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No. 1239

Supreme Court, U.S.

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In The
Supreme Court of the United States

—◆—
JEFFREY HERSON; EAST BAY OUTDOORS, INC.,
a California corporation,

Petitioners,

v.

CITY OF RICHMOND, a California charter city,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

—◆—
PETITION FOR WRIT OF CERTIORARI

—◆—
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QUESTIONS PRESENTED

1. When this Court grants, vacates, and remands (“GVR”s) a case back to a circuit court of the United States “for further consideration in light of” a recently decided opinion of this Court, what exactly does this Court expect; is adding an *ipse dixit* footnote to the original opinion sufficient, or must the circuit court *discuss* how the law applies to the facts in light of the recently decided opinion of this Court?

2. When this Court grants, vacates, and remands (“GVR”s) a case back to a circuit court of the United States “for further consideration in light of” a recently decided opinion of this Court, may the circuit court deem the substantive issue to have been procedurally forfeited even though the substantive issue was raised below and the same procedural forfeiture arguments were unsuccessfully argued to this Court in opposition to the original petition for *certiorari*?

3. A municipal sign ordinance identified various categories of signs based on the type of information they convey, then subjected each category to different restrictions. It exempted signs containing favored noncommercial subject-matter (including foreign and domestic governmental insignia; religious symbols; and civic, patriotic, and commemorative speech). And the city also favored commercial speech over non-commercial speech. In light of this Court’s recent opinion in *Reed v. Town of Gilbert*, did the city abridge the First Amendment?

PARTIES

Petitioners are Jeffrey Herson, an individual, and East Bay Outdoor, Inc., a California Corporation.

Respondent is the City of Richmond, a California charter city.

CORPORATE DISCLOSURE STATEMENT

East Bay Outdoor, Inc. certifies that it has no parent company and no publicly held company owns ten percent or more of its stock.

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ORDERS AND OPINIONS

The unreported Memorandum *Opinion* of the Ninth Circuit issued on January 22, 2016, following remand from this Court is reprinted at App. 1-4. The Ninth Circuit *Order* of February 10, 2016 denying rehearing is reprinted at App. 50. The Ninth Circuit *Order* of November 19, 2015 requesting further briefing is printed at App. 5. This Court's *Judgment* (GVR) issued on October 5, 2015 is reprinted at App. 6-7. The original unreported Memorandum *Opinion* of the Ninth Circuit issued on October 21, 2014 is reprinted at App. 9-12. The underlying District Court *Order* granting summary judgment issued on December 5, 2011 is reprinted at App. 13-22 and is officially reported at 827 F. Supp. 2d 1088. A therein referenced prior District Court *Order* granting and denying summary judgment in part issued on April 25, 2011 is reprinted at App. 23-49.

JURISDICTION

The Ninth Circuit rendered its decision on January 22, 2016. App. 1-4. The Ninth Circuit denied rehearing on February 20, 2016. App. 50. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

City of Richmond Municipal Code Chapters 4 & 15 are excerpted in the Appendix, App. 51-59.



STATEMENT OF THE CASE

In June of 2009, Petitioners Jeffrey Herson and East Bay Outdoor, Inc. were denied the right to display speech at certain locations in the City of

Richmond, California under a now-repealed sign ordinance because municipal officials determined that none of the proposed structures would contain messages that were either authorized by, or exempt from, the then-applicable municipal sign ordinance (hereinafter, "Old Ordinance").

The Old Ordinance, which limited signs that could be displayed within 660 feet of a freeway, regulated billboards in at least two ways. First, the regulations generally banned most noncommercial speech including political speech, but expressly excluded particular, favored, subject-matters of noncommercial speech (including foreign and domestic governmental insignia; religious symbols; and civic, and commemorative speech), including one category based upon viewpoint (patriotic speech). Second, it authorized high and large "Major Gateway Area Identification Signs" announcing the location of major commercial shopping centers, with the name of the centers. In addition to those written regulations that appeared on the face of the ordinance, Petitioners demonstrated that the Old Ordinance was administered by the Richmond Planning Department so as to endorse several high and large signs containing commercial speech, such as the names, trademarks, and products of commercial businesses at the shopping centers.

Petitioners filed suit in the U.S. District Court for the Northern District of California and the case was assigned to the Honorable Phyllis J. Hamilton who ultimately granted summary judgment against

Petitioners and in favor of Richmond. Petitioners appealed to the Ninth Circuit.

A panel of the Ninth Circuit consisting of the Honorable Circuit Judges Sandra S. Ikuta, N.R. Smith, and Mary H. Murguia unanimously concluded in a memorandum decision that Richmond “had an independent, constitutionally valid reason for denying Herson’s applications” – “the content-neutral height and size restrictions of the Old Ordinance.” 585 Fed. Appx. 522, 523 (9th Cir. 2014).

At the time of the decision, the prevailing law of the circuit was that Judges should determine whether sign restrictions were content-neutral by looking to the government’s purpose for the restriction, even when the restriction was facially content-based.

Petitioners sought *certiorari* from this Court, and at the end of last term, this Court issued *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). In *Reed*, this Court disapproved the Ninth Circuit’s test for what constitutes a content-neutral sign restriction, and provided much needed clarity to the mode of analysis courts must employ when judging municipal sign regulations under the First Amendment. Under *Reed*, facially content-based restrictions are treated as content-based regardless of the government’s purpose.

In their petition for *certiorari*, among other things, Petitioners argued that the ordinance contained content-based exemptions. In opposition to the petition for *certiorari*, among other things, the City of

Richmond argued that this Court should deny *certiorari* because that argument had been procedurally forfeited. Petitioners filed a reply brief refuting that argument.

Upon returning from summer recess, this Court granted the Petitioner's petition for *certiorari*, vacated the Ninth Circuit judgment, and remanded "for further consideration in light of *Reed v. Town of Gilbert*, 576 U.S. ____ (2015)." The same Ninth Circuit panel then called for the parties to simultaneously submit ten-page briefs "addressing what effect, if any, the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), has on our prior disposition in this case."

Recognizing the rarity of this Court granting a petition for *certiorari* and the significance of the opportunity to be the first to apply a new precedent of this Court in the largest circuit in the nation, the Petitioners retained First Amendment scholar, Professor Eugene Volokh of U.C.L.A. who prepared the supplemental brief in his capacity as a private lawyer. Professor Volokh argued that under the principles this Court announced in *Reed*, the panel analysis was no longer valid, because the height and size restrictions of the Old Ordinance were not content-neutral, and denials of permits based on those height and size regulations thus constituted discrimination based on content, requiring the Old Ordinance to pass strict scrutiny (which it could not survive).

