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Land Use Law Update: *Reed v. Town of Gilbert* Redux

By Sarah J. Adams-Schoen

The Winter 2015 Land Use Law Update asked whether the Supreme Court's decision in *Reed v. Town of Gilbert*[1] would require municipalities throughout the country to rewrite their sign codes.[2] The short answer is "yes."

At a minimum, following the Supreme Court's decision that the Town of Gilbert's temporary directional sign regulations violated petitioners Good News Community Church's and Pastor Clyde Reed's First Amendment rights, municipalities will want to act quickly to amend their sign codes if they regulate different categories of signs differently. A code that places fewer restrictions on political or ideological signs than on directional signs likely will not withstand judicial review. Whether codes that differentiate between commercial and noncommercial signs will withstand review is an open question, but application of the Court's content neutrality analysis would appear to require strict scrutiny of even commercial-noncommercial distinctions—and if the governmental justifications for the distinction are aesthetics and traffic safety, which they so often are, this distinction also likely will not withstand judicial review.

Introduction

To briefly summarize, the facts are as follows. The Town of Gilbert had a sign code that restricted the size, number, duration, and location of many types of signs, including temporary directional signs. The code generally required anyone who wished to post a sign to obtain a permit, with numerous exceptions for specific types of signs including "ideological signs," "political signs," and "temporary directional signs relating to a qualifying event." The code defined ideological signs as signs "communicating a message or ideas for noncommercial purposes" that do not fall into one of several more specific categories; political signs as signs that "support[] candidates for office or urge[] action on any other matter" on a national, state, or local ballot; and, temporary directional signs as "not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display," and "intended to direct pedestrians, motorists, and other passersby" to "any assembly, gathering, activity, or meeting sponsored, arranged or promoted by a religious, charitable, community service, educational, or other similar non-profit organization."[3]

Like so many sign codes, the Town of Gilbert's code established a hierarchy of restrictions, with the fewest restrictions on ideological signs and the most restrictions on temporary directional signs. The only restriction on ideological signs was that they "be no greater than 20 square feet in area and 6 feet in height." Political signs could be up to 16 square feet (on residential property) or 32 square feet (on nonresidential property) in size; may be up to six feet in height; may remain in place for several days after the election, and were not generally limited in number. Temporary directional signs could be "no greater than 6 feet in height and 6 square feet in area"; no more than four such signs "may be displayed on a single property at any time"; and such signs could be displayed only "12 hours before, during, and 1 hour after" the event. They could not be displayed in "the public right-of-way" or on "fences, boulders, planters, other signs, vehicles, utility facilities, or any structure."[4]

The Church placed signs in the surrounding area announcing the time and location of services. Treating these signs as temporary directional signs, the Town issued code enforcement notices to the Church. The Church then sued the Town, claiming that the sign code violates the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment on its face and as applied to the Church. The district court denied the Church's motion for a preliminary injunction and the Ninth Circuit affirmed this ruling[5]; the district court then granted summary judgment for the Town,[6] which the Ninth Circuit also affirmed.[7]

The Court of Appeals concluded that the Town of Gilbert's sign ordinance was content neutral because the town did not adopt the code because it disagreed with the message conveyed and its interests in regulating the signs were unrelated to their content.[8] In its first opinion in the *Reed* matter, the Ninth Circuit affirmed the petitioners' motion for a preliminary injunction, despite recognizing that an enforcement officer would have to read the sign to determine what provisions of the sign code applied. The court explained that this "kind of cursory examination" for the purposes of determining function "was not akin to an officer synthesizing the expressive content of the sign."[9] On a later appeal of the district court's summary judgment for the petitioners, the court reasoned that the distinctions in the Town's code between temporary directional signs, ideological signs and political signs "are based on objective factors relevant to Gilbert's creation of the specific exemption from the permit requirement and do not otherwise consider the substance of the sign."[10]

The plaintiffs appealed to the Supreme Court and the Court granted certiorari[11]—presumably to resolve a circuit split regarding whether temporary sign regulations that differentiate between sign types based on the function of the sign are content-based and therefore subject to strict scrutiny review.[12] The National League of Cities, United States Conference of Mayors, National Association of Counties, International City/County Management Association, International Municipal Lawyers Association, American Planning Association, and Scenic America[13] filed a brief in support of the Town, warning "that adoption of the strict scrutiny test has the potential to invalidate nearly all sign codes in the country, and would thereby imperil the important traffic safety and aesthetic purposes underlying local government sign regulation."[14] The United States, numerous religious and civil liberties organizations, and nine states filed amicus briefs in support of the petitioners.[15]

On June 18, 2015, nine justices agreed with the petitioners that the Town's sign code was content-based on its face, that strict scrutiny therefore applied, and that the code did not pass constitutional muster.[16] But, the justices took such varying routes to this conclusion that attorneys may find it difficult to determine which categorical sign regulations are content based, and therefore likely unconstitutional under a strict scrutiny analysis.

