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# Section 5: First Amendment

Institute of Bill of Rights Law at the William & Mary Law School

# V. First Amendment

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## *Elonis v. United States*

**13-983**

**Ruling Below:** United States of America v. Anthony Douglas Elonis, 730 F.3d 321 (3rd Cir. 2013), *cert granted,* 134 S.Ct. 2819 (2014).

After his motion to dismiss his indictment was denied, defendant was convicted in the United States District Court for the Eastern District of Pennsylvania of making threatening communications, based on comments he posted on social networking website. Defendant appealed.

**Questions Presented:** (1) Whether, consistent with the First Amendment and *Virginia v. Black*, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont; or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort; and (2) whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten.

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**UNITED STATES OF AMERICA**

**v.**

**ANTHONY DOUGLAS ELONIS, Appellant.**

United States Court of Appeals, Third Circuit

Decided on September 19, 2013

[Excerpt, some footnotes and citations omitted]

**SCIRICA**, **Circuit Judge**.

This case presents the question whether the true threats exception to speech protection under the First Amendment requires a jury to find the defendant subjectively intended his statements to be understood as threats. Anthony Elonis challenges his jury conviction under 18 U.S.C. § 875(c), arguing he did not subjectively intend his Facebook posts to be threatening. In *United States v. Kosma*, we held a statement is a true threat when a reasonable speaker would foresee the statement would be interpreted as a threat. We consider whether the Supreme Court decision in *Virginia v. Black*, overturns this standard by requiring a subjective intent to threaten.

**I.**

In May 2010, Elonis's wife of seven years moved out of their home with their two young children. Following this separation, Elonis began experiencing trouble at work. Elonis worked at Dorney Park & Wildwater Kingdom amusement park as an operations supervisor and a communications technician. After his wife left, supervisors observed Elonis with his head down on his desk crying, and he was sent home on several occasions because he was too upset to work.

One of the employees Elonis supervised, Amber Morrissey, made five sexual harassment reports against him. According to Morrissey, Elonis came into the office where she was working alone late at night, and began to undress in front of her. She left the building after he removed his shirt. Morrissey also reported another incident where Elonis made a minor female employee uncomfortable when he placed himself close to her and told her to stick out her tongue. On October 17, 2010 Elonis posted on his Facebook page a photograph taken for the Dorney Park Halloween Haunt. The photograph showed Elonis in costume holding a knife to Morrissey's neck. Elonis added the caption "I wish" under the photograph. Elonis's supervisor saw the Facebook posting and fired Elonis that same day.

Two days after he was fired, Elonis began posting violent statements on his Facebook page. One post regarding Dorney Park stated:

> Moles. Didn't I tell ya'll I had several? Ya'll saying I had access to keys for the fucking gates, that I have sinister plans for all my friends and must have taken home a couple. Ya'll think it's too dark and foggy to secure your facility from a man as mad as me. You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween haunt could be so fucking scary?

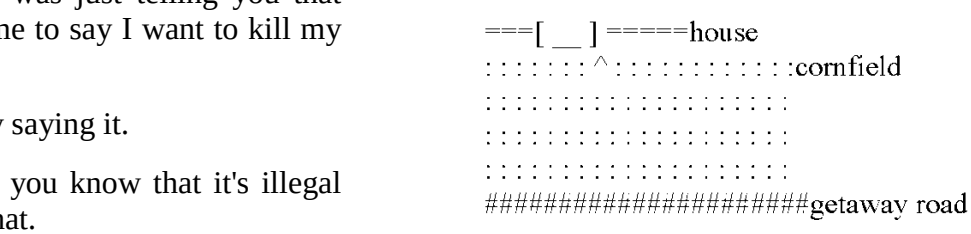
Elonis also began posting statements about his estranged wife, Tara Elonis, including the following: "If I only knew then what I know now, I would have smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek, and made it look like a rape and murder." Several of the posts about Tara Elonis were in response to her sister's status updates on Facebook. For example, Tara Elonis's sister posted her status update as: "Halloween costume shopping with my niece and nephew should be interesting." Elonis commented on this status update, writing, "Tell [their son] he should dress up as matricide for Halloween. I don't know what his costume would entail though. Maybe [Tara Elonis's] head on a stick?" Elonis also posted in October 2010:

> There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts. Hurry up and die, bitch, so I can bust this nut all over your corpse from atop your shallow grave. I used to be a nice guy but then you became a slut. Guess it's not your fault you liked your daddy raped you. So hurry up and die, bitch, so I can forgive you.

Based on these statements a state court issued Tara Elonis a Protection From Abuse order against Elonis on November 4, 2010.

Following the issuance of the state court Protection From Abuse order, Elonis posted several statements on Facebook expressing intent to harm his wife. On November 7 he wrote:

> Did you know that it's illegal for me to say I want to kill my wife?
>
> It's illegal.
>
> It's indirect criminal contempt.
>
> It's one of the only sentences that I'm not allowed to say.
>
> Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife.
>
> I'm not actually saying it.
>
> I'm just letting you know that it's illegal for me to say that.
>
> It's kind of like a public service.
>
> I'm letting you know so that you don't accidently go out and say something like that
>
> Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.
>
> That's illegal.
>
> Very, very illegal.
>
> But not illegal to say with a mortar launcher.
>
> Because that's its own sentence.
>
> It's an incomplete sentence but it may have nothing to do with the sentence before that.
>
> So that's perfectly fine.
>
> Perfectly legal.
>
> I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.
>
> Insanely illegal.
>
> Ridiculously, wrecklessly, insanely illegal.
>
> Yet even more illegal to show an illustrated diagram.




> Insanely illegal.
>
> Ridiculously, horribly felonious.
>
> Cause they will come to my house in the middle of the night and they will lock me up.
>
> Extremely against the law.
>
> Uh, one thing that is technically legal to say is that we have a group that meets Fridays at my parent's house and the password is sic simper tyrannis.

Tara Elonis testified at trial that she took these statements seriously, saying, “I felt like I was being stalked. I felt extremely afraid for mine and my children's and my families' lives.” Ms. Elonis further testified that Elonis rarely listened to rap music, and that she had never seen Elonis write rap lyrics during their seven years of

marriage. She explained that the lyric form of the statements did not make her take the threats any less seriously.

On November 15 Elonis posted on his Facebook page:

> Fold up your PFA and put it in your pocket Is it thick enough to stop a bullet?
>
> Try to enforce an Order
>
> That was improperly granted in the first place Me thinks the judge needs an education on true threat jurisprudence
>
> And prison time will add zeroes to my settlement
>
> Which you won't see a lick
>
> Because you suck dog dick in front of children
>
> * * *
>
> And if worse comes to worse
>
> I've got enough explosives to take care of the state police and the sheriff's department
>
> [link: Freedom of Speech, www.wikipedia.org]

This statement was the basis both of Count 2, threats to Elonis's wife, and Count 3, threats to local law enforcement. A post the following day on November 16 involving an elementary school was the basis of Count 4:

> That's it, I've had about enough
>
> I'm checking out and making a name for myself Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined
>
> And hell hath no fury like a crazy man in a kindergarten class
>
> The only question is ... which one?

By this point FBI Agent Denise Stevens was monitoring Elonis's public Facebook postings, because Dorney Park contacted the FBI claiming Elonis had posted threats against Dorney Park and its employees on his Facebook page. After reading these and other Facebook posts by Elonis, Agent Stevens and another FBI agent went to Elonis's house to interview him. When the agents knocked on his door, Elonis's father answered and told the agents Elonis was sleeping. The agents waited several minutes until Elonis came to the door wearing a t-shirt, jeans, and no shoes. Elonis asked the agents if they were law enforcement and asked if he was free to go. After the agents identified themselves and told him he was free to go, Elonis went inside and closed the door. Later that day, Elonis posted the following on Facebook:

> You know your shit's ridiculous when you have the FBI knockin' at yo' door
>
> Little Agent Lady stood so close
>
> Took all the strength I had not to turn the bitch ghost
>
> Pull my knife, flick my wrist, and slit her throat Leave her bleedin' from her jugular in the arms of her partner
>
> [laughter]
>
> So the next time you knock, you best be serving a warrant
>
> And bring yo' SWAT and an explosives expert while you're at it
>
> Cause little did y'all know, I was strapped wit' a bomb
>
> Why do you think it took me so long to get dressed with no shoes on?

> I was jus' waitin' for y'all to handcuff me and pat me down
>
> Touch the detonator in my pocket and we're all goin'
>
> [BOOM!]

These statements were the basis of Count 5 of the indictment. After she observed this post on Elonis's Facebook page, Agent Stevens contacted the U.S. Attorney's Office.

**II.**

Elonis was arrested on December 8, 2010 and charged with transmitting in interstate commerce communications containing a threat to injure the person of another in violation of 18 U.S.C. § 875(c). The grand jury indicted Elonis on five counts of making threatening communications: Count 1 threats to patrons and employees of Dorney Park & Wildwater Kingdom, Count 2 threats to his wife, Count 3 threats to employees of the Pennsylvania State Police and Berks County Sheriff's Department, Count 4 threats to a kindergarten class, and Count 5 threats to an FBI agent.

Elonis moved to dismiss the indictments against him, contending the Supreme Court held in *Virginia v. Black* that a subjective intent to threaten was required under the true threat exception to the First Amendment and that his statements were not threats but were protected speech. The District Court denied the motion to dismiss because even if the subjective intent standard applied, Elonis's intent and the attendant circumstances showing whether or not the statements were true threats were questions of fact for the jury.

Elonis testified in his own defense at trial. A jury convicted Elonis on Counts 2 through 5, and the court sentenced him to 44 months' imprisonment followed by three years supervised release. Elonis filed a post-trial Motion to Dismiss Indictment with Prejudice under Rule 12(b)(3); and for New Trial under Rule 33(a), to Arrest Judgment under Rule 34(b) and/or Dismissal under Rule 29(c). The District Court denied the motion to dismiss the indictment, finding the indictment correctly tracked the language of the statute and stated the nature of the threat, the date of the threat and the victim of the threat. The court also stated the objective intent standard conformed with Third Circuit precedent. The court found the evidence supported the jury's finding that the statements in Count 3 and Count 5 were true threats. Finally, the court held that the jury instruction presuming communications over the internet were transmitted through interstate commerce was supported by our precedent in *United States v. MacEwan*.

**III.**

**A.**

Elonis was convicted under 18 U.S.C. § 875(c) for "transmit[ting] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another...." Elonis contends the trial court incorrectly instructed the jury on the standard of a true threat. The court gave the following jury instruction:

> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable

> person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

Elonis posits that the Supreme Court decision in *Virginia v. Black* requires that a defendant subjectively intend to threaten, and overturns the reasonable speaker standard we articulated in *United States v. Kosma*.

In *United States v. Kosma,* we held a true threat requires that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President, and that the statement not be the result of mistake, duress, or coercion.

We rejected a subjective intent requirement that the defendant "intended at least to convey the impression that the threat was a serious one." We found "any subjective test potentially frustrates the purposes of section 871—to prevent not only actual threats on the President's life, but also the harmful consequences which flow from such threats." We have held the same "knowingly and willfully" mens rea *Kosma* analyzed under 18 U.S.C. § 871, threats against the president, applies to § 875(c). *United States v. Himelwright*. Since our precedent is clear, the question is whether the Supreme Court decision in *Virginia v. Black* overturned this standard.

The Supreme Court first articulated the true threats exception to speech protected under the First Amendment in *Watts v. United States*. During a rally opposing the Vietnam war, Watts told the crowd, "I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." The Court reversed his conviction for making a threat against the president. "The Court articulated three factors supporting its finding: 1. the context was a political speech; 2. the statement was "expressly conditional"; and 3. "the reaction of the listeners" who "laughed after the statement was made." The Court did not address the true threats exception again until *Virginia v. Black* in 2003.

In *Virginia v. Black* the Court considered a Virginia statute that banned burning a cross with the "intent of intimidating" and provided "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." The Court reviewed three separate convictions of defendants under the statute and concluded that intimidating cross burning could be proscribed as a true threat under the First Amendment. But the prima facie evidence provision violated due process, because it permitted a jury to convict whenever a defendant exercised his or her right to not put on a defense.

The Court reviewed the historic and contextual meanings behind cross burning, and found it conveyed a political message, a cultural message, and a threatening message, depending on the circumstances. The Court then described the true threat exception

generally before analyzing the Virginia statute:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As noted in Part II, the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

Elonis contends that this definition of true threats means that the speaker must both intend to communicate and intend for the language to threaten the victim. But the Court did not have occasion to make such a sweeping holding, because the challenged Virginia statute already required a subjective intent to intimidate. We do not infer from the use of the term "intent" that the Court invalidated the objective intent standard the majority of circuits applied to true threats. Instead, we read "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" to mean that the speaker must intend to make the communication. It would require adding language the Court did not write to read the passage as "statements where the speaker means to communicate [and intends the statement to be understood as] a serious expression of an intent to commit an act of unlawful violence." This is not what the Court wrote, and it is inconsistent with the logic animating the true threats exception.

The "prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.' " Limiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from "the fear of violence" and the "disruption that fear engenders," because it would protect speech that a reasonable speaker would understand to be threatening.

Elonis further contends the unconstitutionality of the prima facie evidence provision in *Black* indicates a subjective intent to threaten is required. The Court found the fact that the defendant burned a cross could not be prima facie evidence of intent to intimidate. The Court explained that while cross burning was often employed as intimidation or a threat of physical violence against others, it could also function as a symbol of solidarity for those within the white supremacist movement. Less frequently, crosses had been burned outside of the white supremacist context, such as stage

performances. Since the burning of a cross could have a constitutionally-protected political message as well as a threatening message, the prima facie evidence provision failed to distinguish protected speech from unprotected threats. Furthermore, the prima facie evidence provision denied defendants the right to not put on a defense, since the prosecution did not have to produce any evidence of intent to intimidate, which was an element of the crime.

We do not find that the unconstitutionality of Virginia's prima facie evidence provision means the true threats exception requires a subjective intent to threaten. First, the prima facie evidence provision did not allow the factfinder to consider the context to construe the meaning of the conduct, whereas the reasonable person standard does encompass context to determine whether the statement was a serious expression of intent to inflict bodily harm. Second, cross-burning is conduct that may or may not convey a meaning, as opposed to the language in this case which has inherent meaning in addition to the meaning derived from context. Finally, the prima facie evidence provision violated the defendant's due process rights to not put on a defense, because the defendant could be convicted even when the prosecution had not proven all the elements of the crime. That is not an issue here because the government had to prove that a reasonable person would foresee Elonis's statements would be understood as threats.

The majority of circuits that have considered this question have not found the Supreme Court decision in *Black* to require a subjective intent to threaten.

The Fourth Circuit in *United States v. White* considered the same criminal statute, 18 U.S.C. § 875(c), and found the Court in *Black* "gave no indication it was redefining a general intent crime such as § 875(c) to be a specific intent crime." The Fourth Circuit reasoned that *Black* had analyzed a statute that included a specific intent element, whereas § 875(c) had consistently been applied as a general intent statute. The court further distinguished *Black* by noting the multiple meanings of cross-burning necessitated a finding of intent to distinguish protected speech from true threats. The court in *White* found this same problem did not exist for threatening language because it has no First Amendment value. Finally, the court found the general intent standard for § 875(c) offenses did not chill "statements of jest or political hyperbole" because "any such statements will, under the objective test, always be protected by the consideration of the context and of how a reasonable recipient would understand the statement."

In *United States v. Jeffries* the Sixth Circuit agreed that *Black* does not require a subjective intent to threaten to convict under 18 U.S.C. § 875(c). Because *Black* interpreted a statute that already had a subjective intent requirement, the Sixth Circuit found the Court was not presented with the question whether an objective intent standard is constitutional. *Jeffries* also found that the Court's ruling on the prima facie evidence provision did not address the specific intent question because "the statute lacked any standard at all." Like the Fourth Circuit

in *White*, the Sixth Circuit explained that the prima facie evidence provision failed to distinguish between protected speech and threats by not allowing for consideration of any contextual factors. In contrast, "[t]he reasonable-person standard winnows out protected speech because, instead of ignoring context, it forces jurors to examine the circumstances in which a statement is made." The Ninth Circuit took a different view, and found the true threats definition in *Black* requires the speaker both intend to communicate and "intend for his language to *threaten* the victim." The Ninth Circuit reasoned that the unconstitutionality of the prima facie provision meant that the Court required a finding of intent to threaten for all speech labeled as "true threats," and not just cross burning. "We are therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat."

Regardless of the state of the law in the Ninth Circuit, we find that *Black* does not alter our precedent. We agree with the Fourth Circuit that *Black* does not clearly overturn the objective test the majority of circuits applied to § 875(c). *Black* does not say that the true threats exception requires a subjective intent to threaten. Furthermore, our standard does require a finding of intent to communicate. The jury had to find Elonis "knowingly and willfully" transmitted a "communication containing ... [a] threat to injure the person of another." A threat is made "knowingly" as when it is "made intentionally and not [as] the result of mistake, coercion or duress." A threat is made willfully when "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm." This objective intent standard protects non-threatening speech while addressing the harm caused by true threats. Accordingly, the *Kosma* objective intent standard applies to this case and the District Court did not err in instructing the jury.

**B.**

Elonis contends the indictment was insufficient because it did not quote the language of the allegedly threatening statements. An indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." An indictment is sufficient when it "(1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution." We have found an indictment is sufficient "where it informs the defendant of the statute he is charged with violating, lists the elements of a violation under the statute, and specifies the time period during which the violations occurred."

In *Huet* we found an indictment for aiding and abetting a felon in possession of a firearm was sufficient because it alleged the previous felony conviction of the principal, the time period of the violation and the specific weapon involved, and alleged the defendant "knowingly aided and abetted

Hall's possession of that firearm." "No more was required to allow Huet to prepare her defense and invoke double jeopardy."

The Eighth Circuit considered an indictment that did not include the verbatim contents of a letter, the date it was written, or the name of the author. The indictment for communicating a threat to injure with the intent to extort merely stated the letter threatened to harm the reputation of the victim with intent to extort. Since the indictment summarized the contents of the letter, provided the date it was mailed and the name of the addressee, the Eighth Circuit found there could be no confusion as to the elements and subject of the crime.

To find a violation of 18 U.S.C. § 875(c) a defendant must transmit in interstate or foreign commerce a communication containing a threat to injure or kidnap a person. Here the indictment on Count 2 stated:

> On or about November 6, 2010, through on or about November 15, 2010, in Bethlehem, in the Eastern District of Pennsylvania, and elsewhere, defendant ANTHONY DOUGLAS ELONIS knowingly and willfully transmitted in interstate and foreign commerce, via a computer and the Internet, a communication to others, that is, a communication containing a threat to injure the person of another, specifically, a threat to injure and kill T. E., a person known to the grand jury. In violation of Title 18, United States Code, Section 875(c).

