

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CLYDE REED, ET AL., :

4 Petitioners :

5 v. : No. 13-502

6 TOWN OF GILBERT, ARIZONA, :

7 ET AL. :

8 - - - - - x

9 Washington, D.C.

10 Monday, January 12, 2015

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:04 a.m.

15 APPEARANCES:

16 DAVID A. CORTMAN, ESQ., Lawrenceville, Ga.; on behalf of
17 Petitioners.

18 ERIC J. FEIGIN, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; for
20 United States, as amicus curiae, supporting neither
21 party.

22 PHILIP W. SAVRIN, ESQ., Atlanta, Ga.; on behalf of
23 Respondents

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 13-502, Reed v. Town
5 of Gilbert.

6 Mr. Cortman.

7 ORAL ARGUMENT OF DAVID CORTMAN

8 ON BEHALF OF THE PETITIONERS

9 MR. CORTMAN: Mr. Chief Justice, and may it
10 please the Court:

11 The town's code discriminates on its face by
12 treating certain signs differently based solely on what
13 they say. For example, political signs may be 32 square
14 feet, may be unlimited in number, and may be placed in
15 the right-of-way of the entire town for five months
16 before the election; but the church's signs can only be
17 one-fifth of that size -- size, only placed in the dark
18 of night, the night before the church service.

19 While the church's signs with directional
20 content are only allowed up for 14 hours, other signs
21 with directional content are allowed up for much longer.
22 For example, builders' directional signs to home sales
23 events are allowed up to be the entire -- are allowed up
24 the entire weekend, and homeowners' association event
25 signs are allowed to be up for 30 days.

1 JUSTICE GINSBURG: Well, what are -- what
2 are you seeking? Do you -- do you want whatever is the
3 most favorable rule, say, for ideological signs? Is
4 that what you want? Or do you accept that it could be
5 some limit on event signs, say, some reasonable time
6 limit?

7 MR. CORTMAN: We're -- we're seeking the
8 same as the -- the favorable signs, which, in this case,
9 would be both ideological and political signs.

10 And -- and the reason on that --

11 JUSTICE GINSBURG: But the ideological isn't
12 time unlimited.

13 MR. CORTMAN: Well, but it's not allowed on
14 the right-of-way, and so that's a major factor in this
15 case because political signs are allowed on the
16 right-of-way, and so the treatment that we're seeking is
17 merely equal treatment under the First Amendment.

18 JUSTICE GINSBURG: The same treatment as
19 political signs, then, is that --

20 MR. CORTMAN: The -- the same treatment as
21 political signs that are allowed up in the right-of-way,
22 that's right.

23 And ideological signs, interestingly enough,
24 are still based into their own content category, but
25 they are not allowed on the right-of-way, yet they are

1 allowed up for an unlimited period of time.

2 JUSTICE SOTOMAYOR: Are you -- are you
3 seeking unlimited placement?

4 MR. CORTMAN: We are not. We're seeking
5 placement that any other temporary signs get, which is
6 the category that we're talking about.

7 And, in fact, the -- the city, the town here
8 has freedom to regulate the amount of time signs can go
9 up, the size of the signs, the number of the signs. All
10 our argument is, is that they do it across the board and
11 not treat signs differently based on their content.

12 CHIEF JUSTICE ROBERTS: Your -- your
13 argument does not turn on the fact that it's a church's
14 sign, does it? I mean, you -- your argument would be
15 the same if this is a temporary sign about where the
16 soccer game was going to be?

17 MR. CORTMAN: Well, that's right. And --
18 and the church's sign merely adds additional components
19 to it. For example, the town puts our -- the church's
20 sign into a category called directional signs; but, yet,
21 the church's sign has religious speech on it. It has,
22 obviously, directional speech. It has ideological
23 speech. But that's correct, it's -- it's equal
24 treatment for that type of sign.

25 And -- and the category --

1 JUSTICE KAGAN: Can I ask about the category
2 for political signs, which is the most favorable?
3 Because all the time this Court says that political
4 speech is the most valued kind of speech. It's at the
5 heart of the First Amendment. It gets special First
6 Amendment protection. So in a way, why aren't --
7 isn't -- isn't the locality here basically adopting the
8 same kind of category-based understanding of political
9 speech and its special rule and First Amendment analysis
10 that this Court has very frequently articulated?

11 MR. CORTMAN: But I think this Court has
12 also said, for example, that -- that religious speech
13 also handles that category of core speech under the
14 First Amendment. And the problem is, is what the --
15 what the town does here, it's valuing speech, and I
16 think that is one of the problems. It is saying that
17 political speech in this case is more valuable than an
18 invitation to church.

19 And so I think this Court has made clear
20 that -- that the government --

21 CHIEF JUSTICE ROBERTS: I -- I'm sorry.
22 That was the significance of my prior question.

23 What -- what they're really saying is that
24 political speech is more valuable than speech about
25 where the soccer game is. In other words, I thought you

1 indicated that your argument did not depend on the fact
2 that the sign was a sign for the church.

3 MR. CORTMAN: Well, that's right. It
4 doesn't depend on that fact. I was merely referring to
5 the facts of this case. I apologize --

6 CHIEF JUSTICE ROBERTS: Don't you think that
7 political speech is more valuable than directions to the
8 soccer game?

9 MR. CORTMAN: Maybe in some people's eyes,
10 but the problem we have is -- is should the government
11 be deciding what speech is more valuable than others,
12 because that is exactly what it did in this case. It
13 has said that, in fact, your speech is not valuable and
14 we can completely ban it. And I think one of the
15 problems --

16 JUSTICE SOTOMAYOR: Well, let's -- let's
17 take a sign that in all other ways is equal except that
18 it says no signs on residential property except
19 properties that are being sold. And so it's valued the
20 homeowner's right to sell its property. Would that be
21 contrary of the First Amendment, and if not, why is that
22 value any different than valuing political speech?

23 MR. CORTMAN: I think it would be. I think
24 this Court's case Linmark dealt with a similar
25 circumstance, where in that city, it banned all

1 residential signs except for -- in fact, it was the
2 reverse. It banned for sale signs and allowed some
3 residential signs that were exceptions.

4 But this Court said exactly that, that the
5 town shouldn't value different types of speech,
6 especially on private property when you have homeowners'
7 rights that also comes into play in addition to speech
8 rights.

9 JUSTICE ALITO: What if it's commercial and
10 it relates to a one-time event. For example, for a yard
11 sale.

12 MR. CORTMAN: Right.

13 JUSTICE ALITO: If the State and the city
14 allow election-related signs to be put up in the
15 right-of-way, then anybody who has a yard sale has an
16 equal right?

17 MR. CORTMAN: Well, I think -- I think
18 commercial speech, under this Court's jurisprudence, can
19 be treated differently, and that's one of the important
20 things. The category here is narrow because government
21 speech -- government can put up whatever signs that it
22 would like. It doesn't trigger any problem under the
23 First Amendment.

24 We hear a lot in the other briefs about
25 warning signs and other types of signs. The government

1 is free to put up all the signs that it would like
2 without triggering this problem. Commercial speech is
3 also in a different category, according to this Court.

4 So the narrow category that we're talking
5 about is temporary signs, not permanent signs, that are
6 put up in the right-of-way that can be regulated.