The Thomas Majority: "A Very Wooden Distinction"

Six justices joined Justice Thomas's majority opinion, which took a literal (some say "wooden"[17]) approach to the question of content neutrality. Essentially, the Thomas majority opinion stands for the principle that, if distinctions in a sign code require reading the sign to determine if the distinction applies, the code is content based, any content neutral justifications for the distinctions are irrelevant to the determination of content neutrality and strict scrutiny applies. Moreover, a code justified by aesthetics and traffic safety will not survive strict scrutiny if it places more lenient restrictions on political or ideological signs than it places on temporary directional signs—because no difference exists between these categories of signs in terms of their impact on aesthetics and traffic safety.

In so holding, the Court rejected several theories the Ninth Circuit—as well as various amici including the United States—had relied upon to support the conclusion that the code was content neutral. First, the Court explained that the Ninth Circuit's and amici's reliance on *Ward*[18] was misplaced because the question of whether a regulation has a neutral justification is irrelevant when the regulation is content based on its face.[19] The Court characterized the question of whether a regulation "draws distinctions based on the message a speaker conveys"[20] as "the crucial first step in the content-neutrality analysis."[21] Only if the answer at the first step is "no" does the analysis move to the second step, which asks whether a facially content-neutral law is still content based as a result of its content-based justification or adoption by the government "because of disagreement with the message."[22] Thus, the Court resoundingly rejected the notion that "an innocuous justification" can transform a facially content-based sign code into one that is content neutral.[23]

Second, the Court rejected the Ninth Circuit's reasoning that the content neutrality analysis "should be applied flexibly with the goal of protecting viewpoints and ideas from government censorship or favoritism."[24] This reasoning, the Court explained, erroneously equates with speech regulation generally a particularly egregious subset of speech regulation—that is, regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker."[25] In doing so, the Court admonished the Ninth Circuit's failure to recognize the well-established application of the First Amendment to speech regulation that targets a specific subject matter—such as political speech generally—as opposed to a specific perspective.[26]

Rejecting classification of codes that distinguish based on function alone as content neutral, the Court explained that "[s]ome facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose," but "[b]oth are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny."[27] Citing *Ward*, the Court explained that there are two categories of laws that are content based—those that are content based on their face including those that regulate speech by its function or purpose, and those that cannot be "'justified without reference to the content of the regulated speech' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'"[28] Content-based regulations of speech are subject to strict scrutiny, and, where the regulation is content-based on its face, the government's justifications or purposes for enacting the regulation are irrelevant to the determination of whether it is subject to strict scrutiny.

Finally, the Court rejected on factual and legal grounds the Ninth Circuit's characterization of the sign code's distinctions as "turning on the content-neutral elements of who is speaking through the sign and whether and when an event is occurring."[29] As a factual matter, the Court observed that the Town of Gilbert's distinctions were not speaker based, but rather categorized by message type—political, ideological or directional—and the applicable category depended on the content of the message, not the identity of the speaker. As a legal matter, the Court observed in dicta that "the

fact that a distinction is speaker based does not… automatically render the distinction content neutral." Rather, "[c]haracterizing a distinction as speaker based is only the beginning—not the end—of the inquiry." Indeed, "'speech restrictions based on the identity of the speaker are all too often simply a means to control content.'"[30]

The Court emphasized three guiding principles that compelled the result. First, a content-based restriction on speech is subject to strict scrutiny regardless of the government's motive and thus "an innocuous justification cannot transform a facially content-based law into one that is content neutral."[31] Second, "the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic" and thus the mere fact that a law is viewpoint neutral does not insulate it from strict scrutiny.[32] Third, whether a law is speaker-based or event-based makes no difference for purposes of determining whether it is content-based.[33]

The Alito Concurrence: An Attempt to Stave Off the Sign Code Apocalypse

Justice Alito, joined by Justices Sotomayor and Kennedy, joined the majority opinion and wrote separately to "add a few words of further explanation."[34] In an apparent attempt to assuage fears that the Court's decision is a harbinger of the sign code apocalypse, the Alito concurrence explains that certain distinctions between signs are content neutral and provides a non-exhaustive list of sign regulations that would not trigger strict scrutiny, including: (1) regulations that distinguish between free-standing versus attached signs, (2) regulations of electronic signs with content that changes, and (3) regulations of the placement of signs on public versus private property or on- versus off-premises signs.

