No. 12-1168

In The
Supreme Court of the United States

ELEANOR MCCULLEN, et al.,

Petitioners,

v.

MARTHA COAKLEY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
ROBERT P. FROMMER*
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel.: (703) 682-9320
E-mail: wmellor@ij.org
rfrommer@ij.org

**Counsel of Record*

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF THE *AMICUS CURIAE*

The Institute is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, the Institute has challenged laws that prevent individuals and small businesses from displaying safe and effective signs based on who those speakers are and what their signs say, including in *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728 (8th Cir. 2011) and *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359 (4th Cir. 2012). The Institute also litigates other free-speech cases where a fundamental issue is if the challenged law is content-based or content-neutral. The Institute's experience will provide the Court with valuable insight as to how the differing tests for content neutrality, as laid out in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), have sown confusion in lower courts and harmed First Amendment rights.[1]

[1] All parties have consented to the filing of this brief. The Institute affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

"The distinction between content-based and content-neutral regulations of speech serves as the keystone of First Amendment law." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443 (1996). Conflicting language in this Court's free-speech cases, however, has profoundly confused the lower courts, some of which now hold that laws regulating the content of one's message are in fact content-neutral. Because these holdings threaten to erode the First Amendment's protections, this Court should harmonize the two leading tests for whether a law is content-based and make clear that failing either test triggers strict scrutiny. And this is the ideal case to resolve this issue: Although *amicus* does not engage in the merits of this case or take a position on whether the law at issue is content-neutral, it recognizes that the First Circuit, in resolving that question, asked only if the government adopted the law "because of disagreement with the message" of petitioners and others. *McCullen v. Coakley*, 571 F.3d 167, 176 (1st Cir. 2009) (quoting *Ward*, 491 U.S. at 791).

Traditionally, a law was content-based if its application required officials to inspect one's message to determine how it could be regulated. *See, e.g.*, *Mosley*, 408 U.S. 92; *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment) ("After all, whether a statute is content neutral or content based

is something that can be determined on the face of it. . . ."). But beginning with *Ward*, the Court laid out a supplemental test that turns on the law's purpose. Under that standard, laws are content-neutral if they are "*justified* without reference to the content of the regulated speech." 491 U.S. at 791 (emphasis added).

Although the test in *Ward* was *one* way for courts to decide if a law was content-based, some lower courts began to treat it as the *only* way. This tendency increased after *Hill v. Colorado,* where this Court held that examining speech to determine if it was "protest, education, or counseling" did not make the statute content-based. 530 U.S. 703, 720 (2000). Due to *Ward* and *Hill*, some lower courts now hold that laws are content-based only if they regulate speech for explicitly censorial reasons. For those courts, a law with a neutral justification receives only intermediate scrutiny, even if it facially treats some messages more harshly than others. The Fifth Circuit, for instance, stated that a law "is content based if . . . it differentiates based on the content of the speech on its face," *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 509-10 (5th Cir. 2009) (citation omitted), but then cited *Ward* to hold that a dress code permitting only school logos on clothing was content-neutral because its purpose was "to provide[ ] students with more clothing options than they would have had under a complete ban on messages." *Palmer*, 579 F.3d at 510.

This exclusive focus on government purpose conflicts with the reasoning of traditional First

Amendment cases like *Mosley* and *Arkansas Writers' Project*. And it has confused the federal and state judiciaries, most noticeably in the area of sign law. Some sign codes exempt certain messages, such as government flags, civic crests, and works of art, from regulation. *See, e.g.*, St. Louis, Mo. Zoning Code § 26.68.020. By last count, four circuits have held that when a sign law permits some signs but not others based on what they say, it is discriminating based on content. *See, e.g.*, *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011) (holding that "the zoning code's definition of 'sign' is impermissibly content-based because the message conveyed determines whether the speech is subject to the restriction") (citation omitted). But at least two other circuits have concluded that such laws are content-neutral despite such discrimination because their purpose is not to suppress any particular message. *See, e.g.*, *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (stating that "a regulation [must] do more than merely differentiate based on content to qualify as content based" in holding that a sign code that exempts works of art from regulation was content-neutral).

The Court should harmonize these two tests. Just as the Court explained in *United States v. Jones*, 132 S. Ct. 945 (2012), that a Fourth Amendment search occurs either when the government impinges on a person's reasonable expectation of privacy *or* when officials intrude upon private property to acquire information, so it should explain that a law is

content-based either if its purpose is to suppress the communicative impact of one's speech *or* if it requires officials to inspect a message's subject in deciding how it should be regulated. By making clear that there are two tests to determine if a law is content-based, and that lower courts should apply them both, this Court can ensure that the government cannot insulate itself from heightened scrutiny while picking and choosing what messages may be shared.[2] *See Wag More Dogs*, 680 F.3d at 363 (holding law content-neutral even though it authorized a government official to tell speaker that her mural could be shown only if it did not depict "something to do with dogs, bones, paw prints, pets, people walking their dogs, etc.").

ARGUMENT

This Court's precedents have sown deep doctrinal confusion on the most fundamental issue in First Amendment jurisprudence. On the one hand, this Court has repeatedly declared that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment," *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983), and has struck down laws that restricted speech by certain speakers and subjects even when passed for

[2] Although *amicus* asks this Court to clarify what makes a law content-based, it does not opine on whether the specific law at issue in this case is content-based under either test or whether it survives the requisite level of scrutiny.

the best of reasons. *See, e.g.*, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119 (1991) (invalidating New York's "Son of Sam" law under strict scrutiny despite government's interest in ensuring that criminals do not profit from their crimes).