7 JUSTICE KENNEDY: Do you think directional
8 signs is a valid category?

9 MR. CORTMAN: The reason I don't think it is
10 is because here, the direction is part of the invitation
11 to come and worship or part of the invitation to come to
12 a different event. So the directional part of it is in
13 addition to the ideological speech, the invitation to
14 come in and worship. And so although it appears to be a
15 different category of directional, it's important to the
16 speech of the church, inviting the community and saying
17 come worship with us, and here is where we are located.

18 And what's interesting about that, if the
19 church, for example, says we're meeting now at a senior
20 living center, that is considered to be a directional
21 sign because the definition is a sign that is intended
22 to invite and direct someone to your service, that would
23 then be banned in the right-of-way.

24 JUSTICE KENNEDY: I guess you see the
25 concern, if an affluent person wants to celebrate a

1 birthday, he can put "Happy birthday, Uncle Fred" as
2 many places as a political sign, and as for long.

3 MR. CORTMAN: Well, I think one of the
4 issues is if the government has decided that its
5 interest -- which, by the way, is what drives this, the
6 interest in safety and aesthetics, which is the two
7 interests the government proposes. If those have
8 already been deemed to be less important than speech,
9 then I think speech should be allowed. But --

10 JUSTICE KENNEDY: But your answer to the
11 question is "Happy birthday, Uncle Fred" can have as
12 many signs and for as long as the political campaign.

13 MR. CORTMAN: I think -- I think that is
14 right. And I --

15 JUSTICE KENNEDY: That has -- that has to
16 be -- seem to me -- what about historical marker, the
17 birthplace of James Madison or whatever?

18 MR. CORTMAN: I think the answer to that is
19 the government is free to put up that marker without
20 any --

21 JUSTICE KENNEDY: No, no, it's privately --
22 privately owned.

23 MR. CORTMAN: Well, I think if it's -- if
24 it's allowing private speech, then we engage in the
25 problem of valuing. For example, in that case, we think

1 that marker is more important than someone else's
2 speech.

3 JUSTICE KENNEDY: So again, under your view,
4 "Happy birthday, Uncle Fred" and "Save your soul" and
5 "Birthplace of James Madison" can all be up for the same
6 length of time, same size.

7 MR. CORTMAN: I think it can, because
8 otherwise I think we have a problem with content-based
9 discrimination --

10 JUSTICE SCALIA: What about permanent signs?
11 I assume that what you say about temporary signs would
12 apply equally to permanent signs, wouldn't it?

13 MR. CORTMAN: It would, but in a different
14 category. In other words, our category that we're
15 discussing is temporary signs, so ours wouldn't affect
16 permanent signs. I believe you could make -- that's a
17 content-neutral category.

18 But if you had a permanent sign, I think
19 within the permanent sign category, the answer is --

20 JUSTICE SCALIA: Within the permanent sign
21 category --

22 MR. CORTMAN: Yes.

23 JUSTICE SCALIA: -- they all have to have
24 the same --

25 MR. CORTMAN: I believe so, because --

1 JUSTICE SCALIA: -- except commercial, I
2 assume.

3 MR. CORTMAN: And especially if -- most of
4 the permanent signs are commercial signs. When we talk
5 about billboards and other types of signs, so this Court
6 I think has made clear if you have, for example,
7 billboards and other permanent signs that do allow
8 commercial speech, then the municipality must allow
9 noncommercial speech.

10 JUSTICE SOTOMAYOR: Well, you
11 characterize --

12 JUSTICE ALITO: Well, what would happen if
13 one church has a -- always meets in the same place and
14 it wants to put up a sign that says, every Sunday this
15 is the place to go, and another church moves around, so
16 it wants to put up a temporary sign. Do they have to be
17 treated the same?

18 MR. CORTMAN: I think they would. If we're
19 talking about the category of what goes on public
20 property, what goes on the right-of-way. On their own
21 property is a different question. But here, the town
22 has already decided to allow an unlimited number of
23 political signs up to 30 square -- 32 square feet for
24 nearly the entire year. There are four elections in
25 Arizona, so with this time limit of five months, you

1 have political signs in an unlimited number. And those
2 signs affect the safety and aesthetics interest the same
3 way as the church's sign does, the same way as an
4 invitation --

5 JUSTICE SOTOMAYOR: How do you create your
6 temporary category without reading the sign? And
7 so there is some force, the counterargument that what is
8 being regulated here is not the content but the function
9 of the sign. So how do you get around that argument?
10 Because you've already created a category that requires
11 you to read the sign.

12 MR. CORTMAN: I don't think it does, and the
13 reason the way the temporary sign is defined here is
14 merely a sign that's both intended and constructed not
15 to be permanent. So it doesn't matter what is on that
16 sign; that's why we think that category is content
17 neutral, because as long as it's a temporary sign, it
18 doesn't matter what the sign says. A permanent sign is
19 just duration, and there can be duration requirements,
20 there can be size requirements, location requirements.
21 That the government --

22 CHIEF JUSTICE ROBERTS: So your point is if
23 it's -- if it's stuck in the ground with a little
24 stake --

25 MR. CORTMAN: Right.

1 CHIEF JUSTICE ROBERTS: -- then it can be
2 treated one way, but if it's in concrete -- but --

3 MR. CORTMAN: That's right.

4 CHIEF JUSTICE ROBERTS: It seems to me that
5 you are trying to find a, I don't know, a difficult way
6 to deal with an issue that could be readily addressed
7 just by seeing if the sign is for a limited event. In
8 other words, what if somebody -- every time -- you know,
9 the stake in the ground at least could last for three
10 weeks, so every three weeks, they come along and stick
11 the stake back in the ground. You are saying the only
12 way they can distinguish is by looking at whether it has
13 a stake in the ground or whether it's in concrete, and
14 yet that seems to me that doesn't help the -- that
15 doesn't answer the city's legitimate concern.

16 MR. CORTMAN: But I think what is important
17 here is that if the city, the town has already
18 agreed that an election is an event, and so we have an
19 election that's an event, but yet that single event sign
20 can be up for five months, and yet we have an event
21 where that single event can only be up overnight. And
22 so it's already made that determination that it would
23 allow those types of signs for what I think is a
24 comparable use, a single event to a single event.

25 The other thing I would say is if you allow

1 signs to be up for one single event for five months,
2 certainly there should be some way to say, well, if we
3 have a recurring event as we do here, certainly the sign
4 should be allowed up at least equal to the same time,
5 and --

6 JUSTICE KENNEDY: Well, I mean, to say that
7 an election is a single event in the same way as a
8 football game, a cookout, a basketball championship,
9 it's -- it seems to me is a very difficult thing for
10 this Court to have to decide. It's just not -- a
11 political campaign is a dynamic that goes on for some
12 weeks that the signs initiate a discussion. Now I can see
13 where you can say the religious sign does or at least
14 should initiate the same discussion of -- on issues that
15 are certainly of the same importance, if not more.

16 MR. CORTMAN: Certainly --

17 JUSTICE KENNEDY: But it seems to me you are
18 forcing us into making a very wooden distinction that
19 could result in a proliferation of signs for birthday
20 parties or for every conceivable event that could be up
21 for five months.

22 MR. CORTMAN: But I think the problem is
23 there -- there already is that here, because we have an
24 unlimited number of political signs. And so if the
25 streets are already littered in an unlimited number of

1 political signs, which they are, then how serious is the
2 town's interest to reduce clutter? And I think that's
3 the problem. The way to reduce clutter is to say, for
4 example, many different ways, you can only have one sign
5 per block, five signs total. It could only be a certain
6 size.