However, the same panel simply re-issued the exact same memorandum decision that this Court vacated, with the exception of a newly inserted *ipse dixit* footnote simply stating that the district court's analysis (done prior to the new precedent) "complies with" the new precedent:

The district court's analysis, in determining that the height and size restriction of the Old Ordinance was content neutral, complies with the Supreme Court's recent opinion in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). The district court first reasoned that the applicable restriction "does not discriminate, on its face, between the content of speech." *Herson v. City of Richmond*, 827 F. Supp. 2d 1088, 1091 (N.D. Cal. 2011). The district court then determined that the restriction was "narrowly tailored to serve a compelling City interest." *Id.* Herson's challenges to the restriction's exemptions were waived when he failed to address the district court's conclusion that these challenges fell outside the scope of the Third Amended Complaint.

App. 2.

Petitioners now return to this Court arguing that there is a reasonable probability that the Ninth Circuit failed to give due "consideration" to this Court's decision in *Reed*, and that *Reed* otherwise requires that the Ninth Circuit's decision in this case

be reversed on its merits and remanded with instructions to consider the issue of remedy.

ARGUMENT

The “all-purpose Latin canon”¹ of *ipse dixit* does not constitute “consideration.” When this Court GVR’s a case “for further consideration in light of” a new precedent, the circuit court must do more than wave “the magic wand of *ipse dixit*”² and incant, “It complies!” The lower court must *discuss* how the law applies to the facts in light of the recently decided opinion of this Court. *Wellons v. Hall*, 558 U.S. 220, 226 (2010) (*per curiam*) (rejecting notion that a court of appeals “should respond to our remand order with a ‘summary reissuance’ of essentially the same opinion”).

The Ninth Circuit’s most recent decision in this case, is contrary to this Court’s recent decision in *Reed*, and also conflicts with the Fourth Circuit’s post-*Reed* decision in *Central Radio Company v. City of Norfolk*, 811 F.3d 625, 2016 U.S. App. LEXIS 1498, *13-19 (4th Cir. 2016). Though this Court’s previously issued GVR order directed the Ninth Circuit to review this case in light of *Reed*, the largest circuit in

¹ See *Montgomery v. Louisiana*, 136 S. Ct. 718, 741 (2016) (Scalia, J., dissenting).

² See *United States v. Yermian*, 468 U.S. 63, 77-78 (1984) (Rehnquist, J., dissenting).

the nation neglected to meaningfully review its precedents and overrule pre-*Reed* cases such as *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1075-81 (9th Cir. 2006) (upholding speaker-based exemptions and event-based exemptions) and *Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 890-94 (9th Cir. 2007) (holding that billboard company lacked standing to facially challenge sign ordinance as content-based even though it had been denied permits).³

A party who believes a circuit court has misconstrued or failed to execute the mandate of this Court is not without a remedy; “either upon an application for a writ of mandamus or upon a new appeal, it is for this court to construe its mandate, and to act accordingly.” *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895). Summary procedures are appropriate because “[a] litigant who . . . has obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment of this Court.”

³ Although the Ninth Circuit carefully avoided reciting the content-based text of the San Diego ordinance in its opinion, it is clear from the district court opinion that the text of the ordinance identified various categories of signs based on the type of information they convey, then subjected each category to different restrictions. *Get Outdoors II, LLC v. City of San Diego*, 381 F. Supp. 2d 1250, 1252-54 (S.D. Cal. 2005), *e.g.*, *id.* at 1253 (prohibition of “ideological signs unrelated to any election but expressing ideological or political views”).

General Atomic Co. v. Felter, 436 U.S. 493, 497 (1978) (explaining appropriateness of writ procedure).

Here, this Court should either issue a GVR order again, or consider a summary *per curiam* reversal because of the egregious misapplication of settled law. *Cf., Wearry v. Cain*, 2016 U.S. LEXIS 1654, at *15 (2016) (*per curiam*) (summary disposition appropriate when “lower courts have egregiously misapplied settled law”). The fact that a lower court opinion is not published carries “no weight” in deciding whether or not to grant *certiorari* and issue a *per curiam* summary reversal. *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987) (*per curiam*).

I. FOLLOWING A GVR “FOR FURTHER CONSIDERATION IN LIGHT OF” SPECIFIED AUTHORITY, A LOWER FEDERAL COURT IS EXPECTED TO *DISCUSS* HOW SAID AUTHORITY DOES OR DOES NOT APPLY TO THE FACTS OF THE REMANDED CASE

As the former Chief Judge of the Ninth Circuit has lamented, “[t]he Supreme Court has previously admonished [the Ninth Circuit] for ignoring a grant, vacate and remand (GVR) order and ‘reinstating [our] judgment without seriously confronting the significance of the cases called to [our] attention.’” *Harris v. Amgen, Inc.*, 788 F.3d 916, 922-23 (9th Cir. 2015) (Judge Kozinski, dissenting with others from the denial of a petition for *en banc* review), citing *Cavazos v. Smith*, 132 S. Ct. 2, 7 (2011). This Court just

recently summarily reversed the Ninth Circuit in *Amgen* in a *per curiam* opinion. *Amgen Incorporated v. Harris*, 136 S. Ct. 758 (2016).

The GVR power is authorized by Congress. *Lawrence v. Chater*, 516 U.S. 163, 166 (1996) (*per curiam*), citing 28 U.S.C. § 2106. On the one hand, the power is used “sparingly” due to this Court’s “[r]espect for lower courts, the public interest in finality of judgments, and concern about [this Court’s] own expanding certiorari docket.” *Lawrence*, 516 U.S. at 173-74. On the other hand, “dry formalism should not sterilize procedural resources” and “a GVR order both promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it.” *Stutson v. United States*, 516 U.S. 193, 197-98 (1996) (*per curiam*).

As this Court’s docket has expanded, “the GVR order has, over the past 50 years, become an integral part of this Court’s practice. . . .” *Lawrence*, 516 U.S. at 166. The GVR procedure “conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court’s insight before [this Court] rule[s] on the merits, and alleviates the potential for unequal treatment that is inherent in [this Court’s] inability to grant plenary review of all pending cases raising similar issue.” *Id.* at 167. “[T]he GVR order can improve the fairness

and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential significance does not merit our plenary review.” *Id.* at 168.