The indictment on the other counts was identical, but stated each date of the threat, the nature of the threat, and the subjects of the threat. Count 3 alleged "a threat to injure employees of the Pennsylvania State Police and the Berks County Sheriff's Department"; Count 4 alleged "a threat to injure a kindergarten class of elementary school children"; and Count 5 alleged "a threat to injure an agent of the Federal Bureau of Investigation." Elonis contends the indictment was deficient because they did not include the allegedly threatening statements.

The indictment was sufficient because the counts describe the elements of the violation, the nature of the threat, the subject of the threat, and the time period of the alleged violation. For example, Count Four alleged defendant communicated over the internet on November 16, 2010 "a threat to injure a kindergarten class." If Elonis had already been charged with this statement, the indictment provided enough information to challenge a subsequent prosecution. Based on the indictment, defendant was notified he needed to dispute that the statement was a threat, that he communicated the statement, and that he transmitted the statement through interstate commerce. Moreover, like the defendant in *Keys*, Elonis was able to identify which internet communications the indictment described, since he did not raise the issue until after trial.

**C.**

Elonis contends there was insufficient evidence to convict on Counts 3 and 5 of the indictment because the statements on which they were based were not threats. "A claim of insufficiency of evidence places a very heavy burden on the appellant." "[T]he

relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

**1.**

Elonis contends Count 3 was based on a conditional statement, which he asserts cannot be a true threat. In *Watts* the Supreme Court found the conditional nature of defendant's statement to be one of the three factors demonstrating it was not a true threat. Elonis posted the following on his Facebook page:

> Fold up your PFA and put it in your pocket
>
> Is it thick enough to stop a bullet?
>
> Try to enforce an Order
>
> That was improperly granted in the first place
>
> Me thinks the judge needs an education on true threat jurisprudence
>
> And prison time will add zeroes to my settlement
>
> Which you won't see a lick
>
> Because you suck dog dick in front of children
>
> * * *
>
> And if worse comes to worse
>
> I've got enough explosives to take care of the state police and the sheriff's department
>
> [link: Freedom of Speech, www.wikipedia.org]

We considered the impact of conditional statements on the true threat analysis in *Kosma*. We found that *Watts* did not hold conditional statements can never be true threats. We explained the conditional statements in *Watts* "were dependent on the defendant's induction into the armed forces—a condition which the defendant stated would never happen." Because the defendant's threats in *Kosma* stated a precise time and place for carrying out the alleged threats, they were true threats.

Here the District Court found that a reasonable jury could find the statement to be a true threat. Unlike in *Watts,* Elonis did not vow the condition precedent would never occur. However, this case is also unlike *Kosma,* where the statement included a particular time and place. Elonis's statement only conveys a vague timeline or condition. But, taken as a whole, a jury could have found defendant was threatening to use explosives on officers who "[t]ry to enforce an Order" of protection that was granted to his wife. Since there is no rule that a conditional statement cannot be a true threat—the words and context can demonstrate whether the statement was a serious expression of intent to harm—and we give substantial deference to a jury's verdict, there was not insufficient evidence for the jury to find the statement was a threat.

**2.**

Defendant contends that the statement on which Count 5 is based is a description of past conduct, not a future intent to harm:

> You know your shit's ridiculous when you have the FBI knockin' at yo' door
>
> Little Agent Lady stood so close

> Took all the strength I had not to turn the bitch ghost
>
> Pull my knife, flick my wrist, and slit her throat Leave her bleedin' from her jugular in the arms of her partner
>
> [laughter]
>
> So the next time you knock, you best be serving a warrant
>
> And bring yo' SWAT and an explosives expert while you're at it
>
> Cause little did y'all know, I was strapped wit' a bomb
>
> Why do you think it took me so long to get dressed with no shoes on?
>
> I was jus' waitin' for y'all to handcuff me and pat me down
>
> Touch the detonator in my pocket and we're all goin'
>
> [BOOM!]

A threat under § 875(c) is a communication "expressing an intent to inflict injury in the present or future." It was possible for a reasonable jury to conclude that the statement "the next time you knock, best be serving a warrant [a]nd bring yo' SWAT and an explosives expert" coupled with the past reference to a bomb was a threat to use explosives against the agents "the next time." Indeed, the phrase "the next time" refers to the future, not a past event. Accordingly, a reasonable jury could have found the statement was a true threat.

**D.**

Elonis contends the jury instruction stating communications that travel over the internet necessarily travel in interstate commerce violated his due process rights because the government was required to prove interstate transmission as an element of the crime. The District Court instructed the jury: "Because of the interstate nature of the Internet, if you find beyond a reasonable doubt that the defendant used the Internet in communicating a threat, then that communication traveled in interstate commerce."

In *United States v. MacEwan* we explained the difference between interstate transmission and interstate commerce. The defendant in *MacEwan* contended the government failed to prove he received child pornography through interstate commerce because a Comcast witness testified it was impossible to know whether a particular transmission traveled through computer servers located entirely within Pennsylvania, or to any other server in the United States. "[W]e conclude[d] that because of the very interstate nature of the Internet, once a user submits a connection request to a website server or an image is transmitted from the website server back to [the] user, the data has traveled in interstate commerce." "Having concluded that the Internet is an instrumentality and channel of interstate commerce.... [i]t is sufficient that MacEwan downloaded those images from the Internet, a system that is inexorably intertwined with interstate commerce."

Elonis distinguishes *MacEwan* by stating that in that case the government presented evidence on how the internet worked. But the government's evidence in *MacEwan* did not show that any one of the defendant's internet transmissions traveled outside of Pennsylvania. We found that fact to be

irrelevant to the question of interstate commerce because submitting data on the internet necessarily means the data travels in interstate commerce. Instead, we held "[i]t is sufficient that [the defendant] downloaded those images from the Internet." Based on our conclusion that proving internet transmission alone is sufficient to prove transmission through interstate commerce, the District Court did not err in instructing the jury.

**IV.**

For the foregoing reasons we will uphold Elonis's convictions under 18 U.S.C. § 875(c).

# "On the Next Docket: How the First Amendment Applies to Social Media"

*The New York Times*
Adam Liptak
June 30, 2014

Just four years ago, the Supreme Court issued a hesitant and muddled decision in a privacy case, saying it was best to move slowly when ruling on an "emerging technology before its role in society has become clear."

The cutting-edge innovation of the case: pagers.

That decision, and the occasional oddball question from the bench, earned the justices a reputation as doddering technophobes.

But the final weeks of the court's current term left a different impression. In major decisions on software patents, smartphones, and Internet streaming, the justices seemed savvy.

Now there is a new challenge looming on the docket for the term that starts in October, one that will require the court to consider how the First Amendment applies to social media.

The case concerns Anthony Elonis, who was prosecuted for making threats on Facebook in the form of rap lyrics after his wife left him in 2010.

He vented his frustration using the nom de rap Tone Dougie. His language was laced with brutally violent images.

He suggested that his son might consider a Halloween costume that included his estranged wife's "head on a stick." He talked about "making a name for myself" with a school shooting, saying, "Hell hath no fury like a crazy man in a kindergarten class." He fantasized about killing an F.B.I. agent.

His wife, Tara Elonis, understood the posts as threats.

"I felt like I was being stalked," she testified. "I felt extremely afraid for mine and my children's and my family's lives."

But it is less clear that Mr. Elonis meant his words that way. He said he was "just an aspiring rapper," and it is not hard to find rap lyrics just as lurid and violent.

Several of the posts included disclaimers and other indications that they were not in earnest. He adapted one post almost wholesale from a sketch by a comedy group, The Whitest Kids U' Know. The Halloween post ended with an emoticon of a face with a tongue sticking out.

"Art is about pushing the limits," he wrote. "I'm willing to go to jail for my constitutional rights."

Did his intent matter? The lower court said no. All the prosecution had to prove, the trial judge ruled, was that a "reasonable person" would foresee that others would view his statements "as a serious expression of an intention to inflict bodily injury or take the life of an individual."

The judge said that he did not mean to make "something said in a joking manner or an outburst of transitory anger" into a crime. But almost anyone who has ever sent an email knows how hard it is to detect those things without the cues that body language and tone of voice provide.

Mr. Elonis was convicted under a federal law that makes it a crime to communicate "any threat to injure the person of another." The sentence was 44 months.

The case is one of many recent prosecutions "for alleged threats conveyed on new media, including Facebook, YouTube and Twitter," according to a brief supporting Mr. Elonis from several First Amendment groups.

In urging the Supreme Court not to hear Mr. Elonis's case, the Justice Department said his intent should make no difference. A perceived threat creates "fear and disruption," the brief said, "regardless of whether the speaker subjectively intended the statement to be innocuous."

Mr. Elonis's lawyers did not deny that their approach would allow some statements with "undesirable effects." But they said the First Amendment should tolerate those effects rather than "imprisoning a person for negligently misjudging how others would construe his words."

The First Amendment does not protect all speech. There are exceptions for libel, incitement, obscenity and fighting words, and one for "true threats," which is at issue in Mr. Elonis's case.

The Supreme Court has not given a definitive answer to the question of whether intent matters in threat cases. But in 1969 it threw out a case against a draft protestor charged with threatening President Lyndon B. Johnson. "If they ever make me carry a rifle," the protestor said, "the first man I want to get in my sights is L.B.J."

The remark was not a true threat, the court ruled, because it was conditional, made at a rally and greeted by laughter. But context is harder to gauge online.

The case, *Elonis v. United States*, No. 13-983, will be argued in the fall. It will again require the justices to confront a new technology and assess the meaning of the First Amendment in the age of the emoticon.

# "Are Facebook Threats Real? The Supreme Court Will Soon Decide."

*Slate*
Dahlia Lithwick
June 16, 2014

Monday morning the Supreme Court agreed to hear an important First Amendment challenge that will attempt to sort out—after years of ambiguity and confusion in the lower courts—when threats, specifically Internet threats, should be taken seriously by the law. The case will be heard in the term that begins next October and will hopefully clarify whether threats of violence made over Facebook and other social media should be judged by whether the threatening speaker intended to harm anyone or whether the listener was genuinely afraid of being harmed. In light of the recent Isla Vista, California, shooting and other acts of violence that were telegraphed in social media, the answer to that question could not be more urgent.

So what do *you* do when you come across a Facebook posting that reads:

*That's it, I've had about enough*
*I'm checking out and making a name for myself*
*Enough elementary schools in a ten mile radius*
*to initiate the most heinous school shooting ever imagined*
*And hell hath no fury like a crazy man in a kindergarten class*
*The only question is . . . which one?*

Is that a threat to shoot up a school? Or just some guy writing terrible rap lyrics?

Anthony Elonis, an eastern Pennsylvania man, has served more than three years in prison for posting threats on Facebook. After his wife took their two kids and left him in 2010, he got fired from his job. He then began a series of dark and vengeful rants, sometimes in the form of rap lyrics like the above, about threats to kill his wife, a female FBI agent, and a class of kindergartners. Elonis contends that these weren't ever real threats—that they were "therapeutic" and that these words are protected First Amendment speech. He claims that the lyrics were not intended as warnings of real violence and that they were a harmless way to express his severe depression and frustration after his wife left.

In one post, Elonis wrote about smothering his wife with a pillow and dumping her body in a creek so it would look like a rape. In another he wrote: "There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts. Hurry up and die, bitch, so I can bust this nut all over your corpse from atop your shallow grave. I used to be a nice guy but then you became a slut. Guess it's not your fault you liked your daddy raped you. So hurry up and die, bitch, so I can forgive you."

Elonis wrote about smothering his wife and dumping her body in a creek but contends these weren't ever real threats.

After an FBI agent visited him to follow up on the earlier threats, Elonis posted a rap about slitting her throat and claimed he'd had a bomb strapped to him throughout the interview. He was arrested in December 2010 and tried before a jury under a federal law that prohibits the use of interstate communications of threats to harm individuals. His wife testified that she was objectively terrified by the posts, especially since they increased after she filed a "protection from abuse" order against him. "I felt like I was being stalked. I felt extremely afraid for mine and my children's and my families' lives," she said at the trial. She also testified that Elonis rarely listened to rap music and that she had never seen him write rap lyrics over the course of their seven-year marriage.

Elonis was convicted on four of the five federal charges and sentenced to 44 months in jail.

The case deals with an area of First Amendment law known as "true threats." These kinds of threats are unprotected under the First Amendment. The trick is figuring out whether Elonis' speech was a true threat or not. At his trial, the jury was told that the legal standard for whether something is an unprotected "true threat" is if an objective person could consider Elonis' posts to be threatening. Elonis claims that the correct test should look at whether *he* intended for the posts to be understood as threats. He also argues that his rap lyrics are important protected speech, no different from the rap lyrics created by the great artists. In his view the threatening and violent lyrics he was posting were emulating those of Eminem. (Elonis was careful to include some disclaimers among his writings, suggesting that this was all more art than threat, and also an act of First Amendment protest: "Art is about pushing limits," he posted. "I'm willing to go to jail for my constitutional rights. Are you?")

The last time the high court scrutinized the "true threat" doctrine was in 2003, when it found that a Virginia law banning cross burning was unconstitutional because a "true threat" requires the speaker to communicate an intent to commit violence. (Justice Clarence Thomas was the lone dissenter.) In that case, the court defined true threats as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Elonis read the Virginia case to say that the definition of true threats means that the speaker must truly intend to threaten the victim.

Courts across the country have been split on whether the subjective intent of the speaker or the objective assessment of the listener is what matters when it comes to discerning a true threat. The 3rd Circuit Court of Appeals, looking at the facts in Elonis' case, held that if a statement causes a reasonable person to fear for her safety, that's a true threat. Most other courts agree on that standard: a reasonable person's objective interpretation controls the outcome. The 9th Circuit on the other hand has taken the position that the speaker must have intended to communicate threat and "intend for his language to threaten the victim." The Justice Department supports the 3rd Circuit's test, arguing that

the law must not only prevent real violence but also deter real fear.

One of the confounding factors here is that the court hasn't yet looked at the question of true threats through the lens of modern technology. Those urging the court to take the case argued that speeches at rallies and even cross burnings are fundamentally different from YouTube postings or tweets. Elonis claims that you can't use an objective listener standard when you are dealing with the interpersonal and context-free conversation that takes place in the Wild West of social media. Elonis' petition for Supreme Court review argues that "modern media allow personal reflections intended for a small audience (or no audience) to be viewed widely by people who are unfamiliar with the context in which the statements were made and thus who may interpret the statements much differently than the speakers intended."

In a column about the high stakes in this case, three law professors writing in support of Elonis explain that "information posted to social media sites is often disseminated and displayed in ways that users do not control or even understand, profoundly complicating attempts to determine a person's intent in posting something or a 'reasonable' person's interpretation of it. Context becomes further complicated when a so-called threat is a lyric from a musical genre that often privileges highly exaggerated, confrontational and violent rhetoric."

Robert Richards, director of the Pennsylvania Center for the First Amendment at Penn State, argues that on the Internet, the recipient is not the issue anymore; that, unlike a letter, posts on social media may simply be left for anyone to find. In an interview with a Pennsylvania paper, Richards explained that people use social media "to say all kinds of things but they may not be directing it to a particular individual. They're just venting their feelings."

This case is not only crucially important in that it will force the court to clarify its own "true threats" doctrine and finally apply it to social media to determine whether—as Justice Stephen Breyer has suggested—the whole world is a crowded theater. But perhaps it's even more important in pushing the conversation about law enforcement, prosecution, and threats to include a much more sophisticated understanding of the ways in which the Internet is not just a rally or a letter. As Amanda Hess has explained so powerfully, women experience threats on social media in ways that can have crippling economic and psychological effects. At the margins, this is a case about the line between first amendment performance art, fantasy violence, real threats—and real fear. In a world in which men and women find it nearly impossible to agree on what's an idle threat and what's a legitimate one, it's also a case about where that line lies, or whether there can be one.

# "True Threats"

*First Amendment Center*
David L. Hudson Jr.
May 12, 2008

The First Amendment protects a wide swath of expression that many of us may find offensive, distasteful or even repugnant. The government cannot silence and punish speakers just because it dislikes their expression. Oftentimes, the First Amendment protects the flag-burner, the tobacco advertiser, the pornographer and the hateful speaker.

However, First Amendment jurisprudence has never provided absolute protection to all forms of speech. There are several unprotected categories of expression, including but not limited to fighting words, obscenity, extortion, perjury and false advertising. Another unprotected category is the true threat. The First Amendment does not give a person the right to walk up to someone else and say "I am going to kill you" or to announce in an airport, "I am going to bomb this plane."

Yet the line between protected expression and an unprotected true threat is often hazy and uncertain. What if a speaker makes a seemingly threatening statement about a political figure through the use of hyperbole? What if a student says that if he receives a poor grade, he may "go Columbine"? What if an abortion protester talks about participating in a "war against abortionists"?

**Supreme Court case law**

The U.S. Supreme Court first addressed a true-threat case in *Watts v. United States* (1969). Robert Watts, a young African-American man, allegedly stated during a protest in Washington D.C.:

> "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday morning. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers."

Prosecutors charged Watts with violating a federal law that prohibits threats against the president. Watts countered that his statement was a form of crude political opposition. A federal jury convicted Watts of a felony for violating the law and a federal appeals court affirmed his conviction. On appeal, the Supreme Court reversed, ruling that Watts' statement was political hyperbole rather than a true threat.

"We agree with [Watts] that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President,'" the Court wrote in a per curiam opinion. "Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise."

Unfortunately, the Court in *Watts* failed to define what constitutes a true threat. Other

courts considering true-threats cases have focused on certain elements of *Watts*, including: (1) the fact that the comments were made accompanying a political debate; (2) the conditional nature of the threat; and (3) the context of the speech, as apparently several listeners laughed after Watts spoke.

The Supreme Court next addressed true threats, though not directly, in another case with connections to the civil rights movement. In *NAACP. v. Claiborne Hardware* (1982), the Court unanimously reversed a finding that Charles Evers and the NAACP could be found civilly liable for speech advocating the boycott of certain white-owned businesses. Evers, field secretary for the NAACP in Mississippi, had given impassioned speeches encouraging fellow African-Americans to participate in the boycott. He made some highly charged statements, such as "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."

The Court found that Evers' comments did not constitute fighting words, incitement to imminent lawless action or a true threat. It concluded that "Evers' addresses did not exceed the bounds of protected speech." While most of the analysis centered on whether Evers' speech incited imminent lawless action, the case added to the *Watts* legacy that charged political advocacy is unlikely to rise to the level of a true threat. Unfortunately, it provided little guidance for determining whether speech constitutes a true threat.

