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Land Use Law Update: Will *Reed v. Town of Gilbert* Require Municipalities Throughout the Country to Rewrite Their Sign Codes?

By Sarah J. Adams-Schoen

Municipal officials and attorneys will want to watch the Supreme Court slip opinions¹ in June for the Court's decision in *Reed v. Town of Gilbert*.² Depending on how the Court decides the case, municipalities may need to act quickly to amend their sign regulations. Indeed, Susan Trevarthen, who represented the American Planning Association in its amicus curiae brief in *Reed*, warns "that adoption of the strict scrutiny test [urged by the petitioner Clyde Reed] 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."³



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As local officials and attorneys know, local sign ordinances are generally recognized to be part of the local government toolkit for advancing substantial governmental interests such as traffic safety and aesthetics.⁴ However, effective regulation of sign placement and aesthetics typically requires the governing jurisdiction to categorize signs by type, and such categorization often requires the regulator to read the sign to determine its function, and therefore its category.⁵

Thus, because these sign regulations require the regulator to review the content of the sign to determine its category, sign regulations pose distinct First Amendment problems for municipalities, which regulate the physical characteristics and placement of signs as part of the exercise of their police powers. Recognizing this, a unanimous Court observed in *City of Ladue v. Gilleo*⁶ that signs present regulatory challenges not applicable to other forms of speech:

While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that

are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs—just as they can, within reasonable bounds and absent censorious purpose, regulate audible expression in its capacity as noise.⁷

Nevertheless, numerous litigants have brought claims alleging that 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. Varied judicial responses to these claims have led to a split of authority and resulting uncertainty in this area of law.⁸

The Court's ruling in *Reed* may resolve this split. Plaintiffs/appellants in *Reed* are the Good News Community Church and its pastor, Clyde Reed (collectively, "the Church"). Defendants/appellees are the Town of Gilbert, Arizona, and Adam Adams in his official capacity as the Town's Code Compliance Manager (collectively, "the Town"). The Church is appealing a Ninth Circuit order that affirmed a district court order granting summary judgment to the Town and denying summary judgment to the Church.⁹

The basic facts are as follows. The Church rented space at an elementary school in Gilbert, Arizona, and placed signs in the surrounding area announcing the time and location of the Church's services. The Town has a sign code that restricts the size, number, duration, and location of many types of signs, including temporary directional signs. The code generally requires anyone who wishes to post a sign to obtain a permit, with numerous exceptions for specific types of signs including "ideological signs,"¹⁰ "political signs,"¹¹ and "temporary directional signs relating to a qualifying event."¹² Treating the Church's signs as temporary directional signs, the Town issued a code enforcement notice to the Church, seeking to enforce the code restrictions applicable to temporary directional signs. 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.

Following Supreme Court precedent that requires intermediate scrutiny for content-neutral regulations,¹³ the district court found that the sign code was a content-neutral regulation that was reasonable in light of the government interests underlying the regulations, and therefore passed constitutional muster.¹⁴ The Ninth Circuit agreed and held that, even though an official would have to read a sign to determine what provisions of the sign code applied, the restrictions were not based on the content of the signs, did not censor speech or favor certain viewpoints over others, and the sign code left open other channels of communication for the Church.¹⁵

The Town's permitting exemption for temporary signs, and, more specifically, its classification of the Church's signs as temporary directional signs, lies at the heart of the *Reed* case. The plaintiff/appellee church in *Reed*—joined by a host of amici representing various religious and libertarian interests, ten states, and the United States¹⁶—argues that if a municipal official has to read the content of a temporary sign to determine what kind of temporary sign it is, the regulation is “content-based” and subject to strict scrutiny. As a result, the Church argues, the Town of Gilbert's sign code is subject to strict scrutiny. Moreover, the Church argues that the Town's code cannot survive strict or intermediate scrutiny because the code is not narrowly tailored and alternative channels for communication do not exist.¹⁷

The United States, which filed a brief in support of the Church, argues instead that intermediate scrutiny applies to the Town's sign code, but the code fails to satisfy that standard. Specifically, the United States argues

[I]ntermediate scrutiny applies in the particular context of a sign-regulation scheme premised solely on the government's substantial and content-neutral interests in safety and aesthetics. Those interests have long been understood as valid bases for limiting the proliferation of signs; they can justify not only general limitations on signs, but also exceptions for signs whose content promotes (or does not significantly detract from) safety and aesthetics; and the existence of such exceptions should not in itself trigger strict scrutiny. Even under intermediate scrutiny, however, respondents' ordinance...draws distinctions be-

tween different types of signs that are not sufficiently connected to safety and aesthetic rationales.¹⁸

The Town—joined by amici representing municipal and planning interests¹⁹—argues that intermediate scrutiny applies to sign ordinances that do not favor or censor viewpoints or ideas and the Town's code does not favor or censor viewpoints or ideas.²⁰ Moreover, amici in support of the Town argue that the Church's absolutist test would wreak havoc on municipalities' ability to further important traffic safety and aesthetic interests and is not necessary to protect speech because a municipality's review of a temporary sign's content to determine the sign's function is not a content-based review.²¹

