Practical Tips for Updating Sign Ordinances Post-Reed v. Town of Gilbert

The dust is still settling from the Supreme Court’s 2015 ruling in Reed v. Town of Gilbert, AZ, 135 S.Ct. 2218 (2015), a case challenging the Town of Gilbert’s sign ordinance as a content based and unconstitutional regulation of speech. The Court sided with the challengers, a small church and its pastor, who had faced numerous regulatory obstacles to erecting temporary signs directing members to services, which were held at different locations every week. In striking down the Town’s sign ordinance, the Court clarified once and for all what it means for such regulations to be “content based” and reiterated the Court’s longstanding rule that content based regulations are subject to strict scrutiny.

What are “content based” regulations? According to Justice Thomas, who penned the majority opinion, a regulation “is content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed.” Reed, 135 S.Ct. at 2227. Because the ordinance at issue in Reed had different size, height and duration requirements for political signs than it did for signs providing directions to an assembly or other event, the Court concluded it was “content based” and therefore subject to “strict scrutiny.” Unable to discern any compelling government interest in the differing rules adopted by the Town, the Court found the ordinance invalid.

The Court’s ruling in Reed means that any sign ordinance with different rules for different categories of signs is “content based,” as long as the categories are defined by the content, topic, or subject matter of the sign’s message. For example, an ordinance that allows “political” signs to be twelve square feet, but limits “temporary directional signs” to six square feet, is content-based. So is an ordinance that prohibits signs without a permit, but provides an exception to this permit requirement for historical markers, real estate signs, address signs, etc.

Is a “content based” regulation automatically unconstitutional? As the Court held in Reed, all “content based” regulations are subject to strict scrutiny. This means that reviewing courts can only uphold the regulation if the government demonstrates that it is the least restrictive means of achieving a compelling government interest, an extremely difficult demonstration to make. Reed, 135 S.Ct. at 2231. As the New York Times explained: “Strict scrutiny, like a Civil War stomach wound, is generally fatal.” The New

What kinds of sign regulations are still permissible? Both the majority and concurring opinions make clear that cities and towns can still legally regulate signs, provided their regulations do not make any distinctions based on content or subject matter. Jurisdictions interested in revising their sign codes to ensure they are “content neutral” under Reed should:

(1) Eliminate any separate rules for categories of signs that are defined by the content or subject matter of their message. This means avoiding rules that have different size, height, or duration requirements for “political” signs, “directional” signs, “real estate” signs, etc.
(2) Closely review “exceptions” to regulations to make sure they are not content based. Eliminate such exceptions even if they seem innocuous (e.g., exceptions for historical markers, address signs, etc.).
(3) Adopt content neutral, “time, place, and manner” (TPM) regulations. Justice Alito’s concurrence contains a list of such TPM regulations, including rules governing the size and location of signs, the amount of time signs are displayed, and the total number of signs allowed per mile of roadway. According to Justice Alito, such TPM regulation can legally distinguish between lighted and unlighted signs, signs with fixed and changing messages and electronic, signs on public and private property, “on-premises” and “off-premises” signs, and signs on commercial and residential property. Reed, 135 S.Ct. at 2233 (Alito, J. concurring).

In addition to following these basic rules of content neutrality, cities and towns should also bear in mind that even facially content neutral sign regulations can still be found content based if (a) they cannot be justified without reference to the content or the regulated speech; or (b) they were adopted because of the government’s disagreement with the message conveyed. Reed, 135 S.Ct. at 2227. And even content neutral regulations are unconstitutional if they cannot withstand intermediate scrutiny, i.e., they are not “narrowly tailored to achieve a significant government interest or they do not leave open ample alternative channels of communication.” See G.K. Limited Travel v. City of Lake Oswego, 436 F.3d 1064, 1071; see also Reed, 135 S.Ct. at 2239 (Kagan, J., dissenting).

What about billboards? One question remaining after Reed is whether cities and towns can still legally differentiate between on-site and off-site advertising in their ordinances. In Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512 (1981), a plurality of the Court held that such distinctions were valid, and many cities have relied on this opinion to ban billboards (i.e., off-site advertising) while permitting on-site advertising for local
businesses. Because *Reed* involved *non-commercial* speech, some have opined that *Metromedia*’s rule, which applies to *commercial* speech, is still the law of the land. This opinion is supported by a long history of requiring lesser scrutiny for regulations of commercial speech than regulations of non-commercial speech. Likewise, Justice Alito asserted in his concurrence that distinctions between “on-premises” and “off-premises” signs remain valid post-*Reed*. However, as Justice Breyer noted in his dissent, the Court has recently blurred this distinction, raising the question of whether a patently content based distinction between two types of commercial speech is valid without a compelling justification. *Reed*, 135 S.Ct. at 2235 (Breyer, J., dissenting). Nonetheless, because the *Reed* Court did not mention, much less overturn, *Metromedia*, it appears that regulations distinguishing between on-site and off-site commercial speech remain valid—for now.

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