Use of a GVR order is appropriate “[w]here intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation. . . .” *Lawrence*, 516 U.S. at 167, *Wellons*, 558 U.S. at 225, accord, *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2286 (2014) (Scalia, J., joined by Thomas, J., dissenting from denial of writ of *certiorari*).

In practice, this Court has issued GVR orders “in light of a wide range of developments” including the issuance of one of its own opinions. *Lawrence*, 516 U.S. at 167, citing *id.* at 180 (Scalia, J., dissenting). A GVR order may be issued where “the lower court’s order shows no sign of having applied” the newly issued opinion – even if the record discloses that the newly issued opinion was clearly brought to the lower court’s attention by counsel. *Id.*, 516 U.S. at 169-70.

Summary dispositions tend to be particularly good candidates for GVR orders. This Court has explained that due to the increasing prevalence of summary dispositions by the circuit courts, “it is important that the meaningful exercise of this Court’s

appellate powers not be precluded by uncertainty as to what the court below ‘*might . . . have relied on.*’” *Lawrence*, 516 U.S. at 170. Although ambiguous summary dispositions are less likely to be granted plenary review by this Court, the very nature of their pithiness makes them more likely candidates for a GVR order. *Ibid.* “A contrary approach would risk effectively immunizing summary dispositions by Courts of Appeals from [this Court’s] review, since it is rare that their basis for decision is entirely unambiguous.” *Stutson*, 516 U.S. at 196.

Indeed, even if a circuit court *expressly* states that it has considered and rejected an argument based upon a newly issued opinion, a GVR may be appropriate if there is a reasonable probability that the argument has been given, “at most, perfunctory consideration” due to the mistaken belief that the argument based upon a newly issued opinion was procedurally barred. *Wellons*, 558 U.S. at 222.

Here, there is a “reasonable probability” that the First Amendment issue only received “perfunctory consideration” due to the mistaken belief that the *Reed v. Town of Gilbert* argument was procedurally barred. After its terse recital that the district court’s analysis (performed *before* the issuance of *Reed*) nevertheless somehow “complies with” *Reed*, the Ninth Circuit stated: “Herson’s challenges to the restriction’s exemptions were waived when he failed to address the district court’s conclusion that these challenges fell outside the scope of the Third Amended Complaint.” The “waiver” argument is demonstrably false

as was brought to the Ninth Circuit's attention in Professor' Volokh's petition for rehearing (which is reprinted in the next section).

When this Court has recently decided a question of law, it has an obvious interest in seeing that the rule is followed in the lower courts. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("Judges of the inferior courts may voice their criticisms, but follow it they must."). However, as a practical matter this Court necessarily limits its merits docket "to a handful of opinions per justice" from the thousands of *certiorari* petitions it receives every Term. *Id.* at 1177 and n. 34. As a consequence, "keeping the law of the circuit consistent" and in conformity with this Court's precedents is by necessity one of the "paramount duties" of the circuit courts. *Id.* at 1178. A GVR order provides circuits the opportunity to conform circuit precedents to the newly announced rule.⁴

This Court also has an obvious interest in seeing *how* the circuit courts apply the new precedent. Too much brevity is not helpful. Without diminishing the important judicial function circuit courts perform in separating the cases that should be precedent from those that should not,⁵ it should go without saying

⁴ Of course, neither the law of the circuit, nor the law of the case, prevents a panel of the Ninth Circuit from following intervening controlling authority from this Court. *Gonzalez v. Arizona*, 677 F.3d 383, 389, n. 4 (9th Cir. 2012) (*en banc*).

⁵ See *Hart*, 266 F.3d at 1180.

that a GVR order from this Court is a strong indicator that an issue is important⁶ and warrants further discussion upon remand.

Although a simple statement by the lower court confirming that it did in fact consider the newly issued opinion arguably satisfies the aforementioned concern of this Court that a flagged issue was not duly considered, it does not satisfy another important articulated purpose of the GVR – a simple acknowledgment does not assist this Court “by procuring the benefit of the lower court’s insight before we rule on the merits.”⁷ *Wellons*, 558 U.S. at 225-26 quoting *Lawrence*, 516 U.S. at 167.

Thus, this Court has expressly rejected the notion that a court of appeals “should respond to our remand order with a ‘summary reissuance’ of essentially the same opinion. . . .” *Wellons*, 558 U.S. at 226. Here, this Court should re-emphasize and squarely hold that as a matter of federal practice,⁸ following

⁶ Supreme Court Rule 10 (“A petition for a writ of certiorari will be granted only for compelling reasons.”).

⁷ This Court sometimes declines granting *certiorari* on the merits “so it will have the benefit of a variety of views from the inferior courts before it chooses an approach to a legal problem.” *Hart*, 266 F.3d at 1173, citing *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) (“It is a sound exercise of discretion for the Court to allow [other courts] to serve as laboratories in which the issue receives further study before it is addressed by this Court.”).

⁸ *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950) (“Our supervisory power over the judgments of the lower

(Continued on following page)

the issuance of a GVR order “for further consideration in light of” specified authority, a lower federal court is expected to *discuss* how said authority does or does not apply to the facts of the remanded case.

II. THERE WAS NO PROCEDURAL BAR TO APPLYING *REED*

As ably explained by Professor Volokh in the petition for rehearing,⁹ the Ninth Circuit panel was demonstrably wrong in concluding that the *Reed* arguments were procedurally barred.

The January 22, 2016 panel decision rejected Herson’s argument that the Old Ordinance impermissibly discriminated based on the content of speech. “Herson’s challenges to the restriction’s exemptions,” the decision concluded, “were waived when he failed to address the district court’s conclusion that these challenges fell outside the scope of the Third Amended Complaint.” App. 2, Memorandum, p. 2 n. 1.

This, however, appears to rest on a misapprehension of the record stemming from the city’s argument

federal courts is a broad one.”), citing 28 U.S.C. § 2106, *see also Danforth v. Minnesota*, 552 U.S. 264, 289 (2008) (observing this Court has “ample authority to control the administration of justice in the federal courts” as opposed to state courts).

⁹ Much of Parts II and III of this brief is quoted virtually verbatim from the Ninth Circuit briefs of Professor Volokh. Quotation marks and edit brackets are omitted to improve readability.

in its supplemental brief, App. 95-99, Appellee's Supplemental Brief 7-10 – a misapprehension that Herson had no opportunity to correct, because the supplemental briefing order called only for simultaneous briefs with no opportunity for a reply brief, and because the Ninth Circuit declined to hear oral argument related to the supplemental briefs.

