

# **SIGN ORDINANCES**

**WHAT CHANGED WITH THE *TOWN OF GILBERT* AND WHAT TO DO NOW?**



# Introduction

- *REED V. TOWN OF GILBERT, ARIZ.*
- *What do we have?*
  - *An over broad standard*
  - *Can effect any city*
  - *Has far reaching consequences*
- *What can you do?*
  - *Take safe steps, and*
  - *Wait for the inevitable clarification.*

# The Case

- The Good News Community Church, and its pastor Clyde Reed filed suit under 42 U.S.C. § 1983 against the Town of Gilbert in March 2007.
  - Note: § 1983 is a fee generating statute
- City won on S.J., and 9<sup>th</sup> Circuit affirmed.
- The Supreme Court took the case, and ultimately reversed the lower court.
  - This ruling settled a three way circuit split.

# Factual Background

- The Good News Community Church used temporary signs to direct people to their Sunday worship.
- The Church was cited for exceeding the time limits for displaying temporary directional signs and for failing to include an event date on the signs.
- The town's sign code, imposed differing restrictions on the size, duration, and location of different types of temporary signs, including “political signs,” “ideological signs,” and “directional signs relating to a qualifying event,” such as a religious, charitable, or community event.

# Facts – Continued

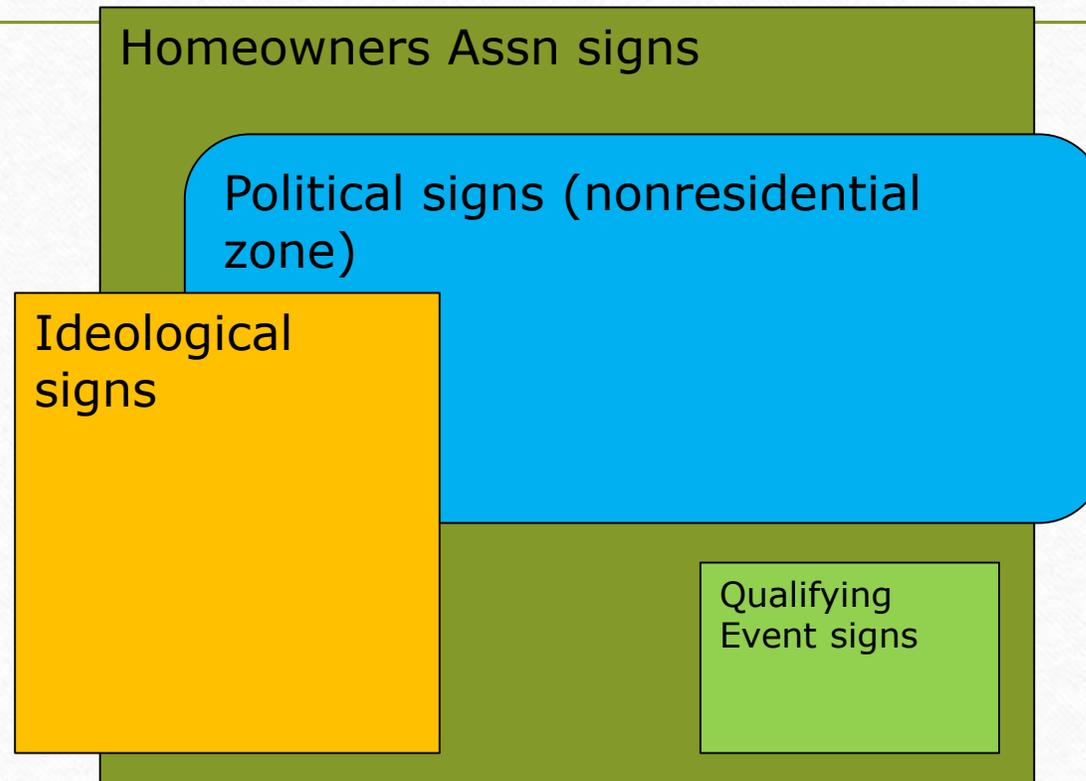
- The Church and its pastor, Clyde Reed brought suit against the Town of Gilbert, claiming that the town's sign code abridged their freedom of speech.
- This differentiation among the types of signs was unconstitutional argued the Church.
  - The sign code also exempted 23 categories of signs from that requirement.