"*Claiborne Hardware* is one of the most difficult cases to analyze," wrote Stanford Law Professor Jennifer Rothman in her incisive 2001 article, "Freedom of Speech and True Threats" for the *Harvard Journal of Law and Public Policy.* "The decision itself is fairly opaque about its basis for determining that Evers' speech did not constitute true threats."

The high court more directly addressed true threats in a pair of Virginia cross-burning cases collectively known as *Virginia v. Black* (2003). One case involved a Ku Klux Klan leader named Barry Elton Black, who burned a cross in a field with the permission of the property owner. The other case involved two individuals who burned crosses in the yard of a neighboring African-American family. In separate cases that became consolidated, the Supreme Court examined the constitutionality of a Virginia state law that prohibited "any person or group of persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place."

Another provision of the law created a presumption that all cross-burnings were done with an intent to intimidate. In its decision, the Court upheld the bulk of the Virginia law, but invalidated the section that provided that all cross-burnings were presumed to be intimidating.

In deciding the case, Justice Sandra Day O'Connor in her plurality opinion offered a definition of true threats:

> "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful

> violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur."

She added, "intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."

**Lack of clarity**

Many legal experts say that the Supreme Court's true-threat cases have failed to provide clear guidance for lower courts. Commentator Paul T. Crane in a 2006 *Virginia Law Review* article "True Threats and the Issue of Intent," wrote that "in providing a definition, the Court created more confusion than elucidation" and "spawned as many questions as answers." Duke law professor Steven Gey, in a 2005 article for the *Notre Dame Law Review*, "A Few Questions About Cross Burning, Intimidation and Free Speech," said: "Justice O'Connor's opinion in the cross burning case borders on the incoherent."

Many lower courts have struggled with the Court's decision in *Black* because it is unclear what level of intent is necessary for a speaker's utterance to be considered a true threat. In other words, must a speaker subjectively intend to intimidate or threaten others? Or is it sufficient if the speaker makes a comment that a recipient reasonably believes is a threat? Should true threats be interpreted under a "reasonable speaker" or "reasonable recipient" standard? Is there a difference between a true threat and intimidation or is intimidation a special subset of the more general category of true threats?

Lower courts struggle to define true threats and apply the Court's precedents from *Watts* and *Black.* Some courts have determined that in order for speech to constitute a true threat, the speaker must subjectively intend to threaten someone. This doesn't mean that the speaker must actually intend to carry out the threat. It does mean, however, that the speaker must subjectively intend that his or her comments be interpreted as a true threat.

A three-judge panel of the 9th U.S. Circuit Court of Appeals adopted this view in *United States v. Cassel* (2005), a case involving a man who allegedly intimidated prospective buyers to dissuade them from purchasing a plot of land next to his own. Jury instructions in his case provided: "Intimidation is to make a person timid or fearful through the use of words and conduct that would put an ordinary, reasonable person in fear or apprehension for the purpose of compelling or deterring legal conduct of that person."

For the 9th Circuit, the jury instructions were constitutionally deficient because they did not require the government to prove that the defendant made the comments with the intent to intimidate the prospective buyers.

However, other courts interpret *Virginia v. Black* as requiring only that the speaker knowingly intended to communicate to

another person. These courts do not require that it be proven that the speaker subjectively intended to threaten someone. Rather, they focus on whether there was an intent to communicate and whether an objective or reasonable recipient would regard it as a serious expression of harm. For example, a three-judge panel of the 5th Circuit in *Porter v. Ascension School District* (2004) wrote:

> "Speech is a true threat and therefore unprotected if an objectively reasonable person would interpret the speech as a serious expression of an intent to cause a present or future harm. The protected status of the threatening speech is not determined by whether the speaker had the subjective intent to carry out the threat; rather, to lose the protection of the First Amendment and be lawfully punished, the threat must be intentionally or knowingly *communicated* to either the object of the threat or a third person."

Even courts that agree there is no subjective-intent requirement disagree over how to apply the objective requirement. Courts disagree whether the objective test should be applied from the perspective of a reasonable speaker (the person allegedly making the threat or who should have known that his words could be interpreted as threatening) or the reasonable recipient (the intended target). Some courts avoid the labeling of reasonable speaker or recipient and simply apply a reasonable-person standard.

Still other courts employ a multi-factor test to determine whether speech constitutes a true threat. In *United States v. Dinwiddie* (1996), the 8th Circuit examined whether an abortion protester engaged in making true threats in violation of the Freedom of Access to Clinics Entrances Act (FACE). The court applied a test consisting of what came to be known as the "*Dinwiddie* factors":

- The reaction of the recipient of the threat and of other listeners.
- Whether the threat was conditional.
- Whether the threat was communicated directly to its victim.
- Whether the maker of the threat had made similar statements to the victim in the past.
- Whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.

**Conclusion**

True-threat jurisprudence remains a muddled mess. Courts often have trouble determining whether violent expression should be evaluated under the "incitement to imminent lawless action" standard or under a true-threats line of analysis.

In a high-profile case involving a Web site known as the Nuremberg Files, which listed abortion providers with lines drawn through names if they were killed, a three-judge panel of the 9th Circuit said *Brandenburg v. Ohio* (1969) and its requirement of imminency must be applied. That is, a threat must be explicit and likely to cause "imminent lawless action." The panel ruled that neither was the case and that the speech on the Web site was protected. But, the full panel of the 9th Circuit eventually ruled 6-5 that the case was more properly evaluated under true-threat analysis and that the Web

site did in fact constitute a true threat. In 2003, the U.S. Supreme Court declined to review this ruling.

Lower courts are far from consistent in how they determine whether speech is truly threatening. Some courts interpret Supreme Court case law to require subjective intent, while others apply different versions of an "objective" test as some form of general intent to communicate.

The Supreme Court's most recent foray into the thickets of true threats in *Virginia v. Black* seemingly raises as many questions as it provides answers. Particularly interesting will be whether intimidation becomes a synonym for, or a subset of, true threats. It may take further clarification from the Supreme Court to resolve these thorny questions and provide more guidance on when speech crosses the line from protected speech into unprotected threats or intimidation.

# “3rd Cir. Re-Examines 1st Amendment True Threat Exception”

*Find Law*
Gabriella Khorasanee
September 27, 2013

People get carried away on Facebook. But when is a rant no longer a rant?

The Third Circuit re-examined its First Amendment jurisprudence to redefine the boundaries of true threats and came to a reasonable conclusion: Objective intent is enough (pun intended).

**Facebook Threats**

Anthony Elonis was estranged from his wife, and as a result of his depression and inappropriate behavior was fired from his job. What followed was a campaign of Facebook rants that included references including, but not limited to, his estranged wife's "head on a stick," an elementary school shooting, detonating explosives, and killing his wife, cops, kids, co-workers, along with FBI agents. Violent enough for you? (For your daily dose of the disturbing and crazy, read the full opinion).

Elonis didn't think so, but a jury did; he was convicted on four of the five counts brought against him for violations of 18 U.S.C. § 875(c), which prohibits the use of interstate communications of threats to harm individuals. His prior attempt to dismiss the indictment failed, as well as several post-conviction motions.

On appeal, Elonis' main argument was whether the true threats exception to First Amendment speech protection requires an objective or subjective intent to threat.

**True Threat Jurisprudence**

In 1991, the Third Circuit in *United States v. Korma* held that an objective standard applied to determine whether a statement was a true threat -- that is, "a statement is a true threat when a reasonable speaker would foresee the statement would be interpreted as a threat." Elonis argued that the Supreme Court's subsequent decision in *Virginia v. Black* required a subjective intent to threaten.

In *Virginia v. Black*, the Court reviewed a statute that prohibited the burning of crosses intended to intimidate and defined cross-burning as prima facie evidence of intention to intimidate. The Supreme Court held that cross-burning could be prohibited, but the language of the statute failed on due process grounds because the prima facie evidence clause denied a defendants' "right to not put on a defense."

**Circuit Split**

The Third Circuit declined to accept Elonis' interpretation, in accord with the Fourth, Sixth and Eighth Circuits. The Third Circuit found that the *Black* case turned on the prima facie evidence exception, which was not present here. Instead, here, the court found that the context of the statements was taken into account, and the Government still had to "prove that a reasonable person would foresee Elonis's statements would be understood as threats." The Third Circuit

declined to accept the Ninth Circuit's reading of *Black*, which would require the speaker to intend to both communicate and threaten.

The Supreme Court has not taken on many true threat cases, but seeing that the circuits have been in disagreement for several years, and that there is only one circuit with a differing interpretation, it may take more division among the circuits for the High Court to clarify the true threat exception.

***Holt v. Hobbs***

**13-6827**

**Ruling Below:** Gregory Houston Holt v. Ray Hobbs, 509 Fed.Appx. 561 (Mem) (8th Cir. 2013), *cert granted*, 134 S.Ct. 1490 (2014).

Gregory Holt, also known as Abdul Maalik Muhammad, filed a *pro se* Complaint pursuant to 42 U.S.C. § 1983, alleging that the Arkansas Department of Correction (ADC) grooming policy violates his constitutional rights and the Religious Land Use and Institutionalized Persons Act (RLUIPA). Mr. Muhammad is a Salafi Muslim who seeks to grow a beard in observance of his religion but in contravention to the ADC grooming policy, which only allows beard growth up to a quarter inch for inmates with diagnosed dermatological problems.

**Question Presented:** Whether the Arkansas Department of Corrections grooming policy violates the Religious Land Use and Institutionalized Persons Act of 2000, 42 U. S. C. § 2000cc *et seq*., to the extent that it prohibits petitioner from growing a one-half-inch beard in accordance with his religious beliefs.

---

**Gregory Houston Holt, also known as Abdul Maalik Muhammad, *Plaintiff - Appellant***

**v.**

**Ray Hobbs, Director, Arkansas Department of Correction; Gaylon Lay, Warden, Cummins Unit, ADC; D W Tate, Captain, Cummins Unit, Arkansas Department of Correction; V. R. Robertson, Major, Cummins Unit, Arkansas Department of Correction; M. Richardson, Sgt., Cummins Unit, Arkansas Department of Correction; Larry May, Chief Deputy Director, Arkansas Department of Correction, *Defendants – Appellees***

United States Court of Appeals, Eighth Circuit

Decided on June 12, 2013

[Excerpt; some footnotes and citations omitted.]

**PER CURIAM**

In this action challenging the Arkansas Department of Correction (ADC) grooming policy under the Religious Land Use and Institutionalized Persons Act (RLUIPA), inmate Gregory Holt (also known as Abdul Maalik Muhammad) appeals the district court's order dismissing his action after an evidentiary hearing.

In his complaint and motion for a preliminary injunction and temporary restraining order, Mr. Holt asserted that one of his fundamentalist Muslim beliefs was that he must grow a beard, but defendants substantially burdened his ability to practice his religion by enforcing ADC's grooming policy, which allowed trimmed mustaches but otherwise no facial hair, with quarter-

inch beards permitted only for a diagnosed dermatological problem. Mr. Holt sought permission to maintain a half-inch beard as a compromise position, to balance his religious beliefs with ADC's security needs. The district court initially granted temporary injunctive relief. The court vacated its order and dismissed the complaint, however, after the hearing produced evidence that Mr. Holt had a prayer rug and a list of distributors of Islamic material, he was allowed to correspond with a religious advisor, and he was allowed to maintain the required diet and observe religious holidays; that the grooming policy helped prevent inmates from concealing contraband, drugs, or weapons; that an inmate who grew a beard could change his appearance quickly by shaving; that affording special privileges to an individual inmate could result in his being targeted by other inmates; and that prison officials believed the grooming policy was necessary to further ADC's interest in prison security.

Following careful review, we conclude that defendants met their burden under RLUIPA of establishing that ADC's grooming policy was the least restrictive means of furthering a compelling penological interest, notwithstanding Mr. Holt's citation to cases indicating that prisons in other jurisdictions have been able to meet their security needs while allowing inmates to maintain facial hair.

Accordingly, we affirm, but we modify the judgment to reflect that the dismissal does not count as a "strike" for purposes of 28 U.S.C. § 1915(g).

# "Supreme Court Agrees to Weigh an Inmate's Right to Grow a Beard for Religious Reasons"

*New York Times*
Adam Liptak
March 3, 2014

The Supreme Court on Monday agreed to decide whether prison officials in Arkansas may prohibit inmates from growing beards in accordance with their religious beliefs.

The policy was challenged by Gregory H. Holt, who is serving a life sentence for burglary and domestic battery. Mr. Holt said his Muslim faith required him to grow a beard.

The state's policy allows trimmed mustaches, along with quarter-inch beards for those with dermatologic problems. Prison officials said the ban on other facial hair was needed to promote "health and hygiene," to minimize "opportunities for disguise" and to help prevent the concealment of contraband.

Mr. Holt sued under the Religious Land Use and Institutionalized Persons Act, a federal law that requires prison officials to show that policies that burden religious practices advance a compelling penological interest and use the least restrictive means to do so. The United States Court of Appeals for the Eighth Circuit, in St. Louis, ruled in June that the justifications offered by the officials satisfied that standard.

Mr. Holt filed a handwritten petition in September asking the justices to hear his case, *Holt v. Hobbs*, No. 13-6827, pointing out that other courts had struck down policies banning beards in prisons. In an interim order in November, the Supreme Court ordered that Mr. Holt be allowed to grow a half-inch beard.

In their response to Mr. Holt's Supreme Court petition, prison officials told the justices that "homemade darts and other weapons" and "cellphone SIM cards" could be concealed in even half-inch beards. They added that they did not welcome the task of monitoring the lengths of inmates' beards.

In a reply brief, Mr. Holt, now represented by Douglas Laycock, a law professor at the University of Virginia, said 39 state corrections systems and the federal system allow prisoners to grow beards. He added that the justifications for the policy were illogical as there were easier places to hide contraband — shoes, say — than in a short beard.

# "U.S. Justices Say Inmate Can Keep Beard While Contesting Policy"

*Reuters*
Lawrence Hurley
November 14, 2013

The Supreme Court on Thursday said an Arkansas prison inmate should be allowed to maintain a beard while he contests the prison's grooming policy.

In an unusual order, the court said that Gregory Holt, 38, should be allowed to grow a beard of up to one-half of an inch in length in accordance with his Muslim beliefs.

The court was responding to a handwritten request filed by Holt, who recounted his lengthy and unsuccessful attempt to fight the grooming policy.

Holt is serving a life sentence for burglary and domestic battery at the Varner Supermax prison, according to the Arkansas Department of Correction's website.

The Supreme Court's order said Holt could keep his beard while he files a petition with the court seeking review of a June appeals court decision that went against him.

## *Reed v. Town of Gilbert, Arizona*

**13-502**

**Ruling Below:** Reed v. Town of Gilbert, Arizona, 707 F.3d 1057 (9th Cir. 2013), *cert granted*, 134 S.Ct. 2900 (2014).

Church and pastor seeking to place temporary signs announcing services filed suit claiming that town's sign ordinance, restricting size, duration, and location of temporary directional signs, violated right to free speech, free exercise of religion, and equal protection. The United States District Court for the District of Arizona denied church's motion for preliminary injunction barring enforcement of ordinance. Church appealed. The Court of Appeals affirmed in part and remanded in part. On remand, the District Court granted town summary judgment. Church and pastor appealed.

**Question Presented:** Whether the Town of Gilbert's mere assertion that its sign code lacks a discriminatory motive renders its facially content-based sign code content-neutral and justifies the code's differential treatment of petitioners' religious signs.

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**Clyde REED, Pastor and Good News Community Church, Plaintiffs-Appellants,**
**v.**
**TOWN OF GILBERT, ARIZONA and Adam Adams, in his official capacity as Code Compliance Manager, Defendants-Appellees.**

United States Court of Appeals, Ninth Circuit

Decided on February 8, 2013

[Excerpt; some footnotes and citations omitted.]

**CALLAHAN, Circuit Judge**:

Good News Community Church and its pastor, Clyde Reed (referred to collectively as "Good News"), appeal from the district court's determination on remand from the Ninth Circuit that the Town of Gilbert's ordinance that restricts the size, duration and location of temporary directional signs does not discriminate between different forms of noncommercial speech in a unconstitutional manner. In *Reed v. Town of Gilbert* (9th Cir. 2009), we held that the ordinance (sometimes referred to as the "Sign Code") is not a content-based regulation and is a reasonable time, place and manner restriction. However, we remanded the case to the district court "to consider the First Amendment and Equal Protection claims that the Sign Code is unconstitutional in favoring some noncommercial speech over other noncommercial speech."

Accepting our opinion in *Reed* as law of the case, we conclude that the Sign Code is constitutional because the different treatment of types of noncommercial temporary signs are not content-based as

that term is defined in *Reed,* and the restrictions are tailored to serve significant governmental interests. In addition, we determine that the amendments to the Sign Code made by the Town of Gilbert ("Gilbert") during the pendency of this appeal do not moot this case and that Good News may file a new action in the district court should it wish to challenge the new provisions of the Sign Code.

**I.**

Good News is a relatively small church with 25 to 30 adult members and 4 to 10 children. "Members of Good News believe the Bible commands them to go and make disciples of all nations, and that they should carry out this command by reaching out to the community to meet together on a regular basis. To do so, they display signs announcing their services as an invitation for those in the community to attend." Starting around 2002, Good News met at an elementary school in Gilbert. It presently rents space at an elementary school in Chandler, Arizona, which borders Gilbert.

For a time, Good News placed about 17 signs in the area surrounding its place of worship in Gilbert announcing the time and location of its services. In 2005, Good News received an advisory notice from Gilbert that it was violating the town's sign ordinance because "the signs were displayed outside the statutorily-limited time period." For a while thereafter, Good News reduced the number of signs it erected and the amount of time its signs were in place, but friction with Gilbert persisted. In March 2008, Good News filed suit in federal court in Arizona alleging that Gilbert's Sign Code violated the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

**A. The Sign Ordinances**

Like many municipalities, Gilbert regulates the display of outdoor signs. Section 4.401(A) outlines the purposes for the Sign Code, namely, to "assure proper and efficient expression through visual communications involving signs compatible with the character and environment of the Town; to eliminate confusing, distracting, and unsafe signs; and to enhance the visual environment of the Town of Gilbert."

Under § 4.402(A), no person may erect a sign without first obtaining a sign permit, unless the sign is one exempted under § 4.402(D). Section 4.402(D) lists nineteen different types of signs that are allowed without a permit. Three of the types of exempted signs are of particular relevance: "Temporary Directional Signs Relating to Qualifying Event," "Political Signs," and "Ideological Signs."