1. Even if the District Court had been correct to say that the Third Amended Complaint reflected only “a narrow challenge to . . . section 15.06.080(C) of the Old Ordinance,” App. 34 § 15.06.080(C) was itself unconstitutionally content-based, for the reasons given in Part III, pp. 27-40. Section 15.06.080(C) allowed signs up to 45 feet high, § 15.06.080(C), if they were “[m]ajor gateway area identification sign[s]” – signs in certain places containing names of major city centers, with no other content. (The City of Richmond apparently viewed the section as implicitly allowing even taller signs, *see* Part III, herein, pp. 36-40.) This argument was thus not waived, even in the District Court's view.

2. Moreover, the District Court erred in concluding that the Third Amended Complaint challenged only § 15.06.080(C) of the Old Ordinance. The Third Amended Complaint expressly also pointed to the Old Ordinance's § 15.06.060 exceptions from the size and height restrictions (*see* Part III, pp. 29-32), and argued that these exemptions also made the restrictions unconstitutionally content-based:

18. OLD CODE Section 15.06.080 sets forth the Richmond Parkway and freeway proximity regulations. Under OLD CODE Section 15.06.080C(1), political signs and many other signs containing noncommercial speech were not permitted in a 660 FOOT RESTRICTED AREA (without a variance), but certain signs containing commercial speech are permitted in a 660 FOOT RESTRICTED AREA. OLD CODE Section 15.06.080C(5) allowed certain signs containing commercial speech to be displayed in a 660 FOOT RESTRICTED AREA and oriented so as to be displayed to those traveling on the Richmond Parkway or a freeway. OLD CODE Section 15.06.080G(6) barred the display of political signs and other signs containing noncommercial speech to those traveling on a freeway. OLD CODE Section 15.06.080G placed certain limits on political speech that are not placed on any other speech, but Section 15.06.080G(6) exempts from the provisions of Section 15.06.080G those signs displayed by those licensed to erect or display outdoor advertising signs or billboards. *OLD CODE Section 15.06.060 provides that signs containing certain noncommercial speech, but not political speech, are exempted from Chapter 15.06 of the OLD CODE. . . .*

. . .

FIRST CLAIM

(42 U.S.C. Section 1983 – First Amendment as to Signs 1 through 4 and 6 through 13 – Damages)

20. Plaintiffs reallege Paragraphs 1 through 19, above.

21. RICHMOND'S regulation of signs as of June 26, 2009, within its 660 FOOT RESTRICTED AREA facially violated the First and Fourteenth Amendments to the United States Constitution by containing content-based restrictions that give greater protection to commercial speech than noncommercial speech, and by regulating noncommercial speech based upon content.

App. 60-63 (emphasis added).

Sections 15.06.060 and 15.06.080 contain the content-based exemptions that Herson's Supplemental Brief relied on, and that show that the Old Ordinance is unconstitutionally content-based. Indeed, § 15.06.060 is a short section consisting entirely of content-based exceptions, which (in the words of the Third Amended Complaint) "provide[] that signs containing certain noncommercial speech, but not political speech, are exempted." App. 61.

3. Herson argued in district court, in opposing the City's motion for summary judgment, that §§ 15.06.060 and 15.06.080 made the Old Ordinance unconstitutionally content-based. App. 64-73, Opposition to Defendant's Motion for Summary Judgment, pp. 7-12. The Appellants' Opening Brief in the Ninth Circuit continued this argument. Appellants' Opening Brief 37-41 (as to § 15.06.080), App. 44-48, 74-79 (as to § 15.06.060). When the City replied that the argument had been waived in the District Court, App. 80-81,

Appellee's Brief 37, Herson responded at length, App. 85-87, Appellants' Reply Brief 13-15. In particular, Herson noted that:

Herson's Third Amended Complaint alleges (App. 60-63, Third Amended Complaint, ¶ 19, p. 4, line 4):

Old Code § 15.06.060 provides that signs containing noncommercial speech, but not political speech, are exempted from chapter 15.06 of the Old Code. Accordingly Signs 1 through 13 were barred under the Old Code.

Not only did Herson allege that § 15.06.060 was content based and unconstitutional, Herson went even further and attached the relevant code sections to the complaint. The City's argument that Herson waived these arguments, or failed to preserve them below is without merit.

App. 87, Appellants' Reply Brief 15.

Though a party may not "raise a new issue in its reply brief," because "[a]n issue advanced only in reply provides the appellee no opportunity to meet the contention," *Image Technical Services, Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1356-57 (9th Cir. 1998) (citation and internal quotation marks omitted), here Herson was not raising a new issue – he was responding to an argument made by the City. As the Ninth Circuit has noted, when an issue is "first raised by the appellee's brief," it can be "met in the reply brief." *Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1332 (9th Cir. 1981), superseded as to

other matters, *PAE Gov't Services, Inc. v. MPRI, Inc.*, 514 F.3d 856, 859 n.3 (9th Cir. 2007). “Although we ordinarily decline to consider arguments raised for the first time in a reply brief, we may consider them if, as here, the appellee raised the issue in its brief,” *Central Delta Water Agency v. United States*, 306 F.3d 938, 952 n.10 (9th Cir. 2002) (quoting *United States v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992)), because, when “appellees raised the issue in their brief, we have the benefit of briefing from both parties on the issue.” *Id.*; see also *Rosenbaum v. City & County of S.F.*, 484 F.3d 1142, 1150 n.3 (9th Cir. 2007).

Herson thus did address the claim that the challenges to the content-based exceptions fell outside the scope of the Third Amended Complaint. Moreover, the Ninth Circuit’s October 21, 2014 decision in this case did not indicate any need to discuss this claim further.

A few additional points should also be made. First, the hyper-technical pleading argument ignores the Federal Rules of Civil Procedure which merely require a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. Rule 8(a) and *Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014) (*per curiam*) (citing cases rejecting heightened pleading requirement in civil rights cases). And Rule 8(f) command: “All pleadings shall be so construed as to do substantial justice.”

Second, the modern appellate process is designed as a funnel to narrow the scope of issues, and this

Court generally does not “open the whole can of worms” when issuing a GVR order. Of course, “when reviewing a judgment of a federal court, [this Court] has jurisdiction to consider an issue not raised below. . . .” *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984). But this Court’s rules of practice provide: “[A]ny objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called the Court’s attention in the brief in opposition.” Supreme Court Rule 15.2 and *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 306 (2010).

