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SIGN REGULATION IN THE WAKE OF *REED V. TOWN OF GILBERT*

U.S. Supreme Court, June 18, 2015
135 S.Ct. 2218, 192 L.Ed.2d 236, 83 USLW 4444

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2 Overview:

Sign Codes must comply with the First Amendment (and the California Constitution). The key concept is content neutrality (which is often determinative in litigation).

3 Key takeaway from *Reed*:

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.

Foundational concept:

Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972):

The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor- management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, **the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.**

4-5 *Reed* parties:

Pastor Clyde Reed and his congregation with no permanent home.
Services are held at various locations and rented facilities.
Town of Gilbert (Phoenix AZ area).

- 6 Gilbert's sign code:
Comprehensive sign code prohibited sign display without a permit. It also set forth several exemptions from the permit requirement for 23 categories, including: government signs, parking, informational / identification, real estate, open house, political, ideological, garage sale, directional to a qualifying event, temporary and special event, construction, certain suspended signs, historic markers, menu boards, address/ directory, short term display of flags and banners (with prior written notice and approval by code administrator).
- 7 Exemptions at issue:
The Gilbert sign code defined several classes of signs by reference to their message content. The litigated categories were: political, ideological, and temporary directionals to non-profit events.
- 8 Reed's Church signs were typically installed early Saturday and removed after Sunday service. City argued Reed's Church exceeded the display time limit and did not provide date of event, as required by the local rules.
- 9 Supreme Court's ruling:
The Supreme Court ruled unanimously that Gilbert's sign code violated the First Amendment. The Court noted the sign code set forth differing standards and rules for various categories, all defined by content or topic. The Court concluded that the rules based on content distinctions failed strict scrutiny review.
- 10 Justice Thomas wrote the opinion for a unanimous court.
- 11-12 The test for sign codes after *Reed*:
If the distinctions are content based, a court will apply strict scrutiny. The rules must serve a **compelling** government interest and be *narrowly tailored* to serve that interest. [But note a rare example of a rule surviving strict scrutiny: *Burson v. Freeman*, 504 U.S. 191 (1992) (rule prohibiting campaigning within 100 feet of polls on Election Day held valid).]

Time, place, and manner restrictions:

The Public Forum Doctrine, developed by the United States Supreme Court,

defines three classes of public fora, (some authorities say four), each with its own rules. A leading explanation of this doctrine is *Arkansas Educational Television Com'n v. Forbes*, 523 U.S. 666 (1988). In traditional public forum areas (streets, sidewalks, parks, external area around city hall), restrictions must be narrowly tailored to serve government's legitimate and content neutral interests, and leave open adequate alternatives. *Perry Education Ass'n v. Perry Local Educator's Ass'n*, 460 US 37 (1983).

For nonpublic or limited forums, restrictions need only be *reasonable and content neutral*. [Leading example: *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (no signs or banners on utility poles or guywires; valid).]

- 13 Court's reasoning for holding that Gilbert's code failed strict scrutiny: The distinctions between the three sign types were not narrowly tailored to meet legitimate government interests. Temporary directional signs posed no greater eyesore or safety threat than ideological or political signs.
- 14 Justice Thomas set forth a list of permissible factors for sign regulation: size, materials, lighting, moving parts, portability. With respect to public property, he stated it is okay to forbid private signs on public property if the rules are even-handed and content neutral. See: *Sussli v. San Mateo*, 120 CA3d 1 (1981) (cert denied).
- 15 Signs on Private Property:
In *Ladue v. Gilleo*, 512 US 43 (1994), the Supreme Court held the City could not ban yard signs and close down an entire medium private yards. The Court reasoned that displaying a sign from one's own residence carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means, for it provides information about the speaker's identity, an important component of many attempts to persuade.
- 16 In *Reed*, Justice Thomas again set forth a list of permissible distinctions that would probably pass strict scrutiny, including sign purposes such as for warnings, hazards, traffic directions, and street numbers on homes.
- 17-19 Justice Alito also set forth a list of "rules that would not be content based," including size (based on any content neutral criteria), locations (freestanding

or attached), lighted & unlit, and fixed messages & electronic variable messages. He noted further some permissible distinctions including private v. public property; commercial v. residential; total number of signs per mile of roadway; and time restrictions on special event signs. Citing to *Pleasant Grove v. Summum*, 129 S.Ct. 1125 (2009), a “commandments monument in the park” case, he noted that “government entities may also erect their own signs consistent with the principles that allow governmental speech.” He also addressed government signs (government speech), safety, directional, and historic spots.

20 Event based exemptions:

In *G.K. Ltd. Travel v. Lake Oswego OR*, 436 F.3d 1064 (9th Cir. 2006), the court approved an increased display area during a defined time before an event (election) where it was not restricted to political messages. The court also approved speaker-based exemptions from a permit requirement (public agencies, hospitals, railroads).