Gilbert asserts, and Good News concedes, that Good News' signs are Temporary Directional Signs subject to the requirements of § 4.402(P). This subsection provides that "Temporary Directional Signs Relating to a Qualifying Event ... shall be no greater than 6 feet in height and 6 square feet in area," "shall only be displayed up to 12 hours before, during and 1 hour after the qualifying event ends," "may be located off-site and shall be placed at grade level," and "shall be placed only with the permission of the owner of the property on which they are placed." Additional restrictions include that

"[n]o more that 4 signs shall be displayed on a single property at any one time," and that Temporary Directional Signs may not be placed "in a public right-of-way" or on "fences, boulders, planters, other signs, vehicles, utility facilities, or any structure."

A "Political Sign" is defined as a "temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general and special elections." Political Signs (a) may be up to 32 square feet in size, (b) may be erected any time prior to an election but must be taken down within 10 days of the election, (c) are not limited in number, and (d) may be placed in the public right-of-way. An "Ideological Sign" is a "sign communicating a message or ideas for noncommercial purposes that is not a construction sign, directional sign, temporary directional sign, temporary directional sign relating to a qualified event, political sign, garage sale sign, or sign owned or required by a governmental agency." Ideological Signs (a) may be up to 20 square feet in size, (b) are not limited in time, (c) are not limited in number, and (d) may be placed in the public right-of-way.

**B. Initial Proceedings in the District Court**

Gilbert initially stipulated to a preliminary injunction, but when Gilbert amended the Sign Code in a way that Good News believed continued to infringe on its constitutional rights, Good News filed a second motion for a preliminary injunction. In September 2008, the district court denied Good News' motion for an injunction, concluding that: (a) "§ 4.402(P) is a content-neutral regulation, and [ ] it passes the applicable intermediate level of scrutiny;" and (b) the Sign Code "does not violate equal protection, as any uneven effects are an unintended consequence of the lawful content-neutral regulation." Good News appealed to the Ninth Circuit.

**C. *Reed v. Town of Gilbert*, 587 F.3d 966 (9th Cir. 2009)**

In November 2009 we basically affirmed the district court's denial of an injunction. In doing so, we made four determinations that guide our review in this appeal.

**1. *Good News alleges an as-applied challenge to the Sign Code***

First, we held that Good News' challenge was an as-applied challenge, and not a facial challenge, to the Sign Code. We determined that Good News' attack on the ordinance was "basically a challenge to the ordinance as applied to [its] activities," and therefore we limited our analysis of the constitutionality of the ordinance to its application to Good News.

**2. *The Sign Code is not a content-based regulation***

Second, after reviewing the evolution of our opinions from *Foti v. City of Menlo Park* to *Menotti v. City of Seattle* and *G.K. Limited Travel v. City of Lake Oswego ("G.K. Ltd.*"), we determined the fact that an enforcement official had to read a sign did not mean that a ordinance is content-based. Instead, we concluded that "our focus should be on determining whether the ordinance targets certain content; whether the ordinance or exemption is based on

identification of a speaker or event instead of on content; and whether an enforcement officer would need to distinguish content to determine applicability of the ordinance."

Applying this focus to the Sign Code, we found that the ordinance "regulates physical characteristics, such as size, number and construction of the signs," their locations, and the timing of displays, none of which "implicate the content of speech." We noted that "[t]he definition of a Qualifying Event sign merely encompasses the elements of 'who' is speaking and 'what event' is occurring." These two criteria invoke the speaker-based and event-based characteristics approved in *G.K. Ltd.* because "the City d[id] not limit the substance of [the] speech in any way." We explained that this case:

> highlights the absurdity of construing the "officer must read it" test as a bellwether of content. If applied without common sense, this principle would mean that every sign, except a blank sign, would be content based. While a Gilbert officer needs to briefly take in what is written on the Qualifying Event Sign to note who is speaking and the timing of the listed event, this "kind of cursory examination" is not akin to an officer synthesizing the expressive content of the sign.

We concluded "that § 4.402(P) is not a content-based regulation: It does not single out certain content for differential treatment, and in enforcing the provision an officer must merely note the content-neutral elements of who is speaking through the sign and whether and when an event is occurring."

**3. *The Sign Code is narrowly tailored to further Gilbert's significant interests***

Third, we determined that the Sign Code, "as a content-neutral time, place and manner regulation," also had to be, and was, narrowly tailored. Quoting *Ward v. Rock Against Racism*, we recognized that to be "narrowly tailored" the Sign Code had to "serve a significant governmental interest" and had to "leave open ample alternative channels for communication of that information." We held that the district court had not abused its discretion in concluding that the Sign Code "is narrowly tailored as it does not sweep in more speech than is necessary to achieve the Town's aesthetic and traffic objectives," explaining:

> The restrictions on time, place and manner imposed by Gilbert on the display of Qualifying Events Signs would indeed appear to "actually advance" the aesthetic and safety interests by limiting the size, duration and proliferation of signs. These measures restricting the number of signs and limiting them to private property do not appear substantially broader measures than required to make sure the rights-of-way are not so thicketed with signs as to pose a safety hazard or create an aesthetic blight. The limitation on timing—twelve hours before the event and one hour after—is equally narrowly tailored to meet these interests. While it might be easier and provide broader exposure for Good News to have the sign up for twenty-four hours, the test is not convenience or optimal display.

We also held that the district court did not abuse its discretion in finding that the Sign Code allowed for alternate channels of communications for Good News to

communicate effectively with members of the public. We explained that "[w]hile the alternative options identified by the district court may not be Good News' preference, 'we cannot invalidate the Sign Code merely because it restricts plaintiffs' preferred method of communication.' " We also noted that the alternative modes available did not appear to be especially burdensome.

This section of *Reed* concludes with the affirmative statement that:

> Section 4.402(P) is a content-neutral regulation of the time, place and manner of display of Good News' Qualifying Event Signs; the provision is narrowly tailored to further Gilbert's significant interests in aesthetics and traffic safety; and Good News has ample alternative channels of communicating its invitation to church services.

#### 4. *The Sign Code does not favor commercial over noncommercial speech*

The fourth relevant holding in *Reed* is our determination that the district court "did not abuse its discretion in concluding, after close examination, that the Sign Code does not favor commercial speech over non-commercial speech." Our opinion in *Reed* remanded on a limited issue only: "to consider the First Amendment and Equal Protection claims that the Sign Code is unconstitutional in favoring some noncommercial speech over other noncommercial speech." We noted that "[o]n remand, the district court will have the opportunity to determine whether Gilbert impermissibly 'evaluate[d] the strength of, or distinguished between, various [noncommercial] communicative interests.'"

### D. Proceedings on Remand in the District Court

On remand, the parties agreed to submit the case on cross-motions for summary judgment. The district court's order set forth three preliminary determinations. First, based in part on our opinion in *Reed*, the court held that the Sign Code "is a content-neutral regulation of speech that seeks to identify who is speaking and what event is occurring and does not discriminate on the basis of content." Second, citing its preliminary injunction order, the district court reiterated that the Sign Code was narrowly tailored to serve significant government interests. Third, the court embraced as a non-preliminary finding its determination that noncommercial speech is more favorably treated than commercial speech.

Addressing the remanded issue, the district court thought that the different treatments of various forms of noncommercial speech were "akin to the regulation at issue in *G.K. Ltd.*" The district court reasoned:

> Both Political Signs and Qualifying Event Signs relate, in substance, to events—an election or a specified event fitting the definition in the Sign Code. In the case of Political Signs, the event is of widespread interest and takes place at a fixed, regular interval. A Qualified Event might take place once, or it might take place several times a week, depending on the type of event. A Qualifying Event Sign could invoke so-called "core" speech, but Political Signs are always core speech.... To distinguish between a Political Sign and a Qualifying Event Sign, an officer need only skim the sign to determine the

> speaker (e.g. is a non-profit speaking?) and the event at issue (e.g. does this relate to an election or a Qualifying Event?). In *G.K. Ltd.*, the court concluded that speaker—and—event based exemptions did not render a sign regulation content-based because the municipality was distinguishing on the basis of the speaker's identity and whether a triggering event had occurred, *not* on the basis of the sign's content.
>
> ....
>
> Ideological Signs are not tied to a specific event, the way Political and Qualifying Event Signs are, so they are not subject to an event-based time restriction under the Sign Code. This accounts for the different "time" restriction for Ideological Signs. As for place, namely whether a particular type of sign can be placed in the right-of-way, Gilbert argues that it has made a municipal decision to limit the overall number of signs in the right-of-way, and it does not discriminate at all among Ideological Signs.... Nonetheless, the Court finds that the Sign Code does not distinguish on the basis of the message of the sign because, other than signs relating to events—whether those events are elections or bake sales—the Sign Code treats all messages on equal footing. Because Ideological Signs do not relate to an event, they are distinguishable from Qualifying Event Signs. To determine whether a sign is an Ideological Sign or a Qualifying Event Sign, an officer does not need to read the content: he or she need only look to see whether the sign concerns an event.

After determining that the Sign Code did not discriminate among types of noncommercial speech, the district court rejected Good News' argument that the Sign Code was impermissibly vague and overbroad. Citing *United States v. Williams*, the district court commented that the "[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment," and that a statute is void if it does not "provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." The district court determined that the deterrent effect of the Sign Code was "insubstantial and remote" as the "ordinance provides plenty of guidance for people of ordinary intelligence to determine what conduct is permitted and prohibited, and does not foster arbitrary, capricious, or discriminatory enforcement."

**E. Gilbert's Motion to Dismiss**

Good News filed this appeal from the district court's entry of summary judgment in favor of Gilbert. However, in October 2011, while the appeal was pending, Gilbert made two amendments to its Sign Code: (1) it allowed placement of Temporary Directional Signs within the public right-of-way; and (2) it limited the Temporary Directional Sign exemption to events held within the Town of Gilbert. Based on the amended Sign Code, Gilbert filed a motion to dismiss this appeal, arguing that because Good News held its services outside of Gilbert, it does not qualify for the Temporary Directional Sign exemption, and lacks standing to pursue this appeal.

The motion to dismiss presents a situation analogous to that before the Supreme Court in *Northeastern Florida Chapter of*

*Associated General Contractors of America v. City of Jacksonville*. In *Northeastern Florida*, the plaintiffs challenged a city ordinance providing preferential treatment to certain minority owned businesses for city contracts. The district court granted the plaintiffs summary judgment, holding that the ordinance was unconstitutional, but the Eleventh Circuit vacated that order finding that the plaintiffs lacked standing. Shortly after the Supreme Court granted certiorari, the city repealed the questioned ordinance and replaced it with new ordinance that provided for a more narrow minority preference. The city then filed a motion to dismiss the case as moot.

Justice Thomas, writing for the Court, held that the case was not moot. He relied on the Court's "well settled rule" set forth in *City of Mesquite v. Aladdin's Castle, Inc.* that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." Justice Thomas wrote:

> There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so. Nor does it matter that the new ordinance differs in certain respects from the old one. *City of Mesquite* does not stand for the proposition that it is only the possibility that the selfsame statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect.

The Court concluded that the new ordinance disadvantaged plaintiffs "in the same fundamental way" and thus the case was not moot. Justice O'Connor, while dissenting, commented that:

> *City of Mesquite* stands for the proposition that the Court has discretion to decide a case in which the statute under review has been repealed or amended. The Court appropriately may render judgment where circumstances demonstrate that the legislature likely will reinstate the old law—which would make a declaratory judgment or an order enjoining the law's enforcement worthwhile. But such circumstances undoubtedly are rare.

Good News' case is one of those rare cases. The amendment of the Sign Code to allow directional signs to be placed in the public right-of-way moots Good News' objection to this provision of the Sign Code, but the new restriction, limiting the Temporary Directional Signs exemption to events that take place in Gilbert, bars Good News from erecting any directional signs at all. Thus, a dismissal for mootness would allow Gilbert to continue to limit Good News' speech without further judicial review. Accordingly, the motion to dismiss is denied.

**II.**

*Reed* limits our consideration of Good News' challenges to the Sign Code. Although our opinion in *Reed* reviewed the denial of a preliminary injunction, our determinations included conclusions of law. Furthermore, on remand, the parties agreed to resolve all remaining issues on cross-motions for summary judgment. There is no indication that the parties engaged in further discovery, and Good News has not asserted any evidentiary facts in this appeal that were not before us in *Reed*. Thus, our opinion

in *Reed* constitutes law of the case and is binding on us.

*Reed* establishes first that "§ 4.402(P) is not a content-based regulation," and second that the Sign Code generally is a reasonable (i.e., not unconstitutional) time, place and manner restriction. The single issue remanded, and hence the primary substantive issue before the district court and now on appeal, is whether the Sign Code improperly discriminates between different forms of noncommerical speech.

We review de novo the district court's grant of summary judgment in favor of Gilbert.

**A. The Evolving Standard for Evaluating the Regulation of Noncommercial Speech**

Judicial review of the regulation of noncommercial speech has evolved over the last 30 years. In 1981, Justice White, in his plurality opinion in *Metromedia* stated that while a city "may distinguish between the relative value of different categories of commercial speech, the city does not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests." Seven years later in *National Advertising Co. v. City of Orange,* we recognized that an ordinance would be invalid if it imposed greater restrictions on noncommercial than on commercial billboards. We noted that a restriction based on content would be unconstitutional unless it was narrowly drawn to serve a compelling interest, but suggested that the city was nonetheless "not powerless to regulate billboards containing noncommercial messages." In *Desert Outdoor Advertising, Inc. v. City of Moreno Valley,* we indicated that an ordinance regulating noncommercial speech would be invalid if it imposed greater restrictions on noncommercial than commercial billboards or if it regulated noncommercial billboards "based on their content." Regarding Gilbert's Sign Code, we have already held that it does not impose greater restrictions on noncommercial signs than commercial signs, and thus the critical issue now before us is whether the Sign Code improperly regulates noncommercial temporary signs based on their content.

The definition of "content neutral" has also evolved over the last couple of decades. In *Foti,* relying on *Desert Outdoor,* we indicated that when an officer must examine the contents of a sign to determine whether an exemption applies, the ordinance is content-based. However, we also noted the Supreme Court's advice that "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based," and that a "speech restriction is content neutral if it is justified without reference to the content of the regulated speech."

More recently, following these guidelines we have fashioned a more nuanced standard. In *G.K. Ltd.,* we held that "[n]either the speaker- nor event-based exemptions implicate *Foti* insofar as neither requires law enforcement officers to read a sign's message to determine if the sign is exempted from the ordinance." The standard of review set forth is:

> The "government may impose reasonable restrictions on the time, place, or manner

> of engaging in protected speech provided that they are adequately justified without reference to the content of the regulated speech." In addition to being justified without reference to content, the restrictions must be "narrowly tailored to serve a significant governmental interest and ... leave open ample alternative channels for communication of the information."

In *Reed*, applying this standard, we concluded that the Sign Code "does not single out certain content for differential treatment, and in enforcing the provision an officer must merely note the content-neutral elements of who is speaking through the sign and whether and when an event is occurring." Nonetheless, this appeal raises two unanswered questions under the *G.K. Ltd.* standard: (1) are the differing restrictions between types of noncommercial speech "adequately justified without reference to the content of the regulated speech"; and (2) are they narrowly tailored? The first issue is the fulcrum of this appeal.

**B. The Restrictions on Types of Noncommercial Speech are not Based on the Content of the Speech.**

The thrust of Good News' challenge to the Sign Code is that its different restrictions for different types of noncommercial speech are inherently content-based and thus unconstitutional. However, we rejected this general argument in *Reed* when we held that distinctions based on the speaker or the event are permissible where there is no discrimination among similar events or speakers. Thus, under *Reed*, the distinctions between Temporary Directional Signs, Ideological Signs, and Political Signs are content-neutral. That is to say, each classification and its restrictions are based on objective factors relevant to Gilbert's creation of the specific exemption from the permit requirement and do not otherwise consider the substance of the sign. The Political Signs exemption responds to the need for communication about elections. The Ideological Sign exemption recognizes that an individual's right to express his or her opinion is at the core of the First Amendment. The Temporary Directional Sign exemption allows the sponsor of an event to put up temporary directional signs immediately before the event. Each exemption is based on objective criteria and none draws distinctions based on the particular content of the sign. It makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted. Accordingly, as the speaker and event determinations are generally "content neutral," Gilbert's different exemptions for different types of noncommercial speech are not prohibited by the Constitution.

Our reading of *Reed* is in accord with our opinion in *G.K. Ltd.* There the town ordinance banned most pole signs but had a grandfather clause for preexisting signs. We determined that "the City's restriction on plaintiffs' pole sign is not a content-based regulation of plaintiffs' speech." We commented:

> The pole sign restriction is not a "law[ ] that by [its] terms distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed." The Code restricts all pole signs across the City's general commercial zones

> without creating exceptions for preferred content. The burdens imposed by these pole sign restrictions are borne equally by all of the City's residents. Further, plaintiffs offer no evidence suggesting illicit motive or bias on the part of the City or that the City banned pole signs in general, or their pole sign in particular, because of a desire to stifle certain viewpoints.

The plaintiffs in *G.K. Ltd.* argued that ordinance's grandfather clause rendered it content-based because town officials would have to read the pole sign to see if it had changed. We rejected this argument, explaining:

> Unlike *Foti*'s exemptions, the grandfather clause does not require Lake Oswego officials to evaluate the substantive message on the preexisting sign and the clause certainly does not favor speech "based on the idea expressed." A grandfather provision requiring an officer to read a sign's message for no other purpose than to determine if the text or logo has changed, making the sign now subject to the City's regulations, is not content-based.

Under the controlling precedent of *Reed* and *G.K. Ltd.*, Good News has not shown that the Sign Code imposes a content-based limitation.

**C. Supreme Court Precedent Affirms our Definition of Content Neutral.**

As suggested in *G.K. Ltd.*, our approach is in accord with the Supreme Court's opinion in *Hill v. Colorado*. In *Hill*, the plaintiffs challenged "the constitutionality of a 1993 Colorado statute that regulates speech-related conduct within 100 feet of the entrance to any health care facility." In holding that the statute was constitutional, the Supreme Court commented that it had "never held, or suggested, that it is 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." The Court noted that the statute:

> places no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker. Rather, it simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners. Instead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries.

Similarly, Gilbert's Sign Code places no restrictions on the particular viewpoints of any person or entity that seeks to erect a Temporary Directional Sign and the exemption applies equally to all.