It is “indisputable” that circuit courts are “bound to carry the mandate of the upper court into execution” and cannot “consider the questions which the mandate laid at rest.” *Sprague v. Ticonic National Bank*, 307 U.S. 161, 167-68 (1939). Though the mandate does not extend to issues “neither before the Circuit Court of Appeals nor before this Court” unless “necessarily implied” this Court’s mandate “is controlling as to matters within its compass.” *Id.* at 168. From “its earliest days” to “later days” this Court has “consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court.” *Briggs v. Pennsylvania Railroad Co.*, 334 U.S. 304, 306 (1948).

Importantly, here the forfeiture argument was previously before this Court. In response to Petitioners’ content-based argument at pages 14 through 16 of the prior *certiorari* petition, Richmond raised the

forfeiture argument in its opposition, and Petitioners replied to the argument. App. 88-89 (opposition) and App. 90-94 (reply). Thus, the range and scope (*i.e.* “compass”) of the prior proceeding *expressly included* Richmond’s argument that the petition for *certiorari* should be denied because the arguments were forfeited below. Moreover, the granting of *certiorari* necessarily implies that this Court rejected the forfeiture argument because this Court is generally “reluctant” to exercise its discretion to consider an argument not properly raised in the federal courts below. *Berkemer*, 468 U.S. at 443.

The form of the mandate also indicates the forfeiture argument was rejected. The very narrow mandate in this case was typical of most GVR orders and merely remanded “for further consideration in light of *Reed v. Town of Gilbert*, 576 U.S. ____ (2015).” In contrast, when this Court seriously questions whether an issue has been procedurally forfeited, it knows how to preserve the issue in the remand order. *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 697-98 (2010) (“On remand, the Ninth Circuit may consider CLS’s pretext argument if, and to the extent, it is preserved.”). This Court also knows how to write a broad remand order without “hard edges.” (*Planned Parenthood v. Casey*, 510 U.S. 1309 (1994) (Souter, J., in chambers on application for stay) (remand for “proceedings consistent with this opinion, *including* consideration of the question of severability” signaled “that there might be something for the courts below to determine

beyond the severability”) (*italics added*), and *Quern v. Jordan*, 440 U.S. 332, 347, fn. 18 (1979) (“for further proceedings consistent with this opinion” signals leeway to consider other issues “not inconsistent with either the spirit or express terms of a decision”).

III. THE NINTH CIRCUIT HAS EGREGIOUSLY MISAPPLIED *REED* AND CREATED A CIRCUIT SPLIT BY NOT OVERRULING TWO OF ITS PRE-*REED* PRECEDENTS

As ably explained by Professor Volokh in the supplemental brief after remand, the Ninth Circuit panel egregiously misapplied settled law in concluding that the old Richmond billboard ordinance passes strict scrutiny under *Reed*.

In *Reed*, this Court overruled the Ninth Circuit’s test for what constitutes a content-neutral sign restriction. Before *Reed*, the Ninth Circuit decided whether sign restrictions are content-neutral by looking to the government’s purpose for the restriction, even when the restriction was facially content-based. But, under *Reed*, facially content-based restrictions are treated as content-based regardless of the government’s purpose.¹⁰

¹⁰ Though not stated in *Reed*, this rule is undoubtedly influenced by the long-recognized practical difficulties with, and aversion to, judicially assessing whether legislation was passed with illicit motives. *Fletcher v. Peck*, 10 U.S. (1 Cranch) 87, 130 (1810) (such assessment poses “much difficulty” and raises

(Continued on following page)

In its original decision in this case, *Herson v. City of Richmond*, the Ninth Circuit concluded that Richmond “had an independent, constitutionally valid reason for denying Herson’s applications” – “the content-neutral height and size restrictions of the Old Ordinance.” 585 Fed. Appx. 522, 523 (9th Cir. 2014). But this Court granted certiorari, vacated the decision, and remanded the case for reconsideration in light of the *Reed* opinion. See 136 S. Ct. 46 (2015). And there was good reason for this Court to do so: under the principles this Court announced in *Reed*, the panel analysis is no longer valid, because the height and size restrictions of the Old Ordinance are not content-neutral.

The Old Ordinance, which limited signs that could be displayed within 660 feet of a freeway, was content-based in at least three ways. First, it expressly excluded from its height and size restrictions various kinds of foreign and domestic governmental insignia; religious symbols; and patriotic, civic, and commemorative speech. Second, it allowed high and large “Major Gateway Area Identification Signs.” Third, in applying the Old Ordinance, the Richmond Planning Department endorsed several high and large signs containing commercial speech.

numerous practical questions for the judiciary to answer without any “clearly discerned” guiding principles) and *United States v. O’Brien*, 391 U.S. 367, 382-86 (1968) (collecting cases and discussing issue in the First Amendment context).

Any exclusion of Herson's proposed noncommercial speech based on its height and size thus constituted discrimination based on content, and requires the Old Ordinance to pass strict scrutiny. The Old Ordinance cannot survive that scrutiny.

Indeed, other circuits have recognized that an exclusion for foreign governmental, domestic governmental, or religious symbols renders a sign law content-based. In *Neighborhood Enterprises v. City of St. Louis*, the Eighth Circuit struck down a sign code that exempted any "[n]ational, state, religious, fraternal, professional and civic symbol[] or crest[], or . . . [a] device used to show time and subject matter of religious services." 644 F.3d 728, 737 (8th Cir. 2011) (quoting St. Louis City Rev. 6 Code § 26.68.020(17)(d) internal quotation marks omitted). The Eighth Circuit held that this exception made "the zoning code's definition of sign" "impermissibly content-based" because "the message conveyed determines whether the speech is subject to the restriction." *Id.* at 736 (citation and internal quotation marks omitted). "Put another way, to determine whether a particular object . . . is . . . subject to the regulations, . . . one must look at the *content* of the object." *Id.* (emphasis in original). Likewise, in *Solantic, LLC v. City of Neptune Beach*, a case cited with approval in *Reed*, the Eleventh Circuit held that an exemption for flags and insignia of a "government, religious, charitable, fraternal, or other organization" rendered a sign code content-based. 410 F.3d 1250, 1264 (11th Cir. 2005).

The Fourth Circuit did hold a similar ordinance to be content-neutral despite such an exemption, using an analysis much like that applied in *Reed* by the Ninth Circuit. *Central Radio Co. v. City of Norfolk*, 776 F.3d 229, 235-37 (4th Cir. 2015). But this Court then granted, vacated, and remanded *Central Radio* for further consideration in light of this Court's *Reed* decision. 135 S. Ct. 2893 (2015). The Fourth Circuit just recently ruled "the former sign code fails strict scrutiny, and therefore was unconstitutional under the First Amendment." *Central Radio Co.*, 811 F.3d 625, 2016 U.S. App. LEXIS 1498, at *13-19.

