NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Pastor Clyde Reed; Good News Presbyterian Church, Plaintiffs, vs. Town of Gilbert; Adam Adams, in his official capacity as Code Compliance Manager, Defendants.	No. CV 07-522-PHX-SRB **ORDER**

At issue are Plaintiffs Pastor Clyde Reed and Good News Presbyterian Church's Motion for Summary Judgment ("Pls.' MSJ") (Doc. 100) and Defendants the Town of Gilbert ("the Town") and Adam Adams' Cross-Motion for Summary Judgment ("Defs.' MSJ") (Doc. 97). The Court also resolves Defendants' Motion for Leave to File Objection to Admission of Evidence ("Defs.' Objection") (Doc. 111) at this time.

I. BACKGROUND

The facts of this case were set out in this Court's Order of September 30, 2008 (the "PI Order"), in which the Court denied Plaintiffs' Second Motion for Preliminary Injunction. (*See* Doc. 43, PI Order at 1-7.) The pertinent details are summarized here.

A. Factual and Procedural History

Plaintiff Clyde Reed is the Pastor of Plaintiff Good News Community Church ("Good News").[1] (Pls.' Statement of Undisputed Facts ("PSOF") ¶ 8.) For approximately five years prior to the filing of Plaintiffs' Complaint in March 2007, Good News met at Coronado Elementary School in Gilbert, Arizona. (*Id.* ¶ 22.) Good News presently rents space at an elementary school in Chandler, Arizona, which borders Gilbert, Arizona, for its weekly services. (DSOF ¶¶ 3, 5; PSOF ¶ 23.) Good News has about 25-30 adult members, as well as 4-10 children. (DSOF ¶ 4.) As part of their religious beliefs, members of Good News "reach out to the community to meet together on a regular basis." (PSOF ¶¶ 12-15.)

"A primary way in which the community may learn about Plaintiffs' services is through the signs that are placed announcing the time and location of the services." (PSOF ¶ 18.) "For a time, the Church was placing about 17 signs in the areas surrounding" the meeting place. (*Id.* ¶ 24.) On September 17, 2005, Good News received an advisory notice from the Town's Code Compliance Department, stating that Good News was in violation of § 4.402(P) of the Town's Sign Code because the signs were displayed outside the statutorily-limited time period of two hours before, during, and one hour after the advertised event. (*Id.* ¶ 26.) On January 8, 2008, the Town passed amendments to its Sign Code.[2] (Joint Statement of Facts in Supp. of Cross-Mots. for Summ. J. ("JSOF") ¶ 2.) Plaintiffs subsequently filed a First Amended Verified Complaint, in which they allege that the amended Sign Code, in particular § 4.402(P), still violates their rights, as guaranteed by the United States and Arizona Constitutions and the Arizona Free Exercise of Religion Act ("FERA").[3] (*See* Doc.

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[1] Mr. Reed testified in his deposition that the name of the church has "vacillated" between Good News Presbyterian Church and Good News Community Church. (Defs.' Separate Statement of Facts in Supp. of Defs.' MSJ ("DSOF"), Ex. A, Dep. of Clyde Reed 5:10-16.) Although the electronic docket for this case uses Good News Presbyterian Church, Plaintiffs in their briefing refer to the church as Good News Community Church, and the Court therefore uses "Community" rather than "Presbyterian."

[2] All further references in this Order to the Sign Code are to the amended Sign Code.

[3] The parties refer to FERA as Arizona's "Religious Freedom Restoration Act."

32, 1st Am. Verified Compl. ¶¶ 83-138.)

On March 24, 2008, the Court heard oral argument on Plaintiffs' Second Motion for Preliminary Injunction. In the PI Order, which was filed on September 30, 2008, the Court denied preliminary injunctive relief, finding that Plaintiffs had not demonstrated a likelihood of success on the merits of their claims. (PI Order at 16-17.) Plaintiffs appealed the Court's decision regarding preliminary injunctive relief to the Ninth Circuit Court of Appeals, which in turn issued a decision filed on December 14, 2009. *See Reed v. Town of Gilbert, Ariz.*, 587 F.3d 966 (9th Cir. 2009). The Court of Appeals largely affirmed this Court's conclusions in the PI Order. *Id.* at 970-71. However, the Court of Appeals remanded this matter for consideration of one issue: whether the Sign Code "unfairly discriminates among forms of noncommercial speech." *Id.* at 971. At a status conference held after the mandate of the Court of Appeals issued, the parties stated that their intention was to resolve all remaining issues on summary judgment, rather than renewing a motion for a preliminary injunction or saving some issues for trial. (*See* Status Conference Hr'g Tr. 3:15-5:2, Jan. 11, 2010.)[4] Therefore, this Order is fully case dispositive. The Court heard oral argument on the parties' Cross-Motions for Summary Judgment on November 22, 2010. (*See* Doc. 116, Minute Entry.)

