“All is Not Lost” – Updating your Sign Code after the Reed v. Town of Gilbert Case

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- Legal and policy consultation
- Research support
- Training Opportunities
- Sample document library
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INTRODUCTION

Here is what I am going to cover during my presentation:

1. Introduction/Overview of Reed v. Town of Gilbert & related case law
2. Implications for Local Sign Codes
3. Tips for Updating your Sign Code
4. One Approach to Implementation
5. What’s Next with Sign Regulations / Final thoughts
6. Discussion / Q&A
But first...a couple questions:

1. Who has been part of drafting a sign code in the past? Worked with the sign code?

2. Who has begun updating their sign codes post Reed?
INTRODUCTION

Sign codes are challenging.

Why?

- Sensitive subject (aesthetics, business interests, safety)
- Complex, with lots of details
- Raise First Amendment/Free Speech issues
- Legal aspects are not always well understood and difficult to explain
The Reed v. Town of Gilbert case has made it even more important (and difficult) to address your sign code!

- Greater attention on sign regulations now.
- Strict test for “content neutrality.”
- Increased potential for litigation, including:
  - Section “1983” lawsuit – “Deprivation by a State or Local Official of Civil Rights Protected by the US Constitution”
Plaintiffs

- Small, cash-strapped church. Good News Community Church (Pastor Clyde Reed)
- Church does not have permanent home
- Services held at local schools and other locations within the Town of Gilbert
- Church used temporary directional signs to guide people to their services
Defendant

- Town of Gilbert, Arizona
- Suburb of Phoenix
- >200,000 people
Gilbert's sign code prohibited display of signs without a permit

But exempted 23 categories of signs

Three categories at issue in Reed:

- Ideological
- Political
- Temporary Directional
Town’s Sign Code:

- **Temporary Directional Signs** (Not political, commercial, or ideological)
  - Can’t exceed 6 sq. ft. / Max time up: 12 hrs. before until 1 hr. after event

- **Political Signs**
  - Up to 32 sq. ft. in non-residential zones / Max time up: 60 days before and 15 days after elections

- **Ideological Signs**
  - Can’t exceed 20 sq. ft. in non-residential zones / unlimited time for display / can’t be in ROW
OVERVIEW OF REED V. TOWN OF GILBERT

Plaintiffs’ “Temporary Directional” Signs

- Town of Gilbert cited Reed for violating the time limits and failing to provide a date of event on the sign, as required for the “Temporary Directional” sign category.

- After failing to reach an accommodation, Reed sued the Town of Gilbert.
OVERVIEW OF REED V. TOWN OF GILBERT

U.S. SUPREME COURT DECISION:

- Nine justices unanimously agreed that the Town’s sign code violated the First Amendment.
- Four opinions were issued:
  - Majority opinion (Justice Clarence Thomas, joined by five others)
  - One Concurrence (Justice Samuel Alito, joined by two others)
  - Two Concurrences in the judgment (Justice Stephen Breyer, Justice Elena Kagan, joined by Justice Ruth Ginsburg)
OVERVIEW OF REED V. TOWN OF GILBERT

Majority Opinion:

- The different standards for different categories of noncommercial speech were content-based.
- Content-based regulation is presumptively unconstitutional and a strict scrutiny test applies.
  - “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.”
OVERVIEW OF REED V. TOWN OF GILBERT

Majority Opinion:

- Adopted very strict test for determining whether a regulation is content-based. Basically, if you have to read the sign to enforce the code, then it's content based.

- Previously, there was a split in the circuit courts and US Supreme Court jurisprudence. Most applied a "purposive" approach to determining content neutrality.
Purposive Approach to determining content-neutrality

- Whether the regulation was adopted because of disagreement with the message it conveys.
- The government’s purpose is the controlling consideration.
- Regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.
Reed approach to determining content-neutrality ("Absolute Rule")

- Look at whether regulation is content-based on its face
- Government’s purpose is not relevant.
  - “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 towards the ideas contained in regulated speech.”
Reed Approach to determining content-neutrality (“Absolute Rule”)

- Thomas acknowledged that making event based distinctions may be a “perfectly rational way to regulate signs” but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem entirely reasonable will sometimes be struck down because of their content-based nature.
FIRST AMENDMENT TESTS FOR REGULATING SPEECH

- If content-based distinction in regulations of a public forum, **STRICT SCRUTINY** applies
  - Regulations must be narrowly tailored to meet a compelling government interest
  - Presumptively unconstitutional
- If regulations content-neutral, less rigorous **TIME, PLACE, AND MANNER** test for a public forum (**INTERMEDIATE SCRUTINY**)
  - Regulations must be narrowly tailored to serve the government’s significant interests and leave open ample alternative means of communication
- If nonpublic/limited forum
  - Regulations need only be **reasonable and viewpoint neutral**
In Reed, having determined that the regulations were content-based, the Court found they failed strict scrutiny.