This creates a circuit split with the Ninth Circuit. Although Ninth Circuit opinions of the later part of the last century easily applied an analytical framework similar to *Reed*,¹¹ in this century the Ninth

¹¹ *National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988) (essentially utilizing "officer must read it test" and recognizing exemptions for memorial tablets or plaques, real estate and construction signs, open house signs, and traffic and safety signs are content-based and subject to strict scrutiny); *Desert Outdoor Adver. v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996) (utilizing "officer must read it test" and recognizing exemptions for official notices, directional, warning, or information structures, public utility signs, and structures erected near a city or county boundary which contain the name of the city, county, or civic, fraternal, or religious organizations located therein were content-based and subject to strict scrutiny); and *Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1998) (utilizing "officer must read it test" and recognizing exemptions for "'open house' real estate signs and safety, traffic, and public informational signs" were content-based and subject to strict scrutiny).

Circuit strayed.¹² Although the GVR order in this case provided the Ninth Circuit the opportunity to reexamine its sign precedents in light of *Reed* and conform the law of the circuit to *Reed*, to this day the Ninth Circuit has not yet overruled *G.K. Ltd. Travel*, 436 F.3d at 1075-81 (upholding speaker-based exemptions and event-based exemptions) or *Get Outdoors II*, 506 F.3d at 890-94 (discussed below).¹³

A. The Old Ordinance, Including Its Height and Size Restriction, Was Content-Based

1. This Court's Decision in *Reed* Overturned Ninth Circuit Law

In *Reed v. Town of Gilbert*, 707 F.3d 1057 (9th Cir. 2013), the Ninth Circuit concluded that even

¹² The Ninth Circuit case this Court recently reversed in *Reed* discussed the Ninth Circuit's "evolution." *Reed v. Town of Gilbert*, 707 F.3d 1057, 1062-63 (9th Cir. 2013), citing *Reed v. Town of Gilbert*, 587 F.3d 966, 976 (9th Cir. 2009) and *G.K. Limited Travel*, 436 F.3d 1064.

¹³ As discussed later in this brief, *Get Outdoors II* egregiously misapplied this Court's precedents regarding standing. It thus never engaged in a facial analysis of the ordinance being challenged. *Id.* at 892 ("Get Outdoors II has standing to challenge only those provisions that applied to it."). As noted above, the text of the San Diego ordinance identified various categories of signs based on the type of information they convey, then subjected each category to different restrictions. *Get Outdoors II*, 381 F. Supp. 2d at 1252-54, *e.g.*, *id.* at 1253 (prohibition of "ideological signs unrelated to any election but expressing ideological or political views").

facially content-based sign restrictions should be viewed as content-neutral when the government “did not adopt its regulation of speech because it disagreed with the message conveyed.” *Id.* at 1071. Because of this, the *Reed* panel concluded that differential size and duration limits for “Political Signs,” “Ideological Signs,” and “Temporary Directional Signs” were not content-based. *Id.* at 1061-63.

But this Court reversed. *Reed*, 135 S. Ct. at 2233. This Court held that, when a sign law “is content based on its face” – *i.e.*, when the application of the law turns “on the communicative content of the sign” – the law cannot be treated as content-neutral. *Id.* at 2227. In that situation, there is “no need to consider the government’s justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.” *Id.*

The “commonsense” test for determining whether a law is content-based “requires a court to consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys” including both “obvious” legal distinctions that are based upon the subject matter, topic, and idea of a message, as well as “more subtle” legal distinctions that are based upon the “function or purpose” of a message. *Reed*, 135 S. Ct. at 2227.

And, as this Court held in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), a speech restriction is “content based if it require[s] enforcement authorities to examine the content of the message that is conveyed

to determine whether a violation has occurred.” *Id.* at 2531 (citations and internal quotation marks omitted).

Under the Supreme Court’s decisions in *Reed* and *McCullen*, the Old Ordinance’s size and height restrictions were content-based. What a sign said determined whether the restrictions applied, in at least three ways. The exceptions for foreign and domestic governmental symbols, religious symbols, and certain other speech plainly turned on a sign’s message. The express favorable treatment for “major gateway area identification” signs was likewise content-based; signs that identified something else did not qualify. Finally, in actual application the Richmond Planning Department construed the Old Ordinance as allowing some gateway signs that exceeded even the size limits apparently set forth for such signs.

2. The Exceptions for Foreign and Domestic Governmental Insignia, Religious Symbols, and Patriotic, Civic, and Commemorative Speech Render the Old Ordinance Content-Based

The Old Ordinance completely exempted certain signs from the height and area restrictions, based on their content. Section 15.06.060 expressly stated that the sign code “shall not apply to the placement of,” among other things:

- “Flags, emblems, insignias and posters of any nation, state, international organization, political subdivision or other governmental agency”;
- “unilluminated, nonverbal religious symbols attached to a building which is a place of religious worship”;
- “temporary displays of patriotic, religious, charitable or civic character”; and
- “[c]ommemorative signs” “placed by historical societies.”

§§ 15.06.060(D)-(E); *see* App. 74-79, Appellants’ Opening Brief in the Ninth Circuit 44-48 (arguing that these exemptions rendered the Old Ordinance content-based). Thus, a property owner could freely display a high, large poster of any governmental organization (foreign or domestic), or a giant temporary patriotic or charitable display. But signs containing other messages were forbidden. And the restrictions were based on the content of the speech, not the identity of the speaker. Any Richmond property owner could, for instance, display governmental emblems or flags – both cloth flags and posters depicting flags – whether or not the property owner was itself a governmental entity.

In *Reed*, the Supreme Court held that the distinction between the Temporary Event Signs, Political Signs, and Ideological Signs in the law under review was content-based “on its face.” 135 S. Ct. at 2227-31. The reasoning of *Reed* applies equally to the

distinction between the exempted signs and the covered signs in this case. Whether a sign constitutes the insignia or poster of some governmental organization (foreign or domestic) turns – to borrow the language from this Court’s *Reed* decision – “on the communicative content of the sign.” *Reed*, 135 S. Ct. at 2227. Likewise, whether something is a religious symbol, a “display[] of patriotic, religious, charitable or civic character,” or a “[c]ommemorative sign” turns on what the sign communicates.