At the same time, though, this Court has stated that the "government's purpose [in enacting a speech regulation] is the controlling consideration," *Ward*, 491 U.S. at 791. As a result, this Court has sometimes held that a law is content-neutral if it is passed for non-speech reasons, even if it explicitly treats certain subjects more harshly than others. Coupled with this Court's ruling in *Hill v. Colorado* that a law making it illegal to approach someone to engage in "protest, education, or counseling" was content-neutral, 530 U.S. at 720, *Ward*'s focus on legislative motive has spread throughout the Court's First Amendment jurisprudence. Indeed, it is the test the First Circuit employed in holding Massachusetts' law to be content-neutral. But the exclusive use of this purpose-based test threatens to short-circuit the heavy scrutiny courts should employ in construing laws that on their face treat some messages more harshly than others. *See Brown v. Town of Cary*, 706 F.3d 294, 303 (4th Cir. 2013) (stating that "we have not hesitated to deem [that] regulation content neutral even if it facially differentiates between types of speech" in upholding sign code that restricted display of political protest sign but exempted "public art" from regulation) (alteration in original).

Last year in *United States v. Jones*, 132 S. Ct. 945 (2012), this Court reminded lower courts that it had two separate tests for whether a Fourth Amendment search had occurred. This case provides the Court with an opportunity to do the same for the First Amendment. In Section I, *amicus* walks through this Court's First Amendment jurisprudence and how it traditionally held that a speech restriction was content-based if its application turned on what one wished to say. In Section II, *amicus* explores this Court's "secondary effects" doctrine, which allows laws imposing greater burdens on adult businesses than other speakers to be deemed content-neutral if passed for non-censorial purposes, and how that doctrine's logic soon found its way into cases that had nothing to do with adult entertainment like *Ward v. Rock Against Racism*. Section III explains how some lower courts now view governmental purpose as the exclusive test for content neutrality, with the effect that they evaluate laws that regulate some messages more heavily than others under the less rigorous strictures of intermediate scrutiny. Finally, in Section IV, *amicus* asks that the Court remind lower courts that a law should be treated as content-based and therefore subject to strict scrutiny either (1) when, on its face, the law treats speakers differently because of their subject matter; or (2) when the purpose behind a facially neutral law is to disapprove or discourage messages on a certain subject matter or viewpoint. Only this two-part inquiry will protect against the erosion of First Amendment rights that the exclusive

invocation of *Ward*'s purpose-based inquiry has engendered.

I. The Development of the Court's Traditional First Amendment Doctrine.

The Supreme Court has been protecting private speech through the First Amendment for the better part of a century. Yet for many years, the Court did not analyze cases through any consistent, rigorous analytical structure. Instead, the Court decided cases on a largely ad hoc basis, with the Court's members making their own independent determinations of whether a speech restriction ran afoul of the Constitution. But as the Court's First Amendment jurisprudence crystallized, it became evident that in most instances a law would be deemed content-based if its terms treated some topics and speakers more favorably than others. At the same time, the Court also recognized that even a facially neutral law could be subject to strict scrutiny if its manifest purpose was to regulate speech for censorial reasons.

A. Early First Amendment Cases: Results But No Doctrine.

Unlike today, in the middle of last century the Supreme Court lacked a systematic approach to categorizing and analyzing alleged free-speech violations, instead deciding cases on grounds that only later would shape the contours of First Amendment doctrine. In *Kovacs v. Cooper*, 336 U.S. 77, 78 (1949),

for instance, the Court upheld a Trenton, New Jersey law that made it illegal "to play, use or operate for advertising purposes . . . a sound truck, loud speaker or sound amplifier . . . which emits therefrom loud and raucous noises." The majority in *Kovacs* did not ask if Trenton's law was content-based or content-neutral; such terminology had not yet been developed. The Court instead ruled that, unlike a complete ban on all sound-making devices, Trenton could "bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities." *Id*. at 87. In so doing, the Court distinguished *Saia v. New York*, 334 U.S. 558 (1948), on the grounds that New York's exemption for "items of news and matters of public concern" granted the Chief of Police unfettered discretion to decide who may speak and who may not.[3]

Other instances of the Court's inchoate approach to the First Amendment arose in cases where members of the Jehovah's Witnesses were prosecuted for proselytizing in public spaces. In *Niemotko v.*

[3] Some members of the Court in *Kovacs* struggled with the fact that the law at issue banned more speech than the law struck down in *Saia*. Justice Jackson, for instance, argued that *Saia* was in fact a more modest restriction of speech, because it allowed the use of sound trucks "when and where the Chief of Police saw no objection." *Kovacs*, 336 U.S. at 97-98 (Jackson, J., concurring). This analysis echoes Justice Burger's dissent in *Metromedia, Inc. v. City of San Diego*, wherein he chastised the plurality for striking down San Diego's sign ordinance because it exempted certain "defined classes of signs" from regulation. 453 U.S. 490, 563-64 (1981) (Burger, J., dissenting).