21 *Metromedia v. San Diego*, 453 U.S. 490 (1981):

Before *Reed*, this was the most famous sign case. The Court took nearly 100 pages to state three simple rules: 1) cities can ban billboards; 2) governments may not favor commercial speech over noncommercial, and 3) governments may not pick and choose favorites within the class of noncommercial messages.

Avoid *Metromedia* problems with message substitution:

Such a provision allows any legally protected noncommercial message to be substituted in place of any other message on a sign, without approval or a new sign permit, so long as there is no change in the sign structure. *Outdoor Media Group v. Beaumont*, 506 F.3d 895, 901-02 (9th Cir. 2007).

22-23 The 4 prong test from *Central Hudson v. PSC*, 447 U.S. 557 (1980) is still valid after *Reed*:

- 1 Advertised product or service must be legal at the place it is offered, even if it is not legal at the place where it is advertised.
- 2 Message must not be false or misleading.
- 3 Rules must serve a *substantial* government interest.
- 4 Rules must directly advance that interest, and go no further than is necessary to serve the objective.

- 24 *Reed* does not mention *Central Hudson* or commercial speech, thereby apparently leaving the parameters of permissible regulation in this area unchanged.
- 25 Federal Cases addressing Commercial Speech:
In *Contest Promotions v. SFO*, 2015 WL 4571564, the court held that *Reed* does not apply to commercial speech and *Central Hudson* still applies.
- 26 Onsite/Offsite is a location criterion, relating sign to product:
An offsite (billboard) ban with exemption for noncommercial constitutional was validated in *Southlake Property Associates v. Morrow*, 112 F.3d 1114 (11th Cir. 1997). The decision turned on the difficulty of identifying the location of an idea. See also: *Clear Channel v. Los Angeles*, 340 F.3d 810, 814-15 (9th Cir. 2003) (whether a sign is on-site or off-site is determined by the sign owner's choice.)
- 27 *Reed* concurrences:
It appears six of the nine Justices voted to uphold onsite/offsite and commercial/noncommercial distinctions.
- 28-29 Commercial speech in California:
The California Constitution provides Liberty of Speech for every person on all subjects. Thus, the Court in *Lamar v. Los Angeles* held onsite/offsite and commercial /noncommercial distinctions to be invalid under the California Constitution. [Note this case is currently on appeal, and there is speculation it will make its way to the California Supreme Court. Oral argument in the Court of Appeal is happening as we speak, on February 24, 2016.]
- 30 Can billboard regulations survive constitutional challenge if the *Lamar* decision is upheld by the California Supreme Court? The key is to avoid defining billboards as off-site, and instead focus on the business model of "general advertising for hire."

Note also the Highway Beautification Act (23 USC §131) and the California Outdoor Advertising Act (COAA) (Bus. & Prof. Code §§5200-5486:
The principal purpose of the California Act is to make sure that the state does not lose 10% of its share of federal highway trust funds. *United Outdoor v.*

Business, Transportation and Housing Agency (1988) 44 Cal.3d 242 is a major California case interpreting COAA. The main idea is that billboards alongside the interstate highway system may be installed only in areas where traditional commercial and industrial land uses are concentrated, conglomered and dominate the area. See also: *Dept. of Trans. v. Maldonado*, 86 Cal.App.4th 1225 (2001).

- 31-32 How you define what constitutes a “sign” sets the scope of regulation for the sign code. Exemptions from the definition, based on message content, could be problematic after *Reed*. Common examples: “real estate signs” and “political signs” are exempted from the sign code.

- 33 Application:
Prohibit signs in certain locations (sidewalks, lamp posts, vegetation, roof-mounted). *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (no signs on utility poles; valid). See also: *Sussli v. San Mateo*, 120 CA3d 1 (1981) (no signs in right of way?); *Showing Animals Respect and Kindness v. West Hollywood*, 166 Cal.App.4th 816 (2008) (No mobile billboards on city streets; valid).

- 34 Political Signs:
Many elected politicians want special rules for political signs. Under *Reed*, such rules are automatically subject to strict scrutiny, and therefore unlikely to survive court review. Instead of rules for politicals, draft the rule to apply to all noncommercial messages on temporary sign structures. Even before *Reed*, special rules for political signs were highly risky. [Note: in *Reed*, the attorney fee award is \$800,000.]

Yard Signs:

Most yard signs advocate a vote or announce “for sale” or “for rent.” The applicable rule should not turn on the message. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (war protest sign in front yard did not qualify for any of the listed exemptions; the rule was unconstitutional); *Frisby v. Schultz*, 487 US 474 (1988) (city law banning focused picketing at individual private home was justified as protecting privacy, and was narrowly tailored.)

