Sign Regulation after
Reed v. Town of Gilbert

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In June of 2015, the United States Supreme Court issued its decision in *Reed v. Town of Gilbert,* 135 S. Ct. 2218. The case originated with an action brought by Clyde Reed, the pastor of the Good News Community Church, a "homeless church" that had no fixed base of worship but rather conducted its services at various locations throughout the town. The location, dates, and times of services were announced by posting temporary signs with this information. Under Gilbert's sign code, temporary directional signs were subject to very short durational and other limitations that differed from regulations applicable to other categories of signs. Pastor Reed felt that the short window of time within which his signs could be displayed frustrated their intended purpose, and in 2007 brought suit in the United States District Court for Arizona. Pastor Reed was unsuccessful in District Court in his facial challenge to the sign code. The Ninth Circuit Court of Appeals affirmed the District Court decision. Thus on *certiorari* the case reached the Supreme Court of the United States.

For background: Gilbert's sign code requires a permit for all signs, but with 23 separate exceptions turning on their purpose(s). Among the exceptions were (a) temporary political signs; (b) ideological signs (for communicating a message or ideas for non-commercial purposes); and (c) temporary directional signs (to direct persons to a qualifying religious, charitable, educational, or non-profit event, but limited in size and duration – 12 hours before the event and 1 hour after the event). There was no content-based distinction among signs within each category, but the categories themselves differed depending on sign content. In other words, the enforcing official would have to read the sign to know which category the sign fell under, and then would have to apply the regulations applicable to that category.

In affirming the District Court decision, the Ninth Circuit reasoned that just because an enforcement official would have to read the sign to ascertain which sign code category the sign falls into does not mean that the code was for that reason content-based. The Ninth Circuit held that the categorical distinctions were based not on content or on the government's views about the sign's message, but rather on the purpose(s) for which the sign was displayed. The Circuit Court's decision was, in its view, consistent with the First Amendment of the United States Constitution and with prior federal court decisions.

The First Amendment states that governments "shall make no law . . . abridging the freedom of speech . . ."   Thus, while governments may exercise their police powers by adopting general and zoning laws, when the exercise of those powers implicates free expression those regulations must satisfy levels and standards of scrutiny higher than applicable to police powers generally. A regulation that is content-based must survive strict scrutiny, meaning the government must prove that there is a compelling governmental interest, the regulation is the least restrictive means to serve that interest, and the regulation is narrowly tailored to achieve that interest.   A sign regulation that is content-neutral is subject to a less rigorous, intermediate scrutiny, which requires that there be a significant or important government interest unrelated to the suppression of speech,

a substantially related means to serve that interest, narrow tailoring of the means to the interest, and ample alternative means of communicating the sign's message. Under this more lenient standard, viewpoint-neutral time, place, and manner restrictions could be fashioned by the government. Rarely does a local regulation pass strict scrutiny when free speech is at issue, while carefully crafted regulations fare rather well under intermediate scrutiny.

At issue in this case, therefore, was whether the Gilbert sign code was content-neutral (as the Ninth Circuit concluded), or content-based. More specifically, the question before the Supreme Court was whether merely considering the content of the sign for administrative purposes makes the sign code content-based, and whether the viewpoint-neutrality of the code or the laudable motivations of the government insulates the code from strict scrutiny.

The unanimous decision of the Supreme Court held that Gilbert's sign code violated the First Amendment. The majority opinion was written by Justice Thomas, and was joined by five other justices (Roberts, Scalia, Kennedy, Alito, and Sotomayor). Justice Kagan, joined by Justices Ginsburg and Breyer, filed an opinion concurring in the judgment but disagreeing with the Court's reasoning. Justice Alito, joined by Justices Kennedy and Sotomayor, also wrote a concurring opinion, in which he outlined categories of sign regulation that, in his opinion, would still be permissible, notwithstanding the Court's decision.

The majority opinion reasoned that government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed. Thus, speech regulation targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter. The Court also held that a law that is content-based is subject to strict scrutiny regardless of whether the government had a benign motive in regulating the speech. The Gilbert code, on its face, was content-based and could not survive strict scrutiny, because the Town did not demonstrate that the code's distinctions furthered a compelling governmental interest and was narrowly tailored towards that objective. Justice Thomas commented that Gilbert's code was "hopelessly under-inclusive," allowing as it does for unlimited numbers of other types of signs that create the same problems, presumably safety and aesthetics. Gilbert also had available ample content-neutral options to resolve its safety and aesthetic concerns – size, materials of construction, lighting, moving parts, location, portability, etc. – all of which have nothing to do with the message.

In her concurring opinion, Justice Kagan contended that it was unnecessary in this case to decide whether a strict-scrutiny test must be applied to sign ordinances that differentiate signs by subject matter, but that do not have the intent or effect of governmental control of ideas or viewpoints. In her view, the Gilbert code was so overly broad, and lacking in a coherent justification for its distinctions, that it was unconstitutional under any standard—the code "does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test." She feared that entirely reasonable regulations that posed no threat to First Amendment values would be invalidated under the majority's opinion.

What may prove to be the most interesting part of the story is Justice Alito's concurring opinion. Alito advanced a "laundry list" of sign regulations that should not be considered content-based. These include regulations having content-neutral criteria for:

- size

- location (including distinctions between free-standing and attached to buildings)

- lighted vs. unlighted signs

- placement on public vs. private property

- placement on commercial vs. private property

- distinguishing between on-premises vs. off-premises signs

- number of signs per mile (or other distance)

- time restrictions or duration on signs advertising a one-time event

- signs erected by government to promote safety, directional signs, and signs pointing out historic or scenic places

"Properly understood," Alito concluded, the Court's decision "will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives."

We are left with many questions on how the decision will play out locally. Many, if not most, Massachusetts cities and towns regulate signs under either their general or zoning ordinances and by-laws. In our accompanying remarks we will touch on how municipal attorneys might best deal with the aftermath of *Reed*. Existing ordinances and bylaws should be reviewed with an eye to repeal, revision, enforcement, etc.

In *Reed's* immediate aftermath, the International Municipal Lawyers Association (IMLA) got quickly into gear to assist the Association's member cities and towns in making well-informed decisions on how best to adjust to the new rules of the game in sign regulation. IMLA promptly made sign regulation after *Reed* the topic of several timely presentations at its annual conference in Las Vegas in October. In the short time between the decision and the conference, IMLA developed the first draft of a Model Sign Code, coordinated the efforts of a group of IMLA members and Association staff in discussing and revising the draft text, and distributed the fourth draft at the October conference.

With the express permission of IMLA the attached "Model Sign Code – 4th Rough Draft" has been reproduced here with the hope and expectation that it will serve as a launch-pad for our Massachusetts cities and towns in reviewing and revising their sign codes to be *Reed*-compliant. IMLA is also soliciting feedback on this 4th Draft to assist it in further revising the document for wider circulation and use. IMLA cautions that the draft is not yet copy-ready for adoption without the careful attention by municipal attorneys familiar with applicable state laws and the provisions of existing ordinances, by-laws, and charters.

In addition to the Model Sign Code, IMLA has also permitted us to reproduce an article on the topic from the October-November issue of IMLA's Municipal Lawyer Magazine, authored by IMLA associate counsel Amanda Kellar, Director of Legal Advocacy – "*Reed's* Aftermath: Strict Scrutiny on Every Corner." Kellar walks us through several lower court decisions applying *Reed*.

We certain don't have all of the answers – let alone all of the questions – in advising our municipal clients how to adopt, revise, or enforce their sign codes; but we trust these materials will guide us in making wise first steps.