SIGN ORDINANCES: WHAT CHANGED WITH THE *TOWN OF GILBERT* AND WHAT TO DO NOW?

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Prepared by Lanny Richmond II

Arkansas Municipal League
P.O. Box 38
301 West 2nd
North Little Rock, AR 72115

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A. Introduction

In *Reed v. Town of Gilbert, Ariz*., the Supreme Court upended First Amendment jurisprudence, and made city attorneys jobs much more difficult. The court iterated a rigorous test for sign ordinances, which all but precludes the use of content based distinctions. In practice this means that is ill-advised for a city to have different rules regulating different types of signs, even where it seems completely logical to do so. In fact, if a city's code has any exemptions from its requirements, those exemptions could make the code "content based" and thus, unconstitutional.

B. The Case

The Good News Community Church, and its pastor Clyde Reed filed the lawsuit under 42 U.S.C. § 1983 against the Town of Gilbert in March 2007, seeking declaratory and injunctive relief and nominal damages. The Town of Gilbert then amended its sign code, and Good News Community Church amended its lawsuit. Good News also filed a second motion for preliminary injunction, which the district court denied and the Ninth Circuit affirmed. After all this, the district court entered summary judgment in favor of the Town of Gilbert, the decision was affirmed by the Ninth Circuit and appealed to the United States Supreme Court where the lower courts' decisions were reversed. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015)

1. *Reed v. Town of Gilbert* - Factual Background

The Good News Community Church's services were held at various temporary locations in and near the Town of Gilbert. The Church posted signs early each Saturday bearing the Church name and the time and location of the next service and did not remove the signs until

around midday Sunday. The Church was cited for exceeding the time limits for displaying temporary directional signs and for failing to include an event date on the signs. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2224-25 (2015).

The Gilbert Sign Code prohibited the display of outdoor signs anywhere within the town limits without a permit, but it then exempts 23 categories of signs from that requirement. These exemptions include everything from bazaar signs to flying banners. Three categories of exempt signs are particularly relevant here. The "Ideological Signs," "Political Signs," and "Temporary Directional Signs Relating to a Qualifying Event." *Id.*

Ideological Signs: This category included any "sign communicating a message or ideas for noncommercial 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.*

Political Signs: This included any "temporary sign designed to influence the outcome of an election called by a public body." These signs were treated less favorably than ideological signs. *Id.*

Finally, Temporary Directional Signs Relating to a Qualifying Event: This included any This includes any "Temporary Sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.'" These signs were treated even less favorably than political signs. *Id.*

The Church and its pastor, Clyde Reed brought suit against the Town of Gilbert, claiming that the town's sign code abridged their freedom of speech. The town's sign code, imposed differing restrictions on the size, duration, and location of different types of temporary signs, including "political signs," "ideological signs," and "directional signs relating to a qualifying

event," such as a religious, charitable, or community event. This differentiation argued the Church was unconstitutional. *Id.* at 2225-26.

2. The Majority Opinion

The Supreme Court of the United States held that the distinctions among signs was a content-based regulation of speech that did not survive strict scrutiny. *Id*. at 2218. The sign ordinance was content based on its face, Justice Thomas concluded, because it defined "political signs," "ideological signs," and "directional signs" based on the message conveyed by the sign, and then subjected each of these categories of signs to different restrictions. *Id.*

The Ninth Circuit, and other circuits, allowed for content based regulation as long as the regulation was not adopted based on "disagree[ment] with the message conveyed," and the justifications for regulating content were "unrelated to the content of the sign."

The Majority Opinion however, said that this analysis "skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face." *Reed*, 135 S. Ct. at 2228. If the law is content based on its face then it 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*. (internal quotations omitted).

Now, whenever one type of speech is disfavored, even if the regulation does not discriminate among viewpoints within the subject matter, that regulation will be subjected to strict scrutiny. To illustrate how broad this ruling is, the Majority Opinion gave the following 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." *Id*.

The Town of Gilbert could not meet its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest, and thus failed strict scrutiny. *Id.* at 2232. Three concurring opinions were penned in an attempt to limit the Majority Opinion, one written by Justice Alito (joined by Justice Kennedy and Sotomayor), one written by Kagan (joined by Justice Ginsburg and Justice Breyer), and one written by Breyer alone.

3. The Concurring Opinions

Alito's Opinion

Justice Alito concurred in the *Reed v. Town of Gilbert*'s judgment, but wrote separately in an attempt to limit the scope of the ruling. Alito, rightfully, feared that the Court's decision would be read to broadly prohibit any sign regulations. In response to this fear he wrote a list of regulation criteria which he deemed to be content neutral, and within a city's ability to regulate. The criterion were:

- Rules regulating the size of signs;
- Rules regulating the locations in which signs may be placed;
    - May distinguish between free-standing signs and those attached to buildings.
- Rules distinguishing between lighted and unlighted signs.
- Rules distinguishing between signs with fixed messages and electronic signs with messages that change.
- Rules that distinguish between the placement of signs on private and public property.
- Rules distinguishing between the placement of signs on commercial and residential property.
- Rules distinguishing between on-premises and off-premises signs.
- Rules restricting the total number of signs allowed per mile of roadway.
- Rules imposing time restrictions on signs advertising a one-time event.
    - Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed.