B. The Sign Code

The Town of Gilbert Land Development Code, Division 4, General Regulations, Article 4.4, Sign Regulations, controls the posting of signs within the Town of Gilbert. (JSOF, Ex. 1, Sign Code (henceforth, the "Sign Code").) Section 4.401(A) outlines the purposes of the Sign Code, namely, to "assure proper and efficient expression through visual communications involving signs compatible with the character and environment of the Town; to eliminate confusing, distracting, and unsafe signs; and to enhance the visual environment of the Town of Gilbert." Section 4.401(A) also lists the reasons why Defendants believe that

[4] The parties again confirmed at oral argument on these Motions that there were no issues for trial and that the case was to be decided on the Cross-Motions for Summary Judgment. (*See* Motion Hr'g Tr. 3:15-20, 26:23-27-2, Nov. 22, 2010.)

the regulation of signs is necessary and in the public interest.[5]

Under § 4.402(A), no person may "construct, install, attach, place, paint, alter, relocate, or otherwise maintain any sign in the Town without first obtaining a sign permit" unless the sign is one exempted under § 4.402(D). Section 4.402(D) lists nineteen different exceptions: types of signs that are allowed without a permit. These include, among others, § 4.402(P), "Temporary Directional Signs Relating to a Qualifying Event; " ("Qualifying Event Signs") § 4.402(I), "Political Signs;" and § 4.402(J), "Ideological Signs." (*See* Sign Code at 2-3.)

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[5] Section 4.401(A) provides:

> The regulation of signs within the Town of Gilbert is necessary and in the public interest for the following reasons:
>
> 1. To promote and aid the public and private sectors in the identification, location, and advertisement of goods and services.
> 2. To preserve the beauty and the unique character of the Town of Gilbert and to protect the Town against visual blight.
> 3. To protect property values within the Town of Gilbert by assuring the compatibility of surrounding land uses.
> 4. To promote general safety and protect the general public from damage or injury caused by, or partially attributed to, the distractions, hazards, and obstructions which result from improperly designed or located signs.
> 5. To promote the general welfare and to provide a pleasing environmental setting and community appearance which are vital to the continued economic development of the Town.
> 6. To make signs compatible with overall Town design objectives which are important in attracting new residents and business to the community.
> 7. To make signs readable to the user in a clear, unambiguous, and concise manner.
> 8. To ensure signs are clear and compatible with the planned character of the adjacent architecture and neighborhoods, and to provide the essential identity of, and direction to facilities in the community.

Section 4.402(P), concerning Qualifying Event Signs, provides, in relevant part:

> Temporary Directional Signs Relating to a Qualifying Event shall be permitted subject to the following regulations:
>
> 1. *Size*. Signs shall be no greater than 6 feet in height and 6 square feet in area.
>
> 2. *Number*. No more than 4 signs shall be displayed on a single property at any one time.
>
> 3. *Display*. Signs shall only be displayed up to 12 hours before, during, and 1 hour after the qualifying event ends. The person who installed the signs shall be responsible for removal. If the person installing the signs is unknown, the property owner shall be responsible.
>
> 4. *Location*. Temporary Directional Signs Relating to a Qualifying Event may be located off-site and shall be placed at grade level. Signs shall be placed only with the permission of the owner of the property on which they are placed.
>
> 5. *Prohibited Locations*. Temporary Directional Signs Relating to a Qualifying Event shall not be located:
>
> a. In the public right-of-way.
>
> b. On fences, boulders, planters, other signs, vehicles, utility facilities, or any structure.

The Sign Code's Glossary of General Terms defines "Temporary Directional Signs Relating to a Qualifying Event" as "a temporary sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event'" and a "Qualifying Event" as "any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." (JSOF, Ex. B at 23). A "Political Sign" is defined as "[a] temporary sign which supports candidates for office or urges action on any other matter on the ballot of primary, general and special elections relating to any national, state or local election." (*Id.* at 21-22.) An "Ideological Sign" is "[a] sign communicating a message or ideas for non-commercial purposes that is not a construction sign, directional sign, temporary directional sign relating to a qualifying event, political sign, garage sale sign, or a sign owned or required by a governmental agency." (*Id.* at 22.)

Plaintiffs also highlight another type of sign: "Homeowners Association Facilities

Temporary Signs," ("HOA Temporary Event Signs") governed by § 4.406(C)(4). Section 4.406(C)(4), provides, in pertinent part:

> Temporary Signs for *Homeowners Association Facilities* shall comply with the following regulations:
>
> a. Applicability. Banners and Directional Signs for *Homeowners Association Facilities* are permitted that display information concerning seasonal or temporary events occurring in the development.
>
> b. Sign Area and Location. A maximum of 80 square feet of sign area is permitted within the limits of the residential community.
>
> c. Installation and Removal. Signs shall be installed no earlier than 30 days prior to the date of an event and shall be removed within 48 hours of completion of the event.
>
> . . .
>
> e. Placement. The regulations of Section 4.402: General Sign Regulations and Section 4.403.C: Placement of Signs shall apply.