How will the Court resolve the questions posed in *Reed*? Hopefully by recognizing that review of a sign's text to discern its function does not equate to regulation of the sign's content, but rather is most often a content-neutral safety or land regulation. Although clearly implicating free speech concerns, typical “[c]omprehensive sign regulations are not speech-licensing or censorship schemes but are chiefly concerned with the form and appearance of the development of land in a variety of zoning settings (residential, mixed-use, commercial, industrial, agricultural, and the like).”²² Indeed, many local governments, including the Town of Gilbert, include beauty, community appearance, and safety among the enumerated purposes in their sign regulations.²³ These regulations cannot be effectively implemented if the municipality is hampered in its ability to discern the functions of the signs it regulates. As the National League of Cities argues in its amicus brief,

Signs are speech and thus can be categorized or differentiated only by what they say. This makes it impossible to overlook a sign's content or message in attempting to formulate regulations on signage or even make exceptions required by law. If the mere categorization of signs by function renders them “content-based,”...few sign regulations will meet the exacting strict scrutiny test.²⁴

An outcome that places local government sign codes under strict scrutiny whenever classification of sign types requires a review of the sign's content to understand the function of the sign would arguably place local governments in an impossible position—and require local governments to act quickly to amend their sign codes.

Endnotes

1. According to the Court's official website, the Court publishes slip opinions on its website "within minutes" of issuing its bench opinions. See SUPREME COURT OF THE UNITED STATES, 2014 TERM OPINIONS OF THE COURT, SLIP OPINIONS, PER CURIAMS (PC), AND ORIGINAL CASE DECREES (D), <http://www.supremecourt.gov/opinions/slipopinion/14> (last visited Feb. 27, 2015).
2. See *Reed v. Town of Gilbert*, 134 S. Ct. 2900 (2014) (granting certiorari). The Court heard oral argument in *Reed* on January 12, 2015, and a decision is expected by June. An audio recording of the oral argument can be accessed at http://www.supremecourt.gov/oral_arguments/audio/2014/13-502 (last visited Feb. 27, 2015).
3. 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).
4. *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) (recognizing role of aesthetics in providing for public welfare); *Covenant Media of South Carolina v. Town of Surfside Beach*, 321 Fed. Appx. 251 (4th Cir. 2009) (promoting traffic safety and aesthetics are substantial governmental interests).
5. See *Wag More Dogs v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) (recognizing that categorization for legitimate regulatory purposes requires review of sign content); *National Advertising Co. v. City of Miami*, 287 F. Supp. 2d 1349, 1376 (S.D. Fla. 2003) (recognizing that general rule against regulation of viewpoints "is not applicable in cases where 'there is not even a hint of bias or censorship in the [municipality's] enactment or enforcement of an ordinance'", *rev'd on other grounds*, 402 F.3d 1329 (11th Cir. 2005)).
6. 512 U.S. 43 (1994).
7. *Id.* at 48.
8. Compare *Wag More Dogs*, 680 F.3d at 365 (recognizing legitimate need to review sign content to categorize sign by function) with *Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985) ("[Preferring] the 'functions' of certain signs over those of other (e.g., political) signs is really nothing more than a preference based on content.").
9. The Ninth Circuit order is reported at 707 F.3d 1057 (9th Cir. 2013). The district court's unreported order is available at No. CV 07-522-PHX-SRB, 2011 WL 5924381 (D. Ariz. Feb. 11, 2011).
10. These are defined as signs "communicating a message or ideas for noncommercial purposes" that do not fall into one of several more specific categories. The only restriction on these signs is that they "be no greater than 20 square feet in area and 6 feet in height." Gilbert Sign Code § 4.402(D) and (J).
11. These are defined as signs that "support[] candidates for office or urge[] action on any other matter" on a national, state, or local ballot. Such signs may 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 are not generally limited in number. Gilbert Sign Code § 4.402.
12. These are defined as signs "not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display," that are "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." Such signs may 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 may be displayed only "12 hours before, during, and 1 hour after" the event. They may not be displayed in "the public right-of-way" or on "fences, boulders, planters, other signs, vehicles, utility facilities, or any structure." Gilbert Sign Code § 4.402.
13. See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428-29 (1992) (acknowledging that law prohibiting newsracks when they contain certain types of publications could be content-neutral if distinction based on neutral rationales).
14. No. CV 07-522-PHX-SRB, 2011 WL 5924381 (D. Ariz. Feb. 11, 2011).
15. 707 F.3d 1057 (9th Cir. 2013).
16. 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).
17. Brief for Petitioners, *Reed v. Town of Gilbert*, 2014 WL 4631957 (Sept. 15, 2014); Petitioners' Reply Brief, *Reed v. Town of Gilbert*, 2014 WL 7145497 (Dec. 15, 2014).
18. Brief for the United States as Amicus Curiae Supporting Petitioners, *Reed v. Town of Gilbert*, 2014 WL 4726504, at *7-8 (Sept. 22, 2014).
19. Brief of the National League of Cities et al. Supporting Respondents, *Reed v. Town of Gilbert*, 2014 WL 6706843 (Nov. 21, 2014). The National League of Cities was joined in the amicus brief by 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.
20. Brief for Respondents, *Reed v. Town of Gilbert*, 2014 WL 6466937, at *8-9 (Nov. 14, 2014).
21. Brief of the National League of Cities, *supra* n. 19, at *8.
22. *Id.*
23. See, e.g., Gilbert Sign Code § 4.401; see also Brief of the National League of Cities, *supra* n. 19, at *6 (arguing same).
24. Brief of the National League of Cities, *supra* n. 19, at *3.

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