SIGN RESEARCH FOUNDATION
2016 ANALYSIS

THE STATE OF SIGN CODES AFTER *REED V. TOWN OF GILBERT*

Professor Alan Weinstein *holds a joint faculty appointment at Cleveland State University's Cleveland-Marshall College of Law and Maxine Goodman Levin College of Urban Affairs and also serves as Director of the Colleges' Law & Public Policy Program. Professor Weinstein is a nationally-recognized expert on planning law who lectures frequently at planning and law conferences and has over eighty publications, including books, book-chapters, treatise revisions and law journal articles.*

SIGN RESEARCH FOUNDATION™

THE U.S. SUPREME COURT'S JUNE 2015 DECISION in *Reed v. Town of Gilbert* was, undoubtedly, the most definitive and far-reaching statement that the Court has ever made regarding day-to-day regulation of signs. But the *Reed* case, while very clear about the rules that must be applied to the regulation of temporary non-commercial signs, provided only scant guidance about how courts should treat sign regulations that apply to commercial business signs or that differentiate between on-site and off-site signs. In the nine months since the *Reed* ruling, lower court decisions have begun to provide additional guidance on these questions while some questions remain unanswered.

CONTENT-BASED REGULATION OF SIGNS IS UNCONSTITUTIONAL

The rules that Justice Thomas announced in *Reed* are straight-forward for non-commercial signs: a regulation that "on its face" requires consideration of the content of a sign is "content-based" and will be subjected to strict scrutiny.

Further, a regulation that is facially content-neutral could still be considered content-based if its purpose is related to the message on a sign. For example, a code provision that allowed more lawn signs for election season would be facially content-neutral but might be challenged as being justified by or have a purpose related to allowing "election campaign" messages.

A sign regulation is content-based and subject to "strict scrutiny" even if the government (i.e. local officials) did not intend to restrict speech or to favor some category of speech for benign reasons. Justice Thomas wrote: "In other words, an innocuous justification cannot transform a facially content-based law into one that is content-neutral."

Justice Thomas specified that a content-based sign regulation (including a regulation that is facially content-neutral but justified in relation to content) is presumed to be unconstitutional and will be invalidated unless government can prove that the regulation is narrowly tailored to serve a compelling governmental interest. This is known as the "strict scrutiny" test, and few, if any, regulations survive strict scrutiny. We don't know what, if any, content-based regulations might survive strict scrutiny.

NEARLY EVERY SIGN CODE IS AFFECTED BY *REED*

Justice Thomas's opinion calls into question almost every sign code in this country:

Temporary Signs: Few, if any, codes have no content-based provisions under the rules announced in *Reed*. For example, almost all codes contain content-based exemptions from permit requirements (real estate signs, political and/or election signs, "holiday displays," etc.), and almost all codes also categorize temporary signs by content, and then regulate them differently. For example, a "real estate" sign can be bigger and remain longer than a "garage sale" sign. *Reed* failed to provide an answer to how we provide for the public's desire for more signage during election campaigns in a wholly content-neutral manner.

Permanent Signs: Many sign codes also have content-based provisions for permanent signs. Because the *Reed* rules consider "speaker-based" provisions to be content-based, differing treatment of signs for "educational uses" vs. "institutional uses" vs. "religious institutions" would be subject to strict scrutiny. The strict scrutiny test could also apply for differing treatment of signs for "gas stations" vs. "banks" vs. "movie theaters."

"TIME, PLACE OR MANNER" REGULATIONS ARE CONTENT-NEUTRAL, SUBJECT TO INTERMEDIATE SCRUTINY

Reed does not, however, cast doubt on the content-neutral "time, place or manner" regulations that are the mainstay of almost all sign codes, provided they are not justified by or have a purpose related to the message on the sign.

Justice Thomas acknowledged that point, noting that the code at issue in *Reed* "regulates many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts and portability."

Justice Alito's concurring opinion, joined by Justices Kennedy and Sotomayor, went further. While disclaiming he was providing "anything like a comprehensive list," Justice Alito noted "some rules that would not be content-based." These included rules regulating the size and location of signs, including distinguishing between building and free-standing signs; "distinguishing between lighted and unlighted signs;" "distinguishing between signs with fixed messages and electronic signs with messages that change;" distinguishing "between the placement of signs on private and public property" and "between the placement of signs on commercial and residential property;" and rules "restricting the total number of signs allowed per mile of roadway."