II. LEGAL STANDARDS AND ANALYSIS

A. Summary Judgment Standard

The standard for summary judgment is set forth in Rule 56(c) of the Federal Rules of Civil Procedure. Under Rule 56, summary judgment is properly granted when: (1) no genuine issues of material fact remain; and (2) after viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288-89 (9th Cir. 1987). A fact is "material" when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" of material fact arises if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*.

In considering a motion for summary judgment, the court must regard as true the non-moving party's evidence, if it is supported by affidavits or other evidentiary material. *Celotex*, 477 U.S. at 324; *Eisenberg*, 815 F.2d at 1289. However, the non-moving party may not merely rest on its pleadings; it must produce some significant probative evidence tending to contradict the moving party's allegations, thereby creating a material question of fact.

Anderson, 477 U.S. at 256-57 (holding that the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment); *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968).

B. Free Speech

Both Plaintiffs and Defendants move for summary judgment on Plaintiffs' claim that the Sign Code violates the First Amendment (Count 1). (Pls.' MSJ at 2; Defs.' MSJ at 7.) This Court addressed all of the parties' arguments, save one, in the PI Order, as did the Ninth Circuit Court of Appeals. (*See* PI Order at 8-15); *Reed*, 587 F.3d at 973-83. The Court now adopts the reasoning set forth in the PI Order and the opinion of the Ninth Circuit Court of Appeals as regards the content-neutrality of the Town's sign code and whether the treatment of noncommercial speech versus commercial speech amounts to a First Amendment violation. For the following reasons, the Court finds that Defendants are entitled to summary judgment on Plaintiffs' First Amendment challenge to the Sign Code.

"Facial constitutional challenges come in two varieties: First a plaintiff seeking to vindicate his own constitutional rights may argue that an ordinance 'is unconstitutionally vague or . . . impermissibly restricts a protected activity.'" *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1033 (9th Cir. 2006) (quoting *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998)). In this type of challenge, "[p]laintiffs may seek directly on their own behalf the facial invalidation of overly broad statutes that 'create an unacceptable risk of the suppression of ideas.'" *Nunez v. City of San Diego*, 114 F.3d 935, 949 (9th Cir. 1997) (quoting *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 965 n.13 (1984) (internal quotation and citation omitted)). "Second, 'an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court.'" *Santa Monica Food Not Bombs*, 450 F.3d 1022 at 1033 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)). The first kind of challenge, which is what Plaintiffs assert here, is frequently paired with the more common as-applied challenge, wherein a plaintiff argues that a law is unconstitutional as applied to his or her own speech or conduct. *See id.* at 1034. In reviewing

the PI Order, the Ninth Circuit Court of Appeals concluded that "Good News . . . has not demonstrated that its facial challenge to § 4.402(P) warrants separate review." *Reed*, 587 F.3d at 974. Indeed, nothing in the record presently before the Court "'indicat[es] that the ordinance will have any different impact on any third parties' interest in free speech than it has on [Good News.]'" *Id.* (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)). The Court therefore analyzes the concrete case at issue here: "whether § 4.402(P) is unconstitutional as applied to Good News." *Id.*

Regulation of speech in a traditional public forum "is subject to the highest scrutiny." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Public streets and sidewalks are "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988); *see also Madsen v. Women's Health Ctr.*, 512 U.S. 753, 764 (1994) (describing street, sidewalk, and right-of-way surrounding a clinic as a traditional public forum). The appropriate level of scrutiny depends on whether the ban on speech is tied to content of the message. *See Frisby*, 487 U.S. at 481.

"Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). A content-based restriction applied to speech in a "public forum[]" is only permissible if it "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)). However, the government may enforce content neutral restrictions on the time, place, and manner of otherwise protected speech. *Rosenbaum v. City & Cnty. of S.F.*, 484 F.3d 1142, 1158 (9th Cir. 2007) (citing *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 907 (9th Cir. 2007)).To enforce such a regulation, the government must show that the provision is "content neutral, [is] narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication." *Perry Educ. Ass'n*, 460 U.S. at 45 (citations omitted). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."

Ward v. Rock Against Racism, 491 U.S. 781, 797 (1989).