Furthermore, in *Hill*, the Supreme Court explained why a statute, which only restricted certain types of speech-related conduct, is properly considered content neutral. The Court reiterates that "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." It then offers three reasons for why the statute is content neutral:

> First, it is not a "regulation of speech." Rather, it is a regulation of the places where some speech may occur. Second, it was not adopted "because of disagreement with the message it conveys." ... Third, the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech. As we have repeatedly explained, government regulation of expressive activity is "content neutral" if it is justified without reference to the content of regulated speech.
>
> The Court further stated that it had "never held, or suggested, that it is 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." The Supreme Court also distinguished its opinion in *Carey v. Brown,* noting that the Colorado statute "places no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter that may be discussed by a speaker." Finally, in response to Justice Scalia's concern that content-based legislation can be used for invidious thought-control purposes, the Court stated: "[b]ut a statute that restricts certain categories of speech only lends itself to invidious use if there is a significant number of communications, raising the same problem that the statute was enacted to solve, that fall outside the statute's scope, while others fall inside."

Gilbert's regulation of Temporary Directional Signs is content-neutral as that term is defined by the Supreme Court in *Hill.* Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed. Rather, it exempted from the permit requirement all directional signs regardless of their content. The Code is "a regulation of the places where some speech may occur," and was not adopted "because of any disagreement with the message it conveys." Also, Gilbert's interests in regulation temporary signs are unrelated to the content of the sign. Moreover, there is no danger of the regulation being used for invidious thought-control purposes as the Sign Code does not purport to regulate the content of Temporary Directional Signs. Because Gilbert's Sign Code places no restrictions on the particular viewpoints of any person or entity that seeks to erect a Temporary Directional Sign and the exemption applies to all, it is content-neutral as that term has been defined by the Supreme Court.

**D. Good News has not shown that the Sign Code's Different Treatment of Different Types of Noncommercial Speech is Unconstitutional.**

Although it is conceivable, as the dissent posits, that different exemptions for noncommercial speech might improperly restrict speech, that concern is not presented here. First, as explained, the Temporary Directional Sign exemption is a content neutral. Second, the Temporary Directional Sign exemption is not in competition with other exemptions from the permit requirement. This is not a situation where there are a limited number of billboards or maximum number of temporary signs that may be placed in the public right-of-way. Nor does the erection of temporary directional signs in any way limit any other person's rights to erect political, ideological, or other signs. Accordingly, as long as the

Temporary Directional Signs exemption—which is the exemption that was applied to Good News' signs and that Good News challenges—is content neutral and reasonable in relationship to its purpose—providing direction to temporary events—its constitutionality is not affected by the fact that the exemptions for Political Signs or Ideological Signs are different.

The cases cited by the dissent do question distinctions among different categories of non-commercial speech, but none concerned instances in which the types of non-commercial speech were unrelated, and all of the cases have been refined by more recent Supreme Court opinions. In *Police Department of Chicago v. Mosley*, the Supreme Court struck down an ordinance as unconstitutional because it sought to distinguish between peaceful labor picketing and other peaceful picketing. Similarly, in *Carey*, the Supreme Court struck down an ordinance that sought to distinguish between picketing at a residence from picketing at a place of employment. In *Metromedia*, the Court, in a fractured opinion, considered an ordinance that differentiated between commercial and non-commercial billboards, but also suggested that the city had less leeway to distinguish between types of non-commercial speech than between types of commercial speech. These cases concerned related and competing forms of speech. In contrast, Gilbert's Temporary Directional Signs exemption neither restricts nor competes with a person's or entity's ability to take advantage of the exemptions for political, ideological, or other types of temporary signs.

Critically, as noted, over the last thirty years, the Supreme Court has refined the concerns set forth in Justice White's plurality opinion in *Metromedia*. Most notably, in *Hill*, the Supreme Court upheld a statute that clearly distinguished between types of noncommercial speech. The statute prohibited the noncommercial speech of "approaching" an individual "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person." No other form of noncommercial speech was regulated. Nonetheless, the Supreme Court upheld the ordinance. Similarly, in *Ward*, the Supreme Court stated 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." Thus, the Sign Code's different provisions for Political, Ideological and Temporary Directional Signs is not in itself unconstitutional.

Although Good News voices some objections to the size, location, and duration limitations on its signs, Good News does not assert that the restrictions actually interfere with the purpose of the signs: providing directions to Good News' services. Moreover, courts have generally deferred to municipal decisions concerning the actual limitations on the sizes and shapes of signs.

**E. The Temporary Directional Signs Exemption is Narrowly Tailored to Serve Significant Governmental Interests**

The Supreme Court has explained that "[c]ontent-neutral regulations do not pose the same inherent dangers to free expression

that content-based regulations do, and thus are subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution." Nonetheless, a content-neutral, reasonable time, place and manner restriction must also be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication.

There is no real question that Gilbert's interests in safety and aesthetics are significant. Good News argues only that such interests are not "sufficiently compelling to satisfy a content-based sign code," but we find that the Sign Code does not impose any content-based restriction.

Good News contends that the Sign Code is not narrowly tailored because all temporary signs placed within the public right-of-way implicate safety and aesthetic concerns, but Temporary Directional Signs are more severely limited than Political and Ideological Signs.

Political and Ideological Signs may infringe on Gilbert's interests to a greater extent than Temporary Directional Signs, but for a number of reasons this is permissible. First, unlike political, ideological and religious speech which are clearly entitled to First Amendment protection, there does not appear to be a constitutional right to an exemption for Temporary Directional Signs. If Good News has no constitutional right to erect Temporary Directional Signs, how can it suffer a cognizable harm when Gilbert creates an exemption facilitating the display of such signs?

Second, each exemption reflects a balance between Gilbert's interests and the constitutional interests of the type of sign covered. With the recent amendment to the Sign Code, there are no longer any differences as to where temporary signs may be located. The differences as to duration are based on the natures of the types of speech involved. Thus, under Arizona law political signs are allowed for an extended period of time before an election. Ideological signs, not being tied to any event, have no time limit. However, the purpose of a Temporary Directional Sign inherently contemplates a limit on duration.

Third, as noted, the exemptions are not in competition. The exemptions are not competing for limited space and the erection of one type of temporary sign does not preclude the placement of another. Accordingly, each exemption may be evaluated on its own merits.

Fourth, there is no showing that the restrictions on Temporary Directional Signs interfere with their purpose: directing interested individuals to temporary events. Good News does not allege that the public cannot see its signs or that the size limit is too small to allow it to adequately provide directions.

Finally, as also noted, courts generally defer to a city's determinations of size and duration. Here, the restrictions on Temporary Directional Signs are reasonable. There are no limits on the number of events that a person or entity may hold, and no limit on the number of signs that may be erected (other than no more than four on any single piece of property). Also, the 12–hour

limitation seems reasonable as a person is unlikely to seek directions to an event more than 12 hours before the event.

We conclude that these considerations refute Good News' arguments that to be narrowly tailored restrictions on types of noncommercial speech must be uniform or vary only to the extent that the type of speech affects a town's interests. Our opinions in *G.K. Ltd.* And *Reed* support, if not compel, our conclusion. In *G.K. Ltd.*, we held a total ban on changed pole signs was narrowly tailored because pole signs could reasonably be perceived as aesthetically harmful and distracting to travelers, even though this is also true of unchanged pole signs. In *Reed,* we determined that "[t]he restrictions on time, place and manner imposed by on the display of [signs] would indeed appear to 'actually advance' the aesthetic and safety interests by limiting the size duration and proliferation of signs." Our determination in *Reed* that the Sign Code is narrowly tailored, if not controlling, remains sound.

In sum, (a) Gilbert was not required to create an exemption for Temporary Directional Signs, (b) the restrictions on directional signs are rationally related to the purpose of the directional signs, and (c) the restrictions are reasonably designed to promote Gilbert's interests in aesthetics and safety. True, the number of temporary signs might be substantially reduced if there were not exemptions for political and ideological signs, but those signs raise different legal rights and interests that Gilbert has to respect. Moreover, there need only be a reasonable fit between the Gilbert's interest and the regulations. At least between elections, the Sign Code may well limit the number of temporary signs in Gilbert without unreasonably limiting anyone's speech, and thus the Sign Code serves significant governmental interests.

Finally, the Sign Code leaves open ample alternate means of communication. Assuming that Good News events are eligible for the exemption, it may erect as many temporary signs as it wants twelve hours before each scheduled event. The Sign Code does not regulate any of the many other ways in which Good News can "go and make disciples of all nations." Indeed, there is no suggestion that Good News' tenets require that it or its members erect temporary directional signs. Thus, the Sign Code's restrictions do not require that the members of Good News violate any cardinal principle of their faith and do not limit the many other ways the members may advertise their services and attract individuals.

**F. Good News' Other Challenges do not Merit Relief**

**1.** To prevail on its claims of violation of its members' right to the free exercise of religion under the Constitution and under Arizona's Free Exercise of Religion Act, Good News must show that "the government action substantially burdens the exercise of religious beliefs." Good News' free exercise claim fails because the Sign Code's restrictions on the size and duration of Temporary Directional Signs is a generally applicable law, and it does not substantially interfere with any of Good News' tenets. The Supreme Court has held that religion

may not exempt a person from complying with neutral laws. Furthermore, while Good News' members may be obligated to spread their message and advertise their events, there is no suggestion that Good News' tenets require that they do so in any particular way. Accordingly, we agree with the district court that the Sign Code's restrictions on Temporary Directional Signs do not constitute a substantial burden on Good News' free exercise rights.

**2.** We also agree with the district court that the Sign Code is not vague or overbroad. The Supreme Court noted in *Ward*, that "perfect clarity and precise guidance have never been required even of regulations that restrict express activity." Good News' claim of vagueness is based on an alleged lack of definitions for signs that arguably meet the requirements of more than one temporary sign exemption. However, Gilbert officials claim that they have yet to see such a sign and Good News does not argue that its signs meet the requirements of more than one exemption. In addition, in *Reed*, we held that Good News' mounted only an as-applied challenge to the Sign Code. This is law of the case, and is not really challenged by Good News.

**3.** Good News' assertion that the Sign Code violates its right to equal protection of law is basically a revision of its argument that Gilbert cannot treat different types of noncommercial speech differently. Clothed in the garb of equal protection the argument still is not persuasive. The Sign Code does not make any distinctions based on religion. Rather, the Temporary Directional Signs exemption is available to all noncommercial entities. Because we conclude that the Sign Code is not unconstitutional just because it differentiates between types of noncommercial signs, Good News' equal protection argument depends on it establishing a cognizable class of noncommercial entities wishing to erect temporary directional signs to their events whose interests may be compared to some other class. Good News has failed to identify such entities.

### G. Any Challenge Good News May Advance to the Amended Sign Code Should Be Initially Litigated in the District Court

Although the amendment to the Sign Code does not moot this appeal, we need not, and do not, determine the merits of the amendment. Unlike the situation before the Supreme Court in *Northeastern Florida*, here the amendment arguably increases rather than decreases the barriers to Good News erecting temporary directional signs. Also, unlike the holding in *Northeastern Florida*, we have determined that Good News has not shown that the other restrictions imposed by the Sign Code violate its constitutional rights. However, the added restriction to the Sign Code—that Temporary Directional Signs are only exempt from the permit requirement if they concern events that take place within the Town of Gilbert—is different in nature from the time, place, and manner restrictions that Good News previously challenged. Moreover, even if we assume that Good News will challenge the new restriction, we do not know what constitutional and legal arguments Good News will present in

challenging the restriction, or what defenses Gilbert will proffer. Accordingly, any challenge Good News may have to the amendment limiting the Temporary Directional Sign exemption to events in the Town of Gilbert should be raised in the first instance in the district court. As we affirm the district court's grant of summary judgment for Gilbert, we leave it to the district court to determine whether Good News may seek to amend its existing complaint or should file a new complaint.

**III**

In *Reed,* and *G.K. Ltd.,* we held that distinctions based on the speaker or the event are permissible where there is no discrimination among similar events or speakers. In *Hill,* the Supreme Court indicated that not all types of noncommercial speech need be treated the same. Applying this case law to the Town of Gilbert's Sign Code's treatment of different types of noncommercial speech, we conclude that the treatment is content-neutral. That is to say, each exemption allowing for the erection of temporary signs and its restrictions are based on objective factors relevant to the creation of the specific exemption and do not otherwise consider the substance of a sign. We further conclude that the exemptions are narrowly tailored because they serve significant governmental interests and leave open ample alternative channels of communication. We also conclude that the Sign Code does not violate Good News' (or its members') right to the free exercise of religion or right to equal protection of law, and is not unconstitutionally vague or overbroad. The district court's grant of summary judgment in favor of the Town of Gilbert is **AFFIRMED.**

**WATFORD, Circuit Judge, dissenting:**

I agree with the majority that the post-judgment amendments to the Town of Gilbert's sign ordinance do not render this appeal moot. But I disagree with the majority's conclusion that the sign ordinance is constitutional.

When this case first came before us, we evaluated § 4.402(P) of Gilbert's sign ordinance in isolation. That provision specifies the restrictions applicable to "temporary directional signs relating to a qualifying event," such as the signs plaintiff Good News Community Church seeks to display inviting people to attend its Sunday morning services. We held that, with respect to the temporary directional signs it covers, § 4.402(P) is content-neutral. We reached that conclusion because, considered on its own, § 4.402(P) "does not single out certain content for differential treatment, and in enforcing the provision an officer must merely note the content-neutral elements of who is speaking through the sign and whether an event is occurring."

What we did not decide in *Reed I* is whether § 4.402(P) is impermissibly content-based when viewed in relation to the other provisions of Gilbert's sign ordinance. In particular, we noted that the district court had not addressed plaintiffs' argument that "the ordinance unfairly discriminates among forms of noncommercial speech" by granting more favorable treatment to signs that Gilbert categorizes as "political" and

"ideological." We therefore remanded the case for resolution of plaintiffs' "First Amendment and Equal Protection claims that the Sign Code is unconstitutional in favoring some noncommercial speech over other noncommercial speech."

The Fourteenth Amendment's Equal Protection Clause and the First Amendment's Free Speech Clause prohibit the government from favoring certain categories of non-commercial speech over others based solely on the content of the message being conveyed. When regulating speech in a public forum, the government may draw distinctions among different categories of non-commercial speech only if those distinctions are justified by some non-communicative aspect of the speech involved. For example, a State may not exempt labor picketing from a general ban on picketing in front of homes (enacted to protect residential privacy), unless it can show that labor picketing is inherently less disruptive of residential privacy than picketing on other subjects. The reason is simple: Within the realm of noncommercial speech, the government may not decide that speech on certain subjects is more (or less) valuable—and therefore more (or less) deserving of First Amendment protection—than speech on other subjects.

The Supreme Court relied on this general principle to strike down a municipal sign ordinance in *Metromedia.* A plurality of the Court invalidated San Diego's ordinance banning most non-commercial billboards on the ground that the ordinance impermissibly granted exemptions for billboards bearing non-commercial speech on favored subjects, such as political campaign messages. The plurality held that, although cities "may distinguish between the relative value of different categories of commercial speech," they do not have the same freedom in the realm of non-commercial speech "to evaluate the strength of, or distinguish between, various communicative interests." San Diego could not identify any non-communicative aspect of the speech at issue to justify the distinctions it had drawn. It failed to show, for example, that the non-commercial billboards it banned had any greater effect on the city's asserted interests in promoting traffic safety and aesthetics than the non-commercial billboards it permitted.

Contrary to the majority's suggestion, *Hill v. Colorado* did not modify or refine the core principle underlying *Mosley, Carey*, and *Metromedia.* The statute at issue in *Hill* prohibited, within certain designated areas, approaching within eight feet of another for the purpose of engaging in oral protest, education, or counseling. The Court held that the statute was content-neutral because it regulated a particular mode of communication—approaching within eight feet of another to engage in oral protest, education, or counseling—without regard to the subject of the speaker's message. As the Court stressed, "Instead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries." Thus, rather than distinguishing among different categories of non-commercial speech based on the

message being conveyed, the Colorado statute prohibited *all* non-commercial speech expressed through a particular mode of communication—a fact that rendered *Carey* "easily distinguishable."

Gilbert's sign ordinance violates the First and Fourteenth Amendments by drawing content-based distinctions among different categories of non-commercial speech. The most glaring illustration is the ordinance's favorable treatment of "political" and "ideological" signs relative to the treatment accorded the non-commercial signs plaintiffs seek to display. Under the ordinance, plaintiffs' temporary directional signs may not exceed six square feet in size and may not be displayed more than 12 hours before or one hour after the relevant event—here, Sunday morning church services. (Given the 9:00 a.m. start time of Good News's church services, this durational restriction limits the display of plaintiffs' signs to periods when it is virtually always dark.) In contrast, "political" signs—defined as "[a] temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general and special elections relating to any national, state or local election"—may be up to 32 square feet in size and may be displayed any time prior to an election and removed within 10 days after the election. "Ideological" signs—defined as "a sign communicating a message or ideas for non-commercial purposes" that is not a construction, directional, political, or garage sale sign—may be up to 20 square feet in size and are not subject to any durational limits at all.

Gilbert's sign ordinance plainly favors certain categories of non-commercial speech (political and ideological signs) over others (signs promoting events sponsored by non-profit organizations) based solely on the content of the message being conveyed. These are not content-neutral "speaker" and "event" based distinctions, like those we approved in *G.K. Ltd. Travel v. City of Lake Oswego* and in *Reed I* when we reviewed § 4.402(P) standing alone. Determining whether a particular sign will be regulated as a "political" sign as opposed to an "ideological" sign or a "temporary directional sign relating to a qualifying event" turns entirely on the content of the message displayed on the sign.

The content-based distinctions Gilbert has drawn are impermissible unless it can identify some non-communicative aspect of the signs at issue to justify this differential treatment. Gilbert has merely offered, as support for the sign ordinance as a whole, its interest in enhancing traffic safety and aesthetics. Traffic safety and aesthetics are certainly important interests. But to sustain the distinctions it has drawn, Gilbert must explain why (for example) a 20–square–foot sign displayed indefinitely at a particular location poses an acceptable threat to traffic safety and aesthetics if it bears an ideological message, but would pose an unacceptable threat if the sign's message instead invited people to attend Sunday church services.

Gilbert has not offered any such explanation, and I doubt it could come up with one if it tried. What we are left with, then, is Gilbert's apparent determination that

"ideological" and "political" speech is categorically more valuable, and therefore entitled to greater protection from regulation, than speech promoting events sponsored by non-profit organizations. That is precisely the value judgment that the First and Fourteenth Amendments forbid Gilbert to make.