But Justice Alito also approved of two rules that seem at odds with Justice Thomas's "on its face" language. Alito claimed that rules "distinguishing between on-premises and off-premises signs" and rules "imposing time restrictions on signs advertising a one-time event" would be content-neutral. But rules regarding "signs advertising a one-time event" clearly are facially content-based, as Justice Kagan noted in her opinion concurring in the judgment, and the same claim could be made regarding the on-site vs. off-site distinction.

Keep in mind, however, that even content-neutral "time, place or manner" sign regulations are subject to intermediate judicial scrutiny rather than the deferential "rational basis" scrutiny applied to regulations that do not implicate constitutional rights such as freedom of expression or religion. Intermediate scrutiny requires that government demonstrate that a sign regulation is narrowly tailored to serve a substantial government interest and leave "ample alternative avenues of communication." Because intermediate scrutiny requires only a "substantial," rather than a "compelling," government interest, courts are more likely to find that aesthetics and traffic safety meet that standard. That said, courts have struck down a number of content-neutral sign code provisions because the regulations were not "narrowly tailored" to achieve their claimed aesthetic or safety goals.

BEYOND *REED*

As noted previously, the Supreme Court ruling of *Reed v. Town of Gilbert* provided scant guidance about how courts should treat sign regulations that apply to commercial business signs or that differentiate between on-site and off-site signs. These issues are now being addressed in the lower federal courts, clarifying how these types of signs might be content-based and subject to strict scrutiny.

Commercial signs: To date, the federal courts have ruled unanimously that *Reed* should not be applied to regulations that affect commercial signs. The following quote from *Lamar Cent. Outdoor, LLC v. City of Los Angeles*, 2016 WL 911406, (Cal. Ct. App. Mar. 10, 2016) is typical: "*Reed* is of no help to plaintiff either..., it does not purport to eliminate the distinction between commercial and noncommercial speech. It does not involve commercial speech, and does not even mention *Central Hudson*." The *Central Hudson* reference is to the 1980 Supreme Court ruling

establishing that regulation of commercial speech should be subject to a form of intermediate scrutiny rather than strict scrutiny.

On-site vs. off-site signs: Treatment of the on-site vs. off-site distinction remains uncertain. Most courts that have addressed the issue have cited Justice Alioto's concurrence as the basis for dismissing the idea that *Reed* should apply to the on-site vs. off-site distinction. But one federal district court has vigorously disagreed. In *Thomas v. Schroer*, 2015 WL 5231911 (W.D. Tenn. Sept. 8, 2015), the judge noted: "Not only is the concurrence not binding precedent, but the concurrence fails to provide any analytical background as to why an on-premise exemption would be content-neutral. The concurrence's unsupported conclusions ring hollow in light of the majority opinion's clear instruction that 'a speech regulation targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter,' citing *Reed*. Clearly, this issue remains unresolved.

Content-based exemptions: Sign regulations that contain content-based exemptions have not fared well under *Reed*. *Central Radio Co. Inc. v. City of Norfolk, Va.*, 811 F.3d 625 (4th Cir. 2016), is a good example. There, in a challenge first decided before *Reed*, the Court of Appeals had concluded that a sign regulation exempting flags, emblems and works of art was content-neutral and, applying intermediate scrutiny, held that the regulation was a constitutional exercise of the city's regulatory authority. But when the challenge was renewed after *Reed*, the Court of Appeals reversed its decision and agreed with the plaintiffs that, under *Reed*, the regulation was a content-based restriction that cannot withstand strict scrutiny. Similarly, in *Marin v. Town of Southeast*, 2015 WL 5732061 (S.D.N.Y. Sept. 30, 2015), a federal district court ruled that a regulation that exempted certain signs, but not political signs, from restrictions placed on temporary signage, was a content-based restriction that did not withstand strict scrutiny.