As in *Reed*, Herson’s and East Bay Outdoors’ proposed political signs would have been “treated differently from signs conveying other types of ideas.” 135 S. Ct. at 2227. And deciding whether any proposed sign would have fit within the §§ 15.06.060(D)-(E) exceptions would have “required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred.” *McCullen*, 134 S. Ct. at 2531 (citations and internal quotation marks omitted).

To be sure, Herson and East Bay Outdoor do not argue that their signs would have been covered by the §§ 15.06.060(D)-(E) exemptions. Rather, as in *Reed*, they argue that §§ 15.06.060(D)-(E) treated speech with certain content better than the speech they wanted to display, and that this made the statutory scheme content-based and thus unconstitutional. Herson and East Bay Outdoor therefore have standing to challenge the constitutionality of the entire statutory scheme, because they claim that others “were exempt from the operation of a [city ordinance]

adversely affecting” them. *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987).

The Ninth Circuit’s pre-*Reed* decision in *Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 893 (9th Cir. 2007), did state that “[s]ize and height restrictions on billboards are evaluated as content-neutral time, place and manner regulations.” But, especially after *Reed*, this must simply mean that size and height restrictions are not seen as inherently content-based, and may be content-neutral if they apply regardless of the billboards’ content. When a city imposes different restrictions on size and height depending on what a sign says, that action is indeed content-based, as this Court’s decision in *Reed* makes clear. *Reed*, 135 S. Ct. at 2224-25, 2230.

Moreover, the standing analysis in *Get Outdoors II* is an egregious misapplication of settled law that cannot be reconciled with this Court’s precedents. *Get Outdoors II* limits its First Amendment analysis based upon permit applications in derogation of this Court’s admonition that “[t]he Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands.” *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969). It fails to recognize that the overbreadth doctrine is an “exception to the usual rules governing standing.” *Bigelow v. Virginia*, 421 U.S. 809, 815-16 (1975). This Court has already held that strict notions of “redressability” (*i.e.*, “whether the plaintiff has asserted an injury that can be

redressed by a favorable decision”) are not appropriate in First Amendment cases because “it would effectively insulate underinclusive statutes from constitutional challenge.” *Ragland*, 481 U.S. at 227 expressly distinguishing *Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). Nevertheless, *Get Outdoors II* completely overlooks the distinction this Court made in *Ragland*. 506 F.3d at 891-93, citing *Valley Forge Christian College*, 454 U.S. at 472.

3. The Exception for “[M]ajor Gateway Area Identification Signs” Renders the Old Ordinance Content-Based

The Old Ordinance allowed signs up to 45 feet high, § 15.06.080(C)(6)(i)(i), if they were “[m]ajor gateway area identification sign[s]” – signs in certain places “announcing the location of major city centers,” with “wordage” that consisted of “only the name of the center.” § 15.06.050(A)(1)(h). Appellants’ Opening Brief in the Ninth Circuit, pp. 37-41 (arguing that this exemption renders the old ordinance content-based). Forty-five feet is taller than some of the signs that Herson and East Bay Outdoor wanted to put up.¹⁴ App. 82-84, SER 12, ¶ 7.

¹⁴ Though a purely legal argument by counsel does not constitute a judicial admission unless made in the complaint, answer, or a stipulation, *Amgen Inc. v. Conn. Ret. Plans & Trust*
(Continued on following page)

Whether a sign could be up to 45 feet high under the Old Ordinance thus likewise turned “on the communicative content of the sign” (whether it “announc[ed] the location of [a] major city center[]” and consisted of “only the name of the center”). *Reed*, 135 S. Ct. at 2227. And it “required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred.” *McCullen*, 134 S. Ct. at 2531 (citations and internal quotation marks omitted). Thus, the exception for major gateway area identification signs further shows that the Old Ordinance was content-based.

Major gateway area identification signs could have an area of 100 square feet per “sign face.” § 15.06.080(C)(6)(i)(iii). And the Old Ordinance had no limitation on the number of “faces” a sign can have, and indeed contemplated that a sign could have “multiple sides or faces,” § 15.06.050(A)(4)(a). The 100 square foot per sign face area overrides the statement in § 15.06.080(C)(2) that: “One (1) square foot of sign area for every one linear foot of street frontage or a sign of 20 square feet, whichever is more, shall be allowed.” The introductory paragraph

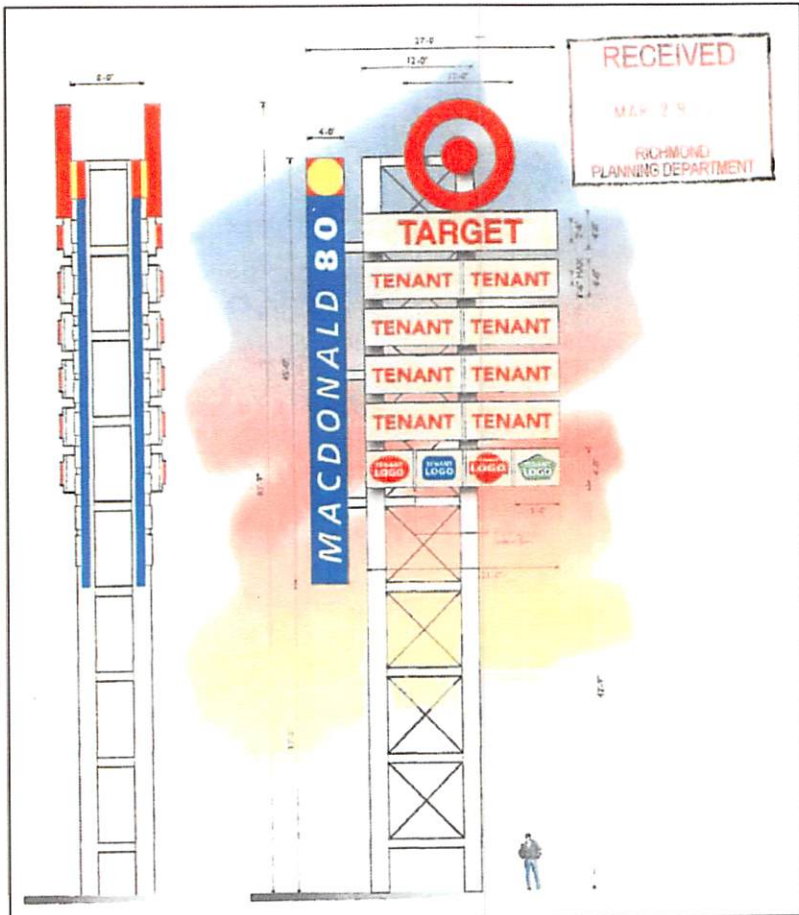
Funds, 133 S. Ct. 1184, 1197, n. 6 (2013), it is nevertheless telling to note that up until this Court rendered its decision in *Reed*, the City of Richmond agreed the “Major Gateway sign category” was “not meaningfully different from the category of ‘Temporary Directional Signs Relating to a Qualifying Event’ that [the Ninth Circuit] upheld as content neutral in *Reed v. Town of Gilbert*, 587 F.3d 966, 976-78 (9th Cir. 2009).” App. 81, Appellee’s Brief in the Ninth Circuit, pp. 25-26.