Nothing we said in *Reed I* is inconsistent with this conclusion. There we held only that § 4.402(P), viewed in isolation, is a valid content-neutral time, place, and manner regulation. We did not decide, and instead remanded for the district court to decide, whether Gilbert's sign ordinance draws content-based distinctions by "favoring some noncommercial speech over other noncommercial speech." In doing so, we mentioned as potentially relevant *National Advertising Co. v. City of Orange* where (we noted in *Reed I*) we invalidated a municipal sign ordinance that "made content-based distinctions among categories of noncommercial speech." Thus, when we said in *Reed I* that *§ 4.402(P)* "does not single out certain content for differential treatment," we obviously did not decide whether *the sign ordinance as a whole* singles out certain content for differential treatment. Otherwise, our remand to the district court would have been entirely unnecessary.

For the reasons given above, I would hold that the regulatory distinctions Gilbert has drawn among different categories of non-commercial speech are unconstitutional, and I would remand for the district court to determine whether those provisions of Gilbert's sign ordinance are severable. I respectfully dissent from the majority's contrary holding.

# “U.S. Supreme Court Will Hear Arizona Church-Sign Case”

*USA Today*
Parker Leavitt
July 2, 2014

A prolonged legal battle between Gilbert, Ariz., and a small Presbyterian church over religious signs is headed to the U.S. Supreme Court, with oral arguments likely to start later this year.

The court on Tuesday announced that it would hear *Reed v. Town of Gilbert*, which alleges the town's sign code is discriminatory in preventing Good News Presbyterian Church from posting roadside signs the day before worship services.

Gilbert officials have argued — and courts have agreed — that the rules treat churches no differently than other non-commercial groups and that the signs are not regulated based on who posts them.

A three-member panel for the 9th U.S. Circuit Court of Appeals last year sided with Gilbert, although the decision was not unanimous and one dissenting judge argued that the town's law is unconstitutional.

Gilbert's code prohibits non-commercial event signs, including the church signs advertising worship services, from going up more than 12 hours beforehand in public rights-of-way.

In contrast, political signs can be placed 60 days before an election. Ideological signs, which are meant to convey a non-commercial message or idea, can be posted in any zoning district and left up indefinitely. This could be a message touting world peace, for example.

Alliance Defending Freedom, representing Good News pastor Clyde Reed, last year asked the Supreme Court to clarify how judges should determine whether an ordinance discriminates based on content, citing disagreement among circuit courts on the issue.

The notion of content-neutral law could apply to a wide range of issues, including public events, for example. A law forbidding all parades down Main Street would be neutral, while a law that bans an immigration rally would not.

The Supreme Court typically grants 70 to 80 — or about 1% — of the 8,000 or so petitions it receives each year, Arizona State University law professor Paul Bender said.

Since the Gilbert case appears to involve a conflict among circuit courts, it's not surprising the Supreme Court agreed to take it on, Bender said.

"This is not a frivolous petition," Bender said. "It's a really important question that determines a lot of First Amendment cases."

The U.S. Supreme Court typically weighs in on issues with implications beyond an individual case, and the Gilbert dispute appears to fit that profile. At least four of the nine Supreme Court justices must agree to accept a petition before the court will hear a case.

Matt Sharp, legal counsel for Alliance Defending Freedom, cheered the court's decision to hear the case, saying it had been in limbo for months.

"I think this court has shown a strong desire to clarify these important issues regarding First Amendment rights," Sharp said.

Alliance Defending Freedom, based in Scottsdale, Ariz., is a conservative organization launched in 1994. It litigates cases tied to religion, abortion and gay marriage. The group claims more than three dozen U.S. Supreme Court victories.

Good News Presbyterian Church's congregation consists of a few dozen members who meet weekly at a Gilbert senior-living center.

Gilbert's dispute with the church began in 2005, when the town's code-compliance department cited the church for posting signs too early in the public right of way.

The church responded by reducing the number of signs and the amount of time they were out, but Gilbert notified church officials again in 2007 that they were in violation.

Good News filed a lawsuit in March 2007 alleging that the code regulating signs discriminated against religious groups by violating free-speech rights.

Gilbert suspended the code while the case made its way through court, but that changed in 2008, when Gilbert adopted a sign-code amendment.

The changes allowed churches and other groups to post bigger signs, no limit on the number of signs and more time for them to be up. Town officials also lumped charitable, community-service, educational and other non-profits into the same category as churches for restrictions.

Gilbert Town Attorney Michael Hamblin said courts have rejected Alliance Defending Freedom's claims four times and the town believes the Supreme Court will do the same.

# "Reed v. Town of Gilbert: an Important First Amendment Content Discrimination Case, to be Heard by the Court this Coming Year"

*The Washington Post*
Eugene Volokh
July 7, 2014

Last week, the Court agreed to hear *Reed v. Town of Gilbert*, an important case on the distinction between content-based and content-neutral restrictions. When the government is acting as sovereign — imposing rules for all of us, rather than just for its own property or its employees — it generally has very limited power to impose content-based speech restrictions. There are some historically recognized First Amendment exceptions (e.g., libel, incitement, obscenity, and the like) that allow certain kinds of content-based restrictions, but outside such zones, content-based restrictions are almost never allowed. In theory, the restrictions are upheld only if they are "narrowly tailored" to a "compelling government interest." In practice, the restrictions are upheld almost never. But content-neutral restrictions, such as limits on all speech amplification louder than a certain volume, limits on the time and place of parades or demonstrations, and the like, are often upheld — not always, but often. Viewpoint-neutral but content-based restrictions, such as bans on display of nude scenes on drive-in theater screens visible from the road, bans on profanity in public places, and the like are treated the same as content-based restrictions (again, when the government is acting as sovereign).

This makes it particularly important to clearly define the line between content-based and content-neutral restrictions. *Reed v. Town of Gilbert* should give us some more clarity on the subject. The UCLA First Amendment Amicus Brief Clinic, which I run, filed an amicus brief urging the Court to support the case; the brief was on behalf of Profs. Ashutosh Bhagwat, Eric Freedman, Richard Garnett, Seth Kreimer, Nadine Strossen, William Van Alstyne, and James Weinstein, and my students Curtis Brown, Tess Curet, and Ali Vaqar worked on the brief. Here is the text, which should also give you an idea of the issue and the main arguments, though you can also read the Ninth Circuit decision (and especially the excellent dissent, by Judge Paul Watford, for whom I have great respect).

* * *

**Summary of Argument**

The speech restriction in this case, which distinguishes (1) signs "support[ing] candidates" or relating to "any other matter on the ballot," (2) "sign[s] communicating a message or ideas," and (3) signs related to noncommercial "event[s]," is facially content-based. It may well not turn on the viewpoint of speech, or be motivated by legislative disagreement with certain ideas. Yet many precedents from this Court have made clear that such content classifications make a law content-based, even in the absence of improper legislative motive.

Nonetheless, the Ninth Circuit panel majority in this case treated this content-based law as content-neutral, and in the process exacerbated a three-way split among eight circuits. Some circuit court decisions, including the decision below, seem to be focusing on occasional remarks in this Court's cases about the importance of whether speech was restricted because of legislative hostility to its message. But those decisions are ignoring the many precedents from this Court striking down content-based laws regardless of the absence of any such hostility. This Court ought to grant certiorari to resolve this split, and to reaffirm the importance of treating content-based speech restrictions as presumptively unconstitutional.

**Argument**

This should have been an easy case. The Town's sign code facially discriminates based on the content of signs, expressly distinguishing

1. "temporary sign[s] which support[] candidates for office or urge[s] action on any other matter on the ballot," which can be up to 32 square feet in size,

2. "sign[s] communicating a message or ideas for noncommercial purposes" that are not related to a "qualifying event," which can be up to 20 square feet in size, and

3. noncommercial signs that do relate to a "qualifying event," which can only be up to 6 square feet in size.

Under this Court's precedents, the law is therefore content-based. Yet the Ninth Circuit panel majority concluded the law was content-neutral—and the three-way, eight-circuit split identified by the petition has led many other courts to make similar errors.

The panel majority's reasoning apparently rested on the conclusions that the Town was not motivated by a desire "to suppress certain ideas," by "disagreement with the message [the speech] conveys," or by any other "illicit motive," and that the law was *viewpoint*-neutral. Yet this Court has repeatedly made clear that laws distinguishing speech based on content—specifically including laws distinguishing campaign-related speech from other speech—are content-based even if they are viewpoint-neutral and not prompted by any motive to suppress particular ideas.

Thus, for example, in *McIntyre v. Ohio Elec. Comm'n*, this Court held that a law requiring campaign literature to be signed was content-based. Part of the reason was that "the category of covered documents is defined by their content—only those publications containing speech designed to influence the voters in an election need bear the required markings." This was so "even though [the] provision applie[d] evenhandedly to advocates of differing viewpoints." And because of this content discrimination, the law was subject not to intermediate scrutiny, but to "exacting scrutiny." Likewise, in this case the category of specially treated signs "is defined by their content"—"only those [signs] containing

speech designed to influence the voters in an election" may be over 20 square feet in area.

Similarly, in *Burson v. Freeman*, this Court treated a restriction on electioneering within 100 feet of a polling place as content-based:

> "Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign. This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic."

Likewise, in this case, "whether individuals may exercise their free speech rights [using large signs] depends entirely on whether their speech is related to a political campaign," and "whether individuals may exercise their free speech rights [using medium-sized signs] depends entirely on whether their speech is related to [a specific event]." Yet "the First Amendment's hostility to content-based regulation extends [beyond] restriction[s] on a particular viewpoint," and includes regulation based on whether speech relates to an election, to ideology generally, or to a "qualifying event."

Similarly, *Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y.* and *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n* made clear that an exclusion of all political advertising from a city-owned bus system was content-based. This Court had upheld such an exclusion in *Lehman* v. *Shaker Heights* based on the city's power as a proprietor of a nonpublic forum. But *Consolidated Edison* and *Perry* make clear that the exclusion was upheld *in spite* of being content-based, solely because of this extra government power over nonpublic fora (a power that is not implicated in this case).

To be sure, the restrictions in *McIntyre*, *Burson*, and *Lehman* treated election-related speech or political speech worse than speech with other content, and the restriction in *Reed* treats election-related speech better. But the analytical question whether the restriction is content-based must be the same whether the restriction favors a category of speech or disfavors it.

This Court has likewise treated as content-based many other restrictions that seem highly unlikely to have been motivated by a desire to suppress particular ideas. For example, in *Regan v. Time, Inc.*, 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." 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."

The statutory exemption was likely not prompted by hostility to any particular views, or even to any particular subjects. Yet this Court treated the law as content-based. Likewise, just as in *Regan v. Time, Inc.*, the determination of whether a sign in

Gilbert can be up to 30 square feet or at most 24 or even just 6 square feet "cannot help but be based on the content" of the message the sign delivers.

Even where signs concern commercial speech, this Court has struck down speech restrictions that discriminate based on the content of the sign. In *City of Cincinnati v. Discovery Network*, the government, motivated by safety and aesthetic concerns, barred the distribution of commercial publications through freestanding newsracks on public sidewalks. In striking down this ordinance, this Court noted that there was no evidence that the city acted with any animus toward the ideas in respondents' publications. But the decision nonetheless rejected the view that "discriminatory treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas."

As in *Discovery Network*, the town of Gilbert might not have had illicit motives in enacting the Sign Ordinance. But that should be just as irrelevant here as in that case. And if the regulation in *Discovery Network* was content-based even as to commercial speech, surely Gilbert's Sign Code must be content-based when it discriminates based on content among noncommercial speech.

Similarly, in *Arkansas Writers' Project, Inc. v. Ragland*, 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. Still, this Court held that, because Arkansas "enforcement authorities must necessarily examine the content of the message that is conveyed" to determine a magazine's tax status, the basis on which Arkansas differentiates between magazines is "particularly repugnant to First Amendment principles."

To give just two more examples, in *Police Department of Chicago* v. *Mosley* and *Carey v. Brown*, this Court viewed as content-based restrictions that banned all picketing in certain places (near schools and residences, respectively), but exempted labor picketing. Those restrictions were doubtless not motivated by hostility to all non-labor-picketing views. Nonetheless, because they distinguished speech based on content, they were treated as content-based.

To be sure, this Court has at times treated as content-neutral laws that are seen as focusing on the "secondary effects" of speech. But political signs, ideological signs, and event signs are no different in any of their possible "secondary effects."

In this respect, this case is just like *Discovery Network* (though involving fully protected speech, not just commercial speech). In *Discovery Network*, this Court noted that, "[i]n contrast to the speech at issue in [*City of Renton v. Playtime Theatres, Inc.*], there are no secondary effects attributable to respondent publishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks." Likewise, there are no secondary effects attributable to Reed's signs promoting religious events that distinguish them from the political signs that the Town of Gilbert allows to be much larger.

The distinction between content-based and content-neutral restrictions has emerged as one of the most important rules of First Amendment law. And this Court has repeatedly stressed to lower courts the significance of this distinction.

Yet the decision below, alongside many other circuit court opinions, calls content-neutral that which is indubitably content-based. Those circuit courts have picked up on some remarks in this Court's jurisprudence that might seem to call for an inquiry into legislative motivation. But those courts have failed to apply the many precedents from this Court cited above, precedents that *Hill* and *Ward* were obviously not seeking to overturn. This Court should grant certiorari in this case, to clarify the content discrimination standard both for sign cases and for free speech cases more broadly.

# "Born (Again) Under a Bad Sign: Ninth Circuit Upholds Ordinance Restricting Duration, Location, Quantity, and Size of Directional Signs for Church Services"

*Abbott & Kindermann Land Use Law Blog*
William W. Abbott
February 21, 2013

As part of its overall regulatory code, the City of Gilbert, Arizona enacted various sign regulations. The regulations generally require a City issued sign permit unless the sign qualifies under one of nineteen different exceptions. Three of the nineteen exceptions involved (1) temporary directional signs for a qualifying event, (2) political signs and (3) ideological signs. Temporary directional signs subject to the exemption were subject to specific limitations not applicable to political and ideological signs including size, location (excluded from public right of way), and duration (same day only).

Pastor Reed and Good News Community Church ("Good News") initially filed suit challenging the limitations on the temporary directional signs, signs which the church relied upon for communication with its congregation and to the community. In response to Good News' request for a preliminary injunction, the district court determined that this lawsuit was an "as applied" challenge (as applied to Good News as compared to a facial challenge to the ordinance.) Next, in the initial round of litigation, the Ninth Circuit Court of Appeals concluded that the ordinance was not a content based regulation, and that it was appropriately narrowly tailored in limiting speech. The appellate court also upheld the district court's determination that the church had alternate means of communications. Finally, and again in the context of review the denial of the preliminary injunction request by the district court, the Ninth Circuit concluded that the district court did not error when it concluded that the ordinance did not favor commercial over non-commercial speech. The matter was remanded to the district court to address equal protection and First Amendment Claims where, by stipulation, the matter was submitted based upon cross motions for summary judgment. The district court entered judgment in favor of the City of Gilbert. Following Good News' second appeal to the Ninth Circuit, the City amended its sign ordinance, then moved to dismiss the appeal on the grounds of mootness. One element of the amendment restricted the use of directional signs only for events taking place within City limits, an amendment which would have had the effect of prohibiting Good News from placing signs as church services occurred outside city limits. While the amendments potentially resolved some of Good News appeal, the Ninth Circuit rejected the motion to dismiss, exercising its discretion to review the local regulations.

On appeal, the Ninth Circuit noted the somewhat narrow and unusual posture of the case. Upon remand, there had been no

further discovery, and no suggestion that an additional evidentiary proceeding was necessary. Accordingly, the justices viewed the legal conclusions from the earlier decision as the "law of the case", framing in part the review of the appeal of the final judgment in favor of the City. The following unresolved questions on appeal involved: (1) were the different restrictions applicable to different types of commercial speech justified without reference to the content of the speech; and (2) are the differences narrowly tailored. Although the exercise of segregating sign types between directional, political and ideological involved some review of sign content, drawing such distinctions between general categories was acceptable in circumstances in which the ordinance was neutral as to signs within a particular category. Each exemption was based upon objective criteria and no distinction was based upon the individual sign content. The Court then focused on whether the ordinance was "narrowly tailored" to serve a legitimate government interest. There was no dispute that the City's interests in aesthetics and safety were significant. The Court went on to note that the same constitutional considerations in protecting political, religious and ideological speech did not apply to temporary directional signs, the effect of which was to subject an ordinance creating an exemption for directional signs to less judicial scrutiny as compared to more protected speech. On the evidence before the Court, the Court concluded that the regulations of temporary directional signs were reasonable. Turning to protections under Arizona's freedom of religion statute, the Court also upheld the ordinance and regulations as it was neutral in character and was not a "substantial burden." Good News' challenge based upon vagueness of the ordinance was rejected in part on the basis that the law of the case restricted the plaintiff's claims to "as applied" challenges. The Court also disposed of Good News' equal protection claims on the same grounds as the plaintiff's primary claims were resolved. As to the potential claims to the amended ordinance, the Ninth Circuit remanded those potential arguments to the district court.

## NEW TOPIC: *HOBBY LOBBY* FOLLOW-UP

# "What the Hobby Lobby Ruling Means for America"

*New York Times*
Binyamin Appelbaum
July 22, 2014

Last month, as you've probably heard, a closely divided Supreme Court ruled that corporations with religious owners cannot be required to pay for insurance coverage of contraception. The so-called *Hobby Lobby* decision, named for the chain of craft stores that brought the case, has been both praised and condemned for expanding religious rights and constraining Obamacare. But beneath the political implications, the ruling has significant economic undertones. It expands the right of corporations to be treated like people, part of a trend that may be contributing to the rise of economic inequality.

The notion that corporations are people is ridiculous on its face, but often true. Although Mitt Romney was mocked for saying it on the campaign trail a few summers ago, the U.S. Code, our national rule book, defines corporations as people in its very first sentence. And since the 19th century, the Supreme Court has ruled that corporations are entitled to a wide range of constitutional protections. This was a business decision, and it was a good one. Incorporation encourages risk-taking: Investors are far more likely to put money into a business that can outlast its creators; managers, for their part, are more likely to take risks themselves because they owe nothing to the investors if they fail.

The rise of corporations, which developed more fully in the United States than in other industrializing nations, helped to make it the richest nation on earth. And economic historians have found that states where businesses could incorporate more easily tended to grow more quickly, aiding New York's rise as a banking center and helping Pennsylvania's coal industry to outstrip Virginia's. The notion of corporate personhood still sounds weird, but we rely upon it constantly in our everyday lives. The corporation that published this column, for instance, is exercising its constitutional right to speak freely and to make contracts, taking money from some of you and giving a little to me.

Since the 1950s, however, the treatment of corporations as people has expanded beyond its original economic logic. According to Naomi Lamoreaux, a professor of economics and history at Yale University, the success of incorporation led states to broaden eligibility to advocacy groups, like the N.A.A.C.P. and the Congress of Racial Equality, which then became "the first corporations to convince the Court that they deserved a broader set of rights." Ever since, the court has intermittently extended the logic of those rulings, and in 2010 it ruled that an advocacy group called Citizens United had the right to spend money on political advertising — and that every other

corporation did, too. Last month, it added religious rights to the mix.