Attempting to reconcile the broad Majority Opinion with his extensive list of possible regulations, Alito concluded: "Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2233-34 (2015) (Alito, J., *Concurring*).

While Alito's list is important in guidance, it is necessary to remember that it is not binding precedent, and a court could easily find one of these regulations to be unconstitutional under the majority opinion in *Reed*. In fact, the on-premises off- premises distinction has already been called into question by *Thomas v. Schroer*, No. 2:13-CV-02987-JPM, 2015 WL 5231911, at *5 (W.D. Tenn. Sept. 8, 2015). There the district court stated "[t]he concurrence's unsupported conclusions ring hollow in light of the majority opinion's clear instruction that 'a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.'" *Id*. (holding that Tennessee's on-premise off-premise distinction was content based, for the purposes of a temporary restraining order).

Kagan's Opinion

Seeing the scope of the ruling, Justice Kagan wrote to note the possible catastrophe that might follow in the wake of the Majority Opinion. Kagan began by correctly noting: "Countless cities and towns across America have adopted ordinances regulating the posting of signs, while exempting certain categories of signs based on their subject matter[,]" Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2236 (2015) (Kagan, J., *Concurring*), and "[g]iven the Court's analysis, many sign ordinances of that kind are now in jeopardy." *Id.*

With these warnings in mind, Kagan argued for a more flexible approach than the one articulated by the majority. She argued that the Supreme Court "may do well to relax our guard so that 'entirely reasonable' laws imperiled by strict scrutiny can survive." *Id*.

> Without a relaxed standard Kagan gave a prophetic warning to the rest of the court: As the years go by, courts will discover that thousands of towns have such ordinances, many of them "entirely reasonable." And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.)

Id. at 2239.

Breyer's Opinion

Justice Breyer wrote to echo the sentiments expressed by Justice Kagan. Re*ed v. Town of Gilbert, Ariz.,* 135 S. Ct. 2218, 2234 (2015) (Breyer, J., *concurring*). Breyer believes that the "First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as 'content discrimination' and 'strict scrutiny,' would permit." *Id*.

To this end, Breyer argued for a different approach to content-based regulations. Instead of all content-based regulations being categorically subjected to strict scrutiny he wanted a more nuanced approach. Breyer thought that the "better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened . . ." This rule could operate as "rule of thumb" in the other situations, finding it helpful but "not a determinative legal tool, in an appropriate case, to determine the strength of a justification." *Id.* at 2235.

Breyer's method as he put it would protect "regulation of signage along the roadside, for purposes of safety and beautification . . ." *Id.* Although, in light of his opinion only being a concurrence, even these common sense, every signs are placed in jeopardy.

C. What the Lower Courts have done so far

Courts have applied *Reed* to a variety of First Amendment cases, and any time that speech is at issue cities should think of *Reed*. Some of the laws struck down under *Reed* are:

Anti-panhandling laws - The Seventh Circuit struck down a municipal ordinance which regulated panhandling in its "downtown historic district . . ." *Norton v. City of Springfield, Ill.*, 806 F.3d 411 (7th Cir. 2015). The ordinance in question applied only to panhandling through an "oral request for an immediate donation of money." *Id.* The ordinance expressly did not regulate: signs requesting donation, and oral pleas to send money later. *Id.* The distinction between requests for money immediately and money later was facial speech discrimination under *Reed*, and as such the ordinance was required to meet strict scrutiny. *Id.*

It is important to note that this case turned solely on the outcome in *Reed v. Town of Gilbert*. Prior to striking down the ordinance the Seventh Circuit had already held that the ordinance was content neutral. *Norton v. City of Springfield, Ill.*, 768 F.3d 713 (7th Cir. 2014) on *reh'g*, 806 F.3d 411 (7th Cir. 2015). However, the Seventh Circuit waited until after *Reed* to rule on the rehearing. *Norton*, 806 F.3d at 411. Then, in light of *Reed*, the Seventh Circuit found the ordinance a form of content based discrimination and unconstitutional.

Election Sign laws - One court has ruled that restrictions against temporary signs, including elections signs, are content based discrimination where those signs are treated differently than other types of temporary signs. *Marin v. Town of Se.*, No. 14-CV-2094 KMK, 2015 WL 5732061, at *15 (S.D.N.Y. Sept. 30, 2015).

