

Government & Regulatory Law Update June 2015

United States Supreme Court Strikes Down Local Sign Ordinance: Content-Based Regulations Fail to Survive Strict Scrutiny

Decades of case law demonstrates that differentiating based on content when regulating speech is an almost certain death knell. The line between content-based and content-neutral regulations, however, has often been hazy, made complicated by an array of inconsistent and irreconcilable court decisions across the country. Some of the obscurity has just been cleared by the United States Supreme Court with its June 18, 2015 decision in *Reed v. Town of Gilbert*, 576 U.S. ___, which strikes down a city sign ordinance that applied differing regulations to different categories of non-commercial signs — categories formulated based on a sign's subject matter. The Court's decision necessitates a close and careful review and possible revision of existing local sign ordinances so as to avoid what even Justices Kagan, Ginsberg and Breyer believe to be an inevitable invalidation of one ordinance after another.

Reed arose out of the regulation of signs by the Town of Gilbert, Arizona. The Town's sign regulations separated out various categories of non-commercial signs, including political signs, ideological signs, temporary directional signs and several others, and subjected each to different rules related to size, number, display duration limitations, etc. For example, while political signs could be up to between 16 and 32 square feet in size (depending on whether located on residential or nonresidential property) and displayed beginning 60 days prior to an election, temporary directional signs related to an event could be no larger than 6 square feet and their display was limited in duration to 12 hours prior to the event to which they related.

The plaintiffs, a local church and its pastor, desired to advertise the time and location of their Sunday church services that take place in schools and other non-fixed locations in or near the Town. After being cited for violating the duration limitations set forth in the Town's ordinance, the plaintiffs sued the Town claiming that because the differing rules regulated based on the content of signs, they were subject to the virtually insurmountable "strict scrutiny" test and unconstitutional.

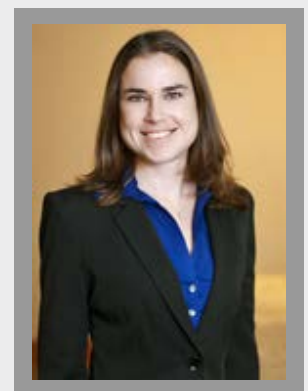
After a decision by the federal district court in favor of the Town, the Ninth Circuit Court of Appeals upheld the sign ordinance. (707 F.3d 1057 (9th Cir. 2013).) In a 2-1 decision, the majority of the appellate panel concluded that the distinctions in the ordinance were content-neutral because the court believed that they were based on objective factors unrelated to the substance of the sign (such as the identity of a speaker or event), there was no distinction between similar types of speakers or events, and there was no indication the Town had adopted the regulations because of disagreement with a particular message. With a strongly worded dissent in hand, the plaintiffs sought review by the United States Supreme Court, which was granted.

By a unanimous decision of the Supreme Court — albeit in outcome and not in reasoning — the Town's ordinance was held to be an unconstitutional content-based regulation of speech. Justice Thomas, who wrote the majority opinion with which six Justices joined, explained that case law precedent has established two categories of regulations that will be deemed content-based: (1) regulations that “on their face” draw distinctions based on the topic discussed (i.e., subject matter) or the idea or message expressed (i.e., viewpoint); and (2) regulations that cannot be justified without reference to the content of speech or that were adopted because of disagreement with the message being conveyed. The Town's ordinance fell into the first category due to the way in which it grouped signs — ideological, political, etc. In rejecting the Ninth Circuit's reasoning, the Supreme Court clarified that lack of animus or a benign motive cannot save an ordinance that is content-based on its face. Notably, even two of the Justices who expressed strong disagreement with the bright-line content-based “test” used in the majority opinion did not hesitate to conclude that the Town's ordinance “[did] not pass . . . even the laugh test.”

The decision in *Reed* will surely have far-reaching implications. Regulations like those of the Town of Gilbert are common. Local governments must carefully review and, if warranted, revise their non-commercial sign regulations, including any exemptions, so as to avoid the imposition of different standards on different categories of signs if the categories are based on the subject-matter or the viewpoint expressed on the signs. Although a seemingly difficult task, notwithstanding the decision in *Reed*, there remain tools by which local public agencies may continue to protect public safety and preserve community aesthetics. For example, content-neutral distinctions (e.g., residential vs. nonresidential, lighted vs. unlighted, on-premises vs. off-premises, permanent vs. temporary) may be employed to establish categories to which divergent regulations may be applied. Even in that realm, however, care must be taken because, although not subject to the most stringent constitutional standards, such regulations must nevertheless pass constitutional muster.

Clients with questions about this Alert or related issues are welcome to contact the article authors, or the Rutan & Tucker attorney with whom you are regularly in contact.

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