The basic justification is that corporations, owned by people, should have the same freedoms as people. And in many ways, of course, they already do. Chick-fil-A does not sell sandwiches on Sundays. Interstate Batteries tells prospective employees, "While it is not necessary to be a Christian to be employed, it is a part of the daily work life for Interstate team members." In 1999, Omni Hotels said its new owner, a Christian, had made a "moral decision" to stop selling pay-per-view pornography.

But corporations, as F. Scott Fitzgerald might have put it, are not like you and me. Those special legal powers, which allow them to play a valuable role in the economy, can also give them the financial power to tilt the rules of the game by lobbying for particular legislation, among other things. "Those properties, so beneficial in the economic sphere, pose special dangers in the political sphere," Justice William Rehnquist wrote in a dissenting opinion from a 1978 ruling that is a precursor to *Citizens United*. "Indeed, the States might reasonably fear that the corporation would use its economic power to obtain further benefits beyond those already bestowed."

The danger is not only that corporations can act at the expense of society, but also that the people who control them can act at the expense of their own shareholders, employees and customers. While the *Hobby Lobby* decision ostensibly addresses only a narrow set of circumstances — a corporation with relatively few owners, a religious objection to particular kinds of birth control — these sorts of limited rulings have a history of becoming more broadly cited as precedent over time. Also, the logic of this particular decision was so expansive and open-ended. "A corporation is simply a form of organization used by human beings to achieve desired ends," Justice Samuel Alito wrote. "When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people." Justice Ruth Bader Ginsburg argued in her dissenting opinion that a corporation might object on religious grounds to paying for blood transfusions, vaccinations or antidepressants. Other scholars say the same logic could justify a right to privacy as a shield against regulatory scrutiny, or a right to bear arms.

Minority shareholders have little power to influence the choices that corporations make. Benjamin I. Sachs, a law professor at Harvard University, notes that while federal law lets union members prevent the use of their dues for political purposes, shareholders do not have similar rights. "If we're going to say that collectives have speech rights, then we should treat unions and corporations the same," Sachs told me. Employees are even more vulnerable. When companies like YUM! Brands, which owns KFC and Taco Bell, campaign against minimum-wage increases, they are effectively using the profits generated by their employees to limit the compensation of those same employees. And of course, some of Hobby Lobby's 13,000 workers will now need to pay for contraception.

Shareholders can sell their shares, sure, and employees can find new jobs. But every increase in corporate rights is a potential limitation on the menu of available jobs and investments. “The idea that if you don’t like what the corporation is doing you should sell your stock, or find a different job, has a certain amount of appeal,” said Darrell A.H. Miller, a professor of law at Duke University. “But it also assumes that people are able to just fish and cut bait. Capital is easier to move around than your body and your family.”

If the court follows the logic of its *Hobby Lobby* decision in the decades to come, it’s not so hard to imagine a job market where people must interview employers about their religious and political views. Or where people who need to make a living may just feel compelled to accept a work environment increasingly shaped by their employers’ beliefs.

# "Fault Lines Re-Emerge in U.S. Supreme Court at End of Term"

*Reuters*
Joan Biskupic
June 30, 2014

Sometimes there is no middle ground.

Through much of the U.S. Supreme Court's term, the nine justices found common if narrow ground to bridge their differences. Many of their high-profile decisions avoided the polarization that defines Washington today. That all changed on Monday, the last day of the nine-month term, with the re-emergence of a familiar 5-4 fault line in a dispute over a U.S. law requiring employers to provide insurance for contraceptives.

For 30 minutes Justice Samuel Alito, a conservative who wrote the majority opinion, and liberal Justice Ruth Bader Ginsburg, who wrote the lead dissent, voiced their competing views of the meaning for America of the decision permitting some corporate employers to object on religious grounds to certain kinds of birth control.

In recent weeks the justices had resolved an array of disputes, including over abortion protests and presidential appointment power, police searches of cellphones and environmental regulation, as well as rules for class-action lawsuits.

In all of those, the nine managed to find shared terrain, even some unanimity. In the cases over abortion protests and presidential "recess" appointments, the justices ruled 9-0 on the bottom line, even as four justices broke away each time to protest the majority's legal reasoning.

But religion is different. The justices divide bitterly over it. Monday's case was further clouded by the issue of reproductive rights and the assertion by the family-owned companies in the dispute that some contraceptive drugs and devices are akin to abortion.

In the case of *Burwell v. Hobby Lobby Stores*, the companies challenged the Obamacare insurance requirement for employee birth control. They objected to four methods, including the so-called morning-after pill. They said they should qualify for an exemption under a 1993 religious freedom law. The Obama administration countered that for-profit corporations, even closely held ones, are not covered by the 1993 law.

In his opinion for the court's five conservatives, Alito said there was a federal interest in ensuring that people who run their businesses for profit not compromise their religious beliefs. "A corporation is simply a form of organisation used by human beings to achieve desired ends," he said. He asserted the decision would have limited effect.

Alito said Congress did not want to exclude people who operate for-profit businesses from the law's protections. Ginsburg countered that such a view effectively allows religious owners to impose their

views on employees who might not share their belief.

**"STARTLING BREADTH"**

In her dissent representing the four liberals, Ginsburg called the ruling one of "startling breadth." A women's rights advocate in the 1970s, she recalled how the court had long declared contraceptive coverage crucial to women's participation in the economic life of the country.

The last announced opinion of the term, Monday's case was arguably the most high-profile. It forced the justices to confront difficult issues against the backdrop of the enduringly controversial 2010 signature healthcare law of Democratic President Barack Obama.

The term featured none of the blockbuster decisions of the past two years when the court upheld the Obamacare law and set the pace for same-sex marriage and voting rights. All told, this term's cases failed to capture public attention the same way. The rulings gave each side - left and right - something to call a triumph.

The justices also ruled narrowly, and even unanimously, in some major business cases, including one brought by Halliburton testing how easily shareholders can band together in class-action lawsuits for damages.

When the court separately ruled that the streaming video service Aereo Inc had violated copyright law, the majority stressed the decision was limited and did not cover other technologies such as cloud computing.

In politically gridlocked Washington, the justices, particularly Chief Justice John Roberts, could be feeling institutional pressure to come together rather than pull apart, Harvard law professor Richard Fallon said.

"We have this enormous gap in politics today, between liberals and conservatives," Fallon said. "The chief justice may be naturally concerned that people not look at the Supreme Court and see it divided in this same way."

But the justices found themselves more apart than together on Monday. Sitting alongside each other on the long mahogany bench, Alito and Ginsburg barely looked at each other while reading from their opinions.

# "After Hobby Lobby, Business Revives Contraception Fight"

*Law 360*
Kelly Knaub
July 30, 2014

The Mennonite owners of a Pennsylvania furniture manufacturing company who unsuccessfully argued that the new federal mandate that they pay for contraceptive services violated their First Amendment rights asked a Pennsylvania federal court Wednesday to block the requirement, following the U.S. Supreme Court's *Hobby Lobby* decision.

Conestoga Wood Specialties Corp., and its owners, the Hahn family, told Pennsylvania's Eastern District that it is entitled to an injunction in light of the U.S. Supreme Court's June 30 *Hobby Lobby* decision, which found that the Religious Freedom Restoration Act applies to closely held companies and shields them from having to provide contraception coverage to their employees.

In an amended motion filed two days prior to its brief, the furniture company said that its health insurance will not currently take any action to omit items that violate its religious beliefs.

"An injunction is needed to protect plaintiffs and their health insurance carrier from the mandate and its attendant penalties, so that the burden on plaintiffs' religious beliefs can be lifted and plaintiffs' health insurance plan can once again omit items that violate plaintiffs' sincerely held religious belief that the prescribed items are potentially abortifacient including education and counseling for the same," the company said.

After the district court denied the furniture company's bid for a preliminary injunction in January 2013, it appealed to the Third Circuit, which affirmed the district court's decision last July. Conestoga then petitioned the Supreme Court, which agreed in November to take up the cases filed by Hobby Lobby Stores Inc. and Conestoga in order to resolve a circuit split over the Affordable Care Act provision, with the Tenth Circuit having ruled in Hobby Lobby's favor.

In a 5-4 vote on June 30, the high court created an exemption to the health care law's requirement that for-profit companies offer birth control coverage to their employees, saying that closely held for-profit corporations are entitled to religious freedom protections. But it refused to expand that ruling to other medical practices such as blood transfusions or vaccinations.

The contraception mandate required that companies with more than 50 employees to provide female employees covered by a company health plan with specified contraceptive coverage at no cost, or face financial penalties.

Although Solicitor General Donald B. Verrilli Jr. claimed during oral arguments in March that siding with family-owned Hobby Lobby and Conestoga would ultimately infringe on their employees' rights, the majority opinion noted that the federal government had already provided several

exemptions to religious organizations and nonprofits, and the mandate-at-issue isn't the least restrictive means of providing contraception coverage to workers.

Justice Samuel A. Alito, who wrote the majority opinion, maintained that the ruling wouldn't protect employers who illegally discriminate against workers under the guise of their religious beliefs.

Hobby Lobby repeatedly told the Supreme Court that corporations frequently engage in religious exercise, as the government concedes with its exemptions for nonprofit religious organizations, and no constitutional right — including that of religious freedom — turns on the tax status of a corporation, a premise the majority of the justices ultimately agreed with.

But Justice Ruth Bader Ginsburg, who wrote the principal dissent, blasted the majority opinion and noted that closely held companies can still be massive organizations worth billions of dollars.

More than 80 amicus briefs were filed in the case from a wide range of advocacy, medical, legal and religious groups, dozens of states, and more than 100 federal lawmakers, among others.

"With the Supreme Court's recent ruling upholding a family business' religious freedom, Conestoga Wood renewed their request for an injunction," Kevin Theriot, attorney Conestoga, told Law360. "The Supreme Court's ruling makes it clear that the government cannot coerce Conestoga Wood to pay for abortion causing drugs in violation of the religious convictions of the Hahn family."

Representatives for the U.S. government did not immediately return a request for comment Wednesday.

Conestoga Wood Specialties is represented by Charles W. Proctor III of Law Offices of Proctor Lindsay & Dixon LLC, Randall Luke Wenger of Independence Law Center, and David A. Cortman, Matthew S. Bowman and Kevin Theriot of Alliance Defending Freedom.

The U.S. government is represented by Michelle R. Bennett of the U.S. Department of Justice, Principal Deputy Assistant Attorney General Stuart F. Delery, Deputy Assistant Attorney General Ian Heath Gershengorn, U.S. Attorney Zane David Memeger, Director Jennifer Ricketts and Deputy Director Sheila M. Lieber.

The case is *Conestoga Wood Specialties Corp. et al. v. Sylvia M. Burwell et al.*, case number 12-6744, in the U.S. District Court for the Eastern District of Pennsylvania.

# "What Hobby Lobby Shows Us About the Supreme Court and Civil Rights Laws: Winners and Losers in the Roberts Court"

*Huffington Post*
Elliot Mincberg
July 24, 2014

In its recent decision in *Hobby Lobby*, the conservative 5-4 majority -- Chief Justice Roberts and Justices Alito, Scalia, Thomas, and Kennedy -- did something that may appear very unusual. In divided cases, these five Justices have the reputation for interpreting very narrowly laws passed by Congress to protect civil rights. So why did they interpret so broadly the Religious Freedom Restoration Act (RFRA), a law passed by Congress to protect the important civil right of religious freedom? The answer, unfortunately, is all too clear. Comparing *Hobby Lobby* with the two rulings in civil rights law cases issued by the Court over the last year, the key factor that explains how the conservative majority ruled is not precedent, the language of the statute, or congressional intent, but who wins and who loses.

Let's start with last year's rulings, both of which concerned Title VII of the 1964 Civil Rights Act which bans employment discrimination. In *University of Texas Southwestern Medical Center v. Nassar*, the majority ruled very narrowly in interpreting Title VII, deciding that the only way that employees can prevail on a claim that they have been fired in retaliation for raising job bias claims is to prove that they would not have been discharged "but for" the retaliatory motive. This was despite the fact that in order to strengthen Title VII, Congress added language to the law in 1991 to make clear that plaintiffs should prevail if they show that discrimination was a "motivating factor" in a job decision. As Justice Ginsburg explained in dissecting Justice Alito's attempt for the majority to draw a distinction between retaliation and other claims under Title VII, the net effect of the majority's ruling was to make it *harder* to prove a Title VII retaliation claim than before the 1991 law and with respect to other civil rights statutes that don't explicitly mention retaliation. The 5-4 majority had "seized on a provision adopted by Congress as part of an endeavor to strengthen Title VII," she concluded, "and turned it into a measure reducing the force of the ban on retaliation."

In *Nassar*, in ruling against a doctor of Middle Eastern descent in a case also involving egregious ethnic and national origin discrimination, Alito disregarded clear legislative history and language showing Congress' broad intent, as well as the interpretation of the law by the Equal Employment Opportunity Commission (EEOC). Interestingly, towards the end of his opinion, Alito appeared to reveal a key consideration behind the majority's decision. The ruling was important, he explained, to "the fair and responsible allocation of resources in the judicial and litigation systems." After all, he pointed out,

retaliation claims "are being made with ever-increasing frequency," although he did not even consider how many have been proven meritorious. Agreeing with the EEOC and the plaintiff on the "motivating factor" standard, he wrote instead, "could also contribute to the filing of frivolous claims." As Justice Ginsburg put it, the majority "appears driven by zeal to reduce the number of retaliation claims against employers."

The other 2013 Title VII ruling also reflected an extremely narrow reading of the law. *Vance v. Ball State University* concerned a complaint by an African-American woman that she had been subjected to racial harassment and a racially hostile work environment. Under prior Title VII Court rulings agreed to by both conservative and moderate Justices, the employer itself is often liable for such harassment claims when the harassment is committed by an employee's supervisor. But in *Vance*, in an opinion by Justice Alito, the familiar 5-4 Court majority significantly narrowed Title VII. It ruled that such vicarious employer liability applies only when the harassment is committed by a manager who can fire or reduce the pay or grade of the victim, not when it is committed by a manager who does not have that power but does control the day-to-day schedules, assignments, and working environment of the victim.

As Justice Ginsburg explained in dissent, the majority's holding again contradicted guidance issued by the EEOC as well as Congress' broad purpose to eliminate workplace discrimination. In fact, she pointed out, not even the university defendant in *Vance* itself "has advanced the restrictive definition the Court adopts." But again, Alito's opinion betrayed part of the majority's true motives. Its narrow interpretation would be "workable" and "readily applied," Alito explained. And it would promote "the limitation of employer liability in certain circumstances."

Something very different happened in the next Supreme Court case interpreting a Congressional civil rights statute: 2014's *Burwell v. Hobby Lobby*.

In that case, the same 5-4 majority that narrowly interpreted Title VII in *Vance* and *Nassar* adopted a very broad interpretation of the Religious Freedom Restoration Act (RFRA). All nine Justices agreed that RFRA was enacted by Congress in response to the Supreme Court decision in *Employment Division v. Smith*, which restricted the protection of religious liberty by the Court under the First Amendment. But the 5-4 majority in *Hobby Lobby* ruled that RFRA provides "very broad protection for religious liberty" - "even broader protection than was available" under the First Amendment in pre-*Smith* decisions. As Justice Ginsburg put it in dissent, the majority interpreted RFRA "as a bold initiative departing from, rather than restoring, pre-Smith jurisprudence." She explained further that this broad interpretation contradicted the language of the statute, its legislative history, and a statement by the Court in a unanimous ruling in 2006 that in RFRA, Congress "adopt[ed] a statutory rule comparable to the constitutional rule rejected in Smith."

This difference in statutory interpretation was critical to the majority's ruling in *Hobby Lobby* -- that for-profit corporations whose owners had religious objections to contraceptives could invoke RFRA to refuse to obey the Affordable Care Act's mandate that they provide their employees with health plans under which contraceptives are available to female employees. As Justice Ginsburg explained, no previous Court decision under RFRA or the First Amendment had ever "recognized a for-profit corporation's qualification for a religious exemption" and such a ruling "surely is not grounded in the pre-Smith precedent Congress sought to preserve." The 5-4 majority's broad interpretation that RFRA applies to for-profit corporations like Hobby Lobby was obviously crucial to its holding.

In addition, however, the 5-4 majority went beyond pre-*Smith* case-law in another crucial respect. Before a person can claim an exemption from a generally applicable law under RFRA, he or she must prove that the law "substantially burden[s] a person's exercise of religion." According to the majority, the corporations in *Hobby Lobby* met that standard by demonstrating that the use of certain contraceptives that could be purchased by their employees under their health plans would seriously offend the deeply held religious beliefs of their owners. As Justice Ginsburg explained, however, that ruling conflicted with pre-*Smith* case law on what must be shown to prove a "substantial burden." In several pre-*Smith* cases, the Court had ruled that there was no "substantial burden" created by, for example, the government's use of a social security number to administer benefit programs or its requirement that social security taxes be paid, despite the genuine and sincere offense that these actions caused to some religious beliefs. As Justice Ginsburg stated, such religious "beliefs, however deeply held, do not suffice to sustain a RFRA claim," except under the extremely broad interpretation of RFRA by the 5-4 Court majority.

As in the Title VII cases, Justice Alito's opinion for the 5-4 majority in *Hobby Lobby* was revealing about some of the majority's underlying concerns. In explaining the majority's decision to interpret RFRA as applying to for-profit corporations, Justice Alito noted that "[w]hen rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people" - in this case "the humans who own and control those companies" in the *Hobby Lobby* case. As Justice Ginsburg observed, the 5-4 majority paid little attention to the Court's pronouncement in a pre-*Smith* case that permitting a religious exemption to a general law for a corporation would "operate[e] to impose the employer's religious faith on the employees" of the corporation. Even though the Supreme Court's 2013-14 rulings that interpreted civil rights laws passed by Congress may seem different, a common theme animates them all. Whether the 5-4 majority interpreted the statutes broadly or narrowly, the losers in all of them were women, minorities, and working people, and the winners were employers and corporations. In the majority's own words, the result is the "limitation of employer

liability" under laws like Title VII designed to protect workers and the "protecting" of the "humans who own and control" corporations under RFRA.