Maryland, 340 U.S. 268 (1951), a state court convicted members of the Jehovah's Witnesses for disorderly conduct after they spoke out in public parks without first obtaining a permit. The Supreme Court invalidated the convictions, holding first that the members' speech was deemed disorderly only because it was conducted without a permit. It then went on to strike down the permitting requirement, holding that because it did not have sufficient procedural protections in place, it amounted to a prior restraint. *Id*. at 272. Nowhere in *Niemtoko*'s discussion of the law did the Court ever discuss whether the state's disorderly conduct statute was content-based either on its face or as applied to the defendants. Likewise, in *Fowler v. Rhode Island*, 345 U.S. 67 (1953), a minister was arrested when he began to speak to his fellow Jehovah's Witnesses in a public park. Charged with violating a law that made it a crime to "address any political or religious meeting in any public park," the minister appealed to the U.S. Supreme Court. In reversing the convictions, the Court held that the government could not pick and choose which religions it let speak out in the park. *Id*. at 69. But just as in *Niemtoko*, the Court in *Fowler* analyzed the case without the benefit of a formal analytical structure.

The problem with this ad hoc approach was apparent: Without a firm theoretical underpinning, the Court's decisions in various cases could not be easily synthesized into a cohesive rule of law. This left lower courts with little guidance about how they should apply the Court's decisions to new fact

patterns. But developments in the Court's First Amendment jurisprudence soon addressed these concerns.

B. The Court, Leaning on Its Equal-Protection Jurisprudence, Develops a Comprehensive System for Scrutinizing Speech Restrictions.

The problems with the Court's ad hoc approach to speech issues led to a push to increasingly formalize First Amendment doctrine. As that doctrine developed, it focused on whether the terms of a law required officials to inspect speech to determine what it said. If the face of the law treated some messages more harshly than others, it would face a more probing review than laws that did not differentiate based on subject matter.

The first major case to expressly focus on subject-matter restrictions was *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). In *Mosley*, Chicago passed a disorderly conduct ordinance that barred picketing within 150 feet of schools during the school day. The ordinance, however, expressly exempted labor disputes from the restriction. Mosley, a long-time protestor outside of Chicago public schools, brought suit, and while the district court dismissed the complaint, the Seventh Circuit reversed and held the ordinance to be invalid. *Id*. at 94.

On review, the Supreme Court upheld the Seventh Circuit, although it held that the ordinance was

unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment. Specifically, the Court looked to the terms of the ordinance itself and reasoned that because the ordinance "describes permissible picketing in terms of its subject matter," it regulated speech because of what it said. *Id*. at 95. Because the streets were a traditional place for the public to gather and speak, the "government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Id*. at 96. Accordingly, said the Court, the ordinance's content-based distinction could survive only if it was "tailored to serve a substantial government interest." *Id*. at 99.[4]

The City of Chicago defended the distinction on the idea that the law had a neutral purpose, *i.e.*, to preserve public order, and the fact that it exempted labor picketing was justified because it was less likely

[4] This protean formulation of strict scrutiny borrows from equal-protection jurisprudence, which imposes different degrees of scrutiny based on whether the law accomplishes its objective by treating different racial or ethnic groups in a differential manner. Some members of this Court have rejected this approach, instead arguing that laws that facially discriminate between speech and speakers on the basis of what they have to say should be subject to a rule of per se invalidation. *See Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (contending that "political speech simply cannot be banned or restricted as a categorical matter") (citing *Simon & Schuster, Inc.*, 502 U.S. at 124 (Kennedy, J., concurring in judgment)).

to be disruptive than other forms of picketing. But the Court rejected this supposition, noting that to accept such free-floating claims, based on broad generalities and divorced from any actual facts, "[f]reedom of expression . . . would rest on a soft foundation indeed." *Id*. at 101. Finding no reason sufficiently important to justify Chicago's content-based distinction, the Court declared the city's picketing ordinance unconstitutional.

Mosley was the Court's first major attempt to formalize its approach to First Amendment cases. Three years later in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Supreme Court further explained how it would analyze free-speech claims. The issue in *Erznoznik* was a Jacksonville ordinance that prevented the display of nudity on drive-in theater screens. The Court distilled the lessons from several previous cases and sketched out how it would generally approach First Amendment cases going forward:

> Although each case ultimately must depend on its own specific facts, some general principles have emerged. A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than

> others, the First Amendment strictly limits its power.

Id. at 209 (internal citations omitted).

The Court held that Jacksonville's law was a content-based restriction on speech because it prevented "drive-in theaters from showing movies containing any nudity, however innocent or even educational." *Id*. at 211-12. Jacksonville argued that the law was an attempt to protect both children and the privacy of accidental viewers. The Supreme Court rejected these justifications and struck down the ordinance, noting that the restriction reached farther than necessary to protect children and that if adults wished to avoid depictions of nudity, they need only avert their eyes. *Id*. at 212.

The Court followed its approach in *Erznoznik* in later cases by first analyzing whether a law applied to all speakers or if it facially discriminated between speakers based on what they are saying. The answer to that question then governed what level of judicial scrutiny applied. *See, e.g.*, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 784-85 (1978) (applying "exacting scrutiny" to law prohibiting corporations from spending money in ballot-issue elections and stating that the legislature "is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue") (citing *Mosley*, 408 U.S. at 96); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (invalidating Illinois law that forbade picketing of residences with exception for

labor protests after finding it to be content-based and therefore should be "carefully scrutinized").[5]

This Court has applied heightened scrutiny (whether termed as "exacting," "careful," or "strict") to laws that turn on the content of the speech even where there was no hint of censorial motive. This was the case with the laws in *Mosley* and *Carey*, which were both passed to protect the public and maintain order, not to suppress speech. Likewise, in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 514-15 (1981), a plurality of this Court held that San Diego's sign ordinance, which permitted certain types of noncommercial signs in commercial and industrial zones, was content-based and therefore subject to heightened scrutiny. Citing to *Carey*, the plurality stated that cities do "not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests." *Id*. Because the city permitted some noncommercial messages to be conveyed on billboards in specified areas of the city, it had to