1. Content Neutrality and Intermediate Scrutiny

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. The Supreme Court held in *Ward* that the government's purpose in implementing the law "is the controlling consideration," and, as stated above, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral." *Id.* Therefore, "[g]overnment regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Id.* (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

In the PI Order, this Court preliminarily found that § 4.402(P) was content neutral. (PI Order at 11.) The Court of Appeals concurred and noted, "[O]ur focus should be on determining whether the ordinance targets certain content; whether the ordinance or exemption is based on identification of a speaker or event instead of on content; and whether an enforcement officer would need to distinguish content to determine applicability of the ordinance." *Reed*, 587 F.3d at 976-79. The Court of Appeals rejected Plaintiffs' expansive interpretation of the "officer must read it test," concluding that a cursory examination of a sign to learn who is speaking and the time of the event "is not akin to an officer synthesizing the expressive content of the sign." *Id.* at 978 (citations omitted).

For the reasons outlined in the PI Order and in *Reed*, the Court now finds that § 4.402(P) is a content-neutral regulation of speech that seeks to identify who is speaking and what event is occurring and does not discriminate on the basis of content. Therefore, it is subject to intermediate scrutiny, and the Court must "determine whether the [c]ode is narrowly tailored to achieve significant government interests and leaves open ample alternative channels for communication." *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1079 (9th Cir. 2006).

2. Time, Place, and Manner Analysis

For the reasons outlined in both the PI Order and *Reed*, the Court finds that § 4.402(P) is narrowly tailored to serve a significant government interest. The Town's asserted interests, namely

- Establishing comprehensive sign regulations that are necessary and in the public interest;
- Promoting effective means of communications;
- Promoting public order by allowing charitable, religious, educational, community service, and other organizations to provide announcement of and directions to events;
- Promoting vehicular and pedestrian safety;
- Promoting the general welfare; and
- Enhancing the Town's community aesthetics

are significant ones. (Defs.' MSJ at 12); *see also G.K. Ltd.*, 436 F.3d at 1079 ("[T]he City's interests in regulating speech to preserve aesthetics and protect traffic and traveler safety are significant."); *One World One Family Now v. City & Cnty. of Honolulu*, 76 F.3d 1009, 1013 (9th Cir. 1996) ("Cities have a substantial interest in protecting the aesthetic appearance of their communities by 'avoiding visual clutter' . . . [and] assuring safe and convenient circulation on their streets." (quoting *Vincent*, 466 U.S. at 806-07)); *Vincent*, 466 U.S. at 805 ("It is well settled that [a municipality] may legitimately exercise its police powers to advance esthetic values."); *Metromedia v. City of San Diego*, 453 U.S. 490, 507-508 (1981) ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further–traffic safety and the appearance of the city–are substantial governmental goals.").

Moreover, § 4.402(P) is narrowly tailored to achieve those interests. Narrow tailoring

> requires that the regulation actually advance the government's interest, but it need not do so in the least restrictive or least intrusive way. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less speech-restrictive alternative."

Reed, 587 F.3d at 979 (quoting *G.K. Ltd.*, 436 F.3d at 1073-74 (internal citation omitted)). The Court examined the restriction in detail in the PI Order and now concludes that the analysis applies to a final determination as well. (*See* PI Order at 12-13.) The Town asserts that the "regulations are specifically related to the purpose of a temporary directional sign – i.e., traffic direction." (Defs.' MSJ at 12.) In other words, the limitations on size, number,

and duration of Qualifying Event Signs is tailored to the goal of alerting passers-by of the time and location of an event, rather than other goals of signage, such as advertising or political advocacy.

As detailed in the PI Order, there are numerous other methods Plaintiffs can use to communicate the time, date, and location of their church services. (PI Order at 13 (outlining methods such as leaflets, emails, carrying signs, posting religious signs on public property, advertising in the newspaper, etc.).) In addition, Plaintiffs can use the Internet and social media to communicate with people who might attend the church services. "These alternative channels of communication ensure that Plaintiffs are . . . able to 'communicate effectively' with members of the public, and there is no evidence to suggest that by failing to expand or eliminate the restrictions of § 4.402(P), the Town is interfering with a 'uniquely valuable or important mode of communication.'" (PI Order at 13 (quoting *G.K. Ltd.*, 436 F.3d at 1080).)

3. Noncommercial v. Commercial Speech

The Court also addressed the Sign Code's treatment of commercial speech as compared to noncommercial speech in the PI Order. (PI Order at 13-15.) Considering the specific examples of "Weekend Directional Signs" and HOA Temporary Event Signs the Court found that the Sign Code "does not impermissibly favor commercial speech over noncommercial speech" and, in fact, that noncommercial speech is more favorably treated than commercial speech, "giving Plaintiffs substantially greater flexibility [than the selected commercial speakers] in directing a larger segment of the public to their events." (*Id.* at 15.) The Court of Appeals affirmed this conclusion, *Reed*, 587 F.3d at 981-82, and the Court now adopts it as a non-preliminary finding.