7 But it's hard to take the interests
8 seriously of reducing clutter when it allows political
9 signs to clutter the entire town in an unlimited number
10 for the entire year. The church's signs or an event
11 signs are not the problem. What we have here is -- is
12 carte blanche authority for political signs to clutter
13 the landscape, unlimited in number for the entire year,
14 and yet the concern is for maybe a few more signs that
15 may be placed.

16 JUSTICE ALITO: Can the town say that signs
17 relating to a one-time event, an election or anything
18 else that occurs on a particular date, have to be taken
19 down within a period of time after that event? And if
20 can say that, isn't that content-based, the way you
21 define that concept?

22 MR. CORTMAN: I don't believe it is. In
23 fact, the Washington, D.C., municipal regulations have
24 that exact code, and -- and it's one that we would
25 recommend to the Court. I believe it's 13605.

1 And what it says is all temporary signs
2 should be treated the same, period. You can put -- you
3 have to put your date on the sign for when you put it
4 up. Every temporary sign can be up for 180 days. If
5 it's tied to an event, after the event is over, it needs
6 to be down 30 days after the event.

7 I think -- our opinion is the reason that is
8 content-neutral is whenever something is over, if your
9 store is closed, the event is done, then the sign can be
10 removed. But the important part is every sign can be up
11 for the same amount of time, even if it is that event
12 that's over now. And I think that's the way you
13 deal with these -- these single event --

14 JUSTICE ALITO: I thought you said the way
15 you distinguish between temporary signs and permanent
16 signs is based on the -- the nature of the sign, not
17 what it says.

18 MR. CORTMAN: Right.

19 JUSTICE ALITO: So that gets you over the
20 problem Justice Sotomayor mentioned about having to read
21 the sign.

22 MR. CORTMAN: Right.

23 JUSTICE ALITO: But if this -- if there's a
24 rule that says the sign has to be down within a certain
25 period of time after the date of the event, which is on

1 the sign, I don't see how you get around to reading the
2 sign.

3 MR. CORTMAN: Well, what you would be
4 reading is the date, and -- and the code requires the
5 date to be placed on the sign both for when the sign is
6 placed and -- and for -- you know, for what the event
7 is. But I think that --

8 JUSTICE ALITO: So if somebody puts up a
9 sign for a yard sale two days before the yard sale, then
10 they can -- that can stay up for 48 days after the yard
11 sale? It has 50 days or whatever the period of time is?

12 MR. CORTMAN: Yes, according to -- according
13 to the code. But what is interesting, that time period
14 can be anything the town desires. It -- it doesn't need
15 to be -- and we're not looking for signs all year long.

16 The town can say, for example, temporary
17 signs can be up for seven days, they can be a certain
18 size. Like Washington, D.C., does, you can only have
19 three signs per block, have to be spaced out. And --
20 and that's part of our point.

21 And I think one of the things to take a --
22 to take look at is the amici brief that's been filed on
23 behalf of the town by the National League of Cities, and
24 the reason that brief is important, for example, on
25 page 10 and 13, it lists dozens and --

1 JUSTICE SCALIA: What page?

2 MR. CORTMAN: Page 10 of the amici brief on
3 behalf of the National League of Cities on behalf of the
4 town. And the reason I point out this brief is we don't
5 believe that the content-neutral regulation would tie
6 the hands of the town because, as -- as they say, there
7 are dozens and dozens of ways to regulate signs on a
8 content-neutral way. For example, and this has to do
9 with permanent signs --

10 JUSTICE SCALIA: What page is this again?

11 MR. CORTMAN: This is page 10 on the
12 National League of Cities' amici brief.

13 JUSTICE SCALIA: Got it.

14 MR. CORTMAN: It says you can regulate
15 locational criteria, off-site signs, number of signs,
16 spacing, setbacks, placement criteria, roof sign, ground
17 signs, wall signs, projecting signs. And all my point
18 is, as we look through their brief, there are
19 innumerable ways for the Court -- excuse me -- for the
20 town to regulate signs.

21 There is no reason to look at the content of
22 the sign, and the reason is the content of the sign
23 affects the -- the government interest of safety and
24 aesthetics in the same way. If -- if you have, for
25 example, clutter, whether it's the church's sign or a

1 political sign, it's going to clutter the roadways the
2 same way.

3 So the way to deal with clutter is an easy
4 rule, and, in fact, even the town concedes that the
5 content-based test that this Court has -- has used and
6 that the majority of the circuits now use in the sign
7 context -- the First Circuit, the Second Circuit, the
8 Eighth Circuit, and the Eleventh apply this test to sign
9 codes, and what they say, it's actually easier for the
10 town because you don't--

11 JUSTICE BREYER: For the towns it might be.
12 What about there are vast areas of the country where
13 there is scenery and people want to keep the scenery the
14 same, and they don't want signs at all, but they don't
15 want to say no signs because someone who wants to put up
16 a sign that says Geronimo is buried 50 feet away from
17 here.

18 MR. CORTMAN: Right.

19 JUSTICE BREYER: Now, if they say, okay,
20 we'll make an exception for that, does that mean that
21 they have to have an exception for everything, and
22 pretty soon the entire State of Wyoming is just filled
23 with clutter?

24 MR. CORTMAN: I wouldn't say everything.
25 But what I would say is -- is content-neutral

1 categories. But they can say, for example, each person
2 could --

3 JUSTICE BREYER: No, no, it's not a
4 content-neutral category. What it is, is it is a
5 category that says if you want to say Geronimo is buried
6 here you can, because that will bring people to look at
7 the grave, and that's it; we don't want anything else.
8 We're trying to keep the place looking nice.

9 Now, that's not a city. Cities are filled
10 with clutter anyway, at least most parts. But that's --
11 so -- so what is -- I'm trying to drive at what is your
12 definition of "content-neutral," which is something that
13 I wonder since I think the entire U.S. Code is filled
14 with content distinctions. All of crime is filled with
15 content distinctions. All of regulation has content
16 distinctions.

17 So what is it precisely in respect to the
18 content-neutral rule that is consistent with the U.S.
19 Code and is consistent with the example, if any, that I
20 gave?

21 MR. CORTMAN: The definition we would
22 propose is the same one this Court has used since the
23 Mosley case about what is content-based, and that is if
24 there -- the restriction or the regulation looks at the
25 subject matter, looks at --

1 JUSTICE BREYER: No, try -- try the criminal
2 code and solicitation, where if you solicit for certain
3 things you commit serious crimes, and if you commit
4 certain -- solicit for certain other things, they are
5 less serious and so forth. We all know that. How does
6 your definition apply there?

7 MR. CORTMAN: Well, I don't think --

8 JUSTICE BREYER: Or how does it apply -- you
9 see, I'm -- I'm confused. I understand the words --

10 MR. CORTMAN: Right.

11 JUSTICE BREYER: -- but I just have never
12 been able to understand how they apply in many cases.

13 MR. CORTMAN: Only limited here to -- to
14 free speech questions, not criminal laws, not --

15 JUSTICE BREYER: No, no, I'm sorry. There's
16 a free speech question under criminal law. Does the
17 First Amendment permit solicitation of drugs to be
18 punished less or more seriously? You understand what I'm
19 driving at --

20 MR. CORTMAN: I do.

21 JUSTICE BREYER: -- think of the U.S. Code,
22 and what I want and hoping for is enlightenment.

23 MR. CORTMAN: I think if there is -- it's a
24 conduct-related offense, we don't get into free speech.
25 If there is a free speech offense, even under the Code,

1 I believe this Court's cases say, for example, there are
2 vagueness cases where there are criminal laws. This, in
3 fact, is a criminal law. If you continue to put up your
4 signs, you could actually get fined and jail time. So I
5 believe the First Amendment would also apply if it's
6 speech-related.