Since all these rulings interpret Congressional statutes, not the Constitution, Congress clearly has the authority to reverse them. In fact, Congress has done exactly that with respect to other 5-4 rulings by the Court that misinterpreted civil rights statutes to harm women and minority workers and benefit their corporate employers. As recently as 2009, the Lily Ledbetter Fair Pay Act reversed a flawed 5-4 ruling that severely restricted workers' ability to file equal pay claims under Title VII. Congress is already considering legislation to reverse many of the effects of *Hobby Lobby*, a corrective effort that Senate Republicans have blocked by a filibuster to prevent the full Senate from even considering it. In our currently divided Congress, immediate prospects for the passage of such remedial legislation may not appear promising. But it is important to recognize the current 5-4 majority's pattern of favoring corporations and harming workers in its decisions interpreting federal civil rights laws, and to recognize and act on the ability to reverse these harmful rulings.

# “Satanists Troll Hobby Lobby”

*The Atlantic*
Emma Green
July 30, 2014

Sometimes American religious liberty gets weird. An Amish person can be sent to prison for shearing the beard of another Amish person. A gentile can discover a love for kosher food in prison. And the same laws that protect the religious freedom of evangelical Christians also apply to devoted Satanists.

This week, the Satanists made moves to claim their share of liberty. The Satanic Temple, a putatively diabolical denomination, announced it's seeking a religious exemption for people who live in states with "informed consent" laws that require doctors to share certain information with women before they get an abortion. This sometimes includes materials about "the link between abortion and breast cancer, as well as claims regarding a depressive 'post-abortion syndrome,'" the Satanic Temple claims, which they see as "'scientifically unfounded' and 'medically invalid' and therefore an affront to their religious beliefs."

Objections to informed-consent laws are not new, but the Satanists' tactic is. They're invoking the Supreme Court's ruling in *Hobby Lobby*, which said that "closely held" businesses with religious objections to contraceptives cannot be required to cover them in the insurance they provide to their employees, as required by the Affordable Care Act. The plaintiffs claimed the mandate violated their religious beliefs, and the Court agreed, saying in a 5-4 ruling that the government had not devised the "least restrictive means" of making contraceptives affordable and accessible to women.

The Satanic Temple is inverting the context of that ruling: It believes in a woman's right to get an abortion without having to listen to information its members see as non-scientific. This is rooted in the group's belief in a "scientific understanding of the world," according to the press release.

As a thought experiment, this is fascinating, because it tests the boundaries of the *Hobby Lobby* ruling, asking: How will the Court's decision change the nature of religious-liberty claims in the United States? This is not the first time this question has come up. The ruling has already encouraged religious groups to petition the White House for special consideration on matters like non-discrimination against gay employees.

Here, though, the Satanists are pushing the question further. As a serious proposition, there are two big problems with the Satanic Temple's case. The organization's legal claims don't really hold up, and, as it turns out, it's not Satanic.

First, the organization isn't actually seeking an exemption through legal means, like a lawsuit or a legislative change. Instead, it has "drawn up a letter for women who are considering an abortion. The letter explains

our position and puts the care provider on notice that a failure to respect our call for an exemption from state—mandated informed consent materials constitutes a violation of our religious liberty."

But that letter is legally meaningless, explained Ira Lupu, a law professor at George Washington University. "These laws create obligations for doctors to inform, not obligations for women to listen or read," he wrote in an email.

The Satanic Temple's spokesman, Lucien Greaves, said in an email that the letter is a first step. "We are not looking to initiate a proactive lawsuit in revolt against anti-abortion laws. We are prepared, however, to go to court to defend our deeply held beliefs if and when our religious liberties, as outlined in our exemption letter, are not respected."

But the problem is not just that the letter is meaningless; it's unclear that informed-consent laws actually create a religious burden on anyone, Satanist or not. The main question in *Hobby Lobby* was whether the law was a burden on religious practice, said Eduardo Peñalver, the dean of the Cornell University Law School. "The typical form a burden is saying, 'I'm being coerced to do something that my religious forbids me to do, or coerced not to do something that my religion requires me to do,'" he explained. "I'm not sure how these informed-consent laws would be framed in those terms—my religion forbids me from hearing these informed-consent disclosures?"

The other problem is that the Satanic Temple wants to extend this exemption to "all women who share our deeply held belief." Peñalver said this undermines the organization's claim. "If these are people who are not members of the Satanist Temple or adherents to Satanism, their basis for objecting may not be religious," he said. "If you're going to raise a religious claim, you have to have a religious point of view."

And this is where things get a little tricky for the Satanic Temple. As Gideon Resnick wrote in *The Atlantic* in February, "Lucien Greaves" is actually a pseudonym used by a man named Douglas Mesner. He isn't actually much into Satan worship. "I think that idea is silly," he told Resnick. "I can't even conceive of that actually being the case." He added, "I mean, I try to respect other people's beliefs as far as that kind of thing goes."

According to Resnick, the Satanic Temple only has about 20 active members; people can join through an email listserv. Although the size of the group doesn't directly affect the strength of its religious-liberty claims, their goals and actions do provide evidence about how sincere they are. "To say your religion is completely separated from your politics is asinine," Mesner told Resnick in February. "Our political actions are our religion."

In short, if the Satanic Temple took this to court, it would probably have a hard time showing that informed-consent laws are a violation of its sincerely held religious beliefs, rather than a group of people's political views.

But as much as anything, the Satanic Temple is trying to make a point: The Supreme Court has accepted the earnestness of one group's politically controversial religious views, leaving an open question about what qualifies as a sincerely held religious belief. The ruling in *Hobby Lobby* was made "in the context of a familiar religious tradition, rather than one outside of the mainstream," Peñalver said. "We're a religiously diverse country."

This case "seems self-consciously political and theatrical," said Peñalver. But "in terms of the kinds of religious claims we might see in the future, that's a very difficult question to answer."

Juxtaposing the religious beliefs of alleged Satanists and evangelical Christians may seem farcical, but it's revealing: It's not enough to claim that a law you disagree with violates your conscience; there are still complicated legal tests for those claims. As Lupu said, "This is politically serious and legally a bit silly."

# "Rules for Birth-Control Mandate after *Hobby Lobby*"

*SCOTUS Blog*
Lyle Denniston
August 22, 2014

The Obama administration, planning to change its health insurance rules to satisfy the Supreme Court's ruling in June limiting the federal birth-control mandate, proposed on Friday that for-profit companies with publicly traded stock will not qualify for a new exemption…

The new rules appear to have two purposes: to keep the mandate under the Affordable Care Act within the new limits required by the Court's decision in *Burwell v. Hobby Lobby Stores*, but also to make sure that women who work for employers who object to the mandate for religious reasons would continue to have access to that coverage. The revisions would apply to both for-profit businesses and non-profit groups like religiously oriented charities, hospitals, schools, and colleges.

In its June 30 decision, the Court by a five-to-four vote gave businesses formed as "closely held corporations" a new exemption from the requirement that most businesses must provide a variety of pregnancy-preventive health care coverage for their female workers, if the firm's owners have religious objections to those services.

Before that ruling, government rules did not allow for-profit firms any exemption from that mandate, and it limited the exemption that did exist for non-profit groups of a religious nature. The *Hobby Lobby* decision required a new exemption for some for-profit firms based on a federal law that protects religious freedom, and a separate action the Court took after that ruling – in a case involving Wheaton College in Illinois – ordered the U.S. Department of Health and Human Services (HHS) to ease the mandate for that college (and, by implication, for some other non-profit groups).

In Friday's action, HHS issued a new set of birth-control rules in interim form and sought comments from the public to help shape the final rules. The proposed rule for profit-making businesses is not yet in effect, but the change for non-profit religious groups is to take effect almost immediately.

Here, in summary, is what HHS is proposing for for-profit businesses whose owners object to the mandate:

* An exemption from the mandate would only exist for a for-profit business organized as a "closely-held corporation."

* Two alternative definitions for such a corporation were offered for comment, but in both, the corporation would not be eligible for an exemption based on its religious objections if it had stock that is publicly traded.

* One way to define such a corporation would be by specifying a maximum number of owners that it could have – with the

public urged to help spell that out. The alternative way would be by specifying a minimum percentage of a total number of owners who had actual ownership concentrated among them – with the public again asked help to spell that out.

* HHS is not committed to either of those approaches, and asked for suggestions for alternatives.

* The public was invited to make suggestions on how a for-profit firm could be required to prove that its owners have established that they do have religious objections to the mandate.

* If a corporation's governing structure takes action, in keeping with state law governing corporations, to claim a religious exemption, and then lets the government know of its objection (by official form or by a simple letter), that would be enough to put the government on notice of the objection, and it would then lead the government to take steps to take over providing access to the services independently of the owners and at no cost to them or to the workers.

* The public was given sixty dates to submit comments on the proposal, which is not yet in effect.

Here, in summary, is what HHS is proposing for non-profit groups of a religious nature that object to the mandate:

* Instead of having to formally notify the organization's health plan administrator of the religious objection, the organization need only write to HHS to claim the exemption. That would trigger HHS to take over to provide contraceptive services, independently of the organization and at no cost to the organization or its workers.

* The public was invited to make comments on the non-profit proposal, but HHS said that this change would go into effect as soon as it is formally published — in the next issue of the government's Federal Register. The expanded exemption opportunity for non-profits followed precisely the approach that the Supreme Court had ordered in the *Wheaton College* case on July 3.

# “Court Rules Against Notre Dame in Contraception Case”

*Wall Street Journal*
Louise Radnofsky & Brent Kendall
February 21, 2014

A federal appeals court Friday ruled against the University of Notre Dame in a legal proceeding claiming the Obama administration's contraception-coverage requirement is forcing it to violate its religious beliefs.

The 7th U.S. Circuit Court of Appeals in Chicago in a 2-1 ruling agreed with a lower court that had turned away the school's request for a temporary injunction sparing it from the federal health law's contraception requirement.

The university has argued the Affordable Care Act's compromise arrangement allowing religiously-affiliated nonprofits to let insurance companies handle the provision of birth control is inadequate, because it still forces the university to be complicit in something it believes to be immoral.

Judge Richard Posner, who wrote the majority opinion, was dismissive of the claim.

"If the government is entitled to require that female contraceptives be provided to women free of charge, we have trouble understanding how signing the form that declares Notre Dame's authorized refusal to pay for contraceptives for its students or staff, and mailing the authorization document to those [insurance] companies, which under federal law are obligated to pick up the tab, could be thought to 'trigger' the provision of female contraceptives," he wrote.

He also criticized the school's officials for the timing of the legal action, which he described as "awkward" because it came so close to the date on which their new insurance plan started.

"We are left with the question, what does Notre Dame want us to do?" Judge Posner asked.

In an arrangement to defuse a standoff with the Catholic Church over the Affordable Care Act, the Obama administration said religiously affiliated institutions—such as Notre Dame—could turn over responsibility for providing contraception coverage to insurers, which would inform employees they were eligible for the coverage with no additional premium or copayments. Dozens of these institutions said that compromise didn't go far enough and filed suit to exempt themselves from the requirement entirely.

After the university failed to win the injunction, it instructed its insurance plan administrator to inform school employees they are eligible for the separate contraception arrangement while the case continues.

The injunction ruling isn't the final word on Notre Dame's case. It only determines that the school to date hasn't made a strong enough showing to block the requirement

while a full legal challenge continues in court.

A university spokesman said the school was still reviewing the ruling but it continued to believe "if we are compelled to be entangled in one issue that violates our conscience we could be entangled in others as well."

The case is one of several dozen lawsuits challenging the contraception requirement for religiously affiliated universities and charities. The Supreme Court next month is expected to hear a related case brought by two religious owners of for-profit businesses.

The business owners are arguing they should be allowed to run their companies without going against their religious beliefs by including the morning-after pill in their insurance plans.

# "Did Little Sisters of the Poor Win or Lose at the Supreme Court?"

*Slate*
Emily Bazelon
January 24, 2014

The Supreme Court said late Friday that the Little Sisters of the Poor don't have to fill out the Obamacare form for nonprofit religious groups seeking an accommodation to the contraception mandate. Instead, in order to get the exception, Little Sisters, which provides housing to elderly people in need, essentially has to provide the same information to the Department of Health of Human Services in a … form (or maybe it's a letter?) the court devised itself. Got that? I know, it sounds weird, but that's pretty much the upshot of the court's three-sentence order, which will remain in effect until the 10th Circuit Court of Appeals rules in the case. And which "should not be construed as an expression of the Court's views on the merits," the order states.

If this is an odd compromise, well, it's also a tricky case. Liberal commentators have said otherwise: There's no serious problem of religious freedom here, the *New York Times* editorial page and *Slate*'s Amanda Marcotte argue, because all Obamacare asks religious organizations to do is sign a form certifying that they don't provide contraception—as they've already made clear. These cases *are* about a single two-page form. But there is no clear answer to what signing that form means—or even, rather bizarrely, what concrete effect doing so has.

There are about 20 lawsuits bubbling up over this around the country, with religious groups saying the form is the gateway to authorizing contraception coverage, one they don't want to walk through. The government responds that actually, for some of the groups, signing the form will mean nothing at all. *Not* signing, though, subjects them all to hefty fines. The lower courts are split over these cases, and so far most of them have actually sided with the religious groups rather than the government. And so, understandably, first Justice Sonia Sotomayor on her own and now the full court have hit the pause button at this preliminary stage, when what's at issue isn't who wins but whether to delay the fines while the courts wrestle with the underlying questions. These cases involve the kind of tangled facts that take time to sort out. In the meantime, it doesn't make sense to impose big fines on groups like Little Sisters.

The Affordable Care Act requires health insurers to cover comprehensive health care for women, including a full menu of contraception and sterilization services. The Department of Health and Human Services decided what to cover based on recommendations by the Institute of Medicine. The IOM brought together a bunch of experts, who reached the obvious conclusion: Yes, contraception is crucial to basic health care for women. After all, nearly half of pregnancies are unintended, and those pregnancies can have adverse health consequences.

All good so far. The problem is that most of us get health insurance through our employers, and some of them object to birth control on religious grounds. The Religious Freedom Restoration Act, passed by Congress to safeguard the free exercise of religion in 1993, clearly applies to nonprofit religious organizations. (Whether it also applies to for-profit secular companies is a separate question that the Supreme Court will address later this term, in the Hobby Lobby case and another one involving a Mennonite cabinetmaker.) When the United States Conference of Catholic Bishops, among others, kicked up a fuss about the contraception mandate back in 2011, the Obama administration created two different exemptions. The first is for houses of worship (churches, mosques, and synagogues). It's a total exemption—these employers don't have to do anything to get it and their employees have to pay for their own contraception. The second kind is for religious nonprofit organizations, and this one is more like a partial accommodation. These groups, which include Little Sisters of the Poor, the University of Notre Dame, and hundreds of others, have to sign the two-page form and send it to the "third-party administrator" of their health insurance plans. Those entities (TPAs for short) then are bound to provide contraception to the religious group's employees, according to the Obamacare regulations, without billing or in any way involving the employer. The government is supposed to pay instead, by lowering the fees the TPA pays in the federal health exchange.

The government, the objecting religious groups, and various judges characterize this accommodation in diametrically opposed ways. Here is Chief Judge Philip Simon of the Northern District of Indiana (a George W. Bush appointee) rejecting a suit by the University of Notre Dame:

> Notre Dame wants to eat its cake, and have it still, at the expense of Congress, administrative agencies, and the employees who will be affected. Notre Dame is free to opt out of providing the coverage itself, but it can't stop anyone else from providing it. But that is essentially what Notre Dame is requesting.

And here is Judge Brian Cogan of the Eastern District of New York (another George W. Bush appointee), agreeing with a bunch of Catholic schools and hospitals that compelling them to sign the form, or face heavy fines, violates their religious freedom:

> The non-exempt plaintiffs are required to complete and submit the self-certification, which authorizes a third-party to provide the contraceptive coverage to which they object. They consider this to be an endorsement of such coverage; to them, the self-certification "compel[s] affirmation of a repugnant belief.

Honestly, isn't this like a picture you can look at and see two entirely different things? One view is that asking Little Sisters of the Poor to sign this form is like asking a Quaker to state his or her opposition to fighting a war in order to be considered a conscientious objector. You can't argue that saying you refuse to fight itself burdens your freedom of religious expression because it means someone else will go to war. But

maybe that's the wrong way to look at it. The alternate view is that demanding Little Sisters of the Poor sign this form to avoid a big fine compels the group to ask someone else to sin on its behalf. If you see this as the group opening the door to getting their employees birth control, which they have a genuine religious objection to doing, then maybe it's not fair to ask them to do that.

I don't know about you, but I can see it both ways. Important note: Even if you choose the second view and think this Obamacare regulation does burden the exercise of religious freedom, you haven't decided the case yet. The Religious Freedom Restoration Act says you must then decide whether there is a compelling reason for the government to impose the burden in the first place. On this one, to me the answer is a clear yes, because of the tangible and significant health benefits for women that come with covering contraception.

But the strange thing about the case brought by Little Sisters of the Poor is that the government now says that if the group signs the form, its employees will be zero steps closer to getting their birth control covered. Huh? I know, it sounds crazy, because what exactly is this case about if that's true? But it is. The government has realized that Little Sisters provides health care through "church plans" that are governed by another federal law, ERISA. And under ERISA, church plans cannot be obligated to cover contraception. That goes for their third-party administrators, too. So if Little Sisters of the Poor were to sign this form, its TPA, Christian Brothers Services, wouldn't have to arrange for a single IUD or birth control prescription. On the law blog *Balkanization*, Marty Lederman calls this a "lacuna" that the government "presumably did not anticipate."

You can argue, as the government has tried to before the Supreme Court, that this means there is no religious burden at stake for Little Sisters. No birth control, no lawsuit. But I would also like to know what the point is of making the group sign this Obamacare form? Why push them to authorize contraceptive care, even theoretically, if the whole thing is an empty exercise? How can the government show it has a compelling interest in making nothing happen? Or as Daniel Blomberg, a lawyer for the Becket Fund for Religious Liberty, which represents Little Sisters, put it to me over the phone, "When does the government force you to either engage in meaningless speech or pay millions of dollars?" Blomberg also argues that Little Sisters can't know for sure it's in the clear, because the government hasn't entirely given up on enforcing the contraception mandate in this case. Its lawyers told one judge that the Obama administration "continues to consider potential options to fully and appropriately extend the consumer protections provided by the regulations to self-insured church plans."

Also, some of the religious groups that are suing don't offer ERISA-based church plans, so they don't fall into the gap between these two different sets of regulations. Notre Dame, for example, has decided to go ahead and sign the Obamacare form, knowing that its employees will actually get contraception coverage, while the lawsuit it has brought

continues to play out. This case, and others by religious groups who are clearly subject to the contraception mandate, are the more interesting ones, which will eventually determine the outcome of this clash between religious freedom (arguably) and women's health. Now that the Supreme Court has issued its Friday order, the action moves back to the lower courts. Godspeed to them.