Qualifying Event Signs, such as those Plaintiffs wish to place, may be placed on weekdays as well as weekends, may be a larger size than Weekend Directional Signs, and while Qualifying Events Signs may not be placed in the right-of-way, they are not restricted to a two-mile radius of the event, as Weekend Directional Signs are. *See* Sign Code §§ 4.402(D)(15), 4.402(P), 4.405(B)(2). Crucially, Qualifying Event Signs do not require a permit, whereas Weekend Directional Signs do. *See id.* § 4.402(A), (D). HOA Temporary

Event Signs are governed by § 4.406(C)(4), may be up to 80 square feet and may only be posted within the limits of the residential community. These signs may be posted up to 30 days prior to the event and must be removed within 48 hours of the completion of the event. The Court also considers the Sign Code's treatment of HOA Temporary Event Signs to be less favorable than its treatment of Qualifying Event Signs because HOA Temporary Event Signs require a permit. *See* § 4.406(C)(4); *see also G.K. Ltd.*, 436 F.3d at 1082 (reasoning that permits constitute "prior restraints [that] are constitutionally suspect"). Also, Qualifying Event Signs are not limited to a specific geographic location the way Weekend Directional Signs are.

4. Discrimination Among Types of Noncommercial Speech

The Court of Appeals remanded this matter so that this Court could consider "whether Gilbert impermissibly 'evaluate[d] the strength of, or distinguished between, various [noncommercial] communicative interests.'" *Reed*, 587 F.3d at 983 (quoting *Metromedia*, 453 U.S. at 514). "Not only must a municipality refrain from favoring commercial over noncommercial speech, it also may not favor certain noncommercial speech over other noncommercial speech without facing stricter review." *Id.* at 982. Municipalities "may distinguish between the relative value of different categories of commercial speech," but they do "not have the same range of choice in the area of noncommercial speech to evaluate the strength of, or distinguish between, various communicative interests." *Metromedia*, 453 U.S. at 514 (holding that an ordinance is invalid if it regulates noncommercial billboards based on their content); *see also Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988) ("The Constitution forbids the selective prohibition of protected noncommercial speech based on its content."). In *City of Orange*, the Ninth Circuit Court of Appeals held "that the City cannot analyze the content of outdoor noncommercial messages to determine whether they are allowed, and if so where." 861 F.2d at 249 (citation omitted). The ordinance at issue there exempted "certain governmental signs and flags, memorial tablets, recreational signs, and temporary political, real estate, construction, and advertising signs" from a general ban on off-site signs. *Id.* at 247.

Plaintiffs argue that the way Qualifying Event Signs are treated, as opposed to Political or Ideological Signs, violates the First Amendment. (Pls.' MSJ at 3-8.) Plaintiffs do not argue that their speech or other noncommercial speech is entirely prohibited. The Town responds that the Sign Code does not (a) effect a total ban on off-site noncommercial advertising, as in *Metromedia* and *City of Orange*, or (b) regulate on the basis of content. (Defs.' MSJ at 8.) Instead, the Town argues that the Sign Code contains "speaker- and event-based exemptions," such as have been upheld by the Ninth Circuit Court of Appeals. (*Id.* (citing *G.K. Ltd*, 436 F.3d at 1076).) Indeed, in *G.K. Ltd.*, the court ruled that exemptions from a permitting requirement that were based on speaker or event did not violate the First Amendment because they did not require a law enforcement officer to read the sign's message in order to enforce the law. *See* 436 F.3d at 1076-78. The officer was only required to decide whether the exemption applied after identifying the speaker or whether a triggering event occurred, without regard to the content of the sign. *Id.* at 1078.

Section 4.402 of the Sign Code provides a list of types of signs that are exempted from the permitting requirement. Qualifying Event Signs are governed by § 4.402(P) of the Sign Code, which sets forth restrictions on size, number, time, and location for the posting of such signs. A Qualifying Event Sign may be up to six square feet in size and may be posted up to 12 hours before the event, during the event, and up to one hour after the event. Up to four Qualifying Event Signs may be posted on a single property, but there is no overall limitation on number of signs. Qualifying Event Signs may be posted off-site, but they may not be placed in the right-of-way or on fences, boulders, plants, other signs, vehicles, utility facilities or any structure.

Political Signs are governed by § 4.402(I). Political Signs may be up to 16 square feet on property zoned for residential use and up to 32 square feet on property zoned for nonresidential use, undeveloped Town property, or rights-of-way. Political Signs must be removed no later than 10 days following the election. Political Signs may be placed in the right-of-way, provided that they do not impede visibility. Ideological Signs are covered in § 4.402(J). Ideological Signs may be up to 20 square feet in area and are permitted in all

zoning districts. Section 4.402(J) is silent on whether Ideological Signs may be placed in the right-of-way.