7 An answer to your hypothetical, I think
8 there are many ways for the locality to regulate those
9 signs. For example, if it doesn't want many signs, it
10 can say one person can put up a temporary sign or a
11 permanent sign or whatever have you.

12 But to say, for example, you could put up a
13 private sign because you think this one location is
14 interesting, what if another person has a location they
15 want people to come visit? Should the government be
16 able to say, well, we think your location is important,
17 but your location is not.

18 And our response is the government could put
19 up the sign if it -- if it wants to make that choice
20 about historical landmarks or other types of signs or
21 directional types of signs.

22 I -- I'd like to reserve the remainder of
23 time for rebuttal if I may.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Mr. Cortman.

1 Mr. Feigin.

2 ORAL ARGUMENT OF ERIC J. FEIGIN.

3 FOR THE UNITED STATES, AS AMICUS CURIAE,

4 SUPPORTING NEITHER PARTY

5 MR. FEIGIN: Thank you, Mr. Chief Justice,
6 and may it please the Court:

7 We agree with Petitioners that Respondents'
8 ordinance here is unconstitutional, but we think that a
9 context-specific intermediate scrutiny approach should
10 apply in evaluating speech-permissive exceptions to a
11 sign ordinance where those exceptions are based on the
12 same longstanding traditional rationales that justify
13 the sign ordinance as a whole.

14 A wooden application of strict scrutiny in
15 this context would suggest that it's presumptively
16 unconstitutional, for example, for a town to limit signs
17 on public property but have an exception if you want to
18 paint your street number on your curb.

19 Now, that doesn't make a great deal of
20 practical sense, and that's not an example I just made
21 up. That's essentially the ordinance that this Court
22 upheld, albeit without specifically addressing this
23 particular issue, in Taxpayers for Vincent.

24 On a theoretical level, the normal reasons
25 for deep judicial skepticism of exceptions to a

1 regulation of speech don't apply in the context of that
2 street address exception, exceptions for danger or
3 safety signs, or other types of exceptions that track
4 the normal safety and nonproliferation rationales for a
5 sign regulation. Those kinds of exceptions don't create
6 any inference that the government is attempting to favor
7 one viewpoint or another, that it's trying to limit the
8 set of ideas that are going to come into the public
9 marketplace, or that it doesn't truly believe in the
10 safety and nonproliferation rationales that underlie the
11 sign regulation as a whole.

12 CHIEF JUSTICE ROBERTS: Well, I mean, you --
13 you obviously know the difficulty with that, which is
14 how does the government decide when there should be an
15 exception or how does a court decide when there should
16 be an exception and when there shouldn't be? I mean, I
17 understood the whole point of the strict scrutiny for
18 content-based restrictions is to find out which are the
19 types of speech or the particular types of regulation
20 that should be given an exception, rather than starting
21 with saying, well, you don't apply this scrutiny because
22 there ought to be an exception.

23 MR. FEIGIN: Well, I think the main problem
24 with strict scrutiny in this context is it sends a
25 signal to legislatures that they are on safer ground if

1 they enact a broad and undifferentiated restriction on
2 signs than if they try to tailor it only to those types
3 of signs that actually cause the problem that they are
4 trying to prevent.

5 And I think that the way the Court can
6 manage the situation is to see whether, under
7 intermediate scrutiny, there really are safety and-or
8 nonproliferation rationales that track onto whatever
9 exception is being drawn.

10 So if we could use, for example, Justice
11 Sotomayor's example of the "For Sale" signs. A town
12 might permissibly have an ordinance that limits the
13 number of signs you can have on your lawn to two, two
14 signs of any type; but it might also say, you know,
15 we're not going to count "for Sale" signs against your
16 quota of two and the reason is that "For Sale" signs are
17 only up on a very small percentage of properties at any
18 given of time, they are up for a very limited purpose
19 when the property is for sale, and they go down once the
20 sale is consummated.

21 JUSTICE SCALIA: And you want us to sort --
22 sort these ordinances out one by one and examine each of
23 these exceptions and say, you know, this is okay and
24 this isn't okay? I don't know that the Federal
25 Judiciary is numerous enough to do that, and it's a much

1 more simple rule that the other side presents: Treat
2 all signs the same. If clutter is the problem, they all
3 clutter. And you shouldn't -- you shouldn't allow or
4 disallow on the basis of the message.

5 MR. FEIGIN: Well, Your Honor, it's a simple
6 rule, but I think it's an extremely impractical rule
7 that is going to foreclose experimentation and local
8 solutions to local problems.

9 Let me give you another example of a town
10 that has some sort of sign restriction, but it doesn't
11 apply that sign restriction to safety signs like
12 "Children at Play" or "Hidden Driveway Ahead." If you
13 are going to apply strict scrutiny to those kinds of
14 exceptions, they are probably not going to pass muster
15 unless it's a really watered-down version of strict
16 scrutiny that I think is unfamiliar to the courts.

17 There is actually a fairly robust
18 empirically --

19 JUSTICE SCALIA: What is the problem? You
20 make -- you make your sign limits big enough that those
21 signs will attract attention, that's all.

22 MR. FEIGIN: Well, I think towns
23 legitimately should not have to be put to the choice if
24 they want to prevent the proliferation of signs that
25 would cause safety problems --

1 JUSTICE SCALIA: Or have the town put up the
2 signs, in which case they can be as big as the town
3 wants. We're just talking about private signs here.

4 MR. FEIGIN: Your Honor, I'm not --

5 JUSTICE SCALIA: So you're -- you're saying
6 every private individual has to have a big sign,
7 "Children At Play," right?

8 MR. FEIGIN: Well, I don't want to resist
9 too hard the idea that the Government can put up any
10 signs it wants, but I think the reason we think the
11 Government could put up the signs here is not because
12 the Government can say that it can speak on certain
13 topics and private citizens can't, but because of the
14 nature of the signs that are being put up, which means
15 that some work has to be done here by the fact that the
16 types of signs I described are safety signs.

17 Now, if we're going to subject that kind of
18 exception to strict scrutiny, it turns out there's actually
19 a fairly robust empirical debate about whether "Children
20 At Play" signs or "Hidden Driveway Ahead" signs actually
21 do enhance safety. And courts are going to have to make a
22 one-size-fits-all conclusion about whether the state of
23 the evidence, which right now is fairly equivocal,
24 justifies that sort of exception. I think courts are
25 likely --

1 CHIEF JUSTICE ROBERTS: Counsel, I'm not
2 sure -- I'm not sure your whole approach is not
3 precluded by our decision in McCullen. There, we said
4 that a facially neutral law does not become content-
5 based simply because it may disproportionately affect
6 certain types of certain topics. And we said the
7 question in such a case -- in other words, when you are
8 dealing with a facially neutral law -- is whether the
9 law is justified without reference to the content. So
10 it seems to me that you've got to get over the content
11 neutrality. Your argument only applies when it's
12 content neutral and yet here we're dealing with a
13 situation where you're saying it's an exception to the
14 content-based rule.