# Facts – The Sign Code

- **Temporary Directional Signs Relating to a Qualifying Event:**
  - This includes any “Temporary Sign intended to direct pedestrians, motorists, and other passersby to a ‘qualifying event.’”
  - Basic signs, telling people where to go for an event, like a church.
  - Treated less favorably than other types of signs.
- **Political Signs:**
  - This included any “temporary sign designed to influence the outcome of an election called by a public body.” These signs were treated less favorably than ideological signs.
- **Ideological Signs:**
  - This included any “sign communicating a message or ideas for noncommercial purposes that is not . . .” otherwise defined.

# Maximum sign sizes in Gilbert



# The Majority Opinion

- Justice Thomas wrote for the majority, joined by Roberts, Scalia, Kennedy, Alito, and Sotomayor.
- There were three concurring opinions, all of which limited the majority.
  - More important later

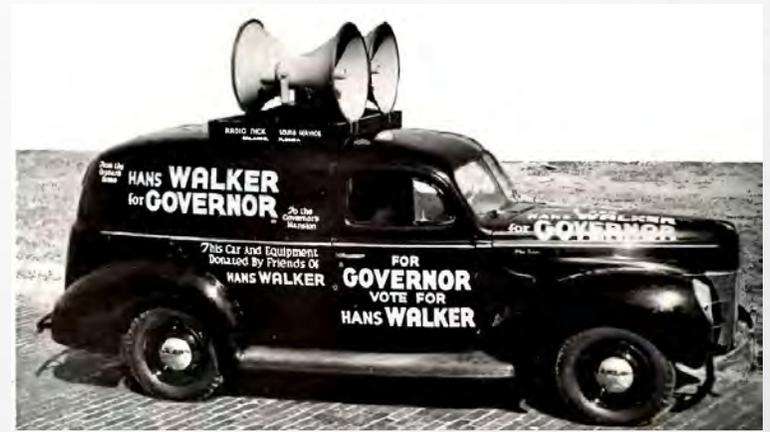
# The Majority Opinion

- SCOTUS held that the distinctions among signs was a content-based regulation of speech that did not survive strict scrutiny.
  - Some circuits allowed differing regulations among signs, if the regulation were not adopted based on “disagree[ment] with the message conveyed,” and the justifications for regulating content were “unrelated to the content of the sign.”

# Maj. Op. Cont.

- The Majority said this view “skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face.”
- If the law is content based on its face then it 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.”

# The Court's Examples



“a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed.”

“The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts, and portability.”

# Maj. Op. Outcome

- The Majority held that the distinctions among signs (Political, Ideological, Directional) was a content-based regulation of speech and thus the Code was subjected to strict scrutiny.
- The Town of Gilbert could not meet its burden to prove that its Sign Code was narrowly tailored to further a compelling government interest, and thus failed strict scrutiny.

# The Concurring Opinions

- Three concurring opinions were penned in an attempt to limit the Majority Opinion:
  1. One written by Justice Alito (joined by Justice Kennedy and Sotomayor),
  2. One written by Kagan (joined by Justice Ginsburg and Justice Breyer), and
  3. One written by Breyer alone.
    - i. A total of 6 justices concurring.

# Alito's Opinion

- Justice Alito wrote in an attempt to guide the majority opinion
- He gave a list of criterion which he deemed content neutral, and thus within a city's ability to regulate.
- Alito did not want to do away with the majority opinion, but had hope the opinion could be limited.

# A New Hope: Alito's Criteria

- According to Alito, cities could still regulate:
  - Rules regulating the size of signs;
  - Rules regulating the locations in which signs may be placed;
  - May distinguish between free-standing signs and those attached to buildings.
  - Rules distinguishing between lighted and unlighted signs.
  - Rules distinguishing between signs with fixed messages and electronic signs with messages that change.

# Other Possible Regulations – Alito

- According to Alito, cities could still regulate:
  - 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.