But, puzzlingly, the list of content-neutral examples also includes signs advertising a one-time event. As the Kagan concurrence discussed below points out, this example is in conflict with the majority opinion—an opinion that the Alito concurrence joined with respect to the result *and reasoning*. Under the majority's reasoning, regulations that target one-time event signs are content based. Indeed, how would one know that a particular sign was covered by the regulation without reading the sign—and this simple, literal test is the majority test for content-based.

Given that the Alito concurrence is inconsistent with the majority reasoning and does not bind the lower courts, its examples of content neutral regulations may provide cold comfort to municipal officials, attorneys and planners. At the very least, given the tensions between the majority opinion and Alito concurrence, it would seem that, to the extent municipalities intend to rely on the concurrence's list of examples of content-neutral sign categories, they should do so cautiously.

The Kagan Concurrence: Bad Facts Make Bad Law

Justices Ginsburg, Breyer, and Kagan rejected the notion that a content-based regulation must necessarily trigger strict scrutiny, and concurred only in the judgment. The Kagan concurrence agrees that the Town of Gilbert regulation was invalid, but warns that the majority approach will lead to either a watering down of strict scrutiny review or courts invalidating many democratically enacted laws. Echoing the warnings of amici the American Planning Association, the Kagan concurrence recognizes that as a result of the Court's decision many municipalities will have to repeal many sign regulations.

In contrast to the literal approach adopted by the majority and endorsed by the Alito concurrence, the Kagan concurrence takes a functional approach, observing that the purpose underlying First Amendment protection simply is not implicated by many categorical sign codes. Rather, the Kagan concurrence argues that regulation of signs by function, even when ascertaining a sign's function requires reading the sign, does not threaten the uninhibited marketplace of ideas. Under the majority's simple, literal test, warns Kagan, the Court will "find itself a veritable Supreme Board of Sign Review."[35] The Kagan concurrence also criticizes that majority for ignoring the last fifty years of sign code jurisprudence, and, indeed, the only sign code case cited by the majority opinion is *City of Ladue v. Gilleo*.[36]

But, bad facts can certainly make bad law, and according to the Kagan concurrence the Town of Gilbert sign ordinance "does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test."[37] Like many municipal codes, the Town's sign code banned outdoor signs without a permit and created exceptions for specific sign types. However, the range of those exceptions was, as conceded by the Town's counsel at oral argument, "silly."[38] Town of Gilbert's code created 23 exemptions to the outdoor sign ban for specific types of signs and placed varying restrictions on the signage depending on which exemption it fell into. For example, the law exempted "temporal directional signs relating to a qualifying event," but placed more severe restrictions on these signs than "ideological signs" or "political signs." Temporary directional signs were required to be "no larger than six square feet. They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. And, they may be displayed no more than 12 hours before the 'qualifying event' and no more than 1 hour afterward."

The Breyer Concurrence: A Regulatory Apocalypse All Round

In addition to joining the Kagan concurrence, Justice Breyer wrote a concurrence in which he warned not only of the invalidating effect of the Court's approach on municipal sign ordinances, but also on a host of other regulations that require reading to determine the applicability or enforcement of the regulation. According to Justice Breyer, the Court's all-or-nothing approach to content neutrality casts a net that will encompass a wide range of regulations including regulations of airplane warnings, drug warnings, securities regulations, energy conservation labeling, and—citing a New York example—signs at petting zoos.[39]

Conclusion

The key holding in *Reed* in terms of impact on municipal authority to regulate signs is the holding that categorical sign ordinances are content-based. It follows from *Reed* that sign ordinances that regulate signs based on their function—such as directional signs, event signs, and advertisements—like those on the books of many New York municipalities, are content-based and therefore subject to strict scrutiny. The case leaves open the question of whether speaker-based regulations—i.e., ordinances that distinguish between who is giving the message (e.g., signs for gas stations)—are subject to strict scrutiny. The case also leaves open how sign ordinance cases not cited in *Reed* will be applied in the future. Did the Court implicitly abrogate them, or, will lower courts attempt to synthesize *Reed* and the pre-*Reed* sign ordinance jurisprudence? Will much of *Reed* be treated as dicta such that the line of sign cases not cited remains good law with *Reed* being narrowly applied to codes that impose a laundry list of different requirements to different types of signs, as Town of Gilbert's code did.