15 MR. FEIGIN: Well, Your Honor, I think
16 the Court can deal with the competing interests in this
17 case more easily not by getting bogged down in the
18 definition of content-based and content-neutral, which I
19 can address in a second, but by focusing more on the
20 bottom-line question of whether this is an appropriate
21 case for the application of strict scrutiny or
22 intermediate scrutiny.

23 JUSTICE GINSBURG: When you use those labels
24 in the context of the First Amendment, do they mean the
25 same thing that they mean in equal protection? That is,

1 intermediate scrutiny is a pretty tough standard in
2 equal protection.

3 MR. FEIGIN: Well, I think there are a
4 couple of flavors of intermediate scrutiny, both under
5 the Constitution at large and under the First Amendment
6 in particular. I think here we would be urging
7 something more like a reasonable fit test, which we
8 think would give municipalities enough room to draw the
9 kinds of distinctions that I think they reasonably
10 should be able to make between painting your street
11 number on your curb so people can more easily find your
12 house and restrictions on, you know, particular types of
13 speech that are much more likely to be motivated by
14 disagreement with that speech.

15 We do think that intermediate scrutiny has a
16 fair amount of teeth in the circumstance, I mean, and
17 we're putting our money where our mouth is because we
18 think that the particular ordinance at issue here fails
19 intermediate scrutiny.

20 But intermediate scrutiny would give
21 municipalities enough room to draw these kinds of
22 distinctions and to draw, in particular, the kinds of
23 distinctions that are drawn in the Highway
24 Beautification Act, which allows certain types of signs
25 that do enhance safety and aesthetics, but generally

1 doesn't allow the ground on the sides of freeways to
2 become a breeding ground for signs which would decrease
3 driver safety and decrease appreciation --

4 JUSTICE SOTOMAYOR: Do you think that a --
5 I'm sorry.

6 CHIEF JUSTICE ROBERTS: Justice Sotomayor.

7 JUSTICE SOTOMAYOR: Do you think that a
8 library could say big books are preferable to little
9 books and it so happens that big books are coffee books
10 and little books tend to be mostly political, so we're
11 going to put all the political books in the basement and
12 all the big books on the main floor?

13 Is that a distinction that the First
14 Amendment permits?

15 MR. FEIGIN: I think a court might be
16 reasonably fairly skeptical of that kind of distinction.
17 But I think signs, Your Honor, present particular First
18 Amendment problems that the Court had to grapple with
19 and didn't quite resolve in MetroMedia and City of
20 Ladue.

21 One distinct problem with signs is that
22 the -- it's very difficult for legislatures to tailor
23 sign regulations and describe types of signs that it
24 doesn't think it needs to regulate to advance its
25 interest, thereby allow more speech, without describing

1 those types of signs in a manner that could be viewed as
2 content-based. And that's what makes sign regulation
3 very difficult and why we think some sort of
4 context-specific rule in this circumstance would be
5 appropriate.

6 JUSTICE SCALIA: I don't see why. I mean,
7 you say it, but why is it true? Just make whatever the
8 sign requirement is big enough that any private signs
9 that need to get people's attention will get people's
10 attention.

11 MR. FEIGIN: Well, I think --

12 JUSTICE SCALIA: What you say about signs I
13 assume applies to noise as well, right? If the city has
14 a noise ordinance, it can distinguish between noises for
15 various purposes. A political sound truck before an
16 election can be given a higher allowance, and, I don't
17 know, a street evangelist given a lower allowance.

18 MR. FEIGIN: I don't think that would be
19 permissible, Your Honor. I think one key here is that
20 the types of exceptions we're talking about, the only
21 types we think should be subject to intermediate
22 scrutiny, are ones that track the safety and
23 nonproliferation rationales for the sign ordinance as a
24 whole. If the City is advancing a distinction based on
25 the fact that they think political speech or ideological

1 speech is more valuable than, say, religious speech, we
2 think that would be subject to strict scrutiny.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Mr. Savrin.

6 ORAL ARGUMENT OF PHILIP W. SAVRIN

7 ON BEHALF OF THE RESPONDENTS

8 MR. SAVRIN: Mr. Chief Justice, and may it
9 please the Court:

10 The problem with applying strict scrutiny in
11 this case or this type of case is that it will have, we
12 believe, the opposite effect. It will limit speech
13 because towns, cities will enact one size fits all. In
14 order to do that, as Petitioner's counsel indicated,
15 there need to be limitations on the number of signs, on
16 the duration of signs. The signs would have to be all
17 large enough to accommodate the largest message that
18 needs to be communicated.

19 And in order to pass strict scrutiny, the
20 legislatures in these towns and cities across this
21 country would be inclined to ban all signs except those
22 that the First Amendment absolutely allows.

23 JUSTICE ALITO: You can make that argument
24 in all kinds of contexts. I don't know where it gets
25 you. Suppose that the question is, whether the town is

1 going to allow anybody to speak in a park, and the
2 town -- the town council says, well, you know, we would
3 like to have people be able to speak on subjects that we
4 like, but there are some subjects we really don't like.
5 We don't want people to speak on those. So we have the
6 choice, we allow everybody to speak or we allow nobody
7 to speak.

8 So you can make exactly that same argument in lots
9 of other contexts where I don't think the distinction
10 could be justified. Isn't that right?

11 MR. SAVRIN: I think there is a difference,
12 Justice Alito, in signs as opposed to speech because
13 signs do take up physical space. They displace other
14 uses of land, and they perform different functions.

15 One thing that we would like to emphasize in
16 this case is that the temporary directional sign
17 provision is limited to in signs that are intended to
18 guide travelers along a route from Point A to Point B.
19 If they have expressive content on them, then they are
20 no longer a directional sign but are then an expressive
21 sign; and there is a different provision that applies
22 for that.

23 JUSTICE GINSBURG: So if the sign here said,
24 "We welcome you to attend our church service," and then
25 it says on the bottom, meeting place, and it specifies

1 the meeting place, but the message is "we welcome you to
2 attend our service," that's ideological?

3 MR. SAVRIN: That is ideological. That
4 would not be a directional sign because it's not
5 directing travelers along -- along the route to that
6 location.

7 JUSTICE GINSBURG: But it says also "welcome
8 you to attend our church service, it will be held at."
9 So it's giving the direction, but it's also expressing
10 the message that everyone is welcome to come worship.

11 MR. SAVRIN: I believe the way that this
12 code has been interpreted, Justice Ginsburg, is that
13 that would not be a directional sign because it's not
14 saying turn right, turn left, go straight a few miles.
15 It's not giving directions about how to get there.

16 So I believe that that type of sign would be
17 permitted under this ordinance as an ideological sign
18 and would not be limited to the terms of the temporary
19 directional.

20 JUSTICE KAGAN: Mr. Savrin, could I ask what
21 the -- your justification is for these specially
22 generous provisions on ideological signs? I mean,
23 putting aside the level of scrutiny, why do you have
24 these very generous rules for ideological signs as
25 compared to others?

1 MR. SAVRIN: Well, specifically on the
2 ideological signs is to protect the First Amendment
3 right of anyone to speak on any topic at any time. The
4 difference in the --

5 JUSTICE KAGAN: So you are not even
6 purporting to have a content-neutral justification for
7 this. You are essentially saying, yes, we generally
8 dislike clutter, but we're willing to make exceptions
9 for clutter for speech that we think has special First
10 Amendment significance.