[5] It is very likely that laws like those in *Mosley* and *Carey* would be deemed content-neutral under the purpose-based test *amicus* discusses in Section II. Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 115 (1987). This is because the governmental purpose behind those anti-picketing laws was not to suppress any particular message but to maintain public peace and order. *Mosley*, 408 U.S. at 101 (stating that government's interest was "in preventing disruption" in front of Chicago schools); *Carey*, 447 U.S. at 464 (stating that banning picketing in front of residences was motivated by an "interest in residential privacy").

similarly allow billboards conveying other noncommercial messages in those same areas. *Id*. at 515. This was the case even though Justice Stevens, writing in dissent, correctly pointed out that "there is not even a hint of bias or censorship in the city's actions." *Id*. at 552 (Stevens, J., dissenting in part).

Two taxing cases, *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987), further explained that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." *Minneapolis Star*, 460 U.S. at 592. In both *Minneapolis Star* and *Arkansas Writers' Project*, this Court struck down use and sales taxes that applied only to a few publications, in the case of *Minneapolis Star*, or to publications that the state did not deem to be religious, professional, trade, or sports periodicals, as in *Arkansas Writers' Project*. Neither the Court nor the parties alleged that the purpose behind the tax regimes was to silence certain disfavored speakers, nor was there any need to adduce evidence of "an improper censorial motive." *Arkansas Writers' Project*, 481 U.S. at 228. All that mattered was that the laws by their terms burdened only certain speakers and, in the case of *Arkansas Writers' Project*, required government officials to "examine the content of the message that is conveyed" to decide whether it could be taxed. *Id*. at 230. That was enough for the Court to declare that the law in each case was subject to strict scrutiny.

II. The Court, Beginning with the "Secondary Effects" Doctrine, Articulates a Second Test Based on the Government's Justification for Regulation.

At the same time that this Court formalized its traditional test for whether a law is content-based, it began to review First Amendment challenges to local zoning rules concerning adult businesses, including adult movie theaters and strip clubs. Under the traditional test laid out in *Mosley*, *Erznoznik*, and *Arkansas Writers' Project*, these rules were clearly content-based in that they only applied to businesses that spoke on a particular subject.

But rather than say that these laws were subject to strict scrutiny – or alternatively creating an exception in the Court's First Amendment jurisprudence for adult businesses – the Court instead held that they were content-neutral under its newly developed "secondary effects" doctrine. In Subsection A, *amicus* explains the development of the doctrine and how it allowed laws that expressly discriminate against certain messages to be deemed content-neutral if the proffered reason for regulation was not to suppress speech but to deal with the unwanted side effects of that speech. Despite concerns that applying the secondary-effects doctrine outside of the adult entertainment context could eviscerate First Amendment freedoms, Subsection B describes how this Court spread the doctrine's logic throughout the entirety of First Amendment jurisprudence through cases like *Ward v. Rock Against Racism* and *Hill v. Colorado*.

The end result is that lower courts now frequently hold that laws that turn on the content of one's speech are content-neutral and subject only to intermediate scrutiny.

A. The Development of the Court's Secondary-Effects Doctrine.

The Court first laid the groundwork for the secondary-effects doctrine in *Young v. American Mini Theatres*, *Inc.*, 427 U.S. 50 (1976), which dealt with a Detroit ordinance that prohibited adult theaters from being located within 1000 feet of any two other "regulated uses." *Id*. at 52. The face of the ordinance turned on what types of films the theater showed: If it presented material that emphasized certain "Specified Sexual Activities," it was subject to the ordinance's locational restrictions. *Id*. at 53. Two adult movie theater operators sued, arguing that the ordinance was content-based and failed heightened scrutiny.

Although the ordinance expressly subjected adult businesses to burdens not shared by other speakers, four justices, in an opinion written by Justice Stevens, held that it was not subject to heightened scrutiny. Rejecting *Mosley*'s statement that "[s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone," the plurality said that "[t]his statement . . . read literally . . . would absolutely preclude any regulation of expressive activity

predicated in whole or in part on the content of the communication." *Id*. at 65. Because the four justices felt that the purpose of the ordinance was to alleviate the secondary effects that Detroit said surrounded adult theaters, rather than to suppress the theaters' speech, they held it to be constitutional. *Id*. at 71 & n.34.

The plurality's decision in *Young* was controversial. Four justices criticized the plurality's view that sexually explicit – but non-obscene – speech was entitled to less First Amendment protection. *See Young*, 427 U.S. at 86 (Stewart, J., dissenting). They also attacked the idea that the government could make content-based distinctions without facing heightened scrutiny. Ultimately, the dissent viewed the decision as "an aberration" that would hopefully not be repeated. *See id*. at 87.