Content-neutral prohibitions: In contrast, courts that have ruled on challenges to content-neutral "time, place or manner" regulations after *Reed* have had little difficulty upholding the regulations. For example, in *Peterson v. Vill. of Downers Grove*, 2015 WL 8780560 (N.D. Ill. Dec. 14, 2015), the court upheld a content-neutral ban on all painted wall signs, and in *Vosse v. The City of New York*, 2015 WL 7280226 (S.D.N.Y. Nov. 18, 2015), the court upheld a content-neutral prohibition on signs extending more than 40 feet above curb level as a reasonable "time, place or manner" restriction on speech.

WHAT NOW?

HOW CAN CITIES RESPOND TO THESE RULINGS?

Some cities are enacting moratoria on sign regulation while they try to figure that out. A court would likely view with disfavor a total moratorium on issuing any sign permits (or, worse yet, displaying any new signs) as an unconstitutional prior restraint on speech. In contrast, a moratorium of short duration – certainly no more than 30 days – targeted at permits issued under code provisions that are questionable after *Reed* is far more likely to be upheld. Cities are also well-advised to suspend enforcement of code provisions – particularly regulation of temporary signs – that are questionable after *Reed*. Obviously, however, *all* sign code structural provisions directly related to public safety should continue to be enforced.

As we all know, drafting a fair and effective sign code that balances a community's interests is no easy task. Trying to do that during a short moratorium is even harder, but it is certainly not impossible.

TIPS FOR COMPLYING WITH *REED*

Until the courts provide more guidance on the uncertainties surrounding the *Reed* ruling, arguably the best course of action is to err on the side of allowing for less restrictive, rather than more restrictive, sign regulations.

1 **Remove from the sign code all references to the content of a sign other than the few examples directly related to public safety noted in Justice Thomas's opinion.** Most of these content-based provisions likely will relate to temporary signs. Rather than referring to "real estate" or "political" or "garage sale" signs, your code should treat these all as "yard" signs or "residential district" signs. You then regulate their number, size, location, construction and amount of time they may be displayed, keeping in mind how your residents want to use such signs. You would use the same approach for temporary signs in business districts: replace references to "Grand Opening" or "Special Sale" signs with "temporary business sign" and regulate their number, size, location, construction and amount of time they may be displayed based on business needs for such signs.

2 **All the provisions in your code that refer to number, area, structure, location and lighting of permanent signs are content-neutral and unaffected by *Reed*.** If your code has any content-based provisions for permanent signs, either by specifying content that must (or must not) be on a sign or because you distinguish among uses (e.g., "gas-station signs"), those provisions will be subject to strict scrutiny if challenged. None of these content-based provisions should be retained unless public safety would be so threatened by removal that the provision would survive strict scrutiny. Permanent signs should be regulated in a content-neutral manner with regulations distinguished not by type of use (because that would be "speaker-based") but by either zoning districts or "character" districts or by reference to street characteristics such as number of lanes or speed-limit. The Sign Research Foundation has a number of resources that can help your community revise your sign code based on the latest research, sign industry expertise and sign-user perspectives.

3 **If your sign code does not have a severability clause and a substitution clause they should be added.** A severability clause provides that if any specific language or provision in the code is found to be unconstitutional, it is the intent of the city council that the rest of the code remain valid. For example: "If any part, section, subsection, paragraph, subparagraph, sentence, phrase, clause, term or word in this code is declared invalid, such invalidity shall not affect the validity or enforceability of the remaining portions of the code." A substitution clause allows a non-commercial message to be displayed on any sign. While *Reed* did not discuss the commercial/non-commercial distinction, prior U.S. Supreme Court cases established that commercial speech should not be favored over non-commercial speech. A substitution clause thus can safeguard you against liability that could result from mistakenly doing just that by prohibiting the display of a non-commercial message or citing it as a code violation. For example: "Signs containing non-commercial speech are permitted anywhere that advertising or business signs are permitted, subject to the same regulations applicable to such signs."

IS YOUR COMMUNITY EXPLORING SIGN CODE CHANGES?

CONTACT **SIGNHELP@SIGNS.ORG**
FOR COMPLIMENTARY ANSWERS.

PUBLISHED BY:

SIGN RESEARCH FOUNDATION™

WWW.SIGNRESEARCH.ORG