The sweeping invalidation of legitimate municipal exercises of the police power that would follow from broad application of *Reed* suggests that lower courts are more likely to apply *Reed* narrowly, relegating to dicta those portions of the opinion that cannot be synthesized with prior sign ordinance cases that took a more functionalist approach. For example, two weeks after *Reed* was decided the Central District of California ruled in *California Outdoor Equity Partners v. City of Corona* that "*Reed* does not concern commercial speech, let alone bans on off-site billboards," observing that "[t]he fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even cite *Central Hudson*, let alone apply it."[40] Similarly, in *Citizens for Free Speech v. County of Alameda*, the Northern District of California distinguished *Reed*, holding that a sign ordinance that applied to commercial speech only was content-neutral despite the fact that the determination of whether a sign is commercial requires reading the sign. Citing the court's duty to interpret zoning ordinances as constitutionally valid if fairly possible, the court held that "*Reed* has no applicability to the issues before the Court" because *Reed* was specifically concerned with a sign code's application of different restrictions—including temporal and geographic restrictions—to permitted signs based on their content" and the plaintiffs in *Citizens for Free Speech* had "not identified any distinct temporal or geographic restrictions on different categories of permitted signs [the code at issue] based on those signs' content."[41] In a later decision, the same court also concluded that "[b]ecause *Reed* does not abrogate prior case law holding that laws which distinguish between on-site and off-site commercial speech survive intermediate scrutiny, the Court holds that its prior analysis continues to control the fate of plaintiff's First Amendment claim."[42]

That said, many municipalities make functional distinctions between sign types that can only be applied by reference to the content of the signs, and, according to the two-step test laid out in the majority opinion, such sign ordinances are subject to strict scrutiny. Indeed, the sign ordinances in two other cases the Court vacated and remanded following *Reed* will probably appear familiar to many municipal attorneys and planners.[43] These cases involved a zoning ordinance that governs the placement and size of signs with various restrictions depending on whether a sign is categorized as a "temporary sign," "freestanding sign," or an "other than freestanding sign,"[44] and a sign ordinance that, in essence, allows more political lawn signs than non-political lawn signs in residential districts.[45] In each of these cases, the lower court had concluded that the regulation, although content-based on its face, was justified by subordinating valid governmental interests, and was therefore subject to intermediate scrutiny.[46] But, under the first step of the *Reed* analysis, a content-neutral justification is irrelevant and each of these ordinances is subject to strict scrutiny.

Moreover, regardless of whether New York courts ultimately apply *Reed* narrowly or broadly, uncertainty regarding the scope of *Reed* is likely to result in more claims that sign ordinances—as well as other government regulations that distinguish based on categories that can be discerned only by reading or listening—are subject to strict scrutiny. Indeed, the Seventh Circuit recently extended the holding of *Reed* to an ordinance that prohibited panhandling[47] and the Fourth Circuit recently applied *Reed* to an anti-robocall statute that carved out exemptions for debt collectors among others, concluding that the statute failed under *Reed's* first step "because it makes content distinctions on its face," and, as a result, strict scrutiny applied whether or not the government's justification for the statute was content-neutral.[48]