For a decade, *Young* did appear to be an aberration. But that changed with the Court's decision in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). Renton's ordinance, like the ordinance in *Young*, applied only to adult entertainment businesses, and whether a business was subject to the rule turned on what those businesses displayed. In an opinion authored by Justice Rehnquist (who had joined the *Young* plurality), the Court fully embraced the secondary-effects doctrine, claiming that "the resolution of this case is largely dictated by our decision in *Young*." *Id*. at 46. The majority believed that Renton's chief concern "was with the secondary

effects of adult theaters, and not with the content of adult films themselves." *Id*. at 47. Accordingly, the majority concluded that Renton's ordinance was content-neutral, even though it turned on what the theaters depicted, because it was "*justified* without reference to the content of the regulated speech." *Id*. at 48 (quoting *Va. Pharm. Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

The Court's decision in *Renton* was deeply divisive. Calling the majority's approach "misguided," Justice Brennan argued that although the threat of negative secondary effects might be a reason to regulate adult movie theaters, the stated purpose for a regulation cannot turn a content-based law into a content-neutral one. *Id*. at 56-57 (Brennan, J. dissenting). Brennan consoled himself with the fact that the doctrine had only been applied in the adult zoning context, but commentators were not so sanguine. They noted that if the secondary-effects doctrine spread, it potentially could redraw the Court's entire content-based/content-neutral framework and "gravely erode the First Amendment's protections." Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 12-19, at 952 (2d ed. 1988); *see also* Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 116 (1987) (stating that doctrine "threatens to undermine the very foundation of the content-based/content-neutral distinction").

The reasoning underlying *Renton* quickly infiltrated subsequent cases. In *Boos v. Barry*, 485 U.S. 312 (1988), for instance, the Court invalidated a District of Columbia law that made it illegal to

display any sign bringing a foreign government into disrepute. The government argued that under *Renton* the law was content-neutral because it furthered a neutral government interest, namely "our international law obligation to shield diplomats from speech that offends their dignity." *Id*. at 320. The plurality, though, held that *Renton* was distinguishable from the facts in the case because the District's justification "focuses only on the content of the speech and the direct impact that speech has on its listeners." *Id*. at 321. Because the sign ban regulated speech "due to its potential primary impact," the plurality concluded that it was content-based. *Id.*

Albeit dictum, the plurality's analysis implicitly accepted the core idea of the secondary-effects doctrine: *i.e.*, the District's law could be deemed content-neutral, despite expressly discriminating against certain messages, if the District had come up with a purpose that did not rely on the listeners' reaction to speech. Justice Brennan chided the plurality for its attempt to divine legislative motive, noting both that "future litigants are unlikely to be so bold or so forthright" as the District. *Boos*, 485 U.S. at 335 (Brennan, J., concurring in the judgment). He also noted that the secondary-effects doctrine does not provide the "clear guidance" of the traditional test, which turns on the statute's terms rather than motive. *Id*. at 335-36. Yet despite these warnings, the Court's use of the purpose-based test undergirding *Young* and *Renton* threatened to radically transform the very nature of the content-based/content-neutral inquiry. What by all accounts should have been a simple case made good on that threat.

B. *Ward v. Rock Against Racism, Hill v. Colorado,* and the Metastasis of *Renton's* Focus on Legislative Motive.

Ward v. Rock Against Racism, 491 U.S. 781 (1989), unwittingly effected a sea change in this Court's First Amendment jurisprudence. *Ward* involved a content-neutral rule that required the use of city-provided sound equipment and engineering services at concerts performed in a Central Park bandshell. *Id*. at 787. Rock Against Racism, which held yearly events in the bandshell, argued that the requirement violated the First Amendment. *Id*. at 787-88. The district court sustained the regulations, but the Second Circuit reversed, holding that the city had not shown that the rule was the least-restrictive means of addressing the sound problem. *Id*. at 789.

On review, the Supreme Court reversed and upheld the restrictions. The Court could have held that the rule – which applied regardless of what was performed – was content-neutral under *Mosley*'s traditional inquiry. Instead, the Court focused on legislative purpose, holding that "[t]he principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The *government's purpose* is the controlling consideration." *Id.* at 791 (internal citations omitted & emphasis added). The Court then cited *Renton* for the idea that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some

speakers or messages but not others." *Id*. Because the rule's purpose was to protect the tranquility of adjoining areas, the Court determined it was content-neutral. *Id*. at 792-93. And because the "less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation," the Court held that the Second Circuit erred in holding that the rule failed because less burdensome alternatives were available. *Id*. at 797.

As Justice Marshall noted in dissent, *Ward* was "the first time [that] a majority of the Court applie[d] *Renton* analysis to a category of speech far afield from that decision's original limited focus." *Id*. at 804 n.1 (Marshall, J., dissenting). The dissenters in *Ward* feared that focusing on legislative purpose rather than a statute's plain meaning might "encourage widespread official censorship" by causing many laws that expressly discriminate against certain messages to be judged under the relatively lax standards of intermediate scrutiny. *Id*. Furthermore, some commentators have noted that by being able to deploy either the traditional test or the *Ward*/*Renton* purpose-based test, the Court gave itself the discretion to characterize most facially discriminatory laws as either content-based or content-neutral depending upon the circumstances. *See, e.g*., John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1132 (2005).[6]

[6] *See also* Christina Wells, *Of Communists and Anti-Abortion Protestors: The Consequences of Falling into the*

(Continued on following page)

Having two separate tests can also lead to confusion in lower courts, which increases the risk that courts will reach differing results in factually indistinguishable cases. *See* R. George Wright, *Content-Based and Confidential-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333, 339 (2006) (noting that lower courts "have made little progress in sorting out the respective roles of an examination of the text of the speech regulation and of broader-ranging attempts to ascertain legislative intent in distinguishing between [content-based] and [content-neutral] regulations") (footnotes omitted). As *amicus* shows below, this is more than a risk: this Court's fractured approach to content neutrality has led to deep splits in fundamental areas of First Amendment law.