# Other Possible Regulations – Alito

- According to Alito, cities could still regulate:
  - Rules restricting the total number of signs allowed per mile of roadway.
  - Rules imposing time restrictions on signs advertising a one-time event.
  - Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed.

“Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public safety and serves legitimate esthetic objectives.”

*Alito, Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2233-34 (2015) (Alito, J., concurring).

# Kagan's Opinion

- Kagan's concurrence, joined by Ginsburg and Breyer, did not join in the majority opinion
  - Unlike Alito, Kennedy and Sotomayor
- Primarily Kagan's concurrence was written to note the possible downsides of the majority opinion.

# Kagan's Opinion

- “Countless cities and towns across America have adopted ordinances regulating the posting of signs, while exempting certain categories of signs based on their subject matter . . .”
- “Given the Court's analysis, many sign ordinances of that kind are now in jeopardy.”
- “As the years go by, courts will discover that thousands of towns have such ordinances, many of them “entirely reasonable.” And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.)”

# Kagan's Standard

- Kagan argued for a more flexible approach than the one articulated by the majority.
- She argued that the Supreme Court “may do well to relax our guard so that ‘entirely reasonable’ laws imperiled by strict scrutiny can survive.”
- These laws are likely those laws that “will skew the public's debate of ideas.”
  - So when “that risk is inconsequential, ... strict scrutiny is unwarranted.”

# Breyer's Opinion

- Echoing Kagan, Breyer wrote largely disagreeing with the majority's reasoning.
- Breyer believes:

“First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as ‘content discrimination’ and ‘strict scrutiny,’ would permit.”

# Breyer's Opinion

- Breyer argued for a different approach to content-based regulations.
- Instead of all content-based regulations being categorically subjected to strict scrutiny he wanted a more nuanced approach.
- The “better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened . . .”

# Breyer's Opinion

- Breyer's rule could operate as “rule of thumb” in the other situations, finding it helpful but “not a determinative legal tool, in an appropriate case, to determine the strength of a justification.”
- Breyer's method as he put it would protect “regulation of signage along the roadside, for purposes of safety and beautification . . .”
  - So does this mean these signs are in jeopardy?

# Counting Justices

- While the Majority Opinion won today, there is hope.
- Alito, Kennedy, Sotomayor, Breyer, Kagan, and Ginsburg (6) concurred
- So should the right case come along it is likely that Reed would be limited, because currently 6 justices thought the case went too far (or in Alito's opinion, needed more specificity).
- Of the Majority's 6 Alito, Kennedy, and Sotomayor, could easily shift their ruling.

# What has happened since Reed?

- Several district courts have begun applying Reed to every conceivable type of speech
  - (except commercial speech, it remains easy to regulate)
- The Seventh Circuit took up an important solicitation case in light of Reed, and ruled against the municipality.

# Norton v. City of Springfield, Ill. – Anti-Panhandling / Solicitation Laws

- The ordinance in question applied only to panhandling through an “oral request for an immediate donation of money.”
- The ordinance expressly did not regulate: signs requesting donation, and oral pleas to send money later.
- The distinction between requests for money immediately and money later was facial speech discrimination under Reed, and as such the ordinance was required to meet strict scrutiny.

## Norton v. City of Springfield, Ill.

- This case turned solely on the outcome in Reed v. Town of Gilbert.
- Prior to striking down the ordinance the Seventh Circuit had already held that the ordinance was content neutral.
- However, the Seventh Circuit waited until after Reed to rule on the rehearing.
- Then, in light of Reed, the Seventh Circuit found the ordinance a form of content based discrimination and unconstitutional.