Endnotes

1. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).
2. *Will* Reed v. Town of Gilbert *Require Municipalities Throughout the Country to Rewrite Their Sign Codes?*, 29 MUNICIPAL LAWYER 16 (2015).
3. Gilbert Sign Code § 4.402.
4. *Id.*
5. 587 F.3d 966 (9th Cir. 2009).
6. The district court's unreported order is available at No. CV 07-522-PHX-SRB, 2011 WL 5924381 (D. Ariz. Feb. 11, 2011).
7. 707 F.3d 1057 (9th Cir. 2013).
8. *Id.* at 1071-72.
9. 587 F.3d 966, 978 (9th Cir. 2009).
10. 707 F.3d at 1069.
11. 134 S. Ct. 2900 (2014).
12. *See Solantic, LLC v. Neptune Beach*, 410 F.3d 1250, 1264–69 (11th Cir. 2005) (holding that sign categories similar to Gilbert's were content-based and subject to strict scrutiny); *Matthews v. Needham*, 764 F.2d 58, 59-60 (1st Cir. 1985) (holding that law banning political signs but not commercial signs was content-based and subject to strict scrutiny).
13. *See* Brief of the National League of Cities, United States Conference of Mayors, National Association of Counties, International City/County Management Association, International Municipal Lawyers Association, American Planning Association, and Scenic America, Inc. as Amici Curiae in Support of Respondent, Reed v. Town of Gilbert, 2014 WL 6706843 (Nov. 21, 2014).
14. WEISS SEROTA HELFMAN COLE & BIERMAN, BLOG, *Susan Trevarthen Co-Authors Amicus Curiae Brief to the US Supreme Court*, http://www.wsh-law.com/blog/17146/#sthash.LemdFBTW.dpuf (last visited Mar. 5, 2015).
15. *See, e.g.*, Brief of Amicus Curiae General Conference of Seventh-Day Adventists in Support of Petitioners, *Reed v. Town of Gilbert*, 2014 WL 4726502 (Sept. 22, 2014); Brief Amicus Curiae of the Becket Fund for Religious Liberty in Support of Petitioners, *Reed v. Town of Gilbert*, 2014 WL 4726503 (Sept. 22, 2014).
16. 135 S. Ct. 2218 (2015).
17. Justice Kennedy suggested at oral argument that the petitioner was "forcing us into making a very wooden distinction that could result in a proliferation of signs for birthday parties or for every conceivable event," all of which would enjoy the benefits of political signs. A transcript and audio recording of the oral argument can be accessed at http://www.scotusblog.com/case-files/cases/reed-v-town-of-gilbert-arizona/?wpmp_switcher=desktop (last accessed Aug. 31, 2015).
18. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).
19. 135 S. Ct. 2218, 2228 (2015).
20. 135 S. Ct. at 2227.
21. 135 S. Ct. at 2228.
22. *Id.* at 2227 (quoting *Ward*, 491 U.S. at 791).
23. *Id.* at 2228.
24. *Id.* at 2229 (internal quotation marks and citation omitted).
25. *Id.* at 2230 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).
26. *Id.* at 2230.
27. *Id.* at 2227.
28. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).
29. *Id.* at 2230 (quoting 707 F.3d at 1069 (internal quotation marks omitted)).
30. *Id.* (quoting *Citizens United v. Fed'l Election Comm'n*, 558 U.S. 310, 340 (2010)).
31. *Id.* at 2222.
32. *Id.* at 2230-31 (internal quotation marks and citation omitted).
33. *Id.*
34. *Id.* at 2233 (Alito, J., concurring).
35. *Id.* at 2239 (Kagan, J., concurring).
36. 512 U.S. 43 (1994).
37. 135 S. Ct. at 2239 (Kagan, J., concurring).
38. For a summary of the oral argument, see Lyle Denniston, *Argument Analysis: If a Law Turns Out to Be "Silly"…*, SCOTUS BLOG, Jan. 12, 2015, 2:09 pm, http://www.scotusblog.com/2015/01/argument-analysis-if-a-law-turns-out-to-be-silly/.
39. 135 S. Ct. at 2235 (Breyer, J. concurring) (citing N.Y. Gen. Bus. Law Ann. § 399–ff(3) (West Cum. Supp. 2015) (requiring petting zoos to post a sign at every exit "'strongly recommend[ing] that persons wash their hands upon exiting the petting zoo area'")).
40. No. CV 15–03172 MMM AGRX, 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015).
41. *Citizens for Free Speech, LLC v. Cnty. of Alameda*, No. C14-02513 CRB, 2015 WL 4365439, at *13 (N.D. Cal. July 16, 2015).
42. *Contest Promotions, LLC v. City & Cnty. of San Francisco*, No. 15-CV-00093-SI, 2015 WL 4571564, at *4 (N.D. Cal. July 28, 2015).
43. *See Thayer v. City of Worcester*, 135 S. Ct. 2887 (2015); *Central Radio Co. v. City of Norfolk*, 135 S. Ct. 2893 (2015); *Wagner v. City of Garfield Heights*, 135 S. Ct. 2888 (2015).
44. *Cent. Radio Co. v. City of Norfolk*, 776 F.3d 229, 232-33 (4th Cir.), *cert. granted, judgment vacated sub nom. Cent. Radio Co. v. City of Norfolk*, 135 S. Ct. 2893 (2015).
45. *Wagner v. City of Garfield Heights*, 577 F. App'x 488, 489-90 (6th Cir. 2014), *cert. granted, judgment vacated*, 135 S. Ct. 2888 (2015). The Court also vacated and remanded for consideration in light of *Reed* a case involving an ordinance that prohibited aggressive panhandling and walking on traffic medians for other than "lawful" purposes. *See Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), *cert. granted, judgment vacated sub nom.*, 135 S. Ct. 2887 (2015).
46. *Wagner*, 577 F. App'x at 492 (citing and quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 (1961)).
47. *Norton v. City of Springfield*, 806 F.3d 411, 411 (7th Cir. 2015).
48. *Cahaly v. Larosa*, No. 14-1651, 2015 WL 4646922, at *4 (4th Cir. Aug. 6, 2015) (citing *Reed*, 135 S. Ct. at 2228 ("[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral.")).

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