These concerns intensified following this Court's ruling in *Hill v. Colorado*, 530 U.S. 703 (2000), a law similar to the one at issue in this case. The law in *Hill* prohibited individuals outside medical facilities from approaching people entering the facility to engage in "oral protest, education, or counseling" without first gaining the would-be listener's permission. *Id*. at 707-08. Even though the pre-approval

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Theoretical Abyss, 33 GA. L. REV. 1, 58 (1998) (stating that "purpose terminology occasionally creeps into the Court's free speech decisions – especially when the Court wants to uphold a content-neutral law. Simultaneously, the Court has reiterated its belief that governmental purpose is irrelevant to determining a law's legitimacy – especially when it wants to strike down a law that discriminates against certain speech.").

requirement in *Hill* applied to only certain speakers and subjects, the majority held that the law was content-neutral because its purposes – to protect patient access and privacy – were unrelated to what the demonstrators said. *Id*. at 719-20.

The Court in *Hill* similarly refused to hold that the law was content-based because it required police to determine if one was engaging in "oral protest, education, or counseling." The majority, relying on picketing cases such as *United States v. Grace*, 461 U.S. 171 (1983), held that it was not "improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." *Hill*, 530 U.S. at 721. Given that the Colorado law limited only unconsented approaches for the purpose of "oral protest, education, or counseling," rather than banned such forms of speech altogether, the Court held that the law was content-neutral. *Id*.

Critics of *Hill*'s treatment of the content neutrality issue have been legion. *See, e.g.*, Michael McConnell, 28 PEPP. L. REV. 747, 748 (2000) (stating that if the law in *Hill* "is not content based, I just do not know what 'content-based' could possibly mean"); Kathleen M. Sullivan, *Sex, Money, and Groups*, 28 PEPP. L. REV. 723, 737 (2000) (questioning whether the law in *Hill* was "properly understood as content-neutral at all"); Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech about Favored Rights*, 51 AM. U. L. REV. 179, 182 (2001) (criticizing *Hill* for making it easy for governments to engage in viewpoint

discrimination "provided that their enactments maintain the thinnest facade of neutrality"); Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 McGeorge L. REV. 595, 620 (2003) (criticizing the *Ward/Hill* approach to content neutrality on the grounds that it is "rare that sufficient evidence exists to demonstrate that the purpose of a facially neutral action is content- or viewpoint-based, and that the proffered neutral justification is, in fact, a sham"). But despite this criticism, lower courts have seized upon *Renton/Ward/Hill*'s focus on legislative purpose.

III. The *Renton/Ward/Hill* Purpose-Based Inquiry Has Led Some Courts To Hold That Laws That Turn on the Content of One's Speech Are Content-Neutral.

Since this Court decided *Hill*, federal and state courts have repeatedly been called upon to scrutinize governmental speech restrictions. But due to the doctrinal confusion that *Renton*, *Ward*, and *Hill* have sown, these lower courts have been left without any clear guidance as to how they should determine whether any particular law is content-based or content-neutral. Should they look at whether the law turns on what the would-be speaker says? Or should they focus on whether the government has put forward some neutral justification for the restriction? The answer to these questions, given this Court's vacillation between the two tests, is murky at best. *Compare Holder v. Humanitarian Law Project*, 130

S. Ct. 2705, 2723-24 (2010) (deeming law to be content-based because whether speech of plaintiffs was prohibited "depends on what they say")[7] with *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (holding law prohibiting intentional disclosure of intercepted communications to be content-neutral under *Ward* because its purpose was to protect "the privacy of wire, electronic, and oral communications" rather than to suppress speech).

In light of this uncertainty, some lower courts now view *Ward*'s focus on legislative purpose not just as one way to determine if a law is content-based, but the *only* way. Consequently, these courts classify facially discriminatory laws as content-neutral and uphold them under the much less rigorous test used for time, place, and manner restrictions. As demonstrated below, this Court's conflicted approach to content neutrality has caused federal and state courts to deeply split on whether laws that turn on the content of one's speech, but which are passed for non-censorial reasons, should be subject to strict scrutiny. At the very least, this Court should take care it does not further that confusion in deciding this case.

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[7] It is important to note that, although this Court correctly concluded that the law in *Holder* was content-based, applying *Ward*'s purpose-based test would not have led to the same conclusion. That is because the government's purpose for passing the law was not to suppress speech, but to protect national security by preventing contributions to foreign terrorist organizations.

A. Federal Courts Are Split on Whether Sign Ordinances That Draw Subject Matter Distinctions Are Content-Based or Content-Neutral.

The U.S. Courts of Appeal are deeply embroiled in a conflict concerning municipal sign ordinances. Specifically, the conflict reflects a disagreement on whether a sign ordinance that provides exemptions or otherwise draws distinctions based on subject matter is content-based, regardless of the governmental motive and proffered justification for the ordinance.

On one side of the divide are those courts that have generally employed this Court's traditional approach to the content-based inquiry, as exemplified in cases like *Mosley* and *Carey v. Brown*. In *Neighborhood Enterprises, Inc. v. City of St. Louis*, the Eighth Circuit followed the approach laid out by the *Metromedia* plurality by holding that the city's exemption for certain noncommercial signs, based on what those signs depicted or said, rendered the ordinance content-based. 644 F.3d 728, 736 (8th Cir. 2011) (holding that "the zoning code's definition of 'sign' is impermissibly content-based because 'the message conveyed determines whether the speech is subject to the restriction'") (internal quotation marks and citation omitted). The Eighth Circuit's decision in *Neighborhood Enterprises* echoes earlier decisions from the First, Second, and Eleventh Circuits. *See Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985) (holding sign code to be content-based when it forbade political signs but permitted signs

erected for charitable or religious causes); *Nat'l Adver. Co. v. Town of Babylon*, 900 F.2d 551, 556-57 (2d Cir. 1990) (holding that ordinance's exemption for signs "identifying a grand opening, parade, festival, fund drive or similar occasion" rendered it content-based); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1263-64 (11th Cir. 2005) (concluding that sign code which exempted government flags and insignia of government, religious, charitable and fraternal organizations from regulation to be content-based).