The Court finds that the Gilbert Sign Code's treatment of Political, Ideological, and Qualifying Event Signs is akin to the regulation at issue in *G.K. Ltd.* Both Political Signs and Qualifying Event Signs relate, in substance, to events–an election or a specified event fitting the definition in the Sign Code. In the case of Political Signs, the event is of widespread interest and takes place at a fixed, regular interval. A Qualifying Event might take place once, or it might take place several times a week, depending on the type of event. A Qualifying Event Sign could involve so-called "core" speech, but Political Signs are always core speech. *See Kaplan v. County of L.A.*, 894 F.2d 1076, 1079 (9th Cir. 1990) ("Political speech lies at the core of the First Amendment's protections."). To distinguish between a Political Sign and a Qualifying Event Sign, an officer need only skim the sign to determine the speaker (e.g., is a non-profit speaking?) and the event at issue (e.g., does this relate to an election or a Qualifying Event?). In *G.K. Ltd.*, the court concluded that speaker- and event-based exemptions did not render a sign regulation content-based because the municipality was distinguishing on the basis of the speaker's identity and whether a triggering event had occurred, *not* on the basis of the sign's content. 436 F.3d at 1076-78. Here, too, the distinction between Political and Qualifying Event Signs is not on the basis of their message, but rather on the basis of the identity of the speaker and the parameters of the event at issue.

Ideological Signs are not tied to a specific event, the way Political and Qualifying Event Signs are, so they are not subject to an event-based time restriction under the Sign Code. This accounts for the different "time" restriction for Ideological Signs. As for place, namely whether a particular type of sign can be placed in the right-of-way, Gilbert argues that it has made a municipal decision to limit the overall number of signs in the right-of-way, and it does not discriminate at all among Ideological Signs. In fact, the Sign Code is quite terse when it comes to Ideological Signs and makes no reference to the content of the particular ideological message. Although Defendants assert that "Ideological [S]igns may not be placed within a right-of-way," the Court was unable to find that restriction in the Sign

Code itself after careful and thorough review. (*See* Defs.' Resp. to PSOF ¶ 36 (citing JSOF, Ex. A at 9).) Nonetheless, the Court finds that the Sign Code does not distinguish on the basis of the message of the sign because, other than signs related to events–whether those events are elections or bake sales–the Sign Code treats all messages on equal footing. Ideological Signs of all types are categorized together. *See* § 4.402(J). Because Ideological Signs do not relate to an event, they are distinguishable from Qualifying Event Signs. To determine whether a sign is an Ideological Sign or a Qualifying Event Sign, an officer does not need to read the content; he or she need only look to see whether the sign concerns an event. If it does, the officer then determines its treatment, as discussed *supra*.

5. Vagueness and Overbreadth

Plaintiffs also argue that the Sign Code is "impermissibly vague and overbroad," in the context of their First Amendment theory in their first cause of action, because the law does not contain guidelines to govern a situation in which a sign has more than one kind of speech on it, for example a sign with political speech and details about a qualifying event. (Pls.' MSJ at 9-10.) Plaintiffs also assert that the Sign Code "restricts more speech than necessary to further the Town's interests in aesthetics and safety." (*Id.* at 10.) "Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *United States v. Williams*, 553 U.S. 285, 128 S. Ct. 1830, 1845 (2008).[6] A statute is void for vagueness if it does not "provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000); *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)).

In the First Amendment context, plaintiffs are permitted "to argue that a statute is

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[6] The vagueness doctrine arising from the Fifth Amendment's Due Process Clause and the First Amendment is incorporated against the states via the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment against the states); *Great Am. Houseboat Co. v. United States*, 780 F.2d 741, 746 n.3 (9th Cir. 1986) (observing that vagueness doctrine applies to the states through the Fourteenth Amendment's due process clause).

overbroad because it is unclear whether it regulates a substantial amount of protected speech." *Id.* (citing *Reno v. A.C.L.U.*, 521 U.S. 844, 870-874 (1997); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495 & nn.6-7 (1982)). Requirements for clarity are enhanced both where a statute provides for a criminal penalty and where First Amendment rights are implicated. *See Info. Providers' Coal. for the Def. of the First Amendment v. F.C.C.*, 928 F.2d 866, 874 (9th Cir. 1991) (citing *Grayned*, 408 U.S. at 109). However, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward*, 491 U.S. at 794. In recognition that words and their meanings cannot be ascertained with "mathematical certainty," a "statute's vagueness exceeds constitutional limits if its 'deterrent effect on legitimate expression is . . . both real and substantial, and if the statute is [not] readily subject to a narrowing construction'" by the court. *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001) (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976)). The law in the Ninth Circuit "is that . . . commercial/non-commercial and onsite/offsite distinctions [in sign ordinances] are not unconstitutionally vague." *Maldonado v. Morales*, 556 F.3d 1037, 1046 (9th Cir. 2009) (citations omitted) (collecting cases).