of § 15.06.080(C)(6) expressly states that: “In addition to the local standards described above, the following size standards shall apply by sign type,” and then § 15.06.080(C)(6)(i)(iii) expressly sets forth the one hundred feet per sign face standard for major gateway area identification signs.

Nor can the exception for major gateway area identification signs be dismissed as merely speaker-based rather than content-neutral. “Because [s]peech restrictions based on the identity of the speaker are all too often simply a means to control content,” “laws favoring some speakers over others demand strict scrutiny when the legislature’s speaker preference reflects a content preference.” *Reed*, 135 S. Ct. at 2230 (citations and internal quotation marks omitted). And the major gateway area identification sign exception reflects a content preference for statements announcing the names of local businesses. The signs may only include a certain kind of content (business names), presumably because Richmond views the display of such content as especially good for commerce.

4. The Richmond Planning Department's Endorsement of Many Large Gateway Signs Renders the Old Ordinance Content-Based

The record also suggests that the Richmond Planning Department had indeed interpreted the Old Ordinance as allowing many signs that were 70 feet or taller, and had large display areas, apparently under the rubric of major gateway area identification signs. *See, e.g.*, 3 ER 424, 510. Consider, for instance, the following sign, which was over 80 feet tall, which was endorsed by the Richmond Planning Department, and which was indeed erected, 3 ER 422-433; 2 ER 332 (declaration of Jeffrey Herson):



(McDonald 80 Shopping Center – 83 feet, nine inches tall; approved by Richmond Planning).

Or consider the following sign, which was over 110 feet total, was likewise endorsed by the Richmond Planning Department, 3 ER 503-11, and which was likewise erected, 2 ER 331 (declaration of Jeffrey Herson):

(Hilltop Shopping Center – 112 feet tall, including a 558-square foot video board; approved by Richmond Planning).

The record reveals other examples, such as the Kaiser Anniversary Signs, one of which was 400 square feet in area, 3 ER 399-407, and the Pacific East Mall sign, 70 feet tall with a 266-square-foot video board, 4 ER 789-98; 2 ER 332 (declaration of Jeffrey Herson). The Planning Department's endorsement of excluding all these signs from the operation of the Old Ordinance – without any articulable content-neutral justification for the exclusion – rendered the Old Ordinance content-based, even setting aside the expressly content-based exceptions.

The Ninth Circuit's decision in *Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011), offers a helpful analogy. In *Hoye*, the Ninth Circuit concluded that an Oakland ordinance limiting speech outside medical facilities was facially content-neutral. *Id.* at 849. But the Ninth Circuit nonetheless held that “a policy of enforcing the Ordinance based on the content of speech” – not enforcing the ordinance against certain pro-abortion speech while enforcing it against anti-abortion speech – rendered the ordinance unconstitutional “content-discriminatory.” *Id.* at 856. And this reflects this Court's statement that “[g]ranting waivers to favored speakers” “would of course be unconstitutional.” *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002).

Likewise, in this case, the city had a policy of excluding certain signs from the Old Ordinance in a “content-discriminatory” way. The commercial signs shown above were allowed even though they were

high and large. Herson's and East Bay Outdoors' proposed political signs were rejected.

To be sure, the discrimination in *Hoye* appeared to be viewpoint-based and not just content-based. But this Court stressed in *Reed* that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." 135 S. Ct. at 2230 (citation omitted).

In particular, sign ordinances discriminating in favor of commercial speech and against political speech are content-based and presumptively unconstitutional. "[A]n ordinance is invalid if it imposes greater restrictions on noncommercial than on commercial billboards." *National Advertising Co.*, 861 F.2d at 248. "Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981) (plurality op.).

B. The Old Ordinance Cannot Pass Strict Scrutiny

Because the Old Ordinance is content-based, it is unconstitutional unless it passes strict scrutiny. *Reed*, 135 S. Ct. at 2231. And, like the ordinance in *Reed*, the Old Ordinance cannot pass strict scrutiny.

Even if there are compelling government interests in aesthetics or in traffic safety, the content-based exceptions to the ordinance are not narrowly tailored to those compelling interests. Richmond “has offered no reason to believe” that the forbidden large signs, including Herson’s and East Bay Outdoors’ proposed signs, would have “pose[d] a greater threat to safety” than the permitted signs would have. *Id.* at 2232. Likewise, Herson’s and East Bay Outdoors’ proposed signs would have been “no greater an eyesore,” *id.* at 2231 (citation omitted), than the signs that Richmond allows. The Old Ordinance is therefore unconstitutional both as applied to Herson’s and East Bay Outdoors’ proposed signs, and on its face. See *Massachusetts v. Oakes*, 491 U.S. 576, 585-88 (1989) (Scalia, J., writing for five Justices) (concluding that even a repealed law can be subject to a facial challenge, in that case an overbreadth challenge).

After this Court’s decisions in *Reed* and *McCullen*, it is no longer correct to say that: “Because Herson’s proposed signs violated the content-neutral height and size restrictions of the Old Ordinance, the City had an independent, constitutionally valid reason for denying Herson’s applications.” *Herson*, 585 Fed. Appx. at 523. Rather, the City’s height-and-size justification for rejecting Herson’s signs was itself constitutionally suspect, because it was based on content-based height and size rules. The Old Ordinance as a whole was therefore content-based,

and has to be evaluated under strict scrutiny, which the Old Ordinance cannot pass.

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CONCLUSION

For the reasons stated above, this Court should grant this petition for a writ of *certiorari* to the Ninth Circuit. In so doing, this Court should seriously consider either issuing another order to vacate and remand for reconsideration in light of *Reed*, or (more preferably) summarily reversing the Ninth Circuit and remanding with instructions to consider the issue of remedies.

Respectfully submitted,

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