ashamed To Hurt You Anymore* likewise consists precisely of the words in the title, though with a slightly less plain background. *See* UNL Libraries Multimedia & Images Collection, http://contentdm.

unl.edu/cdm/ref/collection/sheldon/id/490. Many works by Joseph Kosuth consist almost entirely of text. *See, e.g.*, *Joseph Kosuth at Sean Kelly*, Contemporary Art Daily, Nov. 27, 2008, http://www.contemporaryartdaily.com/2008/11/joseph-kosuth-at-sean-kelly/. The only way to tell such works from the sign in this case—if there is such a way—is through their content.

The "works of art" exemption thus leaves City officials free to impose their own artistic tastes and preferences on the marketplace of ideas. For purposes of enforcing the sign ordinance, "art" is whatever the Office of the Planning Director says it is. A political statement that is associated with a more avant-garde political movement than Central Radio's may well be labeled a "work of art," either if it is plain text or if it has a modicum of graphics, so long as City officials find it artistically moving. The risk of selective enforcement runs high when an exemption from a speech restriction turns on a distinction as uncertain as that between "art" and "non-art."

Indeed, the record reveals that the City has permitted many uncontroversial, nonconforming signs to remain on display, see Petn. 11-12, while wasting no time in ordering the removal of the petitioner's sign protesting the City's policies. Even if the petitioner had expressed the exact same message in a more visually complex way, the City might well have nevertheless refused to consider his sign a "work of art," because the content of the sign was not seen as sufficiently artistic.

The risk that vague rules open the door to content discrimination is one of the reasons that this Court has given for demanding precision in speech restrictions. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972). The "works of art" exception is the antithesis of such precision. Thus, both the exception for the "flag or emblem of any nation, organization of nations, state, city, or any religious organization" and the exception for "works of art which in no way identify or specifically relate to a product or service" are content-based under this Court's precedents.

CONCLUSION

The petition should therefore be granted, and the decision below GVRed in light of *Reed*. But if *Reed* proves inapposite, this Court should grant the petition and decide this case on its merits.

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