Here, the deterrent effect of the Town's Sign Code is insubstantial and remote. The ordinance provides plenty of guidance for people of ordinary intelligence to determine what conduct is permitted and prohibited, and it does not foster arbitrary, capricious, or discriminatory enforcement. The evidence Plaintiffs cite in favor of their vagueness theory is the testimony of Town officials at their depositions in response to hypothetical situations described by Plaintiffs' attorneys. (*See* Pls.' MSJ at 10.) The Town employees also testified that they had never seen a sign like the one proposed in Plaintiffs' hypothetical, including both political and ideological information. (*See id.*, Ex. 3, Dep. of Adam Adams 30:17-20, Ex. 4, Dep. of Steve Wallace 31:8-15.) For the purposes of a facial challenge, the crucial evidence is the ordinance itself, and the Court finds that the Sign Code is not void for vagueness. The Court further concludes that the Sign Code does not sweep in substantially more speech than necessary to achieve the Town's goals of safety and aesthetics. As

explained above, the Sign Code is narrowly tailored to achieve these interests.

B. Equal Protection

Plaintiffs and Defendants both move for summary judgment on the second cause of action in the Amended Complaint: Plaintiffs' equal protection claim. (Pls.' MSJ at 17; Defs.' MSJ at 13.) "The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 101 (1972) (citations omitted); *accord A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 799 (9th Cir. 2006). However, "[t]he equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271 (1979) (citing *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976)). "When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *Id.* at 272 (citations omitted). The Court stated in the PI Order, "[A]ny uneven effects on Plaintiffs are merely an unintended consequence of the content-neutral regulation that the Court has already determined to be narrowly tailored to the Town's legitimate objectives." (PI Order at 16.) The Sign Code regulates not on the basis of content, but rather to address legitimate concerns of traffic safety and aesthetics. Moreover, the Court concluded above that the Sign Code is narrowly tailored to achieve significant government interests and leaves open ample alternative channels for communication. Therefore, Defendants are entitled to summary judgment on their equal protection claim.

C. Free Exercise and Arizona's FERA

Plaintiffs and Defendants both move for summary judgment on Plaintiffs' third and fourth causes of action: violation of the free exercise clause of the First Amendment and of Arizona's FERA, respectively. (Pls.' MSJ at 12-17; Defs.' MSJ at 13-15.) "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990)). If a law is not neutral

and generally-applicable, it must survive strict scrutiny by being narrowly tailored to advance a compelling governmental interest. *Id.* at 531-32.

To ascertain whether a law is neutral, courts begin by examining the language of the statute. *Id.* at 532. The inquiry does not end there, however: "[f]acial neutrality is not determinative. . . . The Free Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.* at 534. "A law is one of neutrality and general applicability if it does not aim to 'infringe upon or restrict practices because of their religious motivation,' and if it does not 'in a selective manner impose burdens only on conduct motivated by religious belief[.]'" *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004) (quoting *Lukumi*, 508 U.S. at 533, 543). The Ninth Circuit Court of Appeals has held that rational basis review applies to determinations of whether a neutral law of general applicability "violate[s] the right to free exercise of religion even though the law incidentally burdens a particular religious belief or practice." *Id.* (quoting *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999)).[7]

Plaintiffs have not demonstrated that the Gilbert Sign Code is not neutral and of general applicability. The language of the amended Sign Code does not single out signs with religious messages. Plaintiffs argue that the law is "underinclusive" because "the Church's temporary directional signs must abide by strict limitations . . . . , while more lenient limitations are placed on Political, Ideological, and HOA Signs." (Pls.' MSJ at 12.) However, as explained above, while the restrictions on Political and Ideological Signs might be different, they are not more restrictive than those placed on Qualifying Event Signs. Also,

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[7] The Supreme Court stated in *Smith* that if a generally-applicable law implicates other constitutional protections along with the free exercise of religion, "such as freedom of speech," it must withstand strict scrutiny. *San Jose Christian Coll.*, 360 F.3d at 1031 (quoting *Smith*, 494 U.S. at 881). This is known as "hybrid rights" analysis. *Id.* (citing *Miller*, 176 F.3d at 1204). Plaintiffs argue that their Complaint involves a so-called "hybrid rights" claim, a theory that has been widely criticized. (Pls.' MSJ at 11 n.8.) The Ninth Circuit Court of Appeals has declined to "allow[] a plaintiff to bootstrap a free exercise claim in this manner." *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 440 n.45 (9th Cir. 2008). The Court will not address this possibility, as it is foreclosed in this circuit.

the requirements for Qualifying Event Signs that apply to Plaintiffs also apply to any other non-profit wishing to direct the public to an event. Plaintiffs are not singled out, nor is the rule that applies to them geared only to religious events or religious speech. Plaintiffs' argument that the Sign Code violates the free exercise clause of the First Amendment because it treats commercial speech differently from noncommercial speech was addressed above, and it is unavailing.