The distinctions between the three types of noncommercial signs were not narrowly tailored to meet the government’s compelling interests.

Because the code placed strict limits on temporary event signs but more freely allowed ideological signs—despite the fact that both types of signs have the same effect on safety and aesthetics—the code failed the narrowly tailored requirement.
What is “narrowly tailored”? 

- **Intermediate Scrutiny:** regulation need not be the least restrictive or least intrusive means to serve the government’s legitimate interests.

- **Strict Scrutiny:** regulation must be the least restrictive means for achieving the compelling governmental interest.
Alito’s Concurrence:

- Provides a non-exhaustive list of rules that would likely not be found content-based

- Government may “put up all manner of signs to promote safety, as well as directional signs, and signs pointing out historic sites and scenic spots.”
OVERVIEW OF REED V. TOWN OF GILBERT

Alito’s List:

- Location (e.g., zones/areas, public/private)
- Size & Height
- Type of Structure (including freestanding vs. building-mounted)
- Use of Materials
- Maximum number
- Lighted vs. unlighted signage
- Fixed vs. changing message signs (electronic or otherwise)
- Moving parts
- Portability (e.g., A-frame signs)
- Restrictions on signs advertising a one-time event
- On-premise vs. off-premise
Kagan’s Concurrence:

- Justice Kagan casts a shadow over Alito’s concurrence if the majority decision is to be applied
  - For example, would need to read message of sign to know if it is a one-day event, off premise, etc.
  - She also questions historical signs passing strict scrutiny
Kagan’s Concurrence:

“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...The consequence *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.”
OVERVIEW OF REED V. TOWN OF GILBERT

Alito’s List, with Kagan’s viewpoint:

- Location (e.g., Zones/areas)
- Size & Height
- Type of Structure (including freestanding vs. building-mounted)
- Use of Materials
- Maximum number
- Lighted vs. unlighted signage
- Fixed vs. changing message signs (electronic or otherwise)
- Moving parts
- Portability (e.g., A-frame signs)
- Restrictions on signs advertising a one-time event
- On-premise vs. off-premise
Reed was silent regarding commercial speech.

So far, district courts in the Ninth Circuit have held that Reed is inapposite in commercial speech cases and does not disturb the commercial speech framework set forth in earlier USSC decisions.

Commercial speech affords less protection than non-commercial speech, but is protected speech under the First Amendment as long as it concerns a lawful activity and is not misleading.
Commercial Signs, cont.

Three Part Test

(1) the restriction must seek to further a substantial government interest,

(2) the restriction must directly advance the government's interest, and

(3) the restriction must reach no further than necessary to accomplish the given objective.

Laws that distinguish between on-site and off-site commercial speech generally survive intermediate scrutiny (e.g. a ban on commercial billboards).

The on-site/off-site distinction is concerned with the location of the sign relative to the product and does not distinguish based on subject.

Commercial speech cannot be favored over noncommercial speech.
WHAT ELSE BESIDES REED?

Lone Star Security v. City of Los Angeles

Ninth Circuit very recently held that a ban on certain-types of mobile advertising billboards OK.

- Reference to “advertising” did not make the regulations content-based.
- Because content-neutral, intermediate scrutiny test applied
- Regulate the manner not the content of speech (size and type)
WHAT ELSE BESIDES REED?

Banning Signs on Public Property

- A content-neutral prohibition on public property generally OK (see *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984)),

- *However*, caution against a complete ban in the “right of way”
  - In Washington state, the parking strip portion of the ROW determined to be a public forum and a ban on political signs in this area held unconstitutional (see *Collier v. City of Tacoma*, 121 Wn.2d 737 (1993)).
Reed Lessons for Passing Even Intermediate Scrutiny:

- **“Goldilocks” Rule**—Can’t be vague or under/over breadth—needs to be narrowly tailored to meet its intended purpose (“Just right”)

- **Show Your Homework**—Must show why and how rule meets significant government interest
**TIPS FOR UPDATING YOUR SIGN CODE**

**RISK ASSESSMENT**

- Potentially competing factors at play regarding sign codes
  - Government’s interest in regulatory objectives such as aesthetics, safety, traffic management
  - Risk of Lawsuit relating to Constitutionality
- Each jurisdiction will need to make its own assessment
- There are ways to mitigate risk
ENFORCEMENT

As you are in the process of revising your code, do not enforce any existing content-based sign regulations that may subject you to litigation.
TIPS FOR UPDATING YOUR SIGN CODE

REVIEW YOUR EXISTING SIGN CODE

- Typically, many types of noncommercial signs exempt from permitting to avoid the challenge of prior restraint on speech.

