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***Reed v. Town of Gilbert - Content Based Sign Codes***

*Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015). United States Supreme Court ruled that sign code provisions that rely upon the communicative content of the sign are content based on their face and are subject to strict scrutiny. Strict scrutiny requires the government to prove that the restriction furthers compelling interest and is narrowly tailored to achieve that interest.*

**I. Facts.**

This case centers around the City of Gilbert, Arizona's sign code, which prohibits the display of outdoor signs without a permit, but exempts 23 categories of signs, including three relevant here.

- "Ideological Signs," defined as signs "communicating a message or ideas for noncommercial purposes" that do not fit into other Sign Code categories, may be up to 20 square feet and have no placement or time restrictions.
- "Political Signs," defined as signs "designed to influence the outcome of an election," may be up to 32 square feet and may only be displayed during an election season.
- "Temporary Directional Signs," defined as signs directing the public to a church or other "qualifying event," have even greater restrictions: No more than four of the signs, limited to six square feet, may be on a single property at any time, and signs may be displayed no more than 12 hours before the "qualifying event" and 1 hour after.

Petitioners, Good News Community Church (Church) and its pastor, Clyde Reed, held Sunday church services at various temporary locations in and near the Gilbert. In order to identify the location for the current week's service, the Church posted temporary signs early each Saturday bearing the Church name and the time and location for the next day's service. The Church left the signs up from Saturday until around midday Sunday, the day of the service. The Church left the signs up for longer than 1 hour after the event and was cited for exceeding the time limits prescribed for "temporary directional signs." The Church filed suit claiming that the Code abridged their freedom of speech.

The District Court denied the Church's motion for a preliminary injunction, and the Ninth Circuit affirmed, ultimately concluding that the Code's sign categories were content neutral, and that the Code satisfied the intermediate scrutiny accorded to content-neutral regulations of speech.

## **II. Applicable Law and Analysis.**

Justice Thomas delivered the opinion of the court and was joined by Justices Roberts, Scalia, Alito, and Sotomayor. Justice Alito wrote a concurring opinion to which Kennedy and Sotomayor joined. Additionally, Justice Kagan filed an opinion concurring in the judgment only, which was joined by Justices Ginsburg and Breyer. Finally, Justice Breyer filed an opinion concurring in the judgment only as well.

Justice Thomas began his opinion by discussing the concept of content based regulation of speech. Thomas embraced the "commonsense meaning of the phrase 'content based'" which, he explained, required the Court to consider whether a regulation of speech "on its face" draws distinctions based on the message the speaker provides. If the regulation of speech is content based on its face, then it is subject to strict scrutiny.

Justice Thomas then applied this rule to the sign regulations in effect in Gilbert. The sign code defined "temporary directional signs" on the basis of whether the sign conveys the message of directing people to a qualified event. "Political signs" were defined as those with a message designed to influence the outcome of an election. Finally, "ideological signs" are those that communicate a message or idea for non-commercial purposes that do not fit into the other code categories. "The restrictions in the sign code that apply to any given sign thus depend entirely on the communicative content of the sign... On its face, the sign code is a content-based regulation of speech." Consequently, the sign code was subject to strict scrutiny. "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."

Justice Thomas next reinforced that the First Amendment hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.

Finally, Justice Thomas discussed how laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference. A law limiting the content of speakers cannot evade strict scrutiny simply because it could not be characterized as speaker based.

In conclusion, “because the town’s sign code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, which requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” In applying this test to the government interests stated by Gilbert (aesthetic appeal and traffic safety) Justice Thomas quickly held that the City failed to meet its burden to prove that the sign code was narrowly tailored and to further a compelling government interest.

Justice Alito wrote a concurring opinion which Justices Kennedy and Sotomayor joined. Justice Alito confirms Justice Thomas’ analysis and states, “as the court shows, the regulations at issue in this case are replete with content-based distinctions, and as a result they must satisfy strict scrutiny.” However, Justice Alito then proceeded to outline a series of rules that he believes would not be content based. His list was only endorsed by three justices and does not amount to law.

Justice Stephen Breyer also wrote a concurring opinion, in which he argued that content-based discrimination should be considered a "rule of thumb, rather than as an automatic 'strict scrutiny' trigger, leading to almost certain legal condemnation". Justice Breyer conceded that content-based regulations sometimes reveal weaknesses in the government's rationale for limiting speech, and that content-based regulations interfere with the "free marketplace of idea[s]". However, he also argued that "virtually all government activities involve speech", and many involve content-based regulations on speech. Therefore, he concluded that a rule triggering strict scrutiny for all cases involving content-based restrictions would be a "recipe for judicial management of ordinary government regulatory activity".

Justice Kagan's opinion concurring in the judgment, was joined by Justice Ruth Bader Ginsburg and Justice Stephen Breyer, cautioned that the Court may soon become "a veritable Supreme Board of Sign Review". She argued that the majority's opinion would jeopardize too many "entirely reasonable" existing sign ordinances across the country. In light of the court's opinion, Justice Kagan suggested that municipalities will now be forced to choose between repealing "exemptions that allow for helpful signs on streets and sidewalks" and lifting "sign restrictions altogether and resign[ing] themselves to the resulting clutter". Instead of applying strict scrutiny in every case, Justice Kagan claimed that strict scrutiny is only appropriate when there is a "realistic possibility that official suppression of ideas is afoot".

### **III. Collateral Damage.**

Included here are summaries of three cases where courts applied *Reed* to non-sign code regulations. Using *Reed*, the regulations in each of these cases were found to be content-based and subject to heightened scrutiny. While these are district court decisions and a Seventh Circuit

Court of Appeals decision (Persuasive at best), they provide key insight into the potential breadth of the *Reed* decision.