Both Plaintiffs and Defendants also seek summary judgment on Plaintiffs' claim under Arizona's FERA. (Pls.' MSJ at 13-17; Defs.' MSJ at 15-18.) "The legislature passed FERA in 1999 to protect Arizona citizens' right to exercise their religious beliefs free from undue governmental interference." *State v. Hardesty*, 214 P.3d 1004, 1006 (Ariz. 2009) (citing 1999 Ariz. Sess. Laws, ch. 332, § 2 (1st Reg. Sess.)). Under FERA, the government may burden the exercise of religion only if the "application of the burden to the person is both . . . [i]n furtherance of a compelling governmental interest [and] [t]he least restrictive means of furthering that compelling governmental interest." Ariz. Rev. Stat. ("A.R.S.") § 41-1493.01(C). The Arizona Supreme Court has held that a party bringing a FERA claim must establish: "(1) that an action or refusal to act is motivated by a religious belief, (2) that the religious belief is sincerely held, and (3) that the governmental action substantially burdens the exercise of religious beliefs." *Hardesty*, 214 P.3d at 1007. Once the claimant establishes those three elements, the burden shifts to the government to demonstrate that the state action is the least restrictive means of furthering a compelling governmental interest. *Id.*

Defendants argue that they are entitled to summary judgment on this claim because the Sign Code "does not substantially burden [Plaintiffs'] exercise of religion." (Defs.' MSJ at 15.) The statute provides, "[T]he term substantially burden is intended solely to ensure that this article is not triggered by trivial, technical, or de minimis infractions." A.R.S. § 41-1493.01(E). In *Hardesty*, the Arizona Supreme Court cited to several cases applying different laws that also contain the substantial burden standard or something similar. *See* 214 P.3d at 1007. In *Wisconsin v. Yoder*, 406 U.S. 205, 215-18 (1972), the Supreme Court considered

whether Wisconsin's compulsory attendance law substantially interfered with Amish families' right to freely exercise their religion. In that case, the Supreme Court held that "the Wisconsin law affirmatively compels [the plaintiffs], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218 (citation omitted).

Here, Plaintiffs are not being compelled to do anything that undermines their religious beliefs; rather, they assert that not being able to post more signs in different locations prevents them from reaching the maximum number of people they might attract to their services. (Pls.' MSJ at 15-16 (describing how, when permitted to post more signs, the Church had a congregation of 38 people, as compared to its current attendance of approximately 30 people).) Plaintiffs' situation is not analogous to the plaintiffs in *Yoder*. For one thing, the evidence regarding attendance rates is hardly overwhelming: a difference of eight people could be attributable to numerous factors besides location and number of signs directing people to the church service. Also, for Amish parents, sending their children to school in Wisconsin was an all-or-nothing proposition, whereas Plaintiffs here are able to post signs under certain conditions and are not wholly prevented from doing so. Similarly, in *Sherbert v. Verner*, 374 U.S. 398, 406 (1963), another cases cited by the *Hardesty* court, the plaintiff would have been forced "to violate a cardinal principle of her religious faith" in order to receive state unemployment benefits. That is simply not the case here.

The Court finds that the Sign Code does not substantially burden Plaintiffs' free exercise of their religion. Any burden placed on their religious exercise is more in the nature of a "de minimis" impact, which does not constitute a substantial burden under the FERA. A.R.S. § 41-1493.01(E). *Yoder* and *Sherbert* are inapposite: in those cases, the plaintiffs were affirmatively obligated to take some action that would interfere with their religious beliefs. In other words, "a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008)

(applying federal Religious Freedom Restoration Act, which contains the same standard as Arizona's FERA); *see also Seidman v. Paradise Valley Unified Sch. Dist. No. 69*, 327 F. Supp. 2d 1098, 1118 & n.3 (D. Ariz. 2004) (observing that result of free exercise analysis was identical under federal law and the FERA).

No genuine issue of material fact exists as to Defendants' liability on counts three and four of Plaintiffs' First Amended Verified Complaint. Therefore, summary judgment in Defendants' favor is appropriate on these claims.

II. CONCLUSION

For the foregoing reasons, the Court concludes that no genuine issues of material fact remain as to any of Plaintiffs' claims. Defendants are entitled to summary judgment on all counts. Furthermore, as the Court does not rely on or refer to the evidence at issue in Defendants' Objection, that Motion is denied as moot.

IT IS THEREFORE ORDERED denying Plaintiffs Pastor Clyde Reed and Good News Presbyterian Church's Motion for Summary Judgment (Doc. 100).

IT IS FURTHER ORDERED granting Defendants the Town of Gilbert and Adam Adams' Cross-Motion for Summary Judgment (Doc. 97).

IT IS FURTHER ORDERED denying as moot Defendants' Motion for Leave to File Objection to Admission of Evidence (Doc. 111).

IT IS FURTHER ORDERED directing the Clerk to enter judgment in this matter in favor of Defendants.

DATED this 11th day of February, 2011.

Susan R. Bolton
United States District Judge