- Exceptions from permitting OK, however problem comes when several different categories identified that may be content-based (real estate; political; construction).
TIPS FOR UPDATING YOUR SIGN CODE

KEY QUESTIONS

▶ Are there content-based exceptions to permitting?

▶ Are there different rules for different defined types of signs? (e.g. different size, durational limitations, locational requirements, etc.)

▶ If certain signs treated differently, does it further the government’s stated regulatory interest (e.g. de-cluttering, aesthetics, safety)
TIPS FOR UPDATING YOUR SIGN CODE

RECONSIDER CATEGORIES OR DEFINITIONS

- Define categories according to activities where sign is located so don’t need to read the sign to enforce.

- **AVOID:** Hot-button categories such as political, religious, etc.

- Maintaining categories of exempt signs is still risky because regulating sign based on function.
TIPS FOR UPDATING YOUR SIGN CODE

EXAMPLES OF REDEFINED CATEGORIES

- **BAD:** Real estate signs.
- **BETTER:** A temporary sign posted on property that is actively marketed for sale.
- **BAD:** Event Sign.
- **BETTER:** A temporary sign displayed within 500 feet of property on which a one-time event is held, and which sign may be displayed for up to five days before and one day after such event.
- **BAD:** Construction sign
- **BETTER:** A temporary sign placed within a parcel of property upon which construction activities of any type are being actively performed.
TIPS FOR UPDATING YOUR SIGN CODE

IF CATEGORIES BAD, WHAT’S AN ALTERNATIVE?

- Uniform regulation of noncommercial temporary signs.
- Distinguish from permanent signage based on structural characteristics and materials.
- Limits on time, number, size.
- **EXAMPLE**: “Notwithstanding any other provision of this code, each parcel of real property shall be allowed, without a permit, an additional 32 square feet of temporary noncommercial signage, not to exceed four signs at any one time, for a period not to exceed ninety days per calendar year.”
TIPS FOR UPDATING YOUR SIGN CODE

MAKE SURE TO INCLUDE...

- **Strong Purpose Statement**: This will demonstrate the government’s “significant” or “compelling” regulatory interest.
  - Basic statements about “aesthetics” and “traffic safety” can be included, but won’t likely pass muster alone
  - The more specific, the better
  - *Examples of additional purpose/policy objectives*: economic development, de-cluttering, civic engagement, free expression, etc.
  - Consider studies or empirical analysis to support this. Also good comprehensive planning.
TIPS FOR UPDATING YOUR SIGN CODE

MAKE SURE TO ALSO INCLUDE...

- **Substitution Clause**: Ensures that commercial signs will not be favored over noncommercial signs. Anywhere where commercial signs are allowed, noncommercial signs are also allowed.

- **Severability Clause**: Ensures that the rest of a code survives should one part be found invalid.
TIPS FOR UPDATING YOUR SIGN CODE

Regulatory Options

Location:
- General
  Zones
  Overlay Districts
  ROW
- Parcel-specific
  Set-backs
  Spacing Restrictions
  On/Off Premise

Type of Property:
- Commercial vs. Residential
- Public vs. Private
- Permitted Construction Site
- House/apartment actively for sale

Use of Property:
- Properties with a drive-thru
- Properties with sports fields
- Etc.

