IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02649-CMA

CARYN ANN HARLOS,
KIYOMI BOLICK,
ANDREW MADSON,

Plaintiffs,

v.

DISTRICT ATTORNEY MITCH MORRISSEY, in his official capacity;
ATTORNEY GENERAL CYNTHIA COFFMAN, in her official capacity;
SECRETARY OF STATE WAYNE WILLIAMS, in his official capacity;

Defendants.

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF LAW CONCERNING REED V. TOWN OF GILBERT

Plaintiffs, through their attorneys Adam Frank and Faisal Salahuddin of FRANK & SALAHUDDIN LLC, respectfully request that this Court consider this supplemental memorandum of law concerning the United States Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015).

Reed concerned a First Amendment challenge to the Town of Gilbert's Sign Code, which set forth a comprehensive scheme regulating the placement of outdoor signs. *See id.* at 2224-26. That Code subjected certain signs – such as the "directional signs" that the *Reed* plaintiffs wished to post to advertise the time and location of their weekly religious services – to more stringent regulation than other types of outdoor signs – such as those "designed to influence the outcome of an election" or "communicat[e] a message or ideas for noncommercial purposes." *Id.* The principal

question presented was whether this differential treatment of signs based on their different messages was a content-based speech restriction to which strict scrutiny must be applied.

The *Reed* Court held that it was. The Court first explained that, irrespective of the motive behind a law, a law is content based "on its face" if it "defin[es] regulated speech by particular subject matter" or by "function or purpose." *Id.* at 2227 (internal quotation marks omitted). Importantly, the Court held that where, as in *Reed*, a law is content based "on its face," courts "have no need to consider the government's justifications or purposes for enacting [it] to determine whether it is subject to strict scrutiny." *Id.* It simply is. *See id.* at 2228 ("A law that is content based on its face is subject to strict scrutiny ….").

Reed explains that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). The Court expressly disapproved as "incorrect" any suggestion "that a government's purpose is relevant even when a law is content based on its face." *Id.*; *see also id.* ("[W]e have repeatedly considered whether a law is content neutral on its face *before* turning to the law's justification or purpose.") (emphasis in original). The Court further explained that "strict scrutiny applies *either* when a law is content based on its face *or* when the purpose and justification for the law are content based." *Id.* (emphasis added). Put another way, a "censorial" purpose is sufficient, but not necessary, to deem a law content based. There is good reason for this rule: "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Id.* at 2229.

Under the Supreme Court's decision in *Reed*, there is no question that C.R.S. § 1-12-713 is a content-based law to which strict scrutiny must be applied. C.R.S. § 1-12-713 is content based because, on its face, it prohibits the revelation of specific content on a ballot – namely, a marking

indicating how a voter actually "has voted" – as well as any disclosure whatsoever of how a voter voted. A ballot omitting this content is not subject to the law's prohibitions. Discussions on political topics other than who a voter selected is also not prohibited. For example, a voter would not run afoul of the law by displaying online a photograph of an unmarked ballot with a mass-produced sticker affixed to the ballot stating "None of the above for president!" But a voter would run afoul of the law by displaying online a photograph of a ballot with content indicating that any particular presidential candidate was specifically marked as the voter's choice. A voter would not run afoul of the law by stating "the candidates are so bad, I wouldn't vote for either of them." But a voter would run afoul of the law by stating "I voted for Hillary Clinton." To determine whether these messages actually violates C.R.S. § 1-12-713 would require a government official to specifically review the contents of the photographed ballot itself, or the contents of the person's statement. Both voting for a particular candidate and refusing to vote for any of them are political statements one can make on a ballot or out loud. C.R.S. § 1-12-713 prohibits certain of these statements based on their content.

Reed also defeats any potential argument from the State that C.R.S. § 1-12-713 is content neutral because its prohibition does not depend on "how the ballot is marked." The State's potential argument here conflates viewpoint discrimination with distinctions based on content. As the *Reed* Court took pains to specify: "[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. For example, a law banning the use of sound trucks for political speech – and only political speech – would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *See Reed*, 135 S.Ct. at 2230. Thus, it does not matter whether the law "target[s] viewpoints within [the regulated] subject matter": if it "singles out specific subject matter for differential treatment," then it is "a paradigmatic example of content-based discrimination," which

must survive strict judicial scrutiny. *Id.* Like the restriction in *Reed*, C.R.S. § 1-12-713 "singles out specific subject matter for differential treatment" – *i.e.*, a voluntary display of a marked ballot or even an oral statement showing how a voter voted – even though the law does not target viewpoints within that subject matter. *See id.* Thus, it is consequently "a paradigmatic example of content-based discrimination," *id.*, no matter what benign motives the State claims to have had for its adoption. Under *Reed*, C.R.S. § 1-12-713 must be subjected to strict scrutiny review. *See id.* at 2230. And, as explained in Plaintiffs' prior submissions, C.R.S. § 1-12-713 fails not only under strict scrutiny review, but also under intermediate scrutiny review. *See McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

Respectfully submitted, October 28, 2016.

FRANK & SALAHUDDIN LLC

s/ *Adam Frank*
s/Faisal Salahuddin
Adam Frank
Faisal Salahuddin
1741 High Street
Denver, CO 80218
(303) 974-1084
adam@fas-law.com
faisal@fas-law.com
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. I further certify that a copy of the foregoing was served via electronic mail through the CM/ECF system, addressed to the following:

Matt Grove
matt.grove@coag.gov

Christopher Jackson
Christopher.jackson@coag.gov

Leeann Morrill
Leeann.morrill@coag.cov

Eric Kuhn
Eric.kuhn@coag.gov

Scott Moss
Moss.scott.a@gmail.com

Andrew Ringel
ringela@hallevans.com

Matthew Hegarty
hegartym@hallevans.com

s/ Adam Frank
FRANK & SALAHUDDIN LLC