Certain Robocalling laws - The Fourth Circuit relying on *Reed* declared a South Carolina law prohibiting "robocalls" unconstitutional in *Cahaly v. Larosa*, 796 F.3d 399, 402

(4th Cir. 2015). The statute placed different restrictions on robocalls depending on whether they were (1) unsolicited and (2) made for consumer, political, or other purposes. *Id.*

Laws preventing sharing photos of election ballots - In *Rideout v. Gardner*, a federal district court struck down a New Hampshire statute which made it unlawful for voters to take and disclose digital or photographic copies of their completed ballots in an effort to let others know how they have voted. No. 14-CV-489-PB, 2015 WL 4743731, at *1 (D.N.H. Aug. 11, 2015).

Advice column regulation, where "family psychologist" offered advice - In *Rosemond v. Markham*, Kentucky sought to regulate an advice column which offered advice on parenting techniques, from a "family psychologist." No. CV 13-42-GFVT, 2015 WL 5769091, at *1 (E.D. Ky. Sept. 30, 2015). Kentucky sought to regulate the column as a valid exercise of its power to regulate the practice of psychology. *Id.* The Court held "[s]uch government regulation is content-based, and only constitutional if it survives strict scrutiny." *Id.* at *7. Relying on *Reed*, the Court ruled that the author of the column must be allowed to continue writing his column, although this might have been different if "[the author] represented himself to be a Kentucky-licensed psychologist or had he actually entered into a client-patient relationship in Kentucky . . ." *Id.* at *11.

Licensing of solicitor's by ordinance - In *Working Am., Inc. v. City of Bloomington*, No. CV 14-1758 ADM/SER, 2015 WL 6756089, at *1 (D. Minn. Nov. 4, 2015), Working America, an advocacy organization focusing on labor issues, challenged Bloomington's ordinance that requires certain door-to-door solicitors to obtain a "solicitor's license" prior to soliciting. The Bloomington ordinance only regulated certain types of solicitors, in particular those seeking to

raise funds, whereas it exempt many others, this ensured that it would be treated as content based under Reed, and accordingly held unconstitutional. *Id.*

Municipal Official instructing citizen to not contact him, or other officials - One court allowed a claim to survive summary judgment, where a municipal official told a citizen through email: "Please never contact me, the Board of Supervisors or the Township employees directly. Do not call me at work, email me at work or speak to me in public or private." *Mirabella v. Villard*, No. CIV.A. 14-7368, 2015 WL 4886439, at *7 (E.D. Pa. Aug. 17, 2015). The official claimed this email was sent out of concern for impending litigation. *Id.* Regardless, this was a form of content based restriction on speech "It distinguishes speech based on who is speaking—here, the Mirabellas—adopted because of a disagreement with the message conveyed." *Id.*

D. How cities should review their ordinances to avoid a *Reed* problem?

1. First, cities should thoroughly review their ordinances and identify any regulations that relate to speech (signage, panhandling, solicitation, etc.).
2. Then the city should review these ordinances to determine if any regulations are content-based. These would include any regulations that are based on the content or subject of the message, the person and/or group delivering the message, or an event(s) taking place.
3. Once identified, any content-based ordinance should not be enforced until the ordinance is redrafted, or the city determines it to be a valid content-based regulation in light of *Reed*.

E. Redrafting your sign code

As you redraft signage codes, include strong, well-articulated purpose statement to pass constitutional muster. Although *Reed* rejected the notion that only a content neutral purpose is sufficient to withstand a First Amendment challenge, governmental intent remains an important factor in sign code drafting and litigation.

Minimize categories and exceptions. The more categories, and exceptions, found in the code are more opportunities for content based distinctions. Be especially weary of exemptions from permitting, or any other standards, an exemption generally grants whatever is being exempt a more favorable status than all others. (So exempting charities from permitting requirements, is disfavoring all other forms of speech i.e. political).

Include a substitution clause should be added to the sign ordinance that allows any sign permitted under the ordinance to contain either a commercial or a non-commercial message. This is to ensure that non-commercial messages are not ever treated worse than commercial messages, thereby invoking *Reed* concerns. The severability clause contained within the adopting ordinance language should also be added as a part of the actual sign ordinance text.

a. Ex. "Signs containing noncommercial speech are permitted anywhere that advertising or business signs are permitted, subject to the same regulations applicable to such signs."

Focus on regulating non-content aspects of signs, such as:

b. Number of signs
c. Area
d. Height
e. Placement
f. Lighting
g. Movement
h. Duration (permanent or temporary)

F. Conclusion - What strategies work once litigation Happens?

The only workable strategy is avoidance. So far no court has upheld a non-commercial content-based regulation since *Reed*, no defendant has been able to show that their regulation "furthers a compelling interest and is narrowly tailored to achieve that interest . . ." *Reed*, 135 S. Ct. at 2231.