11 MR. SAVRIN: That would not be our position,
12 Justice Kagan. Our position is that it's not
13 content-based in a constitutional sense for purposes of
14 applying strict scrutiny, that the distinction is
15 permissible here without relation to the content or in
16 terms of favoring or censoring certain viewpoints or
17 ideas.

18 JUSTICE SCALIA: Well, viewpoint
19 discrimination is quite different from content
20 discrimination. And you are trying to reduce our rules
21 against discriminating on the basis of content to a rule
22 against viewpoint discrimination.

23 MR. SAVRIN: Not just view --

24 JUSTICE SCALIA: I mean, ideological signs,
25 that is a content category, and there is as much a First

1 Amendment right to give somebody directions as there is
2 to speak about -- about being green or whatever else.
3 Is there no First Amendment right to give somebody
4 directions?

5 MR. SAVRIN: Justice Scalia, we would say
6 that the -- they perform different functions. It
7 certainly --

8 JUSTICE SCALIA: They sure do, but is there
9 a First Amendment right for these other messages or not?

10 MR. SAVRIN: I think they would have a right
11 to speak, and I think that they do have that right to
12 speak and that intermediate scrutiny applies to
13 regulations about how speech can be communicated as
14 opposed to what can be communicated.

15 JUSTICE GINSBURG: But you did say in your
16 brief that the First Amendment does not require
17 directional signs, so they could be banned altogether.

18 MR. SAVRIN: I think if it's narrowly
19 tailored and meets the intermediate scrutiny test in a
20 particular jurisdiction, then --

21 JUSTICE GINSBURG: Well, that is a lot of
22 words. I'm giving you an example.

23 The law says no directional signs. That's
24 the law. Does that -- is -- does that offend the First
25 Amendment?

1 MR. SAVRIN: I think that it -- well, when
2 you say offend the First Amendment, I think you would
3 have to apply the intermediate scrutiny analysis and our
4 position would be that it would -- that it could survive
5 that analysis.

6 If I could return to Justice Kagan's
7 question about the interests that are served, it's
8 different. A directional sign, there needs to be more
9 than in order to direct travelers along a route, so that
10 justifies a -- perhaps a smaller size. There is no
11 contention in the record; in fact, the court of appeals
12 found that they function as intended. As far as the
13 duration is concerned, there's no travelers going to an
14 event that is not presently occurring. In fact, the
15 Town of Gilbert expanded the time frame from 2 hours to
16 12 hours, and I -- our question is whether or not that
17 is something that implicates First Amendment
18 jurisprudence as opposed to --

19 JUSTICE BREYER: You say on -- suppose we're
20 talking about the context of signs. You say, well,
21 let's look to the purpose of forbidding -- any
22 prohibition, and I guess it has to do with safety or
23 beautification.

24 MR. SAVRIN: Yes.

25 JUSTICE BREYER: First question would be:

1 Is there some category that you don't allow to put up
2 signs? Answer, no. Everybody can put up signs.

3 So what about applying strict scrutiny to
4 that? If you are going to distinguish on the basis of
5 what the sign says, you have to have an awfully good
6 reason, if your decision is you can't put up one at all.
7 Next, you put them up, but you have all content -- all
8 kinds of distinctions how, how long, et cetera.

9 Now, in respect to that, maybe you should
10 have more leeway, leeway depending upon the purpose of
11 the sign. So if, for example, it's about an open air,
12 municipal movie, you could say put up signs about movies
13 or something. I mean, you know, you maybe have more
14 leeway there.

15 But still they're saying you would flunk
16 even that test here because there isn't really a very
17 good reason at all in this case for making the sign
18 smaller or for putting it there for such a short time.

19 Now, how do you react -- there are three
20 parts: One, very tough if you are going to say you
21 can't put it up at all, sometimes called strict
22 scrutiny; two, somewhat more lenient if it gets up, but
23 you are trying to distinguish among how and under what
24 circumstances, how long; and then three, do you even
25 satisfy that one? That's called time, place and manner,

1 the second one.

2 MR. SAVRIN: Yes, okay. Well, with respect
3 to the first one, the interest most of the times in sign
4 ordinance regulations as the -- as you've indicated, is
5 aesthetics and safety. With respect to aesthetics, I
6 don't believe that that would meet the definition of a
7 compelling interest, so that it's -- it's automatically,
8 presumptively, and conclusively unconstitutional if the
9 strict scrutiny is applied and that's the -- there is no
10 compelling interest.

11 With respect to the interests at stake here,
12 we again believe that directional signs are functionally
13 different from an ideological sign or even from a
14 political sign, that the directional signs do not need
15 to be larger and also that there are more of them. And
16 so if there are more of them, the trade-off is -- at
17 least the legislature in this town has decided the
18 trade-off is that they need to be smaller because they
19 need to guide travelers along a route.

20 JUSTICE SCALIA: And political signs are
21 there almost all year, on the rights-of-way. You talk
22 about clutter. What if somebody doesn't like politics,
23 and he says politics is spinach. I want ideology. I
24 would like ideological signs on the right-of-way. You
25 say, I'm sorry, you are wrong, we think politics is more

1 important, because we are politicians and we're on the
2 city council.

3 (Laughter.)

4 MR. SAVRIN: I have two responses to that,
5 Justice Scalia. The first one is that there is a
6 statute in Arizona that this ordinance complies with in
7 terms of the placement, the duration, and the size of
8 the political signs. The town doesn't have any leeway
9 in that because it needs to comply with the statute.

10 JUSTICE GINSBURG: Does this State statute
11 have the same size and duration? The State statute says
12 that you have to allow political signs, but does it
13 specify the size and the duration?

14 MR. SAVRIN: Yes, Justice Ginsburg, it does.

15 JUSTICE GINSBURG: So you're saying that the
16 town ordinance just mirrors the State?

17 MR. SAVRIN: Yes. Yes, it does.

18 JUSTICE GINSBURG: And do you have that
19 State law?

20 MR. SAVRIN: I do. It's section 16-1019.

21 JUSTICE SCALIA: So your defense to a First
22 Amendment complaint is, what, the State made me do it?

23 MR. SAVRIN: Well, our defense -- well, in
24 part, yes, because we need to comply with the statute,
25 and it doesn't make sense that, as a result, all signs

1 need to be -- meet those provisions for purposes of
2 preserving beauty, reducing clutter, so on and so forth.

3 JUSTICE SCALIA: It makes a lot of sense if
4 you believe in the First Amendment.

5 MR. SAVRIN: Well --

6 JUSTICE SCALIA: If you believe that neither
7 the State nor the city is entitled to say politics is
8 really important, as opposed to music.

9 MR. SAVRIN: The other consideration here,
10 Justice Scalia, is that we're talking about public
11 property. And one of the issues that has not been
12 developed, certainly in the record in this -- at this
13 Court, is the extent to which the government can select
14 subject matter for what is a non-traditional public
15 forum. So there are issues as well that would need to
16 be developed a little bit further before any application
17 of intermediate scrutiny, we say, could be continued --
18 if they -- if the -- if their -- if this Court were to
19 find problems with the Ninth Circuit's application of
20 intermediate scrutiny, and I think that there would
21 still be some issues on location that would need to be
22 developed on the public forum, and that --

23 JUSTICE GINSBURG: You say the street is not
24 a -- not a traditional public forum?

25 MR. SAVRIN: That is the -- certainly

1 Gilbert's position. It was something that was argued in
2 the Ninth Circuit. The Ninth Circuit did not resolve
3 that issue. But I believe that would be a question of
4 Arizona law.