Both size and duration rules for political signs are highly questionable after *Reed*. *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976); *Verilli v.*

Concord, 548 F.2d 262 (9th Cir. 1977).

- 35 Residential Real Estate Signs cannot be completely banned. *Linmark Realty v. Willingboro*, 431 U.S. 85 (1977). For event based rules (such as an open house event), the safe approach is to define the max area and display time for temporary signs on residential properties, at all times. Same rules should apply to religious and political signs in the yard. Special rules for real estate signs should be coupled with message substitution to avoid favoring commercial.
- 36 Event/Directionals:
Many cities exempt film locational/directional signs from a ban on posting signs in the public-right-of-way. After *Reed*, this is likely to be deemed content-based. Speaker-based exemptions, i.e. allowing signs to be placed by film companies, is problematic under the *Central Hudson* test as modified by *Sorrell* and likely sweeps more broadly than most cities would want. Cities may consider an event-based exemption, allowing signage to be placed for a certain duration around the event of filming, but this may sweep too broadly allowing anyone to place signage during the triggering event. A better approach is to consider allowing a certain number of signs (with size and timing limits) to be posted in the public-right-of-way as part of the issuance of a film permit. While the signage would not be limited to directional signage, in practice it likely would be used for such.
- 37 Traffic/Directionals:
Thomas' *Reed* opinion states that content-based exemptions for traffic and safety signs such as warning signs and those directing traffic can be supported by a compelling government interest. Cities should be able to confidently consider such limited content-based distinctions. Cities, however, should avoid exempting any and all directional signs as this content-based distinction will only be upheld if supported by a compelling government interest and directional signs to open houses or other events are unlikely to meet with the compelling interest prong of strict scrutiny review. Alito's concurring opinion in *Reed* also notes that an exemption for government signs may be a permissible content-neutral exception. This exception includes government posted traffic and safety signs but sweeps more broadly to also include signs placed by the government for such things as designating historical sites.

Government Signs:

It is unclear whether there is a duty to allow equal display opportunity to private speakers. See *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009) (Commandments monument became government speech when private donation was accepted, for permanent mounting in city park; no duty to allow display of similar monument with contra message). Compare: *Glassroth v. Moore*, 35 F.3d 1282 (11th Cir. 2012) (Chief Justice of the Alabama Supreme Court placed Ten Commandments monument as the centerpiece of the rotunda in the Alabama State Judicial Building; Eleventh Circuit held that it violated the Establishment Clause and ordered it removed).

Human Signs:

Live, in-person protest picketing cannot be banned, but can be subject to reasonable time, place and manner rules. See *Kitsap County v. Mattress Outlet*, 153 Wash.2d 506 (2005) (commercially decorated raincoats). Rules applying to defined message items (such as prices and services) are at least arguably unconstitutional after *Reed*. See: <http://aarrowssignspinners.com> and *Govan v. Clovis*, 2013 WL5532144 (Liberty Tax franchisee's claim of "unbridled discretion" in sign permitting was rejected as unsupported by facts.)

Advertisements on public transportation facilities:

See: *Metro Lights v. City of Los Angeles*, 551 F.3d 898 (9th Cir. 2009) and *Children of the Rosary v. Phoenix*, 154 F.3d 972 (9th Cir. 1998) (highly instructive decision written by Byron White after retiring from US Supreme Court.)

38 Murals:

An exemption from the sign code for murals to encourage public art may be well-intended, but often the mural turns out to be just an oversized commercial sign or artwork that is thematically linked to the store's products. See: <http://www.inlandoctopus.com>.

A better idea may be a city-sponsored public art program. See: *Hopper v. Pasco*, 241 F.3d 1067 (9th Cir. 2001) (acceptability rules not set in advance); *People for the Ethical Treatment of Animals v. Gittens*, 396 F.3d 416 (DC Cir. 2005) (standard announced in advance; city could reject non-complying sponsorship message).

- 39 Sign Structures:
Rules about size, height, materials are usually upheld if no exemptions are made based on content or category.
- 40 Revising the sign code after *Reed*:
Safe factors include rules about size, display duration, materials. It's okay to treat commercial uses differently from residential, and it's okay to have rules that distinguish between private and public property.
- 41 Exemptions to a general ban on private signs in the public right of way may be justified under strict scrutiny if all content distinctions are removed except warning signs, signs directing traffic, and those supported by compelling government interest.
- 42 Distinctions within "noncommercial" are risky. Better to have rules that apply equally to all types of noncommercial speech. To prepare for possible litigation, adopt detailed findings to support policy choices at the time the sign ordinance, or any amendment to it, is adopted. Courts are wary of "post hoc rationalizations."
- 43 Disclaimer:
This material is for teaching purposes and does not constitute legal advice.

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