

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

FREE SPEECH COALITION, INC., <i>et al.</i>))	
)	
Plaintiffs-Appellants,)	CASE NO. 13-3681
)	
vs.)	<u>PLAINTIFFS-APPELLANTS’</u>
)	<u>MOTION FOR LEAVE TO FILE A</u>
ATTORNEY GENERAL OF THE)	<u>REPLY TO UNITED STATES’</u>
UNITED STATES)	<u>RESPONSE TO PETITION FOR</u>
)	<u>PANEL REHEARING BY AUGUST</u>
Defendant-Appellee.)	<u>19, 2015</u>

In responding to Plaintiffs-Appellants’ contention in their Petition for Panel Rehearing that *Reed v. Town of Gilbert, Ariz.*, No. 13-502 (U.S. June 18, 2015), requires the challenged statutes to be evaluated under strict scrutiny, rather than under intermediate scrutiny, the Government offers a completely new and different basis—not advanced in the briefing before this Court—to support applying intermediate scrutiny here. It argues that, *Reed* aside, Supreme Court authority pertaining to the regulation of the adverse secondary effects of adult book stores, theaters, and nightclubs supports the panel’s application of intermediate scrutiny in this case. Response at 1, citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

The Government acknowledges the panel may wish to amend its opinion “to make clearer its reliance on *Renton*’s secondary-effects doctrine.” Response at 2.

However, while the panel cited *Renton* (as well as *Hill v. Colorado*, 530 U.S. 703, 719–20, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000)) as a “see also,” it is clear that the panel relied on *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) as the basis for its decision to apply intermediate scrutiny in this case:

When determining whether a statute is content neutral, a principal consideration is “whether the government has adopted a regulation of speech because of disagreement with the message it conveys,” or instead, adopted that regulation for some other purpose collateral to the protected speech. *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. In other words, “the government’s purpose is the controlling consideration,” and “[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*, 491 U.S. at 791–92, 109 S.Ct. 2746 (finding that sound-amplification regulations were content neutral because they sought to avoid undue intrusion into residential areas, not suppress free expression); see also *Hill v. Colorado*, 530 U.S. 703, 719–20, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (finding that a statute creating buffer zones near health facilities was content neutral because it was enacted, *inter alia*, to protect patients’ privacy, not because of any disagreement with the speakers’ messages); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (finding that a zoning regulation for adult movie theaters was content neutral because it was promulgated to prevent crime and maintain property values, not to suppress the expression of unpopular speech).

Free Speech Coalition v. Attorney General, 677 F.3d 519, 533 (3rd Cir. 2012).

The Government recognizes that “*Ward*’s ‘content-neutrality’ analysis” does not apply when a regulation of speech on its face, draws distinctions based on the speech’s content. Response at 8. Instead, it argues that *Renton*—a case it neither cited

nor discussed in its briefs in this appeal or the first appeal, Brief of the Appellee, Case No. 10-4085 at 28-30; (May 2, 2011); Brief of Appellee, Case No. 13-3681—“prescribes the use of intermediate scrutiny here.” Response at 2.

Plaintiffs-Appellants have not had an opportunity to respond to the Government’s new, alternative argument that *Renton*’s secondary-effects doctrine applies to support the application of intermediate scrutiny in this case. Plaintiffs-Appellants, therefore, seek leave to file a reply addressing this new argument and explaining why this is not a *Renton* secondary-effects case and why *Reed* is controlling here, by August 19, 2015, fourteen days from the filing of the Government’s Response.

Respectfully submitted,

/s/ J. Michael Murray

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– CERTIFICATE OF SERVICE –

A copy of the foregoing Plaintiffs-Appellants' Motion for Leave to File a Reply to United States' Response to Petition for Panel Rehearing by August 19, 2015 was filed electronically on August 7, 2015. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ J. Michael Murray

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