5 But, again, we have not developed that and
6 that issue has not been developed in this -- at this --
7 in this Court, and I think the reason is because the
8 issue in this Court is whether or not strict scrutiny
9 applies.

10 JUSTICE ALITO: Well, how do you justify
11 the -- the differing treatments of Petitioner's sign, on
12 the one hand, and the weekend builder event signs and
13 homeowners' association signs? Homeowners' association
14 signs can be 80 square feet, and the Petitioner's sign
15 can be 6 square feet.

16 MR. SAVRIN: The homeowners' signs are not
17 really directional signs, because they can only be
18 within the residential community. They are not
19 directing travelers off site, in a generic sense, to a
20 location. There is also a permit requirement.

21 And the other thing is -- about the 80
22 square feet is, that is total sign area. That's not one
23 sign. That's the total sign area you can have.

24 CHIEF JUSTICE ROBERTS: Has anyone ever been
25 denied one of those permits?

1 MR. SAVRIN: I don't know the answer to that
2 question, Your Honor.

3 JUSTICE ALITO: Suppose the Petitioners want
4 to put up a sign that says, we're having a church
5 service at 10:00 o'clock on Sunday morning. Under your
6 code, when can they put that up and when do they have to
7 take it down?

8 MR. SAVRIN: They could put it up 12 hours
9 before, so that would be 10:00 o'clock p.m., and they
10 could take it -- and they have to take down, I believe
11 it's an hour afterwards.

12 JUSTICE ALITO: So they can put it up after
13 dark on Saturday and then they have to take it down
14 within an hour after, when, the commencement of the
15 service, or --

16 MR. SAVRIN: The end of the event.

17 JUSTICE ALITO: -- the end of this --

18 MR. SAVRIN: The end of the event. If
19 the --

20 JUSTICE ALITO: Do you think that really
21 gives them an opportunity to invite people to come to
22 their service?

23 MR. SAVRIN: The purpose of these signs is
24 not supposed to be invitational; it's supposed to be
25 directional. If the event was occurring at 10:00

1 o'clock at night or at 6:00 o'clock in the evening, it
2 could be up during the day. If the event occurs all
3 weekend long, it could be up all weekend long. It's --
4 it's tied to the event.

5 So in that sense, it -- it absolutely serves
6 its purpose for having on -- on the 12 hours before,
7 because if they want to invite members of the public to
8 the services, they can and do have many other
9 opportunities and alternatives -- including signage,
10 including the ideological sign -- that they can use.

11 JUSTICE ALITO: So they could put up a,
12 quote/unquote, ideological sign that says, "Come to our
13 service on Sunday morning," but no arrow, and then they
14 put up another sign that says, this is the arrow? Or
15 maybe they put up on the first sign, "Come to our
16 service on Sunday morning; we can't tell you now where
17 it will be because the town won't let us, but if you
18 come -- if you drive by here tomorrow morning at a
19 certain time, you will see an arrow."

20 (Laughter.)

21 MR. SAVRIN: The sign could say, Your Honor,
22 where it is taking place, but if it is intending to
23 guide travelers to that location, then it would need to
24 comply with -- with the provisions. And the reason,
25 again --

1 JUSTICE GINSBURG: What is the -- what is
2 the guidance? I'm looking at the Good News signs on
3 page 3 of the little brief. It just has an arrow. It
4 says the name of the elementary school, and then it
5 has -- it looks like a telephone number and an arrow.
6 The arrow is the direction?

7 MR. SAVRIN: Yes, Your Honor.

8 JUSTICE GINSBURG: This is not, as you
9 described earlier, turn left on Main Street, turn right
10 on Front Street.

11 MR. SAVRIN: It is the same function as
12 that. But we would say the --

13 JUSTICE BREYER: What is this about, this
14 argument? I mean, you agree they can put up a big sign.
15 Can they put up a big sign, ideological, saying, "Come
16 to the church service next Tuesday, 4th and H Streets,
17 three blocks right and two blocks left"? All right? Or
18 are you saying they can't say, "three blocks right and
19 two blocks left"? And that's what this argument is about?

20 MR. SAVRIN: That is what it comes down to.

21 JUSTICE BREYER: Well, my goodness. I
22 mean -- I mean, on that, it does sound as if the town is
23 being a little unreasonable, doesn't it?

24 MR. SAVRIN: Well, we would say that it
25 has -- that the sign has an -- what this Court has

1 termed an incidental effect on the expression of the
2 Petitioners, that certainly they can have the
3 ideological sign, the information that they want to
4 include --

5 JUSTICE BREYER: Suppose we said this: That
6 where, in fact, the argument is of this nature, where,
7 in fact, there are -- you can have a big sign and have
8 everything on it except an arrow, and the purpose of the
9 sign is, in fact, to tell people both what is happening
10 and where. That there is no good, under any test,
11 reason for requiring this little dingy thing? End of
12 the case. Let's go with that.

13 MR. SAVRIN: Well, Your Honor -- our
14 response to that, Your Honor, is that the directional
15 signs, in order to work, need to guide travelers along
16 the route. So there's going to be a whole lot of these
17 signs in order for them to function as intended. It can
18 be a mile away, it can be two miles away.

19 So having just one sign, perhaps, under
20 the Court's hypothetical, it seems rather silly, but if
21 you are thinking about having a whole bunch of these
22 signs over a long distance, then I think then that --

23 JUSTICE GINSBURG: Does Good News -- does
24 the Good News church have a number of signs -- just as
25 illustration, how many signs do they have?

1 MR. SAVRIN: I believe the number is 15, but
2 I'm not 100 percent sure about that, Your Honor. I know
3 that they have quite a few.

4 JUSTICE SOTOMAYOR: Can you see that car
5 when you -- can you see that sign at all when you
6 pass --

7 MR. SAVRIN: I'm sorry, Your Honor?

8 JUSTICE SOTOMAYOR: Can you see that sign at
9 all when you pass in a moving car?

10 MR. SAVRIN: Yes. In fact, the court of
11 appeals has found that it functioned as intended and
12 there is no indication that -- that it did not. So
13 there's -- it seems to me that those are the kind of
14 decisions, as far as size, duration, are ones that
15 should be the fodder of legislative deliberation. And
16 as long as it meets the intermediate scrutiny test, it
17 should pass Constitutional muster.

18 JUSTICE SCALIA: Whatever that is. Whatever
19 that is, right?

20 MR. SAVRIN: Well, the intermediate scrutiny
21 test, I think, is if it's narrowly tailored, and also if
22 there are alternative modes of communication. But I
23 think that applying strict scrutiny to these types of
24 regulations will result in sign ordinances being struck
25 down uniformly, just about, and the only speech that --

1 that will be allowed will be speech that is
2 constitutionally required. Everything else will not be.

3 But I think the problem, if there is one,
4 that Gilbert has gotten into is that it allows a lot of
5 speech that a lot of other ordinances might not in a lot
6 of different formats.