By contrast, the Fourth, Sixth, and Seventh Circuits have held, based on this Court's statements in *Ward* and *Hill*, that an ordinance's exemptions for certain types of noncommercial signs will not render the sign code content-based so long as the government has proffered some content-neutral "justification," or purpose, for the ordinance. *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359 (4th Cir. 2012); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 623-25 (6th Cir. 2009); *Scadron v. City of Des Plaines*, 734 F. Supp. 1437, 1445-46 (N.D. Ill. 1990), *aff'd*, 1993 WL 64838, at *2 (7th Cir. Mar. 8, 1993) (unreported). In *Wag More Dogs*, for instance, the Fourth Circuit held that Arlington County's sign code was content-neutral because its purpose was "to regulate land use, not to stymie a particular disfavored message." 680 F.3d at 368. It maintained that position even though Arlington's sign code exempted works of decorative art from regulation, holding that "a regulation [must] do more than merely differentiate based on content to

qualify as content based." *Id*. at 365. One year later the Fourth Circuit followed up *Wag More Dogs* with *Brown v. Town of Cary*, 706 F.3d 294, 301-02 (4th Cir. 2013), in which it expressly acknowledged the deep circuit split on the issue and rejected the "absolutist" position taken by the Eighth and Eleventh Circuits.

To add to the confusion, the Third Circuit and Ninth Circuits have developed their own distinct approaches to this issue. The Third Circuit has adopted a "significant relationship" approach. *See Rappa v. New Castle Cnty.*, 18 F.3d 1043, 1065 (3d Cir. 1994). It recognizes that exemptions based on subject matter are content-based, but generally allows such exemptions if (1) there is a significant relationship between the subject matter of the signs allowed by the exemption and the specific location where the exemption applies; (2) the exemption is substantially related to serving an interest that is at least as important as that served by the underlying sign regulation; and (3) the municipality did not include the exemption to censor certain viewpoints or control what issues are appropriate for public debate. *Id.* This rule allows exemptions from general sign bans so long as the exemption is based on a special relationship between the sign and its location.[8]

[8] Then Judge Alito concurred in *Rappa*, noting that until "the Supreme Court provides further guidance concerning the constitutionality of sign laws [that turn on the content being depicted], I endorse the test set out in the court's opinion." 18 F.3d at 1080 (Alito, J., concurring).

Melrose, Inc. v. City of Pittsburgh, 613 F. 3d 380, 388-89 (3d Cir. 2010) (finding ordinance content-neutral when it permitted identification signs but banned advertising on certain buildings because identification signs "convey their information at the location they are intended to identify," and promote public order by giving information about specific buildings).

The Ninth Circuit's position on the content neutrality issue has changed over time. Initially, the court followed the traditional approach and held that sign laws that exempted certain messages were subject to strict scrutiny. *Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 248 & n.2 (9th Cir. 1988) (holding that, *inter alia*, exception in ordinance for flags "of nonprofit religious, charitable or fraternal organizations" rendered ordinance content-based). But in recent opinions, the Ninth Circuit has held sign codes to be content-neutral despite the presence of "speaker- or event-based" exemptions. Relying on *Hill v. Colorado*, the Ninth Circuit held in *Reed v. Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013) that a municipality may exempt signs for certain speakers or during certain "triggering events" (such as elections or home sales) from regulation. *Id*. at 1071-72. Because the town did not adopt its sign code out of disagreement with any particular person's message, the Ninth Circuit held it to be content-neutral even though it required government officials to inspect the would-be speaker's message to decide how it should be regulated. *Id.* (citing *Hill*, 520 U.S. at 719-20).

B. State Courts Also Diverge on Whether Sign Ordinances with Subject Matter Distinctions Are Subject to Strict Scrutiny.

State courts are likewise split in how to scrutinize sign codes that exempt certain noncommercial messages from regulation. Courts in Georgia, Minnesota, New Jersey, Ohio, and Washington have followed the approach of the *Metromedia* plurality and the Eighth and Eleventh Circuit by holding that such exemptions render sign ordinances content-based and subject to strict scrutiny. *Union City Bd. of Zoning Appeals v. Justice Outdoor Displays*, 467 S.E.2d 875, 882 (Ga. 1996) (holding that durational limit placed on political signs but not other signs is content-based); *Goward v. City of Minneapolis*, 456 N.W.2d 460, 465 (Minn. Ct. App. 1990); *State v. DeAngelo*, 963 A.2d 1200 (N.J. 2009) (holding sign ordinance to be content-based where it "prohibited the union from displaying a rat balloon, but authorized a similar display as part of a grand opening"); *City of Tipp City v. Dakin*, 929 N.E.2d 484, 499 (Ohio Ct. App. 2010) (stating that exemptions from permit requirement for, among other things, political flags, garage sale signs, and yard signs intended to display "personal" messages rendered sign code content-based); *Collier v. City of Tacoma*, 854 P.2d 1046, 1053 (Wash. 1993) (rejecting *Ward* purpose-based analysis and holding that durational limitation law placed on political signs was content-based).

