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Sign Regulations After *Reed v. Town of Gilbert*

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The United States Supreme Court's June 2015 decision in *Reed v. Town of Gilbert*, 576 U.S. ____ (2015) significantly changed the way in which local governments can regulate signs. In *Reed*, a unanimous Supreme Court struck down a local government's sign code as a violation of the freedom of speech guaranteed by the First Amendment because it embodies content discrimination subject to strict scrutiny by the courts.

(A recent article in the *New York Times* discussing *Reed* described the legal concept of "strict scrutiny" in the following way: "Strict scrutiny requires the government to prove that the challenged law is 'narrowly tailored to serve compelling state interests.' You can stare at those words as long as you like, but here is what you need to know: Strict scrutiny, like a Civil War stomach wound, is generally fatal."*)

The Facts of the Reed Case

The sign code for the Town of Gilbert, Arizona, prohibited the display of outdoor signs without a permit, but then exempted 23 categories of signs from that requirement. Three categories of exempt signs based on the content of the sign were relevant

to the case: Ideological Signs, Political Signs, and Temporary Directional Signs Related to a Qualifying Event. The code defined a "qualifying event" as an event sponsored by a religious, charitable, or other non-profit organization. Temporary Directional Signs are limited in size (6 square feet), the number that may be placed on property (4), and time (12 hours before and one hour after the event). The signs are treated less favorably than ideological signs (which may be 20 square feet, allowed in any zone and unlimited in time) and political signs (which may be 16 to 32 square feet, depending on the status of the property, and allowed 60 days before and 15 days following an election).

Clyde Reed, the pastor of Good News Community Church, wanted to advertise the time and location of Sunday church services. The church owned no building and held services in elementary schools or other locations in or near the Town. The Church began placing 15 to 20 signs around the Town early in the day on Saturday to announce the time and location of the upcoming service. The signs were removed around midday on Sunday. The Town cited the Church for violating the Town's sign code. Efforts by the Church to reach an accommodation with the

Town proved unsuccessful. The Church sued the Town arguing that the Sign Code abridged their freedom of speech in violation of the United States Constitution.



Alliance Defending Freedom

The United States Supreme Court Decision

Justice Thomas, writing for the Court, found the regulations content-based because they focused on the message (the “qualifying event,” an ideological matter, an election) which triggered different regulations for each category. As content-based regulations of speech, Thomas said that the regulations were subject to strict scrutiny by the Court. “Content-based laws--those that target speech based on its communicative content--are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”

As a result of the decision, sign codes similar to the Town of Reed that distinguish between political signs, ideological signs, or temporary directional signs to certain events will be considered to be content-based. These laws, wrote Thomas, likely will be struck down “regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”

Chief Justice Roberts and Justices Alito, Kennedy, Roberts, Scalia, and Sotomayor supported the main opinion. A concurring opinion written by Justice Alito, and joined by Justices Kennedy and Sotomayor, included a non-comprehensive list of rules, discussed below, that would not be content based as guidance for communities trying to determine what signage they can regulate following the *Reed* case. Alito also concluded that: “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.”

Justices Kagan and Breyer also wrote separate opinions. Justice Kagan expressed her concern that there was no reason to apply strict scrutiny in this case and warned that the Court risks becoming the “Supreme Board of Sign Review.”

Sign regulations after *Reed*

Because of the sweeping impact of the Supreme Court’s decision in *Reed* for sign regulations, local governments need to review their sign codes and ask “Does this regulation apply to a sign because of the content on the sign?” In other words, if you have to read the message to figure out how a sign is to be regulated, then it is content-based and subject to challenge under *Reed*. Examples include the categorical regulations found in many sign codes for “political signs,” “temporary directional signs,” “ideological signs,” “identification signs,” “real estate signs,” “homeowner association signs,” “drive-through restaurant signs” “business hours of operation signs,” or signs based on other content distinctions.

Previous U.S. Supreme Court cases recognized content-based distinctions between commercial and non-commercial speech. The Court drew distinctions based on the content of the sign and held that regulation of commercial speech is subject to a lower level of scrutiny by the courts than non-commercial speech. *Reed* did not overrule the line of cases drawing distinctions between commercial and non-commercial speech so, at least for the time being, sign

ordinances that include provisions for commercial signage, such as special regulations for “temporary business signs” should be okay.

Justice Thomas’ opinion in *Reed* offered some other content-based regulations that may be acceptable if they are narrowly tailored to ensure public safety: “such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses.” It will be critical that local communities clearly articulate the purpose for these regulations.

Justice Thomas also offered examples of content-neutral sign regulations that are not impacted by *Reed*. Regulations that have nothing to do with a sign’s message include: size, building materials, lighting, moving parts, and portability. Justice Thomas also states: “on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner.” This would include the public right-of-way. If signs are allowed, the regulations must not distinguish based on the content of the message, like only allowing signs by non-profit organizations such as a church sign about a spaghetti supper.

The list of content-neutral sign regulations in Justice Alito’s concurring opinion also provides some guidance for local communities trying to understand what types of regulations are still allowed. According to Alito, the following are examples of non-content based regulations that should be acceptable after *Reed*:

- Rules regulating the size of signs;
- Rules regulating the locations in which signs may be placed;
- Rules distinguishing 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.
- Government entities may also erect their own signs consistent with the principles that allow governmental speech.

However, the list raises some questions. Justice Alito’s list includes time restrictions on signs for one-time events. This seems at odds with the temporary directional sign challenged in *Reed*. Nevertheless, after *Reed* it would presumably be appropriate to have sign ordinances that regulate “temporary signs” based on factors other than the event that is the subject of the sign such as allowing the sign to remain for a certain number of days.

Justice Alito’s list also indicated that it would be appropriate to have signs that distinguish between on-premises and off-premises signs. In order to determine if a sign is off-premises or on-premises, the local government will need to read the sign. Presumably the on-premise/off-premise distinction is still valid based on Justice Alito’s statement and the fact that prior U.S. Supreme Court decisions recognized those distinctions and those decisions were not overruled. For example, not allowing off-premise billboards in residential areas should still be appropriate.

As communities remove content-based restrictions, they can explore alternatives such as allowing “yard signs” (as opposed to “yard sale”) which would not be content-neutral) of a certain number and dimension in residential districts. Regulations could also be based on the type of building material of the sign. From a planning perspective, it will be important to stand back and evaluate what a community is trying

to accomplish through sign regulations and how much regulation is necessary. It is important to review other ordinances that may relate to speech to insure they are content-neutral. Future cases may help clarify the Court's decision.

Endnotes

* "Court's Free-Speech Expansion Has Far-Reaching Consequences," *New York Times*, Aug. 17, 2015, available at:
http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html?_r=2

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