7 JUSTICE KAGAN: Just, again, if I could
8 understand --

9 MR. SAVRIN: Yes.

10 JUSTICE KAGAN: -- let's even assume that
11 intermediate scrutiny applies, and just focus in on this
12 special provision for ideological speech which allows
13 very large signs to stay up as long as possible. And
14 you would say we're making that exception, if you will,
15 to the general rule that there shouldn't be clutter and
16 there shouldn't be a lot of these signs because, why?

17 MR. SAVRIN: Because directional signs --

18 JUSTICE KAGAN: No, no, no.

19 MR. SAVRIN: I'm sorry.

20 JUSTICE KAGAN: I just asked you for the
21 exemption for ideological signs, for the specially
22 generous provision for ideological signs. Why do
23 ideological signs get such generous treatment?

24 MR. SAVRIN: Because the -- to protect the
25 First Amendment right to speak.

1 JUSTICE KAGAN: Okay. So that is a
2 content-based rationale. And then, you know, on one theory,
3 you lose regardless of what the standard of review is.

4 MR. SAVRIN: If the --

5 JUSTICE KAGAN: You are not justifying it on
6 the grounds of safety or on the grounds of clutter.
7 You're saying, this is a special kind of speech that we
8 think there ought to be more of.

9 MR. SAVRIN: With respect to the ideological
10 sign?

11 JUSTICE KAGAN: Yeah.

12 MR. SAVRIN: Yeah, the purpose of that is --
13 is it is content-neutral in terms of anything can be on
14 that sign. And what we're saying --

15 JUSTICE KAGAN: So that goes back to what
16 Justice Scalia said. It's viewpoint neutral, but, you
17 know, it's content-based. And maybe you are just saying
18 that we've run amok on this content-based distinction,
19 and there would be an argument there. But, I mean, it
20 is content-based to say what is ideology and what is
21 not.

22 MR. SAVRIN: And I would agree that that's
23 what we're arguing, Your Honor, that what we're saying
24 is that the First Amendment is -- guards against the
25 abridgment of speech. And having a rigid content

1 definition to be the on/off switch for whether strict
2 scrutiny or intermediate scrutiny applies does -- is not
3 workable, does not achieve common-sense results. It
4 handicaps the legislatures in their ability to be
5 flexible.

6 JUSTICE SCALIA: Well, maybe you think that,
7 but the guy who doesn't like politics and likes ideology
8 doesn't think that.

9 MR. SAVRIN: Well, the person --

10 JUSTICE SCALIA: So we're -- we're supposed
11 to sit here and say, oh, political speech is the most
12 valuable and then you can allow that, but ideological speech
13 comes in a close second, and then what? Then
14 directional speech or whatever else?

15 MR. SAVRIN: Well, I --

16 JUSTICE SCALIA: I don't want to do that. I
17 don't think you should want any governmental official,
18 even -- even a judge, to do stuff like that.

19 MR. SAVRIN: Your Honor, I think for
20 purposes of ruling in this case, I think the question is
21 whether or not the temporary directional sign is subject
22 to -- is content-based in a constitutional sense such
23 that it would be subject to strict scrutiny. We believe
24 that that would be improper. We think that it would be
25 against the jurisprudence of this Court.

1 JUSTICE SCALIA: What is content-based in a
2 constitutional sense, as opposed to content-based in a
3 non-constitutional sense?

4 MR. SAVRIN: Whether it puts the finger on a
5 scale of ideas or viewpoints, whether the substance of
6 it -- whether --

7 JUSTICE SCALIA: That is viewpoint-based,
8 not content-based.

9 MR. SAVRIN: Well, whether it favors
10 or censors --

11 JUSTICE SCALIA: You want to eliminate
12 content-based as the criterion and make it
13 viewpoint-based.

14 MR. SAVRIN: No, Your Honor, that is not
15 what we're advocating. What we're advocating is that if
16 an ordinance does not -- if an ordinance addresses the
17 function of the sign as opposed to the particular ideas
18 or even the subject matter, then it would not be
19 content-based for purposes of --

20 JUSTICE SCALIA: Is there -- is there a
21 difference between the function of the sign and the
22 content of the sign?

23 MR. SAVRIN: Yes, Your Honor.

24 JUSTICE SCALIA: I frankly can't grasp that.
25 What is it?

1 MR. SAVRIN: Well, it depends on how --

2 JUSTICE SCALIA: Doesn't its function depend
3 upon its content?

4 MR. SAVRIN: In a literal sense, yes.

5 JUSTICE SCALIA: Oh, I see. What sense are
6 we talking here?

7 (Laughter.)

8 JUSTICE SCALIA: Poetic?

9 MR. SAVRIN: Well, both --
10

11 MR. SAVRIN: No. We think that there needs
12 a be a -- a nuance, as the Federal government has
13 indicated. So it guides the -- the content test is a
14 guide for courts to determine which level of scrutiny
15 applies. And at some level, if content is the on/off
16 switch, then such distinctions as temporary and
17 permanent, commercial and non-commercial, even on-site
18 and off-site, are going to be content. And we don't
19 believe that that in and of itself justifies strict
20 scrutiny.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Cortman, you have four minutes
23 remaining.

24 REBUTTAL ARGUMENT OF DAVID A. CORTMAN

25 ON BEHALF OF PETITIONERS

1 MR. CORTMAN: Thank you, Mr. Chief Justice.
2 Just a few quick points in response, if I may.

3 Clarification point on the State statute.

4 First of all, when this case began, the State statute
5 was not in effect, and political signs were actually
6 allowed up for longer than the period of time. When the
7 State statute was enacted, it actually lessened that
8 time. So it's not the State's doing that the town
9 decided to allow political signs in its -- in its
10 right-of-way.

11 But even with the State statute, the -- if
12 the State has decided that its interest in free speech
13 in political signs outweighs the interest in safety and
14 aesthetics, then the town should basically adopt an
15 ordinance that abides by that. And the simple way to do
16 that is to treat it as a constitutional floor. If the
17 State has decided that we're going to allow political
18 signs up for that period of time -- and by the way, the
19 statue doesn't mention other signs. So it's not a
20 restriction like this town code is. All it says is,
21 we've deemed it important enough for political signs to
22 be up for --

23 JUSTICE KENNEDY: It's just permissive for
24 political signs.

25 MR. CORTMAN: That's right. And so the

1 response by the town is, okay, if that's the case and
2 the State has decided that political signs outweigh our
3 interests in safety and aesthetics, the way we deal with
4 that is treating other similar signs the same.

5 I think, a couple other points, the noise
6 ordinance is a perfect example, whether it's the that
7 side case or the Kobachs case. This ordinance would be
8 akin to allowing, for example, political speech to be
9 much louder in decibels and for longer periods of time,
10 and someone on the street corner inviting someone to
11 church must be quieter and for lesser periods of time.

12 And quickly, if I may address the safety and
13 beautification interests, they are certainly important
14 interests. But as this Court said several times in
15 Carey v. Brown, for example, and Discovery Network, the
16 distinctions, the content-based distinctions in the code
17 bear no relationship to the government interest. The
18 distinctions don't advance those interests.

19 And as to being under-inclusive, I think
20 it's similar to what this Court found in Discovery
21 Network. When there the town wanted to prohibit 62 news
22 racks and then allow 1,500 to 2,000 news racks to
23 remain, this Court said that was under-inclusive and
24 would fail just on that. Here, the town is allowing an
25 unlimited number of political signs, but then

1 prohibiting just a few other signs.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, at 11:03 a.m., the case in the
6 above-entitled matter was submitted.)

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