On the other hand, courts in Michigan and Texas have held that sign laws that expressly regulate certain messages more harshly than others due to their subject matter are content-neutral so long as the purpose for regulation was not to suppress speech. In *Sackllah Investments, LLC v. Charter Township of Northville*, No. 293709, 2011 Mich. App. LEXIS 1452 (Mich. Ct. App. Aug. 9, 2011), the Michigan Court of Appeals examined a sign code that exempted, among other things, "flags bearing the official design of the United States, State of Michigan, a public educational institution, or official design of a corporation or award flags." *Id*. at *25 n.8. After analyzing the split in the federal circuits on this issue, the court chose to follow the Sixth Circuit's approach in *H.D.V.-Greektown*, 568 F.3d 609, to hold that the law, despite its exemptions, was content-neutral because its purpose is to "eliminat[e] visual clutter to promote aesthetics . . . and to promote traffic safety." *Id*. at *33. *See also Tex. DOT v. Barber*, 111 S.W.3d 86, 94 (Tex. 2003) (applying *Renton* secondary-effects analysis to hold state billboard law to be content-neutral even though it "does make certain distinctions based on subject matter").

IV. The Court Should Use This Case To Instruct Lower Courts That There Are Two Tests for Whether a Law Is Content-Based and That They Should Apply Them Both.

The conflicts that *amicus* has identified have arisen because lower courts mistakenly believe that

Ward's purpose-based inquiry is in fact the only inquiry they must undertake. But recent precedents make clear that this Court continues to categorize laws that turn on the content of one's speech as content-based irrespective of whether they were passed for censorial reasons. *Humanitarian Law Project*, 130 S. Ct. at 2723-24; *United States v. Stevens*, 559 U.S. 460, 468 (2010) (holding that law's terms rendered it content-based). This Court should remind lower courts of its statement in *Turner Broadcasting System, Inc. v. FCC* that "while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content-based, it is not necessary to such a showing in all cases. Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content." 512 U.S. 622, 642-43 (1994) (citations omitted).

Last year, this Court in *United States v. Jones*, 132 S. Ct. 945 (2012), resolved a similar problem with respect to Fourth Amendment precedent. Traditionally, the government committed a search for Fourth Amendment purposes when it trespassed to gather information. *See Kyllo v. United States*, 533 U.S. 27, 31 (2001) (discussing property-rights focus of early Fourth Amendment caselaw). But as technology improved, so did the government's ability to conduct surveillance without physically intruding on one's property. In response, the Court in *Katz v. United States* explained that even when the government committed no trespass, it conducted a search for

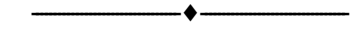
Fourth Amendment purposes if it infringed on one's "reasonable expectation of privacy." 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

The *Katz* reasonable expectation of privacy test quickly became the centerpiece of Fourth Amendment jurisprudence, but it was not without its faults. Most importantly, to the extent a person lacked a reasonable expectation of privacy, *Katz* permitted the government to search without constitutional consequence. *See United States v. Knotts*, 460 U.S. 276, 281-82 (1983) (holding that monitoring vehicle's movements on public roads was not a search). This was particularly problematic when construing the warrantless placement of GPS tracking devices, which allowed police to know the constant whereabouts of a vehicle for an extended period of time. Some lower courts invoked a modified version of *Katz* that looked at the overall "mosaic" that long-term GPS monitoring painted, *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), but most held that no Fourth Amendment search had occurred. *See, e.g.*, *United States v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010).

The majority in *Jones* resolved this problem by reminding lower courts that *Katz* was not the sole test for whether a search had occurred. 132 S. Ct. at 952. Stating that "the *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test," *id*., the Court explained that the government committed a search for Fourth Amendment purposes either when it (1)

physically invaded one's property for the purpose of acquiring information, *id*. at 949; or (2) infringed on one's reasonable expectation of privacy. *Id*. at 950. Finding that the former had occurred in Jones' case, the Court held that admitting the evidence that the government had collected violated the Fourth Amendment. *Id*. at 954.

This Court should do for the First Amendment what it did in *Jones* for the Fourth Amendment. *Ward*'s inquiry into legislative purpose was "added to, not substituted for" this Court's traditional test, and speech restrictions are content-based *either* when (1) the restrictions require the government to look at the content of one's speech in determining whether or not it is subject to regulation; or (2) they are motivated by antipathy toward a particular subject matter or viewpoint. By reminding lower courts that both tests exist and they should employ them both, this Court can protect First Amendment rights and ensure that laws that turn on the content of one's speech are judged under the proper standard.



CONCLUSION

More than twenty years ago, this Court said that a law is content-based when "the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. But many lower courts now erringly view *Ward* as the sole test for content neutrality, and subject

facially discriminatory laws only to the relatively lax standards meant for time, place, and manner restrictions. That includes the First Circuit, which held that Massachusetts' reproductive facilities act was content-neutral because it served purposes other than suppressing speech. It is possible that the First Circuit could have reached the same result even if it scrutinized the law under the traditional test. But no matter how it affects this particular case, this Court should instruct lower courts that invoking both tests is constitutionally necessary. Only this will ensure that the mistakes of the past are not repeated once again.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
ROBERT P. FROMMER*
901 North Glebe Road
Suite 900
Arlington, VA 22203
Tel.: (703) 682-9320

**Counsel of Record*

Counsel for Amicus Curiae