***Rideout v. Gardner*, 2015 WL 4743731, at 1 (D.N.H. Aug. 11, 2015).**

In this case, New Hampshire adopted a regulation that makes it unlawful for voters to take and disclose digital or photographic copies of their completed ballots in an effort to let others know how they have voted. Three voters, who were under investigation because they posted images of their ballots on social media sites, challenged the law on First Amendment grounds.

After outlining the *Reed* holding in detail, the court analyzed the New Hampshire law to determine whether it was content-based.

“In the present case, as in *Reed*, the law under review is content based on its face because it restricts speech on the basis of its subject matter. The only digital or photographic images that are barred by RSA 659:35 are images of marked ballots that are intended to disclose how a voter has voted. Images of unmarked ballots and facsimile ballots may be shared with others without restriction... **In short, the law is plainly a content-based restriction on speech because it requires regulators to examine the content of the speech to determine whether it includes impermissible subject matter.** Accordingly, like the sign code at issue in *Reed*, the law under review here is subject to strict scrutiny even though it does not discriminate based on viewpoint and regardless of whether the legislature acted with good intentions when it adopted the law.” (Emphasis added.)

After determining that the law is “plainly a content-based restriction on speech,” the court proceeded to analyze the law under strict scrutiny. The court found that the law failed strict scrutiny. The details of that analysis are not included here. However, it is important to note that the interests put forward by the state were quickly dispatched by the court because they were anecdotal and speculative.

**Why this case matters** - First, the court quickly and easily applied the *Reed* holding to a non-sign code regulation. This means that other regulations that impact “speech” may be subject to strict scrutiny if they require regulators to examine the content of the speech to determine whether it includes impermissible subject matter. In order to apply *Reed* to this case the court did not have to make any great leap - the *Reed* holding was easily applied. Second, unless the government’s interests are well defined and adequately supported, they will likely not satisfy strict scrutiny. Strict scrutiny is often fatal. For any regulation that may be susceptible to strict scrutiny, the municipality should take the necessary time to fully and completely create a record supporting the stated interests behind the regulation.

***Norton v. City of Springfield, Ill.*, 2015 WL 4714073, at 1 (7th Cir. Aug. 7, 2015).**

This case involved an anti-panhandling law and was decided by the Seventh Circuit Court of Appeals on a petition for rehearing. The petition for rehearing was filed shortly before the *Reed* decision was set to be released, so the court deferred its consideration of the petition for rehearing until *Reed* was decided.

In its original decision, the Seventh Circuit held that “[t]he Court has classified two kinds of regulations as content-based. One is regulation that restricts speech because of the ideas it conveys. The other is regulation that restricts speech because the government disapproves of its message. It is hard to see an anti-panhandling ordinance as entailing either kind of discrimination.” On rehearing the court acknowledged that “we classified the ordinance as one regulating by subject matter rather than content or viewpoint.” What is missing from the Seventh Circuit’s analysis is the type of content-based regulation analysis that the *Reed* court relied upon - regulations that are content-based on their face.

On re-hearing the court applied the *Reed* holding to the anti-panhandling regulation and found it to be content-based on its face and subject to strict scrutiny. Because the city did not contend that the ordinance was justified (the city essentially hung its hat on the classification stage and did not argue justification) the law failed strict scrutiny.

**Why this case matters** - First, this is a Seventh Circuit Court of Appeals case, as opposed to a district court case, that applies the *Reed* holding to a non-sign code regulation. Second, the succinct nature of the opinion shows that the court had very little hesitation in applying *Reed* outside of the sign code context. In fact, the parties in that case agreed that the regulation stands or falls on the answer to the question whether the regulation is a form of content discrimination. It was *Reed* that provided the answer to that question.

***Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 2015 WL 5178147, at 2 (E.D.N.Y. Sept. 3, 2015).**

This case relates to an ordinance passed by the Town of Oyster Bay that limited the ability of day laborers to solicit work on certain streets. There were numerous issues before the court including plaintiff’s First Amendment challenge. The court found that the conduct at issue is commercial speech and subject to the four prong test set forth in *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n of New York*, 447 U.S. 557, 100 S.Ct. 2343 (1980). The court then acknowledged that *Sorrell v. IMS Health Inc.*, — U.S. —, 131 S.Ct. 2653 (2011), couched *Central Hudson’s* fourth prong for restrictions on commercial speech that are content-based as requiring that “the [government] must show at least that the statute directly advances a substantial government interest and that the measure is drawn to achieve that interest.” 131 S.Ct. at 2667–68. In other words, if the restriction on commercial speech is content-based, rather than showing that it furthers the asserted government interest, it must directly advance a substantial

interest. Even within the context of commercial speech, if the restriction on speech is content-based, the regulation is subject to heightened scrutiny.

The court recited the *Reed* holding and held that “on its face, the Ordinance is content-based. It is addressed to only one type of speech, viz. the roadside solicitation of employment and does not address other types of roadside solicitation or nonsolicitation speech.” Using *Reed*, the court held that the restriction on commercial speech must withstand a heightened level of scrutiny. The court then went on to analyze the regulation pursuant to the *Central Hudson* and *Sorrell* factors and found that it failed the narrowly tailored prong.

**Why this case matters** - The trend continues - again a court relies on *Reed* when analyzing a regulation of speech that is not within a sign code. And, for the first time *Reed* is applied to commercial speech. Because of *Reed*, it now may be more likely that regulation of commercial speech will be found to be content-based. While such a finding does not mean that the commercial speech will be subject to strict scrutiny, it does mean that those regulations will be subject to heightened scrutiny. It is apparent that even commercial speech may be impacted by *Reed*.