# District Court Cases

# What has happened since *Reed*?

- ▶ *Reed* has been applied to a variety of speech cases, and any time that speech is at issue cities should think of *Reed*.
- ▶ Some of the situations where *Reed* has been applied to invalidate laws include:
  - ▶ Election sign restrictions
  - ▶ Robocalling laws
  - ▶ Anti-panhandling ordinances
  - ▶ Licensing of solicitor's by ordinance
  - ▶ Laws preventing sharing election ballot photos
  - ▶ State's regulation of an advice column from a purported psychologist

# Solicitation laws

- ▶ In *Working Am., Inc. v. City of Bloomington*, Working America, an advocacy organization focusing on labor issues, challenged Bloomington's ordinance that requires certain door-to-door solicitors to obtain a “solicitor's license” prior to soliciting.
- ▶ The Bloomington ordinance only regulated certain types of solicitors, in particular those seeking to raise funds, whereas it exempt many others, this ensured that it would be treated as content based under *Reed*, and accordingly held unconstitutional. *Id.*
- ▶ *Working Am., Inc. v. City of Bloomington*, No. CV 14-1758 ADM/SER, 2015 WL 6756089, at \*1 (D. Minn. Nov. 4, 2015).

# Election Signs

- ▶ One court ruled that restrictions against temporary signs, including elections signs, are content based discrimination where those signs are treated differently than other types of temporary signs.
- ▶ *Marin v. Town of Se.*, No. 14-CV-2094 KMK, 2015 WL 5732061, at \*15 (S.D.N.Y. Sept. 30, 2015).

# Certain Robocalling laws

- ▶ The Fourth Circuit relying on *Reed* declared a South Carolina law prohibiting “robocalls” unconstitutional in *Cahaly v. Larosa*, 796 F.3d 399, 402 (4th Cir. 2015).
- ▶ The statute placed different restrictions on robocalls depending on whether they were (1) unsolicited and (2) made for consumer, political, or other purposes. *Id.*

# How to avoid a Reed problem

## Step 1 – Review and Redraft

- ▶ First, cities should thoroughly review their ordinances and identify any regulations that relate to speech (signage, panhandling, solicitation, etc.).
- ▶ Then the city should review these ordinances to determine if any regulations are content-based. These would include any regulations that are based on the content or subject of the message, the person and/or group delivering the message, or an event(s) taking place.
- ▶ Once identified, any content-based ordinance should not be enforced until the ordinance is redrafted, or the city determines it to be a valid content-based regulation in light of *Reed*.

# How to avoid a Reed problem

## Step 2 – Redraft and Add

- ▶ As you redraft signage codes, include strong, well-articulated purpose statement to pass constitutional muster. Although *Reed* rejected the notion that only a content neutral purpose is sufficient to withstand a First Amendment challenge, governmental intent remains an important factor in sign code drafting and litigation.
- ▶ Minimize categories and exceptions. The more categories, and exceptions, found in the code are more opportunities for content based distinctions.
- ▶ Focus on regulating non-content aspects of signs, such as:
  - ▶ Number of signs
  - ▶ Area
  - ▶ Height
  - ▶ Placement
  - ▶ Lighting
  - ▶ Movement
  - ▶ Duration (permanent or temporary)

# Substitution clauses – Just in Case

- ▶ A substitution clause should be added to the sign ordinance.
- ▶ This allows any non-commercial sign to be permitted where commercial messages are allowed.
- ▶ This is to ensure that non-commercial messages are not ever treated worse than commercial messages, thereby invoking *Reed* concerns.
  - ▶ Ex. “Signs containing noncommercial speech are permitted anywhere that advertising or business signs are permitted, subject to the same regulations applicable to such signs.”
- ▶ Also include a severability clause contained within the adopting ordinance.

# You're in litigation, what now?

- ▶ Avoidance is the best method.
  - ▶ So far no court has upheld a non-commercial content-based regulation since *Reed*, no defendant has been able to show that their regulation was “the least restrictive means of achieving a compelling state interest.”
- ▶ Frame the case. The last option is to frame the case so as to avoid *Reed* and strict scrutiny.
  - ▶ If the ordinance only regulates commercial messages you should get intermediate scrutiny.

# Conclusion

- ▶ The best strategy is avoidance.
  - ▶ So far no court has upheld a non-commercial content-based regulation since *Reed*,
  - ▶ No defendant has been able to show that their regulation “furthers a compelling interest and is narrowly tailored to achieve that interest . . .”
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- ▶ Any Questions?