

A Sign of the Times – U.S. Supreme Court Ruling Impacts Municipal Sign Ordinances

December 1, 2015

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Municipal Matters Newsletter - Fall/Winter 2015 Edition

The U.S. Supreme Court recently decided a case that will undoubtedly have a significant impact on municipal sign ordinances. In *Reed v Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2224 (2015), the Supreme Court analyzed a municipal sign ordinance challenged under the First Amendment.

The town, Gilbert, Arizona, enacted a comprehensive ordinance governing the manner in which people were allowed to display outdoor signs – as most municipalities do. The ordinance identified various categories of signs based on the type of information they conveyed and then subjected each category to different restrictions.

One of the categories was “Temporary Directional Signs Relating to a Qualifying Event,” loosely defined as signs directing the public to a meeting of a nonprofit group. The ordinance imposed more stringent restrictions on those signs than it did on signs conveying other messages.

The Supreme Court ruled that those provisions were content-based regulations of speech that were subject to “strict scrutiny” review. As with every other legislative enactment that has been subject to strict scrutiny review, the Gilbert ordinance was held unconstitutional.

The Supreme Court's holding and rationale has far-reaching implications for municipal sign ordinances. In order to understand the Supreme Court's ruling, and how to have an ordinance that complies with the ruling, it is necessary to examine the rationale adopted by the court. First and foremost, the current Supreme Court is perhaps the most protective court ever when it comes to the First Amendment. This case is another in a series of decisions that have expanded First Amendment protections in virtually every setting.

The constitutional challenge in the case was brought by Pastor Clyde Reed of the Good News Community Church. The church sought to advertise the time and location of their Sunday church services. In order to inform the public about its services, which were held in a variety of different locations, the church began placing 15 to 20 temporary signs around Gilbert, frequently in the public

right-of-way abutting the street. The signs typically displayed the church's name, along with the time and location of the upcoming service. Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday.

The practice caught the attention of Gilbert's sign code compliance manager, who twice cited the church for violating the code. The first citation noted that the church exceeded the time limits for displaying its temporary directional signs. The second citation referred to the same problem, along with the church's failure to include the date of the event on the signs. Pastor Reed contacted the sign code compliance department in an attempt to reach an accommodation. The code compliance manager informed the church that there would be "no leniency under the Code" and promised to punish any future violations.

The ordinance being enforced in *Reed* prohibited the display of outdoor signs anywhere within Gilbert without a permit, but then exempted 23 categories of signs from that requirement. Among the exempted categories were "Ideological Signs," which 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." The code allowed ideological signs to be up to 20 square feet in area and to be placed in all "zoning districts" without time limits.

Also exempted were "Political Signs," which included any "temporary sign designed to influence the outcome of an election called by a public body." The code allowed the placement of political signs up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and "rights-of-way." Those signs could be displayed up to 60 days before a primary election and up to 15 days following a general election.

"Temporary Directional Signs Relating to a Qualifying Event" were also exempted from the permit requirement. The exemption applied to any "temporary sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.'" A "qualifying event" was defined as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization."

The code required temporary directional signs to be no larger than six square feet. They could be placed on private property or on a public right-of-way, but no more than four signs could be placed on a single property at any time. The signs could be displayed no more than 12 hours before the "qualifying event" and no more than one hour afterward.

The district court granted the town's motion for summary judgment. The U.S. Court of Appeals for the Ninth Circuit affirmed that ruling, holding that the town's sign categories were content neutral. The court explained that "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed" and its "interests in regulat[ing] temporary signs are unrelated to the content of the

sign.” Accordingly, the court believed that the code was “content-neutral as that term has been defined by the Supreme Court.” The appellate court then applied a lower level of scrutiny to the ordinance and concluded that the law did not violate the First Amendment.

In reversing the appellate court’s ruling, the Supreme Court explained the ordinance was not content-neutral. “The restrictions in the Sign Code that apply to any given sign thus ***depend entirely on the communicative content of the sign***. If a sign informs its reader of the time and place a book club will discuss John Locke’s Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke’s followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke’s theory of government.” Applying that rationale to Pastor Reed’s challenge of the Gilbert ordinance the Supreme Court stated: “More to the point, the Church’s signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech.”

Rejecting the town’s argument that the ordinance did not take a position that either agreed or disagreed with the message being conveyed, and was thus content-neutral, the Supreme Court stated: “A law that is content based on its face 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 In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.” *Reed v Town of Gilbert, Ariz.*, 135 S. Ct. at 2228

The Supreme Court also rejected the town’s argument that a sign regulation that “does not censor or favor particular viewpoints or ideas” cannot be content based. The court gave the example of a law banning the use of sound trucks for political speech—and only political speech—as a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. In applying the example to Gilbert’s ordinance, the Supreme Court observed: “Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination.” *Reed v Town of Gilbert, Ariz.*, 135 S. Ct. at 2230

What does all of this mean for current sign ordinances? Although five justices joined in the Supreme Court’s ruling, five justices – including two who joined the lead opinion – filed concurrences to address that very issue. Justice Elena Kagan expressed her concern that “many sign ordinances ... are now in jeopardy The consequence [of this decision] – unless courts water down strict scrutiny to something unrecognizable – is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter.” *Reed v Town of Gilbert, Ariz.*, 135 S. Ct. 2236-2237

Justice Kagan suggested the better approach would be to inquire whether a law is “viewpoint-neutral” rather than simply “content-neutral.” That, however, is not the test the Supreme Court applies. In order to comply with the *Reed* decision, a sign ordinance must be **content** neutral – that is, distinctions cannot be made among types of messages regardless of whether the government expresses a viewpoint on that message.

In order for the Gilbert ordinance to comply with the Supreme Court's rationale, ideological signs, political signs and temporary directional signs would all have to be subject to the same restrictions. That is, all would have to be the same size. All would have to be allowed in the same locations and all would have to be permitted for the same period of time. The Supreme Court is essentially forbidding the government to decide whether a sign is political as opposed to ideological and, thereby, placing differing restrictions on a sign based on that determination. Since all types of signs must be subject to the same restrictions, it will not matter into which category the government places a sign.

Does this mean that every municipal sign ordinance is now unconstitutional? Not necessarily. However, it is vitally important that municipalities proactively review their sign ordinances to determine whether they comply and if not, amend them. Consultation with an attorney on this issue is essential and a wise investment. Losing a First Amendment challenge in court will not only result in an invalidated ordinance, it will also result in being required to pay the challenging party's attorney's fees.

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