Type of Sign:
- Materials, etc.
TIPS FOR UPDATING YOUR SIGN CODE

Regulatory Options (continued)

Confidently Enforceable:

- Size
- Lighted/Unlighted
- Fixed/Changing Messages
- Traditional Government Signs
- Total # of Signs
- Materials
- General Time Restrictions/Duration

Questionably Enforceable:

- Time Restrictions on Signs Advertising One-Time Events
- Government Signs for Historic Sites, Scenic Spots, etc.
- On/Off Premises (though commercial likely ok)

CONSULT YOUR ATTORNEY!
TIPS FOR UPDATING YOUR SIGN CODE

Regulatory Options (continued)

- Don’t forget to think about:
  - Neighborhood/geographic signs ("sense of place" signs)
  - Art / Murals

- Either draft so excluded from the sign code, or draft general regulations that would accommodate desired uses

- Remember, though, to not upset or defeat your Purpose Statement
TIPS FOR UPDATING YOUR SIGN CODE

ADMINISTRATION & ENFORCEMENT OF NEW SIGN CODE

- Public education / outreach
- Account for increased demand on staff time
- Consistency, consistency, consistency
LAST, BUT NOT LEAST

- Work closely with your municipal or prosecuting attorney!
- Keep your elected officials informed about this issue and your update process
- Have an open and transparent code revision process
Covington’s Approach

- Reviewed *Entire* Sign Code
  - All relevant stakeholders participated—Community Development Director, Senior Planner, Code Enforcement Officer, City Attorney
  - Scrubbed against most conservative interpretation/analysis of Reed v. Gilbert
- Use of **RED** **YELLOW** **GREEN** to tag code
ONE APPROACH TO IMPLEMENTATION

- **Categorical Signs**
  - Political/Election, Real Estate, Directional/Identification, Instructional, Construction, Nameplate, Price, Home Occupation, etc.

- **Speaker and Event-Based Signs**
  - Grand Opening Signs, Garage Sale Signs, “Displayed on a lot with a property for sale or rent”, Theater Signs, Gas Station Signs, etc.

- **Content-based Exemptions**
  - Time/temp from ban on changeable copy sign, real estate signs from ban on temporary signs, etc.
Consider whether Dependent Provisions are Content-Based
  • e.g. If definition of signs is unenforceable, along with all code provisions dependent on that definition.

Consider those Regulations Questioned by Kagan
  • Time restrictions on signs advertising a one-time event
  • Government signs for historic sites and scenic spots
  • On / Off Premises
  • But note Ninth Circuit interpretations

Facially **RED** but Substantively **GREEN**
  • e.g. “inflatable advertising devices” OR “commercial handbills”
  • Note “advertising” discussion in Ninth Circuit decision
Alito’s List (minus Kagan shade), such as:
  - Lighting
  - Fixed v. Changing Messaging
  - Restricting Total # Signs per Mile of Road
  - Public v. Private / Commercial v. Residential Property
  - Government Signs—Promoting Safety, etc. (Purposes that would pass strict scrutiny)

Established Content-neutral Regulations
  - Size
  - Materials
  - Placement (i.e., lot location, set-backs, etc.)
**Initial Council Study Session**

- Presented abstract questions to extract broad policy objectives
- Collated responses with the group and reduced to five main categories:
- Internal Staff Follow-Up—Took results and compared against comp plan goals and city mission/vision statements
Second Study Session

- Present general code recommendations based on council’s expressed goals/preferences and current purpose provision
- Present minimal regulations required based on current case law
- Spaghetti on the Wall—Get all desired regulations from council and then will return with draft code
Third Study Session

- Present draft sign code
- Explain why certain provisions are either clearly unconstitutional, carry too much legal risk, or would be too difficult to implement and/or enforce (REDs and YELLOWs)
- Seek consensus on general draft to then begin planning commission review and public comment
Subsequent Meetings... And Beyond

- Review by Planning Commission
- Review by Interested Stakeholders and the Public
- Public Hearing
- Bring back for Council review and adoption
WHAT’S NEXT RE: SIGN REGULATIONS

- Evolving situation
- More jurisdictions are working on their sign code updates (such as Covington, Tacoma, and Prosser)
- Examples should be available soon
- Model ordinances have been, or are being, prepared
  - AWC (but restricted access)
  - International Municipal Lawyers Assn. (IMLA)
Implementation

- Risk Assessment
- Draft “for Goldilocks” and show your homework
- Include stakeholders
- Consider administration of new code—reality of staff time v. community needs/expectations
SOME FINAL THOUGHTS

In the Mean Time…

➤ Develop Policy for *Enforcement* of *Current* Code
  • Based on *RED YELLOW GREEN* review (*remember to ensure that dependencies of all *GREEN* code areas are also *GREEN*)

➤ Demonstrate Movement Towards New Code
  • Director's Decision; official policy; interim regulations; etc.

➤ Best to Avoid
  • Moratoria (unconstitutional prior restraint on speech)
  • “Free for all” (could impede on property rights)
THANK YOU FOR YOUR ATTENTION and GOOD LUCK!
Discussion / Q&A