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U. S. Supreme Court Ruling on Signs

Reed v. Town of Gilbert, 2015 WL 2473374, 576 U.S. __ (U.S. 2015)

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The recent U.S. Supreme Court decision on signs in the *Reed v. Gilbert* case is an alert that communities need to review the implications of the case regarding their own sign bylaws and ordinances.

Courts will now view content neutrality differently given this decision. Further, *Reed* makes clear that view-point neutral regulation is not synonymous with content-neutral regulation. Under the holding in *Reed*, any content-based sign regulation - whether zoning or general - must satisfy the "strict scrutiny" test for constitutional purposes.

Good News Community Church (Good News) claimed that Gilbert's sign ordinance made impermissible content-based distinctions between "Temporary Directional Signs, Ideological Signs, and Political Signs." Good News, which holds services at different locations from week to week, used signs directing congregants to each week's chosen location. Gilbert categorized such signs as "Temporary Directional." The Ninth Circuit Court disagreed with Good News, finding that the sign restrictions, including the distinctions among them, were content-neutral for purposes of free speech.

However, the Supreme Court disagreed. The Court's majority opinion, authored by Justice Thomas, started with the well-recognized principle: "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."

The Court found that the ordinance is "content based on its face" as it regulates based on the message conveyed: Temporary Directional signs convey a message directing the public; Political Signs are designed to influence election outcomes; and Ideological Signs communicate a message or idea. By regulating the message, Gilbert regulated the "communicative content of the sign," making the ordinance content based and subject to strict scrutiny review. Even though the ordinance may have a content-neutral justification, "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute..."

The Court went on to conclude that Gilbert's purported reasons for the regulation, preserving the Town's aesthetic appeal and traffic safety, were not adequate justifications to pass strict scrutiny review. Assuming that these interests were "compelling," the Court found the ordinance "hopelessly underinclusive" because the same restrictions were not placed on other types of signs. Thus, Gilbert failed to show that its ordinance was "narrowly tailored to further a compelling government interest."

The Court concluded the majority opinion by noting that its decision does not limit a municipality's ability to regulate signage, so long as the regulation is content neutral. For instance, "size, building materials, lighting, moving parts, and portability" may be regulated without reference to a sign's message. Further, "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."

The *Reed* decision does not mention the distinction between noncommercial and commercial speech. Older cases, including *Metromedia*, held that commercial speech gets less First Amendment protection

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than noncommercial speech. In the 30-plus years since *Metromedia*, however, commercial speech has received increasing protection. The 2011 case of *Sorrell v. IMS Health* reviewed commercial speech regulations under a time, place, and manner noncommercial speech analysis. It may be that the Court's heavy citation to *Sorrell* in the *Reed* majority, and failure to mention the commercial speech doctrine suggests a gradual weakening of the commercial speech doctrine.

Although the decision was unanimous, the Justices filed three separate concurring opinions. Justice Alito, joined by Justices Kennedy and Sotomayor added "a few words of further explanation." Justice Alito stressed that municipalities are not powerless to enact sign regulation, and provided a non-inclusive list of content neutral criteria:

- * Rules regulating the locations in which signs may be placed;
- * 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; and
- * Rules imposing time restrictions on signs advertising a one-time event.

While Justice Alito's suggests several sign regulations that he believes are content neutral, it is unclear whether the authors of the majority opinion (and even the Breyer and Kagan concurrences) agree, and it may therefore be difficult for a local government lawyer to defend, say, a distinction between onsite and offsite signage, or a temporary event sign regulation, before a lower federal court or a state court.

Justice Breyer provided a separate opinion urging that content-based discrimination "cannot and should not always trigger strict scrutiny." Justice Breyer recognized that "[r]egulatory programs almost always require content discrimination" and provided several examples of content-based regulation where "a strong presumption against constitutionality has no place."

Finally, Justice Kagan, joined by Justices Ginsburg and Breyer, provided a third concurrence. Justice Kagan questioned the reasonableness of applying strict scrutiny review to all types of content-based regulation: "We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function." Concurring only in the judgment, Justice Kagan prophesized that courts will now be required to invalidate numerous "entirely reasonable" sign ordinances, making the Court "a veritable Supreme Board of Sign Review."

Many if not most local governments will need to update their sign codes post-*Reed* to eliminate content-based distinctions.

A link to the decision is at:

http://www.supremecourt.gov/opinions/14pdf/13-502_90lb.pdf